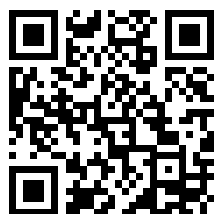

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OF
LAW

EDITED BY
DAVID S. GARLAND AND LUCIUS P. McGEHEE
UNDER THE SUPERVISION OF
JAMES COCKCROFT

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TABLES OF TITLES AND WORDS AND PHRASES

I. TITLES.

Italics indicate cross-references.

- Importunity*, 2.
Impossible Contracts, 3.
IMPOUNDING, 4.
IMPRISONMENT FOR DEBT AND IN CIVIL
ACTIONS, 12.
IMPROVEMENTS, 62.
Imputable Negligence, 123.
Inadequate Damages, 131.
Incapacitated, 132.
INCEST, 134.
Income Tax, 152.
Inconsistent Conduct, 154.
Incrimination of Self, 157.
Indebitatus Assumpsit, 162.
Indecent Exposure, 165.
Indecent Language, 165.
Indecent Publications, 165.
INDEMNITY CONTRACTS, 167.
INDEPENDENT CONTRACTORS, 186.
Independent Covenant, 210.
Indian Lands, 211.
INDIANS, 212.
Indictment, 239.
Indorsement — Indorser — Indorsee, 241.
Inducement, 242.
Industrial Schools, 242.
Inebriate, 242.
Inequalities, 242.
INFAMY AND INFAMOUS CRIMES, 245.
Infanticide, 254.
INFANTS, 255.
Infeoffment, 317.
In Forma Pauperis, 321.
Information and Belief, 322.
INFORMERS, 323.
Infringement, 328.
Ingross, 328.
Inheritance Tax, 336.
Inhuman Treatment, 336.
Initials, 336.
INJUNCTIONS, 337.
INJURIES TO ANIMALS BY RAILROADS, 471.
Injury to Children, 500.
Injury to the Inheritance, 501.
Innocence, 503.
INNS AND INNKEEPERS, 505.
Inquest, 556.
Insane Asylums, 557.
INSANITY, 558.
INSOLVENCY AND BANKRUPTCY, 630.
INSPECTION AND PHYSICAL EXAMINATION, 810.
Inspection of Books, 820.
Inspection of Municipal Records, 820.
Inspection of Public Records, 821.
Inspector, 821.
Insurable Interest, 829.
INSURANCE, 830.
INSURANCE BROKERS, 970.
INSURRECTION, 977.
Intercourse, 983.
INTEREST, 984.
INTERFERENCE WITH CONTRACT RELATIONS, 1109.
Interlocutory Injunctions, 1117.
Internal Revenue, 1120.
INTERNATIONAL LAW, 1121.
INTERPLEADER, 1189.

II. WORDS AND PHRASES.

BY THOMAS JOHNSON MICHIE.

- IMPORT — IMPORTATION — IMPORTER, 1.
IMPOSE, 2.
IMPOSITION, 3.
IMPOST, 3.
IMPOTENCY, 3.
IMPRESSION, 9.
IMPRESSMENT, 9.
IMPRIMIS, 10.
IMPRISON — IMPRISONMENT, 10.
IMPROPER, 57.
IMPROVE — IMPROVEMENT, 57.
IMPROVIDENCE, 123.
IMPUNITY — IMPUNITIVE, 123.
IN, 123.
INABILITY, 131.
INACCURATE, 131.
INADEQUATE, 131.
INADVERTENCE, 131.
INAPPRECIABLE, 132.
INBOARD, 132.
INCAPABLE — INCAPACITY, 132.
INCENDIARISM, 132.
INCEPTION, 133.
INCH, 142.
INCHOATE, 142.
INCIDENT — INCIDENTAL, 142.
INCITE, 144.
INCLOSE, INCLOSURE, ETC., 144.
INCLUDE — INCLUSIVE, 146.
INCOMBUSTIBLE, 147.
INCOME, 147.
INCOMPATIBLE, 152.
INCOMPETENCY — INCOMPETENT, 153.
INCONSISTENCY, 154.
INCONTINENCY, 154.
INCONTROVERTIBLE, 154.
INCORPORATE — INCORPORATION, 154.
INCORPOREAL, 155.
INCREASE, 156.
INCRIMINATING, 157.
INCULPATING, 157.
INCUMBENT, 157.
INCUMBRANCE — INCUMBER, 158.
INCUMBRANCER, 161.
INCUR, 161.
INCURABLE, 162.
IND., 162.
INDEBTED — INDEBTEDNESS, 162.
INDECENCY, 163.
INDECENT, 165.
INDECOROUS, 165.
INDEFINITE, 165.
INDEMNIFY, 166.
INDEMNITY, 166.
INDENT, 184.
INDENTURE, 184.
INDEPENDENT, 184.
INDEX, 210.
INDIAN, 210.
INDICATE, 239.
INDICAVIT, 239.
INDIFFERENT, 239.
INDIGENT, 239.
INDIGNITY, 240.
INDIRECT, 240.
INDIRECTLY, 240.
INDISPENSABLE PARTIES, 240.
INDISPUTABLE, 240.
INDIVIDUAL, 240.
INDOOR, 241.
INDUBITABLE, 241.
INDUCE, 242.
INDULGENCE, 242.
INDUSTRIAL, 242.
INDUSTRY, 242.
INEFFECTUAL, 242.
INELIGIBLE, 242.
INEVITABLE ACCIDENT OR CASUALTY, 242.
INFAMOUS, 244.
INFECT — INFECTION, 317.
INFERENCE, 317.

TABLE OF WORDS AND PHRASES.

- INFERIOR COURTS, 318.
 INFIDEL, 319.
 INFINITESIMAL, 319.
 INFIRMARY, 319.
 INFIRMITY, 320.
 INFLAMMATORY, 320.
 INFLAMMABLE, 320.
 INFLECT, 320.
 INFLUENCE, 321.
 INFLUENZA, 321.
 INFORMAL ISSUE, 321.
 INFORMALITY, 321.
 INFORMATION, 321.
 INFORMATION OF INTRUSION, 322.
 INGRESS, 328.
 INHABIT — INHABITANT, 328.
 INHALE, 335.
 INHERIT — INHERITOR, 335.
 INHERITANCE, 335.
 INIQUITY, 336.
 INITIAL, 336.
 INJURIA, 470.
 INJURY, INJURE, ETC., 499.
 INLAND BILL, 502.
 INLAND NAVIGATION—INLAND WATERS,
 502.
 INLET, 503.
 INMATE, 503.
 INNOCENT, 503.
 INNOCENT AGENT, 503.
 INNOCENT CONVEYANCES, 503.
 INNOCENT PURCHASER, 504.
 INNUENDO, 556.
 INOFFICIOUS WILL, 556.
 INOPPORTUNE, 556.
 INQUEST OF OFFICE, 556.
 INQUIRY — INQUISITION, 557.
 INSIST, 629.
 INSOLENT — INSOLENCY, 629.
 INSPECT — INSPECTION — INSPECTION
 LAWS, 808.
 INSTALMENT, 821.
 INSTANCE, 821.
 INSTANT — INSTANTLY, 821.
 INSTANTANEOUS, 821.
 INSTANTER, 822.
 INSTEAD OF, 822.
 INSTIGATE, 822.
 INSTITUTE, 822.
 INSTITUTION, 822.
 INSTRUCTIONS, 824.
 INSTRUMENT, 824.
 INSTRUMENTALITY, 828.
 INSUFFICIENCY — INSUFFICIENT, 828.
 INSULTING, 829.
 INSURED, 975.
 INSURGENT, 975.
 INT., 978.
 INTAKE, 978.
 INTEGRITY, 978.
 INTELLIGENCE — INTELLIGENT, 978.
 INTELLIGENCE OFFICE, 978.
 INTEMPERANCE — INTEMPERATE, 978.
 INTEND, 979.
 INTENDMENT, 980.
 INTENT — INTENTION, 980.
 INTENTIONAL, 981.
 INTERDICTION, 983.
 INTERESSE TERMINI, 983.
 INTEREST — INTERESTED, 1102.
 INTEREST POLICY, 1107.
 INTERFERE, 1107.
 INTERIM, 1117.
 INTERIOR, 1117.
 INTERLINE — INTERLINEATION, 1117.
 INTERLOCUTORY, 1117.
 INTERLUDE, 1118.
 INTERMEDDLE, 1118.
 INTERMEDIATE, 1118.
 INTERMENT, 1119.
 INTERNAL, 1119.
 INTERNAL IMPROVEMENT, 1119.
 INTERNATIONAL, 1120.
 INTER PARTES, 1189.
 INTERPOSE, 1189.

THE AMERICAN AND ENGLISH ENCYCLOPÆDIA OF LAW.

IMPORT — IMPORTATION — IMPORTER. (See also the titles **REVENUE LAWS; TAXATION.** And see **IMPOST, post.**) — I. To import is to bring from a foreign jurisdiction into this jurisdiction merchandise not the product of this country.¹ "Imports" are things imported.² An importation, in the

1. **Import.** — U. S. *v.* The Steamboat Forrester, Newb. Adm. (U. S.) 94.

To **import** is to bear or carry into. The Conqueror, 49 Fed. Rep. 102.

Bring In. (See also the title **REVENUE LAWS.**) — In U. S. *v.* Jordan, 2 Lowell (U. S.) 539, it was said that the revenue laws use the terms "to **import**," "to bring in," and "to introduce" as synonymous.

Same — Non-intercourse Law. — A statute declared it unlawful to **import** into the United States any goods, wares, or merchandise of British growth. A British ship and cargo were captured by a French frigate on the high seas, pending a war between England and France, and were given by the commander of the French frigate to the captain and crew of an American vessel which had previously been captured and burned by the same frigate, and who were detained on board the French frigate when the British ship was captured. The American captain brought the ship and cargo into a United States port. This was held to be no infraction of the non-intercourse law. It was contended that the word **import** was co-extensive with the words "bring in." Chief Justice Marshall said: "I am not prepared to controvert or absolutely to admit this proposition." Ship Adventure Case, 1 Brock. (U. S.) 235.

Import and Export Distinguished. (See also **EXPORT — EXPORTATION**, vol. 12, p. 520.) — In Kidd *v.* Flagler, 54 Fed. Rep. 369, the court thus distinguished **import** and "export" as used in the revenue laws: "The defendant maintains that if the owners intended to bring the property back, it was not exported. The plaintiffs assert that the question of intent has no bearing whatever upon the point at issue. The dictionary meaning of the term 'export' is as follows: 'To carry from a state or country, as wares in commerce.' Webst. Dict. 'To send goods and merchandise from one country to another.' 1 Bouv. Law Dict. 502; 1 Rap. & L. Law Dict. 487. The term is the direct converse of **import**, which means 'to bring into a country merchandise from abroad.'"

Part of the Property of the State. — In its strictly literal sense **import** signifies merely bringing into, or to bring into the state, but "to **import**" may be understood as meaning "to bring in," as a part of the property of the state, to be held for use or sale. Com. *v.* Griffin, 3 B. Mon. (Ky.) 215. That case was upon the right of a state to forbid the **importation** of slaves.

2. The word **import** in a commercial sense means the goods or other articles brought into this country from another country. Peirce *v.* New Hampshire, 5 How. (U. S.) 504.

Constitutional Provision — Act and Thing Imported. — In Brown *v.* Maryland, 12 Wheat. (U. S.) 419, it was said: "What then are **imports**? The lexicons inform us they are 'things **imported**.' If we appeal to usage for the meaning of the word, we shall receive the same answer. They are the articles themselves which are brought into the country. 'A duty on **imports**,' then, is not merely a duty on the act of **importation**, but is a duty on the thing **imported**. It is not, taken in its literal sense, confined to a duty levied while the article is entering the country, but extends to a duty levied after it has entered the country." And in that case it was held that a license tax on **importers** is a duty on **imports**, within the meaning of Const. U. S., art. 1, § 10, cl. 2: "No state shall * * * lay any imposts or duties on **imports**," etc.

In Wynne *v.* Wright, 1 Dev. & B. L. (N. Car.) 23, the term **imports** was said to include in its meaning both the act of **importation** and the articles **imported**, which latter retain their character as **imports** until by the first wholesale disposition of them they have passed from the control of the **importer** and become incorporated in the mass of property of the state, or until they have been broken up from the original cases, or other form in which they have been **imported**, and are offered for sale at retail, or in any other peculiar manner. See also Low *v.* Austin, 13 Wall. (U. S.) 29; King *v.* McEvoy, 4 Allen (Mass.) 110. And see the title **ORIGINAL PACKAGE**.

Same — Interstate Commerce. — Under Const.

broad meaning of the term, consists of a voluntary bringing in of goods with the intent to unlade them.¹ An importer is a person engaged in foreign commerce.² II. "Import" is also that which is conveyed by words; meaning; tendency.³

IMPORTUNITY. — See the title **UNDUE INFLUENCE**.

IMPOSE. (See also the title **TAXATION**.) — To impose means to lay or levy.⁴

U. S., art. 1, § 10, cl. 2, the term *imports* is confined to things brought from foreign countries, and does not include things brought from another state. *Brown v. Houston*, 114 U. S. 622; *Pittsburg, etc., Coal Co. v. Louisiana*, 156 U. S. 590; *Peirce v. New Hampshire*, 5 How. (U. S.) 594; *Woodruff v. Parham*, 8 Wall. (U. S.) 123; *Hinson v. Lott*, 8 Wall. (U. S.) 148; *Hay Inspectors v. Pleasants*, 23 La. Ann. 350; *Territory v. Farnsworth*, 5 Mont. 303; *People v. Maring*, 3 Keyes (N. Y.) 374; *State v. Pinckney*, 10 Rich. L. (S. Car.) 474. Compare *Almy v. California*, 24 How. (U. S.) 169.

Same — Persons. — The word *imports* applies to things, property only, and not to persons, as passengers and immigrants. *People v. Compagnie Generale Transatlantique*, 10 Fed. Rep. 362, 107 U. S. 59; *Brown v. Houston*, 114 U. S. 622; *Pittsburg, etc., Coal Co. v. Louisiana*, 156 U. S. 590; *Norris v. Boston*, 4 Met. (Mass.) 282. And see *Norris v. Boston*, 7 How. (U. S.) 477. The word *importation* is used in Const. U. S., art. 1, § 9, in reference to slaves, but these were property.

Yacht. — Where a yacht was built in a foreign country and navigated to a port of New York, it was held that it was not an *imported* article in the sense of the tariff laws. *The Conqueror*, 40 Fed. Rep. 99. See generally the title **REVENUE LAWS**.

Seamen. — A statute forbade the captain of a ship to *import* or bring into any port of the United States any negroes. It was held that this did not apply to colored seamen employed in navigating the vessel. *The Brig Wilson v. U. S.*, 1 Brock. (U. S.) 423. See generally the title **SEAMEN**.

1. *Republic v. Anderson*, 10 Hawaii 253.

Importation. — "To constitute an *importation* so as to attach the right to duties, it is necessary not only that there should be an arrival within the limits of the United States and of a collection district, but also within the limits of some port of entry." *Arnold v. U. S.*, 9 Cranch (U. S.) 104. See also *U. S. v. Vowell*, 5 Cranch (U. S.) 368; *Marriott v. Brune*, 9 How. (U. S.) 632. To constitute an *importation*, under a non-intercourse act, it is also necessary that there should be an intent to land the goods there. "It is undoubtedly true that the mere act of coming into port, though without breaking bulk, is *prima facie* evidence of *importation*. Yet even this presumption may be rebutted. If a vessel come in by distress, or to avoid capture, it has never been considered as an *importation*." *Per Story, J.*, in *Schooner Mary*, 1 Gall. (U. S.) 206. See also *Schooner Boston*, 1 Gall. (U. S.) 239.

In *Republic v. Anderson*, 10 Hawaii 253, it was held that the voluntary bringing in of opium from foreign jurisdictions to a landing

place, though not a port of entry within the jurisdiction of Hawaii, was an *importation* within the meaning of an act against the *importation* of opium. See also *Schooner Mary*, 1 Gall. (U. S.) 206; *Schooner Boston*, 1 Gall. (U. S.) 239; *U. S. v. Arnold*, 1 Gall. (U. S.) 348; *U. S. v. Lyman*, 1 Mason (U. S.) 499; *Kohne v. Insurance Co. of North America*, 1 Wash. (U. S.) 165; *U. S. v. The Steamboat Forrester*, Newb. Adm. 94.

Imported into the Harbor. — A statute imposed a duty upon all goods *imported* into or exported from a certain harbor. The harbor extended from a certain bridge down the river to the sea. A vessel brought goods into the harbor, made some use of the posts erected therein, and passed, without otherwise using the harbor, under the bridge, up the river, landing the goods at a point above the bridge within the flow of the tide where there was no harbor. It was held that the goods were not *imported* into the harbor. *Wilson v. Robertson*, 24 L. J. Q. B. 185, 4 El. & Bl. 923, 82 E. C. L. 923.

Illegal Importation. — In *U. S. v. Jordan*, 2 Lowell (U. S.) 539, it was held that the act of entering goods by false invoice came within the definition of an illegal *importation*.

2. **Importer.** — *Peirce v. New Hampshire*, 5 How. (U. S.) 594.

By the English Customs Amendment Act, 1859, § 8, "the word *importer*, in any act relating to the customs, is * * * to apply to and include any owner or other person for the time being possessed of or beneficially interested in any goods *imported*." See *Budenberg v. Roberts*, L. R. 1 C. P. 575.

In *King v. McEvoy*, 4 Allen (Mass.) 110, it was held that one who received from an *importer* and duly foreclosed a mortgage on a cask of spirituous liquors which was in a United States warehouse in bond, and paid the duties and received the cask, did not thereby become the *importer* thereof within the meaning of the *Massachusetts* statute of 1855, c. 215, § 2, concerning the manufacture and sale of spirituous liquors. See generally the title **INTOXICATING LIQUORS**.

3. **Import and Tenor.** (See also **PURPORT; TENOR**.) — A declaration on a patent which avers the patent and specifications to be "in language of the *import* and to the effect following," and then sets them forth *in hac verba*, is sufficient, and is not open to the objection that the patent is not set forth according to its legal tenor and effect. *Wilder v. McCormick*, 2 Blatchf. (U. S.) 31, 29 Fed. Cas. No. 17,650.

4. **County Taxes.** — In *Neary v. Philadelphia, etc., R. Co.*, 7 Houst. (Del.) 419, it was held that a tax levied under the general law of the state for the assessment of county taxes was *imposed* by law on the person who is bound to pay it.

IMPOSITION. (See also the title TAXATION; and see IMPOST, *post.*)—An imposition is an impost; tax; contribution.¹

IMPOSSIBLE CONTRACTS.—See the titles ACT OF GOD, vol. 1, p. 588; CONDITIONS, vol. 6, p. 499; CONTRACTS, vol. 7, p. 147; INTERPRETATION AND CONSTRUCTION, *post.*

IMPOST. (See also the titles REVENUE LAWS; TAXATION; and see IMPORT; IMPOSE; and IMPOSITION, *ante.*)—An impost is a duty on imported goods and merchandise. In a larger sense it is a tax of imposition.²

IMPOTENCY. (See also the titles BASTARDY, vol. 3, p. 876; DIVORCE, vol. 9, p. 816; MARRIAGE.)—Impotency is an incapacity that admits of neither copulation nor procreation.³

1. **Imposition—Exemption from Taxation.** (See also the title EXEMPTIONS (FROM TAXATION), vol. 12, p. 266.)—In *Harvard College v. Boston*, 104 Mass. 470, it was held that an assessment by the city of Boston upon the land of Harvard college of part of the expense of altering a street, proportionate to the benefit received by the assessed land from the alteration, was a civil *imposition*.

Impositions—Covenant in Lease.—A lessee covenanted to pay all rates, taxes, and *impositions* whatsoever. It was held that water rates were not rates or *impositions* within the meaning of this covenant. *Badcock v. Hunt*, 22 Q. B. D. 148.

In *Tidswell v. Whitworth*, L. R. 2 C. P. 326, where the lessee covenanted to pay all taxes, rates, assessments, and *impositions* whatsoever, it was held that the term *impositions* did not include a special assessment for paving a street. Compare *Sweet v. Seager*, 2 C. B. N. S. 119, 89 E. C. L. 119.

2. **Imposts.**—*Pacific Ins. Co. v. Soule*, 7 Wall. (U. S.) 445; *Neary v. Philadelphia, etc.*, R. Co., 7 Houst. (Del.) 419; *Hancock v. Singer Mfg. Co.*, 62 N. J. L. 289.

In *The Union Bank v. Hill*, 3 Coldw. (Tenn.) 328, it was said: "The word *imposts* is sometimes used to signify taxes, or duties, or impositions; but in its more restrained sense it is used to signify a duty on imported goods and merchandise."

An *impost* tax or duty is an exaction to fill the public coffers for the payment of the debts and for the promotion of the welfare of the country, and does not extend to a retribution provided to defray the expense of a bridge, or removing obstructions in a watercourse, or the like, to be paid by those only who enjoy the advantages resulting therefrom. *Worsley v. New Orleans*, 9 Rob. (La.) 324.

Costs against a garnishee are not a "tax, *impost*, assessment, or municipal fine." *Wearne v. Haynes*, 13 Nev. 103.

United States Constitution.—Under Const. U. S., art. 1, § 10, cl. 2, "an *impost* or duty on imports is a custom or a tax levied on articles brought into a country, and is most usually secured before the importer is allowed to exercise his rights of ownership over them." It is not the less an *impost* because levied upon them after landing or in the form of a license

tax upon the importer. *Brown v. Maryland*, 12 Wheat. (U. S.) 419. See also *Crow v. State*, 14 Mo. 237.

"*Impost* is a duty on imported goods and merchandise. In a larger sense, it is any tax or imposition. Story Const. Abr., § 474. Cowell says it is distinguished from custom 'because custom is rather the profit which the prince makes on goods shipped out.' Cowell's Interpreter, title *Impost*. Mr. Madison considered the terms 'duties' and *imposts* in these clauses [of the Constitution] as synonymous. 1 Story Const. 669, note. Judge Tucker thought they were probably intended to comprehend every species of tax or contribution not included under the ordinary terms 'taxes and excises.'" *Per Swayne, J.*, in *Pacific Ins. Co. v. Soule*, 7 Wall. (U. S.) 445.

Pilotage.—The words "*imposts* or duties on imports," in the United States Constitution, do not cover pilotage fees and penalties. *Cooley v. Philadelphia*, 12 How. (U. S.) 299.

Exemption from Taxation. (See also the title EXEMPTIONS (FROM TAXATION), vol. 12, p. 266.)—The shares of stock of a company were exempted from any tax or *impost* whatever. It was held that the word *impost* included every enforced contribution from the company to the public treasure. *Hancock v. Singer Mfg. Co.*, 62 N. J. L. 289. See also *Singer Mfg. Co. v. Heppenheimer*, 58 N. J. L. 633.

3. **Impotency.**—In *Payne v. Payne*, 46 Minn. 467, it was said: "The statute does not define the term *impotency*, but in the law of divorce it means want of *potentia copulandi*, and not merely incapacity for procreation. It is an incapacity that admits neither copulation nor procreation. And what the law refers to is capacity for *copula vera*, and not partial and imperfect or unnatural copulation. The incapacity must also be incurable." Citing 1 Bishop on Mar. & Div., § 765 *et seq.*; *D-e v. A-g*, 1 Rob. Ecc. 379. See also *Kempf v. Kempf*, 34 Mo. 211.

Physical Incapacity and Impotency.—In *Anonymous*, 89 Ala. 292, it was said: "The meaning of the words 'physically incapacitated,' as here used, is substantially the same as that of the word *impotent*, frequently met with in divorce proceedings. It means powerless, or wanting in physical power, to consummate the marriage."

IMPOUNDING.

BY WALTER CARRINGTON.

- I. DEFINITION, 4.**
- II. SCOPE OF ARTICLE, 4.**
- III. WHEN ANIMALS MAY BE IMPOUNDED, 4.**
 - 1. *Animals Distained Damage Feasant, 4.*
 - 2. *Estrays, 4.*
- IV. WHAT CONSTITUTES IMPOUNDING, 5.**
- V. CHARACTER OF POUND REQUIRED TO BE USED, 5.**
 - 1. *At Common Law, 5.*
 - 2. *By Statute, 5.*
- VI. IMPOUNDING MUST BE WITHIN REASONABLE TIME, 5.**
- VII. CERTIFICATE TO BE LEFT WITH POUNDKEEPER, 5.**
- VIII. DUTIES AND LIABILITY OF POUNDKEEPER, 6.**
- IX. WHO IS REQUIRED TO FEED ANIMALS WHILE IMPOUNDED, 6.**
- X. NOTICE OF IMPOUNDING, 6.**
- XI. APPRAISEMENT OF DAMAGES, 7.**
- XII. RELEASE FROM POUND, 7.**
- XIII. SALE, 7.**
- XIV. RESCUE AND POUND BREACH, 8.**
- XV. LIABILITY FOR UNLAWFUL IMPOUNDING, 8.**

CROSS-REFERENCES.

See also the titles *ANIMALS*, vol. 2, p. 341; *DISTRESS*, vol. 9, p. 617.

I. DEFINITION. — Impounding, as used in this article, means placing in a pound animals distrained or astray.¹

II. SCOPE OF ARTICLE. — Questions relating to the impounding of property seized on a distress for rent have been treated under another title in this work.² This article will be confined, therefore, to questions relating to the impounding of estrays or of animals taken damage feasant.

III. WHEN ANIMALS MAY BE IMPOUNDED — 1. Animals Distained Damage Feasant. — A man finding beasts of another wandering on his grounds damage feasant, that are doing him hurt or damage by treading down his grass and the like, may, by the rules of the common law, distrain and impound them until satisfaction be made him. In the United States the distraint and impounding of animals found damage feasant is generally regulated by statute.³

2. Estrays. — In some of the United States there are statutes providing for the taking charge of cattle or other domestic animals when found running at large, for impounding and advertising them, and when not reclaimed by their owner within a certain time, for their sale to satisfy the charges against them.⁴

1. Definitions. — 1 Bouv. Law Dict. 994.

A Pound is an inclosed piece of land secured by a firm structure of stone or pieces of timber placed in the ground. *Wooley v. Groton*, 2 Cush. (Mass.) 305.

2. See the title *DISTRESS*, vol. 9, p. 652.

3. For questions relating to distress damage feasant, see the title *ANIMALS*, vol. 2, p. 358.

4. As to the constitutionality and construction of laws relating to estrays, see the title *ANIMALS*, vol. 2, p. 378.

IV. WHAT CONSTITUTES IMPOUNDING.—To constitute an impounding, the animals must be placed in a pound and there restrained with the intent on the part of the person so restraining them to impound them.¹

V. CHARACTER OF POUND REQUIRED TO BE USED—1. **At Common Law.**—At common law, animals distrained damage feasant could be impounded in either a common or a private pound, at the option of the impounder.²

2. **By Statute.**—And by statute in some of the United States the same rule prevails;³ in other states animals distrained damage feasant or found going at large must be impounded in the public pound if there is one in the town;⁴ while in a few states the requirement to impound the animals in a public pound is absolute and unqualified.⁵

VI. IMPOUNDING MUST BE WITHIN REASONABLE TIME.—In those states where animals are required to be impounded in a public pound, they must be taken to the pound in a reasonable time. What is a reasonable time is a question of fact for the jury.⁶

VII. CERTIFICATE TO BE LEFT WITH POUNDKEEPER.—Under the statutes of several states the impounder is required to leave with the poundkeeper a certificate or memorandum stating the cause of impounding, the amount of damages claimed, the fees and charges incurred, etc.⁷

1. **What Is Necessary to Constitute an Impounding.**—Howard v. Bartlett, 70 Vt. 314. In this case it was held that the mere taking up of cattle by a person who found them on his premises doing damage, and putting them in an inclosed pasture without the intention of impounding them, did not constitute an impounding, although there was no usable public pound in the town where the cattle were taken.

2. **Common-law Rule.**—Vin. Abr., title Distress, E 4. par. 6; Mosher v. Jewett, 63 Me. 84; Collins v. Larkin, 1 R. I. 219.

3. **Statutes Allowing Impounding in Either a Public or Private Pound.**—Sherman v. Braman, 13 Met. (Mass.) 407. See also Adams v. Adams, 13 Pick. (Mass.) 384; Anthony v. Anthony, 6 Allen (Mass.) 408; Pettit v. May, 34 Wis. 666.

Legal Impounding under the Massachusetts Statute.—A cow which was found damage feasant upon a mowing field was driven by the owner of the field into the road and there delivered into the custody of a field driver, who drove her to his barn and there confined her, the owner of the field assisting him and at the same time notifying him that he claimed remuneration for the damage done. It was held that this was a legal impounding under the Massachusetts statute. Pierce v. Josselyn, 17 Pick. (Mass.) 415.

4. **Impounding in Public Pound Where There Is One in the Town.**—Mosher v. Jewett, 59 Me. 453, 63 Me. 84; Bills v. Kinson, 21 N. H. 448; Drew v. Spaulding, 45 N. H. 472; Riker v. Hooper, 35 Vt. 457, 82 Am. Dec. 646; Rowe v. Hicks, 58 Vt. 18. See also Harriman v. Fifield, 36 Vt. 341.

Under the Vermont Statute, if there is no public pound in the town the distrainer is not bound to impound the animals in an inclosure of his own; he may impound them in one belonging to some other person. Riker v. Hooper, 35 Vt. 457, 82 Am. Dec. 646.

In this state it was held that a distrainer who, having impounded cattle in his barnyard, turned them into an inclosed field to graze during the days, and put them back into his barnyard each night, thereby lost his

legal control over them. Harriman v. Fifield, 36 Vt. 341.

5. **Statutes Requiring Impounding in a Public Pound.**—Price v. Babbit, 5 Alb. L. J. 382; Rockwell v. Nearing, 35 N. Y. 302; Collins v. Larkin, 1 R. I. 219.

Rhode Island Statute Construed.—Sheep taken damage feasant were delivered to the poundkeeper, and, there being no public pound, were by him confined in his own yard. Such confinement was held not to constitute a legal impounding under the Rhode Island statute. Collins v. Larkin, 1 R. I. 219.

6. **Reasonable Time Allowed for Impounding.**—Drew v. Spaulding, 45 N. H. 472.

But under the New York Statute animals distrained damage feasant cannot be impounded before the damages have been appraised. Pratt v. Petrie, 2 Johns. (N. Y.) 191; Sackrider v. M'Donald, 10 Johns. (N. Y.) 253; Hopkins v. Hopkins, 10 Johns. (N. Y.) 369; Merritt v. O'Neil, 13 Johns. (N. Y.) 477; Gates v. Lounsbury, 20 Johns. (N. Y.) 427.

But a mere intention to impound the animals before the damages have been appraised will not render a person a trespasser *ab initio*. Gates v. Lounsbury, 20 Johns. (N. Y.) 427.

7. **Memorandum Required to Be Left with Poundkeeper.**—Eastman v. Rice, 14 Me. 419; Merrill v. Gatchell, 17 Me. 191; Palmer v. Spaulding, 17 Me. 239; Morse v. Reed, 28 Me. 481; Sherman v. Braman, 13 Met. (Mass.) 407; Merrick v. Work, 10 Allen (Mass.) 544; Pickard v. Howe, 12 Met. (Mass.) 198; Wild v. Skinner, 23 Pick. (Mass.) 251; Osgood v. Green, 33 N. H. 318; Rollins v. Jones, 39 N. H. 475.

Under the New Hampshire Statute it is not essential that the certificate should be left with the poundkeeper before or at the time of impounding. It may be left within a reasonable time after the impounding. Rollins v. Jones, 39 N. H. 475.

Memorandum Held Defective in Not Stating Cause of Impounding.—In Massachusetts a person distraining cattle doing damage on his land impounded them in the town pound and handed the keeper the following written memorandum

VIII. DUTIES AND LIABILITY OF POUNDKEEPER. — A public poundkeeper is bound to take and keep whatever is brought to him, and when animals are once impounded he cannot let them go without a replevin, or the consent of the party. If the animals are wrongfully taken the liability rests with the person who brings them, and not with the poundkeeper.¹ But if the poundkeeper, by going out of the line of his duty, makes himself a party to some illegal act of the impounder, he is liable therefor.²

IX. WHO IS REQUIRED TO FEED ANIMALS WHILE IMPOUNDED. — At common law, if the impounding was in the common pound, or in a special pound overt, the owner of the animals was bound to supply them with food; but if the impounding was in a special pound covert (such as a barn or other inclosure where the owner could not have access to his animals to feed them without offense) then the impounder was required to feed them at his peril.³ By statute in some of the United States, when animals are impounded in the public pound it is the duty of the poundkeeper to supply them with food and drink,⁴ and he is liable to the owner for all damages arising from his neglect to do so.⁵

Poundkeeper Entitled to Charges for Food and Detention. — Whether cattle have been legally impounded or not, the poundkeeper, before releasing them, is entitled to be paid his legal charges in respect of their food and detention.⁶

X. NOTICE OF IMPOUNDING. — The statutes of some of the United States provide that notice of the impounding shall be given to the owner of the animals.⁷

with his name and a date upon the paper: "Two dollars for damages and three dollars and fifty cents for fees." It was held that the memorandum was defective in not stating the cause of impounding, as required by the statute. *Newhouse v. Hatch*, 126 Mass. 364.

1. Duty of Poundkeeper — Not Liable for Impounder's Wrong. — *Brandling v. Kent*, 1 T. R. 60; *Badkin v. Powell*, 2 Cowp. 476; *Ibbottson v. Henry*, 8 Ont. Rep. 625; *Wardell v. Chisholm*, 9 U. C. C. P. 125; *Folger v. Hinckley*, 5 Cush. (Mass.) 263; *Anthony v. Anthony*, 6 Allen (Mass.) 408.

2. When Poundkeeper Is Liable. — *Buist v. McCombe*, 8 Ont. App. 598; *Wardell v. Chisholm*, 9 U. C. C. P. 125.

3. Duty of Feeding Animals. — *Riker v. Hooper*, 35 Vt. 457, 82 Am. Dec. 646.

4. Bills v. Kinson, 21 N. H. 448; *Cate v. Cate*, 44 N. H. 211; *Riker v. Hooper*, 35 Vt. 457, 82 Am. Dec. 646.

5. Poundkeeper Liable for Not Feeding Animals. — *Riker v. Hooper*, 35 Vt. 457, 82 Am. Dec. 646.

6. Black v. Stewart, 19 Nova Scotia 77.

Under the Vermont Statute the owner of the animals must pay all expenses of keeping them while impounded. *Riker v. Hooper*, 35 Vt. 457, 82 Am. Dec. 646; *Harriman v. Fifield*, 36 Vt. 341.

As to who is entitled to recover such expenses from the owner, see *Riker v. Hooper*, 35 Vt. 457, 82 Am. Dec. 646.

7. Notice of Impounding — Iowa. — *Lyons v. Van Gorder*, 77 Iowa 600.

Massachusetts. — *Wild v. Skinner*, 23 Pick. (Mass.) 251; *Field v. Jacobs*, 12 Met. (Mass.) 118; *Lyman v. Gipson*, 18 Pick. (Mass.) 422; *Smith v. Gates*, 21 Pick. (Mass.) 55; *Coffin v. Field*, 7 Cush. (Mass.) 355; *Coffin v. Vincent*, 12 Cush. (Mass.) 98.

Michigan. — *Norton v. Rockey*, 46 Mich. 460; *Jones v. Dashner*, 89 Mich. 246.

New Hampshire. — *Bills v. Kinson*, 21 N. H.

448; *Kimball v. Adams*, 3 N. H. 182; *McIntire v. Marden*, 9 N. H. 288; *Young v. Rand*, 18 N. H. 569; *Osgood v. Green*, 33 N. H. 318; *Brown v. Smith*, 1 N. H. 36.

New York. — *Rockwell v. Nearing*, 35 N. Y. 302.

Pennsylvania. — *Vandamager v. Wood*, 1 Ashm. (Pa.) 203.

Vermont. — *Moore v. Robbins*, 7 Vt. 363; *Riker v. Hooper*, 35 Vt. 457, 82 Am. Dec. 646; *Harriman v. Fifield*, 36 Vt. 341; *Keith v. Bradford*, 39 Vt. 34; *Porter v. Aldrich*, 39 Vt. 326; *Howard v. Bartlett*, 70 Vt. 314.

Under the Iowa Statute, where one who distrains trespassing animals gives the statutory notice to the person who has charge of them, as well as to one having charge of the farm on which they are usually kept, it is sufficient though the owner has not been notified. *Lyons v. Van Gorder*, 77 Iowa 600.

The Massachusetts Statute (Pub. Stat. Mass. (1882), c. 36, § 32), provides that within twenty-four hours after the animals have been impounded the person impounding them must notify their owner of such impounding. Under this statute, if the owner of the cattle replevy them within twenty-four hours after they have been impounded, he cannot afterwards object that no notice of such impounding was given him. *Field v. Jacobs*, 12 Met. (Mass.) 118; *Wild v. Skinner*, 23 Pick. (Mass.) 251.

By the Michigan Statute the notice is required to be in writing. *Jones v. Dashner*, 89 Mich. 246.

Under the Vermont Statute, if the owner of the animals does not replevy or redeem within forty-eight hours after notice of the impounding he is made subject to a penalty. *Riker v. Hooper*, 35 Vt. 457, 82 Am. Dec. 646; *Harriman v. Fifield*, 36 Vt. 341.

The claim for the penalty, under this statute, is not barred in nine months. *Riker v. Hooper*, 35 Vt. 457, 82 Am. Dec. 646.

As to who is entitled to recover the penalty,

The Notice Is Waived by the owner of the animals if he discovers the facts within the time allowed for giving notice, and refuses to pay lawful damages.¹

XI. APPRAISEMENT OF DAMAGES. — After the impounding of animals distrained damage feasant, if the owner of the animals does not pay the estimated damages and expenses, such damages must be appraised. The statutes provide who shall act as appraisers and the manner of their appointment. The appraisal is usually required to be made within a certain time after the impounding, or after notice thereof to the owner of the animals.² Some of the statutes also require notice of the appraisement to be given to the owner.³

XII. RELEASE FROM POUND. — If, after the impounding, the owner of the animals tenders to the impounder or poundkeeper the amount of the damages sustained or expenses and legal charges incurred, or after the appraisal pays the sum found to be due, he will be entitled to have his animals released from the pound and surrendered to him.⁴

XIII. SALE. — If, in the case of estrays, the legal charges and expenses, or in the case of animals distrained damage feasant, the sum found by the appraisers to be due, be not paid, the animals may be sold and the proceeds applied to the liquidation of the damages or charges. The proceedings preliminary to the sale differ in the several states. Nearly all the statutes require the sale to be advertised.⁵

see *Riker v. Hooper*, 35 Vt. 457, 82 Am. Dec. 646.

Time Within Which Notice Must Be Given. — Under a statute requiring notice to be given within twenty-four hours after impounding, the time does not begin to run until the animals are actually impounded. *Howard v. Bartlett*, 70 Vt. 314.

Description of the Animals. — Under the *New Hampshire* statute, where the impounder, in his notice, failed to describe one of the animals distrained, it was held that the omission invalidated the proceedings as to that one animal, but not as to the others taken. *Brown v. Smith*, 1 N. H. 36.

The owner of a close having impounded a horse doing damage therein, sent a notice to the owner of the horse containing these words, "I have taken up as an estray, doing damage in my inclosure, a horse belonging to you." It was held that a sale of the horse in the manner prescribed by the *Massachusetts* statute, in the case of animals taken up damage feasant, was nevertheless valid, the word "estray" not being used technically in such notice. *Lyman v. Gipson*, 18 Pick. (Mass.) 422.

1. *Norton v. Rockey*, 46 Mich. 460.

2. But under the *New York* Statutes the appraisement of damages done by cattle distrained damage feasant was required to be made before the animals were impounded. *Pratt v. Petrie*, 2 Johns. (N. Y.) 191; *Sackrider v. McDonald*, 10 Johns. (N. Y.) 253; *Hopkins v. Hopkins*, 10 Johns. (N. Y.) 369; *Merritt v. O'Neil*, 13 Johns. (N. Y.) 477; *Gates v. Lounsbury*, 20 Johns. (N. Y.) 427.

For an interpretation of the particular provisions of the *New York* statute see *Hale v. Clark*, 19 Wend. (N. Y.) 498; *Stafford v. Ingersoll*, 3 Hill (N. Y.) 38; *Price v. Babbit*, 5 Alb. L. J. 382; *Hopkins v. Hopkins*, 10 Johns. (N. Y.) 369; *Rockwell v. Nearing*, 35 N. Y. 302; *Armbruster v. Wilson*, 43 Hun (N. Y.) 261; *Allaback v. Utt*, 51 N. Y. 651.

3. Appraisement — *Iowa*. — *Barrett v. Dolan*, 71 Iowa 94.

Maine. — *Merrill v. Gatchell*, 17 Me. 191;

Palmer v. Spaulding, 17 Me. 239; *Dunton v. Reed*, 17 Me. 178; *Morse v. Reed*, 28 Me. 481.

Massachusetts. — *Gilmore v. Holt*, 4 Pick. (Mass.) 258; *Smith v. Gates*, 21 Pick. (Mass.) 55; *Lyman v. Gipson*, 18 Pick. (Mass.) 422; *Coffin v. Field*, 7 Cush. (Mass.) 355; *Coffin v. Vincent*, 12 Cush. (Mass.) 98.

New Hampshire. — *Osgood v. Green*, 33 N. H. 318; *Drew v. Spaulding*, 45 N. H. 472.

Pennsylvania. — *Vandamager v. Wood*, 1 Ashm. (Pa.) 203; *Kerr v. Lowry*, 2 Pa. Dist. 371.

Vermont. — *Harriman v. Fifield*, 36 Vt. 341; *Keith v. Bradford*, 39 Vt. 34; *Porter v. Aldrich*, 39 Vt. 326; *Dudley v. McKenzie*, 54 Vt. 685.

Wisconsin. — *Pettit v. May*, 34 Wis. 666; *Warring v. Cripps*, 23 Wis. 460.

Notice of Appraisement Required on General Principles. — In *Vandamager v. Wood*, 1 Ashm. (Pa.) 203, the court said: "It would be prudent, if it is not absolutely necessary, to give notice of the time and place of such appraisement, in the case of a known owner, although not positively directed by the act. General principles seem to require it."

Appraisers Not Limited to Amount of Damages Claimed. — Under the *Massachusetts* statute, in estimating the damage done by cattle distrained damage feasant, the appraisers were not limited to the amount of damages claimed by the owner of the close in the notice of distress given by him to the owner of the cattle. *Lyman v. Gipson*, 18 Pick. (Mass.) 422.

Certificate of Appraisers Conclusive. — In *Vermont*, when an appraisal is in all respects made according to the provisions of the statute and without fraud, the certificate of the appraisers is conclusive. It is in the nature of a judgment. *Harriman v. Fifield*, 36 Vt. 341.

4. Release from the Pound upon Payment of Amount Due. — *McPherson v. James*, 69 Ill. App. 337; *Lyman v. Gipson*, 18 Pick. (Mass.) 422; *Osgood v. Green*, 33 N. H. 318; *Drew v. Spaulding*, 45 N. H. 472; *Gilbert v. Stephens*, 6 Okla. 673.

5. Sale of Animals. — *Delk v. Pickens*, 84 Ga. 76; *Miller v. Dale*, 72 Iowa 470; *Merrill v.*

XIV. RESCUE AND POUND BREACH. — Where animals are distrained damage feasant, if there be anything wrongful in the distress the owner of the animals may rightfully retake them before the impounding; but if the distress be lawful, and he retakes them, he will be liable for a rescue. If the animals be once impounded, they cannot be taken though the distress was without cause; and a person taking distrained animals from the pound will, in any case, be liable in damages to the distrainer,¹ and if he breaks into the pound and takes the animals, he may be indicted for pound breach.²

What Will Amount to a Rescue. — It is not necessary that positive violence, or menacing, or threatening words should be employed, to characterize the taking of distrained animals as a rescue. The taking away and setting at liberty, against law, constitute a rescue. Such a taking is esteemed in law a violent taking.³ But there can be no rescue unless the party from whom they are taken has had the actual possession of the animals.⁴

XV. LIABILITY FOR UNLAWFUL IMPOUNDING. — If an impounding is unlawful or the proceedings irregular, or if one who impounds animals afterwards neglects, abuses, or kills them, he will be liable in damages to the owner, or the owner may recover the animals impounded in an action of replevin.⁵

Gatchell, 17 Me. 191; Smith v. Gates, 21 Pick. (Mass.) 55; Cate v. Cate, 44 N. H. 211; Drew v. Spaulding, 45 N. H. 473; Harriman v. Fifield, 36 Vt. 341.

1. When Distress May Be Retaken — Liability for Unlawful Taking. — Cotsworth v. Bettison, 1 Salk. 247; State v. Young, 18 N. H. 543; Sackrider v. M'Donald, 10 Johns. (N. Y.) 253; Collins v. Larkin, 1 R. I. 219; Taylor v. Welbey, 36 Wis. 42.

But under the Massachusetts and Vermont Statutes it was unlawful to rescue animals distrained damage feasant, although the distress was wrongful and the animals had not yet been impounded. Field v. Coleman, 5 Cush. (Mass.) 267; Bowman v. Brown, 55 Vt. 184.

Michigan. — One sued under the Michigan statute for a rescue of beasts distrained or impounded cannot bring into question the regularity of the distrainer's proceedings; he is expressly remitted to his action of replevin to test the validity of those proceedings. Hamlin v. Mack, 33 Mich. 103.

Owner Aiding in Completing Rescue. — If the owner of animals that have been rescued from the pound aids in completing the rescue, he will be liable for a pound breach, although he was not present when the animals were taken, and the taking was not done by his direction or with his knowledge or consent. Pierce v. Josselyn, 17 Pick. (Mass.) 415.

2. Indictment for Pound Breach. — State v. Young, 18 N. H. 543.

In the Iowa Statute making it a misdemeanor to release distrained stock, the word "stock" has its ordinary meaning as used in agriculture, and includes swine. The State v. Clark, 65 Iowa 336.

Under the Vermont Statute, if any person breaks open any pound or releases any animal impounded, without lawful authority, he is liable to a fine of twenty-five dollars and all damages. Harriman v. Fifield, 36 Vt. 341.

3. What Constitutes a Rescue. — Hamlin v. Mack, 33 Mich. 103.

4. Bac. Abr., tit. Rescue, (A); Vinton v. Vinton, 17 Mass. 342.

Taking a Rescue, Though Animals Are Finally Impounded. — If a person take cattle from the

lawful custody of the field driver when driving them to the pound, it is a rescue, although they are never out of his sight and are finally impounded by him. Vinton v. Vinton, 17 Mass. 342.

When Animals, Before Impounding, Are Allowed to Escape. — In Knowles v. Blake, 5 Bing. 499, 15 E. C. L. 517, it appeared that the plaintiff's son, having seen the defendant's horses trespassing in his father's field, was in the act of driving them to the pound, when he left them for the purpose of apprising the defendant of what had happened. While he was out of sight on this errand, the horses strayed from the plaintiff's field into the defendant's shrubbery, where they remained nearly half an hour, at the expiration of which time the plaintiff's son, having failed to obtain redress from the defendant, drove the horses out of the shrubbery into the plaintiff's yard, whence they were shortly afterwards taken by the defendant. It was held that the defendant's act in taking his cattle was not a rescue, and judgment was therefore rendered in his favor.

5. Liability for Unlawful Impounding — Recovery of Animals — Massachusetts. — Adams v. Adams, 13 Pick. (Mass.) 384; Smith v. Gates, 21 Pick. (Mass.) 55; Sherman v. Brame, 13 Met. (Mass.) 407; Merrick v. Work, 10 Allen (Mass.) 544.

Mississippi. — Dickson v. Parker, 3 How. (Miss.) 219, 34 Am. Dec. 78.

New Hampshire. — Kimball v. Adams, 3 N. H. 182; McIntire v. Marden, 9 N. H. 288; Cate v. Cate, 44 N. H. 211; Drew v. Spaulding, 45 N. H. 472.

New York. — Pratt v. Petrie, 2 Johns. (N. Y.) 191; Sackrider v. M'Donald, 10 Johns. (N. Y.) 253; Hopkins v. Hopkins, 10 Johns. (N. Y.) 369; Merritt v. O'Neil, 13 Johns. (N. Y.) 477.

Vermont. — Mellen v. Moody, 23 Vt. 674; Rowe v. Hicks, 58 Vt. 18.

Injury to Beast in Pound Without Distrainer's Knowledge. — But a person who impounds a beast taken damage feasant, in a town pound, is not liable for any injury the beast may receive, without his agency or knowledge, while confined in the pound. Brightman v. Grinnell, 9 Pick. (Mass.) 14.

Measure of Damages in Actions for Unlawful Impounding. — In an action for an unlawful impounding and sale, or for killing animals impounded, the measure of damages is the value of the animals.¹

IMPRESSION. (See also the title *WITNESSES*.) — The impression of a witness, if derived from recollection, is competent, but if it is merely his belief founded on hearsay, or is mere inference, it is incompetent. If, however, his testimony is susceptible of the former construction it is not to be excluded by the court merely because it is an impression.²

IMPRESSMENT. (See also the titles *MILITARY LAW*; *SEAMEN*.) — Impressment has been defined as taking into the public service by compulsion.³ In a more limited sense it is the power of compelling seafaring men to enter the naval service.⁴

Massachusetts Statute — Field Driver Not Liable After Lawful Impounding. — After animals found upon the highway without a keeper have been lawfully impounded by a field driver as required by the Massachusetts statute, the field driver is not liable in damages to their owner, although he fails either to restore the animals or sells them as required by law, through the default of the poundkeeper or other person, or from the insufficiency of the pound, the animals being lawfully in the poundkeeper's custody. *Coffin v. Vincent*, 12 Cush. (Mass.) 98.

Agent's Liability for Neglect to Comply with Statutory Requirements. — Under the statutes requiring notice of impounding, if a person who impounds cattle damage feasant acts as the mere servant and at the immediate request of the owner of the land on which the cattle were doing damage, or at the request of one standing in the place of the principal in interest, he is not responsible for the neglect to give notice of the impounding. But where a landowner who resides out of the state has appointed a person his agent to take care of the premises and protect them from damages from cattle running at large, and for seizing and impounding, for and in his name, all cattle found trespassing upon the close, the owner of cattle distrained damage feasant has a right to treat such agent as standing in the place of his principal, so far as to hold him responsible for the omission to give notice of the impounding. *Porter v. Aldrich*, 39 Vt. 326.

In *Maine*, A, acting as the servant of B, without justifiable cause distrained and impounded cattle doing damage on B's land, but failed to leave a certificate with the poundkeeper, such as the statute requires, to fix the liability upon B. It was held that A was liable in damages to the owner of the cattle. *Eastman v. Rice*, 14 Me. 419.

Penalty for Neglect to Give Notice of Impounding. — Under the *Vermont* statute a person who impounds another's beasts and neglects to give notice of the impounding to the owner of the beasts, is subject to a penalty for such neglect. *Porter v. Aldrich*, 39 Vt. 326; *Dudley v. McKenzie*, 54 Vt. 394.

1. Measure of Damages. — *Coffin v. Field*, 7 Cush. (Mass.) 355; *Dickson v. Parker*, 3 How. (Miss.) 219, 34 Am. Dec. 78.

What the Value of the Animal Is, is a question of fact for the jury. *Dickson v. Parker*, 3 How. (Miss.) 219, 34 Am. Dec. 78.

2. Witnesses. — *State v. Flanders*, 38 N. H. 333; *Kingsbury v. Moses*, 45 N. H. 225; *Lisbon v. Buth*, 23 N. H. 9.

An Affidavit stated that the impression of the affiant that he tore up an agreement, or, as an alternative, that it was lost or mislaid. It was argued that the affidavit was not sufficiently certain and positive. The court said: "We do not concur in this reasoning. An impression is an image fixed in the mind; it is belief; and believing the paper in question was destroyed has been deemed sufficient to let in the secondary evidence." *Riggs v. Tayloe*, 9 Wheaton (U. S.) 486. See also *Hopper v. Ashley*, 15 Ala. 464. And see the titles *LOST PAPERS*; *SECONDARY EVIDENCE*.

Impression and Opinion Distinguished — Juries. (See the title *JURY AND JURY TRIAL*.) — A juror was asked if he had formed an opinion. He replied that he thought not, but that he had formed an impression. The court said: "The word impression, if it can properly be applied to a mental operation, does not reach the strength of an opinion. An opinion is a conviction which is based, and must be based, upon testimony. An impression is a mere fancy or lodgment in the mind which is not based upon testimony, and the existence of which cannot be traced to proof; and in this case the juror himself distinguished between an opinion and an impression by insisting that he had not formed an opinion, and did not entertain any at the time, but that it was a mere impression." *State v. Krug*, 12 Wash. 288. See also *State v. Pike*, 49 N. H. 399; *Freeman v. People*, 4 Den. (N. Y.) 9. Compare *Greenfield v. People*, 74 N. Y. 283.

3. Impressment. — *Irwin v. U. S.*, 23 Ct. Cl. 157; *Porter's Case*, 10 Op. Atty.-Gen. 24. In the case first cited it was held, where a military officer during a campaign stopped the claimant's trains, forced them into his column, placed them under military discipline, and made direct use of some of the property for the benefit of the army, that the loss of some of the animals was a destruction of private property arising from the impressment of the trains.

4. This right had its foundation in the common law, and resided in the crown alone. 1 Black. Com. 419; *Rex v. Tubbs*, 2 Cowp. 517; *Ex p. Fox*, 5 T. R. 276. It extends to all seafaring men, and any exemption must depend upon the positive provisions of statutes. *Ex p. Fox*, 5 T. R. 276.

IMPRIMIS. — See note 1.

IMPRISON — IMPRISONMENT. (See also the titles ARREST, vol. 2, p. 832; BAIL (IN CIVIL CASES), vol. 3, p. 587; BAIL AND RECOGNIZANCE (IN CRIMINAL CASES), vol. 3, p. 651; DURESS, vol. 10, p. 320; ESCAPE, vol. 11, p. 258; EXTRADITION, vol. 12, p. 590; FALSE IMPRISONMENT, vol. 12, p. 719; FINES AND PENALTIES, vol. 13, p. 52; HABEAS CORPUS, vol. 15, p. 125; HOSPITALS AND ASYLUMS, vol. 15, p. 757; HOUSES OF REFUGE AND CORRECTION, vol. 15, p. 777; IMPRISONMENT FOR DEBT AND IN CIVIL ACTIONS, *post*; PRISONS; SENTENCE AND IMPRISONMENT.) — Imprisonment is the restraint of a person contrary to his will.²

1. **Imprimis.** — A legacy prefaced by the word *imprimis* has been held not to be entitled to a preference over other legacies. *Blower v. Morret*, 2 Ves. 422; *Perrine v. Perrine*, 6 N. J. L. 137. See also the title LEGACIES AND DEVISES; and see FIRST, vol. 13, p. 552.

2. **Imprisonment.** — *Johnson v. Tompkins*, 1 Baldw. (U. S.) 600; *U. S. v. Benner*, 1 Baldw. (U. S.) 239.

Imprisonment is any forcible detention of a man's person, or control over his movements. *Lawson v. Buzines*, 3 Harr. (Del.) 416. See also *Johnson v. Bouton*, 35 Neb. 898.

Every confinement of the person is an *imprisonment* whether it be in a common prison or in a private house, or in the stocks, or even by forcibly detaining one in the public streets. *Hubert's Case*, Cro. Car. 210; *Floyd v. State*, 12 Ark. 43.

Actual Confinement. — In *Doyle v. Doyle*, 19 Kan. 168, it was held that it was not a fatal defect in an indictment that it failed to show that a debtor was in jail. The court, *per* Brewer, J., said: "We see no good reason for limiting the meaning of the word *imprisoned* to actual confinement in the jail, but think it may fairly be construed as denoting the actual detention by the sheriff under the writ; and when a debtor is so seized and held, it seems to us he may be considered, in the language of the statute, as one '*imprisoned* under the provisions of this article.'" Compare *Lytte v. Davies*, 2 Ohio 277.

A statute permitted the discharge, in certain cases, of prisoners who had been *imprisoned* in the county jail for twelve months. It was held that a prisoner who was allowed to work upon the streets under the sheriff's directions, and who was not locked up in his cell at nights, was still *imprisoned*. *State v. Woodward*, 123 Ind. 30.

"Indulgence of his jailer may mitigate but it does not destroy his *imprisonment*." Page *v. Mitchell*, 13 Mich. 69.

Same — Custody of Counsel. — A statute provided that no prisoner should be *imprisoned* under a commitment for contempt for nonpayment of alimony, for a longer period than specified. It was held that the *imprisonment* referred to actual *imprisonment* within the walls of a jail, and not to the technical restraint under which a person is supposed to be when he is committed to the custody of his counsel and suffered to go at large. *People v. Grant*, 47 Hun (N. Y.) 604, *affirmed* 111 N. Y. 587.

Same — Jail Limits. — A person in custody within prison limits has been held to be *imprisoned*. *Comstock's Case*, (N. Y. Super. Ct.

Spec. T.) 16 Abb. Pr. (N. Y.) 233; *Buttles v. Carlton*, 1 Ohio 32; *Matter of Moore*, 1 Am. Insolv. Rep. 95.

So within a statute providing for discharges from custody in certain cases where arrests have been made in civil causes, it was held that the word *imprisonment* applied to a person confined within jail limits. *Coman v. Storm*, (N. Y. Super. Ct.) 26 How. Pr. (N. Y.) 84, *overruling* *Bylandt v. Comstock*, (N. Y. Super. Ct. Spec. T.) 25 How. Pr. (N. Y.) 431.

In *Ex p. Manchester*, 25 N. Bruns. 552, it was held that the word *imprisoned* in a statute providing for the discharge of a debtor from arrest was applicable to a defendant on the limits, and also to a case where the debtor had given bail on his arrest and had afterwards been rendered by his bail.

But within the meaning of a statute which provided for the release of poor debtors from *imprisonment*, it was held that the word *imprisoned* did not apply to a debtor who had given bond for jail limits. *Miller v. Strabbing*, 92 Mich. 303. See also *Griffin v. Helme*, 94 Mich. 495.

Same — Statute of Limitations. (See also the title LIMITATION OF ACTIONS.) — A slave held in trust to be set free as soon as it could be done, and permitted by her nominal owner to act as a free person, was held not to be *imprisoned* within the meaning of that term as used in the statute of limitations. *Downs v. Allen*, 10 Lea (Tenn.) 652.

Imprisonment and Fine. — Where indictments for misdemeanors might charge in several counts different kindred offenses, the punishment for which was the same, it was held that *imprisonment* and fine were not punishments of a similar nature. *Norvell v. State*, 50 Ala. 178.

Hard Labor. — In *Hodge v. Reg.*, 5 Crim. L. Mag. 391, it was held that the "imposition of punishment by * * * *imprisonment* for enforcing any law," in the British North America Act, included the power to impose hard labor. The court said: "It seems * * * that *imprisonment* there means restraint by confinement in a prison, with or without its usual accompaniment, 'hard labor.'" But see *Reg. v. Frawley*, 46 U. C. Q. B. 158. And in *State v. Hyland*, 36 La. Ann. 710, it was said that the word *imprisonment*, unqualified, is used in contradistinction to "*imprisonment* at hard labor."

Penitentiary. — In *Cheaney v. State*, 36 Ark. 80, it was said: "In all our penal legislation, when the word *imprisonment* only is used, it is understood to mean *imprisonment* in a county jail or local prison, and when the legis-

lature has intended *imprisonment* in the penitentiary it has been so expressed."

House of Refuge.—In *State v. Brown*, 50 Minn. 353, it was said: "We do not propose to add to the very many pages which, in the reports and text books, have been devoted to the support of the position, now taken almost universally by the courts, that a person committed to the care and custody of a board in charge of an institution of the character of the Minnesota state reform school is not 'punished,' nor is he *imprisoned*, in the ordinary meaning of those words. Hence the constitutional provision which regulates and limits the jurisdiction of justices of the peace in criminal matters has no application." To the same effect see *Ex p. Nichols*, 110 Cal. 651; *Reynolds v. Howe*, 51 Conn. 478; *Jarrard v. State*, 116 Ind. 99; *Roth v. House of Refuge*, 31 Md. 329; *Farnham v. Pierce*, 141 Mass. 203; *Kelley, Petitioner*, 152 Mass. 432; *Wares, Petitioner*, 161 Mass. 70; *State v. Ray*, 63 N. H. 408; *People v. Masten*, 79 Hun (N. Y.) 581; *Prescott v. State*,

19 Ohio St. 184; *Cincinnati House of Refuge v. Ryan*, 37 Ohio St. 197; *Ex p. Crouse*, 4 Whart. (Pa.) 9; *Milwaukee Industrial School v. Milwaukee County*, 40 Wis. 328. Compare *Com. v. Harregan*, 127 Mass. 450.

But in *People v. Turner*, 55 Ill. 280, it was held that an act of the legislature creating a reform school and providing for the summary commitment of children who were destitute of proper parental care or were growing up in mendicancy, ignorance, idleness, or vice, was unconstitutional as prescribing a virtual *imprisonment* without due process of law. This decision was approved by Judge Redfield in a note in 10 Am. L. Reg. N. S. 372. To the same effect see *State v. Ray*, 63 N. H. 406.

But in *Matter of Ferrier*, 103 Ill. 367, it was held that an act establishing an industrial school and providing for the commitment of vagrant children to such school was constitutional. See also *McLean County v. Humphreys*, 104 Ill. 378.

IMPRISONMENT FOR DEBT AND IN CIVIL ACTIONS.

BY JOSEPH R. LONG.

- I. DEFINITIONS, 14.**
- II. CONSTITUTIONAL PROVISIONS, 14.**
- III. STATUTORY PROVISIONS, 15.**
 - 1. *Generally, 15.*
 - 2. *Constitutionality, 16.*
- IV. RIGHT OF ARREST AS DETERMINED BY NATURE OF ACTION, 17.**
 - 1. *Actions Arising on Contract, 17.*
 - 2. *Actions Founded on Tort, 17.*
 - 3. *Equitable Actions, 18.*
 - 4. *Election of Remedies, 18.*
 - 5. *Effect of Judgment, 19.*
 - 6. *Effect of Assignment, 20.*
- V. GROUNDS OF ARREST AND IMPRISONMENT, 20.**
 - 1. *Generally, 20.*
 - 2. *Injuries to Person or Character, 20.*
 - 3. *Injuries to Property, 21.*
 - 4. *Fraud, 22.*
 - a. *Generally, 22.*
 - b. *In Action of Fraud and Deceit, 22.*
 - c. *Fraud in Contracting Debt, 23.*
 - (1) *Generally, 23.*
 - (2) *False Representations as to Solvency, 24.*
 - (3) *Fraudulent Purchase, 24.*
 - (4) *Fraud by Agent or Copartner, 25.*
 - d. *Fraud in Avoiding Payment of Debt, 25.*
 - (1) *Generally, 25.*
 - (2) *Concealment or Disposal of Property, 26.*
 - (3) *Removal of Debtor from State, 27.*
 - e. *Fraud in Fiduciary Capacity, 28.*
 - f. *Fraud Committed in Another State, 30.*
 - 5. *Misconduct or Neglect in Office or in Professional Employment, 30.*
 - 6. *Disobedience to Orders of Court, 31.*
 - 7. *Arrest and Imprisonment in Certain Cases Considered, 31.*
 - a. *In Bastardy Cases, 31.*
 - b. *In Actions for Breach of Promise of Marriage, 32.*
 - c. *In Actions to Recover Chattel Where Property Has Been Fraudulently Disposed of, 32.*
 - d. *Where Defendant Is Nonresident, 33.*
 - e. *For Nonpayment of Fines and Penalties, 33.*
 - f. *For Nonpayment of Costs, 33.*
 - 8. *Conflict of Laws, 35.*
 - 9. *Clear Proof Required, 36.*
 - 10. *Discretion of Court to Grant Order of Arrest, 36.*
- VI. ENGLISH DEBTORS ACT, 36.**
 - 1. *Generally, 36.*
 - 2. *Default by Trustee or Person Acting in Fiduciary Capacity, 37.*
 - 3. *Default by Attorneys and Solicitors, 38.*

IMPRISONMENT FOR DEBT AND IN CIVIL ACTIONS.

VII. PRIVILEGE FROM ARREST, 38.

1. *Persons Privileged*, 38.
 - a. *Members of Royal Household*, 38.
 - b. *Legislators*, 39.
 - c. *Electors*, 39.
 - d. *Soldiers and Sailors — Police*, 39.
 - e. *Federal Officers*, 39.
 - f. *Persons in Attendance upon Court*, 40.
 - (1) *Judicial Officers and Jurors*, 40.
 - (2) *Parties*, 40.
 - (a) *Generally*, 40.
 - (b) *In What Tribunals*, 40.
 - (c) *Duration of Privilege*, 41.
 - (d) *Defendant in Criminal Proceedings*, 41.
 - (3) *Witnesses*, 42.
 - (4) *Attorneys at Law*, 43.
 - g. *Freeholders*, 43.
 - h. *Persons under Disability*, 43.
 - (1) *Infants*, 43.
 - (2) *Insane Persons*, 43.
 - (3) *Females*, 43.
 - i. *Debtor Brought into Jurisdiction by Fraud*, 45.
2. *Extension of Privilege to Codefendant*, 45.
3. *Waiver of Exemption*, 45.
 - a. *Generally*, 45.
 - b. *What Constitutes Waiver*, 45.
4. *Action for False Imprisonment for Arrest of Person Privileged*, 46.

VIII. WHO MAY EXERCISE RIGHT OF ARREST, 46.

IX. WAIVER OF RIGHT OF ARREST, 46.

X. EXECUTION AGAINST THE PERSON, 48.

1. *Generally — Grounds for Execution*, 48.
2. *Effect of Execution*, 49.

XI. DISCHARGE FROM ARREST AND IMPRISONMENT, 50.

1. *Defendant Arrested on Mesne Process*, 50.
 - a. *Generally*, 50.
 - b. *Evidence*, 51.
2. *Defendant Taken in Execution*, 52.
 - a. *On Payment of Judgment Debt*, 52.
 - b. *With Consent of Plaintiff*, 53.
 - c. *Discharge by Attorney, Agent, or Officer*, 54.

XII. SECOND ARREST, 55.

XIII. ARREST AND ATTACHMENT FOR SAME CAUSE OF ACTION, 56.

CROSS-REFERENCES.

For matters of *PROCEDURE* see the *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*, titles *EXECUTIONS AGAINST THE BODY AND ARREST IN CIVIL CASES*, vol. 8 p. 584; *FINES AND COSTS IN CRIMINAL CASES*, vol. 8, p. 953.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *ARREST*, vol. 2, p. 832; *BAIL (IN CIVIL CASES)*, vol. 3, p. 587; *DEBT*, vol. 8, p. 982; *ESCAPE*, vol. 11, p. 258; *FALSE IMPRISONMENT*, vol. 12, p. 719; *FRAUD AND DECEIT*, vol. 14, p. 12; *FRAUDULENT SALES AND CONVEYANCES*, vol. 14, p. 213; *HABEAS CORPUS*, vol. 15, p. 125; *INSOLVENCY AND BANKRUPTCY*, post; *POOR DEBTORS*.

I. DEFINITIONS. — Imprisonment for Debt may be defined as any restraint upon the liberty¹ of the defendant in a civil action,² whether upon execution against the person or upon an order of arrest granted by the court during the dependency of the proceedings, for the purpose of holding him to bail.

Debt Defined. — The word "debt," as understood in the subject under discussion, does not include all cases of debt in the technical legal sense,³ but is confined in its application to cases of debt in the popular sense of a demand founded upon or arising out of a contract, express or implied.⁴

II. CONSTITUTIONAL PROVISIONS. — The constitutions of many of the states contain provisions prohibiting imprisonment for debt or restricting the right to imprison debtors to certain cases.

Imprisonment for Debt Prohibited. — In several states imprisonment for debt is prohibited absolutely.⁵

Allowed in Cases of Fraud. — In other states it is provided that there shall be no imprisonment for debt except in cases of fraud.⁶

Debts Founded on Contract. — In some states the constitutional exemption extends only to the case of debts founded on contract, cases of fraud being

1. Imprisonment is "the restraint of a man's liberty." Bouv. Law Dict. See IMPRISON — IMPRISONMENT, *ante*, p. 10.

2. As to what is a civil action, see CIVIL SUIT, ACTION, CASE, ETC., vol. 6, p. 96.

A constitutional prohibition against imprisonment for debt has never been understood or held to apply to criminal proceedings. *Exp. Mann*, 39 Tex. Crim. 491 [citing *Ex p. Fleming*, 4 Hill (N. Y.) 581; *Moak v. De Forrest*, 5 Hill (N. Y.) 605; *Lynde v. Montgomery*, 15 Wend. (N. Y.) 461].

Imprisonment for Debt on Execution and Imprisonment for Contempt Distinguished. — In *Côté v. Vermette*, 9 Quebec 340, imprisonment upon execution and imprisonment for contempt are thus distinguished: "La contrainte par corps [execution against the person] en matière civile n'est jamais une punition; elle n'est qu'un moyen de coaction. * * * Elle appartient exclusivement à la juridiction civile des tribunaux, tandis que le mépris de cour est strictement une offense criminelle, et n'appartiendrait qu'à cette juridiction, si l'on n'eut dû, pour la bonne administration de la justice, permettre aux tribunaux offensés de punir de suite et sommairement l'offenseur. * * * Elle [contrainte par corps] était distincte et indépendante de la punition qui pouvait lui être imposée pour son mépris de cour, et qui aurait pu être une amende ou un emprisonnement spécial ou les deux réunis."

3. See the title DEBT, vol. 8, p. 982.

4. **Debt Defined.** — *Parker v. Follensbee*, 45 Ill. 473; *Perry v. Orr*, 35 N. J. L. 295; *Colby v. Backus*, 19 Wash. 347.

Road Assessments or levies are not debts within the meaning of the constitutional provision abolishing imprisonment for debt. *Matter of Dassler*, 35 Kan. 678.

The Master's Fee in Divorce Proceedings is not a debt within the meaning of the *Pennsylvania* act abolishing imprisonment for debt. *Calhoun v. Calhoun*, 6 Pa. Co. Ct. 177.

Proceeding on Contingent Liability. — A proceeding against an executor by his sureties to compel him to indemnify them against loss, and to prevent him from removing his person or property out of the state without first giv-

ing such indemnity, is not an action on a debt within the constitutional inhibition. *Ruddell v. Childress*, 31 Ark. 511.

See generally cases cited throughout this article in which imprisonment for particular classes of obligations is considered.

5. Imprisonment for Debt Prohibited Absolutely — *Alabama*. — Const., art. 1, § 21.

Georgia. — Const., art. 1, § 1, par. 21.

Maryland. — Const., art. 3, § 38; *Trail v. Snouffer*, 6 Md. 308.

Mississippi. — Const., art. 3, § 30.

Missouri. — Imprisonment for debt shall not be allowed except for the nonpayment of fines and penalties imposed for violation of law. Const., art. 2, § 16.

Tennessee. — The legislature shall pass no law authorizing imprisonment for debt in civil cases. Const., art. 1, § 18.

Texas. — Const., art. 1, § 18.

A Statute Providing Indirectly for the Imprisonment of a Debtor by creating a crime for the nonpayment of debts and prescribing punishment therefor by imprisonment is unconstitutional under such a provision. *Carr v. State*, 106 Ala. 35, 54 Am. St. Rep. 17; *State v. Paint Rock Coal, etc., Co.*, 92 Tenn. 81, 36 Am. St. Rep. 68. See also *Ex p. Hardy*, 68 Ala. 303. *Aliter* of a city ordinance declaring the violation or neglect of a public duty a misdemeanor and punishable as such. *Crosby v. Montgomery*, 108 Ala. 498.

6. No Imprisonment for Debt Except in Case of Fraud — *Arkansas*. — Const., art. 2, § 16.

Florida. — Const., Declaration of Rights, § 16.

Indiana. — Const., art. 1, § 22.

Iowa. — Const., art. 1, § 19.

Kansas. — Const., Bill of Rights, § 16.

Minnesota. — Const., art. 1, § 12.

Nebraska. — Const., art. 1, § 20.

Nevada. — Const., art. 1, § 14, excepting "cases of fraud, libel, or slander."

North Carolina. — Const., art. 1, § 16.

Ohio. — Const., art. 1, § 15.

Oregon. — Const., art. 1, § 19.

Wyoming. — Const., art. 1, § 5.

See also the two notes following.

usually excepted from the operation of the prohibition.¹

Debtors Who Have Surrendered Their Property. — In several instances it is provided that the person of a debtor, where there is not a strong presumption of fraud, shall not be continued in prison after delivering up his estate for the benefit of creditors in the manner prescribed by law.²

Absconding Debtors. — In *Oregon* and *Washington* absconding debtors may be imprisoned.³

Imprisonment for Militia Fines. — In several states it is provided that no person shall be imprisoned for a militia fine in time of peace.⁴

III. STATUTORY PROVISIONS — 1. Generally. — The right of imprisonment for debt and in civil actions is regulated in most of the states, even where the state constitution contains no provision on the subject, by express statutory provisions. In general these statutes follow the constitutional provisions already considered and prohibit imprisonment for debt and in civil cases except for fraud and in actions founded on tort.⁵

Federal Statute. — There is no provision in the Federal Constitution relating to imprisonment for debt. It has been provided by Acts of Congress, however, that "no person shall be imprisoned for debt in any state on process issuing from a court of the United States where by the laws of such state imprisonment for debt has been or shall be abolished. And all modifications, conditions, and restrictions upon imprisonment for debt provided by the laws of any state shall be applicable to the process issuing from the courts of the United States to be executed therein; and the same course of proceedings shall be adopted therein as may be adopted in the courts of such state."⁶

1. No Imprisonment for Debts Founded on Contract Except in Case of Fraud — Michigan. — Const., art. 6, § 33.

New Jersey. — Const., art. 1, § 17.

South Dakota and Wisconsin. — In *South Dakota* (Const., art. 6, § 15) and *Wisconsin* (Const., art. 1, § 16) the exception as to fraud is not expressed.

2. Debtor Not to Be Detained in Prison After Delivering up His Property for Benefit of Creditors — Colorado. — Const., art. 2, § 12.

Illinois. — Const., art. 2, § 12. In order to hold a defendant to bail, it must appear that he has refused to surrender his estate or has been guilty of fraud. *Stafford v. Low*, 20 Ill. 152; *Matter of Smith*, 16 Ill. 347; *Gorton v. Frizzell*, 20 Ill. 291; *Malcolm v. Andrews*, 68 Ill. 100; *Kitson v. Farwell*, 132 Ill. 327; *Huntington v. Metzger*, 158 Ill. 272.

Kentucky. — Const., § 18.

North Dakota. — Const., § 15.

Pennsylvania. — Const., art. 1, § 17.

Rhode Island. — Const., art. 1, § 11.

Vermont. — Const., c. 2, § 33.

A Debtor Who Has Assigned All His Property in trust for the benefit of his creditors is not liable to arrest. *Hopgood Shoe Co. v. Saupp*, 7 Pa. Super. Ct. 480. See also *Burton v. Dickens*, 3 Murph. (7 N. Car.) 103.

Demand and Refusal. — In *Illinois*, before a debtor can be arrested for refusal to deliver up his property, it must appear that there was a demand for the property and a refusal by the debtor. *Tuttle v. Wilson*, 24 Ill. 553; *Maher v. Huette*, 10 Ill. App. 56.

3. Imprisonment of Absconding Debtors — Oregon. — Const., art. 1, § 19.

Washington. — Const., art. 1, § 17.

As to the meaning of "absconding debtor" in these constitutions, see *Norman v. Zieber*, 3 *Oregon* 197; *Burrichter v. Cline*, 3 *Wash.* 136.

These cases are set out under **ABSCOND — ABSCONDING DEBTOR**, vol. 1, p. 202, note. See also *Norman v. Mancietie*, 1 *Sawyer* (U. S.) 484, and *infra*, this title, *Grounds of Arrest and Imprisonment — Removal of Debtor from State*.

4. No Imprisonment for Militia Fines — Iowa. — Const., art. 1, § 19.

Michigan. — Const., art. 6, § 33.

Nevada. — Const., art. 1, § 14.

New Jersey. — Const., art. 1, § 17.

5. Consult the statutes of the several states.

As to the *New Mexico* Act of 1857 (Comp. Laws 1884, § 2183), forbidding imprisonment (except in cases of fraud and personal injuries) where the debtor files a complete schedule of his property, see *In re Jaramillo*, 8 *N. Mex.* 598.

Term of Imprisonment — New York. — Under Code Civ. Pro. N. Y., § 111, as amended in 1886, the period of imprisonment in civil cases is absolutely limited, with certain exceptions, to three months within the prison walls of a jail, and to six months within the jail liberties. *People v. Grant*, (Supm. Ct. Spec. T.) 18 Abb. N. Cas. (N. Y.) 220; *Downey v. Clute*, (Supm. Ct. Spec. T.) 18 Abb. N. Cas. (N. Y.) 235. For earlier contrary decisions under this statute see *People v. Grant*, (Supm. Ct. Spec. T.) 18 Abb. N. Cas. (N. Y.) 231, note; *Warshauer v. Webb*, (N. Y. City Ct. Spec. T.) 18 Abb. N. Cas. (N. Y.) 232, note; *Dolan v. Knapp*, (N. Y. Super. Ct. Spec. T.) 18 Abb. N. Cas. (N. Y.) 233, note.

6. Federal Statute Relating to Imprisonment for Debt. — Rev. Stat. U. S., § 990. This is substantially the Act of Congress of Feb. 28, 1839, as supplemented by the Act of Jan. 14, 1841. And see Act of March 2, 1867, 14 U. S. Stat. at L. 543; *U. S. v. Walsh*, 1 Abb. (U. S.) 66; *Deady* (U. S.) 281; *Catherwood v. Gapete*, 2 *Curt.* (U. S.) 94; *U. S. v. Tetlow*, 2 *Lowell* (U.

Since the passage of these acts no process to arrest a defendant in a civil case can be issued except under the state law.¹

Imprisonment of Defendant in Admiralty Cases. — It is held that these acts do not apply to cases in admiralty, and that a defendant may be arrested and imprisoned on admiralty process notwithstanding the Acts of Congress and the laws of the state legislatures abolishing imprisonment for debt.²

Claims by United States. — The United States as plaintiff is bound by the provisions of the acts to the same extent as private creditors.³

No Arrest Except as Prescribed by Statute. — According to the terms of the statutes regulating imprisonment in civil cases, there can be no arrest in such cases except as prescribed by the statutes.⁴ Moreover, it seems that there can be no arrest even in cases excepted from the operation of the constitutional provisions abolishing imprisonment for debt unless there are statutes so providing.⁵

Statutes Construed Strictly. — Statutes authorizing imprisonment for debt, although remediable in that they are designed to coerce, by means of the imprisonment, the payment of the creditor, are also regarded as penal, and are not to be extended by construction so as to embrace cases not clearly within them.⁶ Such statutes are strictly construed, and a creditor seeking to avail himself of the remedy provided thereby must fully comply with all the requirements prescribed by them.⁷

2. Constitutionality. — Statutes regulating the right of imprisonment for debt and in civil actions have repeatedly been held constitutional.⁸

S.) 159; *In re Bergen*, 2 Hughes (U. S.) 513; *Low v. Durfee*, 5 Fed. Rep. 256. See also *Ex p. Minor*, 2 Cranch (C. C.) 404.

The Act of Congress adopting the laws of a state in regard to imprisonment for debt gives immediate effect to such laws, as well in cases pending as in those subsequently commenced. *Gray v. Munroe*, 1 McLean (U. S.) 528.

Massachusetts Statutes Not Within Federal Statute. — The several insolvent acts of Massachusetts prohibiting imprisonment in certain cases were held not to be laws abolishing imprisonment for debt within the federal act. *Catherwood v. Gapete*, 2 Curt. (U. S.) 94; *Matter of Freeman*, 2 Curt. (U. S.) 491; *Campbell v. Hadley*, 1 Sprague (U. S.) 470.

1. *Cooper v. Dugler*, 4 McLean (U. S.) 257.

2. *Gaines v. Travis*, Abb. Adm. 422; *Hanson v. Fowle*, 1 Sawy. (U. S.) 497.

3. *U. S. v. Tetlow*, 2 Lowell (U. S.) 159. Compare *U. S. v. Hewes*, *Crabbe* (U. S.) 307.

4. **No Arrest Except as Prescribed by Statute.** — Consult the statutes. See also *Fellows v. Cooke*, 6 Daly (N. Y.) 204; *Tompkins v. Smith*, (N. Y. Super. Ct. Gen. T.) 62 How. Pr. (N. Y.) 499; *Gibbs v. Larrabee*, 23 Wis. 495; *Wagner v. Lathers*, 26 Wis. 436.

In order to authorize the arrest of a defendant for debt the requirements of the constitution and statutes under which it is sought to make the arrest must be complied with. *Stafford v. Low*, 20 Ill. 152; *Parker v. Follensbee*, 45 Ill. 473. See *infra*, this section, the paragraph headed *Statutes Construed Strictly*.

5. **No Imprisonment in Absence of Statute.** — In *Spice v. Steinruck*, 14 Ohio St. 213, Peck, C. J., said, with reference to the provision of the Ohio Constitution abolishing imprisonment for debt: "This constitutional provision clearly contemplates legislation before any arrest could be made in civil actions, though fraud may have intervened. Courts, therefore, whether of general or limited jurisdiction, have now no common-law power to authorize

arrests in such cases, and the power, as it exists at all, must have been conferred by express legislation."

6. **Scope of Statutes Authorizing Imprisonment for Debt Not to Be Extended.** — *Hathaway v. Johnson*, 55 N. Y. 93, 14 Am. Rep. 186. See also *Batchelder v. Batchelder*, 66 N. H. 31.

7. **Statutes Construed Strictly.** — *Ferguson v. Foster*, 7 Mart. N. S. (La.) 521; *Mondelli v. Russell*, 17 La. 537; *Absolom v. Callum*, 6 La. Ann. 536; *Merritt v. Openheim*, 9 La. Ann. 54; *Levi v. Levy*, 20 La. Ann. 552; *Mason v. Hutchings*, 20 Me. 77; *Fish v. Barbour*, 43 Mich. 19; *Southern Inland Nav., etc., Co. v. Sherwin*, (Supm. Ct. Spec. T.) 1 Civ. Pro. (N. Y.) 44; *Spice v. Steinruck*, 14 Ohio St. 213.

In order to authorize the arrest of a debtor for refusal to deliver up his estate for the benefit of his creditors the statute authorizing such arrest must be substantially complied with. *Maier v. Huette*, 10 Ill. App. 56.

8. **Statutes Permitting Arrest in Civil Cases Constitutional.** — *Norman v. Manciette*, 1 Sawy. (U. S.) 484; *Mayewski v. His Creditors*, 40 La. Ann. 94; *Light v. Canadian County Bank*, 2 Okla. 543. See also *Dummer v. Nungesser*, 107 Mich. 481.

The passage of a constitutional provision prohibiting imprisonment for debt except in cases of fraud does not affect the status of a prior act of the legislature consistent with the constitutional provision. *Hill v. Hunt*, 20 N. J. L. 476; *Ex p. Clark*, 20 N. J. L. 648, 45 Am. Dec. 394.

In Actions ex Delicto. — Statutes authorizing the imprisonment of a defendant in an action *ex delicto* are not in conflict with the constitutional inhibition of imprisonment for debt. *Ex p. Hardy*, 68 Ala. 303; *Ex p. Bergman*, 18 Nev. 331. See *infra*, this title, *Right of Arrest as Determined by Nature of Action — Actions Founded on Tort*.

Prohibiting Arrest of Seaman. — A law prohibiting the arrest or imprisonment for debt of

Effect of Statutes on Obligation of Contracts. — The right to imprison a debtor constitutes no part of the contract, and a state legislature may pass an act abolishing imprisonment for debt or releasing the debtor from imprisonment which will operate upon existing as well as future cases without thereby impairing the obligation of contracts.¹

Statutes Authorizing Imprisonment for Contempt. — It has been held in *Alabama* that where the constitution of a state declares that there shall be no imprisonment for debt the legislature has no power to pass a law which by evasion and indirection authorizes such imprisonment under the form of imprisonment for contempt of court.²

IV. RIGHT OF ARREST AS DETERMINED BY NATURE OF ACTION — 1. Actions Arising on Contract. — By the terms of the various constitutional and statutory provisions of the several states the defendant cannot be arrested in an action on contract except where he has been guilty of fraud.³

2. Actions Founded on Tort. — It is well settled that obligations arising in tort or *ex delicto* are not debts within the meaning of the constitutional provisions, and that therefore orders of arrest or executions against the person may competently issue in the case of claims founded upon tort.⁴

officers or seamen of seagoing vessels is not invalid as class legislation. *In re Oberg*, 21 Oregon 406.

1. Statutes Abolishing Imprisonment Held Constitutional. — *United States*. — *Sturges v. Crowninshield*, 4 Wheat. (U. S.) 122; *Mason v. Haile*, 12 Wheat. (U. S.) 370; *Beers v. Haughton*, 9 Pet. (U. S.) 329; *Gray v. Munroe*, 1 McLean (U. S.) 529; *Penniman's Case*, 103 U. S. 714. See also *Russell v. Thomas*, 10 Nat. Bankr. Reg. 14, 21 Fed. Cas. No. 12,162.

Arkansas. — *Newton v. Tibbatts*, 7 Ark. 150. *Indiana*. — *Fisher v. Lacky*, 6 Blackf. (Ind.) 373.

Michigan. — *Bronson v. Newberry*, 2 Dougl. (Mich.) 38.

Mississippi. — *Brown v. Dillahunt*, 4 Smed. & M. (Miss.) 713, 43 Am. Dec. 499.

New York. — *Donnelly v. Corbett*, 7 N. Y. 500.

Rhode Island. — *Matter of Nichols*, 8 R. I. 50.

South Carolina. — *Ware v. Miller*, 9 S. Car. 13.

Tennessee. — *Woodfin v. Hooper*, 4 Humph. (Tenn.) 13.

Vermont. — *Sommers v. Johnson*, 4 Vt. 278, 24 Am. Dec. 604.

See also the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 15, p. 1059.

2. Imprisonment for Failure to Obey Chancery Decree. — *Ex p. Hardy*, 68 Ala. 303. In this case it was held that the *Alabama Act* of March 8, 1871, authorizing a court of chancery to imprison a debtor for contempt in failing to comply with a decree of the court requiring him to deliver up his property as prescribed by the act, was a law authorizing imprisonment for debt, and was therefore unconstitutional and void. But see the title CONTEMPT, vol. 7, p. 39; and see *infra*, this title, *Grounds of Arrest and Imprisonment — Disobedience to Orders of Court*.

3. Actions ex Contractu — Generally. — *People v. McAllister*, 19 Mich. 215; *Matter of Stephenson*, 32 Mich. 60; *Wheeler v. Frenche*, 33 N. Y. Super. Ct. 63; *Blanco v. Lauradon*, 11 Phila. (Pa.) 363, 32 Leg. Int. (Pa.) 426; *Blanco v. Bosch*, 3 W. N. C. (Pa.) 171; *Howard v. McKee*, 82 Pa. St. 409; *Lang v. Finch*, 166 Pa. St.

255. Consult also the constitutions and statutes of the various states.

Breach of Warranty. — Without proof of fraud the defendant cannot be arrested in an action to recover for breach of warranty on a contract. *Howard v. McKee*, 82 Pa. St. 409.

Action on Bond. — In early *Virginia* cases it was held that bail was not required in actions of debt on bonds with collateral conditions. *Ruffin v. Call*, 2 Wash. (Va.) 181; *Nadenbush v. Lane*, 4 Rand. (Va.) 413. But see in *Maryland*, *Coward v. Bohun*, 1 Har. & J. (Md.) 538. See also the title BAIL (IN CIVIL CASES), vol. 3, p. 598.

Waiver of Tort. — Where an action may be brought either *ex contractu* or *ex delicto*, and the plaintiff waives the tort and sues on the contract, the defendant cannot be arrested. *Goodwin v. Griffin*, 88 N. Y. 629.

4. Arrest Authorized in Actions ex Delicto. — *Ex p. Hardy*, 68 Ala. 303; *People v. Cotton*, 14 Ill. 414; *McKindley v. Rising*, 28 Ill. 337; *People v. Greer*, 43 Ill. 213; *Rich v. People*, 66 Ill. 513; *Ex p. Bergman*, 18 Nev. 331; *Keeler v. Clark*, (Supm. Ct. Spec. T.) 18 Abb. Pr. (N. Y.) 154; *Moore v. Green*, 73 N. Car. 394, 21 Am. Rep. 470; *Long v. McLean*, 88 N. Car. 3; *Kinney v. Laughenour*, 97 N. Car. 325; *Howland v. Needham*, 10 Wis. 495.

The following cases hold generally that the defendant may be arrested and held to bail in an action of tort. *Wilder v. Brush*, 7 La. Ann. 657; *Block v. Bannerman*, 10 La. Ann. 1; *Jones v. Kelly*, 17 Mass. 116; *Patten v. Halsted*, 1 N. J. L. 320; *Benson v. Bennett*, 25 N. J. L. 166; *McDuffie v. Baddoe*, 7 Hill (N. Y.) 578; *Sedgbecker v. Moore*, Bright. (Pa.) 197; *Rowe v. Newton*, 5 Pa. Co. Ct. 325; *In re Kindling*, 30 Wis. 35.

Contrary Doctrine — California. — It was held in *Ex p. Prader*, 6 Cal. 239, that section 73 of the California Practice Act, providing that the defendant might be arrested in actions for wilful injuries to person or character, was unconstitutional as being in violation of the provision of the constitution that no person shall be imprisoned for debt unless in case of fraud.

When Special Cause for Arrest Must Be Shown. — Where the power to order bail in an action of tort is discretionary with the court or judge, it is held that the plaintiff's affidavit upon which bail is asked for must disclose not only a cause of action, but also some special cause for ordering bail, as that the defendant is a nonresident, or is about to depart out of the state, and the like.¹

3. Equitable Actions. — It seems that the question whether the defendant in an equitable action may be arrested depends not so much upon the form of the action as upon the nature of the relief sought. Thus it has been held that if, in an action for the recovery of money, the facts stated in the plaintiff's affidavit bring the case within the provisions of the statute authorizing the arrest of the defendant in a civil action, the order of arrest may be granted notwithstanding the action is brought in a court of equity.² But where the relief asked for is of an equitable nature the defendant is not liable to arrest,³ and in such case the fact that damages are asked as incidental to the main relief prayed for is immaterial.⁴

4. Election of Remedies. — Where the plaintiff has an election to bring his action either *ex contractu* or *ex delicto*, the arrest of the defendant being prohibited in the former case and allowed in the latter, the better doctrine seems to be that he cannot subject the defendant to arrest and imprisonment by electing to sue in tort.⁵ But where the action is to recover damages for a distinct tort, although one growing out of the existence of a contract, the plaintiff, by disaffirming the contract and proceeding against the defendant for his fraudulent or tortious conduct, may render him liable to arrest.⁶ The right of arrest is not affected by the mere fact that in an action founded in tort a contract is alleged by way of inducement.⁷ It is sometimes difficult, however, to determine whether an action as brought is to be regarded as

Trespass by Stock. — The defendant may be arrested in an action to recover damages for trespass committed by his stock. *Harrison v. Brown*, 5 Wis. 27.

Infringement of Patent Right. — So also in an action for the infringement of a patent right the defendant is subject to arrest. *Parkhurst v. Kinsman*, 3 Woodb. & M. (U. S.) 168.

1. Arrest in Action of Tort Only Where Special Cause Shown. — *Benson v. Bennett*, 25 N. J. L. 166; *Clason v. Gould*, 2 Cal. (N. Y.) 47; *Zimmerman v. Chrisman*, 7 Hill (N. Y.) 153; *Van Vechten v. Hopkins*, 2 Johns. (N. Y.) 293; *Norton v. Barnum*, 20 Johns. (N. Y.) 337; *Smith v. Corbiere*, 3 Bosw. (N. Y.) 634; *Brooks v. McLellan*, 1 Barb. (N. Y.) 247; *Perry v. Wing*, 3 How. Pr. (N. Y.) 13; *Davis v. Scott*, (C. Pl.) 15 Abb. Pr. (N. Y.) 127; *Pflugheler v. Leske*, 2 McCarty Civ. Pro. (N. Y.) 248. See also *Britton v. Richards*, (Brooklyn City Ct. Spec. T.) 13 Abb. Pr. N. S. (N. Y.) 258; *Duffield v. Smith*, 6 Binn. (Pa.) 302.

2. Arrest in Equitable Action on Money Demand. — *Short v. Barry*, (Supm. Ct. Gen. T.) 39 How. Pr. (N. Y.) 315. See also *Hennequin v. Clews*, 45 N. Y. Super. Ct. 108.

3. No Arrest in Equitable Action Where Equitable Relief Is Asked. — See *Carter v. Porter*, 71 Me. 167; *Com. v. Sumner*, 5 Pick. (Mass.) 360.

The defendant cannot be arrested in an equitable action to set aside a conveyance on the ground of fraud, *People v. Kelly*, 35 Barb. (N. Y.) 444; *Fassett v. Tallmadge*, 37 Barb. (N. Y.) 436; nor in an action to have a contract rescinded and cancelled, *Ely v. Steigler*, (Supm. Ct. Spec. T.) 9 Abb. Pr. N. S. (N. Y.) 35.

The Right to Issue a Writ of *Ne Exeat* was held not to be abolished in *New York* by an act abolishing imprisonment for debt. *Brown v. Haft*, 5 Paige (N. Y.) 235, 28 Am. Dec. 425; *McNamara v. Dwyer*, 7 Paige (N. Y.) 230, 32 Am. Dec. 627. See also *Ashworth v. Wrigley*, 1 Paige (N. Y.) 301. And see the title *NE EXEAT*, 14 ENCYC. OF PL. AND PR. 320.

4. *Ely v. Steigler*, (Supm. Ct. Spec. T.) 9 Abb. Pr. N. S. (N. Y.) 35.

5. No Right of Arrest Acquired by Election to Sue in Tort. — *Levy v. Appleby*, (Marine Ct. Spec. T.) 1 City Ct. (N. Y.) 258; *Bowen v. Burdick*, 5 Pa. L. J. 113, 3 Clark (Pa.) 226; *Coal Co. v. Huntzinger*, 6 W. N. C. (Pa.) 300; *Corney v. Delaney*, 11 W. N. C. (Pa.) 575; *Bager v. Radley*, 1 Phila. (Pa.) 47, 7 Leg. Int. (Pa.) 50; *McCauley v. Salmon*, 14 Phila. (Pa.) 131, 37 Leg. Int. (Pa.) 262; *Hammer v. Ladner*, 17 Phila. (Pa.) 315, 41 Leg. Int. (Pa.) 376; *Connolly v. Evans*, 4 Pa. Co. Ct. 300.

6. Action Founded on Tort Growing Out of Contract. — *Sedgebeer v. Moore*, Bright. (Pa.) 197; *Tryon v. Hassinger*, 1 Clark (Pa.) 184, 2 Pa. L. J. 43. See also *Hayes v. Jones*, 1 Edm. Sel. Cas. (N. Y.) 11; *Schermerhorn v. Jones*, (Supm. Ct. Spec. T.) 1 How. Pr. (N. Y.) 147.

7. Alleging Contract by Way of Inducement. — *McDuffie v. Beddoe*, 7 Hill (N. Y.) 578; *Keeler v. Clark*, (Supm. Ct. Spec. T.) 18 Abb. Pr. (N. Y.) 154; *Matter of Mowry*, 12 Wis. 52. See also *Suydam v. Smith*, 7 Hill (N. Y.) 182 [*explaining Brown v. Treat*, 1 Hill (N. Y.) 225]; *Cotton v. Sharpstein*, 14 Wis. 226, 80 Am. Dec. 744. Compare *Connolly v. Evans*, 4 Pa. Co. Ct. 300.

founded on contract or in tort. Illustrative cases showing the distinction will be found in the note.¹

5. Effect of Judgment. — In general all causes of action become debts after judgment;² but it seems that the mere fact that a claim founded in tort has been reduced to a judgment does not render it a debt in the sense of that term as used in the constitutional prohibition of imprisonment for debt.³

Recovery of Judgment as Affecting Right of Arrest. — The question whether the recovery of a judgment in an action in which the arrest of the defendant was authorized is a merger of the original cause of action and the right to arrest the defendant therein is one upon which the decisions have been conflicting.⁴ In *New York* the question is now settled as to judgments of foreign tribunals by a statute which provides that "the recovery of judgment in a court not of the state, for the same cause of action, or where the action is founded upon fraud or deceit, for the price or value of the property obtained thereby, does not affect the right of the plaintiff to arrest the defendant" as prescribed by statute.⁵

1. Whether Action Is on Contract or in Tort — Illustrations. — An action against an innkeeper for the loss of a guest's baggage is founded on tort, and warrants the arrest of the defendant, if the conditions required by the statute exist. *People v. Willett*, 26 Barb. (N. Y.) 78, 15 How. Pr. (N. Y.) 210.

Where the Action May Be Either Tort or Contract against a carrier for the loss of goods, and the action brought is in contract, an execution against the person of the defendant is not authorized. *Catlin v. Adirondack Co.*, (Ct. App.) 11 Abb. N. Cas. (N. Y.) 377, 81 N. Y. 379, reversing 20 Hun (N. Y.) 19.

A claim against a superintendent of a railroad company for failure on demand to account for and pay over money belonging to the company, collected by him, was held to be a cause of action arising upon contract, in an action upon which the defendant was not liable to arrest. *Matter of Stephenson*, 32 Mich. 60.

An Action by a Tenant Alleging Forcible Entry and Detainer on the part of his landlord is an action of tort, and the defendant may be arrested. *Medcraft v. Dartt*, 67 Wis. 115.

Fraudulently Obtaining and Fraudulently Concealing Property. — An action in which the plaintiff alleges in one count that the defendant by fraudulent representations obtained goods on credit, and in another count that the defendant, being indebted to the plaintiff on certain notes, fraudulently concealed his property, is an action of tort wherein the defendant might be held to bail under the *Connecticut* Act of 1842. *Armstrong v. Ayres*, 19 Conn. 540.

2. Causes of Action Reduced to Judgment Are Debts. — See the title DEBT, vol. 8, pp. 994, 999. See also *Ex p. Prader*, 6 Cal. 239; *Southern Express Co. v. Lynch*, 65 Ga. 240.

3. Judgments in Tort Not Debts in Constitutional Sense. — *Moore v. Green*, 73 N. Car. 394, 21 Am. Rep. 470, holding that an arrest of the defendant in an action of libel is not improper under a constitution abolishing imprisonment for "debt." The defendant argued that a judgment against him would convert the claim for damages into a debt, which would render his further detention unlawful under the constitution, thus making the giving of bail nugatory. The court considered, however, that the constitutional clause was applicable only to

"imprisonment for debt as popularly understood, viz., for a cause of action arising *ex contractu*." See further the title DEBT, vol. 8, p. 992.

4. Domestic Judgment a Merger. — In *McButt v. Hirsch*, (C. Pl. Spec. T.) 4 Abb. Pr. (N. Y.) 441, it was held that the recovery of a judgment in one of the courts of the state upon a debt fraudulently contracted merged the original cause of action, and that the defendant in an action upon such judgment was not liable to arrest for fraud in contracting the debt. See also *Field v. Bland*, (Ct. App.) 8 Abb. N. Cas. (N. Y. 221, 81 N. Y. 239.

It has been several times held that the defendant may be arrested in an action upon a judgment recovered in another jurisdiction. *Wanzer v. De Baun*, 1 E. D. Smith (N. Y.) 261; *Fellows v. Cook*, (C. Pl. Spec. T.) 50 How. Pr. (N. Y.) 95, reversed in 6 Daly (N. Y.) 204, apparently without reference to this point; *Greenbaum v. Stein*, 2 Daly (N. Y.) 223; *Gordon v. Lindo*, 1 Cranch (C. C.) 588. Compare *Goodrich v. Dunbar*, 17 Barb. (N. Y.) 644; *Mallory v. Leach*, (Supm. Ct. Spec. T.) 23 How. Pr. (N. Y.) 507. And see *Goodale v. Finn*, 2 Hun (N. Y.) 151.

The defendant may be arrested in an action on the original cause of action notwithstanding a foreign judgment therein. *Arthurton v. Dalley*, (Supm. Ct. Spec. T.) 20 How. Pr. (N. Y.) 311. See also *Wanzer v. De Baun*, 1 E. D. Smith (N. Y.) 261.

5. Right of Arrest Not Affected by Foreign Judgment — New York. — Code Civ. Pro. N. Y., § 552; *Baxter v. Drake*, 85 N. Y. 502, 61 How. Pr. (N. Y.) 365, affirming 22 Hun (N. Y.) 565; *Leach v. Linde*, 73 Hun (N. Y.) 246, affirming 142 N. Y. 628; *Pitt v. Freed*, 78 Hun (N. Y.) 614, 28 N. Y. Supp. 863, overruling 66 Hun (N. Y.) 632, 21 N. Y. Supp. 300; *Milbury v. Heitzberg*, (Supm. Ct. Spec. T.) 28 Civ. Pro. (N. Y.) 179.

The true interpretation of the section cited is that where there is a judgment out of the state, when the action is of such a nature as to authorize an arrest, the plaintiff has a right to sue within the state for the original cause of action precisely the same as if no judgment had been obtained, and that such judgment is not a bar to the action brought. It seems,

6. Effect of Assignment. — The assignment of a cause of action in which the arrest of the defendant is authorized does not affect the right of arrest, and the defendant may be arrested in an action brought by the assignee in any case in which he might have been arrested at the suit of the party in whose favor the cause of action originally arose.¹

V. GROUNDS OF ARREST AND IMPRISONMENT — 1. Generally. — The grounds upon which the defendant in a civil action may be arrested and imprisoned will be found enumerated in the various state statutes by which this matter is regulated. For the most part the cases in which arrest is authorized are either those in which the cause of action is founded upon tort or those where the defendant has been guilty of fraud.²

Refusal to Make Judicial Abandonment. — A refusal on the part of a trader, who has ceased payments, to make a judicial abandonment of his property for the benefit of his creditors when required to do so is, under the *Quebec* law, a ground of arrest.³

2. Injuries to Person or Character. — A common provision of the statutes is that the defendant may be arrested in an action to recover damages for a "personal injury"⁴ or for an "injury to person or character."⁵ Under these provisions it has been held that the defendant may be arrested in an action for the seduction of the plaintiff's daughter,⁶ or for criminal conversation,⁷ or for assault and battery,⁸ or for malicious prosecution⁹ or false

however, that the action should be brought upon the judgment, and not upon the original cause of action. *Baxter v. Drake*, 85 N. Y. 502, 61 How. Pr. (N. Y.) 365.

1. Assignee May Arrest. — *King v. Kirby*, 28 Barb. (N. Y.) 49. See also *Winning v. Fraser*, 13 L. C. Jur. 167; *Quinn v. Atcheson*, 4 L. C. Rep. 378; *Laidlaw v. Burns*, 16 L. C. Rep. 318.

2. A Cause of Action Arising in a Foreign Country is not a ground for arrest under the *Quebec* statutes, *Consol. Stat. L. C.*, § 7, subsec. 2. *McDougall v. Torrance*, 5 L. C. Jur. 148; *Gregory v. Boston, etc., Glass Co.*, 9 L. C. Jur. 134; *Royal Ins. Co. v. Knapp*, 11 L. C. Jur. 1; *Koornhuyse v. Grondin*, 14 L. C. Jur. 218; *Moisic Iron Co. v. Olsen*, 18 L. C. Jur. 29; *Ventini v. Ward*, 23 L. C. Jur. 267.

For the purpose of the act England is a foreign country. *Bottomley v. Lumley*, 13 L. C. Rep. 227, 15 L. C. Rep. 213. So is *Barbadoes*. *Trobridge v. Morange*, 6 L. C. Jur. 312.

3. Code Civ. Pro. Quebec (1897), § 895. See *Channell v. Beckett*, 17 Rev. Lég. 678, *affirming* 11 Montreal Leg. N. 42; *Henry v. Brouillet*, 16 Rev. Lég. 206; *Boston Woven Hose Co. v. Fenwick*, 6 Montreal Super. Ct. 487.

4. See Code Civ. Pro. N. Y., § 549.

A "Personal Injury" as Defined by the New York Code includes libel, slander, criminal conversation, seduction, and malicious prosecution; also an assault, battery, false imprisonment, or other actionable injury to the person either of the plaintiff or of another. *Code Civ. Pro. N. Y.*, § 3343.

In an Action for Injuring the Plaintiff's Health by knowingly selling unwholesome food to him, the defendant may be arrested. *Miller v. Scherder*, 2 N. Y. 262.

5. See Stat. Wis. (1898), § 2689, subdiv. 1.

6. Action for Seduction. — *Taylor v. North*, (Supm. Ct. Spec. T.) 3 Code Rep. (N. Y.) 9; *Steinberg v. Lasker*, (N. Y. Super. Ct.) 50 How. Pr. (N. Y.) 432; *Hooover v. Palmer*, 80 N. Car.

313; *Kinney v. Laughenour*, 97 N. Car. 325; *Hood v. Sudderth*, 111 N. Car. 215.

An action for seduction is not within the *Wisconsin* statute authorizing arrest in an action for injury to person or character. *Wagner v. Lathers*, 26 Wis. 436. But arrest for seduction is now expressly authorized by statute in that state. *Stat. Wis. (1898), § 2689, subdiv. 1.*

Seduction as Malicious Act. — In *Whiting v. Dow*, 42 Vt. 262, it was held that the seduction of the plaintiff's daughter was a wilful and malicious act within the meaning of the statute authorizing the confinement of the defendant in close jail in actions for such acts.

But the contrary has been held under the *Illinois* Insolvent Debtors' Act. *People v. Greer*, 43 Ill. 213.

7. Criminal Conversation. — *Delamater v. Russell*, 2 Code Rep. (N. Y.) 147, (Supm. Ct. Spec. T.) 4 How. Pr. (N. Y.) 234; *Straus v. Schwarzwalden*, 4 Bosw. (N. Y.) 627.

Enticing Away Plaintiff's Husband. — The defendant may be arrested in an action for enticing away the plaintiff's husband. *Breiman v. Paasch*, (Brooklyn City Ct. Spec. T.) 7 Abb. N. Cas. (N. Y.) 249.

8. Assault and Battery. — *Cole v. Tolison*, 40 Fed. Rep. 303; *Hanson v. Fowle*, 1 Sawy. (U. S.) 497; *In re Murphy*, 109 Ill. 31; *Pease v. Pendell*, 57 Mich. 315; *Dougherty v. Gardner*, (Supm. Ct. Spec. T.) 58 How. Pr. (N. Y.) 284; *Schultz v. Schultz*, (Supm. Ct. Gen. T.) 2 Civ. Pro. (N. Y.) 282; *Moll v. Witmer*, 11 W. N. C. (Pa.) 248; *Wedman v. Kendall*, 14 W. N. C. (Pa.) 157. See also *Block v. Bannerman*, 10 La. Ann. 1. *Compare Ex p. Prader*, 6 Cal. 239.

In *New York* it was formerly held that the defendant should not be arrested unless he was a nonresident or transient person, or except in extreme cases of very violent and cruel battery. *Davis v. Scott*, (C. Pl.) 15 Abb. Pr. (N. Y.) 127; *Zimmerman v. Chrisman*, 7 Hill (N. Y.) 153.

9. Malicious Prosecution. — *Dempsey v. Lepp*, (Supm. Ct. Spec. T.) 52 How. Pr. (N. Y.) 11.

imprisonment,¹ or in an action of libel² or slander.³ So also the defendant may be arrested in an action for divorce on the ground of cruel and inhuman treatment,⁴ though it seems not where the action is brought on the ground of adultery.⁵

Personal Injuries Caused by Defendant's Negligence. — In an action to recover damages for personal injuries it is not necessary, in order to render the defendant liable to arrest, that the injury complained of should be wilful; it is sufficient to authorize the defendant's arrest that the injury was caused through his negligence.⁶

Death by Wrongful Act. — It seems that the question whether the defendant may be arrested in an action to recover damages for negligently causing the death of another is to be determined by the language of the particular statutes under which the action is brought. The right to arrest the defendant has been denied in *Wisconsin* and in a *New York* case under a similar statute, though the rule seems to be otherwise under the present statutes of *New York*.⁷

3. Injuries to Property. — It is provided by statute in several states⁸ that the defendant may be arrested in an action to recover damages for an injury to property,⁹ or for wrongfully taking, detaining, or converting

1. False Imprisonment. — *Wilder v. Brush*, 7 La. Ann. 657; *Jones v. Kelly*, 17 Mass. 116.

2. Libel. — *Britton v. Richards*, (Brooklyn City Ct. Spec. T.) 13 Abb. Pr. N. S. (N. Y.) 258; *Moore v. Green*, 73 N. Car. 394, 21 Am. Rep. 470. Compare *Folk v. Solis*, 1 Mart. (La.) 64.

In an early case in *New York* it was held that the defendant could not be held to bail in an action for libel except for special cause shown. *Clason v. Gould*, 2 Cal. (N. Y.) 47. See also *Knickerbocker L. Ins. Co. v. Ecclesine*, (N. Y. Super. Ct. Gen. T.) 42 How. Pr. (N. Y.) 201; *Blakelee v. Buchanan*, (Supm. Ct. Spec. T.) 44 How. Pr. (N. Y.) 97.

In an Action by a Corporation for libel the defendant may be arrested. *Knickerbocker L. Ins. Co. v. Ecclesine*, (N. Y. Super. Ct. Gen. T.) 42 How. Pr. (N. Y.) 201, 34 N. Y. Super. Ct. 76, 11 Abb. Pr. N. S. (N. Y.) 385.

Defendant's Residence Immaterial. — *Britton v. Richards*, (Brooklyn City Ct. Spec. T.) 13 Abb. Pr. N. S. (N. Y.) 258.

3. Slander. — *Jewell v. Staats*, 3 Harr. (Del.) 96; *A. B. v. R.*, 4 W. N. C. (Pa.) 185; *Peareson v. Pickett*, 1 McCord L. (S. Car.) 472.

4. Divorce for Cruel and Inhuman Treatment. — *Jamieson v. Jamieson*, 11 Hun (N. Y.) 38, 53 How. Pr. (N. Y.) 112; *Gardiner v. Gardiner*, (N. Y. Super. Ct.) 3 Abb. N. Cas. (N. Y.) 1. See *M'Intosh v. M'Intosh*, (Supm. Ct. Spec. T.) 12 How. Pr. (N. Y.) 289.

Alimony. — The defendant is not liable to arrest upon a petition for alimony. *Westbrook v. Westbrook*, 2 Greene (Iowa) 598.

5. Divorce for Adultery. — See *M'Intosh v. M'Intosh*, (Supm. Ct. Spec. T.) 12 How. Pr. (N. Y.) 289. But in *Boucicault v. Boucicault*, 21 Hun (N. Y.) 431, 59 How. Pr. (N. Y.) 131, in an action for divorce on the ground of the defendant's adultery, where the plaintiff's affidavit stated that the defendant was about to depart from the state and had no present intention of returning thereto, it was held that the defendant might be arrested.

6. Personal Injury through Negligence Sufficient. — *Ritterman v. Ropes*, 52 N. Y. Super.

Ct. 236. See *Haines v. Jeroleum*, 2 McCarty Civ. Pro. (N. Y.) 196.

In an Action for Personal Injuries Caused by the Negligence of the Defendant's Servants, the defendant cannot be held under execution against the person issued under Code Civ. Pro. N. Y., § 1487. *Lasche v. Dearing*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 722.

7. Death by Wrongful Act. — See *Gibbs v. Larrabee*, 23 Wis. 495. See also *Ryall v. Kennedy*, 41 N. Y. Super. Ct. 531. But in *Haines v. Jeroleum*, 2 McCarty Civ. Pro. (N. Y.) 196, it was held that the term "personal injury," as defined in Code Civ. Pro. (N. Y.), § 3343, included a claim for damages for negligently causing the death of a decedent, and that execution against the person might issue on a judgment obtained therefor.

8. Actions for Injury to Property. — See Code Civ. Pro. (N. Y.), § 549, subd. 2; Code N. Car., § 291, subd. 1; Stat. Wis. (1898), § 2689, subd. 1.

9. Injury to Property Defined — New York. — An injury to property as defined by the New York Code is "an actionable act whereby the estate of another is lessened, other than a personal injury or the breach of a contract." Code Civ. Pro. N. Y., § 3343.

In an Action to Recover Money Lost in Gambling it has been held that the defendant cannot be arrested in *New York*. *Tompkins v. Smith*, (N. Y. Super. Ct. Gen. T.) 62 How. Pr. (N. Y.) 499, affirmed 89 N. Y. 602. But the defendant may be arrested in such actions under the *Wisconsin* statutes. *Stoddard v. Burt*, 75 Wis. 107.

A Combination to Injure the Plaintiff's Business by means of declaring and enforcing a boycott against him is an injury to property within the meaning of the statute authorizing the arrest of the defendant. *Old Dominion Steamship Co. v. McKenna*, (U. S. Cir. Ct.) 18 Abb. N. Cas. (N. Y.) 263, 30 Fed. Rep. 48.

Injury to Animal — **Negligence of Bailee.** — The defendant may be arrested in an action to recover damages for an injury to the plaintiff's ox caused by the defendant's negligence while

the property of the plaintiff.¹

Injuries to Real Property. — The question whether the statutes authorizing the arrest of the defendant in such cases apply to real as well as personal property will depend upon the wording of the particular statutes.²

4. Fraud — *a. GENERALLY.* — In most of the states in which imprisonment for debt and in civil cases has been made the subject of constitutional or statutory provisions, cases in which the defendant has been guilty of fraud are excepted from the operation of exemptions secured by these provisions. The several cases of fraud that may arise will now be considered in detail.

b. IN ACTION OF FRAUD AND DECEIT. — The defendant may be arrested in an action to recover damages for fraud and deceit.³

using it. *Keeler v. Clark*, (Supm. Ct. Spec. T.) 18 Abb. Pr. (N. Y.) 154. But see *McCauley v. Salmon*, 14 Phila. (Pa.) 131, 37 Leg. Int. (Pa.) 262, where, in a similar case, it was held that the defendant bailee was not liable to arrest, the decision being based on the ground that the action arose *ex contractu*.

1. Conversion of Property — *Michigan.* — *Matter of Hicks*, 20 Mich. 280; *Wilcox v. Ismon*, 34 Mich. 268.

New York. — *Schermerhorn v. Jones*, (Supm. Ct. Spec. T.) 1 How. Pr. (N. Y.) 147; *Person v. Civer*, (Supm. Ct. Gen. T.) 29 How. Pr. (N. Y.) 432; *Lambertson v. Van Bosker*, (Supm. Ct. Gen. T.) 49 How. Pr. (N. Y.) 266; *Searing v. Goodstein*, 11 Daly (N. Y.) 236; *Agar v. Haines*, 14 Daly (N. Y.) 448; *Shaughnessy v. Chase*, (Supm. Ct. Gen. T.) 7 N. Y. St. Rep. 293; *Honey v. McDonald*, 45 N. Y. Super. Ct. 606; *Hayes v. Jones*, 1 Edm. Sel. Cas. (N. Y.) 11; *Strebe v. Albert*, (Marine Ct. Gen. T.) 1 City Ct. (N. Y.) 376; *Suydam v. Smith*, 7 Hill (N. Y.) 182; *Palmer v. Hussey*, 65 Barb. (N. Y.) 278, *affirmed* 59 N. Y. 647; *Babcock v. Smith*, (C. Pl. Gen. T.) 19 N. Y. Supp. 817; *Boyer v. Fenn*, (Supm. Ct. App. T.) 19 Misc. (N. Y.) 128; *Eckert v. Belden*, 1 N. Y. L. Bul. 61.

North Carolina. — *Long v. McLean*, 88 N. Car. 3.

South Dakota. — *Winton v. Knott*, 7 S. Dak. 179.

Wisconsin. — *Isley v. Harris*, 10 Wis. 95; *Matter of Mowry*, 12 Wis. 52; *Cotton v. Sharpstein*, 14 Wis. 226, 80 Am. Dec. 774.

As to arrest of an agent or other person acting in a fiduciary capacity for conversion of property intrusted to him, see *infra*, this section, *Fraud* — *Fraud in Fiduciary Capacity*.

A partner who unlawfully obtains possession of a portion of partnership property which has been assigned for the benefit of creditors is liable to arrest in an action by the assignee. *Isley v. Harris*, 10 Wis. 95.

Where the Mortgagor of Personal Property fraudulently takes some of the property out from the operation of the mortgage, he is liable to arrest. *Matter of Hicks*, 20 Mich. 280. To the same effect see *Woodbridge v. Nelson*, 13 Hun (N. Y.) 390.

Unlawful Detention. — The defendant may be arrested in an action to recover possession of personal property unjustly detained and damages for the detention. *Tracy v. Griffin*, 50 Barb. (N. Y.) 70. But see *In re Short*, (Supm. Ct. App. Div.) 54 N. Y. Supp. 1075; *Purchase v. Bellows*, (N. Y. Super. Ct. Spec. T.) 23 How. Pr. (N. Y.) 421. And it has been held

that a statute authorizing the arrest of the defendant in an action to recover possession of personal property does not authorize the arrest of the defendant in an action for damages for the wrongful conversion of such property. *Seymour v. Van Curen*, (Supm. Ct. Spec. T.) 18 How. Pr. (N. Y.) 94.

Imprisonment under Bail Process in Trover — *Georgia.* — Under Code Ga., §§ 3418-3420, in force in 1876 (2 Code 1895, §§ 4604-4606), the defendant in an action for the recovery of personal property may be imprisoned under bail process. *Harris v. Bridges*, 57 Ga. 407, 24 Am. Rep. 495. See also *State v. Bridges*, 64 Ga. 146. But there can be no arrest in such action where the plaintiff accepts an alternative verdict for the property or its value, as authorized by section 3564 (2 Code 1895, § 5335), and the verdict becomes absolute for the money value. *Southern Express Co. v. Lynch*, 65 Ga. 240.

2. Whether Word "Property" Includes Real Property. — Under the former *New York* statute the word "property" was limited in its application to personal property. *Merritt v. Carpenter*, 3 Keyes (N. Y.) 142, 3 Abb. App. Dec. (N. Y.) 285, *reversing* 30 Barb. (N. Y.) 61; *Griswold v. Sweet*, (Supm. Ct. Spec. T.) 49 How. Pr. (N. Y.) 171; *Brush v. Muller*, (Supm. Ct. Spec. T.) 12 Abb. Pr. (N. Y.) 242; *Fullerton v. Fitzgerald*, 18 Barb. (N. Y.) 441. So also in *North Carolina*. *Bridgers v. Taylor*, 102 N. Car. 86. But in the present *New York* statute (Code Civ. Pro., § 549) the word "property" includes real as well as personal property. *Welch v. Winterburn*, 14 Hun (N. Y.) 518.

In Vermont, under the provisions now embodied in Stat. Vt. (1894), §§ 1560, 1561, the defendant in an action to recover possession of a tenement unlawfully held over by the lessee may be arrested. *Barnes v. Tenney*, 52 Vt. 557.

Trespass upon Land Lying in Another State cannot form the basis of an arrest, for such action can be maintained only in the state in which the land is situated. *American Union Tel. Co. v. Middleton*, 80 N. Y. 408.

3. Arrest in Action of Fraud and Deceit. — *Graham v. Dominguez*, 1 Am. L. T. Rep. 70, 10 Fed. Cas. No. 5,664; *Cohn v. Judge*, 40 Mich. 169; *Ely v. Mumford*, 47 Barb. (N. Y.) 629; *Hazlett v. Gill*, (N. Y. Super. Ct. Spec. T.) 19 Abb. Pr. (N. Y.) 353, 4 Robt. (N. Y.) 627; *Redfield v. Frear*, (Supm. Ct. Spec. T.) 9 Abb. Pr. N. S. (N. Y.) 449; *Cranhall v. Bryan*, (Supm. Ct.) 15 How. Pr. (N. Y.) 48; *Faris v. Peck*, (N. Y. Super. Ct. Gen. T.) 40 How. Pr. (N. Y.) 484; *Bruce v. Kelly*, 5 Hun (N. Y.) 229; *Bishop v.*

c. FRAUD IN CONTRACTING DEBT — (1) *Generally*. — A common provision of the statutes is that the defendant may be arrested in an action upon contract where he has been guilty of fraud in contracting the debt or incurring the liability.¹ Fraud in contracting a debt in the sense of these statutes means some fraudulent conduct on the part of the defendant at the time of making the contract whereby the plaintiff was deceived. A subsequent failure to perform the contract, even though fraudulent, does not warrant the arrest of the defendant on the ground that the debt was fraudulently contracted.²

Debt Contracted by False Representations. — Fraud in contracting a debt will obviously consist for the most part in false representations made by the defendant,

Davis, 9 Hun (N. Y.) 342; Boyer v. Fenn, (Supm. Ct. App. T.) 19 Misc. (N. Y.) 128; Bresnehan v. Darrin, 7 Alb. L. J. (N. Y.) 316; Hooper v. Williams, 2 Clark (Pa.) 448, 4 Pa. L. J. 235, 1 Clark (Pa.) 379, 2 Pa. L. J. 382; Sedgebeer v. Moore, Bright, (Pa.) 197; Tryon v. Hassinger, 1 Clark (Pa.) 184, 2 Pa. L. J. 43.

Obtaining Property by False Pretenses is a ground of arrest in *Wisconsin*. Warner v. Bates, 75 Wis. 278.

An Action of Deceit for False Warranty being one in which a recovery may be had without proving fraud, an order of arrest is not grantable as of course. Fowler v. Abrams, 3 E. D. Smith (N. Y.) 1.

In an Action Grounded on False Representations of the Solvency of a Third Person arrest is proper. Hazlett v. Gill, 4 Robt. (N. Y.) 627; Sherman v. Brantley, 7 Robt. (N. Y.) 55. See Smith v. Corbiere, 3 Bosw. (N. Y.) 634.

Conspiracy to Defraud. — The defendants may be arrested in an action for conspiracy to defraud the plaintiffs. Moers v. Morro, (Supm. Ct. Gen. T.) 17 How. Pr. (N. Y.) 280, 8 Abb. Pr. (N. Y.) 257.

1. Fraud in Contracting Debt — United States. — London Guaranty, etc., Co. v. Geddes, 22 Fed. Rep. 639.

Connecticut. — Armstrong v. Ayres, 19 Conn. 540.

Michigan. — Hatch v. Saunders, 66 Mich. 181.

New York. — Morrison v. Garner, (C. Pl. Gen. T.) 7 Abb. Pr. (N. Y.) 425; Lovell v. Martin, (C. Pl. Gen. T.) 11 Abb. Pr. (N. Y.) 126; Wilmerding v. Mooney, (C. Pl. Gen. T.) 11 Abb. Pr. (N. Y.) 283; Wilmerding v. Cohen, (Supm. Ct. Gen. T.) 8 Abb. Pr. N. S. (N. Y.) 141; Murphy v. Fernandez, to Bosw. (N. Y.) 665; McGovern v. Payn, 32 Barb. (N. Y.) 83; Crandall v. Bryan, (Supm. Ct.) 15 How. Pr. (N. Y.) 48; Scudder v. Barnes, (Supm. Ct.) 16 How. Pr. (N. Y.) 534; Harding v. Shannon, (Supm. Ct. Spec. T.) 20 How. Pr. (N. Y.) 25; Muklan v. Doty, (Supm. Ct. Spec. T.) 20 How. Pr. (N. Y.) 236; Burbridge v. Hart, (C. Pl. Spec. T.) 54 How. Pr. (N. Y.) 455; Roebeling v. Duncan, 8 Hun (N. Y.) 502; Mathushek Piano Mfg. Co. v. Pearce, (Supm. Ct. Gen. T.) 21 N. Y. Supp. 921; Standard Sugar Refinery v. Dayton, 70 N. Y. 486.

North Carolina. — Bahnsen v. Chesebro, 77 N. Car. 325.

Ohio. — Este v. Wilshire, 44 Ohio St. 636.

Pennsylvania. — Gosline v. Place, 32 Pa. St. 520; Hart v. Cooper, 129 Pa. St. 297; Hamill v. Rawlston, 9 Phila. (Pa.) 52, 29 Leg. Int. (Pa.) 382.

Compare similar statutes as to attachment. See the title ATTACHMENT, vol. 3, p. 202.

Buying Goods on Credit Immediately Before Failure has been held to render one liable to arrest. City Bank v. Lumley, (C. Pl. Gen. T.) 28 How. Pr. (N. Y.) 397. See also Dale v. Jacobs, (Supm. Ct. Spec. T.) 41 How. Pr. (N. Y.) 94, 10 Abb. Pr. N. S. (N. Y.) 382.

The Sale of a Worthless Patent Right upon false representations that it was genuine and no infringement of any prior patent has been held ground for arrest in an action to recover the purchase price. Bahnsen v. Chesebro, 77 N. Car. 325.

Fraudulently Obtaining a Loan is within the statute. Wilmerding v. Mooney, C. Pl. Gen. T.) 11 Abb. Pr. (N. Y.) 283.

Overdrawing a Bank Account Fraudulently may be ground of arrest. Union Bank v. Mott, (Supm. Ct. Spec. T.) 6 Abb. Pr. (N. Y.) 315.

Fraud in Contracting a Debt Discovered After a Judgment Therefor Was Obtained warrants the defendant's arrest in an action on the judgment. Wanzer v. De Baun, 1 E. D. Smith (N. Y.) 261.

2. Fraud Committed After Debt Was Contracted. — Vankirk v. Staats, 24 N. J. L. 121. In this case it was held that a subsequent refusal to pay a debt does not warrant the inference that the debt was fraudulently contracted. See also U. S. v. Wood, 28 Fed. Cas. No. 16,755a; Steinhardt v. Beir, 60 N. Y. Super. Ct. 489.

In an action on a contract to recover damages for the breach thereof the defendant cannot be arrested for fraud in contracting the liability where the fraud complained of was committed in respect to the performance and not to the making of the contract. Mooney v. La Follette, 21 N. Y. App. Div. 510.

But the Defendant's Subsequent Acts May Warrant an Inference of Fraudulent Intent in Contracting a Debt. So where a loan was obtained by representations that the money was to be used for a particular purpose, and the borrower afterwards diverted it to other uses. Lovell v. Martin, (C. Pl. Gen. T.) 11 Abb. Pr. (N. Y.) 126.

A Mere Failure to Keep a Promise to Pay for Goods Purchased on Credit, although the intention not to pay existed when the goods were obtained, has been held in *Illinois* not to warrant the defendant's arrest in execution. Kitson v. Farwell, 132 Ill. 327; Kitson v. Ellinger, 35 Ill. App. 55. See, as to whether such a representation when the intention is not to pay is a fraud, the title FRAUD AND DECEIT, vol. 14, p. 51.

directly or indirectly, by which the plaintiff was induced to enter into the contract, and in order that the defendant may be arrested it must appear that such representations were relied upon by the plaintiff.¹ Fraud cannot be predicated upon the mere expression of an opinion.²

(2) *False Representations as to Solvency.* — One who obtains goods on credit by means of false representations as to his solvency, made with knowledge of their falsity, is guilty of such fraud in contracting the debt as will furnish a ground for his arrest in an action to recover the price of the goods.³

Scienter Necessary. — But in order to justify an arrest in such case it is essential that the representations should have been made with knowledge of their falsity.⁴ Such knowledge, however, may be inferred from circumstances.⁵

If a Vendee Knowingly Conceals His Insolvency, and his concealment is accompanied with an intention to acquire the property of his vendor without paying for it, he is guilty of such fraud as will render him liable to arrest in an action for the debt.⁶

(3) *Fraudulent Purchase.* — One who purchases goods for cash and obtains possession without paying for the goods, with the intent of immediately disposing of them or of converting them into a form in which they cannot easily be reached on execution, is guilty of such fraud as will authorize his arrest.⁷

1. False Representations Not Relied Upon. — *Cox v. Dwyer*, (Supm. Ct. Gen. T.) 17 N. Y. Supp. 713. See the title FRAUD AND DECEIT, vol. 14, p. 106 *et seq.*

The Falsity of One of Several Material Representations is enough, if relied on. *Wannemacher v. Davis*, 2 Sweeny (N. Y.) 272. And see the title FRAUD AND DECEIT, vol. 14, p. 113.

Where a Person Obtains Goods by Representations False to His Knowledge, a fraudulent intent will be legally presumed, and he may be arrested, although he denies the fraudulent intent. *Whitcomb v. Salsman*, (Supm. Ct. Spec. T.) 16 How. Pr. (N. Y.) 533. But see *Cullen v. Herz*, (Supm. Ct. Gen. T.) 13 N. Y. St. Rep. 333, and the title FRAUD AND DECEIT, vol. 14, p. 103.

2. Statement of Opinion Not Fraudulent Misrepresentation. — Thus where one purchasing goods, in settlement of the price, indorses to the vendor the check of a third person payable to the vendee, he is not chargeable with fraud in contracting the debt so as to render him liable to arrest because of a representation or statement that the check would be paid upon presentation, for such a statement is "necessarily a mere expression of opinion and belief, and must have been received as such." *Stewart v. Potter*, (C. Pl. Gen. T.) 37 How. Pr. (N. Y.) 68. See the title FRAUD AND DECEIT, vol. 14, p. 34 *et seq.*

3. False Representations of Solvency. — *Freeman v. Leland*, (Supm. Ct. Spec. T.) 2 Abb. Pr. (N. Y.) 479; *Wilmerding v. Mooney*, (C. Pl. Gen. T.) 11 Abb. Pr. (N. Y.) 283; *Scudder v. Barnes*, (Supm. Ct.) 16 How. Pr. (N. Y.) 534; *Claffin v. Moore*, 42 N. Y. Super. Ct. 262; *Wilmerding v. Cohen*, (Supm. Ct. Gen. T.) 8 Abb. Pr. N. S. (N. Y.) 141; *McDonough v. Dillingham*, 43 Hun (N. Y.) 493; *Whitmore v. Van Steenberg*, 2 Thomp. & C. (N. Y.) 668; *Lamkin v. Oppenheim*, 86 Hun (N. Y.) 27. See also *Tracy v. Veeder*, (Supm. Ct. Gen. T.) 35 How. Pr. (N. Y.) 209, 50 Barb. (N. Y.) 70; *Bard v. Naylon*, 33 W. N. C. (Pa.) 251; and the title FRAUD AND DECEIT, vol. 14, p. 28.

An Officer of a Corporation who obtains credit

for the corporation by false representations as to its solvency is liable to arrest in an action by the person injured. *Phillips v. Wortendyke*, 31 Hun (N. Y.) 192. And see the title last cited, vol. 14, p. 27.

4. Scienter Necessary. — *Gaffney v. Burton*, (Supm. Ct. Gen. T.) 12 How. Pr. (N. Y.) 516; *Birchell v. Strauss*, 28 Barb. (N. Y.) 293.

5. Scienter Inferred from Circumstances. — *Scudder v. Barnes*, (Supm. Ct.) 16 How. Pr. (N. Y.) 534.

6. Knowingly Concealing Fact of Insolvency. — *Watson v. Judge*, 40 Mich. 729; *Morrison v. Garner*, (C. Pl. Gen. T.) 7 Abb. Pr. (N. Y.) 425; *Claffin v. Moore*, 42 N. Y. Super. Ct. 262; *Roebeling v. Duncan*, 8 Hun (N. Y.) 502; *Wright v. Brown*, 67 N. Y. 1. Consult also the title FRAUD AND DECEIT, vol. 14, pp. 51, 81.

But a Mere Concealment of Insolvency Unaccompanied by an Intention Not to Pay is not fraud rendering the purchaser amenable to arrest. *Wright v. Brown*, 67 N. Y. 1; *Morris v. Talcott*, 96 N. Y. 100; *Wells v. Selling*, (C. Pl. Spec. T.) 53 How. Pr. (N. Y.) 35; *Watson v. Browne*, 1 Lehigh Val. L. Rep. 156. Consult also the title last cited, vol. 14, p. 80.

7. Fraudulently Disposing of Property Purchased for Cash Without Making Payment. — *Harding v. Shannon*, (Supm. Ct. Spec. T.) 20 How. Pr. (N. Y.) 25; *Robbins v. Seithel*, (Supm. Ct. Spec. T.) 20 How. Pr. (N. Y.) 366; *Wallace v. Murphy*, (N. Y. Super. Ct. Spec. T.) 22 How. Pr. (N. Y.) 414. See also *Miltnerberger v. Burgess*, 15 La. Ann. 8.

Where the defendant purchased beef cattle from the plaintiff for cash on delivery, and while he and the plaintiff were consulting as to payment his agent drove off the cattle and slaughtered them the same day, and the defendant thereupon induced the plaintiff to accept a worthless sight draft in payment, it was held that the facts showed a fraudulent scheme to obtain possession of the cattle for which the defendant might be arrested. *Harding v. Shannon*, (Supm. Ct. Spec. T.) 20 How. Pr. (N. Y.) 25.

Where certain note brokers purchased notes

whether such fraud would or would not avoid the sale.¹

(4) *Fraud by Agent or Copartner*. — **Fraud by Agent.** — To authorize an arrest for fraud in contracting the debt sued on, the fraud complained of must be actual and personal, and not merely legal or constructive. Thus fraudulent representations made by an agent, but not known to or authorized or ratified by the principal, will not subject the latter to arrest.² But where the principal participates in or knowingly reaps the benefits of the agent's fraud he may be arrested.³

The Arrest of One Partner for the Fraud of His Copartner in making a contract for the firm is, according to the better opinion, regulated by the same principles, and such an arrest can be justified only by showing that the partner arrested actually participated in the fraud.⁴

d. FRAUD IN AVOIDING PAYMENT OF DEBT — (1) *Generally.* — Statutes authorizing the arrest of a defendant who has been guilty of fraud in contracting a debt do not authorize the arrest of a debtor who resorts to fraud and subterfuge to avoid the payment of a debt honestly contracted.⁵ But under constitutional provisions abolishing imprisonment for debt, but excepting fraud from the operation of the prohibition, such fraud includes not only fraud in contracting the debt, but also fraud in avoiding its payment.⁶

Fraudulently Procuring Extension of Time of Payment. — A debtor who for the purpose of securing an extension of the time of payment of his debt fraudulently induces his creditor to accept a worthless security therefor may be arrested.⁷

Payment by Worthless Post-dated Check. — It has been held, however, that a debtor who has induced his creditor to accept a worthless post-dated check in pay-

from other brokers for cash, but were permitted to take them away without making payment, nothing being said about credit, and the purchasers afterwards sold the notes and converted a part of the proceeds, it was held that they might be arrested. *Robbins v. Seithel*, (Supm. Ct. Spec. T.) 20 How. Pr. (N. Y.) 366.

1. *Wallace v. Murphy*, (N. Y. Super. Ct. Spec. T.) 22 How. Pr. (N. Y.) 414.

Resale at Loss. — Usually the fact that a purchaser sells for less than he pays, almost immediately after obtaining possession, is considered a badge of fraud, and evidence that the purchaser intended not to pay the purchase price; but such fact may be explained, as by evidence that the sale was made at the full market value. *Manning v. Solis*, 50 Barb. (N. Y.) 224.

2. **Fraudulent Representations by Agent.** — *Clatlin v. Frank*, (Supm. Ct. Spec. T.) 8 Abb. Pr. (N. Y.) 412; *Hathaway v. Johnson*, 55 N. Y. 93, 14 Am. Rep. 186. And see the title AGENCY, vol. 1, p. 1161, note.

3. **Principal Liable to Arrest When Participant in Fraud of Agent.** — *Tracy v. Veeder*, (Supm. Ct. Gen. T.) 35 How. Pr. (N. Y.) 211; *Stewart v. Strasburger*, 7 Hun (N. Y.) 337, 51 How. Pr. (N. Y.) 388.

4. **Partner Not Liable to Arrest for Fraud of Copartner.** — *National Bank v. Temple*, (N. Y. Super. Ct. Gen. T.) 39 How. Pr. (N. Y.) 432, 2 Sweeny (N. Y.) 344; *Bacon v. Kendall*, 49 N. Y. Super. Ct. 123; *Wetmore v. Earl*, (Supm. Ct. Spec. T.) 9 Abb. Pr. (N. Y.) 58, note; *Hanover Co. v. Sheldon*, (C. Pl. Spec. T.) 9 Abb. Pr. (N. Y.) 240. See also *Hitchcock v. Peterson*, 14 Hun (N. Y.) 389; *McNeely v. Haynes*, 76 N. Y. 122. Compare *Townsend v. Bogert*, (N. Y. Super. Ct. Gen. T.) 11 Abb. Pr. (N. Y.)

355; *Coman v. Reese*, (Supm. Ct. Gen. T.) 21 How. Pr. (N. Y.) 114; *Sherman v. Smith*, (Supm. Ct. Spec. T.) 42 How. Pr. (N. Y.) 198; *Anonymous*, (C. Pl. Spec. T.) 5 Abb. Pr. (N. Y.) 319, note; *Matter of Benson*, (C. Pl. Gen. T.) 60 How. Pr. (N. Y.) 314. And see *Bull v. Melliss*, (Supm. Ct. Gen. T.) 9 Abb. Pr. (N. Y.) 58, and *dissenting* opinion of Jones, J., in *National Bank v. Temple*, (N. Y. Super. Ct. Gen. T.) 39 How. Pr. (N. Y.) 432.

5. **Provision Against Fraud in Contracting Debt** — **No Arrest for Avoiding Payment.** — *Davis v. Cardue*, 38 S. Car. 471. See also *Hart v. Cooper*, 129 Pa. St. 297; *Hefner v. Kantner*, 1 Leg. Chron. (Pa.) 162, 4 Leg. Gaz. (Pa.) 249.

6. **Arrest Allowed in "Cases of Fraud"** — **Fraud in Avoiding Payment Sufficient.** — *Baker v. State*, 109 Ind. 47; *Bromley v. People*, 7 Mich. 472; *Ex p. Bergman*, 18 Nev. 331; *Ex p. Clark*, 20 N. J. L. 648, 45 Am. Dec. 304.

Refusal to Apply Money to Debt. — A refusal to apply money of which the defendant has the possession or control to the payment of a judgment is a fraud within the meaning of such a constitutional provision. *Ex p. Clark*, 20 N. J. L. 648, 45 Am. Dec. 304. In this case the court said: "Whatever is dishonest is fraudulent *in foro conscientie*, and is so treated in a court of equity. Fraud and dishonesty are synonymous terms." The court declared that one who so dealt with his money or property was "a dishonest and fraudulent man," whose imprisonment was provided for under the constitution.

7. **Procuring Extension of Time by Fraud.** — *Van Wageningen v. Coe*, 22 N. J. L. 531, decided under a statute authorizing arrest for fraud in contracting debt. See also *Easton v. Cardwell*, (Brooklyn City Ct. Gen. T.) 11 Civ. Pro. (N. Y.) 301.

ment of the debt is not liable to arrest in an action brought upon the check.¹

(2) *Concealment or Disposal of Property.* — The defendant in an action on contract may be arrested where, since the making of the contract or in contemplation thereof, he has concealed, removed, or disposed of his property, or is about to do so, with intent to defraud his creditors.²

What Constitutes Fraudulent Disposition of Property. — To constitute a disposition of property by a debtor with intent to defraud his creditors so as to warrant the arrest of the debtor, three things must concur: first, the thing disposed of must be of value, out of which the creditor could have realized all or a portion of his claim; second, it must be transferred or disposed of by the debtor; third, this must be done with intent to defraud creditors.³ Illustrative cases will be found set out in the note.⁴

1. Payment by Worthless Post-dated Check. — *Woodruff v. Valentine*, (N. Y. Super. Ct. Spec. T.) 19 Abb. Pr. (N. Y.) 93. The ruling was based upon the ground that, as suit was brought on the check itself, it was an action for a debt evidenced by the check, "not an action to recover upon an obligation incurred by the defendant's fraud." No decision was made as to whether an action in which an arrest could have been had would have lain upon all the facts.

2. Disposing of Property with Intent to Defraud Creditors — *Connecticut.* — *Armstrong v. Ayres*, 19 Conn. 540.

Illinois. — *Matter of Salisbury*, 16 Ill. 350. *New York.* — *Phillips v. Benedict*, 33 Barb. (N. Y.) 655; *Wells v. Selling*, (C. Pl. Spec. T.) 53 How. Pr. (N. Y.) 35; *Kern v. Rachow*, (N. Y. Super. Ct. Spec. T.) 12 Abb. Pr. N. S. (N. Y.) 352, 34 N. Y. Super. Ct. 239; *Hitchcock v. Peterson*, 14 Hun (N. Y.) 389; *Bassett v. Pitts*, 15 Hun (N. Y.) 464; *Duncan v. Guest*, 24 Hun (N. Y.) 639; *Untermeyer v. Hutter*, 26 Hun (N. Y.) 147; *Claffin v. Frenkel*, 29 Hun (N. Y.) 283, 3 Civ. Proc. (N. Y.) 109; *Arnold v. Shapiro*, 29 Hun (N. Y.) 478; *Hanover Vulcanite Co. v. Nathanson*, 38 Hun (N. Y.) 488; *Flour City Nat. Bank v. Hall*, (Supm. Ct. Gen. T.) 33 How. Pr. (N. Y.) 1; *McButt v. Hirsch*, (C. Pl. Spec. T.) 4 Abb. Pr. (N. Y.) 441; *Potter v. Sullivan*, (N. Y. Super. Ct. Spec. T.) 16 Abb. Pr. (N. Y.) 295, note; *Wilmerding v. Cohen*, (Supm. Ct. Gen. T.) 8 Abb. Pr. N. S. (N. Y.) 141; *Hinck v. Dessar*, (Supm. Ct. Gen. T.) 3 N. Y. St. Rep. 349; *Talcott v. Rosenberg*, (Supm. Ct. Gen. T.) 4 N. Y. St. Rep. 17; *Baily v. Prince*, (Supm. Ct. Gen. T.) 5 N. Y. Supp. 896, 53 Hun (N. Y.) 629; *Fitch v. McMahon*, 103 N. Y. 690.

North Carolina. — *Durham Fertilizer Co. v. Little*, 118 N. Car. 808.

Pennsylvania. — *Com. v. Duncan*, 1 Pittsb. (Pa.) 207; *Gregg v. Hilsen*, 12 Phila. (Pa.) 348, 34 Leg. Int. (Pa.) 20; *Berger v. Smull*, 39 Pa. St. 302; *Grieb v. Kuttner*, 135 Pa. St. 281.

Canada. — *Benoit v. Petitclerc*, 9 Rev. Lég. 385, 1 Montreal Leg. N. 32. See also *Goulet v. Bernard*, 17 Quebec 75; *Ouimet v. Meunier*, 3 Quebec Super. Ct. 43. As to what amounts to a secretion of property, see *Langley v. Chamberlain*, 5 L. C. Jur. 49; *Demont v. Gourt*, 7 L. C. Jur. 119; *Gault v. Robertson*, 21 L. C. Jur. 281; *Eastern Townships Bank v. Parent*, 5 Montreal Super. Ct. 288; *Graham v. Bennett*, 6 Montreal Leg. N. 298; *Molson's Bank v. McMinn*, 24 L. C. Jur. 256; *Raphael*

v. McDonald, 9 L. C. Jur. 336; *Mitcheson v. Burnett*, 2 Quebec Super. Ct. 260; *St. Michel v. Vidler*, 1 Montreal Super. Ct. 163. A fraudulent preference may amount to a secretion. *Mackinnon v. Kerouack*, 15 Can. Sup. Ct. 111; *Labranche v. Cassidy*, 32 L. C. Jur. 95; *Vipond v. Weldon*, 18 Rev. Lég. 422; *Nash v. Beuthner*, 16 Rev. Lég. 699; *La Banque de la Nouvelle-Ecosse v. Lallemand*, 19 Rev. Lég. 65.

See also as to similar provisions in attachment statutes, the title ATTACHMENT, vol. 3, p. 201.

Obtaining an Extension of Time by Promising to Deliver Certain Securities, and then disposing of these securities in payment of other debts, has been held a fraudulent disposal of property as to the creditor giving time. *Easton v. Cardwell*, (Brooklyn City Ct. Gen. T.) 11 Civ. Pro. (N. Y.) 301.

3. *Hoyt v. Godfrey*, 88 N. Y. 669; *Hanover Vulcanite Co. v. Nathanson*, 38 Hun (N. Y.) 488. See also the title FRAUDULENT SALES AND CONVEYANCES, vol. 14, p. 251 *et seq.*

4. What Is Fraudulent Disposition of Property — *Cancellation of a Worthless Claim* is not. *Hoyt v. Godfrey*, 88 N. Y. 669. See the title FRAUDULENT SALES AND CONVEYANCES, vol. 14, p. 256, note 3.

An Open Removal of Property from the Country by a debtor has been held not to be a removal "with intent to defraud his creditors," secrecy being necessary to evince a fraudulent intent. *Anonymous*, (C. Pl.) 2 Code Rep. (N. Y.) 51. Nor will an open removal of property believed to be exempt warrant an arrest. *Krauth v. Vial*, (C. Pl.) 10 Abb. Pr. (N. Y.) 139.

Concealing and Disposing of Property After a General Assignment for Creditors is ground for arrest. *Untermeyer v. Hutter*, 26 Hun (N. Y.) 147. See also *McButt v. Hirsch*, (C. Pl. Spec. T.) 4 Abb. Pr. (N. Y.) 441, and the title FRAUDULENT SALES AND CONVEYANCES, vol. 14, p. 451.

A Sale of Property for an Inadequate Consideration to a Relative shortly before the maturity of certain debts, the sale being conditional on long credit and not explained, has been held ground of arrest. *Kern v. Rachow*, 34 N. Y. Super. Ct. 239, 12 Abb. Pr. N. S. (N. Y.) 352. See also *Létang v. Renaud*, 6 Montreal Super. Ct. 232, and the title FRAUDULENT SALES AND CONVEYANCES, vol. 14, pp. 516, 521, 523.

Conveyance by Husband to Wife. — Where an insolvent husband conveys his property to his wife on account of an alleged indebtedness which does not legally exist, he may be arrested

An Actual Intent to Defraud, and not merely constructive fraud,¹ must be established by satisfactory evidence² in order to justify the defendant's arrest on the ground of disposing of his property with intent to defraud creditors.

A Fraudulent Disposal of Property in a Different Jurisdiction from that in which the debt was contracted has been held to warrant an arrest in the latter jurisdiction.³ The rule is otherwise, however, where the defendant both contracted the debt and disposed of his property in a foreign country.⁴

(3) **Removal of Debtor from State**.—A debtor who is about to leave the state without leaving sufficient property to pay his debts, and with intent to defraud his creditors, may be arrested at the suit of a creditor.⁵ The mere

for disposing of his property with intent to defraud. *Com. v. Duncan*, 1 Pittsb. (Pa.) 207. But merely preferring his wife, to whom he is indebted, to other creditors is not fraudulent on the part of the husband. *Watson v. Browne*, 1 Lehigh Val. L. Rep. (Pa.) 156.

The Disposal of His Wife's Separate Estate, upon the security of which a husband borrowed money, will not justify an arrest of the husband, in an action to recover the money, on the ground that he had disposed of his property with intent to defraud his creditors or had been guilty of fraud in contracting the debt. *Isaacs v. Gorham*, 1 Hilt. (N. Y.) 479.

That disposing of or secreting property not belonging to the debtor is not ground for arrest, see *Gay v. Dénard*, 3 Montreal Super. Ct. 125; *Gendron v. Lemieux*, 12 L. C. Rep. 222.

Partner's Withdrawal of Firm Property.—A member of an insolvent partnership who withdraws a portion of the partnership property to pay his individual debts has been held not liable to arrest for this act. *Sherill Roper Air Engine Co. v. Harwood*, 30 Hun (N. Y.) 9. The withdrawal of partnership assets may, however, constitute evidence of an intent to defraud partnership creditors, *Hinck v. Desjar*, (Supm. Ct. Gen. T.) 3 N. Y. St. Rep. 349; and so subject to arrest the partner withdrawing such assets and converting them to his own use, *Hanover Vulcanite Co. v. Nathanson*, 38 Hun (N. Y.) 488. But a partner who merely withdraws money from the firm business in consequence of partnership losses cannot be arrested without proof that he has disposed or intends to dispose of the money withdrawn in fraud of creditors, although his copartner is shown to have been guilty of a fraudulent disposal. *Scott v. Reed*, (Supm. Ct. Gen. T.) 2 How. Pr. N. S. (N. Y.) 521.

Carrying on the Person Money derived from the sale of property subject to attachment is a fraudulent concealment of property with intent to defraud creditors. *Clement v. Dudley*, 42 N. H. 367. See the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 67.

1. Defendant Must Be Guilty of Actual Fraud.—*Caldwell's Case*, (Supm. Ct. Gen. T.) 13 Abb. Pr. (N. Y.) 405, reported as *People v. Kelly*, 35 Barb. (N. Y.) 444; *Pacific Mut. Ins. Co. v. Machado*, (Supm. Ct. Gen. T.) 16 Abb. Pr. (N. Y.) 456; *Flour City Nat. Bank v. Hall*, (Supm. Ct. Gen. T.) 33 How. Pr. (N. Y.) 1; *Spies v. Joel*, 1 Duer (N. Y.) 669; *Birchall v. Strauss*, 28 Barb. (N. Y.) 293, 8 Abb. Pr. (N. Y.) 53; *Stroub v. Henly*, (N. Y. City Ct.) 1 How. Pr. N. S. (N. Y.) 400; *Hoyt v. Godfrey*, 88 N. Y. 669.

In Rhode Island Constructive Fraud Is Sufficient.—*Eichenberg v. Marcy*, 18 R. I. 169, distinguishing the *New York* cases as being decided under a different statute.

2. Clear Proof of Fraudulent Intent Required.—*Vredenburg v. Hendricks*, 17 Barb. (N. Y.) 179; *Courter v. McNamara*, (Supm. Ct. Spec. T.) 9 How. Pr. (N. Y.) 255, and cases cited in the note immediately preceding. See also *Hathorn v. Hall*, (Supm. Ct. Spec. T.) 4 Abb. Pr. (N. Y.) 227.

The Sale of Property by an Insolvent Debtor without any fraudulent intent does not render him liable to arrest. *Neithinger v. Wetzel*, 1 Leg. Rec. (Pa.) 49; *Watson v. Browne*, 1 Lehigh Val. L. Rep. (Pa.) 156.

The Fact that the Debtor Is About to Go Abroad, and states that he does not intend to pay his debts, does not support an inference that he is about to remove his property to defraud creditors. *Stroub v. Henly*, (N. Y. City Ct.) 1 How. Pr. N. S. (N. Y.) 400. See also *Davis v. Cardue*, 38 S. Car. 471.

3. Clafin v. Frenkel, 29 Hun (N. Y.) 288.

4. Blason v. Bruno, (Supm. Ct. Spec. T.) 21 How. Pr. (N. Y.) 112; *Brown v. Ashbough*, (Supm. Ct. Spec. T.) 40 How. Pr. (N. Y.) 226.

One who contracted a debt in a foreign country, and there disposed of his property, and brought the proceeds thereof to the United States, is not liable to arrest in the latter country for fraudulently disposing of his property. *Blason v. Bruno*, (Supm. Ct. Spec. T.) 21 How. Pr. (N. Y.) 112.

5. Arrest of Debtor About to Leave State.—*Norman v. Manciette*, 1 Sawy. (U. S.) 484; *Hudson's Case*, 2 Mart. (La.) 172; *Wooster v. Salzman*, 14 La. 98; *Brooklyn Daily Union v. Hayward*, (Brooklyn City Ct. Gen. T.) 11 Abb. Pr. N. S. (N. Y.) 235. See also *Mason v. Hutchings*, 20 Me. 77; *Hawthorn v. Hunter*, 8 Leigh (Va.) 411; *Vansickle v. Boyd*, 14 Ont. Pr. 469; *Meyer Rubber Co. v. Rich*, 14 Ont. Pr. 243; *Scane v. Coffey*, 15 Ont. Pr. 112; *Coffey v. Scane*, 25 Ont. 22, affirmed 22 Ont. App. 269.

For a similar provision in attachment statutes, see the title ATTACHMENT, vol. 3, p. 195.

A Nonresident Debtor Coming Temporarily into a State and about to return to his home has been held not to be within such a statute. *Stevenson v. Smith*, 28 N. H. 12; *McKay v. Ray*, 63 N. Car. 46; *Renaud v. Vandusen*, 21 L. C. Jur. 44. But compare *Vergennes Bank v. Barker*, 27 Vt. 243; *Rutland Bank v. Barker*, 27 Vt. 293.

The Intention of a Debtor to Depart Will Be Presumed upon proof of a fraudulent or suspicious disposal of his property. *Hudson's*

intention of a debtor to leave the state is not sufficient to authorize his arrest where there is no intent to defraud creditors;¹ but a debtor about to leave the state, whether openly or secretly, without intending to return, and with intent to hinder, delay, or defraud his creditors, is an absconding debtor and liable to arrest as such.²

e. FRAUD IN FIDUCIARY CAPACITY. — The statutory right of arrest exists in a number of states in actions to recover for money received or for property embezzled or fraudulently misapplied by a public officer, an attorney at law, an officer or agent of a corporation or banking association in the course of his employment, or by a factor, agent, broker, or other person in a fiduciary capacity.³

The Term "Fiduciary" as here employed, as interpreted by the courts, applies to contracts not based on credit, but based on confidence, having reference to the integrity and fidelity of the person trusted rather than to his credit or ability, and contemplating good faith rather than legal obligation as the basis

Case, 2 Mart. (La.) 172. But the fact that a debtor seeks to avoid a personal interview with an importunate creditor is not sufficient to warrant his arrest. *Devries v. Summit* 86 N. Car. 126.

An Executrix who has rendered an account is not liable to arrest in a suit by a creditor of the estate to secure his share thereof on the ground that she is about to leave the state without leaving sufficient funds to pay his debt. *Mondelli v. Russell*, 17 La. 537.

The executrix and sole legatee of a deceased debtor who had filed no inventory of the estate, and was about to leave the state, taking the assets with her, was held not liable to arrest under Code Civ. Pro. N. Y., § 550. *Genesee River Nat. Bank v. Mead*, 18 Hun (N. Y.) 303.

The Arrest of Two Joint Debtors Where One Is About to Depart under such circumstances as to warrant his arrest has been held authorized. *Ex p. Overick*, 3 Whart. (Pa.) 175.

No Execut. — The arrest and detention of a person about to leave the state under a writ of ne exeat is not imprisonment for debt. *Dean v. Smith*, 23 Wis. 483, 99 Am. Dec. 198. But see *Malcolm v. Andrews*, 68 Ill. 100. See *NE EXEAT*.

1. Debtor Leaving State Innocently Not Liable to Arrest. — See *Ex p. Fkumoto*, 120 Cal. 316; *Tooth v. Frederick*, 14 Ont. Pr. 287.

A debtor departing openly, leaving his property, and intending to return, is not liable to arrest. *Levi v. Levy*, 20 La. Ann. 552. See also *Myall v. Wright*, 2 Bush (Ky.) 130; *Caraby v. Davis*, 6 Mart. N. S. (La.) 163.

In Quebec, under Code Civ. Pro. 1897, § 895, the intent to defraud must be established in order to subject to arrest a person "immediately about to leave the provinces of Quebec and Ontario," and the mere fact that the defendant is leaving the province without paying his debts is not enough. *Shaw v. McKenzie*, 6 Can. Sup. Ct. 181; *S. S. White Dental Mfg. Co. v. Dixon*, 3 Quebec Super. Ct. 399; *Tremblay v. Graham*, 7 Montreal Super. Ct. 374; *Shotton v. Lawson*, 6 Montreal Super. Ct. 451; *Henderson v. Duggan*, 5 Quebec 364 [*disapproving Benjamin v. Wilson*, 1 L. C. Rep. 351, and *Debien v. Marsant Dit Lapiere*, 14 L. C. Rep. 89]; *Hurtubise v. Bourret*, 23 L. C. Jur. 137; *Paulet v. Antaya*, 10 Rev. Lég. 329, 3 Montreal Leg. N. 154; *Senécal v. Tranchant*,

14 Rev. Lég. 556. See also *Lagace v. Ayotte*, 6 Quebec 88, *affirming* 5 Quebec 240; *Ambrois v. Malleval*, 2 Montreal Leg. N. 159; *Marcotte v. Moody*, 11 Rev. Lég. 460, 5 Montreal Leg. N. 359.

The history of previous legislation is noticed in *Henderson v. Duggan*, 5 Quebec 364.

It seems that subsequently developed facts cannot avail to help out an insufficient affidavit. *Shaw v. McKenzie*, 6 Can. Sup. Ct. 181. But compare *Blanckensee v. Sharpley*, 10 L. C. Rep. 240.

For cases wherein the facts were held sufficient to warrant an inference of fraudulent intent, see *Macdougall v. Torrance*, 5 L. C. Jur. 148; *Ross v. Burns*, 10 L. C. Jur. 89, *affirming* 7 L. C. Jur. 35; *Valade v. Bellehumeur*, 2 Montreal Leg. N. 116; *McCrae v. Miller*, 4 Montreal Leg. N. 324; *McFarlane v. McNiece*, 7 Montreal Leg. N. 308.

A person going to Manitoba may be arrested. *Lainé v. Clarke*, 2 Rev. Crit. 232.

2. Norman v. Manciette, 1 Sawy. (U. S.) 484.

The manner of a debtor's removal from the state, whether secretly or openly, is only material as showing the object of such removal. *Prima facie* a debtor about to remove from the state without the consent of his creditors, and without intending to return, is an absconding debtor. *Norman v. Manciette*, 1 Sawy. (U. S.) 484. And see *ABSCOND—ABSCONDING DEBTOR*, vol. 1, p. 201.

3. Fiduciaries. — See cases cited in this and the following notes.

An Administrator who has applied the funds of the estate to his own use may be arrested. *Melvin v. Melvin*, 72 N. Car. 384.

The Directors and Officers of a Corporation who have misapplied and embezzled the corporate funds, suit being brought by a stockholder, are liable to arrest. *Crook v. Jewett*, (Supm. Ct. Spec. T.) 12 How. Pr. (N. Y.) 19. See also *Northern R. Co. v. Carpentier*, (Supm. Ct. Spec. T.) 4 Abb. Pr. (N. Y.) 47; *Pierson v. Freeman*, 77 N. Y. 589.

The Receipt of Money under an Illegal Employment will not create a fiduciary relation within the meaning of such provision. *Rolfe v. Delmar*, 7 Robt. (N. Y.) 80.

Where a Partnership Has Acted in a Fiduciary Capacity only a partner actually guilty of fraud in such capacity may be arrested. *National Bank v. Jennings*, 38 S. Car. 372.

of the transaction. If credit is given to the party trusted, so that he becomes the debtor of the principal rather than his agent, he is not then acting in a fiduciary capacity within the meaning of the statute.¹

Agents, Factors, or Brokers. — An agent, factor, or broker, acting in a fiduciary capacity, who converts money intrusted to him for a specified purpose,² or which he has been employed to collect,³ or who converts or fails to turn over to his principal the proceeds of property intrusted to him to be sold or converted into money,⁴ is liable to arrest.

1. Meaning of Term "Fiduciary." — Dunaher v. Meyer, (Supm. Ct.) 1 Code Rep. (N. Y.) 87; Sutton v. De Camp, (C. Pl. Spec. T.) 4 Abb. Pr. N. S. (N. Y.) 483; Fuentes v. Mayorga, 7 Daly (N. Y.) 103; Stoll v. King, (Supm. Ct. Spec. T.) 8 How. Pr. (N. Y.) 298; Goodrich v. Dunbar, 17 Barb. (N. Y.) 644. See also Decatur v. Goodrich, 44 Hun (N. Y.) 3; Graeffe v. Currie, 52 N. Y. Super. Ct. 554; Morange v. Waldron, 6 Hun (N. Y.) 529; and see FIDUCIARY, vol. 13, p. 10.

The Fiduciary Character of an Agent Receiving Moneys has been said to depend on whether good faith requires the keeping and paying over to the principal of the specific moneys, or a mere relation of debtor and creditor is created, the agent having the right to use the sum collected, holding himself accountable to the principal for that amount. In the former case he would be liable to arrest; in the latter, not liable. Stoll v. King, (Supm. Ct. Spec. T.) 8 How. Pr. (N. Y.) 298; Robbins v. Falconer, 43 N. Y. Super. Ct. 363; Donovan v. Cornell, (C. Pl. Gen. T.) 3 How. Pr. N. S. (N. Y.) 525, 13 Daly (N. Y.) 339, 9 Civ. Pro. (N. Y.) 222; Angus v. Dunscomb, (Supm. Ct. Spec. T.) 8 How. Pr. (N. Y.) 14.

Partners have been held not fiduciaries toward one another, within such a statute. Soule v. Hayward, 1 Cal. 345. See also Smith v. Small, 54 Barb. (N. Y.) 223, and FIDUCIARY, vol. 13, p. 11, note.

Money Received by a Broker for the Purpose of Securing Himself against loss upon his client's transactions is not received in a fiduciary capacity so as to render the broker liable to arrest for failure to pay it over. Mann v. Sands, (N. Y. City Ct. Spec. T.) 2 City Ct. (N. Y.) 25; McBurney v. Martin, 6 Robt. (N. Y.) 502. Compare Clark v. Pinckney, 50 Barb. (N. Y.) 226.

2. Conversion of Money Received for Specified Purpose. — Grant's Case, (Supm. Ct. Spec. T.) 8 Abb. Pr. (N. Y.) 357; Dubois v. Thompson, 1 Daly (N. Y.) 309, 25 How. Pr. (N. Y.) 417; Noble v. Prescott, 4 E. D. Smith (N. Y.) 139; Obregon v. De Mier, (C. Pl. Spec. T.) 52 How. Pr. (N. Y.) 356; Arthurton v. Dallev, (Supm. Ct. Spec. T.) 20 How. Pr. (N. Y.) 311; Burthans v. Casey, 4 Sandf. (N. Y.) 707; Emerson v. Dow, 11 W. N. C. (Pa.) 270. See also Dunbar v. Hughes, 6 La. Ann. 466.

3. Agent for Collection. — Stoll v. King, (Supm. Ct. Spec. T.) 8 How. Pr. (N. Y.) 298; Hall v. McMahon, (C. Pl. Gen. T.) 10 Abb. Pr. (N. Y.) 319; Powers v. Davenport, 101 N. Car. 286; National Bank v. Jennings, 38 S. Car. 372; Cotton v. Sharpstein, 14 Wis. 226, 80 Am. Dec. 774. But see Smith v. Edmonds, (C. Pl. Spec. T.) 1 Code Rep. (N. Y.) 86.

An Agent Who Receives Paper to Be Discounted and fails to turn over the proceeds after get-

ting it discounted may be arrested. Wolfe v. Brouwer, 5 Robt. (N. Y.) 601.

Mere Failure of an Agent to account for moneys received will not authorize his arrest. People v. McAllister, 19 Mich. 215; Matter of Stephenson, 32 Mich. 60. See also Pennock v. Fuller, 41 Mich. 153, 32 Am. Rep. 148.

4. Agent for Sale Converting Proceeds. — *New York.* — Dunaher v. Meyer, (Supm. Ct.) 1 Code Rep. (N. Y.) 87; Turner v. Thompson, (Supm. Ct. Spec. T.) 2 Abb. Pr. (N. Y.) 444; Bull v. Melliss, (Supm. Ct. Gen. T.) 9 Abb. Pr. (N. Y.) 58; Holbrook v. Homer, (Supm. Ct. Spec. T.) 6 How. Pr. (N. Y.) 86; Ridder v. Whitlock, (Supm. Ct. Spec. T.) 12 How. Pr. (N. Y.) 208; Frost v. McCarger, (Supm. Ct. Spec. T.) 14 How. Pr. (N. Y.) 131; Schudder v. Shiells, (Supm. Ct. Gen. T.) 17 How. Pr. (N. Y.) 420; Ostell v. Brough, (Supm. Ct. Spec. T.) 24 How. Pr. (N. Y.) 274; Kelly v. Scripture, 9 Hun (N. Y.) 283; Barret v. Gracie, 34 Barb. (N. Y.) 20; Duguid v. Edwards, 50 Barb. (N. Y.) 288, reversing 32 How. Pr. (N. Y.) 254; Castree v. Kirby, (Marine Ct. Spec. T.) 2 Civ. Pro. (N. Y.) 334; Holt v. Streeter, 74 Hun (N. Y.) 538; Standard Sugar Refinery v. Dayton, 70 N. Y. 486.

North Carolina. — Travers v. Deaton, 107 N. Car. 500; Boykin v. Maddrey, 114 N. Car. 89; Durham Fertilizer Co. v. Little, 118 N. Car. 808; Gossler v. Wood, 120 N. Car. 69.

Ohio. — Este v. Wilshire, 44 Ohio St. 636. In this case it was held that a broker who embezzles and converts the proceeds of stock committed to him for sale is liable to arrest on the ground of fraud in incurring the obligation.

Wisconsin. — Williams Mower, etc., Co. v. Raynor, 38 Wis. 119.

An Auctioneer who receives goods for sale under an agreement that he is to receive all over a certain amount of the proceeds, for his compensation, is liable to arrest for the non-payment of the proceeds. Holbrook v. Homer, (Supm. Ct. Spec. T.) 6 How. Pr. (N. Y.) 86. Compare Morange v. Waldron, 6 Hun (N. Y.) 529.

Where Goods Were Consigned to a Member of a Firm in His Individual Capacity, and by him were turned over to his firm for sale on commission, it was held that no fiduciary relation was thereby established between the firm and the owner so as to render them liable to arrest for failure to pay over the proceeds of the sale. Fuentes v. Mayorga, 7 Daly (N. Y.) 103.

Effect of Discharge in Bankruptcy. — One who receives goods to sell on commission acts in a fiduciary capacity, and upon his failure to pay over the proceeds it has been held that he may be arrested notwithstanding the pendency of bankruptcy proceedings, or his discharge in bankruptcy, such discharge not affecting debts

Effect of Acceptance by Agent of Draft for Property Received. — Where an agent receives goods to sell for his principal the fiduciary relation thus established is not terminated by his acceptance of a draft drawn on him for the value of the property, and upon the nonpayment of the draft he may be arrested in an action to recover the proceeds of the sale;¹ but it is otherwise in such cases where the action is brought upon the acceptance and not for the recovery of the money received by the agent.²

Del Credere Agency. — The fact that an agent or factor is entitled to a *del credere* commission on sales made by him does not affect his liability to arrest for converting the proceeds of such sales.³

Bankers. — A banker who receives money for deposit in the ordinary course of business does not assume a fiduciary relation towards the depositor, and is not liable to arrest for failure to pay over the money so deposited.⁴ But if at the time of receiving money for deposit a banker knows that he is insolvent, he is guilty of fraud in incurring the obligation, and may be arrested on that ground although he may not have had any special intent to defraud a particular customer.⁵ So also a banker who converts the proceeds of a note intrusted to him for collection,⁶ or who converts funds received by him for a specific purpose,⁷ may be arrested.

f. FRAUD COMMITTED IN ANOTHER STATE. — Where the defendant in an action on contract has been guilty of such fraud as will authorize his arrest under the laws of the state in which the action is brought, his liability to arrest is not affected by the fact that the fraud was committed in another state.⁸

5. Misconduct or Neglect in Office or in Professional Employment. — Public officers and persons employed in a professional capacity usually sustain towards the public or clients a fiduciary relation, and for failure to turn over moneys received by them in their official or professional capacity they are ordinarily liable to arrest by virtue of this relation.⁹ In several states, however, misconduct or neglect in office or in a professional employment is made by statute an independent ground of arrest.¹⁰ Under such a statute an attorney at law

contracted by the bankrupt while acting in a fiduciary capacity. *In re* Kimball, 6 Blatchf. (U. S.) 293; *Matter of Seymour*, 6 Int. Rev. Rec. 60, 1 Ben. (U. S.) 348; *Whitaker v. Chapman*, 3 Lans. (N. Y.) 155. But see *Grover, etc., Sewing Mach. Co. v. Clinton*, 5 Biss. (U. S.) 324. See also the title **INSOLVENCY AND BANKRUPTCY, post**.

Agent Must Be Guilty of Fraud. — Under Const. *California*, art. 1, § 15, an agent cannot be arrested in a suit to recover the proceeds of goods sold by him, in the absence of fraud on his part. *Matter of Holdforth*, 1 Cal. 439.

1. *Kelly v. Scripture*, 9 Hun (N. Y.) 283.

2. *Farmers', etc., Nat. Bank v. Sprague*, 52 N. Y. 605; *German Bank v. Edwards*, 53 N. Y. 541.

3. **Sale on Del Credere Commission.** — *Ostell v. Brough*, (Supm. Ct. Spec. T.) 24 How. Pr. (N. Y.) 274; *Wallace v. Castle*, 14 Hun (N. Y.) 106; *Williams Mower, etc., Co. v. Raynor*, 38 Wis. 119. To the same effect see *Travers v. Deaton*, 107 N. Car. 500. And see the title **DEL CREDERE AGENCY**, vol. 9, pp. 186, 187.

4. **Bankers.** — *Buchanan Farm Oil Co. v. Woodman*, 1 Hun (N. Y.) 639, 4 Thomp. & C. (N. Y.) 193; *Bussing v. Thompson*, (Super. Ct. Gen. T.) 15 How. Pr. (N. Y.) 97, 6 Duer (N. Y.) 696. See the title **BANKS AND BANKING**, vol. 3, p. 826.

5. Anonymous, 67 N. Y. 598. See the title last cited, vol. 3, p. 847.

6. *Turney v. Guthrie*, (Supm. Ct. Spec. T.) 15 N. Y. Supp. 679.

7. *Johnson v. Whitman*, (Supm. Ct. Spec. T.) 10 Abb. Pr. N. S. (N. Y.) 111.

8. *Ex p. Bergman*, 18 Nev. 331; *Johnson v. Whitman*, (Supm. Ct. Spec. T.) 10 Abb. Pr. N. S. (N. Y.) 111; *Clafin v. Frenkel*, 29 Hun (N. Y.) 289; *Freeman v. Kolarek*, (N. Y. City Ct. Tr. T.) 3 N. Y. St. Rep. 283; *Powers v. Davenport*, 101 N. Car. 286; *Gosline v. Place*, 32 Pa. St. 520. See *Bromley v. People*, 7 Mich. 472; *Peel v. Elliott*, (Supm. Ct.) 16 How. Pr. (N. Y.) 481.

9. See *supra*, this section, *Fraud—Fraud in Fiduciary Capacity*. And see cases cited in the notes immediately following.

10. **Misconduct or Neglect in Office or in Professional Employment.** — See Code Civ. Pro. *New York*, § 549, subd. 2; Stat. *Wisconsin* (1898), § 2689, subd. 2. As to the arrest of a public officer under such statutes, see *Peel v. Elliott*, (Supm. Ct.) 16 How. Pr. (N. Y.) 481, 28 Barb. (N. Y.) 200; *People v. Clark*, (Supm. Ct. Spec. T.) 45 How. Pr. (N. Y.) 12; Republic of Mexico *v. De Arangoiz*, 5 Duer (N. Y.) 634; *Van Schaick v. Sigel*, 9 Daly (N. Y.) 383.

As to who is a public officer under the *Pennsylvania* Act of July 12, 1842, see *Com. v. Evans*, 74 Pa. St. 124.

A clergyman cannot be taken in execution upon a judgment in assumpsit for the recovery of money received by him for safekeeping,

who converts or misapplies money in his hands belonging to his client may be arrested in an action for the recovery of such money;¹ and to subject him to liability to arrest in such case it is not necessary that he should have acted in bad faith.²

6. Disobedience to Orders of Court. — Where an order of court directs one party to pay to the other or to a third person money or property in his possession or under his control, disobedience to such order is a contempt of court, and may be punished by imprisonment without any violation of the constitutional provision abolishing imprisonment for debt.³ Under statutes, however, authorizing the punishment of contempt in disobedience to such orders, a distinction is made between an order to pay the debt and an order settling the right of the judgment creditor to the application of the proceeds of the debt, it being held that only the latter can be enforced by imprisonment.⁴ In several states, in statutes abolishing imprisonment for debt, proceedings as for contempt to enforce civil remedies are excepted from the operation of the statutes.⁵

7. Arrest and Imprisonment in Certain Cases Considered — *a.* **IN BASTARDY CASES** — **Imprisonment for Noncompliance with Order of Maintenance.** — The defendant in bastardy proceedings may be imprisoned for failure to comply with an order of the court requiring him to pay a certain sum for the maintenance of the child, the sum so charged not being a "debt" within the meaning of the constitutional inhibition.⁶

such receipt of money not being in the line of his professional employment. *Emerich v. McDevitt*, 19 Pa. Co. Ct. 53.

A Real Estate Agent is not engaged in professional employment, within the meaning of such a statute. *Pennock v. Fuller*, 41 Mich. 153, 32 Am. Rep. 148. See also **EMPLOY — EMPLOYEE** — **EMPLOYMENT**, vol. II, p. 4, note.

1. Arrest of Attorney for Neglect or Misconduct as Such. — *Yates v. Blodgett*, (Supm. Ct. Spec. T.) 8 How. Pr. (N. Y.) 278; *Schadle v. Chase*, (Supm. Ct. Spec. T.) 16 How. Pr. (N. Y.) 413; *Grant's Case*, (Supm. Ct. Spec. T.) 8 Abb. Pr. (N. Y.) 357; *Stage v. Stevens*, 1 Den. (N. Y.) 267; *Mills v. Kane*, 2 Grant Cas. (Pa.) 60; *Cotton v. Sharpstein*, 14 Wis. 226, 80 Am. Dec. 774. See also *Bronson v. Newberry*, 2 Dougl. (Mich.) 38; and the title **CONTEMPT**, vol. 7, p. 40.

Money Received in Other than Legal Proceedings. — An attorney against whom assumpsit is brought to recover money collected for his client is liable to imprisonment for misconduct in a professional employment, notwithstanding the fact that the money was received by him independently of any judicial proceedings. *Stage v. Stevens*, 1 Den. (N. Y.) 267.

Attorney Residing in Another State. — An attorney may be arrested for failure to pay over money collected by him on behalf of a client although he resides and practices in another state. *Yates v. Blodgett*, (Supm. Ct. Spec. T.) 8 How. Pr. (N. Y.) 278.

2. Attorney Liable for Conversion Although Acting in Good Faith. — *Schadle v. Chase*, (Supm. Ct. Spec. T.) 16 How. Pr. (N. Y.) 413. See also *Grose v. Graves*, (N. Y. Super. Ct. Spec. T.) 19 Abb. Pr. (N. Y.) 95, 2 Robt. (N. Y.) 707.

3. Imprisonment for Disobedience to Orders of Court. — *Remley v. De Wall*, 41 Ga. 466; *Ex p. Grace*, 12 Iowa 208, 79 Am. Dec. 529; *Matter of Burrows*, 33 Kan. 675; *State v. Becht*, 23 Minn. 411; *Ex p. Crenshaw*, 80 Mo. 447; *Ex p. Millett*, 37 Mo. App. 76; *In re Knaup*, 144 Mo. 653; *In re Milburn*, 59 Wis. 24. Compare *Ex p.*

Hardy, 68 Ala. 303. See the title **CONTEMPT**, vol. 7, pp. 38 *et seq.*, 44, 68.

As to the *Ontario* law, see *Berry v. Donovan*, 21 Ont. App. 14. As to the general powers of courts of chancery in this connection, see *McGill v. Sexton*, 1 Grant Ch. (U. C.) 311.

Courts of Chancery Have Power to Imprison for Contempt on a failure to pay a money decree, but the power should not be exercised unless the disobedience is wilful. *O'Callaghan v. O'Callaghan*, 69 Ill. 552; *Dinet v. People*, 73 Ill. 183. See also *Goodwillie v. Millmann*, 56 Ill. 525.

Under the *Pennsylvania* Act of July 12, 1842, a court of equity may enforce a decree for the payment of money by a trustee by attachment against the person for contempt incurred by disobedience to the decree, such cases being excepted from the operation of the act. *Chew's Appeal*, 44 Pa. St. 247; *Tome's Appeal*, 50 Pa. St. 285; *Church's Appeal*, 103 Pa. St. 263; *Wilson v. Wilson*, 142 Pa. St. 247. But a decree of a court of equity for the payment of money due on a contract cannot be enforced by imprisonment. *Scott v. Jailer*, 1 Grant Cas. (Pa.) 237. See also *Com. v. Keeper*, 2 Phila. (Pa.) 153, 13 Leg. Int. (Pa.) 276.

4. Right to Payment and Right to Application of Proceeds Distinguished. — *Board of Education v. Scoville*, 13 Kan. 17; *Daniel v. Owen*, 72 N. Car. 340; *Union Bank v. Union Bank*, 6 Ohio St. 254. See also *In re Bingham*, 32 Vt. 329; *In re Leach*, 51 Vt. 630; *Leach v. Peabody*, 58 Vt. 485; *Matter of Blair*, 4 Wis. 522.

5. See Comp. Laws Mich. (1897), § 9554; *Bright*, *Purd. Dig. Laws Pa.* (1894), p. 67, § 52.

6. Imprisonment in Bastardy Proceedings — *Alabama*. — *Paulk v. State*, 52 Ala. 427.

Florida. — *Ex p. J. C. H.*, 17 Fla. 362.

Illinois. — *Rich v. People*, 66 Ill. 513.

Indiana. — *Lower v. Wallick*, 25 Ind. 68 [overruling *Byers v. State*, 20 Ind. 47]; *Ex p. Teague*, 41 Ind. 278; *Turner v. Wilson*, 49 Ind. 581. See also, that defendant may be impris-

Warrant of Arrest upon Institution of Proceedings. — The justice before whom the proceedings were instituted may issue a warrant for the defendant's arrest.¹

b. IN ACTIONS FOR BREACH OF PROMISE OF MARRIAGE. — A breach of promise to marry is a breach of contract, and in the absence of any charge of fraud the imprisonment of the defendant in an action for such breach is within the constitutional inhibition against imprisonment for debt.² But if the defendant fraudulently, by means of a promise of marriage, has seduced the plaintiff, he may be arrested in an action on the breach of promise.³

c. IN ACTIONS TO RECOVER CHATTEL WHERE PROPERTY HAS BEEN FRAUDULENTLY DISPOSED OF. — In several states the defendant may be arrested in an action to recover a chattel where the chattel or a part thereof has been concealed, removed, or disposed of so that it cannot be found or taken by the sheriff.⁴

oned, *State v. Hamilton*, 33 Ind. 502; *Ex p. Voltz*, 37 Ind. 237; *Reynolds v. Lamount*, 45 Ind. 308; *State v. Mullen*, 50 Ind. 598; *Lucas v. Hawkins*, 102 Ind. 64; *Holderman v. Thompson*, 105 Ind. 112.

Kansas. — *Matter of Wheeler*, 34 Kan. 96.

Maine. — See *McLaughlin v. Whitten*, 32 Me. 21.

Minnesota. — *State v. Becht*, 23 Minn. 1.

Nebraska. — *Ex p. Cottrell*, 13 Neb. 193; *Ex p. Donahoe*, 24 Neb. 66.

North Carolina. — *State v. Palin*, 63 N. Car. 471; *State v. Wynne*, 116 N. Car. 981. See also *State v. Beasley*, 75 N. Car. 211; *State v. Giles*, 103 N. Car. 391; *State v. Burton*, 113 N. Car. 655.

Ohio. — *Musser v. Stewart*, 21 Ohio St. 353; *Welty v. Furley*, 2 West. L. Month. 596, 2 Ohio Dec. (Reprint) 399.

Rhode Island. — *Canning's Petition*, 11 R. I. 257.

South Carolina. — *State v. Brewer*, 38 S. Car. 263, 37 Am. St. Rep. 752, *distinguishing* *State v. Glenn*, 14 S. Car. 118, and *State v. Quick*, 25 S. Car. 110.

See also *Woodcock v. Walker*, 14 Mass. 386; *Eby v. Burkholder*, 17 S. & R. (Pa.) 9; and further the title DEBT, vol. 8, p. 992, note; the title BASTARDY, vol. 3, p. 889, and same title 3 ENCYC. OF PL. AND PR. 310.

That a defendant may be arrested for non-compliance with an order of maintenance, see *Mariner v. Dyer*, 2 Me. 165; *Young v. Makepeace*, 103 Mass. 50; *Roy v. Targee*, 7 Wend. (N. Y.) 359. Compare *Holmes v. State*, 2 Greene (Iowa) 501, in which case it was held that a statute authorizing the imprisonment of the defendant in such cases was in conflict with the provision of the state constitution abolishing imprisonment for debt. And see *Com. v. Clark*, 2 Pa. Co. Ct. 311.

Where a defendant in a bastardy proceeding is in custody when a judgment is rendered against him, the court may order that he remain in custody until he gives the bond required by the statute. *Yarborough v. Judge*, 15 Ala. 556; *Parsons v. State*, 97 Ga. 73.

Jail Liberties — Wisconsin. — A defendant in a bastardy proceeding who is in custody for noncompliance with a judgment rendered against him is not entitled to jail liberties under Stat. Wis., § 4322. *Hodgson v. Nickell*, 69 Wis. 308.

1. *Britton v. State*, 54 Ind. 535. See also *Walker v. State*, 6 Blackf. (Ind.) 1; *Melton v.*

State, 9 Ind. 452; *Corey v. Sumner*, 52 N. H. 479.

2. **Breach of Promise to Marry.** — *Matter of Tyson*, 32 Mich. 262; *Perry v. Orr*, 35 N. J. L. 295; *Moore v. Mullen*, 77 N. Car. 327; *Drury v. Merrill*, 20 R. I. 2.

In New York, where there is no constitutional provision against imprisonment in civil cases, it is provided by statute that the defendant may be arrested in an action for breach of promise to marry. Code Civ. Pro., § 549. See *Durand v. Durand*, 2 Sweeny (N. Y.) 315.

A Female Defendant cannot be held to bail in an action for breach of promise. *Siefke v. Tappey*, (C. Pl.) 3 Code Rep. (N. Y.) 23.

3. **Seduction by Fraudulent Promise of Marriage.** — *Matter of Sheahan*, 25 Mich. 145; *Perry v. Orr*, 35 N. J. L. 295; *Hood v. Sudderth*, 111 N. Car. 215. See also *Vansickle v. Boyd*, 14 Ont. Pr. 469.

4. **Recovery of Chattel Fraudulently Disposed of** — *Kansas.* — *Matter of Farr*, 41 Kan. 276.

New York. — Code Civ. Pro., § 549; *Snow v. Roy*, 22 Wend. (N. Y.) 602; *Barnett v. Selling*, 70 N. Y. 492; *Lowrey v. Mansfield*, (Supm. Ct. Spec. T.) 3 How. Pr. (N. Y.) 88; *Tracy v. Veeder*, (Supm. Ct. Gen. T.) 35 How. Pr. (N. Y.) 209; *Thompson v. Strauss*, 20 Hun (N. Y.) 256; *Estell v. De Pennevet*, 15 Daly (N. Y.) 10, 14 Civ. Pro. N. Y. 336; *Levy v. Salomon*, (Supm. Ct. Gen. T.) 1 N. Y. St. Rep. 207; *Myers v. Shupeck*, (N. Y. City Ct. Spec. T.) 3 N. Y. St. Rep. 239.

Wisconsin. — Stat. Wis. (1898), § 2689, subdv. 3.

The Removal or Concealment Must Be with Intent that the chattel cannot be found or taken, under the present *New York* statute, Code Civ. Pro., § 549 (Code Pro., § 179, as amended). *Barnett v. Selling*, 70 N. Y. 492; *Mulvey v. Davison*, (N. Y. Super. Ct. Spec. T.) 8 How. Pr. (N. Y.) 111; *Watson v. McGuire*, 2 Daly (N. Y.) 219, (C. Pl. Gen. T.) 33 How. Pr. (N. Y.) 87. See also *Jananiqu v. De Luc*, (C. Pl. Gen. T.) 1 Abb. Pr. N. S. (N. Y.) 419.

And a similar ruling was made under Code Pro., § 179, before the clause requiring the presence of intent was added. *Roberts v. Randel*, 3 Sandf. (N. Y.) 707, (N. Y. Super. Ct.) 5 How. Pr. (N. Y.) 327; *Reimer v. Nagel*, 1 E. D. Smith (N. Y.) 256, (C. Pl. Gen. T.) Code Rep. N. S. (N. Y.) 219. But compare *Van Neste v. Conover*, 8 Barb. (N. Y.) 509, 5 How. Pr. (N. Y.) 148.

Fraud in the Purchase of Goods Will Justify an

Volume XVI.

Disposal of Property Before Action Brought. — Where the defendant has fraudulently acquired possession of the property he may be arrested in an action for its recovery although he has disposed of it before the commencement of the action.¹ But he cannot be arrested if he has parted with the property in good faith before the bringing of the suit.²

d. WHERE DEFENDANT IS NONRESIDENT — Defendant Not Exempt from Arrest on Account of Nonresidence. — The fact that the defendant is a nonresident of the state in which the action is brought does not render him exempt from arrest.³

Nonresidence as Ground for Arrest. — In some jurisdictions the nonresidence of the defendant will justify his arrest in certain cases.⁴ It has been held, however, that a statute authorizing the arrest of a defendant solely on the ground of nonresidence is unconstitutional.⁵

e. FOR NONPAYMENT OF FINES AND PENALTIES. — Fines and penalties imposed in criminal proceedings for the violation of penal statutes⁶ or for civil contempt⁷ are not "debts" within the meaning of the constitutional prohibition, and hence the imprisonment of a defendant for the nonpayment of a fine so imposed is not imprisonment for debt, and statutes providing for such imprisonment are not unconstitutional.

Action to Recover Fine or Penalty. — So also the defendant may be arrested in an action to recover a fine or penalty.⁸

f. FOR NONPAYMENT OF COSTS — In Criminal Cases. — Under statutes so

Inference that an inability of the sheriff to find the goods in an action of claim and delivery was in consequence of a fraudulent disposition thereof. *Fitch v. McMahon*, 103 N. Y. 690.

1. Property Disposed of Before Action Brought. — *Barnett v. Selling*, 70 N. Y. 492, *modifying* 9 Hun (N. Y.) 236, *allowed* in *Lippman v. Shapiro*, 50 N. Y. Super. Ct. 367. See also *Levy v. Salomon*, (Supm. Ct. Gen. T.) 1 N. Y. St. Rep. 207; *Myers v. Shupeck*, (N. Y. City Ct. Spec. T.) 3 N. Y. St. Rep. 289. Compare the earlier case of *Pike v. Lent*, 4 Sandf. (N. Y.) 650.

2. Merrick v. Suydam, (Supm. Ct.) Code Rep. N. S. (N. Y.) 212. See also *Roberts v. Randel*, (N. Y. Super. Ct.) 5 How. Pr. (N. Y.) 327.

3. Nonresidence No Ground for Exemption from Arrest. — *Johnson v. Whitman*, (Supm. Ct. Spec. T.) 10 Abb. Pr. N. S. (N. Y.) 111; *Powers v. Davenport*, 101 N. Car. 286. See also *Frost v. Brisbin*, 19 Wend. (N. Y.) 11, 32 Am. Dec. 423; *Brett v. Smith*, 1 Ont. Pr. 309; and *supra*, this section, 4. d. (3) *Removal of Debtor from State*, and notes.

As to the arrest of nonresident debtors under the several *Louisiana* statutes see *Armistead v. Sanderson*, 1 Rob. (La.) 176; *Hand v. Taliaferro*, 1 La. Ann. 26; *Absolom v. Callum*, 6 La. Ann. 536; *Merritt v. Openheim*, 9 La. Ann. 54; *Tallamon v. Cardenas*, 14 La. Ann. 514.

The exemption from arrest except in certain cases of citizens of other states does not extend to citizens of foreign states or countries. *New Orleans Canal Co. v. Schroeder*, 7 La. Ann. 615; *Block v. Bannerman*, 10 La. Ann. 1. See *Absolom v. Callum*, 6 La. Ann. 536.

That Both Plaintiff and Defendant Are Foreigners does not of itself warrant setting aside an arrest in *Ontario*. *Palmer v. Rodgers*, 6 U. C. L. J. 188. But see *Frear v. Ferguson*, 2 Chamb. (U. C.) 144; *Romberg v. Steenbock*, 1 Ont. Pr. 200; *Blumenthal v. Solomon*, 2 Ont. Pr. 51.

4. Nonresidence as Ground for Arrest. — Ensign

v. Nelson, 49 Hun (N. Y.) 215, *affirmed* 112 N. Y. 674, applying Code Civ. Pro. (N. Y.) § 550.

In *Ohio* the defendant's nonresidence is no ground for his arrest. *Morrow v. Finch*, 7 West. L. J. 144, 1 Ohio Dec. (Reprint) 307; *Messenger v. Lockwood*, 9 West. L. J. 521, 1 Ohio Dec. (Reprint) 433.

In Actions of Tort where the granting of an order of arrest is discretionary with the court it has been held in a number of cases that the order should not be granted unless in addition to stating a cause of action the plaintiff's affidavit set forth some special cause for the order, as that the defendant was a nonresident. See *supra*, this title, *Right of Arrest as Determined by Nature of Action — Actions Founded on Tort*. In such actions the order will be granted where the defendant is a nonresident. *Van Vechten v. Hopkins*, 2 Johns. (N. Y.) 293; *Sherman v. Brantley*, 7 Robt. (N. Y.) 55.

6. Chappee v. Thomas, 5 Mich. 53.

6. Imprisonment for Nonpayment of Fines Not Imprisonment for Debt. — See the titles DEBT, vol. 8, p. 997; FINES AND PENALTIES, vol. 13, p. 66. See also *Deitz v. Central City*, 1 Colo. 323; *Ex p. Bryant*, 24 Fla. 278, 12 Am. St. Rep. 200; *Brock v. State*, 22 Ga. 98; *Chicago v. Kenney*, 35 Ill. App. 57; *McCool v. State*, 23 Ind. 127 [*overruling* *Thompson v. State*, 16 Ind. 516]; *Blewett v. Smith*, 74 Mo. 404; *Deadwood v. Allen*, 9 S. Dak. 221.

7. Ex p. Robertson, 27 Tex. App. 628, 11 Am. St. Rep. 207.

8. Arrest of Defendant in Action to Recover Fine or Penalty. — U. S. *v. Walsh*, 1 Abb. (U. S.) 66, *Deady* (U. S.) 281; U. S. *v. Banister*, 70 Fed. Rep. 44; *State v. Mace*, 5 Md. 337, *Champion v. Pierce*, 11 N. J. L. 196; *Watts v. Taylor*, 13 Johns. (N. Y.) 305; *Buffalo v. Ray*, (Buffalo Super. Ct. Gen. T.) 1 N. Y. St. Rep. 730.

In several states the right to arrest the defendant in an action to recover a fine or penalty is given by statute. See *Bright, Purd.*

providing the payment of costs adjudged against a defendant in a criminal proceeding may be enforced by imprisonment.¹ And even at common law it has been held that a court has power to imprison a defendant until a fine and costs are paid.² There are cases, however, which hold that a defendant cannot be imprisoned for costs in the absence of a statutory provision therefor.³ Costs charged against the defendant do not constitute a debt within the meaning of the constitutional inhibition against imprisonment for debt, and statutes providing for the enforcement of payment of costs by imprisonment have repeatedly been held constitutional.⁴ So also statutes providing for the imprisonment of a prosecuting witness for the nonpayment of costs with which he has been charged have received the same construction.⁵

Defendant's Own Costs. — It is held that statutes providing for imprisonment for nonpayment of costs do not contemplate that the defendant shall be held for costs incurred by himself in his defense.⁶

Dig. Laws Pa. (1894), p. 67, § 52; Stat. Wis. (1898), § 2689, subdiv. 2.

Right to Arrest Defendant Denied. — In some cases it has been held that the defendant in an action to recover a penalty could not be arrested. *U. S. v. Mundell*, 1 Hughes (U. S.) 415, 27 Fed. Cas. No. 15,834; *Clay v. Swett*, 4 Bibb (Ky.) 255.

In *Saul v. Aillier*, 1 Mart. (La.) 21, it was held that bail was not required in an action on a penal statute to recover a forfeiture, where the statute does not especially authorize it. In *Com. v. Cheney*, 6 Mass. 347, it was held that a justice of the peace cannot hold one to bail for an offense which may be prosecuted by information *qui tunc* as well as by indictment.

Infringement of Revenue Laws. — The defendant may be imprisoned in an action to recover a penalty for the sale of goods without payment of duty in violation of the revenue laws, this being a fraud upon the United States and therefore within the purview of the exception permitting imprisonment for debt in case of fraud. *U. S. v. Walsh*, 1 Abb. (U. S.) 66, Deady (U. S.) 281.

The Action Must Be to Recover a Penalty and Not Merely of Penal Nature. Thus an arrest has been refused in an action to enforce the statutory liability of the trustees of an association for the debts of the association by reason of their failure to file a report as required. *Glens Falls Paper Co. v. White*, (Supm. Ct. Spec. T.) 58 How. Pr. (N. Y.) 172. See also *Staub v. Myers*, 16 N. Y. App. Div. 476.

1. Imprisonment for Costs in Criminal Proceedings under Statutes. — *Caldwell v. State*, 55 Ala. 133; *Riley v. State*, 16 Conn. 47; *Matter of McCort*, 52 Kan. 18; *People v. Weeks*, 99 Mich. 86; *In re Dobson*, 37 Neb. 449; *In re Newton*, 39 Neb. 757; *Dodge v. State*, 24 N. J. L. 455; *Eaton v. State*, 15 Lea (Tenn.) 200; *Luckey v. State*, 14 Tex. 400. See also *Deitz v. Central City*, 1 Colo. 323; *State v. Wallace*, 41 Ind. 445; *Matter of Boyd*, 34 Kan. 570. Compare *Petty v. San Joaquin County*, 45 Cal. 245. And see cases cited in the third note *infra*.

Hard Labor. — In *Alabama* the defendant may be held to hard labor for the nonpayment of costs. *Nelson v. State*, 46 Ala. 186; *Morgan v. State*, 47 Ala. 34; *Bradley v. State*, 69 Ala. 318; *Bailey v. State*, 87 Ala. 44; *Ex p. Joice*, 88 Ala. 128; *Ex p. State*, 89 Ala. 177.

The Defendant in a Bastardy Proceeding may be imprisoned for nonpayment of costs adjudged against him, although he may have executed the statutory bond for the support of the child. *People v. Stowell*, 2 Den. (N. Y.) 127.

2. Imprisonment for Costs at Common Law. — *Brown v. People*, 19 Ill. 613; *Hill v. State*, 2 Yerg. (Tenn.) 247.

3. Matter of Mitchell, 39 Kan. 762; *In re Heitman*, 41 Kan. 136; *State v. Sheppard*, 15 Oregon 598, *overruling* *Crowley v. State*, 11 Oregon 512.

4. Imprisonment of Defendant for Costs Not Imprisonment for Debt — *Alabama*. — *Morgan v. State*, 47 Ala. 34; *Caldwell v. State*, 55 Ala. 133; *Lee v. State*, 75 Ala. 29; *State v. Leach*, 75 Ala. 36; *Bailey v. State*, 87 Ala. 44.

Illinois. — *Kennedy v. People*, 122 Ill. 649.

Indiana. — *McCool v. State*, 23 Ind. 127, *overruling* *Thompson v. State*, 16 Ind. 516.

Kansas. — *Matter of Boyd*, 34 Kan. 570.

Mississippi. — *Ex p. Meyer*, 57 Miss. 85.

North Carolina. — *State v. Wallin*, 89 N. Car. 578.

Tennessee. — *Mosley v. Gallatin*, 10 Lea (Tenn.) 494.

Texas. — *Dixon v. State*, 2 Tex. 481.

5. Imprisonment of Prosecuting Witness for Costs. — *State v. Cannady*, 78 N. Car. 539; *Colby v. Backus*, 19 Wash. 347; *State v. Smith*, 65 Wis. 93.

The *Kansas* statute (now Gen. Stat. 1897, c. 104, § 22) providing in effect that when, upon a trial before a justice of the peace for misdemeanor, it shall be found that the prosecution was maliciously instituted, or without probable cause, the prosecuting witness shall be adjudged to pay the costs, and unless a bond is given therefor, shall be committed to the county jail until paid, is constitutional, costs not being a debt within the meaning of the constitutional inhibition. *Matter of Ebenhack*, 17 Kan. 618. See also *Matter of Lowe*, 46 Kan. 255. Compare in *Nebraska*, *State v. Ensign*, 11 Neb. 529.

A prosecuting witness is not liable to imprisonment for failure to pay costs except where authority therefor is clearly conferred by statute. *In re Heitman*, 41 Kan. 136.

6. Bradley v. State, 69 Ala. 318; *Knox v. State*, 9 Baxt. (Tenn.) 202. See also *Hill v. State*, 78 Ala. 1; *Ex p. Meyer*, 57 Miss. 85.

Whether Costs Part of Punishment. — In some jurisdictions costs are regarded as a part of the penalty, and imprisonment for costs is considered a part of the punishment,¹ but the prevailing doctrine seems to be that the imprisonment of a defendant until the payment of a fine and costs adjudged against him constitutes no part of the penalty imposed, but is merely one of the means of enforcing compliance with the judgment of the court.²

Execution for Costs in Civil Cases. — In *New York* and *South Dakota* it is provided by statute that in certain cases an execution may be issued against the person of a party against whom a judgment for costs has been rendered.³ And it seems that the payment of costs in civil cases may be enforced generally by imprisonment, subject to the general rules regulating imprisonment for debt.⁴

8. Conflict of Laws. — The right to arrest a defendant in a civil action depends upon the *lex fori*, and not upon the *lex loci*, and a party found within the jurisdiction of one state, although not a resident thereof, may be there arrested for causes within the statutes of such state, although the cause of action arose in another state or country in which the defendant would not be subject to arrest therefor.⁵

1. *Caldwell v. State*, 55 Ala. 133.

In *Montana* a defendant may be imprisoned for the nonpayment of costs where the statute makes the costs a part of the punishment, but not otherwise. *State v. Sullivan*, 9 Mont. 490; *State v. Reynolds*, 14 Mont. 383.

In *Virginia* the costs are a part of the fine, and the defendant being taken on a *capias pro fine* can be released only by paying the costs as well as the fine. *Com. v. Fields*, 33 Gratt. (Va.) 291.

2. *Matter of Bollig*, 31 Ill. 88; *Albertson v. Kriechbaum*, 65 Iowa 11; *In re Newton*, 39 Neb. 757.

3. Execution Against Person of Plaintiff upon Judgment for Costs. — In cases falling within the provisions of Code Civ. Pro. N. Y., § 1487, an execution may be issued against the person of the plaintiff upon a judgment against him for costs. See *Kloppenbergh v. Neefus*, 4 Sandf. (N. Y.) 655; *Miller v. Scherder*, 2 N. Y. 262; *Corwin v. Freeland*, 6 N. Y. 560; *Parce v. Halbert*, (Supm. Ct. Spec. T.) 1 How. Pr. (N. Y.) 235; *Brown v. Brockett*, (County Ct.) 55 How. Pr. (N. Y.) 32; *Parker v. Spear*, (N. Y. Super. Ct. Spec. T.) 62 How. Pr. (N. Y.) 394; *Catlin v. Adirondack Co.*, 20 Hun (N. Y.) 19, reversed 81 N. Y. 379; *Philbrook v. Kellogg*, 21 Hun (N. Y.) 238; *Purchase v. Bellows*, (N. Y. Super. Ct.) 14 Abb. Pr. (N. Y.) 357, 19 Abb. Pr. (N. Y.) 306, 23 How. Pr. (N. Y.) 421; *Merritt v. Carpenter*, 3 Abb. App. Dec. (N. Y.) 285, reversing 30 Barb. (N. Y.) 61; *People v. Carpenter*, 46 Barb. (N. Y.) 619; *Knapp v. Murphy*, 20 N. Y. App. Div. 83.

An execution may issue against the person of a guardian *ad litem* against whom judgment has been rendered for costs in an action brought by him on behalf of his ward. *Miller v. Woodhead*, 52 Hun (N. Y.) 127, 17 Civ. Pro. (N. Y.) 102.

Process of Contempt for Nonpayment of Any Sum of Money is abolished in *Ontario* as between debtor and creditor. *Berry v. Donovan*, 21 Ont. App. 14. See *Dickson v. Cook*, 1 Ch. Chamb. (Ont.) 210; *Harris v. Myers*, 1 Ch. Chamb. (Ont.) 229; *Pherill v. Pherill*, 2 Ch. Chamb. (Ont.) 444. For older cases involving imprisonment for nonpayment of costs see

Rowell v. Hartwell, Draper (U. C.) 90; *Plumb v. Miller*, 5 U. C. Q. B. O. S. 484; *Sanders v. McSherry*, 6 U. C. Q. B. O. S. 191.

Judgment Against Defendant. — An execution for the collection of costs may be issued against a defendant against whom a judgment has been entered in an action to set aside a fraudulent conveyance. *Smith v. Duffy*, 37 Hun (N. Y.) 506.

In *South Dakota*, under a statute (Comp. Laws Dak., § 5115) similar to that of New York referred to above, it is held that a judgment against the plaintiff for costs in an action in which the defendant might have been arrested may be enforced by an execution against the person. *Winton v. Knott*, 7 S. Dak. 179.

4. Imprisonment for Costs. — See *Newton v. Rowe*, 9 Q. B. 948, 58 E. C. L. 948; *Lane v. Gover*, 1 Harr. & M. (Md.) 459.

Under the Pennsylvania Act of 1842 abolishing imprisonment for debt, the right to imprison for nonpayment of costs depends upon the nature of the action in which the payment of costs was adjudged or decreed. See *Pierce's Appeal*, 103 Pa. St. 27; *Com. v. Keeper*, 2 Phila. (Pa.) 153, 13 Leg. Int. (Pa.) 276; *Cochran v. Gowen*, 9 Phila. (Pa.) 299, 31 Leg. Int. (Pa.) 252; *Peterson v. Geary*, 3 Pa. Co. Ct. 49; *Fetters v. Barkers*, 1 Pa. Dist. 448; *Church's Appeal*, 103 Pa. St. 263.

An Action for Unlawful Detainer being an action of tort, an execution issued therein for costs is not imprisonment for debt arising out of or founded on a contract. *Toai v. Clapp*, 64 Wis. 223.

In *New York* imprisonment for the nonpayment of interlocutory costs, except in certain cases, is prohibited by Code Civ. Pro., § 15. See *Morrison v. Lester*, 15 Hun (N. Y.) 538; *Matter of Lippincott*, 5 Dem. (N. Y.) 299; *In re Humfreville*, 154 N. Y. 115.

5. Right to Arrest Governed by Lex Fori. — *Smith v. Spinolla*, 2 Johns. (N. Y.) 198; *Sicard v. Whale*, 11 Johns. (N. Y.) 194; *City Bank v. Lumley*, (C. Pl. Gen. T.) 28 How. Pr. (N. Y.) 397; *Johnson v. Whitman*, (Supm. Ct. Spec. T.) 10 Abb. Pr. N. S. (N. Y.) 111; *Brown v. Ashbough*, (Supm. Ct. Spec. T.) 40 How. Pr.

9. Clear Proof Required. — In order to justify the arrest of the defendant in a civil action the existence of a proper ground of arrest must be clearly established.¹ It seems, however, that a reasonable degree of certainty is all that is required.²

10. Discretion of Court to Grant Order of Arrest. — A statute providing that the defendant in a civil action may be arrested in certain cases does not entitle the plaintiff to an order of arrest in a proper case as a matter of right, but the granting or refusing of the order is a matter within the discretion of the judge to whom the application is made.³ It follows that the manner in which the judge has exercised this discretion is not subject to review.⁴ This does not, however, prevent another court from reviewing the question whether the judge had authority to grant the order upon the facts shown.⁵ But the sufficiency of the evidence to support the jurisdiction to issue a warrant of arrest cannot be attacked in a collateral proceeding.⁶

VI. ENGLISH DEBTORS ACT — 1. Generally. — The English Debtors Act of 1869, while presenting some points of similarity to the American statutes, is yet in the main so different that it is deemed best to treat it separately. The act provides substantially that no person shall be arrested or imprisoned for making default in payment of a sum of money except in the following cases: 1. Default in payment of a penalty, or sum in the nature of a penalty, other than a penalty in respect of any contract. 2. Default in payment of any sum recoverable summarily before a justice or justices of the peace. 3. Default by a trustee or person acting in a fiduciary capacity and ordered to pay by a court of equity any sum in his possession or under his control. 4. Default by an attorney or solicitor in payment of costs when ordered to pay costs for misconduct as such, or in payment of a sum of money when ordered to pay the same in his character of an officer of the court making the order. 5. Default in payment for the benefit of creditors of any portion of a salary or other income in respect of the payment of which any court having jurisdiction in bankruptcy is authorized to make an order. 6. Default in payment of sums in respect of the payment of which orders are authorized by the act to be made.⁷ It is further provided that, subject to certain provisions and rules,

(N. Y.) 226. See also *Webster v. Massey*, 2 Wash. (U. S.) 157, 20 Fed. Cas. No. 17,336; *Vibus v. Wirting*, 2 Yeates (Pa.) 350. But see *Camfranke v. Burnell*, 1 Wash. (U. S.) 340.

One who in a foreign country fraudulently obtains goods by means of false and fraudulent representations and brings them to the state of *New York* may be arrested in New York although he could not have been arrested under the laws of the foreign country. *City Bank v. Lumley*, (C. Pl. Gen. T.) 28 How. Pr. (N. Y.) 397.

1. Clear Proof Required. — *Griswold v. Sweet*, (Supm. Ct. Spec. T.) 49 How. Pr. (N. Y.) 171; *Scott v. Reed*, (Supm. Ct. Gen. T.) 8 Civ. Pro. (N. Y.) 269; *Cornier v. Hawkins*, 69 N. Y. 158; *Mulry v. Collett*, 3 Robt. (N. Y.) 716. See also *Melvin v. Melvin*, 72 N. Car. 384.

In order to warrant the arrest of the defendant for fraud, clear proof of the fraud is required. *McKernan v. McDonald*, 27 N. J. L. 541; *Clafin v. Frank*, (Supm. Ct. Spec. T.) 8 Abb. Pr. (N. Y.) 412; *Duncan v. Guest*, (Supm. Ct. Gen. T.) 2 Civ. Pro. (N. Y.) 275; *Artman v. Bell*, 9 Phila. (Pa.) 237, 32 Leg. Int. (Pa.) 117. See also *Henderson v. Daggan*, 5 Quebec 364. See *supra*, this section, *Fraud in Avoiding Payment of Debt — Concealment or Disposal of Property*.

The Plaintiff's Own Affidavit has been held incompetent except to show the amount due from

the defendant. *Hill v. Hunt*, 20 N. J. L. 476.

The Weight of the Evidence Is a Question for the Trial Judge under the New Jersey Act of 1842. *Wife v. Browning*, 20 N. J. L. 364; *Hill v. Hunt*, 20 N. J. L. 476; *Van Wagenen v. Coe*, 22 N. J. L. 531.

2. Reasonable Degree of Proof Sufficient. — *Parasset v. Gautier*, 2 Dall. (Pa.) 330. *Compare Mulry v. Callett*, 3 Robt. (N. Y.) 716. See also *Southworth v. Resing*, 3 Cal. 377; *Parker v. Follensbee*, 45 Ill. 473.

3. Granting Order of Arrest Discretionary with Judge. — *In re Bergen*, 2 Hughes (U. S.) 513; *Lapeous v. Hart*, (Supm. Ct. Spec. T.) 9 How. Pr. (N. Y.) 541; *Davis v. Scott*, (C. Pl.) 15 Abb. Pr. (N. Y.) 127; *National Bank v. Temple*, (N. Y. Super. Ct. Gen. T.) 39 How. Pr. (N. Y.) 432; *Knickerbocker L. Ins. Co. v. Ecclesine*, (N. Y. Super. Ct. Spec. T.) 6 Abb. Pr. N. S. (N. Y.) 9, 11 Abb. Pr. N. S. (N. Y.) 385, 42 How. Pr. (N. Y.) 201, 34 N. Y. Super. Ct. 76.

4. Lapeous v. Hart, (Supm. Ct. Spec. T.) 9 How. Pr. (N. Y.) 541.

5. Knickerbocker L. Ins. Co. v. Ecclesine, (N. Y. Super. Ct. Spec. T.) 6 Abb. Pr. N. S. (N. Y.) 9, 11 Abb. Pr. N. S. (N. Y.) 385; *National Bank v. Temple*, (N. Y. Super. Ct. Gen. T.) 39 How. Pr. (N. Y.) 432.

6. Johnson v. Maxon, 23 Mich. 129.

7. English Debtors Act of 1869. — § 32 & 33 Vict., c. 62, § 4.

any court may commit to prison for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in payment of any debt or instalment of any debt due from him in pursuance of any order or judgment of that or any other competent court.¹

Arrest upon Mesne Process. — The act also provides that a person shall not be arrested upon mesne process in any action.

Arrest of Defendant About to Quit England. — Power is given, however, to arrest a defendant under certain circumstances when about to quit England.²

2. Default by Trustee or Person Acting in Fiduciary Capacity. — By the third exception above stated a trustee or person acting in a fiduciary capacity is rendered liable to imprisonment for default in payment of any sum in his possession or under his control when such payment is ordered by a court of equity.³

Statute of Punitive Character. — It is now well settled that the section authorizing imprisonment in such cases is of a punitive character.⁴

The act protects from imprisonment all persons not within the exceptions. See *Jackson v. Mawby*, 1 Ch. D. 86; *Buckley v. Crawford*, (1893) 1 Q. B. 105.

Crown Debts. — The Debtors Act does not relieve from imprisonment for the nonpayment of crown debts. *Atty.-Gen. v. Edmunds*, 22 L. T. N. S. 667; *In re Smith*, 2 Ex. D. 47.

The Payment of Costs awarded by Quarter Sessions may be enforced by imprisonment. *Reg. v. Pratt*, L. R. 5 Q. B. 176.

Committal for Contempt for nondelivery of securities or money is permitted. *Harvey v. Hull*, 23 L. T. N. S. 391.

1. Committal of Debtor under Section 5 of Debtors Act. — 32 & 33 Vict., c. 62, § 5; *Esdaille v. Visser*, 13 Ch. D. 421, 41 L. T. N. S. 745; *Harper v. Scrimgeour*, 5 C. P. D. 366, 29 W. R. 264; *Imperial Mercantile Credit Assoc.*, 28 L. T. N. S. 396, 42 L. J. Ch. 379; *Ex p. Otway*, 58 L. T. N. S. 885, 36 W. R. 698, 5 Morrell 115; *Chard v. Jervis*, 9 Q. B. D. 178; *Linton v. Linton*, 15 Q. B. D. 239, 52 L. T. N. S. 782; *Mitchell v. Simpson*, 25 Q. B. D. 183, 63 L. T. N. S. 405; *Schuller v. Wood*, 64 L. J. Q. B. 243, *explaining Washer v. Elliott*, 45 L. J. C. Pl. 144, 1 C. P. D. 169; *Dillon v. Cunningham*, L. R. 8 Exch. 23, 27 L. T. N. S. 830; *Williamson v. Bryans*, 8 L. R. Ir. 25; *Horsnail v. Bruce*, L. R. 8 C. P. 378, 28 L. T. N. S. 705; *Anonymous*, 22 L. T. N. S. 666; *Rogers v. Rogers*, 23 L. T. N. S. 796, 19 W. R. 317, 374.

Judgment Against Married Woman. — Section 5 of the Debtors Act does not extend to the judgment which can be recovered against a married woman only by virtue of the Married Women's Property Act, 1882. *Scott v. Morley*, 20 Q. B. D. 120, 57 L. T. N. S. 919, 36 W. R. 67; *Draycott v. Harrison*, 17 Q. B. D. 147, 34 W. R. 546. See also *Meager v. Pellew*, 14 Q. B. D. 973, 53 L. T. N. S. 67, 33 W. R. 573; *Johnstone v. Browne*, 20 L. R. Ir. 443; *Morgan v. Eyre*, 20 L. R. Ir. 541; *In re Walter*, 55 J. P. 551; *Dillon v. Cunningham*, L. R. 8 Exch. 23, 27 L. T. N. S. 830.

Only One Committal for Same Default. — *Horsnail v. Bruce*, L. R. 8 C. P. 378, 28 L. T. N. S. 705; *Evans v. Wills*, 1 C. P. D. 229, 34 L. T. N. S. 679. Unless the debt is payable in instalments. See *Evans v. Wills*, 1 C. P. D. 229, 34 L. T. N. S. 679.

Payment of Costs may be enforced by imprisonment. *Hewitson v. Sherwin*, L. R. 10 Eq.

53, 22 L. T. N. S. 576. See in special cases *Weldon v. Weldon*, 52 L. T. N. S. 233, 54 L. J. P. 60; *In re Walter*, 55 J. P. 551; *Lynch v. Lynch*, 10 P. D. 183, 54 L. J. P. 93; *Bates v. Bates*, 14 P. D. 17, 60 L. T. N. S. 125; *Rogers v. Rogers*, 23 L. T. N. S. 796, 19 W. R. 317, 374.

80 Arrears of Payment of Alimony. — *Linton v. Linton*, 15 Q. B. D. 239.

2. Stat. 32 & 33 Vict., c. 62, § 6.

As to the arrest of a person about to quit England under this act, see *Drover v. Beyer*, 13 Ch. D. 242; *Colverson v. Bloomfield*, 29 Ch. D. 341, 52 L. T. N. S. 478; *Hume v. Druryff*, L. R. 8 Exch. 214, 29 L. T. N. S. 64; *Yorkshire Engine Co. v. Wright*, 21 W. R. 15; *M'Blair v. Weir*, 7 Ir. C. L. 526. See also the title NE FREAT.

3. Imprisonment of Trustee or Fiduciary for Default. — *Evans v. Bear*, L. R. 10 Ch. 76, 31 L. T. N. S. 625; *Marris v. Ingram*, 13 Ch. D. 338, 41 L. T. N. S. 613; *Young v. Dallimore*, 22 L. T. N. S. 119, 18 W. R. 445; *Tinnuchi v. Smart*, 54 L. J. P. 92, 10 P. D. 184; *Preston v. Etherington*, 37 Ch. D. 104, 58 L. T. N. S. 318; *In re Gent*, 40 Ch. D. 190, 60 L. T. N. S. 355. See further FIDUCIARY, vol. 13, p. 11, note; *Phosphate Sewage Co. v. Hartmont*, 25 W. R. 743; *In re Diamond Fuel Co.*, 13 Ch. D. 815.

One Partner Receiving the Assets of the Firm on account of himself and copartners is not liable to imprisonment as a person acting in a fiduciary capacity. *Piddocke v. Burt*, (1894) 1 Ch. 343.

Default of Cotrustee. — A trustee who without any dishonesty or fraudulent breach of trust hands over money to his cotrustee, who misapplies it, is not liable to imprisonment. *In re Smith*, (1893) 2 Ch. 1, 68 L. T. N. S. 337, 62 L. J. Ch. 336. But see the earlier case, *Evans v. Bear*, L. R. 10 Ch. 76.

The remedy against trustees is limited to *cestuis que trustent*. *In re Firmin*, 57 L. T. N. S. 45.

4. Statute of Punitive Character. — *Middleton v. Chichester*, L. R. 6 Ch. 152; *Marris v. Ingram*, 13 Ch. D. 338; *In re Gent*, 40 Ch. D. 190, 60 L. T. N. S. 355; *In re Knowles*, 52 L. J. Ch. 685, 48 L. T. N. S. 760; *In re Smith*, (1893) 2 Ch. 1. See also *Holroyde v. Garnett*, 20 Ch. D. 532.

A proceeding against a fiduciary under the Debtors Act being of a punitive character, the

Discretion of Court in Ordering Imprisonment. — Formerly the court had no discretion to refuse to commit a trustee who had defaulted within the terms of the act.¹ This rule, however, was found to work hardship in some cases where the trustee had been guilty of no moral delinquency, or where his imprisonment would serve no useful purpose,² and by the Act of 1878 the court was authorized to inquire into each case and to exercise its discretion in ordering the imprisonment of a defaulting trustee.³

Money Must Have Been in Defendant's Possession or Control. — In order to bring a trustee within the exception so as to render him liable to imprisonment for default, it must appear that the sum in question has been at some time in his possession or under his control.⁴

Inability of Trustee to Make Payment Immaterial. — The fact that a defaulting trustee is unable to pay the money in respect to which he is in default is ordinarily not a sufficient ground to induce the court, in the exercise of its discretion, to refuse to order his imprisonment, at least where the trustee has been guilty of a fraudulent breach of trust.⁵

Fraud Unnecessary. — It is not necessary that a defaulting trustee should be guilty of fraud to be liable to imprisonment.⁶

3. Default by Attorneys and Solicitors. — By the fourth exception as above stated an attorney or solicitor may be imprisoned for default in payment of costs when ordered to pay costs for misconduct as such, or in payment of a sum of money when ordered to pay the same as an officer of court.⁷ The attachment against a solicitor in such cases, as in the case of defaulting trustees, is not merely a civil process, but is in its nature punitive and disciplinary.⁸

VII. PRIVILEGE FROM ARREST — 1. Persons Privileged — a. MEMBERS OF ROYAL HOUSEHOLD. — In *Great Britain* members of the royal household and servants in attendance upon the sovereign are privileged from arrest by virtue of their office.⁹

defendant cannot claim a privilege from arrest as a member of Parliament. *In re Gent*, 40 Ch. D. 190, 60 L. T. N. S. 355.

1. *Evans v. Bear*, L. R. 10 Ch. 76.

2. See remarks of Jessel, M. R., in *Marris v. Ingram*, 13 Ch. D. 338.

3. 41 & 42 Vict., c. 54; *Barrett v. Hammond*, 10 Ch. D. 285; *Street v. Hope*, 10 Ch. D. 286, note; *Marris v. Ingram*, 13 Ch. D. 338; *Holroyde v. Garnett*, 20 Ch. D. 532; *Aylesford v. Poulett*, (1892) 2 Ch. 60, 66 L. T. N. S. 484.

4. **Money Must Have Been in Possession or under Control of Trustee.** — *Middleton v. Chichester*, L. R. 6 Ch. 152, 40 L. J. Ch. 237; *Ex p. Cuddiford*, 45 L. J. Bankr. 127, 34 L. T. N. S. 666, 24 W. R. 931; *In re Hickey*, 55 L. T. N. S. 588, 35 W. R. 53; *In re Walker*, 60 L. J. Ch. 25, 63 L. T. N. S. 237; *Ferguson v. Ferguson*, L. R. 10 Ch. 661. See also *Evans v. Bear*, L. R. 10 Ch. 76.

5. **Where Trustee Is Unable to Pay.** — *In re Knowles*, 52 L. J. Ch. 685, 48 L. T. N. S. 760. See also *In re Gent*, 40 Ch. D. 190.

But see *In re Mackenzie*, 44 L. T. N. S. 618. 6. *Presion v. Etherington*, 37 Ch. D. 104. See *Evans v. Bear*, L. R. 10 Ch. 76.

7. **Imprisonment of Solicitor under Debtors Act.** — *In re Rush*, L. R. 9 Eq. 147, 21 L. T. N. S. 692; *Harvey v. Hall*, L. R. 16 Eq. 324, 28 L. T. N. S. 734; *In re White*, 23 L. T. N. S. 387, 19 W. R. 39; *In re Barfield*, 24 L. T. N. S. 248, 19 W. R. 466; *In re Freston*, 11 Q. B. D. 545; *In re Dudley*, 12 Q. B. D. 44, 49 L. T. N. S. 737; *In re Edye*, 63 L. T. N. S. 762, 39 W. R. 198; *In re Hope*, 41 L. J. Ch. 797; *Matter of Ball*, L. R. 8 C. P. 104, 42 L. J. C. Pl. 104;

In re Fereday, (1895) 2 Ch. 437, 73 L. T. N. S. 56, 64 L. J. Ch. 894.

As to when a person is to be regarded as a solicitor within the act, see *In re Strong*, 32 Ch. D. 342, 55 L. T. N. S. 3.

A Solicitor Who Has Become Bankrupt may be imprisoned. *In re Edye*, 63 L. T. N. S. 762, 39 W. R. 198, following *In re Wray*, 36 Ch. D. 138, 57 L. T. N. S. 605, and repudiating *In re Simes*, 62 L. T. N. S. 721, 38 W. R. 570.

A Solicitor Acting in a Fiduciary Capacity may be liable to imprisonment in the latter capacity. *Litchfield v. Jones*, 36 Ch. D. 530.

8. *In re Freston*, 11 Q. B. D. 545; *In re Wray*, 36 Ch. D. 138, 57 L. T. N. S. 605; *In re Edye*, 63 L. T. N. S. 762, 39 W. R. 198.

9. **Members of Royal Household Privileged.** — *King v. Foster*, 2 Taunt. 167; *Bartlett v. Hebbes*, 5 T. R. 686; *Reynolds v. Pocock*, 4 M. & W. 371, 7 Dowl. P. C. 4; *Aldridge v. Barry*, 3 Dowl. 450, note; *Dyer v. Disney*, 16 M. & W. 312, 4 Dowl. & L. 698; *Sard v. Forrest*, 2 Dowl. & R. 250, 1 B. & C. 139, 8 E. C. L. 60; *Hatton v. Hopkins*, 6 M. & S. 271, 18 Rev. Rep. 371. See *Tapley v. Baltine*, 1 Dowl. & R. 79, 16 E. C. L. 19; *Batson v. McLean*, 2 Chit. 48, 18 E. C. L. 245, 23 Rev. Rep. 742; *Bidgood v. Davies*, 6 B. & C. 84, 13 E. C. L. 108, 9 Dowl. & R. 153.

Chaplains in Ordinary are privileged. *Winter v. Dibin*, 2 Dowl. & L. 211, 13 M. & W. 25; *Harvey v. Dakins*, 3 Exch. 266, 6 Dowl. & L. 437; *Ex p. Dakins*, 16 C. B. 77, 81 E. C. L. 77, 24 L. J. C. Pl. 131, 1 Jur. N. S. 378; *Byron v. Dibdin*, 1 C. M. & R. 821, 3 Dowl. P. C. 448, 1 Gale 58.

b. LEGISLATORS. — That the discharge of their duty to the public may not be interfered with at the instance of private parties, members of Parliament,¹ of Congress,² and of the state legislatures³ are privileged from arrest in civil actions while going to, attending, and returning from the sessions of the bodies to which they respectively belong.

Duration of Privilege. — In *Great Britain* the privilege of members of Parliament exists not only during the session, but also for forty days before and forty days after each meeting of Parliament.⁴ In the *United States* members of Congress are privileged only during the sessions of Congress and for a reasonable time for going and returning.⁵

c. ELECTORS. — On the day of an election voters are privileged from arrest while voting and going to or returning from the polls.⁶

d. SOLDIERS AND SAILORS — POLICE. — **Soldiers** while engaged in the performance of their military duties are by statute in most states privileged from arrest.⁷ It seems, however, that there is no such exemption except when secured by statute.⁸

Marines. — By Act of Congress marines are exempt, when enlisted in the marine corps, from all personal arrest for debt or contract.⁹

Policemen. — In New York city policemen are protected from arrest in civil cases while actually on duty.¹⁰

e. FEDERAL OFFICERS. — It seems that an officer of the United States is

1. Members of Parliament. — *Goudy v. Duncombe*, 5 Dowl. & L. 209, 1 Exch. 430, 17 L. J. Exch. 76; *Cassidy v. Steuart*, 2 Scott N. R. 432, 2 M. & G. 437, 40 E. C. L. 450, 9 Dowl. P. C. 366.

2. Members of Congress. — Const. U. S., art. 1, § 6; *Coxe v. M'Clenachan*, 3 Dall. (Pa.) 478; *Dunton v. Halstead*, 2 Clark (Pa.) 450, 4 Pa. L. J. 237. See also *Miner v. Markham*, 28 Fed. Rep. 387.

Delegates from Territories are within the protection secured by the Constitution. *Doty v. Strong*, 1 Pin. (Wis.) 85; *Flanders v. Kimball*, (Mass. 1868) 3 Am. L. Rev. 376.

3. Members of Legislature. — Consult the constitutions of the several states. See also *Hiss v. Bartlett*, 3 Gray (Mass.) 468, 63 Am. Dec. 768; *Matter of Potter*, 55 Barb. (N. Y.) 625.

4. Duration of Privilege — Great Britain. — *Goudy v. Duncombe*, 1 Exch. 430, 5 Dowl. & L. 209. See also the following earlier cases, set out in *Hoppin v. Jenckes*, 8 R. I. 453; *Barnes v. Ward*, Sid. 29; *Holiday v. Pitt*, 2 Stra. 985, 7 Mod. 225; *Lee t. Hardw.* 29; *Athol v. Derby*, 2 Lev. 721, 2 Ch. Rep. 221; *Barnard v. Mordaunt*, 1 Ken. K. B. 125.

5. Lewis v. Elmendorf, 2 Johns. Cas. (N. Y.) 222; *Hoppin v. Jenckes*, 8 R. I. 453.

Under a statute exempting a member of the legislature from arrest during his attendance upon and while going to or returning from the sessions of the body, providing the time of such going or returning does not exceed fourteen days, a member is not entitled to his privilege after he has reached home, although within the fourteen days. *Colvin v. Morgan*, 1 Johns. Cas. (N. Y.) 415; *Corey v. Russell*, 4 Wend. (N. Y.) 204.

6. Electors. — Consult the constitutions of the several states. See also *Swift v. Chamberlain*, 3 Conn. 537.

In *Swift v. Chamberlain*, 3 Conn. 537, it was held that an elector who, having voted, waited in a house while the officers were counting the

votes was attending to the business of the election, and therefore was privileged from arrest, under the Constitution of *Connecticut*.

The privilege does not begin until the elector actually sets out for the polls. *Hobbs v. Getchell*, 8 Me. 187, 23 Am. Dec. 497.

7. Soldiers Privileged. — Consult the statutes of the several states, and see Rev. Stat. U. S., § 1237; *Greening v. Sheffield*, Minor (Ala.) 276; *Ray v. Hogeboom*, 11 Johns. (N. Y.) 433; *Matter of Roode*, 2 Wheel. Crim. (N. Y.) 541; *People v. Campbell*, 40 N. Y. 133; *Murphy v. McCombs*, 11 Ired. L. (33 N. Car.) 274; *Wright v. Quinn*, 1 Yeates (Pa.) 163. See also *Morgan v. Eckart*, 1 Dall. (Pa.) 205; *Ex p. Field*, 5 Hall L. J. (Pa.) 474; *Manchester v. Manchester*, 6 R. I. 127.

State Militia in Service of United States. — A statute exempting from arrest members of the state militia while in the line of their military duty applies to such members notwithstanding they have been mustered into the service of the United States. *People v. Campbell*, 40 N. Y. 133. But a state statute exempting militia from arrest while in the service of the state does not exempt a soldier in the service of the United States but not of the state. *White v. Lowther*, 3 Ga. 307.

A Soldier on Furlough is not privileged. *Ex p. McRoberts*, 16 Iowa 600.

Exemption from Service of Process. — A statute which exempts officers and soldiers from arrest does not exempt them from the service of process where bail is not required. *Hart v. Flynn*, 8 Dana (Ky.) 190.

8. No Exemption in Absence of Statute. — *Ex p. Harlan*, 39 Ala. 563; *Moses v. Mellett*, 3 Strobb. L. (S. Car.) 210.

9. Rev. Stat. U. S., § 1610.

10. Policemen Privileged — New York City. — See *Squire's Case*, (N. Y. Super. Ct.) 12 Abb. Pr. (N. Y.) 38; *Hart v. Kennedy*, 39 Barb. (N. Y.) 186, 15 Abb. Pr. (N. Y.) 290, 24 How. Pr. (N. Y.) 425; *Coxson v. Doland*, 2 Daly (N. Y.) 66; *Laws 1882*, c. 410, § 988.

not liable to arrest upon civil process while engaged in the performance of his official duty, and if so arrested the federal court in its discretion may order his release. But the mere fact that the defendant is an officer of the United States does not secure to him immunity from arrest in civil cases when not engaged in the performance of his duty as such officer.¹

f. PERSONS IN ATTENDANCE UPON COURT — (1) *Judicial Officers and Jurors*. — In order that the due administration of justice may not be impeded or delayed, judicial officers, such as judges,² magistrates,³ coroners,⁴ and jurors,⁵ are privileged from arrest while engaged in the discharge of their public duties or in attendance upon the court.

Sheriffs are not privileged in the absence of a statute so providing.⁶

(2) *Parties* — (a) *Generally*. — Parties to suits are privileged from arrest while going to, attending, and returning from court on business connected with their suits.⁷

(b) *In What Tribunals*. — The protection extends to all legal tribunals of a judicial character, whether strictly courts of record or not, recognized by the laws of the state and having power to pass upon the rights of persons attend-

1. *United States Customs Officer*. — In *Ex p. Murray*, 35 Fed. Rep. 496, it was held that a United States customs officer might be arrested under civil process issuing from a state court.

A *United States Marshal* may be arrested and imprisoned in a civil case. *Parsons v. Stanton*, 2 Day (Conn.) 300; *Wilcox v. Buckingham*, 2 Day (Conn.) 304.

2. *Judges*. — *Matter of Livingston*, 8 Johns. (N. Y.) 351. See also *Lyell v. Goodwin*, 4 McLean (U. S.) 29; *Com. v. Ronald*, 4 Call (Va.) 97.

3. *Glendenning v. Browne*, 3 Ir. R. C. L. 115; *Dubois v. Wyse*, 5 Ir. R. C. L. 303.

4. *Ex p. Deputy Coroner*, 3 L. T. N. S. 754, 6 H. & N. 501.

5. *Jurors*. — *Brookes v. Chesley*, 4 Har. & M. (Md.) 295; *M'Neil's Case*, 3 Mass. 288; *Brower v. Tatro*, 115 Mich. 368.

The privilege of a juror from arrest is a privilege of the court and not of the party, and the privilege ceases as soon as the juror is discharged. *Brookes v. Chesley*, 4 Har. & M. (Md.) 295.

6. *Sheriff*. — *Day v. Brett*, 6 Johns. (N. Y.) 22; *Hill v. Lott*, (Supm. Ct. Spec. T.) 10 How. Pr. (N. Y.) 46. See also *Morgan v. Eckart*, 1 Dall. (Pa.) 295.

The *New Hampshire* statute exempting sheriffs from arrest on civil process does not exempt deputy sheriffs. *George v. Fellows*, 58 N. H. 494.

7. *Parties to Suits Privileged from Arrest* — *England*. — *Lightfoot v. Cameron*, 2 W. Bl. 1113; *Pitt v. Coombs*, 3 N. & M. 212, 5 B. & Ad. 1078, 27 E. C. L. 270; *Crone v. Odell*, 2 Molloy 525; *Childerston v. Barrett*, 11 East 439; *Newton v. Harland*, 8 Scott 70, 3 Jur. 679; *Persse v. Persse*, 5 H. L. Cas. 671; *Mahon v. Mahon*, 2 Ir. Eq. 447.

United States. — *Hurst's Case*, 4 Dall. (U. S.) 387, 1 Wash. (U. S.) 186; *McFerran v. Wherry*, 5 Cranch (C. C.) 677; *Matter of Kimball*, 2 Ben. (U. S.) 38.

Georgia. — *Henegar v. Spangler*, 29 Ga. 217. *Indiana*. — *Crocker v. Duncan*, 6 Blackf. (Ind.) 278.

Massachusetts. — *Ex p. M'Neil*, 6 Mass. 245; *Wood v. Neale*, 5 Gray (Mass.) 538.

Michigan. — *Watson v. Judge*, 40 Mich. 729.

New Jersey. — *Harris v. Grantham*, 1 N. J. L. 165.

New York. — *Taft v. Hoppin*, Anth. N. P. (N. Y.) 187; *Petrie v. Fitzgerald*, 1 Daly (N. Y.) 401; *Salhinger v. Adler*, 2 Robt. (N. Y.) 704; *Mackay v. Lewis*, 7 Hun (N. Y.) 83; *Schlesinger v. Foxwell*, (Marine Ct. Spec. T.) 1 City Ct. (N. Y.) 461.

North Carolina. — *Hammershold v. Rose*, 7 Jones L. (52 N. Car.) 629.

Pennsylvania. — *Caldwell v. Dixey*, 3 Pa. Co. Ct. 532; *Steinmetz v. Wade*, 3 W. N. C. (Pa.) 187.

Rhode Island. — *Ellis v. De Garmo*, 17 R. I. 715; *Eliason's Petition*, 19 R. I. 117.

South Carolina. — *Hunter v. Cleveland*, 1 Brev. (S. Car.) 167; *Vincent v. Watson*, 1 Rich. L. (S. Car. 194; *Sadler v. Ray*, 5 Rich. L. (S. Car.) 523.

Virginia. — *Richards v. Goodson*, 2 Va. Cas. 381.

And cases cited *infra*, this subsection, *In What Tribunals*.

A party who has attended his cause all day in court, and retires in the evening to dine with his attorney and witnesses at a tavern, is privileged, *causa redeundi*. *Lightfoot v. Cameron*, 2 W. Bl. 1113. So also of a party waiting in the vicinity of the court for the trial of his cause. *Childerston v. Barrett*, 11 East 439; or after trial to hear judgment pronounced, *Newton v. Harland*, 8 Scott 70, 3 Jur. 679.

Party Arrested in Another Cause. — It has been held that the privilege of a party does not exist where he has been surrendered by his bail in another cause and is in actual custody at the time of his arrest. *Davis v. Cummins*, 3 Yeates (Pa.) 387. But where a person arrested on the civil process of a federal court was taken to the place of holding court, and being thus brought within the jurisdiction of the local court was arrested on civil process issuing therefrom after he had been released from the first arrest, but before he could leave the place, it was held that he was entitled to be discharged. *Watson v. Judge*, 40 Mich. 729.

The Service of a Writ of Capias ad Respondendum on a party has been held not a violation of privilege. *Huntington v. Shultz*, Harp. L. (S. Car.) 452, 18 Am. Dec. 660.

ing them.¹ Thus proceedings in bankruptcy before commissioners of bankruptcy are of such a nature as to privilege from arrest an interested party attending such proceedings.² So also a party attending a reference to arbitrators is privileged in the same manner as if he were attending a trial at court.³

(c) **Duration of Privilege.** — The privilege of a party from arrest continues during the time of his necessary attendance at court and for a reasonable time thereafter during which to return home, and not longer.⁴ It is held, however, that liberality will be exercised in regard to the reasonableness of the time for going, attending, and returning.⁵

Deviation from Direct Route When Returning Home. — A reasonable indulgence, not only as to the time within which he must return, but also as to his route, is allowed to a party to a suit returning from court. He is not required to return by the shortest and most direct route; a slight deviation will not result in a forfeiture of his privilege.⁶ But any unreasonable deviation or delay will result in such forfeiture.⁷

(a) **Defendant in Criminal Proceedings.** — There is no privilege from arrest in civil cases in favor of a defendant in criminal proceedings immediately after discharge or sentence.⁸ But it is otherwise if the apprehension of the defendant

Bail attending court for the purpose of justifying are privileged. *Rimmer v. Green*, 1 M. & S. 638.

1. *Wood v. Neale*, 5 Gray (Mass.) 538.

The privilege from arrest exists in the case of all proceedings in their nature judicial, whether taking place in court or elsewhere. *Watson v. Judge*, 40 Mich. 729.

Attendance Before Committee of Legislature. — The privilege from arrest of parties and witnesses attending either house of the legislature or a committee thereof is the same as of those attending any strictly judicial tribunal. *Thompson's Case*, 122 Mass. 428, 23 Am. Rep. 370.

2. **In Bankruptcy Proceedings.** — *Arding v. Flower*, 8 T. R. 534; *Ex p. King*, 7 Ves. Jr. 312; *List's Case*, 2 Ves. & B. 373, 2 Rose 24; *Selby v. Hills*, 8 Bing. 166, 21 E. C. L. 257, 1 Dowl. P. C. 257, 1 Moo. & S. 253; *Matter of Kimball*, 2 Ben. (U. S.) 38; *Ex p. Mifflin*, 1 Pa. L. J. 146, 17 Fed. Cas. No. 9,537; *U. S. v. Dobbins*, 1 Pa. L. J. Rep. 5, 25 Fed. Cas. No. 14,971; *Chan v. Chan*, 2 Pa. L. J. 176, 1 Pa. L. J. Rep. 252.

An insolvent debtor is privileged when attending at or returning from the court in which his petition is held, although on the day when he was arrested the consideration of the final order was adjourned *sine die*. *Chauvin v. Alexander*, 2 B. & S. 47, 110 E. C. L. 47, 31 L. J. Q. B. 79, 8 Jur. N. S. 262.

Creditors attending before commissioners for the purpose of proving their debts are privileged. *List's Case*, 2 Ves. & B. 373, 2 Rose 24; *Wood v. Neale*, 5 Gray (Mass.) 538.

A person attending before commissioners of bankruptcy in order to oppose the discharge of a debtor is privileged. *Willingham v. Matthews*, 2 Marsh. 57, 6 Taunt. 356, 1 E. C. L. 412.

3. **Party to Reference.** — *Spence v. Stuart*, 3 East 89, 6 Rev. Rep. 549; *Clark v. Grant*, 2 Wend. (N. Y.) 257; *Webb v. Carter*, 9 Lanc. Bar. (Pa.) 65.

A suitor in chancery is privileged from arrest on bail process while attending a reference before the master during vacation. *Vincent v. Watson*, 1 Rich. L. (S. Car.) 194.

4. *Gray v. Ayres*, Tappan (Ohio) 164.

The privilege of a party to a reference extends only to a reasonable time after the hearing, and not necessarily until after the report of the referee. *Clark v. Grant*, 2 Wend. (N. Y.) 257.

A party to a reference who after the adjournment of the hearing to a subsequent day fails for want of funds to return home within a reasonable time is not privileged from arrest during the period of adjournment. *Spencer v. Newton*, 6 Ad. & El. 623, 33 E. C. L. 157, 1 N. & P. 818.

5. **Privilege Construed Liberally as to Time for Going and Returning.** — *Selby v. Hills*, 8 Bing. 166, 21 E. C. L. 257, 1 Dowl. P. C. 257, 1 Moo. & S. 253; *Salhinger v. Adler*, 2 Robt. (N. Y.) 704.

Though a party comes from a distance an unreasonable length of time before the trial, so that if then arrested he could not claim his privilege, yet if not arrested until after his case has been set for hearing he will be discharged. *Persse v. Persse*, 5 H. L. Cas. 671.

6. **Privilege Not Lost by Slight Deviation.** — *Pitt v. Coombs*, 3 N. & M. 212, 5 B. & Ad. 1078, 27 E. C. L. 270; *Willingham v. Matthews*, 2 Marsh. 57, 6 Taunt. 356, 1 E. C. L. 412; *Williams v. Webb*, 2 Dowl. N. S. 904, 5 Scott N. R. 898; *Salhinger v. Adler*, 2 Robt. (N. Y.) 704. See also *Mahon v. Mahon*, 2 Ir. Eq. 440.

7. **Privilege Lost by Unreasonable Deviation from Direct Route.** — Where a party to a suit, privileged from arrest, while returning from court went to a place out of the direct route to his home for the purpose of attending the funeral of his son, it was held that he had forfeited his privilege. *Chaffee v. Jones*, 19 Pick. (Mass.) 260.

8. **Defendant in Criminal Case Not Privileged.** — *Hare v. Hyde*, 16 Q. B. 394, 71 E. C. L. 394, 15 Jur. 315; *Goodwin v. Lordon*, 2 Dowl. P. C. 504, 1 Ad. & El. 378, 28 E. C. L. 106, 3 N. & M. 879; *Jacobs v. Jacobs*, 3 Dowl. P. C. 675; *Lucas v. A'bee*, 1 Den. (N. Y.) 666; *Lynch's Case*, 1 City Hall Rec. (N. Y.) 138; *Shotwell's Case*, 4 City Hall Rec. (N. Y.) 75; *Moore v. Green*, 73 N. Car. 394, 21 Am. Rep. 470; *Wood v. Boyle*, 177 Pa. St. 620, 55 Am. St. Rep. 747.

on a criminal charge was merely a contrivance to get him in custody in a civil suit.¹

The Question Whether a Person Brought into a Jurisdiction under Extradition Proceedings can be arrested in a civil suit has been elsewhere discussed.²

(3) *Witnesses.* — In order to insure the attendance of witnesses at the trial of causes in cases in which they might otherwise be reluctant to attend court,³ and in accordance with the general policy of the law to protect all persons necessarily in attendance at court or upon judicial proceedings, witnesses in the cause are privileged from arrest.⁴

Whether Subpœna Necessary to Entitle Witness to Protection. — It has been held that a witness who voluntarily attends court without being subpœnaed or summoned is not so privileged.⁵ In other cases the contrary has been held,⁶ and this latter doctrine would certainly seem to be the more consonant with reason, for the main object of the subpœna is to secure the attendance of the witness, and the administration of justice would be obstructed by his arrest when

[citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 724]; *Key v. Jetto*, 1 Pittsb. (Pa.) 117; *Com. v. Daniel*, 6 Pa. L. J. 330, 4 Clark (Pa.) 40. *Compare In re Barton*, 3 Pa. Co. Ct. 334; *Com. v. Brown*, 1 Browne (Pa.) 72. And see *Treichler v. Hauck*, 2 Woodw. (Pa.) 19.

In *Scott v. Curtis*, 27 Vt. 762, it was held that the Vermont statute exempting a party from arrest applied only to parties in civil suits, and that a person attending court as party respondent in a criminal prosecution was not privileged.

1. *Benninghoff v. Oswell*, (Supm. Ct. Spec. T.) 37 How. Pr. (N. Y.) 235; *Wells v. Gurney*, 8 B. & C. 769, 15 E. C. L. 336.

2. **Defendant in Extradition Proceedings.** — See the title EXTRADITION, vol. 12, pp. 598, 606.

In *Slade v. Joseph*, 5 Daly (N. Y.) 187, it was held that a person brought into the jurisdiction from another state under extradition proceedings might be arrested in a civil suit at the instance of persons who had not participated in or connived at his indictment or extradition.

3. **Grounds of Privilege of Witness.** — *May v. Shumway*, 16 Gray (Mass.) 86, 77 Am. Dec. 401. See also *Walpole v. Alexander*, 3 Dougl. 45, 26 E. C. L. 32.

4. **Witnesses Privileged from Arrest — England.** — *Walpole v. Alexander*, 3 Dougl. 45, 26 E. C. L. 32; *Webb v. Taylor*, 1 Dowl. & L. 676, 13 L. J. Q. B. 24, 8 Jur. 39; *Rishton v. Nisbett*, 1 M. & Rob. 347; *Rex v. Wigley*, 7 C. & P. 4, 32 E. C. L. 415; *Burke v. Higgins*, 2 Hog. 210; *Gibbs v. Phillipson*, 1 Russ. & M. 19, 8 L. J. Ch. 43; *Ex p. Byne*, 1 Ves. & B. 316, 1 Rose 451; *Ex p. Temple*, 2 Ves. & B. 391; *Ex p. Clarke*, 2 Deac. & C. 99; *Franklyn v. Colqhoun*, 1 Madd. 580.

United States. — *Matter of Kimball*, 2 Ben. (U. S.) 38; *Hurst's Case*, 4 Dall. (U. S.) 387; *Larned v. Griffin*, 12 Fed. Rep. 590.

Massachusetts. — *May v. Shumway*, 16 Gray (Mass.) 86, 77 Am. Dec. 401.

New York. — *Norris v. Beach*, 2 Johns. (N. Y.) 294; *Bours v. Tuckerman*, 7 Johns. (N. Y.) 538; *Sanford v. Chase*, 3 Cow. (N. Y.) 381; *MacKay v. Lewis*, 7 Hun (N. Y.) 83.

Pennsylvania. — *U. S. v. Edme*, 9 S. & R. (Pa.) 147; *Smythe v. Banks*, 4 Dall. (Pa.) 329.

Rhode Island. — *Eliason's Petition*, 19 R. I. 117.

Vermont. — *Ex p. Hall*, 1 Tyler (Vt.) 274; *Booraem v. Wheeler*, 12 Vt. 311.

Prosecuting Witness. — A person attending a police court as prosecutor or witness, on a charge there pending, is privileged from arrest on civil process, though not attending under compulsion. *Montague v. Harrison*, 3 C. B. N. S. 292, 91 E. C. L. 292, 27 L. J. C. Pl. 24, 4 Jur. N. S. 29.

But in *Ex p. Cobbett*, 7 El. & Bl. 955, 90 E. C. L. 955, 26 L. J. Q. B. 293, 3 Jur. N. S. 665, it was held that a voluntary prosecutor, as common informer in a proceeding to recover a penalty, was not privileged.

Must Attend as Witness. — A person attending before a court or officer is not entitled to a witness's privilege from arrest unless he attends as a witness. *Cole v. McClellan*, 4 Hill (N. Y.) 59.

A Witness at Liberty on Bail is not privileged from arrest by his bail for the purpose of being surrendered. *Ex p. Lyne*, 3 Stark. 132, 14 E. C. L. 167; even though he be attending in court at the time of arrest for the purpose of giving evidence. *Horn v. Swinford*, 1 Dowl. & R. N. P. 20, 16 E. C. L. 417.

One Attending as a Witness May Be Committed for Contempt. — *Page v. Randall*, 6 Cal. 32.

Duration of Privilege. — A witness is privileged from arrest for a reasonable time to prepare for his departure and return to his home as well as during his actual attendance upon the court, but the privilege does not extend throughout the term at which the cause is marked for trial, nor will it protect the witness while engaged in transacting his general private business after his discharge from the obligations of the subpœna. *Smythe v. Banks*, 4 Dall. (Pa.) 329.

5. *Ex p. McNeill*, 6 Mass. 264; *Rogers v. Bullock*, 3 N. J. L. 109; *Hardenbrook's Case*, (Supm. Ct.) 8 Abb. Pr. (N. Y.) 416.

6. **Witness Voluntarily Attending Privileged.** — *Walpole v. Alexander*, 3 Dougl. 45, 26 E. C. L. 32; *Ex p. Byne*, 1 Ves. & B. 316, 1 Rose 451; *Montague v. Harrison*, 3 C. B. N. S. 292, 91 E. C. L. 292, 27 L. J. C. Pl. 24, 4 Jur. N. S. 29; *Rishton v. Nisbett*, 1 M. & Rob. 347; *May v. Shumway*, 16 Gray (Mass.) 86, 77 Am. Dec. 401; *Dixon v. Ely*, 4 Edw. Ch. (N. Y.) 557; *Ballinger v. Elliott*, 72 N. Car. 596; *Wilson v. Byrd*, 14 W. N. C. (Pa.) 438.

attending voluntarily to as great an extent as though he came under subpœna.

(4) *Attorneys at Law*. — An attorney at law is exempt from arrest on civil process while engaged in the trial of a cause and in attendance upon the court for that purpose, and while going to and returning from the trial. A full discussion of the privilege of attorneys will be found elsewhere in this work.¹

g. *FREEHOLDERS*. — It is held in *New York* that the defendant in an action of tort is not liable to arrest where he is a householder and freeholder residing in the county.² And in *Pennsylvania* a freeholder is exempt by statute from arrest in civil cases.³

h. *PERSONS UNDER DISABILITY* — (1) *Infants*. — It seems that at common law a person enjoyed no immunity from arrest in a civil action on account of infancy.⁴ In *New York* it is now provided by statute that an infant under the age of fourteen years, if arrested, may be discharged from arrest, as a privileged person, in the discretion of the court.⁵

(2) *Insane Persons*. — At common law a debtor is not privileged from arrest and imprisonment on account of his insanity,⁶ nor is the fact that he has become insane since his arrest a sufficient ground for his discharge.⁷ In several states statutes have been enacted providing for the discharge of insane debtors from imprisonment and their commitment to insane asylums.⁸ In *New York* a lunatic or an idiot, if arrested, may be discharged from arrest, as a privileged person, in the discretion of the court.⁹

(3) *Females*. — At Common Law there seems to have been no privilege from arrest in favor of unmarried females.

1. *Attorney at Law*. — See the title ATTORNEY AND CLIENT, vol. 3, p. 293.

A solicitor who is proceeding to court to attend his professional business there pending is privileged from arrest. *Atty.-Gen. v. Leather-Sellers' Co.*, 7 Beav. 157. See also *Williams v. Webb*, 2 Dowl. N. S. 904, 5 Scott N. R. 898.

An attorney at law is not privileged from arrest while remaining at his home, although such arrest prevents his contemplated attendance at court. *Corey v. Russell*, 4 Wend. (N. Y.) 204.

Attorney for Bail. — In *Jones v. Marshall*, 2 C. B. N. S. 615, 89 E. C. L. 615, 26 L. J. C. Pl. 229, it was held that an attorney who attended on the occasion when his client became bail for a defendant in an action in the lord mayor's court, and who acted there only as the attorney and adviser of such bail, and not as the attorney and adviser for either of the parties to the cause, was not privileged from arrest in going to or returning from the court on such occasions.

2. *Burton v. Temple*, (Supm. Ct.) 1 How. Pr. (N. Y.) 8.

3. *Freeholder Exempt from Arrest* — *Pennsylvania*. — *Pepp. & L. Dig. Laws Pa.* (1894) 3582, § 53; *Penman v. Wayne*, 1 Dall. (Pa.) 241; *Barnard v. Field*, 1 Dall. (Pa.) 348; *Fidler v. La Breure*, 1 S. & R. (Pa.) 362; *Lynd v. Biggs*, 1 Clark (Pa.) 18, 1 Pa. L. J. 47; *Jacobs v. Bety*, 2 W. N. C. (Pa.) 127; *Buckman v. Jones*, 3 W. N. C. (Pa.) 302; *Ingersoll v. Campbell*, 10 W. N. C. (Pa.) 553; *Henry v. Flanagan*, 1 Kulp (Pa.) 152. See also in *New Jersey* *Faulkner v. Whitaker*, 15 N. J. L. 438.

The freehold must be clear of incumbrance, *Hill v. Ramsey*, 2 Miles (Pa.) 342; *Tesone v. Longo*, 18 W. N. C. (Pa.) 64; *Logan v. O'Neill*, 34 W. N. C. (Pa.) 281; *Unangst v. Fitzgerald*, 1 Northam. Co. Rep. (Pa.) 132.

A freeholder whose freehold exceeds in value the amount prescribed by the statute is privileged although the value of the freehold is less than the amount of the plaintiff's demand. *Fidler v. La Breure*, 1 S. & R. (Pa.) 363.

A freeholder who neglects upon notice to put in special bail may be arrested under the statute. *Jack v. Shoemaker*, 3 Binn. (Pa.) 280.

A judgment before a justice is sufficient to defeat the privilege of a freeholder. *Quesnel v. Mussi*, 1 Dall. (Pa.) 436.

4. *Arrest of Infant*. — *Schunemann v. Paradise*, (Supm. Ct. Spec. T.) 46 How. Pr. (N. Y.) 426. See *Lane v. Gover*, 1 Har. & M. (Md.) 459.

In *Taylor v. Van Keuren* (Supm. Ct. Spec. T.) 54 How. Pr. (N. Y.) 25, it was held that an infant who makes false statements as to his property when buying goods other than necessities cannot be made liable to arrest by bringing the action in fraud.

5. Code Civ. Pro. N. Y., § 554. See also *Taylor v. Van Keuren*, (Supm. Ct. Spec. T.) 54 How. Pr. (N. Y.) 25.

In *Massachusetts* an infant cannot be arrested for debt. *Cassier's Case*, 139 Mass. 458.

As to the *Quebec Law*, see *Morgan v. Le Boutillier*, 5 Quebec 212; *Browning v. Yule*, 12 L. C. Rep. 292.

Persons over Seventy are in *Quebec* entitled to an exemption from arrest in certain cases. *Ouimet v. Meunier*, 3 Quebec Super. Ct. 43.

6. *Nutt v. Verney*, 4 T. R. 121; *Steel v. Alan*, 2 B. & P. 362; *Ex p. Leighton*, 14 Mass. 207.

7. *Kernot v. Norman*, 2 T. R. 390; *Ibbotson v. Galway*, 6 T. R. 133.

8. *Statutes Authorizing Discharge of Insane Persons from Arrest*. — See Pub. Stat. Mass. (1882), c. 162, §§ 56, 57; How. Annot. Stat. Mich. (1882), § 1910; *Bush v. Pettibone*, 4 N. Y. 300, affirming 5 Barb. (N. Y.) 273.

9. Code Civ. Pro. N. Y., § 554.

A Married Woman might be imprisoned, either with or without her husband, upon an execution against both,¹ but she could not be held in custody upon mesne process.²

Discharge on Motion. — Under the later practice it was the custom of the courts in the exercise of a sound discretion to discharge upon motion a married woman taken into custody upon an execution against herself and her husband, where it appeared that she had no separate estate.³ But such discharge would not be granted where the wife had a separate estate,⁴ or where the judgment was obtained against her alone.⁵

Statutes Exempting Females from Arrest. — In a number of states statutes exempting females from arrest in certain cases have been enacted.⁶ Thus it is provided in some states that no female shall be arrested in any action founded on contract⁷ or for any debt contracted by her.⁸ In other jurisdictions no female can be arrested except for injuries to person, character, or property.⁹ An

1. **Imprisonment of Married Woman upon Execution Against Husband and Wife.** — *Pitts v. Meller*, 2 Stra. 1167; *Finch v. Duddin*, 2 Stra. 1237; *Newton v. Rowe*, 9 Q. B. 948, 58 E. C. L. 948; *Langstaff v. Rain*, 1 Wils. C. Pl. 149; *Anonymous*, 3 Wils. C. Pl. 124; *Scott v. Morley*, 20 Q. B. D. 120; *Hall v. White*, 27 Conn. 488; *Com. v. Badiam*, 9 Pick. (Mass.) 362; *Kimball v. Molony*, 3 N. H. 376; *M'Kinstry v. Davis*, 3 Cow. (N. Y.) 339, 15 Am. Dec. 269. See also the title HUSBAND AND WIFE, vol. 15, pp. 893, 899.

2. **Married Woman Not Liable to Arrest on Mesne Process.** — *Roberts v. Andrews*, 2 W. Bl. 720; *Anonymous*, 3 Wils. C. Pl. 124; *Cornish v. Marks*, 6 Mod. 17. See also *Pearson v. Meadon*, 2 W. Bl. 903; *Edwards v. Rourke*, 1 T. R. 486; *Anonymous*, Cro. Jac. 445.

Bail cannot be required of a *feme covert* in a civil action. *Henry v. Cornelius*, 1 Cranch (C. C.) 37.

Wife Living Apart from Her Husband. — A married woman is not liable to arrest for torts committed by her, even though living apart from her husband and carrying on business for herself. *Com. v. Prison Keeper*, 2 Pa. Co. Ct. 310.

3. **Married Woman Taken in Execution Discharged on Motion.** — *Edwards v. Martyn*, 17 Q. B. 693, 79 E. C. L. 693; *Beynon v. Jones*, 15 M. & W. 566. See *Chalk v. Deacon*, 6 Moo. 128, 17 E. C. L. 21; *Larkin v. Marshall*, 4 Exch. 804.

In Connecticut the practice of discharging married women on motion has not been recognized. *Hall v. White*, 27 Conn. 488.

4. *Sparkes v. Bell*, 8 B. & C. 1 15 E. C. L. 143. See also *Evans v. Chester*, 2 M. & W. 847.

5. **No Discharge Where Judgment Is Against Wife Alone.** — *Cooper v. Hunchin*, 4 East 521; *Beynon v. Jones*, 15 M. & W. 566. See also *Larkin v. Marshall*, 4 Exch. 804.

6. **Females Privileged by Statute.** — Consult the statutes of the several states. See also *Hatheway v. Jones*, 20 Ark. 109.

A statute which exempts females from arrest under a ca. sa. does not exempt them from arrest under a bail writ. *Desprang v. Davis*, 3 McCord L. (S. Car.) 16.

Action to Recover Penalty. — If a penalty for an infringement of a liquor law is recoverable by an action of debt, such action is in the nature of a civil action, and not a criminal prosecu-

tion; and a *capias* on a judgment therein cannot, under a statute prohibiting the arrest of females, issue against a female defendant in such proceedings. *Strickland v. Bartow*, 27 Mich. 68.

Contempt for Nonpayment of Costs. — A statute which enacts that it shall not be lawful to arrest the person of any female by virtue of any mesne process or process by execution in any civil action does not apply to proceedings for contempt, and an attachment for contempt in failing to pay costs in certiorari brought unsuccessfully by a woman to review the laying out of a highway may be issued. *Clark v. Grant*, 38 N. J. L. 257.

7. *Ohio.* — *Bates's Annot. Stat.* (1897), § 5457, subdiv. 5. See also *O'Boyle v. Brown*, Wright (Ohio) 465.

Vermont. — *Stat.* (1894), § 1725; *Adams v. Whitcomb*, 46 Vt. 708.

8. *Blight v. Meeker*, 7 N. J. L. 97; *Nagley's Accounts*, 1 Ashm. (Pa.) 373; *Kirkendall v. Stevens*, 4 Kulp (Pa.) 473; *Kent Iron, etc., Co. v. Pearson*, 3 Pa. Co. Ct. 349; *Com. v. Keeper*, 9 W. N. C. (Pa.) 314; *Com. v. Keeper*, 11 W. N. C. (Pa.) 341.

Where a statute prohibits the arrest of women in civil suits for debt, it seems that a woman acting *en autre droit* as tutrix, curatrix, and perhaps executrix may be arrested. *Mondelli v. Russell*, 17 La. 537.

9. **New York.** — *Code Civ. Pro.*, § 553. See *Duncan v. Katen*, 6 Hun (N. Y.) 1. Under this statute a woman cannot be arrested in an action for debt on the ground of fraud in contracting it, *Wheeler v. Hartwell*, 4 Bosw. (N. Y.) 684; nor in an action for breach of promise to marry, *Siefke v. Tappey*, (C. Pl.) 3 Code Rep. (N. Y.) 23.

Married Women — New York. — Notwithstanding the New York statute authorizing the arrest of a female for wilful injury to person, character, or property, the exemption from arrest of a married woman remains as at common law. *Anonymous*, 1 Duer (N. Y.) 613, 8 How. Pr. (N. Y.) 134; *Baldwin v. Kimmel*, (N. Y. Super. Ct. Gen. T.) 16 Abb. Pr. (N. Y.) 353, 1 Robt. (N. Y.) 109; *Schaus v. Putscher*, (N. Y. Super. Ct. Spec. T.) 16 Abb. Pr. (N. Y.) 353, note, 25 How. Pr. (N. Y.) 463. See also *Neville v. Neville*, (Supm. Ct. Spec. T.) 22 How. Pr. (N. Y.) 500; *Robinson v. Rivers*, (C. Pl. Spec. T.) 9 Abb. Pr. N. S. (N. Y.) 144.

Married Woman Held Not Liable to Arrest for
Volume XVI.

injury to property within the meaning of such a statute includes not merely an injury to the thing itself, but also an injury to the property of the owner therein.¹

i. DEBTOR BROUGHT INTO JURISDICTION BY FRAUD. — A debtor who has been brought into the jurisdiction from another state by means of false pretenses, for the purpose of being sued by his creditor, and has been arrested in such suit, is entitled to be discharged, this being a fraud upon the debtor of which the creditor will not be permitted to take advantage.²

2. Extension of Privilege to Codefendant. — It has been held that the exemption from arrest of one of two co-obligors on a joint and several obligation does not extend to the other in an action on the obligation against him.³ But it seems that if a man enters into a contract with two persons one of whom he knows is privileged, he thereby extends the exemption to the other.⁴ It is held, however, that if a person privileged is sued jointly with one not privileged, the privilege is lost.⁵

3. Waiver of Exemption — *a. GENERALLY.* — The exemption from arrest is a personal privilege which may be waived.⁶ The cases so holding are those in which the person privileged was a private person, by whose arrest and imprisonment no interference with public business would have been caused. It would seem that where the exemption exists by reason of the party's official position or duty to the public, the privilege is attached to the office and is not a personal privilege, and therefore cannot be waived. And it has been so declared with reference to representatives of foreign governments.⁷

b. WHAT CONSTITUTES WAIVER — *Proceeding with Case.* — Where a person privileged from arrest, upon being arrested, fails to claim his privilege, and proceeds to take steps in the defense of the case, this ordinarily constitutes a waiver.⁸

Costs. — *Hovey v. Starr*, 42 Barb. (N. Y.) 435; *Maloy v. Dagnal*, 1 Thomp. & C. (N. Y.) 10, addenda.

Arrest of Husband for Wife's Torts Allowed. — *Soloman v. Waas*, 2 Hilt. (N. Y.) 179. Compare the earlier case, *Anonymous*, 1 Duer (N. Y.) 613, 8 How. Pr. (N. Y.) 134.

1. Injury to Property Includes Injury to Owner's Right. — *Duncan v. Katen*, 6 Hun (N. Y.) 1, affirmed 64 N. Y. 625; *Egypt v. Bolenius*, (Supm. Ct. Spec. T.) 2 Abb. N. Cas. (N. Y.) 193; *Muser v. Miller*, (N. Y. Super. Ct. Spec. T.) 3 Civ. Pro. (N. Y.) 388, 12 Abb. N. Cas. (N. Y.) 305, note; *People v. Davidson*, (Supm. Ct. Spec. T.) 3 Civ. Pro. (N. Y.) 389, note. See also *Northern R. Co. v. Carpentier*, (Supm. Ct. Spec. T.) 3 Abb. Pr. (N. Y.) 259, 4 Abb. Pr. (N. Y.) 47, 13 How. Pr. (N. Y.) 222.

Thus, under a statute authorizing the arrest of a female in an action for damages for a wilful injury to property, a warrant of arrest may issue against a female defendant who has induced another to deliver to her the property of a third person, and has converted it. *Duncan v. Katen*, 6 Hun (N. Y.) 1, affirmed 64 N. Y. 625. So a woman who has borrowed money on worthless security falsely represented to be good may be arrested. *Egypt v. Bolenius*, (Supm. Ct. Spec. T.) 2 Abb. N. Cas. (N. Y.) 193. Compare *Tracy v. Leland*, 2 Sandf. (N. Y.) 723, 3 Code Rep. (N. Y.) 47.

A female may be arrested in an action to recover possession of personal property where the property is concealed, removed, or disposed of so that it cannot be found or taken by the sheriff. *Starr v. Kent*, (C. Pl.) 2 Code Rep. (N. Y.) 30.

2. Debtor Brought into State by Fraud. — *Hill v. Goodrich*, 32 Conn. 588; *Wanzer v. Bright*, 52 Ill. 35; *Smith v. Meyers*, 1 Thomp. & C. (N. Y.) 665; *Goupil v. Simonson*, (Supm. Ct. Spec. T.) 3 Abb. Pr. (N. Y.) 474; *Steele v. Bates*, 2 Aik. (Vt.) 338, 16 Am. Dec. 720. See also *Higgins v. Dewey*, (C. Pl. Gen. T.) 27 Abb. N. Cas. (N. Y.) 81.

3. Gibbes v. Mitchell, 2 Bay (S. Car.) 406.

4. Faulkner v. Whitaker, 15 N. J. L. 438.

5. Broadwaite v. Blackerby, 12 Mod 163; *Fife v. Keating*, 2 Browne (Pa.) 135; *Beale v. Hoag*, 16 Phila. (Pa.) 73, 40 Leg. Int. (Pa.) 170, 13 W. N. C. (Pa.) 193, overruling *Buckman v. Jones*, 3 W. N. C. (Pa.) 302, and *McGuigan v. McCarthy*, 6 W. N. C. (Pa.) 253.

6. Privilege from Arrest May Be Waived. — *Chase v. Fish*, 16 Me. 132; *Woods v. Davis*, 34 N. H. 328; *Hees v. Morgan*, 3 Johns. Cas. (N. Y.) 84; *Leal v. Wigram*, 12 Johns. (N. Y.) 28; *Cole v. McClellan*, 4 Hill (N. Y.) 59; *Pettie v. Fitzgerald*, 1 Daly (N. Y.) 401. See also *Smith v. Jones*, 76 Me. 138, 49 Am. Rep. 598; *Biower v. Tatrow*, 115 Mich. 368.

A party attending court may avail himself of the protection from arrest which the law affords; but if he submits he cannot afterwards object to the imprisonment as unlawful. *Brown v. Getchell*, 11 Mass. 11.

7. No Waiver Where Privilege Is Due to Official Position. — *Barbuit's Case*, Cas. 1 Talb. 281.

8. Privilege Waived by Taking Steps in Case. — *Stewart v. Howard*, 15 Barb. (N. Y.) 26; *Green v. Bonaffon*, 2 Miles (Pa.) 219.

A plea in bar constitutes a waiver. *Randall v. Crandall*, 6 Hill (N. Y.) 342.

A motion to reduce bail is not a waiver.

Giving Bail. — There is some conflict in the decisions as to whether by submitting to arrest and giving bail a party privileged from arrest waives his privilege. According to the weight of authority this does not constitute a waiver.¹

Laches in Claiming Privilege. — Laches on the part of the person privileged in claiming his privilege constitutes a waiver thereof.²

4. Action for False Imprisonment for Arrest of Person Privileged. — At common law an action for false imprisonment does not lie for the arrest on legal process of a person at the time privileged from arrest.³

VIII. WHO MAY EXERCISE RIGHT OF ARREST — General Rule. — From the various statutes authorizing the arrest of the defendant in a civil action in certain cases the general rule follows by necessary implication that the right of arrest exists in favor of the plaintiff in any case coming within the provisions of the statutes. This rule is subject to the operation of certain principles now to be considered.

Plaintiff Must Have Present Right to Bring Action. — In order to entitle the plaintiff in an action to have the defendant arrested it must not only appear that he holds a valid claim against the defendant in a case in which the defendant might be arrested, but he must also have the right to commence a suit thereon.⁴

Right of Action Must Exist in Favor of Plaintiff and Not of Third Person. — The plaintiff cannot have the defendant arrested where it appears that the wrong complained of and constituting the ground of arrest was committed not upon the plaintiff, but upon some third person. In such case the right of arrest exists in favor of such third person alone.⁵ It is otherwise, however, if the claim has been assigned to the plaintiff.⁶

Nonresidents. — In the absence of a statute providing otherwise it seems that the right to arrest a defendant in a proper case is not affected by the fact that the plaintiff is a nonresident of the state.⁷

Partners. — It has been held that a partner cannot have his copartner arrested, this being forbidden by the very nature of the partnership.⁸

IX. WAIVER OF RIGHT OF ARREST. — The plaintiff may waive his right to

Dobson v. Fitzpatrick, 2 W. N. C. (Pa.) 186. Nor is the privilege waived by a voluntary appearance for the purpose of making a deposition. *Stone v. Sommerick*, 2 Pa. Co. Ct. 309.

1. Privilege Not Waived by Giving Bail. — *Larned v. Griffin*, 12 Fed. Rep. 590; *Farmer v. Robbins*, (Supm. Ct. Spec. T.) 47 How. Pr. (N. Y.) 415; *Mackay v. Lewis*, 7 Hun (N. Y.) 83; *U. S. v. Edme*, 9 S. & R. (Pa.) 147; *Washburn v. Phelps*, 24 Vt. 506. Compare *Stewart v. Howard*, 15 Barb. (N. Y.) 26; *Petrie v. Fitzgerald*, 1 Daly (N. Y.) 401; *Fletcher v. Baxter*, 2 Aik. (Vt.) 224.

A privilege from arrest is waived by giving a prison-bonds bond. *Tipton v. Harris*, Peck (Tenn.) 414.

2. Laches. — *Wilson v. Nettleton*, 12 Ill. 61; *Cable v. Cooper*, 15 Johns. (N. Y.) 152; *Farmer v. Robbins*, (Supm. Ct. Spec. T.) 47 How. Pr. (N. Y.) 415; *Wood v. Kinsman*, 5 Vt. 588; *Prentiss v. Com.*, 5 Rand. (Va.) 697, 15 Am. Dec. 782.

The Mere Silence of an elector at the time of his arrest is not a waiver of his constitutional privilege. *Swift v. Chamberlain*, 3 Conn. 537.

3. Cameron v. Lightfoot, 2 W. Bl. 1190; *Magnay v. Burt*, 5 Q. B. 381, 48 E. C. L. 381;

Woods v. Davis, 34 N. H. 328. See the title FALSE IMPRISONMENT, vol. 12, p. 744.

4. Batchelder v. Batchelder, 66 N. H. 31. See also *Gay v. Dénard*, 3 Montreal Super. Ct. 125; *Phillips v. Kun*, 2 Quebec Super. Ct. 444; *Dumaine v. Guillemot*, 6 L. C. Rep. 477; *Allen v. Allen*, 6 L. C. Rep. 478. These cases deny the sufficiency of an affidavit for a *capias* founded on a claim of personal indebtedness where the claim is contingent or not reduced to certainty.

5. Where Wrong Is Committed Against Third Person. — *Dunbar v. Hughes*, 6 La. Ann. 466; *Hart v. Grant*, 8 S. Dak. 248.

6. Right of Assignee to Arrest. — *King v. Kirby*, 28 Barb. (N. Y.) 49. See also *Winning v. Fraser*, 13 L. C. Jur. 167; *Quinn v. Atcheson*, 4 L. C. Rep. 378; *Laidlaw v. Burns*, 16 L. C. Rep. 318.

7. Burrows v. Dumphy, 2 Harr. (Del.) 308.

In Louisiana it was provided by the Act of March 28, 1840, § 9, that no citizen of another state should be arrested in Louisiana at the suit of a nonresident creditor except where the debtor had absconded from his residence. See *Broadnax v. Thompson*, 1 La. Ann. 382; *Conrey v. Elbert*, 2 La. Ann. 18.

8. Smith v. Small, 54 Barb. (N. Y.) 223. See also *Soule v. Hayward*, 1 Cal. 345.

arrest the defendant either expressly¹ or by his conduct,² as by entering into a settlement with the defendant.³ Thus where a defendant has been guilty of fraud in contracting a debt so that he would be liable to arrest in an action for its recovery, but the plaintiff, with full knowledge of the fraud, settles the debt by taking the defendant's note therefor or by entering into any other new contract free from fraud, the defendant is not liable to arrest in an action on the new contract on account of the original fraud.⁴ But the acceptance by a creditor of worthless notes or bills in payment of a debt fraudulently contracted is not a waiver of the right to arrest the debtor in an action on the debt where such acceptance was brought about by means of false representations on the part of the debtor.⁵ Nor is the right to arrest a debtor affected by the acceptance by the creditor of security for the debt.⁶

Joinder of Causes of Action. — The arrest of a defendant must be on account of the plaintiff's entire cause of action, and not on account of a portion of it; and if the plaintiff joins a cause of action in which the arrest of the defendant is authorized with one in which the defendant is not liable to arrest, or embraces in his action demands in which he is not entitled to the defendant's arrest with those in which he is entitled to arrest the defendant, he will be deemed to have waived his right of arrest, and the defendant cannot be arrested on mesne or final process in the action as brought.⁷

Waiver by Election. — Where the plaintiff may bring his action either in tort

1. Express Waiver. — *M'Nair v. Lane*, 2 Mo. 58.

The defendant cannot be taken in execution in an action on a note containing a stipulation exempting the maker from arrest. *Chickering v. Greenleaf*, 6 N. H. 51.

2. Waiver of Bail. — In *Pennsylvania*, if the plaintiff submits the cause to arbitration before special bail is entered, he thereby waives bail. *Moulson v. Rees*, 6 Binn. (Pa.) 32; *Phillips v. Oliver*, 5 S. & R. (Pa.) 419; *Nones v. Gelbaud*, 11 S. & R. (Pa.) 9; *Johnson v. M'Coy*, 1 Miles (Pa.) 89.

3. Right of Arrest Lost by Settlement. — *Nelson v. Blanchfield*, 54 Barb. (N. Y.) 630; *Fields v. Bland*, 81 N. Y. 239; *Trunninger v. Busch*, 7 Daly (N. Y.) 124; *Murphy v. Elder*, 4 W. N. C. (Pa.) 212.

The Receipt of Part Payment under an agreement to compromise a debt fraudulently contracted is not such a waiver of the fraud as will affect the right to arrest the debtor. *McDonough v. Dillingham*, 43 Hun (N. Y.) 493. See also *Lambertson v. Van Boskerck*, 4 Hun (N. Y.) 628.

4. Waiver by Entering into New Contract. — *Merchants' Bank v. Dwight*, 6 Duer (N. Y.) 659, 13 How. Pr. (N. Y.) 366; *Alliance Ins. Co. v. Cleveland*, (Supm. Ct. Spec. T.) 14 How. Pr. (N. Y.) 408; *Fritts v. Slade*, 9 Hun (N. Y.) 145; *Martin v. Lynch*, (C. Pl. Spec. T.) 14 Misc. (N. Y.) 47; *Person v. Civer*, (Supm. Ct. Gen. T.) 29 How. Pr. (N. Y.) 432.

5. Right to Arrest Not Waived by Acceptance of Worthless Paper in Payment. — *Murphy v. Fernandez*, 10 Bosw. (N. Y.) 665; *Spence v. Baldwin*, (Supm. Ct. Spec. T.) 59 How. Pr. (N. Y.) 375.

6. Acceptance of Security. — *Dubois v. Thompson*, 1 Daly (N. Y.) 309, 25 How. Pr. (N. Y.) 417.

7. Right of Arrest Waived by Improper Joinder of Causes of Action. — *New York*. — *Brown v. Ashbough*, (Supm. Ct. Spec. T.) 40 How. Pr. (N. Y.) 226; *Pain v. Vilmar*, (Supm. Ct.) 52

How. Pr. (N. Y.) 238; *Lambert v. Snow*, (C. Pl. Gen. T.) 9 Abb. Pr. (N. Y.) 91, 2 Hilt. (N. Y.) 501, 17 How. Pr. (N. Y.) 517; *Molenaer v. Koerner*, (Supm. Ct. Spec. T.) 13 Abb. Pr. (N. Y.) 241; *Goodale v. Finn*, 4 Thomp. & C. (N. Y.) 432, note, 2 Hun (N. Y.) 151; *Toffey v. Williams*, 5 Thomp. & C. (N. Y.) 294, 3 Hun (N. Y.) 217; *Mason v. Lambert*, 3 Daly (N. Y.) 250; *McGovern v. Payn*, 32 Barb. (N. Y.) 83; *Miller v. Scherder*, 2 N. Y. 262; *Bowen v. True*, 53 N. Y. 640; *Madge v. Puig*, 71 N. Y. 608; *American Union Tel. Co. v. Middleton*, 80 N. Y. 408; *Sherwood v. Pierce*, 50 N. Y. Super. Ct. 378; *Easton v. Cassidy*, 21 Hun (N. Y.) 459; *Knight v. Abell*, 48 Hun (N. Y.) 605; *McDonald v. Convis*, (Supm. Ct. Gen. T.) 13 N. Y. Supp. 82; *In re Short*, (Supm. Ct. App. Div.) 54 N. Y. Supp. 1075. See also *Redfield v. Frear*, (Supm. Ct. Spec. T.) 9 Abb. Pr. N. S. (N. Y.) 449; *Tracy v. Veeder*, (Supm. Ct. Gen. T.) 35 How. Pr. (N. Y.) 209; *Bassett v. Pitts*, 15 Hun (N. Y.) 464; *Smith v. Knapp*, 30 N. Y. 587.

South Dakota. — *Hormann v. Sherin*, 8 S. Dak. 36, 59 Am. St. Rep. 744.

Vermont. — *Witt v. Marsh*, 14 Vt. 303; *Williams, etc., Fertilizer Co. v. Rudd*, 68 Vt. 607.

Thus in an action on a judgment upon two claims, one for money due upon a sale and the other for a loan, the defendant is not liable to arrest upon an affidavit merely averring fraud in relation to the sale and not as to the loan. *Goodale v. Finn*, 4 Thomp. & C. (N. Y.) 432, 2 Hun (N. Y.) 151.

Rule Qualified. — Ordinarily an execution against the person will not issue upon a judgment in an action in which several causes of action are combined, if either of such causes is one upon a judgment on which an execution could not issue; but this rule does not apply where it appears from the verdict that the judgment was rendered only upon a cause of action which would support a judgment upon which an execution might issue. *Hormann v. Sherin*, 8 S. Dak. 36, 59 Am. St. Rep. 744.

or on contract, by electing to sue in contract he waives any right he might have had to imprison the defendant in an action for the tort.¹

X. EXECUTION AGAINST THE PERSON — 1. Generally — Grounds for Execution. — Except in cases where the king was plaintiff,² an execution against the body, *capias ad satisfaciendum*, lay at the common law only in actions of trespass *vi et armis*.³ But a series of statutes, beginning at an early period, gave the right of arrest on mesne process in a variety of actions,⁴ and the effect of this was to permit execution against the person in all such cases, for it was a doctrine of the common law that wherever a *capias* lies in process before judgment, it will lie in execution upon the judgment itself.⁵

Under Modern Practice the right to issue an execution against the body of a judgment debtor is dependent entirely upon statutes expressly authorizing executions against the body or authorizing arrest on mesne process.

Grounds for Execution. — As at common law, the general rule deducible from the decided cases and the various statutory provisions on the subject is that the body of a defendant may be taken in execution upon a judgment against him in all cases in which he might have been arrested before judgment and in no other.

Actions of Tort. — Thus executions against the body may issue in actions of tort,⁶ such as actions for injuries to property⁷ or person, as trover,⁸ ejectment,⁹ unlawful detainer,¹⁰ replevin,¹¹ for assault and battery,¹² or for seduction.¹³

1. *Goodwin v. Griffin*, 88 N. Y. 629. See *supra*, this title, *Right of Arrest as Determined by Nature of Action — Election of Remedies*.

2. "At common law, where the king was plaintiff in any action, whether for debt or damages, he had execution against the defendant, both for body, lands, and goods." 3 Salk. 286. And see Harbert's Case, 3 Coke 12; Bac. Abr., tit. Execution, C 3.

3. Harbert's Case, 3 Coke 12; Co. Litt. 290b; Hob. 56; Tidd's Pr. (3d Am. ed.) 994. But see Bac. Abr., tit. Execution, C 3.

4. "At common law the defendant was not liable to be arrested, upon mesne process, for civil injuries unaccompanied with force. This immunity of the defendant's person, in case of peaceable though fraudulent injuries, producing great contempt of the law in indigent wrongdoers, a *capias* was allowed to arrest the person in actions of account, though no breach of the peace was suggested, by the statutes of Marlbridge (52 Hen. III.), c. 23, and Westminster 2 (13 Ed. I.), c. 11, in actions of debt and detinue by statute 25 Edw. III., stat. 5, c. 17, and in all actions on the case by statute 19 Hen. VII., c. 9." Tidd's Pr. (3d Am. ed.) 128. See also 3 Black. Com. 281; Harbert's Case, 3 Coke 12; 3 Salk. 286; Bac. Abr., tit. Execution, C 3.

5. 3 Salk. 286; Harbert's Case, 3 Coke 12; Bac. Abr., tit. Execution, C 3; Tidd's Pr. (3d Am. ed.) 1025; U. S. v. Griswold, 6 Sawy. (U. S.) 255.

Coercive Imprisonment (*contrainte par corps*) is a mode of executing judgments under the laws of Quebec, and is not to be confounded with imprisonment for contempt of court. *Côté v. Vermette*, 9 Quebec 340. As to when it lies, see Code Civ. Pro. Quebec (1897), § 833.

6. **In Actions of Tort.** — *Sawyer v. Nelson*, 44 Ill. App. 184; *Hunt v. Burdick*, 42 Vt. 610.

A judgment in an action in case in the nature of a conspiracy may be enforced by a writ of *ca. sa.* *Kalbfus v. Rundell*, 134 Pa. St. 102.

7. **Injury to Property.** — *Niver v. Niver*, 43 Barb. (N. Y.) 411.

The defendant may be taken in execution upon a judgment for trespass to land, *People v. Fargo*, 4 N. Y. App. Div. 544; or for an injury to personal property, *Keeler v. Clark*, (Supm. Ct. Spec. T.) 18 Abb. Pr. (N. Y.) 154.

8. **Trover and Conversion.** — *Eames v. Stevens*, 26 N. H. 117; *Richmeyer v. Remsen*, 38 N. Y. 206; *Lembke's Case*, (Supm. Ct. Spec. T.) 11 Abb. Pr. N. S. (N. Y.) 72; *Hormann v. Sherin*, 8 S. Dak. 36, 59 Am. St. Rep. 744; *Matter of Mowry*, 12 Wis. 52.

9. **Ejectment.** — *Howland v. Needham*, 10 Wis. 495. Compare *Fullerton v. Fitzgerald*, 18 Barb. (N. Y.) 441.

A judgment for mesne profits recovered in an action of ejectment may be enforced by a *ca. sa.* *Hopkinson v. Cooper*, 8 Phila. (Pa.) 8; *Com. v. Bowman*, 3 Pa. Dist. 74. So also a judgment for costs. *Lane v. Gover*, 1 Har. & M. (Md.) 459; *Seldon v. Cozad*, 13 Pa. Co. Ct. 303.

10. *Toal v. Clapp*, 64 Wis. 223.

11. **Replevin.** — Imprisonment on an execution in replevin is not imprisonment for debt, and is not unlawful when authorized by common law or by statute; but a *capias ad satisfaciendum* on a judgment in replevin, not being authorized by common law, cannot be issued in the absence of a statute so providing. *Fuller v. Bowker*, 11 Mich. 204. And see *Purchase v. Bellows*, (N. Y. Super. Ct. Spec. T.) 23 How. Pr. (N. Y.) 421.

In *Wisconsin*, where a defendant who has prevailed in an action of replevin elects to take judgment for damages instead of for a return of the property replevied, he cannot enforce such judgment by an execution against the body of the plaintiff. *Pomeroy v. Crocker*, 3 Pin. (Wis.) 378, 4 Chand. (Wis.) 174.

A *ca. sa.* may issue on a replevin bond. *Scott v. Maupin*, Hard. (Ky.) 129.

12. *Dougherty v. Gardner*, (Supm. Ct. Spec. T.) 58 How. Pr. (N. Y.) 284.

13. *Kinney v. Laughenour*, 97 N. Car. 325.

In Cases of Fraud. — So also an execution against the body may issue where the defendant has been guilty of fraud in contracting the debt sued on¹ or in attempting to avoid its payment,² or of fraud in a fiduciary capacity,³ or of neglect in a professional employment.⁴

Where Defendant Could Not Have Been Arrested Before Judgment. — An execution cannot issue against a judgment debtor in a cause of action in which the defendant could not have been arrested on mesne process.⁵

Execution for Costs. — An execution to enforce the payment of costs may ordinarily issue against the person of the party in a civil action against whom judgment for costs has been rendered, in actions in which the defendant might have been arrested before judgment.⁶

2. Effect of Execution — Execution as Satisfaction of Judgment. — The rule is laid down in some of the cases that at common law the taking of the body of a defendant in execution amounts to a satisfaction of the judgment.⁷ According to the weight of authority, however, imprisonment on a body execution does not absolutely extinguish the judgment, but operates as a satisfaction thereof so long as the imprisonment continues, and suspends for the time being all other remedies of the creditor against the debtor. While it continues the creditor cannot have any other or different satisfaction for the same debt.⁸

1. Fraud in Contracting Debt. — *Stewart v. Levy*, 36 Cal. 159; *Macaig's Case*, 137 Mass. 467; *May v. Hammond*, 146 Mass. 439; *Barker v. Russell*, 11 Barb. (N. Y.) 303.

2. Fraud in Avoiding Payment. — *Frost's Case*, 127 Mass. 550; *Ex p. Clark*, 20 N. J. L. 648, 45 Am. Dec. 394. See also *Wallace v. Pratt*, 4 Mackey (D. C.) 259.

Concealment or Detention of Property. — A judgment debtor may be taken in execution for fraud in concealing, detaining, or disposing of his property in order to defeat the debt. *Brown v. Walk*, 8 Ired. L. (30 N. Car.) 517; *Keene's Petition*, 15 R. I. 294.

Fraud in Avoiding the Payment of a Judgment Debt is a sufficient ground for an execution against the person of the judgment debtor. *Baker v. State*, 109 Ind. 47.

3. Roeber v. Dawson, (N. Y. City Ct. Gen. T.) 22 Abb. N. Cas. (N. Y.) 73.

4. Wills v. Kane, 2 Grant Cas. (Pa.) 60.

5. Gottlieb v. Glazier, (Supm. Ct. App. T.) 54 N. Y. Supp. 1020. See *Green v. Morse*, 5 Me. 291; *Fullerton v. Fitzgerald*, 18 Barb. (N. Y.) 441.

Judgment on Note. — Imprisonment for debt being prohibited by the constitution, the defendant cannot be arrested upon a judgment on a note. *Stewart v. Bryan*, 121 N. Car. 46, *distinguishing* *Peebles v. Foote*, 83 N. Car. 102.

6. See *supra*, this title, *Grounds of Arrest and Imprisonment — Arrest and Imprisonment in Certain Cases Considered — For Nonpayment of Costs*.

7. Execution Against Person Satisfies Debt. — *Foster v. Jackson*, Hob. 52; *Ex p. Knowell*, 13 Ves. Jr. 192; *Cohen v. Cunningham*, 8 T. R. 123; *Hustick v. Allen*, 1 N. J. L. 195; *Cooper v. Bigalow*, 1 Cow. (N. Y.) 56. See also *Snead v. M'Coull*, 12 How. (U. S.) 407; *Howe v. Buffalo*, etc., R. Co., 38 Barb. (N. Y.) 124.

8. Execution Against Body Not Satisfaction of Judgment. — *England* — *Blumfield's Case*, 5 Coke 87; *Peacock v. Jeffery*, 1 Taunt. 426; *Taylor v. Waters*, 5 M. & S. 103; *Thompson v. Parish*, 5 C. B. N. S. 685, 94 E. C. L. 685, 5 Jur. N. S. 986, 28 L. J. C. Pl. 153.

United States. — *Tayloe v. Thomson*, 5 Pet. (U. S.) 358.

Maine. — *Clement v. Garland*, 53 Me. 427.

Massachusetts. — *Kennedy v. Duncklee*, 1 Gray (Mass.) 65.

Missouri. — *Warrensburg v. Simpson*, 22 Mo. App. 695.

New Hampshire. — *Tappan v. Evans*, 11 N. H. 311. See also *Butler v. Washburn*, 25 N. H. 251; *Morrison v. Morrison*, 49 N. H. 69.

New York. — *Jackson v. Benedict*, 13 Johns. (N. Y.) 543; *Stilwell v. Van Epps*, 1 Paige (N. Y.) 615; *Osterhout v. Roberts*, 8 Cow. (N. Y.) 43; *Sunderland v. Loder*, 5 Wend. (N. Y.) 58; *Wakeman v. Lvon*, 9 Wend. (N. Y.) 241; *Fassett v. Tallmadge*, (Supm. Ct. Gen. T.) 15 Abb. Pr. (N. Y.) 205; *Koenig v. Steckel*, 58 N. Y. 475; *Flack v. State*, 95 N. Y. 461; *Ryle v. Falk*, 24 Hun (N. Y.) 255, *affirmed* 86 N. Y. 641; *Prusia v. Brown*, 45 Hun (N. Y.) 80; *Beloit Bank v. Beale*, 7 Bosw. (N. Y.) 611.

Ohio. — See *Douglas v. Wallace*, 11 Ohio 42; *Bowrell v. Zigler*, 19 Ohio 362.

Pennsylvania. — *Freeman v. Ruston*, 4 Dall. (Pa.) 214; *Sharpe v. Speckenagle*, 3 S. & R. (Pa.) 463.

South Carolina. — *Richbourn v. West*, 1 Hill L. (S. Car.) 309; *Saunders v. M'Cool*, 1 Strobb. L. (S. Car.) 22; *Mazyck v. Coil*, 3 Rich. L. (S. Car.) 235; *Schroter v. Crawford*, 3 Rich. L. (S. Car.) 241, note; *Hamilton v. Bredeman*, 12 Rich. L. (S. Car.) 464. See also *Brandon v. Gowing*, 6 Rich. Eq. (S. Car.) 5.

Vermont. — *Willard v. Lull*, 20 Vt. 373.

Virginia. — See *Leake v. Ferguson*, 2 Gratt. (Va.) 419.

See also *infra*, this title, *Discharge from Arrest and Imprisonment — Defendant Taken in Execution — With Consent of Plaintiff*.

Proceeding under Bankrupt Laws. — A creditor who has taken the body of his debtor in execution cannot proceed against him under the bankrupt laws. *Barnaby's Case*, 1 Stra. 653; *Ex p. Knowell*, 13 Ves. Jr. 192; *Beaty v. Beaty*, 2 Johns. Ch. (N. Y.) 430. See also *Ex p. Cundall*, 6 Ves. Jr. 446; *Ex p. Arundel*, 18 Ves. Jr. 231.

Set-off. — The taking of the body in execu-

Moreover, where the person of the judgment debtor is in custody in satisfaction of the judgment an action cannot be maintained by the creditor against one standing as surety for the debtor to enforce collateral securities for the payment of the debt.¹

Execution Against One of Several Defendants. — In case of a judgment against several defendants jointly, the taking of one defendant in execution does not affect the plaintiff's right to proceed against the others.² But the imprisonment of one of the defendants, so long as it continues, is a good defense to a joint action on the judgment against all the defendants.³

Death of Debtor in Custody. — By the early common law, if a debtor taken in execution on a ca. sa. died while in custody, the creditor was not entitled to any further satisfaction for the debt.⁴ This rule was later changed by a statute providing that in case of the death of the debtor while in custody the creditor might proceed against his property for the debt just as if the debtor had not been taken in execution.⁵

Effect of Execution on Judgment Lien. — According to the weight of authority the taking of a debtor in execution operates as a suspension of the lien of the judgment, and any rights in or liens upon the property of the debtor acquired by third persons, by judgment or otherwise, during the imprisonment take precedence over the judgment on which the ca. sa. was issued.⁶

XI. DISCHARGE FROM ARREST AND IMPRISONMENT — 1. Defendant Arrested on Mesne Process — a. GENERALLY — Unauthorized Arrest. — A defendant arrested on civil process in an action in which an arrest is unauthorized is obviously entitled to his discharge.⁷ So also where the defendant is privileged from arrest.⁸

Where Arrest Was Authorized. — Again, a defendant arrested in a civil action upon affidavits showing a case in which an arrest would be authorized will be

tion does not extinguish the debt, but it bars the remedy against the debtor, and in like manner precludes a set-off against him. *Taylor v. Waters*, 5 M. & S. 103. But see *Peacock v. Jeffery*, 1 Taunt. 426; *Simpson v. Hanley*, 1 M. & S. 696; *Utica Ins. Co. v. Power*, 3 Paige (N. Y.) 365.

Bill in Equity to Set Aside Fraudulent Conveyance. — A plaintiff in a judgment at law having his debtor in custody under a ca. sa. may file a bill in equity to have a previous conveyance by the debtor and a previous judgment confessed by him set aside for fraud. *Pettus v. Smith*, 4 Rich. Eq. (S. Car.) 197.

The Sureties on a Bond given to dissolve an attachment are not discharged by the commitment of the defendant on execution after their liability on the bond has attached. *Murray v. Shearer*, 7 Cush. (Mass.) 333; *Moore v. Loring*, 106 Mass. 455.

In Massachusetts a creditor does not, by committing his debtor, necessarily relinquish his claim on the attaching officer for the value of goods attached. *Twining v. Foot*, 5 Cush. (Mass.) 512. See also *Lyman v. Lyman*, 11 Mass. 317.

1. *Sunderland v. Loder*, 5 Wend. (N. Y.) 58; *Wakeman v. Lyon*, 9 Wend. (N. Y.) 241; *Koenig v. Steckel*, 58 N. Y. 475.

2. **Imprisonment of One of Several Defendants.** — *Sheldon v. Kibbe*, 3 Conn. 214, 8 Am. Dec. 176; *Scott v. Colmesnil*, 7 J. J. Marsh. (Ky.) 416; *Penn v. Remsen*, (Supm. Ct. Gen. T.) 24 How. Pr. (N. Y.) 503; *Leake v. Ferguson*, 2 Gratt. (Va.) 419.

3. *Chapman v. Hatt*, 11 Wend. (N. Y.) 41.

4. *Shaw v. Cutteris*, Cro. Eliz. 850; *Wil-*

liams v. Cutteris, Cro. Jac. 136, 143; *Foster v. Jackson*, Hob. 52.

5. 21 Jac. 1., c. 24.

6. **Effect on Liens.** — *Griswold v. Hill*, 2 Paine (U. S.) 492; *Snead v. M'Coull*, 12 How. (U. S.) 407; *Jackson v. Benedict*, 13 Johns. (N. Y.) 533; *Mairs v. Smith*, 3 McCord L. (S. Car.) 52; *Cohen v. Grier*, 4 McCord L. (S. Car.) 509; *Foreman v. Loyd*, 2 Leigh (Va.) 285, *overruling* *Jackson v. Heiskell*, 1 Leigh (Va.) 257; *Rogers v. Marshall*, 4 Leigh (Va.) 425. Compare *Owen v. Glover*, 2 Cranch (C. C.) 578; *Trustees of Poor v. Pratt*, 10 Md. 5; *Mazyck v. Coil*, 3 Rich. L. (S. Car.) 235.

Where several judgments are entered against a debtor on the same day, each operating as a lien on his land, and one of the creditors takes the body of the debtor on a ca. sa., he thereby postpones his lien to that of each of the other creditors, and the relative priority of the liens is not affected by the discharge of the debtor under the insolvency law. *Rockhill v. Hanna*, 15 How. (U. S.) 193.

On a Joint Judgment Against Several, the service of a ca. sa. upon one does not extinguish the lien of the judgment upon the land of the others. *Leake v. Ferguson*, 2 Gratt. (Va.) 419.

7. *Soule v. Hayward*, 1 Cal. 345.

Debt Not Discharged by Discharge of Debtor Illegally Arrested on Mesne Process. — *Jacobs v. Stevens*, 57 N. H. 610.

8. See *supra*, this title, *Privilege from Arrest*.

Where a defendant is arrested in two cases in only one of which he is privileged, he is not entitled to be entirely discharged from custody. *Crocker v. Duncan*, 6 Blackf. (Ind.) 278.

discharged where it appears that the allegations contained in such affidavits are not supported by the evidence,¹ and this although a valid cause for arrest in fact existed at the time when the arrest was made.² So also where the cause of action for which the defendant was arrested has been subsequently extinguished or modified so that a valid cause for arrest no longer exists.³

Confession of Judgment. — It has been held that a confession of judgment by a debtor imprisoned for debt does not authorize his discharge from imprisonment.⁴

Discharge on Account of Plaintiff's Laches. — At common law a defendant imprisoned in a civil action is not entitled to his discharge on account of the plaintiff's delay in filing his declaration.⁵ He is entitled to his discharge, however, where the plaintiff is nonsuited for failure to appear.⁶ Under statutes so providing a defendant is entitled to be discharged from arrest if the declaration be not filed or the trial of the cause begun within the period limited by the statute.⁷

b. EVIDENCE. — Where the affidavits presented by the plaintiff make out a *prima facie* case against the defendant of a cause of action authorizing an arrest, the court will not set aside an order of arrest except where the evidence adduced by the defendant is clearly preponderating; a mere denial by the defendant is not sufficient.⁸ But the order will be vacated where the preponderance of the evidence is in the defendant's favor.⁹

1. See *infra*, this section, *Evidence*.

2. **Discharge Where Ground of Arrest No Longer Exists.** — *California Wine Co. v. Murray*, 62 N. H. 597.

3. **Discharge Where Cause of Action Has Been Extinguished.** — *Southern Express Co. v. Lynch*, 65 Ga. 240; *Foxell v. Fletcher*, 11 Hun (N. Y.) 643; *Claffin v. Underwood*, 75 N. Car. 485.

A defendant arrested in an action for breach of promise to marry will be discharged upon an offer to marry the plaintiff which the plaintiff refuses. *Bonn v. Bloch*, (N. Y. City Ct. Gen. T.) 13 Civ. Pro. (N. Y.) 275.

Defendant in Custody under Ca. Sa. — Where a defendant in an action of debt was arrested and held to bail upon an affidavit charging fraud in concealment of property, and the allegation of fraud was denied in the answer, and by consent judgment was entered for the debt only, the issue of fraud not being tried, it was held that the defendant, being in custody under a ca. sa., was entitled to his discharge. *Claffin v. Underwood*, 75 N. Car. 485.

4. **Confession of Judgment.** — *Anderson v. Brinkley*, 1 La. Ann. 126; *State v. Civil Sheriff*, 31 La. Ann. 799; *State v. Judge*, 37 La. Ann. 385. See also *Martin v. Freed*, (Supm. Ct. Gen. T.) 21 N. Y. Supp. 302.

5. *Branson v. Shinn*, 9 N. J. L. 1; *Hind v. Thompson*, 2 Miles (Pa.) 345.

6. *Dunham v. Solomon*, 16 N. J. L. 50.

7. *Arnold v. Steeves*, 10 Wend. (N. Y.) 515; *Judson v. Jones*, 12 Wend. (N. Y.) 209; *Pope v. Hart*, 35 Barb. (N. Y.) 630, 23 How. Pr. (N. Y.) 215.

8. **Order of Arrest Vacated Only Where Defendant's Evidence Preponderates.** — *Phillips v. Benedict*, (Supm. Ct. Spec. T.) 20 How. Pr. (N. Y.) 265; *Faris v. Peck*, (N. Y. Super. Ct. Gen. T.) 40 How. Pr. (N. Y.) 484, 2 Sweeny (N. Y.) 689; *Blakelee v. Buchanan*, (Supm. Ct. Spec. T.) 44 How. Pr. (N. Y.) 97. See *Moers v. Moers*, (Supm. Ct. Gen. T.) 17 How. Pr. (N. Y.) 280, 8 Abb. Pr. (N. Y.) 257; *Brodsky v. Ihms*, (C. Pl. Gen. T.) 25 How. Pr. (N. Y.) 471; *Butler v. McIlvaine*, (N. Y. Super. Ct. Spec. T.) 31 How.

Pr. (N. Y.) 379; *Woodward Steam Pump Mfg. Co. v. Stokes*, (N. Y. Super. Ct. Spec. T.) 33 How. Pr. (N. Y.) 396; *Whitmore v. Van Steenberg*, 2 Thomp. & C. (N. Y.) 668; *Clews v. Raphael*, 4 Thomp. & C. (N. Y.) 664; *Sloane v. Livermore*, 14 Hun (N. Y.) 29; *Warshauer v. Webb*, (N. Y. City Ct. Gen. T.) 1 N. Y. St. Rep. 130.

A mere denial by the defendant of the plaintiff's allegations upon which an order of arrest was granted does not entitle him to a discharge without other evidence. *Chittenden v. Hubbell*, (Supm. Ct. Spec. T.) 6 Abb. Pr. (N. Y.) 319, note; *Anonymous*, (C. Pl. Spec. T.) 6 Abb. Pr. (N. Y.) 319, note; *Barron v. Sanford*, (Supm. Ct. Spec. T.) 6 Abb. Pr. (N. Y.) 320, note; *Bedell v. Sturta*, 1 Bosw. (N. Y.) 634. See also *Cousland v. Davis*, 4 Bosw. (N. Y.) 619; *Powers v. Davenport*, 101 N. Car. 286.

9. **Order Vacated Where Evidence in Favor of Defendant Preponderates.** — *Gardner v. O'Connell*, 5 La. Ann. 353; *Bonn v. Bloch*, (N. Y. City Ct. Gen. T.) 13 Civ. Pro. (N. Y.) 275. See *Torrey v. Waters*, (Supm. Ct. Gen. T.) 23 N. Y. Supp. 1145; *Ramsey v. Timayenis*, (Supm. Ct. Gen. T.) 24 N. Y. Supp. 76; *Mecklin v. Berry*, (Supm. Ct. Spec. T.) 23 How. Pr. (N. Y.) 380; *Chambers v. Durand*, 33 N. Y. Super. Ct. 494; *Hoy v. Duncan*, 33 N. Y. Super. Ct. 555; *Anderson v. Hunt*, (Supm. Ct. Spec. T.) 55 How. Pr. (N. Y.) 336; *Molson v. Carter*, 25 L. C. Jur. 65; *Egert v. Laidlaw*, 7 L. C. Jur. 227; *McNamee v. Jones*, 10 Rev. Lég. 663, 3 Montreal Leg. N. 371.

The existence or nonexistence of a ground of arrest, like any other fact, must be decided by the weight of testimony. *Southworth v. Resing*, 3 Cal. 377.

The Question upon a Motion to Vacate an Order of Arrest is whether upon the whole case, as made by the affidavits on both sides, the court, if called upon to act upon the application as *res nova*, would grant the order. If so, the motion to vacate should be denied; but if, after hearing both parties, it should appear that a case for arrest had not been made out,

A Distinction Is Made, however, in this connection between cases in which the facts constituting the ground of arrest are extrinsic to those constituting the cause of action and cases in which the facts upon which the order of arrest is issued and those constituting the cause of action are identical. In the former case the court, on a motion to vacate an order of arrest, will pass upon the facts in dispute and render judgment thereon according to the general rules of evidence governing the determination of questions of fact.¹ But where the facts constituting the cause of action and those authorizing the arrest are identical, the evidence in favor of the defendant necessary to cause the court to vacate an order of arrest must be such as would oblige the judge at the trial either to nonsuit the plaintiff or direct a verdict for the defendant.² The order in such case will not be vacated upon conflicting affidavits. The court will not try the merits of the case upon affidavits on a preliminary motion to discharge from arrest.³

Evidence of Nonexistence of Cause of Action or Ground for Arrest. — Where the right of arrest is derived from the nature of the action the defendant will not be permitted to introduce affidavits to show that there is no cause of action.⁴ But when the arrest is founded upon extrinsic facts wholly independent of the cause of action, as where the defendant has removed or disposed of his property, or is about to do so, with intent to defraud creditors, then the defendant may contest the truth of the facts upon which the arrest was ordered, and if he satisfies the court, either by his own affidavit or otherwise, that there was no sufficient ground for the arrest, he is entitled to be discharged.⁵

2. Defendant Taken in Execution — *a.* ON PAYMENT OF JUDGMENT DEBT. — A defendant taken in execution is entitled to be discharged from custody on payment of the amount of the judgment and fees charged against him.⁶

the order should be vacated. *Chapin v. Seeley*, (Supm. Ct. Spec. T.) 13 How. Pr. (N. Y.) 499.

1. *Hoy v. Duncan*, 33 N. Y. Super. Ct. 555, and cases cited in the notes immediately following.

2. Order Vacated Only Where Plaintiff Has No Cause of Action. — *Frost v. McCarger*, (Supm. Ct. Spec. T.) 14 How. Pr. (N. Y.) 131; *Stuyvesant v. Bowran*, (C. Pl. Spec. T.) 34 How. Pr. (N. Y.) 51; *Barret v. Gracie*, 34 Barb. (N. Y.) 20; *Ely v. Mumford*, 47 Barb. (N. Y.) 629; *Merritt v. Heckscher*, 50 Barb. (N. Y.) 451; *Griswold v. Sweet*, (Supm. Ct. Spec. T.) 49 How. Pr. (N. Y.) 171; *Miller v. Parks*, (N. Y. Super. Ct. Spec. T.) 66 How. Pr. (N. Y.) 159; *Tallman v. Whitney*, 5 Daly (N. Y.) 505; *Swift v. Wylie*, 5 Robt. (N. Y.) 680; *Lorillard F. Ins. Co. v. Meshural*, 7 Robt. (N. Y.) 308; *Hoy v. Duncan*, 33 N. Y. Super. Ct. 555; *Bachman v. Goldmann*, 48 N. Y. Super. Ct. 549; *McClure v. Levy*, 68 Hun (N. Y.) 525; *Levins v. Noble*, (Supm. Ct. Gen. T.) 15 Abb. Pr. (N. Y.) 475; *Stuyvesant v. Bowran*, (C. Pl. Spec. T.) 3 Abb. Pr. N. S. (N. Y.) 270; *Royal Ins. Co. v. Noble*, (C. Pl. Spec. T.) 5 Abb. Pr. N. S. (N. Y.) 54. But see *Hernandez v. Carnobeli*, (Super. Ct. Spec. T.) 10 How. Pr. (N. Y.) 433; *Republic of Mexico v. De Arrangois*, (Super. Ct. Spec. T.) 11 How. Pr. (N. Y.) 1.

3. Order of Arrest Not Vacated on Conflicting Affidavits. — *Wicks v. Ellis*, Abb. Adm. (U. S.) 444; *Welch v. Winterburn*, 14 Hun (N. Y.) 518; *Peck v. Lombard*, 22 Hun (N. Y.) 63; *Jaroslauski v. Saunderson*, 1 Daly (N. Y.) 232; *Miller v. Parks*, (N. Y. Super. Ct. Spec. T.) 66 How. Pr. (N. Y.) 159. See also, to the point that the court will not try the case on the merits on a motion to vacate an order of arrest,

Anonymous, 1 Salk. 99; *Anonymous*, 1 Salk. 100; *Horsley v. Walstab*, 7 Taunt. 235, 2 E. C. L. 235; *Merwin v. Playford*, 3 Robt. (N. Y.) 702; *Swift v. Wylie*, 5 Robt. (N. Y.) 680; *Faris v. Peck*, 2 Sweeny (N. Y.) 689; *Nelson v. Blanchfield*, 54 Barb. (N. Y.) 630; *Butler v. McIlvaine*, (N. Y. Super. Ct. Spec. T.) 31 How. Pr. (N. Y.) 379.

4. *Geller v. Seixas*, (C. Pl. Spec. T.) 4 Abb. Pr. (N. Y.) 103; *Solomon v. Waas*, 2 Hilt. (N. Y.) 179; *Martin v. Vanderlip*, (Supm. Ct.) 3 How. Pr. (N. Y.) 265; *Warner v. Bates*, 75 Wis. 278. See also *Jordan v. Jordan*, 6 Wend. (N. Y.) 524.

In *Welsh v. Hill*, 2 Johns. (N. Y.) 100, it was held that a court might in its discretion admit or reject counter-affidavits on the part of the defendant, according to circumstances, but that where the plaintiff swore positively to a cause of action it would be improper to receive them.

5. *Per* Daly, J., in *Geller v. Seixas*, (C. Pl. Spec. T.) 4 Abb. Pr. (N. Y.) 103; *Johnson v. Florence*, (C. Pl. Gen. T.) 32 How. Pr. (N. Y.) 230.

Facts Unknown to Plaintiff When Arrest Was Made. — When the defendant has been arrested for secreting property, the plaintiff, on a motion to quash the writ of *capias*, may present evidence of facts tending to show that the defendant was guilty of secreting his property, although such facts were unknown to him when he swore out the process. *Alcan v. Giroux*, 18 Rev. L&G. 289.

6. **Discharge on Payment.** — *Rogers v. McDearmid*, 7 N. H. 506.

A Reasonable Opportunity to Tender Property sufficient to discharge the debt must be allowed

b. WITH CONSENT OF PLAINTIFF — Discharge with Plaintiff's Consent Satisfaction of Judgment. — It is the well-settled rule of the common law that the discharge, with the consent of the plaintiff, of a defendant taken in execution upon a judgment against him, operates as an absolute satisfaction of the judgment.¹

Intention of Plaintiff Immaterial. — And in such case the intention of the plaintiff in consenting to the discharge is immaterial.²

Effect of Contrary Agreement Between Parties. — Moreover, the rule applies notwithstanding any agreement between the parties to the contrary; and no new execution can issue upon the judgment, even though the defendant was discharged upon an express undertaking on his part that the plaintiff's rights should not be affected by the discharge, and that the defendant should be liable to be again taken in execution upon his failure to comply with the terms upon which he was discharged.³ Upon default by the defendant in such case the plaintiff's remedy is upon the new agreement and not upon the judgment debt.⁴

Voluntary Return to Imprisonment. — But where a debtor in custody upon execution procures a conditional liberation under an agreement to return to prison if the terms of the agreement are not complied with, and voluntarily returns into custody in pursuance of the agreement, he may be again imprisoned upon the judgment.⁵

Discharge of One of Several Defendants. — If one defendant taken in execution upon a joint judgment against two or more defendants be discharged with the plaintiff's consent, such discharge operates as a satisfaction of the judgment

to a debtor taken in execution. *Gilbert v. Rider, Kirby (Conn.) 180.*

1. Discharge with Plaintiff's Consent Satisfaction of Judgment — England. — *Walker v. Alder, Styles 117; Basset v. Salter, 2 Mod. 136; Jaques v. Withy, 1 T. R. 557; Tanner v. Hague, 7 T. R. 416; Vigers v. Aldrich, 4 Burr. 2482; Goodman v. Chase, 1 B. & Ald. 297; Da Costa v. Davis, 1 B. & P. 242; Baker v. Ridgway, 2 Bing. 41, 9 E. C. L. 311; Lambert v. Parnell, 15 L. J. Q. B. 55.*

United States. — *Magniac v. Thomson, 15 How. (U. S.) 281; U. S. v. Stansbury, 1 Pet. (U. S.) 573. See U. S. v. Watkins, 4 Cranch (C. C.) 271.*

Indiana. — *Wakeman v. Jones, 1 Ind. 517.*

Maryland. — *Harden v. Campbell, 4 Gill (Md.) 29, distinguishing West v. Hyland, 3 Har. & J. (Md.) 200.*

Massachusetts. — *King v. Goodwin, 16 Mass. 63; Coburn v. Palmer, 10 Cush. (Mass.) 273; Kennedy v. Duncklee, 1 Gray (Mass.) 65; Nowell v. Waitt, 121 Mass. 554. See also Doane v. Bartlett, 4 Allen (Mass.) 74.*

New Jersey. — *Strong v. Linn, 5 N. J. L. 920.*

New York. — *Powers v. Wilson, 7 Cow. (N. Y.) 274; Lathrop v. Briggs, 8 Cow. (N. Y.) 171; Ransom v. Keyes, 9 Cow. (N. Y.) 128; Poucher v. Holley, 3 Wend. (N. Y.) 184; Vidrard v. Fradneburg, (Supm. Ct. Spec. T.) 53 How. Pr. (N. Y.) 339; Rawl v. Guillaume, (Supm. Ct. Gen. T.) 56 How. Pr. (N. Y.) 308; Bonesteel v. Garlinghouse, 60 Barb. (N. Y.) 338; Utica Ins. Co. v. Power, 3 Paige (N. Y.) 365.*

North Carolina. — *Bryan v. Simonton, 1 Hawks, (8 N. Car.) 51.*

Pennsylvania. — *Palethorpe v. Leshner, 2 Rawle (Pa.) 272; Bamford v. Keefer, 68 Pa. St. 389. See also Sharpe v. Speckenagle, 3 S. & R. (Pa.) 463.*

Vermont. — *Foster v. Collamer, 10 Vt. 466.*

Virginia. — *Windrum v. Parker, 2 Leigh (Va.) 361; Noyes v. Cooper, 5 Leigh (Va.) 186.*

Where the Debtor Is Not Actually under Arrest, though in charge of the officer, his discharge by the creditor does not discharge the debt. *Foster v. Collamer, 10 Vt. 466.*

Qui Tam Action. — While in a mere private action the discharge by the plaintiff of the defendant in custody upon a ca. sa. is a discharge of the debt, in a *qui tam* action such discharge, so far as it relates to the moiety of the people, is void. *Minton v. Woodworth, 11 Johns. (N. Y.) 474.*

Imprisonment for Fine. — Imprisonment for the nonpayment of a fine not being a satisfaction of the judgment, unlike the case of a private judgment, a discharge from the imprisonment is not a release or satisfaction of the fine. *State v. Richardson, 18 Ala. 109; State v. Dodge, 24 N. J. L. 672.*

2. Poucher v. Holley, 3 Wend. (N. Y.) 184. See also Basset v. Salter, 2 Mod. 136.

3. Judgment Satisfied Notwithstanding Agreement to Contrary. — *Blackburn v. Stupart, 2 East 243; Magniac v. Thomson, 15 How. (U. S.) 281; Coburn v. Palmer, 10 Cush. (Mass.) 273; Abbott v. Osgood, 38 N. H. 280; Yates v. Van Rensselaer, 5 Johns. (N. Y.) 364; Bonesteel v. Garlinghouse, 60 Barb. (N. Y.) 338; Green v. Young, (Buffalo Super. Ct. Spec. T.) 21 N. Y. Supp. 255; Noyes v. Cooper, 5 Leigh (Va.) 186.*

A Release upon a Condition Afterwards Broken by the Debtor is a discharge in the absence of fraud on the part of the debtor in securing his release. *Catlin v. Kernott, 27 L. J. C. Pl. 186, 4 Jur. N. S. 281; Tanner v. Hague, 7 T. R. 416.*

4. Vigers v. Aldrich, 4 Barr. 2482.

5. Little v. Newburyport Bank, 14 Mass. 443. See also Brown v. Getchell, 11 Mass. 11,

Volume XVI.

as to all the defendants.¹ So also where two or more defendants are sued separately for the same cause of action and a separate judgment is recovered against each, the discharge of one defendant taken in execution operates as a satisfaction of all the judgments.²

Common-law Rule Changed by Statute. — The rule of the common law that the discharge of a judgment debtor from imprisonment operates as a discharge or satisfaction of the debt or judgment has in some jurisdictions been abolished by statute.³

No Satisfaction where Discharge Is Without Plaintiff's Consent. — In order that the discharge of a judgment debtor from imprisonment may operate as a satisfaction of the judgment, such discharge must be with the voluntary⁴ consent of the creditor.⁵ Thus the judgment is not satisfied by the escape of the debtor.⁶ So also where an imprisoned debtor procures his discharge by fraud or abuse of the forms of law.⁷

c. DISCHARGE BY ATTORNEY, AGENT, OR OFFICER. — Where the body of a debtor has been taken in execution it is held in *New York* that the creditor's attorney, in his general character as such, has no power to discharge the debtor without the consent of the creditor, unless there has been an actual satisfaction of the debt by the payment of the amount due.⁸ In *Pennsylvania* and *Vermont* the contrary has been held.⁹

Discharge by Special Agent. — The authority of a person as agent for the plaintiff to discharge a defendant from custody on execution without satisfaction of the debt must be clearly and fully proved and strictly pursued.¹⁰

Discharge by Officer. — The officer who has taken the debtor in execution has no authority to discharge him from custody without actual payment.¹¹

1. Discharge of One of Several Defendants Satisfaction as to All. — *Price v. Goodrick*, *Styles* 387; *Clark v. Clement*, 6 T. R. 525; *Ballam v. Price*, 2 Moo. 235, 4 E. C. L. 418; *Eales v. Fraser*, 6 M. & G. 755, 46 E. C. L. 755; *Denton v. Godfrey*, 11 Jur. 800; *Gould v. Gould*, 4 N. H. 174; *Allen v. Craig*, 14 N. J. L. 102; *Ransom v. Keyes*, 9 Cow. (N. Y.) 128; *Bryan v. Simonton*, 1 Hawks (8 N. Car.) 51.

In an Action Against Husband and Wife the Discharge of the Wife, who had been taken in execution upon the judgment, is a satisfaction. *Eastman v. Thrasher*, cited in *Kimball v. Molony*, 3 N. H. 376.

2. Kasson v. People, 44 Barb. (N. Y.) 347.

3. Rule Abolished by Statute. — See *U. S. v. Stansbury*, 1 Pet. (U. S.) 573; *Lawson v. Snyder*, 1 Md. 71; *Abbott v. Osgood*, 38 N. H. 280; *Jacobs v. Stevens*, 57 N. H. 610; *Hoyle v. McCrear*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 290; *Eggart v. Barnstine*, 3 McCord L. (S. Car.) 162, 15 Am. Dec. 625; *Hall v. Moye*, 2 Bailey L. (S. Car.) 9.

4. Must Be Voluntary. — *Rawl v. Guilleaume*, (Supm. Ct. Gen. T.) 56 How. Pr. (N. Y.) 308. See also *Woodruff v. McGuire*, (Marine Ct. Gen. T.) 1 City Ct. (N. Y.) 281 (arrest on an irregular execution).

5. No Satisfaction Where Discharge Is Without Plaintiff's Consent. — *Griswold v. Hill*, 2 Paine (U. S.) 492; *Appleby v. Clark*, 10 Mass. 59; *Vidrad v. Fradneburg*, (Supm. Ct. Spec. T.) 53 How. Pr. (N. Y.) 339; *Wesson v. Chamberlain*, 3 N. Y. 331; *Bowrell v. Zigler*, 19 Ohio 362. See *infra*, this section, *Discharge by Attorney, Agent, or Officer*.

Discharge for Nonpayment of Prison Fees by the plaintiff is not a discharge with the plaintiff's consent, and does not operate as a dis-

charge of the judgment. *Nadin v. Battie*, 5 East 147; *Tatem v. Potts*, 5 Blackf. (Ind.) 534; *Prentiss v. Hinton*, 6 Blackf. (Ind.) 35.

6. Escape. — *Allanson v. Butler*, 1 Sid. 330; *Mounson v. Clayton*, Cro. Car. 240; *Basset v. Salter*, 2 Mod. 136; *Buxton v. Home*, 1 Show. 174; *Bowrell v. Zigler*, 19 Ohio 362. See also *Whiteacres v. Hankinson*, Cro. Car. 73; *Richborough v. West*, 1 Hill L. (S. Car.) 309; *Saunders v. M'Cool*, 1 Strobb. L. (S. Car.) 22.

By the early common law the escape of the debtor operated as a release. *Year Book*, 33 Hen. VI., p. 47.

The Reason of the Rule permitting the reimprisonment of a debtor who has escaped is that he was not legally out of custody. *Jacques v. Withy*, 1 T. R. 557.

Subsequent Assent of Creditor to Escape. — If a debtor escapes, a subsequent assent thereto and an agreement by the creditor that he may remain at large do not satisfy the judgment. *Scott v. Peacock*, 1 Salk. 271; *Sweet v. Palmer*, 16 Johns. (N. Y.) 181; *Powers v. Wilson*, 7 Cow. (N. Y.) 276.

7. Discharge Procured by Fraud. — *Baker v. Ridgway*, 2 Bing. 41, 9 E. C. L. 311, 9 Moo. 114.

8. Attorney's Authority to Discharge. — *Jackson v. Bartlett*, 8 Johns. (N. Y.) 361; *Kellogg v. Gilbert*, 10 Johns. (N. Y.) 220, 6 Am. Dec. 335; *Simonton v. Barrell*, 21 Wend. (N. Y.) 362. See also *Crary v. Turner*, 6 Johns. (N. Y.) 51.

9. Scott v. Seiler, 5 Watts (Pa.) 235; *Hopkins v. Willard*, 14 Vt. 475.

10. Crary v. Turner, 6 Johns. (N. Y.) 51.

11. Codwise v. Field, 9 Johns. (N. Y.) 263.

If the officer takes anything else than money in satisfaction, this does not discharge the judgment, but it is otherwise if the plaintiff

XII. SECOND ARREST — No Second Arrest for Same Cause of Action. — The general rule of law is well settled that no man shall be twice arrested for the same cause of action,¹ although the second arrest is in a different form of action² or in a different court.³

Qualification of Rule. — This general rule, however, is subject to an important qualification. Thus a defendant may be arrested a second⁴ or even a

subsequently ratifies the act. *Townsend v. Olin*, 5 Wend. (N. Y.) 207; *Armstrong v. Garrow*, 6 Cow. (N. Y.) 465.

1. **No Second Arrest for Same Cause of Action** — *England*. — *Archer v. Champneys*, 1 Brod. & B. 289, 5 E. C. L. 86; *Imlay v. Ellefsen*, 3 East 309; *Taylor v. Wasteneys*, 2 Stra. 1218.

United States. — *U. S. v. Watkins*, 4 Cranch (C. C.) 271; *Bingham v. Wilkins*, *Crabbe* (U. S.) 50.

California. — *McGi very v. Morehead*, 2 Cal. 607.

Illinois. — *People v. Healy*, 128 Ill. 9, 15 Am. St. Rep. 90.

New Jersey. — *Lambert v. Moore*, 6 N. J. L. 131; *Peltier v. Washington Banking Co.*, 14 N. J. L. 391.

New York. — *Wright v. Ritterman*, 4 Robt. (N. Y.) 704; *Matter of Johnson*, 7 Robt. (N. Y.) 269; *Citizens' Nat. Bank v. Vorhis*, 39 Hun (N. Y.) 24; *Matter of Nebenzahl*, (Supm. Ct. Spec. T.) 57 How. Pr. (N. Y.) 328.

Pennsylvania. — *Clark v. Weldon*, 4 Yeates (Pa.) 206; *Butterworth v. White*, 2 Miles (Pa.) 141.

See also *supra*, this title, *Execution Against the Person* — *Effect of Execution, and Discharge from Arrest and Imprisonment* — *Defendant Taken in Execution*.

A defendant, having been held to bail and a judgment rendered against him in one state, cannot be held to bail in another state in an action on that judgment. *Lambert v. Moore*, 6 N. J. L. 131. But see *Peck v. Hozier*, 14 Johns. (N. Y.) 346.

Vexatious Arrest. — A second arrest for the same cause of action will not be permitted when vexatious. *Wheelwright v. Joseph*, 5 M. & S. 93; *Young v. Weeks*, 7 Daly (N. Y.) 115.

Reinstatement of Order of Arrest. — When the defendant, after arrest, is discharged upon the dismissal of the complaint in the action, the judgment supersedes the order of arrest, and though an appeal has resulted in a new trial and a verdict for the plaintiff, the former order of arrest cannot be reinstated, though perhaps a new order might be obtained upon which an arrest might be had. *Bowman v. Bowe*, 40 Hun (N. Y.) 489, *following* *People v. Bowe*, 81 N. Y. 43. See also *Arnold v. Thomas*, (Supm. Ct. Spec. T.) 2 How. Pr. (N. Y.) 91.

2. *Imlay v. Ellefsen*, 3 East 309; *Wright v. Ritterman*, 4 Robt. (N. Y.) 704; *Matter of Nebenzahl*, (Supm. Ct. Spec. T.) 57 How. Pr. (N. Y.) 328; *People v. Kelly*, 1 Abb. Pr. N. S. (N. Y.) 432.

3. *Hernandez v. Carnobeli*, (N. Y. Super. Ct. Spec. T.) 10 How. Pr. (N. Y.) 433; *People v. Kelly*, 1 Abb. Pr. N. S. (N. Y.) 432; *Young v. Weeks*, 7 Daly (N. Y.) 115.

4. **Second Arrest Allowed When Not Vexatious** — *England*. — *Puckford v. Maxwell*, 6 T. R. 52; *Housin v. Barrow*, 6 T. R. 218; *Turton v. Hayes*, 1 Stra. 439; *Bates v. Barry*, 2 Wils. C.

Pl. 381; *De La Cour v. Read*, 2 H. Bl. 278; *Brown v. Davis*, 1 Chit. 161, 18 E. C. L. 56; *Kearney v. King*, 1 Chit. 273, 18 E. C. L. 77; *Cartwright v. Keely*, 7 Taunt. 192, 2 E. C. L. 192.

Massachusetts. — *Jewett v. Locke*, 6 Gray (Mass.) 233.

Michigan. — *Breckon v. Ottawa Circuit Judge*, 109 Mich. 615.

New Jersey. — *Peltier v. Washington Banking Co.*, 14 N. J. L. 391.

New York. — *Peck v. Hozier*, 14 Johns. (N. Y.) 346; *People v. Tweed*, 63 N. Y. 202, *affirming* 5 Hun (N. Y.) 382; *Meucci v. Raudnitz*, 20 Hun (N. Y.) 343; *Ewart v. Schwartz*, 48 N. Y. Super. Ct. 390.

Pennsylvania. — *Parasset v. Gautier*, 2 Dall. (Pa.) 330.

Wisconsin. — *Matter of Bowen*, 20 Wis. 300, 91 Am. Dec. 404.

Illustrations. — Where the plaintiff is non-prossed, the defendant may be again arrested provided the second arrest is not vexatious. *Archer v. Champneys*, 1 Brod. & B. 289, 5 E. C. L. 86; *Williams v. Thacker*, 1 Brod. & B. 514, 5 E. C. L. 171; *Turton v. Hayes*, 1 Stra. 439.

So also where the plaintiff has made a mistake in the form of action, and discontinues the action on that account and brings a second action, the defendant may be arrested a second time. *Bates v. Barry*, 2 Wils. C. Pl. 381.

The defendant may be arrested a second time where he has himself been guilty of fraud or contrivance to defeat the effect of the first process. *Puckford v. Maxwell*, 6 T. R. 52; *Olmus v. Delany*, 2 Stra. 1216; *Citizens' Nat. Bank v. Vurhis*, 39 Hun (N. Y.) 24.

So also where the first action was defeated through the fault of the officer a second arrest is proper. *Housin v. Barrow*, 6 T. R. 218.

In *Cartwright v. Keely*, 7 Taunt. 192, 2 E. C. L. 192, a second arrest was allowed after judgment in the first action had been reversed.

The Rule Against a Second Arrest Does Not Apply where no bail was given in the former action, *Field v. Colerick*, 3 Yeates (Pa.) 56; or where the process on which the first arrest was made was absolutely void, *Schadle v. Chase*, (Supm. Ct. Spec. T.) 16 How. Pr. (N. Y.) 413; or where the party was discharged from the first arrest because privileged at the time, *Petrie v. Fitzgerald*, 1 Daly (N. Y.) 401; or where the original action was determined in the defendant's favor, but not on the merits, *Gardner v. Lindo*, 1 Cranch (C. C.) 592.

A Defendant Arrested on a Defective Order may be discharged from arrest and rearrested upon a new order based upon the same affidavit. *Matter of Bowen*, 20 Wis. 300, 91 Am. Dec. 404.

A Defendant Discharged Because of the Insufficiency of or Defects in the Affidavit for arrest may be rearrested. *Peltier v. Washington Banking Co.*, 14 N. J. L. 391; *Meucci v. Raud-*

third¹ time, in the same cause of action, where such arrest is not vexatious, or where the plaintiff has not been guilty of oppression or laches. But a second arrest is in all cases *prima facie* unlawful, and it must be so taken by the court unless the contrary appears from the facts and circumstances of the case.² Whether a second arrest would or would not be vexatious is a question to be determined upon the particular facts and circumstances of each case.³ And in every case of this kind the court must exercise a sound discretion.⁴

A Further Discussion of this branch of the subject will be found elsewhere in this work.⁵

In Cases of Escape. — Where a party held in custody in a civil action escapes therefrom, the general rule is that he may be retaken by the sheriff when he was detained on mesne process, but not where he was in custody under final process.⁶

Discharge on Security. — Where a party arrested in a civil action is discharged on giving bail, but the bail fail to justify, whereby the sheriff himself becomes bail, such party may be rearrested by the sheriff.⁷ But a sheriff who has discharged a debtor on bail or other security cannot rearrest him on the ground that the bail or security is insufficient.⁸

XIII. ARREST AND ATTACHMENT FOR SAME CAUSE OF ACTION — Arrest and Attachment in Same Action. — The plaintiff cannot ordinarily arrest the person of the defendant and attach his property in the same execution.⁹ Thus at common law, while a plaintiff in execution may take out executions against the person and the property of the defendant at the same time, only one process may be executed.¹⁰ But the plaintiff may take the property of the defendant and his body also where both remedies are necessary to insure the satisfaction of the judgment.¹¹ In some states it is provided by statute that an execution

nitz, 20 Hun (N. Y.) 343. Compare *McGilvery v. Morehead*, 2 Cal. 607; *Enoch v. Ernst*, (Supm. Ct. Spec. T.) 21 How. Pr. (N. Y.) 96.

1. *Citizens' Nat. Bank v. Vorhis*, 39 Hun (N. Y.) 24.

2. **Second Arrest Prima Facie Vexatious.** — *Archer v. Champneys*, 1 Brod. & B. 289, 5 E. C. L. 86; *Williams v. Thacker*, 1 Brod. & B. 514, 5 E. C. L. 171; *Peltier v. Washington Banking Co.*, 14 N. J. L. 391; *Young v. Weeks*, 7 Daly (N. Y.) 115.

3. **Whether Second Arrest Is Vexatious Dependent upon Circumstances of Case.** — *People v. Tweed*, 63 N. Y. 202; *Ewart v. Schwartz*, 48 N. Y. Super. Ct. 390; *Young v. Weeks*, 7 Daly (N. Y.) 115; *Citizens' Nat. Bank v. Vorhis*, 39 Hun (N. Y.) 24; *Parasset v. Gautier*, 2 Dall. (Pa.) 330.

4. *Buttsworth v. White*, 2 Miles (Pa.) 141.

5. See the title *ARREST*, vol. 2, p. 832.

6. *Langdon v. Hathaway*, 1 N. H. 367; *Com. v. Sheriff*, 1 Grant Cas. (Pa.) 187; *Aldrich v. Weeks*, 62 Vt. 89; *Bac. Abr.*, title *Escape in Civil Cases*, C. See also *Bruce v. Snow*, 20 N. H. 484.

For a full discussion of this branch of the subject see the titles *ARREST*, vol. 2, p. 832; *ESCAPE*, vol. 11, p. 258.

7. *Santos v. Merceques*, (C. Pl. Spec. T.) 9 How. Pr. (N. Y.) 188; *Seaver v. Genner*, (Supm. Ct. Spec. T.) 10 Abb. Pr. (N. Y.) 256. See the title *ARREST*, vol. 2, p. 832.

8. **Release on Insufficient Security.** — *State v. Brittain*, 3 Ired L. (25 N. Car.) 17. See also *Ricks v. Richardson*, *Dudley L.* (S. Car.) 57.

9. **Simultaneous Remedies Against Person and Property Not Permitted.** — *Daniels v. Wilcox*, 2 Root (Conn.) 346; *Ferguson v. Foster*, 7 Mart. N. S. (La.) 521; *Trafton v. Gardiner*, 39 Me.

501; *Brinley v. Allen*, 3 Mass. 561; *Almy v. Wolcott*, 13 Mass. 73; *Peltier v. Washington Banking Co.*, 14 N. J. L. 391; *Cleft v. Hosford*, 12 Vt. 296. See also *Chappel v. Skinner*, (Supm. Ct. Spec. T.) 6 How. Pr. (N. Y.) 338; *Langdon v. Dyer*, 13 Vt. 273.

On a Writ Against Two Defendants the attachment of the property of one defendant does not exempt the other defendant from arrest. *Connor v. Madden*, 57 Me. 410.

Arrest and Attachment in the Same Action Are Not Both Void; one may be vacated and the other sustained. *Rockford, etc., R. Co. v. Boody*, 56 N. Y. 456.

10. **Execution Against Person and Property at Same Time — England.** — *Miller v. Parnell*, 6 Taunt. 370, 1 E. C. L. 414; *Knight v. Coleby*, 5 M. & W. 275; *Hodgkinson v. Whalley*, 2 Cromp. & J. 86, 2 Tyrw. 174. See also *Chapman v. Bowlby*, 8 M. & W. 240; *Lawes v. Codrington*, 1 Dowl. P. C. 30; *Primrose v. Gibson*, 2 Dowl. & R. 193, 16 E. C. L. 78.

Georgia. — *Craig v. Adair*, 22 Ga. 373.

Maine. — *Miller v. Miller*, 25 Me. 110.

North Carolina. — *Wheeler v. Bouchelle*, 5 Ired. L. (27 N. Car.) 584.

Pennsylvania. — *Young v. Taylor*, 2 Binn. (Pa.) 218; *Davies v. Scott*, 2 Miles (Pa.) 52; *Grant v. Potts*, 2 Miles (Pa.) 164; *Fenstman v. Ury*, 2 Pearson (Pa.) 357; *Allison v. Rheam*, 3 S. & R. (Pa.) 139, 8 Am. Dec. 644.

South Carolina. — *State v. Guignard*, 1 McCord L. (S. Car.) 176; *Miller v. Bagwell*, 3 McCord L. (S. Car.) 429; *Mazyck v. Coil*, 2 Bailey L. (S. Car.) 101.

See also *Turner v. Walker*, 3 Gill & J. (Md.) 377.

11. **Both Attachment and Arrest Permitted When Necessary to Insure Satisfaction.** — *Dicas v.*

against the person of a defendant cannot be issued unless an execution against his property has been previously issued and returned unsatisfied.¹

Arrest in Separate Action. — A defendant arrested on mesne process is not entitled to his discharge merely because the plaintiff has previously commenced another suit against him for the same cause of action and has attached his property therein.² So also the defendant's property may be attached although he has been previously arrested on bail process for the same cause of action.³ But the plaintiff cannot sue out an attachment against the defendant, and at the same time, for the same cause of action, institute another suit against him in which bail is required.⁴

IMPROPER. — Improper means not fitted to the circumstances; ⁵ wrongful.⁶

IMPROVE — IMPROVEMENT. (See also BONA FIDE, vol. 4, p. 616; and see the titles COMMUNITY PROPERTY, vol. 6, p. 324; CONTRIBUTION AND EXONERATION, vol. 7, p. 357; CORPORATIONS (PRIVATE), vol. 7, p. 707; COVENANTS, vol. 8, pp. 172, 174, 184; EJECTMENT, vol. 10, p. 542; EMINENT

Warne, 10 Bing. 341, 25 E. C. L. 158; Chapman v. H. D. Lee Mercantile Co., 7 Kan. App. 254; Ferguson v. Foster, 7 Mart. N. S. (La.) 521; Champenois v. White, 1 Wend. (N. Y.) 92; Olcott v. Lilly, 4 Johns. (N. Y.) 407; Grieb v. Kuttner, 135 Pa. St. 281. See also Edmond v. Ross, 9 Price 5; People v. Tweed, 5 Hun (N. Y.) 382, 63 N. Y. 202. But see Trafton v. Gardiner, 39 Me. 501.

1. See ENCYC. OF PL. AND PR., article EXECUTIONS AGAINST THE BODY AND ARREST IN CIVIL CASES, vol. 8, p. 630.

2. Lithauer v. Turner, (Supm. Ct.) Code Rep. N. S. (N. Y.) 210; *In re Hosley*, 22 Vt. 363.

Proceedings under the Michigan nonimprisonment act for the imprisonment of a debtor are not rendered void by the fact that when they were commenced a writ of attachment in favor of the creditor had been levied upon sufficient of the goods and chattels of the debtor to satisfy the debt. Johnson v. Maxon, 23 Mich. 129.

3. Massey v. Walker, 8 Ala. 167; Wood v. Carter, 29 Ga. 580.

4. Clark v. Tuggle, 18 Ga. 604.

5. Pennsylvania Co. v. Sloan, 125 Ill. 80. This was upon the question of what constituted *improper* signaling by a flagman at a railroad crossing.

6. The Warkworth, 53 L. J. Adm. 65.

Mobs. (See also the titles COUNTIES, vol. 7, p. 949; MUNICIPAL CORPORATIONS.) — In an act making municipalities liable for damages caused by mobs, but denying the benefits of the act to those through whose own illegal or *improper* conduct the damage was caused, *improper* means "that which is 'not suitable,' 'unfit,' 'not suited to the character, time, and place.'" Chadbourne v. Newcastle, 48 N. H. 106. That *improper* conduct is "such as a man of ordinary and reasonable care and prudence, under the circumstances, in plaintiff's situation, would not have been guilty of," is a correct charge to the jury. Palmer v. Concord, 48 N. H. 211, 97 Am. Dec. 605.

In Allegheny County v. Gibson, 90 Pa. St. 416, it was said: "It has never yet been held that the assertion of a legal right in a legal manner, in pursuit of a legal and ordinary business, was such '*improper* conduct' as

would prevent the owner of property destroyed by a mob from recovering its value under the Act of 1841 or similar statutes." See also Hermits of St. Augustine v. Philadelphia County, Bright. (Pa.) 116; St. Michael's Church v. Philadelphia County, Bright. (Pa.) 121; Donoghue v. Philadelphia County, 2 Pa. St. 230.

Improper Navigation. (See also the titles MARINE INSURANCE; NAVIGATION.) — An association of steamship owners agreed by deed to indemnify each other in respect of ships entered by them in the association against loss or damage by reason of *improper* navigation to goods carried on board such ships. In construing this deed Willes, J., said: "*Improper* navigation, within the meaning of this deed, is something *improperly* done with the ship or part of the ship in the course of the voyage. Suppose the ship were anchored in a place where she ought not to have been anchored without a light, and a collision took place in consequence, clearly that would be a damage arising from *improper* navigation — an omission properly to navigate the ship. Here, the bilgecock having been opened for the purpose of getting water out of the ship, and having been negligently left open, the seacock was opened for the purpose of getting in water to work the ship. The omission to close the bilgecock was clearly *improper* navigation within the meaning of this deed." Good v. London Steamship Owners' Mut. Protecting Assoc., L. R. 6 C. P. 563.

So in Carmichael v. Liverpool Sailing Ship Owners' Mut. Indemnity Assoc., 19 Q. B. D. 249, approving Good v. London Steamship Owners' Mut. Protecting Assoc., L. R. 6 C. P. 569, Fry, L. J., said: "Without attempting to define all the cases which may come within the words '*improper* navigation,' I think those words as used in this rule do include every case where something is omitted to be done which ought to be done before the departure of the ship in order to enable the ship to carry the cargo safely from the port of departure to the port of arrival, and where that omission leads to the cargo not being safely and properly so carried."

A cargo of wheat was damaged while in the hold of the plaintiffs' ship, owing to a taint

DOMAIN, vol. 10, p. 1158; FENCES, vol. 12, p. 1050; FIXTURES, vol. 13, p. 658; FRAUDULENT SALES AND CONVEYANCES, vol. 14, pp. 264, 346; GIFTS, vol. 14, p. 1041; IMPROVEMENTS, p. 62, *post*; JOINT TENANTS AND TENANTS IN COMMON; LANDLORD AND TENANT; LEASES; LIENS; MECHANICS' LIENS; PUBLIC LANDS; REMAINDERS AND EXECUTORY INTERESTS; SPECIAL OR LOCAL ASSESSMENTS; TAXATION.)—The word "improvement" is defined as an amelioration in the condition of real or personal property, effected by the expenditure of labor or money for the purpose of rendering it useful for other purposes than those for which it was originally used, or more useful for the same purposes.¹

communicated to the wheat through the ceiling and limber boards of the vessel having been saturated with a composition which had leaked from the previous cargo. The ceiling and limber boards had not been properly cleaned before the wheat was stowed. It was held that the damage was not caused by "*improper* navigation," *Canada Shipping Co. v. British Shipowners' Mut. Protection Assoc.*, 23 Q. B. D. 342.

In construing the same phrase, as used in an act limiting the liability of a shipowner for damages to another ship by reason of the "*improper* navigation of the former, *Brett, M. R.*, said: "*Improper* must be considered as synonymous with wrongful. The case falls within this proposition: all damage wrongfully done by a ship to another whilst it is being navigated, where the wrongful action of the ship by which damage is done is due to the negligence of any person for whom the owner is responsible, is comprised within the statute." Inability to steer because of a screw "*improperly* inserted in the steering gear was held to be within the act. *The Warkworth*, 9 P. D. 145, 53 L. J. Adm. 65, *affirming* 9 P. D. 20.

Improper Removal, with intent to make the county chargeable, in an act relating to paupers, means "without legal authority." *Foster v. Cronkhite*, 35 N. Y. 145. See generally the title POOR AND POOR LAWS.

Improperly — Attachment. (See also the title ATTACHMENT, vol. 3, p. 181.)—In an attachment act requiring a bond for costs and the damages which the defendant might sustain in consequence of the writ's being sued out "*improperly*, this word "has a broader signification than a mere irregularity, and * * * it is insufficient to allege as a breach of the condition, although in the express words of the bond, that it was *improperly* issued. * * * It is only *improperly* issued when the plaintiff has no meritorious cause of action, of that class of actions in which the law authorizes a resort to the remedy against the defendant, or, having such a cause of action, the ground alleged in the affidavit for its issue is untrue, or not one of the grounds enumerated which must exist before it can be obtained." *Steen v. Ross*, 22 Fla. 480.

1. Improvement Defined.—*Traver v. Merrick County*, 14 Neb. 333; *Chase v. Sioux City*, 86 Iowa 606, *quoting* 10 AM. AND ENG. ENCYC. OF LAW (1st ed.) 243.

In *Tucker v. Judd*, 3 Hawaii 203, it was said: "The term *improvements*, according to Bouvier, applies principally to buildings, 'though generally it extends to amelioration of every description of property, whether real or personal.'"

Improve.—"Worcester defines the word *improve* to mean, 'to make good use of; to employ advantageously; to increase, augment, or enhance, as to that which is evil;' while Webster defines it, 'to make better; to advance in value; to use or employ to good purpose; to make productive; to turn to profitable account; to use for advantage.'" *Vandall v. South San Francisco Dock Co.*, 40 Cal. 90.

Plural.—The fact that an ordinance in some sections speaks of the *improvement* to be made as *improvements*, is not sufficient of itself to show that several distinct *improvements* are proposed. *Wilbur v. Springfield*, 123 Ill. 395.

Realty.—In *Ames v. Trenton Brewing Co.*, 56 N. J. Eq. 317, it was said: "The thing done which is held to be an *improvement* is done to the realty. The word itself conveys this meaning. In order that there might be an *improvement*, there must previously have been something to be *improved*."

Improvements and Appurtenances. (See also APPURTENANT, vol. 2, p. 520.)—A deed contained the following words: "The following described lands, * * * with all the mills, machinery, tools, fixtures, appurtenances pertaining to the same." In construing this provision the court said: "This means substantially (according to our view of it) the same as the expression, 'and all the *improvements* thereon'—a phrase of common use in our Western country to denote whatever has the character of a physical fixture at the time, and is generally comprehended in the words 'appurtenances,' 'hereditaments,' etc., and in this case made to come under the last designation expressly in the *habendum* clause." *Bemis v. First National Bank*, 63 Ark. 625.

Improving Real Estate — Purposes of Incorporation.—In *Vandall v. South San Francisco Dock Co.*, 40 Cal. 84, it was held that where a corporation was formed to buy, *improve*, lease, sell, and otherwise dispose of real estate, the term *improve* included the performance of any act, whether on or off the land, the direct and proximate tendency of which was to benefit the property or enhance its value.

Improving Trust Property.—Property was left in trust for a particular purpose, and the particular mode of *improving* the donation was left to the discretion of the trustees. In construing this provision *Shaw, C. J.*, said: "Possibly it may be argued that the term *improving* may be used in a restricted sense, and confined to investing, increasing, and bettering the fund. But we are inclined to believe that the term, as used at that period, was used in a larger sense, as to use, occupy, and appropriate, limiting it, if used in that sense in the

present case, to the means; the end being designated with sufficient precision." *Greene Foundation v. Boston*, 12 Cush. (Mass.) 57.

In considering a trust to *improve* and manage real estate, Senator Maison in *Coster v. Lorillard*, 14 Wend. (N. Y.) 359, said: "I know not what the trustees could not do with this estate, under the head of *improvements*; anything, everything, which will tend to enhance its value." And see *Greene Foundation v. Boston*, 12 Cush. (Mass.) 57.

Trust Estate. — A statute of *New York* authorized trustees to sell the trust estate to raise money to make *improvements* where necessary. It was held that the *improvements* contemplated were of the real estate, not of the trust fund, and that the sale of the land to *improve* the balance of the estate and income or principal was not authorized by the statute. *Matter of Roe*, 119 N. Y. 509.

Repairs and Improvements Distinguished. (See also **REPAIRS**.) — In *Walsh v. Wilson*, 131 Mass. 535, it was held that repairs of premises in which dower was claimed, made by tenants for the purpose of keeping the house in tenable condition, were not *improvements*. See also *Clark v. Smith*, 34 Barb. (N. Y.) 140.

The charter of a city provided that the city should not be liable for a failure to establish streets and sidewalks, or for failing to alter and *improve* such streets. It was held that *improve* as thus used referred to the betterment of the streets and sidewalks which had already been established, and putting them in proper condition, and not to such repairs and *improvements* as were necessary to keep and make them reasonably safe. *Birmingham v. Starr*, 112 Ala. 98, citing *Bieling v. Brooklyn*, 120 N. Y. 98.

Improvements and Fixtures. (See also the title **FIXTURES**, vol. 13, p. 658.) — The word *improvements* as used in a lien expresses every addition, alteration, erection, or annexation made by the lessees during the demised term. The first-used word is more comprehensive than the word "fixtures," which is necessarily embraced in it. *French v. New York*, (Supm. Ct. Gen. T.) 16 How. Pr. (N. Y.) 220; *Chase v. Sioux City*, 86 Iowa 606.

Temporary Structures. — A covenant provided that certain restrictions upon the use of land should cease "whenever either of the said lots of ground shall be *improved* by buildings, which shall be built in accordance with the spirit of this agreement." In construing this provision the court said: "The spirit of the agreement evidently contemplated the *improvement* of the ground by the erection of permanent buildings. That is the popular and ordinary sense of the word *improved*. It does not refer to mere temporary structures, intended only to answer the purposes of present use, however long that use might continue." *St. Andrew's Lutheran Church's Appeal*, 67 Pa. St. 519. See generally the title **BUILDING RESTRICTIONS AND RESTRICTIVE AGREEMENTS**, vol. 5, p. 1.

Improved and Inclosed. — In an action against a railroad company for killing stock, the declaration, in stating the excepted places specified in the statute, which a railroad company is not required to fence, used the word *unimproved* instead of "uninclosed" as used in the statute. It was held that this averment

was sufficient. The exception having been stated larger and the obligation of the company less than it was, the defendant could not complain. *Illinois Cent. R. Co. v. Wade*, 46 Ill. 115.

Improved Land — Occupied. — Land in a deed was described as *improved* land. In construing this deed the court said: "The word *improved* is not a technical word, having a precise legal meaning. Indeed, there is no very good authority for its use in the sense in which it is not unfrequently employed in familiar speech. It seems quite probable that, Gridley Putney living with his brother Rodney, and working with him upon the land, it was supposed that their possession of it was a joint possession; or that the conveyancer may have supposed that their connection with the land might be well enough expressed by the word *improved*." *Bond v. Fay*, 8 Allen (Mass.) 215.

Same — Cultivate. — In *Clark v. Phelps*, 4 Cow. (N. Y.) 203, the court, in speaking of the terms "*improved* or cultivated land," as used in the law as to laying out highways, said: "These terms are to be taken in the popular sense, according to the general understanding of the community, when distinguishing what is called wld land, or land in a state of nature, from that which has been cultivated and *improved*. The terms to '*improve* or cultivate' may be considered synonymous. To cultivate is defined 'to *improve* the product of the earth by manual industry.' When speaking of *improved* land it is generally understood to be such as has been reclaimed, is used for the purpose of husbandry, and is cultivated as such, whether the appropriation is for tillage, meadow, or pasture." See also *Voight v. Meyer*, 42 N. Y. App. Div. 353.

Improved was held to be synonymous with "converted into arable ground or meadow," in *Ross v. Smith*, 1 B. & Ad. 911, 20 E. C. L. 508.

Within the *Minnesota* statute relating to division fences, it has been held that the word *improve* was not used in the same sense as "cultivate." *Boenig v. Hornberg*, 24 Minn. 310. See also the title **FENCES**, vol. 12, p. 1050.

Same — Highway. — A statute was directed against trespasses upon the garden, orchard, or other *improved* land of another. It was held that the highway could not be considered as the *improved* land of an adjoining proprietor, and that the words did not apply to land within the limits of a highway. *People v. O'Brien*, 60 Mich. 13. See generally the titles **HIGHWAYS**, vol. 15, p. 343; **TRESPASS**. See also *Rohrer v. Rohrer*, 18 Pa. St. 367.

But a private lane may be *improved* land within a statute relating to line fences. *Odenwelder v. Frankenfield*, 153 Pa. St. 526.

Highways. (See also the titles **HIGHWAYS**, vol. 15, p. 343; **STREETS AND SIDEWALKS**.) — In *State v. Hopping*, 18 N. J. L. 423, it was held that the word *improvements* as used in a *New Jersey* statute concerning roads meant inclosures or inclosed fields — lands fenced in as distinguished from wastes or commons.

A power to *improve* the course of roads includes the power to lower and raise roads, to fill up hollows, and to level hills. *Boulton v. Crowther*, 2 B. & C. 703, 9 E. C. L. 227.

Same — Vacation of Street. — Within a statute

requiring that notice of *improvements* be given before the passage of an ordinance authorizing them, it was held that the vacation of a street was an *improvement*. *Cook v. Chambersburg*, 39 N. J. L. 257.

Same — Grading. — In *Chase v. Sioux City*, 86 Iowa 603, it was held that the filling or grading of a city lot to accord with the established grade of a street was an *improvement* within the meaning of a statute making the city liable for damages to property resulting from a change in the grade of a street, where *improvements* had been made thereon according to a grade previously established.

Same — Establishment of Highway. — A statute provided that before the commissioners of any county should order any *improvement*, a petition should be presented to them by a majority of the landowners. It was held that the word *improvement* related not only to the *improvements* of an existing road, but also to the establishment and construction of a new road. *Putnam County v. Young*, 36 Ohio St. 292.

Barn or Dwelling House. — In *State v. Smith*, 21 N. J. L. 92, it was held that a barn or dwelling house was not such an *improvement* as was required to be laid down in the map annexed to the return of the surveyors of highways. See also *State v. Hopping*, 18 N. J. L. 423.

Floor. — In *Harris v. Kelly*, (Pa. 1888) 13 Atl. Rep. 527, an additional floor put into a building intended for use as a skating rink by the tenant was held to be an *improvement* within a provision that all *improvements* were to remain part of the property. See also *Doran v. Chase*, 2 W. N. C. (Pa.) 699.

Milldam. — In *Currie v. Adams*, 14 Quebec 169, it was held that a dam, though not actually working the mill, but constructed to provide a reserve supply of water for the millpond, was an *improvement*.

Water Mains. — For purposes of taxation, water mains, pipes, and hydrants in the streets of a city are *improvements*. *Colorado Fuel, etc., Co. v. Pueblo Water Co.*, 11 Colo. App. 352.

Dower. — As to the mode of assigning dower as affected by *improvements*, see the title DOWER, vol. 10, p. 175; as to allowances for the widow's *improvements*, see the title DOWER, vol. 10, p. 199; as to damages, see the title DOWER, vol. 10, p. 191; as to the deduction of *improvements* from profits, see the title DOWER, vol. 10, p. 196; as to the time of valuation of the estate, see the title DOWER, vol. 10, p. 189.

Wills — Fee Simple. (See also the title WILLS.) — A testator devised the *improvement* of a farm to a sister and provided that the farm should be equally divided between her legal heirs at her death. The court said that the use of the word *improvement* might have "a considerable tendency to show that a fee simple was not intended to be given." *Bowers v. Porter*, 4 Pick. (Mass.) 204.

But in *Anonymous*, 3 Dall. (Pa.) 477, it was held that a devise "to my son James the *improvement* whereon I now live" gave an estate in fee to him.

A testator gave to his wife "the *improvement* of all my estate, personal or real, which *improvement* to belong solely to herself, for her own use and benefit." In construing this

gift, Shaw, C. J., said: "The word *improvement* must be construed according to the subject-matter. Of land, it would constitute a freehold estate, for the devisee's life; of plate, pictures, furniture, it would be the possession and use; of money or securities or stocks, it would be the income." *Lamb v. Lamb*, 11 Pick. (Mass.) 376.

Eminent Domain. (See also the title EMINENT DOMAIN, vol. 10, p. 1158.) — The Constitution of Ohio provided that the jury, in assessing damages in condemnation proceedings, should not take into consideration any advantage that might result to the owner on account of the *improvement* for which the property was taken. In construing this provision where land was taken for a public road the court said: "In short, whatever benefit results to the land on account of the *improvement* is covered by the provision. The use of the word *improvement* has peculiar significance in this connection. It relates to the work done, the road itself when constructed, as well as to its uses and purposes. The express language, therefore, of the constitution covers benefits accruing on account of the road itself, as well as on account of its uses." *Frederick v. Shane*, 32 Iowa 256.

Internal Improvements — Eminent Domain. (See also INTERNAL IMPROVEMENTS.) — In *West Virginia Transp. Co. v. Volcanic Oil, etc., Co.*, 5 W. Va. 387, it was said: "It has been decided time and time again, and is therefore settled by the best authority, that the construction of railroads, turnpikes, canals, ferries, telegraphs, wharves, basins, etc., creating the necessary facilities for intercommunication, constitutes what is generally known by the name of 'internal *improvements*,' and gives occasion for the exercise of the right of eminent domain."

Ditches — County Improvements. — In *Wallace v. Skagit County*, 8 Wash. 457, it was held that the construction of a local ditch was not such an *improvement* as to require the county commissioners to take a bond from the contractors.

Municipal Improvements. (See also the titles MUNICIPAL CORPORATIONS; SPECIAL ASSESSMENTS.) — The provision in the charter of the city of Trenton that requires that "all contracts for doing work, furnishing materials for any *improvement* provided under this act," etc., shall be given to the lowest bidder, applies only to contracts relating to the streets, etc., and not to a contract to furnish rubber hose for the fire department. *Trenton v. Shaw*, 49 N. J. L. 638.

Public Lands. (See also the titles PUBLIC LANDS; STATE LANDS.) — In *Simpson v. Robinson*, 37 Ark. 137, it was said: "An *improvement* under our land system does not mean a general enhancement of the value of the tract from the occupant's operations. It has a more limited meaning, which has in view the population of our forests and the increase of agricultural products. All works which are directed to the creation of homes for families, or which are substantial steps towards bringing lands into cultivation, have in their results the special character of *improvements*, and under the land laws of the United States, and of the several states, are encouraged."

A statute provided that it should not be lawful within twelve months after the passage of

the act for any person to enter into a quarter-section which had been *improved* by any actual settler. It was held that any *improvement*, however small, was within the protection of the act. *Johnson v. Gresham*, 5 Dana (Ky.) 547.

Clearing Land — Distinction Between Improvement and Settlement. — In *Bixler v. Baker*, 4 Binn. (Pa.) 217, it was said: "In our Acts of Assembly and in common parlance there is a difference between an *improvement* and a settlement. An *improvement* may be made by clearing land and cultivating it without residing on it. A settlement requires an actual residence."

Patents. (See also the title PATENTS.) — The owners of letters patent for a new and useful *improvement* in cigarette machines assigned a third interest therein and also in any *improvements*, renewals, or reissues of said cigarette machines or letters patent. It was held that the term *improvements* did not include a new invention. *Allison Brothers Co. v. Allison*, 144 N. Y. 29, reversing 70 Hun (N. Y.) 33. See also *Geiser Mfg. Co. v. Frick Co.*, 92 Fed. Rep. 191.

Same — Improved Construed New. — Where, under a statute providing that patents might be granted for new and original designs, a patent was granted for a new and *improved* design, no prior design being mentioned, the term *improved* was construed to mean new and distinctive, and *improved* as compared with others; and in connection with "new," to mean original. *Wood v. Dolby*, 7 Fed. Rep. 475.

Trademark. (See also the title TRADEMARKS.) — In a trademark case it was held that the introduction of the word *improved* by the defendant into the name of an article manufactured by him did not justify the use of the name if without the introduction of such word the plaintiff had a right to object to such use. *Russia Cement Co. v. Le Page*, 147 Mass. 206, 9 Am. St. Rep. 685.

Mechanics' Liens. (See also the title MECHANICS' LIENS.) — In *Koenig v. Mueller*, 39 Mo. 165, it was held that if the *improvements* placed upon leasehold property are such as a tenant could remove at the end of the term, they are not *improvements* within the meaning of the mechanics' lien law.

In *Schmidt v. Armstrong*, 72 Pa. St. 355, it

was held that the word *improvement* in the mechanics' lien law covered only useful and important erections constituting part of the works placed there by the tenant.

Same — Engines and Boilers. — In *Collins v. Mott*, 45 Mo. 100, it was held that the term *improvement* as used in a mechanics' lien law did not include engines and boilers, but was synonymous with "buildings." See also *Baylies v. Sinex*, 21 Ind. 45.

Same — Windmill. — In *Phelps, etc., Windmill Co. v. Baker*, 49 Kan. 434, it was held that a windmill was an *improvement* within the law.

Same — Coal Mine. — In *Central Trust Co. v. Sheffield, etc., Coal, etc., Co.*, 42 Fed. Rep. 106, a coal mine was held to be an *improvement* within the meaning of the mechanics' lien law.

Collieries. — The *Pennsylvania* Act of February 27, 1868, extending the Mechanics' Lien Act of 1836, to *improvements*, etc., for oil or other refineries, does not apply to leases for the ordinary purposes of residence, etc. See also *Esterley's Appeal*, 54 Pa. St. 195. But compare *Thomas v. Smith*, 42 Pa. St. 73.

Same — Breaking Prairie. — In *Brown v. Wyman*, 56 Iowa 452, 41 Am. Rep. 117, it was held that breaking the prairie was not an *improvement* in land for which a mechanics' lien would lie.

Same — Independent Structure. — A mechanics' lien law provided that a lien for work or materials should attach to buildings, erections, or *improvements* for which they were furnished. It was held that the statute did not give a mechanics' lien for repairs upon an existing building to the prejudice of rights previously acquired by a mortgagee. *Getchell v. Allen*, 34 Iowa 559; *Haeussler v. Thomas*, 4 Mo. App. 468. So in *Meistrell v. Reach*, 56 Mo. App. 243, it was said that the words "building" and *improvement* "are used in the mechanics' lien statute as synonymous terms."

The term *improvement* has been generally held not to apply to the addition or betterment of a building, but to some independent structure on the land. *Neilson v. Iowa Eastern R. Co.*, 44 Iowa 77; *Equitable L. Ins. Co. v. Slye*, 45 Iowa 615; *Collins v. Mott*, 45 Mo. 102; *Richardson v. Koch*, 51 Mo. 270. Compare *Wimberly v. Mayberry*, 94 Ala. 240.

IMPROVEMENTS.

BY JOSEPH WALKER MAGRATH.

I. DEFINITION AND SCOPE OF ARTICLE, 66.

1. *Definition*, 66.
2. *Scope of Article*, 66.

II. GROWTH OF THE DOCTRINE OF COMPENSATION, 66.

1. *Original Common-law Rule*, 66.
2. *Modification in Equity*, 67.
3. *Rule Adopted in Courts of Law*, 68.
4. *Universal Recognition of Right to Compensation*, 69.
5. *Statutory Provisions Allowing Compensation*, 70.
 - a. *General Adoption of*, 70.
 - b. *Extent to Which Rights of Occupying Claimants Are Enlarged*, 70.
 - c. *Constitutionality of Statutes*, 71.
 - (1) *General Rule — Statutes Constitutional*, 71.
 - (a) *Rule Stated*, 71.
 - (b) *Retroactive Statutes*, 72.
 - (2) *Provisions Rendering Statutes Unconstitutional*, 72.
 - (a) *Giving Occupying Claimant Option to Retain Land on Paying Unimproved Value*, 72.
 - (b) *Authorizing General Money Judgment for Improvements*, 72.
 - (c) *Requiring Payment or Tender of Payment for Improvements Before Bringing Suit for Property*, 73.
 - (d) *Failure to Discriminate Between Innocent and Tortious Possession*, 73.

III. GENERAL RULE AS TO WHAT CONSTITUTE IMPROVEMENTS, 73.

1. *Rule Stated*, 73.
2. *Illustrations of Additions Held to Be Improvements*, 74.

IV. MEASURE OF COMPENSATION FOR IMPROVEMENTS, 75.

1. *General Rule Stated*, 75.
2. *Method of Ascertaining Enhancement of Value*, 77.
3. *Time with Reference to Which Compensation Should Be Computed*, 77.
4. *Whether Allowance May Exceed Actual Cost of Improvements*, 78.
5. *Rule Restricting Compensation to Value of Rents and Profits*, 78.
6. *Interest*, 79.

V. WHAT OCCUPANTS ARE ENTITLED TO COMPENSATION, 79.

1. *General Requisites as to Occupancy*, 79.
2. *Necessity for Color of Title*, 79.
 - a. *Rule Stated*, 79.
 - b. *Improvements Made Before Acquiring Color of Title*, 80.
 - c. *What May Constitute Color of Title*, 81.
 - (1) *Introductory*, 81.
 - (2) *Meaning of Term*, 81.
 - (3) *Color of Title Arising from Written Instrument*, 81.
 - (4) *Color of Title Arising in Absence of Written Instrument*, 82.
3. *Necessity for Adverse Character of Occupancy*, 82.
 - a. *Rule Stated*, 82.
 - b. *What Constitutes Adverse Possession*, 83.

IMPROVEMENTS.

- c. *Presumption Against Change of Character of Possession*, 83.
4. *Necessity for Good Faith in Occupant*, 84.
 - a. *Rule Stated*, 84.
 - b. *What Is Meant by Good Faith*, 85.
 - c. *Presumption of Good Faith*, 86.
 - d. *Effect of Notice of Adverse Claim on Question of Good Faith*, 86.
 - (1) *General Rule Stated*, 86.
 - (2) *Rule as to Constructive Notice*, 88.
 - (a) *Doctrine that Such Notice Is Insufficient*, 88.
 - (b) *Doctrine that Such Notice Is Sufficient*, 89.
 - (3) *When Good Faith and Notice of Adverse Claim May Co-exist*, 89.
 - (4) *Rule in South Carolina and Wisconsin*, 90.
 - e. *Existence of Good Faith a Question for the Jury*, 90.
5. *Requirements under Particular Statutes*, 90.
 - a. *Introductory*, 90.
 - b. *Claim Founded on Descent or Any Written Instrument*, 90.
 - c. *Title Derived from Public Authority*, 90.
 - d. *Record Title*, 91.
 - e. *Six Years' Possession*, 91.
 - f. *Possession for at Least One Year*, 91.
 - g. *Purchaser of Supposed Title in Fee*, 92.
 - h. *Occupant Dispossessed by Legal Proceedings*, 92.
 - i. *Eviction by Title Both Paramount and Adverse*, 92.
 - j. *South Carolina Statutes*, 92.
6. *Requirement of Actual Occupancy or Possession*, 92.
7. *Requirement of Peaceable Possession*, 93.
8. *Rule as to Occupants of Public Lands*, 93.
9. *Rights of Purchasers at Tax Sale*, 93.
 - a. *General Rule*, 93.
 - b. *Belief in Integrity of Title Not Necessary in Arkansas*, 94.
 - c. *Improvements Made Before Expiration of Time Allowed for Redemption*, 94.
 - d. *Improvements Made After Tender by One Entitled to Redeem*, 94.
10. *Rights of Purchasers at Judicial Sale*, 94.
 - a. *General Rule*, 94.
 - b. *Want of Jurisdiction in Court Ordering Sale*, 94.
 - c. *Execution Sale Subject to Debtor's Right of Homestead Exemption*, 95.
 - d. *Redemption from Foreclosure Sale by Junior Incumbrancer*, 95.
 - e. *Sale under Junior Lien*, 95.
11. *Rights of Parol Vendees*, 95.
12. *Rights of Donees*, 95.
 - a. *Parol Gift*, 95.
 - b. *Donation Void for Want of Form*, 95.
 - c. *Agreement or Promise to Donate*, 95.
13. *Rights of Vendees under Contract of Sale*, 96.
 - a. *At Law*, 96.
 - b. *In Equity*, 96.
 - (1) *Relief May Be Afforded*, 96.
 - (2) *Where Vendor Is Responsible for Nonfulfilment of Contract*, 96.
 - (3) *Where Vendee Fails to Carry Out Contract*, 97.
 - (4) *Where Contract Was Contingent Merely*, 98.
14. *Occupants Holding Through Mistake as to Identity of Land*, 98.
15. *Husband Holding Land Conveyed to Wife*, 99.
16. *Rights of Trespassers and Wrongdoers*, 99.

IMPROVEMENTS.

VI. FOR WHAT IMPROVEMENTS COMPENSATION WILL BE ALLOWED, 100.

1. *Improvements Placed on Land by Grantor or Predecessor in Title of Occupant*, 100.
2. *Improvements Must Belong to Person Claiming Compensation*, 100.

VII. AS AGAINST WHOM COMPENSATION WILL BE ALLOWED, 100.

1. *The State*, 100.
2. *Person Recovering Land*, 101.
3. *Person Entering Land Without Judgment and Withholding Possession*, 101.
4. *Purchaser of School Lands*, 101.
5. *Infant Owner*, 101.
6. *Indian Owner Holding under Treaty Stipulation*, 101.
7. *Dowress*, 102.

VIII. WHEN OWNER OF PROPERTY IS ESTOPPED TO DISPUTE CLAIM FOR IMPROVEMENTS, 102.

IX. METHODS OF OBTAINING COMPENSATION FOR IMPROVEMENTS, 102.

1. *By Interposing Claim in Possessory Action*, 102.
 - a. *The Right to Set Off Improvements*, 102.
 - (1) *Where Rents and Profits or Damages Are Claimed*, 102.
 - (2) *Where Rents and Profits or Damages Are Not Claimed*, 103.
 - b. *Actions and Proceedings in Which Improvements May Be Claimed*, 103.
2. *By Direct Proceedings*, 103.
 - a. *In General*, 103.
 - b. *Time of Making Claim When Proceeding Is a Continuation of Possessory Action*, 103.
 - c. *Set-off in Possessory Action as a Bar to Direct Proceeding*, 104.
 - d. *Where Owner Has Obtained Possession Without Legal Proceedings*, 104.
 - e. *In What Court Action for Improvements Should Be Brought*, 104.
 - f. *Limitation of Actions*, 104.

X. METHODS OF ENFORCING PAYMENT FOR IMPROVEMENTS, 104.

1. *Lien of Occupant for Improvements*, 104.
2. *Right of Occupant to Retain Land until Payment for Improvements*, 105.
 - a. *After Assessment of Compensation*, 105.
 - b. *During Pendency of Proceedings for Compensation*, 105.
 - c. *Use of Land by Occupant While Retaining Possession*, 106.
3. *Power of Court to Extend Time for Payment for Improvements*, 106.
4. *Election of Owner as to Taking Land or Receiving Unimproved Value*, 106.
 - a. *Rule Stated*, 106.
 - b. *Time with Reference to Which Value of Land Should Be Computed*, 106.
 - c. *Adjustment Where Both Owner and Occupant Decline to Pay*, 107.
 - (1) *Sale of Land and Division of Proceeds*, 107.
 - (2) *Tenancy in Common*, 107.
5. *Extinguishment of Title of Owner by Failure to Pay for Improvements*, 107.
6. *Extinguishment of Right of Occupant by Failure to Pay Unimproved Value*, 107.
7. *Who Liable for Costs of Sale of Part of Land to Pay for Improvements*, 108.

XI. SETTING OFF RENTS AND PROFITS AGAINST CLAIM FOR IMPROVEMENTS, 108.

1. *General Rule Stated*, 108.
2. *In Direct Proceedings for Compensation*, 108.

IMPROVEMENTS.

3. *Period for Which Rents and Profits May Be Set Off*, 109.
4. *Mesne Profits Prior to Entry of Occupant*, 109.
5. *Whether Rent Can Be Charged on Value of Property as Improved*, 109.

XII. WAIVER OR FORFEITURE OF CLAIM FOR IMPROVEMENTS, 110.

XIII. RULES CONCERNING IMPROVEMENTS BY LESSEES, 110.

XIV. RULES CONCERNING IMPROVEMENTS BY ONE OF SEVERAL COTENANTS, 111.

1. *Right to Allowance Therefor*, 111.
2. *How the Allowance Is Made*, 112.
 - a. *By Assigning Improved Portion of Property to Maker of Improvements*, 112.
 - (1) *Method Adopted When Practicable*, 112.
 - (2) *Whether Cotenant Must Have Claimed Exclusive Title and Acted in Good Faith*, 113.
 - (3) *Right to Have Improved Portion Set Off Recognized Though Right to Pecuniary Compensation Denied*, 114.
 - (4) *Distinction Depending upon Whether Improving Tenant Is Plaintiff in Partition*, 114.
 - (5) *Right Not Dependent upon Consent of Cotenants to Improvements*, 114.
 - b. *By Requiring Payment of Compensation by Other Cotenants*, 114.
 - (1) *In General*, 114.
 - (2) *Necessity for Claim of Exclusive Title and Good Faith*, 115.
 - c. *By Allowance Out of Proceeds of Sale of Property*, 116.
 - d. *By Assigning an Increased Quantity of Land to Maker of Improvements*, 116.
 - e. *By Setting Off Improvements Against Rents and Profits*, 116.
3. *Rents and Profits May Be Set Off Against Improvements*, 117.

XV. RULES CONCERNING IMPROVEMENTS BY LIFE TENANTS OR TENANTS FOR YEARS, 117.

1. *General Rule Stated*, 117.
2. *Reason of the Rule*, 118.
3. *Acquiescence of Remainderman or Reversioner*, 118.
4. *Exceptions to the Rule*, 118.
 - a. *Where Absolute Title Is Claimed*, 118.
 - b. *Completion by Tenant for Life under a Will, of Improvements Begun by Testator*, 119.

XVI. RULES CONCERNING IMPROVEMENTS BY MORTGAGORS OR MORTGAGEES IN POSSESSION, 119.

1. *By Mortgagors*, 119.
2. *By Mortgagees in Possession*, 120.
 - a. *In the United States*, 120.
 - (1) *General Rule Stated*, 120.
 - (2) *When Compensation May Be Allowed*, 120.
 - (a) *Belief of Mortgagee that He Has Acquired Complete Title*, 120.
 - (b) *Consent or Acquiescence of Mortgagor*, 121.
 - (3) *Rents and Profits*, 121.
 - b. *In England and Canada*, 121.

XVII. RULES CONCERNING IMPROVEMENTS BY TRUSTEES AND OTHER FIDUCIARIES, 122.

XVIII. RULES CONCERNING IMPROVEMENTS BY ONE SPOUSE ON LAND OF OTHER, 122.

1. *As Between the Parties*, 122.
 - a. *View that No Compensation Should Be Allowed*, 122.
 - b. *View that Compensation Should Be Allowed*, 123.
2. *As Against Creditors*, 123.

CROSS-REFERENCES.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles: *ADVERSE POSSESSION*, vol. 1, p. 787; *EJECTMENT*, vol. 10, p. 467; *FIXTURES*, vol. 13, p. 594; *HUSBAND AND WIFE*, vol. 15, p. 785; *LANDLORD AND TENANT*; *LEASES*; *MORTGAGES*; *TRUSTS AND TRUSTEES*; and specific cross-references given throughout this article.

I. DEFINITION AND SCOPE OF ARTICLE — 1. Definition. — An improvement is defined as an amelioration in the condition of real or personal property, effected by the expenditure of labor or money, for the purpose of rendering it useful for purposes other than those for which it was originally used, or more useful for the same purposes.¹

Confined to Real Property. — The term is, however, ordinarily used only in reference to real property,² and in this article improvements to real property only will be treated.

Betterment. — The term "betterment," which has exactly the same meaning as improvement so far as the present article is concerned, is defined as an improvement made upon real estate, more extensive in its nature than a mere repair,³ and which increases in a substantial degree the value of the property.⁴

2. Scope of Article. — This article will be strictly confined to a treatment of the right of an occupant of land who has placed improvements thereon to be compensated therefor, either directly or indirectly. The reader is referred to other portions of this work for a treatment of such subjects as the improvement of highways,⁵ or of navigation,⁶ special or local improvements,⁷ the right to real property arising from improvement thereof,⁸ or the lien on property arising from the erection of improvements thereon by one claiming neither the title thereto nor the right to possession thereof.⁹

The Line of Demarcation Between Improvements and Fixtures seems rather vague until the subject is given a close study. The true distinction is that observed in this work, viz.: the law of improvements relates to the right of the occupant to compensation for his additions to the property, while the law of fixtures relates to the right of such occupant to remove his additions.¹⁰

II. GROWTH OF THE DOCTRINE OF COMPENSATION — 1. Original Common-law Rule. — By the *English* and *American* common law, the true owner of land might recover it in ejectment without any liability to pay for improvements which might have been made upon it by an occupant without title. Improvements annexed to the freehold the law deemed a part of it, and they passed with the recovery; and every occupant made improvements at his peril, even

1. Definition. — Bouv. L. Dict.

"Improvements," as used in a contract to purchase land and improvements of the plaintiff, "must be construed to mean work and labor generally of the plaintiff enhancing the value of the premises." *Spencer v. Tobey*, 22 Barb. (N. Y.) 260, per Strong, J.

The Term Improvements "Is a More Comprehensive Word than 'Fixtures,' and necessarily includes it, and such additions as the law might not regard as fixtures. It would be difficult to select a more comprehensive word; and where the parties say that all improvements which may be placed on the premises shall belong to the lessors, it is difficult to say what, if anything, would be excluded." *French v. New York*, (Supm. Ct. Gen. T.) 16 How. Pr. (N. Y.) 220. See also *West v. Blake-way*, 2 M. & G. 729, 40 E. C. L. 598. And see generally the title *FIXTURES*, vol. 13, p. 594.

Not Necessarily Buildings. — An improvement

within the meaning of the *California* statute with reference to adverse possession does not necessarily mean buildings or other structures on the land. *Allen v. McKay*, 120 Cal. 332.

2. Ordinarily Confined to Real Property. — Black's L. Dict.

3. Definition of "Betterment." — Vol. 4, p. 7.

4. And. L. Dict. See also *infra*, this title, *General Rule as to What Constitute Improvements*.

5. See the titles *HIGHWAYS*, vol. 15, p. 408; *STREETS AND SIDEWALKS*.

6. See the titles *NAVIGABLE WATERS*; *NAVIGATION*.

7. See the title *SPECIAL OR LOCAL IMPROVEMENTS*.

8. See the titles *ADVERSE POSSESSION*, vol. 1, p. 787; *ESTOPPEL*, vol. 11, p. 385; *PUBLIC LANDS*.

9. See the title *MECHANICS' LIENS*.

10. As to the Law of *Fixtures*, see the title *FIXTURES*, vol. 13, p. 594.

if he acted under a *bona fide* belief of ownership.¹ This rigid rule was founded upon the idea that the owner should not pay an intruder, or disseisor, or occupant, for improvements which he never authorized.² It was supposed to be founded in good policy, inasmuch as it induced diligence in the examination of titles,³ and prevented intrusions upon and appropriations of the property of others.⁴

2. Modification in Equity. — Chancery, borrowing from the civil law,⁵ made the first innovation upon the common-law doctrine. And it came at length to be held in equity, that when a *bona fide* possessor of property (for equity no more than law would aid a *mala fide* possessor) made meliorations and improvements upon it in good faith, and under an honest belief of ownership, and the real owner was for any reason compelled to come into a court of equity, that court, applying the familiar maxim that he who seeks equity must do equity, and adopting the civil-law rule of natural equity, would compel him to pay for those improvements or industrial accessions, not the cost indeed, but so far as they were permanently beneficial to the estate and enhanced its value.⁶

1. Original Common-law Doctrine. — *United States*. — Jackson v. Ludeling, 99 U. S. 513; Albee v. May, 2 Paine (U. S.) 78. See also Kutter v. Smith, 2 Wall. (U. S.) 491.

Alabama. — Gordon v. Tweedy, 74 Ala. 232, 49 Am. Rep. 813; New Orleans, etc., R. Co. v. Jones, 68 Ala. 48.

Arkansas. — See McCloy v. Arnett, 47 Ark.

445.

California. — Ford v. Holton, 5 Cal. 319.

Indiana. — Westerfield v. Williams, 59 Ind.

221.

Iowa. — Parsons v. Moses, 16 Iowa 440; Lunquest v. Ten Eyck, 40 Iowa 213; Webster v. Stewart, 6 Iowa 401.

Kansas. — Barton v. National Land Co., 27 Kan. 634.

Kentucky. — Pugh v. Bell, 2 T. B. Mon. (Ky.) 125, 15 Am. Dec. 142.

Missouri. — Dothage v. Stuart, 35 Mo. 251.

Ohio. — McCoy v. Grandy, 3 Ohio St. 463.

Pennsylvania. — Putnam v. Tyler, 117 Pa. St. 570; Gregg v. Patterson, 9 W. & S. (Pa.) 209.

Virginia. — Graeme v. Cullen, 23 Gratt. (Va.) 266; Effinger v. Hall, 81 Va. 95; Hollingsworth v. Funkhouser, 85 Va. 448.

West Virginia. — Williamson v. Jones, 43 W. Va. 562; Dawson v. Grow, 29 W. Va. 333.

A Tenant for Life is not, by the common law, entitled to any compensation for improvements made by him. Pratt v. Churchill, 42 Me. 471.

Burden of Proof as to Exceptions upon Party Seeking Benefit of Them. — Graeme v. Culien, 23 Gratt. (Va.) 266.

2. View that Owner Should Not Pay for Improvements Which He Never Authorized. — Parsons v. Moses, 16 Iowa 440.

No Moral Obligation to Pay for Unauthorized Improvements. — McCoy v. Grandy, 3 Ohio St. 463; Dawson v. Grow, 29 W. Va. 333.

3. Rule Intended to Induce Diligence in Examination of Titles. — Parsons v. Moses, 16 Iowa 440.

4. Prevention of Intrusions upon and Appropriations of Property of Others. — Albee v. May, 2 Paine (U. S.) 74; Parsons v. Moses, 16 Iowa 440.

5. Equitable Rule Borrowed from the Civil Law. — New Orleans, etc., R. Co. v. Jones, 68 Ala. 48; Gordon v. Tweedy, 74 Ala. 232, 49 Am. Rep. 813; Dean v. Feely, 69 Ga. 806.

According to the Rule of the Civil Law a *bona fide* possessor is entitled to be reimbursed, by way of indemnity, for beneficial improvements. Albee v. May, 2 Paine (U. S.) 78; Bright v. Boyd, 1 Story (U. S.) 478; Ensign v. Batterson, 68 Conn. 298; Woodhull v. Rosenthal, 61 N. Y. 382; Putnam v. Ritchie, 6 Paige (N. Y.) 390; Pope v. Henry, 24 Vt. 560; Dawson v. Grow, 29 W. Va. 333. See also Barton v. National Land Co., 27 Kan. 634.

Spanish Law. — In Scott v. Mather, 14 Tex. 235, it was said that the right of the possessor in good faith to be remunerated on eviction, for his improvements, was a principle of the laws of Spain which were in force up to the adoption of the first statute on the subject of improvements. Cited with approval in Saunders v. Wilson, 19 Tex. 194, in which case Hemphill, C. J., further discussed the Spanish law on the subject.

6. Modification in Equity — England. — Atty.-Gen. v. Baliol College, 9 Mod. 411; Shine v. Gough, 1 Ball & B. 444.

Canada. — Munsie v. Lindsay, 11 Ont. 520.

United States. — Jackson v. Ludeling, 99 U. S. 513; Albee v. May, 2 Paine (U. S.) 74; Green v. Biddle, 8 Wheat. (U. S.) 77; Bright v. Boyd, 1 Story (U. S.) 478, 2 Story (U. S.) 605; Canal Bank v. Hudson, 111 U. S. 66; Williams v. Gibbs, 20 How. (U. S.) 535. See also George v. Steam Stone Cutter Co., 20 Fed. Rep. 478.

Alabama. — See Ware v. Curry, 67 Ala. 274.

Arkansas. — Teaver v. Akin, 47 Ark. 528; West v. Williams, 15 Ark. 682; Marlow v. Adams, 24 Ark. 109; Jones v. Johnson, 28 Ark. 211; Felkner v. Tighe, 39 Ark. 358; Horsley v. Hilburn, 44 Ark. 478; Watkins v. Wasell, 15 Ark. 73; Cunningham v. Ashley, 16 Ark. 181; Summers v. Howard, 33 Ark. 490; McCloy v. Arnett, 47 Ark. 445; Brewer v. Hall, 36 Ark. 353.

Connecticut. — Ensign v. Batterson, 68 Conn. 298.

Georgia. — See Barnes v. Shinholster, 14 Ga. 131.

3. Rule Adopted in Courts of Law. — The courts of law next modified the strict rule of the common law (which makes the occupant of land which is owned by another, no matter how good the faith of the occupant may be, liable for the rents and profits) to this extent, that where such owner brought his action for mesne profits, which the courts of law treated as an equitable action, the *bona fide* occupant might set off or recoup the value of his permanent improvements to the extent of the rents and profits demanded, but no further.¹

Illinois. — *Cable v. Ellis*, 120 Ill. 136; *Lager v. Mutual Union Loan, etc., Assoc.*, 146 Ill. 283; *Ebelmesser v. Ebelmesser*, 99 Ill. 511. See also *Mettler v. Craft*, 39 Ill. App. 193; *Butler v. Butler*, 164 Ill. 171, *affirming* 61 Ill. App. 51; *Williams v. Vanderbilt*, 145 Ill. 238, 36 Am. St. Rep. 486.

Iowa. — *Parsons v. Moses*, 16 Iowa 440. *Kentucky.* — *Harlan v. Seaton*, 18 B. Mon. (Ky.) 312; *Hayden v. Delay*, Litt. Sel. Cas. (Ky.) 278; *Parker v. Stephens*, 3 A. K. Marsh. (Ky.) 197; *Hall v. Brummal*, 7 Bush (Ky.) 43. See also *Pugh v. Bell*, 2 T. B. Mon. (Ky.) 125, 15 Am. Dec. 142.

Maryland. — *McLaughlin v. Barnum*, 31 Md. 425; *Hagthorp v. Hook*, 1 Gill & J. (Md.) 305.

Nebraska. — *Shuman v. Willetts*, 19 Neb. 705. See also *Page v. Davis*, 26 Neb. 670.

New Jersey. — See *Foley v. Kirk*, 33 N. J. Eq. 170.

New York. — *Putnam v. Ritchie*, 6 Faige (N. Y.) 390; *Mickles v. Dillaye*, 17 N. Y. 80; *Thomas v. Evans*, 105 N. Y. 601, 59 Am. Rep. 519; *Frear v. Hardenbergh*, 5 Johns. (N. Y.) 272, 4 Am. Dec. 356. See also *Brown v. Miles*, 61 Hun (N. Y.) 453.

North Carolina. — *Wharton v. Moore*, 84 N. Car. 479, 37 Am. Rep. 627. See also *Barker v. Owen*, 93 N. Car. 198; *Justice v. Baxter*, 93 N. Car. 405; *Merritt v. Scott*, 81 N. Car. 385.

Ohio. — *Preston v. Brown*, 35 Ohio St. 18.

Pennsylvania. — *Skiles's Appeal*, 16 W. N. C. (Pa.) 246; *Putnam v. Tyler*, 117 Pa. St. 570. See also *Walker v. Humbert*, 55 Pa. St. 407; *Morrison v. Robinson*, 31 Pa. St. 456.

Tennessee. — *Broyles v. Waddell*, 11 Heisk. (Tenn.) 32. See also *Townsend v. Shipp*, *Cooke* (Tenn.) 300. But compare *Nelson v. Allen*, 1 Yerg. (Tenn.) 383.

Texas. — See *Watt v. Hunter*, 20 Tex. Civ. App. 76.

Virginia. — *Wood v. Krebs*, 33 Gratt. (Va.) 685; *Effinger v. Hall*, 81 Va. 94. See also *Walker v. Beauchler*, 27 Gratt. (Va.) 511.

West Virginia. — *Dawson v. Grow*, 29 W. Va. 333.

Whether a Complainant May Obtain Relief. — In *Putnam v. Ritchie*, 6 Paige (N. Y.) 390, the plaintiff, in the honest belief that his title was good, improved the estate, and was afterwards sued in ejectment for the recovery thereof. Thereupon he filed his bill to restrain the further prosecution of the action, or to be allowed for his improvements; but Chancellor Walworth dismissed the bill. See also *Pegley v. Woods*, 14 Grant Ch. (U. C.) 47; *Parsons v. Moses*, 16 Iowa 440; *Butler v. Butler*, 164 Ill. 171, *affirming* 61 Ill. App. 51; *Williams v. Vanderbilt*, 145 Ill. 238, 36 Am. St. Rep. 486.

This decision is in harmony with the doc-

trine laid down by Judge Story in his work on Equity. But the question some years afterwards arose and was differently decided in *Bright v. Boyd*, 1 Story (U. S.) 478. There relief was granted the complainant, against whom a judgment in ejectment had been recovered for the possession of certain land, which he had previously purchased at a judicial sale, and upon which he had put expensive improvements, supposing his title to be good. To the same effect are the following cases: *Thomas v. Thomas*, 16 B. Mon. (Ky.) 420; *Valle v. Fleming*, 29 Mo. 152, 77 Am. Dec. 557; *Union Hall Assoc. v. Morrison*, 39 Md. 281; *Hatcher v. Briggs*, 6 Oregon 31. See also *Effinger v. Hall*, 81 Va. 94.

But in *Wharton v. Moore*, 84 N. Car. 479, 37 Am. Rep. 627, the Supreme Court of *North Carolina* said, in reference to the case of *Bright v. Boyd*, 1 Story (U. S.) 478, and those of *Mathews v. Davis*, 6 Humph. (Tenn.) 324, and *Herring v. Pollard*, 4 Humph. (Tenn.) 362, 40 Am. Dec. 653, in which it was followed: "These cases pressed the doctrine further than we have found it carried in any other state except in this."

Circumstances under Which Equity Would Not Require Compensation for Improvements. — In a case where the plaintiff in an action to recover two adjoining lots obtained a judgment for one, but as to the other the defendant was adjudged to have acquired title by possession, it was held that the plaintiff was not accountable in equity out of the lot which he recovered for improvements. *Griffin v. Lee*, 90 Ga. 224.

1. Rule Adopted in Courts of Law — England. — See *Dormer v. Fortescue*, 3 Atk. 134; *Coulter's Case*, 5 Coke 30.

Canada. — *Beaty v. Shaw*, 14 Ont. App. 600.

United States. — *Green v. Biddle*, 4 Ark. 478, (U. S.) 1; *Hylton v. Brown*, 2 Wash. (U. S.) 165; *Stark v. Starr*, 1 Sawy. (U. S.) 15; *Gill v. Patten*, 1 Cranch (C. C.) 465.

Alabama. — *Gordon v. Tweedy*, 74 Ala. 232, 49 Am. Rep. 813; *Hollinger v. Smith*, 4 Ala. 367; *Kerr v. Nicholas*, 88 Ala. 346; *New Orleans, etc., R. Co. v. Jones*, 68 Ala. 48; *Lamar v. Minter*, 13 Ala. 31.

Arkansas. — See *Porter v. Doe*, 10 Ark. 186. But compare *Horsley v. Hilburn*, 44 Ark. 478, in which it is intimated that a claim to set off improvements is permissible only in equity.

California. — See *Love v. Shartzer*, 31 Cal. 487; *Welch v. Sullivan*, 8 Cal. 511.

Georgia. — *Davis v. Smith*, 5 Ga. 274, 48 Am. Dec. 279; *Beverly v. Burke*, 9 Ga. 440, 54 Am. Dec. 351; *Thomas v. Malcom*, 39 Ga. 328, 99 Am. Dec. 459.

Iowa. — *Lunquest v. Ten Eyck*, 40 Iowa 213; *Parsons v. Moses*, 16 Iowa 440.

Kansas. — See *Stebbins v. Guthrie*, 4 Kan. 356.

4. Universal Recognition of Right to Compensation. — The right of a *bona fide* occupant who has made lasting and permanent improvements upon land which has turned out to be another's, to be compensated therefor, has thus come to be universally recognized.¹

Right Not Dependent upon Statute. — And the equity of such a possessor is considered so strong and persuasive as to force its recognition, at least to the partial extent stated in the preceding paragraphs, without the aid of statute.²

Kentucky. — *Hawkins v. King*, 1 T. B. Mon. (Ky.) 161.

Louisiana. — *Burrows v. Peirce*, 6 La. Ann. 303.

Maryland. — *Tongue v. Nutwell*, 31 Md. 302; *Duckett v. Duckett*, (Md. 1891) 21 Atl. Rep. 323.

Michigan. — See *King v. Harrington*, 18 Mich. 213.

Mississippi. — *Johnson v. Futch*, 57 Miss. 73; *Learned v. Corley*, 43 Miss. 687.

Missouri. — *Dothage v. Stuart*, 35 Mo. 251; *Pierce v. Rollins*, 1 Mo. App. Rep. 217, 60 Mo. App. 497.

Nebraska. — *Dworak v. More*, 25 Neb. 735.

New York. — *Jackson v. Loomis*, 4 Cow. (N. Y.) 168, 15 Am. Dec. 347; *Wallace v. Berdell*, 101 N. Y. 13; *Murray v. Gouverneur*, 2 Johns. Cas. (N. Y.) 438, 1 Am. Dec. 177; *Putnam v. Ritchie*, 6 Paige (N. Y.) 404.

Ohio. — *Worthington v. Young*, 8 Ohio 401; *Preston v. Brown*, 35 Ohio St. 18. See also *McCoy v. Grandy*, 3 Ohio St. 463.

Pennsylvania. — *Putnam v. Tyler*, 117 Pa. St. 570; *Morrison v. Robinson*, 31 Pa. St. 456; *Ege v. Kille*, 84 Pa. St. 333. See also *Walker v. Humbert*, 55 Pa. St. 407.

Tennessee. — *Mathews v. Davis*, 6 Humph. (Tenn.) 324.

Virginia. — *Effinger v. Hall*, 81 Va. 94; *Wood v. Krebs*, 33 Gratt. (Va.) 685; *Graeme v. Cullen*, 23 Gratt. (Va.) 286. See also *Morris v. Terrell*, 2 Rand. (Va.) 6.

West Virginia. — *Dawson v. Grow*, 29 W. Va. 333.

Wisconsin. — *Davis v. Louk*, 30 Wis. 308.

Occupant Without Remedy if Owner Made No Claim for Rents and Profits. — *Dawson v. Grow*, 29 W. Va. 333; *Graeme v. Cullen*, 23 Gratt. (Va.) 296.

1. Right of Bona Fide Occupant to Compensation for Improvements — *England.* — *Davey v. Durrant*, 1 De G. & J. 535; *Donovan v. Fricker*, Jac. 165.

Canada. — *Bevis v. Boulton*, 7 Grant Ch. (U. C.) 39; *Townsley v. Neil*, 10 Grant Ch. (U. C.) 72; *Smith v. Bonnisteel*, 13 Grant Ch. (U. C.) 35; *Morley v. Matthews*, 14 Grant Ch. (U. C.) 551; *Knowlton v. Clark*, 9 L. C. Jur. 243; *Nugent v. Mitchell*, 19 Rev. Jég. 569; *McGregor v. McGregor*, 27 Grant Ch. (U. C.) 470; *Lawrence v. Stuart*, 6 L. C. Rep. 294; *Stuart v. Eaton*, 8 L. C. Rep. 113.

United States. — *Stark v. Starr*, 1 Sawy. (U. S.) 15; *Griswold v. Bragg*, 6 Fed. Rep. 342; *Wells v. Riley*, 2 Dill. (U. S.) 566; *Green v. Biddle*, 8 Wheat. (U. S.) 1.

Alabama. — *Ormond v. Martin*, 37 Ala. 598; *Copeland v. McAdory*, 100 Ala. 553.

Arkansas. — *Rector v. Gaines*, 19 Ark. 70; *Byers v. Fowler*, 12 Ark. 220, 54 Am. Dec. 271.

California. — *Love v. Shartzer*, 31 Cal. 487.

Georgia. — See *Bryant v. Hambrick*, 9 Ga.

133; *Martin v. Atkinson*, 7 Ga. 228, 50 Am. Dec. 403.

Illinois. — *Breit v. Yeaton*, 101 Ill. 242. See also *Cable v. Ellis*, 120 Ill. 136; *Lagger v. Mutual Union Loan Assoc.*, 146 Ill. 283.

Iowa. — *Parsons v. Moses*, 16 Iowa 440; *Stinson v. Richardson*, 44 Iowa 373.

Kansas. — *Lemert v. Barnes*, 18 Kan. 9.

Kentucky. — *Pugh v. Bell*, 2 T. B. Mon. (Ky.) 125, 15 Am. Dec. 142; *Bell v. Barnett*, 2 J. J. Marsh. (Ky.) 516; *Thomas v. Thomas*, 16 B. Mon. (Ky.) 420; *Dean v. Cassiday*, 88 Ky. 572; *Dawson v. Lee*, 83 Ky. 49; *Patrick v. Marshall*, 2 Bibb (Ky.) 40, 4 Am. Dec. 670. See also *Hackworth v. Harlan*, (Ky. 1892) 19 S. W. Rep. 172; *Evans v. Page*, (Ky. 1894) 26 S. W. Rep. 1016; *Winn v. Redman*, 2 Bibb (Ky.) 84.

Louisiana. — *Howard v. Zeyer*, 18 La. Ann. 407; *Montgomery v. Whitfield*, 41 La. Ann. 649. See also *McCastle v. Chaney*, 28 La. Ann. 720.

Massachusetts. — *Bacon v. Callender*, 6 Mass. 303; *Jones v. Carter*, 12 Mass. 314; *Newhall v. Saddler*, 17 Mass. 350.

Mississippi. — *Miller v. Ingram*, 56 Miss. 510; *Johnson v. Futch*, 57 Miss. 73.

Missouri. — *Dothage v. Stuart*, 35 Mo. 251; *Fenwick v. Gill*, 38 Mo. 510.

Nebraska. — *Page v. Davis*, 26 Neb. 670.

New York. — *Wood v. Wood*, 83 N. Y. 575; *Jackson v. Loomis*, 4 Cow. (N. Y.) 168, 15 Am. Dec. 347.

North Carolina. — *Hedgepeth v. Rose*, 95 N. Car. 41; *Pitt v. Moore*, 99 N. Car. 85, 6 Am. St. Rep. 489; *Field v. Moody*, 111 N. Car. 353.

Oregon. — *Hatcher v. Briggs*, 6 Oregon 31.

Pennsylvania. — *Putnam v. Tyler*, 117 Pa. St. 570; *Scates v. Tyler*, (Pa. 1888) 12 Atl. Rep. 51.

South Carolina. — *Rabb v. Flenniken*, 32 S. Car. 189.

Tennessee. — *Bains v. Perry*, 1 Lea (Tenn.) 37; *Alston v. Boyd*, 6 Humph. (Tenn.) 505; *Humphreys v. Holtsinger*, 3 Sneed (Tenn.) 229.

Texas. — *Van Zandt v. Brantley*, 15 Tex. Civ. App. 420.

Virginia. — *Wood v. Krebs*, 33 Gratt. (Va.) 685.

West Virginia. — *Williamson v. Jones*, 43 W. Va. 562.

Wisconsin. — *Blodgett v. Hitt*, 29 Wis. 169.

There Must Have Been a Claim of Right. — *Powell v. Davis*, 19 Tex. 350.

2. Rights of Bona Fide Purchaser Recognized on Equitable Principles Independent of Statute — *Arkansas.* — *Teaver v. Akin*, 47 Ark. 528.

Iowa. — *Parsons v. Moses*, 16 Iowa 440.

Kentucky. — *Hayden v. Delay*, Litt. Sel. Cas. (Ky.) 278; *Whitledge v. Wait*, Sneed (Ky.) 335, 2 Am. Dec. 721; *Parker v. Stephens*, 3 A. K. Marsh. (Ky.) 107. See also *Doe v. Buford*, 1 Dana (Ky.) 494.

Mississippi. — *Johnson v. Futch*, 57 Miss. 73.

5. Statutory Provisions Allowing Compensation — *a. GENERAL ADOPTION OF.* — Nevertheless these rights soon began to be recognized by legislative bodies, and various statutes were enacted in the different jurisdictions allowing such persons compensation for their improvements, until at the present time such statutes have been very generally adopted.¹

b. EXTENT TO WHICH RIGHTS OF OCCUPYING CLAIMANTS ARE ENLARGED. — The principal particulars in which such statutes enlarge the rights

Ohio. — *Preston v. Brown*, 35 Ohio St. 18.

Texas. — *Wood v. Cahill*, (Tex. Civ. App. 1899) 50 S. W. Rep. 1071; *Van Zandt v. Brantley*, 16 Tex. Civ. App. 420; *Patrick v. Roach*, 21 Tex. 251; *Eberling v. Verein*, 72 Tex. 339; *Long v. Cude*, 75 Tex. 227; *Harrell v. Houston*, 66 Tex. 280; *Thouvenin v. Lea*, 26 Tex. 612.

Virginia. — *Effinger v. Hall*, 81 Va. 94.

And see cases cited in the two preceding subsections. But compare *King v. Potter*, 18 Mich. 134.

Apparently Conflicting Cases Explained. — There are several cases in which it has been said that the right of an occupying claimant to compensation for improvements is entirely of statutory origin, and does not exist independent of statute. *Chapman v. Barger*, 4 Dill. (U. S.) 557; *Westerfield v. Williams*, 59 Ind. 221; *Graham v. Connersville, etc.*, R. Co., 36 Ind. 463, 10 Am. Rep. 56; *Chesround v. Cunningham*, 3 Blackf. (Ind.) 82; *Webster v. Stewart*, 6 Iowa 401; *Craton v. Wright*, 16 Iowa 133; *Lunquest v. Ten Eyck*, 40 Iowa 213.

But it is considered that these cases meant to refer merely to the right to recover for such improvements in an affirmative action, and in this view they are not in conflict with the statement in the text.

1. Statutory Provisions Allowing Compensation

— *United States.* — *Bright v. Boyd*, 2 Story (U. S.) 607; *Leighton v. Young*, 10 U. S. App. 298; *Griswold v. Bragg*, 18 Blatchf. (U. S.) 202; *Hamilton Bank v. Dudley*, 2 Pet. (U. S.) 492; *Canal Bank v. Hudson*, 111 U. S. 66; *Chapman v. Barger*, 4 Dill. (U. S.) 557; *Litchfield v. Johnson*, 4 Dill. (U. S.) 551.

Alabama. — *Lamar v. Minter*, 13 Ala. 31; *Kerr v. Nicholas*, 88 Ala. 346.

Arkansas. — *Sand. & H. Dig.* (1894) 2583-2594; *Shepherd v. Jernigan*, 51 Ark. 275, 14 Am. St. Rep. 50; *Fee v. Cowdry*, 45 Ark. 410, 55 Am. Rep. 560; *Anderson v. Williams*, 59 Ark. 144; *Beard v. Dansby*, 48 Ark. 183.

California. — *Hannan v. McNickle*, 82 Cal. 122.

Connecticut. — *Griswold v. Bragg*, 48 Conn. 577.

Florida. — *Duncan v. Jackson*, 16 Fla. 338.

Georgia. — *Dean v. Feely*, 69 Ga. 804; *Tripp v. Fausett*, 94 Ga. 330.

Illinois. — *Ross v. Irving*, 14 Ill. 171; *Montag v. Linn*, 27 Ill. 328.

Indiana. — *McGill v. Kennedy*, 11 Ind. 20; *Armstrong v. Jackson*, 1 Blackf. (Ind.) 374; *Westerfield v. Williams*, 59 Ind. 221.

Iowa. — *Parsons v. Moses*, 16 Iowa 440; *Finnegan v. Campbell*, 74 Iowa 158; *Welles v. Newsom*, 76 Iowa 81. See also *Snell v. Mehan*, 80 Iowa 53.

Kansas. — *Krause v. Means*, 12 Kan. 335; *Larkin v. Wilson*, 28 Kan. 513; *Lemert v. Barnes*, 18 Kan. 9; *Coontadt v. Myers*, 31 Kan.

30; *Maynes v. Veale*, 20 Kan. 374; *Hazen v. Rounsaville*, 35 Kan. 405; *Bauder v. Bryan*, 20 Kan. 367; *Hentig v. Redden*, 38 Kan. 496.

Kentucky. — *Fowler v. Halbert*, 4 Bibb (Ky.) 52; *Patrick v. Marshall*, 2 Bibb (Ky.) 45, 4 Am. Dec. 670; *Thompson v. Mason*, 4 Bibb (Ky.) 199; *Parker v. Stephens*, 3 A. K. Marsh. (Ky.) 202; *Howe v. Logwood*, 3 A. K. Marsh. (Ky.) 388; *Ewing v. Handley*, 4 Litt. (Ky.) 371, 14 Am. Dec. 140.

Massachusetts. — *Jones v. Carter*, 12 Mass. 314.

Michigan. — *Burkle v. Ingham Circuit Judge*, 42 Mich. 513.

Minnesota. — *Hall v. Torrens*, 32 Minn. 527; *Pfefferle v. Wieland*, 55 Minn. 202; *Wheeler v. Merriman*, 30 Minn. 372.

Mississippi. — *Annot. Code Miss.* (1892), § 1673; *Miller v. Ingram*, 56 Miss. 510; *Citizens' Bank v. Costanera*, 62 Miss. 825.

North Carolina. — *Justice v. Baxter*, 93 N. Car. 405; *Carolina Cent. R. Co. v. McCaskill*, 98 N. Car. 526; *Barker v. Owen*, 93 N. Car. 198; *Browne v. Davis*, 109 N. Car. 23.

Ohio. — *Davis v. Powell*, 13 Ohio 308; *McCoy v. Grandy*, 3 Ohio St. 463; *Hunt v. McMahan*, 5 Ohio 132.

South Dakota. — *Wood v. Conrad*, 2 S. Dak. 334.

Texas. — *Scott v. Mather*, 14 Tex. 235; *Norton v. Davis*, 13 Tex. Civ. App. 90; *Saunders v. Wilson*, 19 Tex. 194; *Bonner v. Wiggins*, 52 Tex. 128; *Cahill v. Benson*, 19 Tex. Civ. App. 30; *Thomas v. Quarles*, 64 Tex. 491.

Vermont. — *Whitney v. Richardson*, 31 Vt. 306.

Virginia. — *Graeme v. Cullen*, 23 Gratt. (Va.) 266.

West Virginia. — *Williamson v. Jones*, 43 W. Va. 562.

Wisconsin. — *Pacquette v. Pickness*, 19 Wis. 219; *Huebschmann v. McHenry*, 29 Wis. 663; *Falck v. Marsh*, 88 Wis. 680; *Stewart v. Stewart*, 90 Wis. 516, 48 Am. St. Rep. 949.

Canada. — *Rev. Stat. Ontario* (1877), c. 95, § 4; *McCarthy v. Arbuckle*, 31 U. C. C. P. 405; *Haisley v. Somers*, 13 Ont. 600. See also *Skae v. Chapman*, 21 Grant Ch. (U. C.) 534.

There is no statute in *Pennsylvania* on the subject of payment for improvements, except as to the recovery of land sold for taxes. *Putnam v. Tyler*, 117 Pa. St. 570. (Decided in 1888).

Strict Construction of Statutes. — Statutory provisions relating to the allowance of compensation for improvements are to be strictly construed, and cannot be extended so as to warrant their removal as personality. *Huebschmann v. McHenry*, 29 Wis. 655.

Court Has No Discretion as to Allowing Inquiry as to Value of Improvements — *Kansas.* — *Hazen v. Rounsaville*, 35 Kan. 405.

of occupying claimants are, that under them the claimant can recover for his improvements in a direct affirmative proceeding against the owner,¹ and that he is not limited in the amount of his recovery to the value of the rents and profits.²

c. CONSTITUTIONALITY OF STATUTES — (1) *General Rule — Statutes Constitutional* — (a) *Rule Stated*. — That statutes allowing compensation to occupants of land under color of title, for improvements made thereon by them in good faith, are constitutional, is well established.³

1. *Occupying Claimant May Recover in Direct Proceeding* — *United States*. — *Bright v. Boyd*, 1 Story (U. S.) 494.

Alabama. — *Lamar v. Minter*, 13 Ala. 31.

Georgia. — *Martin v. Atkinson*, 7 Ga. 228, 50 Am. Dec. 403.

Indiana. — *Hollingsworth v. Stumph*, 131 Ind. 546; *Fish v. Blasser*, 146 Ind. 186; *Wernke v. Hazen*, 32 Ind. 431.

Iowa. — *Parsons v. Moses*, 16 Iowa 440.

Maine. — See *Briggs v. Fiske*, 17 Me. 420.

New Hampshire. — *Bailey v. Hastings*, 15 N. H. 525.

North Carolina. — *Barker v. Owen*, 93 N. Car. 198.

Tennessee. — *Herring v. Pollard*, 4 Humph. (Tenn.) 362, 40 Am. Dec. 653.

Wisconsin. — *Pacquette v. Pickness*, 19 Wis. 219.

The right to maintain an action for betterments depends wholly upon statute. *Jones v. Steam Stone Cutter Co.*, 20 Fed. Rep. 477; *Griswold v. Bragg*, 18 Blatchf. (U. S.) 202.

2. *Recovery for Improvements Not Limited to Value of Rents and Profits* — *Alabama*. — *Kerr v. Nicholas*, 88 Ala. 346. See also *New Orleans*, etc., *R. Co. v. Jones*, 68 Ala. 48.

Georgia. — *Dean v. Feely*, 69 Ga. 804.

Iowa. — *Parsons v. Moses*, 16 Iowa 440.

Mississippi. — *Johnson v. Futch*, 57 Miss. 73.

Missouri. — *Dothage v. Stuart*, 35 Mo. 251.

Nebraska. — *Page v. Davis*, 26 Neb. 670.

Wisconsin. — *Barrett v. Stradl*, 73 Wis. 385, 9 Am. St. Rep. 795; *Neeves v. Eron*, 73 Wis. 542.

Claims under Statute and under Common Law Not Repugnant. — *Kerr v. Nicholas*, 88 Ala. 346.

In *Tennessee* the doctrine has been asserted that the allowance for improvements cannot exceed the value of the rents and profits, and it is strongly intimated that statutes allowing more are to that extent unconstitutional. *M'Kinly v. Holliday*, 10 Yerg. (Tenn.) 477; *Jones v. Perry*, 10 Yerg. (Tenn.) 59, 30 Am. Dec. 430.

3. *Statutes Allowing Compensation Constitutional* — *United States*. — *Griswold v. Bragg*, 18 Blatchf. (U. S.) 202; *Leighton v. Young*, 10 U. S. App. 298, citing 10 AM. AND ENG. ENCYC. OF LAW (1st ed.), title IMPROVEMENTS; *Dunn v. Games*, 2 McLean (U. S.) 344; *Albee v. May*, 2 Paine (U. S.) 74; *Bright v. Boyd*, 2 Story (U. S.) 607. See also *Hamilton Bank v. Dudley*, 2 Pet. (U. S.) 492.

Alabama. — *Lamar v. Minter*, 13 Ala. 31.

Arkansas. — *Fee v. Cowdry*, 45 Ark. 410, 55 Am. Rep. 560; *Beard v. Dansby*, 48 Ark. 183; *Craig v. Flanagan*, 21 Ark. 319; *Pope v. Macon*, 23 Ark. 644.

Connecticut. — *Griswold v. Bragg*, 48 Conn. 577.

Illinois. — *Ross v. Irving*, 14 Ill. 171.

Indiana. — *Armstrong v. Jackson*, 1 Blackf. (Ind.) 374.

Iowa. — *Childs v. Shower*, 18 Iowa 261.

Kansas. — *Claypoole v. King*, 21 Kan. 602; *Stephens v. Ballou*, 27 Kan. 594.

Kentucky. — *Bodley v. Craig*, 1 Bibb (Ky.) 1; *Estill v. Willhite*, Hard. (Ky.) 537; *Fisher v. Cockerill*, 5 T. B. Mon. (Ky.) 129; *Fowler v. Halbert*, 4 Bibb (Ky.) 52.

Maine. — *Bracket v. Norcross*, 1 Me. 89.

Massachusetts. — *Jones v. Carter*, 12 Mass. 314. See also *Bacon v. Callender*, 6 Mass. 308;

Missouri. — *Stump v. Hornback*, 94 Mo. 26; *Dothage v. Stuart*, 35 Mo. 251.

Nebraska. — *Page v. Davis*, 26 Neb. 670; *Dworak v. More*, 25 Neb. 735.

North Carolina. — *Barker v. Owen*, 93 N. Car. 198.

Ohio. — *McCoy v. Grandy*, 3 Ohio St. 463; *Hunt v. McMahan*, 5 Ohio 132; *Davis v. Powell*, 13 Ohio 308.

Texas. — *Cahill v. Benson*, 19 Tex. Civ. App. 30; *Saunders v. Wilson*, 19 Tex. 194; *Scott v. Mather*, 14 Tex. 235. See also *Van Valkenburg v. Ruby*, 68 Tex. 139.

Vermont. — *Whitney v. Richardson*, 31 Vt. 306.

Wisconsin. — *Pacquette v. Pickness*, 19 Wis. 219; *Huebschmann v. McHenry*, 29 Wis. 655.

In *Tennessee* the doctrine has been announced that the acts of assembly allowing the value of improvements to be recovered at law are reconcilable with the constitution to this extent and no further: that a *bona fide* possessor of land, from whom the same has been recovered, is entitled to such improvements as have permanently improved the land, provided the value thereof does not exceed the value of the rents and profits; but where a party improves land, with knowledge or notice of a better title in another, he is not entitled either in law or in equity to any diminution from the rents and profits by reason of said improvements. *M'Kinly v. Holliday*, 10 Yerg. (Tenn.) 477.

And in *Nelson v. Allen*, 1 Yerg. (Tenn.) 361, the court went further and declared the acts in reference to improvements absolutely unconstitutional. But the decision seems to be founded on a mistaken view of the case of *Green v. Biddle*, 8 Wheat. (U. S.) 1, which case is explained further on in this note.

Not a Deprivation of Property. — See *Ross v. Irving*, 14 Ill. 171.

Not in Conflict with Homestead Rights. — See *Barker v. Owen*, 93 N. Car. 198.

Statute Destroying Right of Successful Claimant to Compel Occupant to Buy Land. — The clause of the *Kentucky* Act of 1820, destroying the right of the successful claimant under the Act of 1812 to compel the occupant to buy the land at the price fixed by the commissioners or of the

(b) **Retroactive Statutes.** — And even statutes giving compensation for improvements made before their enactment have been upheld.¹

(2) *Provisions Rendering Statutes Unconstitutional* — (a) **Giving Occupying Claimant Option to Retain Land on Paying Unimproved Value.** — But an *Ohio* statute giving to the occupying claimant, after a recovery against him in ejectment, the option of either retaining the land upon paying in money its value without the improvements, or being paid for his improvements, was held void, as being a palpable invasion of the rights of private property and a violation of the constitutional provision that "private property shall ever be held inviolate."²

(b) **Authorizing General Money Judgment for Improvements.** — In *Iowa* a statute authorizing the rendition of a general money judgment against the owner of the land in favor of the occupying claimant for his improvements, and the enforcement of such a judgment by a general execution, has been held to be unconstitutional on the ground that under it a judgment for improvements would be a lien upon all of the real estate of the owner and could be made out of any of his property, real or personal, and he could not escape by losing the property which had been improved.³

View of the Texas Court. — A different view would seem to be entertained in *Texas*.⁴

View in North Carolina. — And in *North Carolina* the court does not appear to have doubted the constitutionality of a statute allowing the occupant to have a

occupant to take it at that price, was valid and not unconstitutional. *Fisher v. Cockerill*, 5 T. B. Mon. (Ky.) 129.

Statute Exempting Occupying Claimant from Liability for Rents or Profits, or Damages Held Valid. — See *Ross v. Irving*, 14 Ill. 171.

Case Explained. — In the case of *Green v. Biddle*, 8 Wheat. (U. S.) 1, which determined that the occupying claimant law of *Kentucky* of 1812 was unconstitutional, the decision was placed on the ground that the law impaired the obligation of the compact between *Kentucky* and *Virginia* relative to lands in the former state. And the same court, in the case of *Hamilton Bank v. Dudley*, 2 Pet. (U. S.) 492, in which the statute of *Ohio* for the relief of occupying claimants came under review, conceded the legislative power of the state to secure to a *bona fide* occupant of land a compensation for the value of his lasting improvements, and to authorize him to retain possession of the land he had improved until he should be paid that amount. See other United States cases cited *supra*, this note.

1. **Statutes Giving Compensation for Improvements Made Before Their Enactment Held Constitutional.** — *Albee v. May*, 2 Paine (U. S.) 74; *Fee v. Cowdry*, 45 Ark. 410, 55 Am. Rep. 560; *Beard v. Dansby*, 48 Ark. 183. See also *Litchfield v. Johnson*, 4 Dill. (U. S.) 551.

But compare *Society, etc., v. Wheeler*, 2 Gall. (U. S.) 105, in which the *New Hampshire* statute of June 19, 1805, was held unconstitutional in so far as it related to past improvements.

Statutes Held Not Retroactive. — The *Maine* Act of March 6, 1844, c. 6, § 1, authorizing a tenant for years to recover betterments as against the owners of the expectant estate, did not apply to improvements made by a life tenant before its passage. *Pratt v. Churchill*, 42 Me. 471.

2. **Statute Giving Occupying Claimant Right to Retain Land on Paying Unimproved Value Unconstitutional.** — *McCoy v. Grandy*, 3 Ohio St. 463.

This ruling has been approved in *Stephens v. Ballou*, 27 Kan. 504, and *Barker v. Owen*, 93 N. Car. 198. And see also *Stump v. Hornback*, 94 Mo. 26, reversing 15 Mo. App. 367, so far as it approved a judgment authorizing an occupant to retain the land on paying the true owner the unimproved value, the owner's consent not being required.

But a Statute Giving a Similar Option to the Owner Is Valid. — *McCoy v. Grandy*, 3 Ohio St. 463. See also *Stump v. Hornback*, 94 Mo. 26, quoted above, and cases cited *supra*, this section. And see generally *infra*, this title, X. 4. *Election of Owner as to Taking Land or Receiving Unimproved Value*.

3. **Statute Authorizing General Money Judgment Against Owner of Land for Improvements Unconstitutional.** — *Childs v. Shower*, 18 Iowa 261.

In *Dungan v. Von Puhl*, 8 Iowa 263, the court referred to the same statute but did not intimate that it was unconstitutional. It was, however, not applicable in that case.

See Further in This Connection the case of *Stump v. Hornbeck*, 15 Mo. App. 367, in which it was said, that "the court is not permitted to render an absolute, unconditional judgment for the value of improvements, and to enforce it by execution." To the same effect are *Russell v. DeFrance*, 39 Mo. 506; *Malone v. Stretch*, 69 Mo. 25.

4. **In a Case in Texas where property which had been sold by a husband was recovered by the husband and wife, on the ground that the sale was void as being a sale of the homestead without the joinder of the wife, and the sale avoided, it was held that the trial court should have rendered a personal judgment against the husband for the increased value of the land resulting from the improvements, as the occupant was clearly entitled to recover, and a judgment for improvements could not be made a lien upon the land, nor could a personal judgment be rendered against the wife.** *Paris, etc.,*

Volume XVI.

judgment for his improvements which might be enforced by execution against the property of the owner.¹

(c) **Requiring Payment or Tender of Payment for Improvements Before Bringing Suit for Property.** — The court of *Texas* has declared unconstitutional a law providing in effect that a plaintiff shall not recover lands from a possessor in good faith unless he can prove that prior to the institution of suit he had offered in good faith to refer the question of pay for improvements to arbitration, or that he tendered payment for such improvements.² But the court of *Arkansas* has upheld a similar statute.³

(d) **Failure to Discriminate Between Innocent and Tortious Possession.** — In *California*, a statute allowing all occupants compensation for their improvements, and failing to discriminate between an innocent and a tortious possession, has been declared unconstitutional.⁴

III. GENERAL RULE AS TO WHAT CONSTITUTE IMPROVEMENTS — 1. Rule Stated. — In order for additions to property to constitute improvements within the rule of equity and the statutes allowing compensation therefor, the additions must be permanent,⁵ must have been placed upon the land under such circumstances as to make them a part of the realty,⁶ and must enhance its value⁷

R. Co. v. Greiner, 84 Tex. 443. See also *Eberling v. Verein*, 72 Tex. 340; *Goff v. Jones*, 70 Tex. 572.

1. **North Carolina View.** — *Carolina Cent. R. Co. v. McCaskill*, 98 N. Car. 526.

2. **Law Requiring Payment or Tender of Payment for Improvements Before Bringing Suit for Property Held Unconstitutional.** — *Hearn v. Camp*, 18 Tex. 545; *Saunders v. Wilson*, 19 Tex. 194.

3. **Similar Statute Held Valid in Arkansas.** — *Craig v. Flanagan*, 21 Ark. 319; *Pope v. Macon*, 23 Ark. 644.

4. **Statute which Does Not Discriminate Between Innocent and Tortious Possession Unconstitutional.** — *Billings v. Hall*, 7 Cal. 1.

5. **Additions Must Be Permanent — England.** — See *Trevelyan v. White*, 1 Beav. 588.

Canada. — *Queen Victoria Niagara Falls Park v. Colt*, 22 Ont. App. 1. See also *McCarthy v. Arbuckle*, 31 U. C. C. P. 405.

Alabama. — *Donehoo v. Johnson*, 113 Ala. 126, citing 10 AM. AND ENG. ENCYC. OF LAW (1st ed.) 243.

Georgia. — See *Morris v. Tinker*, 60 Ga. 466.

Illinois. — See *Gilbreath v. Dilday*, 152 Ill. 207; *Laggar v. Mutual Union Loan Assoc.*, 146 Ill. 283; *Cable v. Ellis*, 120 Ill. 136.

Kansas. — *Hentig v. Redden*, 38 Kan. 496.

South Dakota. — *Parker v. Vinson*, 11 S. Dak. 381.

Texas. — *Goedeke v. Baker*, (Tex. Civ. App. 1894) 28 S. W. Rep. 1039.

Virginia. — *Effinger v. Kenney*, 92 Va. 245; *Cullop v. Leonard*, 97 Va. 256. See also *Walker v. Beauchler*, 27 Gratt. (Va.) 511.

Wisconsin. — *Pacquette v. Pickness*, 19 Wis. 219.

Interpreting the Phrase "Permanent Improvements" by the common law, it must be construed to mean something done to or put upon the land which the occupant cannot remove or carry away with him, either because it has become physically impossible to separate it from the land, or because in contemplation of law it has been annexed to the soil and is therefore to be considered a part of the freehold. *Stark v. Starr*, 1 Sawy. (U. S.) 15.

Commercial Fertilizer used upon the land for the special benefit of the crop with which it is used cannot be regarded as a permanent improvement of the land, and therefore cannot be allowed for. *Effinger v. Kenney*, 92 Va. 245.

Distinction Between Lasting Improvements and Moneys Expended for Fancy or Humor. — See *Hollis v. Edwards*, 1 Vern. 159.

Permanency and Value Questions for the Jury. — *Powell v. Davis*, 19 Tex. 380.

Finding of Jury Conclusive. — What constitute permanent improvements is largely a question of fact, and where the trial court and jury have found the value of permanent improvements to be a certain amount, this finding is conclusive upon an appellate court that such improvements are permanent. *Parker v. Vinson*, 11 S. Dak. 381.

6. **Additions Must Have Become a Part of the Realty.** — *Harkey v. Cain*, 69 Tex. 146. See also *Ames v. Trenton Brewing Co.*, 56 N. J. Eq. 399.

7. **Value of Land Must Be Increased — United States.** — *Stark v. Starr*, 1 Sawy. (U. S.) 15; *Bright v. Boyd*, 1 Story (U. S.) 494.

Arkansas. — *Reynolds v. Reynolds*, 55 Ark. 369.

Georgia. — *Morris v. Tinker*, 60 Ga. 466; *Hunt v. Pond*, 67 Ga. 578; *Thomas v. Malcom*, 39 Ga. 328, 99 Am. Dec. 459.

Illinois. — *Breit v. Yeaton*, 101 Ill. 242. See also *Cable v. Ellis*, 120 Ill. 136; *Gilbreath v. Dilday*, 152 Ill. 207; *Laggar v. Mutual Union Loan Assoc.*, 146 Ill. 283.

Iowa. — *Childs v. Shower*, 18 Iowa 261. See also *McMurray v. Day*, 70 Iowa 671.

Kentucky. — *Leavison v. Harris*, (Ky. 1890) 14 S. W. Rep. 343.

Louisiana. — *Citizens' Bank v. Miller*, 44 La. Ann. 199.

Mississippi. — See *Johnson v. Futch*, 57 Miss. 73.

New Jersey. — See *Foley v. Kirk*, 33 N. J. Eq. 170.

New York. — *Woodhull v. Rosenthal*, 61 N. Y. 382.

North Carolina. — See *Carolina Cent. R. Co.*

as a whole,¹ for purposes for which it is or may be used.²

2. Illustrations of Additions Held to Be Improvements. — Many illustrations could be given of additions to property which might be considered as improvements within the rule just stated.³ Among these may be mentioned the erection of a house,⁴ or the replacing of old buildings with new and better ones,⁵ the placing of an additional floor in a building,⁶ the digging of a

v. McCaskill, 98 N. Car. 526; *Fort v. Allen*, 110 N. Car. 183.

Pennsylvania. — *Noble v. Biddle*, 81* Pa. St. 430.

Tennessee. — See *Alston v. Boyd*, 6 Humph. (Tenn.) 505.

Texas. — See *Herndon v. Reed*, 82 Tex. 647.

Utah. — *Bacon v. Thornton*, 16 Utah 138.

Virginia. — *Effinger v. Kenney*, 92 Va. 245. See also *Walker v. Beauchler*, 27 Gratt. (Va.) 511.

Canada. — *Queen Victoria Niagara Falls Park v. Colt*, 22 Ont. App. 1.

Governing Consideration Is Whether the Future Betterment of the Premises Is Intended. — *Cullop v. Leonard*, 97 Va. 256.

Structures Placed on Right of Way of Railroad.

— In an action by a railroad company to compel the removal of structures from a portion of its right of way lying on defendants' land, the defendants cannot recover the value of their improvements as possessors in good faith under the provisions of the statute regulating actions of trespass to try title. *Olive v. Sabine*, etc., R. Co., 11 Tex. Civ. App. 208.

1. Value of Land as a Whole Must Be Enhanced. — *Pacquette v. Pickness*, 19 Wis. 219.

A Trespasser on Another's Land, who draws profits from one part of it, cannot in an action for mesne profits, after a recovery in ejectment against him, set off his losses in experimenting for profits on other parts of the land. *Noble v. Biddle*, 81* Pa. St. 430.

2. Improvements Must Be for Purposes for Which the Lands Are or May Be Used. — The words "valuable and permanent improvements," as used in the *Wisconsin* Improvement Act, have reference to the purposes for which the lands are or may be used. *Pacquette v. Pickness*, 19 Wis. 219.

Use to Which True Owner Intends to Put Land Immaterial. — An unsuccessful defendant in ejectment cannot be denied compensation for his improvements under How. Ann. Stat. *Michigan*, § 7836, on the ground that the improvements are not adapted to the use to which the plaintiff may assert it to be his intention to devote the property upon recovering it. *Petit v. Flint*, etc., R. Co., (Mich. 1899) 78 N. W. Rep. 554.

Nor is it necessary, to entitle an occupant to compensation, that the true owner should have desired such improvements or should be able to make a profitable use of them in his particular business. *Carolina Cent. R. Co. v. McCaskill*, 98 N. Car. 526. But compare *People v. Campbell*, 35 N. Y. App. Div. 103.

3. Illustrations of Additions Held to Be Improvements. — A lessee of store property covenanted "that all improvements of the buildings shall belong to the landlord at the expiration of the term," and put up shelves which, besides being nailed to boards or cleats which were nailed to the wall, rested on counters which were not in any way fastened to the

wall or floor; and put in a furnace with hot-air flues extending to holes cut in the floor, for the purpose of heating the storeroom which he occupied with his goods. He also put up large awnings over the front windows. It was held that these were all improvements, and embraced in the covenant referred to, and passed to the landlord. *Parker v. Wulstein*, 48 N. J. Eq. 94.

In a *New York* case where the lessees of certain premises agreed to surrender to the lessees at the expiration of the term "all improvements" placed on the demised premises by them, it was held that this covenant embraced "gas pipes, burners, gas ladders, and two large and one small meters, lumber in hat room, fifteen batten doors, hinges and locks, floor of stage, large glass case, benches in gallery, benches under gallery, upholstered woodwork and canvas constituting the stage, gas pendant, under gallery, picket fence on the north and south sides of the building, fixtures and ticket office, board fence on the north side of the building." *French v. New York*, (Supm. Ct. Gen. T.) 16 How. Pr. (N. Y.) 220.

In *West v. Blakeway*, 2 M. & G. 729, 40 E. C. L. 598, the tenant had covenanted to yield up at the expiration of his term all erections and improvements made or set up during the term, and it was held that this covenant was broken by the removal of the sashes and framework of a greenhouse erected during the term, the framework of which was laid upon walls built for the purpose of receiving it, and embedded in mortar.

4. House. — "The word 'improvement' is large enough, under ordinary circumstances, to include a house or private dwelling." *Schenley's Appeal*, 70 Pa. St. 98. In this case it was, however, shown that the word, as used in various mechanics' liens laws of *Pennsylvania*, has a more restricted meaning. See also *Schmidt v. Armstrong*, 72 Pa. St. 355. And see generally the title MECHANICS' LIENS.

Raising House Where Necessary or Desirable Held an Improvement. — *Cosgrove v. Merz*, (R. I. 1897) 37 Atl. Rep. 704.

Moving House. — But the moving of a house, and other things incident thereto, as digging a cellar, and constructing the cellar wall, etc., cannot be allowed for as improvements, especially where the site from which the house was moved was an excellent one, and the site to which it was moved was in some respects not good, and the removal had not enhanced the value of the property. *McMurray v. Day*, 70 Iowa 671.

5. New Buildings in Place of Old. — See *Robinson v. Ridley*, 6 Madd. 2; *Stevens v. Melcher*, 152 N. Y. 551, *modifying* 80 Hun (N. Y.) 514.

6. Extra Floor. — An additional floor placed in a leased building by the tenants for the purpose of fitting it for their use as a skating rink

well¹ or ditches,² the erection of fences,³ the clearing of unimproved lands,⁴ and building of levees,⁵ the planting of fruit trees⁶ or clover and orchard grass,⁷ and in *Kansas* a sidewalk alongside of the property.⁸

But the **Disclosing of Granite** on the property, though by means of the occupant's operations, cannot be considered such an improvement as should be compensated for.⁹

Repairs. — Ordinary repairs to structures already on the property are not as a rule considered improvements, and will not be treated in this article.¹⁰

Burden of Proof. — Those who claim an allowance for alleged improvements must assume the burden of proving that the property has been benefited thereby.¹¹

IV. MEASURE OF COMPENSATION FOR IMPROVEMENTS — 1. General Rule Stated. — The well-established rule as to the compensation to which an occupant of land is entitled for his improvements, is that he should be allowed, not the amount the improvements have cost him,¹² nor the actual value of the

and bicycle riding hall is an improvement which becomes a part of the property. *Harris v. Kelly*, (Pa. 1888) 13 Atl. Rep. 523.

1. **Digging of Well.** — *Morton v. Lewis*, 16 U. C. C. P. 485.

2. **Ditches.** — *Beard v. Morancy*, 2 La. Ann. 347.

3. **Erection of Fences.** — *Croskery v. Busch*, 116 Mich. 288; *Morton v. Lewis*, 16 U. C. C. P. 485. *Contra*, *Wood v. Krebbs*, 33 Gratt. (Va.) 685.

Wall Out of True Line Not an Improvement. — Occupants of land who have built a wall out of the true line, thereby throwing the lot out of its proper shape and damaging it, are not entitled to be compensated therefor. *Leavison v. Harris*, (Ky. 1890) 14 S. W. Rep. 343.

4. **Clearing of Unimproved Land.** — *Croskery v. Busch*, 116 Mich. 288. See also *Pearce v. Frantum*, 16 La. 414; *Beard v. Morancy*, 2 La. Ann. 347.

Ordinary Cultivation of Land Not an Improvement. — *Cullop v. Leonard*, 97 Va. 256.

In *Hawkins v. King*, 1 T. B. Mon. (Ky.) 161, it was considered that reduction of the soil by the use of the land in a husbandmanlike manner is compensated by rent. And see also *Bolling v. Lersner*, 26 Gratt. (Va.) 36.

5. **Levees.** — *Beard v. Morancy*, 2 La. Ann. 347.

6. **An Apple Orchard** is a permanent improvement within the meaning of sections 2702 and 2703 of the *Alabama Code* of 1886, allowing defendants in ejectment to be compensated for "permanent improvements." *Donahoo v. Johnson*, 113 Ala. 126, citing 10 AM. AND ENG. ENCYC. OF LAW (1st ed.) 243.

7. **A Stand of Clover and Orchard Grass** may be allowed for as improvements. *Thompson v. Buckner*, (Ky. 1897) 40 S. W. Rep. 915.

8. **Sidewalk.** — *Hentig v. Redden*, 38 Kan. 496.

Amount Paid for Street Assessment. — But an amount paid to the city by an occupant of property as an assessment for the improvement of the street adjoining the premises is not an improvement "made upon the property" within the meaning of the provision of the *Oregon Code* allowing permanent improvements to be set off against damages for occupation, and cannot be set off, however much it may indirectly enhance the value of the property. *Stark v. Starr*, 1 Sawy. (U. S.) 15.

9. **Disclosing of Granite.** — *Peabody v. Hewett*, 52 Me. 33, 83 Am. Dec. 486.

10. **Repairs Not Improvements.** — *McKenzie v. Bacon*, 41 La. Ann. 6; *Goedeke v. Baker*, (Tex. Civ. App. 1894) 28 S. W. Rep. 1039.

But compare *Cullop v. Leonard*, 97 Va. 256, in which case the court said: "Repairs to buildings are usually treated as permanent improvements."

11. **Burden of Proof.** — *Bacon v. Thornton*, 16 Utah 138.

12. **Cost of Improvements Not the Measure of Compensation** — *United States*. — *Van Bibber v. Williamson*, 37 Fed. Rep. 756; *Young v. Mahoning County*, 53 Fed. Rep. 895; *Leighton v. Young*, 10 U. S. App. 298.

California. — *Conlan v. Sullivan*, 110 Cal. 624; *Fountain v. Semi-Tropic Land, etc., Co.*, 99 Cal. 677.

Florida. — *Glinski v. Zawadski*, 8 Fla. 405.

Iowa. — *Parsons v. Moses*, 16 Iowa 440; *Childs v. Shower*, 18 Iowa 261; *McMurray v. Day*, 70 Iowa 671; *Welles v. Newsom*, 76 Iowa 81.

Kentucky. — *Glass v. Abbott*, 6 Bush (Ky.) 622; *Bell v. Barnet*, 2 J. J. Marsh. (Ky.) 516; *Bourne v. Odam*, (Ky. 1895) 32 S. W. Rep. 398.

Michigan. — *Petit v. Flint, etc., R. Co.*, (Mich. 1899) 78 N. W. Rep. 554.

Mississippi. — *Hicks v. Blakeman*, 74 Miss. 459.

Nebraska. — *Fletcher v. Brown*, 35 Neb. 660; *Lothrop v. Michaelson*, 44 Neb. 633.

New Jersey. — *Thornton v. Ogden*, 41 N. J. Eq. 345.

North Carolina. — *Carolina Cent. R. Co. v. McCaskill*, 98 N. Car. 526.

South Carolina. — *Harman v. Harman*, 54 S. Car. 100.

Tennessee. — *Smoot v. Smoot*, 12 Lea (Tenn.) 274.

But Compare *Seigneuret v. Fahey*, 27 Minn. 60, in which case, Berry, J., delivering the opinion of the court, said: "We perceive no reason why it was not proper to show the value of the improvements by showing what it was worth to make them." And see also *Gilbreath v. Dilday*, 152 Ill. 207, *infra*, this note.

Improvements Benefiting Land Actually Owned by Occupant as Well as Land in Controversy — Apportionment of Cost. — See *Gilbreath v. Dilday*, 152 Ill. 207.

The Actual Expenditure for Improvements Was Allowed in *Bevis v. Boulton*, 7 Grant Ch. (U.

improvements themselves,¹ but an amount equal to the actual enhancement in the value of the land which has resulted from the placing of such improvements thereon.²

C.) 39; *Brunskill v. Clarke*, 9 Grant Ch. (U. C.) 430; *Fitzgibbon v. Duggan*, 11 Grant Ch. (U. C.) 188. See also *Paul v. Johnson*, 12 Grant Ch. (U. C.) 474.

1. Value of Improvements Not the Measure of Compensation — *United States*. — *Leighton v. Young*, 10 U. S. App. 298.

Kentucky. — *Glass v. Abbott*, 6 Bush (Ky.) 622; *James v. McKinsey*, 4 J. J. Marsh. (Ky.) 625. See also *Washington v. McGee*, 3 Dana (Ky.) 445. But compare *Bell v. Barnett*, 7 J. J. Marsh. (Ky.) 379, *infra*, this note.

Tennessee. — *Fisher v. Edington*, 85 Tenn. 23; *Smoot v. Smoot*, 12 Lea (Tenn.) 274. See also *Mathews v. Davis*, 6 Humph. (Tenn.) 324.

Texas. — *McCown v. McCafferty*, 14 Tex. Civ. App. 77.

Nor Is the Sum Which Would Be Necessary to Replace the Improvements, if they were considered as removed and not on the land, the proper measure of compensation. *Hicks v. Blakeman*, 74 Miss. 459.

Interest on Value of Improvements May Be Set Off Against Rent. — *Munsie v. Lindsay*, 11 Ont. 520.

Cases Holding Value of Improvements to Be the Measure of Compensation Explained. — In some cases it has been asserted that the value of the improvements is the measure of compensation therefor. *Neesom v. Clarkson*, 2 Hare 176, 4 Hare 97; *Gliniski v. Zawadski*, 8 Fla. 405; *McGill v. Kennedy*, 11 Ind. 20; *Wendell v. Moulton*, 26 N. H. 41. See also *Fountain v. Semi-Tropic Land, etc.*, Co., 99 Cal. 677; *Barnett v. Higgins*, 4 Dana (Ky.) 505.

And it is so provided by statute in some jurisdictions. But the apparent discrepancy between such decisions and statutes and the rule stated in the text may be explained on the theory that the term "value" as so used is meant to refer, not to the absolute value of the improvements themselves, but to their value as they stand on the land in question, which must necessarily be equivalent to the amount by which they increase the value of the land. This view finds some support in the following remark of Caldwell, Circ. J., in *Leighton v. Young*, 10 U. S. App. 298, in reference to the measure of compensation for improvements: "The occupant is not entitled to their cost, nor to their value when new, but only to their value at the time of the trial, which must be measured by the benefits which the owner will receive from them in their then condition."

Where Improvements Consist of Clearing. — Although an occupant has gone to extraordinary expense in the clearing and improvement of land, he is not entitled to an extraordinary compensation therefor, but is entitled to only the ordinary value of clearing in the ordinary way, and such occupant should be charged with rents, in a similar manner, according to the ordinary value of such land cleared in the ordinary way. *Bell v. Barnett*, 7 J. J. Marsh. (Ky.) 379.

2. Occupant Entitled to Compensation to Extent that Actual Value of Land Has Been Enhanced — *United States*. — *Leighton v. Young*, 10 U. S.

App. 298; *Young v. Mahoning County*, 53 Fed. Rep. 895; *Van Bibber v. Williamson*, 37 Fed. Rep. 756; *McClasky v. Barr*, 62 Fed. Rep. 209. See also *Jackson v. Ludeling*, 99 U. S. 513; *Bright v. Boyd*, 1 Story (U. S.) 478, 2 Story (U. S.) 605; *Green v. Biddle*, 8 Wheat. (U. S.) 1; *Albee v. May*, 2 Paine (U. S.) 74.

California. — *Conlan v. Sullivan*, 110 Cal. 624.

Connecticut. — *Ensign v. Batterson*, 68 Conn. 298.

Georgia. — *Thomas v. Malcom*, 39 Ga. 328, 99 Am. Dec. 459. See also *Barnes v. Shinholster*, 14 Ga. 131.

Illinois. — *Breit v. Yeaton*, 101 Ill. 242. See also *Kurtz v. Hibner*, 55 Ill. 514, 8 Am. Rep. 665; *Dean v. O'Meara*, 47 Ill. 120.

Iowa. — *McMurray v. Day*, 70 Iowa 671; *Childs v. Shower*, 18 Iowa 261; *Welles v. Newsum*, 76 Iowa 81; *Parsons v. Moses*, 16 Iowa 440.

Kansas. — *Hentig v. Redden*, 1 Kan. App. 163; *Sarbach v. Newell*, 30 Kan. 103.

Kentucky. — *Hall v. Brummal*, 7 Bush (Ky.) 43; *Thompson v. Buckner*, (Ky. 1897) 40 S. W. Rep. 915; *Glass v. Abbott*, 6 Bush (Ky.) 622; *Bell v. Barnett*, 2 J. J. Marsh. (Ky.) 516; *Bourne v. Odam*, (Ky. 1895) 32 S. W. Rep. 398; *Booth v. Vanarsdale*, 9 Bush (Ky.) 718; *James v. McKinsey*, 4 J. J. Marsh. (Ky.) 625; *Forst v. Davis*, (Ky. 1897) 41 S. W. Rep. 27; *Leavison v. Harris*, (Ky. 1890) 14 S. W. Rep. 343; *Harlan v. Seaton*, 18 B. Mon. (Ky.) 312. See also *Hayden v. Delay*, Litt. Sel. Cas. (Ky.) 278; *Bartram v. Burns*, (Ky. 1897) 43 S. W. Rep. 248; *Washington v. McGee*, 3 Dana (Ky.) 445; *Arterburn v. Gwathmey*, 3 Bibb (Ky.) 306.

Louisiana. — *Citizens' Bank v. Miller*, 44 La. Ann. 199. But compare *Roberts v. Brown*, 15 La. Ann. 698; *Gibson v. Hutchins*, 12 La. Ann. 545.

Maine. — *Page v. Finson*, 74 Me. 512.

Maryland. — *Barnum v. Barnum*, 42 Md. 251. See also *McLaughlin v. Barnum*, 31 Md. 425.

Michigan. — *Petit v. Flint, etc.*, R. Co., (Mich. 1899) 78 N. W. Rep. 554.

Mississippi. — *Hicks v. Blakeman*, 74 Miss. 459; *Nixon v. Porter*, 38 Miss. 416. See also *Willie v. Brooks*, 45 Miss. 551.

Nebraska. — *Fletcher v. Brown*, 35 Neb. 660; *Lothrop v. Michaelson*, 44 Neb. 633.

New Jersey. — *Thornton v. Ogden*, 41 N. J. Eq. 345.

New York. — *Conklin v. Conklin*, 3 Sandf. Ch. (N. Y.) 64; *Stevens v. Melcher*, 152 N. Y. 551; *Scott v. Guernsey*, 48 N. Y. 106. See also *Putnam v. Ritchie*, 6 Paige (N. Y.) 300.

North Carolina. — *Carolina Cent. R. Co. v. McCaskill*, 98 N. Car. 526; *Smith v. Stewart*, 83 N. Car. 406; *Justice v. Baxter*, 93 N. Car. 405; *Wetherell v. Gorman*, 74 N. Car. 603; *Hill v. Brower*, 76 N. Car. 124. See also *Wharton v. Moore*, 84 N. Car. 479, 37 Am. Rep. 627; *Merritt v. Scott*, 81 N. Car. 385; *Barker v. Owen*, 93 N. Car. 198; *Fort v. Allen*, 110 N. Car. 183.

Ohio. — *Youngs v. Heffner*, 36 Ohio St. 232.

Enhancement of "Vendible" Value. — Some cases have asserted as the rule, that the enhancement of the "vendible" or "salable" value of the land is the measure of compensation; but this does not differ materially from the rule as stated above.¹

2. Method of Ascertaining Enhancement of Value. — The method of ascertaining the enhancement of value resulting from the placing of improvements thereon is to deduct from the value of the property as improved² its value before any of the improvements in question were placed thereon,³ and also deducting any increase of value which has resulted from causes other than the occupant's improvements.⁴

3. Time with Reference to Which Compensation Should Be Computed. — The

Oregon. — See *Hatcher v. Briggs*, 6 Oregon 31.
Pennsylvania. — *Putnam v. Tyler*, 117 Pa. St. 570; *Skiles's Appeal*, 16 W. N. C. (Pa.) 246. See also *Noble v. Biddle*, 81* Pa. St. 430.

South Carolina. — *Moore v. Williamson*, 10 Rich. Eq. (S. Car.) 323, 73 Am. Dec. 93; *Buck v. Martin*, 21 S. Car. 592, 53 Am. Rep. 702; *Johnson v. Harrelson*, 18 S. Car. 604; *Scaife v. Thomson*, 15 S. Car. 368; *Williman v. Holmes*, 4 Rich. Eq. (S. Car.) 476; *Harman v. Harman*, 54 S. Car. 100; *Annelly v. De Saussure*, 17 S. Car. 389. See also *Gadsden v. Desportes*, 39 S. Car. 131; *Rabb v. Flenniken*, 32 S. Car. 189; *Stoney v. Shultz*, 1 Hill Eq. (S. Car.) 465, 27 Am. Dec. 429.

Tennessee. — *Fisher v. Edington*, 85 Tenn. 23, 12 Lea (Tenn.) 189; *Smoot v. Smoot*, 12 Lea (Tenn.) 274; *Garth v. Fort*, 15 Lea (Tenn.) 683; *Rhea v. Allison*, 3 Head (Tenn.) 176; *Winters v. Elliott*, 1 Lea (Tenn.) 676. See also *Townsend v. Shipp*, *Cooke* (Tenn.) 294; *Mathews v. Davis*, 6 Humph. (Tenn.) 324; *Rainer v. Hudleston*, 4 Heisk. (Tenn.) 223.

Texas. — *McCown v. McCafferty*, 14 Tex. Civ. App. 77; *Thomas v. Quarles*, 64 Tex. 491; *Sellman v. Lee*, 55 Tex. 319. See also *Herndon v. Reed*, 82 Tex. 647.

Utah. — *Bacon v. Thornton*, 16 Utah 138; *Wasatch Min. Co. v. Jennings*, 14 Utah 221.

Washington. — *J. F. Hart Lumber Co. v. Everett Land Co.*, 20 Wash. 71.

West Virginia. — *Williamson v. Jones*, 43 W. Va. 562.

Wisconsin. — *Pacquette v. Pickness*, 19 Wis. 219.

Canada. — *Morley v. Matthews*, 14 Grant Ch. (U. C.) 551; *Lawrence v. Stuart*, 6 L. C. Rep. 294; *Munsie v. Lindsay*, 11 Ont. 520, 10 Ont. Pr. 173; *Carroll v. Robertson*, 15 Grant Ch. (U. C.) 173; *Paul v. Johnson*, 12 Grant Ch. (U. C.) 474; *Smith v. Bonnisteel*, 13 Grant Ch. (U. C.) 29; *McCarthy v. Arbuckle*, 31 U. C. C. P. 405. See also *Brotherton v. Hetherington*, 23 Grant Ch. (U. C.) 187; *Pegley v. Woods*, 14 Grant Ch. (U. C.) 47.

Benefit Received by True Owner. — It was considered in *McMurray v. Day*, 70 Iowa 671, that the allowance for improvements must be measured by the benefit which the true owner would derive therefrom.

And in *Mississippi* it has been considered that if the improvement does not inure to the benefit of the owner of the land, justice is done by denying the occupant the value of it. *Johnson v. Futch*, 57 Miss. 73; *Nixon v. Porter*, 38 Miss. 401.

Improvements by Railway Company. — When improvements have been placed upon land by

a railway company the measure of compensation is the extent to which the land is enhanced in value by these improvements, not the value of the improvements for railway purposes. *Paris, etc., R. Co. v. Greiner*, 84 Tex. 443.

1. Enhancement of "Vendible" or Salable Value of Land the Measure of Compensation. — *Kentucky.* — *Thompson v. Buckner*, (Ky. 1897) 40 S. W. Rep. 915; *Hawkins v. Brown*, 80 Ky. 186; *Dawson v. Lee*, 83 Ky. 49; *Thomas v. Thomas*, 16 B. Mon. (Ky.) 420.

Maryland. — *Barnum v. Barnum*, 42 Md. 251.

Mississippi. — *Clark v. Hornthal*, 47 Miss. 478; *Massey v. Womble*, 69 Miss. 347.

Nebraska. — *Carson v. Broady*, 56 Neb. 648.

In no event can allowances for improvements be made beyond the actual increase of the value of the land as ascertained by its sale. *Ebelmesser v. Ebelmesser*, 99 Ill. 541; *Lagger v. Mutual Union Loan, etc., Assoc.*, 146 Ill. 283.

2. The Price Which Might Be Realized at a Forced Sale for Cash is not the true measure of the present improved value of the land. *Fawcett v. Burwell*, 27 Grant Ch. (U. C.) 445.

3. Allowance Where Old Buildings Are Replaced by New. — In estimating the allowance for improvements made by a purchaser at a judicial sale which is afterwards avoided, which improvements consist of pulling down old buildings and erecting new ones, the old buildings, if incapable of repair, should be valued as old materials, but otherwise as buildings standing. *Robinson v. Ridley*, 6 Madd. 2.

4. Method of Ascertaining Enhancement of Value. — *Munsie v. Lindsay*, 10 Ont. Pr. 173, 11 Ont. 520; *Fawcett v. Burwell*, 27 Grant Ch. (U. C.) 445; *Sarbach v. Newell*, 30 Kan. 102. See also *Pacquette v. Pickness*, 19 Wis. 219. And see further in this connection *King v. Thompson*, 13 Pet. (U. S.) 128; *Porter v. Doe*, 10 Ark. 186; *Taylor v. Bate*, 4 Dana (Ky.) 198; *Ewing v. Handley*, 4 Litt. (Ky.) 346; *Stark v. Cannady*, 3 Litt. (Ky.) 399; *Taylor v. Whiting*, 9 Dana (Ky.) 399; *Pope v. Lemaster*, 5 Litt. (Ky.) 76; *Rawson v. Parsons*, 6 Mich. 401; *Jackson v. Creal*, 13 Johns. (N. Y.) 116.

As indispensable to the remedy designed to be afforded by the *Iowa* statute, it is required that the value of the land, aside from the improvements, as well as the value of the improvements, shall be ascertained by the jury, unless such value is agreed upon by the parties. *Dungan v. Von Puhl*, 8 Iowa 263.

The Location of Improvements Should Be Considered in estimating the enhancement in the value of the land resulting from their being placed on it. *Fisher v. Edington*, 85 Tenn. 23.

compensation to be allowed the occupant should be computed with reference to the time when he is ousted.¹

Deterioration After Ouster of Occupant. — And as, after such time, he has no further control of the land as owner, he cannot be held responsible for any subsequent providential visitation, such as excessive and unusual droughts which damage improvements consisting of clover and orchard grass seed sowed on the land by him, and his allowance cannot be reduced on account of such damage.²

4. Whether Allowance May Exceed Actual Cost of Improvements. — It is quite possible that the enhancement of the value of property by reason of improvements may be greater than the amount which they have cost the occupant. Under those circumstances it is usually considered that only the cost should be allowed,³ though the court of *Georgia* adheres to the rule that the enhancement of value is the proper measure of compensation even in such case.⁴

5. Rule Restricting Compensation to Value of Rents and Profits. — In the absence of any statute allowing full compensation according to the rule set out above, the amount which can be recovered is subject to the limitation that, as the general policy of the law, where no statute intervenes, is to allow the value of improvements only by way of set-off against or in mitigation of damages for the detention of the land, the amount allowed cannot usually exceed the amount of the true owner's damages and mesne profits.⁵ And in some juris-

1. Compensation Computed with Reference to Time of Ouster. — *Taylor v. James*, (Ga. 1899) 34 S. E. Rep. 674; *McGill v. Kennedy*, 11 Ind. 20; *Thompson v. Buckner*, (Ky. 1897) 40 S. W. Rep. 915; *Thomas v. Thomas*, 16 B. Mon. (Ky.) 420; *Neale v. Hagthorp*, 3 Bland (Md.) 551; *Wendell v. Moulton*, 26 N. H. 41; *Justice v. Baxter*, 93 N. Car. 405; *Garth v. Fort*, 15 Lea (Tenn.) 683; *Fisher v. Edington*, 12 Lea (Tenn.) 189.

Value at Time of Trial Held the Proper Measure of Compensation. — *Leighton v. Young*, 10 U. S. App. 298; *Miller v. Moss*, (Tex. 1888) 9 S. W. Rep. 257.

Value at Time When Assessment Is Made. — *Hentig v. Redden*, 1 Kan. App. 163.

Compensation Computed with Reference to Time of Sale in Partition. — *Ward v. Ward*, 40 W. Va. 613, 52 Am. St. Rep. 911. See generally, *infra*, this title, XIV. *Rules Concerning Improvements by One of Several Cotenants*.

In Mississippi it has been held that the value should be reckoned on a basis coextensive in time with the estimate of rents and profits which the improvements contributed to produce, so as to allow the defendant for all his improvements of which the plaintiff recovers the benefit. *Johnson v. Futch*, 57 Miss. 73.

Improvements Destroyed By Casualty Before Recovery in Ejectment — No Compensation. — *Nixon v. Porter*, 38 Miss. 401.

2. Damage from Droughts Occurring After Ouster of Occupant. — *Thompson v. Buckner*, (Ky. 1897) 40 S. W. Rep. 915.

3. Allowance Should Not Exceed Cost of Improvements. — In a *Canadian* case the court directed the allowance of an amount equal to the enhancement of the value of the property by reason of the improvements, or the price of the improvements, whichever should be shown to be the lesser. *Pegley v. Woods*, 14 Grant Ch. (U. C.) 47.

Under section 476 of the Code of *North Carolina* the value of such improvements as were made before notice in writing of the title which the plaintiff claimed, not exceeding the

amount actually expended in making them, and not exceeding the amount to which the value of the premises is actually increased thereby at the time of the assessment is to be allowed. *Justice v. Baxter*, 93 N. Car. 405. And see also *McClaskey v. Barr*, 62 Fed. Rep. 209.

Where Materials Used Obtained from Land of True Owner, Occupant's Allowance Confined to Value of His Labor and Money Actually Expended — *Duckett v. Duckett*, (Md. 1891) 21 Atl. Rep. 323.

Improvements Made by Government and Sold to Occupant at Nominal Price — Price Paid, and Not Value to the Owner, Allowed. — *Hall v. Brummal*, 7 Bush (Ky.) 43.

4. Georgia Rule that Enhancement of Value Should Be Allowed Though It Exceed Value of Improvements. — *Thomas v. Malcom*, 39 Ga. 328, 99 Am. Dec. 459; *Willingham v. Long*, 47 Ga. 540.

5. Rule in the Absence of Statute — England. — *Dormer v. Fortescue*, 3 Atk. 134. See also *Coulter's Case*, 5 Coke 30.

Canada. — See *Beaty v. Shaw*, 14 Ont. App. 600.

United States. — *Gill v. Patten*, 1 Cranch (C. C.) 465; *Green v. Biddle*, 8 Wheat. (U. S.) 1; *Stark v. Starr*, 1 Sawy. (U. S.) 15; *Hylton v. Brown*, 2 Wash. (U. S.) 165.

Alabama. — *Hollinger v. Smith*, 4 Ala. 367; *Lamar v. Minter*, 13 Ala. 31; *Horton v. Sledge*, 29 Ala. 478; *Ormond v. Martin*, 37 Ala. 598. See also *Gordon v. Tweedy*, 74 Ala. 232, 49 Am. Rep. 813; *Kerr v. Nicholas*, 88 Ala. 346.

Arkansas. — *Marlow v. Adams*, 24 Ark. 109. See also *Rector v. Gaines*, 19 Ark. 70; *Byers v. Fowler*, 12 Ark. 220, 54 Am. Dec. 271.

Georgia. — *Davis v. Smith*, 5 Ga. 274, 48 Am. Dec. 279; *Beverly v. Burke*, 9 Ga. 440, 54 Am. Dec. 351; *Thomas v. Malcom*, 39 Ga. 328, 99 Am. Dec. 459. See also *Fields v. Carlton*, 75 Ga. 554, 84 Ga. 597.

Iowa. — *Parsons v. Moses*, 16 Iowa 440; *Lunquest v. Ten Eyck*, 40 Iowa 213. See also *Wright v. Stevens*, 3 Greene (Iowa) 63.

dictions there have been statutes prescribing the same limit.¹

6. Interest. — It has been considered that in estimating the amount to be allowed an occupant of land for his improvements, interest should not be allowed.² But after the amount of such allowance has been settled a judgment therefor may bear interest.³

V. WHAT OCCUPANTS ARE ENTITLED TO COMPENSATION — 1. General Requisites as to Occupancy. — As a general rule, in order to entitle an occupant of land to compensation for his improvements, three things must concur: (1) he must have held possession under color of title; (2) his possession must have been adverse to the title of the true owner; and (3) he must have acted in good faith.⁴ These three fundamental requisites will be discussed in the order indicated, before going on to treat of the further requirements under particular statutes and other matters.

2. Necessity for Color of Title — a. RULE STATED. — To support a claim

Louisiana. — *Burrows v. Peirce*, 6 La. Ann. 303.

Maryland. — *Tongue v. Nutwell*, 31 Md. 302.

Mississippi. — *Johnson v. Futch*, 57 Miss. 73; *Learned v. Corley*, 43 Miss. 687.

Missouri. — See *Fenwick v. Gill*, 38 Mo. 510.

New York. — *Murray v. Gouverneur*, 2 Johns. Cas. (N. Y.) 438, 1 Am. Dec. 177; *Jackson v. Loomis*, 4 Cow. (N. Y.) 168, 15 Am. Dec. 347; *Putnam v. Ritchie*, 6 Paige (N. Y.) 404. See also *Wood v. Wood*, 83 N. Y. 575.

Ohio. — *McCoy v. Grandy*, 3 Ohio St. 463; *Worthington v. Young*, 8 Ohio 401.

Pennsylvania. — *Putnam v. Tyler*, 117 Pa. St. 570; *Morrison v. Robinson*, 31 Pa. St. 456; *Scates v. Tyler*, (Pa. 1888) 12 Ail. Rep. 51; *Walker v. Humbert*, 55 Pa. St. 407.

Tennessee. — *Mathews v. Davis*, 6 Humph. (Tenn.) 324.

Virginia. — *Hollingsworth v. Funkhouser*, 85 Va. 448.

Wisconsin. — See *Davis v. Louk*, 30 Wis. 308.

Actual Enhancement of Value Allowed. — Previous to *Fisher v. Edington*, 12 Lea (Tenn.) 189, it had been the practice, and was by the bar generally thought to be the rule, to limit the allowance for betterments to the sum total of rents and profits. The reasons for this, and the danger to the title-holder from a different practice, are cogently expressed in the opinion of Judge Turney in that case.

In that case, however, the true owners, after their disabilities were removed and their rights accrued, having stood by with knowledge of their rights and seen the improvements of their estates without any objection or claim, the equity of the occupants was considered by a majority of the court to be so strong as to overcome these objections, and the full enhancement of value resulting from their improvements was decreed to them regardless of the limit of rents and profits.

This case was followed in *Howard v. Massengale*, 13 Lea (Tenn.) 577. See also *Day v. Walker*, Knoxville, 1876, cited in *Smoot v. Smoot*, 12 Lea (Tenn.) 274.

It will be noticed that these cases seem to have considered that the rule stated in the text should not be applied in the particular instances on account of the strong equities in favor of the occupants, rather than to have denied that rule.

The Court of Kentucky, however, has gone a step further and flatly denied the rule stated in the text. See *Ewing v. Handley*, 4 Litt. (Ky.) 371, 14 Am. Dec. 140. See also *Hawkins v. King*, 1 T. B. Mon. (Ky.) 161.

1. Statutes Restricting Compensation to Amount of Rents and Profits or Damages. — *Ford v. Holton*, 5 Cal. 319; *Yount v. Howell*, 14 Cal. 465; *Wilson v. Scruggs*, 7 Lea (Tenn.) 635; *Sengfelder v. Hill*, (Wash. 1899) 58 Pac. Rep. 250.

The *Mississippi* statute (Code 1880, § 2512), allowing compensation for improvements, only applies where the right to sue for or demand mesne profits exists. *Pass v. McLendon*, 62 Miss. 580.

2. Interest Not Allowed. — *Pugh v. Bell*, 2 T. B. Mon. (Ky.) 125, 15 Am. Dec. 142; *Hendrix v. Nesbitt*, (Ky. 1899) 49 S. W. Rep. 963; *Talbot v. Todd*, 7 J. J. Marsh. (Ky.) 456.

Contrary View. — One who has improved land under a mistaken belief of title thereto is entitled to interest on the enhanced value resulting from his improvements from the time the money was expended for them, especially where the rental is charged on the increased value. *Fawcett v. Burwell*, 27 Grant Ch. (U. C.) 445. See also *Childs v. Shower*, 18 Iowa 261.

As to charging rental on increased value, see *infra*, this title, XI. 5. *Whether Rent Can Be Charged on Value of Property as Improved.*

3. Interest on Judgment for Improvements. — *Young v. Pate*, 3 J. J. Marsh. (Ky.) 100.

Rev. Stat. *Wisconsin*, 1878, § 3098, provides that when the right of compensation for improvements shall be established and the amount thereof assessed, such assessment with the costs of such issue shall be set off against the sum awarded for costs and damages to the plaintiff in the action, "and if there remain any excess the judgment in such action shall provide that the plaintiff shall pay the amount thereof with interest." *Neeves v. Eron*, 73 Wis. 542. See generally the title INTEREST, *post*.

4. General Requisites as to Occupancy. — *Stark v. Starr*, 1 Sawy (U. S.) 15.

And see the numerous cases cited *infra*, this section, subsections 2. *Necessity for Color of Title*; 3. *Necessity for Adverse Character of Occupancy*; 4. *Necessity for Good Faith in Occupant*.

for compensation for improvements it is necessary that the occupant should have had color of title.¹

The Occupant Is Not Required to Show a Complete Chain of Title from the sovereignty of the soil, under full and complete deeds, to entitle him to compensation for improvements made in good faith, for on such a showing he would be entitled to a judgment for the land itself.²

But a Mere Trespasser is not considered to be entitled to the full benefit of the rule allowing compensation.³

b. IMPROVEMENTS MADE BEFORE ACQUIRING COLOR OF TITLE. — There is authority for the view that one who has made improvements on land to which he has no color of title does not acquire any right to compensation therefor by afterwards acquiring a colorable title.⁴ But there would seem to

1. Occupant Must Have Had Color of Title — *United States*. — *Stark v. Starr*, 1 Sawy. (U. S.) 15; *Field v. Columbet*, 4 Sawy. (U. S.) 523; *Litchfield v. Johnson*, 4 Dill. (U. S.) 551; *Wells v. Riley*, 2 Dill. (U. S.) 566.

Alabama. — *Lamar v. Minter*, 13 Ala. 31. See also *Ormond v. Martin*, 37 Ala. 598.

Arkansas. — *Teaver v. Akin*, 47 Ark. 528; *Beard v. Dansby*, 48 Ark. 183; *Anderson v. Williams*, 59 Ark. 144; *Kemp v. Cossart*, 47 Ark. 62; *Jefferson v. Edrington*, 53 Ark. 545.

California. — *Carpentier v. Small*, 35 Cal. 346; *Love v. Shartsh*, 31 Cal. 487; *Bay v. Pope*, 18 Cal. 694; *Hannan v. McNickle*, 82 Cal. 122; *Wise v. Burton*, 73 Cal. 174.

Georgia. — *Tripp v. Fausett*, 94 Ga. 330.

Iowa. — *Welles v. Newsom*, 76 Iowa 81; *Snell v. Mechan*, 80 Iowa 53; *Lunquest v. Ten Eyck*, 40 Iowa 213; *Dungan v. Von Puhl*, 8 Iowa 203; *Finnegan v. Campbell*, 74 Iowa 158.

Kansas. — See *Larkin v. Wilson*, 28 Kan. 513.

Kentucky. — See *Hackworth v. Harlan*, (Ky. 1892) 19 S. W. Rep. 172.

Michigan. — *Petit v. Flint, etc., R. Co.*, (Mich. 1899) 78 N. W. Rep. 554.

Minnesota. — *Hall v. Torrens*, 32 Minn. 527; *McLellan v. Omodt*, 37 Minn. 157; *Wheeler v. Merriman*, 30 Minn. 373; *Pfefferle v. Wieland*, 55 Minn. 202. See also *Wheeler v. Merriman*, 30 Minn. 372.

New York. — *Barley v. Roosa*, (Supm. Ct. Gen. T.) 13 N. Y. Supp. 209, 59 Hun (N. Y.) 617 mem., 20 Civ. Pro. (N. Y.) 113.

North Carolina. — *Browne v. Davis*, 109 N. Car. 23; *Carolina Cent. R. Co. v. McCaskill*, 98 N. Car. 526.

Oklahoma. — *Woodruff v. Wallace*, 3 Okla. 355.

Pennsylvania. — See *Scates v. Tyler*, (Pa. 1888) 12 Atl. Rep. 51; *Putnam v. Tyler*, 117 Pa. St. 570.

South Dakota. — *Parker v. Vinson*, 11 S. Dak. 381; *Seymour v. Cleveland*, 9 S. Dak. 94; *Wood v. Conrad*, 2 S. Dak. 334.

Tennessee. — *Wilson v. Scruggs*, 7 Lea (Tenn.) 635. See also *State v. McMinnville, etc., R. Co.*, 6 Lea (Tenn.) 369.

Washington. — *Brygger v. Schweitzer*, 5 Wash. 504.

Wisconsin. — *Whitcomb v. Provost*, 102 Wis. 278; *Falck v. Marsh*, 88 Wis. 680; *Barrett v. Stradl*, 73 Wis. 385, 9 Am. St. Rep. 795; *Zwietusch v. Watkins*, 61 Wis. 615; *Stewart v. Stewart*, 90 Wis. 516, 48 Am. St. Rep. 949.

Meaning of Requirement of "Color of Title in Fee." — The language of Gen. Stat. *Minnesota*,

1878, c. 75, § 15, "under color of title in fee," is broad enough to include color of title in fee either in the occupying claimant himself, or color of title in fee in the person under whom he claims his right, whatever it is. In either case the claimant is in "under color of title in fee." *Hall v. Torrens*, 32 Minn. 527, *distinguishing Wheeler v. Merriman*, 30 Minn. 372.

A Holding in Good Faith Is Not of Itself Sufficient, it has been said, to entitle an occupant to compensation for improvements under the *California* statute. His holding must also have been under color of title. *Field v. Columbet*, 4 Sawy. (U. S.) 523. And all the cases cited above would seem to support this view.

But, on the Other Hand, it has been held that if the occupant claims title in good faith the character of his possession is sufficient to entitle him to improvements, although he may have no color of title. *Holt v. Adams*, (Ala. 1898) 25 So. Rep. 716; *New Orleans, etc., R. Co. v. Jones*, 68 Ala. 48; *Pickett v. Pope*, 74 Ala. 122.

And a *bona fide* purchaser, who improved the property he had bought at the foreclosure of a mortgage belonging to an estate which had not been inventoried nor assigned to the administrator, has been allowed the value of his improvements though he had not acquired title or even color of title. *Miller v. Clark*, 56 Mich. 337.

2. Occupant Not Required to Show a Complete Chain of Title. — *Thompson v. Jones*, 77 Tex. 626. See also *Dorn v. Dunham*, 24 Tex. 366; *Dothage v. Stuart*, 35 Mo. 251.

Where Plea of Bona Fide Purchaser Is Not Available to Defeat Recovery. — The fact that an occupant may not be able to use the plea of *bona fide* purchaser without notice, to defeat a recovery by the claimants, will not deprive him of any equity he may have for an allowance of improvements, especially where relief against him is sought in a court of equity. *McLaughlin v. Barnum*, 31 Md. 425.

3. Trespasser Not Entitled to Compensation for Improvements. — *Carpentier v. Mitchell*, 29 Cal. 330; *Hunt v. Pond*, 67 Ga. 578; *Stamper v. Bradley*, (Ky. 1899) 53 S. W. Rep. 16; *New Orleans, etc., R. Co. v. Jones*, 68 Ala. 48. And see cases cited *supra*, this section.

But Trespassers Have Certain Rights in Some Jurisdictions. — See *infra*, this section, subsection 16, *Rights of Trespassers and Wrongdoers*.

4. Acquisition of Color of Title After Making Improvements Gives No Right to Compensation. — *Arkansas*. — *Jacks v. Dyer*, 31 Ark. 334; *Anderson v. Williams*, 59 Ark. 144.

be no reason why, if an occupant, who has color of title at the time the action to dispossess him is brought, has all along acted in good faith, he should not be allowed for improvements made before his color of title accrued, especially where such color of title is founded on adverse possession during the time the improvements were made; and it has been so held.¹

c. WHAT MAY CONSTITUTE COLOR OF TITLE — (1) *Introductory*. — There has already been given in this work some discussion of what constitutes color of title,² so it is proposed to give here only such general principles as are absolutely necessary to an understanding of this particular subject, together with other principles particularly applicable thereto.

(2) *Meaning of Term*. — The courts have very generally concurred in defining color of title as "that which in appearance is title, but which in reality is no title."³

(3) *Color of Title Arising from Written Instrument*. — Any written instrument having a grantor and a grantee and containing a description of the land intended to be conveyed,⁴ and apt words for its conveyance,⁵ will give color of title to the land described,⁶ even though the grantor had no title to

California. — *Carpentier v. Small*, 35 Cal. 346.

Iowa. — *Snell v. Mechan*, 80 Iowa 53. See *Craton v. Wright*, 16 Iowa 134; *Read v. Howe*, 49 Iowa 65.

Minnesota. — *Wheeler v. Merriman*, 30 Minn. 372. See also *McLellan v. Omodt*, 37 Minn. 157.

Improvements by Grantor of Occupant. — A grantee does not occupy a better position, in regard to improvements made by his grantor, than the latter himself occupied. Hence, to entitle him to recover for such improvements, he must show that his grantor was within the provisions of the statute when he made the improvements. *Wheeler v. Merriman*, 30 Minn. 372.

Acquisition of Part Interest in Land. — One who has made improvements on land while holding the same as a naked trespasser is not entitled to any allowance therefor, and he acquires no right to compensation by a subsequent purchase of a part interest in the land. *Carpentier v. Mitchell*, 29 Cal. 330.

1. Occupant Held Entitled to Compensation for Improvements Made Before Acquiring Color of Title. — *Litchfield v. Johnson*, 4 Dill. (U. S.) 551. See also *Bellows v. McCartee*, 20 N. H. 515; *Davis v. Powell*, 13 Ohio 308.

2. See the title ADVERSE POSSESSION, vol. I, p. 787.

3. Meaning of "Color of Title" — *United States*. — *Wright v. Mattison*, 18 How. (U. S.) 50; *Field v. Columbet*, 4 Sawy. (U. S.) 523.

Alabama. — *Russell v. Erwin*, 38 Ala. 44.

Arkansas. — *Teaver v. Akin*, 47 Ark. 528.

Illinois. — *Brooks v. Bruyn*, 35 Ill. 392.

Minnesota. — *Seigneuret v. Fahey*, 27 Minn. 60.

Oklahoma. — *Woodruff v. Wallace*, 3 Okla. 355.

South Dakota. — *Seymour v. Cleveland*, 9 S. Dak. 94.

Vermont. — *Hodges v. Eddy*, 38 Vt. 327.

Wisconsin. — *Whitcomb v. Provost*, 102 Wis. 278; *Edgerton v. Bird*, 6 Wis. 527, 70 Am. Dec. 473.

The Apparent Title Must Be Such as to Satisfy
16 C. of L.—6

the Occupant of His Right to possess and improve the property. *Green v. Biddle*, 8 Wheat. (U. S.) 1; *O'Mulcahy v. Florer*, 27 Minn. 449; *Carolina Cent. R. Co. v. McCaskill*, 98 N. Car. 526; *Mathews v. Davis*, 6 Humph. (Tenn.) 324; *Cain v. Cox*, 29 W. Va. 258.

4. Lack of Description. — A deed in which a description of the lands purporting to be conveyed is lacking will not of itself support a claim for compensation for improvements. *Simpson v. Johnson*, 92 Tex. 159.

5. Instrument Must Apparently Transfer Title. — *Wood v. Conrad*, 2 S. Dak. 334.

A Bond for Title does not, *ex vi termini*, purport to convey the title to the obligee. It is, at most, an executory agreement, entitling him to a deed at a future day, on the performance of certain conditions. *Teaver v. Akin*, 47 Ark. 528; *White v. Stokes*, (Ark. 1899) 53 S. W. Rep. 1060; *Felkner v. Tighe*, 39 Ark. 363; *Rigor v. Frye*, 62 Ill. 507.

Quit-claim Deed. — An unsuccessful defendant in ejectment may have a recovery for improvements if he held possession *bona fide* and under a belief of a good title in himself, notwithstanding his deed was a quit-claim. *Griswold v. Bragg*, 6 Fed. Rep. 342.

Certificate of Homestead Entry. — A holding under a valid certificate of homestead entry is not a holding under title, and hence a holding under an invalid certificate of homestead entry cannot be a holding under color of title such as will entitle the occupant to compensation for his improvements under the Rev. Stat. *Wisconsin*, 1878, § 3096. *Whitcomb v. Provost*, 102 Wis. 278. See also *Woodruff v. Wallace*, 3 Okla. 355; *Calhoun v. McCornack*, 7 Okla. 347.

6. What Written Instrument May Convey Color of Title — *United States*. — *Field v. Columbet*, 4 Sawy. (U. S.) 523; *Hall v. Law*, 102 U. S. 461.

Arkansas. — *Beard v. Dansby*, 48 Ark. 183; *Teaver v. Akin*, 47 Ark. 528.

Illinois. — *Brooks v. Bruyn*, 35 Ill. 392.

Oklahoma. — *Woodruff v. Wallace*, 3 Okla. 355.

Oregon. — *Hatcher v. Briggs*, 6 Oregon 31.

Volume XVI.

convey,¹ or was under some personal disability to convey,² or for some other reason the instrument is not effectual to pass title.³

(4) *Color of Title Arising in Absence of Written Instrument.* — Ordinarily, to constitute color of title to land, it is necessary that the occupant should have a paper title.⁴ But this is not invariably true.⁵ Thus, in some jurisdictions, an occupant of land may acquire a right to compensation for his improvements merely by reason of the length of time his occupancy has continued,⁶ and payment of taxes thereon.⁷

3. Necessity for Adverse Character of Occupancy — *a. RULE STATED.* — The second general requisite to the support of a claim for compensation for improvements is that the possession of the occupant should have been adverse to the title of the true owner.⁸ One who holds possession by permission of another,

1. *Title in Grantor Not Necessary.* — *Field v. Columbet*, 4 Sawy. (U. S.) 523; *Brooks v. Bruyn*, 35 Ill. 392; *Woodruff v. Wallace*, 3 Okla. 355.

Conveyance by Husband of His Wife's Land. — If a husband assumes to convey his wife's land, she not joining in the deed, the purchaser may have the value of the improvements erected by him in good faith, but not a lien for the purchase money paid to the husband. *Garth v. Fort*, 15 Lea (Tenn.) 683.

Conveyance in Fee from Life Tenant. — One who holds under a deed from a life tenant purporting to convey the land to him in fee simple, and believes himself to be the owner in fee simple, is a *bona fide* occupant and holds under color of title. *Fee v. Cowdry*, 45 Ark. 410, 55 Am. Rep. 560.

Grantor Must Have Had Possession or Color of Title. — One who enters upon land under a conveyance from one not in possession, and, so far as appears, not having any color of title, enters and improves the premises at his peril. *Tripp v. Fausett*, 94 Ga. 330.

2. *Personal Disability of Grantor to Convey.* — *Krause v. Means*, 12 Kan. 335.

Conveyance from Married Woman Without Joinder of Husband. — One who has, in good faith, purchased from a *feme covert*, paying full consideration and believing that she had power to convey the land, and who has received a deed in which the husband did not join, is entitled to compensation for improvements where the deed is set aside at the instance of the grantor on the ground of her coverture when it was executed. *Hawkins v. Brown*, 80 Ky. 186. But compare *Smith v. Gibson*, 25 U. C. C. P. 248.

3. *Occupant Holding under Defective Conveyance Entitled to Compensation for Improvements.* — *Shroyer v. Nickell*, 55 Mo. 264; *Bacon v. Calender*, 6 Mass. 309; *Newhall v. Saddler*, 17 Mass. 350; *Brooks v. Bruyn*, 35 Ill. 392; *Woodruff v. Wallace*, 3 Okla. 355. See also *Coker v. Roberts*, 71 Tex. 597.

Deed Void on Its Face. — Color of title, under the *Wisconsin* statute, in reference to improvements, may be by a written instrument having an infirmity making it absolutely void upon its face. *Stewart v. Stewart*, 90 Wis. 516, 48 Am. St. Rep. 949; *Zwietusch v. Watkins*, 61 Wis. 620. In the case first cited the court said: "Otherwise the statute would rarely afford any protection." Compare *Seymour v. Cleveland*, 9 S. Dak. 94.

Deed Void for Want of Delivery. — A deed which is void for want of delivery may, up to

the time of the judgment declaring it void, constitute the color of title necessary to entitle the person holding thereunder to compensation for his improvements under the *Wisconsin* statute. *Stewart v. Stewart*, 90 Wis. 516, 48 Am. St. Rep. 949.

Protection of Occupant Does Not Depend upon Original Deeds Through Which Title Is Deraigned — *Illinois.* — *Montag v. Linn*, 27 Ill. 328.

4. *Paper Title Ordinarily Necessary.* — *Lunquest v. Ten Eyck*, 40 Iowa 213; *Hamilton v. Wright*, 30 Iowa 480.

There can be no color of title in an occupant who does not hold under any instrument, proceeding, or law purporting to transfer to him the title or to give to him the right of possession. *Field, J.*, in *Deffebach v. Hawke*, 115 U. S. 392, quoted with approval in *Woodruff v. Wallace*, 3 Okla. 355.

5. *Paper Title Not Invariably Necessary.* — *Wendell v. Moulton*, 26 N. H. 41.

6. *Right to Compensation Arising from Continued Occupancy* — *Iowa.* — *Wellis v. Newsom*, 76 Iowa 81, citing Code Iowa, § 1983; *Lunquest v. Ten Eyck*, 40 Iowa 213.

Of course this occupancy must be in the claimant's own right and for his own benefit, and not in the right of another as tenant, etc. *Lunquest v. Ten Eyck*, 40 Iowa 213.

Under the *Alabama* Code of 1876, § 2951, a defendant in an action for the recovery of real property may set off against the rents the value of permanent improvements made by him, upon a suggestion of three years' adverse possession, provided his occupancy was under such color or claim of title as to be in good faith. *New Orleans, etc., R. Co. v. Jones*, 68 Ala. 48. See also *Turnipseed v. Fitzpatrick*, 75 Ala. 297; *Wisdom v. Reeves*, 110 Ala. 418.

7. *Color of Title Resulting from Payment of Taxes* — *Iowa.* — *Finnegan v. Campbell*, 74 Iowa 158.

8. *Possession Must Have Been Adverse to True Owner* — *United States.* — *Stark v. Starr*, 1 Sawy. (U. S.) 15; *Field v. Columbet*, 4 Sawy. (U. S.) 523.

Alabama. — *New Orleans, etc., R. Co. v. Jones*, 68 Ala. 48; *Wisdom v. Reeves*, 110 Ala. 418.

California. — *Bay v. Pope*, 18 Cal. 694; *Wise v. Burton*, 73 Cal. 174; *Love v. Shartzler*, 31 Cal. 487; *Hannan v. McNickle*, 82 Cal. 122.

Georgia. — *Barnes v. Shinholster*, 14 Ga. 131; *Dean v. Feely*, 69 Ga. 804. But see statement of modification of the general rule in *Georgia* set out *infra*, this note.

whose title he recognizes, is not entitled to compensation,¹ even though the improvements were made with an honest expectation that he would subsequently acquire title from the owner.²

An Exception to the Rule Stated Above seems to have been recognized in a *Kentucky* case, in which it was held that where a purchaser of land had placed improvements on adjoining land of his vendor, in reliance upon the parol assurance of the latter that he should be unmolested in the use of them, he was entitled to compensation for such improvements when the vendor gained possession of them.³

b. WHAT CONSTITUTES ADVERSE POSSESSION. — The adverse character of possession necessary to support a claim for improvements does not differ materially from that necessary to put in operation the statute of limitations,⁴ save that in the former case the occupancy must have been under color or claim of title asserted in good faith.⁵

c. PRESUMPTION AGAINST CHANGE OF CHARACTER OF POSSESSION. — Where it appears that an occupant of land has at one time held such adverse possession as to entitle him to compensation for improvements, it will be presumed, in the absence of evidence to the contrary, that his possession continued to be adverse down to the time the action against him for the recovery of the land was commenced.⁶ And conversely, one who has held

Iowa. — *Keas v. Burns*, 23 Iowa 235; *Lunquest v. Ten Eyck*, 40 Iowa 213; *Wiltse v. Hurley*, 11 Iowa 473; *Parsons v. Moses*, 16 Iowa 440; *Jones v. Graves*, 21 Iowa 474; *Snell v. Mehan*, 80 Iowa 53.

Maine. — *Treat v. Strickland*, 23 Me. 234; *Tyler v. Fickett*, 75 Me. 211; *Moore v. Moore*, 61 Me. 417; *Pratt v. Churchill*, 42 Me. 471; *Peabody v. Hewett*, 52 Me. 33, 83 Am. Dec. 486.

Massachusetts. — *Wales v. Coffin*, 100 Mass. 177; *Knox v. Hook*, 12 Mass. 329.

Michigan. — *Jones v. Merrill*, 113 Mich. 433; *Wolf v. Holton*, 92 Mich. 136; *Paldi v. Paldi*, 84 Mich. 346.

New York. — *Barley v. Roosa*, (Supm. Ct. Gen. T.) 13 N. Y. Supp. 209, 59 Hun (N. Y.) 617, mem., 20 Civ. Pro. (N. Y.) 113.

Ohio. — *Allen v. Russell*, 59 Ohio St. 137; *Preston v. Brown*, 35 Ohio St. 18.

South Dakota. — *Parker v. Vinson*, 11 S. Dak. 381; *Seymour v. Cleveland*, 9 S. Dak. 94.

Texas. — *Baker v. Millman*, 77 Tex. 46.

Wisconsin. — *Barrett v. Stradl*, 73 Wis. 385, 9 Am. St. Rep. 795; *Whitcomb v. Provost*, 102 Wis. 278; *Falck v. Marsh*, 88 Wis. 680; *Zwietusch v. Watkins*, 61 Wis. 615; *Stewart v. Stewart*, 90 Wis. 516, 48 Am. St. Rep. 949.

Canada. — See *Foster v. Emerson*, 5 Grant Ch. (U. C.) 135.

Under the Georgia Code, where improvements of a permanent character are made in good faith by one who has no claim of right to the possession, but is a tenant by sufferance merely, the value of such improvements may be allowed to the extent of the rent found to be due for the use of the land, but no further. *Dean v. Feely*, 60 Ga. 804.

1. Permissive Holding. — *Wisdom v. Reeves*, 110 Ala. 418; *New Orleans, etc., R. Co. v. Jones*, 68 Ala. 48; *Thomas v. Thomas*, 69 Miss. 564.

One Who Holds under an Executory Contract for the purchase of lands does not hold adversely, as against his vendor or his vendor's grantee, until after full performance of the con-

ditions of his contract. *Simpson v. Snelode*, 83 Wis. 201.

Consequently, One Who Holds under a Certificate of Homestead Entry, but has not carried out the conditions of his entry and earned his patent, has not that adverse possession which is necessary under Rev. Stat. *Wisconsin*, 1878, § 3096, to entitle him to compensation for his improvements. *Whitcomb v. Provost*, 102 Wis. 278.

See *infra*, this section, *Rights of Vendees under Contract of Sale*.

2. Expectation of Acquiring Title Not Sufficient. — *Thomas v. Thomas*, 69 Miss. 564; *Baker v. Millman*, 77 Tex. 46.

3. Exception to the Rule. — *M'Cracken v. Sanders*, 4 Bibb (Ky.) 511. The syllabus of this case refers to a parol "contract for the sale of land" to which no reference appears in the opinion of the court; and the same inadvertence is repeated in the digest of the case, in the *United States Digest*.

4. Possession Must Be Such as Would Put the Statute of Limitations in Operation. — *Pratt v. Churchill*, 42 Me. 471; *Treat v. Strickland*, 23 Me. 234. See the title *ADVERSE POSSESSION*, vol. 1, p. 787.

Claimant Need Not Actually Live on Property. — *Jones v. Merrill*, 113 Mich. 433.

Occupancy under Agreement for Purchase Made with Equitable Owner Not Adverse. — *Preston v. Brown*, 35 Ohio St. 18. In such case, however, relief may be afforded the occupant in equity. *Preston v. Brown*, 35 Ohio St. 18. See also *King v. Thompson*, 9 Pet. (U. S.) 204.

As to the General Requisites of Adverse Possession see the title *ADVERSE POSSESSION*, vol. 1, p. 795 *et seq.*

5. Occupancy Must Have Been under Color or Claim of Title Asserted in Good Faith. — *Holt v. Adams*, (Ala. 1898) 25 So. Rep. 716. See also *Barrett v. Stradl*, 73 Wis. 385, 9 Am. St. Rep. 795.

6. Presumption that Possession Has Continued Adverse. — *Barrett v. Stradl*, 73 Wis. 385, 9 Am. St. Rep. 795.

under another must expressly assert an adverse title subsequently acquired, in order to be entitled to compensation for his improvements.¹

4. Necessity for Good Faith in Occupant — *a. RULE STATED.* — As a general rule it is absolutely necessary, to entitle an occupant of land to compensation for his improvements, that in holding the land and placing his improvements thereon he shall have acted in perfect good faith.²

1. Purchase of Outstanding Tax Title and Recording of Deed. — One who holds possession of property in subordination to the rights of another whose title he recognizes, cannot acquire a right to compensation for improvements merely by purchasing an outstanding tax title and recording the deed, as such recording is not of itself a sufficient assertion of an adverse title. The claim of an adverse holding under such title must be expressly asserted and brought to the knowledge of the person under whom the occupant formerly held. *Paldi v. Paldi*, 84 Mich. 346.

2. Occupant Must Have Acted in Good Faith — *United States.* — *Griswold v. Bragg*, 6 Fed. Rep. 342; *Albee v. May*, 2 Paine (U. S.) 74; *Stark v. Starr*, 1 Sawy. (U. S.) 15; *Wells v. Riley*, 2 Dill. (U. S.) 566; *Green v. Biddle*, 8 Wheat. (U. S.) 1; *Canal Bank v. Hudson*, 111 U. S. 66; *Vilas v. Prince*, 88 Fed. Rep. 682; *George v. Steam Stone Cutter Co.*, 20 Fed. Rep. 478; *Field v. Columbet*, 4 Sawy. (U. S.) 523.

Alabama. — *Lamar v. Minter*, 13 Ala. 31; *Holt v. Adams*, (Ala. 1898) 25 So. Rep. 716; *Horton v. Sledge*, 29 Ala. 478; *Gordon v. Tweedy*, 74 Ala. 232, 49 Am. Rep. 813; *New Orleans, etc., R. Co. v. Jones*, 68 Ala. 48, 70 Ala. 227. See also *Ormond v. Martin*, 37 Ala. 598; *Copeland v. McAdory*, 100 Ala. 553; *Pickett v. Pope*, 74 Ala. 122.

Arkansas. — *Kemp v. Cossart*, 47 Ark. 62; *Teaver v. Akin*, 47 Ark. 528; *Shepherd v. Jernigan*, 51 Ark. 275, 14 Am. St. Rep. 50; *Byers v. Fowler*, 12 Ark. 220, 54 Am. Dec. 271; *White v. Stokes*, (Ark. 1899) 53 S. W. Rep. 1060; *Shaw v. Hill*, 46 Ark. 333; *Fee v. Cowdry*, 45 Ark. 410, 55 Am. Rep. 560; *Jefferson v. Edrington*, 53 Ark. 545. See also *Marlow v. Adams*, 24 Ark. 109.

California. — *White v. Moses*, 21 Cal. 34; *Love v. Shartzer*, 31 Cal. 487; *Hannan v. McNickle*, 82 Cal. 122; *Bay v. Pope*, 18 Cal. 604; *Wise v. Burton*, 73 Cal. 174.

Connecticut. — See *Ensign v. Batterson*, 68 Conn. 298.

Georgia. — *Dean v. Feely*, 69 Ga. 804.

Illinois. — *Montag v. Linn*, 27 Ill. 328. See also *Cable v. Ellis*, 120 Ill. 136; *Mettler v. Craft*, 39 Ill. App. 193; *Laggar v. Mutual Union Loan Assoc.*, 146 Ill. 283.

Indiana. — *Hilgenberg v. Northup*, 134 Ind. 92.

Iowa. — *Lunquest v. Ten Eyck*, 40 Iowa 213; *Dungan v. Von Puhl*, 8 Iowa 263; *Snell v. Mechan*, 80 Iowa 53; *Welles v. Newsom*, 76 Iowa 81; *Parsons v. Moses*, 16 Iowa 444. See also *Stinson v. Richardson*, 44 Iowa 373.

Kansas. — *Lemert v. Barnes*, 18 Kan. 9. See also *Larkin v. Wilson*, 28 Kan. 513.

Kentucky. — *Patrick v. Marshall*, 2 Bibb (Ky.) 40, 4 Am. Dec. 670; *Singleton v. Jackson*, 2 Litt. (Ky.) 208; *Dean v. Cassidy*, 88 Ky. 572. See also *Evans v. Page*, (Ky. 1894) 26 S. W. Rep. 1016; *Hackworth v. Harlan*, (Ky. 1892)

19 S. W. Rep. 172; *Thompson v. Mason*, 4 Bibb (Ky.) 199; *Parker v. Stephens*, 3 A. K. Marsh. (Ky.) 202; *Howe v. Logwood*, 3 A. K. Marsh. (Ky.) 388; *Ewing v. Handley*, 4 Litt. (Ky.) 371, 14 Am. Dec. 140.

Louisiana. — *Stille v. Shull*, 41 La. Ann. 816. See also *Montgomery v. Whitfield*, 41 La. Ann. 649; *Howard v. Zeyer*, 18 La. Ann. 407; *Wood v. Lyle*, 4 La. Ann. 145; *Jenkins v. Gibson*, 3 La. Ann. 203; *Anselm v. Brashear*, 2 La. Ann. 403.

Michigan. — *Petit v. Flint, etc., R. Co.*, (Mich. 1899) 78 N. W. Rep. 554; *Miller v. Clark*, 56 Mich. 337.

Minnesota. — See *Hall v. Torrens*, 32 Minn. 527.

Mississippi. — *Citizens' Bank v. Costanera*, 62 Miss. 825; *Gaines v. Kennedy*, 53 Miss. 103; *Holmes v. McGee*, 64 Miss. 129; *Johnson v. Futch*, 57 Miss. 73; *Thomas v. Thomas*, 69 Miss. 564; *Cole v. Johnson*, 53 Miss. 94.

Missouri. — *Lee v. Bowman*, 55 Mo. 400.

Nebraska. — *Carter v. Brown*, 35 Neb. 670.

New Hampshire. — *Bellows v. Copp*, 20 N. H. 492.

New Jersey. — See *Foley v. Kirk*, 33 N. J. Eq. 170.

New York. — *Barley v. Roosa*, (Supm. Ct. Gen. T.) 20 Civ. Pro. (N. Y.) 113; *Woodhull v. Rosenthal*, 61 N. Y. 382; *Jackson v. Loomis*, 4 Cow. (N. Y.) 168, 15 Am. Dec. 347. See also *Moore v. Cable*, 1 Johns. Ch. (N. Y.) 385; *Mickles v. Dillaye*, 17 N. Y. 80; *Thomas v. Evans*, 105 N. Y. 601, 59 Am. Rep. 519.

North Carolina. — *Hedgepeth v. Rose*, 95 N. Car. 41; *Pitt v. Moore*, 99 N. Car. 85, 6 Am. St. Rep. 489; *Field v. Moody*, 111 N. Car. 353. See also *Justice v. Baxter*, 93 N. Car. 405; *Browne v. Davis*, 109 N. Car. 23.

Ohio. — *Beardsley v. Chapman*, 1 Ohio St. 118.

Oklahoma. — *Woodruff v. Wallace*, 3 Okla. 355.

Pennsylvania. — See *Putnam v. Tyler*, 117 Pa. St. 570; *Scates v. Tyler*, (Pa. 1888) 12 Atl. Rep. 51; *Morrison v. Robinson*, 31 Pa. St. 456.

South Dakota. — *Wood v. Conrad*, 2 S. Dak. 334; *Parker v. Vinson*, 11 S. Dak. 381; *Seymour v. Cleveland*, 9 S. Dak. 94.

Tennessee. — *Wilson v. Scruggs*, 7 Lea (Tenn.) 635. See also *State v. McMinnville, etc., R. Co.*, 6 Lea (Tenn.) 369.

Texas. — *Baker v. Millman*, 77 Tex. 46; *Bassett v. Sherrod*, 13 Tex. Civ. App. 327; *Johnson v. Schumacher*, 72 Tex. 334; *Parrish v. Jackson*, 69 Tex. 614; *Dorn v. Dunham*, 24 Tex. 366; *Bitner v. New York, etc., Land Co.*, 67 Tex. 341; *Harkey v. Cain*, 69 Tex. 146; *Brown v. Bedinger*, 72 Tex. 247; *Ferguson v. Cochran*, (Tex. Civ. App. 1898) 45 S. W. Rep. 30; *Gilley v. Williams*, (Tex. Civ. App. 1897) 43 S. W. Rep. 1094; *Greenwood v. McLeary*, (Tex. Civ. App. 1894) 25 S. W. Rep. 708. See

b. WHAT IS MEANT BY GOOD FAITH. — By good faith is meant an honest belief on the part of the occupant that he has secured a good title to the property in question and is the rightful owner thereof.¹ And for this belief there

also *Van Zandt v. Brantley*, 16 Tex. Civ. App. 420; *Bailey v. White*, 13 Tex. 117; *Thompson v. Comstock*, 59 Tex. 318; *Crumbley v. Busse*, 11 Tex. Civ. App. 319; *Simpson v. Johnson*, (Tex. Civ. App. 1898) 44 S. W. Rep. 1076.

Virginia. — *McKim v. Moody*, 1 Rand. (Va.) 58.

Washington. — *Brygger v. Schweitzer*, 5 Wash. 564.

West Virginia. — *Hall v. Hall*, 30 W. Va. 779; *Dawson v. Grow*, 29 W. Va. 333; *Cain v. Cox*, 29 W. Va. 258. See also *Williamson v. Jones*, 43 W. Va. 562.

Wisconsin. — *Stewart v. Stewart*, 90 Wis. 516, 48 Am. St. Rep. 949; *Waterman v. Dutton*, 6 Wis. 265; *Green v. Dixon*, 9 Wis. 532; *Thompson v. Thompson*, 16 Wis. 91; *Witt v. Grand Grove*, etc., 55 Wis. 376; *Whitcomb v. Provost*, 102 Wis. 278; *Falck v. Marsh*, 88 Wis. 680; *Barrett v. Stradl*, 73 Wis. 385, 9 Am. St. Rep. 795; *Zwielusch v. Watkins*, 61 Wis. 615.

Canada. — *Queen Victoria Niagara Falls Park v. Colt*, 22 Ont. App. 1; *Galarneau v. Chretien*, 10 Quebec 83. See also *Knowlton v. Clark*, 9 L. C. Jur. 243; *Nugent v. Mitchell*, 19 Reg. Lég. 569; *Lane v. Deloge*, 1 L. C. Jur. 3.

One Who, Knowing that He Has Good Title to Only Five-sixths of a Tract of Land, takes possession and improves the same, cannot, in a court of equity, on his own motion, have the land appraised irrespective of improvements and acquire the whole on paying to the other owner one-sixth of such appraised value. *Penrod v. Danner*, 19 Ohio 218.

Good Faith Entitles the Possessor of Land to Great Favor as to compensation for valuable improvements made by him. *Duke v. Griffith*, 13 Utah 361.

The Existence of Good Faith May Be Proved Directly by the Testimony of the Party whose good faith is to be shown. *Seigneuret v. Fahey*, 27 Minn. 60. See also *Berkey v. Judd*, 22 Minn. 287; *Garrett v. Mannheimer*, 24 Minn. 193; *Carolina Cent. R. Co. v. McCaskill*, 98 N. Car. 526.

1. What Is Meant by Good Faith — *United States*. — *Green v. Biddle*, 8 Wheat. (U. S.) 1; *Bright v. Boyd*, 1 Story (U. S.) 478; *Stark v. Starr*, 1 Sawy. (U. S.) 15; *Albee v. May*, 2 Paine (U. S.) 74; *Griswold v. Bragg*, 19 Blatchf. (U. S.) 94.

Alabama. — *Horton v. Sledge*, 29 Ala. 478; *Gordon v. Tweedy*, 74 Ala. 232, 49 Am. Rep. 813.

Arkansas. — *Beard v. Dansby*, 48 Ark. 183; *Teaver v. Akin*, 47 Ark. 528; *Fee v. Cowdry*, 45 Ark. 410, 55 Am. Rep. 560; *Kemp v. Cossart*, 47 Ark. 62; *Jefferson v. Edrington*, 53 Ark. 545; *Shaw v. Hill*, 46 Ark. 333.

Iowa. — *Snell v. Mehan*, 80 Iowa 53. See also *Stinson v. Richardson*, 44 Iowa 373.

Maryland. — *McLaughlin v. Barnum*, 31 Md. 425.

Massachusetts. — *Wales v. Coffin*, 100 Mass. 177.

Michigan. — *Petit v. Flint*, etc., R. Co., (Mich. 1899) 78 N. W. Rep. 554.

Minnesota. — *Seigneuret v. Fahey*, 27 Minn. 60.

Mississippi. — *Cole v. Johnson*, 53 Miss. 94; *Gaines v. Kennedy*, 53 Miss. 103.

Texas. — *Cahill v. Benson*, 19 Tex. Civ. App. 30; *Dorn v. Dunham*, 24 Tex. 366; *Sartain v. Hamilton*, 12 Tex. 222, 62 Am. Dec. 524; *Houston v. Sneed*, 15 Tex. 310; *Parrish v. Jackson*, 69 Tex. 614; *Johnson v. Schumacher*, 72 Tex. 334; *Settegast v. O'Donnell*, 16 Tex. Civ. App. 56; *Bassett v. Sherrod*, 13 Tex. Civ. App. 327; *Gaither v. Hanrick*, 69 Tex. 92. See also *McCown v. Terrell*, (Tex. Civ. App. 1897) 40 S. W. Rep. 54; *Saunders v. Wilson*, 19 Tex. 194.

West Virginia. — *Dawson v. Grow*, 29 W. Va. 333; *Cain v. Cox*, 29 W. Va. 258.

Good Faith Refers to the Actual Existing State of Mind. — *Wright v. Mattison*, 18 How. (U. S.) 56; *Seymour v. Cleveland*, 9 S. Dak. 94.

Belief that Title in Fee Has Been Acquired. — The right of a party to betterments depends upon his *bona fide* supposition that he bought the title in fee. *Whitney v. Richardson*, 31 Vt. 300; *Kendall v. Tracy*, 64 Vt. 522.

Belief in Legal and Equitable Ownership Necessary — *Arkansas*. — *Kemp v. Cossart*, 47 Ark. 62; *Teaver v. Akin*, 47 Ark. 528; *Jefferson v. Edrington*, 53 Ark. 545.

Title which Occupant Does or Ought to Know to Be Defective. — In *Walker v. Quigg*, 6 Watts (Pa.) 87, 31 Am. Dec. 452, it was held that one who takes a title, when he knows, or ought to know, that it is defective, is not entitled to compensation for improvements as against the true owner, even though the latter saw the improvements in progress and did not object. See also *Dart v. Hercules*, 57 Ill. 446; *Woodhull v. Rosenthal*, 61 N. Y. 382; *Wood v. Wood*, 83 N. Y. 575; *Cook v. Kraft*, 3 Lans. (N. Y.) 512; *Davidson v. Barclay*, 63 Pa. St. 406; *McKim v. Moody*, 1 Rand. (Va.) 58.

The question was incidentally discussed, and the same view expressed, in *Graeme v. Cullen*, 23 Gratt. (Va.) 266, though the improvements for which compensation was sought in that case were made, not by the occupant of the land, but by a firm of builders, under a contract with the owner, who had previously executed a deed of trust thereon, which was duly recorded.

Belief that Title Has Been Acquired by Limitation. — Occupants are entitled to compensation for improvements placed on land after they believed in good faith that they had acquired a title thereto by limitation, the circumstances being such that men of ordinary prudence would entertain such belief. *Bassett v. Sherrod*, 13 Tex. Civ. App. 327.

Knowledge of Lack of Title. — "There can be no such thing as good faith in an adverse holding where the party knows that he has no title, and that, under the law, which he is presumed to know, he can acquire none by his occupation." *Field, J.*, in *Deffebach v. Hawke*, 115 U. S. 392, quoted with approval in *Woodruff v. Wallace*, 3 Okla. 355. See also to the same effect *Gaines v. Kennedy*, 53 Miss. 103.

must be some reasonable grounds such as would lead a man of ordinary prudence to entertain it.¹

Deed Void on Its Face. — Thus one who holds under a deed void on its face cannot be considered a possessor in good faith, but must be held to be put upon notice of his want of title.²

Knowledge that Vendor Has No Title. — And one who purchases land with knowledge that his vendor has no title nor written contract for a title thereto does not hold the same in good faith and cannot obtain compensation for his improvements.³

Hope of Purchasing Land. — A mere trespasser, who makes no claim of right or title, and merely hopes some day to purchase the land, cannot burden it with charges for improvements.⁴

c. PRESUMPTION OF GOOD FAITH. — It has been asserted that where a person holding under color of title has made improvements it must be presumed, until the contrary is shown, that in so doing he acted in good faith.⁵ But other cases have held the view that in the first instance the burden is upon the occupant to show not only his belief that he had good title, but the reasonableness of such belief.⁶

d. EFFECT OF NOTICE OF ADVERSE CLAIM ON QUESTION OF GOOD FAITH — (1) *General Rule Stated.* — It is well established as a general rule that an occupant must, in order to be entitled to the privileges of a holder of property in good faith, have reasonably believed that there were no adverse claims,⁷ and have been ignorant that his title was contested by one having or

1. Occupant Must Have Had Reasonable Ground for Belief — *United States*. — *Stark v. Starr*, 1 Sawy. (U. S.) 15.

Iowa. — *Snell v. Mechan*, 80 Iowa 53.

Massachusetts. — *Wales v. Coffin*, 100 Mass. 177.

Texas. — *Gaither v. Hanrick*, 69 Tex. 92; *Parrish v. Jackson*, 69 Tex. 614; *Johnson v. Schumacher*, 72 Tex. 334; *Cahill v. Benson*, 19 Tex. Civ. App. 30; *Sartain v. Hamilton*, 12 Tex. 222, 62 Am. Dec. 524; *Dorn v. Dunham*, 24 Tex. 366; *Armstrong v. Oppenheimer*, 84 Tex. 365; *Settegast v. O'Donnell*, 16 Tex. Civ. App. 56; *Bassett v. Sherrod*, 13 Tex. Civ. App. 327.

West Virginia. — *Williamson v. Jones*, 43 W. Va. 562; *Dawson v. Grow*, 29 W. Va. 333.

Canada. — See *Smith v. Gibson*, 25 U. C. C. P. 248.

Under the Louisiana Code if the title of the defendant is what the law denominates "a just title," the possessor thereunder must be considered in good faith, unless there is some reference in the deed of sale to the title under which the conveyance is made, which destroys that good faith. But after a possessor *animo acquirendi* has purchased in good faith, it may be terminated, and of right ceases from the moment the defects of his title are made known to him by extraneous evidence, or by suit instituted for the recovery of the property by the true owner. *Montgomery v. Whitfield*, 41 La. Ann. 649.

2. Deed Void on Its Face. — *Bassett v. Sherrod*, 13 Tex. Civ. App. 327; *Simpson v. Johnson*, (Tex. Civ. App. 1898) 41 S. W. Rep. 1076.

3. Knowledge that Vendor Has No Title. — *Singleton v. Jackson*, 2 Litt. (Ky.) 208; *Citizens Bank v. Costanera*, 62 Miss. 825; *Greenwood v. McLeary*, (Tex. Civ. App. 1894) 25 S. W. Rep. 708; *Armstrong v. Oppenheimer*, 84 Tex. 365. See also *Miller v. Brownson*, 50

Tex. 596; *House v. Stone*, 64 Tex. 683; *Parrish v. Jackson*, 69 Tex. 614; *Scott v. Hunter*, 14 Grant Ch. (U. C.) 376.

Notice that Vendor Has No Power to Sell. — *Dorn v. Dunham*, 24 Tex. 366; *Saunders v. Wilson*, 19 Tex. 198; *Robson v. Osborn*, 13 Tex. 307.

4. Hope of Purchasing Land. — *Snell v. Mechan*, 80 Iowa 53.

5. Presumption of Good Faith. — *Stark v. Starr*, 1 Sawy. (U. S.) 15; *Hilgenberg v. Northrup*, 134 Ind. 92; *Fish v. Blasser*, 146 Ind. 186; *Bates v. Prickett*, 5 Ind. 22, 61 Am. Dec. 73; *Adams v. Slate*, 87 Ind. 573; *Clay v. Miller*, 2 Litt. (Ky.) 279.

Taking of Possession Presumed to Have Been Peaceable. — *Seigneuret v. Fahey*, 27 Minn. 60.

6. Burden of Proof on Occupant. — In a proceeding to ascertain the value of betterments under the Code of *North Carolina*, sections 473 and 480, the burden is upon the petitioner to show, not only that he believed, but that he had good reason to believe, his title to the premises was good, at least until he had made out a *prima facie* case, when the burden will shift. *Carolina Cent. R. Co. v. McCaskill*, 98 N. Car. 526. See also *Brown v. Bedinger*, 72 Tex. 247; *Dawson v. Grow*, 29 W. Va. 333.

7. Occupant Must Have Believed that There Were No Adverse Claims — *Johnson v. Schumacher*, 72 Tex. 334; *McCown v. Terrell*, (Tex. Civ. App. 1897) 40 S. W. Rep. 54. See also *Wood v. Conrad*, 2 S. Dak. 334; *Parker v. Vinson*, 11 S. Dak. 381.

One Who Has the Legal Title, and Is Informed of the Facts Which Constitute Equitable Title in Another, will not be allowed the value of improvements made in violation of the express orders of the equitable owner, unless, perhaps, out of the rents. *Glasscock v. Glasscock*, 17 Tex. 480.

claiming a superior right;¹ and that knowledge or notice of an existing title adverse to that under which he claims deprives him of all right to compensation for any improvements which he may have placed on the property after acquiring such knowledge or receiving such notice.²

Improvements by Husband on Land of Which He Believes Wife to Be Owner in Fee.—A husband who has in good faith expended money in improving land of which he believes his wife to be the owner in fee, as heiress-at-law of her father, is entitled to an allowance for improvements, where, after the wife's death, a will of her father is found, by which she is entitled to only a life estate in the property. *Fawcett v. Burwell*, 27 Grant Ch. (U. C.) 445.

1. Occupant Must Have Been Ignorant that His Title Was Contested.—*United States*.—*Vilas v. Prince*, 88 Fed. Rep. 682; *Green v. Biddle*, 8 Wheat. (U. S.) 1; *Bright v. Boyd*, 1 Story (U. S.) 478.

Alabama.—*Gordon v. Tweedy*, 74 Ala. 232, 49 Am. Rep. 813; *Horton v. Sledge*, 29 Ala. 478.

Arkansas.—*Beard v. Dansby*, 48 Ark. 183; *Fee v. Cowdry*, 45 Ark. 410, 55 Am. Rep. 560; *Shaw v. Hill*, 46 Ark. 333.

Kentucky.—*Barlow v. Bell*, 1 A. K. Marsh. (Ky.) 246, 10 Am. Dec. 731.

Maryland.—*McLaughlin v. Barnum*, 31 Md. 425.

Mississippi.—*Cole v. Johnson*, 53 Miss. 94.

Texas.—*Parrish v. Jackson*, 69 Tex. 614; *Gaither v. Hanrick*, 69 Tex. 92; *Dorn v. Dunham*, 24 Tex. 366; *Houston v. Sneed*, 15 Tex. 310; *Sartain v. Hamilton*, 12 Tex. 222, 62 Am. Dec. 524. See also *Saunders v. Wilson*, 19 Tex. 194.

Evidence as to Ignorance of Adverse Claim Admissible.—Upon the issues of improvements made in good faith, there was no error in permitting the defendants to show that they were ignorant of the existence of the plaintiff and her claim to the land, nor was there error in permitting the defendants to show that they paid the taxes on the land and that the plaintiff had not. *Polk v. Chaison*, 72 Tex. 500.

Grant Procured After Service of Declaration in Ejectment.—If after service of declaration in ejectment the defendant proceeds to make an entry and get a grant, it will not be such a title, under those circumstances, as will entitle him to payment for his improvements. *Townsend v. Shipp, Cooke* (Tenn.) 294.

2. Occupant Not Entitled to Compensation for Improvements Made After Notice of Adverse Claim.—*United States*.—*Green v. Biddle*, 8 Wheat. (U. S.) 1; *George v. Steam Stone Cutter Co.*, 20 Fed. Rep. 478; *Campbell v. Brown*, 2 Woods (U. S.) 349; *McClaskey v. Barr*, 62 Fed. Rep. 209.

Alabama.—*Gordon v. Tweedy*, 74 Ala. 232, 49 Am. Rep. 813; *Horton v. Sledge*, 29 Ala. 478.

Arkansas.—*Fee v. Cowdry*, 45 Ark. 410, 55 Am. Rep. 560; *Byers v. Fowler*, 12 Ark. 220, 54 Am. Dec. 271; *Shaw v. Hill*, 46 Ark. 333; *White v. Stokes*, (Ark. 1899) 53 S. W. Rep. 1060.

California.—*White v. Moses*, 21 Cal. 34.

Connecticut.—See *Ensign v. Batterson*, 68 Conn. 298.

Georgia.—See *Nunn v. Burger*, 76 Ga. 705.

Illinois.—*Haslett v. Crain*, 85 Ill. 129; *Mett-*

ler v. Craft, 39 Ill. App. 193. See also *Montag v. Linn*, 27 Ill. 328; *Powell v. Rogers*, 11 Ill. App. 98; *Dart v. Hercules*, 57 Ill. 466; *Lagger v. Mutual Union Loan Assoc.*, 146 Ill. 283.

Indiana.—*Hilgenberg v. Northup*, 134 Ind. 92; *Mayer v. Haggerty*, 138 Ind. 628; *Bryan v. Uland*, 101 Ind. 477. See also *McGill v. Kennedy*, 11 Ind. 20.

Iowa.—*Wellies v. Newsom*, 76 Iowa 81. See also *Webster City, etc., R. Co. v. Newsom*, 70 Iowa 355.

Kentucky.—*Patrick v. Marshall*, 2 Bibb (Ky.) 40, 4 Am. Dec. 670; *Scroggs v. Taylor*, 1 A. K. Marsh. (Ky.) 247; *Henderson v. Pickett*, 4 T. B. Mon. (Ky.) 54, 16 Am. Dec. 130; *Harrison v. Fleming*, 7 T. B. Mon. (Ky.) 537; *Parker v. Bullock*, 2 Litt. (Ky.) 196; *Harrison v. Baker*, 5 Litt. (Ky.) 250. See also *Hawkins v. King*, 1 T. B. Mon. (Ky.) 161; *Nourse v. Turnham*, 1 Bibb (Ky.) 62.

Louisiana.—*Stille v. Shull*, 41 La. Ann. 816.

Mississippi.—*Cole v. Johnson*, 53 Miss. 94; *Holmes v. McGee*, 64 Miss. 129; *Thomas v. Thomas*, 69 Miss. 564; *Gaines v. Kennedy*, 53 Miss. 103.

Missouri.—*Brown v. Baldwin*, 121 Mo. 106; *Maupin v. Emmons*, 47 Mo. 304; *Shumate v. Reavis*, 49 Mo. 333; *Whitman v. Taylor*, 60 Mo. 127; *Lee v. Bowman*, 55 Mo. 400. See also *Speck v. Riggins*, 40 Mo. 405; *Drey v. Doyle*, 99 Mo. 459.

Nebraska.—*Carter v. Brown*, 35 Neb. 670.

New Jersey.—*Foley v. Kirk*, 33 N. J. Eq. 170.

New York.—*Jackson v. Loomis*, 4 Cow. (N. Y.) 168, 15 Am. Dec. 347; *Van Horne v. Fonda*, 5 Johns. Ch. (N. Y.) 388; *Barley v. Roosa*, (Supm. Ct. Gen. T.) 20 Civ. Pro. (N. Y.) 113; *Woodhull v. Rosenthal*, 61 N. Y. 382. See also *Mickles v. Dillaye*, 17 N. Y. 80; *Thomas v. Evans*, 105 N. Y. 601, 59 Am. Rep. 519; *Moore v. Cable*, 1 Johns. Ch. (N. Y.) 385.

North Carolina.—See *Justice v. Baxter*, 93 N. Car. 405.

Ohio.—*Taylor v. Foster*, 22 Ohio St. 255. See also *Preston v. Brown*, 35 Ohio St. 18; *Youngs v. Hefner*, 36 Ohio St. 232.

Oregon.—See *Hatcher v. Briggs*, 6 Oregon 31.

Pennsylvania.—*Wilkinson v. Pearson*, 23 Pa. St. 117; *Morrison v. Robinson*, 31 Pa. St. 456.

South Carolina.—*De Brahm v. Fenwick*, 1 Desaus. (S. Car.) 114; *Belton v. Briggs*, 4 Desaus. (S. Car.) 465.

South Dakota.—*Wood v. Conrad*, 2 S. Dak. 334; *Parker v. Vinson*, 11 S. Dak. 381.

Tennessee.—*Jones v. Perry*, 10 Yerg. (Tenn.) 59, 30 Am. Dec. 430; *Wilson v. Scruggs*, 7 Lea (Tenn.) 635; *M'Kinly v. Holliday*, 10 Yerg. (Tenn.) 477. See also *Garth v. Fort*, 15 Lea (Tenn.) 683.

Texas.—*Thompson v. Comstock*, 59 Tex. 318; *Howard v. Richeson*, 13 Tex. 553; *Gilley v. Williams*, (Tex. Civ. App. 1897) 43 S. W. Rep. 1094; *Greenwood v. McLeary*, (Tex. Civ. App. 1894) 25 S. W. Rep. 708. See also *Miller*

Purchase Pendente Lite. — Thus, one who purchases land during the pendency of a litigation in reference thereto is not entitled to compensation for his improvements when the party adverse to his grantor recovers the land, for in such case the purchaser was bound to take notice of the proceedings.¹

(2) **Rule as to Constructive Notice** — (a) **Doctrine that Such Notice Is Insufficient.** — It has very generally been considered that, if an occupant purchased and held the land in good faith believing he had obtained a perfect title, constructive notice of an adverse title such as the law will imply from the registry of a deed in the public records of the county is not sufficient to preclude him from recovering for his improvements;² and that in order to effect this it is necessary either that the occupant should have actual notice of the adverse title,³

v. Brownson, 50 Tex. 596; *House v. Stone*, 64 Tex. 683; *Lewis v. Sellick*, 69 Tex. 379; *Parish v. Jackson*, 69 Tex. 614.

Virginia. — *McKim v. Moody*, 1 Rand. (Va.) 58; *Wood v. Krebs*, 33 Gratt. (Va.) 685; *Effinger v. Hall*, 81 Va. 94. See also *Morris v. Terrell*, 2 Rand. (Va.) 6.

Washington. — *Brygger v. Schweitzer*, 5 Wash. 564.

West Virginia. — *Dawson v. Grow*, 29 W. Va. 333; *Williamson v. Jones*, 43 W. Va. 563; *Hall v. Hall*, 30 W. Va. 779; *Cain v. Cox*, 29 W. Va. 258.

Wisconsin. — *Witt v. Grand Grove, etc., Trustees*, 55 Wis. 376.

Canada. — See *Hawn v. Cashion*, 20 Grant Ch. (U. C.) 518.

If One Purchases a Speculative Title, knowing or having notice of an outstanding title, he cannot be a purchaser in good faith. *Miller v. Clark*, 56 Mich. 337.

Improvements Pending Litigation. — There can be no *bona fide* improvements made pending litigation in reference to the title to the property, in the case at bar a partition suit. *Mayer v. Haggerty*, 138 Ind. 628. See also *Gordon v. Tweedy*, 74 Ala. 232, 49 Am. Rep. 813.

Improvements After Adjudication Against Title. — There can be no good faith and no color of title after a direct adjudication establishing that another is the rightful owner. *Craton v. Wright*, 16 Iowa 133.

Improvements Made During Pendency of Appeal. — And the same is true in *Texas* even though such improvements are placed on the land during the pendency of an appeal by the occupant from the adjudication against his title. *Norton v. Davis*, 13 Tex. Civ. App. 90.

Discontinuance of Action for Possession. — In a case where a claimant of land commenced an action for the recovery thereof, but subsequently discontinued such action, and some time later brought another action for the same purpose, it was held that the occupant was entitled to compensation for improvements made before the commencement of the first action, and between the discontinuance of that action and the commencement of the second, but not for those made during the pendency of either action. *O'Grady v. McCaffray*, 2 Ont. 309.

Effect of Recital in Deed Showing Adverse Claim. — An occupant will be held to have notice of an adverse claim if a recital in his own deed or the deed of his grantor expressly shows such a claim. *Beardsley v. Chapman*, 1 Ohio St. 118.

1. **Purchase Pendente Lite.** — *Davis v. John V. Farwell Co.*, (Tex. Civ. App. 1899) 49 S. W.

Rep. 656 [citing *Harle v. Langdon*, 60 Tex. 555; *McDonald v. Miller*, 90 Tex. 309].

2. **Constructive Notice Arising from Record of Adverse Title Does Not Preclude Recovery for Improvements** — *United States*. — *Bright v. Boyd*, 1 Story (U. S.) 478; *Canal Bank v. Hudson*, 111 U. S. 66.

Alabama. — *Gordon v. Tweedy*, 74 Ala. 232, 49 Am. Rep. 813.

Arkansas. — *Beard v. Dansby*, 48 Ark. 183; *Shepherd v. Jernigan*, 51 Ark. 275, 14 Am. St. Rep. 50.

Mississippi. — *Cole v. Johnson*, 53 Miss. 95 [overruling *Learned v. Corley*, 43 Miss. 687]; *Gaines v. Kennedy*, 53 Miss. 103. See also *Morgan v. Hazlehurst Lodge*, 53 Miss. 665.

Missouri. — *Pierce v. Rollins*, 60 Mo. App. 497; *Stump v. Hornbeck*, 15 Mo. App. 367, 94 Mo. 26; *Henderson v. Langley*, 76 Mo. 226; *Hill v. Tissier*, 15 Mo. App. 299; *Lee v. Bowman*, 55 Mo. 400; *Brown v. Baldwin*, 121 Mo. 106; *Maupin v. Emmons*, 47 Mo. 304; *Shumate v. Reavis*, 49 Mo. 333; *Whitman v. Taylor*, 60 Mo. 127; *Dothage v. Stuart*, 35 Mo. 251. See also *Speck v. Riggan*, 40 Mo. 405; *Drey v. Doyle*, 99 Mo. 459.

Oregon. — *Hatcher v. Briggs*, 6 Oregon 31.

Pennsylvania. — *Morrison v. Robinson*, 31 Pa. St. 456.

Tennessee. — *Howard v. Massengale*, 13 Lea (Tenn.) 577.

Vermont. — *Whitney v. Richardson*, 31 Vt. 300.

Wisconsin. — *Green v. Dixon*, 9 Wis. 532.

The beneficent provisions of section 476 of the Code of *North Carolina* would be defeated by a construction which charged a *bona fide* claimant under a deed in form and purpose purporting to convey a perfect title with a knowledge of imperfections which might be met with in the deduction of his own title. *Justice v. Baxter*, 93 N. Car. 405.

Occupant Not Presumed to Know of Defects Not Appearing in His Muniments of Title. — *Beardsley v. Chapman*, 1 Ohio St. 118.

Lack of Diligence Does Not Necessarily Negative Good Faith. — *Griswold v. Bragg*, 19 Blatchf. (U. S.) 94; *Canal Bank v. Hudson*, 111 U. S. 66; *Rawson v. Fox*, 65 Ill. 200; *Petit v. Flint, etc., R. Co.*, (Mich. 1899) 78 N. W. Rep. 554; *Cole v. Johnson*, 53 Miss. 94.

3. **Necessity for Actual Notice.** — *Gordon v. Tweedy*, 74 Ala. 232, 49 Am. Rep. 813; *Beard v. Dansby*, 48 Ark. 183; *Pierce v. Rollins*, 60 Mo. App. 497; *Dothage v. Stuart*, 35 Mo. 251; *Russell v. DeFrance*, 39 Mo. 506; *Howard v. Massengale*, 13 Lea (Tenn.) 577. And see also cases cited in next note.

or that there should be brought home to him notice of some fact or circumstance that would put a man of ordinary prudence to such an inquiry as would lead to a knowledge of the adverse title if honestly followed.¹

(b) *Doctrine that Such Notice Is Sufficient.* — But on the other hand, there are cases which have held that constructive notice of an adverse title is sufficient to defeat a claim for improvements,² and that an occupant cannot recover if he had full means of discovering the existence of such adverse title,³ because in order to be in the position of a holder in good faith the occupant must have used proper care and diligence in ascertaining the condition of the title upon which he bases his claim.⁴

(3) *When Good Faith and Notice of Adverse Claim May Coexist.* — The mere fact of notice of an adverse claim does not always and necessarily negative good faith,⁵ for in cases where the occupant, though aware of such a

The Question of Actual Notice Is for the Jury. — *Hill v. Tissier*, 15 Mo. App. 299. See also *Masterson v. West End Narrow-Gauge R. Co.*, 5 Mo. App. 64.

1. Necessity for Notice of Circumstance Which Would Lead to Inquiry. — *Brown v. Baldwin*, 121 Mo. 106; *Maupin v. Emmons*, 47 Mo. 304; *Shumate v. Reavis*, 49 Mo. 333; *Whitman v. Taylor*, 60 Mo. 127; *Cole v. Johnson*, 53 Miss. 94, *overruling* *Learned v. Corley*, 43 Miss. 687, and *followed in* *Gaines v. Kennedy*, 53 Miss. 103, and *Canal Bank v. Hudson*, 111 U. S. 66. See also *Morgan v. Hazlehurst Lodge*, 53 Miss. 665; *Speck v. Riffin*, 40 Mo. 405; *Drey v. Doyle*, 99 Mo. 459.

Direct and Positive Information Is Not Necessary; anything calculated to put a man of ordinary prudence on the alert is notice. *Lee v. Bowman*, 55 Mo. 400; *Hill v. Tissier*, 15 Mo. App. 299; *Wood v. Conrad*, 2 S. Dak. 334. See also *Shepherd v. Jernigan*, 51 Ark. 275, 14 Am. St. Rep. 50; *Dohan v. Murdock*, 41 La. Ann. 494; *Brown v. Baldwin*, 121 Mo. 106.

Statutory Provision as to Written Notice Does Not Abrogate Equitable Doctrine as to Notice. — See *Lee v. Bowman*, 55 Mo. 400.

2. Constructive Notice Sufficient. — *Effinger v. Hall*, 81 Va. 94; *Dawson v. Grow*, 29 W. Va. 333. See also *Lagger v. Mutual Union Loan Assoc.*, 146 Ill. 283.

Description in Recorded Deed. — If taking the description from a deed on record conveying premises to the plaintiff in an action for the recovery of land, one could go upon the land and identify the premises as the land in controversy, then the record of the deed should be held such constructive notice of the plaintiff's title as to defeat the defendant's claim for improvements. *Daugherty v. Yates*, 13 Tex. Civ. App. 646; *Parrish v. Jackson*, 69 Tex. 614.

Deed Not Entitled to Be Recorded. — Where the deed evidencing the title of the plaintiff in an action of trespass to try title was not entitled to be recorded because no seal was affixed to the certificate of acknowledgment, and therefore the record would not convey such knowledge as would put another upon inquiry, the defendant is entitled to compensation for improvements placed on the land, if they were, after due diligence to ascertain the location of the plaintiff's land, placed there in good faith without knowledge of the fact that the land was the property of the plaintiff. *Daugherty v. Yates*, 13 Tex. Civ. App. 646.

When the Rule as to Constructive Notice Does Not Apply. — Where the title to the land was in a *feme covert* who married when under age, and she and her husband executed a bond to convey the land after she became of age to a party from whom the defendant derived title by mesne conveyances, which bond was never registered, and the defendant had no actual notice of any defect in his title, which he believed to be good, it was held that the doctrine of constructive notice from registration did not apply to such party, and that he was entitled to compensation under the act — the Code, § 473 — for permanent improvements made by him upon the land. *Justice v. Baxter*, 93 N. Car. 405.

3. No Right to Compensation Where Occupant Had Full Means of Obtaining Knowledge of Adverse Title. — *Barlow v. Bell*, 1 A. K. Marsh. (Ky.) 246, 10 Am. Dec. 731; *Harrison v. Fleming*, 7 T. B. Mon. (Ky.) 537; *Woodhull v. Rosenthal*, 61 N. Y. 382; *Wood v. Krebbs*, 33 Gratt. (Va.) 685; *Dawson v. Grow*, 29 W. Va. 333.

Difference Between Cases of Remote and Immediate Vendee under Defective Deed Which Is Recorded. — The fact that a deed from a husband and wife has such a defective certificate of acknowledgment that it does not pass the wife's right, and that such certificate is of record, should not be considered as affecting a remote vendee with notice of the wife's right to the land, although an immediate vendee might be thus affected. *Thomas v. Thomas*, 16 B. Mon. (Ky.) 420.

4. Occupant Must Have Used Proper Care to Ascertain Condition of Title. — *Nunn v. Burger*, 79 Ga. 705; *McCown v. Terrell*, (Tex. Civ. App. 1897) 40 S. W. Rep. 54; *Johnson v. Schumacher*, 72 Tex. 334; *Parrish v. Jackson*, 69 Tex. 614; *Brown v. Eedinger*, 72 Tex. 247; *Morris v. Terrell*, 2 Rand. (Va.) 6.

No Right to Compensation Where Mistake of Title Due to Negligence of Occupant. — *Foley v. Kirk*, 33 N. J. Lq. 170.

A Caveat Entered by the Predecessor in Title of the occupant against an adverse claim, and dismissed, operates as notice to the occupant of such claim. *Nourse v. Turnham*, 1 Bibb (Ky.) 62.

5. Notice of Adverse Claim Does Not Necessarily Negative Good Faith. — *Griswold v. Bragg*, 19 Blatchf. (U. S.) 94, *citing* *Harrison v. Castner*, 11 Ohio St. 347; *Wells v. Riley*, 2 Dill. (U. S.) 569.

claim, has reasonable and strong grounds for believing it to be destitute of any just or legal foundation, he may still be considered a *bona fide* possessor.¹

Mistake of Law. — But it has been said that one who has notice of facts rendering his title inferior to that of another, but, by mistake of law, regards his title as good, cannot be allowed for improvements.²

(4) **Rule in South Carolina and Wisconsin.** — Under the statutes of these two states, notice of an adverse claim does not prevent a recovery of compensation for improvements made after receiving such notice.³

e. EXISTENCE OF GOOD FAITH A QUESTION FOR THE JURY. — The question whether or not an occupant of land has held and improved the same in good faith is one of fact for the jury.⁴

5. Requirements under Particular Statutes — **a. INTRODUCTORY.** — Excluding for the present all consideration of the equitable rights of occupants, it is clear that one who claims compensation for improvements under a statute must bring himself within the terms thereof.⁵ And it is the purpose of this section to give a discussion of the requirements of various local statutes peculiar to the states in which they exist, without, however, attempting to discuss any which have not been passed upon or at least referred to by the courts.

b. CLAIM FOUNDED ON DESCENT OR ANY WRITTEN INSTRUMENT. — Under the *Wisconsin* statute the occupant must not only hold "adversely by color of title asserted in good faith," but such color of title must be "founded on descent or any written instrument."⁶

c. TITLE DERIVED FROM PUBLIC AUTHORITY. — To entitle an occupant

1. Reasonable Belief that Adverse Claim Is Invalid. — *Dorn v. Dunham*, 24 Tex. 366; *Sartain v. Hamilton*, 12 Tex. 222, 62 Am. Dec. 524; *Cahill v. Benson*, 19 Tex. Civ. App. 30; *Parrish v. Jackson*, 69 Tex. 614; *Gaither v. Hanrick*, 69 Tex. 92. See also *Settegast v. O'Donnell*, 16 Tex. Civ. App. 56. And see other cases cited in this note.

Belief that Source of Adverse Title Is Fraudulent. — Under the *Iowa* statute (*Iowa Rev.*, § 2264), it cannot be said that an occupant has not made improvements in good faith simply because he knew of a partition decree which was the source of the legal title, where he nevertheless believed such decree to be fraudulent, and there is nothing in the record to show that this belief of the occupant was without any reasonable foundation. *Craton v. Wright*, 16 Iowa 135.

Decision Against Adverse Title. — One claiming pay for improvements as a possessor in good faith may show that he possessed the premises and improved them, after a decision by a court of competent jurisdiction pronouncing the adverse title a forgery. *Gaither v. Hanrick*, 69 Tex. 92.

There Must Be Reasonable Grounds for Believing Adverse Title Invalid. — *Gilley v. Williams*, (Tex. Civ. App. 1897) 43 S. W. Rep. 1094; *Miller v. Clark*, 56 Mich. 337.

2. Mistake of Law. — *Williamson v. Jones*, 43 W. Va. 562. See also *Holmes v. McGee*, 64 Miss. 129.

3. South Carolina Rule. — By the express terms of the *South Carolina* statute (*Rev. Stat.* 1893, § 1952), the condition upon which the party making the improvements is entitled to recover is declared to be that he shall have purchased a title to the land, "supposing at the time of such purchase such title to be good in fee." *Templeton v. Lowry*, 22 S. Car.

389; *Tumbleston v. Rumph*, 43 S. Car. 285; *McKnight v. Cooper*, 27 S. Car. 92.

The Rule Is Otherwise under Rev. Stat. 1893, §§ 1957, 1958. A full discussion and comparison of these apparently conflicting provisions is given elsewhere. See *infra*, this section, *South Carolina Statutes*.

Wisconsin Rule. — Notice of an adverse claim does not prevent a recovery for improvements made thereafter under *Rev. Stat. Wis.*, § 3096, providing for compensation to a defendant in ejectment who has entered upon the possession of the premises under color of title asserted in good faith, and has held adversely to the plaintiff. *Barrett v. Stradl*, 73 Wis. 385, 9 Am. St. Rep. 795.

4. Good Faith of Occupant a Question for the Jury. — *Jones v. Merrill*, 113 Mich. 433; *Miller v. Clark*, 56 Mich. 337; *Seigneuret v. Fahey*, 27 Minn. 60; *Traylor v. Lide*, (Tex. 1887) 7 S. W. Rep. 58. See also *Griswold v. Bragg*, 19 Blatchf. (U. S.) 94; *Luhn v. Stone*, 65 Tex. 439.

Whether an unsuccessful defendant in an action for the recovery of land supposed at the time he purchased a title to the same that such title was good in fee, as is necessary under the *South Carolina* statute to entitle him to betterments, is necessarily a question of fact. *Templeton v. Lowry*, 22 S. Car. 389.

The Jury Must Judge of the Reasonableness of the Occupant's Belief that He Has Good Title. — *Carolina Cent. R. Co. v. McCaskill*, 98 N. Car. 526.

5. Claimant Must Bring Himself Within Terms of Statute. — *Maxwell Land Grant Co. v. Santistevan*, 7 N. Mex. 1; *King v. Harrington*, 18 Mich. 213.

6. Claim Must Be Founded on Descent or Written Instrument. — *Rev. Stat. Wis.* (1878), § 3096; *Vilas v. Prince*, 88 Fed. Rep. 682; *Zwietusch v. Watkins*, 61 Wis. 615; *Falck v. Marsh*, 88

who has been evicted to recover for his improvements under the provisions of the *Nebraska* occupying claimant act, it must appear that such improvements were made while he was in good faith claiming title, legal or equitable, to the premises, from some public office of the United States or of the state of Nebraska.¹ In *Kentucky*, also, the person claiming compensation must connect himself with a grant from the commonwealth.² And in *New Mexico* the occupant must "have title of the premises in dispute, either by grant from the government of Spain, Mexico, or the United States, deed of conveyance founded on a grant, or entry for the same," and consequently a defendant in ejectment, whose only right, title, or claim to the property was that growing out of his squatting on and improving it, cannot claim compensation under the statute.³

d. RECORD TITLE. — In several states the benefits of the improvement statutes are extended to occupants who can show a plain and connected title in law or equity deduced from the records of some public office.⁴

e. SIX YEARS' POSSESSION. — The *Maine* and *New Hampshire* betterment statutes require an actual possession by the occupant or those under whom he claims for six years;⁵ while those of *Massachusetts* and *Michigan* contain a like requirement with an alternative of a possession for a less time under a title which the occupant has reason to believe good, in the first named state.⁶ or in the second, under color of title and in good faith.⁷

f. POSSESSION FOR AT LEAST ONE YEAR. — The *Texas* statute requires

Wis. 680; *Stewart v. Stewart*, 90 Wis. 516, 48 Am. St. Rep. 949; *Whitcomb v. Provost*, 102 Wis. 278.

A Receiver's Receipt for Fees Paid on a Homestead Entry of land supposed to be a part of the public domain open to such entry is not such a written instrument as will support a claim for compensation under the statute cited above. *Vilas v. Prince*, 88 Fed. Rep. 652.

1. Title Derived from Public Authority.—*Carter v. Brown*, 35 Neb. 670; *Page v. Davis*, 26 Neb. 670.

2. Grant from the Commonwealth. — So held under the *Kentucky* occupying claimant law in force in 1863 (Rev. Stat., c. 70). *Fairbairn v. Means*, 4 Met. (Ky.) 323; *Clay v. Miller*, 4 Bibb (Ky.) 461; *Lewis v. Singleton*, 2 A. K. Marsh. (Ky.) 214.

3. Squatter Not Entitled to Compensation under New Mexico Statute. — *Maxwell Land Grant Co. v. Santistevan*, 7 N. Mex. 1, citing Comp. L. N. Mex., 1884, § 2270.

4. Record Title. — *Montag v. Linn*, 27 Ill. 328; *Mettler v. Craft*, 39 Ill. App. 193; *Preston v. Brown*, 35 Ohio St. 18.

In order for a defendant in ejectment to be entitled to improvements under the *Oklahoma* statute, he must show "a plain and connected title in law or equity, derived from the records of some public office, or being in quiet possession of and holding the same by deed, devise, descent, contract, bond or agreement from and under any person claiming title as aforesaid, derived from the records of some public office." *Province v. Lovi*, 4 Okla. 672.

What Is a Claim of Public Record. — An entry and survey is a claim of public record within the meaning of the occupying claimant laws of *Kentucky*, and a bond given by the person in whose name the survey was made to the occupant is sufficient to connect him with the record and entitle him to compensation for

improvements. *Pulliam v. Robinson*, 1 T. B. Mon. (Ky.) 228.

Bond from Person Claiming Title by Deed Duly Authenticated and Recorded. — One who is in quiet possession of land, and holding the same by bond from and under any person claiming title by deed duly authenticated and recorded, is entitled, under the second clause of section 601 of the *Kansas* Code of 1868, to the benefits of the occupying claimant law. *Krause v. Means*, 12 Kan. 335.

Construction of Ohio Statute. — The words "a deed duly authenticated and recorded," in Rev. Stat. Ohio, § 5786, subd. 2, do not refer to the deed to the occupant, but to the deed to the person from whom he derives title; and the deed to both the occupant and his grantor must apparently convey an estate which would justify the holder of it in making permanent and lasting improvements. But the occupant will not be presumed to know of any defects or recitals which appear in deeds prior to that under which his grantor held. *Beardsley v. Chapman*, 1 Ohio St. 118, overruling *Glick v. Gregg*, 19 Ohio 57; *Young v. Mahoning County*, 53 Fed. Rep. 895.

5. Requirement of Six Years' Possession — Maine. — *Page v. Finson*, 74 Me. 512.

New Hampshire. — *Bellows v. McCartee*, 20 N. H. 515.

The Six Years' Actual Possession Must Have Immediately Preceded the Dispossession in order for the occupant to be entitled to claim under the *Maine* statute. *Page v. Finson*, 74 Me. 512.

6. Massachusetts Rule. — *Wales v. Coffin*, 100 Mass. 177. See also *Baggot v. Fleming*, 10 Cush. (Mass.) 451 citing Rev. Stat. Mass., c. 101, § 20, to the same effect.

7. Michigan Rule. — *Burkle v. Ingham Circuit Judge*, 42 Mich. 513; *Paldi v. Paldi*, 84 Mich. 346; *Wolf v. Holton*, 92 Mich. 136. See also *Jones v. Merrill*, 113 Mich. 433; *Martin v. O'Conner*, 37 Mich. 440.

that a defendant in an action for the possession of real property, in order to sustain his claim for improvements, must aver and prove that he and those under whom he claims have had adverse possession in good faith of the premises in controversy for at least one year before the commencement of the action.¹

g. PURCHASER OF SUPPOSED TITLE IN FEE. — Under the *Vermont* statute the sole test of the right to an allowance for betterments is whether they were made by the purchaser of a supposed title in fee.²

h. OCCUPANT DISPOSSESSED BY LEGAL PROCEEDINGS. — The statute of *Virginia* is confined in its operation to cases in which a decree or judgment has been rendered against the occupant for the recovery of the land;³ and those of *Indiana* and *Iowa* apply only when the occupant has been found "in a proper action" not to be the owner of the land.⁴

i. EVICTION BY TITLE BOTH PARAMOUNT AND ADVERSE. — The *Ohio* act for the relief of occupying claimants operates only in cases where the person in possession has been evicted by a title both paramount and adverse.⁵

j. SOUTH CAROLINA STATUTES. — The South Carolina statutes provide for two distinct cases in either of which the occupant may recover; the first where he believed at the time of his purchase that he obtained a good title, the second where he believed at the time he erected the improvements that he had good title. These provisions are fully discussed in the note.⁶

6. Requirement of Actual Occupancy or Possession. — It is usually considered that in order for one to be entitled to compensation for improvements he must have been an occupant in actual possession of the land.⁷ But in *Iowa*

1. Possession for at Least One Year. — Rev. Stat. Tex., art. 4813; *Whitaker v. Allday*, 71 Tex. 623; *Baker v. Millman*, 77 Tex. 46.

Where Both Parties Claim from the Same Grantor the unsuccessful occupant cannot tack his possession to that of the common grantor in order to bring himself within the statutory requirement of possession for at least one year. *Whitaker v. Allday*, 71 Tex. 623.

2. Purchaser of Supposed Title in Fee. — *Jones v. Steam Stone Cutter Co.*, 20 Fed. Rep. 477; *George v. Steam Stone Cutter Co.*, 20 Fed. Rep. 478; *Amsden v. Steam Stone Cutter Co.*, 20 Fed. Rep. 479; *Brown v. Storm*, 4 Vt. 37; *Whitney v. Richardson*, 31 Vt. 300.

Therefore, one who purchased land supposing the title to be good in fee is entitled to betterments though the land was in fact encumbered. *George v. Steam Stone Cutter Co.*, 20 Fed. Rep. 478.

But it is otherwise in the case of one who purchased with knowledge of an incumbrance, though it was covenanted against in the deed. *Jones v. Steam Stone Cutter Co.*, 20 Fed. Rep. 477.

While, in the case of a purchase and improvement by one who supposed the title to be good in fee and a subsequent conveyance by him to one who knew of the encumbrance, the latter is entitled to recover for betterments because the statute expressly covers this difference by providing for a recovery by a defendant in ejectment for betterments made by those under whom he claims, if they purchased the land supposing the title to be good in fee when they made the betterments. *Amsden v. Steam Stone Cutter Co.*, 20 Fed. Rep. 479.

3. Necessity for Decree or Judgment Against Occupant for Recovery of Land. — Va. Code 1873, c. 131, 132; *Eltlinger v. Hall*, 81 Va. 94; *Gracme v. Cullen*, 23 Gratt. (Va.) 266.

4. Occupant Must Have Been Dispossessed "in a Proper Action." — *Vannoy v. Blessing*, 36 Ind. 349, citing 2 *Gavin & H. Stat. Ind.* 285; *Craton v. Wright*, 16 Iowa 133.

5. Eviction Must Be by Title Both Paramount and Adverse. — *Preston v. Brown*, 35 Ohio St. 18; *McCloskey v. Barr*, 62 Fed. Rep. 209.

6. Discussion of South Carolina Statutes. — There is no inconsistency between the two South Carolina acts appearing respectively as sections 1952 *et seq.* and sections 1957, 1958 of the Rev. Stat. 1893; the difference between them being, that under the first act improvements made by the party under whom the defendant claims, as well as those made by himself, may be recovered, provided, however, that he believed when he purchased the land that he was getting a good title, while under the second act he can recover only for such improvements as were made by himself, and when at the time they were made he believed his title was perfect. *McKnight v. Cooper*, 27 S. Car. 92; *Salinas v. Aultman*, 45 S. Car. 283. Section 1957 was intended to afford relief in such cases as were not covered by section 1952; it was intended to supplement, not to supersede, the provision of section 1952. *Tumbleston v. Rumph*, 43 S. Car. 275; *Salinas v. Aultman*, 45 S. Car. 283.

7. Requirement of Actual Occupancy or Possession — *Iowa*. — *Parsons v. Moses*, 16 Iowa 440; *Lunquest v. Ten Eyck*, 40 Iowa 213; *Claussen v. Rayburn*, 14 Iowa 136; *Webster v. Stewart*, 6 Iowa 401.

Kansas. — *Coonradt v. Myers*, 31 Kan. 30.

Maine. — *Page v. Finson*, 74 Me. 512; *Chapman v. Butler*, 22 Me. 191.

Michigan. — *Croskery v. Busch*, 116 Mich. 2-8; *Jones v. Merrill*, 113 Mich. 433.

New Hampshire. — *Bellows v. McCartee*, 20 N. H. 515.

it has been considered that the claimant need not have been in personal possession and that his possession by a tenant is sufficient.¹

7. Requirement of Peaceable Possession. — The betterment statutes of several of the states require that the occupant shall have had peaceable possession.²

8. Rule as to Occupants of Public Lands. — It has been asserted in some jurisdictions that one who occupies and improves public land cannot set up any claim for compensation against the government or its grantees.³ But under the *Iowa* statute it has been held that one who has been a settler on lands of the United States, and has received a pre-emption certificate and a patent therefor, has color of title, though the lands were not subject to entry under the pre-emption laws on account of being included in the Des Moines river grant.⁴

9. Rights of Purchasers at Tax Sale — *a.* **GENERAL RULE.** — It may be considered established as a general rule that one who has improved land which he took possession of and held by virtue of a tax deed therefor, is entitled to compensation for his improvements;⁵ and this whether the tax deed be void upon its face,⁶ or voidable because of some defect in the proceedings for the assessment and collection of the tax for which the land was sold.⁷

Texas. — *Ferguson v. Cochran*, (Tex. Civ. App. 1898) 45 S. W. Rep. 30.

What Constitutes an Occupation or Possession. — One who has entered upon the premises in good faith and has moved some things into the house, and has shingled a part of the roof and painted the exterior of the house, has "occupied" the premises within the meaning of 3 How. Annot. Stat. *Michigan*, § 7836. *Jones v. Merrill*, 113 Mich. 433.

A purchaser at a tax sale of unimproved land, who has cleared a few acres, surrounded it with a bush fence, and raised one or more crops there, has been sufficiently in possession to entitle him to compensation for his improvements under section 104 of the *Michigan* tax law of 1893. *Croskery v. Busch*, 116 Mich. 288.

1. Personal Occupancy Not Necessary. — *Parsons v. Moses*, 16 Iowa 440.

2. Requirement of Peaceable Possession — *Arkansas.* — *Kemp v. Cossart*, 47 Ark. 62; *Teaver v. Akin*, 47 Ark. 528; *Beard v. Dansby*, 48 Ark. 183; *Jefferson v. Edrington*, 53 Ark. 545.

Michigan. — *Wolf v. Holton*, 92 Mich. 136; *Paldi v. Paldi*, 84 Mich. 346; *Burkle v. Ingham Circuit Judge*, 42 Mich. 513.

New Hampshire. — *Bellows v. McCartee*, 20 N. H. 515.

3. Occupant of Public Lands Acquires No Claim for Improvements as Against the Government or its Grantees — *Arkansas.* — *Martin v. Roesch*, 57 Ark. 474.

Louisiana. — *Jenkins v. Gibson*, 3 La. Ann. 203; *Hollon v. Sapp*, 4 La. Ann. 519; *Jones v. Wheelis*, 4 La. Ann. 541; *Gibson v. Hutchins*, 12 La. Ann. 545. See also *Lawrence v. Grout*, 12 La. Ann. 835.

Texas. — The rule stated in the text seems to be recognized by the later decisions. *Finks v. Cox*, (Tex. Civ. App. 1895) 30 S. W. Rep. 512; *State v. Snyder*, 66 Tex. 687; *Swetman v. Sanders*, 85 Tex. 299. But a contrary doctrine has been asserted in the earlier cases. *Gaither v. Hanrick*, 69 Tex. 92; *Sellman v. Lee*, 55 Tex. 319; *Powell v. Davis*, 19 Tex. 382; *Thompson v. Comstock*, 59 Tex. 318.

Canada. — See *Thompson v. Desmariseau*, 6 Montreal Super. Ct. 379.

4. Iowa Rule as to Lands Entered and Patented Though Not Subject to Entry. — *Wells v. Riley*, 2 Dill. (U. S.) 566; *Litchfield v. Johnson*, 4 Dill. (U. S.) 551.

5. Occupant under Tax Deed Entitled to Compensation for Improvements — *Colorado.* — *Knowles v. Martin*, 20 Colo. 393.

Illinois. — See *Gilbreath v. Dilday*, 152 Ill. 207.

Indiana. — *Fish v. Blasser*, 146 Ind. 186.

Kansas. — *Waterson v. Devoe*, 18 Kan. 223; *Smith v. Smith*, 15 Kan. 290.

Nebraska. — *Page v. Davis*, 26 Neb. 670.

Pennsylvania. — *Gilmore v. Thompson*, 3 Watts (Pa.) 106.

South Dakota. — *Parker v. Vinson*, 11 S. Dak. 381.

Texas. — *Franklin v. Campbell*, 5 Tex. Civ. App. 174. See also *Traylor v. Lide*, (Tex. 1887) 7 S. W. Rep. 58.

Canada. — *Haisley v. Somers*, 13 Ont. 600.

Quitclaim Deed Conveying Tax Title Only. — A quitclaim deed purporting to remise, release, and convey all the grantor's interest in and to the premises, and containing the following clause: "Intending hereby to convey only my title to said land acquired by the purchase of the same for taxes for the year 1864, and previous years," — is sufficient to constitute the "color of title in fee," required by the Minnesota occupying claimant law (Gen. Stat. 1878, c. 75, § 15), to entitle to compensation for improvements. The recital in the deed that the title conveyed is only a tax title, will not, of itself, charge the grantee with actual notice of the infirmities in such title, although appearing of record. *Wheeler v. Merriman*, 30 Minn. 372.

6. Tax Deed Void on Its Face. — *Waterson v. Devoe*, 18 Kan. 223; *Smith v. Smith*, 15 Kan. 290; *Parker v. Vinson*, 11 S. Dak. 381.

7. Deed Voidable for Defect in Proceedings for Assessment or Collection of Tax. — *Smith v. Smith*, 15 Kan. 290; *Waterson v. Devoe*, 18 Kan. 223.

Statutory Change in Wisconsin. — To entitle a tax title claimant to recover for improvements under Rev. Stat. Wis. 1858, c. 141, §§ 30, 31

b. BELIEF IN INTEGRITY OF TITLE NOT NECESSARY IN ARKANSAS. — The Arkansas law for the relief of occupying tax claimants, *i. e.*, purchasers at tax sales, was passed subsequently to the "betterment act" and gave the claimant the right to compensation for his improvements without showing the belief in the integrity of his title which was demanded by the latter act.¹

c. IMPROVEMENTS MADE BEFORE EXPIRATION OF TIME ALLOWED FOR REDEMPTION. — In *Minnesota* the holder of a tax title has no right to compensation for improvements placed on the land before the expiration of the period of redemption.² And in *Arkansas* such an occupant is entitled to compensation only for improvements made after two years from the date of the sale.³

d. IMPROVEMENTS MADE AFTER TENDER BY ONE ENTITLED TO REDEEM. — A purchaser at a tax sale cannot claim anything for improvements made by him after a tender has been made by one entitled to redeem the land.⁴

10. Rights of Purchasers at Judicial Sale — **a. GENERAL RULE.** — As a general rule one who has purchased land at a judicial sale believing that he was acquiring a good title thereto, and has in good faith made improvements thereon, is entitled to compensation when the sale is avoided⁵ or the original owner is allowed to redeem.⁶ And in *Minnesota* such purchasers are placed on a more secure footing in this respect than other occupants.⁷

b. WANT OF JURISDICTION IN COURT ORDERING SALE. — The rule stated above would not apply where the court which pronounced the judgment or

and 32, it was not only necessary that the improvements should have been made in good faith, but also that the assessment or tax upon which the deed was issued should have been "lawfully assessed." *Oberich v. Gilman*, 31 Wis. 495; *Zwietusch v. Watkins*, 61 Wis. 615.

But the words "lawfully assessed thereon," as used in the old statutes, seem to have been entirely omitted in the revision, and the general language used in section 33, *supra*, was enlarged and adopted so as to include improvements made by tax-title claimants. Sec. 3096, Rev. Stat. 1878. And a tax deed void for reasons going to the groundwork of the tax or assessment upon which it issued may give the color of title required by that section to entitle the occupant to compensation for his improvements. *Zwietusch v. Watkins*, 61 Wis. 615; *Stewart v. Stewart*, 90 Wis. 516, 48 Am. St. Rep. 949. In the case first cited an occupant under a tax title was held not entitled to compensation for improvements made prior to November 1, 1878, when the Rev. Stat. 1878 went into effect, but was allowed to recover for improvements made subsequent to that time.

1. Belief in Integrity of Title Not Necessary in Arkansas. — *Bender v. Bean*, 52 Ark. 132, in exposition of Mansf. Dig., § 5792. See also *McCann v. Smith*, 65 Ark. 305.

2. No Right to Compensation for Improvements Made Before Expiration of Time Allowed for Redemption. — *McLellan v. Omodt*, 37 Minn. 157.

3. Arkansas Rule. — *Bender v. Bean*, 52 Ark. 132, also referring to Mansf. Dig., § 5792. See also *McCann v. Smith*, 65 Ark. 305.

4. No Right to Compensation for Improvements Made After Tender for Redemption of Land. — *Seger v. Spurlock*, 59 Ark. 147.

5. Purchaser at Judicial Sale Entitled to Compensation for Improvements When Sale Is Avoided — *England*. — *Robinson v. Ridlev*, 6 Madd. 2; *Trevelyan v. White*, 1 Beav. 588.

Canada. — See *McLaren v. Fraser*, 17 Grant Ch. (U. C.) 567.

Indiana. — *Fish v. Blasser*, 146 Ind. 186.

Kansas. — *Stephens v. Ballou*, 25 Kan. 618.

Kentucky. — *Forst v. Davis*, (Ky. 1897) 41 S. W. Rep. 27. See also *Hall v. Brummal*, 7 Bush (Ky.) 43.

Mississippi. — *Cole v. Johnson*, 53 Miss. 94; *Stewart v. Matheny*, 66 Miss. 21, 14 Am. St. Rep. 538.

Nebraska. — *Dworak v. More*, 25 Neb. 735, 741; *Higginbottom v. Benson*, 24 Neb. 461, 8 Am. St. Rep. 211.

Ohio. — *Bomberger v. Turner*, 13 Ohio St. 263, 82 Am. Dec. 438.

Texas. — *Bailey v. White*, 13 Tex. 114. See also *French v. Grenet*, 57 Tex. 273; *Thompson v. Jones*, (Tex. 1889) 12 S. W. Rep. 77.

Virginia. — *Effinger v. Kenney*, 92 Va. 245. **Purchase under Power of Sale in Mortgage.** — *Carroll v. Robertson*, 15 Grant Ch. (U. C.) 173; *McLaren v. Fraser*, 17 Grant Ch. (U. C.) 567. See also *McSorley v. Larissa*, 100 Mass. 270.

Guardian's Sale Void for Want of Confirmation. — *Hicks v. Blakeman*, 74 Miss. 459. See also *Cole v. Johnson*, 53 Miss. 94.

6. Purchaser Entitled to Compensation when Original Owner Is Allowed to Redeem. — *Canal Bank v. Hudson*, 111 U. S. 66; *Cosgrove v. Merz*, (R. I. 1897) 37 Atl. Rep. 704. See also *Barnard v. Jennison*, 27 Mich. 230; *Green v. Dixon*, 9 Wis. 532; *Green v. Wescott*, 13 Wis. 606.

7. Minnesota Rule. — See *Pfefferle v. Wieland*, 55 Minn. 202.

What Is an "Official Deed." — A county auditor's certificate of assignment of the state's right in an "official deed" within the meaning of the *Minnesota* statute (Gen. Stat. 1878, c. 75, 15) allowing compensation for improvements to occupants who have "taken possession of any land under the official deed of any person or officer empowered by law * * * to sell land." *Pfefferle v. Wieland*, 55 Minn. 202.

decree under which the sale was made was without jurisdiction, for a purchaser at a judicial sale is chargeable with notice as to whether or not the court ordering the same has jurisdiction.¹

c. EXECUTION SALE SUBJECT TO DEBTOR'S RIGHT OF HOMESTEAD EXEMPTION. — Where property of a debtor has been sold under execution, subject to his right of homestead exemption, and purchased by one of the execution creditors, he is not entitled to compensation for his improvements when, after the death of the debtor, the wife and children of the latter establish their homestead exemption in the land; for the purchaser knew that his title was disputed, and the general rule as to the effect of notice of an adverse claim must apply.²

d. REDEMPTION FROM FORECLOSURE SALE BY JUNIOR INCUMBRANCER. — One who purchases at a foreclosure sale under a senior mortgage, knowing that there is a junior mortgagee who has a legal right to redeem from such sale, is not entitled to compensation for his improvements.³

e. SALE UNDER JUNIOR LIEN. — In an *Illinois* case where property subject to a mortgage was sold under a decree establishing a mechanic's lien and purchased by the lienholders, who made improvements thereon, and such decree was subsequently reversed at the instance of the mortgagee, and a decree entered for foreclosure of the mortgage, it was held that the purchasers at the first sale had no valid claim for their improvements superior to the right of the mortgagee to the proceeds of the second sale; as parties to an erroneous judgment or decree are presumed to be cognizant of all errors in the record, and a reversal restores the parties to their original rights.⁴

11. Rights of Parol Vendee. — In *Mississippi* it has been considered that one who accepts a parol transfer of land cannot be said to believe that he thereby acquires either a title or a right to a title to the land, and therefore does not claim under any deed or contract of purchase made or acquired in good faith, as required by statute.⁵

12. Rights of Donee — *a. PAROL GIFT.* — One who has in good faith occupied and improved land, relying upon a parol gift from the owner, is entitled to compensation for his improvements when the owner repudiates the gift and retakes possession.⁶

b. DONATION VOID FOR WANT OF FORM. — Similarly, a son who took possession of land under a donation from his father which was void for want of form, and, believing himself to be the owner of the land, erected improvements thereon, has been held entitled to compensation therefor.⁷

c. AGREEMENT OR PROMISE TO DONATE. — And even an agreement or

1. No Right to Compensation Where Court Ordering Sale Was Without Jurisdiction. — See *Chambers v. Jones*, 72 Ill. 278.

2. Purchase at Execution Sale Subject to Debtor's Right of Homestead Exemption. — *Andrews v. Melton*, 51 Ala. 400. It is stated in the syllabus of this case that the deed to the purchaser recited that the land was sold "subject to homestead exemption."

3. Purchase under Foreclosure of Senior Mortgage with Knowledge of Junior Mortgagee's Right to Redeem — No Compensation. — *Cram v. Cotrell*, 48 Neb. 646, 58 Am. St. Rep. 714.

4. Sale Otherwise in Case of Subsequent Purchaser Without Knowledge of Junior Mortgage. — *Ensign v. Batterson*, 68 Conn. 298.

5. Sale under Junior Lien. — *Powell v. Rogers*, 105 Ill. 318, *affirming* 11 Ill. App. 98. But it was further considered in this case that as the original owner, who had been made a defendant in the action, had defaulted and made no

defense, the surplus, after paying the amounts due on the mortgage and the mechanic's lien, might be decreed to the purchasers to apply upon the improvements made on the property.

6. Parol Vendee. — *Citizens' Bank v. Costanera*, 62 Miss. 825, decided under Miss. Code 1880, sec. 2512.

7. Rights of Parol Donee. — *Hamilton v. Hamilton*, 5 Litt. (Ky.) 28; *Bourne v. Odam*, (Ky. 1895) 32 S. W. Rep. 398; *James v. McKinsey*, 4 J. J. Marsh. (Ky.) 625; *Robert v. Ezell*, 11 Tex. Civ. App. 176.

Compensation to Heirs of Donee. — Where a son under a parol gift from his father entered upon and expended large sums of money in improving a tract of land, the father, having retaken possession, was decreed to compensate the heirs of the son for the improvements. *Hamilton v. Hamilton*, 5 Litt. (Ky.) 28.

7. Donation Void for Want of Form. — *White's Succession*, 51 La. Ann. 1703.

promise to donate has been held sufficient to support a claim for such compensation.¹

13. Rights of Vendees under Contract of Sale — a. AT LAW. — The possession of one who holds land under an uncompleted contract for the purchase and sale thereof cannot be considered to have that adverse character which is necessary to entitle the purchaser to compensation for his improvements at law;² nor does a bond for title convey such color of title as is necessary to give the person occupying the land by virtue thereof such a right.³

b. IN EQUITY — (1) Relief May Be Afforded. — It is not to be inferred, however, that one who has made valuable improvements upon land which he holds under a contract of sale is entirely without remedy, for equity may afford him relief.⁴

(2) Where Vendor Is Responsible for Nonfulfilment of Contract. — Thus it is considered that the purchaser, he being without fault, is entitled to compensation for his improvements when the vendor refuses to complete his contract⁵ and for any reason the vendee is unable to enforce a specific per-

1. Agreement or Promise to Donate. — *Glass v. Abbott*, 6 Bush (Ky.) 622; *Biehn v. Biehn*, 18 Grant Ch. (U. C.) 497. See also *Hovey v. Ferguson*, cited in 18 Grant Ch. (U. C.) 498; *Dunn v. Dunn*, (Tenn. Ch. 1899) 51 S. W. Rep. 119.

Improvements Made by Son with Consent of Father and in Anticipation of Devise. — A son who enters upon and improves land of his father with the consent of the latter and in anticipation of a devise by him to the son of such land, is entitled to compensation for his improvements when he is afterwards ousted by the father. *Duckett v. Duckett*, (Md. 1891) 21 Atl. Rep. 323. See also in this connection *Unity Joint Stock Mut. Banking Assoc. v. King*, 25 Beav. 72, 27 L. J. Ch. 585, 4 Jur. N. S. 470, 6 W. R. 204.

2. Vendee under Contract of Sale Not Entitled to Compensation at Law — California. — *Hannan v. McNickle*, 82 Cal. 122.

Georgia. — *Barnes v. Shinholster*, 14 Ga. 131.

Iowa. — *Jones v. Graves*, 21 Iowa 474.

Maine. — *Treat v. Strickland*, 23 Me. 234; *Tyler v. Fickett*, 75 Me. 211; *Moore v. Moore*, 61 Me. 417.

South Dakota. — *Seymour v. Cleveland*, 9 S. Dak. 94.

Tennessee. — *Mathews v. Davis*, 6 Humph. (Tenn.) 324.

West Virginia. — See *Cain v. Cox*, 29 W. Va. 258.

Vendee Who Has Paid Nothing under Contract of Sale Not Entitled. — *Schetter v. Southern Oregon Co.*, 19 Oregon 192.

Parol Contract Denied by Owner Who Is Willing that Improvements Should Be Removed — No Compensation Allowed. — *McCracken v. McCracken*, 88 N. Car. 272, distinguishing *Albea v. Griffin*, 2 Dev. & B. Eq. (22 N. Car.) 9.

Tax Sale Before Payment of Entire Purchase Price. — In *Kansas* a purchaser of school land who improved it, but allowed it to be sold for taxes after having paid two instalments of the purchase money, was not allowed the value of his improvements when ejected by the tax-sale purchaser, it being considered that he was not entitled thereto under the occupying claimant law. *Newland v. Baker*, 26 Kan. 341.

3. Bond for Title Does Not Convey the Necessary Color of Title. — See *White v. Stokes*, (Ark.

1899) 53 S. W. Rep. 1060; *Teaver v. Akin*, 47 Ark. 528; *Felkner v. Tighe*, 39 Ark. 363; *Rigor v. Frye*, 62 Ill. 507.

4. Relief May Be Afforded in Equity. — *Barnes v. Shinholster*, 14 Ga. 131; *Casey v. Cooper*, 99 N. Car. 395; *Mathews v. Davis*, 6 Humph. (Tenn.) 324; *Herring v. Pollard*, 4 Humph. (Tenn.) 362, 40 Am. Dec. 653; *Rainer v. Huddleston*, 4 Heisk. (Tenn.) 223. See also *Cain v. Cox*, 29 W. Va. 258.

One in Possession under an Agreement to Purchase Made with the Equitable Owner, with the knowledge and acquiescence of the trustee of the legal title, and in the belief, which such purchaser is justified in entertaining, that the legal title will ultimately be conveyed to him, may be allowed for his improvements. *Preston v. Brown*, 35 Ohio St. 18.

Contract Rescinded. — The court of *North Carolina* has several times recognized the doctrine of betterments in cases where the contract for the sale of land has been rescinded. *Albea v. Griffin*, 2 Dev. & B. Eq. (22 N. Car.) 9; *Wharton v. Moore*, 84 N. Car. 479, 37 Am. Rep. 627, citing *Wetherell v. Gorman*, 74 N. Car. 603; *Hill v. Brower*, 76 N. Car. 124; *Smith v. Stewart*, 83 N. Car. 406. See *McCracken v. McCracken*, 88 N. Car. 276.

Improvements Made by Authority of Vendor. — In *Hannibal*, etc., R. Co. v. *Shortridge*, 86 Mo. 662, the defendant was put in possession of land of the plaintiff pending the consideration of an application by him to buy the same, upon which he had paid a cash instalment, and was authorized by the plaintiff to make improvements. It was held that he was entitled to compensation therefor when the plaintiff rejected his application and sought to recover the land. See also *Minor v. Erving*, *Kirby* (Conn.) 158.

5. Contract Rescinded for Vendor's Default. — *Worthington v. Collins*, 39 W. Va. 406.

Occupant Not Turned Out of Possession. — One who has taken possession of land under a parol agreement for a deed from the owner is not entitled to recover for improvements made by him merely because the owner refuses to comply with his agreement, where it does not appear that he has turned the occupant out of possession, notified him to quit, or in any way excluded him from the full enjoyment of his

formance,¹ as, for instance, where the contract is a parol one and the vendor takes advantage of the statute of frauds to avoid the same.²

Inability of Vendor to Make Good Title. — And the same is true where the vendor is unable to make the vendee a good title as he undertook to do.³

(3) *Where Vendee Fails to Carry Out Contract.* — But the vendee is entitled to no compensation for his improvements where he loses the land through his failure to comply with the terms of his contract for the purchase thereof,⁴ or

improvements; for if the occupant is still enjoying them, or may enjoy them, he should not be paid for them, and if he has voluntarily abandoned them he must be deemed to have waived all claim to compensation. *Miller v. Tobie*, 41 N. H. 84, citing *Gillet v. Maynard*, 5 Johns. (N. Y.) 85, 4 Am. Dec. 329; *Farnam v. Davis*, 32 N. H. 302; *Wells v. Banister*, 4 Mass. 514; *Kemble v. Dresser*, 1 Met. (Mass.) 271, 35 Am. Dec. 364; *Davies v. Davies*, 9 C. & P. 87, 38 E. C. L. 46.

1. Vendee Entitled to Compensation Where Contract Cannot Be Enforced. — *Chabot v. Winter Park Co.*, 34 Fla. 258, 43 Am. St. Rep. 192.

2. Vendee Entitled to Compensation When Vendor Takes Advantage of Statute of Frauds to Avoid Contract. — *Kentucky.* — *Dean v. Cassidy*, 88 Ky. 572.

New York. — See *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. (N. Y.) 273.

North Carolina. — *Winton v. Fort*, 5 Jones Eq. (58 N. Car.) 251; *Albee v. Griffin*, 2 Dev. & B. Eq. (22 N. Car.) 9; *Daniel v. Crumpler*, 75 N. Car. 184; *Pope v. Whitehead*, 68 N. Car. 191; *Wetherell v. Gorman*, 74 N. Car. 603; *Vann v. Newsom*, 110 N. Car. 122; *Hill v. Brower*, 76 N. Car. 124; *Smith v. Stewart*, 83 N. Car. 406. See also *Wharton v. Moore*, 84 N. Car. 479, 37 Am. Rep. 627.

Pennsylvania. — See *Aurand v. Wilt*, 9 Pa. St. 54.

Tennessee. — *Rhea v. Allison*, 3 Head (Tenn.) 176. See also *Rainer v. Huddleston*, 4 Heisk. (Tenn.) 223.

Texas. — *Thouvenin v. Lea*, 26 Tex. 612.

Utah. — *Duke v. Griffith*, 13 Utah 361, citing 10 AM. AND ENG. ENCYC. OF LAW (1st ed.) 243.

Parol Contract for Devises of Land. — By the law of *Pennsylvania*, a contract for the devise of land, though not put in writing, is not entirely nugatory, but only so far as that it passes no interest in the land and cannot furnish any right in law or equity to demand a specific performance. But damages may be recovered for a breach of it in the form of compensation for all permanent improvements made upon the land with the knowledge of the contractor and of which he gets the benefit by taking back the land, deducting the value of the rents and profits during the time the land was occupied under such contract. *Bender v. Bender*, 37 Pa. St. 419.

Where Contract Is Denied. — If in an action brought to enforce the specific performance of a parol contract for the sale of land, or in the alternative for compensation for improvements put upon the land, the answer should deny that there was any contract, or allege that its terms differed from those set out in the complaint, then the court could grant neither relief, because the statute forbids its going into proof to establish, for any purpose whatever, a contract variant from the one admitted in the

answer; and if upon that the plaintiff could get no relief, he could not get it at all. *Chambers v. Massey*, 7 Ired. Eq. (42 N. Car.) 286; *Dunn v. Moore*, 3 Ired. Eq. (38 N. Car.) 364; *Sain v. Dulin*, 6 Jones Eq. (59 N. Car.) 195. See also *McCracken v. McCracken*, 88 N. Car. 272.

3. Vendor Unable to Make Good Title. — *Winters v. Elliott*, 1 Lea (Tenn.) 676, distinguishing *Rainer v. Huddleston*, 4 Heisk. (Tenn.) 225. See also *Hays v. Bonner*, 14 Tex. 629; *Davis v. Snyder*, 1 Grant Ch. (U. C.) 134. But compare *Kilborn v. Workman*, 9 Grant Ch. (U. C.) 255.

No Occasion Arises for the Making of Such an Allowance where specific performance of the contract of sale can be compelled. *Davis v. Snyder*, 1 Grant Ch. (U. C.) 134.

4. Vendee Who Fails to Perform His Part of the Contract Not Entitled to Compensation. — *United States.* — See *Bedford v. Burton*, 106 U. S. 338.

California. — *Hannan v. McNickle*, 82 Cal. 122.

Florida. — *Chabot v. Winter Park Co.*, 34 Fla. 258, 43 Am. St. Rep. 192.

Maine. — See *Tyler v. Fickett*, 75 Me. 211.

Michigan. — See *Buell v. Irwin*, 24 Mich. 145.

South Dakota. — See *Seymour v. Cleveland*, 9 S. Dak. 94.

Tennessee. — *Guthrie v. Holt*, 9 Baxt. (Tenn.) 527.

Texas. — *Austin First Nat. Bank v. Jackson*, (Tex. Civ. App. 1897) 40 S. W. Rep. 833.

Vermont. — *Walker v. Arnold*, (Vt. 1899) 44 Atl. Rep. 351.

Canada. — *In re Yaggie*, 1 Ch. Chamb. (Ont.) 52.

Vendee Must Prove that He Was Without Default. — *Rainer v. Huddleston*, 4 Heisk. (Tenn.) 223, approved in *Guthrie v. Holt*, 9 Baxt. (Tenn.) 527.

Vendee Not Entitled to Compensation Where He Elects to Be Dispossessed Rather than Pay Purchase Money. — One who takes possession of land under an executory contract for the sale thereof cannot claim compensation for improvements where, without showing that there is any defect in the title of his vendor, he elects to be dispossessed rather than pay the purchase money. *Allen v. Mitchell*, 13 Tex. 373.

Agreement of Vendee to Improve Land. — A vendee who by his contract of sale has agreed to improve the land and thereby make it more valuable and better secure the payment of all of the purchase money notes, is not entitled to compensation for improvements where he has failed to carry out his contract. *Watt v. Hunter*, 20 Tex. Civ. App. 76.

Where the contract stipulated that time should be of the essence of the contract; that failure in making payment should avoid the contract; that by such failure the party holding

avoids a performance of his agreements by pleading the statute of frauds.¹

Part Performance of Contract. — It has been held, however, that a vendee who has complied with part and only a part of his agreements may be entitled to compensation for improvements.²

(4) *Where Contract Was Contingent Merely.* — An imperfect contract for the purchase and sale of lands, dependent for its completion on contingencies which never happen, does not entitle the occupant thereunder to compensation for improvements; for he must be considered a mere tenant at will who made the improvements for his own accommodation, and must surrender possession on the demand of the owner.³

14. Occupants Holding Through Mistake as to Identity of Land. — It has been held that compensation or relief in some form may be accorded to occupants who have in good faith held and improved land under a mistake as to the identity thereof, it being in reality the property of another, but such mistake not being due to the negligence of the occupant,⁴ especially where, in the case of a mistake as to the boundary between land which the occupant really owns, and that of an adjoining owner to whom the land really belongs, the mistake is due to the acts or declarations of the latter in relation to the position of his line,⁵ or if such owner, knowing of the mistake, stood by and permitted the occupant to improve the land without giving him any notice thereof.⁶

Erroneous Survey. — In *Canada* provision is made for an allowance for improvements to one who has occupied land believing it to be his own, having been misled by an erroneous survey.⁷

under the contract should forfeit all improvements on the premises and all right to compensation therefor; and that he should cease to have any interest therein; forfeiture by failure to perform the stipulations will preclude relief under the occupying claimant act.

Provision in Contract for Forfeiture of Improvements. — *Boeken v. Alderman*, 26 Kan. 738. See also to the same effect *Vance v. Burlington, etc., R. Co.*, 12 Neb. 285.

Notice that Vendor Objected to Improvements. — A vendee of land by parol, who has failed to comply with his contract and paid no part of the purchase money, but has made permanent improvements with notice that the vendor was opposed to the improvements being made, cannot hold the vendor responsible for the enhanced value of the land. *Rainer v. Huddleston*, 4 Heisk. (Tenn.) 223.

1. Purchaser Who Takes Advantage of Statute of Frauds to Avoid Contract Not Entitled to Compensation. — *Young v. Pate*, 3 J. J. Marsh. (Ky.) 100; *Lockett v. Williamson*, 37 Mo. 388.

2. Part Performance of Contract. — And the court may refuse to put the vendor in possession until such compensation be paid. *McCarty v. Moorer*, 50 Tex. 287. See also *Humphreys v. Holsinger*, 3 Sneed (Tenn.) 228.

3. Contingent Contract. — *Howe v. Logwood*, 3 A. K. Marsh. (Kv.) 388.

4. Mistake as to Boundary — Occupant Allowed Compensation. — *Houston v. Brown*, (Tex. 1888) 8 S. W. Rep. 318; *Gatlin v. Organ*, 57 Tex. 11; *Thompson v. Comstock*, 59 Tex. 318; *Daugherty v. Yates*, 13 Tex. Civ. App. 646.

No Right to Compensation Where Mistake Due to Negligence. — *Mitchell v. Bridgman*, 71 Minn. 360; *Foley v. Kirk*, 33 N. J. Eq. 170; *Shroll v. Klinker*, 15 Ohio 152; *Gatlin v. Organ*,

57 Tex. 13; *Thompson v. Comstock*, 59 Tex. 318; *Brown v. Bedinger*, 72 Tex. 247.

Mistake as to Identity — Relief Afforded. — In *McKelway v. Armour*, 10 N. J. Eq. 115, 64 Am. Dec. 445, the complainant had, by mistake, erected a valuable dwelling house on the land of the defendant, who also labored under the same mistake and did not suspect the building to be upon his lot until some time after its erection, when by actual measurement he discovered the mistake. In this state of circumstances the chancellor relieved the complainant, putting the defendant to as little inconvenience as possible.

No Compensation for Improvements Made under Belief that Land Belongs to Father of Occupant. — *Anderson v. Williams*, 59 Ark. 144.

5. Mistake Due to Acts or Declarations of Adjoining Owner. — *Coughran v. Alderete*, (Tex. Civ. App. 1894) 26 S. W. Rep. 109.

6. Failure of Owner to Notify Occupant of Mistake. — *Gatlin v. Organ*, 57 Tex. 11; *Thompson v. Comstock*, 59 Tex. 318.

7. Erroneous Survey. — *Plumb v. Steinhoff*, 2 Ont. 614, (this question was not considered in the higher courts where the judgment in the case was reversed, see 11 Ont. App. 788, 14 Can. Sup. Ct. 739); *Mozier v. Keegan*, 13 U. C. C. P. 547. See also *Swanston v. Strong*, 21 U. C. Q. B. 279.

The Occupant Must Have Been Misled by the erroneous survey. See *Doe v. Campbell*, 8 U. C. Q. B. 19; *Doe v. Potts*, 5 U. C. Q. B. 492.

Private Survey. — Compensation may be allowed the occupant although the survey by which he was misled was a private one. *Campbell v. Fergusson*, 4 U. C. C. P. 414; *Hutton v. Trotter*, 16 U. C. C. P. 367; *Morton v. Lewis*, 16 U. C. C. P. 485; *Doe v. McConnel*, 6 U. C. Q. B. O. S. 347.

15. Husband Holding Land Conveyed to Wife. — A husband who has in good faith entered upon and improved land which has been conveyed to his wife, may recover for his improvements after a judgment of dispossession has been rendered against him.¹

16. Rights of Trespassers and Wrongdoers. — Notwithstanding the well-settled rule that in order to be entitled to compensation for improvements the occupant must have acted in good faith, there are several cases in which it has been either expressly held or intimated that one who has made improvements may set them off against the rents and profits or damages for the occupation, even though he has not acted in such good faith as to entitle him to any further allowance under the statutes.²

No Such Right Is Recognized in West Virginia, for though in one case a possessor in bad faith was allowed to set off his improvements against the rents and profits, the Supreme Court, on the same case coming up before it a second time, referred to such allowance as an "inadvertence."³

In Louisiana it is considered that an occupant in bad faith owes indemnity to the owner of the property,⁴ and is not entitled to any claim for his improvements beyond that given by statute.⁵ Under the statutes of that state the owner of property which has been improved by such an occupant⁶ with materials belonging to the latter, has the right either to keep the improvements or to compel the maker to take them away or demolish them at his own expense;⁷ and if the owner of land keeps the improvements he must reimburse the occupant the value of the materials used and the price of the workmanship, without regard to the greater or less value which the soil shall have acquired by reason of the improvements.⁸ This claim for improvements may be satisfied by setting it off against the owner's claim for rents and revenues.⁹

1. Improvements by Husband on Land Conveyed to Wife. — Lane v. Allen, 53 Mo. App. 125.

2. View that Trespasser or Wrongdoer May Set Off Improvements Against Rents, etc. — Georgia. — Tripp v. Fausett, 94 Ga. 330; McPhee v. Guthrie, 51 Ga. 83; Nunn v. Burger, 76 Ga. 705; Thomas v. Malcom, 39 Ga. 328, 99 Am. Dec. 459. See also Dean v. Feely, 69 Ga. 804; Beverly v. Burke, 9 Ga. 440, 54 Am. Dec. 351. Illinois. — See Mettler v. Craft, 39 Ill. App. 193.

Kentucky. — Nourse v. Turnham, 1 Bibb (Ky.) 62; Hawkins v. King, 1 T. B. Mon. (Ky.) 161; Pugh v. Bell, 2 T. B. Mon. (Ky.) 125, 15 Am. Dec. 142; Smith v. Bell, 91 Ky. 655.

Texas. — Glasscock v. Glasscock, 17 Tex. 480.

Canada. — Wright v. Wright, 6 Montreal Leg. N. 116.

3. Right Not Recognized in West Virginia. — Cain v. Cox, 29 W. Va. 258.

4. Possessor in Bad Faith Owes Indemnity. — Cannon v. White, 16 La. Ann. 85; Gibson v. Vaughan, 12 La. Ann. 545; Wood v. Nicholls, 33 La. Ann. 744; Aronstein v. Irvine, 49 La. Ann. 1478; Vicksburg, etc., R. Co. v. Elmore, 46 La. Ann. 1237; Walworth v. Stevenson, 24 La. Ann. 251; Bry v. Fouché, 11 La. Ann. 665.

5. Possessor in Bad Faith Has No Claim for Improvements Save That Given by Statute. — A possessor in bad faith is entitled in law to no other claim for his improvements than those stated in the first three sentences of the Civ. Code, art. 500. Cannon v. White, 16 La. Ann. 85; Gibson v. Vaughan, 12 La. Ann. 545. The sentences referred to are embodied in art. 508 (500) of Merriek's Rev. Civ. Code La. (1899).

6. Statutes Refer to Possessors in Bad Faith. — In Wood v. Nicholls, 33 La. Ann. 744, it was

contended that article 508 of the Civil Code of Louisiana, referred to above, did not refer to possessors in bad faith, but the court said that it did not find even plausibility in that contention. Approved in Scott v. Scott, 42 La. Ann. 766.

7. Election of Owner as to Keeping Improvements or Having Them Removed or Demolished. — Cannon v. White, 16 La. Ann. 85; d'Armand v. Pullin, 16 La. Ann. 243.

A Possessor in Bad Faith Has the Right to Demolish His Improvements and Remove the Materials if the owner shall elect not to retain them. Jackson v. Ludeling, 99 U. S. 513.

8. Compensation to Be Paid by Owner Who Elects to Keep Improvements. — Jackson v. Ludeling, 99 U. S. 513; Aronstein v. Irvine, 49 La. Ann. 1485; Green v. Moore, 44 La. Ann. 855; Wilson v. Benjamin, 26 La. Ann. 587; Cannon v. White, 16 La. Ann. 85; d'Armand v. Pullin, 16 La. Ann. 243.

When Compensation May Be Claimed. — The occupant cannot claim compensation for his improvements before the owner of the soil has elected to keep them. Citizens' Bank v. Maureau, 37 La. Ann. 857. See also Kibbe v. Campbell, 34 La. Ann. 1163.

Improvements Inseparable from the Soil. — As to improvements by their nature inseparable from the soil, such as ditching, wells, clearings, etc., a possessor in bad faith is not entitled to compensation. Jackson v. Ludeling, 99 U. S. 513; Wood v. Nicholls, 33 La. Ann. 744; Scott v. Scott, 42 La. Ann. 766. See also Gibson v. Vaughan, 12 La. Ann. 545. But compare Green v. Moore, 44 La. Ann. 855; Wilson v. Benjamin, 26 La. Ann. 588.

9. Improvements Set Off Against Rents, etc. — Aronstein v. Irvine, 49 La. Ann. 1478. See

In Illinois it has been considered that, in a case of partition and sale of land upon which improvements have been placed by a wrongdoer, a court of equity may allow and pay the wrongdoer the amount by which the proceeds of the sale have been increased by reason of such improvements.¹

Indebtedness Incurred in Improving the Estate Protected. — And it has also been considered that where the wife of a guardian had purchased from the ward her interest in property of which the wife owned the remaining interest, under such circumstances that she was not an innocent purchaser, the estate of the ward could not be burdened, on cancellation of the deed, with payment for such improvements; but where the entire property had been mortgaged to pay for the improvements, the court might, in the exercise of its equitable powers, protect the indebtedness incurred for improvements upon the ward's estate, upon the theory that the estate had been benefited and the ward received an advantage thereby.²

VI. FOR WHAT IMPROVEMENTS COMPENSATION WILL BE ALLOWED—1. Improvements Placed on Land by Grantor or Predecessor in Title of Occupant. — As a general rule it is considered that a *bona fide* occupant is not confined to compensation for improvements made by himself, but may also be allowed for those which have been placed on the land by his grantor or predecessor in title,³ if the latter held the land under such circumstances that he would have been entitled to compensation therefor had he been ousted by the true owner.⁴

2. Improvements Must Belong to Person Claiming Compensation. — In order for one who has held property which turns out to belong to another to be entitled to compensation for improvements thereon, he must be the owner of such improvements.⁵

VII. AS AGAINST WHOM COMPENSATION WILL BE ALLOWED — 1. The State. — In the absence of some statute authorizing such relief, the state cannot, through the instrumentality of the courts, be required to make compensation for improvements placed on vacant land belonging to the state.⁶

also Vicksburg, etc., *R. Co. v. Elmbre*, 46 La. Ann. 1237; *Wilson v. Benjamin*, 26 La. Ann. 587.

1. Wrongdoer Allowed Amount by Which Proceeds of Sale Are Increased by His Improvements. — *Eury v. Merrill*, 42 Ill. App. 193.

2. Indebtedness Incurred in Improving the Estate Protected. — *McParland v. Larkin*, 155 Ill. 84.

3. Occupant May Recover for Improvements Made by His Grantor or Predecessor in Title — Alabama. — *Wisdom v. Reeves*, 110 Ala. 418.

Georgia. — *Willingham v. Long*, 47 Ga. 540; *Dean v. Feely*, 69 Ga. 804. See also *Jenkins v. Means*, 59 Ga. 55; *Gardner v. Grannis*, 57 Ga. 539.

Iowa. — *Wright v. Stevens*, 3 Greene (Iowa) 63; *Craton v. Wright*, 16 Iowa 133; *Parsons v. Moses*, 16 Iowa 440.

Kentucky. — *Pugh v. Bell*, 2 T. B. Mon. (Ky.) 125, 15 Am. Dec. 142.

Minnesota. — *McLellan v. Omodt*, 37 Minn. 157.

Pennsylvania. — *Morrison v. Robinson*, 31 Pa. St. 456.

South Carolina Decisions. — The rule stated in the text has been affirmed in the cases of *McKnight v. Cooper*, 27 S. Car. 92, and *Salinas v. Aultman*, 45 S. Car. 253, but denied in the cases of *Gadsden v. Desportes*, 39 S. Car. 131, and *Aultman v. Utsey*, 41 S. Car. 304.

This apparent, but not real, discrepancy, as well as some others in the South Carolina decisions, is explained by the fact that there are

in that state two distinct statutes on the subject of improvements, which vary in their terms. A full discussion and comparison of these statutes are given in another part of this article, to which the reader is referred. See *supra*, subsection *South Carolina Statutes*.

Improvements by Strangers. — But the occupant cannot recover for improvements made by strangers before his entry. *Parker v. Stephens*, 3 A. K. Marsh. (Ky.) 107.

4. Predecessor in Title Must Have Held under Such Circumstances that He Would Have Been Entitled to Compensation. — See *Hart v. Bodley*, Hard. (Ky.) 104.

Right to Compensation Assignable. — *Craton v. Wright*, 16 Iowa 133; *Parsons v. Moses*, 16 Iowa 440.

5. Improvements Must Belong to Person Claiming Compensation. — *Burks v. Vaughan*, (Ark. 1892) 19 S. W. Rep. 754; *Schetter v. Southern Oregon Co.*, 19 Oregon 192. See also *Stevens v. Stevens*, 80 Hun (N. Y.) 514.

Interest of Occupant in Improvements Divested by Judicial Sale. — A defendant in ejectment cannot avail himself of the provisions of the occupying claimant act (chap. 63, Comp. Stat. Nebraska), where all his interests in the improvements have been divested by judicial sale prior to the request for a jury to assess the value of the improvements. *La Bonty v. Lundgren*, (Neb. 1890) 79 N. W. Rep. 551.

6. The State Cannot, in the Absence of Statute, Be Required to Pay for Improvements. — *State v. Snyder*, 66 Tex. 687; *Swetman v. Sanders*, 85

2. Person Recovering Land. — An unsuccessful defendant in ejectment may recover compensation for his improvements from the plaintiff, and is not confined to his remedy against his grantor.¹

Improvements Made Before Plaintiff's Title Accrued. — But he cannot be allowed to recoup against the mesne profits for improvements made before the plaintiff's title accrued.²

Right to Possession Must Be Established. — And the occupant is entitled to no compensation from the adverse claimant until the right of the latter to possession of the land has been established.³

3. Person Entering Land Without Judgment and Withholding Possession. — In an action under the *Maine* statute to recover the increased value of the land, by reason of a possession and improvement thereof for six years or more, against those making an entry into the land without judgment and withholding the possession thereof, an entry by one having a bond from the defendants to convey the land to him, without other authority from them to enter, does not render them liable.⁴

4. Purchaser of School Lands. — Under the statutes of *Washington*, where one in possession of school lands has made improvements thereon, which have been duly appraised by the board of county commissioners before the sale of the lands, and at such sale the lands are purchased by a person other than the owner of such improvements, the purchaser must pay to the occupant the appraised value of the improvements.⁵

5. Infant Owner. — The right of an occupying claimant to an allowance for his improvements is in no way affected by the fact that the real owner of the land is an infant.⁶

6. Indian Owner Holding under Treaty Stipulation. — It has been held in *Kansas* that an Indian owner of land, held under treaty stipulations which provide that the land shall be exempt from levy, taxation, or sale, and shall be alienable in fee, or leased, or otherwise disposed of only to the United States, or to persons then being members of a specified tribe and of Indian blood, with the permission of the President, and under such regulations as the Secretary of the Interior shall direct, cannot be compelled, under the occupying claimant act, to pay for improvements on the premises.⁷

Immunity a Personal Privilege. — Such an immunity is, however, a personal privilege of the Indian owner, and if he has the right to alienate the land and does so, his grantee succeeds only to the title to the land, and has no better right than any other owner of real estate to appropriate improvements made by an occupying claimant without paying for them.⁸

Tex. 294. See also cases cited *supra*, this title, V. 8. *Rule as to Occupants of Public Lands.*

Rule Applies to Grantees of State. — *Swetman v. Sanders*, 85 Tex. 294.

1. Unsuccessful Defendant in Ejectment May Recover Compensation from Plaintiff. — *Dothage v. Stuart* 35 Mo. 251.

The occupying claimants Act of *Oklahoma* is predicated upon the fact of title to the land being in one of the parties to the litigation. *Woodruff v. Wallace*, 3 Okla. 355.

Plaintiff Must Have Established Title in Fee Simple. — The *Michigan* statute (Comp. L., § 6252, Act 180 of 1875) allowing defendants in ejectment compensation for improvements can apply only to cases where the plaintiff establishes a title in fee simple. No provision is made for the case of interests less than the fee, and the statute is incapable of being applied to such a case. *Burkle v. Ingham Circuit Judge*, 42 Mich. 513.

2. Improvements Made Before Plaintiff's Title Accrued. — *Bay v. Pope*, 18 Cal. 694. The syllabus of this case is misleading in that it uses the word "after" in the statement of this point, instead of the word "before."

3. Right to Possession Must Be Established. — *Foley v. Kirk*, 33 N. J. Eq. 170.

4. Person Entering Land Without Judgment and Withholding Possession. — *Biggs v. Fiske*, 17 Me. 420.

5. Purchaser of School Lands Must Pay Occupant for Improvements. — *Pearson v. Asnley*, 5 Wash. 160.

6. Infancy of Owner. — *Beard v. Dansby*, 48 Ark. 183; *Potts v. Cullum*, 68 Ill. 217.

7. Indian Owner Holding under Treaty Stipulations Not Liable for Improvements. — *Maynes v. Veale*, 20 Kan. 374. See also *Krause v. Means*, 12 Kan. 335.

8. Immunity a Personal Privilege. — *Krause v. Means*, 12 Kan. 335.

7. DOWRESS. — In *South Carolina* it has been held that where a widow established her claim of dower in lands which had been conveyed by her husband immediately before the marriage with an intent to defeat her dower rights, no counterclaim based upon buildings erected and like improvements was a legitimate charge against her.¹

VIII. WHEN OWNER OF PROPERTY IS ESTOPPED TO DISPUTE CLAIM FOR IMPROVEMENTS. — An owner of property who has been guilty of fraud or gross laches in not making his title known to an occupant after he had notice that the latter was improving the property under a claim of title is estopped to contest the right of the latter to compensation for his improvements.² And this would seem to be true even though the occupant has not held under such circumstances as would ordinarily entitle him to compensation for his improvements.³ But where the owner has notified the occupant of his title, he is not estopped because he took no steps to prevent the latter from proceeding with his improvements, where the owner's delay in resorting to law to oust the occupant was due to certain negotiations between the parties in reference to a purchase of the land by the occupant.⁴

IX. METHODS OF OBTAINING COMPENSATION FOR IMPROVEMENTS — 1. By Interposing Claim in Possessory Action — a. THE RIGHT TO SET OFF IMPROVEMENTS — (1) Where Rents and Profits or Damages Are Claimed. — Where, in a suit or action for the recovery of real property, the plaintiff claims rents and profits or damages for the occupation of the land, the defendant may set off against such claim his claim for compensation for his improvements.⁵

1. No Recovery Against DOWRESS. — *Brooks v. McMeekin*, 37 S. Car. 285.

2. Estoppel of Owner Resulting from Fraud or Laches in Failing to Assert Title — *United States*. — *McClaskey v. Barr*, 62 Fed. Rep. 209.

Arkansas. — *Grider v. Driver*, 46 Ark. 109. See also *Summers v. Howard*, 33 Ark. 490.

Kentucky. — *Hawkins v. King*, 1 T. B. Mon. (Ky.) 161.

Ohio. — See *Preston v. Brown*, 35 Ohio St. 18.

Pennsylvania. — See *Davidson v. Barclay*, 63 Pa. St. 406.

South Carolina. — *Rabb v. Flenniken*, 32 S. Car. 189.

Texas. — *Boothe v. Best*, 75 Tex. 568.

Virginia. — *Wood v. Krebs*, 33 Gratt. (Va.) 685; *Morris v. Terrell*, 2 Rand. (Va.) 6; *Walker v. Beauchler*, 27 Gratt. (Va.) 511. See also *Effinger v. Hall*, 81 Va. 94; *Southall v. M'Keand*, 1 Wash. (Va.) 336.

West Virginia. — *Hall v. Hall*, 30 W. Va. 779. See also *Cain v. Cox*, 29 W. Va. 258.

Wisconsin. — See *Witt v. Grand Grove*, etc., 55 Wis. 376.

Canada. — See *Ellice v. Courtemanche*, 17 L. C. Rep. 423.

Circumstances Not Constituting Acquiescence in Occupant's Possession and Improvements. — See *Nunnally v. Owens*, 90 Ga. 220.

Mistaken Belief of Owner as to Location of His Land. — The owner of land is not estopped from contesting an occupant's claim for improvements, because they were made with his knowledge, where it is shown that at the time they were made he was laboring under the belief that his land lay west of where the improvements were being placed. *Daugherty v. Yates*, 13 Tex. Civ. App. 646.

Where Owner Had No Knowledge of Improvements until After Their Completion. — If the owner had no knowledge of the fact before or at the time the improvements were made, he

cannot be charged with them, although he is cognizant of the fact after they have been completed, and fails to notify the claimant of his title. *Hall v. Hall*, 30 W. Va. 779.

3. Occupant Not a Bona Fide Purchaser. — *Hall v. Hall*, 30 W. Va. 779.

4. Owner Who Has Made His Title Known Not Estopped by Failure to Prevent Improvements. — *Brown v. Baldwin*, 121 Mo. 106.

5. Improvements May Be Set Off Against Claim for Rents and Profits or Damages in Possessory Action — *United States*. — *Gill v. Patten*, 1 Cranch (C. C.) 465.

California. — *Welch v. Sullivan*, 8 Cal. 511; *Love v. Sharizer*, 31 Cal. 487; *Carpentier v. Small*, 35 Cal. 346.

District of Columbia. — *McIntire v. Pryor*, 10 App. Cas. (D. C.) 432.

Georgia. — *Beverly v. Burke*, 9 Ga. 440, 54 Am. Dec. 351; *Willingham v. Long*, 47 Ga. 540; *Dean v. Feely*, 69 Ga. 804; *McDowell v. Sutlive*, 78 Ga. 142. See also *Jenkins v. Means*, 59 Ga. 55.

Kansas. — *Stebbins v. Guthrie*, 4 Kan. 353.

Michigan. — *King v. Harrington*, 18 Mich. 213.

New Hampshire. — See *Corbett v. Norcross*, 20 N. H. 366.

Pennsylvania. — *Ege v. Kille*, 84 Pa. St. 333. See also *Morrison v. Robinson*, 31 Pa. St. 456.

And see also cases cited *supra*, this title, II. 3. *Rule Adopted in Courts of Law*.

Claim for Betterments as a Defense. — If an action is brought against the tenant to dispossess him, he can enforce his claim to betterments by way of defense. *Page v. Finson*, 74 Me. 512.

Improvements May Be Allowed as Set-off Where Affirmative Recovery Would Be Denied. — *Browne v. Davis*, 109 N. Car. 23; *Scott v. Battle*, 85 N. Car. 192; *Dowd v. Faucett*, 4 Dev. L. (15 N. Car.) 92.

(2) *Where Rents and Profits or Damages Are Not Claimed.* — But where the plaintiff in a possessory action makes no such claim, the defendant cannot, in that action, be allowed for his improvements.¹

b. ACTIONS AND PROCEEDINGS IN WHICH IMPROVEMENTS MAY BE CLAIMED. — A claim for improvements may be interposed, as a rule, in any possessory action, such as ejectment,² or trespass to try title.³ But it has been considered that such a claim cannot be interposed in an action to establish an escheat,⁴ or, in *Wisconsin*, in an equitable action to set aside a land patent for fraud.⁵

Action Not Possessory in Its Nature. — And it is considered that such a claim cannot be interposed in an action which has not for its object the recovery of possession of the land.⁶

2. By Direct Proceedings — *a. IN GENERAL.* — The right to recover compensation for improvements by a direct proceeding against the owner of the property is, as has been seen, of purely statutory origin,⁷ and therefore one who seeks to recover compensation in this manner must bring himself within the statute and pursue the statutory remedy.⁸

b. TIME OF MAKING CLAIM WHEN PROCEEDING IS A CONTINUATION OF POSSESSORY ACTION. — These proceedings are frequently in the nature of an adjunct to or continuation of the action against the occupant for the recovery of possession of the property;⁹ and in such case the occupant should make his claim after the determination against his title,¹⁰ but before he is

Extent of Recovery in Possessory Action. — Under the *Indiana* statute, the defendant in an action for the recovery of real property cannot have relief in that action, except that, as to the damage which he has inflicted upon the plaintiff by withholding or using or injuring his property, he may set off the value of the permanent improvements made on such real estate by him. *Wernke v. Hazen*, 32 Ind. 431.

Rule under Alabama Statutes. — In *Alabama*, the period during which the defendant in an action for the recovery of land and mesne profits may be charged for the rent, and the circumstances under which he may claim pay for his improvements, are regulated by statute. See Code 1876, §§ 2951-2954 and 2966. And see *Dobbs v. Hairston*, 80 Ala. 594; *Turnipseed v. Fitzpatrick*, 75 Ala. 297; *Southern Cotton Oil Co. v. Henshaw*, 89 Ala. 448; *Hairston v. Dobbs*, 80 Ala. 589; *McQueen v. Lampley*, 74 Ala. 408.

Agreement to Pay for Improvements Not a Defense. — In a case where the defendants in an action of ejectment had entered upon the land in controversy upon an agreement of the plaintiff to pay them for their improvements, provided it was established that the premises belonged to them, it was held that the alleged agreement to pay for the improvements, if made, was no defense to the action of ejectment, but the remedy of the parties in such case was by a direct action upon the agreement. *Norris v. Hoyt*, 18 Cal. 217.

1. No Allowance Can Be Made Where Plaintiff Does Not Claim Rents and Profits or Damages. — *Learned v. Corley*, 43 Miss. 687; *Daniels v. Bates*, 2 Greene (Iowa) 151. See also *Graeme v. Cullen*, 23 Gratt. (Va.) 296.

2. Ejectment. — See cases cited in preceding section.

3. Trespass to Try Title. — *Brown v. State*, 36 Tex. 282. And see also cases cited in preceding section.

4. Escheat. — *Brown v. State*, 36 Tex. 282; *Ellis v. State*, 3 Tex. Civ. App. 170.

5. Action to Set Aside Land Patent for Fraud. — *Prickett v. Muck*, 74 Wis. 199. This case proceeded upon the view that the remedy given by the statutes of *Wisconsin* could be made available only in an action of ejectment.

6. Action Not Seeking Recovery of Possession. — *Sanborn v. Mueller*, 38 Minn. 27.

Thus in an action to quiet title the defendant cannot be allowed for improvements made by him while in possession. *Buck v. Holt*, 74 Iowa 294. See also *Collins v. Storm*, 75 Iowa 36.

And the same is true of a personal action to recover the value of property purchased at a judicial sale. *Central Trust Co. v. Hubinger*, 87 Fed. Rep. 3.

Action to Have Absolute Deed Declared a Mortgage. — In an action to have a deed absolute in form declared a mortgage, the court refused to allow the defendant for improvements or the plaintiff for the use and occupation of the premises. *Foley v. Foley*, 15 N. Y. App. Div. 276.

7. Right of Purely Statutory Origin. — See *supra*, this title, II. 5 *b. Extent to Which Rights of Occupying Claimants Are Enlarged.*

8. Claimant Must Bring Himself Within Statute. — *Webster v. Stewart*, 6 Iowa 401. See also *Lieby v. Ludlow*, 4 Ohio 469.

9. An Adjunct to or Continuation of the Action of Ejectment. — See *Meitler v. Craft*, 39 Ill. App. 193.

10. Claim Should Be Made After Determination Against Title — *Florida.* — *Duncan v. Jackson*, 16 Fla. 338; *Asia v. Hiser*, 22 Fla. 378.

Iowa. — *Walton v. Gray*, 29 Iowa 440; *Fogg v. Holcomb*, 64 Iowa 621.

Missouri. — *McClannahan v. Smith*, 76 Mo. 428; *Jasper County v. Wadlow*, 82 Mo. 172; *Jasper County v. Mickey*, (Mo. 1887) 4 S. W. Rep. 424.

actually deprived of possession of the property.¹

In *Wisconsin* it is considered that the claim must be made within the term at which the judgment against the occupant is rendered.²

But in *Kentucky* the application to have a jury impaneled to fix the value of the improvements may be made by the occupant at a term subsequent to that in which the judgment against him was rendered.³

c. SET-OFF IN POSSESSORY ACTION AS A BAR TO DIRECT PROCEEDING. — It has been held that an occupant who has proved his improvements in the ejectment action to reduce rent and damages is estopped from afterwards having them assessed in the statutory mode, for he cannot have the value of the improvements twice in the same action.⁴ But in *Indiana* it has been said that in the action for the recovery of the real property the defendant cannot have relief except by setting off the value of his permanent improvements against the damage he has inflicted on the plaintiff by withholding, using, or injuring the property, and that any further relief the occupant can obtain only by bringing an action under the occupying claimant act after the question of title has been determined.⁵

d. WHERE OWNER HAS OBTAINED POSSESSION WITHOUT LEGAL PROCEEDINGS. — It has been asserted in *Maine* that an occupant who has been dispossessed by an entry without suit may bring an action to enforce his claim for improvements,⁶ but this has been denied in other jurisdictions.⁷

e. IN WHAT COURT ACTION FOR IMPROVEMENTS SHOULD BE BROUGHT. — It has been held that the language of the *Missouri* statute authorizing a recovery "in a court of competent jurisdiction" for improvements made in good faith upon the land of another, though quite broad, is not sufficiently comprehensive to admit of an action being brought in any other court than the one wherein the recovery in ejectment was had.⁸

f. LIMITATION OF ACTIONS. — A claim for improvements is subject to the statute of limitations,⁹ which begins to run when the right accrues by reason of the occupant being found not to be the rightful owner of the land and its recovery being awarded to another.¹⁰

X. METHODS OF ENFORCING PAYMENT FOR IMPROVEMENTS — 1. Lien of Occupant for Improvements. — In some jurisdictions it is considered that the amount

Nebraska. — *Leighton v. Young*, 10 U. S. App. 238 (decided under *Nebraska* statute).

North Carolina. — *Condry v. Cheshire*, 88 N. Car. 375; *Merritt v. Scott*, 81 N. Car. 385. See also *Wernke v. Hazen*, 32 Ind. 431.

1. Claim Must Be Made Before Occupant Is Deprived of Possession. — *Leighton v. Young*, 10 U. S. App. 298; *Condry v. Cheshire*, 88 N. Car. 375; *Merritt v. Scott*, 81 N. Car. 385; *Boyer v. Garner*, 116 N. Car. 125. See also *Malone v. Stretch*, 69 Mo. 25.

A Judgment for the Possession of Land Is "Executed" when the sheriff, acting under a writ of possession, has put the defendant out of possession and delivered possession of the land to the plaintiff, and the defendant cannot thereafter claim betterments, though damages which were assessed to the plaintiff in the same action have not been paid. *Boyer v. Garner*, 116 N. Car. 125.

Person Out of Possession Cannot Maintain Action for Compensation for Improvements. — *Webster v. Stewart*, 6 Iowa 401; *Claussen v. Rayburn*, 14 Iowa 136.

Failure to Apply for Compensation Before Issuing of Writ of Restitution Does Not Bar Recovery. — *Page v. Davis*, 25 Neb. 670; *Burlington, etc., R. Co. v. Dobson*, 17 Neb. 455.

2. Time for Making Claim in *Wisconsin*. — *Thomas v. Rewey*, 36 Wis. 328.

3. *Kentucky Rule*. — *Counts v. Kitchen*, 87 Ky. 47.

4. Set-off in Ejectment Action Bars Direct Proceeding. — *Douglass v. Boyle*, 42 Kan. 392. See also *Powell v. Davis*, 19 Tex. 380.

A Denial of Compensation to the defendant in the possessory action has the same effect. *Casey v. Cooper*, 99 N. Car. 395.

5. Direct Proceeding May Be Brought in *Indiana* for Relief Beyond Set-off. — *Wernke v. Hazen*, 32 Ind. 431.

6. Occupant Dispossessed Without Legal Proceedings May Bring Action for Improvements. — *Page v. Finson*, 74 Me. 512. See also *Briggs v. Fiske*, 17 Me. 420.

7. Contrary Doctrine. — *Webster v. Stewart*, 6 Iowa 401. See also *Lemerand v. Flint, etc., R. Co.*, 117 Mich. 309.

8. Action for Improvements Must Be Brought in Court in Which Recovery in Ejectment Was Had. — *Malone v. Stretch*, 69 Mo. 25.

9. Claim Subject to Statute of Limitations. — *Metzler v. Craft*, 39 Ill. App. 193.

10. When Right Accrues. — *Fish v. Blasser*, 146 Ind. 186; *Westerfield v. Williams*, 59 Ind. 221.

A right to claim compensation for improvements made by a tenant in common does not arise until the suit for partition is brought. *Ballou v. Ballou*, 94 Va. 350. See generally the title LIMITATION OF ACTIONS.

found to be due to an occupant as compensation for his improvements constitutes a lien on the improved property.¹

2. Right of Occupant to Retain Land until Payment for Improvements —

a. AFTER ASSESSMENT OF COMPENSATION. — It is also considered that the occupant has the right to retain possession of the land until the amount found to be due him as compensation for his improvements has been paid, before which time the courts will not issue their process to put the successful claimant in possession.²

b. DURING PENDENCY OF PROCEEDINGS FOR COMPENSATION. — And even the pendency of proceedings on behalf of the occupant to obtain compensation for his improvements may entitle him to retain possession of the land until such claim is settled.³

1. Amount Found Due for Improvements a Lien on Improved Property — United States. — *McClaskey v. Barr*, 62 Fed. Rep. 209.

Arkansas. — *West v. Waddill*, 33 Ark. 575.

Kentucky. — See *Hackworth v. Harlan*, (Ky. 1892); 19 S. W. Rep. 172.

North Carolina. — *Barker v. Owen*, 93 N. Car. 198; *Field v. Moody*, 111 N. Car. 353. See also *Carolina Cent. R. Co. v. McCaskill*, 98 N. Car. 526; *Pitt v. Moore*, 99 N. Car. 85, 6 Am. St. Rep. 489; *Hedgepeth v. Rose*, 95 N. Car. 41.

Ohio. — *Preston v. Brown*, 35 Ohio St. 18.

Oregon. — *Hatcher v. Briggs*, 6 Oregon 31.

Wisconsin. — *Whitcomb v. Provost*, 102 Wis. 278.

Equity Gives to a Parol Purchaser of Land a lien upon it for the purchase money he may have paid, and also for the value of any permanent improvements made bona fide. *Dean v. Cassiday*, 88 Ky. 572.

Lien as Against Creditors of Grantor. — Where a conveyance from a father to his children is fraudulent as against the former's creditors because without valuable consideration, but the latter have accepted the deeds in good faith and without fraudulent intent, and have improved the land, they are entitled to a first lien as against the father's creditors, to the extent that the improvements have enhanced the value of the land. *Bartram v. Burns*, (Ky. 1897) 43 S. W. Rep. 248.

Lien Against Railroad Right of Way. — In a *North Carolina* case where the land improved was a part of the right of way of a railroad, it was claimed that the lien for improvements could not attach because the land could not be sold to discharge it. The court said: "This may, on account of public considerations, be so, but we need not now and do not decide that it is or is not." *Carolina Cent. R. Co. v. McCaskill*, 98 N. Car. 526.

Early Kentucky Statute. — The Kentucky occupying claimant Act of 1797 gave the occupant no specific lien on the land for the value of his ameliorations; the remedy given was personal. *Hayden v. Delay*, Litt. Sel. Cas. (Ky.) 278.

2. Right of Occupant to Retain Land until Paid for His Improvements — Arkansas. — *Douglass v. Sharp*, 64 Ark. 645.

Indiana. — *Armstrong v. Jackson*, 1 Blackf. (Ind.) 374.

Iowa. — *Reilly v. Ringland*, 39 Iowa 106; *Webster City, etc., R. Co. v. Newson*, 70 Iowa 355.

Kansas. — *Stephens v. Ballou*, 27 Kan. 594.

Kentucky. — *Counts v. Kitchen*, 87 Ky. 47.

Louisiana. — *Fletcher v. Cavellier*, 10 La. 119.

Missouri. — *Hannibal, etc., R. Co. v. Shortridge*, 86 Mo. 662; *Shroyer v. Nickell*, 55 Mo. 264.

Nebraska. — *Troxell v. Stevens*, 57 Neb. 329. See also *Page v. Davis*, 26 Neb. 670.

North Carolina. — *Field v. Moody*, 111 N. Car. 353. See also *Hedgepeth v. Rose*, 95 N. Car. 41; *Pitt v. Moore*, 99 N. Car. 85, 6 Am. St. Rep. 489.

Ohio. — *Patterson v. Prather*, 11 Ohio 35.

Oregon. — *Hatcher v. Briggs*, 6 Oregon 31.

Texas. — *Van Valkenburg v. Ruby*, 68 Tex. 139; *Hearn v. Camp*, 18 Tex. 546.

Washington. — *Pearson v. Ashley*, 5 Wash. 170.

Canada. — *Knowlton v. Clark*, 9 L. C. Jur. 243; *Nugent v. Mitchell*, 19 Rev. Lég. 569; *Lawrence v. Stuart*, 6 L. C. Rep. 294; *Gummerson v. Banting*, 18 Grant Ch. (U. C.) 516; *Ellice v. Courtemanche*, 17 L. C. Rep. 423; *Stuart v. Eaton*, 8 L. C. Rep. 113. See also *Boulton v. Shea*, 22 Can. Sup. Ct. 742; *Dufour v. Dufour*, 10 Montreal Leg. N. 305.

The Owner May Be Enjoined from Obtaining Possession of the land until such amount has been paid. *Shroyer v. Nickell*, 55 Mo. 264; *Hannibal, etc., R. Co. v. Shortridge*, 86 Mo. 662.

Time for Which Occupant May Retain Possession. — Under sections 2590-2591 of Sand. & H. Dig. (Arkansas Stat. 1894), occupants have the right to hold possession of the lands and the improvements thereon until paid therefor, and such holding may continue after the three years allowed them to enforce the lien on the lands for the sums adjudged to be due for improvements has expired. *Douglass v. Sharp*, 64 Ark. 645.

Rule Denied in Pennsylvania. — In Pennsylvania, an occupant of land, against whom a judgment of ejectment is rendered, is not entitled to retain the land until he is paid the value of his improvements. *Putnam v. Tyler*, 117 Pa. St. 570.

Improvements and expenditures on the faith of a contract within the statute of frauds, with the knowledge of the owner, give no equity to the purchaser to retain possession until he is repaid. If he has any remedy, it is by action and not by a retention of possession. *Harden v. Hays*, 9 Pa. St. 151.

3. Pendency of Proceedings for Compensation. — *Wernke v. Hazen*, 32 Ind. 431; *Hollingsworth v. Stumph*, 131 Ind. 546; *Webster v. Stewart*, 6 Iowa 401; *Chicago, etc., R. Co. v. Tharnish*, 54 Iowa 690; *Webster City, etc., R. Co. v. Newson*, 70 Iowa 355; *Lunquest v. Ten Eyck*,

c. **USE OF LAND BY OCCUPANT WHILE RETAINING POSSESSION.** — An occupant remaining in possession under the circumstances indicated above may, it has been held, use the land for such purposes as he deems proper,¹ and is entitled to the crops which he may raise thereon.² But he may properly be restrained from making any further improvements on the property while so holding.³

3. **Power of Court to Extend Time for Payment for Improvements.** — In *Pennsylvania* it has been held that the court has power to extend the time fixed by the jury for the payment by the plaintiff in ejectment of the amount assessed to the defendants as the value of improvements, where the entry of a judgment on the verdict has been delayed by reason of a motion of the defendants for a new trial.⁴

4. **Election of Owner as to Taking Land or Receiving Unimproved Value** —
a. **RULE STATED.** — In some jurisdictions it is provided that the successful plaintiff in an action for the recovery of real property may, at his election, either take the land and pay the assessed value of the improvements, or let the unsuccessful defendant retain the land and pay to him, the plaintiff, the unimproved value thereof;⁵ or if the plaintiff neglects or refuses to pay the appraised value of the improvements within a reasonable time fixed by statute, or by the court, the defendant may, upon paying to the plaintiff or into court the appraised value of the land without the improvements, become entitled to a decree vesting the title to the land in him.⁶

Possession and Improvement of Different Portions of Land by Different Persons. — Where several persons have occupied and improved different portions of a tract of land, the owner may pay off the amount awarded as compensation for improvements to some, and as to others accept payment of the value of the land and relinquish his title.⁷

b. **TIME WITH REFERENCE TO WHICH VALUE OF LAND SHOULD BE COMPUTED.** — It has been held in *Maine* that the amount to be paid by the occupant is the value of the land at the time of trial, and not at the time of

40 Iowa 213; *Dunn v. Starkweather*, 6 Iowa 466.

1. **Right to Use Land.** — *Webster City, etc., R. Co. v. Newson*, 70 Iowa 355.

2. **Right to Crops.** — *Reilly v. Ringland*, 39 Iowa 106.

3. **Occupant May Be Restrained from Making Further Improvements.** — *Webster City, etc., R. Co. v. Newson*, 70 Iowa 355.

4. **Power of Court to Extend Time for Payment for Improvements.** — *Pendleton v. Richey*, 32 Pa. St. 58.

5. **Election of Owner as to Taking Land or Receiving Unimproved Value** — *Kansas*. — *Price v. Allen*, 39 Kan. 476; *Stephens v. Ballou*, 27 Kan. 594.

Maine. — *Cary v. Whitney*, 50 Me. 322.

Maryland. — *See Union Hall Assoc. v. Morrison*, 39 Md. 281.

Michigan. — *McKenzie v. A. P. Cook Co.*, 113 Mich. 452; *Burke v. Ingham Circuit Judge*, 42 Mich. 513; *Miller v. Clark*, 60 Mich. 162. See also *Cook v. Bertram*, 86 Mich. 356.

Missouri. — *Stump v. Hornback*, 94 Mo. 26; *Cox v. McDavit*, 125 Mo. 358.

Nebraska. — *Troxell v. Stevens*, 57 Neb. 329.

Ohio. — *Patterson v. Prather*, 11 Ohio 35; *McCoy v. Grandy*, 3 Ohio St. 463.

Owner After Making Election Must Abide By It. — *Miller v. Clark*, 60 Mich. 162.

Time of Making Election. — The owner must make his election by answer and before trial

in a proceeding against him for compensation for improvements under the *Missouri* statute. *Cox v. McDavit*, 125 Mo. 358.

Enhanced Value Greatly Disproportionate to Unimproved Value. — Under section 484 of the Code of *North Carolina*, if the enhanced value of the property is greatly disproportionate to the value of the land as unimproved, so that it might almost be said that the owner is "improved out of his property" he has an election to let the land go, relinquishing his estate upon payment by the occupant of its value as unimproved. *Barker v. Owen*, 93 N. Car. 198.

View that Owner by Recovering Land Thereby Makes an Election to Take it Which Binds Him. — *Clay v. Miller*, 2 Litt. (Ky.) 279.

6. **Right of Defendant to Pay Unimproved Value and Obtain Title Where Plaintiff Will Not Pay for Improvements.** — *Leighton v. Young*, 10 U. S. App. 298, decided under the *Nebraska* statute; *Cox v. Hart*, 145 U. S. 376, decided under the *Texas* statute, *Webster v. Stewart*, 6 Iowa 401.

Personal Judgment Not Authorized. — *Dungan v. Von Pahl*, 8 Iowa 263. See also *supra*, this title, II. 5. c. (2) *Provisions Rendering Statutes Unconstitutional* — (A) *Authorizing General Money Judgment for Improvements*.

7. **Where There Are Several Occupants of Distinct Portions of Land.** — *Benson v. Cahill*, (Tex. Civ. App. 1896) 37 S. W. Rep. 1088.

the entry of the occupant,¹ but the justice and reasonableness of a provision that the land shall be valued as of the date of the occupant's entry seem to be clearly shown by a recent case in a federal court.²

c. **ADJUSTMENT WHERE BOTH OWNER AND OCCUPANT DECLINE TO PAY** — (1) *Sale of Land and Division of Proceeds.* — Where a statute allows the owner an election as indicated above, but makes no provision as to what shall be done when the owner declines to pay the appraised value of the improvements, and the occupant declines to pay the appraised value of the land, equity will, in such case, treat the parties as having rights in the property in proportion to the value of the lands and the improvements respectively, and will divide the property, or the fund derived from its sale, accordingly, and a court of chancery, upon the motion of either the owner or the occupant, will decree a sale of the property and distribute the proceeds of the sale as to the parties in proportion to their respective interests.³

(2) *Tenancy in Common.* — It has been considered in *Iowa* that where the owner declines to pay for the improvements, and the occupant declines to pay the unimproved value of the land, the parties may become tenants in common, each holding an interest in proportion to the value of his property as ascertained by appraisement.⁴

5. **Extinguishment of Title of Owner by Failure to Pay for Improvements.** — In a few of the states it has been provided by law that, upon the failure of the landowner to pay the amount awarded to the occupant as compensation for his improvements within the time fixed by statute, the rights of the owner are extinguished and the title becomes vested in the occupant.⁵

6. **Extinguishment of Right of Occupant by Failure to Pay Unimproved Value.** — On the other hand it has been considered that the equitable rights of the occupant are sufficiently recognized by allowing him to obtain title by paying the unimproved value of the land, in case the owner will not pay for the

1. **Occupant Should Pay Value of Land at Time of Trial.** — *Cary v. Whitney*, 50 Me. 322.

2. **Justice and Reasonableness of Provision that Land Shall Be Valued as of Date of Occupant's Entry.** — See *Leighton v. Young*, 10 U. S. App. 298, *per Caldwell*, Cir. J.

3. **Sale of Improved Land and Division of Proceeds.** — *Leighton v. Young*, 10 U. S. App. 298. This was a *Nebraska* case.

4. **Occupant Cannot Have Land Sold until Owner Has Refused to Make Election.** — The occupant may not have the land and improvements sold to pay the parties the value of their respective interests — at least, not until a time has been fixed by the court within which the successful owner may elect whether he will accept the value of the land without the improvements, or pay the value of the improvements, and he has refused to make such election. *Troxell v. Stevens*, 57 Neb. 329.

5. **Rule under North Carolina Statutes.** — Under section 484 of the Code of North Carolina, if the enhanced value of property is greatly disproportionate to the value of the land improved, so that it might almost be said that the owner is "improved out of his property," he has an election to let the land go, relinquishing his estate upon payment by the occupant of its value as unimproved. Under section 485, if payment is not made to the occupant or into court for his use within a time to be fixed by the court, a sale may be ordered and therefrom the sum due the occupant taken, and the residue, if any, paid to the owner. And under section 479, if the owner does not exercise his

right of election, the sum adjudged the occupant constitutes a lien upon the land, and this can only be made effectual and enforced, if not paid without, by a sale of the premises. *Barker v. Owen*, 93 N. Car. 198.

4. **Tenancy in Common.** — *Webster v. Stewart*, 6 Iowa 401.

5. **Extinguishment of Title by Failure to Pay for Improvements.** — *Flynn v. Lemieux*, 46 Minn. 458; *Craig v. Dunn*, 47 Minn. 59; *Thomas v. Rewey*, 36 Wis. 328; *Scott v. Reese*, 38 Wis. 636; *Neeves v. Eron*, 73 Wis. 542. See also *Bailey v. White*, 13 Tex. 114.

In *Michigan*, unless the owner has elected to abandon the premises to the occupant, he must pay for the improvements within a year after the rendition of a final judgment in his favor or be barred of any recovery of the land. *Clark v. Green*, 62 Mich. 355.

One Year Is a Sufficiently Long Time to allow the plaintiff who has recovered property to pay for improvements, or else be barred of his recovery of the land. *Bailey v. White*, 13 Tex. 114.

Where Owner Had No Notice of Occupant's Possession. — An exception to the rule stated in the text was established by statute in *Minnesota* providing that where the occupant is in possession under color of title in fee, but not under an official deed, the successful claimant may, if he have no "notice, actual or constructive, of the occupant's possession," in time to disclose or assert his claim before the improvements in question were made, require the occupant to pay him the assessed value of the land. *Jewell v. Truhn*, 38 Minn. 433.

improvements, and that if the occupant will not avail himself of this privilege the legal title must prevail and the occupant will lose the benefit of his improvements.¹

7. Who Liable for Costs of Sale of Part of Land to Pay for Improvements. — It has been held in *Tennessee* that where the defendant to an ejectment bill lost the land, but recovered for improvements placed thereon by him, and a portion of the land was sold under the decree in the cause to pay for the improvements, the complainants were liable for the costs of such sale.²

XI. SETTING OFF RENTS AND PROFITS AGAINST CLAIM FOR IMPROVEMENTS
— 1. General Rule Stated. — Where a claim for improvements is made, the owner of the land may set off against it his claim for rents and profits,³ unless for some reason he is estopped,⁴ or the land has no rental value apart from the improvements.⁵ And improvements will not be allowed where the enhancement in value which they cause does not exceed the value of the use and occupation of the land.⁶

2. In Direct Proceedings for Compensation. — Where a defendant in an action for the possession of real property, after judgment against him, brings an action or proceeding to obtain compensation for his improvements, the owner may still set off his claim for rents and profits or damages,⁷ unless such claim

1. Extinguishment of Right of Occupant by Failure to Pay Unimproved Value. — *Cox v. Hart*, 145 U. S. 376 (*Texas* statute).

But compare *Van Zandt v. Brantley*, 16 Tex. Civ. App. 420, in which case it was held that where the defendant conceded the title of the plaintiff the court properly directed that if the amount allowed the defendant for improvements were not paid in six months the land should be sold to satisfy it, citing *Pearson v. Cox*, 71 Tex. 251, 10 Am. St. Rep. 740; *Bailey v. White*, 13 Tex. 114.

In *Nebraska* the rule stated in the text formerly prevailed, but has been abrogated by statute. *Leighton v. Young*, 10 U. S. App. 298. In this case Caldwell, Cir. J., delivering the opinion of the court, reviewed and explained the legislation in *Nebraska* on this subject.

2. Complainants in Ejectment Liable for Costs of Sale. — "It was entirely proper to charge complainants with the cost of sales, because the sales were made to satisfy decrees for balances found to be due from them upon the account." *Fisher v. Edington*, 85 Tenn. 23.

3. Owner May Set Off Rents and Profits Against Claim for Improvements — Georgia. — See *Williamingham v. Long*, 47 Ga. 510; *Dean v. Feely*, 69 Ga. 804; *Jenkins v. Means*, 59 Ga. 55.

Illinois. — See *Breit v. Yeaton*, 101 Ill. 242; *Mettler v. Craft*, 39 Ill. App. 193.

Indiana. — See *Carver v. Coffman*, 109 Ind. 547.

Kansas. — *Sarbach v. Newell*, 30 Kan. 103, 28 Kan. 642.

Texas. — *Ammons v. Dwyer*, 78 Tex. 639; *Robert v. Ezell*, 11 Tex. Civ. App. 176.

Virginia. — *Wood v. Krebs*, 33 Gratt. (Va.) 681. See also *Hollingsworth v. Funkhouser*, 85 Va. 448.

Canada. — *McCarthy v. Arbuckle*, 31 U. C. C. P. 48, 405.

Plaintiff in Action to Recover Land Need Not Have Demanded Rents and Profits — Texas. — *Ammons v. Dwyer*, 78 Tex. 639.

Judgment for Improvements Does Not Merge Previous Judgment for Damages for Detention of

Land — Indiana. — *Hollingsworth v. Stumph*, 131 Ind. 546.

4. Contract by Parol Vendor to Pay for Improvements. — Where the vendor in a parol contract for the sale of land has agreed to pay for improvements but made no stipulation as to the rents, he is not entitled to set off the rents when he is sued for the improvements upon his failure to complete the contract of sale. *Thouvenin v. Lea*, 26 Tex. 612.

5. Where Land Has No Rental Value Apart from Improvements. — Where the land had no rental value outside of the improvements put there by the possessor, the owner cannot offset any part of the enhanced value of the land by reason of the improvements by rents. *Thouvenin v. Lea*, 26 Tex. 612; *Van Zandt v. Brantley*, 16 Tex. Civ. App. 420.

6. Where Enhancement in Value from Improvements Does Not Exceed Value of Rents and Profits. — *Folt v. Allen*, 110 N. Car. 183; *Crawford v. Shaft*, 46 Kan. 704. See also *Connor v. Parsons*, (Tex. Civ. App. 1895) 30 S. W. Rep. 83.

Use of Land Held to Completely Offset Claim for Improvements. — In *Pierson v. Conley*, 95 Mich. 619, it was considered that where the defendant had had the benefit of the use of the land in controversy for about twenty-five years, this would offset all the improvements which he had made. It does not appear in what those improvements consisted. See also *Grider v. Driver*, 46 Ark. 109, where the court considered the improvements to have been fully compensated for by the use and occupation of the land up to a certain period, and ordered payment of rent for the balance of the time the land was occupied.

7. Rents and Profits May Be Set Off in Direct Proceeding for Compensation for Improvements. — *Welles v. Newsom*, 76 Iowa 81; *Parsons v. Moses*, 16 Iowa 440; *Barton v. National Land Co.*, 27 Kan. 634.

Claim for Rents and Profits Made in Action of Ejectment but Withdrawn. — The rule stated in the text was applied though a claim for such use and occupation was made in the original action of ejectment, where such claim was

has been merged in the previous judgment in his favor.¹

3. Period for Which Rents and Profits May Be Set Off. — Against a claim for improvements the owner may set off rents and profits or damages for the occupation for a period so remote that a direct recovery would be barred by the statute of limitations.²

4. Mesne Profits Prior to Entry of Occupant. — While a defendant in ejectment is not ordinarily liable for mesne profits taken, prior to his own entry, by those under whom he claims, yet if in accounting for the profits chargeable to himself he claims credit for improvements made by his predecessors,³ such improvements must first answer for the profits taken by those who erected them.⁴

5. Whether Rent Can Be Charged on Value of Property as Improved. — The general rule is that in estimating the rents and profits to be charged against the occupant, he should not be required to account for rents and profits on the land as enhanced in value by improvements placed thereon by him, but only for those rents and profits which might properly have been charged had the improvements not been made.⁵ This rule is, however, subject to some

withdrawn in open court and not determined upon in such action. *Welles v. Newsom*, 76 Iowa 81.

1. Claim for Rents and Profits Merged in Judgment for Plaintiff in Action of Ejectment. — *Lee v. Bowman*, 55 Mo. 400.

Only Rents and Profits Accruing Subsequent to Commencement of Action of Ejectment May Be Set Off — Nebraska. — *La Bonty v. Lundgren*, (Neb. 1899) 79 N. W. Rep. 551.

2. Owner May Set Off Rents and Profits a Direct Recovery of Which Would Be Barred — Iowa. — *Parsons v. Moses*, 16 Iowa 440. See also *Dungan v. Von Puhl*, 8 Iowa 263.

Kentucky. — *Whiting v. Taylor*, 8 Dana (Ky.) 403, 9 Dana (Ky.) 399.

Maryland. — *Tongue v. Nutwell*, 31 Md. 302.

North Carolina. — *Barker v. Owen*, 93 N. Car. 198, citing Code N. Car., § 477.

Rule in Alabama. — Where a defendant in ejectment seeks to obtain the benefit of improvements of a permanent character, under a suggestion of three years' adverse possession under Code Alabama (1876), §§ 2951-2954, the defendant is allowed full value for his improvements and the plaintiff full rent for his land, the one being adjusted by way of equitable set-off against the other. And in such case the provisions of section 2966, limiting the recovery of damages or rent, against persons holding possession and under color of title in good faith, to one year prior to suit brought, do not apply. *Turnipseed v. Fitzpatrick*, 75 Ala. 297.

3. As to the Right to Make Such a Claim. see *supra*, this title, VI. 1. *Improvements Placed on Land by Grantor or Predecessor in Title of Occupant.*

4. When Mesne Profits Prior to Entry of Occupant May Be Set Off. — *Gardner v. Granniss*, 57 Ga. 539.

5. Rent Cannot Be Charged on Value of Property as Improved — Alabama. — *Wisdom v. Reeves*, 110 Ala. 418. See also *Holt v. Adams*, (Ala. 1898) 25 So. Rep. 716; *Dozier v. Mitchell*, 65 Ala. 511; *Southern Cotton Oil Co. v. Henshaw*, 82 Ala. 448.

Arkansas. — *McCloy v. Arnett*, 47 Ark. 445.

Georgia. — *Dean v. Feely*, 69 Ga. 804.

Illinois. — *Breit v. Yeaton*, 101 Ill. 242; *Meitler v. Craft*, 39 Ill. App. 193.

Indiana. — *Adkins v. Hudson*, 19 Ind. 392; *Elliott v. Armstrong*, 4 Blackf. (Ind.) 424.

Iowa. — *Dungan v. Von Puhl*, 8 Iowa 263; *Wolcott v. Townsend*, 49 Iowa 456.

Kansas. — *Hentig v. Redden*, 1 Kan. App. 163.

Kentucky. — *Pugh v. Bell*, 2 T. B. Mon. (Ky.) 125, 15 Am. Dec. 142; *Taylor v. Whiting*, 9 Dana (Ky.) 399.

Maryland. — *Neale v. Hagthorpe*, 3 Bland (Md.) 551; *Worthington v. Hiss*, 70 Md. 172.

Massachusetts. — See *Hodgkins v. Price*, 141 Mass. 162.

Minnesota. — *Nash v. Sullivan*, 32 Minn. 189.

New York. — *Jackson v. Loomis*, 4 Cow. (N. Y.) 168, 15 Am. Dec. 347.

North Carolina. — *Barker v. Owen*, 93 N. Car. 198.

South Carolina. — *Johnson v. Pelot*, 24 S. Car. 255, 58 Am. Rep. 253. See also *Lewis v. Prince*, 3 Rich. Eq. (S. Car.) 175.

Texas. — *Van Zandt v. Brantley*, 16 Tex. Civ. App. 420; *Cahill v. Benson*, 19 Tex. Civ. App. 30, *Benson v. Cahill*, (Tex. Civ. App. 1896) 37 S. W. Rep. 1088; *Mahon v. Burnett*, (Tex. Civ. App. 1897) 45 S. W. Rep. 24; *Spicer v. Henderson*, (Tex. Civ. App. 1897) 43 S. W. Rep. 27; *Bitner v. New York, etc., Land Co.*, 67 Tex. 341.

Virginia. — *Hollingsworth v. Funkhouser*, 85 Va. 448.

Wisconsin. — See *Davis v. Light*, 30 Wis. 308.

Rent Not Chargeable on Improvements Made by Grantor or Predecessor in Title of Occupant. — *Pugh v. Bell*, 2 T. B. Mon. (Ky.) 125, 15 Am. Dec. 142; *Barker v. Owen*, 93 N. Car. 198; *Hollingsworth v. Funkhouser*, 85 Va. 448. See also *Jenkins v. Means*, 59 Ga. 55.

Rent Chargeable on Improvements Not Made by Occupant or Those under Whom He Claims. — See *Jenkins v. Means*, 59 Ga. 55.

Rule in Canada. — Where lasting improvements are not allowed to the person in possession, he should not be charged with any increase in rent attributable thereto. *Munsie v. Lindsay*, 11 Ont. 520; *Carroll v. Robertson*, 15 Grant Ch. (U. C.) 173; *Bright v. Campbell*, 54 L. J. Ch. 1077; *McGregor v. McGregor*, 5 Ont. 617.

Value of Improvements Must Be Shown. — Mesne profits, though arising chiefly out of the

exceptions, which are treated in the note.¹

Improvements Not Made in Good Faith. — The rental value of the land as improved may be allowed where the court has found that the improvements were not made in good faith.²

Rule in Mississippi. — In Mississippi rent is charged on the value of the property as improved where the occupant is allowed compensation for his improvements.³

XII. WAIVER OR FORFEITURE OF CLAIM FOR IMPROVEMENTS. — The right to recover compensation may be waived, abandoned, or forfeited by a failure to claim the same,⁴ or to comply with the statutory requirements in order to secure an allowance;⁵ by voluntarily abandoning the improvements;⁶ or, in *Nebraska*, by electing to remove them.⁷

XIII. RULES CONCERNING IMPROVEMENTS BY LESSEES. — It is well settled that one who has occupied land merely as the tenant or lessee of another is not entitled, as against his lessor, to any compensation for improvements which he may have placed on the demised premises in the absence of some express or implied covenant or agreement on the part of the lessor to pay therefor.⁸

improvements, and though the land, if vacant, would have been worth nothing for rent, are not to be diminished on account of the value added to the land by constructing the improvements, unless there be some evidence of what amount in value was so added. *Jenkins v. Means*, 59 Ga. 55.

Former Rule in Texas. — The proper construction of article 4814 of the Texas Revised Statutes is that one who had improved the land of another, being in possession *bona fide*, upon setting up his claim for the value of his improvements, cannot be made to account for so much of the value of the use and occupation as has accrued from the improvements so made. But rent could be charged upon improvements erected before the revised statutes went into effect, for that right under the former statute was a vested right such as was preserved by section 5 of the final title of the revised statutes. *Bitner v. New York, etc., Land Co.*, 67 Tex. 341. See also *Ebetts v. Tendick*, 44 Tex. 570.

1. Improvements Consisting of Preparing Land for Cultivation. — The occupant has been required "to pay rent according to the increased adaptation of the land for the purpose for which it is used, though such adaptation is brought about by the occupant's own labors." *Dungan v. Von Puhl*, 8 Iowa 263. *Followed in Wolcott v. Townsend*, 49 Iowa 456.

Rents During Pendency of Appeal. — Where the occupant has appealed from a judgment against him in an action for the recovery of the land and given a supersedeas bond for the rental value, he may be charged rent on the improvements during the pendency of his appeal. *Norton v. Davis*, 13 Tex. Civ. App. 90.

Where Interest Is Allowed on Value of Improvements. — If the owner of property be decreed to pay interest on the value of the improvements, he should be allowed the value of the use of them; otherwise not. *Childs v. Shower*, 18 Iowa 261. See also *Dungan v. Von Puhl*, 8 Iowa 263; *Parsons v. Moses*, 16 Iowa 440; *Fawcett v. Burwell*, 27 Grant Ch. (U. C.) 445.

As to the propriety of allowing such interest, see *supra*, this title, IV. 6. *Interest*.

2. Improvements Not Made in Good Faith. — *Gilley v. Williams*. (Tex. Civ. App. 1897) 43 S. W. Rep. 1094.

3. Rule in Mississippi. — "The full rule is, allowance to defendants for improvements to the extent of the enhanced vendible value of the lands imparted by such improvements, and liability for enhanced rental value imparted by the same improvements. This rule is so just, so reasonable, so fair to both parties that we must adhere to it." *Hicks v. Blake-man*, 74 Miss. 459. See also *Miller v. Ingram*, 56 Miss. 510.

Where Compensation for Improvements Is Denied. — If the improvement does not inure to the benefit of the plaintiff, justice is done by denying the defendant the value of it; and if the defendant can get no pay for an improvement, the plaintiff should not be allowed any rent by reason of such improvement. *Johnson v. Futch*, 57 Miss. 73; *Nixon v. Porter*, 38 Miss. 401; *Phillips v. Chamberlain*, 61 Miss. 240. See also *Tatum v. McLellan*, 56 Miss. 352.

4. Abandonment by Failure to Claim Value of Improvements. — *Pearce v. Gibbon*, 6 Rev. Lég. 649.

5. Refusal to Appoint Referee to Ascertain Value — Alabama. — *Steele v. Hanna*, 91 Ala. 190; *Prichard v. Sweeney*, 109 Ala. 651.

6. Waiver of Claim for Compensation by Voluntarily Abandoning Improvements. — *Miller v. Tobie*, 41 N. H. 84.

7. Election to Remove Improvements. — One who has occupied and improved school lands of the state waives his right to compensation for the improvements by electing to remove them. *Luse v. Rankin*, 57 Neb. 632.

8. Lessee Not Entitled to Compensation for Improvements in Absence of Agreement Therefor — England. — See *Pierce v. Webb*, 3 Bro. C. C. (Belt ed.) 16 note, *Wildridge v. McKane*, 8 Ir. Eq. 231.

Canada. — *Adamson v. Rogers*, 26 Can. Sup. Ct. 159. See also *Townsley v. Neil*, 10 Grant Ch. (U. C.) 72.

United States. — *Kutter v. Smith*, 2 Wall. (U. S.) 491.

A Full Discussion of the question of the respective rights of the landlord and the tenant under leases containing such covenants or agreements will be given in another part of this work, to which reference is made.¹

XIV. RULES CONCERNING IMPROVEMENTS BY ONE OF SEVERAL COTENANTS

— 1. Right to Allowance Therefor. — It is generally considered that where one of several joint tenants or tenants in common of real property has erected improvements thereon, he is entitled to an allowance therefor on a partition of the property,² in addition to his *pro rata* interest in the

Arkansas. — *Gocio v. Day*, 51 Ark. 46; *Jones v. Hoad*, 59 Ark. 42, 43 Am. St. Rep. 17.

Colorado. — See *Hughes v. Ford*, 15 Colo. 330.

Georgia. — *Milledgeville v. Thomas*, 69 Ga. 535. See also *Barnes v. Shinholster*, 14 Ga. 131.

Illinois. — *Gardner v. Watson*, 18 Ill. App. 386; *Schreiber v. Chicago, etc.*, R. Co., 115 Ill. 346.

Indiana. — *Mull v. Graham*, 7 Ind. App. 561.

Iowa. — See *Wright v. Stevens*, 3 Greene (Iowa) 63.

Kentucky. — *Gudgell v. Duvall*, 4 J. J. Marsh. (Ky.) 229. See also *Wilkinson v. Nichols*, 1 T. B. Mon. (Ky.) 36.

Louisiana. — *Sigur v. Lloyd*, 1 La. Ann. 421. See also *Talley v. Alexander*, 10 La. Ann. 627.

Maine. — See *Doak v. Wiswell*, 38 Me. 569.

Massachusetts. — See *Haven v. Adams*, 8 Allen (Mass.) 363.

Michigan. — *Leslie v. Smith*, 32 Mich. 65.

Missouri. — *Wilkerson v. Farnham*, 82 Mo. 672. See also *Yeatman v. Clemens*, 6 Mo. App. 210; *McQueen v. Chouteau*, 20 Mo. 222, 64 Am. Dec. 178.

New Hampshire. — *Rand v. Dodge*, 17 N. H. 343.

New Jersey. — *Woolley v. Osborne*, 39 N. J. Eq. 54.

New York. — *Cosgriff v. Foss*, 65 Hun (N. Y.) 184; *Finkelmeier v. Bates*, 92 N. Y. 172. See also *Van Alen v. Rogers*, 1 Johns. Cas. (N. Y.) 281, 1 Am. Dec. 113; *Paine v. Trinity Church*, 7 Hun (N. Y.) 89.

North Carolina. — *Pomeroy v. Lambeth*, 1 Ired. Eq. (36 N. Car.) 65, 36 Am. Dec. 33; *Foster v. Penry*, 77 N. Car. 160; *Merritt v. Scott*, 81 N. Car. 385; *Parker v. Allen*, 84 N. Car. 466; *Hahn v. Guilford*, 87 N. Car. 172; *Dunn v. Bagby*, 88 N. Car. 91.

Ohio. — *Worthington v. Young*, 8 Ohio 401. See also *Davis v. Porter*, 10 Ohio Cir. Ct. 243, 6 Ohio Cir. Dec. 607, 3 Ohio Dec. 427.

Pennsylvania. — *Pollman v. Morgester*, 99 Pa. St. 611.

Tennessee. — *State v. McMinnville, etc.*, R. Co., 6 Lea (Tenn.) 369; *Wilson v. Scruggs*, 7 Lea (Tenn.) 635. See also *Hite v. Parks*, 2 Tenn. Ch. 373.

Texas. — *Hintze v. Krabbschmidt*, (Tex. Civ. App. 1897) 44 S. W. Rep. 38.

Washington. — *J. F. Hart Lumber Co. v. Everett Land Co.*, 20 Wash. 71.

West Virginia. — *Windom v. Stewart*, 43 W. Va. 711.

Wisconsin. — *Yates v. Bachley*, 33 Wis. 185. See also *Hopkins v. Gilman*, 47 Wis. 581; *Ecke v. Fetzer*, 65 Wis. 55.

1. Rights under Covenants or Agreements in Lease. — See the title LEASES.

2. Allowance for Improvements May Be Made in Partition — *Alabama.* — *Sanders v. Robertson*,

57 Ala. 465. See also *Ormond v. Martin*, 37 Ala. 598.

Illinois. — *Dean v. O'Meara*, 47 Ill. 120.

Indiana. — *Martindale v. Alexander*, 26 Ind. 104, 89 Am. Dec. 458; *Lane v. Taylor*, 40 Ind. 495; *Elrod v. Keller*, 89 Ind. 382; *Parish v. Camplin*, 139 Ind. 1; *Carver v. Coffman*, 109 Ind. 547.

Iowa. — *Van Ormer v. Harley*, 102 Iowa 150; *Killmer v. Wuchner*, 79 Iowa 722, 18 Am. St. Rep. 392.

Kansas. — See *Sarbach v. Newell*, 30 Kan. 102.

Kentucky. — *Borah v. Archers*, 7 Dana (Ky.) 176.

Louisiana. — *Litton v. Litton*, 36 La. Ann. 348.

Maine. — *Reed v. Reed*, 68 Me. 568; *Allen v. Hall*, 50 Me. 253.

Maryland. — See *Worthington v. Hiss*, 70 Md. 172.

Massachusetts. — *Husband v. Aldrich*, 135 Mass. 317. See also *Chandler v. Simmons*, 105 Mass. 412.

Prior to the enactment of the Massachusetts statute of 1850, c. 278 (Gen. Stat., c. 136), the rule in that state was otherwise. See *Marshall v. Crehore*, 13 Met. (Mass.) 462.

Michigan. — *Michigan Act 150 of 1885*. See, prior to the statute, *Martin v. O'Conner*, 37 Mich. 440.

Missouri. — *Spitts v. Wells*, 18 Mo. 469.

New York. — *Conklin v. Conklin*, 3 Sandf. Ch. (N. Y.) 64; *Scott v. Guernsey*, 48 N. Y. 106. But compare *Jackson v. Bradt*, 2 Cai. (N. Y.) 303.

Ohio. — *Penrod v. Danner*, 19 Ohio 218.

Pennsylvania. — See *Jevons v. Kline*, 9 Kulp (Pa.) 305.

South Carolina. — *Buck v. Martin*, 21 S. Car. 590, 53 Am. Rep. 702; *Annelly v. De Saussure*, 17 S. Car. 389; *Johnson v. Pelot*, 24 S. Car. 255, 58 Am. Rep. 258.

Texas. — See *Curtis v. Poland*, 66 Tex. 511; *Cardwell v. Rogers*, 76 Tex. 37.

Virginia. — *Ballou v. Ballou*, 94 Va. 350; *Carter v. Carter*, 5 Munf. (Va.) 108.

Canada. — See *Wood v. Wood*, 16 Grant Ch. (U. C.) 471.

A Tenant by the Curtesy Initiate of his wife's undivided interest in land may be allowed for improvements erected by him, as he presumably acted for himself and his wife, and therefore cannot be considered as a mere stranger or volunteer. *Kelsey's Appeal*, 113 Pa. St. 119, 57 Am. Rep. 444.

Improvements Made for His Own Benefit by Tenant in Common in Sole Possession with Acquiescence of Others. — A tenant in common, who has been in sole occupation of the land with the acquiescence of the others, whose right he recognizes, will not be allowed compensation for improvements which add little if anything

premises.¹ This right is distinct and different from any right to recover a proportion of the expenses of improvements by an action of assumpsit, or any similar action against the other cotenants, and has been recognized even where the latter right is denied.²

Distinction Depending upon Knowledge of Title of Cotenants. — In *South Carolina* the right to an allowance for improvements has been said to depend upon whether or not the cotenant knew of the title of the other cotenants,³ but such a distinction does not prevail generally in regard to all methods of allowance.¹

Assent of Cotenants Not Necessary. — To entitle a tenant in common to an allowance on a partition in equity for the improvements made on the premises, it does not appear to be necessary for him to show the assent of his cotenants to such improvements or a promise on their part to contribute their share of the expense, nor is it necessary for him to show a previous request to join in the improvements and their refusal.⁵

2. How the Allowance Is Made — a. BY ASSIGNING IMPROVED PORTION OF PROPERTY TO MAKER OF IMPROVEMENTS. — (1) *Method Adopted When Practicable.* — The most equitable mode of making such an allowance is to assign to the tenant who has made the improvements that portion of the property on

to the salable value of the land, and were put there for the benefit of himself alone. *Hixon v. Bridges*, (Ky. 1897) 38 S. W. Rep. 1046. See also *Cosgriff v. Foss*, 152 N. Y. 104, 57 Am. St. Rep. 500, affirming 65 Hun (N. Y.) 184, in which a tenant in common, who held exclusive possession under a lease from his cotenant, was refused an allowance for improvements made for the purpose of carrying on his business and not for the benefit of the property, the increased income resulting from the improvements benefiting the occupant alone.

Improvements Made by Tenants in Common in Reversion During the Previous Life Estate. — The fact that improvements were made by tenants in common in reversion during the previous life estate has been held no bar to an allowance to them for such improvements. *Hall v. Piddeck*, 21 N. J. Eq. 311; *Brookfield v. Williams*, 2 N. J. Eq. 341; *Green v. Putnam*, 1 Barb. (N. Y.) 500. See also *Killmer v. Wuchner*, 79 Iowa 722, 18 Am. St. Rep. 392; *Broyles v. Waddel*, 11 Heisk. (Tenn.) 32. *Contra*, *Lasby v. Crewson*, 21 Ont. 255.

As to the rights of life tenants, see *infra*, this title, *Rules Concerning Improvements by Life Tenants or Tenants for Years*.

When Improvements May Inure to Benefit of All Cotenants. — In *Kelsey's Appeal*, 113 Pa. St. 119, 57 Am. Rep. 444, *Mercur, C. J.*, delivering the opinion of the court, said: "It may be conceded that there may be cases of partition in which the improvements should be held to inure to the benefit of all the cotenants. It is well intimated such might be the case where one cotenant undertakes to improve the whole estate as by erecting a building covering the whole of a city lot."

Action to Set Aside Sale. — When, in an action to set aside an administrator's sale, it is found that the purchaser is the owner of half the property, he should be charged with half of the rent and credited with half of the value of the improvements. *Barks v. Vaughan*, (Ark. 1892) 19 S. W. Rep. 754. See also *Nichols v. Nichols*, 79 Tex. 332.

Lien Resulting from Improvements. — There is a lien resulting to a joint owner of any real

estate from improvements made upon such property for the joint benefit. *Gavin v. Carling*, 55 Md. 530.

1. Allowance in Addition to Pro Rata Interest in Premises. — *Dean v. O'Meara*, 47 Ill. 120; *Kurtz v. Hibner*, 55 Ill. 514, 8 Am. Rep. 665. And see also cases cited in preceding note.

2. Right to Allowance on Partition Recognized but Right to Recover Directly from Cotenants Denied. — *Ballou v. Ballou*, 94 Va. 350. See also *Cosgriff v. Foss*, 152 N. Y. 104, 57 Am. St. Rep. 500, affirming 65 Hun (N. Y.) 184; *Clapp v. Nichols*, 31 N. Y. App. Div. 531, 32 N. Y. App. Div. 628.

As to the right to such direct recovery, see the title **JOINT TENANTS AND TENANTS IN COMMON**.

3. Distinction Depending upon Knowledge of Title of Cotenants. — *Johnson v. Pelot*, 24 S. Car. 255, 58 Am. Rep. 253, citing 1 Story Eq. Jur., § 655; *Thurston v. Dickinson*, 2 Rich. Eq. (S. Car.) 317, 46 Am. Dec. 56; *Dellet v. Whitner*, Cheves Eq. (S. Car.) 223; *Hancock v. Day*, McMull. Eq. (S. Car.) 69, 36 Am. Dec. 293; *Thompson v. Bostick*, McMull. Eq. (S. Car.) 79; *Williman v. Holmes*, 4 Rich. Eq. (S. Car.) 476; *Scaife v. Thomson*, 15 S. Car. 268; *Annelly v. De Saussure*, 17 S. Car. 391; *Johnson v. Harrelson*, 18 S. Car. 604; *Buck v. Martin*, 21 S. Car. 592, 53 Am. Rep. 702.

4. Distinction Not General. — See the remaining portion of this section.

5. Consent of Cotenants Not Necessary. — *Ballou v. Ballou*, 94 Va. 350. In this case *Harrison, J.*, delivering the opinion of the court, said: "The allowance of compensation for improvements is, in all cases, made not as a matter of legal right, but purely from the desire of the court to do justice, and therefore the compensation will be estimated so as to inflict no injury on the cotenant against whom the improvements are charged. *Freeman on Cotenancy and Partition*, § 510; 3 *Pomeroy's Eq. Jur.* § 1389; 1 *Story's Eq. Jur.*, § 655; *Ruffner v. Lewis*, 7 Leigh (Va.) 720, 30 Am. Dec. 513, note to *Robinson v. McDonald*, 11 Tex. 385, 62 Am. Dec. 482, and the cases there cited."

which they are situated, the division being made on the basis of the unimproved value; and this is the method which is adopted whenever the nature of the property and the improvements, and the situation of the latter, are such as to render it practicable,¹ and it can be done without injury to the other cotenants.²

(2) *Whether Cotenant Must Have Claimed Exclusive Title and Acted in Good Faith.* — It would seem that the one who made the improvements may be allowed for them in this manner regardless of whether or not he claimed

1. Assignment of Improved Portion Preferred When Practicable — *England* — See *Story v. Johnson*, 1 Y. & C. Exch. 538.

Canada. — *Hovey v. Ferguson*, cited in *Biehn v. Biehn*, 18 Grant Ch. (U. C.) 498; *Wood v. Wood*, 16 Grant Ch. (U. C.) 471.

Alabama. — *Wilkinson v. Stuart*, 74 Ala. 198; *Ferris v. Montgomery Land, etc., Co.*, 94 Ala. 557, 33 Am. St. Rep. 146; *Sanders v. Robertson*, 57 Ala. 465; *Donnor v. Quartermas*, 90 Ala. 164, 24 Am. St. Rep. 778.

Arkansas. — *Drennen v. Walker*, 21 Ark. 557.

California. — *Seale v. Soto*, 35 Cal. 102.

Illinois. — *Beam v. Scroggin*, 12 Ill. App. 321; *Mahoney v. Mahoney*, 65 Ill. 408; *Louvalle v. Menard*, 6 Ill. 39, 41 Am. Dec. 161; *Dean v. O'Meara*, 47 Ill. 120. See also *Chambers v. Jones*, 72 Ill. 281.

Indiana. — *Carver v. Coffman*, 109 Ind. 547; *Elrod v. Keller*, 89 Ind. 382. See also *Alleman v. Hawley*, 117 Ind. 532.

Kansas. — See *Sarbach v. Newell*, 28 Kan. 642.

Kentucky. — *Withers v. Thompson*, 4 T. B. Mon. (Ky.) 335; *Nelson v. Clay*, 7 J. J. Marsh. (Ky.) 138, 23 Am. Dec. 387; *Hart v. Hawkins*, 3 Bibb (Ky.) 510, 6 Am. Dec. 666; *Smith v. Frost*, 1 Bibb (Ky.) 377; *Borah v. Archers*, 7 Dana (Ky.) 176.

Maryland. — *Dugan v. Baltimore*, 70 Md. 1. See also *Gittings v. Worthington*, 67 Md. 139; *Worthington v. Hiss*, 70 Md. 172.

Massachusetts. — *Crafts v. Crafts*, 13 Gray (Mass.) 360.

Michigan. — *Fenton v. Miller*, 116 Mich. 45.

Missouri. — *Spitts v. Wells*, 18 Mo. 469.

Nebraska. — *Carson v. Broady*, 56 Neb. 648.

New Jersey. — *Booraem v. Wells*, 19 N. J. Eq. 87; *Brookfield v. Williams*, 2 N. J. Eq. 341; *Hall v. Piddock*, 21 N. J. Eq. 311.

New York. — *Town v. Needham*, 3 Paige (N. Y.) 545, 24 Am. Dec. 246; *St. Felix v. Rankin*, 3 Edw. (N. Y.) 323; *Cosgriff v. Foss*, 152 N. Y. 104, 57 Am. St. Rep. 500, affirming 65 Hun (N. Y.) 184, citing 17 AM. AND ENG. ENCYC. OF LAW (1st ed.) 758; *Conklin v. Conklin*, 3 Sandf. Ch. (N. Y.) 64. See also *Stephenson v. Cotter*, (Supm. Ct. Spec. T.) 5 N. Y. Supp. 749.

North Carolina. — *Pope v. Whitehead*, 68 N. Car. 191; *Collett v. Henderson*, 80 N. Car. 337. See also *Pipkin v. Pipkin*, 120 N. Car. 161.

Pennsylvania. — *Kelsey's Appeal*, 113 Pa. St. 119, 57 Am. Rep. 444.

South Carolina. — *Sutton v. Sutton*, 26 S. Car. 33; *Annelly v. De Saussure*, 17 S. Car. 389; *Seafie v. Thomson*, 15 S. Car. 337; *Johnson v. Pelot*, 24 S. Car. 255, 58 Am. Rep. 253. See also *William v. Holmes*, 4 Rich. Eq. (S. Car.) 476; *Johnson v. Harrelson*, 18 S. Car. 604;

Buck v. Martin, 21 S. Car. 592, 53 Am. Rep. 702.

Tennessee. — *Reeves v. Reeves*, 11 Heisk. (Tenn.) 609. See also *Broyles v. Waddel*, 11 Heisk. (Tenn.) 32.

Texas. — *Osborn v. Osborn*, 62 Tex. 495; *Robinson v. McDonald*, 11 Tex. 385, 62 Am. Dec. 482, note; *Yancy v. Batte*, 48 Tex. 46; *Acklin v. Paschal*, 43 Tex. 147; *Curtis v. Poland*, 66 Tex. 511; *Spicer v. Henderson*, (Tex. Civ. App. 1897) 43 S. W. Rep. 27. See also *Clift v. Clift*, 72 Tex. 144; *McLane v. Canales*, (Tex. Civ. App. 1894) 25 S. W. Rep. 31; *Tevis v. Collier*, 84 Tex. 638; *Thompson v. Jones*, 77 Tex. 629; *Taylor v. Taylor*, (Tex. Civ. App. 1894) 26 S. W. Rep. 889; *Mahon v. Barnett*, (Tex. Civ. App. 1897) 45 S. W. Rep. 24; *Griffie v. Maxey*, 58 Tex. 210.

West Virginia. — *Ward v. Ward*, 40 W. Va. 611, 52 Am. St. Rep. 911; *Dodson v. Hays*, 29 W. Va. 597.

Improvements Made for Personal Convenience. — In *Rowan v. Reed*, 19 Ill. 21, the court refused to apportion to the occupying tenant improvements made by him for his personal convenience, and not for the benefit of the estate, and of which he had had enjoyment for several years.

Improvements by Grantee of Original Cotenant. — If the improvements are made, not by the original tenant in common, but by his grantee, there is no good reason why the latter should not have the benefit of the same measure of protection which a court of equity would have afforded to his grantor if no conveyance had been made. *Ferris v. Montgomery Land, etc., Co.*, 94 Ala. 557, 33 Am. St. Rep. 146, citing 11 AM. AND ENG. ENCYC. OF LAW (1st ed.) 1092, 1093; *Young v. Edwards*, 33 S. Car. 404, 26 Am. St. Rep. 689; *Gittings v. Worthington*, 67 Md. 146; *Teal v. Woodworth*, 3 Paige (N. Y.) 472; *St. Felix v. Rankin*, 3 Edw. (N. Y.) 323; *Camoran v. Thurmond*, 56 Tex. 22; *Boggess v. Meredith*, 16 W. Va. 28; *Worthington v. Staunton*, 16 W. Va. 208.

In *Maine*, in order for one tenant who has occupied and improved the premises to have his share set off so as to include his improvements without considering their value, he must show "that by mutual consent he had the exclusive possession of a part of the estate and made improvements thereon." But without such consent he is entitled to have the value of the improvements considered in assigning the shares so that he shall receive the benefit of them, though in the division some other part of the property fall to him. *Reed v. Reed*, 68 Me. 568; *Allen v. Hall*, 50 Me. 253.

2. No Injury to Other Cotenants. — *Sanders v. Robertson*, 57 Ala. 465; *Seale v. Soto*, 35 Cal.

the exclusive title to the property at the time he made them,¹ and without reference to the question whether or not he acted in good faith,² for the rights of the other cotenants are in no way affected by such a partition being made.³

(3) *Right to Have Improved Portion Set Off Recognized, Though Right to Pecuniary Compensation Denied.* — There are cases which have recognized the right of an occupant who has made improvements to have them set off to him on partition, as stated above, although they denied any right in the occupant to pecuniary compensation.⁴

(4) *Distinction Depending upon Whether Improving Tenant Is Plaintiff in Partition.* — In some jurisdictions the right of an improving tenant to have the improved portion assigned to him on partition has been limited to cases in which the other tenant seeks the partition,⁵ but in others the improving tenant has been considered to be entitled to receive such portion though he was plaintiff in the partition suit.⁶

(5) *Right Not Dependent upon Consent of Cotenants to Improvements.* — The equity of a cotenant to have the part of the common property which he has improved allotted to him on a partition is not founded upon the idea that he made the improvements with the consent, express or implied, of his cotenants.⁷

b. BY REQUIRING PAYMENT OF COMPENSATION BY OTHER COTENANTS — (1) *In General.* — Where such a division of the property as is indicated above is not practicable, the other cotenants may be required to pay to the

102; *Ward v. Ward*, 40 W. Va. 611, 52 Am. St. Rep. 911.

1. **Cotenant Making Improvements Need Not Have Believed Himself to Be the Sole Owner.** — *Ferris v. Montgomery Land, etc., Co.*, 94 Ala. 557, 33 Am. St. Rep. 146; *Hall v. Piddock*, 21 N. J. Eq. 311. See also *Dean v. O'Meara*, 47 Ill. 120; *Kurtz v. Hibner*, 55 Ill. 514, 8 Am. Rep. 665; *Sarbach v. Newell*, 30 Kan. 102. But compare *Austin v. Barrett*, 44 Iowa 489; and *supra*, this section, *Right to Allowance Therefor*, paragraph *Distinction Depending upon Knowledge of Title of Cotenants*.

Belief in Sole Title an Equitable Consideration in Favor of Occupant. — The authorities generally, both in cases where compensation for improvements is allowed and in cases where the improved portion of the estate is allotted to the cotenant who has expended his labor and capital thereon, treat the fact that the improvements were made by one who supposed himself to be legally entitled to the whole premises, as an equitable consideration in his favor. *Ferris v. Montgomery Land, etc., Co.*, 94 Ala. 557, 33 Am. St. Rep. 146; *Patrick v. Marshall*, 2 Bibb (Ky.) 40, 4 Am. Dec. 670; *Pitt v. Moore*, 99 N. Car. 85, 6 Am. St. Rep. 489.

2. **Not Necessary that Improvements Should Have Been Made in Good Faith.** — *Mahon v. Barnett*, (Tex. Civ. App. 1897) 45 S. W. Rep. 24, citing *McLane v. Canales*, (Tex. Civ. App. 1894) 25 S. W. Rep. 31; *Tewis v. Collier*, 84 Tex. 638; *Thompson v. Jones*, 77 Tex. 629.

The Only Good Faith Required is that the tenant should have made the improvements honestly for the purpose of improving the property, and not of embarrassing his cotenants, or encumbering their estate, or hindering partition. *Hall v. Piddock*, 21 N. J. Eq. 311.

3. **Assignment of Improved Portion to Cotenant Who Made the Improvements Does Not Affect Rights of Other Cotenants.** — *Ferris v. Mont-*

gomery Land, etc., Co., 94 Ala. 557, 33 Am. St. Rep. 146; *Brookfield v. Williams*, 2 N. J. Eq. 341.

4. **Right to Have Improved Portion Set Off Recognized, but Right to Pecuniary Compensation Denied.** — *Stephenson v. Cotter*, (Supm. Ct. Spec. T.) 5 N. Y. Supp. 749; *Taylor v. Taylor*, (Tex. Civ. App. 1894) 26 S. W. Rep. 889.

On partition, the part improved should be assigned to the improver, if it can be done without injury to others, but when this cannot be done, the cost of the improvement cannot be charged to him to whom it goes. *Ward v. Ward*, 40 W. Va. 611, 52 Am. St. Rep. 911.

5. **Right to Assignment of Improved Portion Limited to Cases Where Other Tenants Seek Partition.** — *Swan v. Swan*, 8 Price 518; *Bazemore v. Davis*, 55 Ga. 519; *Ford v. Knapp*, 102 N. Y. 141, 55 Am. Rep. 782. See also *Davis v. Smith*, 5 Ga. 289, 48 Am. Dec. 279, in which this difference of rights between a plaintiff and a defendant is recognized but severely criticised.

Under the *Massachusetts* statutes, (Gen. Stat., c. 136) a plaintiff seeking partition is not entitled to have assigned to him a portion of the land which he has improved without the knowledge or consent of his cotenants, and without including the value of the improvements in the partition. *Husband v. Aldrich*, 135 Mass. 317.

6. **Plaintiff in Partition Suit Allowed Improved Portion.** — *Spitts v. Wells*, 18 Mo. 469; *Brookfield v. Williams*, 2 N. J. Eq. 341; *Doughaday v. Crowell*, 11 N. J. Eq. 203.

7. **Right Not Dependent upon Assent of Cotenants.** — *Ferris v. Montgomery Land, etc., Co.*, 94 Ala. 565. See also *Wilkinson v. Stuart*, 74 Ala. 198; *Nelson v. Clay*, 7 J. J. Marsh. (Ky.) 138, 23 Am. Dec. 387; *St. Felix v. Rankin*, 3 Edw. (N. Y.) 323; *Robinson v. McDonald*, 11 Tex. 385, 62 Am. Dec. 480.

one who made the improvements a proportion of the enhancement of value which has resulted therefrom, equal to their interest in the property.¹

(2) *Necessity for Claim of Exclusive Title and Good Faith.* — But it has been frequently held that in order for a cotenant to be entitled to this relief, he must have claimed the exclusive title to the property, and have held exclusive possession thereof, at the time when he erected the improvements for which he claims compensation,² and in making such improvements should have acted in good faith.³ Thus, if a cotenant purposely covers the whole of the estate with valuable improvements in such a manner as to render it impossible to assign the shares of the others without including part of such improvements, he will be considered as a volunteer as to them, and when they were made without the consent of his cotenants he is not entitled to compensation.⁴

1. *Other Cotenants May Be Required to Compensate the One Who Made Improvements* — *England.* — *Swan v. Swan*, 8 Price 518.

United States. — *McClaskey v. Barr*, 62 Fed. Rep. 209.

Alabama. — *Sanders v. Robertson*, 57 Ala. 465; *Ormond v. Martin*, 37 Ala. 598; *Ferris v. Montgomery Land, etc., Co.*, 94 Ala. 557, 33 Am. St. Rep. 146.

Arkansas. — *Drennen v. Walker*, 21 Ark. 540; *Shepherd v. Jernigan*, 51 Ark. 275, 14 Am. St. Rep. 50.

Illinois. — *Baird v. Jackson*, 98 Ill. 78; *Kurtz v. Hibner*, 55 Ill. 521, 8 Am. Rep. 665; *Dean v. O'Meara*, 47 Ill. 120; *Louvalle v. Menard*, 6 Ill. 39, 41 Am. Dec. 161; *Mahoney v. Mahoney*, 65 Ill. 406. See also *McParland v. Larkin*, 155 Ill. 84.

Indiana. — *Carver v. Coffman*, 109 Ind. 547; *Martindale v. Alexander*, 26 Ind. 105, 89 Am. Dec. 458. See also *Parish v. Camplin*, 139 Ind. 1, *citing* 17 AM. AND ENG. ENCYC. OF LAW, (1st ed.) 760, 761.

Iowa. — *Killmer v. Wuchner*, 79 Iowa 722, 18 Am. St. Rep. 392.

Kansas. — *Sarbach v. Newell*, 30 Kan. 102.

Kentucky. — *Arterburn v. Gwathmey*, 3 Bibb (Ky.) 306; *Respass v. Breckenridge*, 2 A. K. Marsh. (Ky.) 584; *Sneed v. Atherton*, 6 Dana (Ky.) 281, 32 Am. Dec. 70; *Borah v. Archers*, 7 Dana (Ky.) 177.

Louisiana. — *Litton v. Litton*, 36 La. Ann. 348; *Davis v. Wilcoxon*, 10 La. Ann. 640.

Maryland. — *Worthington v. Hiss*, 70 Md. 172.

Massachusetts. — *Husband v. Aldrich*, 135 Mass. 317; *Chandler v. Simmons*, 105 Mass. 412.

Michigan. — *Pierson v. Conley*, 95 Mich. 619.

Mississippi. — *Nelson v. Leake*, 25 Miss. 199.

Missouri. — *Spitts v. Wells*, 18 Mo. 468.

New Jersey. — *Doughaday v. Crowell*, 11 N. J. Eq. 204.

New York. — *Green v. Putnam*, 1 Barb. (N. Y.) 500; *Hitchcock v. Skinner*, Hoffm. (N. Y.) 21; *St. Felix v. Rankin*, 3 Edw. (N. Y.) 323.

North Carolina. — *Tucker v. Markland*, 101 N. Car. 422.

Ohio. — *Youngs v. Heffner*, 36 Ohio St. 232.

South Carolina. — *Johnson v. Pelot*, 24 S. Car. 255, 58 Am. Rep. 253; *Sutton v. Sutton*, 26 S. Car. 33; *Annelly v. De Saussure*, 17 S. Car. 389. See also *Scaife v. Thomson*, 15 S.

Car. 368; *Woodward v. Clarke*, 4 Strobb. Eq. (S. Car.) 167; *Rowland v. Best*, 2 McCord Eq. (S. Car.) 317.

Tennessee. — *Broyles v. Waddel*, 11 Heisk. (Tenn.) 32.

Texas. — *Lewis v. Sellick*, 69 Tex. 379; *Bond v. Hill*, 37 Tex. 626; *Robinson v. McDonald*, 11 Tex. 390, 62 Am. Dec. 480; *Curtis v. Poland*, 66 Tex. 511.

Vermont. — *Strong v. Hunt*, 20 Vt. 614.

Virginia. — *Carter v. Carter*, 5 Munf. (Va.) 108; *Chinn v. Murray*, 4 Gratt. (Va.) 348.

Wisconsin. — *Stewart v. Stewart*, 90 Wis. 516, 48 Am. St. Rep. 949; *Phoenix Lead Min., etc., Co. v. Sydnor*, 39 Wis. 600.

Payment of the Ratable Proportion Should Be Made Before Division. — *Hitchcock v. Skinner*, Hoffm. (N. Y.) 21.

2. *Necessity for Claim of Exclusive Title* — *United States.* — See *McClaskey v. Barr*, 62 Fed. Rep. 209.

Alabama. — *Ferris v. Montgomery Land, etc., Co.*, 94 Ala. 557, 33 Am. St. Rep. 146; *Horton v. Sledge*, 29 Ala. 498.

Arkansas. — See *Shepherd v. Jernigan*, 51 Ark. 275, 14 Am. St. Rep. 50.

Indiana. — See *Carver v. Coffman*, 109 Ind. 547; *Elrod v. Keller*, 89 Ind. 382; *Parish v. Camplin*, 139 Ind. 1, *citing* 17 AM. AND ENG. ENCYC. OF LAW, (1st ed.) 760, 761.

Massachusetts. — *Husband v. Aldrich*, 135 Mass. 317. See also *Chandler v. Simmons*, 105 Mass. 412.

Improvements Made Without Denial of Cotenant's Title and Without Cotenant's Assent. — Where one joint tenant or tenant in common, not denying his fellow's right, makes permanent improvements, without his fellow's consent, he cannot charge him, nor hold exclusive possession until reimbursed by rents and profits. *Williamson v. Jones*, 43 W. Va. 562; *Ward v. Ward*, 40 W. Va. 611, 52 Am. St. Rep. 911; *Crest v. Jack*, 3 Watts (Pa.) 238, 27 Am. Dec. 353. See also *Coakley v. Mahar*, 36 Hun (N. Y.) 157.

3. *Improvements Must Have Been Made in Good Faith.* — *Ferris v. Montgomery Land, etc., Co.*, 94 Ala. 557, 33 Am. St. Rep. 146; *Austin v. Barrett*, 44 Iowa 489; *Sarbach v. Newell*, 30 Kan. 102; *Hall v. Piddock*, 21 N. J. Eq. 314; *Annelly v. De Saussure*, 17 S. Car. 389. Compare *Graham v. Graham*, 6 T. B. Mon. (Ky.) 561, 17 Am. Dec. 166.

4. *Improvements Made in Bad Faith* — *Illinois.* — *Rowan v. Reed*, 19 Ill. 21.

c. BY ALLOWANCE OUT OF PROCEEDS OF SALE OF PROPERTY. — Where the property is sold in partition proceedings, the cotenant who made the improvements is entitled to an allowance therefor out of the proceeds of sale.¹ And indeed a sale may be ordered for the purpose of making such an allowance where it is not possible to divide the property so as to assign the improvements to the tenant who made them.²

Notice of Interest of Other Tenants. — And it has been held that such an allowance may be made though the tenant in possession had notice of the interest of the other cotenants at the time the improvements were made.³

d. BY ASSIGNING AN INCREASED QUANTITY OF LAND TO MAKER OF IMPROVEMENTS. — It has been said that if, on partition, the improved portion of the land cannot be assigned to the maker of the improvements without injury to the other tenant in common, the former should be compensated by an increased quantity of land or in some other way.⁴ But the latter has the right to pay his share of the value of the improvements in money and retain his full share of the common property.⁵

e. BY SETTING OFF IMPROVEMENTS AGAINST RENTS AND PROFITS. — Improvements made by a tenant in possession may be set off against rents and profits due from him to his cotenants,⁶ and in some cases the courts have

Kentucky. — *Neison v. Clay*, 7 J. J. Marsh. (Ky.) 142, 23 Am. Dec. 387.

South Carolina. — *Hancock v. Day, McMull. Eq. (S. Car.)* 69, 36 Am. Dec. 293; *Thurston v. Dickinson*, 2 Rich. Eq. (S. Car.) 317, 46 Am. Dec. 56; *Dellet v. Whitner, Cheves Eq. (S. Car.)* 223; *Thompson v. Bostick, McMull. Eq. (S. Car.)* 75; *Corbett v. Laurens*, 5 Rich. Eq. (S. Car.) 361.

1. Allowance Out of Proceeds of Sale — *Illinois.* — *Kurtz v. Hibner*, 55 Ill. 514, 8 Am. Rep. 665; *Dean v. O'Meara*, 47 Ill. 120; *Gardner v. Diederichs*, 41 Ill. 171; *Louvalle v. Menard*, 6 Ill. 39, 41 Am. Dec. 161.

Michigan. — *Fenton v. Miller*, 116 Mich. 45. *New York.* — *Clapp v. Nichols*, 31 N. Y. App. Div. 531, 32 N. Y. App. Div. 628; *Ford v. Knapp*, 102 N. Y. 135, 55 Am. Rep. 782; *Conklin v. Conklin*, 3 Sandf. Ch. (N. Y.) 64. See also *Hitchcock v. Skinner, Hoffm. (N. Y.)* 21.

Rhode Island. — *Moore v. Thorp*, 16 R. I. 657. *South Carolina.* — *Scaife v. Thomson*, 15 S. Car. 337; *Moore v. Williamson*, 10 Rich. Eq. (S. Car.) 323, 73 Am. Dec. 93; *Sutton v. Sutton*, 26 S. Car. 33; *McGee v. Hall*, 28 S. Car. 562.

Tennessee. — *Broyles v. Waddel*, 11 Heisk. (Tenn.) 32.

West Virginia. — *Dodson v. Hays*, 29 W. Va. 597; *Ward v. Ward*, 40 W. Va. 611, 52 Am. St. Rep. 911.

A Plaintiff in Partition Proceedings May Be Given a Lien for the value of improvements made by him where the decree directs the sale of the lands as not susceptible of division. *Prather v. Prather*, 139 Ind. 570.

Amount Allowed. — The coparcener who made the improvements should be allowed out of the proceeds of the sale that amount by which the property, at the date of the sale, remains enhanced in value from the improvements, not their original cost. *Ward v. Ward*, 40 W. Va. 611, 52 Am. St. Rep. 911.

Where Improvements Not Necessary. — Where one tenant has made improvements upon the common property without the consent of his

cotenant, and the land is not susceptible of division, and the improvements are not found to have been necessary to the enjoyment of the estate, their value cannot be allowed to the party making them from the proceeds arising from a sale of the land. *Elrod v. Keller*, 89 Ind. 382.

2. Sale May Be Ordered — *Kansas.* — *Sarbach v. Newell*, 30 Kan. 102, 28 Kan. 642.

Nebraska. — *Carson v. Broady*, 56 Neb. 648. *New Jersey.* — *Hall v. Piddock*, 21 N. J. Eq. 311.

New York. — *Conklin v. Conklin*, 3 Sandf. Ch. (N. Y.) 65; *Green v. Putnam*, 1 Barb. (N. Y.) 500.

South Carolina. — See *Johnson v. Pelot*, 24 S. Car. 255, 58 Am. Rep. 253; *Scaife v. Thomson*, 15 S. Car. 368; *Annelly v. De Saussure*, 17 S. Car. 391; *Johnson v. Harrelson*, 18 S. Car. 604; *Buck v. Martin*, 21 S. Car. 592, 53 Am. Rep. 702; *Williman v. Holmes*, 4 Rich. Eq. (S. Car.) 476.

3. Notice of Interest of Cotenants. — *Alleman v. Hawley*, 117 Ind. 532.

4. By Assignment of Increased Quantity of Land. — *Sanders v. Robertson*, 57 Ala. 465. See also *Gardner v. Diederichs*, 41 Ill. 171; *Louvalle v. Menard*, 6 Ill. 39, 41 Am. Dec. 161; *Dean v. O'Meara*, 47 Ill. 120; *Patrick v. Marshall*, 2 Bibb (Ky.) 40, 4 Am. Dec. 670; *Ford v. Knapp*, 102 N. Y. 135, 55 Am. Rep. 782; *Conklin v. Conklin*, 3 Sandf. Ch. (N. Y.) 64; *Moore v. Thorp*, 16 R. I. 657; *Scaife v. Thomson*, 15 S. Car. 337; *Broyles v. Waddel*, 11 Heisk. (Tenn.) 32; *Dodson v. Hays*, 29 W. Va. 597.

5. Right of Cotenant to Pay His Share of Value of Improvements and Retain Full Share of Property. — *Stafford v. Nutt*, 35 Ind. 63.

6. Improvements Made by Tenants in Possession May Be Set Off Against Rents and Profits — *Georgia.* — *Bazemore v. Davis*, 55 Ga. 519.

Indiana. — *Hyatt v. Cochran*, 85 Ind. 231.

New Hampshire. — *Pickering v. Pickering*, 63 N. H. 468.

South Carolina. — *Hancock v. Day, McMull. Eq. (S. Car.)* 72, 36 Am. Dec. 293; *Thompson v. Bostick, McMull. Eq. (S. Car.)* 78; *Sutton v.*

refused to make any allowance for improvements save such set-off.¹

3. Rents and Profits May Be Set Off Against Improvements. — If the tenant in possession makes a claim for improvements, his cotenants will be entitled to set off rents and profits for the period of his occupation.²

XV. RULES CONCERNING IMPROVEMENTS BY LIFE TENANTS OR TENANTS FOR YEARS — **1. General Rule Stated.** — As a general rule improvements made on property by a life tenant thereof attach to the estate and pass to the reversioner or remainderman at the expiration of the life estate, without any liability on his part to make compensation therefor.³ And the holder of any

Sutton, 26 S. Car. 33; McGee v. Hall, 28 S. Car. 562; Annely v. De Saussure, 26 S. Car. 497, 4 Am. St. Rep. 725.

Tennessee. — Tyner v. Fenner, 4 Lea (Tenn.) 469.

Texas. — Curtis v. Poland, 66 Tex. 511.

Virginia. — Ruffner v. Lewis, 7 Leigh (Va.) 743, 30 Am. Dec. 513; Graham v. Pierce, 19 Gratt. (Va.) 28, 100 Am. Dec. 658.

See also Jones v. Johnson, 28 Ark. 211.

1. Compensation Limited to Amount of Rents. — In the *Alabama* cases involving the claim of one tenant in common to compensation from his cotenants for improvements made by him upon the common property, such claim has not been denied, but the amount of the compensation has not been permitted to go beyond the amount of the rents charged against the improving tenant. Horton v. Sledge, 29 Ala. 478; Ormond v. Martin, 37 Ala. 598; Turnipseed v. Fitzpatrick, 75 Ala. 304; Ferris v. Montgomery Land, etc., Co., 94 Ala. 557, 33 Am. St. Rep. 146.

Improvements Set Off Only Against Rents Arising from Improvements. — In *Graham v. Graham*, 6 T. B. Mon. (Ky.) 562, 17 Am. Dec. 166, the court refused to allow improvements made by a copartner to be charged against any rents except those arising from the improvements.

2. Rents and Profits May Be Set Off Against Improvements — *England.* — Teasdale v. Sander-son, 33 Beav. 534.

United States. — Davis v. Chapman, 36 Fed. Rep. 42.

Illinois. — Rowan v. Reed, 19 Ill. 28.

Indiana. — Hyatt v. Cochran, 85 Ind. 231.

Kentucky. — Respass v. Breckenridge, 2 A. K. Marsh. (Ky.) 581.

New Hampshire. — Pickering v. Pickering, 63 N. H. 468.

New York. — Hannan v. Osborn, 4 Paige (N. Y.) 336; Clapp v. Nichols, 31 N. Y. App. Div. 531, 32 N. Y. App. Div. 628.

Pennsylvania. — Luck v. Luck, 113 Pa. St. 236.

South Carolina. — Sutton v. Sutton, 26 S. Car. 33.

Virginia. — Carter v. Carter, 5 Munf. (Va.) 108.

West Virginia. — Ward v. Ward, 40 W. Va. 611, 52 Am. St. Rep. 911.

Right to Allowance for Improvements Dependent upon Accounting for Profits. — Rice v. George, 20 Grant Ch. (U. C.) 221. See also Teasdale v. Sander-son, 33 Beav. 534.

Whether Rents Can Be Charged on Improved Value. — Where the defendants in a partition proceeding are *bona fide* purchasers, and have put improvements on portions of the land, and have rented such portions by perpetual leases,

the ground rents that are due to the enhanced value of the land consequent upon such improvements are not to be charged to such defendants in taking an account of rents and profits. Worthington v. Hiss, 70 Md. 172. See also Carpentier v. Mitchell, 29 Cal. 330; Johnson v. Pelot, 24 S. Car. 255, 58 Am. Rep. 253; Fenton v. Miller, 116 Mich. 45.

3. Improvements by Life Tenant Furnish No Ground for Compensation — *United States.* — See McClaskey v. Barr, 62 Fed. Rep. 209.

Arkansas. — Fee v. Cowdry, 45 Ark. 410, 55 Am. Rep. 560.

Georgia. — Dean v. Feely, 69 Ga. 804.

Indiana. — See Parish v. Camplin, 139 Ind. 1; Miller v. Shields, 55 Ind. 71; Clark v. Middle-sworth, 82 Ind. 240.

Iowa. — Killmer v. Wuchner, 79 Iowa 722, 18 Am. St. Rep. 392.

Kentucky. — Henry v. Brown, 99 Ky. 13. See also Johnson v. Stewart, 8 Ky. L. Rep. 857; Church v. Fithian, 16 Ky. L. Rep. 591.

Mississippi. — Stewart v. Matheny, 66 Miss. 21, 14 Am. St. Rep. 538.

Missouri. — Schaffner v. Schilling, 6 Mo. App. 42.

New York. — See Stevens v. Melcher, 152 N. Y. 551.

North Carolina. — Merritt v. Scott, 81 N. Car. 385.

Pennsylvania. — See Datesman's Appeal, 127 Pa. St. 348.

South Carolina. — See Brooks v. Brooks, 12 S. Car. 422.

Tennessee. — Fisher v. Edington, 12 Lea (Tenn.) 189; Hughes v. Peters, 1 Coldw. (Tenn.) 70; State v. McMinnville, etc., R. Co., 6 Lea (Tenn.) 369; Broyles v. Waddel, 11 Heisk. (Tenn.) 32.

Texas. — Clift v. Clift, 72 Tex. 144.

Virginia. — Effinger v. Hall, 81 Va. 94.

Canada. — Wilson v. Graham, 13 Ont. 661. See also Re Smith, 4 Ont. 518. But compare La Fontaine v. Suzor, 11 L. C. Rep. 388, and Morley v. Matthews, 14 Grant Ch. (U. C.) 551, in which latter case an executrix who had an annuity charged on the testator's estate and who, in good faith, expended money in improving the realty, was allowed to set off such improvements against an indebtedness to the estate.

Widow Holding Dower Interest. — Schaffner v. Schilling, 6 Mo. App. 42.

One Holding an Estate in Dower under the Widow cannot, after the termination of the estate, set up a claim for betterments against the reversioner. Maddocks v. Jellison, 11 Me. 482.

Rule in Maine. — In Maine the rule set forth in the text is recognized as the common-law

other determinable estate in land will lose the benefit of his or her improvements when the estate comes to an end.¹

Purchasers. — The same is true of improvements made by a purchaser from one holding any such estate,² for it is presumed that such purchaser knew the title which he acquired.³

Lessees. — The lessee of the holder of such an estate has no such color of title to the premises as will give him a right to compensation for his improvements.⁴

2. Reason of the Rule. — The most satisfactory reason which has been given for this rule is that the life tenant, or one holding through or under him, does not hold in any way adversely to the remainderman or reversioner,⁵ and therefore must be held to have made such improvements merely with the view of enjoying them so long as the life estate continued,⁶ or to have intended them to be for the benefit of the remainderman.⁷

3. Acquiescence of Remainderman or Reversioner. — A mere acquiescence on the part of the remainderman or reversioner will not bind him to compensate for improvements by the life tenant. He must in general have concurred in, consented to, or connived at the ameliorations upon the estate, in order to be estopped from resisting a demand for improvements as a set-off to the rents.⁸

4. Exceptions to the Rule — a. WHERE ABSOLUTE TITLE IS CLAIMED. — It has been considered that where one possessed of a good life estate in land holds the same under a claim of title in fee simple thereto, if such latter holding be of such a character as to entitle him to compensation for his improvements, the fact that he was possessed of a valid life estate will not deprive him of such right.⁹ But on the other hand there are cases which have maintained

rule. *Pratt v. Churchill*, 42 Me. 471; *Reed v. Reed*, 68 Me. 568; *Varney v. Stevens*, 22 Me. 331; *Maddocks v. Jellison*, 11 Me. 482. But under the statutes of that state the rule is otherwise, and a life tenant or his grantee or assignee is entitled to the benefit of improvements made by him. *Reed v. Reed*, 68 Me. 568; *Pratt v. Churchill*, 42 Me. 471. See also *Austin v. Stevens*, 24 Me. 520.

1. Holder of Determinable Estate — *Elam v. Parkhill*, 60 Tex. 581.

2. Purchasers — *Georgia*. — *Taylor v. Kemp*, 86 Ga. 181.

Michigan. — *Curtis v. Fowler*, 66 Mich. 606.

Mississippi. — *Stewart v. Matheny*, 66 Miss. 21, 14 Am. St. Rep. 538; *Pass v. McLendon*, 62 Miss. 580.

Missouri. — *Schorr v. Carter*, 120 Mo. 409.

Tennessee. — *Fisher v. Edington*, 12 Lea (Tenn.) 189.

Texas. — *Elam v. Parkhill*, 60 Tex. 581.

Wisconsin. — *Falck v. Marsh*, 88 Wis. 680. See also *McEvoy v. Loyd*, 31 Wis. 142; *Cowan v. Lindsay*, 30 Wis. 586.

3. Purchaser Presumed to Know Title Purchased. — *Fisher v. Edington*, 12 Lea (Tenn.) 189.

4. Lessees. — *Wiltse v. Hurley*, 11 Iowa 473.

5. Possession of Life Tenant or His Grantee Not Adverse to Remainderman or Reversioner. — *Barrett v. Stradl*, 73 Wis. 385, 9 Am. St. Rep. 795.

The Grantee of a Life Tenant by Quitclaim Deed cannot counterclaim for the value of improvements made by him on the premises while holding under such deed as against the owner of the fee, for such a deed manifestly cannot be made the basis of an adverse holding of the fee in remainder because it does not purport to convey the remainder. *Falck v. Marsh*, 88 Wis. 680. See also *McEvoy v. Loyd*, 31 Wis. 142; *Cowan v. Lindsay*, 30 Wis. 586.

Where Possession of Grantee of Life Tenant Becomes Adverse. — Where the grantee of a life tenant believed at the time of his purchase that he was getting a good title in fee to the premises, and has continued to hold possession under such belief, such possession is, after the death of the life tenant, adverse to the remainderman. *Barrett v. Stradl*, 73 Wis. 385, 9 Am. St. Rep. 795.

6. Improvements Held to Have Been Made with a View to Enjoyment During Life Estate Only — *Arkansas*. — *Fee v. Cowdry*, 45 Ark. 410, 55 Am. Rep. 560.

Georgia. — See *Taylor v. Kemp*, 86 Ga. 181.

Mississippi. — *Stewart v. Matheny*, 66 Miss. 21, 14 Am. St. Rep. 538.

Missouri. — *Schorr v. Carter*, 120 Mo. 409.

Tennessee. — *Fisher v. Edington*, 12 Lea (Tenn.) 189; *Hughes v. Peters*, 1 Coldw. (Tenn.) 70; *State v. McMinnville, etc., R. Co.*, 6 Lea (Tenn.) 369; *Broyles v. Waddel*, 11 Heisk. (Tenn.) 32.

7. Improvements Presumed to Have Been Intended for the Benefit of the Remainderman. — *Culleton v. Keune*, (Ky. 1897) 39 S. W. Rep. 511, in this case the remainderman was the son of the life tenant.

8. Acquiescence of Remainderman or Reversioner. — *Broyles v. Waddel*, 11 Heisk. (Tenn.) 32; *Fisher v. Edington*, 12 Lea (Tenn.) 189. See also *Stewart v. Matheny*, 66 Miss. 21, 14 Am. St. Rep. 538. But compare *Effinger v. Hall*, 81 Va. 94.

9. Belief in Absolute Ownership of Land — *Arkansas*. — *Fee v. Cowdry*, 45 Ark. 410, 55 Am. Rep. 560.

Iowa. — *Killmer v. Wuchner*, 79 Iowa 722, 18 Am. St. Rep. 392.

Massachusetts. — *Plimpton v. Plimpton*, 12 Cush. (Mass.) 458; *Wales v. Coffin*, 100 Mass.

the strict rule that one holding under a life tenant is not entitled to compensation for his improvements, even though he held under a claim of fee simple title.¹

b. COMPLETION BY TENANT FOR LIFE UNDER A WILL, OF IMPROVEMENTS BEGUN BY TESTATOR. — It has been considered that in the case of a tenant for life under a will, who has gone on to finish improvements begun by the testator and permanently beneficial to the estate, a court of equity will hold the expenditure to be a charge upon the estate, for which the tenant is entitled to a lien.²

XVI. RULES CONCERNING IMPROVEMENTS BY MORTGAGORS OR MORTGAGEES IN POSSESSION — 1. **By Mortgagors.** — As a general rule all buildings and other improvements put upon the mortgaged premises by the mortgagor after the execution of the mortgage become a part of the freehold, and as such inure to the benefit of the mortgagee by enhancing the value of his security.³ Therefore the mortgagor cannot be allowed for such improvements as against the mortgagee in a suit for foreclosure;⁴ nor can he claim the benefit of such

177. See also *Heath v. Wells*, 5 Pick. (Mass.) 140, 16 Am. Dec. 383.

Virginia. — See *Effinger v. Hall*, 81 Va. 94.

Canada. — See *McKibbin v. Williams*, 24 Ont. App. 122.

The Possession of a Tenant May Be So Far Adverse as to Entitle Him to Compensation for Betterments, although he holds a limited estate which entitles him to the possession at the same time, so that his possession does not constitute a disseisin of the tenant in remainder, if his holding is not in fact and intent under the partial and rightful title, but under a claim of the entire interest. *Plimpton v. Plimpton*, 12 Cush. (Mass.) 458; *Wales v. Coffin*, 100 Mass. 177. See also *Heath v. Wells*, 5 Pick. (Mass.) 140, 16 Am. Dec. 383.

The Compensation for the Improvements Should Be Computed with Reference to the Time of the Termination of the Life Estate. — *McKibbin v. Williams*, 24 Ont. App. 122.

1. Exception Denied. — A tenant for life cannot lay out money in building on the land and charge it on the estate in remainder or make it a personal charge against the remainderman. Nor does it seem to make any difference that he made improvements upon the false assumption that he had absolute title to the property. *Henry v. Brown*, 99 Ky. 13. See also *Johnson v. Stewart*, 8 Ky. L. Rep. 857; *Church v. Fithian*, 16 Ky. L. Rep. 591.

Georgia Doctrine. — In *Taylor v. Kemp*, 86 Ga. 181, it was held that a purchaser of a life estate was not entitled, as against the remaindermen, to be paid for any permanent improvements which he had made upon the land except as a set-off against the mesne profits, although he might have been mistaken as to the title which he obtained and have thought that he got a fee simple title, and the remaindermen having abandoned their claim for mesne profits the purchaser was allowed no compensation for his improvements.

2. Completion by Tenant for Life under a Will of Improvements Begun by Testator. — *Broyles v. Waddel*, 11 Heisk. (Tenn.) 32. See also *Gavin v. Carling*, 55 Md. 530; *Hibbert v. Cooke*, 1 Sim. & St. 552.

3. Improvements by Mortgagor Inure to Benefit of Mortgagee — *California.* — See *Union Water Co. v. Murphy's Flat Fluming Co.*, 22 Cal. 621.

Illinois. — *Baird v. Jackson*, 98 Ill. 78.

Massachusetts. — *Butler v. Page*, 7 Met. (Mass.) 40, 39 Am. Dec. 757. See also *Winslow v. Merchants Ins. Co.*, 4 Met. (Mass.) 306, 38 Am. Dec. 368.

New York. — See *Rice v. Dewey*, 54 Barb. (N. Y.) 455.

North Carolina. — *Wharton v. Moore*, 84 N. Car. 479, 37 Am. Rep. 627.

Texas. — *Neal v. Hamilton*, (Tex. 1887) 7 S. W. Rep. 672.

Virginia. — *Graeme v. Cullen*, 23 Gratt. (Va.) 266.

A Stranger Who Has Notice of the Existence of a Mortgage upon land, and who erects buildings or other improvements thereon, with the consent of the owner, places them under the lien as though erected by the mortgagor. *Booraem v. Wood*, 27 N. J. Eq. 371.

4. Mortgagor Not Entitled to Compensation as Against Mortgagee — *California.* — *Union Water Co. v. Murphy's Flat Fluming Co.*, 22 Cal. 621.

Illinois. — *McCumber v. Gilman*, 15 Ill. 381.

Indiana. — *Catterlin v. Armstrong*, 79 Ind. 514.

Maine. — *Holmes v. Morse*, 50 Me. 102. See also *Heath v. Williams*, 25 Me. 209, 43 Am. Dec. 265.

Maryland. — *Dougherty v. McColgan*, 6 Gill & J. (Md.) 275.

Massachusetts. — *Childs v. Dolan*, 5 Allen (Mass.) 319.

North Carolina. — *Phillips v. Holmes*, 78 N. Car. 191; *Wharton v. Moore*, 84 N. Car. 479, 37 Am. Rep. 627. See also *Parker v. Banks*, 79 N. Car. 480.

Virginia. — *Wood v. Krebs*, 33 Gratt. (Va.) 685.

Improvements by Mortgagor Subsequent to Mortgage Not a Lien Superior to Mortgage. — *Martin v. Beatty*, 54 Ill. 100. See also *Wharton v. Moore*, 84 N. Car. 479, 37 Am. Rep. 627.

A Purchaser from a Mortgagor Is Not Entitled to Compensation for His Improvements. — *Vannoy v. Blessing*, 36 Ind. 349; *Wharton v. Moore*, 84 N. Car. 479, 37 Am. Rep. 627; *Kendall v. Tracy*, 64 Vt. 522.

Under the code of *Louisiana* the rule is otherwise. *Citizens' Bank v. Miller*, 44 La. Ann. 199.

improvements as against one having title through a sale under the mortgage.¹

Covenant in Mortgage for Allowance. — Of course, if the mortgage contains a covenant for an allowance to the mortgagor for improvements in case of foreclosure, such allowance should be made.²

2. By Mortgagees in Possession — *a. IN THE UNITED STATES* — (1) *General Rule Stated.* — As a general rule it is considered that a mortgagee in possession of the mortgaged premises is not entitled, as against the mortgagor, to be compensated for improvements made thereon,³ and the same is true where the mortgagee has bought in the equity of redemption under such circumstances that the transaction will not be sustained in equity.⁴

(2) *When Compensation May Be Allowed* — (a) **Belief of Mortgagee that He Has Acquired Complete Title.** — It has been considered that where the mortgagee is in possession of the mortgaged premises under such circumstances that he reasonably can and actually does believe that he has acquired the complete title to the property, he has a right to be compensated for his improvements.⁵

A Purchaser under the Foreclosure of a Senior Mortgage, the Junior Mortgagee Not Having Been Made a Party to the Foreclosure Proceedings, and such purchaser having constructive notice of the junior mortgage, occupies in this respect, as towards the junior mortgagee, the same position as though such purchaser were the original mortgagor. *Catterlin v. Armstrong*, 79 Ind. 514.

Decree of Foreclosure Saving Rights of Another Mortgagee. — And the same is true of a purchaser under a decree of foreclosure of one mortgage, which provides that the rights of another mortgagee shall not be impaired thereby. *Coleman v. Witherspoon*, 76 Ind. 285.

1. Mortgagor Not Entitled to Compensation as Against Purchaser at Foreclosure Sale. — *Vannoy v. Blessing*, 36 Ind. 349. See also *Matzon v. Griffin*, 78 Ill. 477.

Persons Claiming under a Mortgagor with actual or constructive notice of the mortgage are not entitled to the benefit of improvements made by them as against a person having a title by virtue of a sale under the mortgage. *Vannoy v. Blessing*, 36 Ind. 349.

2. Covenant for Allowance to Mortgagor. — See *Catterlin v. Armstrong*, 79 Ind. 514; *Childs v. Dolan*, 5 Allen (Mass.) 319; *Phillips v. Holmes*, 78 N. Car. 191.

3. Mortgagee in Possession Not Entitled to Compensation for Improvements — *Arkansas.* — See *McCarron v. Cassidy*, 18 Ark. 34.

California. — See *Hidden v. Jordan*, 32 Cal. 397.

Iowa. — *Montgomery v. Chadwick*, 7 Iowa 114. See also *Gleiser v. McGregor*, 85 Iowa 489.

Kansas. — *Cook v. Ottawa University*, 14 Kan. 548.

Kentucky. — *Hopkins v. Stephenson*, 1 J. J. Marsh. (Ky.) 341.

Maine. — *Bradley v. Merrill*, 88 Me. 319, 91 Me. 340. See also *Ruby v. Abyssinian Religious Soc.*, 15 Me. 306.

Minnesota. — *Bacon v. Cottrell*, 13 Minn. 194.

Nebraska. — *White v. Atlas Lumber Co.*, 49 Neb. 82.

New York. — *Moore v. Cable*, 1 Johns. Ch. (N. Y.) 385. See also *Quin v. Brittain*, 1 Hoffm. (N. Y.) 353; *Mickles v. Dillaye*, 17 N. Y. 80.

Oregon. — *Adkins v. Lewis*, 5 Oregon 292.

Pennsylvania. — See *Harper's Appeal*, 64 Pa. St. 315.

South Carolina. — See *Lowndes v. Chisholm*, 2 McCord Eq. (S. Car.) 455, 16 Am. Dec. 667.

A Mortgagee Who Has Wrongfully Entered upon the Premises and ousted the mortgagor therefrom cannot be allowed for improvements placed on the premises by him while so wrongfully in possession and holding adversely to the mortgagor. And this is true even though it may appear that the mortgagor would have made the same improvements if he had not been ousted from possession. *Mahoney v. Bostwick*, 96 Cal. 53, 31 Am. St. Rep. 175.

Where a Mortgagee Purchased at His Own Sale and took possession and made betterments, and in an action to recover possession by the mortgagor the latter was adjudged entitled thereto upon payment of the mortgage debt, the mortgagee was held to be not entitled to allowance for such betterments, since he was charged with notice of the defect in his title. *Southerland v. Merritt*, 120 N. Car. 318.

Where Junior Incumbrancer Seeks to Redeem. — In *Connecticut* it has been held that a junior incumbrancer, seeking to redeem from a mortgagee in possession, who has improved the property, must pay the value of the betterments. *Wheat v. Griffin*, 4 Day (Conn.) 419; *Ensign v. Batierson*, 68 Conn. 298.

4. Where Purchase by Mortgagee of Equity of Redemption Cannot Be Sustained in Equity. — *Hall v. Lewis*, 118 N. Car. 509.

5. Mortgagee Who Believes that He Has Acquired Complete Title May Have Compensation for Improvements — *Maryland.* — *Neale v. Hagthorp*, 3 Bland (Md.) 551; *Davis v. Simpson*, 5 Har. & J. (Md.) 147, 9 Am. Dec. 500; *Hepburn v. Sewell*, 5 Har. & J. (Md.) 211, 9 Am. Dec. 512; *Rawlings v. Stewart*, 1 Bland (Md.) 22 note; *Strike's Case*, 1 Bland (Md.) 57; *Rawlings v. Carroll*, 1 Bland (Md.) 76 note; *Jones v. Jones*, 4 Gill (Md.) 87; *Hagthorp v. Hook*, 1 Gill & J. (Md.) 270. See also *McLaughlin v. Barnum*, 31 Md. 425.

Minnesota. — *Bacon v. Cottrell*, 13 Minn. 194. *New York.* — *Howell v. Baker*, 4 Johns. Ch. (N. Y.) 118.

North Carolina. — *Gillis v. Martin*, 2 Dev. Eq. (17 N. Car.) 470, 25 Am. Dec. 729.

Vermont. — *Brighton v. Doyle*, 64 Vt. 616; *Morgan v. Walbridge*, 56 Vt. 405.

(b) **Consent or Acquiescence of Mortgagor.** — The consent or acquiescence of the mortgagor to or in the making of improvements by the mortgagee may impose upon him a liability to compensate the latter for such improvements.¹

(3) **Rents and Profits.** — The mortgagee should not, as a rule, be charged with such rents and profits as are directly the product of permanent improvements made by him and which arise exclusively from such improvements.²

b. IN ENGLAND AND CANADA. — In England and Canada the rule seems to be that a mortgagee in possession should be allowed compensation for his improvements.³ But it has been said that a person who has made improvements under the belief that he was the absolute owner of the property will be allowed therefor more liberally than a mortgagee who knew himself to be such when spending his money.⁴

1. **Consent or Acquiescence of Mortgagor** — *Arkansas.* — See *McCarron v. Cassidy*, 18 Ark. 34.

California. — See *Hidden v. Jordan*, 28 Cal. 301.

Illinois. — *Roberts v. Fleming*, 53 Ill. 196.

Iowa. — *Gleiser v. McGregor*, 85 Iowa 489; *Montgomery v. Chadwick*, 7 Iowa 114.

Maine. — See *Bradley v. Merrill*, 88 Me. 319, 91 Me. 340.

New York. — See *Mickles v. Dillaye*, 17 N. Y. 80.

Pennsylvania. — See *Harper's Appeal*, 64 Pa. St. 315.

South Carolina. — See *Lowndes v. Chisholm*, 2 McCord Eq. (S. Car.) 455, 16 Am. Dec. 667.

Measure of Compensation. — In such case it has been held in *Iowa* that the mortgagor should be held to account for what the improvements cost, in the absence of evidence showing that the cost was so great as to indicate that the mortgagee intended thereby to prevent any redemption. *Gleiser v. McGregor*, 85 Iowa 489.

Where Mortgagee Not in Actual Possession. — In *Brighton v. Doyle*, 64 Vt. 616, the town, believing itself to have derived an absolute title to certain land, but having in fact only a mortgagee's interest after condition broken, suffered the grantor of its title (its mortgagor in fact) to remain in possession of the property and enjoy the rents and profits, but during this continued occupancy of the mortgagor the town erected buildings upon the premises with the approval of the mortgagor. It was held that the town was entitled to compensation for these improvements in a suit proper for the allowance of a claim of that character.

2. **Rents and Profits Arising from Improvements Not to Be Charged Against Mortgagee** — *Indiana.* — *Catterlin v. Armstrong*, 79 Ind. 514.

Kentucky. — *Hopkins v. Stephenson*, 1 J. J. Marsh. (Ky.) 341.

Maryland. — *Hagthorpe v. Hook*, 1 Gill & J. (Md.) 270.

New York. — *Moore v. Cable*, 1 Johns. Ch. (N. Y.) 385; *Bell v. New-York*, 10 Paige (N. Y.) 49.

3. **Mortgagee Allowed Compensation for Improvements in England and Canada** — *England.* — *Quarrell v. Beckford*, 1 Madd. 268, 14 Ves. Jr. 177; *Webb v. Rorke*, 2 Sch. & Lef. 676; *Shepard v. Jones*, 21 Ch. D. 469, 47 L. T. N. S. 604, 31 W. R. 308; *Henderson v. Astwood*, (1894) A. C. 150, 6 Reports 450; *Scholefield v. Lockwood*, 33 L. J. Ch. 106, 9 Jur. N. S. 738, 8 L.

T. N. S. 409, 11 W. R. 555. See also *Sandon v. Hooper*, 6 Beav. 246, 12 L. J. Ch. 309, affirmed by 14 L. J. Ch. 120; *Jortin v. South-Eastern R. Co.*, 2 Smale & G. 48; *Powell v. Trotter*, 1 Drew. & Sm. 388, 7 Jur. N. S. 206, 4 L. T. N. S. 45; *Tipton Green Colliery Co. v. Tipton Moat Colliery Co.* 7 Ch. D. 192, 47 L. J. Ch. 152, 26 W. R. 348; *Ex p. Smith*, 3 Mont. & A. 63, 2 Deac. 236.

Canada. — *Munsie v. Lindsay*, 10 Ont. Pr. 173; *Brotherton v. Hetherington*, 23 Grant Ch. (U. C.) 187; *Harrison v. Jones*, 10 Grant Ch. (U. C.) 99; *Paul v. Johnson*, 12 Grant Ch. (U. C.) 474; *Romanes v. Hems*, 22 Grant Ch. (U. C.) 469. See also *McLaren v. Fraser*, 17 Grant Ch. (U. C.) 567; *Constable v. Guest*, 6 Grant Ch. (U. C.) 510.

But the Improvements Must Be Reasonable and not such as to unduly hinder the exercise by the mortgagor of his right to redeem. *Sandon v. Hooper*, 6 Beav. 246, 12 L. J. Ch. 309, affirmed by 14 L. J. Ch. 120.

Extent of Allowance — **General Rule and Exception.** — While a mortgagee in possession is ordinarily entitled to be allowed for necessary improvements only to the extent that they enhance the value of the property, yet where such a mortgagee obtained a release of the equity of redemption giving back a memorandum by which he agreed to reconvey the property to the mortgagors if they should pay within a given time a certain amount "and also all costs of improvements" made by the mortgagee upon the lands, it was held that the mortgagors could redeem only by paying the cost of such improvements. *Brotherton v. Hetherington*, 23 Grant Ch. (U. C.) 187.

A Second Mortgagee in Possession is not entitled, as against the first mortgagee, to a charge on the property for improvements made by him. *Landowners West of England, etc., Drainage etc. Co. v. Ashford*, 16 Ch. D. 411, 50 L. J. Ch. 276, 44 L. T. N. S. 20.

Where Consent Is Necessary. — In *Kerby v. Kerby*, 5 Grant Ch. (U. C.) 587, a mortgagee in possession of a grist mill and other property erected a carding and fulling mill upon the premises, and for this improvement an allowance was refused, the court saying: "It is not an improvement that a mortgagee under the circumstances could make without consent, and no consent is proved."

4. **Allowance to Mortgagee Less Liberal than to One Who Claimed Absolute Title.** — *Carroll v. Robertson*, 15 Grant Ch. (U. C.) 173; *Fawcett v. Burwell*, 27 Grant Ch. (U. C.) 445.

XVII. RULES CONCERNING IMPROVEMENTS BY TRUSTEES AND OTHER FIDUCIARIES. — Trustees and other fiduciaries may, within certain limits, be allowed compensation for improvements which they have made upon the property held by them.¹

When No Allowance Should Be Made. — But no such allowance should be made where the trustee has wrongfully retained possession of and used the property in violation of a direction to sell contained in the trust instrument,² or has been guilty of actual fraud,³ or has derived sufficient benefit from his possession of the property to compensate him for his improvements.⁴

XVIII. RULES CONCERNING IMPROVEMENTS BY ONE SPOUSE ON LAND OF OTHER — **1. As Between the Parties** — *a.* **VIEW THAT NO COMPENSATION SHOULD BE ALLOWED.** — It has been repeatedly held that a husband who expends his money or labor in making improvements on land which is the separate property of his wife does not acquire any right to compensation therefor as against the wife or her heirs.⁵

1. Allowance May Be Made for Improvements — *England.* — *Williamson v. Taber*, 3 Y. & C. Exch. 717; *Lawder v. Lewis*, 1 Y. & C. Exch. 427; *Bridge v. Brown*, 2 Y. & C. Ch. 181.

Canada. — *Morley v. Matthews*, 14 Grant Ch. (U. C.) 551; *Bevis v. Boulton*, 7 Grant Ch. (U. C.) 39. See *In re Brazil*, 11 Grant Ch. (U. C.) 253.

United States. — *Case v. Kelly*, 133 U. S. 21; *Williams v. Barrett*, 2 Cranch (C. C.) 673.

Illinois. — See *Layger v. Mutual Union Loan Assoc.*, 146 Ill. 283; *Thorp v. McCullum*, 1 Gilm. (Ill.) 614; *Ebelmesser v. Ebelmesser*, 99 Ill. 541. But compare *McParland v. Larkin*, 155 Ill. 184.

And see other cases cited throughout this section.

A trustee is entitled to be remunerated for the actual amount of money or labor bestowed on such improvements as are necessary to preserve the property or to render it permanently more beneficial, but not on ideal or unsuccessful experiments. *Myers v. Myers*, 2 McCord Eq. (S. Car.) 214, 16 Am. Dec. 648.

A Trustee Ex Maleficio was allowed compensation for improvements in *Thornton v. Ogden*, 41 N. J. Eq. 345.

Expenditure for Improvements Approved by Cestui Que Trust. — *Woodard v. Wright*, 82 Cal. 202.

Allowance Made as Against Infant Cestui Que Trust. — *Bevis v. Boulton*, 7 Grant Ch. (U. C.) 39.

View that Compensation Will Not Be Allowed. — *Bonsall's Appeal*, 1 Rawle (Pa.) 266. See also *McParland v. Larkin*, 155 Ill. 84, citing *Hassard v. Rowe*, 11 Barb. (N. Y.) 22; *Bellinger v. Shafer*, 2 Sandf. Ch. (N. Y.) 293.

2. No Allowance Where Possession of Property Was Wrongfully Retained. — *Tatum v. McLellan*, 56 Miss. 352.

Rents Not Charged on Improvements. — But even in such case the trustee should not be charged an increased rent on account of the additions to the land for which he is denied compensation. *Tatum v. McLellan*, 56 Miss. 352.

3. No Allowance to Trustee Guilty of Fraud. — *Jackson v. Ludeling*, 99 U. S. 513.

4. Benefits Derived from Possession Sufficient Compensation. — *Bradford v. Clayton*, (Ky. 1897) 39 S. W. Rep. 40.

5. Husband Not Entitled to Compensation — *Alabama.* — See *Ware v. Seasongood*, 92 Ala. 152; *Ware v. Hamilton Shoe Co.*, 92 Ala. 145.

Connecticut. — *Connecticut Humane Society's Appeal*, 61 Conn. 465.

Kentucky. — *Carpenter v. Hazelrigg*, (Ky. 1898) 45 S. W. Rep. 666. See also *Dehoney v. Bell*, (Ky. 1895) 30 S. W. Rep. 400.

Minnesota. — See *Frost v. Steele*, 46 Minn. 1.

Missouri. — *Woodward v. Woodward*, 148 Mo. 241; *Curd v. Brown*, 148 Mo. 82; *Rogers v. Wolfe*, 104 Mo. 1.

New York. — See *Wood v. Wood*, 18 Hun (N. Y.) 350; *Gould v. Gould*, 51 Hun (N. Y.) 3; *Norton v. Norton*, 49 Hun (N. Y.) 605, 1 N. Y. Supp. 552.

Tennessee. — *Marable v. Jordan*, 5 Humph. (Tenn.) 417, 42 Am. Dec. 441; *Knott v. Carpenter*, 3 Head (Tenn.) 542.

Vermont. — See *Webster v. Hildreth*, 33 Vt. 457, 78 Am. Dec. 632.

Equity Will Not Imply a Promise by the Wife to pay her husband for improvements or repairs on her land while possessed, used, or enjoyed by him in virtue of his marital rights, but, on the contrary, a presumption arises in all such cases that the consideration and motive of the husband were that he would be reimbursed by use and enjoyment of the land. *Nall v. Miller*, 95 Ky. 448.

Marriage May Cancel Claim for Improvements.

— It has been held in *Missouri* that where a woman had entered into a contract to convey certain property to a man in consideration of his supporting her during her life and the parties subsequently married, if anything was owing to the man for improvements made on the woman's property under the supposed agreement the marriage canceled the debt. *Rogers v. Wolfe*, 104 Mo. 1, citing *Smiley v. Smiley*, 18 Ohio St. 543; *Chapman v. Kellogg*, 102 Mass. 246; *Long v. Kinney*, 49 Ind. 235.

Heirs of Husband May Be Allowed Improved Portion on Partition. — In *Kentucky* it has been held that on a partition between a widow and the heirs of her deceased husband, of lands which had been owned by the husband and wife in common, the heirs should be assigned the portion of the land which contained permanent improvements made by the husband. *Dehoney v. Bell*, (Ky. 1895) 30 S. W. Rep. 400.

6. VIEW THAT COMPENSATION SHOULD BE ALLOWED. — On the other hand there are cases which have considered that the spouse who has made improvements is entitled to compensation for such improvements.¹

2. As Against Creditors. — The placing of improvements on his wife's land by a husband does not necessarily constitute a fraud upon his creditors or give them any rights as against the property so improved.² But it may be otherwise when the circumstances show an actual intent to defraud creditors;³ and it has also been held that such expenditures may be charged on the land for debts existing when the improvements were made.⁴

IMPROVIDENCE. (See also the title EXECUTORS AND ADMINISTRATORS, vol. 11, pp. 781, 824.) — Improvidence is defined to be want of care and foresight in the management of property.⁵

IMPUNITY—IMPUNITIVE. — See note 6.

IMPUTABLE NEGLIGENCE. — See the title CONTRIBUTORY NEGLIGENCE, vol. 7, p. 445.

IN. — In means inside of; within the bounds or limits of.⁷

1. View that Compensation Should Be Allowed. — *Furth v. Winston*, 66 Tex. 521; *Finlayson v. Finlayson*, 17 Oregon 348, 11 Am. St. Rep. 836. See also *Robinson v. Moore*, 1 Tex. Civ. App. 93; *Parrish v. Williams*, (Tex. Civ. App. 1899) 53 S. W. Rep. 79; *Roth's Succession*, 33 La. Ann. 540. And see generally the title COMMUNITY PROPERTY, vol. 6, p. 324.

2. Improvement of Wife's Land by Husband Does Not Necessarily Give His Creditors Any Rights as Against Such Land — *Alabama*. — *Nance v. Nance*, 84 Ala. 375, 5 Am. St. Rep. 378. See also *Ware v. Seasongood*, 92 Ala. 152. *California*. — *Peck v. Brummagin*, 31 Cal. 440, 89 Am. Dec. 195.

Iowa. — See *Corning v. Fowler*, 24 Iowa 584. *Kansas*. — *Atchison Sav. Bank v. Wheeler*, 20 Kan. 632; *Hixon v. George*, 18 Kan. 253.

Kentucky. — See *Robinson v. Huffman*, 15 B. Mon. (Ky.) 80, 61 Am. Dec. 177.

Minnesota. — *Frost v. Steele*, 46 Minn. 1. *New Hampshire*. — *Caswell v. Hill*, 47 N. H. 407.

New Jersey. — See *Dickson v. Shay*, 45 N. J. Eq. 821.

North Carolina. — *Thurber v. La Roque*, 105 N. Car. 301.

Tennessee. — *Holder v. Crump*, 10 Lea (Tenn.) 320.

Vermont. — *Webster v. Hildreth*, 33 Vt. 457, 78 Am. Dec. 632; *White v. Hildreth*, 32 Vt. 265.

West Virginia. — See *Board of Education v. Mitchell*, 40 W. Va. 431; *Robinson v. Neill*, 34 W. Va. 128; *Stewart v. Stout*, 38 W. Va. 478; *Trapnell v. Conklyn*, 37 W. Va. 248, 38 Am. St. Rep. 30; *Atwood v. Dolan*, 34 W. Va. 563.

3. When Improving Wife's Land May Constitute Fraud on Creditors. — *Ware v. Hamilton Shoe Co.*, 92 Ala. 145. See also *Arnold v. Elkins*, 67 Miss. 675.

4. Debts Existing When Improvements Were Made. — *Humphrey v. Spencer*, 36 W. Va. 11; *Caswell v. Hill*, 47 N. H. 407.

5. Coope v. Lowerre, 1 Barb. Ch. (N. Y.) 45; *Root v. Davis*, 10 Mont. 246, and *Connors v. Secord*, 110 Cal. 412, citing 10 AM. AND ENG. ENCYC. OF LAW (1st ed.) 321; *Emerson v. Bowers* 14, N. Y. 449.

That a man is a professional gambler fur-

nishes a presumption of his improvidence. *McMahon v. Harrison*, 6 N. Y. 443.

In an act authorizing the superseding of an executor upon the ground of improvidence, mismanagement or misconduct in his trust is not improvidence, nor is illiteracy, nor the fact that he is of small pecuniary means. *Improvidence* "evidently refers to habits of mind and conduct which become a part of the man and render him generally and under all ordinary circumstances unfit for the trust or employment in question." *Emerson v. Bowers*, 14 N. Y. 454, reversing 14 Barb. (N. Y.) 658.

6. Impunity—Impunitive. — "A new trial should have been granted in this case. The verdict of the jury was unintelligible. Our English word *impunity*, which applies to something which may be done without penalty or punishment, comes from the Latin word *impunis*, which is a derivative from the word *pæna* with the prefix *in*, and means without punishment or penalty. We have no such word in our language as *impunitive*; it cannot, then, be a proper finding for the jury to say, 'We, the jury, find for the plaintiff one hundred dollars *impunitive* damages.'" *Dillon v. Rogers*, 36 Tex. 152.

7. Chimney in House. — Where an act makes it penal to erect to any building an addition having in it a chimney or fireplace, an addition warmed from a chimney or fireplace built solely in the old part of the building, but for the exclusive accommodation of the new part, is not within the inhibition. *Daggett v. State*, 4 Conn. 60.

Fire Insurance. — As to the effect of a policy upon chattels contained in a certain building, etc., see the title FIRE INSURANCE, vol. 13, p. 122 et seq.

In and From—Larceny. — An indictment charging that the defendant "feloniously took and carried away from" a dwelling house does not charge larceny in a dwelling house, but, being mere matter of description, it does not affect the sufficiency of the indictment. *Moore v. State*, 40 Ala. 49.

In a House—Will. — (See also the title WILLS.) — In general, a legacy of a certain class of goods in a house will carry all goods of that

as in the house, in the city, in the county; within;¹ upon;²

class which are usually *in* the house, although at the time they have been temporarily removed. *In re Johnston*, 26 Ch. D. 538. But where the testator had removed entirely from the house mentioned in the will, it was held that his household chattels did not pass. *Spencer v. Spencer*, 21 Beav. 548.

In the City—Taxation. (See also the title TAXATION.)—In *Ogden v. St. Joseph*, 90 Mo. 522, it was held that a statute making property *in* the city subject to taxation included intangible property, such as shares of stock owned by a resident of the city.

Same—Outside of Corporate Limits.—In *Wichita v. Barleigh*, 36 Kan. 41, it was said: "The plaintiff in error now claims that at the time when the act was passed there was no 'Gilbert's addition *in* the city of Wichita,' or *in* the town of Wichita, upon which the act could operate. This addition, however, to the city of Wichita may in fact at that time have been *in* the town or city of Wichita, considering the collective body of people *in* that vicinity as the town or city, and not merely the corporate limits; for the town or city as thus considered may in fact have extended beyond its corporate limits. And it does not appear that there was any other Gilbert's addition *in* or near to the town or city of Wichita."

In a County—Will. (See also the title WILLS.)—A bequest of the testator's goods *in* a certain county or locality will pass debts due to him from residents of such county. *Arnold v. Arnold*, 2 Myl. & K. 365; *Horsfield v. Ashton*, 2 Jur. N. S. 193; *Guthrie v. Walrond*, 22 Ch. D. 573; *Nisbett v. Murray*, 5 Ves. Jr. 149; *Tyrone v. Waterford*, 1 De G. F. & J. 613.

Same—Taxation.—In *Conley v. Chedick*, 7 Nev. 341, it was held that to constitute property *in* any particular county so as to make it assessable therein, "it must be in such situation as to make it a part of the wealth of that county; it must belong *in* it; must be incorporated with the other property of the county."

Elections—Voting in Precinct of Residence.—The election precincts of a town were laid off from the court house, the court house not being included *in* any precinct. The voting was conducted *in* several rooms of the court house. It was held that this did not violate a constitutional provision that the electors should vote *in* the precinct of their residence. *Ex p. White*, 33 Tex. Crim. 504.

1. Payment. (See also the titles BILLS OF EXCHANGE AND PROMISSORY NOTES, vol. 4, p. 92; PAYMENT.)—Where a bond was conditioned for the payment of a certain sum *in* five years from date, the court said that "the natural acceptance is that it may be paid inside of the five years, and must be paid at the end thereof. But this would not warrant the payment in instalments without Post's [the obligee] consent." *Verdine v. Olney*, 77 Mich. 320. See also *Horstman v. Gerker*, 49 Pa. St. 283.

A promise was to pay a sum of money within a certain time. The court said in construing it that there was but a slight difference in phraseology between such a note and one payable *in* a certain time, though perhaps

commercial usage may have construed the latter as a promise to pay at the expiration of the period. It was accordingly held that tender might be made at any reasonable time within the specified period. *Buffum v. Buffum*, 11 N. H. 456.

But a bond payable "*in* twenty-five years after date" was held not to be payable within that time. *Allentown School Dist. v. Derr*, 115 Pa. St. 446, 6 Cent. Rep. 887. See also *In re Hofmann*, 14 W. N. C. (Pa.) 563.

Same—Delivery.—A contract for the sale of thirty bales of goat wool provided that the goods were to be paid for by cash *in* one month. It was held that the vendee was entitled to have the goods delivered to him immediately, or within a reasonable time, but was not bound to pay for them until the expiration of the month. *Spartali v. Benecke*, 10 C. B. 212, 70 E. C. L. 212.

2. In Any Street in the Sense of Upon Any Street.—Chicago, etc., R. Co. v. *Dunbar*, 100 Ill. 137.

In and Across.—Where the charter of a railroad company authorized the construction of the road "upon and over such streets," naming the streets, "except *in*" certain of the streets therein mentioned, "as shall be from time to time fixed and determined by the city council," it was held that this did not preclude the company from crossing the excepted streets. *State v. Newport St. R. Co.*, 16 R. I. 533, citing *Chicago, etc., R. Co. v. Dunbar*, 100 Ill. 137.

Termini.—The charter of the defendants contained the following clause. "The president and directors of the said company be and they are hereby authorized and invested with all the rights and powers necessary and expedient to survey, lay out, and construct a railroad from some suitable point *in* the township of Orange, *in* the county of Essex, to some suitable point *in* Orange street, or some street north of said street or south of Market street, *in* the city of Newark." It was held that this enactment related not to the route but to the termination of the road, and that thereby the road of the company was not excluded from being located *in* or through Market street. *McFarland v. Orange, etc., Horse Car R. Co.*, 13 N. J. Eq. 17.

In and About the Rails.—A street-railroad company contracted with the city to pave the streets whereon its tracks were laid "*in* and about the rails." It was held that the words "*in* and about the rails" included so much of the street service outside the rails as was disturbed in laying the track; and in the absence of evidence as to how far that space extended, it was a reasonable presumption that it included as much as one foot outside the rails. *McMahon v. Second Ave R. Co.*, 75 N. Y. 231, affirming 11 Hun (N. Y.) 347, followed in *New York v. Second Ave. R. Co.*, 102 N. Y. 572, 26 Am. & Eng. R. Cas. 546, in which case it was held that the contract extended to the entire space between the rails.

In the Pillory.—Standing erect upon the pillory is not being set *in* it. *Rex v. Beardmore*, 2 Burr. 795.

In a Street.—A., by his will, devised all his

at;¹ of.² For its use adjunctively, in connection with other words, see note 3.

message or dwelling house, with the appurtenances, *in* High street, in the town of H., and all and every his buildings and hereditaments *in* the same street, to his mother for life and after her death to C. D. A. had only one house *in* High street, but behind that house he had two cottages fronting a lane called Bakehouse lane. There was no thoroughfare through that lane, the only entrance into it being from High street. It was held that the two cottages passed under the will. *Doe v. Roberts*, 5 B. & Ald. 407, 7 E. C. L. 150.

1. **At and In Synonymous.** (See also *At*, vol. 3, p. 167.)—*Graham v. State*, 1 Ark. 171; *State v. Cox*, 35 N. J. L. 302; *Augustine v. State*, 20 Tex. 450; *Williams v. Ft. Worth, etc., R. Co.*, 82 Tex. 553.

But where a statute required that notice of sales be posted "*in* at least four public places" in the county, an affidavit that notice had been posted "*at*," etc., was held insufficient to show a compliance with the requirement. *Hilgers v. Quinney*, 51 Wis. 62.

In *Ray v. State*, 50 Ala. 173, it was said: "It will be seen that these sections of the code [Code Ala. 1867, §§ 3620, 3622] make a distinction between playing with cards *in* a place and *at* a place. Webster, in his dictionary, defines '*at*' to mean nearness in place or time. To be *at* church does not necessarily mean to be *in* the church; and to be *at* home does not require a party to be *in* the homestead domicile. Webster's Dict. Unabr., word '*at*.' Then, as in the sections of the code above referred to, the words '*at*' and '*in*' are both used to signify position in place, there will be no sound reason for this distinction, unless they also expressed a difference in place. This would authorize the court to construe '*at*' as '*near to*.'"

In and At His Tavern.—A conviction that one G. P., of, etc., innkeeper, "after the hour of seven in the evening and before the hour of twelve of the clock of the night of Saturday, * * * *in* and at his tavern, * * * being a place where * * * intoxicating liquors are allowed to be sold by retail, did unlawfully sell and otherwise dispose of, and permit and allow to be drunk, * * * one glassful of beer," etc., was held bad, as not necessarily bringing the defendant within the class of persons designated by the statute 32 Vict., c. 32, § 24, O., viz.: "The person or persons who are the proprietors *in* occupancy, or tenants or agents *in* occupancy of the said place or places;" for the word "innkeeper" only amounts to a mere description, and not to an averment of his filling such a character, and the words "*in* and at his tavern" would not necessarily mean the proprietor *in* occupancy, etc., to whom the license is granted, and who alone is liable, but would also include the owner or proprietor even if he were not the occupant. *Quere*, whether the conviction charges three distinct offenses. *Reg. v. Parlee*, 23 U. C. C. P. 359.

2. **Of.**—"Rivers, bays, or waters *in*" the state of New Jersey is equivalent to "rivers, bays, or waters of" the state of New Jersey. *Kean v. Rice*, 12 S. & R. (Pa.) 205.

"*In*" in the Sense of Proximate Cause. — Upon

the question of the interpretation of the words "*in* case he shall die * * * in the known violation of any law," the court said: "It seems to be clear that a relation must exist between the violation of law and the death, to make good the defense; that the death must have been caused by the violation of law to exempt the company from liability. It cannot be the true meaning of the proviso that the policy is to be avoided by the mere fact that, at the time of the death, the assured was violating the law, if the death occurred from some cause other than such violation." *Bradley v. Mutual Ben. L. Ins. Co.*, 45 N. Y. 428. See also the titles ACCIDENT INSURANCE, vol. 1, p. 320; LIFE INSURANCE.

To in the Sense of In. — See *Delorme v. Ferk*, 24 Wis. 203.

In and To — Conveyance. — A deed of trust in the nature of a mortgage set out in full a contract between the mortgagor and certain parties for the conveyance of several parcels of land to the former, and then conveyed to the mortgagee all the right, title, and interest which the mortgagor had or might thereafter acquire *in* and to the lands embraced by the contract. It was held that the conveyance was in legal effect an assignment of the contract. *Shoecraft v. Bloxham*, 124 U. S. 730.

"In" in the Sense of For. — See *Maguire v. Board of Revenue*, 71 Ala. 421.

3. **In an Indictment** under an act punishing embezzlement by certain officers employed *in* the Bank of the United States, "being then a bookkeeper *in*," etc., is an insufficient description. *U. S. v. Forrest*, 3 Cranch (C. C.) 56.

Deal In, Etc. — See *DEAL — DEALER*, vol. 8, p. 846.

In or About. — Exploding torpedoes *in* a completed oil well, to quicken the flow, gives a lien under statute as labor "*in* or about the sinking, drilling, or completing" an oil well. *Gallagher v. Karns*, 27 Hun (N. Y.) 375. See generally the title MECHANICS' LIENS.

The statement that a bastard was born "*in* or about the year 1833" was held not sufficient where it was material that the birth should have been before August 14, 1834. The use of "*in* or about" signified that "about" did not mean *in*, and might mean in 1832 or 1834. *Reg. v. St. Paul*, 7 Q. B. 232, 53 E. C. L. 232.

In Accordance with the Form. — An English Bills of Sale Act provided that bills of sale must be "*in* accordance with the form" prescribed by statute. In *Consolidated Credit, etc., Corp. v. Gosney*, 16 Q. B. D. 24, it was said: "We must put on these words a reasonable interpretation and hold that substantial though not literal accordance with the form is sufficient." See also *Melville v. Stringer*, 13 Q. B. D. 398; *Davis v. Barton*, 11 Q. B. D. 540; *Ex p. Stanford*, 17 Q. B. D. 269.

In Action. — See *CHOS IN ACTION*, vol. 6, p. 2.

In Actual Service. — In *Leathers v. Greenacre*, 53 Me. 561, it was held that the terms "*in* actual service" and "engaged *in* an expedition" were synonymous. This case was upon the question of who might make a nun-

cupative will. See also the title NUNCUPATIVE WILLS.

In Addition. (See also ADDITION — ADDITIONAL, vol. 1, p. 608.) — Where a statute gives a civil remedy "in addition to" a criminal one, these words "do not carry with them any idea of sequence or order of time;" they are "synonymous with 'also,' 'moreover,' 'likewise.'" Com. v. Avery, 14 Bush (Ky.) 636.

"The words 'in addition' do not in themselves add anything to the effect of a simple bequest without these words. The legacies would be additional without them." And it is doubted whether the use of these superfluous words in a bequest requires less than its proper operation to be given to another bequest in the same will wherein they are not used. Lee v. Pain, 4 Hare 218. See generally the title WILLS.

In Aid. — A testator charged his general realty "in aid of my personal estate and in exoneration of my other real estate with the payment of my just debts and testamentary expenses." It was held that debts in this provision did not include a mortgage debt on realty specifically devised. *In re Newmarch*, 9 Ch. D. 12. See also Buckley v. Buckley, 19 L. R. Jr. 555.

In His Aid. — A North Carolina statute provided that actions against a public officer for acts done by him by virtue of his office, or against a person who, by his command, or in his aid, should do anything touching the duties of such officer, should be tried where the cause arose. It was held that an indemnity bond did not bring the obligors within the words "in his aid." Harvey v. Brevard, 98 N. Car. 93. See generally the title INDEMNITY CONTRACTS, *post*.

In Arms. — A Canadian statute enacted that citizens of a foreign state, at peace with Canada, taken in arms against the Canadian government, should be guilty of a capital offense. It was held that it was not necessary in order to render a party amenable to the statute that he should actually have arms on his person, it being sufficient that he should be present and concerned with those who were armed, even though he did not carry arms himself. Reg. v. Slavin, 17 U. C. C. P. 210.

In Arrears. — See ARREARS, vol. 2, p. 830.

In Bales. — See BALE, vol. 3, p. 768.

In Barn or in Fields. — A policy insured two barns and certain articles "contained therein," and also a horse "in barn or in fields." It was held that the horse was insured, although in a barn not one of those specified. Trade Ins. Co. v. Barracloiff, 45 N. J. L. 544.

In That Behalf. — See Garby v. Harris, 7 Exch. 501, 21 L. J. Exch. 160.

In Behalf Of. — In Wanner v. Emanuel's Church, 174 Pa. St. 466, it was said: "The notes are said to have been executed, etc., 'in behalf' of the corporation. That means 'for' it. Anderson's Law Dict., *ad verb.* 'for.' A note, however, executed by one 'for' another is executed by the former as agent for the latter." *Citing* Campbell v. Baker, 2 Watts (Pa.) 83; Wright v. Weakly, 2 Watts (Pa.) 89. And see Hoffa v. Homestead Bldg. Assoc., 3 Pa. Dist. 567.

In Being. — Within the meaning of an act restricting the entailment of real estate, it has

been held that a child *in utero* at the testator's death was *in being*. Phillips v. Herron, 55 Ohio St. 478. See also Starling v. Price, 16 Ohio St. 29; Turley v. Turley, 11 Ohio St. 173; McArthur v. Scott, 113 U. S. 340.

In Blood. — In *In re Fitzgerald*, 58 L. J. Ch. 662, it was held that the addition of the words "in blood" to "next of kin" made the latter phrase stronger against a widow taking under it. See generally NEXT OF KIN.

In Case. (See also CASE, vol. 5, p. 756.) — This phrase, in a bequest, implies a condition as explicitly as "if," "upon," and the like. Roberts's Appeal, 59 Pa. St. 70, 98 Am. Dec. 312.

In Case of or in Event of Decease. (See also the titles LEGACIES AND DEVISES; WILLS.) — Where a testator provides for a gift over in event of or in case of the decease of the legatee or devisee, it has been held that in event of the decease of the legatee meant the decease of the legatee before the decease of the testator. Phelps v. Phelps, 55 Conn. 359; White v. White, 52 Conn. 518; Coe v. James, 54 Conn. 511; Briggs v. Shaw, 9 Allen (Mass.) 517; Ewing v. Winters, 34 W. Va. 23. See also *In re Potter*, L. R. 8 Eq. 52, 4 Ves. Jr. 160; Lowfield v. Stoneham, 2 Stra. 1261; Smart v. Clark, 3 Russ. 365; Tilson v. Jones, 1 Russ. & M. 553; Bowen v. Scowcroft, 2 Y. & C. Exch. 640; Cambridge v. Rous, 8 Ves. Jr. 12; Home v. Pillans, 2 Myl. & K. 20, 21; Schenk v. Agnew, 4 Kay & J. 406. Compare Douglas v. Chalmer, 2 Ves. Jr. 501.

In Hill v. Hill, 5 Gill & J. (Md.) 96, the court declared that the words "in case of" manifested that there was some contingency in the mind of the testator, and refused to construe them as "at" or "upon."

But in Naundorf v. Schumann, 41 N. J. Eq. 14, where a testator gave all his property for the sole use and benefit of his wife, and in the event of her death, then over, it was held that the wife took a life estate, and that the words "in the event of her death" meant "upon her death."

In Ewing v. Winters, 34 W. Va. 23, it was held that the devise over in case of the death of the first devisee was equivalent to a devise over upon the death of the first devisee.

Same — Vesting of Legacy. — A grandfather, by his will, gave to his granddaughter a legacy, to be at her own disposal in case she married with the consent of J. E. The granddaughter died at the age of fourteen, unmarried. It was held that as the vesting of the legacy related to the event of the marriage, and that never happened, the legacy did not vest. Elton v. Elton, 3 Atk. 507. See also Roberts's Appeal, 59 Pa. St. 70, 98 Am. Dec. 312. And see the title LEGACIES AND DEVISES.

In Any Case. — The Revised Statutes of the United States authorized the issuance of a *dedimus potestatem* to take testimony in any case where it was necessary in order to prevent a failure or delay of justice. It was held that this provision applied only where the courts had jurisdiction. U. S. v. Hom Hing, 48 Fed. Rep. 637.

In Cash. (See also CASH, vol. 5, p. 757; and see the title PAYMENT.) — Under a statute requiring that a payment shall be in cash, it has been held that anything which would sustain

a plea of payment in point of law, as distinguished from mere accord and satisfaction, will satisfy the requirement; and, therefore, if there be money due to the person who has to make the payment, and that money be set off against what he has to pay, that will be a payment *in* cash. Stroud's Jud. Dict.; *In re* Harmony, etc., Tin, etc., Min. Co., L. R. 8 Ch. 407; *In re* Pen' Allt Silver Lead Min. Co., L. R. 8 Ch. 270; *In re* Government Security F. Ins. Co., 12 Ch. D. 517; *In re* Land Development Assoc., 39 Ch. D. 259; *In re* Jones, 41 Ch. D. 159. But the debt must be presently payable. *In re* Land Development Assoc., 39 Ch. D. 259.

In Charge. (See also CHARGE, vol. 5, p. 888.) — The plaintiff's son, as it was getting dark, was taking three horses along a road which crossed the defendant's railway, riding one, leading another, and driving the third. This last horse, being from sixty to one hundred feet in front, attempted to cross the track as the train approached, and was killed. It was held that the horse was not *in* charge of any person. Markham v. Great Western R. Co., 25 U. C. Q. B. 572. See also Cooley v. Grand Trunk R. Co., 18 U. C. Q. B. 96.

In the Clear. — See CLEAR, vol. 6, p. 109.

In Close Proximity. — In an action against a railroad company, the court instructed that it was negligence in the company to allow weeds or bushes to grow near to or *in* close proximity to the track. In holding this to be error the appellate court said: "'Near,' in common parlance, is understood, and by lexicographers is defined, to mean either 'close' or 'at no great distance;' while '*in* close proximity' or '*in* the immediate vicinity' are equivalent terms." Ward v. Wilmington, etc., R. Co., 109 N. Car. 363. See generally the title CROSSINGS, vol. 8, p. 392.

In Commission. — One provisionally appointed colonel by the war department, who does not pass the examining board and is not confirmed by the senate, is neither "*in* commission" nor "*in* service," though under such appointment he awaited the order of discharge for several weeks. Greer v. U. S., 3 Ct. Cl. 182. See generally the title MILITARY LAW.

In Common. (See also the title JOINT TENANTS AND TENANTS IN COMMON.) — In Walker v. Dunshee, 38 Pa. St. 439, it was said: "They are to take also '*in* common,' and this indicates equality where nothing is said to the contrary."

In the Conduct of a Suit. — In *Re* Emanuel, 9 Q. B. D. 408, it was held that the words "*in* the conduct of suit," in a statute providing for costs, did not include anything to be done before or after the action.

In Confidence. — See the title PRECATORY TRUSTS.

In Congress. — "Representative *in* Congress" is synonymous with "member of Congress." Butler v. Hopper, 1 Wash. (U. S.) 501.

In Custodia Legis. — See CUSTODY OF THE LAW, vol. 8, p. 532; and see the titles ATTACHMENT, vol. 3, p. 181; CONTEMPT, vol. 7, p. 25; EXECUTIONS, vol. 11, p. 604; EXEMPTIONS (FROM TAXATION), vol. 12, p. 266; INJUNCTIONS, *post*; JURISDICTION; PRIVATE INTERNATIONAL LAW; RECEIVERS; REPLEVIN; SHERIFFS, MARSHALS, AND CONSTABLES; UNITED STATES. As to the

payment of money into court, see the title PAYMENT.

In Custody. — A defendant in a criminal prosecution who has given bail for his appearance at the next term of court, and is thereby entitled to his freedom, is not entitled to the writ of habeas corpus as being *in* custody, within the meaning of a statute. Spring v. Dahlman, 34 Neb. 692.

In Debt. — In Massey v. Walker, 10 Ala. 290, it was said: "We think, with the plaintiff's counsel, that to say one is *in* debt is just as much a conclusion as to say that one is embarrassed with debts."

In Default. — See DEFAULT, vol. 9, p. 167.

In Due Form. — This phrase, within an Act of Congress providing for the authentication of the records in judicial proceedings in state courts, has been held to mean the mode of attestation in use in the state from which the form comes. Ducommun v. Hysinger, 14 Ill. 250. See also Haynes v. Cowen, 15 Kan. 643. See generally the titles JUDGMENTS AND DECREES; RECORDS.

In the Employ. (See also the titles INDEPENDENT CONTRACTORS, *post*; MASTER AND SERVANT.) — In State v. Emerson, 72 Me. 456, a person who operated a machine to manufacture shingles by the thousand for the owners or lessees of a mill was held not to be in the employ of the mill owners.

In Extremis. — See the titles DYING DECLARATIONS, vol. 10, p. 359; GIFTS, vol. 14, p. 1056.

In Failing Circumstances. — In Dodge v. Mastin, 5 McCrary (U. S.) 412, it was said: "The phrase '*in* failing circumstances,' used in the constitution and statutes, when applied to a bank, must be taken to mean a state of uncertainty whether the bank will be able to sustain itself, depending on favorable or unfavorable contingencies, which in the course of business may occur, and over which its officers have no control. Thus, for instance, an individual may be said to be *in* failing circumstances when he is put to unusual shifts to meet his liabilities, such as borrowing money at unusual rates of interest, [or] makes sacrifice, in the disposition of his property, which he would not do but for his condition. Such a condition of things may exist regarding a bank, and when this is the case a bank, like an individual, may be said to be *in* failing condition."

In the Field, in reference to the military service, means *in* the service for the purpose of carrying on war. Sargent v. Ludlow, 42 Vt. 726.

In the First Place, in the Next Place, etc., in a will, mark only the order in which the items occurred to the testator, and not the order of the payment of legacies. They do not, in the absence of a contrary intent, create a preference. Nash v. Dillon, 1 Molloy 236; Beeston v. Booth, 4 Madd. 161; *In re* Hardy, 17 Ch. D. 805; Blower v. Morret, 2 Ves. 420; Perrine v. Perrine, 6 N. J. L. 137; Duncan v. Alt, 3 P. & W. (Pa.) 386. Otherwise of "to be paid *in* the first place." Duncan v. Alt, 3 P. & W. (Pa.) 382. See also the title LEGACIES AND DEVICES.

In Form Following. — "The words '*in* form following' are used in the records, civil and criminal, and all writs of error, as representing the record of the court of original jurisdiction.

They do not imply a copy, or secondary evidence of the thing, but the body of the writing itself." *Gardner v. State*, 25 Md. 151.

In Fraud. — In an act punishing the removing of revenue stamps from tobacco, "*in fraud of the internal revenue laws*" means "*in violation of,*" etc. *Quantity of Tobacco*, etc., 5 Ben. (U. S.) 410.

In Full. (See also the titles PAYMENT; RECEIPTS; and see FULL, vol. 14, p. 560.) — In *Watts v. Baker*, 78 Ga. 628, a receipt *in full* given by an administrator *de bonis non* was held open to explanation. The court said: "The words '*in full,*' etc., ought to be interpreted with reference to the subject-matter of the settlement on which the instrument was founded. Assets of the testator's estate which came to the hands of the administratrix of the executor, and assets which the executor had wasted in his lifetime, would be wholly different subject-matters."

The words "*in full compensation*" have a clear, distinct, and well understood signification, and cannot be overlooked or argued out of the statute. They "were introduced into these appropriation acts for the very purpose of reducing, for the respective years for which the appropriations were made, the compensation of those officers for whom the appropriations were less than the salaries established by previous laws." *Fisher's Case*, 15 Ct. Cl. 323. See generally the title PUBLIC OFFICERS.

In *Day v. McLea*, 22 Q. B. D. 610, it was held that the sending of a check *in full* of all demands does not amount to an accord and satisfaction, although the check is kept and placed to the sender's credit.

In Good Faith. — See GOOD FAITH, vol. 14, p. 1078.

In Good Order — In Apparent Good Order. — See GOOD, vol. 14, p. 1077; and see the titles BILLS OF LADING, vol. 4, pp. 526, 529; RECEIPTS.

In Gross. — See GROSS, vol. 14, p. 1118.

In Hand Paid. — A policy conditioned to be void on failure to pay "any notes or other obligations given for premium" purported to be issued in consideration of a certain sum "*in hand paid*" and of annual premiums for a like amount. Of the said sum only a part was paid in cash, and for the balance a note was given. The note set forth on its face that, if not paid when due, the policy should be void in accordance with the conditions of the policy. It was held that the policy was forfeited by failure to pay this note when due, and that the amount of this note must be deducted from the net value of the policy in determining the premium of temporary insurance under the statute of 1861, c. 186. *Pitt v. Berkshire L. Ins. Co.*, 100 Mass. 500.

In the Hands. — A statute exempted from levy any pension money *in the hands* of the pensioner. It was held that when a pension check was deposited in a mutual savings bank, of whose assets the pensioner became a proportional part owner, it was exempt. *Price v. Savings Soc.*, 64 Conn. 362.

In the Heat of Passion. — See the titles MURDER and MANSLAUGHTER; SELF-DEFENSE.

In the Last Sickness. (See also the title NUNCUPATIVE WILLS.) — In *Harrington v. Stees*, 82 Ill. 50, it was held that the words "*in the time of the last sickness*" of the deceased, as used

in the *Illinois* statute relating to nuncupative wills, meant merely that the will must be made in the sickness of which the testator subsequently died, and did not mean that the will must have been made *in extremis*, or that the testator must not have had time to reduce it to writing.

In Liquidation. — A note given by a firm contained as an addition to the signature the words "*in liquidation.*" It was held that the omission of these words from a declaration upon the note did not amount to a variance. *Fairchild v. Grand Gulf Bank*, 5 How. (Miss.) 604. See also *Burr v. Williams*, 20 Ark. 188.

In Like Manner. — See LIKE MANNER.

In Loco Parentis. — See LOCO PARENTIS.

In the Name Of. (See also the title NAME.) — A man invests *in* his own name when he invests openly for himself, though he receives the investment only by manual delivery. A written transfer is not necessary to such an investment. *Carpenter v. Carpenter*, 12 R. I. 548.

A Chinese exclusion act provided that where a Chinaman sought to enter the United States on the ground that he was formerly engaged in business in this country, he must show that he carried on business *in* his own name. It was held that under this act a Chinaman might be excluded where it appeared that his business was carried on under a firm name of which his name formed a part. *In re Quan Gin*, 61 Fed. Rep. 395. See generally the title CHINESE EXCLUSION ACTS, vol. 5, p. 1101.

In the Nature. — See NATURE.

In Need. — Of the words "*in need of immediate relief,*" as used in a poor law, the court said: "A person may have property and yet fall into distress, and be *in need* of immediate relief, from inability to avail himself of it. On the other hand, a person may have no property, and yet, if he is supported by relatives or friends, would not be *in need* of immediate relief, within the meaning of the statute." *Templeton v. Winchendon*, 138 Mass. 110.

In Numero — Action of Debt. — In *Thompson v. French*, 10 Yerg. (Tenn.) 455, it was said: "By *eo nomine* and *in numero* is only meant that a specific sum is sought to be recovered which is improperly detained, and that the action does not sound in damages as does the action of assumpsit."

In Office. (See also the title PUBLIC OFFICERS; and see OFFICE.) — A statute prohibited a board of supervisors of the county of New York from creating any new office or increasing the salaries of "those now *in office.*" In construing this provision the court said: "Whether we look into the dictionary of our language, the terms of politics, or the diction of common life, we find that whoever has a public charge or employment, or even a particular employment affecting the public, is said to hold or be *in office.*" *Rowland v. New York*, 83 N. Y. 375.

In *State v. Borowsky*, 11 Nev. 119, it was held to be a misdemeanor *in office* for a public administrator to embezzle money received *ex officio* after his term of office had expired.

In Operation. — A statute declaring in full force all the ordinances of a state *in operation* at its date was held not to embrace an ordinance which had been judicially announced to

be inoperative before the passage of the statute in question. *Allen v. Savannah*, 9 Ga. 286.

In Order To. — A testatrix, after disposing of all her property except a house and lot, provided that "in order to pay" any of her debts or any of the aforesaid legacies, her executors should sell the house and lot. In construing this will the court said: "We do not think this was intended as a limitation on the power, as though she had said, 'But the sale shall not be made unless it becomes necessary to the payment of my debts and pecuniary legacies.' She made no alternative disposition of the house and lot as would have been natural if she had contemplated the possibility of its sale not being necessary to carry out the provisions of her will. If the power is not unconditional but may be defeated in the manner proposed, then the testatrix becomes intestate as to this house and lot, and her intended bounty to her sisters fails." *Adams's Estate*, 148 Pa. St. 394.

In Her Own Right. (See also the title SEPARATE PROPERTY OF MARRIED WOMEN.) — A conveyance of land to a married woman "in her own right" is not a sufficient conveyance "to her sole and separate use, free from the interference or control of her husband," within the *Massachusetts Separate Property Act*. *Merrill v. Bullock*, 105 Mass. 486.

In His Own Right. — In *Weston v. Landgrove*, 53 Vt. 375, it was held that when one had purchased and occupied a farm, though he held it by a bond conditioned that he should have a deed thereof on payment of the sum specified in it, he held such farm in his own right, within the provisions of a pauper law.

Where the articles of association of a company provided that no person should be eligible as a director unless he held "as registered member in his own right capital of the company of the nominal value of five hundred pounds, at least," it was held that beneficial ownership was not necessary for qualification. *Pulbrook v. Richmond Consol. Min. Co.*, 9 Ch. D. 615. But in *Bainbridge v. Smith*, 41 Ch. D. 462, the case above cited was considered, and the observation of Jessel, M. R., as to the meaning to be attached to the words "in his own right" was questioned by Cotton, L. J., who held that the meaning of holding shares "in his own right" is that the holder must not only have a legal right to deal with them, but must have a beneficial ownership of them, although such ownership may be encumbered. In the same case, Lindley, L. J., said that he was not prepared to dissent from the view taken by the master of the rolls. See also *Gill v. Continental Union Gas Co.*, L. R. 7 Exch. 332.

In Pais. (See also the title ESTOPPEL, vol. II, p. 420.) — In the country. This phrase, as applied to a legal transaction, primarily means that it has taken place without legal proceedings. "Matters in pais" is used sometimes in distinction from "matters of record," sometimes from "matters in writing." *Sweet's Law Dict.*

In Pari Delicto. — Equally in fault; equally guilty.

In Pari Materia. — The words *in pari materia* are used as a phrase applicable to public statutes or general laws made at different times

and in reference to the same subject. Such laws are to be construed together as forming a united system, and as one statute; otherwise the system might be unharmonious and inconsistent. *Plummer v. Murray*, 51 Barb. (N. Y.) 202. See also the title STATUTES.

In Perfect Order. — Where a lease recited that the house was now in perfect order, it was held that this statement referred to the condition of the house as an edifice in perfect repair, not to the present or future purity of air within it. *Foster v. Peyser*, 9 Cush. (Mass.) 242, 246.

In Person in the Sense of In Body. — See *Calloway v. Laydon*, 47 Iowa 458; *Mulford v. Clewell*, 21 Ohio St. 166; and see PERSON.

In Personam and In Rem. (See also the titles EQUITY, vol. II, p. 167; JUDGMENTS AND DECREES; KES JUDICATA.) — These terms have been adopted from the terminology of the Roman law. There an *actio in personam* was an action against a particular person to enforce the plaintiff's right to an act or forbearance on the part of the defendant. An *actio in rem* was either an impersonal action or an action against a thing. In the former sense it was an action which was not based on a mere claim against the defendant personally; which did not raise the question of the existence of an obligation between plaintiff and defendant, and therefore of a personal duty of action or forbearance on the defendant's part for the plaintiff's satisfaction. As meaning an action against a thing it was an action wherein the plaintiff claimed some corporeal thing as his own, or made a direct claim to one of those rights, other than obligation, called *res incorporales*. 4 L. Quar. Rev. 304 *et seq.* The English division of actions into real and personal is derived from this, but is based upon a different principle of classification, viz., the nature of the remedy sought.

The terms are used in something of their original meaning to describe rights, proceedings, and judgments. As applied to rights, they signify the distinction between those which are available against particular persons and those which are available against the world at large. *Rapalje & L. Law Dict.* And judicial proceedings are said to operate *in rem* or *in personam*. Chancery acts *only in personam*, because its decrees operate by compelling defendants to do what they are ordered to do, and not by producing the effect directly. *Penn. v. Baltimore*, 3 Har. & W. Lead. Cas. 767, Bisp. Eq. 47. Judgments *in personam* are adjudications of individual rights pronounced against particular persons, upon whom alone they are binding. Judgments *in rem* are adjudications pronounced upon the status of some particular subject-matter by a tribunal having competent authority for the purpose. *Notes to Kingston's Case*, 2 Smith Lead. Cas. 784; *Best's Evidence*, § 593. They decide and determine a status or make a final and conclusive transfer of property. *State v. Central Pac. R. Co.*, 10 Nev. 47. Among them are decrees in divorce, *Cheever v. Wilson*, 9 Wall. (U. S.) 108; *Hood v. Hood*, 110 Mass. 463; probate decrees, *Grignon v. Astor*, 2 How. (U. S.) 319; *Tompkins v. Tompkins*, 1 Story (U. S.) 547; and decrees in admiralty, *The Mary*, 9 Cranch (U. S.) 126; *Magown v. New England*

Marine Ins. Co., 1 Story (U. S.) 157; *The Slavers*, 2 Wall. (U. S.) 383.

In Port. (See also **PORT**; and see the title **MARINE INSURANCE**.)—A ship insured for a voyage to any port of discharge in the United Kingdom, and while *in port* during thirty days after arrival, arrived at Greenock, discharged her cargo, and was placed in a dock for repairs. Within thirty days after her arrival she left the dock in ballast for the port of Glasgow, in tow of a steam tug, to proceed on a new voyage, and had reached the fairway of the channel of the Clyde, her stern being about five hundred feet distant from the harbor works, when she was capsized by a sudden gust of wind, and sustained damage. It was held, affirming the decision of the Court of Session (14 Ct. Sess. Cas., 4th series 544), that the ship at the time of the accident was not *in port* within the meaning of the policy, and that the underwriters were not liable. *Hunter v. Northern Marine Ins. Co.*, 13 App. Cas. 717.

In His Possession.—See **POSSESSION**.

In Their Presence.—Abusive, insulting, or vulgar (*i. e.*, obscene) language uttered in a public highway, near enough to the premises of the prosecutor to be distinctly heard, and actually heard by his family, or by any member thereof, must be regarded as uttered *in their presence*, and as a violation of Code of Alabama (1876), § 4203 (Crim. Code 1896, § 4306). *Henderson v. State*, 63 Ala. 193.

In the Presence Of.—See the title **WILLS**.

In Progress.—A statute provided that all work involving a certain expenditure should be by contract, "excepting such works now *in progress* as are authorized by law or ordinance to be done otherwise than by contract." It was held that where, for the purpose of laying a sewer, a street was divided into sections and subsections, commencement of work on one of the subsections was not a commencement on the other sections; therefore the work was not *in progress* on the other sections, within the meaning of the statute. *Boas v. New York*, 85 Hun (N. Y.) 311.

In Smith v. New York, 82 Hun (N. Y.) 570, affirmed 145 N. Y. 641, it was held that work was *in progress* if begun on the day previous to the taking effect of the statute. See generally the title **MUNICIPAL CORPORATIONS**.

In Pursuance.—See **PURSUANCE**.

In the Rear.—See **REAR**.

In Rem.—See *supra*, this note, *In Personam* and *In Rem*.

In Restraint of Trade.—See the title **RESTRAINT OF TRADE**.

In the Same Manner.—See **MANNER**.

In Session. (See also the title **SESSION**.)—In *People v. Fancher*, 50 N. Y. 288, it was held that where a state senate took a long adjournment, although the session was continued, the senate was not *in session* within the meaning of the constitution, and that the appointment of a judge to fill a vacancy, made by the governor during such adjournment, was invalid. The court said: "The words 'in session,' as used in the clause under review, indicate a present acting or being of the senate as a body."

In *McMullen v. U. S.*, 146 U. S. 360, it was held that, for the purpose of determining the amount of compensation to be paid to the

United States marshals for attending court, the court is *in session* only when it is open by its order for the transaction of business; and that if it be closed by its own order for a day it is not *in session*, although the current term may not have expired.

In the State.—A statute taxing the gross receipts of railroads "doing business *in the state*" includes a road only a small part of which is within the state. It is to that extent *in the state*. *Erie R. Co. v. Pennsylvania*, 21 Wall. (U. S.) 492. See generally the title **TAXATION**.

In Store.—Although a receipt for wheat stated that the wheat was received *in store*, it was said that it was competent for the plaintiff to prove that there was a sale, notwithstanding the words "*in store*." *Isaac v. Andrews*, 28 U. C. C. P. 40; *McBride v. Silverthorne*, 1 U. C. Q. B. 545. See also *Erwin v. Clark*, 13 Mich. 10.

But it has been held that a written instrument acknowledging the receipt of a quantity of wheat "*in store*" imports a bailment and not a sale. *Goodyear v. Ogden*, 4 Hill (N. Y.) 104. See also the titles **RECEIPTS**; **SALES**.

In Substance.—See **SUBSTANCE**.

In Term. (See also **TERM**.)—A statute provided that judgments confessed in vacation should have the same force and effect as judgments entered "*in term*." In construing this statute the court said: "What is understood by the words '*in term*'? They mean that the judgments confessed in vacation shall have the same force and effect as those entered *in the term* time of court. We see that a judgment may be confessed in court in vacation as well as at the session." *Highway Com'rs v. People*, 4 Ill. App. 391.

In Trade.—In *Woods v. Dial*, 12 Ill. 72, it was held that a contract, payable *in trade*, without time or place for payment, was payable on demand, or within a reasonable time thereafter, according to the nature of the thing demanded.

In His Trade or Business.—In *In re Jenkinson*, 15 Q. B. D. 441, it was held that this phrase in the Bankrupt Act did not include property unconnected with the bankrupt's business, although he had mortgaged it for money to be used *in his business*. *Following In re Pryce*, 4 Ch. Div. 685. See *Colonial Bank v. Winney*, 11 App. Cas. 426, reversing 30 Ch. D. 280.

In Transitu.—See the title **STOPPAGE IN TRANSITU**.

In Trust.—Where the plaintiff, a judgment creditor, showed that the judgment debtor kept a bank account under his own name, adding the words "*in trust*," without further designating the character of the trust or naming the beneficiary, it was held that the claim against the bank was a chose in action in favor of the judgment debtor personally, and, in the absence of further facts, the plaintiff was entitled to appropriate this chose in action. *Green v. Griswold*, 57 N. Y. Super. Ct. 24, affirmed 127 N. Y. 682.

Same—Fire Insurance.—See the title **FIRE INSURANCE**, vol. 13, p. 116.

In Trust For.—"There is no peculiar potency in the word 'benefit' which the terms '*in trust for*' and 'for the use of' do not possess."

INABILITY. — See note 1.

INACCURATE. — See note 2.

INADEQUATE. — See note 3.

INADEQUATE DAMAGES. — See the title DAMAGES, vol. 8, p. 628.

INADVERTENCE. — See note 4.

Every gift, either to a third person directly, or *in* trust for him, is for his benefit, whether or not it is so declared *in totidem verbis*; and the word, so far as the legal effect of the instrument is concerned, is a mere expletive, neither limiting nor enlarging the estate of the beneficiary." *O'Neil v. Teague*, 8 Ala. 345.

In Twelve Months After Date. — In an action on a promissory note, the declaration described the note as payable "*in* twelve months after date," while the one offered in evidence was payable "twelve months after date." This was held no variance. *Tipton v. Utley*, 59 Ill. 25.

In the Usual Course of Business. — As applied to commercial paper, the phrase "*in* the usual course of business" means "according to the usages and customs of commercial transactions." *Kellogg v. Curtis*, 69 Me. 212. See also the title BILLS OF EXCHANGE AND PROMISSORY NOTES, vol. 4, p. 282.

In Value. — A bankruptcy act required that a deed or arrangement between a debtor and his creditors, in order to bind nonconsenting creditors, should be assented to in writing by the majority in number representing two-thirds *in* value of the creditors of such debtor. It was held that in determining whether the requisite majority *in* value of the creditors had assented to the deed, the value of securities held by secured creditors was not to be deducted. *Whittaker v. Lowe*, L. R. 1 Exch. 74. See the title INSOLVENCY AND BANKRUPTCY, *post*.

In the Vicinity. — See VICINITY.

In Virtue of His Office. — See VIRTUE OFFICIAL.

In a Word. — For "*in* a word" in the sense of "to sum up," see *Clopton v. Cozart*, 13 Smed. & M. (Miss.) 368.

In Writing. (See also WRITING.) — In *Re Lewis*, 1 Q. B. D. 726, Lord Coleridge, C. J., said: "An 'agreement *in* writing' * * * must be an agreement by both parties, and both parties must sign their names upon the agreement." See also *In re Malaga Lead Co.*, 44 L. J. Ch. 617, L. R. 20 Eq. 524; *Re New Eberhardt Co.*, 59 L. J. Ch. 73; *Pooley v. Driver*, 5 Ch. D. 458.

1. Pecuniary Embarrassment. — The statute 9 & 10 Vict., c. 95, § 24, authorized the judge of a County Court, subject to the approval of the lord chancellor, to remove the clerk of the court "in case of *inability* or misbehavior." It was held that pecuniary embarrassment or insolvency did not in itself constitute *inability* within the meaning of the act. *Reg. v. Owen*, 15 Q. B. 476, 69 E. C. L. 476.

A Charter-party of affreightment provided that in case of the "ship's *inability* to execute and proceed on the service," certain persons should be at liberty to make such abatement out of the freight as they should think reasonable. It was held that an *inability* of the ship to proceed to sea for want of men to navigate her was within the proviso, even though such want of men arose from no fault or neglect of

the shipowner, but from an act of God. *Beatson v. Schank*, 3 East 233.

A justice of the peace was authorized to take jurisdiction of an action only in case of the "absence, sickness, or other *inability*" of a municipal judge. It was held that the fact that such judge declined to act in the cause did not give jurisdiction to the justice. *Klaire v. State*, 27 Wis. 462.

Judge. (See also the title JUDGE.) — A statute provided that it should be the duty of the mayor of a city to designate one of the justices of the peace of that city to act as city judge in case of sickness, absence from the city, or *inability* of the city judge to act. It was held that *inability* did not mean physical *inability* alone, and that where the city judge was engaged in the removal of his family from his summer resort to his home in the city, the justice of the peace was authorized to act in his place. *People v. Schirmer*, 55 Hun (N. Y.) 160, affirmed 119 N. Y. 625.

Trustees. (See also the title TRUSTS AND TRUSTEES.) — In *In re Lemann*, 22 Ch. D. 633, it was held that the words *inability* and "incapable" as used in a statute prescribing the qualification of trustees were convertible, and applied to personal incapacity from acting, such as age or infirmity, as distinguished from unfitness. See also *Re Watts*, 9 Hare 106; *In re Bignold*, L. R. 7 Ch. 223; *In re Moravian Soc.*, 26 Beav. 101. But in *Mesnard v. Welford*, 1 Smale & G. 426, Stuart, V. C., said: "How can Mr. Welford perform the duties of a trustee of property situate at Somers Town and in Paddington, if he is a resident in New York? I think that a trustee domiciled at New York can hardly be capable of acting as a trustee of the property in question."

Inability and Incompetency. — See *Armstrong v. Union School Dist. No. 1*, 28 Kan. 349.

2. Inaccurate Description. — This term was held not to apply where one place was correctly described instead of another. *Reg. v. Coward*, 16 Q. B. 819, 71 E. C. L. 819. See also *Rogers v. Lewis*, 7 C. B. N. S. 30, 97 E. C. L. 30.

3. Inadequate Price. (See also the titles CONSIDERATION, vol. 6, p. 694; FRAUDULENT SALES AND CONVEYANCES, vol. 14, pp. 292, 516.) —

Inadequate price is defined to be a term applied to indicate a want of sufficient consideration for a thing sold, or such a price as under ordinary circumstances would be insufficient. *State v. Purcell*, 131 Mo. 312.

4. Inadvertence. — The omission in good faith of a stamp, the parties believing that none was required, was held to be an *inadvertence* within an Act of Congress providing that it should be lawful for a collector to affix a stamp within twelve months and remit the penalty, where it was shown to him that because of *inadvertence* the instrument had not been duly stamped. *Green Mt. Cent. Institute v. Britain*, 44 Vt. 13. See generally the title STAMP ACTS.

Judgments. (See also the title JUDGMENTS.)

INAPPRECIABLE. — See note 1.

INBOARD. — See note 2.

INCAPABLE — INCAPACITY. — See note 3.

INCAPACITATED. — See IMPEDE — IMPEDIMENT, vol. 15, p. 1073.

INCENDIARISM. (See also the title ARSON, vol. 2, p. 917.) — See note 4.

— In *Russell v. Colyar*, 4 Heisk. (Tenn.) 154, it was held that a statute allowing a court after the term to vacate or correct mistakes in judgments given through *inadvertence* or oversight did not apply to any judgment which was given upon the deliberate consideration and judgment of the court, though the court might have since adopted a different ruling as correct.

Bankruptcy. (See the title INSOLVENCY AND BANKRUPTCY, *post*.) — In *In re Piers*, (1898) 1 Q. B. 627, it was held that where a creditor omitted to value his security, by reason of erroneous information leading him to suppose it to be worthless, there was no omission to value the security which arose from *inadvertence* within the meaning of the English Bankruptcy Act. See also *Ex p. Clarke*, 40 W. R. 608; *In re Lister*, (1892) 2 Ch. 417. In *In re Piers*, (1898) 1 Q. B. 631, Smith, L. J., said that *inadvertence* and mistake were not convertible terms, and that the former word meant the opposite of deliberate election, and did not include a deliberate election, though based upon false grounds.

1. **Inappreciable.** — In *Embrey v. Owen*, 6 Exch. 366, Talford, J., *ad nisi prius*, had defined an *inappreciable* abstraction of water to mean so inconsiderable an amount as to be incapable of value or price. Parke, B., in delivering the opinion of the court on appeal, said: "We are not prepared to say that the learned judge *ad nisi prius* was correct in his interpretation of the word *inappreciable* when connected with the word 'quantity,' nor sure that he was not; for the word *inappreciable*, or 'unappreciable,' is one of a new coinage, not to be found in Johnson's Dictionary or Richardson's. The word 'appreciate' first appears in our dictionaries in the last edition of Johnson, by Todd, 1827, with the explanation 'to estimate,' 'to value;' and assuming that to be the true meaning, which we suppose it is, the compound adjective signifies that the quantities were not capable of being estimated or valued, and in that sense the fourth plea was not proved." See also *Sampson v. Hodinott*, 1 C. B. N. S. 604, 87 E. C. L. 604.

2. **Inboard.** — A marine policy insured certain goods "*inboard* cargo of boat *W. S. Alden*." The court said: "*Inboard* is used in contrast to 'outboard.' It does not necessarily mean under deck, but seems to mean a cargo not projecting over the rail of the vessel. No evidence explanatory of its meaning was given or offered at the trial. Under all the circumstances it is therefore but fair to hold, and especially as the policy was general and permitted any mode of lading usual in canal navigation, and expressly provided that the rules applicable to ordinary marine policies should not apply, that if the defendant intended by the certificate to limit the insurance to the cargo under deck, it should have said so in clear terms." *Allen v. St. Louis Ins. Co.*, 46 N. Y. Super. Ct. 175. See generally the title MARINE INSURANCE.

3. **Incapable of Acting — Public Officer.** (See also the title PUBLIC OFFICERS.) — A statute provided that if the mayor of any borough should at any time be *incapable* of acting, the council of such borough should forthwith elect one of the aldermen to act in place of the mayor. In a borough not divided into wards the mayor, being returning officer, offered himself for re-election as town councillor, and the council elected one of the aldermen to act at the election in the place of the mayor; the mayor was re-elected a town councillor. It was held that the mayor was not disqualified as a candidate, but he could not act as returning officer; that he was *incapable* of acting within the meaning of the section; and consequently that the appointment of the alderman as substitute and the election were valid. *Reg. v. White*, L. R. 2 Q. B. 557. See also *Reg. v. Owens*, 2 El. & El. 86, 105 E. C. L. 86; *Fanagan v. Kerman*, 8 L. R. Ir. 44.

It has been held that a trustee who went to reside abroad came within a description of a trustee *incapable* to act. *Mesnard v. Welford*, 1 Smale & G. 426, 1 Eq. Rep. 237. But this doctrine has been doubted. See also *Lewin on Trusts* (8th ed.) 659; *In re Rignold*, L. R. 7 Ch. 223; *INABILITY*, *ante*, p. 131; and see the title TRUSTS AND TRUSTEES.

In *Matter of Munger*, 10 N. Y. App. Div. 347, it was held that a county judge who was absent at the time set for the hearing of a cause was not *incapable* to act within the meaning of a statute authorizing the removal of a cause where the judge was *incapable* to act. The court said: "The term *incapable* or *incapacity* is seldom used in legislation as inclusive of the idea conveyed by the word 'absent' or 'absence.'"

Incapable of Being Estimated. — The words "debt or liability *incapable* of being fairly estimated," in an English bankruptcy act, have been held not to apply to a bankrupt's liability to contribute for future calls to a limited company which had gone into liquidation pending his bankruptcy. *In re Mercantile Mut. Marine Ins. Assoc.*, 25 Ch. D. 415. In *Ex p. Blakemore*, 5 Ch. D. 372, it was held that an annuity terminable on a second marriage was not such a debt or liability.

Incapacity. — A testatrix gave certain property to one J. for the purpose of providing him with a collegiate education, and provided that if through his own disinclination or *incapacity* he should fail to carry out these intentions the gift should lapse. It was held that J. took the estate subject to be divested by condition subsequent, and that his death while pursuing his studies did not forfeit the estate. *Ellicott v. Ellicott*, (Md. 1900) 45 Atl. Rep. 183.

Incompetent and Incapable. — See INCOMPETENT, *post*.

4. **Incendiarism.** — A policy of insurance provided that it did not cover any loss occasioned by or in consequence of *incendiarism*. It was held that this included a loss occasioned by an

INCEPTION. — See note 1.

act of *incendiarism* in an adjoining house. *Walker v. London, etc., Ins. Co.*, 22 L. R. Ir. 572.

1. **Inception.** — In *Marvin v. McCullum*, 20 Johns. (N. Y.) 289, it was held that a promissory note had no legal *inception* until delivered to some person as evidence of a subsisting debt. This case was upon the question whether a note was usurious in its *inception*. See also the title *USURY*.

Inception of Lien. — A statute provided that any mortgage on land at the time of the *inception* of a mechanic's lien should not be affected thereby. In construing this statute

the court said: "The word *inception* means 'initial stage.' Century Dictionary. It does not refer to a state of actual existence, but to a condition of things or circumstances from which the thing may develop. When the building has been projected, and construction of it entered upon — that is, contracted for — the circumstances exist out of which all future contracts for labor and material necessary to its completion may arise, and for all such labor and material a common lien is given by the statute; and in this state of circumstances the lien to secure each has its *inception*." *Oriental Hotel Co. v. Griffiths*, 88 Tex. 583.

INCEST.

By A. S. H. BRISTOW.

- I. DEFINITION AND NATURE, 134.**
- II. ESSENTIAL ELEMENTS, 135.**
 - 1. *Concurrent Assent of Parties, 135.*
 - 2. *The Act, 135.*
 - a. *Single Act Sufficient, 135.*
 - b. *Marriage, 136.*
 - 3. *The Relationship, 136.*
 - a. *In General, 136.*
 - b. *Knowledge of Relationship, 138.*
- III. EVIDENCE, 138.**
 - 1. *Admissibility, 138.*
 - a. *To Prove the Act, 138.*
 - (1) *In General, 138.*
 - (2) *Confessions, 138.*
 - (3) *Other Acts of Familiarity or Illicit Intercourse, 139.*
 - (a) *Prior Acts Between the Parties, 139.*
 - (b) *Subsequent Acts Between the Parties, 139.*
 - (c) *Sexual Acts with Third Parties, 139.*
 - b. *To Show Relationship, 140.*
 - (1) *In General, 140.*
 - (2) *Reputation, 140.*
 - (3) *Admissions of the Defendant, 140.*
 - c. *To Show Character, 140.*
 - 2. *Sufficiency, 140.*
 - a. *In General, 140.*
 - b. *Confessions of Accused, 141.*
 - c. *Testimony of Prosecutrix, 141.*
- IV. PUNISHMENT, 141.**
- V. ATTEMPT TO COMMIT INCEST, 141.**

CROSS-REFERENCES.

For matters of PROCEDURE, see ENCYCLOPÆDIA OF PLEADING AND PRACTICE, vol. 10, p. 334.
For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the following titles in this work: ATTEMPTS TO COMMIT CRIME, vol. 3 p. 250; CHARACTER (IN EVIDENCE), vol. 5, p. 850; CRIMINAL LAW, vol. 8, p. 274; MARRIAGE; RAPE.

I. DEFINITION AND NATURE. — Under the statutes of various states incest may be defined as the intermarriage¹ or carnal copulation without marriage²

1. **Incestuous Marriage Defined** — *California*. — *People v. Patterson*, 102 Cal. 242.
Minnesota. — *State v. Herges*, 55 Minn. 465.
Missouri. — *State v. Slaughter*, 70 Mo. 484.
Montana. — *Territory v. Corbett*, 3 Mont.

55.
Ohio. — *State v. Brown*, 47 Ohio St. 108, 21 Am. St. Rep. 790.
Texas. — *Simon v. State*, 31 Tex. Crim. 201, 37 Am. St. Rep. 802.

Virginia. — *Atty.-Gen. v. Broadbuss*, 6 Munf. (Va.) 116.

Wisconsin. — *Hintz v. State*, 58 Wis. 497.

2. **Incest Without Marriage Defined.** — *Bouv. Law Dict.* (15th ed.) 783; *State v. Herges*, 55 Minn. 464; *Territory v. Corbett*, 3 Mont. 55; *State v. Brown*, 47 Ohio St. 108, 21 Am. St. Rep. 790; *Simon v. State*, 31 Tex. Crim. 201, 37 Am. St. Rep. 802; *Hintz v. State*, 58 Wis. 497.

of a man and woman related to each other in any of the degrees within which marriage is prohibited by law.

Not a Crime at Common Law. — Incest is not a crime at common law.¹

A Statutory Crime. — But in most of the states incest is made an indictable offense by statute.²

II. ESSENTIAL ELEMENTS — 1. Concurrent Assent of Parties. — In some states the concurrent assent of the parties is required to establish the crime of incest, and where an illicit connection is accomplished by force, the defendant cannot be convicted of incest.³ But under this rule it has been held that one party who is guilty may be indicted and tried and convicted alone for the offense, and it is unnecessary that both parties shall be guilty of the offense before one of them may be convicted, as for instance where one party is aware and the other ignorant of the relation which exists between them.⁴

In other jurisdictions it has been held that the intercourse and relationship being established, it is immaterial as regards the defendant's guilt whether the act of intercourse was or was not with the consent of the other party, and that the crime may be committed though force was used by one of the parties sufficient to constitute rape.⁵

Consent of Female Inoperative as Defense. — On the other hand it has been held that the fact that the female consented to the intercourse is no defense to a prosecution for incest.⁶

2. The Act — a. SINGLE ACT SUFFICIENT. — Under statute in some jurisdictions it has been held that a single act of unlawful sexual intercourse may be

1. Incest Not a Crime at Common Law. — *People v. Burwell*, 106 Mich. 27; *State v. Slaughter*, 70 Mo. 488; *State v. Keesler*, 78 N. Car. 469; *Tuberville v. State*, 4 Tex. 128.

An Offense Punishable by Canon Law. — But incest was recognized as a crime and punished by the ecclesiastical courts. *Chick v. Ramsdale*, 1 Curt. Ecc. 34; *Woods v. Woods*, 2 Curt. Ecc. 516; *Griffiths v. Reed*, 1 Hag. Ecc. 195; *Burgess v. Burgess*, 1 Hag. Cons. 384; *Blackmore v. Brider*, 2 Phill. Ecc. 359.

2. A Crime by Statute in Most Jurisdictions. — *Cook v. State*, 11 Ga. 54, 56 Am. Dec. 410; *State v. Slaughter*, 70 Mo. 484; *Rea v. Harrington*, 58 Vi. 181, 56 Am. Rep. 561.

In Louisiana it has been held that though the crime of incest is denounced, it is not defined by any statute in that state, and hence there can be no conviction for incest under the laws of that state. *State v. Smith*, 30 La. Ann. 846.

But by Rev. Laws of Louisiana (1897), page 189, a definition of the crime of incest has been given corresponding to the definition of the text.

3. Jurisdictions Holding Assent of Both Parties Essential. — *People v. Jenness*, 5 Mich. 321; *De Groat v. People*, 39 Mich. 124; *People v. Burwell*, 106 Mich. 27, citing 10 AM. AND ENG. ENCYC. OF LAW (1st ed.) 339; *People v. Skutt*, 96 Mich. 449; *State v. Ellis*, 74 Mo. 385, 41 Am. Rep. 321; *State v. Eding*, 141 Mo. 283; *People v. Harriden*, (Supm. Ct.) 1 Park. Crim. (N. Y.) 344; *State v. Jarvis*, 20 Oregon 437, 23 Am. St. Rep. 141. See also *Noble v. State*, 22 Ohio St. 545; *Com. v. Goodhue*, 2 Met. (Mass.) 193. Compare *People v. Rouse*, 2 Mich. N. P. 209.

A Question for the Jury. — It is proper to leave it to the jury to determine whether the intercourse took place under such circumstances as to constitute rape or incest. *People v. Skutt*, 96 Mich. 449.

4. Guilt of Both Parties Unnecessary. — *People*

v. Patterson, 102 Cal. 239; *State v. Kimble*, 104 Iowa 19; *State v. Ellis*, 74 Mo. 385, 41 Am. Rep. 321; *State v. Jarvis*, 20 Oregon 437, 23 Am. St. Rep. 141. See also *Yeoman v. State*, 21 Neb. 171.

Under Statute in Indiana it has been held that one party to the incest cannot be legally guilty unless the other is also guilty, since knowledge of the relationship by both parties is required. *Baumer v. State*, 49 Ind. 545, 19 Am. Rep. 691.

5. Jurisdictions Holding Consent of Both Parties Unnecessary to Constitute Incest — Alabama. — *Smith v. State*, 108 Ala. 1, 54 Am. St. Rep. 140.

California. — *People v. Kaiser*, 119 Cal. 456. See also *People v. Patterson*, 102 Cal. 244, citing 10 AM. AND ENG. ENCYC. OF LAW (1st ed.) 341.

Georgia. — *Powers v. State*, 44 Ga. 209.

Indiana. — *Norton v. State*, 106 Ind. 163.

Iowa. — *State v. Thomas*, 53 Iowa 214; *State v. Chambers*, 87 Iowa 1, 43 Am. St. Rep. 349; *State v. Hurd*, 101 Iowa 391; *State v. Kouhns*, 103 Iowa 720.

Texas. — *Mercer v. State*, 17 Tex. App. 464.

Washington. — *State v. Nugent*, 20 Wash. 522, citing 10 AM. AND ENG. ENCYC. OF LAW, 214. Compare *State v. McGilvery*, 20 Wash. 240.

Female Under Age of Consent. — Though the female is under the age of consent the crime of incest may exist. *People v. Kaiser*, 119 Cal. 456; *People v. Barnes*, 2 Idaho 148; *State v. Chambers*, 87 Iowa 1, 43 Am. St. Rep. 349. Compare *De Groat v. People*, 39 Mich. 124.

In *Raiford v. State*, 68 Ga. 672, it was held that in the crime of incest there may be a certain force or power exerted, resulting from the age, relationship, or circumstances of the parties which overcomes the objections of the female, without amounting to that violence which would constitute rape.

6. Consent of Female Inoperative as Defense. — *Schoenfeldt v. State*, 30 Tex. App. 695.

sufficient to constitute incest.¹

But Carnal Knowledge and Penetration are necessary to be proved to convict the defendant, and an unsuccessful attempt to accomplish this end does not constitute the offense in a case where the gist of the action is carnal copulation and not incestuous intermarriage.²

Emissio Seminis Essential. — And it has been held that *emissio seminis* is an essential ingredient in the crime of incest.³

6. MARRIAGE. — Under statute in many of the states, sexual commerce by persons within the prohibited degrees of consanguinity is incest, though they have gone through the form of intermarriage.⁴

Cohabitation as Man and Wife Sufficient. — Under a statute defining incest to be the intermarrying or carnal knowledge of persons within the forbidden degrees, it has been held that the crime of incest does not require proof of marriage to sustain it, but where the state proves either cohabitation (that is, living together as husband and wife) or carnal knowledge, it will be sufficient without proof of marriage; so that when incest is charged in an indictment alleging intermarriage between parties within the prohibited degrees, it may be proved by cohabitation, and the defendant cannot answer such charge by attacking the validity of the marriage.⁵

Intermarriage Without Carnal Knowledge. — Under statute in *Iowa* prohibiting the intermarriage of persons within certain degrees of consanguinity and affinity, and providing a punishment for its violation, it has been held that to sustain a conviction for incest, it is not necessary for the state to show in addition to intermarriage carnal knowledge between the parties.⁶

3. The Relationship — *a. IN GENERAL.* — Various statutory provisions exist in the different states prescribing the relationship existing between the parties necessary to constitute the crime of incest, a very common provision being that in order to constitute the crime the parties must be related to each other in some degree within which marriage is prohibited.⁷ Accordingly the crime may occur between parent and child,⁸ brother and

1. Single Act of Intercourse Sufficient. — *Mathis v. Com.*, (Ky. 1890) 13 S. W. Rep. 360; *State v. Brown*, 47 Ohio St. 102, 21 Am. St. Rep. 790. See also *Barnhouse v. State*, 31 Ohio St. 39.

2. Penetration Necessary. — *Com. v. Lynes*, 142 Mass. 581, 56 Am. Rep. 709.

3. Emissio Seminis Necessary. — *Noble v. State*, 22 Ohio St. 542.

4. Incestuous Marriage. — *State v. Brown*, 47 Ohio St. 102, 21 Am. St. Rep. 790; *Territory v. Corbett*, 3 Mont. 50; *Simon v. State*, 31 Tex. Crim. 186, 37 Am. St. Rep. 802.

Where Marriage is Valid in State Where Contracted. — In *State v. Brown*, 47 Ohio St. 102, 21 Am. St. Rep. 790, the court said: "We hold, therefore, that by section 7019, Rev. Stat., sexual commerce, as between persons nearer of kin than cousins, is prohibited, whether they have gone through the form of intermarriage or not; nor is it material that the marriage was celebrated in a country where it was valid, for we are not bound upon principles of comity to permit persons to violate our criminal laws, adopted in the interest of decency and good morals, and based on principles of sound public policy, because they have assumed, in another state or country where it was lawful, the relation which led to the acts prohibited by our laws."

5. Cohabitation as Man and Wife Sufficient to Establish Offense. — *Simon v. State*, 31 Tex. Crim. 202, 37 Am. St. Rep. 802.

6. Intermarriage Without Carnal Knowledge Sufficient. — *State v. Schaunhurst*, 34 Iowa 547.

7. See the statutes of the various states.

Marriage of Sister of Former Wife. — It seems that the marrying of a sister of a former wife was at one time incest under statute in *Virginia*. *Atty.-Gen. v. Broadbuss*, 6 Munf. (Va.) 116.

Marrying Brother's Widow. — Under statute in *Virginia* providing that "if the brother hath married or shall marry his brother's wife" the marriage shall be dissolved, the parties fined, etc., it has been held that the marrying of a brother's widow is an offense within the statute. *Com. v. Perryman*, 2 Leigh (Va.) 718.

But by Code of *Virginia* (1887), § 2224, it is provided that "if any man have heretofore married his brother's widow * * * such marriage is hereby declared to be legal and valid, and exempt from the penalties prescribed by existing laws."

8. Incest Between Father and Daughter — *Alabama*. — *Baker v. State*, 30 Ala. 521.

Arkansas. — *State v. Ratcliffe*, 61 Ark. 62; *Martin v. State*, 58 Ark. 3.

Georgia. — *Cook v. State*, 11 Ga. 54, 56 Am. Dec. 410.

Iowa. — *State v. Hurd*, 101 Iowa 391.

Kentucky. — *Mathis v. Com.*, (Ky. 1890) 13 S. W. Rep. 360.

Maine. — *State v. Peterson*, 70 Me. 216.

Michigan. — *Hicks v. People*, 10 Mich. 395.

Nebraska. — *State v. Lawrence*, 19 Neb. 307.

sister,¹ uncle and niece,² aunt and nephew,³ and, under the *Arkansas* statute, first cousins.⁴

Blood Relationship Not Essential. — In the case of parent and child the relationship need not be of blood, for it is equally criminal for a man to have intercourse with his stepdaughter,⁵ and the same is true of a stepmother and stepson.⁶ But it has been held that such intercourse is not incest after the death of the stepchild's parent by blood,⁷ nor before unless it be shown that one of the parties was lawfully the husband or wife of the parent of the other.⁸ And it has been held that a brother-in-law and sister-in-law are within the prohibition of a statute forbidding marriage between persons nearer of kin by consanguinity or affinity than cousins.⁹

Relationship by the Half-blood. — Under the statutes defining incest it has also been held that the relationship of brother and sister includes brother and sister of the half-blood,¹⁰ and the same rule has been applied to uncles and nieces of the half-blood.¹¹

Illegitimacy of One of the Parties. — And it has been held that the fact that one of the parties to the crime was born out of wedlock is immaterial if he sustains towards the other a relationship within some prohibited degree of consanguinity, and therefore carnal intercourse by a father with an illegitimate daughter, for instance, is incest and creates guilt of the same degree as if the latter party had been born in lawful wedlock.¹²

Pennsylvania. — *Com. v. Bruce*, 4 Pa. L. J. Rep. 14, 6 Pa. L. J. 236.

Texas. — *Waggoner v. State*, 35 Tex. Crim. 199.

Wisconsin. — *Hintz v. State*, 58 Wis. 493.

1. **Brother and Sister.** — *Jackson v. State*, (Tex. Crim. 1897) 40 S. W. Rep. 998.

Sister Under Sixteen. — Under an *Iowa* statute against incest, including in its prohibitions any brother and sister who are of the age of sixteen years or upwards, it has been held that a brother, over sixteen, having sexual intercourse with his sister under sixteen was not guilty of incest. *U. S. v. Hiler*, 1 Morr. (Iowa) 330.

2. **Uncle and Niece.** — *State v. Brown*, 47 Ohio St. 102, 21 Am. St. Rep. 790; *State v. Dana*, 59 Vt. 614; *State v. Pennington*, 41 W. Va. 599.

3. **Aunt and Nephew.** — See *State v. Guiton*, 51 La. Ann. 155.

4. **Cousins** — *Arkansas.* — *Nations v. State*, 64 Ark. 467; *State v. Fritts*, 48 Ark. 66.

5. **Stepfather and Stepdaughter.** — *Norton v. State*, 106 Ind. 163; *Schoenfeldt v. State*, 30 Tex. App. 695. Compare *People v. Kaiser*, 119 Cal. 456.

6. **Incest Between Stepmother and Stepson.** — *Baumer v. State*, 49 Ind. 544, 19 Am. Rep. 691. But in *Chancellor v. State*, 47 Miss. 278, it was held that cohabitation by a man with his stepdaughter was not incestuous by the laws of that state.

7. **Effect of Death of Parent by Blood in Case of Intercourse between Step-parent and Step-child.** — Thus it has been held that there cannot be incest between a man and his wife's daughter after his wife's death. *Johnson v. State*, 20 Tex. App. 609, 54 Am. Rep. 535.

8. **Necessity of Lawful Marriage Between Step-parent and Parent by Blood.** — Thus it has been held that in a prosecution for incest, based on the carnal intercourse of stepfather and stepdaughter, there must be presented affirmative evidence of the legal marriage of the former

with the mother of the latter. *McGrew v. State*, 13 Tex. App. 340.

But in a prosecution for incest with a stepdaughter an instruction that, if the evidence showed that the female's mother had been married three times, and that the defendant was the last husband, the state must show by evidence to the satisfaction of the jury beyond a reasonable doubt that the first and second marriages were legally dissolved, or defendant is entitled to a verdict of "not guilty," is error where it is shown that the prior husbands were both dead at the time of the marriage. *Schoenfeldt v. State*, 30 Tex. App. 695.

9. **Brother-in-law and Sister-in-law.** — *Stewart v. State*, 39 Ohio St. 152.

Death of Wife. — But the begetting of an illegitimate child on the body of the sister of a deceased wife is not within the *Tennessee* statute (Shannon's Code, § 6767). *Wilson v. State*, 100 Tenn. 596.

10. **Brothers and Sisters of the Half-blood.** — *Territory v. Corbett*, 3 Mont. 50; *Shelly v. State*, 95 Tenn. 122, 49 Am. St. Rep. 926. See also *People v. Jenness*, 5 Mich. 305.

11. **Uncle and Niece of Half-blood** — *Kansas.* — *State v. Reedy*, 44 Kan. 190.

Louisiana. — *State v. Guiton*, 51 La. Ann. 155.

Missouri. — *State v. Pruett*, 144 Mo. 92.

Texas. — *Simon v. State*, 31 Tex. Crim. 186, 37 Am. St. Rep. 802.

Vermont. — *State v. Wyman*, 59 Vt. 527, 59 Am. Rep. 753.

12. **Intercourse Between Father and Illegitimate**

Daughter — *Alabama.* — *Baker v. State*, 30 Ala. 521.

California. — *People v. Kaiser*, 119 Cal. 456.

Iowa. — *State v. Schaunhurst*, 34 Iowa 547.

Michigan. — *People v. Jenness*, 5 Mich. 305.

New York. — *People v. Lake*, 110 N. Y. 61,

6 Am. St. Rep. 344.

North Carolina. — *State v. Lawrence*, 95 N.

Car. 659.

Texas. — *Clark v. State*, 39 Tex. Crim. 179.

b. KNOWLEDGE OF RELATIONSHIP. — Where the statutes are silent as to any *scienter*, as where they do not use the words "knowingly," "wilfully," or the like in describing the offense, it will not be necessary to allege and prove affirmatively that the defendant knew the relationship existing between him and the *particeps*.¹ While this is true, still it would seem, upon reason, that the defendant's ignorance of such fact would constitute a valid defense.² Of course where knowledge of the relationship is expressly made an essential part of the crime, then it must be alleged and proved, in order to convict.³

III. EVIDENCE — 1. Admissibility — a. TO PROVE THE ACT — (1) In General. — The principles governing the admissibility of evidence in criminal cases generally operate as to evidence in proof of the criminal act in prosecutions for incest.⁴

(2) *Confessions.* — The confessions of the defendant, if voluntary, are admissible to show the commission of the act.⁵

1. Affirmative Proof of Knowledge Unnecessary Where Statute Is Silent as to Knowledge. — *State v. Bullinger*, 54 Mo. 143; *Simon v. State*, 31 Tex. Crim. 186, 37 Am. St. Rep. 802; *State v. Wyman*, 59 Vt. 528, 59 Am. Rep. 753; *State v. Dana*, 59 Vt. 623.

Constitutionality of Statute Omitting Words as to *Scienter*. — *In re Nelson*, 69 Fed. Rep. 712, it was held that a statute of *Washington* relating to incest was not invalid because of the omission of the word "knowingly" or other equivalent word or phrase making knowledge of the relationship an element of the crime.

Necessity of Knowledge on Part of Both Parties. — Under statute in *Indiana* it has been held that to constitute incest both parties must have knowledge of the relationship. *Baumer v. State*, 49 Ind. 544, 19 Am. Rep. 691. But knowledge by the defendant alone has been held to be sufficient in other jurisdictions. *State v. Ellis*, 74 Mo. 385, 41 Am. Rep. 321; *State v. Jarvis*, 20 Oregon 437, 23 Am. St. Rep. 141; *State v. McGilvery*, 20 Wash. 240.

2. Ignorance of Relationship a Defense. — See *State v. Ellis*, 74 Mo. 385, 41 Am. Rep. 321. Compare *State v. Dana*, 59 Vt. 623.

3. Affirmative Proof of Knowledge Necessary under Statute Making Knowledge an Element of the Crime. — *Baumer v. State*, 49 Ind. 544, 19 Am. Rep. 691; *Williams v. State*, 2 Ind. 439.

4. Evidence Held to Be Relevant. — In an action for incest against a father, evidence of his cruel treatment of the daughter for the purpose of subduing her and forcing her to submit to his embraces is admissible. *Clements v. State*, 34 Tex. Crim. 616.

Evidence that the defendant denied the prosecutrix the privilege of attending church and Sunday school, and of social intercourse with the young people in the neighborhood, is admissible when, according to the testimony of the prosecutrix, the defendant based such denial on his desire for sexual intercourse with her. *Com. v. Bell*, 166 Pa. St. 405.

But it has been held that where upon a trial under an indictment for incest, committed by a father and his daughter, evidence that the defendant had six years previously quarreled with his sons and caused them to leave his house for causes having no relation to the commission of the crime, is irrelevant. *State v. Moore*, 81 Iowa 578.

In *State v. Pruett*, 144 Mo. 92, it was held that where a witness testified that he saw the

defendant and his half-sister on a bed in their father's house, and in such a position as indicated that they were indulging in sexual intercourse, and was afterwards allowed to testify over the objections of the defendant that about a month thereafter the half-sister appeared to be "in the family way," this latter evidence was inadmissible, since to admit such testimony would be to ignore the various opportunities which might present themselves to others than the defendant to accomplish such a result.

Hearsay Evidence. — In *State v. Pruett*, 144 Mo. 92, it was held that evidence that on one occasion when the defendant and his sister were away until dark, their absence "made the old man [their father] mad, because she wasn't there to get supper, and he rared around," and on their coming home "told them this way of laying out until dark had to be stopped," was inadmissible as being hearsay.

Testimony of Medical Experts. — In *Com. v. Lynes*, 142 Mass. 577, 56 Am. Rep. 709, it was held competent for medical experts to testify as to the abnormal condition of the private parts of the child with whom the offense was alleged to have been committed, when examined about six weeks after the offense was committed, and as to the causes which would produce such abnormal condition.

On the other hand, it has been held inadmissible to show that four or five years before the trial in the court below the female was examined by a physician and found to be suffering from some irritation of the vagina caused by some recent violence, since it was irrelevant from the peculiar nature of the offense. *State v. Jarvis*, 20 Oregon 437, 23 Am. St. Rep. 141. The court in this case said: "It is possible the evidence might have been competent had the charge against the defendant been rape and not incest."

Testimony of Physician as to Likeness of Offspring of Incestuous Intercourse to Defendant. — The testimony of a physician that he attended the prosecutrix at the birth of her child, and saw it several times during its life of about six weeks, and that in his opinion the child favored the defendant, is inadmissible. *Kilpatrick v. State*, 39 Tex. Crim. 10.

5. Admissibility of Confessions to Prove Act of Incest. — *Bergen v. People*, 17 Ill. 426, 65 Am. Dec. 672; *Yeoman v. State*, 21 Neb. 171.

Where a confession was made by the pris-

(3) *Other Acts of Familiarity or Illicit Intercourse* — (a) *Prior Acts Between the Parties.* — Previous Acts of Lascivious Familiarity between the parties not amounting to actual intercourse are competent evidence in prosecutions for incest, since the evidence is of such character as tends to make it probable that the parties did commit the specific offense charged; they constitute the foundation of an antecedent probability.¹

Previous Acts of Actual Intercourse. — And it has been asserted that while it is a general rule in criminal cases that evidence of the commission of other though similar offenses, by the defendant, is not admissible for the purpose of showing that he was more likely to have committed the offense for which he was on trial, nor as corroborating the testimony relating to the commission of such principal offense, the courts have shown a disposition to relax the rule in cases where the offense consists of illicit intercourse between the sexes.² Accordingly evidence of previous acts of actual intercourse between the parties is admissible, if offered to show an antecedent disposition to perpetrate the crime and not to prove distinct and substantive offenses, such evidence being of much stronger probative force than mere acts of indecent familiarity.³

Acts Barred by Statute of Limitations. — If an act is so remote in point of time from the act laid in the indictment that the statute of limitations would protect the participants in it in case of their prosecution therefor, evidence thereof is still admissible if it is one of a series of acts indicating continuousness of sexual intercourse.⁴

(b) *Subsequent Acts Between the Parties.* — Evidence of acts of illicit intercourse between the parties subsequent to the act specifically under trial is admissible when indicating continuousness of illicit relations.⁵

But in *Indiana* it has been held that where an indictment contained a single charge of incest, which was proved as laid, the state could not prove sexual intercourse between the parties at a subsequent time, on the principle that it is not competent for the prosecution to prove another distinct offense for the purpose of raising an inference that the accused had committed the offense in question.⁶

(c) *Sexual Acts with Third Parties — Of Prosecutrix.* — Where the relationship of the defendant and the prosecutrix is proved and the intercourse between them is established, proof that she had had sexual relations with other men is no excuse or mitigation of the defendant's offense, and hence it is not error to exclude such evidence.⁷

oner under duress and it was subsequently repeated to another person when the prisoner was not threatened or menaced, it is admissible. *Mathis v. Com.*, (Ky. 1890) 13 S. W. Rep. 360.

Prerequisite Establishment of Corpus Delicti. — Where in a prosecution for incest it was proven that the person with whom the incestuous intercourse was alleged to have been had was of the age of sixteen years; that she resided with her parents; that the accused also resided with the family; that they were often together alone; that she kept company with no other person; that the relation of uncle and niece existed between them; that, when her pregnancy was discovered, the accused confessed the paternity of the child which was afterwards born, admitted the intercourse, and settled the claims of the mother in satisfaction of proceedings in bastardy, and tried to induce a physician to produce an abortion — the *corpus delicti* was sufficiently proven to require the submission of the case to the jury. *Yeoman v. State*, 21 Neb. 171.

1. *Admissibility of Previous Acts of Familiarity Between the Parties.* — *State v. Markins*, 95 Ind.

464, 48 Am. Rep. 733; *People v. Skutt*, 96 Mich. 449.

2. *State v. Markins*, 95 Ind. 464, 48 Am. Rep. 733.

3. *Admissibility of Previous Acts of Actual Intercourse Between the Parties — California.* — *People v. Patterson*, 102 Cal. 239.

Indiana. — *State v. Markins*, 95 Ind. 464, 48 Am. Rep. 733; *Lefforge v. State*, 129 Ind. 551.

Michigan. — *People v. Jenness*, 5 Mich. 305; *People v. Skutt*, 96 Mich. 449; *People v. Cease*, 80 Mich. 576.

Pennsylvania. — *Com. v. Bell*, 166 Pa. St. 405.

Texas. — *Burnett v. State*, 32 Tex. Crim. 86.

4. *Com. v. Bell*, 166 Pa. St. 405.

5. *Admissibility of Subsequent Acts Between Parties.* — *Mathis v. Com.*, (Ky. 1890) 13 S. W. Rep. 360; *Burnett v. State*, 32 Tex. Crim. 86.

6. *Lovell v. State*, 12 Ind. 18.

7. *Sexual Acts of Female with Third Persons Inadmissible by Way of Mitigation.* — *Mathis v. Com.*, (Ky. 1890) 13 S. W. Rep. 360; *State v. Winningham*, 124 Mo. 423. See also *State v. Miller*, 65 Iowa 60.

Evidence of Pregnancy by Third Person. — In *Kidwell v. State*, 63 Ind. 384, it was held that

Of Defendant. — Nor is evidence of improper relations between the defendant and another subsequent to the offense charged admissible either to show that he had committed the offense charged or that he had a tendency to commit such crimes.¹

b. TO SHOW RELATIONSHIP — (1) *In General.* — It has been held that in a prosecution for incest it is error to instruct the jury as a conclusion of law that relationship is a matter that can scarcely be testified to directly in any case.²

(2) *Reputation.* — It would seem to be the better view that on an indictment for incest the relationship of the parties may be shown by reputation.³ But in a recent case it was held that on a trial for incest, pedigree cannot be shown by reputation in the neighborhood.⁴

(3) *Admissions of the Defendant.* — The admissions of the defendant have been held to be competent evidence upon the question of his consanguinity with the *particeps*.⁵

c. TO SHOW CHARACTER — **Character of Prosecutrix.** — The reputation of the prosecutrix for virtue and chastity has been held not to be material to the charge of incest and is inadmissible in evidence in favor of the defendant.⁶

Character of Defendant. — But it has been held to be error to refuse evidence of the general reputation of the defendant for gentlemanly deportment and good moral character, and to confine the proof to his reputation for virtue and chastity.⁷

Former Conduct of Defendant as Showing Character. — But it has been held to be incompetent on a trial for incest to introduce in evidence the former conduct of the defendant for the purpose of showing his bad character.⁸

2. Sufficiency — **a. IN GENERAL.** — The question whether the evidence is sufficient to support a conviction for incest is, as a general rule, to be deter-

the fact as to whether or not the prosecuting witness had become pregnant by means of sexual intercourse had by her with others than the defendant, and her declarations in relation thereto, are immaterial and irrelevant on the trial of a defendant indicted for incest.

Where the fact of pregnancy is in issue it has been held improper to introduce evidence of acts of familiarity or sexual intercourse between the prosecutrix and a third person where it is not shown that those acts occurred at a time when the pregnancy could have been caused thereby. *State v. Hurd*, 101 Iowa 391; *Kilpatrick v. State*, 39 Tex. Crim. 10.

1. Sexual Acts of Defendant with Other Persons Inadmissible. — *Porath v. State*, 90 Wis. 527.

2. Admissibility of Evidence of Relationship. — *Elder v. State*, (Ala. 1899) 26 So. Rep. 213.

Declaration of Parent to Show Illegitimacy of Son. — On a trial for incest, where the defendant was being prosecuted for marriage with the daughter of his half sister by the same father, it was held that evidence of the declarations of his deceased mother and his deceased father, that there was no blood relationship between him and his supposed half sister, and the further declaration of his deceased mother that "if defendant got into trouble by his marriage, she would protect him," was inadmissible, there being no evidence of non-access between the supposed parents, or that they were not living together, or of impotency on the part of the putative father, when the defendant was conceived in the mother's womb. *Simon v. State*, 31 Tex. Crim. 186, 37 Am. St. Rep. 802.

Declarations of Parents as to Illegitimacy to Show Son's Good Faith in Contracting Marriage.

— Declarations of the defendant's deceased mother that he was illegitimate, though born in wedlock, made to him about the time of the marriage, are not admissible to show good faith on his part in entering into the marriage, such declarations not being shown to have been made sufficiently *ante litem motam*. *Simon v. State*, 31 Tex. Crim. 186, 37 Am. St. Rep. 802.

3. View that Relationship May Be Shown by Reputation. — *State v. Bullinger*, 54 Mo. 144; *Ewell v. State*, 6 Yeig. (Tenn.) 364, 27 Am. Dec. 480.

4. View that Relationship May Not Be Shown by Reputation. — *Elder v. State*, (Ala. 1899) 26 So. Rep. 213.

5. Admissions of Defendant as Evidence of Relationship. — *People v. Jenness*, 5 Mich. 305; *People v. Harriden*, (Supm. Ct.) 1 Park. Crim. (N. Y.) 344.

The Admissions of a Father that the person with whom he had sexual intercourse was his daughter are competent evidence. *Morgan v. State*, 11 Ala. 280; *Bergen v. People*, 17 Ill. 426, 65 Am. Dec. 672; *People v. Harriden*, (Supm. Ct.) 1 Park. Crim. (N. Y.) 344.

6. Reputation of Prosecutrix for Chastity Inadmissible. — *Kidwell v. State*, 63 Ind. 381.

7. Reputation of Defendant for Moral Character Admissible. — *Poyner v. State*, (Tex. Crim. 1898) 48 S. W. Rep. 516.

8. Former Conduct Inadmissible to Show Character. — *People v. Benoit*, 97 Cal. 240.

mined solely by the jury, but, as in other criminal cases, this rule has its exceptions made with reference to certain kinds of evidence.¹

b. **CONFESSIONS OF ACCUSED.** — Thus the courts uniformly refuse to sustain convictions for incest which are entirely unsupported except by uncorroborated confessions made by the defendant.²

c. **TESTIMONY OF PROSECUTRIX.** — Where the prosecutrix is forced against her will, either through violence or fear, to submit to sexual intercourse, she is not regarded as an accomplice to the crime of incest in those jurisdictions in which the view obtains that this offense may exist in the absence of the concurrent assent of the parties; and as a consequence, to warrant a conviction against the other party, her testimony does not as a matter of law require corroboration where by statute corroboration of the testimony of an accomplice is necessary for conviction.³ But if the intercourse is accomplished with the consent of the female, she is regarded as an accomplice and her testimony comes within the statutory rule requiring corroboration.⁴ And at common law it seems that the defendant may be convicted of incest on the uncorroborated testimony of the prosecutrix, though she is an accomplice, but in such case the jury should be instructed that the evidence should be received with great caution.⁵

IV. PUNISHMENT. — Various statutes exist in the different states providing for the punishment of the crime of incest, it being punished as a felony in many of the states.⁶

V. ATTEMPT TO COMMIT INCEST. — An attempt to commit incest has been said to contain two elements — an evil intention, and a simultaneous resulting act which if fully performed would constitute the substantive crime.⁷

Mere Solicitation Insufficient. — It has been held that a bare unsuccessful solicitation does not constitute an attempt to commit incest, and that an attempt to commit incest must be a physical act, as contradistinguished from a verbal declaration, that is, it must be a step taken towards the actual commission of the offense, and not a mere effort by persuasion to produce the condition of mind essential to the commission of the offense.⁸

Solicitation Accompanied by Overt Act. — But where the evidence showed that

1. **Sufficiency Generally a Question for Jury.** — *State v. Edging*, 141 Mo. 281.

Clear Evidence of Relationship of Illegitimate Relations Necessary. — Where there is testimony tending to show that one of the parties to the alleged incest is an illegitimate relation the evidence must be clear and unequivocal as to the fact of the relationship. *Clark v. State*, 39 Tex. Crim. 179.

2. **Uncorroborated Confessions Insufficient to Convict.** — *Bergen v. People*, 17 Ill. 426, 65 Am. Dec. 672; *Sauls v. State*, 30 Tex. App. 496.

3. **Testimony of Prosecutrix Not Consenting to Intercourse Sufficient to Convict** — *Alabama*. — *Smith v. State*, 108 Ala. 1, 54 Am. St. Rep. 140. *Iowa*. — *State v. Chambers*, 87 Iowa 1, 43 Am. St. Rep. 349; *State v. Hurd*, 101 Iowa 391; *State v. Kouhns*, 103 Iowa 720.

Kentucky. — *Mathis v. Com.*, (Ky. 1890) 13 S. W. Rep. 360.

Texas. — *Mullinix v. State*, (Tex. Crim. 1894) 26 S. W. Rep. 504; *Watson v. State*, 9 Tex. App. 237; *Freeman v. State*, 11 Tex. App. 92, 40 Am. Rep. 787.

4. **Testimony of Prosecutrix Consenting to Intercourse Insufficient to Convict** — *Nevada*. — *State v. Streeter*, 20 Nev. 403.

North Dakota. — *State v. Kellar*, 8 N. Dak. 563.

Oregon. — *State v. Jarvis*, 20 Oregon 437, 23 Am. St. Rep. 141.

Texas. — *Jackson v. State*, (Tex. Crim. 1897) 40 S. W. Rep. 998; *Bales v. State*, (Tex. Crim. 1898) 44 S. W. Rep. 517; *Kilpatrick v. State*, 39 Tex. Crim. 10; *Clark v. State*, 39 Tex. Crim. 179; *Mercer v. State*, 17 Tex. App. 452.

See also *State v. Kimes*, 149 Mo. 459; *Dodson v. State*, 24 Tex. App. 514. Compare *Whittaker v. Com.*, 95 Ky. 632.

The testimony of the prosecutrix has been held to be sufficiently corroborated by evidence of her pregnancy and the fact that the defendant alone had access to her and opportunity to have carnal intercourse with her. *Jackson v. State*, (Tex. Crim. 1897) 40 S. W. Rep. 998.

It has been held that where the prosecutrix testifies to the fact of intercourse, she is sufficiently corroborated if the defendant testifies, "I don't think I did such a thing; I might have done so in my sleep." *Bales v. State*, (Tex. Crim. 1898) 44 S. W. Rep. 517.

5. *State v. Dana*, 59 Vt. 614. See also *Com. v. Lynes*, 142 Mass. 577, 56 Am. Rep. 709.

6. **Punishment of the Offense.** — *Baker v. State*, 30 Ala. 521; *People v. Patterson*, 102 Cal. 242; *State v. Herges*, 55 Minn. 465; *Newman v. State*, 69 Miss. 393.

7. **Elements of Attempt to Commit Incest** — *In General*. — *State v. McGilvery*, 20 Wash. 240.

8. **Mere Unsuccessful Solicitation Not an Attempt.** — *Cox v. People*, 82 Ill. 192.

both by solicitation and by overt acts a father attempted to have connection with his daughter, that the attempt proceeded to the extent of contact of the sexual organs, lacking only penetration to consummate the act, it was held sufficient to constitute an attempt to commit incest.¹

Effect of Subsequent Abandonment. — It has been held that where the elements of an attempt have once existed, the subsequent abandonment of his intention cannot avail the defendant as a defense.²

Incestuous Marriage. — But it has been held that the attempt to commit an incestuous marriage contemplated by the statute of *California* must be manifested by acts which would end in the consummation of the particular offense, but for the intervention of circumstances independent of the will of the party.³

Necessity of Consent of Parties. — The crime of attempting to commit incest may occur without the consent of the woman with whom the attempt is made.⁴

INCH. — See note 5.

INCHOATE. — See note 6.

INCIDENT — INCIDENTAL. — Incident is defined as belonging or appertaining to; following; depending upon another thing as more worthy or principal. A thing may be necessarily or inseparably incident to another, or usually so.⁷

1. **Solicitation Accompanied by Overt Act an Attempt.** — *People v. Gleason*, 99 Cal. 359, 37 Am. St. Rep. 56.

2. **Effect of Subsequent Abandonment of Attempt.** — *State v. McGilvery*, 20 Wash. 240.

3. *People v. Murray*, 14 Cal. 160. In this case it was held that the declaration of the determination of an uncle to marry his niece, his elopement with her for that avowed purpose and his request to one of the witnesses to go to a magistrate to perform the ceremony, will not be sufficient to constitute an attempt. The court in this case said: "So in the present case the declarations and elopement and request for a magistrate were preparatory to the marriage, but until the officer was engaged and the parties stood before him, ready to take the vows appropriate to the contract of marriage, it cannot be said in strictness that the attempt was made."

4. **Consent of Female Not Necessary to Constitute an Attempt.** — *People v. Gleason*, 99 Cal. 359, 37 Am. St. Rep. 56.

5. **Inch.** — The hydraulic *inch* is a circle whose diameter is an *inch*. — *Schuylkill Nav. Co. v. Moore*, 2 Whart. (Pa.) 493.

Inch of Water. — The question being as to the meaning of the term "*inches* of water" in a deed granting the right to draw from a canal "2,000 *inches* of water under an eleven-foot head," it was held, upon the evidence, that the term had not acquired a fixed technical meaning, and that therefore the grant must be construed in the light of the attendant circumstances. — *Jackson Milling Co. v. Chandos*, 82 Wis. 437. See also *Janesville Cotton Mills v. Ford*, 82 Wis. 416.

6. **Inchoate Right of Dower.** — See the title **DOWER**, vol. 10, pp. 123, 142.

Inchoate Title. (See also the title **SPANISH LAND GRANTS**). — In *Gunn v. Bates*, 6 Cal. 271, it was said: "There was at the date of the treaty, as it was supposed, from all the analogies existing between the mode of granting lands in California and in Florida and Louisiana, at least two kinds of titles, one perfect

and the other incomplete. The owner of the perfect title was fully protected, both by the laws of Mexico and the laws and usages of nations; and his title was not, neither could be, divested by the treaty or any subsequent Act of Congress. *Inchoate* titles were such as rested upon the first incipient steps for confirmation, where the fee of the land had never parted from the government, and depended for their completion upon some political act of the authority granting. In these cases the authority of the Mexican government to ratify and confirm was passed to the government of the United States, subject to the equities of the claimants, which she may disregard, but is bound in good faith to maintain."

7. *Thomas v. Harmon*, 46 Hun (N. Y.) 77. And in that case the court further said: "It is difficult to see how lands not covered by the mortgage are *incident* to those which are. No importance can be attached to the fact that the mortgage only covers an undivided part or portion of a lot or farm. The balance is no more *incidental* than a separate lot or farm."

In *Neal v. East Tennessee College*, 6 Yerg. (Tenn.) 206, it was said: "A land warrant is not an *incident* to the land; it is not technical to call it so; an *incident* is that which follows the more worthy or principal."

Incidents of Sovereignty. — The *incidents* of sovereignty are those powers of which a state cannot divest itself without materially impairing its efficient action. *Boggs v. Merced Min. Co.*, 14 Cal. 309.

Labor Incident to a Manufacturing Process. — The statute 7 & 8 Vict., c. 15, § 73, provides that "any person who shall work in any factory, * * * either in any manufacturing process or in any labor *incident* to any manufacturing process, * * * shall be deemed * * * to be employed therein within the meaning of this act." A. a manufacturer of cotton sewing thread, was the owner of a factory at M. and another at L. At the factory at M. cotton yarns were doubled into sewing thread, in hanks ready for the wholesale

market. For the retail dealers and small consumers these hanks were sent to the factory at L., where the thread was wound on bobbins. It was held that the winding at L. was labor "incident to" a "manufacturing process," within the meaning of the act, because "it brings cotton thread into a state in which it is more salable." *Haydon v. Taylor*, 4 B. & S. 519, 116 E. C. L. 519. See generally the title LABOR REGULATIONS.

Incidental Labor — Mechanics' Lien. — A Colorado statute allowed a mechanics' lien for incidental labor. It was held that the incidental labor must be directly done for and connected with, or actually incorporated into, the building or improvement. The court said: "It will not do to extend the protection given to services indirectly and remotely associated with the construction work. The cook who prepares food for the employees, the blacksmith who shoes the horses or repairs the implements in use, and all similar contributors to the enterprise are not among the favored workmen." *Rara Avis Gold, etc., Min. Co. v. Bouscher*, 9 Colo. 388, citing *McCormick v. Los Angeles City Water Co.*, 40 Cal. 185. See also the title MECHANICS' LIENS.

Incidental Services. — A railway act gave to the directors power to charge a sum for the conveyance of coal along the line, "including the tolls for the use of the railways and wagons, or trucks and locomotive power, and every expense incidental to such conveyance," which sum was to be a maximum sum, except in certain cases, the exception being thus expressed: "Except a reasonable sum for loading, covering, and unloading of goods, and delivery and collection, and any other services incidental to the business of a carrier, where such services, or any of them, are or is to be performed by the company." The services in respect of which the excepted charges were claimed to be made were those of taking the wagons of a colliery owner from his own sidings and attaching them to the trains, or returning them from the line of the railway to the sidings of the colliery owner; and it was found in the special case that whatever particular difficulty arose in this work was occasioned by the position of the points effecting the junction of the line with the sidings. It was held that these were not services which came within the meaning of the exception. *Lancashire, etc., R. Co. v. Gidlow*, L. R. 7 H. L. 517.

So within a similar act, it was held that station accommodation, the use of sidings, weighing, checking, clerkage, watching, and labelling, provided and performed by the company in respect to goods carried by them, might be and *prima facie* were services incidental to the carrier. *Hall v. London, etc., R. Co.*, 15 Q. B. D. 507, 17 Q. B. D. 230.

Costs Incidental to Sale of Land by Tenant for Life under Statutory Power. — By the English Settled Land Act of 1882, which authorizes the sale of settled land by a tenant for life, it is enacted that the "capital money arising under the act, subject to payment of claims properly payable thereout, and to application thereof for any special authorized object for which the same was raised, shall when received" be applied to the payment, *inter alia*,

"of costs, charges, and expenses of or incidental to the exercise of any of the powers" conferred by the act. In a case arising under this provision the court said: "It must be observed that what is allowed is the payment of costs, charges, and expenses, not merely 'of' but also incidental to the exercise of any of the powers of the act, and I have to determine what force is to be given to the words 'incidental to.' It seems to me that if any meaning is to be attached to them, it is that the tenant for life is to have not merely his costs, charges, and expenses which directly and necessarily arise out of the exercise of the powers and provisions of the act, but also those which without being a direct or necessary consequence of that exercise, are incurred casually or incidentally in the course of that exercise." *In re Llewellyn*, 37 Ch. D. 317, 58 L. T. N. S. 152. See also *Cardigan v. Curzon-Howe*, 58 L. J. Ch. 177, 40 Ch. D. 338; *In re Beck*, 24 Ch. D. 608; *In re Sebrig*, 33 Ch. D. 429; *In re Stanford*, 43 Ch. D. 84.

Matter or Thing Besides What Is Incident to Sale and Conveyance. — The statute 55 Geo. III., c. 184, enacted that "where any deed or instrument operating as a conveyance on the sale of any property shall also contain any other matter or thing besides what shall be incident to the sale and conveyance of the property sold, or relate to the title thereto, every such deed or instrument shall be charged, in addition to the duty to which it shall be liable as a conveyance on the sale of property, and to any progressive duty to which it may also be liable, with such further stamp duty as any separate deed, containing the other matter, would have been chargeable with, exclusive of the progressive duty." It was held that a deed purporting to surrender a lease for lives, in consideration of one hundred and twenty pounds, and of a new lease to be granted to the surrenderer for his life, did not require an agreement stamp in addition to the *ad valorem* stamp, the stipulation for a new lease not being a matter or thing besides what is incident to the sale and conveyance." *Doe v. Phillipps*, 11 Ad. & El. 796, 39 E. C. L. 231.

Injury by Event Incident to Navigation. — The United States government chartered a boat for the purpose of carrying its soldiers, etc. By the terms of the charter-party the government agreed to make compensation to the owner of the boat in case of her injury or destruction "by any event not incident to the navigation of the river or rivers on which she may be employed." It was held that under this agreement the government was liable to the owner for a loss occasioned by the carelessness of the officers of the government in loading the boat. Attorney-General Hoar said: "I think those words [injury by an event incident to navigation] mean substantially the same as the words 'perils of navigation,' or 'dangers of the seas,' or 'dangers of navigation.'" *Steamer Wathan's Case*, 13 Op. Atty.-Gen. 119. See generally the title NAVIGATION.

Tax Not Expense Incidental to Issue of Bonds. — Where a city issued bonds in aid of a railroad, and in consideration of the loan the railroad company executed a mortgage of its property to the city and agreed to pay all and any expenses incidental to the issue of the bonds, it

INCITE. — The word "incite" means to move to action; to stir up; to arouse; to spur on.¹

INCLOSE, INCLOSURE, ETC. (See also the title **FENCES**, vol. 12, p. 1035.) — To inclose means to surround; to shut in; to confine on all sides.² An

was held that where Congress passed an excise law, levying an income tax of three per cent. on all sums due for interest by railroad companies, such a tax was not an expense *incidental* to the issue of the bonds. The court said: "To carry out the arrangement between the parties required a considerable expenditure of money for printing, clerk hire, stationery, advertising, and similar matters. These expenses were *incidental* to the issue of the bonds, and it was right and proper that the railroad company — the party to be benefited by the transaction — should pay them. And it agreed to do so; but this agreement cannot be extended to cover the tax in question, for in no sense is it an expense *incidental* to the issue of the bonds." *Baltimore v. Baltimore R. Co.*, 10 Wall. (U. S.) 543.

Incidental School Purposes. — A school district was authorized by statute to assess a tax not exceeding three hundred dollars annually to keep the schoolhouse in repair and furnish it with fuel and appendages. At an annual meeting of the board of the district taxes were voted as follows: "For the payment of teachers' wages in the district, six hundred and fifty dollars; for the payment of indebtedness of said district incurred for building school house in 1866, nine hundred dollars; for *incidental* purposes, fifty dollars." It was held that the tax of fifty dollars for "*incidental* purposes" was a valid exercise of the power conferred by the statutory provision above quoted. Said the court: "It might be more precise, in voting a tax for these purposes, to say, 'for repairs, fuel, and appendages;' but the words 'for *incidental* purposes' must, we think, be construed to mean the same thing." *State v. Wolfrom*, 25 Wis. 468.

Incidental Repairs. — A policy of insurance allowed five days each year for *incidental* repairs, without notice to the insurer. The insured secured a builder's risk for two months and made extensive repairs. This work had ceased for about two weeks, and the two months had expired, when the insurer commenced a further repair of putting on new siding, the old having become decayed. This work had been in progress three days when the building was destroyed by fire. It was held that the work being done was embraced in the term "*incidental* repairs." The court said: "The repairs permitted by the policy are not merely ordinary repairs, but *incidental*, that is, occasional repairs, such as are not regular, but as occasion may require." *Rann v. Home Ins. Co.*, 59 N. Y. 387.

Incidental Expenses. — In *Dunwoody v. U. S.*, 22 Ct. Cl. 250, it was said: "The adjectives 'contingent,' *incidental*, and 'miscellaneous,' as used in appropriation bills to qualify the word 'expenses,' have a technical and well-understood meaning; it is usual for Congress to name the principal classes of expenditure which they authorize, such as clerk hire, fuel, light, postage, telegrams, etc., and then to

make a small appropriation for the minor and unimportant disbursements *incidental* to any great business, which cannot well be foreseen and which it would be useless to specify more accurately. For such disbursements a round sum is appropriated under the head of 'contingent expenses,' or 'incidental expenses,' or 'miscellaneous expenses.' Such appropriations the law says shall not be used for clerk hire."

A judge's order was drawn up by consent, that, upon payment of the debt and costs on a certain day, all further proceedings should be stayed; but in default of payment, the plaintiff should be at liberty to sign judgment, issue execution, and levy the debt and costs, together with the costs of execution, sheriffs' poundage, officers' fees, and all other *incidental* expenses. Default having been made and execution issued, it was held that the sheriff could not levy, nor was the defendant liable to pay, as *incidental* expenses, the costs of a rule to return the writ. *Hutchinson v. Humbert*, 8 M. & W. 638.

Incidental Power. — An *incidental* power may be defined to be one that is directly and immediately appropriate to the execution of the specific power granted, and not one that has merely some slight or remote relation to it. *Hood v. New York, etc.*, R. Co., 22 Conn. 16; *State v. Newman*, 51 La. Ann. 833.

In *Cromwell v. Phipps*, 6 Dem. (N. Y.) 60, it was held that the Circuit Court had no jurisdiction in a special proceeding instituted under Code Civ. Pro. N. Y., § 2749, for the disposition of a decedent's real property for the payment of his debts, to compel a purchaser, at the instance of a freeholder appointed to sell the property, to accept the deed and pay the balance of the purchase money. The court said: "It is the business of the executor, or other person making the sale, to collect the money from strangers, and not the surrogate's, and when collected to pay it into court. That act, in so far as the power conferred on the surrogate is concerned, is not *incident* to it. *Incident*, according to Jacob (Law Dict., title *incident*), is 'a thing necessarily depending upon, appertaining to, or following another that is more worthy or principal.' Thus, timber trees are *incident* to the freehold, and so is a right of way."

1. *Long v. State*, 23 Neb. 45, in which case it was held that the words "requested, advised, and *incited*," as used in a charge of the trial court, were equivalent to the statutory words, "aid, abet, or procure." See generally the title **AIDER AND ABETTOR**, vol. 2, p. 29.

2. *Union Pac. R. Co. v. Harris*, 28 Kan. 206.

Inclose. — The words *inclose* and "include" are of common derivation, and signify among other things, to "confine within." Hence a deed specifying certain lands of "section ten, township three, range twenty-one, *inclosing* the lands where the said * * * mill and house now stand," etc., should be read as if it had said that the mill and house were "con-

inclosure is that which is inclosed; also a barrier or fence inclosing something, as a tract of land.¹

fin'd within" the land, etc. Such signification must be adopted as give effect to the intention of the parties. *Campbell v. Gilbert*, 57 Ala. 569. See also *Pepper v. O'Dowd*, 39 Wis. 546; and see INCLUDE — INCLUSIVE, p. 146, *post*.

Inclosed Building, Ground, Land, etc. — A subscription to the building of a church to be paid when the building is *inclosed* is due and may be collected when the main building is *inclosed*, though some towers connected with the building have not been *inclosed*. *Snell v. Methodist Episcopal Church Soc.*, 58 Ill. 290.

Same — Partly Open. — A testator in his will directed his executors to "inclose with a good and substantial iron fence * * * the Friends' meeting-house grounds, as also the schoolhouse grounds and the Friends' burial ground." These three grounds were adjoining. It was held that under the circumstances there was no latent ambiguity as to the testator's intentions to *inclose* each of such grounds on all sides. The court said: "The several and respective lots were to be *inclosed* — that is to say, shut in on all sides. A field with a fence on three sides only could not, in any proper sense, be spoken of as *inclosed*, unless the fourth side was bounded by some natural object or occupied by some artificial erection which rendered a fence impracticable or unnecessary." *Hall's Appeal*, 112 Pa. St. 42.

In *Gundy v. State*, 63 Ind. 530, it was said: "A fence only partly *inclosing* the land would not make it an *inclosure*. To constitute the *inclosure*, we think the fences, including the partition fence, must surround the adjoining land or some part of it."

The statute 5 Geo. III., c. 14, § 3, provides for the punishment of any person convicted of fishing in any water in any "inclosed ground which shall be private property," with certain specified exceptions. In an action under this act it appeared that the plaintiff owned a tract of land and so much of the soil of a river bordering on one side thereof as lay between the bank and the *filum aquæ*. All sides of the tract, except that which abutted on the river, were separated from the adjacent lands by a fence; but there was no fence on the river side, nor down the *filum aquæ*. The defendant stood upon the tract, and caught fish from the river. It was held that there was no fishing in water in "inclosed ground," within the meaning of the act. *Gibbs, C. J.*, said: "This is property which, from the nature of the thing, is not and cannot be *inclosed*." *Lisle v. Brown*, 5 Taunt. 440, 1 E. C. L. 150, 1 Chittv's Gen. Pr. 179, 1 Marsh. 127.

Same — Substantial Inclosure. — Within a statute providing that lands should be deemed improved when protected by a substantial *inclosure*, the court thus construed "substantial *inclosure*:" "It cannot be maintained that the *locus in quo* in this case was protected by a substantial *inclosure*. The premises claimed by the defendant were not so *inclosed*. Accept the statement of the defendant's counsel, as given in his points, that it was 'inclosed on two sides by fences, a highway on another, and a distinct line of marked trees from corner stake to stake on the other,' and the lot could

not be deemed protected by a substantial *inclosure*. *Doolittle v. Tice*, 41 Barb. (N. Y.) 182. Corner stakes do not, nor does a line of marked trees, constitute a substantial *inclosure*." *Pope v. Hanmer*, 8 Hun (N. Y.) 269.

Same — Railroads. (See also the title FENCES, vol. 12, p. 1061.) — A statute defining the liability of railroads for animals killed provided that the act should not apply to any railroad whose road was *inclosed* with a good and lawful fence. The court said: "Now, can anything be said to be *inclosed* with a good and lawful fence when the only fences are the side fences, and there is no protection on the ends? The word *inclose* is defined by Webster, 'to surround; to shut in; to confine on all sides,' etc." *Union Pac. R. Co. v. Harris*, 28 Kan. 210.

A statute required railroads to fence all their roadbeds running through *inclosed* lands. The court, after citing 6 AM AND ENG. ENCYC. OF LAW (1st ed.) 633, said: "*Inclosed* lands, therefore, are lands surrounded by a fence; and a fence is a visible or tangible obstruction, which may be a hedge, ditch, wall, or a frame of wood, or any line of obstacle interposed between two portions of land so as to part off and shut in the land, and set it off as private property." *Kimball v. Carter*, 95 Va. 77.

Where a statute requires railroad companies to fence their tracks along "inclosed or cultivated fields," it is not necessary, in order to be entitled to this protection, that the *inclosure* of the fields should be by lawful fences. *Biggerstaff v. St. Louis, etc., R. Co.*, 60 Mo. 567.

Same — Wharf. — A wharf bounded on the north by a river, on the south by a railroad embankment and trestle, and on the east and west, respectively, by piles of lumber placed thereon, not for the purpose of forming an *inclosure*, but merely for the convenience of the occupants of the wharf, is not *inclosed*, although it and other wharf property may be inside of a tract surrounded in consecutive order by a river, certain salt sheds, a canal, railroad trestles, and a fence, and although this tract, including the wharves and other realty, may be inside a still larger tract, surrounded as to two sides by fences, and as to the other two by a river and canal. Consequently it is not, under the *Georgia* Act of 1883, making it a misdemeanor wilfully to "enter, go upon, or pass over any field, orchard, garden, or other *inclosed* or cultivated land of another, after being personally forbidden so to do by the owner, or person entitled to the possession for the time being, or authorized agent thereof," an indictable offense wilfully to enter or go upon such wharf, after being so forbidden, and a conviction therefor is contrary to law. *Daniels v. State*, 91 Ga. 1.

Same — Turnpike Act. — In an English turnpike act the words "inclosed lands" were held to have been used in their popular sense of lands surrounded by a fence. *Tapsell v. Crosskey*, 7 M. & W. 441.

1. Impounding. (See also the title IMPOUNDING, p. 4, *ante*.) — This meaning was adopted in

INCLUDE — INCLUSIVE. (See also INCLOSE, INCLOSURE, ETC., *ante*, p. 144.) — See note 1.

Taylor v. Welbey, 36 Wis. 42, where the word was construed as used in a statute limiting the right of distraining beasts damage feasant within the *inclosure* of the distrainer. See Bouv. L. Dict. See also Pettit v. May, 34 Wis. 666.

In the interpretation of a similar act it was said: "The word *inclosure* * * * imports land *inclosed* with something more than the imaginary boundary line; that there should be some visible or tangible obstruction, such as a fence, hedge, ditch, or something equivalent, for the protection of the premises against encroachment by cattle." "Close" is a more extensive word, including cases where land is *inclosed* by only imaginary boundary lines. Its use in pleading under these statutes instead of *inclosure* is bad. Porter v. Aldrich, 39 Vt. 326.

In Keith v. Bradford, 39 Vt. 34, it was held that a statutory fence was not necessary to constitute an *inclosure*. Compare Mooney v. Maynard, 1 Vt. 470.

A **Potato Patch** is not within the meaning of an act forbidding the laying out of roads or streets through yards or *inclosures* necessary to the use and enjoyment of any dwelling house or manufacturing establishment to which they are appurtenant. Lansing v. Caswell, 4 Paige (N. Y.) 519.

Destruction. — A North Carolina statute forbade the destruction of any fence, wall, or other *inclosure* surrounding or about a cultivated field. It was held that *inclosure*, as used in this statute, did not include an erection consisting of posts nine or ten feet apart, on which, near the tops, were nailed slats, not intended to *inclose* or surround a field, but designed only to prevent travelers from trespass on the land by turning out of the road. State v. Roberts, 101 N. Car. 746.

Field — Injuries to Animals. (See also the title INJURIES TO ANIMALS, *post*.) — In State v. Staton, 66 N. Car. 640, it was held that under an act concerning the killing of stock in any *inclosure* not surrounded by a lawful fence, an indictment which simply charged the injury to have been committed on stock in a "field" of one A B was not certain and could not be sustained. The court said: "*Inclosure* is a general term which includes several specific things, as a farm, public square, cemetery, fortification, etc. The modified meaning of the word as used in the statute is ascertained by reference to a statute *in pari materia* (Rev. Co., c. 48), to be '*inclosed* grounds,' used for the purpose of habitations and husbandry, and separated from woodland or common by a fence or wall of some kind. Such an *inclosure* may be a yard, garden, orchard, field, etc. The word 'field' has not as extensive a signification as *inclosure*, and therefore the terms are not equivalent and the less cannot include the greater."

1. **Include.** — In State v. Cook, 32 N. J. L. 351, it was said: "Webster defines the word *include* as synonymous with comprise, comprehend, contain, and gives this apt example. 'The word duty *includes* what we owe to God, to our fellow men, and to ourselves; it *in-*

cludes also a tax payable to the government.'" And in that case it was held, where it was provided that shares of stock held by any person should be *included* in the valuation of the personal property of such person, that the value of the stock need not literally be *included* with the other personal property by summing up the valuation together, but that a tax against the stockholder on the same duplicate with other personal property was sufficient, although the valuation was carried out separately.

Exclusion. — A statute provided that a clerk must insert in an entry of judgment the necessary disbursements, *including* the fees of the officers allowed by law, the fees of witnesses, the necessary expenses of commissions, the compensation of referees, and the expense of printing papers on appeal. In construing this provision the court said: "The word *including*, as used in the above provision of statute, does not necessarily confine the items of disbursements recoverable to those enumerated; but the special provision for 'printing papers on appeal' does exclude the idea of a recovery for such papers when prepared in any other way." Cooper v. Stinson, 5 Minn. 522.

Same — Interpretation. (See also the titles INTERPRETATION, *post*; STATUTES.) — The interpretation clause of English statutes sometimes provides that a certain word shall *include* a variety of things. The courts hold that this term is thus used by way of extension, and not as giving a definition by which other things are to be excluded. Reg. v. Kershaw, 6 El. & Bl. 1007, 88 E. C. L. 1007, 26 L. J. M. C. 23. Thus where the Merchant Shipping Act, 1854 (17 & 18 Vict., c. 104), provided that "ship" should *include* "every description of vessel used in navigation not propelled by oars," it was held that a vessel propelled by oars was not excluded. Ex p. Ferguson, L. R. 6 Q. B. 291. It was declared by the Petroleum Act, 1868 (31 & 32 Vict., c. 56), that "petroleum" should *include* all such rock oil, etc., as gave off an inflammable vapor at a temperature of less than 100 degrees Fahrenheit. But petroleum itself was held to be within the act, even if it did not give off an inflammable vapor below the specified temperature. Jones v. Cook, L. R. 6 Q. B. 505. To all such cases the words used by Blackburn, J., in reference to the Metropolis Management Act, 1855 (18 & 19 Vict., c. 120), have a forcible application. "It does not follow that because, in the interpretation clause, they say the expression 'new street' shall *include* certain other things, we are to say it does not *include* its own natural sense." Pound v. Plumstead Board of Works, L. R. 7 Q. B. 194. See Wilberf. Stat. Law 299. See also Worsley v. South Devon R. Co., 16 Q. B. 539, 71 E. C. L. 539; Nutter v. Accrington Local Board of Health, 4 Q. B. D. 375.

Ejusdem Generis. — Upon the question of the application of the *ejusdem generis* rule of construction, it was said in Calhoun v. Memphis, etc., R. Co., 2 Flipp. (U. S.) 445, that where the particulars are introduced by the word *in-*

INCOMBUSTIBLE. — See note 1.

INCOME. (See also the titles LEGACIES AND DEVISES; REMAINDERS AND EXECUTORY INTERESTS; TAXATION; TRUSTS AND TRUSTEES; WILLS.) — Income is defined to be that gain which proceeds from labor, business, or property of any kind; the produce of a farm; the rent of houses, etc.²

cluding, such word "does not indicate a restrictive intention, but rather the contrary."

"**Consisting of**" Distinguished from "**Including**." — See *Farish v. Cook*, 6 Mo. App. 331.

Public Lands. (See generally the title PUBLIC LANDS.) — A United States statute provided that when school lands granted to a state or territory were *included* within any Indian, military, or other reservation, the state might select indemnity lands in lieu of such school lands. In construing this statute in *Hibberd v. Slack*, 84 Fed. Rep. 576, the court said: "The pivotal word of this clause is *included*, and to my mind it refers, when read in the light of its immediate context, to those school sections which are constituent parts of a reservation, but not to those which, although shut in by its outer lines, are distinct from the reservation."

Inclusive Legacy. (See also the titles LEGACIES AND DEVISES; WILLS.) — A testator gave "to the Academy of the Pennsylvania Fine Arts, fifty thousand dollars, *inclusive* of the note of the academy." At the time of his death the testator held the note of the academy for the sum of eight thousand dollars for money loaned to it. It was held that the amount of the note should be deducted from the legacy, and that the legatee was entitled to receive only forty-two thousand dollars. The court said: "Giving to the word *inclusive* its accepted meaning, the note was to be *included* in the legacy and form a part of it." *Pepper's Estate*, 154 Pa. St. 340.

A testator bequeathed a legacy of "one hundred dollars, *including* money trustee, at" a certain bank. At the time of the making of the will, an action was pending by the legatee against the testator for a sum less than one hundred dollars, and the bank named had been summoned as trustee. The testator had several hundred dollars deposited at the bank. It was held that the testator meant to give to the legatee one hundred dollars only. The court said: "The plaintiff contends that the word *including* means, in this connection, 'in addition to,' and that the testatrix intended to give the plaintiff not only one hundred dollars, but in addition to that sum all the money she had in the bank; the words 'money trustee at the Union savings bank' being descriptive of, and intended to identify, the whole amount which she had then on deposit. But this is a forced construction, inconsistent with the meaning of the words used by the testatrix; and we can have no doubt from the language of the bequest, taken in connection with the facts existing at the time the will was made, that she intended a gift to the plaintiff of one hundred dollars only, which sum was to *include* the amount for which the bank might be held liable as trustee; or, in other words, that the one hundred dollars was to *include* the amount which the plaintiff claimed to be due from her." *Brainard v. Darling*, 132 Mass. 219.

1. Incombustible Materials. (See also the title FIRE LIMITS, vol. 13, p. 396.) — The English Metropolitan Building Act, 1855, § 19, subsec. 1, provided that the roof of every building should be covered externally with "slates, tiles, metal, or other *incombustible* materials." The roof of a building was covered externally with materials consisting of woven iron wire coated with an oleaginous compound. The coating would ignite and burn away, leaving the wirework uninjured. It was held that the roof was not covered with *incombustible* materials within the meaning of the act. *Payne v. Wright*, (1892) 1 Q. B. 104.

2. Income. — *McClintock v. Dana*, 106 Pa. St. 386; *Remington v. Field*, 16 R. I. 510.

Income signifies what comes in. *Jones v. Ogle*, 42 L. J. Ch. 336.

In *Ex p. Huggins*, 21 Ch. D. 85, *Jessel, M. R.*, said that *income* was as large a word as could be used to denote a person's receipts.

Limited Meaning. — In *New Orleans v. Hart*, 14 La. Ann. 815, it was held that the word *income* in a tax act meant moneys received in compensation of services, such as wages, commissions, brokerage, etc., and was totally different from the fruits of capital invested in merchandise, stocks, etc.

Net Income and Income. (See also *infra*, this note, *Profits and Income Distinguished*.) — Where the term *income* alone has been used there has been considerable controversy as to whether net or gross *income* is meant. Thus in *Mundy v. Van Hoose*, 104 Ga. 292, it was said: "*Income* is defined to be 'that which comes in or is received from any business or investment of capital, without reference to the outgoing expenditures.'" And in *People v. New York*, 18 Wend. (N. Y.) 605, *income* was held not to have meant net *income*. This was a tax case. See generally the title TAXATION.

So in *Reg. v. Southampton*, L. R. 4 H. L. 450, it was held that where commissioners were authorized by an Act of Parliament to receive certain moneys, and at the same time were directed to pay a portion of those moneys to another body of persons, the gross sum received was to be deemed the *income* of the commissioners, and the persons to whom the payment was to be made had an interest in that portion and were entitled to enforce the payment thereof. *Bramwell, B.*, said: "*Income* is that which comes in, not that which comes in less an outgoing. The fifth defendants were liable to pay to the plaintiffs was an 'outgoing,' not a diminution of *income*. In speaking of a man's *income* from an estate, no one would deduct the interest payable on money borrowed to pay for one-fifth of it. The *income* of the United Kingdom is not its revenue less the interest on the national debt."

A member of a partnership, who was also its general manager, was to receive, under the articles of partnership, "a liberal salary, say

five hundred dollars, out of the gross *income*," for his services. In the statement of an account of the partnership's business, a sum of money expended in permanent improvements to the firm's real estate was included among the expenditures. With this item included, the account showed that the firm had made no profits from its business. The court below, holding that "gross *income*" in the articles meant net profits, and not gross receipts, held accordingly that A was not entitled to any salary under the agreement. It was held on appeal that the insertion in the expenditures of the account of the item for sums expended in permanent improvements to the real estate was erroneous; that as with this item omitted there would have been a profit, A was entitled to the salary agreed upon. *Braun's Appeal*, 105 Pa. St. 414.

By its charter a railroad was to pay a certain percentage on its annual *income*. In construing this provision, in *Goldsmith v. Augusta, etc., R. Co.*, 62 Ga. 472, the court said: "Does that mean gross or net *income*? We think that the meaning is gross *income*. *People v. Niagara County*, 4 Hill (N. Y.) 23, 7 Hill (N. Y.) 504. Besides, in other charters of other railroad companies the word 'net' is inserted before *income*. Why left out here, if the intention was to levy on net *income* only?"

A testator, by his will, directed that his farm should be rented until his youngest child should become of age. He further provided that his wife should live on the farm and that she and her minor children should have "one-half of the *income* of said farm" for their support. The executors leased the farm on shares, as the testator had been accustomed to do, the total annual product thereof being about one thousand four hundred dollars. It was held that the testator intended his widow to have one-half of the annual product, viz., all that did not belong to the tenant, and that he did not intend her to take merely one-half of the amount annually realized by his executors. *Thompson's Appeal*, 100 Pa. St. 478.

But in *Pursel v. Pursel*, 14 N. J. Eq. 521, it was said: "By the terms of the will, she [the widow] was to receive one-third of all the *income* of the estate, real and personal. The *income* from land under lease can be no more than the rent or share paid by the tenant. The land was under lease from the testator to his son at the date of the will. The testator knew that his estate was to receive from that land but two-fifths of the gross products, and in giving to his widow one-third of the *income* of his estate he could have referred only to that portion which his estate was to receive, not to that which by the terms of the lease it was not to receive. It is true that the *income* of an individual, a bank, or a government is the amount it may receive independent of its losses, and this is all that was really decided in *People v. Niagara County*, 4 Hill (N. Y.) 23. But the *income* of a government surely does not include the cost of assessing and collecting the taxes which never reach the treasury. Nor can the *income* of the owner of leased lands exceed the amount of rent he receives from them irrespective of their gross annual value."

So in *Lawless v. Sullivan*, 6 App. Cas. 373,

it was held that the word *income* in the New Brunswick Assessment Act, when applied to a commercial business, meant the balance of gain over loss, and that when no such gain had been made during the year there is no *income* or fund capable of being assessed. See also *In re Taylor*, 16 Can. L. T. 169; and see the title TAXATION.

A charge on all the property and *income* of a company was held not to give a charge on debts, except so far as they represented *income*; and the term *income* was held in such a case to mean net earnings, after providing for current expenses. *McCargar v. McKinnon*, 15 Grant Ch. (U. C.) 361.

There is no fair distinction between *income* and "net *income*." "Net is a term used among merchants to designate the quantity, amount, or value of an article or commodity, after all tare and charges are deducted. The *income* of an estate means nothing more than the profit it will yield after deducting the charges of management; or the rent which may be obtained for the use of it. The rents and profits of an estate, the *income* or the net *income* of it, are all equivalent expressions." *Andrews v. Boyd*, 5 Me. 199.

And in the following cases *income* was held to mean net *income*: *Opinion of Justices*, 5 Met. (Mass.) 596; *Farmers L. & T. Co. v. New York*, 7 Hill (N. Y.) 289; *Re Biddle Cape*, 5 British Columbia 37; *Kingston v. Canada L. Assur. Co.*, 19 Ont. 453.

Estate for Life — Land Itself. — The devise of *income* or net *income* of an estate for one's lifetime has been held to be a devise of the estate itself for the life of the beneficiary, and a devise of the *income* absolutely to be a devise of the land itself. *Andrews v. Boyd*, 5 Me. 199; *Sampson v. Randall*, 72 Me. 109; *Hopkins v. Keazer*, 89 Me. 347; *Reed v. Reed*, 9 Mass. 372; *Diamond v. Lore*, 31 N. J. L. 220. See also *Griffith v. Smith*, Moore's Rep. 753; *Bristol v. Bristol*, 53 Conn. 259; *Thompson v. Schenck*, 16 Ind. 194; *Fox v. Phelps*, 17 Wend. (N. Y.) 393; *Sprout's Appeal*, 105 Pa. St. 441; *Carlyle v. Cannon*, 3 Rawle (Pa.) 489. But see *South v. Allen*, 5 Mod. 98, 1 Salk. 228; *Craig v. Craig*, 3 Barb. Ch. (N. Y.) 76; *France's Estate*, 75 Pa. St. 220; *Rowen v. Payton*, 14 R. I. 257. And for a complete treatment of the subject see the titles LEGACIES AND DEVISES; WILLS.

Alimony. (See generally the title ALIMONY, vol. 2, p. 91.) — In holding that a married woman was entitled to alimony *pendente lite* when the *income* from her separate estate was not sufficient for her support, the court said: "That the term 'alimony' means *income*, and not the corpus or capital yielding it, is clear from the * * * statute in relation to divorces from bed and board, which declares that there shall be given 'such alimony as the circumstances of the parties may render necessary, which, however, shall not in any case exceed the one-third part of the net annual *income* from the estate, occupation, or labor of the party against whom judgment shall be rendered.'" *Miller v. Miller*, 75 N. Car. 71.

Annuity. — A testator devised to his wife the dividends and *income* of certain shares of bank stock during her natural life, or so long as she remained his widow, and in lieu of dower, the

reversionary right being in his three daughters, who were also made his residuary legatees and devisees. It was held that the gift was one of *income* and not of annuity. The court distinguished between annuity and *income*, saying: "An annuity is defined as a stated sum payable annually. * * * On the other hand, *income* would include all cases where the interest of a certain sum is given, where the profits or earnings of the property, although payable at fixed periods, might vary from time to time." *Pearson v. Chace*, 10 R. I. 457.

In *Flickwir's Estate*, 136 Pa. St. 381, it was said: "There is no substantial difference in legal aspect between the gift of an annuity for life and of the interest or *income* of a fund for life; nor between the gift simply of interest and of interest payable annually." And in that case it was held that in all these cases, if no actual intent to the contrary appears, the annuity, interest, or *income* begins to accrue to the legatee at the death of the testator.

And that there is no distinction between *income* and annuity, see *Hilyard's Estate*, 5 W. & S. (Pa.) 30; *Pennsylvania Co.'s Appeal*, 41 Leg. Int. (Pa.) 26.

Same — Income of Five Thousand Dollars. — A testatrix bequeathed "the *income* of five thousand dollars" to be paid to the legatee during life, by her executors, "out of an adequate fund to be retained therefor." It was held that the bequest was of the annual proceeds or interest of that sum of money, and not an annuity of that amount. The court said: "Had the indefinite article 'an' *income* of five thousand dollars for life been the form of the devise, it is agreed it would have caused an annuity of five thousand a year. This would have been a widely different expression; yet the appellant is forced to insist, in order to maintain his position, that the expression 'the *income* of five thousand dollars' means precisely the same thing as 'an *income* of five thousand dollars.' While, therefore, we must recognize this great difference in the force of the words used, we must, in the absence of a contrary intent appearing, presume that the difference was well understood, and intended to be made. The additional words, 'out of an adequate fund to be retained therefor,' in no ways control this interpretation." *Sims's Appeal*, 44 Pa. St. 347.

Income and Capital or Corpus. — A building society's rules provided that in the event of the directors determining at a special meeting, to be held every three years, that there was a deficiency in *income*, by which the society might be prevented from meeting its anticipated expenditures and liabilities, the amount of such deficiency should be apportioned by the directors. Upon the construction of the word *income* as used in this by-law, *Chitty, J.*, in *In re West Riding of Yorkshire Permanent Ben. Bldg. Soc.*, 43 Ch. D. 415, said: "Some part of the argument I had a difficulty in following on the term *income*. It seemed at one time that counsel was trying to advance the proposition that *income* here meant something which was distinguished from 'capital.' There is no contrast in this clause between *income* and 'capital.' *Income* here means all that comes in. And that is so

from the very nature of these societies. What is coming in from time to time are the subscriptions. The subscriptions, if an actuary were to analyze them, would be found to consist of principal and interest, but that is only in the calculation, and the interest does not appear. There is no distinction here to be found as between capital and *income*, which of course does exist in companies, under the Limited Liability Acts, where there is a fixed capital. I therefore hold that *income* includes, for instance, repayments by advanced members, moneys borrowed from outsiders, who are commonly called in these societies depositors, and in fact everything that comes in. Then, acknowledging, as I do, that there is some defect in the expression, I think it would also include any money that they may have in hand."

An English act provided that "where a husband or wife is entitled, either solely or jointly with the other, to the *income* of any property settled by the other under a disposition which has taken effect before the commencement of this part of this act, and on his or her death the survivor becomes entitled to the *income* of the property settled by such survivor, estate duty shall not be payable in respect of that property until the death of the survivor." In *Atty.-Gen. v. Strange*, (1898) 2 Q. B. 42, it was held that *income* was used in this sense as distinguished from the corpus of the property, and that the act did not apply where the survivor became entitled not only to the *income*, but to the corpus. See generally the title SUCCESSION TAXES.

Increase. (See also *Stock, Dividends, Surplus, Etc.*, *infra*, this note.) — A testator devised real and personal estate, the latter consisting in part of negroes, to a trustee in trust, "the *income* arising therefrom to be applied to the mutual benefit" of the uncle and aunt of the testator during their joint lives, and after the death of the uncle "to the mutual benefit" of the aunt "and her children," and after the death of the aunt "to the use and benefit" of her children, until the youngest should attain the age of twenty-one years, then the said real estate, "together with the rest of the property so as aforesaid left in trust, to the children" of his said aunt, "to them and their heirs, forever, share and share alike." The decree of the chancellor deciding that the increase of the female slaves born during the life of the aunt constituted a part of the trust estate, and passed to those entitled in remainder, was, upon appeal, affirmed by a divided court. *Holmes v. Mitchell*, 4 Md. 532.

Interest. — The word *income* means a gain which proceeds from property, labor, or business. When applied to a sum of money, or money in the public debt, it is equivalent to "interest." *Sims's Appeal*, 44 Pa. St. 347.

Money in the Sense of Income. — See *Ellicott v. Ellicott*, (Md. 1900) 45 Atl. Rep. 186. And see generally the title MONEY.

Proceeds of Sale. — Under a United States statute which imposed a tax on gains, profits, and *income* for the years of 1870 and 1871, and no longer, the amount of a promissory note taken in 1871, on the sale in that year of a patent right, but not due until some time in 1872, and paid in that year was held not tax-

able as *income* for 1871. *U. S. v. Schillinger*, 14 Blatchf. (U. S.) 71.

The advance in the value of personal property during a series of years does not constitute the gains, profits, or *income* of any one particular year of the series, although the entire amount of the advance be at one time turned into money by a sale of the property. Accordingly, when bonds of the United States were sold by the owner, after being held by him for four years, at an advance of twenty thousand dollars over their cost to him, it was held that this amount was not taxable as "gains, profits, and *income*" of the owner for the year in which the sale was made, under an internal revenue act. *Gray v. Darlington*, 15 Wall. (U. S.) 63.

Proceeds. — In *Gehr v. Mont Alto Iron Co.*, 174 Pa. St. 430, it was said: "The fund for distribution can in no sense be called *income* or earnings. It results from sales of materials, manufactured iron, products from the land, or general personal property, all indicating a final winding up of the business of the concern."

A direction in a will to sell the testator's personal as well as real property and divide the *income* among his five children was held to refer to the proceeds of the sale of the property, and not to include notes, bonds, and mortgages. *Bredlinger's Appeal*, 2 Grant Cas. (Pa.) 461. See also *Roberts's Appeal*, 92 Pa. St. 419.

In a clause of a will setting forth that a person named "shall have sufficient *income* from my property that I may possess at the time of my death for her support during her natural life," the word *income* has reference to what shall be received by the beneficiary of the will, and not what sum of money the estate would produce during the year by way of *income*; it would mean that sum of money yearly equal to her reasonable support, without reference to whether it was derived from the *income* of the property or from a sale of the property itself. *Sowards v. Taylor*, 42 Ill. App. 275.

Same — Sale of Option. — The price realized by the sale of a privilege incident to the ownership of stock of a corporation to subscribe to the bonds of another corporation whose stock is to be given as a bonus to the subscriber is not *income* from the stock to which the privilege is incident. *Thomson's Estate*, 153 Pa. St. 333.

Profit Realized by Foreclosure of Mortgage and Resale. — A testator bequeathed to his executors, in trust, the residue of his estate, to receive and collect the rent of the real estate thereby devised to them in trust, and the *income* and profits of the personal estate, to pay the residue of the net income arising from the said real and personal estate into the hands of his daughter. It was held that a profit realized by the foreclosure of a mortgage and a resale of the property bought in by the trustees was *income* and profit. *Park's Estate*, 173 Pa. St. 190.

Profits and Income Distinguished. (See also PROFITS, and see the title TAXATION.) — In construing a statute of *New York* authorizing the levy of a tax upon all moneyed or stock corporations "deriving an *income* or profit from their capital or otherwise," the court, in

People v. Niagara County, 4 Hill (N. Y.) 20, in giving the relative definitions of "profits" and *income*, said: "It is undoubtedly true that 'profits' and *income* are sometimes used as synonymous terms; but strictly speaking, *income* means that which comes in, or is received from any business or investment of capital, without reference to the outgoing expenditures, while 'profits' generally mean the gain which is made upon any business or investment when both receipts and payments are taken into the account. *Income*, when applied to the affairs of individuals, expresses the same idea that 'revenue' does when applied to the affairs of a state or nation; and no one would think of denying that our government has any revenue because the expenditures for a given period may exceed the amount of receipts." This case was quoted with approval in *Bates v. Porter*, 74 Cal. 224; *People v. San Francisco Sav. Union*, 72 Cal. 203; *Mundy v. Van Hoose*, 104 Ga. 292. In *People v. San Francisco Sav. Union*, 72 Cal. 203, it was said: "The rents and profits of an estate, the *income* or net *income* of it, are all equivalent expressions. *Andrews v. Boyd*, 5 Me. 202; *Earl v. Rowe*, 35 Me. 420."

It has been held that the words "profits and *income*," in a devise of the profits and *income* of property held in trust, were equivalent to a devise of the *income* alone. *Beers v. Narramore*, 61 Conn. 13. See also *Leake v. Watson*, 60 Conn. 498.

Net Income and Property. — In *Waring v. Savannah*, 60 Ga. 100, it was said: "Is *income* property, in the sense of the constitution, and must it be taxed at the same rate as other property? It seems to us that it is not property, and it has been held not to be since the *Hartridge* case [*Savannah v. Hartridge*], in 8 Ga. 23. The legislature has taxed it differently from property from that day to this. Code, §§ 799, 804, 4647; Acts of 1868, 1869, 1871-2, etc., etc., down to this day. The fact is, property is a tree, *income* is the fruit; labor is a tree, *income* the fruit; capital the tree, *income* the fruit. The fruit, if not consumed as fast as it ripens, will germinate from the seed which it incloses, and will produce other trees, and grow into more property; but so long as it is fruit merely, and plucked to eat, and consumed in the eating, it is no tree, and will produce itself no fruit."

Income and Rent. (See also RENT.) — A statute prescribed that a guardian should improve his ward's estate without waste and apply the *income* and profits thereof to the support and maintenance of the ward. It was argued from the use of the word *income* that if the guardian had a farm in his charge, he must lease it out and so derive an *income* from it. But the court refused to sustain this reasoning, saying that rent was only one form of *income*, though "as a general rule it is wiser and better for a guardian having charge of a farm belonging to his ward to lease it than to manage it himself; * * * but there may be circumstances in which it is proper and advantageous for his wards for him to take the management on himself." *Remington v. Field*, 16 R. I. 510.

See *Lindley's Appeal* 102 Pa. St. 255, 13 W. N. C. (Pa.) 69, where it was said that the

words "income, issues, and profits" include the rents of real estate.

Income and Revenues — Earnings. — In *Tompkins v. Little Rock, etc.*, R. Co., 15 Fed. Rep. 14, it was said: "It is futile to say that there is a distinction between a pledge or appropriation of the 'earnings of the road,' as in the *Ketchum* case [*Ketchum v. St. Louis*, 101 U. S. 306, 4 Dill. (U. S.) 78], and the 'income and revenues of the company,' as in the case at bar. The 'income and revenues' of a railroad company are all the income and revenues of the company, and necessarily embrace the 'earnings' of its road." And see *supra*, this note, *Profits and Income Distinguished*.

Income and Revenue Provided for Such Year. — A statute provided that no city should become indebted in any one year for a greater amount than "the income and revenue provided for such year." It was held that the words "income and revenue" meant income derived from any source, and not income derived from taxes alone. *Lamar Water, etc., Co. v. Lamar*, 128 Mo. 188. See generally the title MUNICIPAL CORPORATIONS.

Royalty. — A testatrix devised her residuary estate to her executor in trust, to invest the personal estate and the proceeds of her real estate, to apply so much of the "yearly proceeds or income" thereof as should be necessary for the support of her daughter during her minority, and to invest for accumulation whatever balance there might be of such income. Upon the majority of the daughter the entire income of the estate was to be paid to her during her life, and after her death the corpus of the estate was limited to her children. The executors had power both to lease and to sell real estate, and in pursuance thereof "leased" certain coal land, unopened when the testatrix died, to lessees who were empowered to mine the coal until it was exhausted, paying therefor a certain royalty or rent. It was held that the rent or royalty thus received was payable by the trustees to the daughter as *cestui que trust* for life, as income of the estate within the meaning of the will. *McClintock v. Dana*, 106 Pa. St. 386.

In *Eley's Appeal*, 103 Pa. St. 306, it was said: "The word income means the gain which accrues from property, labor, or business. In its ordinary and popular meaning it is strictly applicable to the periodical payments, in the nature of rent, which are usually made under coal and other mineral leases, and we have no doubt it was used in that sense by the testator." See also *Bedford's Appeal*, 126 Pa. St. 122; *Shoemaker's Appeal*, 106 Pa. St. 392; *Park's Estate*, 173 Pa. St. 195; *Woodburn's Estate*, 138 Pa. St. 606.

Salary. (See also SALARY, and the title INSOLVENCY AND BANKRUPTCY, *post.*) — A bankruptcy statute provided that where a bankrupt was in the receipt of a salary or income, the court, upon the application of the trustee, should from time to time make such orders as it thought just for the payment of such salary or income or any part thereof to the trustee during the bankruptcy. It was held that the word income applied only to an income *ejusdem generis* with a salary, and did not enable the court to set aside for the benefit of the creditors of a professional man who was an undis-

charged bankrupt any part of his prospective and contingent earnings in the exercise of his personal skill and knowledge. *Ex p. Benwell*, 14 Q. B. D. 301. So in *Ex p. Webber*, 18 Q. B. D. 111, it was held that a voluntary allowance granted by the secretary of state for India to an officer of the Indian army on compulsory retirement, to which the recipient had no claim or right, and which could be withdrawn at any time, at the discretion of the secretary of state, was not an income within the meaning of this act. See also *Ex p. Wicks*, 17 Ch. D. 70.

In *In re Shine*, (1892) 1 Q. B. 527, it was held that money to be paid to an actor by a theatre manager, weekly, for a term of two years, was salary or income, though subject to deduction when the theatre was closed. Lord Esher, M. R., said: "I cannot doubt that the sum payable to the bankrupt under this agreement is a 'salary,' but at any rate it is income."

But in *In re Jones*, (1891) 2 Q. B. 231, it was held that wages earned by workmen employed in a colliery were not salary or income. The court followed *Ex p. Benwell*, 14 Q. B. D. 301, *supra*, in holding that income must be *ejusdem generis* with salary.

Stock, Dividends, Surplus, Etc. — In *Smith's Estate*, 140 Pa. St. 352, it was said: "It is well settled in this state that when the stock of a corporation is, by the will of a decedent, given in trust, the income thereof for the use of a beneficiary for life, with remainder over, the surplus profits which have accumulated in the lifetime of the testator, but which are not divided until after his death, belong to the corpus of his estate; whilst the dividends of earnings made after his death are income, and are payable to the life tenant, no matter whether the dividend be in cash, or scrip, or stock." See also *Simpson v. Moore*, 30 Barb. (N. Y.) 637; *Moss's Appeal*, 83 Pa. St. 264; *Oliver's Estate*, 136 Pa. St. 43.

Where a testator devised the income of his estate which consisted of shares of stock in a corporation, it was held that the word income did not include the surplus funds accumulated at the time of the death of the testator, but did include the accumulation on the stock after the death of the testator. *Earp's Appeal*, 28 Pa. St. 368. See also *Park's Estate*, 173 Pa. St. 195.

A testatrix gave her estate in trust to pay to her daughter one thousand four hundred dollars annually from the income, and the remainder of the income to her son. Part of the trust fund was stock in two corporations. One ordered an increase of stock, to be distributed to the old stockholders on payment of seventy-five dollars per share; the trustee sold the privilege to subscribe. The other corporation made a similar order, the trustee advanced money, subscribed for the stock, sold it at an advance, and carried what was received in both cases to the trust account. It was held that these items were income and not capital. The court said: "The case is not within the decision in *Earp's Appeal*, 28 Pa. St. 368, though falling clearly within its principle. There the actual earnings of Robert Earp's stock made before his death were held to constitute a part of his capital at his decease, while the earnings made afterwards were income only. The principle established in that

INCOME TAX. — See the title TAXATION.

INCOMPATIBLE. — See note 1.

case is that the earnings or profits of stock made after death are *income* and not capital, even though in form of capital by the issue of new stock. Equity, seeking the substance of things, found that the new stock was but a product, and was therefore *income*. Precisely so it is here; equity discovers the subject of controversy is a mere product — a right incidental to the stock — and is therefore *income*." Wiltbank's Appeal, 64 Pa. St. 256.

Where the *income* and interest of shares of stock were bequeathed for life with remainder over, and after the death of the testator the company increased its capital by offering to its shareholders the option to subscribe new stock at par, and the executors sold the option in the market, and it appeared that a slight depreciation followed the issue of the new stock, it was held that the sum realized by the sale of the options, though greater in amount than was necessary to make up this depreciation, was all to be accounted capital and not *income*. Biddle's Appeal, 99 Pa. St. 278, 14 Cent. L. J. 253. See also Vinton's Appeal, 99 Pa. St. 434, 14 Cent. L. J. 273.

A will created a trust for the testator's children, the "rents, dividends, increase, and *income*" to be paid to them annually. Part of the fund consisted of shares of a fire insurance company. The company increased its capital and issued new stock, part of which was apportioned to the trustees. They sold part of the right to subscribe at a profit, and bought a larger number of the new shares. The dividends on the whole stock were smaller after the issue of the new stock. It was held that the right to subscribe for the new stock, the profit on the sale of part of the right, and the new shares became part of the principal of the fund, and not *income* or "increase." Brinley v. Grou, 50 Conn. 66, 47 Am. Rep. 618.

In Spooner v. Phillips, 62 Conn. 62, it was held that the word *income* has a broader meaning than "dividends," but that the term is not broad enough to include anything not separated in some way from the principal; that accumulated surplus, so long as it is retained by the corporation, either as surplus or increased stock, can in no proper sense be called *income*. To the same effect see Mills v. Britton, 64 Conn. 23. But that *income* may sometimes be used synonymously with "dividends" see Lord v. Brooks, 52 N. H. 75. See also Clarkson v. Clarkson, 18 Barb. (N. Y.) 646.

Where, by will, certificates of stock are bequeathed in trust for the legatee and his children, the *income* to be paid to him during his life, and remainder to his children, with remainder over in the event of their death, a dividend in certificates of indebtedness, in addition to a cash dividend, will be considered a part of such *income*. Millen v. Guerrard, (Ga. 1881) 14 Cent. L. J. 214.

Same — Money Recovered. — A bank, duly authorized, reduced the par value of its shares in consequence of certain supposed losses. Upon the recovery of the sums supposed to have been lost, it issued additional stock to its shareholders. It was held that a legatee having a right for life to the *income* of certain

shares under a will approved prior to these changes was not entitled to an unconditional certificate of the new dividend stock. Parker v. Mason, 8 R. I. 429.

Value. — In Betts v. Betts, (Supm. Ct. Spec. T.) 4 Abb. N. Cas. (N. Y.) 400, it was held that "annual *income*" meant annual receipts, and was not equivalent to "annual value." This case was upon the construction of a restriction in the charter of a corporation upon holding property which should exceed a specified annual *income*.

Income Derived from Property Subject to Taxation. (See also the title TAXATION.) — A Massachusetts statute provided that no *income* should be taxed which was derived from property subject to taxation. It was held that *income* derived from dealing in merchandise was not within the statute. The court said: "The *income* from a 'profession, trade, or employment,' which is taxable under our system of laws, is an entirely different thing from the capital invested in the business, or the stock of goods in the purchase of which the whole or part of such capital may have been expended. The *income* meant by the statute is the *income* for the year, and is the result of the year's business. It is the net result of many combined influences; the use of the capital invested; the personal labor and services of the members of the firm; the skill and ability with which they lay in, or from time to time renew, their stock; the carefulness and good judgment with which they sell and give credit; and the foresight and address with which they hold themselves prepared for the fluctuations and contingencies affecting the general commerce and business of the country. To express it in a more summary and comprehensive form, it is the creation of capital, industry, and skill." Wilcox v. Middlesex County, 103 Mass. 545.

1. Absolutely Incompatible. — In a prosecution for murder the court refused to give the following instruction: "In order to justify the inference of legal guilt from circumstantial evidence, the existence of the inculpatory facts must be absolutely *incompatible* with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt." On appeal, it was held that the words "absolutely *incompatible*," as contained in the instruction, implied that the proof of the defendant's guilt must be established beyond the possibility of a doubt, and for that reason the court did not err in refusing the instruction. State v. Rover, 13 Nev. 17. See generally the title REASONABLE DOUBT.

Divorce. — See the title DIVORCE, vol. 9, p. 816.

Public Officers. (See also the title PUBLIC OFFICERS.) — In People v. Green, (C. Pl. Spec. T.) 46 How. Pr. (N. Y.) 170, it was said: "According to an early authority *incompatibility* as to office is divided into two classes. 'Offices are said to be *incompatible* and inconsistent so as to be executed by the same person, first, when, from the multiplicity of business in them, they cannot be executed with care

INCOMPETENCY — INCOMPETENT. — Incompetency is defined to be want of sufficient power, either physical, intellectual, or moral; insufficiency; inadequacy; as, the incompetency of a child for hard labor, or of an idiot for intellectual labor.¹

and ability; or, second, when, their being subordinate and interfering with each other, it induces a presumption that they cannot be executed with impartiality and honesty.' 4 Inst. 100; Bac. Abr., tit. Office, K. Among the multitude of cases reported containing adjudications as to what constitutes *incompatibility* in offices, illustrations are found of the latter class, and none whatever in the former. Indeed, where the question arose concerning the incumbent of two offices which bore no relation subordinating one to the other, it has been invariably held that they were not *incompatible*." See also 4 Inst. 310; Rex v. Pate-man, 2 T. R. 777; Verrier v. Sandwich, 1 Sid. 305; Dyer's Case, 2 Dyer, 1586; Rex v. Godwin, 1 Dougl. 307; Milward v. Thatcher, 2 T. R. 82; Rex v. Trelawney, 3 Burr. 1615; Rex v. Jones, 1 B. & A. 677, 20 E. C. L. 407; Rex v. Patteson, 4 B. & Ad. 9, 24 E. C. L. 11; Rex v. Tizzard, 9 B. & C. 418, 17 E. C. L. 411; Bryan v. Cattell, 15 Iowa 550; State v. Lusk, 48 Mo. 242; Com. v. Sheriff, 4 S. & R. (Pa.) 277; Com. v. Binns, 17 S. & R. (Pa.) 222; State v. Buttz, 9 S. Car. 179.

1. **Incompetency.** — Brandt v. Godwin, (N. Y. City Ct. Tr. T.) 3 N. Y. Supp. 811. This case was upon the construction of a contract with a singer, which provided that the singer should not be discharged during the term of his engagement, except for *incompetency*. During that period he received notice that his work was not musically satisfactory. It was held that this was not an exercise of the right to discharge him for *incompetency*. This case was affirmed in 15 Daly (N. Y.) 456, where the court said that *incompetent* was not a synonym for "unsatisfactory."

Removal of Veterans. (See also the title PUBLIC OFFICERS.) — A statute provided that veterans should not be removed except for *incompetency* or misconduct. In construing this provision the court said: "The definition of *incompetency* includes 'disqualification' as well as 'inability' or 'incapacity.'" People v. Board of Health, 15 N. Y. App. Div. 275.

By a New York statute a veteran cannot be removed from office except for *incompetency* and conduct inconsistent with his position. In construing this statute in People v. Wright, 7 N. Y. App. Div. 193, the court said: "It is true that the statute reads '*incompetency* and conduct inconsistent,' etc. We think, however, that the clear intention was to treat these phrases disjunctively. *Incompetency* is one thing. Conduct inconsistent with the relator's position is another. A man may be perfectly competent and yet be guilty of some heinous conduct for which he should be removed. If, therefore, notwithstanding the relator's competency, he was guilty of what is charged in this connection, his general efficiency should not save him."

In People v. Board of Health, 153 N. Y. 513, the word *incompetency* was held to refer to the capacity of a legally appointed incumbent to fill the place, not to eligibility to appoint-

ment, and hence not to entitle a *de facto* officer to a hearing as to whether he had passed the required civil service examination.

Master and Servant. (See also the titles FELLOW SERVANTS, vol. 12, p. 909; MASTER AND SERVANT.) — "*Incompetence* is by no means confined to mere inability to do properly the particular work required. It goes to reliability in all that is essential to make up a reasonably safe person, considering the nature of the work and the general safety of those who are required to associate with such person in the general employment. A person may be competent to do the particular acts required of a fireman, yet be so careless in respect to obeying the rules that prohibit him from interfering with appliances not connected with his work as to render him an exceedingly dangerous and *incompetent* person to be associated with. The rule is tersely stated in the opinion of Mr. Justice Brown, in Coppins v. New York Cent., etc., R. Co. 122 N. Y. 557, substantially thus: 'A competent man is a reliable man. *Incompetency* exists not alone in physical or mental attributes, but in the disposition with which a person performs his duties, and though he may be physically and mentally able to do all that is required of him, his disposition toward his work, and toward his employer, and toward his fellow servants, may make him an *incompetent* man.'" Maitland v. Gilbert Paper Co., 97 Wis. 489.

In Curran v. A. H. Stange Co., 98 Wis. 598, it was held that *incompetency* in a mechanic might arise from mere lack of practice of his trade for several years.

A complaint stated that the defendant employed an *incompetent* servant to take charge of the boilers and engines in its blast furnace, and that the plaintiff was injured by a negligent act of such servant. The court said: "In applying the foregoing rule it is important to look to the meaning of the words *incompetent* and 'negligent,' as ordinarily understood. The former means want of ability for the purpose (Stand. Dict.); not adequate, sufficient, fit, suitable, or capable (Webst. Dict.). The latter means careless, heedless, liability to omit what ought to be done, want of attention (Stand. Dict.); habitually omitting, careless, heedless, neglectful, *incompetent*, thoughtless, or regardless (Webst. Dict.). So it is clear that the word *incompetent* signifies either ignorance of how to do a thing perfectly, or that mental make-up or acquired habit which renders one neglectful, careless, and *incompetent*, though possessing sufficient knowledge and experience to do with reasonable care and skill the work in hand. In such circumstances the inattention or carelessness refers, not to a particular act, but to general character, so as to affect, in fact, the capacity of the person for the work he is employed to do." Kliefoth v. Northwestern Iron Co., 98 Wis. 499.

Malpractice. (See also the title MALPRACTICE.) — In an action against a veterinary surgeon for malpractice, the petition alleged that the

INCONSISTENCY. — See note 1.

INCONSISTENT CONDUCT. — See INCOMPETENCY — INCOMPETENT, *ante*, p. 153.

INCONTINENCY. — See note 2.

INCONTROVERTIBLE. — Incontrovertible means too clear and certain to admit of dispute.³

INCORPORATE — INCORPORATION. (See also the titles CORPORATIONS (PRIVATE), vol. 7, p. 620; MUNICIPAL CORPORATIONS.) — To incorporate

defendant was and is *incompetent*. The petition was held insufficient. The court said: "No doubt an action will lie against a veterinary surgeon for gross ignorance and want of skill as well as for negligence (*Seare v. Prentice*, 8 East 348); but there is no charge of this kind unless the word *incompetent* includes such charge, which it does not necessarily, as the *incompetency* may arise from physical defects, as impaired vision or other like cause." *Barney v. Pinkham*, 39 Neb. 352.

Incredibility — Witnesses. — An instruction touching a witness who had pleaded guilty of the crime of forgery, in which the words *incompetent* and "incredible" were used as synonymous terms, was held to be correct. *In re Noble*, 22 Ill. App. 537. See also the title WITNESSES.

Incompetent and Incapable as Synonymous. — The word *incompetent*, as used in How. Stat. Mich., § 6314, which provides for notice to a supposed *incompetent* person of the time and place of hearing an application for the appointment of a guardian for him, is synonymous with the word "incapable," as used in How. Stat. Mich., § 6315, which provides for the appointment of a guardian if, on the hearing, it shall appear that the person is incapable of taking care of himself and managing his property. *Matter of Leonard*, 95 Mich. 296. See also the title INSANITY, *post*.

Same — Fiduciaries. — In *Matter of Blinn*, 99 Cal. 221, it was said: "The legislature has classified death, insanity, and conviction of an infamous offense under the designation 'incapable,' and other matters affecting the integrity or qualification for the discharge of the duties of an administrator as *incompetency*. The embezzler, the thief, the man who hesitates at no fraudulent scheme to despoil an estate, or who is so careless and indifferent as to habitually and grossly neglect his duties, may have capacity to properly discharge all the duties of an administrator, but the man who is dead, or insane, or *civiliter mortuus*, is 'incapable.' Whether the word *incompetent* was wisely chosen or not, the context leaves no room to doubt the sense in which it was used, and that it was used to designate a different class from those characterized as 'incapable.'"

Fiduciaries — Incompetent in the Sense of Unfitness. — *Stephenson v. Stephenson*, 4 Jones L. (49 N. Car.) 473. See also the titles EXECUTORS AND ADMINISTRATORS, vol. 11, p. 720; TRUSTS AND TRUSTEES.

Incompetency as Applied to Guardianship. — The *New York* statutes authorize the removal of a testamentary guardian by the surrogate having jurisdiction in the premises on the ground of his *incompetency*, or of his wasting the real or personal estate of his ward, or of

any misconduct in relation to his duties as guardian. In construing this provision the court said: "The word *incompetency*, as applied to guardianship, is one, in my judgment, of broad signification and comprehensiveness, like the word 'unsuitableness,' as applied to a trustee. In my opinion it has relation, not merely to the mental condition and moral status of a testamentary guardian, but imports that, in the interests of the child in respect of nurture, care, education, and safety, the court may take into consideration the relative social and pecuniary position of the guardian and the infant." *Damarell v. Walker*, 2 Redf. (N. Y.) 205. See also the title GUARDIAN AND WARD, vol. 15, p. 47.

Assignee. — A New York statute provided for the removal of an assignee for misconduct or *incompetency*. In construing this statute in *Matter of Cohn*, 78 N. Y. 252, the court said: "The words 'misconduct' and *incompetency*, as used in this statute, have no technical meaning. The two were intended to embrace all the reasons for which an assignee ought to be removed. The power of summary removal conferred upon the county judge, sitting as a court, was intended to be as broad as the exigencies of the case might require. This power could not be less than that possessed by a court of equity."

1. Inconsistency and Repugnance. — In *Swan v. U. S.*, 3 Wyo. 153, it was said: "One definition given by the lexicons of *inconsistency* is 'repugnance,' and one definition given of 'repugnance' is *inconsistency*. These words, though not exactly synonymous, may be, and often are, used interchangeably."

2. Incontinency — Slander. (See also the title LIBEL AND SLANDER.) — To constitute the offense of slandering an innocent woman by allegations of *incontinency* it is necessary to prove that the words alleged to have been spoken amounted to a charge of actual definitive illicit sexual intercourse. *State v. Moody*, 98 N. Car. 672. See also *State v. Davis*, 92 N. Car. 764; *State v. Brown*, 100 N. Car. 519; *McBrayer v. Hill*, 4 Ired. L. (26 N. Car.) 136; *State v. Aldridge*, 86 N. Car. 680.

In *Lucas v. Nichols*, 7 Jones L. (52 N. Car.) 35, Manly, J., said: "*Incontinency* means want of restraint in regard to sexual indulgence, and imports, according to our statute, definitive illicit sexual intercourse."

In *Watts v. Greenlee*, 2 Dev. L. (13 N. Car.) 87, 119, Henderson, C. J., said that the word *incontinent* "cannot be understood, when generally applied to a female, to mean anything else but that she is unchaste."

3. McCreary v. Skinner, 75 Iowa 413, in which case it was held error to instruct that the evidence to sustain the inference of fraud must be natural and *incontrovertible*.

means to form into a legal body, or body politic; to constitute into a corporation recognized by law as persons with special functions, rights, and duties; as, to incorporate a bank, a railroad company, or the like.¹ The word "incorporate" means united in one body.²

INCORPOREAL. — See note 3.

1. **Incorporate.** — *Copeland v. Memphis, etc.*, R. Co., 3 Woods (U. S.) 651, 6 Fed. Cas. No. 3,209, in which case it was held that there was no ambiguity in the title of an act which declared its purpose to be "to incorporate the Memphis and Charleston Railroad Company."

A statute provided that every joint-stock company or corporation "incorporated under any law of this state" should make a report, by its president, to the comptroller, of its capital and dividends. In construing this provision the court said: "The word *incorporated*, as here used, is not to be taken in a technical or restricted meaning and confined to an association brought into being according to the formula of a statute, but as including any combination of individuals upon terms which embody or adopt as rules or regulations of business the enabling provisions of the statutes." *People v. Wemple*, 117 N. Y. 147.

Incorporation. — A statute authorized a town to raise money by taxation for the purpose of celebrating any centennial anniversary of its incorporation. It was held that the statute referred to the act which was the beginning of the town's corporate existence, whether as a district or a town. *Hill v. Selectmen*, 140 Mass. 381.

Incorporated Bank. — This term, as used in a *Massachusetts* statute, was held to include banks chartered since the passage of the act, as well as those then existing. *Com. v. Tenney*, 97 Mass. 50.

Incorporated City. — In *New York, etc., R. Co. v. Drummond*, 46 N. J. L. 646, it was said: "I should hesitate to say that a borough, so called, of any or what size, can be considered as within the term 'incorporated city.' Town is generic. Of the genus, cities and boroughs are species. Had the exception been 'incorporated towns,' Asbury Park would be in it, but when an act of legislation speaks of 'incorporated cities,' the most obvious, if not necessary, subjects of the application of such law are localities that are cities by legislative designation."

In *Elma v. Carney*, 4 Wash. 419, it was held that the term "incorporated city" applied to municipal corporations and not to towns.

The Constitution of *Indiana* provided that no county should subscribe for stock in any incorporated company unless the stock should be paid for at the time of subscription. It was held that the words "incorporated company" as thus used, referred to those associations which were created for public benefit and for which the government delegated a portion of its sovereign power to be exercised for public utility, such as turnpikes, bridges, canals, and railroad companies. *Lafayette, etc., R. Co. v. Geiger*, 34 Ind. 185. See generally the title MUNICIPAL AID.

Incorporated Company. — In *U. S. v. Trinidad Coal, etc., Co.*, 137 U. S. 169, it was said: "An incorporated company is an association

of individuals acting as a single person, and by their corporate name."

Incorporated Town. (See generally the title TOWNS AND TOWNSHIPS.) — In *Harris v. Schryock*, 82 Ill. 121, it was said: "Whilst the word 'town' is sometimes employed to designate a township, the term 'incorporated town' is seldom, if ever, employed to embrace such a body."

In *People v. Harvey*, 142 Ill. 573, it was held that a town created under township organization was not an incorporated town within the meaning of a statute allowing the incorporation of municipal corporations in territories, not included within the limits of an incorporated town.

Joint-stock Companies. (See also the title JOINT-STOCK COMPANIES.) — In *Gregg v. Sanford*, 65 Fed. Rep. 151, it was held that within a tax statute a joint-stock company was not an incorporated company in *Pennsylvania*. But compare *People v. Wemple*, 117 N. Y. 147.

2. **Incorporated.** — *Toledo, etc., R. Co. v. Cupp*, 8 Ind. App. 389. This case arose upon the question of whether a certain plat was incorporated in a bill of exceptions.

3. **Inc corporeal Hereditament.** (See also HEREDITAMENTS, vol. 15, p. 337.) In *Barton v. Rushton*, 4 Desaus. (S. Car.) 384, it was said: "Judge Blackstone says that hereditaments, to use the largest expression, are of two kinds, corporeal and incorporeal. Corporeal consist of such as affect the senses, such as may be seen and handled by the body. Incorporeal are not of sensation; can neither be seen nor handled, are creatures of the mind, and can only exist in contemplation."

An incorporeal hereditament is "a right issuing out of a thing corporate (whether real or personal), or concerning, or annexed to, or exercisable within, the same. It is not the thing corporate itself, which may consist in lands, houses, jewels, or the like, but something collateral thereto, as a rent issuing out of those lands or houses." *In re Christmas*, 33 Ch. D. 338, 55 L. J. Ch. 880, quoting 2 Black. Com. 20. See also *Walker v. Daly*, 80 Wis. 227; *Reynolds v. Cook*, 83 Va. 817.

Inc corporeal Property. — In *State v. Georgia Medical Soc.*, 38 Ga. 626, it was said: "Property, says Bouvier, volume 2, page 381, is divided into corporeal and incorporeal. The former comprehends such property as is perceptible to the senses, as lands, houses, goods, merchandise, and the like; the latter consists in legal rights, as choses in action, easements, and the like."

Inc corporeal Real Property. — In *Nellis v. Munson*, 108 N. Y. 458, it was said: "Inc corporeal real property is defined to be a right issuing out of or annexed to a thing corporeal, and consists of the right to have some part only of the produce or benefit of the corporeal property, or to exercise a right or have an easement or privilege or advantage over or out of it."

INCREASE. (See also the titles ACCESSION, vol. 1, p. 247; ACCRETION, vol. 1, p. 47; and see INCOME, *ante*, p. 147.) — Increase is that which is added to the original stock by augmentation or growth; produce; profits; interest; progeny; issue; offspring; increment.¹

1. **Increase.** — *Alferitz v. Ingalls*, 83 Fed. Rep. 974. In this case it was held that wool was the natural *increase* of sheep and was included in the term "sheep and the *increase* thereof." Compare *Alferitz v. Borgwardt*, 126 Cal. 201.

"The word *increase*, from *cresco*, to grow, originally meant growth. It has acquired other meanings by use, but some are figurative, and others, which at first seem not to be growth, upon examination will be seen to be strictly so. When we speak of the 'earth's *increase*,' meaning the annual crops, it is evident that the word is used figuratively. If we speak of interest on money as *increase*, we refer to the sum of money at interest which is thereby *increased*; this is growth. Similarly, when we refer to rents, profits, and other gains as *increase*, it is the fortune of the owner which thereby is made to grow. When we speak of the *increase* of a herd of cattle or a flock of sheep we refer to growth of the herd or flock by addition of new members." *Alferitz v. Borgwardt*, 126 Cal. 206.

Increase of Live Stock. (See also the title COMMUNITY PROPERTY, vol. 6, p. 293.) — As applied to live stock belonging to the wife's separate property, the *increase* of such property has been invariably recognized by the *Texas* courts to denote the progeny of the original stock or their descendants. *Stringfellow v. Sorrells*, 82 Tex. 277. See also *Howard v. York*, 20 Tex. 670; *De Blane v. Lynch*, 23 Tex. 25.

A statute authorized chattel mortgages on certain domestic animals and the *increase* thereof. It was held that the word *increase* imported only the natural *increase* or offspring of such animals and did not include the profit arising from the use of the animals by the mortgagor while he remained in possession. *Alferitz v. Borgwardt*, 126 Cal. 201. Compare *Alferitz v. Ingalls*, 83 Fed. Rep. 974.

A mortgage upon the *increase* of sheep has been confined to natural *increase* and held not to include additions to the flock by purchase. *Wenster v. Power*, L. R. 1 P. C. 150.

Slaves. — In *Reno v. Davis*, 4 Hen. & M. (Va.) 283, it was held that the word *increase*, without the word "future" prefixed, in a bequest of a female slave, was ambiguous, and if the intention of the testator in using it could not be ascertained from the whole will taken together, parol evidence was permissible to explain it.

In *Puller v. Puller*, 3 Rand. (Va.) 87, it was said: "The broad proposition which it appears to me, must be contended for in this case, to wit, that a bequest of a female slave and her *increase* is a bequest of her and her progeny, as well those in being as those to be born thereafter, unless the enlarged operation of that word shall be restricted by the word 'future,' or by a bequest of part of the progeny to some one else, so as thus to evince a restricted use of that term, it seems to me cannot be sustained."

In *Donald v. Dendy*, 2 McMull L. (S. Car.)

130, the term was held to apply only to children born after the making of the will.

In *Carswell v. Schley*, 56 Ga. 111, it was said: "The word *increase*, wherever used in the settlement, means natural *increase*; and such *increase*, in the case of slaves, would go to enlarge the corpus; and we think it was not the intention of the parties here to vary that general rule."

The word *increase* includes children, grandchildren, etc., issue of the body. Where, therefore, a will gave a female slave and her child to A, and then gave the woman and her *increase* over after the death of A, it was held that this bequest over included the child mentioned in the first bequest. *Moye v. Moye*, 5 Jones Eq. (58 N. Car.) 359. But see *Carroll v. Hancock*, 3 Jones L. (48 N. Car.) 473.

Increase per Annum. — Where the resolutions of a company provided that a bookkeeper's salary should be "*increased* one hundred and four dollars per annum," it was held that the words used were only a mode of computation, and did not extend the hiring for a year. *Stanford v. Fisher Varnish Co.*, 43 N. J. L. 153.

Increased Value. — Of the use of this term in a local assessment act, the court said: "The phrases 'benefits' and '*increased* value' may, therefore, be regarded as convertible terms; and if the constitutional provision referred to is to be considered as applicable to this kind of taxation, it would seem that the spirit, if not the very letter, of its injunctions has been embodied in the act. The tax is exactly proportioned according to the *increased* value of the lot, which is the same thing as the value of the 'benefit' which the owner receives from the improvement." *Garrett v. St. Louis*, 25 Mo. 511. See also the title SPECIAL ASSESSMENTS.

Increase of Salary. — In *Crosman v. Nightingill*, 1 Nev. 323, it was held that a law making the lieutenant-governor of the state of *Nevada* *ex officio* warden of the state prison and allowing to him a salary for such services did not conflict with a provision of the state constitution that no *increase* of compensation of certain officers should take effect during the term for which they had been elected. The court said: "It would be putting a construction too restricted upon the constitutional limitation to hold that the provision which prohibits the *increase* of salary or compensation would prevent the holding of two offices by the same person, or the receipt of the salary of both by the same individual."

Increase in the Sense of Heirs. — A bequest to A and her *increase*, without any allusion to a particular estate in her, and without any terms to qualify or control the meaning of *increase*, was held to confer upon A the absolute property. *Holderby v. Holderby*, 4 Jones Eq. (57 N. Car.) 241.

Increase of Land — Texas Act as to Wife's Separate Property. — A Texas statute provided that all property, both real and personal, of the wife, owned by her before marriage,

INCRIMINATING. — See note 1.

INCRIMINATION OF SELF. — See the titles CONTEMPT, vol. 7, pp. 47, 48, 64; WITNESSES.

INCUPLATING. — See note 2.

INCUMBENT. — See note 3.

and the *increase* of all lands or slaves, should be the separate property of the wife. In *De Blane v. Lynch*, 23 Tex. 25, the court refused to interpret the word *increase*, as applied to land, as meaning that which grows out of it or is produced by its cultivation. The court said: "In an etymological sense it cannot be doubted that the word *increase* as applied to land, or to the soil, means that which grows out of it, or that which is produced by the cultivation of it. The word is frequently employed in this sense in the English Bible. Instances of it will be found in the twenty-fifth chapter of the Book of Leviticus. It is there said: 'And for thy cattle, and for the beast that are in thy land, shall all the *increase* thereof be meat.' Again, it is said: 'Behold, we shall not sow nor gather in our *increase*.' So in the sixty-seventh Psalm, the expression occurs, 'Then shall the earth yield her *increase*.'" See also *Holland v. Seward*, 1 Tex. App. Civ. Cas., § 944; *Seligson v. Staples*, 1 Tex. App. Civ. Cas., § 1070; *Cleveland v. Cole*, 6 Tex. 405. And see the title COMMUNITY PROPERTY, vol. 6, p. 293.

Under this act it was held that where the husband took funds of his wife and engaged in the occupation of buying and selling real property, the profits derived from his transactions belonged to his wife, as *increase* of the land. *Evans v. Purinton*, 12 Tex. Civ. App. 158.

Natural Increase — Dividends. — A Georgia statute provided that the natural *increase* of property should belong to the tenant for life. In *Millen v. Guerrard*, 67 Ga. 284, it was held that dividends, whether in cash or bonds or certificates of indebtedness, are the natural *increase* of stock, and not an accumulation of the corpus; nor is this doctrine affected by the fact that no dividends are declared on the stock for some time, and when they are declared the amount is unusually large. Therefore, such dividends belong to the life tenant, and not to the remainderman.

1. Incriminating Circumstances. — In an instruction the trial court used this language: "And if the jury find from the evidence that all the *incriminating* circumstances upon which the prosecution relies for a conviction will as well apply to some other person or persons as to the defendant, or if such facts and circumstances are reconcilable with any reasonable theory or hypothesis other than the guilt of the defendant, or if such facts and circumstances, together with the direct evidence offered in this case, do not satisfy the minds of the jury, beyond any reasonable doubt, of the guilt of the defendant, then you should, by your verdict, acquit him." It was held that the use by the court of the expression "*incriminating* circumstances," if error, was without prejudice to the prisoner. The reviewing court said: "The criticism made upon this instruction is the use by the District Court of the phrase '*incriminating* circumstances.'"

'Incriminate' means to charge with a crime, and an *incriminating* circumstance is one which tends to show that a crime had been committed, or that some particular person committed it." *Davis v. State*, 51 Neb. 323.

2. Incuplating. — Where, on a trial for train wrecking, it was shown that the accused, of his own motion, undertook to point out, and did point out, the places at which certain tools were secreted with which the evidence indicated that the alleged wreck had been committed, it was not error for the trial judge to instruct the jury: "If you believe from the evidence in this case, and find there was any evidence upon that question, that the defendant, without any information from any one else, pointed out the places where the tools were found, and they were the tools that were used in wrecking the train, that would be an *incuplating* circumstance that you might consider in this case with reference to his guilt, in connection with other evidence." It was held that the use of the word *incuplating* in the connection in which it was employed did not amount to the expression or intimation of an opinion respecting the guilt or innocence of the accused. *Shaw v. State*, 102 Ga. 664.

3. Incumbent. — By the California Political Code it is provided that "an office becomes vacant on the happening of either of the following events before the expiration of the term: 1. The death of the *incumbent*. * * * 9. His refusal or neglect to file his official oath or bond within the time prescribed." It was held that, in order to effectuate the intention of the legislature, this provision must be construed as regarding "the person duly elected to an office as the *incumbent* of that office from the time of the commencement of the term for which he was elected until the expiration thereof, whether he qualifies or not." *People v. Taylor*, 57 Cal. 622. See also *Rosborough v. Boardman*, 67 Cal. 116.

But in *People v. Ward*, 107 Cal. 236, it was held that a person who has not taken the position or entered upon the discharge of the duties of his office cannot be charged with misfeasance or malfeasance as an *incumbent*.

An *incumbent* of an office is a person in possession of the office; and a person who has not qualified or entered upon the duties of the office, and who dies before the commencement of the term, cannot be said to be an *incumbent*. *State v. Benedict*, 15 Minn. 198. Compare *Scott County v. Ring*, 29 Minn. 403.

A statute prohibiting the holding by one person of more than one public office at the same time provided that nothing therein contained should be applicable to the present *incumbent* of two or more official positions until their term of office should expire. Upon the question whether the defendant was within the proviso, the court said, "I cannot concur with counsel that a man appointed or elected to an office thereby becomes an *in-*

INCUMBRANCE—INCUMBER. (See also the titles COVENANTS, vol. 8, p. 122; FIRE INSURANCE, vol. 13, p. 258; LIENS; LIS PENDENS; MORTGAGES.) — I. An incumbrance is a burden upon land depreciative of its value, such as a lien, easement, or servitude, which, though adverse to the interest of the landowner, does not conflict with his conveyance of the land in fee.¹

Incumbent of that office. An *incumbent* of an office is one who is legally authorized to discharge the duties of that office. For instance, a man who is elected county treasurer is required to give bonds and take an oath of office. Now, these things must be done before he can discharge the duties of the office; and if not done in due time, the office itself is vacant. There is no *incumbent*. So, where a man is elected judge, he does not, by the election, become a judge. He must receive a commission, as evidence of his authority to act; must take an oath of office, and have it indorsed on his commission. When this is done, and not before, he is an *incumbent* of the office." *State v. McCollister*, 11 Ohio 50, citing *State v. Moffitt*, 5 Ohio 358.

1. *Batley v. Foerderer*, 162 Pa. St. 466, following 10 AM. AND ENG. ENCYC. OF LAW (1st ed.) 361; *Chapman v. Kimball*, 7 Neb. 399; *Carter v. Denman*, 23 N. J. L. 260, 273.

Other Definitions. — An *incumbrance* is defined to be any right to or interest in land which may subsist in a third person to the diminution of the value of the land, and not inconsistent with the passing of the fee in it by a deed of conveyance. *Bouv. L. Dict.*; 2 *Greenleaf on Evidence*, § 242; *Alling v. Burlock*, 46 Conn. 510; *Kelsey v. Remer*, 43 Conn. 138; *Campbell v. Hamilton Mut. Ins. Co.*, 51 Me. 72; *Prescott v. Trueman*, 4 Mass. 630; *Post v. Campau*, 42 Mich. 90; *Fritz v. Pusey*, 31 Minn. 368; *Sessions v. Irwin*, 8 Neb. 8; *Burr v. Lamaster*, 30 Neb. 693; *Huyck v. Andrews*, 113 N. Y. 81, 10 Am. St. Rep. 432; *Forster v. Scott*, 136 N. Y. 582; *Batley v. Foerderer*, 162 Pa. St. 466.

In *Newcomb v. Fiedler*, 24 Ohio St. 466, it was said that an *incumbrance*, in the legal meaning of that term, is an estate or interest in, or a right to, the land granted, to the diminution of its value.

An *incumbrance* is defined to be a burden, an obstruction, an impediment. As applied to an estate in lands, it may fairly include whatever charges, burdens, obstructs, or impairs its use or prevents or impedes its transfer. *Anderson's L. Dict.*, followed in *Willsie v. Rapid Valley Horse-Ranch Co.*, 7 S. Dak. 121; *Wetmore v. Bruce*, 118 N. Y. 319; *Anonymous*, (N. Y. Super. Ct. Spec. T.) 2 Abb. N. Cas. (N. Y.) 63.

An *incumbrance* is a legal claim in favor of one person on the estate of another. *Robinson v. Wiley*, 15 N. Y. 492.

In *Stout v. Dunning*, 72 Ind. 346, it was said: "Burden, clog, load, impediment, are synonyms of *incumbrance*."

In *Post v. Campau*, 42 Mich. 94, it was said: "Anything is an *incumbrance* which constitutes a burden upon the title; a right of way, *Clark v. Swift*, 3 Met. (Mass.) 392; a condition which may work a forfeiture of the estate, *Jenks v. Ward*, 4 Met. (Mass.) 412; a right to take off timber, *Cathcart v. Bowman*, 5 Pa. St.

317; a right of dower, whether assigned or unassigned, *Runnells v. Webber*, 59 Me. 488."

Absolute Conveyance. — "An absolute conveyance is an *incumbrance* in the fullest sense of that term." *Warden v. Sabins*, 36 Kan. 169.

Building Restrictions. (See generally the title BUILDING RESTRICTIONS AND RESTRICTIVE AGREEMENTS, vol. 5, p. 2.) — In *Kountze v. Helmuth*, 67 Hun (N. Y.) 343, a building restriction was held to be an *incumbrance*. To the same effect see *Roberts v. Levy*, (C. Pl. Spec. T.) 3 Abb. Pr. N. S. (N. Y.) 311.

It seems that where the prohibition in a deed of the erection of buildings includes only wooden structures prohibited by city ordinance or general law, the restriction is not open to objection by the vendee as an *incumbrance* upon the title. *Batley v. Foerderer*, 162 Pa. St. 460.

Cloud on Title. (See also the title CLOUD ON TITLE, vol. 6, p. 149.) — In a legal sense the word *incumbrance* means "an estate, interest, or right in lands, diminishing their value to the general owner; a paramount right in or weight upon land which may lessen its value." *Abbott's L. Dict.*, quoted in *Thomson v. Locke*, 66 Tex. 387.

Claims. — In *Johnson v. Hollensworth*, 48 Mich. 140, it was held that *incumbrances* were claims, and that a covenant against all claims must be held to embrace all *incumbrances*.

Condition Subsequent. — In *Anonymous*, (N. Y. Super. Ct. Spec. T.) 2 Abb. N. Cas. (N. Y.) 56, a condition subsequent, though grafted upon the estate at the time of its creation, was held to constitute an *incumbrance*. See also *Jenks v. Ward*, 4 Met. (Mass.) 412.

Devise. — If land which is subject to an easement is devised "subject to the *incumbrances* thereon," the fact that the testator had been in the habit of using the land in connection with his adjoining land does not make such mode of use an *incumbrance*; nor is such a construction aided by the fact that the testator devised his remaining land to two persons in severalty, and imposed an easement on each part for the benefit of the other. *Sullivan v. Ryan*, 130 Mass. 116.

Ditch. — The estimated value of the labor of constructing a ditch, awarded to the owner of lands through which it passed, by the commissioners of a county, under the *Ohio Act of April 12, 1871* (68 Ohio L. 60), was held not an *incumbrance* on such lands, for which a recovery might be had for a breach of the covenant against *incumbrances* in the deed conveying the land, against the vendor, by a vendee who became the purchaser thereof after the ditch was established and such estimate made, and before such work was let by the commissioners. *Newcomb v. Fiedler*, 24 Ohio St. 463.

Dower. (See generally the title DOWER, vol. 10, p. 122.) — A right of dower is an *incumbrance*. *Runnells v. Webber*, 59 Me. 488.

Same — Debt. — By an act of *Delaware* there

II. With reference to streets and highways the term "incumbrance" is

was secured to a widow her dower in all lands in which her husband was seized during the marriage, free and discharged from all debts, liens, and *incumbrances*, except those liens and *incumbrances* which existed prior to the act. In *Griffin v. Reece*, 1 Harr. (Del.) 512, it was held that simple debts were not excepted under the term "liens and *incumbrances*." Compare *Brinckloe v. Brinckloe*, (1829) Laws of Del. 168, note.

Eminent Domain. — The provision of the *New York Consolidation Act of 1882* (Laws 1882, c. 410, § 677), which declares that no compensation shall be allowed to the owner of land taken for a street for any building erected or placed thereon, after the filing of a map of the street as prescribed by the act (section 672), by its terms imposes a restriction upon the use of the land which amounts to an *incumbrance*, and so is unconstitutional. *Forster v. Scott*, 136 N. Y. 577.

Homestead Exemption. — In *Robinson v. Wiley*, 15 N. Y. 489, reversing 19 Barb. (N. Y.) 161, it was held that the representation by the owner of the house that there was no claim or *incumbrance* thereon was not shown to be false by proving that he had previously filed a notice required by the New York Act of 1850, to exempt such house as his homestead from sale on execution.

Illegal Claim — Cloud upon Title. — In *Thomson v. Locke*, 66 Tex. 387, it was said that the word *incumbrance* in a popular sense might include an illegal claim set up to land, under such state of facts as would apparently give title, when in fact no title existed.

Judgment. — In *Lodge v. Capital Ins. Co.*, 91 Iowa 103, it was held that a judgment against the insured after issuance of a fire-insurance policy to him was not an *incumbrance* within the meaning of the policy, the court defining *incumbrances* to mean voluntary *incumbrances*. See also *Horsford v. Hartford Ins. Co.*, 127 U. S. 404; *Walton v. Hargrove*, 42 Miss. 18; *Owens v. Farmers' Joint Stock Ins. Co.*, 57 Barb. (N. Y.) 518; *Green v. Homestead F. Ins. Co.*, 82 N. Y. 517; *Grevenmeyer v. Southern Mut. F. etc., Co.*, 62 Pa. St. 340.

In *Rodgers v. Bonner*, 45 N. Y. 387, it was held that a judgment lien was not an *incumbrance* within the meaning of Code Pro. N. Y., § 132, which provided for the filing of a lis pendens and the priority of *incumbrances*. The court said: "A judgment lien is not an *incumbrance* within the meaning of the section. A judgment is not a specific lien upon any particular real estate of the judgment debtor, but a general lien upon all his real estate, subject to all prior liens, either legal or equitable, irrespective of any knowledge of the judgment creditor as to the existence of such liens. There is no reason for holding that it was the intention of the section under consideration to change the law in this respect."

But in *Willis v. Rapid Valley Horse-Ranch Co.*, 7 S. Dak. 114, it was held that the lien of a docketed judgment constitutes, in the ordinary sense of the term, an *incumbrance* upon real property.

In *Sullivan v. Barry*, 46 N. J. L. 5, it was said: "Neither the word 'convey' nor in-

umber, according to its ordinary signification, is expressive of the act of creating a tenancy for years in lands. The former of the terms is appropriate to the transfer of a title to a freehold, the latter to putting the property in pledge for the payment of money." To the same effect see *Hoover v. Chambers*, 3 Wash. Ter. 29; *Norris v. Bradford*, 4 Ala. 203.

But in *Fritz v. Pusey*, 31 Minn. 368, a lease was held to be an *incumbrance* in a covenant against *incumbrances*. To the same effect is *Grice v. Scarborough*, 2 Spears L. (S. Car.) 649. See also *Batchelder v. Sturgis*, 3 Cush. (Mass.) 201; *Porter v. Bradley*, 7 R. I. 538.

Local Assessment Held Not to Be Incumbrance. — *Gothelf v. Stranahan*, 138 N. Y. 345. See generally the title SPECIAL ASSESSMENTS.

Mechanics' Liens. (See generally the title MECHANICS' LIENS.) — A mechanics' lien has been held to be an *incumbrance* within the meaning of a warranty against *incumbrances* in a fire-insurance policy. *Redmon v. Phoenix F. Ins. Co.*, 51 Wis. 293, 37 Am. Rep. 830. The court said: "It is insisted that in this application 'the word *incumbrance* is used in its popular and not its technical sense.' No case has been cited making such distinction in the use of the word *incumbrance*. Webster defines an *incumbrance* to be 'a burdensome and troublesome load;' and again, 'a burden or charge upon property; a legal claim or lien upon an estate.' It will hardly be claimed that Webster did not define the word for the use of the populace, or that he only intended such definition to include mortgages. Certainly judgments duly rendered and docketed must be regarded as *incumbrances*, as used in popular speech. Is not the same true with respect to a mechanic's lien?"

Mortgage. — A satisfied mortgage not discharged of record was held not an *incumbrance* within the meaning of a statute providing that a settlement might be gained by an inhabitant of another town, if he should possess in his own right, in fee, real estate of the value of one hundred dollars, free from any *incumbrance*. The court said: "It is material only so far as it is an *incumbrance*. It is an *incumbrance* to the extent of the debt or duty secured thereby. When the debt is paid or duty discharged the *incumbrance* ceases to exist. A satisfied mortgage is not an *incumbrance* within the meaning of this statute. It may be a cloud upon the title, but that is not necessarily an *incumbrance*. Where, as in this case, it is without force as between the parties, except to a very limited extent, and where strangers cannot be permitted to take advantage of it, we do not hesitate to hold that it is not an *incumbrance*." *Clinton v. Westbrook*, 38 Conn. 14.

And in *Smith v. Niagara F. Ins. Co.*, 60 Vt. 682, an undischarged mortgage which had been paid was held not to be an *incumbrance* within an insurance policy.

Paramount Right. — A paramount right is an *incumbrance* within the meaning of a covenant in a conveyance of land that the land is free of all *incumbrances*. *Prescott v. Tiue-man*, 4 Mass. 627.

Party Wall. (See generally the title PARTY

sometimes used in the sense of "obstruction."¹

WALLS.—Where a person purchases a vacant lot which supports the half of the wall of a building erected on the adjoining lot, and such purchaser is, by the terms of a previous agreement entered into by his grantor, obliged to pay a part of the cost of the wall in order to use it, such agreement and wall constitute an *incumbrance*. *Burr v. Lamaster*, 30 Neb. 688. To the same effect see *Mackey v. Harmon*, 34 Minn. 168; *O'Neil v. Van Tassel*, 137 N. Y. 297.

Postnuptial Settlement.—In *Swift v. Fitzhugh*, 9 Port. (Ala.) 58, the court said: "The deed in this case is a postnuptial settlement, made in pursuance to an antenuptial agreement, the execution of which, had it not been voluntarily made, a court of chancery would have enforced. Such an instrument is not within either the letter or spirit of the terms 'deed of trust, mortgage, or other legal *incumbrance*,' as used in the Act of 1824. Property thus circumstanced cannot, in any sense, legal or popular, be said to be *incumbered*, as that term always implies previous ownership, and a right to *incumber* or subject property to the payment of a debt; whereas, in this case, Maguire never was the owner of the property—the instrument in question being merely evidence of the renunciation, before marriage, of his marital rights."

Rent Charge — Incumbrance.—Within the English Settled Land Act of 1882 it was held that the word *incumbrance* included a rent charge. *In re Strafford*, (1896) 1 Ch. 235.

Sheriff's Sale of Right of Redemption.—Where a policy of insurance upon the interest of a mortgagor was to be void if the estate should be alienated or *incumbered* by sale, assignment, or otherwise, and his right to redeem the property was seized and sold on a writ of execution, it was held that the sheriff's sale to a third person of the right of redemption was an *incumbrance* upon the property, and if the title thus acquired was perfected by lapse of time, it would constitute an alienation of it. *Campbell v. Hamilton Mut. Ins. Co.*, 51 Me. 69.

Tax Sale.—Where property has been sold for taxes and is unredeemed, it has been held that it is *incumbered* within an insurance policy. *Wilbur v. Bowditch Mut. F. Ins. Co.*, 10 Cush. (Mass.) 446.

But in *Sessions v. Irwin*, 8 Neb. 5, it was held that a tax deed was not an *incumbrance* within the meaning of a statute requiring appraisers selected by a sheriff to appraise real estate levied upon by him to enumerate the liens and *incumbrances* against such real estate.

Voluntary and Involuntary.—Within a policy of insurance requiring notice of *incumbrances* on the property insured, it was held that the term *incumbrances* included both voluntary and involuntary *incumbrances*. *Brown v. Commonwealth Mut. Ins. Co.*, 41 Pa. St. 193. See also *Thatcher v. Valentine*, 22 Colo. 201.

But it has been held to refer only to voluntary *incumbrances*, and not to apply to *incumbrances* by judgment or otherwise *in invitum* by operation of law. *Baley v. Homestead F. Ins. Co.*, 80 N. Y. 21, 36 Am. Rep. 570. See *supra*, this note, *Judgment*.

English Settled Land Act.—In *In re Knatchbull*, 27 Ch. D. 349, it was held that the term "*incumbrances* affecting the inheritance of the settled land," in the English Settled Land Act, 1882, must be taken to mean *incumbrances* in the ordinary sense, such as mortgages, portions, etc., and not terminable charges such as those which affect the tenant for life rather than the remainderman. And as to the construction of this statute see *In re Stamford*, 43 Ch. D. 95; *In re Chaytor*, 25 Ch. D. 654.

1. Streets. (See also the titles **HIGHWAYS**, vol. 15, p. 343; **STREETS AND SIDEWALKS**.)—By the charter of the city of Winona, its common council was authorized, "by ordinances, resolutions, or by-laws, * * * to prevent the *incumbrance* of streets, sidewalks, lanes, or alleys with carriages, carts, wagons, boxes, sleighs, fire-wood, lumber, or any other material or substance whatever." It was held that the word *incumbrance* was used in the sense of "obstruction," and that the authority to prevent the *incumbrance* of streets was an authority not only to remove or cause to be removed anything actually obstructing a street, but also to take measures to prevent anything from becoming an obstruction. *Fox v. Winona*, 23 Minn. 10.

Incumbrance Distinguished from Encroachment.—A statute was entitled "*incumbrances* and encroachments upon highways." In *State v. Kean*, (N. H. 1897) 45 Atl. Rep. 257, the court said: "The legislature understood encroachment and *incumbrance* to be different evils requiring different remedies. An object is not an *incumbrance* in a highway unless it obstructs the use of the way, while an encroachment is an unlawful gaining upon the right or possession of another, as where a man sets his fence beyond his line. *Bouv. Law Dict.* Thus the title furnishes evidence that the object of the statute was the preservation of the limits of the public right, not the prevention of obstruction to travel."

Street Railroads. (See also the title **STREET RAILROADS**.)—The charter of a street-railroad company forbade it to *incumber* any portion of the streets or highways of the city not occupied by its tracks. It was held that the use of poles ancillary to the electric motive power was not forbidden by this prohibition. The court said: "To *incumber*, according to Webster, is 'to impede the motion or action of, as with a burden, to weigh down; to obstruct, embarrass, or perplex.' To *incumber*, as used in said section 7, doubtless means to obstruct or hinder travel by putting things in the way of it. The poles are very slightly in the way of travel, being placed, as hitching posts, lamp posts, electric-light poles, telegraph and telephone poles are placed, near the front margins of the sidewalks. We are not inclined to say, however, that they do not *incumber* because they are placed as they are, but only that it does not follow that they *incumber* because they are so placed. Take, for instance, a lamp post or an electric-light pole. It is slightly in the way, and if it served no useful purpose in regard to the street might justly be deemed to *incumber* it. But it supports a lamp, or an

INCUMBRANCER. — An incumbrancer is one who has a legal claim upon an estate.¹

INCUR. — To incur means to become liable or subject to; to cause, occasion, bring on.²

electric light, which illuminates the street at night, and so improves the street for its proper uses. It is not, therefore, an *incumbrance* in any proper sense of the word." *Taggart v. Newport St. R. Co.*, 16 R. I. 685.

Private Way. — A deed provided that the grantee should have a passageway over other lands, not to be *incumbered* in any way. It was held that bars and a gate across an opening in the wall through which the passageway extended were an *incumbrance*. *Mineral Springs Mfg. Co. v. McCarthy*, 67 Conn. 279.

1. *Warden v. Sabins*, 36 Kan. 169; *Campbell v. Hamilton Mut. Ins. Co.*, 51 Me. 72.

"He who places a charge upon his interest in realty, as a mortgage or judgment confessed, is an *incumbrancer*." *Willis v. Rapid Valley Horse-Ranch Co.*, 7 S. Dak. 121.

A statute required that notice of assignment be given to *incumbrancers*. In construing this statute in *Thatcher v. Valentine*, 22 Colo. 201, the court said: "The word *incumbrancer* is employed in section 6 'In its broad and general sense, and embraces every class of *incumbrancers* and every class of incumbrances. A lien or charge upon land which binds it for the payment of a debt is an incumbrance, and the holder of the lien is an *incumbrancer*. The incumbrance may be created by contract, or it may be acquired in pursuance of some statute. The lien of an attaching creditor is an incumbrance equally with a mortgage.'" See also *Spangler v. Sanborn*, 7 Colo. App. 102.

2. *Beekman v. Van Dolsen*, 70 Hun (N. Y.) 288; *Scott v. Tyler*, 14 Barb. (N. Y.) 204.

Contracted and Incurred. — "Men contract debts, they *incur* liabilities. In the one case they act affirmatively, in the other the liability is *incurred* or cast upon them by act or operation of law." *Crandall v. Bryan*, (Supm. Ct.) 15 How. Pr. (N. Y.) 56, 5 Abb. Pr. (N. Y.) 162.

But "contracted" is sometimes used in the sense of *incurred*. See *Carver v. Braintree Mfg. Co.*, 2 Story (U. S.) 432, 2 Robb. Pat. Cas. 141, 10 Hunt. Mer. Mag. 470, 5 Fed. Cas. No. 2,485. See also *Chase v. Curtis*, 113 U. S. 463; *Allen v. Clark*, 108 N. Y. 269.

Paid Out or Incurred. — An instruction in an action for personal injuries directed an allowance of medical expenses "paid out or *incurred*." This was held error. The court said: "Being in the alternative, it would be followed by allowing for the medical expenses *incurred* (become liable for: Webster's Dictionary), and the jury could not have understood that they were directed to find for expenses paid in the absence of proof thereof." *Flanagan v. Baltimore, etc., R. Co.*, 83 Iowa 644.

Past Tense. — In *Agawam Bank v. Strever*, 18 N. Y. 502, the note sued upon was left with the bank as collateral security "for all liabilities *incurred* by Isaac S. Doane or Doane & Hoysradt to the Agawam Bank." The court said: "It is true that upon a strict grammatical construction of these terms they would be held to embrace only liabilities which had

been already *incurred*. The word *incurred*, being in the past tense, when used without other words to modify its meaning would in strictness relate exclusively to past transactions. Were this memorandum, therefore, to be construed by itself, without the aid of any extrinsic fact or circumstance whatever, I am inclined to think the interpretation contended for by the appellants' counsel the one which should be adopted. * * * But its meaning can hardly be regarded as so entirely clear and unequivocal as to exclude all aid from the circumstances surrounding the parties at the time of entering into the contract. * * * It was proper, therefore, upon the trial, to resort to evidence of the attending circumstances to assist in ascertaining the meaning and intention of the parties." See also *Beemer v. Packard*, 92 Hun (N. Y.) 512.

A judgment obtained after a date named, upon an action instituted before that date, is not a debt *incurred* after the date. *Knight v. Whitman*, 6 Bush (Ky.) 51, 99 Am. Dec. 652.

3. **Incurred — Brought On.** — A statute provided that each party to his suit should be liable for the costs *incurred* by him. It was held that the word *incurred* as here used meant brought on, occasioned, or caused. *Ashe v. Young*, 68 Tex. 126.

Fences. — A statute provided: "If any person liable to contribute to the erection or reparation of a division fence shall neglect or refuse to make and maintain his proportion of such fence, or shall permit the same to be out of repair, he shall not be allowed to have and maintain any action for damages *incurred*." In construing this statute the court said: "The word *incurred* means 'brought on' (Web. Dict.); and by this statute the party in default is to have no action for damages brought on himself in some manner." *Deyo v. Stewart*, 4 Den. (N. Y.) 103.

Debt Incurred for Purchase of Land. (See generally the titles VENDOR AND PURCHASER; VENDOR'S LIEN.) — Where a purchaser of land gave his notes with another as security for the purchase money, and the assignee of the notes subsequently took in their stead notes of the principal alone, these latter were held to be a debt *incurred* for the purchase of land. *Williams v. Jones*, 100 Ill. 362.

Expenses Incurred. — Where an act placed additional duties in respect to the registry of votes upon a town clerk and authorized the parish officers to repay to him "expenses *incurred*," this expression meant money paid out by him, and did not include remuneration for his services. It did not mean his labor. *Reg. v. Kingston upon Hull*, 2 El. & Bl. 184, 75 E. C. L. 184.

Bring into Operation. — The Act of Congress of June 6, 1872, § 12, provided that a distiller who carried on business after the time stated in a notice of suspension should *incur* the forfeitures provided for persons who carried on business without having given bond, being the forfeitures mentioned in section 44 of the same

INCURABLE. — Admitting no cure.¹

IND. — See note 2.

INDEBITATUS ASSUMPSIT. — See ENCYC. OF PL. AND PR., title ASSUMPSIT, vol. 2, p. 987.

INDEBTED — INDEBTEDNESS. (See the title DEBT, vol. 8, p. 982.) — Indebted means placed in debt; being under obligation; held to payment or requital; beholden.³ Indebtedness is pecuniary obligation. It includes liabilities of every sort, present and to accrue.⁴

act. The word *incure* here means "cause, or bring on," and the forfeiture takes effect without regard to ownership. *U. S. v. Distillery 11 Blatchf. (U. S.) 255.*

1. **Incurable.** — In construing a law giving an action of redhibition where a slave sold had an infirmity *incurable* by nature, the *Louisiana* court said: "An infirmity is *incurable* either by its nature or by the progress it has made or by the ignorance of the physician. When an infirmity results from the injury of one of the organs necessary to life, as the brain, the heart, or the lungs, it is, and always will be, *incurable* by its nature. It is also said, though not very correctly, to be *incurable* by its nature when the healing art has no remedy to cure it. * * * When an infirmity curable by its nature has been neglected or ill treated in its beginning, it reaches a stage where it ceases to be curable, and is said to be *incurable* by the progress it has made. When the infirmity is such that the physician called to heal it is ignorant of the means of cure, it is said to be *incurable* by the ignorance of the physician. Out of these three classes of *incurable* infirmities the law gives the redhibitory action in the case of those which are *incurable* by their nature." *St. Romes v. Porc, 10 Mart. (La.) 205.*

2. **Ind.** — The courts of *Indiana* will take judicial notice that the abbreviation *Ind.* as applied to a place means *Indiana*. *Burroughs v. Wilson, 59 Ind. 539.* See generally the title ABBREVIATIONS, vol. 1, p. 97.

3. **Indebted.** — Webster's Dict., quoted in *Chicago, etc., R. Co. v. Lundstrom, 16 Neb. 254; Scott v. Davenport, 34 Iowa 208.* See also *Brown v. Cairns, 107 Iowa 727, citing 8 AM. AND ENG. ENCYC. OF LAW (2d ed.) 983, 984, 986.*

4. **Indebtedness.** — *Merriman v. Social Mfg. Co., 12 R. I. 175.*

"Webster defines *indebtedness* as 'the state of being *indebted* or placed in debt, or under an obligation, or held for payment or requital.'" *Davenport v. Kleinschmidt, 6 Mont. 536; Powell v. Oregonian R. Co., 36 Fed. Rep. 730.*

Indebtedness is defined as a condition of owing money; also, the amount owed. *Cheyenne County v. Bent County, 15 Colo. 325.*

Due or to become due. — In *Merriman v. Social Mfg. Co., 12 R. I. 179*, the court, in construing a contract to assume *indebtedness*, said: "*Indebtedness* is a word of large meaning. It is used to denote almost every kind of pecuniary obligation originating in contract. * * * The language is, 'all the *indebtedness* * * * now due or to grow due.' The assumption was obviously meant to be comprehensive. We think it must be held to cover liabilities contracted by indorsement, whether then due or to grow due." See

also *St. Louis Perpetual Ins. Co. v. Goodfellow, 9 Mo. 149; Davis v. Herring, (Supm. Ct. Spec. T.) 65 How. Pr. (N. Y.) 290; Grant v. Mechanics' Bank, 15 S. & R. (Pa.) 143.*

In *Yocum v. Allen, 58 Ohio St. 280*, it was held that an allegation of *indebtedness* was not equivalent to an allegation that the debt was due and payable.

But in *Lum v. Steamboat Buckeye, 24 Miss. 565*, it was said: "A party, either in legal or common acceptance, can only be said to be *indebted* to another when he withholds from him that which is his due, which he is then bound to pay, and the other has a right to demand. When only under an obligation to pay at a future day, he may become *indebted* by a failure to pay at the time stipulated, but cannot be said to be *indebted* until the day of payment, because till then he does not withhold that which is another's due, and which he has a right to demand."

"The word *indebted* is significant, for it is a legal term, having a legal meaning, and implies a debt presently payable. It was so defined by this court in *Trowbridge v. Sickler, 42 Wis. 417.*" *Slutts v. Chaffee, 46 Wis. 618.* See also *In re Stockton Malleable Iron Co., 2 Ch. D. 101.*

Same — Affidavit of Attachment. — In an affidavit for an attachment, a statement that the attachment defendant "is *indebted*" to the plaintiff in a sum named, "upon express contract, over and above all legal set-offs," was held a sufficient affidavit that the amount named was due. The court said: "In *Lenox v. Howland, 3 Cai. (N. Y.) 323*, the word *indebted*, as used in the attachment laws of New York, is held to be synonymous with owing; and among the definitions of owing or owe are 'due,' 'to be due to.' (Webster.) It has been held in *Louisiana* that the words 'really *indebted*' convey the idea of a debt actually due and payable; not *debitum in presenti, solvendum in futuro*. No weight seems to have been given to the adverb 'really.' *Parmele v. Johnston, 15 La. 429.* Likewise in some of the approved forms of common-law pleadings, especially in actions of debt on simple contracts, the word is used as denoting a debt presently payable. This appears from the omission of an averment to that effect. 2 Chitty's Pl. 385." *Trowbridge v. Sickler, 42 Wis. 419, overruling Whitney v. Brunette, 15 Wis. 61; Bowen v. Slocum, 17 Wis. 181.*

Insurable Interest — Future Loans. — In holding that an insurable interest which the creditor has in the life of his debtor cannot exceed in amount that of the *indebtedness* secured, the court said that the word *indebtedness* "may embrace not only a debt or debts actually existing when the insurance is taken out by the debtor, or is thereafter assigned to

INDECENCY. (See the titles DISORDERLY HOUSES, vol. 9, p. 508; EXPOSURE OF PERSON, vol. 12, p. 536; LEWD AND LASCIVIOUS COHABITATION AND CONDUCT; OBSCENITY; POSTAL LAWS.)—Indecency is defined to mean that which is unbecoming in language or manners; any action or behavior which

the creditor, but also additional indebtedness to arise upon the making of further loans or advances by the creditor to the debtor—such, for instance, as cash for premiums to be paid in obtaining the policy or in keeping it alive." *Exchange Bank v. Loh*, 104 Ga. 450.

Future Interest.—The term *indebtedness*, as used in a constitutional limitation upon the *indebtedness* which a city might incur, has been held not to include future interest. *Ashland v. Culbertson*, (Ky. 1898) 44 S. W. Rep. 442.

Loan. (See also LOAN.)—A life-insurance policy containing nonforfeiture provisions declared that upon default after payment of two annual premiums, the net reserve, "less any *indebtedness* to the company on this policy," would be applied to the purchase of nonparticipating term insurance. In construing these provisions the court said: "What did the parties mean? It cannot reasonably be supposed that they intended the word *indebtedness* to have any special or technical significance; and that, in common and ordinary apprehension, a 'loan,' no matter when or how payable, is understood to be an *indebtedness*, is indubitable. That, too, in each of these instances, the loan was 'on the policy,' is, under the express terms of the certificate, unquestionable." *Omaha Nat. Bank v. Mutual Ben. L. Ins. Co.*, 84 Fed. Rep. 125.

Broad Meaning—Moral Obligation—Advances.—Where a testator directed that "all moneys or *indebtedness* which shall appear upon any inventory or ledger or books of account" kept by him, "charged as due" to him from any of the beneficiaries during his lifetime, "and as an outstanding or unsettled account" at the time of his decease, should be deducted from the share of the person concerned, the word was held to cover advances so made. The court said: "The word *indebtedness* is not exclusively a term of legal technicality. It has at times a signification far broader than the law dictionaries assign to it, not even involving of necessity the idea of money obligation. Like any other word, therefore, which is used in a testamentary paper, its signification is open to construction, and it may be necessary to scrutinize the provisions of the testator's will, and even, under some circumstances, the condition of his estate and his relation to the objects of his bounty, in order to ascertain the sense in which he has seen fit to employ it." *Matter of Robert*, 4 Dem. (N. Y.) 185. And see *Scott v. Neeves*, 77 Wis. 310, where the term was applied to a moral obligation.

Joint Liability.—*Indebtedness* has been held to cover the debtor's joint as well as several liabilities, and also his liabilities contracted by indorsement, whether then due or to become due. *Bell v. Mendenhall*, (Minn. 1899) 80 N. W. Rep. 843.

Definite Liability.—In *Chicago v. Galpin*, 183 Ill. 408, it was said: "A debt or *indebtedness* means a determinate and definite liability."

ity." This was upon the construction of a constitutional provision limiting the amount of *indebtedness* which might be incurred by a municipal corporation.

In *Latimer v. Veader*, 20 N. Y. App. Div. 425, it was said: "In the AMERICAN AND ENGLISH ENCYCLOPÆDIA OF LAW [1st ed.] it is said: 'Ordinarily, it imports a sum of money arising upon a contract express or implied. In its more general sense it is defined to be that which is due from one person to another, whether money, goods, or services; that which one person is bound to pay or perform to another.' (Vol. 5, 143.) It has been expressly held, however, that debt does not include a liability in tort. (*Id.*, 148, 149, and cases cited in note 1 on page 149.)" See also *Powell v. Oregonian R. Co.*, 36 Fed. Rep. 726, cited in *McDonnell v. Alabama Gold L. Ins. Co.*, 26 Am. & Eng. Corp. Cas. 274.

Same—Judgment for Tort.—A judgment against a lessee (a corporation) for waste permitted on the demised premises is an *indebtedness* within a constitutional provision which declared that a stockholder of a corporation should be "liable for the *indebtedness*" thereof to the amount unpaid on his stock; the judgment obtained thereon was such an *indebtedness*; and any stockholder of the corporation was liable therefor to the plaintiff therein to the amount unpaid on his stock. *Powell v. Oregonian R. Co.*, 36 Fed. Rep. 726.

Same—Fraudulent Conveyances.—The word *indebtedness* in a statute against fraudulent conveyances has been construed to mean not a fixed sum due, but any liability that may have been incurred by contract either express or implied, that renders a party a debtor within the meaning of the law. *Mattingly v. Wulke*, 2 Ill. App. 172. See also the title FRAUDULENT SALES AND CONVEYANCES, vol. 14, p. 253.

Same—Attachment. (See also the title ATTACHMENT, vol. 3, p. 189.)—Within an attachment statute it has been held that a claim for breach of contract to sell and deliver merchandise was an *indebtedness*. *Hyman v. Newell*, 7 Colo. App. 78.

So of the use of the term *indebted* in an attachment statute the court said: "Being *indebted* is synonymous with owing; it is sufficient, therefore, if the demand arise on contract." *Lenox v. Howland*, 3 Cal. (N. Y.) 323.

In an attachment statute directing that a creditor shall make oath that the debtor is *bona fide indebted*, etc., it has been held that *indebted* is to be construed in its ordinary sense and not in a technical or strict legal sense. *Wilson v. Wilson*, 8 Gill (Md.) 192, 50 Am. Dec. 685.

Involuntary Debts.—A statute provided that if the *indebtedness* of any company should at any time exceed its capital stock, the trustees of such company should be personally liable. In construing this statute in *Allen v. Clark*, 108 N. Y. 269, the court said: "The word *indebtedness* in this section clearly includes not only every debt voluntarily contracted by

is deemed a violation of modesty, or an offense to delicacy, as rude or wanton actions, obscene language, and whatever tends to excite a blush in the spectator.¹

the company, but every debt of every nature, however contracted or arising."

Indebted to Each Other.—The expressions "mutual debts," "dealing together," "*indebted* to each other," have been held to convey the same meaning, in set-off statutes. *Pate v. Gray*, Hempst. (U. S.) 155, citing *Gordon v. Bowne*, 2 Johns. (N. Y.) 155.

Sale of Newspaper.—In *Blew v. Collins*, 61 Minn. 418, a seller of a newspaper agreed to pay all *indebtedness* of the paper contracted before the sale. It was held that *indebtedness*, as thus used, did not include contracts for advertising which had been paid in advance.

Bonded Debt of a Corporation.—A charter of a corporation provided that if the *indebtedness* of the corporation at any time exceeded the capital stock paid in, the directors should be individually liable to the creditors. It was held that *indebtedness* included the bonded debt of the corporation as well as the floating debt. *Tradesman Pub. Co. v. Knoxville Car Wheel Co.*, 95 Tenn. 634. See generally the title PUBLIC OFFICERS.

Money Embezzled.—Upon the discovery of thefts committed by the secretary of a savings bank, both while holding that office and previously while acting as one of the clerks of the bank, and of thefts by others of its employees subordinate to the secretary, which occurred through his connivance or negligence, the secretary gave to a third person, for the benefit of the bank, an agreement, made part of and at the same time with a mortgage executed by him to secure its obligations. This agreement, after stating that he was *indebted* to the bank in an amount uncertain, but to be ascertained by investigation within twelve months, contained a condition that if any *indebtedness* from him to the bank should be found to exist, he would pay it with lawful interest, or, in the alternative, that the mortgage should be available. It was held that the bank was entitled to recover upon a foreclosure of the mortgage, under the word *indebtedness*, and upon proper proof, not only the personal debt of the secretary to it, but also the sum taken from it, with his connivance or through his negligence, by the clerks who were subordinate to him, together with lawful interest thereon from the time when his obligation to the bank accrued. *Latimer v. Veader*, 20 N. Y. App. Div. 418.

School Warrants. (See generally the title MUNICIPAL SECURITIES.)—The Act of *Nebraska* approved March 30, 1887 (Laws Neb. 1887, p. 100), entitled "An act to authorize counties, precincts, townships, or towns, cities, villages, and school districts to compromise their *indebtedness* and issue new bonds therefor," was held not to empower a school district to issue its bonds and deliver them to parties in compromise, or to take the place of an *indebtedness* evidenced by school-district warrants or orders. *State v. Moore*, 45 Neb. 12.

Unpaid Stock. (See generally the titles STOCK; STOCKHOLDERS.)—In *Kahn v. St. Joseph Bank*, 70 Mo. 271, it was said: "We have con-

ceded at the outset of this opinion that the word *indebted* is sufficiently comprehensive to embrace unpaid stock as well as any other form of *indebtedness*, provided the context and general intent of the law does not require a more narrow interpretation." But in that case it was held that the word *indebted* referred to *indebtedness* outside of stock subscriptions.

In *Pittsburgh, etc., R. Co. v. Clarke*, 29 Pa. St. 146, it was held that the liability to pay for the amount of stock subscribed for was an *indebtedness* within the meaning of a statute providing that a stockholder *indebted* to a company could not transfer his stock without the consent of the board of directors.

But it has been held that *indebted* in such a provision was not restricted to *indebtedness* growing out of the original subscription and subsequent calls and assessments, but applied to all *indebtedness* of the stockholder to the company. *National Bank of Republic v. Rochester Tumbler Co.*, 172 Pa. St. 614.

Indebtedness in Writing.—In *O'Donnell v. Chicago, etc., R. Co.*, 22 Ill. App. 233, it was held that a justice's judgment was an evidence of *indebtedness* in writing, within the meaning of a statute of limitations. See generally the title LIMITATIONS OF ACTIONS.

Entries of deposits made by a bank in a bank book issued to a depositor constitute evidence of *indebtedness* in writing, within the meaning of the *Illinois* statute which bars actions upon such evidence of *indebtedness* only upon the lapse of ten years, and an action thereon by the depositor against a stockholder of the bank to enforce the individual liability of the latter is barred on the lapse of the same period as bars an action against a corporation. *Schalucky v. Field*, 124 Ill. 617, 21 Am. & Eng. Corp. Cas. 545.

Evidence of Indebtedness.—Under a constitutional provision that "no scrip * * * shall be issued except for the redemption of stock, bonds, or other evidences of *indebtedness* previously issued," bank bills not issued directly by the state, but issued by a corporation created by the state, in which it was the sole stockholder, under express authority from the state, and for the sole benefit of the state, are such evidences of *indebtedness*. *Bond Debt Cases*, 12 S. Car. 200, 287.

Limitations to Municipal Indebtedness.—See the title MUNICIPAL CORPORATIONS.

1. Public Indecency.—*McJunkins v. State*, 10 Ind. 144. The court further said: "It would therefore appear that the term 'public *indecent*' has no fixed legal meaning—is vague and indefinite, and cannot in itself imply a definite offense. And hence the courts, by a kind of judicial legislation, in England and the United States, have usually limited the operation of the term to public displays of the naked person, the publication, sale, or exhibition of obscene books and prints, or the exhibition of a monster—acts which have a direct bearing on public morals, and affect the body of society."

INDECENT.—Indecent means unfit for the eye or ear; tending to obscenity.¹

INDECENT EXPOSURE.—See the title EXPOSURE OF PERSON, vol. 12, p. 536.

INDECENT LANGUAGE.—See the title OBSCENITY.

INDECENT PUBLICATIONS.—See the titles OBSCENITY; POSTAL LAWS.

INDECOROUS.—Indecorous means impolite, or in violation of good manners or proper breeding. "It is broad enough to cover the slightest departure from the most polished politeness, to conduct which is vulgar and insulting."²

INDEFINITE. (See also ENCYC. OF PL. AND PR., title DEFINITENESS AND CERTAINTY IN PLEADINGS, vol. 6, p. 246.)—See note 3.

1. U. S. v. Weightman, 34 Pittsb. Leg. J. (Pa.) 242.

Postal Laws. (See also the title POSTAL LAWS.)—In construing an act forbidding the use of the mails to circulate publications of an *indecent* character, it was said: "The term is said to signify more than indelicate and less than immodest—to mean something unfit for the eye or ear. Worcester, Dict." U. S. v. Loftis, 12 Fed. Rep. 671.

So it has been said that passages are *indecent* within the meaning of the act "when they tend to obscenity, that is to say, matter having the form of indecency which is calculated to promote the general corruption of morals." U. S. v. Bennett, 16 Blatchf. (U. S.) 362. See also U. S. v. Britton, 17 Fed. Rep. 733; U. S. v. Pratt, 2 Am. L. T. N. S. 238.

In U. S. v. Smith, 11 Fed. Rep. 665, it was said: "The connection in which the word *indecent* is used, taken with the history of the legislation upon the subject, leads me to the conclusion that it means immodest, impure; and that language which is coarse or unbecoming, or even profane, is not within the inhibition of this act." See also U. S. v. Bebout, 28 Fed. Rep. 524; U. S. v. Williams, 3 Fed. Rep. 485.

Indecent Assault. (See also the title ASSAULT AND BATTERY, vol. 2, pp. 973, 975.)—In State v. West, 39 Minn. 321, it was held that a verdict of guilty of an *indecent* assault sufficiently described the offense prohibited under section 245 of the Penal Code of Minnesota. The court said: "The second point raised is that the verdict does not state any crime known to the law; that the words '*indecent* assault' are no part of the statute, but merely 'catch words.' We think this objection is not well taken. The crime as defined by the statute is, in its legal tenor and import, an *indecent* assault. '*Indecent* liberties' with or on the person of a female without her consent, and an '*indecent* assault' upon her, are in effect convertible expressions. The term '*indecent* assault' is but the statutory definition of the crime epitomized."

Indecently Drunk. (See also the title INTOXICATION.)—Where a complaint and warrant charged that the defendant was "*indecently* drunk, contrary to the provisions of the act passed by the legislature [of Rhode Island] at its June session, A. D. 1854," it was held that he was sufficiently charged with the offense defined in that act by the words "intoxicated under such circumstances as amount to a violation of decency." Alexander v. Card, 3 R. I. 145.

Indecently Acting.—Where the disturbance of divine service alleged in an indictment was "by talking, and by loud talking, and by using profane language, and by using obscene language, and by then and there being intoxicated, and by otherwise *indecently* acting, striking matches, smoking pipe, making *indecent* and vulgar noises, by laughing aloud," and there was evidence of *indecent* and vulgar noises by the defendant, but not of his laughing aloud, the court did not err in charging that the jury might convict upon proof of *indecent* and vulgar noises. Under the indictment the jury was not restricted to the consideration of *indecent* and vulgar noises made by laughing aloud, the noise in question being fairly within the description of "*indecently* acting." Taffe v. State, 90 Ga. 459.

Indecent Behavior.—Crim. Code Ala. 1886, § 4032 (Crim. Code 1896, § 4653), makes a disturbance created "by rude or *indecent* behavior or by profane or obscene language" an offense. In construing this statute the court said: "The expression 'rude or *indecent* behavior,' as here used, at least implies conduct which is boisterous, rough, or uncivil, or is offensive to modesty or delicacy. It cannot fairly be said that one is guilty of such conduct who merely strikes back at another by whom he is insulted and assaulted, in the presence or within the hearing of women, though he could have avoided a continuance of the difficulty by withdrawing from it without peril to himself." Reeves v. State, 96 Ala. 41.

Indecent Purpose.—Entering a court house and urinating against the door facing therein is using the building "for an *indecent* purpose," within the meaning of section 725 of the Georgia Penal Code, and such an act is a misdemeanor, whether as a result thereof the building is or is not injured or defaced. Smith v. State, (Ga. 1900) 35 S. E. Rep. 166.

2. **Indecorous.**—Louisville, etc., R. Co. v. Ballard, 85 Ky. 312. In this case it was held that, in an action to recover for injuries resulting to the plaintiff from her being taken past a station for which she had purchased a ticket, it was error to instruct the jury that damages should be awarded to the plaintiff if any employee of the company was *indecorous* or insulting.

3. **Lease.** (See also the title LEASE.)—A lessee "for the term of one year and an *indefinite* period thereafter," at an annual rent, is a tenant from year to year. Pugsley v. Aiken, 11 N. Y. 494.

Indefinite Failure of Issue. (See also the titles ISSUE; REMAINDERS AND EXECUTORY IN-

INDEMNIFY. — See note 1.

INDEMNITY. — See note 2.

TEREST; SHELLEY'S CASE; WILLS.) — In *Hall v. Chaffee*, 14 N. H. 220, it was said: "A definite failure of issue is when a precise time is fixed by the will for the failure of issue, as in the case of a devise to A, but if he dies without lawful issue living at the time of his death. If there should be no such issue living at the time, a remainder over would be good. An *indefinite* failure of issue is a proposition the very converse of the other, and means a failure of issue whenever it shall happen, sooner or later, without any fixed, certain, or definite period within which it must happen. It means the period when the issue or descendants of the first taker shall become extinct, and when there is no longer any issue of the issue of the grantee, without reference to any particular time or any particular event; or, in the words of the statute *de donis*, referring to the first taker, if his issue shall fail."

Indefinite Imprisonment. (See also the title PUNISHMENT AND IMPRISONMENT.) — In *Ex p. Bryant*, 24 Fla. 278, it was held that a sentence to imprisonment until a fine should be paid did not create an *indefinite* imprisonment within the meaning of a constitutional provision prohibiting *indefinite* imprisonment.

1. **Indemnify.** — In holding that there must be actual loss in order to recover under a contract to *indemnify* against liability, the court said: "Webster defines this word: '*Indemnify* (in and damnify; L. *damnificus*, *damnum*, loss). (1) To save harmless; to secure against loss, damage, or penalty. (2) To make good; to reimburse one what he has lost. We *indemnify* a man by giving sufficient security to make good a future loss, or by actual reimbursement of loss after it has occurred.' It follows from this definition that (in the ordinary signification of the term) to *indemnify* against legal liability means to save harmless from loss occasioned by legal liability." *Weller v. Eames*, 15 Minn. 461. So under a contract to *indemnify*, the person

to be *indemnified* must pay before he is entitled to the benefit of the contract. *Collinge v. Heywood*, 9 Ad. & El. 633, 36 E. C. L. 223.

Full Protection. — In *Paulin v. Kaighn*, 29 N. J. L. 493, it was said: "To *indemnify* means to fully protect and save harmless; and when the defendant offered to show that the co-securities had received securities to *indemnify* them against this liability, it must be understood that they were securities that were sufficient to protect and save them harmless against all liability on that bond."

2. **Indemnity Lands.** (See also the title PUBLIC LANDS.) — In *Barney v. Winona*, etc., R. Co., 117 U. S. 232, the court said: "In the construction of land-grant acts in aid of railroads there is a well-established distinction observed between 'granted lands' and '*indemnity* lands.' The former are those falling within the limits specially designated, and the title to which attaches when the lands are located by an approved and accepted survey of the line of the road filed in the land department, as of the date of the Act of Congress. The latter are those lands selected in lieu of parcels lost by previous disposition or reservation for other purposes, and the title to which accrues only from the time of their selection." See also *U. S. v. Missouri*, etc., R. Co., 141 U. S. 375; *Kansas Pac. R. Co. v. Atchison*, etc., R. Co., 112 U. S. 421; *Sioux City*, etc., R. Co. v. *Chicago*, etc., R. Co., 117 U. S. 406; *Wisconsin Cent. R. Co. v. Price County*, 133 U. S. 496.

Insurance. — The very meaning of the term *indemnity* excludes all idea of profit to be insured. *Davis v. Phoenix Ins. Co.*, 111 Cal. 409. See also *Godsall v. Boldero*, 9 East 72; *Hamilton v. Mendes*, 2 Burr. 1210; *Exchange Bank v. Loh*, 104 Ga. 446. And see the several insurance titles such as BENEFICIARIES (IN INSURANCE), vol. 3, p. 923; FIDELITY AND GUARANTY INSURANCE, vol. 13, p. 3; LIFE INSURANCE; etc.

INDEMNITY CONTRACTS.

By JOSEPH WALKER MAGRATH.

I. DEFINITION AND NATURE, 168.

II. WHAT CONSTITUTES, 168.

III. WHETHER WITHIN STATUTE OF FRAUDS, 169.

IV. VALIDITY, 170.

1. *In General*, 170.
2. *Indemnity Against Consequences of Illegal Act*, 170.
 - a. *Act Known to Be Illegal*, 170.
 - b. *Act Not Believed to Be Illegal*, 171.
3. *Indemnity to Bail*, 172.

V. CONSIDERATION, 172.

1. *Necessity*, 172.
2. *Sufficiency*, 172.
3. *Past Consideration*, 173.
4. *Future Consideration*, 173.

VI. CONSTRUCTION, 173.

1. *In General*, 173.
2. *To Whose Benefit Contract of Indemnity Inures*, 176.
3. *Duration of the Contract*, 176.
4. *Liability of Indemnitor to Third Persons Not Increased*, 176.

VII. FULFILMENT AND BREACH OF THE CONTRACT, 176.

1. *Fulfilment*, 176.
2. *Breach*, 176.
 - a. *In General*, 176.
 - b. *Judgments by Default, Consent, etc.*, 177.
 - c. *What Constitutes a Payment by Indemnitor*, 177.
 - d. *Voluntary Payments by Indemnitor*, 177.
 - e. *Whether Indemnitor Must Have Suffered Actual Loss or Damage*, 178.
 - (1) *Affirmative View*, 178.
 - (2) *Negative View*, 178.
 - (3) *The Best Rule*, 178.
 - (a) *Rule Stated*, 178.
 - (b) *Equitable Right to Relief Before Actual Loss*, 179.
 - f. *Contract to Do a Particular Act*, 179.
 - g. *Whether Notice to Indemnitor of Suit Against Indemnitor Is Necessary*, 180.
 - h. *Evidence*, 180.

VIII. MEASURE OF RECOVERY, 181.

1. *In General*, 181.
2. *Interest*, 181.
3. *Expenses of Litigation*, 181.
 - a. *Costs*, 181.
 - b. *Attorney's Fees*, 182.

IX. JOINT OR SEVERAL LIABILITY OF INDEMNITORS, 182.

1. *Agreement Purporting to Be Joint*, 182.
2. *Separate Agreements of Indemnity*, 182.

X. DEFENSES, 182.

XI. DISCHARGE OF INDEMNITOR, 183.**XII. DEPOSITS FOR INDEMNITY, 183.****XIII. INDEMNITY MORTGAGES, 183.****1. In General, 183.****2. Description of Debt or Obligation Indemnified Against, 184.****CROSS-REFERENCES.**

For matters of Procedure, see the title BONDS, ENCYC. OF PL. AND PR., vol. 3, p. 635. For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the following titles in this work: BONDS, vol. 4, p. 618; CONTRACTS, vol. 7, p. 88; EMPLOYERS' LIABILITY INSURANCE, vol. 11, p. 9; FIDELITY AND GUARANTY INSURANCE, vol. 13, p. 3; GUARANTY, vol. 14, p. 1127; INSURANCE, post; INTERPRETATION AND CONSTRUCTION, post; LIMITATION OF ACTIONS; REFORMATION AND CANCELLATION; SURETYSHIP.

I. DEFINITION AND NATURE. — An indemnity contract is an agreement between two parties whereby one agrees to indemnify and save harmless¹ the other from loss or damage in connection with some particular transaction,² or to protect him against liability to or the claim of a third person.³

The Terms "Indemnitor" and "Indemnitee" have been used to designate the parties to such a contract, and will be so used in this article.⁴

The Essential Distinction Between an Indemnity Contract and a Contract of Guaranty or Suretyship is that the promisor in an indemnity contract undertakes to protect his promisee against loss or damage through a liability on the part of the latter to a third person, while the undertaking of a guarantor or surety is to protect the promisee against loss or damage through the failure of a third person to carry out his obligations to the promisee.⁵

II. WHAT CONSTITUTES. — In order that a contract may be considered one of indemnity the intention of indemnifying against a certain loss or liability must appear;⁶ it is not, however, necessary that this intention be expressed

1. "Save Harmless" Is a Term of More Extensive Meaning than "Indemnify." — *Carr v. Roberts*, 5 B. & Ad. 78, 27 E. C. L. 39.

2. A Strict Definition of the term should go no further than this, for a covenant against liability is not philologically a contract of indemnity. There are many instances in the reports in which the word "indemnity" has been used in its strictly literal meaning, and the distinction must be kept clearly in view. See *Gage v. Lewis*, 68 Ill. 604; *Valentine v. Wheeler*, 122 Mass. 566, 23 Am. Rep. 404; *Weller v. Eames*, 15 Minn. 461, 2 Am. Rep. 150; *Hoy v. Hansborough, Freem.* (Miss.) 533; *Carson Opera House Assoc. v. Miller*, 16 Nev. 327; *Jones v. Childs*, 8 Nev. 121; *Chace v. Hinman*, 8 Wend. (N. Y.) 452, 24 Am. Dec. 30; *Crippen v. Thompson*, 6 Barb. (N. Y.) 532; *McGee v. Roen*, (N. Y. Super. Ct. Spec. T.) 4 Abb. Pr. (N. Y.) 8; *Crofoot v. Moore*, 4 Vt. 204; *Pond v. Warner*, 2 Vt. 532. But for convenience in treatment and ease of reference it is deemed best to extend the definition, and of course the scope of the article, as given in the text.

3. Definition. — The definition given in the text is practically the same as that given in 10 AM. AND ENG. ENCYC. OF LAW, (1st ed.) 402, and adopted in Black's Law Dict.

4. The Terms "Indemnitor" and "Indemnitee" are of comparatively recent origin, and they do

not appear in Webster's Dictionary, nor in any of the earlier law dictionaries save Anderson's. But their use is now well recognized, and since the argument in favor of their use, in the first edition of this work, definitions of these terms have appeared in the Century Dictionary and in Black's Law Dictionary, the latter work having also adopted the definition of an "indemnity contract" given in 10 AM. AND ENG. ENCYC. OF LAW (1st ed.) 402, in which these terms are used.

Instances of the use of these terms in the sense of the text may be found in the following cases: *Smith v. McGhee*, 14 Ala. 404; *Lewis v. Johns*, 34 Cal. 633; *Davidson v. Dallas*, 8 Cal. 227; *Brandts v. Donnelly*, 94 Ky. 129; *Leshner v. Getman*, 30 Minn. 321; *Weller v. Eames*, 15 Minn. 461, 2 Am. Rep. 150; *Herring v. Hoppock*, 15 N. Y. 413; *Bridgeport F. & M. Ins. Co. v. Wilson*, 34 N. Y. 275; *Aberdeen v. Blackmar*, 6 Hill (N. Y.) 324; *Heinmuller v. Gray*, (N. Y. Super. Ct. Gen. T.) 44 How. Pr. (N. Y.) 260; *Weber v. Ferris*, (C. Pl. Gen. T.) 37 How. Pr. (N. Y.) 102.

5. See the titles GUARANTY, vol. 14, p. 1127; SURETYSHIP.

6. Contracts, etc., Held to Be of Indemnity. — A bond given by a partner purchasing the entire interest in a partnership firm to the other, conditioned to "truly indemnify and save harmless" such other from the payment of all and

in any particular terms.¹

III. WHETHER WITHIN STATUTE OF FRAUDS. — The decided preponderance of authority is in support of the view that an indemnity contract is an original and not a collateral undertaking, and therefore not within the provision of the statute of frauds that a promise to answer for the debt, default, or mis-carriage of another must, in order to be valid, be in writing.² But in

every of the debts due or to become due from the firm, is a bond of indemnity only. *Hough v. Perkins*, 2 How. (Miss.) 724.

Direct Promise to Support a Pauper, Coupled with Agreement to Indemnify Town Against Expenses of Supporting Him, Held to Be Contract of Indemnity. — *Palmyra v. Nichols*, 91 Me. 17.

Contracts, etc., Held to Be Not of Indemnity. — F., having been convicted and fined for selling intoxicating liquor, prayed an appeal and executed an appeal bond with J. as his surety. Subsequently F. and another executed to J. a bond conditioned that F. should appear at the term of the district court to which an appeal was taken, but such bond did not recite that in case J. should suffer by reason of becoming surety for F., or in case J. should pay or be compelled to pay the penalty of the appeal bond, the promisors in the other bond would indemnify him. It was held that the bond in question was not an indemnifying bond. *Slater v. Jacobitz*, 3 Colo. App. 127.

In an *Illinois* case, where W. promised R. that if R. would sign a certain promissory note payable to the order of W., as surety for S., W. would forthwith obtain a chattel mortgage upon all of the personal property of S. to secure payment of the note and also to secure payment of a previous note for a like amount given by the said S. to W., and also signed by R. as surety, it was held that "the mere promise to obtain a chattel mortgage was not indemnity nor a guaranty of indemnity." *Resseter v. Waterman*, 151 Ill. 169, reversing 45 Ill. App. 155.

A Direct Promise to Pay certain notes is not a contract of indemnity. *Crofoot v. Moore*, 4 Vt. 204.

1. Expressions Held to Amount to Agreements to Indemnify. — See *Carr v. Wyley*, 23 Ala. 821.

In *Brewster v. Countryman*, 12 Wend. (N. Y.) 446, where the vendor of property in connection with the terms of sale said to the vendee, "I will see you out with it," there was held to be an agreement to indemnify.

Similarly, in *Grant v. Lawrence*, 79 Hun (N. Y.) 565, where a contract for the purchase of patented articles contained a clause that the purchasers were "to be defended from trouble about patents," there was held to be a contract to indemnify.

A Contract to Furnish a Bond of Indemnity is in substance a contract of indemnity, and must be treated as itself in effect a contract to indemnify where it is not superseded by such promised bond. *Showers v. Wadsworth*, 81 Cal. 270.

2. Indemnity Contract Not Within Statute of Frauds — England. — *Thomas v. Cook*, 8 B. & C. 728, 15 E. C. L. 333; *Guild v. Conrad*, (1894) 2 Q. B. 885, 9 Reports 746; *Sutton v. Grey*, 9 Reports 168, affirming 69 L. T. N. S. 354; *Eastwood v. Kenyon*, 11 Ad. & El. 438, 39 E. C. L. 137; *Yorkshire R. Wagon Co. v. Maclure*, 19

Ch. D. 478; *Toplis v. Grane*, 5 Bing. N. Cas. 636, 35 E. C. L. 256; *Cripps v. Hartnoll*, 4 B. & S. 414, 116 E. C. L. 414, 32 L. J. Q. B. 381, 11 W. R. 953, 10 Jur. N. S. 200, 8 L. T. N. S. 768; *Reader v. Kingham*, 13 C. B. N. S. 344, 106 E. C. L. 344; *Batson v. King*, 4 H. & N. 739; *Wildes v. Dudlow*, L. R. 19 Eq. 198; *Lakeman v. Mountstephen*, L. R. 7 H. L. 17, 43 L. J. Q. B. 188, 30 L. T. N. S. 437, 22 W. R. 617, overruling L. R. 5 Q. B. 613. But see to the contrary, *Winckworth v. Mills*, 2 Esp. 484; *Green v. Creswell*, 10 Ad. & El. 453, 37 E. C. L. 142.

United States. — *Townesley v. Sumrall* 2 Pet. (U. S.) 170; *D'Wolf v. Rabaud*, 1 Pet. (U. S.) 476.

California. — *Lerch v. Gallup*, 67 Cal. 595; *Stark v. Raney*, 18 Cal. 622.

Connecticut. — *Reed v. Holcomb*, 31 Conn. 360; *Marcy v. Crawford*, 16 Conn. 549, 41 Am. Dec. 158; *Stocking v. Sage*, 1 Conn. 519; *Smith v. Delaney*, 64 Conn. 264, 42 Am. St. Rep. 181, referring to 8 AM. AND ENG. ENCYC. OF LAW (1st ed.) 673.

Georgia. — *Bohannon v. Jones*, 30 Ga. 488; *Jones v. Shorter*, 1 Ga. 294, 44 Am. Dec. 649.

Indiana. — *Spencer v. McLean*, 20 Ind. App. 626; *Anderson v. Spence*, 72 Ind. 315, 37 Am. Rep. 162; *Horn v. Bray*, 51 Ind. 555, 19 Am. Rep. 742.

Iowa. — *Mills v. Brown*, 11 Iowa 314.

Kentucky. — *George v. Hoskins*, (Ky. 1895) 30 S. W. Rep. 406; *Lucas v. Chamberlain*, 8 B. Mon. (Ky.) 276; *Dunn v. West*, 5 B. Mon. (Ky.) 376.

Maine. — *Goodspeed v. Fuller*, 46 Me. 141, 71 Am. Dec. 572; *Knight v. Sawin*, 6 Me. 361; *Smith v. Sayward*, 5 Me. 504.

Massachusetts. — *Perley v. Spring*, 12 Mass. 297; *Perkins v. Littlefield*, 5 Allen (Mass.) 370; *Aldrich v. Ames*, 9 Gray (Mass.) 76; *Fish v. Thomas*, 5 Gray (Mass.) 45, 66 Am. Dec. 348; *Alger v. Scoville*, 1 Gray (Mass.) 391; *Blake v. Cole*, 22 Pick. (Mass.) 97; *Chapin v. Lapham*, 20 Pick. (Mass.) 467.

Michigan. — *Boyer v. Soules*, 105 Mich. 31; *Green v. Brookins*, 23 Mich. 48, 9 Am. Rep. 74.

Minnesota. — *Goetz v. Foos*, 14 Minn. 265, 100 Am. Dec. 218; *Fidelity, etc., Co. v. Lawler*, 64 Minn. 144.

Nebraska. — *Minick v. Huff*, 41 Neb. 516.

New Hampshire. — *Demeritt v. Bickford*, 58 N. H. 523; *Holmes v. Knights*, 10 N. H. 175.

New Jersey. — *Appar v. Hiler*, 24 N. J. L. 812.

New York. — *Jones v. Bacon*, 145 N. Y. 446, affirming 72 Hun (N. Y.) 506; *Sanders v. Gillespie*, 59 N. Y. 250; *Konitzky v. Meyer*, 49 N. Y. 571; *Mallory v. Gillett*, 21 N. Y. 412; *Barry v. Ransom*, 12 N. Y. 462; *Lyon v. Clark*, 8 N. Y. 148; *Farley v. Cleveland*, 4 Cow. (N. Y.) 432, 15 Am. Dec. 387; *Conkey v. Hopkins*, 17 Johns. (N. Y.) 113; *Harrison v. Sawtell*, 10 Johns. (N. Y.) 242, 6 Am. Dec. 337; *Allaire v. Ouland*, 2 Johns. Cas. (N. Y.) 52; *Chapin v.*

some jurisdictions the contrary opinion prevails.¹

IV. VALIDITY — 1. In General. — There is nothing in the nature of an indemnity contract which necessarily renders it invalid as against public policy,² though, as will be shown, particular contracts of this character may, on account of the unlawful nature of the acts from the consequences of which they seek to afford indemnity, be condemned.

2. Indemnity Against Consequences of Illegal Act — a. ACT KNOWN TO BE ILLEGAL. — Thus there can be no doubt of the invalidity of a contract by which one party undertakes to indemnify the other against the consequences

Merrill, 4 Wend. (N. Y.) 657. But see *Kingsley v. Balcome*, 4 Barb. (N. Y.) 131.

Ohio. — See *infra*, this note, paragraph *Ohio Cases*.

Vermont. — *Hodges v. Hall*, 29 Vt. 209; *Beaman v. Russell*, 20 Vt. 205, 49 Am. Dec. 775.

Wisconsin. — *Barth v. Graf*, 101 Wis. 27; *Vogel v. Melms*, 31 Wis. 306, 11 Am. Rep. 608; *Shook v. Vanmater*, 22 Wis. 532.

Ohio Cases. — In *Mays v. Joseph*, 34 Ohio St. 22, it was held that a verbal promise by a judgment creditor to indemnify an officer holding an execution, against loss or damage from the seizure and sale of property claimed by the debtor to be exempt from execution, was not within the statute of frauds, as the promise was an original and not a collateral engagement; that there was no element of debt, default, or miscarriage of any third party in the agreement; and that the act against which the indemnity was promised was for the benefit of the promisor. The court made no reference to the earlier cases of *Kelsey v. Hibbs*, 13 Ohio St. 340, and *Easter v. White*, 12 Ohio St. 219, where it was held that a promise to indemnify one who had become surety upon a bond against any loss arising therefrom was within the statute of frauds, and therefore invalid if not in writing.

1. Indemnity Contract Within Statute of Frauds — Alabama. — *Martin v. Black*, 20 Ala. 309; *Brown v. Adams*, 1 Stew. (Ala.) 51, 18 Am. Dec. 36.

Illinois. — *Spear v. Farmers', etc., Bank*, 156 Ill. 555, affirming 49 Ill. App. 509; *Brand v. Whelan*, 18 Ill. App. 186; *Waterman v. Resetter*, 45 Ill. App. 155. (This case was reversed by the Supreme Court in *Resetter v. Waterman*, 151 Ill. 169, but such reversal does not conflict with the general rule in Illinois, for the Supreme Court proceeded upon the ground that the particular contract or undertaking in question was not one of indemnity.)

Mississippi. — *May v. Williams*, 61 Miss. 125, 48 Am. Rep. 80.

Missouri. — *Hurt v. Ford*, 142 Mo. 283, reversing (Mo. 1896) 36 S. W. Rep. 671; *Bissig v. Britton*, 59 Mo. 204, 21 Am. Rep. 379.

North Carolina. — *Draughan v. Bunting*, 9 Ired. L. (31 N. Car.) 10.

Ohio. — See *supra*, preceding note, paragraph *Ohio Cases*.

Pennsylvania. — *Nugent v. Wolfe*, 111 Pa. St. 471, 56 Am. Rep. 291; *Townsend v. Long*, 77 Pa. St. 143, 18 Am. Rep. 438; *Maule v. Bucknell*, 50 Pa. St. 39; *Miller v. Long*, 45 Pa. St. 350; *Shoemaker v. King*, 40 Pa. St. 107; *Allshouse v. Ramsay*, 6 Whart. (Pa.) 331, 37 Am. Dec. 417.

South Carolina. — *Simpson v. Nance*, 1 Spear L. (S. Car.) 4. But see *Adkinson v. Barfield*, 1 McCord L. (S. Car.) 575; *Tindal v. Touchberry*, 3 Strobb. L. (S. Car.) 177, 49 Am. Dec. 637.

2. Instances of Indemnity Contracts Held Not Illegal — Bond of Indemnity Against the Costs and Charges of Defending a Suit. — *Riggs v. Shirley*, 9 Humph. (Tenn.) 71.

Indemnity Against Costs of Prosecuting Action Brought by Indemnitor in Name of Indemnitee with Permission of Latter. — *Knight v. Sawin*, 6 Me. 361.

Bond Indemnifying Purchaser of Land Against Threatened Adverse Claims. — *Osborne v. Eales*, 2 Moo. P. C. C. N. S. 125, 12 W. R. 654.

Delivery by Magistrate of Stolen Goods to One Claiming Ownership. — *Ballard v. Pope*, 3 U. C. Q. B. 317.

Damages Recovered for Personal Injuries. — *Kansas City, etc., R. Co. v. Southern R. News Co.*, 151 Mo. 373; *Trenton Pass. R. Co. v. Guarantors Liability Indemnity Co.*, 60 N. J. L. 246.

Maintenance of Wife. — *Winn v. Sanford*, 148 Mass. 39.

Improper Use of Trust Funds. — *Warwick v. Richardson*, 10 M. & W. 284, 11 L. J. Exch. 351.

Expense of Erecting County Buildings. — *Sterner v. Palmer*, 34 Pa. St. 131. See also the title COUNTY-SEAT, vol. 7, p. 1041.

Manufacturing Private Die Stamps. — *Diamond Match Co. v. U. S.*, 31 Fed. Rep. 271.

Loan of Arms Belonging to State. — *State v. Buffalo*, 2 Hill (N. Y.) 434.

A Guarantee Policy given by a third person to sureties upon the bond of a tax collector to protect them against loss is valid. *Towle v. National Guardian Ins. Soc.*, 5 L. T. N. S. 193, 30 L. J. Ch. 900, 7 Jur. N. S. 1109.

A Policy of Reinsurance for the purpose of protecting the company insuring against loss is valid. *New York Bowery F. Ins. Co. v. New York F. Ins. Co.*, 17 Wend. (N. Y.) 359; *Eastern R. Co. v. Relief F. Ins. Co.*, 98 Mass. 420.

Support of Pauper. — A bond to indemnify a town against expenses attending the support of a pauper is valid. *Palmer v. Ferry*, 6 Gray (Mass.) 420; *Turner v. Hadden*, 62 Barb. (N. Y.) 480; *Williston v. White*, 11 Vt. 40.

Assignment of Mail Contract. — An undertaking by one to whom a mail carrier has agreed to assign his mail contract, that if the post-office department does not accept him as a substitute he will indemnify the assignor against all damages and charges resulting from the assignor's nonperformance, is valid. *Whitehouse v. Langdon*, 10 N. H. 331.

of an act which is illegal and which the parties know to be so, because such a contract is necessarily against public policy.¹

b. ACT NOT BELIEVED TO BE ILLEGAL. — But it is otherwise where the act against the consequences of which the indemnity is given, though actually illegal, is performed under a claim of right and a belief on the part of the indemnitee that it is a legal act,² as, for instance, an apparently legal act which turns out to be a trespass;³ especially in cases where the contract of

1. Contract of Indemnity Against Consequences of Illegal Act Invalid — England. — *Shackell v. Rosier*, 2 Bing. N. Cas. 634, 29 E. C. L. 438; *Ligeart v. Wischam*, 3 Dyer 323 *b*; *Pitcher v. Bailey*, 8 East 171; *De Mesnil v. Dakin*, L. R. 3 Q. B. 18; *Samuel v. Evans*, 2 T. R. 569.

Canada. — *Bell v. Riddell*, 2 Ont. 25.

United States. — *Arnold v. Clifford*, 2 Sumn. (U. S.) 238; *Hayden v. Davis*, 3 McLean (U. S.) 276. See also *Bierbauer v. Wirth*, 5 Fed. Rep. 336.

Alabama. — *Collier v. Windham*, 27 Ala. 291, 62 Am. Dec. 767; *Prewitt v. Garrett*, 6 Ala. 128, 41 Am. Dec. 40; *James v. Hendree*, 34 Ala. 488.

California. — *Buffendeau v. Brooks*, 28 Cal. 641; *Stark v. Raney*, 18 Cal. 622.

Colorado. — *Porter v. Stapp*, 6 Colo. 32.

Illinois. — *Nelson v. Cook*, 17 Ill. 443.

Indiana. — *Anderson v. Farns*, 7 Blackf. (Ind.) 343.

Kentucky. — See *Lampton v. Taylor*, Litt. Sel. Cas. (Ky.) 273.

Maine. — *Jose v. Hewett*, 50 Me. 248.

Massachusetts. — *Babcock v. Terry*, 97 Mass. 482; *Vincent v. Nantucket*, 12 Cush. (Mass.) 103; *Ayer v. Hutchins*, 4 Mass. 370, 3 Am. Dec. 232. See also *Marsh v. Gold*, 2 Pick. (Mass.) 285.

Missouri. — *Harrington v. Crawford*, 136 Mo. 467, 58 Am. St. Rep. 653.

New Hampshire. — *Hinds v. Chamberlin*, 6 N. H. 225; *Riley v. Whittiker*, 49 N. H. 145, 6 Am. Rep. 474.

New York. — *Moss v. Cohen*, (C. Pl. Gen. T.) 15 Misc. (N. Y.) 108; *Griffiths v. Hardenbergh*, 41 N. Y. 464; *Pierson v. Thompson*, 1 Edw. (N. Y.) 212; *Stone v. Hooker*, 9 Cow. (N. Y.) 154; *Coventry v. Barton*, 17 Johns. (N. Y.) 142, 8 Am. Dec. 376; *Richmond v. Roberts*, 7 Johns. (N. Y.) 319; *Love v. Palmer*, 7 Johns. (N. Y.) 159; *Webbers v. Blunt*, 19 Wend. (N. Y.) 188, 32 Am. Dec. 445; *Kneeland v. Rogers*, 2 Hall (N. Y.) 579; *Newburgh v. Galatian*, 4 Cow. (N. Y.) 340.

North Carolina. — *Ives v. Jones*, 3 Ired. L. (25 N. Car.) 538, 40 Am. Dec. 421. See also *Thompson v. Whitman*, 4 Jones L. (49 N. Car.) 47; *Garner v. Qualls*, 4 Jones L. (49 N. Car.) 223.

Ohio. — *Cumpston v. Lambert*, 18 Ohio 81, 51 Am. Dec. 442.

Pennsylvania. — *Hopkinson v. Leeds*, 78 Pa. St. 396.

Tennessee. — *Lea v. Collins*, 4 Sneed (Tenn.) 393.

Vermont. — *Atkins v. Johnson*, 43 Vt. 78, 5 Am. Rep. 260; *Gleason v. Briggs*, 28 Vt. 135.

Virginia. — *Kemper v. Kemper*, 3 Rand. (Va.) 8.

See also the title **ILLEGAL CONTRACTS**, vol. 15, p. 927.

Where the Promise of Indemnity Is Unconnected

with the Illegal Act It Is Enforceable. — *Armstrong v. Toler*, 11 Wheat. (U. S.) 258.

Fraud in connection with the transaction against the consequences of which the indemnity is given will not invalidate the promise of indemnity. *Thomas v. Brady*, 10 Pa. St. 164.

2. Act Believed to Be Legal and Performed under Claim of Right — England. — *Merryweather v. Nixan*, 8 T. R. 186.

Indiana. — *Anderson v. Farns*, 7 Blackf. (Ind.) 343.

Kentucky. — See *Lampton v. Taylor*, Litt. Sel. Cas. (Ky.) 273.

Massachusetts. — *Jacobs v. Pollard*, 10 Cush. (Mass.) 287, 57 Am. Dec. 105. See also *Marsh v. Gold*, 2 Pick. (Mass.) 285.

Mississippi. — *Forniquet v. Tegarden*, 24 Miss. 96; *Shotwell v. Hamblin*, 23 Miss. 156, 55 Am. Dec. 83.

New York. — *Pierson v. Thompson*, 1 Edw. (N. Y.) 212; *Coventry v. Barton*, 17 Johns. (N. Y.) 142, 8 Am. Dec. 376; *Newburgh v. Galatian*, 4 Cow. (N. Y.) 340.

Ohio. — *Cumpston v. Lambert*, 18 Ohio 81, 51 Am. Dec. 442; *Acheson v. Miller*, 2 Ohio St. 203, 59 Am. Dec. 663.

Pennsylvania. — *Armstrong County v. Clarion County*, 66 Pa. St. 218, 5 Am. Rep. 368.

South Carolina. — *Jamieson v. Calhoun*, 2 Spears L. (S. Car.) 19.

Virginia. — *Kemper v. Kemper*, 3 Rand. (Va.) 8.

Publication of Libelous Article. — A contract to indemnify a publisher against the consequences of publishing an article which is apparently innocent, and which the publisher has no reason to believe to be actually libelous, is valid. *Smith v. Ashley*, 11 Met. (Mass.) 367, 45 Am. Dec. 216. But it is otherwise if the article is libelous upon its face. *Shackell v. Rosier*, 2 Bing. N. Cas. 634, 29 E. C. L. 438; *Arnold v. Clifford*, 2 Sumn. (U. S.) 238; *Lea v. Collins*, 4 Sneed (Tenn.) 393; *Atkins v. Johnson*, 43 Vt. 78, 5 Am. Rep. 260.

3. Apparently Legal Act which Proves to Be a Trespass — Alabama. — *Moore v. Appleton*, 26 Ala. 633.

Connecticut. — *Marcy v. Crawford*, 16 Conn. 549, 41 Am. Dec. 158.

Illinois. — *Nelson v. Cook*, 17 Ill. 443; *Stan-ton v. McMullen*, 7 Ill. App. 326.

Massachusetts. — *Avery v. Halsey*, 14 Pick. (Mass.) 174.

New York. — *Stone v. Hooker*, 9 Cow. (N. Y.) 154; *Coventry v. Barton*, 17 Johns. (N. Y.) 142, 8 Am. Dec. 376; *Allaire v. Ouland*, 2 Johns. Cas. (N. Y.) 52.

North Carolina. — *Ives v. Jones*, 3 Ired. L. (25 N. Car.) 538, 40 Am. Dec. 421.

The True Test is not whether the act turns out to be a trespass, but whether the parties knew it was a trespass and contemplated it as such, or whether they contemplated the com-

indemnity is not made until after the act has been performed.¹

3. Indemnity to Bail. — In reference to a contract to indemnify a person on account of his becoming bail for a prisoner charged with a criminal offense, the best rule would seem to be that such a contract is illegal as against public policy where it is entered into by the prisoner himself,² but valid and enforceable if persons other than the prisoner are the indemnitors.³

V. CONSIDERATION — **1. Necessity.** — A contract to indemnify, like any other contract, must be founded upon a consideration.⁴

2. Sufficiency. — The mere assuming of the liability or performing of the act against which or the consequences of which the indemnity is given is a sufficient consideration to support such a contract,⁵ as is also the incurring of

mission of an act which they supposed they had a right to do, and did it under such claim of right. *Marcy v. Crawford*, 16 Conn. 549, 41 Am. Dec. 158.

When Promise of Indemnity Is Implied. — If an agent, by the direction of his principal, does an act which is not manifestly illegal, but which proves to be a trespass, a promise by the principal to indemnify him is implied. *Moore v. Appleton*, 26 Ala. 633; *Nelson v. Cook*, 17 Ill. 443; *Gower v. Emery*, 18 Me. 79. See also *Adamson v. Jarvis*, 4 Bing. 66, 13 E. C. L. 343.

Knowledge of Indemnitee that Act Is Illegal Must Be Shown. — A promise to indemnify against a trespass is valid unless the promisor shows that the promisee knew the act to be a trespass and illegal. *Stone v. Hooker*, 9 Cow. (N. Y.) 154.

Knowledge of Indemnitor that Act Is Illegal. — There is no decision which lays down that the intention of both parties must be innocent; and it might be inferred from the language of the court in *Avery v. Halsey*, 14 Pick. (Mass.) 174; *Stone v. Hooker*, 9 Cow. (N. Y.) 154, and *Coventry v. Barton*, 17 Johns. (N. Y.) 142, 8 Am. Dec. 376, that although the promisor may have contemplated a wilful trespass, that fact will not avoid the promise if the act was not palpably illegal and the promisee acted in the belief that he was entitled to perform it.

1. Act Performed Before Indemnity Given — *England.* — *Hackett v. Tilly*, 11 Mod. 93.

New York. — *Griffiths v. Hardenbergh*, 41 N. Y. 464; *Given v. Driggs*, 1 Cai. (N. Y.) 450; *Kneeland v. Rogers*, 2 Hall (N. Y.) 579.

Virginia. — *Kemper v. Kemper*, 3 Rand. (Va.) 8.

Vermont. — *Hall v. Huntoon*, 17 Vt. 244, 44 Am. Dec. 332.

Past Unlawful Act May Be Indemnified Against. — *Kneeland v. Rogers*, 2 Hall (N. Y.) 579, citing *Hackett v. Tilly*, 11 Mod. 93.

2. Indemnity Given by Prisoner Illegal. — *Wilson v. Strugnell*, 7 Q. B. D. 548, 50 L. J. M. C. 145, 45 L. T. N. S. 218, 14 Cox C. C. 624, 45 L. P. 831; *Jones v. Orchard*, 16 C. B. 614, 81 E. C. L. 614; *Herman v. Jeuchner*, 15 Q. B. D. 561, 54 L. J. Q. B. 340, 53 L. T. N. S. 94, 33 W. R. 606, 49 J. P. 502.

Contrary View in Georgia. — In Georgia it has been held that such a contract is valid even though the prisoner be the indemnitor. *Simpson v. Robert*, 35 Ga. 180.

3. Indemnity Given by Third Person Not Illegal. — *Moloney v. Nelson*, 158 N. Y. 351, affirming 12 N. Y. App. Div. 545, which affirmed (Supm. Ct. Spec. T.) 16 Misc. (N. Y.) 474. See also

Anderson v. Spence, 72 Ind. 315, 37 Am. Rep. 162; *Aldrich v. Ames*, 9 Gray (Mass.) 76; *Holmes v. Knights*, 10 N. H. 175; *Maloney v. Nelson*, 144 N. Y. 182; *Harrison v. Sawtel*, 10 Johns. (N. Y.) 242, 6 Am. Dec. 337. See generally the title BAIL AND RECOGNIZANCE (IN CRIMINAL CASES), vol. 3, p. 684, where this subject is fully discussed.

As to bail in civil cases, see the title BAIL (IN CIVIL CASES), vol. 3, pp. 623, 649.

4. Necessity for Consideration. — *Rogers v. Kimball*, 121 Cal. 247; *Israel v. Reynolds*, 11 Ill. 218; *Myers v. Morse*, 15 Johns. (N. Y.) 425; *Coffin v. Lockhart*, 71 Hun (N. Y.) 262.

A Written Promise to Indemnify Imports a Sufficient Consideration, but it may be shown that there was none in fact. *Marshall v. Cobleigh*, 18 N. H. 485.

5. Indorsement a Sufficient Consideration for Undertaking to Indemnify Indorser. — *Williams v. Hagar*, 50 Me. 9; *Gardner v. Webber*, 17 Pick. (Mass.) 407.

Becoming Bail a Sufficient Consideration for Undertaking to Indemnify Bail. — *Marshall v. Cobleigh*, 18 N. H. 485.

Guaranty a Sufficient Consideration for Indemnity to Guarantor. — *Carr v. Wyley*, 23 Ala. 821; *Jones v. Bacon*, 145 N. Y. 446, affirming 72 Hun (N. Y.) 506.

Becoming Surety a Sufficient Consideration for Undertaking to Indemnify Surety. — *Connecticut.* — See *Smith v. Delaney*, 64 Conn. 264, 42 Am. St. Rep. 181.

Iowa. — See *Seiberger v. Wyman*, (Iowa 1899) 79 N. W. Rep. 290; *Grim v. Semple*, 39 Iowa 570.

Minnesota. — *Esch v. White*, (Minn. 1899) 78 N. W. Rep. 1114.

Nebraska. — See *Forbes v. McCoy*, 15 Neb. 632.

Pennsylvania. — *Carroll v. Nixon*, 4 W. & S. (Pa.) 517; *Carman v. Noble*, 9 Pa. St. 366.

Bond to Save Vendee Harmless Against Lien. — A bond given by a vendor of land at the time of sale, to hold the vendee harmless from any lien upon the property growing out of a judgment which was a lien thereon, but from which an appeal was pending, is based upon a sufficient consideration. *Frank v. Jenkins*, 11 Wash. 611.

Entry upon Lands. — In *Allaire v. Ouland*, 2 Johns. Cas. (N. Y.) 52, it was held that if an employer directed his servant to enter upon lands under a claim of right, promising to indemnify him against loss if such entry should prove to be a trespass, the act of the promisee in obeying the direction was a sufficient consideration.

expense¹ or suffering of damage by the indemnitee.²

3. Past Consideration. — Notwithstanding the general rule that a past consideration is not sufficient to support a new promise,³ and the fact that in some cases this rule has been applied to indemnity contracts,⁴ there are other cases in which a promise of indemnity has been sustained though made subsequent to the event out of which the indemnitee's liability or loss arose, and founded upon no new consideration.⁵

4. Future Consideration. — A mortgage given to indemnify a person against loss or damage growing out of indorsements thereafter to be made by the mortgagee is supported by a sufficient consideration and is valid.⁶

VI. CONSTRUCTION — 1. In General. — A contract of indemnity should be construed so as to cover all losses, damages, or liabilities to which it reasonably appears to have been the intention of the parties that it should apply,⁷

Removal of Property. — The danger incurred in removing property under a claim of right is sufficient consideration to support an indemnity to those engaged in or participating in the removal. *Avery v. Halsey*, 14 Pick. (Mass.) 174.

Permission to Defend Suit. — If the defendant in a suit at law, at the request of a third person indirectly interested in the result, permits such person to assume the defense upon a promise to indemnify him and pay all costs recovered against him, such promise is not void for want of consideration. *Goodspeed v. Fuller*, 46 Me. 141, 71 Am. Dec. 572.

Promise Held to Be Without Consideration. — A declaration in assumpsit stated a promise from the plaintiffs to the defendant not to require the payment of a certain note indorsed by the defendant to the plaintiffs, in consideration whereof the defendant promised the plaintiffs to indemnify them from one-third of all loss which they might sustain in consequence of their indorsement of certain notes for a third person; that the plaintiffs had never required payment of the note, and that they had sustained a loss to a certain amount. It was held that the declaration was bad in not stating that the third person was insolvent, as otherwise there was no consideration for the defendant's promise, either of benefit to himself or of loss to the plaintiffs. *Myers v. Morse*, 15 Johns. (N. Y.) 425.

1. Incurring of Expense by Indemnitee and Benefit to Indemnitor a Sufficient Consideration. — *Dorwin v. Smith*, 35 Vt. 69; *Diamond Match Co. v. U. S.*, 31 Fed. Rep. 271.

2. Damage to Indemnitee a Sufficient Consideration. — *White v. Baxter*, 71 N. Y. 254.

3. See the title CONSIDERATION, vol. 6, p. 667.

4. Indemnity Contract Bond upon Past Consideration Not Enforceable. — *Bulkley v. Landon*, 2 Conn. 404; *Jones v. Shorter*, 1 Ga. 294, 44 Am. Dec. 649; *Peck v. Harris*, 57 Mo. App. 467; *Coffin v. Lockhart*, 71 Hun (N. Y.) 262.

5. Promise of Indemnity Made Subsequent to Event Causing Liability or Loss Valid. — *Suffield v. Bruce*, 2 Stark, 175, 3 E. C. L. 365. See also *Doty v. Wilson*, 14 Johns. (N. Y.) 378; *Stocking v. Sage*, 1 Conn. 519.

Where a note was signed by the mortgagee as surety on March 29, and a mortgage to indemnify him was made by the principal debtor and wife on April 1 following, it was held that there was no presumption that there was no consideration for the mortgage. *Forbes v. McCoy*, 15 Neb. 632.

Antecedent Promise to Indemnify. — An obligation undertaken on the faith of a promise that the obligor would be indemnified is sufficient consideration for a bond of indemnity subsequently executed. *Grim v. Semple*, 39 Iowa 570.

Moral Obligation. — A debtor who had been allowed by the sheriff's deputy to escape promised afterwards to indemnify the sheriff for the amount of the debt and costs paid by him; and it was held that the moral obligation upon which the promise was based was a good consideration. *Doty v. Wilson*, 14 Johns. (N. Y.) 378.

Continuing Consideration. — Eight days after the execution of an administration bond by A as security for B the administrator, C wrote to A that at the request of B he promised and agreed to indemnify A against all loss or injury he might sustain in consequence of having become security for B in that business. It was held that the consideration was a continuing one, and sufficient to sustain an action of assumpsit by A against C for indemnity against a loss that afterwards happened to him by reason of the default of B the administrator. *Carroll v. Nixon*, 4 W. & S. (Pa.) 517. See also *Bestor v. Roberts*, 58 Ala. 331.

6. Future Consideration. — *Kramer v. Farmers', etc., Bank*, 15 Ohio 253; *Lyle v. Ducomb*, 5 Binn. (Pa.) 585.

7. Losses, Damages, and Liabilities Covered by Indemnity. — For illustrations of losses, damages, and liabilities to which particular contracts have been held to extend, see the following cases:

England. — *Vesey v. Mantell*, 9 M. & W. 323, 11 L. J. Exch. 99; *Fergus v. Gore*, 1 Sch. & Lef. 107.

Connecticut. — *Ætna Nat. Bank v. Hollister*, 55 Conn. 188.

Georgia. — *English v. Grant*, 102 Ga. 35.

Illinois. — *Chicago, etc., R. Co. v. Chicago*, 134 Ill. 323, affirming 35 Ill. App. 206.

Louisiana. — *Kern v. Their Creditors*, 49 La. Ann. 886.

Maine. — *Jepson v. Hall*, 24 Me. 422.

Massachusetts. — *Woodbury v. Post*, 158 Mass. 140.

Michigan. — *Colby Wringer Co. v. Coon*, 116 Mich. 208.

New York. — *Gamble v. Cuneo*, 21 N. Y. App. Div. 413; *Niagara Falls Paper Co. v. Lee*, 20 N. Y. App. Div. 217; *Holdgate v. Clark*, 10 Wend. (N. Y.) 215.

but not to extend to losses, damages, or liabilities which are neither expressly within its terms nor of such character that it can reasonably be inferred that they were intended to be within the contract.¹ Thus if the condition of the undertaking is that the obligor will indemnify the purchaser of lands against the acts of any person, the obligor is liable only in the event of a lawful entry by a third person and the consequent eviction of the purchaser; but if the indemnity is directed against the acts of a particular person, the condition is

Ohio. — *Kilborn v. Cooke*, Wright (Ohio) 71.
Pennsylvania. — *Lancaster County Nat. Bank's Appeal*, 122 Pa. St. 31.

South Carolina. — *Lucas v. O'Neale*, Riley L. (S. Car.) 30.

Vermont. — *Emerson v. Torrey*, 10 Vt. 323.

Wisconsin. — *Taylor v. North*, 79 Wis. 86.

Indemnity Extending to All Damages. — A bond from a grantor to his grantees, conditioned that he shall indemnify the grantees and "save them perfectly free and harmless from the operation" of certain judgments which are liens upon the land purchased, amounts to a bond to save the vendees harmless from all damages from the judgments mentioned in the condition. *Loyd v. Marvin*, 7 Blackf. (Ind.) 464.

Indemnity Against Costs Extends to Costs of Defending Groundless Suit. — *Newburgh v. Galatian*, 4 Cow. (N. Y.) 340. See also *Niagara Falls Paper Co. v. Lee*, 20 N. Y. App. Div. 217; *Chilson v. Downer*, 27 Vt. 536; *Ibbett v. De La Salle*, 6 H. & N. 233, 30 L. J. Exch. 44.

But compare *Home Ins. Co. v. Watson*, 1 Hun (N. Y.) 643, 4 Thomp. & C. (N. Y.) 227.

An Indemnity Against "Claims" Embraces Any Claims, whether Valid or Otherwise, which may subject the party indemnified to costs, delay, or expense. *Home Ins. Co. v. Watson*, 59 N. Y. 390. See also *Niagara Falls Paper Co. v. Lee*, 20 N. Y. App. Div. 217.

Indemnity Against Mortgage Includes Bond Which Mortgage Was Given to Secure. — *White v. D. Villiers*, 1 Johns. Cas. (N. Y.) 173.

Indemnity Against Notes, etc., Signed for a Particular Individual. — In *Quickel v. Henderson*, 6 Jones Eq. (59 N. Car.) 286, it was held that a bond to indemnify the surety of A against all notes, bonds, etc., signed and entered into for B, extended to notes, bonds, etc., signed and entered into for B & Co. Compare *Donley v. Liberty Imp. Bank*, 40 Ohio St. 47, and the title GUARANTY, vol. 14, p. 1139.

Indemnity Against Trespass Includes Damages Recovered Against Agents of Indemnitee. — *Stone v. Hooker*, 9 Cow. (N. Y.) 154.

1. Losses, Damages, and Liabilities Not Covered by Indemnity. — For illustrations of losses, damages, and liabilities to which particular contracts have been held not to extend, see the following cases:

England. — *Draper v. Thompson*, 4 C. & P. 84, 19 E. C. L. 286.

California. — *Fernandez v. Tormey*, 121 Cal. 515.

Illinois. — *Condict v. Flower*, 106 Ill. 105.

Kentucky. — See *Brandts v. Donnelly*, 94 Ky. 129.

Maryland. — *Wheeler v. Stone*, 4 Gill (Md.) 38.

New York. — *People v. Albany*, 5 Lans. (N.

Y.) 524; *Boyle v. Boyle*, 106 N. Y. 654; *Niagara Falls Paper Co. v. Lee*, 20 N. Y. App. Div. 217. *Pennsylvania*. — *Shroder v. Hatz*, 47 Pa. St. 528.

Wisconsin. — *Case v. Hoffman*, 100 Wis. 314.

A Bond of Indemnity Against Loss on a Subscription to the Capital Stock of a Corporation does not have the effect of assuring to the indemnitees interest or dividends on the stock so subscribed. *Abend v. West*, 65 Ill. App. 267.

Indemnity Against Debt of Individual Does Not Extend to Debt of Firm of Which Individual Is a Member. — *Donely v. Liberty Imp. Bank*, 40 Ohio St. 47. Compare *Quickel v. Henderson*, 6 Jones Eq. (59 N. Car.) 286. See the title GUARANTY, vol. 14, p. 1139.

Indemnity to Trustee Does Not Cover Losses Sustained as Beneficiary. — *Evans v. Benyon*, 37 Ch. D. 329, 58 L. T. N. S. 700.

Damages Resulting from Negligence of Indemnitee. — A contract of indemnity will not usually be construed to protect the indemnitee against damage resulting from his own negligence. *Indianapolis, etc., R. Co. v. Brownburg*, 32 Ind. 199. Or that of his subordinates or employees. *Manhattan R. Co. v. Cornell*, 54 Hun (N. Y.) 292, affirmed without opinion 130 N. Y. 637; *San Antonio, etc., R. Co. v. Adams*, 6 Tex. Civ. App. 102.

Indemnity Against Costs and Damages Does Not Cover Value of Personal Services. — *Beckman v. Van Dolsen*, 70 Hun (N. Y.) 288, affirming 63 Hun (N. Y.) 487.

Indemnity to Partners Against Liabilities at Time of Formation of Partnership. — Where a banker on taking partners into the business has given them a charge on his estates by way of indemnity against his liabilities at the time of the formation of the partnership, this indemnity applies only to what the partners are called upon to pay on account of the original banker's liabilities out of their private means independent of the banking business. *Grylls v. Grylls*, 18 W. R. 85.

Indemnity by Mortgagor Against Mechanics' Liens Does Not Cover Loss Resulting from Mortgagor's Want of Title. — *Guaranty Sav., etc., Assoc. v. Rutan*, 6 Ind. App. 83.

Indemnity Against Negligence of Indemnitor. — Where the indemnity is against the consequences of the negligence or carelessness on the part of the indemnitor, the indemnitee must, in order to recover, show that the damage for which he seeks to be indemnified was caused by some negligent act of the indemnitor for which, as between the parties to the indemnity contract, the indemnitor was primarily liable, unless there be in the contract some provision rendering this unnecessary. *New York v. Brady*, 70 Hun (N. Y.) 250, 77 Hun (N. Y.) 241, 81 Hun (N. Y.) 440. See also *Springfield v. Boyle*, 164 Mass. 591.

broken in the event of the possession of the purchaser being interrupted by such person, whether lawfully or unlawfully.¹

Covenant of Indemnity Cannot Be Restricted by Recitals. — A covenant of indemnity, unlike a release, cannot, when it is clear in its terms, be restricted by a recital.²

An Indemnity Against Certain Specified Claims cannot, it has been held, extend to any other, though of the same character,³ unless it appear that the indemnity is intended to extend to all claims.⁴

Contracts Construed as Prospective. — Contracts by an assignee to indemnify an assignor upon the assignment of a chose in action are construed to be prospective and to relate to acts done under the assignment, unless there be language used expressive of an attempt to give the indemnity a broader scope.⁵

Past Advances and Existing Liabilities. — But a contract of indemnity may be construed to apply to past advances and existing liabilities as well as to advances to be made and liabilities to be created in the future, when such an intention clearly appears in the agreement.⁶

Indemnity Extending to Renewal of Original Liability. — An indemnity to an indorser of a note against any liability in consequence of his indorsement extends to another note executed by the same parties on a renewal of the first note, as such renewal is not a payment for the purposes of the indemnity; and the same is true of other contracts of indemnity;⁷ but where the indemnitor has expressly undertaken to indemnify an accommodation indorser against his liability on certain notes and a single renewal thereof, the liability of the indemnitor is discharged by a second renewal.⁸

Contract Binding Indemnitors Both Individually and as Trustees. — In a case where an indemnity contract recited that the indemnitors as trustees of a certain estate and as individuals did certain acts, and went on to set out that "we hold ourselves responsible for any cost or damages" which might be incurred by the indemnitee, it was held that the wording of the instrument clearly showed that the indemnitors intended to bind themselves both in their fiduciary and in their individual capacities.⁹

Indemnity to Sureties on Bond to Answer Indictment for Criminal Offense. — Persons

1. **Indemnity to Purchaser — Distinction Between Indemnity Against Acts of All Persons and of a Particular Person.** — *Nash v. Palmer*, 5 M. & S. 374.

2. **Covenant of Indemnity Cannot Be Restricted by Recitals.** — *In re Baker*, 51 L. J. Ch. 315, 20 Ch. D. 230, 45 L. T. N. S. 658, 30 W. R. 858; *Parker v. Read*, 9 N. H. 121. See also *Hancock v. Clay*, 2 Stark. 100, 3 E. C. L. 334.

3. **Indemnity Against Specified Claims.** — *Tanner v. Woolmer*, 8 Exch. 482, 22 L. J. Exch. 259. See also *Masonic Sav. Bank v. Eschman*, (Ky. 1896) 37 S. W. Rep. 487.

4. **Indemnity Intended to Cover All Claims.** — *Wood v. Lindley*, 12 Ind. App. 258. See also *Hart v. Messenger*, 46 N. Y. 253, reversing 2 Lans. (N. Y.) 446.

5. **Contracts Construed as Prospective.** — *Warwick v. Hutchinson*, 45 N. J. L. 61, affirmed by *Hutchinson v. Warwick*, 46 N. J. L. 200.

6. **Indemnity Held to Cover Past Advances.** — *Turner v. Gill*, (Ky. 1899) 49 S. W. Rep. 311.

Indemnity Held to Extend to Existing as Well as Future Liabilities. — *Heaton v. Ainley*, (Iowa 1899) 78 N. W. Rep. 798.

7. **Indemnity Extending to Renewal of Original Liability — Delaware.** — *Sutton v. Mulford*, 2 Harr. (Del.) 72.

Indiana. — *Mayer v. Grottendick*, 68 Ind. 1.

Kentucky. — *Burdett v. Clay*, 8 B. Mon. (Ky.) 287.

Massachusetts. — *Commercial Bank v. Cunningham*, 24 Pick. (Mass.) 270, 35 Am. Dec. 322.

Minnesota. — *Fidelity, etc., Co. v. Lawler*, 64 Minn. 144.

New York. — *Babcock v. Morse*, 19 Barb. (N. Y.) 140; *Chapman v. Jenkins*, 31 Barb. (N. Y.) 164; *Utica Bank v. Finch*, 3 Barb. Ch. (N. Y.) 293, 49 Am. Dec. 175; *Dunham v. Dey*, 15 Johns. (N. Y.) 555, 8 Am. Dec. 282; *Brinckerhoff v. Lansing*, 4 Johns. Ch. (N. Y.) 65, 8 Am. Dec. 538.

Ohio. — *Nesbit v. Worts*, 37 Ohio St. 378.

Pennsylvania. — *Lytle's Appeal*, 36 Pa. St. 131.

Tennessee. — *Bobbitt v. Flowers*, 1 Swan (Tenn.) 511.

Where an indemnity mortgage is conditioned to save the mortgagee harmless, and to pay the note on which the mortgagee is surety, the protection of the mortgage extends to a liability incurred by the mortgagee jointly with the mortgagor, for money borrowed to pay the first note, and with which such note was paid. *Nesbit v. Worts*, 37 Ohio St. 378.

8. **Indemnitee Discharged by Second Renewal.** — *Moorehead v. Duncan*, 82 Pa. St. 488.

9. **Contract Binding Indemnitors Both Individually and as Trustees.** — *Beekman v. Van Dolson*, 70 Hun (N. Y.) 288, affirming 63 Hun (N. Y.) 487.

indemnified for becoming sureties on a bond requiring another person to answer an indictment for a criminal offense cannot charge the indemnitor by entering into a more onerous bond than the one against which the indemnitor made a deposit to indemnify them.¹

2. To Whose Benefit Contract of Indemnity Inures. — A contract of indemnity inures to the benefit of the indemnitee only, and a third person having a right of action or a claim against the indemnitee cannot proceed directly against the indemnitor, though the claim be such as the indemnity contract will apply to save the indemnitee harmless from.² But in *Wisconsin* it has been held that a railroad contractor, who has agreed with the railroad company to save it harmless from the payment of laborers' wages, assumed the responsibility placed upon the company by a statute giving laborers on a railroad the right to hold the railroad company directly liable for the amount of their wages, by serving on it the required notices.³

Indemnity Against Incumbrances. — And it has been considered that in the case of a bond of indemnity against an incumbrance a court of equity will take jurisdiction of all the parties interested, and will make the party immediately liable who is or may be ultimately made liable.⁴

3. Duration of the Contract. — Where a bond and mortgage are given for the indemnification of a surety, the mortgagor is liable thereon although by its terms the bond expires before the expiration of the contract on which the surety is bound.⁵

4. Liability of Indemnitee to Third Persons Not Increased. — The taking of a bond or contract of indemnity cannot have the effect to subject the indemnitee to any liability to third persons beyond what would have existed in the absence of such bond or contract.⁶

VII. FULFILLMENT AND BREACH OF THE CONTRACT — **1. Fulfillment.** — The undertaking of the indemnitor is fulfilled by any course on his part which does actually save harmless and protect the indemnitee, and the latter has no right to insist upon being saved harmless or protected in any particular manner;⁷ and it has been held sufficient that the indemnitee is saved harmless from loss or damage and protected from liability by reason of circumstances not in any manner due to the efforts of or brought about by the indemnitor.⁸

2. Breach — *a. IN GENERAL.* — There is a breach of the covenant and the indemnitee's right of recovery accrues as soon as he has suffered the loss or damage against which he was to be saved harmless, or the liability against which he was to be protected has become fixed and absolute,⁹ but until such

1. Indemnity to Sureties on Bond to Answer Indictment for Criminal Offense. — *Barry v. Larabee*, 7 Mont. 179.

2. Third Person Cannot Proceed Directly Against Indemnitor. — *Turk v. Ridge*, 41 N. Y. 201; *French v. Vix*, 143 N. Y. 90, *affirming* (C. Pl. Gen. T.) 2 Misc. (N. Y.) 312, 30 Abb. N. Cas. (N. Y.) 158; *Taylor v. Dunn*, 80 Tex. 652; *Union Nat. Bank v. Rich*, 106 Mich. 319. See also *Derry v. Morrison*, 8 Ind. App. 50; *Warum v. Derry*, 14 Ind. App. 442.

Indemnitee Cannot Force His Creditor to Resort to Indemnitor. — *Stiles v. Stannard*, 67 Vt. 246.

3. Agreement to Save Railroad Company Harmless from Payment of Laborers' Wages. — *French v. Langdon*, 76 Wis. 29.

4. Indemnity Against Incumbrances. — *Smith v. Peace*, 1 Lea (Tenn.) 586. See also *Carpenter v. Bowen*, 42 Miss. 28; *Martin v. Campbell*, 29 Barb. (N. Y.) 188.

5. Duration. — *Springs v. Brown*, 97 Fed. Rep. 405.

6. Liability of Indemnitee to Third Persons Not Increased. — *Terry v. Richmond*, 94 Va. 537.

7. Methods of Protection Held Sufficient. — *Lewis v. Duane*, 141 N. Y. 302; *Hoy v. Hansborough*, *Freem.* (Miss.) 533; *Sergeant v. Ruble*, 33 Minn. 354.

8. Protection Not Resulting from Act of Indemnitor. — *Tufts v. Hayes*, 31 N. H. 138.

There could be no recovery upon an agreement to save harmless against any judgment to be rendered in a particular suit when the suit was determined in favor of the indemnitee and no judgment was rendered against him, and the indemnitor paid the expenses of the suit. The fact that at one stage of the suit the indemnitee offered to pay a certain amount in settlement, which offer was refused, does not entitle him to recover such amount from the indemnitor. *Bedford v. Blythe*, 74 Miss. 720.

9. When Indemnitee's Right of Recovery Accrues. — *Challoner v. Walker*, 1 Burr. 574; *Hancock v. Clay*, 2 Stark. 100, 3 E. C. L. 334; *Mechanics' Sav. Bank v. Thompson*, 58 Minn. 346. See also *Sparkes v. Martindale*, 8 East 593; *Smith v. Eubanks*, 9 Yerg. (Tenn.) 20.

time there can be no recovery against the indemnitor.¹

Indemnitee Must Have Fully Performed His Part of Contract. — In order for an indemnitee to be entitled to recover upon the indemnity contract, he must have fully performed his part thereof.²

b. JUDGMENTS BY DEFAULT, CONSENT, ETC. — It has been held that a judgment by default against an indemnitee is sufficient to warrant a recovery under the indemnity contract,³ and the same view has been taken of a judgment by consent.⁴ But on the other hand it has been said that an indemnitee who has suffered judgment to go against him, either through ignorance, carelessness, or design, cannot visit the loss on his indemnitor.⁵

c. WHAT CONSTITUTES A PAYMENT BY INDEMNITEE. — In order to entitle a surety or indorser to recover upon a contract of indemnity to him in respect of such suretyship or indorsement, it is sufficient that he has given his own note in settlement of the liability which he assumed, where such note is accepted as a payment,⁶ and this although the note so given has not yet been paid.⁷

d. VOLUNTARY PAYMENTS BY INDEMNITEE. — While it is true that a bond or contract of indemnity does not protect the indemnitee against loss through a payment which is entirely voluntary on his part,⁸ it is not necessary in order that he may recover that he should wait for a demand, for which he is clearly liable, to be enforced against him by legal proceedings,⁹ nor, after

A Bond to Save Harmless Against Judgments is broken the moment a judgment is recorded against the obligee. *Conner v. Reeves*, 103 N. Y. 527; *Smith v. Eubanks*, 9 Yerg. (Tenn.) 20.

An Indemnity to a Surety on a Prison Bonds Bond Is Broken by the Escape of the Prisoner, and the surety may then pay the creditor without suit and maintain his action on the indemnity bond. *Rudd v. Hanna*, 4 T. B. Mon. (Ky.) 528.

Indemnity Against Several Notes. — If the obligor promises to pay and save harmless his obligee from three notes payable in three successive years, the obligee may pay each as it falls due, and he may bring a suit on each payment and recover thereon, without barring or prejudicing his right of action upon the remaining notes. *Hosford v. Foote*, 3 Vt. 391.

Actual Eviction from Possession Not Necessary to Authorize Recovery upon Indemnity Against Breach of Warranty. — *Murray v. Porter*, 26 Neb. 288.

1. No Recovery Before Loss or Damage Suffered or Liability Incurred. — *French v. Vix*, 143 N. Y. 90, *affirming* (C. Pl. Gen. T.) 30 Abb. N. Cas. (N. Y.) 158, 2 Misc. (N. Y.) 312; *Cranmer v. Building, etc., Assoc.*, 6 S. Dak. 311; *Barth v. Graf*, 101 Wis. 27.

A Suit by the Indemnitor to Annul the Agreement of Indemnity Is Not a Breach of Such Agreement. — *Waln v. Cuthbert*, 54 N. J. L. 1.

2. Indemnitee Must Have Fully Performed His Part of Contract. — *Winton v. Meeker*, 25 Conn. 456; *Conn v. Jones*, 99 Ga. 608.

Performance of Obligations by Third Persons Not a Condition Precedent to Liability of Indemnitor. — *Kaiser v. Johnson*, 107 Ga. 659; *Springfield v. Boyle*, 164 Mass. 591.

3. Judgment by Default. — *Creamer v. Stephenson*, 15 Md. 211; *Given v. Driggs*, 1 Cai. (N. Y.) 450. See also *Lee v. Clark*, 1 Hill (N. Y.) 56.

4. Judgment by Consent. — *Conner v. Reeves*, 103 N. Y. 527. In this case it was, however, considered that such a judgment formed presumptive evidence only in an action upon the bond.

5. Judgment Recovered through Ignorance, Carelessness, or Design of Indemnitee. — *Lothrop v. Blake*, 3 Pa. St. 483. See also *Bridgeport F. & M. Ins. Co. v. Wilson*, 7 Bosw. (N. Y.) 427.

6. Giving of Note by Indemnitee. — *Flannagan v. Forrest*, 94 Ga. 685; *Bausman v. Credit Guarantee Co.*, 47 Minn. 377.

Indemnity Against Mortgage. — If the vendee of lands agrees to assume and pay off a certain mortgage on the lands sold, as part of the consideration for the sale of the same, and the vendor is, through the vendee's fault, obliged to give a new mortgage therefor, the vendor is sufficiently damaged to give him a right of action on the vendee's agreement to indemnify. *Bolles v. Beach*, 22 N. J. L. 680, 53 Am. Dec. 263.

7. Note of Indemnitee Not Paid. — *Bausman v. Credit Guarantee Co.*, 47 Minn. 377.

8. Indemnitee Not Protected Against Loss through Voluntary Payment. — *Massey v. Schott*, Pet. (C. C.) 132; *Beere v. Mayer*, (N. Y. City Ct. Gen. T.) 61 N. Y. Supp. 926; *Bazen v. Roget*, 3 Johns. Cas. (N. Y.) 87. See also *Tolleson v. Jennings*, 60 Ark. 190; *Lombard v. Fiske*, 24 Me. 56; *Price v. Doyle*, 34 Minn. 400; *Donnell Mfg. Co. v. Hart*, 40 Mo. App. 512; *Eaton v. Wright*, 11 Nova Scotia 508.

One who is indemnified by another to be the surety of a third person cannot recover from his indemnitor if there is nothing due at the time he discharges the debt and he is notified not to pay. *Smith v. McGehee*, 14 Ala. 404.

Estoppel Resulting from Instrument of Indemnity. — In *Atkins v. Revell*, 1 De G. F. & J. 360, it was held that the indemnitor of a surety was estopped by the instrument of indemnity from treating a payment by the indemnitee to the holder of the bill on which he was surety as voluntary and not made in satisfaction of a legal liability.

9. Payment Without Legal Proceedings. — *Ker v. Mitchell*, 2 Chit. 487, 18 E. C. L. 399; *Rudd v. Hanna*, 4 T. B. Mon. (Ky.) 528.

judgment has been rendered against him, that he should wait for execution to issue.¹

e. WHETHER INDEMNITEE MUST HAVE SUFFERED ACTUAL LOSS OR DAMAGE—(1) *Affirmative View*.—There are cases which have considered that it is always necessary in order to warrant a recovery by the indemnitee that he should have suffered some actual loss or damage.²

(2) *Negative View*.—On the other hand, it has been held that the mere incurring of liability is sufficient to give him a right of recovery.³

(3) *The Best Rule*—(a) *Rule Stated*.—But the best rule would seem to result from a partial adoption of both these views in a modified form, resulting in a rule which may be stated as follows: Where the contract is strictly one of indemnity⁴ the indemnitee cannot recover until he has suffered actual loss or damage; the mere incurring of liability gives him no such right;⁵ but where

Payment to Prevent Distress.—A purchaser of land who has been indemnified by his vendor against certain arrears of rent to which the land was subject may recover on the bond of indemnity where he had paid the rent in order to prevent a distress, although he was not personally liable for such arrears and it is not shown that there was at the time of payment anything liable to distress upon the premises. *Vechte v. Brownell*, 8 Paige (N. Y.) 212.

1. **Payment of Judgment Before Execution.**—*Creamer v. Stephenson*, 15 Md. 211.

2. **Actual Loss or Damage Must Be Shown.**—*Churchill v. Hunt*, 3 Den. (N. Y.) 321, *per Beardsley, J.* See also *Weller v. Eames*, 15 Minn. 461, 2 Am. Rep. 150. And see the note following.

3. **Incurring of Liability Sufficient.**—*Rockfeller v. Donnelly*, 8 Cow. (N. Y.) 623; *Leber v. Kauffelt*, 5 W. & S. (Pa.) 440; *Bellune v. Wallace*, 2 Rich. L. (S. Car.) 80; *Ramsay v. Gervais*, 2 Bay (S. Car.) 145, 1 Am. Dec. 635; *Tankersley v. Anderson*, 4 Desaus. (S. Car.) 44; *Hellams v. Abercrombie*, 15 S. Car. 110, 40 Am. Rep. 684; *Beasley v. Newell*, 40 S. Car. 16. See also *Jones v. Cooper*, 2 Aik. (Vt.) 54, 16 Am. Dec. 678.

Case Criticised.—In *Rockfeller v. Donnelly*, 8 Cow. (N. Y.) 623, it was held that a bond given pursuant to the statute to indemnify a town against the maintenance, etc., of a bastard child, was broken and an action might be maintained upon it as soon as the town became liable or bound to maintain the child, and without any actual disbursement, advance, or payment by the town. But in *Chace v. Hinman*, 8 Wend. (N. Y.) 452, 24 Am. Dec. 39, it was said that this case went too far; and in *Aberdeen v. Blackmar*, 6 Hill (N. Y.) 324, it was characterized as "a very questionable case;" while in *Weller v. Eames*, 15 Minn. 461, 2 Am. Rep. 150, the court said: "Mr. Sedgwick in his work on Damages (pp. 309, 314) shows conclusively, as we think, that the rule laid down and followed in *Rockfeller v. Donnelly*, 8 Cow. (N. Y.) 623, is neither good law nor good sense."

4. As to what is strictly a contract of indemnity, see *supra*, this title, *Definition and Nature*.

5. **When Actual Loss or Damage Is Necessary**—*England*.—*Penny v. Foy*, 8 B. & C. 11, 15 E. C. L. 146, 2 M. & R. 181, 6 L. J. K. B. 230; *Eddowes v. Argentine Loan Co.*, 63 L. T. N. S. 364. See also *Loosemore v. Radford*, 9 M. & W. 657.

United States.—See *Pigou v. French*, 1 Wash. (U. S.) 278.

Alabama.—*Taliaferro v. Brown*, 11 Ala. 702. See also *Lane v. Westmoreland*, 79 Ala. 372.

California.—See *Stone v. Hammell*, 83 Cal. 547, 17 Am. St. Rep. 272; *Matter of Hill*, 67 Cal. 238.

Florida.—*Solary v. Webster*, 35 Fla. 363.

Georgia.—*Harvey v. Daniel*, 36 Ga. 562.

Illinois.—*Ressetter v. Waterman*, 151 Ill. 169, *Israel v. Reynolds*, 11 Ill. 218.

Indiana.—*Loyd v. Marvin*, 7 Blackf. (Ind.) 464. See also *Romine v. Romine*, 59 Ind. 346; *Stearns v. Irwin*, 62 Ind. 558; *Covey v. Neff*, 63 Ind. 392.

Iowa.—*Wilson v. Smith*, 23 Iowa 252.

Maine.—*Gennings v. Norton*, 35 Me. 308.

Massachusetts.—*Valentine v. Wheeler*, 122 Mass. 566, 23 Am. Rep. 404.

Minnesota.—See *Kimmel v. Lowe*, 28 Minn. 265.

Mississippi.—*Hoy v. Hansborough, Freem.* (Miss.) 533; *Hough v. Perkins*, 2 How. (Miss.) 724; *M'Lean v. Ragsdale*, 31 Miss. 701.

Missouri.—See *Hearne v. Keath*, 63 Mo. 84; *Huse v. Ames*, 104 Mo. 91; *Ellis v. Harrison*, 104 Mo. 270.

Nebraska.—*Honaker v. Vesey*, 57 Neb. 413; *Forbes v. McCoy*, 15 Neb. 632; *Gregory v. Hartley*, 6 Neb. 356.

New Jersey.—*Jeffers v. Johnson*, 21 N. J. L. 73.

New York.—*Maloney v. Nelson*, 144 N. Y. 182, *affirming* 70 Hun (N. Y.) 202; *Fayerweather v. Willet*, 1 Edm. Sel. Cas. (N. Y.) 364; *Wright v. Whiting*, 40 Barb. (N. Y.) 235; *Gilbert v. Wiman*, 1 N. Y. 550; *Motley v. Flannagan*, (Supm. Ct. Spec. T.) 16 Misc. (N. Y.) 470; *Crippen v. Thompson*, 6 Barb. (N. Y.) 532; *Aberdeen v. Blackmar*, 6 Hill (N. Y.) 324; *Chace v. Hinman*, 8 Wend. (N. Y.) 452, 24 Am. Dec. 39; *Douglass v. Clark*, 14 Johns. (N. Y.) 177. See also *Churchill v. Hunt*, 3 Den. (N. Y.) 321; *Lockwood v. Nichols*, 14 Daly (N. Y.) 182.

Nevada.—*Carson Opera House Assoc. v. Miller*, 16 Nev. 327; *Jones v. Childs*, 8 Nev. 121.

North Carolina.—*Reynolds v. Magness*, 2 Ired. L. (24 N. Car.) 26.

Pennsylvania.—See *Brown v. Brodhead*, 3 Whart. (Pa.) 89.

Vermont.—*Pond v. Warner*, 2 Vt. 532; *Selectmen v. Curtis*, 1 D. Chip. (Vt.) 164; *Cro-*

the contract is to protect against liability, the indemnitee may recover upon it as soon as his liability has become fixed and established, even though he has sustained no actual loss or damage at the time when he seeks to recover.¹

(b) **Equitable Right to Relief Before Actual Loss.** — There are, however, some cases which have recognized an equitable, as distinguished from a legal, right in an indemnitee to be secured against impending or imminent loss although no actual loss has as yet been sustained by him.²

f. **CONTRACT TO DO A PARTICULAR ACT.** — Where the promisor has undertaken to do a particular act or make a specified payment, as well as to indemnify the promisee, the contract is broken, and a recovery for such breach may be had, as soon as the time for doing such act or making such payment has arrived and the promisor has failed to perform his obligations,³ and in

foot v. Moore, 4 Vt. 204; Ide v. Spencer, 50 Vt. 293. See also Farnsworth v. Nason, Brayt. (Vt.) 194.

Wisconsin. — Taylor v. Coon, 79 Wis. 76; Thompson v. Taylor, 30 Wis. 68. See also Barth v. Graf, 101 Wis. 27.

The obligee of a bond of indemnity has no cause of action against the obligor which he can set up as a counterclaim or set-off in an action brought against the obligee, unless he has sustained some loss covered by the bond, or would sustain some such loss by reason of a recovery against him in such action. Abeles v. Cohen, 8 Kan. 180. But compare Woolridge v. Norris, L. R. 6 Eq. 410, 16 W. R. 965.

Indemnity Against "Payments." — An agreement by a purchaser of corporate stock to save the seller harmless "against the payment of any and all claims and demands" against the corporation for which he was personally liable is a contract of indemnity against the payment of such debts only, and there can be no recovery thereunder until the obligee has paid the liability specified. Cochran v. Selling, (Oregon 1899) 59 Pac. Rep. 329, citing 10 AM. AND ENG. ENCYC. OF LAW (1st ed.) 413.

A Threat of Suit on the part of the holder of a note against one who has signed the same for another does not entitle the person so signing to recover on a bond conditioned to save him harmless from all cost, damage, expense or trouble on account of so signing the note, even although in consequence of such threat and a fear of arrest the signer has omitted to go to a place where the transaction of his necessary business required him to be. Hart v. Bull, Kirby (Conn.) 396.

1. **When Incurring of Liability Is Sufficient** — *England.* — Penny v. Foy, 8 B. & C. 11, 15 E. C. L. 146, 2 M. & R. 181, 6 L. J. K. B. 230.

California. — Showers v. Wadsworth, 81 Cal. 270. See also Tunstead v. Nixdorf, 80 Cal. 647; McBeth v. McIntyre, 57 Cal. 50.

Illinois. — Gage v. Lewis, 63 Ill. 604.

Indiana. — Gunel v. Cue, 72 Ind. 34.

Mississippi. — Hoy v. Hansborough, Freem. (Miss.) 533.

Nevada. — Jones v. Childs, 8 Nev. 121.

New York. — Beekman v. Van Dolsen, 70 Hun (N. Y.) 288, affirming 63 Hun (N. Y.) 487; Chace v. Hinman, 8 Wend. (N. Y.) 452, 24 Am. Dec. 39; Miller v. Miller Knitting Co., (Supm. Ct. Tr. T.) 23 Misc. (N. Y.) 404; Kohler v. Matlage, 72 N. Y. 259; Gilbert v. Wiman, 1 N. Y. 550; National Bank v. Bigler, 83 N. Y. 51; McGee v. Roen, (N. Y. Super. Ct. Spec.

T.) 4 Abb. Pr. (N. Y.) 8; Rockefeller v. Donnelly, 8 Cow. (N. Y.) 623; Churchill v. Hunt, 3 Den. (N. Y.) 321; Webb v. Pond, 19 Wend. (N. Y.) 423.

Ohio. — Pratt v. Walworth, 15 Ohio Cir. Ct. 412, 8 Ohio Cir. Dec. 472.

Pennsylvania. — Stroh v. Kimmel, 8 Watts (Pa.) 157; Leber v. Kauffelt, 5 W. & S. (Pa.) 440.

South Carolina. — Bellune v. Wallace, 2 Rich. L. (S. Car.) 80.

Wisconsin. — Smith v. Chicago, etc., R. Co., 18 Wis. 17. See also Thompson v. Taylor, 30 Wis. 69.

Bond Against "Consequences" of Indorsement. — The obligee in a bond to save the obligee harmless against the "consequences" and damages arising from the indorsement of a note may bring an action against the obligor as soon as suit is brought against him on his indorsement. Ramsay v. Gervais, 2 Bay (S. Car.) 145, 1 Am. Dec. 635.

Indemnity Against Debt or Damage. — Where the agreement is to indemnify against debt or damage, the indemnitee has a right to recover when a judgment has been rendered against him, although he has not satisfied such judgment. Carman v. Noble, 9 Pa. St. 366.

2. **Relief in Equity Before Actual Loss.** — Johnston v. Salvage Assoc., 19 Q. B. D. 460, 57 L. T. N. S. 218, 36 W. R. 56, 6 Asp. M. Cas. 187; Central Trust Co. v. Louisville Trust Co., 67 Fed. Rep. 23; Burroughs v. McNeill, 2 Dev. & B. Eq. (22 N. Car.) 297.

A surety who has received a bond of indemnity may maintain an action in equity to ascertain the liability of his indemnitors, where a judgment has been rendered against the principal, although no judgment has been rendered against the surety on his obligation and he has not paid anything on the judgment rendered against his principal. Seeberger v. Wyman, (Iowa 1899) 79 N. W. Rep. 290.

3. **Contract to Do a Particular Act or to Pay Money as Well as to Indemnify** — *England.* — Penny v. Foy, 8 B. & C. 11, 15 E. C. L. 146, 2 M. & R. 181, 6 L. J. K. B. 230; Carr v. Roberts, 5 B. & Ad. 78, 27 E. C. L. 39, Bullock v. Lloyd, 2 C. & P. 119, 12 E. C. L. 53.

Connecticut. — Whitney v. Cady, 71 Conn. 166; Lathrop v. Atwood, 21 Conn. 117.

Illinois. — Pierce v. Plumb, 74 Ill. 326; Gage v. Lewis, 63 Ill. 604.

Indiana. — Milburn v. Milburn, (Ind. 1895) 40 N. E. Rep. 1082.

Michigan. — Dye v. Manna, 10 Mich. 991.

such case it is no defense that the promisee has not been damnified.¹

g. WHETHER NOTICE TO INDEMNITOR OF SUIT AGAINST INDEMNITEE IS NECESSARY. — It has been considered that it is not necessary, in order to entitle the indemnitee to maintain an action upon a general promise of indemnity against damage or liability, that he should have given the indemnitor notice of the action or suit in which the judgment against the indemnitee, upon which the breach is predicated, was rendered.²

h. EVIDENCE. — A judgment against the indemnitee is evidence, in an action by him upon the contract or bond of indemnity, that he was liable in the action in which such judgment was rendered.³

Conclusive and Prima Facie Evidence. — Where the indemnitor has had notice of an action against his indemnitee and an opportunity to defend the same, a judgment rendered therein against the indemnitee is conclusive on the indemnitor as to the extent as well as the existence of the liability of the indemnitee.⁴ But in the absence of such notice the judgment is merely *prima facie* evidence of these matters as against the indemnitor.⁵

New York. — *Gilbert v. Wiman*, 1 N. Y. 550; *Hume v. Hendrickson*, 79 N. Y. 117; *Matter of Negus*, 7 Wend. (N. Y.) 499; *Churchill v. Hunt*, 3 Den. (N. Y.) 321.

Vermont. — *Selectmen v. Curtis*, 1 D. Chip. (Vt.) 164; *Crofoot v. Moore*, 4 Vt. 204; *Hubbard v. Billings*, 35 Vt. 599. See also *Seaver v. Young*, 16 Vt. 658.

West Virginia. — *Bansimer v. Fell*, 39 W. Va. 448.

As to the Distinction Between a Contract to Do a Particular Act or Pay Money and an Indemnity Contract, see *Ham v. Hill*, 29 Mo. 275; *Thomas v. Allen*, 1 Hill (N. Y.) 146; *Port v. Jackson*, 17 Johns. (N. Y.) 239, 480; *Lockwood v. Nichols*, 14 Daly (N. Y.) 182; *Selectmen v. Curtis*, 1 D. Chip. (Vt.) 164.

But Where It Manifestly Appears from the Whole Instrument that It Was Intended for Indemnity Only the rule may be otherwise though there be a covenant to pay certain debts. See *Gage v. Lewis*, 68 Ill. 604; *Matter of Negus*, 7 Wend. (N. Y.) 499.

1. That Promisee Has Not Been Damnified, No Defense. — *Matter of Negus*, 7 Wend. (N. Y.) 503. See also *Bansimer v. Fell*, 39 W. Va. 448. And see also cases cited in preceding note.

2. Notice to Indemnitor of Action or Suit Against Indemnitee Not Necessary. — *Bridgeport F. & M. Ins. Co. v. Wilson*, 34 N. Y. 275. See also *Curtis v. Banker*, 136 Mass. 355; *Ker v. Mitchell*, 2 Chit. 487, 18 E. C. L. 399. See the next subsection for the effect of notice as regards the conclusiveness of a judgment against the indemnitee.

Costs. — Notwithstanding the absence of notice the obligee is entitled to recover his costs in a suit against him, *Curtis v. Banker*, 136 Mass. 355; provided the jury is satisfied that it was reasonable to defend the action under all the circumstances of the case, *Caldbeck v. Boon*, Ir. R. 7 C. L. 32.

In North Carolina It Is Considered that Notice of the Loss Should Be Given to the indemnitor before suit is brought against him on the contract. *Reynolds v. Magness*, 2 Ired. L. (24 N. Car.) 26.

3. Judgment Against Indemnitee Evidence of His Liability. — *Train v. Gold*, 5 Pick. (Mass.) 380; *Conner v. Reeves*, 103 N. Y. 527; *New*

York v. Brady, 70 Hun (N. Y.) 250; *Stroh v. Kimmel*, 8 Watts (Pa.) 157.

Sufficiency of Evidence. — A judgment in favor of an indemnitee is warranted by evidence consisting of the introduction by the plaintiff of the written obligation by which the defendants bound themselves to save him from all loss by reason of his liability on certain notes, and also executions issued upon judgment recovered on the notes, upon which executions there is indorsed by the owners of the debts the receipt of the payment of the executions by the indemnitee and their assignment to him. *Smith v. Barton*, 94 Va. 158.

In an action on a bond to save harmless a surety on another bond, it is sufficient that the record of a judgment against the surety shows him to have been damnified, and the evidence upon which he became damnified need not be produced. *Spratlin v. Hudspeth*, *Dudley* (Ga.) 155.

4. When Judgment Against Indemnitee Is Conclusive upon Indemnitor. — *Showers v. Wadsworth*, 81 Cal. 270; *Train v. Gold*, 5 Pick. (Mass.) 380; *Stewart v. Thomas*, 45 Mo. 42; *Wright v. Whiting*, 40 Barb. (N. Y.) 235; *New York v. Brady*, 70 Hun (N. Y.) 250; *Newburgh v. Galatian*, 4 Cow. (N. Y.) 340. See also *Kansas City, etc., R. Co. v. Southern R. News Co.*, 151 Mo. 373.

An indemnitor who has had notice of and assumed the defense of an action against his indemnitee is concluded by the verdict in that action. *Hart v. Messenger*, 46 N. Y. 253.

5. When Judgment Against Indemnitee Is Only Prima Facie Evidence Against Indemnitor. — *Train v. Gold*, 5 Pick. (Mass.) 380; *Stewart v. Thomas*, 45 Mo. 42; *Bridgeport F. & M. Ins. Co. v. Wilson*, 34 N. Y. 275; *Browne v. French*, 3 Tex. Civ. App. 445.

Action Compromised Without Assent of Indemnitor. — Where an action against an indemnitee of which the indemnitor has notice is compromised without the consent of the indemnitor, the judgment is merely presumptive evidence of a liability. *Kansas City, etc., R. Co. v. Southern R. News Co.*, 151 Mo. 373. See also *Laing v. Hanson*, (Tex. Civ. App. 1896) 36 S. W. Rep. 116, in which it was held that such a compromise simply fixed a limit beyond which the indemnitees could not recover, but did not

Indemnity Against Judgments. — Where the indemnity is against judgments, a judgment recovered against the indemnitee is conclusive, if it was rendered in a contested suit; but is presumptive evidence only, as against the indemnitors, where it was taken by consent.¹

VIII. MEASURE OF RECOVERY — 1. In General. — The measure of recovery by an indemnitee is the full amount of the loss or damage which he has incurred, or the liability to which he has become subject, by reason of the matters in respect to which he was indemnified;² though, of course, where the indemnity is by bond in a penal sum the amount of recovery is limited to such penal sum,³ and where the indemnity is in the form of a note no amount greater than that expressed in the note can be recovered.⁴

2. Interest. — The indemnitee is entitled to interest on the amount which he has lost or been compelled to pay,⁵ even though such allowance have the effect of increasing his recovery to an amount greater than that mentioned as the penal sum in the bond given for his indemnity.⁶

3. Expenses of Litigation — a. COSTS. — The indemnitee is entitled to be reimbursed for the costs to which he has been subjected by reason of actions or suits against him in reference to the matter in which he is indemnified;⁷

establish their right to recover anything against the indemnitor.

Judgment Without Notice to Indemnitor Held Not Binding upon Him. — In an early *Vermont* decision it was held that if the obligee fails to notify the obligor, a judgment obtained against the former was *res inter alios acta*, and did not bind the obligor. *Selectmen v. Miner*, 8 Vt. 207.

1. Indemnity Against Judgments. — *Conner v. Reeves*, 103 N. Y. 527.

2. Indemnitees May Recover Amount of Loss Sustained or Liability Incurred — Georgia. — *English v. Grant*, 102 Ga. 35.

Indiana. — *Keesling v. Frazier*, 119 Ind. 185. *Massachusetts.* — *Train v. Gold*, 5 Pick. (Mass.) 380.

New Hampshire. — *Child v. Eureka Powder Works*, 44 N. H. 354.

New York. — *Conner v. Reeves*, 103 N. Y. 527.

Texas. — *Gipson v. Williams* (Tex. Civ. App. 1894) 27 S. W. Rep. 824.

Wisconsin. — *Barth v. Graf*, 101 Wis. 27.

The Recovery Is Limited to the Actual Loss, although the obligation of the indemnitor is evidenced by a note which is, in its terms, absolute for the payment of an express amount. *Fernandez v. Tormey*, 127 Cal. 515.

Computation of Amount of Loss. — In a case where the plaintiff had contracted with the defendant that if the latter should be obliged to sell any of his own property at a loss, to raise funds to pay the debts of the plaintiff, such loss should be reimbursed to him, it was held that the fair construction of such agreement was that the loss contemplated by the parties was the difference between the actual value of the property and the price obtained upon the sale of it. *Beckley v. Munson*, 22 Conn. 209.

Damages Occurring After Commencement of Suit, to enforce the indemnity, may be recovered for. *Spear v. Stacy*, 26 Vt. 61; *Miller v. Miller Knitting Co.*, (Supm. Ct. Tr. T.) 23 Misc. (N. Y.) 404.

3. Indemnitees May Recover Amount of Damages Proved up to Penal Sum of Bond. — *Warwick v. Richardson*, 10 M. & W. 284; *Osborne v. Eales*,

2 Moo. P. C. C. N. S. 125; *Wood v. Wade*, 2 Stark. 167, 3 E. C. L. 361; *Griffiths v. Hardenbergh*, 41 N. Y. 464.

4. Recovery Limited to Amount of Note Given for Indemnity. — See *Gipson v. Williams*, (Tex. Civ. App. 1894) 27 S. W. Rep. 824.

5. Indemnitees Entitled to Interest. — *Fergus v. Gore*, 1 Sch. & Lef. 107; *Keesling v. Frazier*, 119 Ind. 185; *Child v. Eureka Powder Works*, 44 N. H. 354; *Barth v. Graf*, 101 Wis. 27.

When Extra Interest Recovered Against Indemnitees Will Not Be Allowed. — In *Lombard v. Fiske*, 24 Me. 56, the defendants had undertaken to clear the plaintiff from all liabilities in respect to his share in a factory operated by an unincorporated company. A creditor of the company obtained judgment against the individuals composing it, and the judgment debtors were arrested on execution and gave bonds. Afterwards a suit was brought against the plaintiff on his bond, and judgment was rendered by default for the debt and costs, including the extra interest given by statute against the principal in such bonds without notice given by him to the defendants. It was held that the plaintiff was not entitled to recover of the defendants the extra interest so paid.

6. Interest May Be Allowed though This Increases Amount of Recovery to More than Penal Sum of Indemnity Bond. — *Francis v. Wilson*, R. & M. 105, 21 E. C. L. 391; *Lyon v. Clark*, 1 E. D. Smith (N. Y.) 250, 8 N. Y. 148; *Griffiths v. Hardenbergh*, 41 N. Y. 464; *Mower v. Kip*, 6 Paige (N. Y.) 88; *Smedes v. Hooghtaling*, 3 Cai. (N. Y.) 48, 2 Am. Dec. 250. See also *Stafford v. Jones*, 91 N. Car. 180.

7. Indemnitee May Recover His Costs — England. — *Lloyd v. Mostyn*, 10 M. & W. 478, 2 Dowl. N. S. 476, 12 L. J. Exch. 1, 6 Jur. 974; *Howard v. Lovegrove*, L. R. 6 Exch. 43, 40 L. J. Exch. 13, 23 L. T. N. S. 396, 19 W. R. 188; *In re Wells*, 15 Reports 169, 72 L. T. N. S. 359. See also *Spark v. Heslop*, 1 El. & El. 563, 102 E. C. L. 563, 28 L. J. Q. B. 197, 5 Jur. N. S. 730, 7 W. R. 312.

Indiana. — *Keesling v. Frazier*, 119 Ind. 185.

provided that under all the circumstances of the case he acted reasonably in defending such action.¹

b. ATTORNEY'S FEES. — It has also been considered that the indemnitee is entitled to be reimbursed for attorney's fees which he has had to pay in defending an action against him.²

IX. JOINT OR SEVERAL LIABILITY OF INDEMNITORS — 1. **Agreement Purporting to Be Joint.** — An agreement, purporting by its terms to be joint, to indemnify one who has become bail, is not rendered several by the fact that each of the indemnitors has annexed to his signature a character and figures indicating different sums in dollars and cents.³ And where several signers of a note have released one of their number from liability thereon, and agreed to indemnify him from any loss or damage on account of the note, this liability is joint, and the indemnitee can recover against all of them, though judgment has been rendered against him only for the balance remaining due after one of the indemnitors has paid his proportion of the note.⁴

2. **Separate Agreements of Indemnity.** — In a *New York* case where several persons had given separate agreements to indemnify, it was held that in a suit against one of the indemnitors it was not error to exclude proof of the other indemnity agreements, as their existence in no way affected the responsibility of the defendant;⁵ but in an *English* case where trustees had received from their *cestuis que trustent* separate covenants by which the latter undertook to indemnify the trustees against liabilities incurred in the execution of the trust, it was held that the trustees might file a bill against the *cestuis que trustent* jointly for a general account of the trust so that the liability of the indemnitors might be ascertained once for all.⁶

X. DEFENSES. — In defense to an action on a contract of indemnity the defendant may plead *non damnificatus*,⁷ or may show that the plaintiff has not complied with his part of the contract,⁸ but it is no answer to such an action that the defendant has not fulfilled other obligations to the plaintiff not directly connected with the promise of indemnity,⁹ nor can the contract

Massachusetts. — *Curtis v. Banker*, 136 Mass. 355.

New York. — *Mott v. Hicks*, 1 Cow. (N. Y.) 513, 13 Am. Dec. 550.

See also *Morgan v. North Texas Nat. Bank*, (Tex. Civ. App. 1896) 34 S. W. Rep. 138.

Groundless Action. — Such costs may be recovered though the action in which they were incurred was brought against the indemnitee groundlessly. *Newburgh v. Galatian*, 4 Cow. (N. Y.) 340; *Chilson v. Downer*, 27 Vt. 536.

1. **Indemnitee Must Have Acted Reasonably in Defending Action Against Him.** — *Caldbeck v. Boon*, Ir. R. 7 C. L. 32; *Beckley v. Munson*, 22 Conn. 299; *Langford v. Broadhead*, (Supm. Ct. Gen. T.) 17 N. Y. Supp. 290, 63 Hun (N. Y.) 624, *mem.* See also *Gillett v. Rippon*, 1 M. & M. 406, 22 E. C. L. 342; *Mors-le-Blanch v. Wilson*, L. R. 8 C. P. 227; *Ronneberg v. Falkland Islands Co.*, 17 C. B. N. S. 1, 112 E. C. L. 1; *Fisher v. Val de Travers Asphalt Co.*, 1 C. P. D. 511.

The Recovery Is Limited to Costs Which Are the Natural Consequence of the Indemnitor's Default, in the case of the implied indemnity arising out of the responsibility of a subcontractor to his principal. *Baxendale v. London, etc., R. Co.*, L. R. 10 Exch. 35; *Fisher v. Val de Travers Asphalt Co.*, 1 C. P. D. 511.

2. **Attorney's Fees.** — *McKenzie v. Underwood*, 21 D. C. 126. See also *In re Wells*, 15 Reports 169, 72 L. T. N. S. 359; *Howard v. Lovegrove*, L. R. 6 Exch. 43, 40 L. J. Exch. 13.

23 L. T. N. S. 396, 19 W. R. 188; *Spark v. Heslop*, 1 El. & El. 563, 102 E. C. L. 563, 28 L. J. Q. B. 197, 5 Jur. N. S. 730, 7 W. R. 312.

3. **Joint Liability Not Rendered Several by Figures Indicating Certain Sums Annexed to Signatures.** — *McCullis v. Thurston*, 27 Vt. 596.

4. **Recovery Against All Indemnitors.** — *Rogers v. Kimball*, (Cal. 1897) 49 Pac. Rep. 719.

5. **No Error to Exclude Proof of Other Indemnity Agreements.** — *American Surety Co. v. Thurber*, 121 N. Y. 655, 30 N. Y. St. Rep. 489.

6. **Bill May Be Filed Against Indemnitors Jointly.** — *Singleton v. Selwyn*, 9 Jur. N. S. 1149, 3 N. R. 27, 9 L. T. N. S. 408, 12 W. R. 98.

7. **Non Damnificatus a Proper Plea.** — *Lloyd v. Marvin*, 7 Blackf. (Ind.) 464; *Coombs v. Newlon*, 4 Blackf. (Ind.) 120; *Hough v. Perkins*, 2 How. (Miss.) 724.

Where the Indemnity Is Against the Establishment of an Adverse Title to Property it may be shown that certain proceedings relied upon as establishing an adverse title in another did not have that effect within the meaning of the bond. *Brattle Square Church v. Bullard*, 2 Met. (Mass.) 363.

8. **That the Indemnitee Has Not Performed His Part of the Contract, a Good Defense.** — *Winton v. Meeker*, 25 Conn. 456; *Conn. v. Jones*, 99 Ga. 603.

9. **That Indemnitor Has Not Fulfilled Other Obligations to Indemnitee, No Defense.** — *Briant v. Pilcher*, 16 C. B. 354, 81 E. C. L. 354, 1 Jur. N. S. 1020, 3 W. R. 483.

be avoided on account of fraud in the original transaction in regard to which the indemnity was given,¹ nor because the plaintiff might, by pursuing a course other than that which he did pursue, have avoided loss, the plaintiff having acted in good faith.²

Indemnity to Officer of Corporation for Indorsing Notes. — It is no defense to an action on a contract to indemnify an officer of a corporation for indorsing notes of the corporation, that he issued and personally indorsed notes to an amount exceeding the limit fixed in the indemnity contract without any authority of the corporation, and that the property and assets of the corporation were by its authority applied to the payment of such notes and used for its benefit at a time when the corporation was in fact insolvent, nor does the fact that the officer received an increase of salary for indorsing the paper prevent him from resorting to the indemnity contract.³

XI. DISCHARGE OF INDEMNITOR. — Where one who has been indemnified for indorsing a note, and has been compelled to pay the same, releases the maker from his liability for the money so paid, this will operate to discharge the indemnitor from all liability.⁴

Indemnity Against Rents. — In an *English* case where upon the dissolution of a partnership one partner assigned to the other all his interest in two houses held under lease, and the latter covenanted to pay the rents and keep the former indemnified against them, and some time afterwards the indemnitee acquired the reversion of the property and also the leasehold interest which he had assigned to the indemnitor, it was held that this fact did not deprive him of the right to recover against the estate of the indemnitor for rents which had previously become due and which he had paid.⁵

XII. DEPOSITS FOR INDEMNITY. — It sometimes happens that a deposit of money or valuables is made for the purpose of protecting the person with whom they are deposited against a certain loss or liability, and in such case he is entitled to hold such deposit until it is ascertained that he will be subjected to no such loss or liability, or until he receives some other indemnity.⁶

Contribution Between Depositors. — Where, for the purpose of indemnification, two persons have made deposits, and a loss to the indemnitee has been made good entirely out of the deposit of one, he can enforce contribution from the other.⁷

Effect of Mistake of Indemnitee as to Value of Securities. — Where a person is at liberty to require either cash or securities to be deposited with him as indemnity for his promise to pay money, and he voluntarily chooses securities, without deceit or fraud of any kind, he thereby becomes just as much bound to make good his promise as he would have been had he asked for and received cash, though the securities prove to be less valuable than he thought they were.⁸

XIII. INDEMNITY MORTGAGES — 1. In General. — A contract to indemnify is often evidenced by a mortgage,⁹ and a mortgage may be shown to have been given simply for the purpose of indemnifying the mortgagee, although upon

1. **Fraud in Original Transaction in Reference to Which Indemnity Was Given, No Defense.** — *Thomas v. Brady*, 10 Pa. St. 164.

2. **No Defense that Indemnitee Might Have Avoided Loss by Pursuing Another Remedy.** — See *Spaulding v. Northumberland*, 64 N. H. 153.

3. **Indemnity to Officer of Corporation for Indorsing Notes.** — *Taylor v. Matteson*, 86 Wis. 113.

4. **Release of Maker of Note Discharges Indemnitor.** — *Jones v. Bacon*, 145 N. Y. 446, 72 Hun (N. Y.) 506. The reason for this decision was that the indemnitor on making good the loss to the indemnitee would be entitled to the rights of the latter as against the maker of the note, and the action of the indemnitee in discharging

the maker barred this right of the indemnitor. Compare *Morehead v. Horner*, 30 W. Va. 548.

5. **Indemnity Against Rents — Acquisition of Leasehold Interest by Indemnitee.** — *In re Russell*, 20 Ch. D. 254.

6. **Right to Retain Deposit.** — *Cook v. Shull*, 35 N. Y. App. Div. 121. See also *Tyson v. Cox*, T. & R. 395, 24 Rev. Rep. 79.

7. **Contribution Between Depositors.** — *Springs v. Brown*, 97 Fed. Rep. 405. See the title CONTRIBUTION AND EXONERATION, vol. 7, p. 325.

8. **Indemnitee Bound to Make Good His Promise though Securities Deposited Prove Less Valuable than He Thought.** — *Atlantic Trust Co. v. Consolidated Electric Storage Co.*, 49 N. J. Eq. 402.

9. See generally the title MORTGAGES.

its face it appears to have been given to secure an absolute debt.¹

2. Description of Debt or Obligation Indemnified Against. — An indemnity mortgage is not invalid because the debt or obligation against which the mortgagee is intended to be protected is not described with absolute precision; it is sufficient that it be described with reasonable certainty.²

INDENT. — A certificate issued by the United States Government, at the close of the Revolution, to public creditors.³

INDENTURE. (See also the titles *DEEDS*, vol. 9, p. 87; *SEAL*.) — An indenture, in the language of the law, is a deed; that is, a writing sealed and delivered. It takes its name from being indented or cut on the top or on the side, either by a waving line or a line of indenture, *instar dentium*, so as to fit or aptly join its counterpart from which it is supposed to have been separated.⁴

INDEPENDENT. — See note 5.

1. Mortgage Absolute on Its Face May Be Shown to Be of Indemnity Merely. — *Lawrence v. Tucker*, 23 How. (U. S.) 14; *Shirras v. Caig*, 7 Cranch (U. S.) 34; *Honaker v. Vesey*, 57 Neb. 413; *McKinster v. Babcock*, 26 N. Y. 378; *Utica Bank v. Finch*, 3 Barb. Ch. (N. Y.) 293, 49 Am. Dec. 175.

Conveyance for Indemnity Held to Amount to Mortgage. — *Ashton v. Shepherd*, 120 Ind. 69.

2. Reasonable Certainty in Description Sufficient. — *Utley v. Smith*, 24 Conn. 290, 63 Am. Dec. 163; *Ketchum v. Jauncey*, 23 Conn. 123; *Lewis v. De Forest*, 20 Conn. 427; *Burdett v. Clay*, 8 B. Mon. (Ky.) 287; *Goddard v. Sawyer*, 9 Allen (Mass.) 78; *Benton v. Sumner*, 57 N. H. 117; *Gilman v. Moody*, 43 N. H. 239; *Paterson First Nat. Bank v. Byard*, 26 N. J. Eq. 255.

Parol Evidence is admissible to show what notes have been indorsed by the mortgagees, and are intended to be secured by a mortgage conditioned to indemnify them against loss by reason of their having indorsed certain notes "now payable" at a certain place. *Benton v. Sumner*, 57 N. H. 117.

Ohio Rule. — In order for an indemnity mortgage to be valid against creditors the affidavit must show that the mortgage was taken in good faith to indemnify against any loss resulting from the liability stated in the mortgage. A mere statement that the claim on which the mortgagee is surety is just and unpaid is not sufficient. *Nesbit v. Worts*, 37 Ohio St. 378; *Blandy v. Benedict*, 42 Ohio St. 295.

3. U. S. v. Irwin, 5 McLean (U. S.) 183.

4. Overseers of Poor v. Overseers of Poor, 6 N. J. L. 175.

In *Bowen v. Beck*, 94 N. Y. 89, the court said: "The conveyance to Beck and Tucker purports to be an *indenture*, which according to its proper signification is a deed *inter partes* or a mutual deed. It is said in Co. Litt. 231a: 'An *indenture* is a writing containing a conveyance, bargain, contract, covenants, or agreements between two or more.' And Sir Henry Finch, in his Book on the Law, 109, speaking of the different kinds of deeds, says: '*Indenture* — that which is the mutual deed of both.'"

Indenting is no longer necessary. *Currie v. Donald*, 2 Wash. (Va.) 63.

Seal. — In *Com. v. Wilbank*, 10 S. & R. (Pa.) 417, it was held that a writing without seal was not an *indenture* within the meaning of a

statute relating to apprenticeship. The court said: "I will not say that the word *indenture*, in its largest sense, might not comprehend a writing indented, though not under seal. But certain it is that when an *indenture* is spoken of, and particularly an *indenture* of apprenticeship, an instrument under seal is generally understood. It was said by Holt, C. J., in the case of *Reg. v. Callingwood*, 2 Ld. Raym. 1117, that an apprentice cannot be bound without deed; and the law is so laid down in 1 Burn's Just., title *Apprentice*, p. 37, and 1 Salk. 68. It might be fairly inferred, therefore, that our Act of Assembly required a deed, from the sense in which the word *indenture* was usually taken." See also *North Brunswick v. Franklin*, 16 N. J. L. 535.

Indenture means a writing sealed and delivered. *Tod v. Baylor*, 4 Leigh (Va.) 498.

Calling an instrument an *indenture* in the body of it is not a sufficient recognition of a scroll as a seal to make it a deed. *Walker v. Keile*, 8 Mo. 301.

Imports Seal in Pleading. — The term, when used in pleading, imports that the instrument referred to is sealed. Note to *Cabell v. Vaughan*, 1 Saund. 291; *Heaton v. Woolfe*, 2 Rolle 228; *Bond v. Moyle*, 2 Vent. 106; *Woodcock v. Morgan*, 6 Mod. 306; *Moore v. Jones*, 2 Stra. 815; *Atkinson v. Coatsworth*, 1 Stra. 512; *Phillips v. Clift*, 4 H. & N. 173; *Beardsley v. Southmayd*, 14 N. J. L. 542.

But in *Magee v. Fisher*, 8 Ala. 320, it was said that the terms *indenture*, "covenant," "demise," and "to farm let," though usually found in deeds, are not technical. "The use of these terms, therefore, in the declaration, does not necessarily imply that the instrument in which they were alleged to be, was sealed. That is only effected by the use of the terms 'deed,' or 'writing obligatory.'"

5. Independent Democrats. — At the general election in 1896 several candidates styling themselves "*Independent Democrats*" polled in Ramsey county, Minn., on an average, thirteen hundred votes, and one polled as high as two thousand three hundred and forty-three votes. The total vote polled in the county was about twenty-nine thousand. It was held that the court below was warranted, on the evidence, in finding that shortly prior to the election of 1898 ten certain persons acted fraudulently in assuming to act as the county committee of the "*Independent Democratic*

party," in calling a county convention to nominate candidates, in publishing once in an obscure place in a daily paper a notice of such call, in meeting at the time and place appointed and nominating some of themselves as candidates for county offices, and in adjourning for eight days, at which time only seven of them met again and nominated six of themselves as such candidates. *State v. District Ct.*, 74 Minn. 177.

Independently. — The word *independently*, as applied to a gift to a married woman, is not an appropriate word to describe the duration or unconditional character of the estate, but is regarded as necessarily implying an intention to exclude the husband. *Johnson v. Johnson*, 32 Ala. 643. See generally the title SEPARATE PROPERTY (OF MARRIED WOMEN).

Religious Society. (See the title RELIGIOUS SOCIETIES.) — Upon the question whether a religious society was *independent* the court said: "The charter of this congregation, obtained from the legislature in 1848, is relied on to show its independent character; and certainly it does not allude to any more general body of which it is to form a part. But, we may add, it does not forbid any connection with other congregations, and congregational individuality is not at all inconsistent with denominational unity, as any one that looks may see. And in many denominations it is quite common, not to say that it is the usual rule, to omit all notice of the denominational bond in their congregational charter, and this without meaning to affect the character of the congregation, as it was before the charter, or to declare it independent. Section 9 of the charter expressly forbids its enumeration of powers and privileges from including others not enumerated. The powers given to the congregational officers are no more exclusive of denominational character, powers, and laws, than is common in church charters, and, rightly understood, are not at all inconsistent

with the associate duties of the congregation. The legislature never means, by granting or allowing such charters, to change the ecclesiastical status of congregations, but only to afford them a more advantageous civil status. And so this charter has been understood by this congregation ever since it was granted; for it has continued all its associated action without change, up to the time of this dispute. And it could not reasonably have supposed that the charter changed its ecclesiastical law relative to the appointment of pastors, for the charter declares nothing on that subject. It is argued, moreover, that every congregation is proved to be *independent*, because it is so declared in the 'History of the Church of God,' given in evidence, and especially because it is there declared that churches should be formed 'subject to no extrinsic or foreign jurisdiction, and governed by their own officers chosen by a majority of the members of each individual church.' This history is admitted to be an authentic exposition of the doctrine and order of the church — and was written by John Winebrenner, who was the founder of the sect, and who, as part of this quarrel, was expelled from the church, and died in expulsion — if the action of the majority of this congregation is to be sustained. Not much is to be made out of the word *independent*, for in ordinary usage its meaning is very indefinite. The tenant of the poorhouse likes to call himself an *independent* citizen, and no one need object very seriously to this, so long as he conforms to the laws of the place. Others have a better right to claim this distinction, and yet all must submit to the laws of the land. No man or body of men can be entirely independent of society and its laws. And yet there is a measure of independence in all associations, and its extent can be ascertained only by an observation of the facts that define it." *Winebrenner v. Colder*, 43 Pa. St. 252.

INDEPENDENT CONTRACTORS.

BY H. T. TIFFANY.

I. WHO ARE INDEPENDENT CONTRACTORS, 187.

1. *General Definition*, 187.
2. *Right to Control Work*, 187.
3. *Supervision and Approval of Work*, 188.
4. *Control as to Scope of Work*, 189.
5. *Mode of Payment*, 189.
6. *Liability to Discharge*, 190.
7. *Control as to Employees*, 190.
8. *Character of Occupation*, 191.
9. *Question of Law or Fact*, 191.

II. EMPLOYER'S LIABILITY FOR CONTRACTOR'S ACTS, 192.

1. *General Rule*, 192.
2. *Transfer of Employee*, 195.
3. *Injury from Acts Contracted for*, 196.
4. *Legal Duties Not Transferable*, 197.
 - a. *In General*, 197.
 - b. *Municipal Corporations*, 197.
 - c. *Railroad Companies*, 199.
 - d. *Canal Companies*, 199.
 - e. *Turnpike Companies*, 199.
 - f. *Master and Servant*, 199.
 - g. *Duty to Guests*, 200.
 - h. *Landlord and Tenant*, 200.
 - i. *Adjoining Owners*, 200.
5. *Work Intrinsically Dangerous or Probably Injurious*, 201.
6. *Duties under License*, 202.
7. *Contract for Illegal Act*, 203.
8. *Violation of Ordinance*, 203.
9. *Delegation of Charter Powers*, 203.
10. *Duties Imposed by Contract*, 204.
11. *Incompetent Contractor*, 204.
12. *Unsafe Premises*, 205.
13. *Defective Appliances*, 205.
14. *Interference by Employer*, 206.
15. *Completion and Acceptance of Work*, 206.
16. *Special Applications of Rule*, 207.
 - a. *Excavations and Obstructions in Streets*, 207.
 - b. *Contracts for Railroad Construction*, 208.

III. CONTRACTOR'S LIABILITY, 209.

CROSS-REFERENCES.

For matters of *PROCEDURE*, see the *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*, title *MASTER AND SERVANT*, vol. 13, p. 891.

As to other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *ARCHITECTS*, vol. 2, p. 815; *CONTRIBUTORY NEGLIGENCE*, vol. 7, p. 368; *FELLOW SERVANTS*, vol. 12, p. 893; *MASTER AND SERVANT; NEGLIGENCE; WORKING CONTRACTS*.

I. WHO ARE INDEPENDENT CONTRACTORS — 1. General Definition. — Generally speaking, an independent contractor is one who, in rendering services, exercises an independent employment or occupation, and represents his employer only as to the results of his work, and not as to the means whereby it is to be accomplished.¹ The word "results," however, is used in this connection in the sense of a production or product of some sort, and not of a service.²

An Employer Is Not Estopped to deny that the relation of master and servant exists between him and his independent contractor, merely because a servant of the latter had reasonable cause to believe from the acts of the employer that the contractor was merely a servant.³

Identity of Officers. — A construction company, however, having the same officers as the company for which it is doing work under a contract, such officers supervising the work, has been held not to be an independent contractor.⁴

Same Person Servant and Contractor. — A contractor for certain work may at the same time be a servant of the same employer in regard to other work to be done by him, so as to render the latter liable for his acts in connection with such other work.⁵

2. Right to Control Work. — The chief consideration which determines one to be an independent contractor is the fact that the employer has no right of control as to the mode of doing the work contracted for,⁶ though it has been

1. Employer Represented as to Results. — This, or a practically similar definition, is given in a number of late cases.

United States. — *Casement v. Brown*, 148 U. S. 615.

Maine. — *McCarthy v. Second Parish*, 71 Me. 323, 36 Am. Rep. 320.

Minnesota. — *Barg v. Bousfield*, 65 Minn. 355; *Vosbeck v. Kellogg*, (Minn. 1899) 80 N. W. Rep. 957.

Missouri. — *Burns v. McDonald*, 57 Mo. App. 599.

Montana. — *Jensen v. Barbour*, 15 Mont. 582.

New York. — *Hexamer v. Webb*, 101 N. Y. 377, 54 Am. Rep. 703; *Sullivan v. Dunham*, 35 N. Y. App. Div. 342.

Tennessee. — *Powell v. Virginia Constr. Co.*, 88 Tenn. 692, 17 Am. St. Rep. 925.

Virginia. — *Bibb v. Norfolk, etc., R. Co.*, 87 Va. 711.

2. Result Distinct from Service. — *Jensen v. Barbour*, 15 Mont. 582, where De Witt, J., said: "One may contract to produce a house, a ship, or a locomotive, and such house or ship or locomotive produced is the 'result.' Such 'results' produced are often, and probably generally, by independent contractors. But we do not think that plowing a field, mowing a lawn, driving a carriage or a horse-car for one trip or for many trips a day, is a 'result' in the sense that the word is used in the rule. Such acts do not result in a product. They are simply a service."

3. Estoppel to Assert Relation. — *Smith v. Belshaw*, 89 Cal. 427; *Johnson v. Owen*, 33 Iowa 512. Compare *Myles v. Ballston Terminal R. Co.*, 35 N. Y. App. Div. 143, where it was held that the employer was liable on the principle of estoppel for the wages of a contractor's servant.

4. Identity of Officers. — *Chicago Economic Fuel Gas Co. v. Myers*, 168 Ill. 139.

5. Same Person Servant and Contractor. — *Samyn v. McClosky*, 2 Ohio St. 536.

So in *Toomey v. Donovan*, 158 Mass. 232, it

was decided that one doing work as an independent contractor might, at the same time, be the employer's representative for the purpose of looking after the machines used in doing the work, so as to render the employer liable under the Employer's Liability Act for the contractor's failure to do this properly. Compare *Toledo Stove Co. v. Reep*, 9 Ohio Cir. Dec. 467.

6. Employer's Right to Control Method of Work — *England.* — *Blake v. Thirst*, 2 H. & C. 20; *Burgess v. Gray*, 1 C. B. 578, 50 E. C. L. 578; *Donovan v. Laing*, (1893) 1 Q. B. 633.

Canada. — *Johnston v. Hastie*, 30 U. C. Q. B. 232; *Saunders v. Toronto*, 29 Ont. 273.

United States. — *Singer Mfg. Co. v. Rahn*, 132 U. S. 518; *New Orleans, etc., R. Co. v. Hanning*, 15 Wall. (U. S.) 649.

Alabama. — *Drennen v. Smith*, 115 Ala. 396.

Florida. — *St. Johns, etc., R. Co. v. Shalley*, 32 Fla. 397.

Illinois. — *Chicago, etc., R. Co. v. McCarthy*, 20 Ill. 385, 71 Am. Dec. 285; *Schwartz v. Gilmore*, 45 Ill. 456, 92 Am. Dec. 227; *Chicago v. Joney*, 60 Ill. 383; *Chicago v. Dermody*, 61 Ill. 431; *Jefferson v. Jameson, etc., Co.*, 165 Ill. 138; *Pioneer Fireproof Constr. Co. v. Hansen*, 176 Ill. 100; *Andrews v. Boedecker*, 17 Ill. App. 213; *Arasmith v. Temple*, 11 Ill. App. 39.

Indiana. — *Dehority v. Whitcomb*, 13 Ind. App. 558.

Iowa. — *Brown v. McLeish*, 71 Iowa 381; *Hughbanks v. Boston Invest. Co.*, 92 Iowa 267.

Louisiana. — *Camp v. St. Louis Church*, 7 La. Ann. 321; *Gallagher v. Southwestern Exposition Assoc.*, 28 La. Ann. 943; *Peyton v. Richards*, 11 La. Ann. 62; *Faren v. Sellers*, 39 La. Ann. 1011, 4 Am. St. Rep. 256.

Maine. — *Wyman v. Penobscot, etc., R. Co.*, 46 Me. 162; *State v. Emerson*, 72 Me. 455; *Leavitt v. Bangor, etc., R. Co.*, 89 Me. 509.

Maryland. — *Smith v. Benick*, 87 Md. 610.

Massachusetts. — *Connors v. Hennessey*, 112 Mass. 98; *Clapp v. Kemp*, 122 Mass. 481; *Sproul v. Hemmingway*, 14 Pick. (Mass.) 1, 25

decided that the fact that by the contract of employment the employer foregoes this right of control does not make one who is otherwise a mere servant an independent contractor.¹ If the employer has the right of control, it is immaterial whether he actually exercises it.²

Contracts Reserving Control may assume a variety of forms, but generally there is a plain provision for supervision or direction by the employer or his representative;³ and so one contracting to do the work for a city, under the direction of certain officers, has been held to be a mere servant of the city.⁴

Surrender of Premises. — In some cases special reference is made to the fact that the premises are or are not surrendered to the contractor, as showing whether the employer has a right to control the method of work.⁵

3. Supervision and Approval of Work. — A reservation by the employer of the right by himself or his agent to supervise the work for the purpose merely of determining whether it is being done in conformity to the contract does not affect the independence of the relation.⁶

Am. Dec. 350; *Linton v. Smith*, 8 Gray (Mass.) 147; *Brackett v. Lubke*, 4 Allen (Mass.) 138, 81 Am. Dec. 691; *Forsyth v. Hooper*, 11 Allen (Mass.) 419.

Minnesota. — *Whitson v. Ames*, 68 Minn. 23; *Rait v. New England Furniture, etc., Co.*, 66 Minn. 76; *Gahagan v. Aeromotor Co.*, 67 Minn. 252; *Vosbeck v. Kellogg*, (Minn. 1899) 80 N. W. Rep. 957.

Mississippi. — *New Orleans, etc., R. Co. v. Reese*, 61 Miss. 581.

Missouri. — *Morgan v. Bowman*, 22 Mo. 538.

New Hampshire. — *Knowlton v. Hoyt*, 67 N. H. 155.

New York. — *Pack v. New York*, 8 N. Y. 222; *Kelly v. New York*, 11 N. Y. 432; *Charlock v. Freel*, 125 N. Y. 357; *Goldman v. Mason*, (Brooklyn City Ct. Gen. T.) 2 N. Y. Supp. 337; *Hart v. Ryan*, (Supm. Ct. Gen. T.) 6 N. Y. Supp. 921; *Lacour v. New York*, 3 Duer (N. Y.) 406.

North Carolina. — *Waters v. Greenleaf-Johnson Lumber Co.*, 115 N. Car. 648.

Pennsylvania. — *First Presb. Congregation v. Smith*, 163 Pa. St. 561, 43 Am. St. Rep. 808.

South Carolina. — *Rogers v. Florence R. Co.*, 31 S. Car. 378.

Washington. — *Seattle v. Buzby*, 2 Wash. Ter. 25.

1. Illustration. — A firm of jobbing carpenters were customarily employed by a steamship company to make repairs on vessels when in port. The firm charged for work by the hour, and material by the foot, and the superintendent of the company and the captains of the vessels had the right to direct the extent and manner of repairs and alterations. It was held that the firm were servants of the steamship company, and not independent contractors. *Atlantic Transport Co. v. Coneys* 82 Fed. Rep. 177, 51 U. S. App. 570.

Contract Not to Control. — In *Tiffin v. McCormack*, 34 Ohio St. 638, 32 Am. Rep. 408 one hired to break stone in a quarry, receiving compensation according to the amount broken, was held to be a mere servant, though the employer "had no other or further control" over him, the court saying: "A master cannot exonerate himself from responsibility to third persons, which the law imposes upon him, for injury resulting from the misconduct of his servant, by contracting with the servan-

that he will not exercise any control over him, and will not therefore be responsible for any injury that he may wrongfully inflict."

2. Exercise of Right of Control Unnecessary. — *Campbell v. Lunsford*, 83 Ala. 512; *Linnehan v. Rollins*, 137 Mass. 123, 50 Am. Rep. 287; *Norwalk Gaslight Co. v. Norwalk*, 63 Conn. 495.

3. Contracts Reserving Control. — One who was to do work under the control of the employer's superintendent, and to "remove all improper work or materials upon being directed so to do by the superintendent," was held to be a mere servant. *Schwartz v. Gilmore*, 45 Ill. 455, 92 Am. Dec. 227.

A contractor who agreed to take down a building, the work to be done carefully, under the owner's direction and subject to his approval, was likewise held to be a mere servant. *Linnehan v. Rollins*, 137 Mass. 123, 50 Am. Rep. 287. And a similar decision was made where the contract provided that the work was to be done under the supervision of the superintendent of the employer and subject to the employer's approval and acceptance. *Donovan v. Oakland, etc., Rapid Transit Co.*, 102 Cal. 245. See also *Hughbanks v. Boston Invest. Co.*, 92 Iowa 267.

4. Municipal Contracts. — *Denver v. Rhodes*, 9 Colo. 554; *St. Paul v. Seitz*, 3 Minn. 297, 74 Am. Dec. 753.

So there was no independent relation where it was provided that the city engineer should superintend the improvement and that any person employed on the work who disobeyed the city engineer should be discharged. *Cooper v. Seattle*, 16 Wash. 462, 58 Am. St. Rep. 46.

Effect of Statute. — And a similar effect was given to a statute requiring the board of public works to retain control of the mode and manner of the performance of the work, the presumption being that the contract conformed to the law. *Harper v. Milwaukee*, 30 Wis. 365.

5. Surrender of Premises. — *Mumby v. Bowden*, 25 Fla. 454; *Jefferson v. Jameson, etc., Co.*, 165 Ill. 138; *Bernauer v. Hartman Steel Co.*, 33 Ill. App. 491.

6. Right of Supervision — England. — *Hardaker v. Idle Dist. Council*, (1896) 1 Q. B. 335.

United States. — *Casement v. Brown*, 148 U. S. 615.

Supervision by Architect. — The fact that the work is to be supervised by an architect representing the owner is also immaterial if this involves merely his approval or disapproval of the results of the work, and not directions as to the mode of arriving at such results.¹

Under Direction and to Satisfaction of Employer. — And it has been held that a provision that the work shall be done under the direction and to the satisfaction of a representative of the employer does not make the employee a mere servant, but that such a provision is merely to secure a satisfactory performance of the work in compliance with the contract.²

4. Control as to Scope of Work. — Nor is it material that the contract provides that the employer shall, during the progress of the work, define and direct the scope thereof.³

5. Mode of Payment. — The fact that payment is made "by the job," or according to the amount of work done, does not make an employee an independent contractor,⁴ though it may be evidence that he is such.⁵ On the

California. — *Callan v. Bull*, 113 Cal. 593.

Georgia. — *Harrison v. Kiser*, 79 Ga. 588.

Illinois. — *Pioneer Fireproof Constr. Co. v. Hansen*, 176 Ill. 100.

Maine. — *Eaton v. European, etc., R. Co.*, 59 Me. 520, 8 Am. Rep. 430.

Minnesota. — *Vosbeck v. Kellogg*, (Minn. 1899) 80 N. W. Rep. 957.

Missouri. — *Crenshaw v. Ullman*, 113 Mo. 633.

New York. — *Weber v. Buffalo R. Co.*, 20 N. Y. App. Div. 292; *Hawke v. Brown*, 28 N. Y. App. Div. 37.

Pennsylvania. — *Welsh v. Lehigh, etc., Coal Co.*, (Pa. 1886) 5 Atl. Rep. 48; *Welsh v. Parrish*, 148 Pa. St. 599.

South Carolina. — *Rogers v. Florence R. Co.*, 31 S. Car. 378.

Tennessee. — *Powell v. Virginia Constr. Co.*, 88 Tenn. 692, 17 Am. St. Rep. 925.

Virginia. — *Bibb v. Norfolk, etc., R. Co.*, 87 Va. 711.

1. Supervision by Architect. — *Robinson v. Webb*, 11 Bush (Ky.) 464; *Morgan v. Smith*, 159 Mass. 570; *Smith v. Milwaukee Builders' etc., Exch.*, 91 Wis. 360, 51 Am. St. Rep. 912.

But a Clause in the Contract providing that the "work of demolition is to be carried out according to the directions of the supervising architect, whose decisions on all points in dispute I agree to accept as final," was held to prevent the contractor from being independent. *Faren v. Sellers*, 39 La. Ann. 1011, 4 Am. St. Rep. 256.

And a like decision was made as to a contractor agreeing to carry forward the work under the control of the superintendent, to whose judgment as to work and materials he agreed to submit. *Schwartz v. Gilmore*, 45 Ill. 455, 92 Am. Dec. 227.

2. California. — *Frassi v. McDonald*, 122 Cal. 400.

Massachusetts. — *Harding v. Boston*, 163 Mass. 14.

New York. — *Kelly v. New York*, 11 N. Y. 432.

Pennsylvania. — *Painter v. Pittsburgh*, 46 Pa. St. 213; *Hunt v. Pennsylvania R. Co.*, 51 Pa. St. 475; *Allen v. Willard*, 57 Pa. St. 374; *Thomas v. Altoona, etc., Electric R. Co.*, 191 Pa. St. 361; *School Dist. v. Fuess*, 98 Pa. St. 606, 42 Am. Rep. 627.

See also *Norwalk Gaslight Co. v. Norwalk*, 63 Conn. 495, in which very full powers of supervision and direction were held not to make the contractor a servant.

Supervision by Engineer. — The fact that the work was to be done under the "general supervision" of the employer's engineer was held not to make the employee a servant. *Eaton v. European, etc., R. Co.*, 59 Me. 520, 8 Am. Rep. 430.

3. Control as to Scope of Work — *California.* — *Frassi v. McDonald*, 122 Cal. 400.

Iowa. — *Callahan v. Burlington, etc., R. Co.*, 23 Iowa 562.

Massachusetts. — *Morgan v. Smith*, 159 Mass. 570.

Missouri. — *Fink v. Missouri Furnace Co.*, 82 Mo. 276, 52 Am. Rep. 376.

New York. — *Slater v. Mersereau*, 64 N. Y. 138; *Burke v. Ireland*, 26 N. Y. App. Div. 487.

Ohio. — *Hughes v. Cincinnati, etc., R. Co.*, 39 Ohio St. 461.

Pennsylvania. — *Hunt v. Pennsylvania R. Co.*, 51 Pa. St. 475; *School Dist. v. Fuess*, 98 Pa. St. 606, 42 Am. Rep. 627.

Tennessee. — *Powell v. Virginia Constr. Co.*, 88 Tenn. 697, 17 Am. St. Rep. 925.

Illustrations. — In a contract with a city for the construction of a sewer, a stipulation that the work should be commenced and carried on at such times and in such places and in such a manner as the engineer of the city should direct was held not to be such a reservation of power as to make the contractor a mere servant. *Erie v. Caulkins*, 85 Pa. St. 247, 27 Am. Rep. 642.

So where one had a contract to construct a sewer, the city reserving the right to "vary, extend, or diminish the quantity of work during its progress," and before the work was completed he was directed to make changes in the sidewalk, and in doing this his workmen left a hole in the sidewalk into which the plaintiff fell and was injured, it was held that the defendant was an independent contractor. *Charlock v. Freely*, 125 N. Y. 357.

4. Payment by Job. — *Sadler v. Henlock*, 4 El. & Bl. 570, 82 E. C. L. 570; *Waters v. Pioneer Fuel Co.*, 52 Minn. 474, 38 Am. St. Rep. 564; *Tiffin v. McCormack*, 34 Ohio St. 638, 32 Am. Rep. 408; *Rummell v. Dilworth*, 111 Pa. St. 343.

So a person employed by a coal company to unload its coal at a stipulated price per carload was held to be not an independent contractor, but a servant of the company. *Holmes v. Tennessee Coal, etc., Co.*, 49 La. Ann. 1465.

5. Forsyth v. Hooper, 11 Allen (Mass.) 419.

other hand, the payment of a contractor according to the time consumed by him or his men in the work does not render him a servant merely,¹ though it is entitled to consideration as tending to show that the relation is that of master and servant.² Nor does a provision that the contractor shall be paid the cost of the work and a percentage thereon render him a mere servant.³ And the fact that no price for the job was fixed and no specifications were made as to the work to be done does not necessarily create the relation of master and servant.⁴

6. Liability to Discharge. — The fact that the employer may at any time terminate the employment, though strong evidence that the employee is a mere servant,⁵ is not conclusive in that regard.⁶

7. Control as to Employees. — The reservation to the employer of a right to dictate the dismissal of particular workmen employed by the contractor does not render the latter a mere servant,⁷ though this is, it appears, a matter entitled to considerable weight in determining the relation.⁸ Nor is the relation rendered dependent by the reservation of the right to object to the employment of particular persons,⁹ or by a provision for the annulment of the contract if the contractor fails to employ a force satisfactory in quantity and

1. Payment by Time. — *Geer v. Darrow*, 61 Conn. 220; *Morgan v. Smith*, 159 Mass. 570; *Dane v. Cochrane Chemical Co.*, 164 Mass. 453; *Larow v. Clute*, (Supm. Ct. Gen. T.) 14 N. Y. Supp. 616; *Harrison v. Collins*, 86 Pa. St. 153, 27 Am. Rep. 699; *Emmerson v. Fay*, 94 Va. 60.

"That the work was charged for by the day could make no difference, and did not alter the position which Burford occupied, in reference to the defendant, as an independent contractor. It did not give the defendant control over the job, or authority to hire or discharge the men, or render him in any way liable to them instead of Burford." *Miller, J.*, in *Hexamer v. Webb*, 101 N. Y. 377, 54 Am. Rep. 703.

2. Corbin v. American Mills, 27 Conn. 274, 71 Am. Dec. 63; *Morgan v. Bowman*, 22 Mo. 538.

3. Payment by Percentage of Cost. — *Whitney, etc., Co. v. O'Rourke*, 172 Ill. 177, *affirming* 68 Ill. App. 487; *Morgan v. Smith*, 159 Mass. 570. But see *Hughbanks v. Boston Invest. Co.*, 92 Iowa 267.

4. Stipulations as to Work and Price. — *Hexamer v. Webb*, 101 N. Y. 384, 54 Am. Rep. 703. But in *Dane v. Cochrane Chemical Co.*, 164 Mass. 453, it is said that when there are no specifications in advance of what is to be done, and no round price is agreed upon, and a carpenter is employed to make repairs and alterations to the satisfaction of his employer, to be paid according to the amount of work done, it would seem to be a reasonable inference that the employer retains the right to direct the manner in which the carpenter should do the work.

5. Liability to Discharge. — *Blake v. Thirst*, 2 H. & C. 20; *Texas, etc., R. Co. v. Juneman*, 71 Fed. Rep. 939, 30 U. S. App. 541; *Indiana Iron Co. v. Cray*, 19 Ind. App. 565; *Morgan v. Bowman*, 22 Mo. 538; *Tiffin v. McCormack*, 34 Ohio St. 638, 32 Am. Rep. 408. And see *Toledo Stove Co. v. Reep*, 9 Ohio Cir. Dec. 467.

6. Is Not Conclusive. — *New Albany Forge, etc., Mill v. Cooper*, 131 Ind. 363.

So in *Robinson v. Webb*, 11 Bush (Ky.) 464, it was held that the fact that the building con-

tract authorized the owner's representative to employ another builder in case the work was delayed by the contractor did not negative the idea of an independent contract, but should be regarded as merely a stipulation securing a faithful compliance with his contract on the part of the builder.

7. Control as to Dismissal of Employees. — *Harris v. McNamara*, 97 Ala. 181; *Bayer v. Chicago, etc. R. Co.*, 68 Ill. App. 219; *Blumb v. Kansas City*, 84 Mo. 113, 54 Am. Rep. 87; *McKinley v. Chicago, etc., R. Co.*, 40 Mo. App. 449; *Erie v. Caulkins*, 85 Pa. St. 253, 27 Am. Rep. 642; *Rogers v. Florence R. Co.*, 31 S. Car. 378.

In *Hobbit v. London, etc., R. Co.*, 4 Exch. 254, *Rolfe, B.* made use of the following language, *quoted* with approval in *Cuff v. Newark, etc., R. Co.*, 35 N. J. L. 17, 10 Am. Rep. 205: "Our attention was directed during the argument to the provisions of the contract, whereby the defendants had the power of insisting on the removal of careless or incompetent workmen, and so it was contended they must be responsible for their nonremoval. But this power of removal does not seem to us to vary the case. The workman is still the servant of the contractor only, and the fact that the defendants might have insisted on his removal if they thought him careless or unskilful did not make him their servant."

8. Evidence as to Relation. — *Speed v. Atlantic, etc., R. Co.*, 71 Mo. 303; *Larson v. Metropolitan St. R. Co.*, 110 Mo. 234; *Chicago v. Joney*, 60 Ill. 383, where the court says: "It appears the city retained a supervisory control over the work, and had power to dismiss any person employed by the contractors on the work, and the dismissions of the board of public works, who represented the city, were final and conclusive in every case that might arise under the contract. Here was dependence — servient — in the contractors, and for their negligence the doctrine of *respondet superior* must apply."

9. Right to Object to Employees. — *Harris v. McNamara*, 97 Ala. 181.

quality to the contractee.¹

8. Character of Occupation. — Though the statement in the definition adopted at the beginning of this article, that the services are to be rendered in the course of "an independent employment or occupation," is authorized by the cases there cited, and accords with various text-books,² and some few cases emphasize the fact that the services were rendered in the exercise of a distinct and recognized trade or calling,³ in most of the cases such a requirement is not mentioned, and the true view is, perhaps, that the fact that the occupation is of that character is important merely as tending to show that the control of the methods of work was probably left to the contractor, who had previously done similar work as a part of his regular business, and consequently was better fitted than his employer to judge in regard thereto,⁴ and also as tending to show that he was a competent man to do the work, and therefore was properly selected for the purpose.⁵

9. Question of Law or Fact. — The question whether one is an independent contractor, when a matter to be decided upon oral evidence as to the amount of control or upon verbal contracts of employment, is a question for the jury,⁶ acting under instructions from the court as to what is requisite to constitute

1. *Burmeister v. New York El. R. Co.*, 47 N. Y. Super. Ct. 264; *Rogers v. Florence R. Co.*, 31 S. Car. 378.

2. **Character of Occupation.** — See *supra*, *General Definition*. See also *Mechem on Agency*, § 747; *Shearman & Redfield on Negligence*, § 164; *Thompson on Negligence*, vol. 2, p. 899.

Independent Employment. — A number of cases evidently use the phrase "independent employment" merely to describe the contractual relation of the employer to the employed. *Smith v. Belshaw*, 89 Cal. 427; *Park v. Adams County*, 3 Ind. App. 536; *Wood v. Cobb*, 13 Allen (Mass.) 58; *Harrison v. Collins*, 86 Pa. St. 153, 27 Am. Rep. 699.

And so in *Hass v. Philadelphia, etc., Mail Steamship Co.*, 88 Pa. St. 269, 32 Am. Rep. 462, the court spoke approvingly of an instruction in which it was left to the jury to find whether the person whose negligence caused the injury was a simple agent, with the instruction that if he was the company was liable, but that it was not liable if he was in an "independent employment."

3. Exercise of Distinct Calling. — Thus in *De Forrest v. Wright*, 2 Mich. 368, *Copeland, J.*, said: "The record shows that the draymen of the city of Detroit are a body of men in the exercise of a separate, distinct, and independent employment, using their own teams and drays, and duly licensed." And in *Linton v. Smith*, 8 Gray (Mass.) 147, it is said: "The business of stevedores is a separate, distinct, well-recognized business in Boston."

'The case shows that Canselo Winship was a slater by trade, and carried on the business of a slater, and had done so, in Portland, for more than twenty years, keeping a shop, and a slate on which to receive orders, and men constantly in his employ to assist in executing such orders as he should receive. He was, therefore, carrying on what the law denominates an independent business.'" *McCarthy v. Second Parish*, 71 Me. 324, 36 Am. Rep. 320. See also *Brackett v. Lubke*, 4 Allen (Mass.) 138, 81 Am. Dec. 694; *Morgan v. Smith*, 159 Mass. 574, quoted *infra*.

4. As Evidence of Character of Contract. —

"The further fact that the job was such as to require for its accomplishment some special knowledge and skill, falling within 'a regular independent employment' or 'distinct calling' which the employee followed as a business, would raise some probability that it was intended to leave to his judgment, to be exercised on his own responsibility, the means, the manner of using them, and all the details of the work." *Pleasants, P. J.*, in *Arasmith v. Temple*, 11 Ill. App. 50.

The **Uncertainty** arises from the double meaning of the word "employment" in the sense of either a trade or a contract of hiring, as in the following cases, where it may mean either.

In *Morgan v. Smith*, 159 Mass. 574, *Lathrop, J.*, said that the test is whether the employer was in the exercise of a distinct and independent employment, using his own means and methods for accomplishing his work, and not being under the immediate supervision and control of his employer.

And so in *De Forrest v. Wright*, 2 Mich. 370, *Copeland, J.*, said: "Where the person employed is in the exercise of an independent and distinct employment, and not under the immediate control, direction, or supervision of the employer, the latter is not responsible for the negligence or misdoings of the former."

5. See *infra*, *Employer's Liability for Contractor's Acts — Incompetent Contractor*.

6. Question for Jury — United States. — *Atlantic Transport Co. v. Coney*, 82 Fed. Rep. 177.

Minnesota. — *Barg v. Bousfield*, 65 Minn. 355; *Rait v. New England Furniture, etc., Co.*, 66 Minn. 76; *Whitson v. Ames*, 68 Minn. 23.

New York. — *Sullivan v. Dunham*, 35 N. Y. App. Div. 342; *Hart v. Ryan*, (Supm. Ct. Gen. T.) 6 N. Y. Supp. 921; *Brophy v. Bartlett*, 108 N. Y. 632.

Texas. — *Wallace v. Southern Cotton Oil Co.*, 91 Tex. 18.

Wisconsin. — *Carlson v. Stocking*, 91 Wis. 432.

the relation.¹ When, however, the existence of the relation depends on a written contract of employment, it is for the court to construe the contract in this regard.²

II. EMPLOYER'S LIABILITY FOR CONTRACTOR'S ACTS — 1. General Rule. — Since the relation between parties which renders one liable to third persons for the acts or negligence of the other must be that of superior and subordinate, and is based on the control which the superior has the right to exercise over the acts of the subordinate in the performance of his duties, it follows that an employer is not so liable for the acts of an independent contractor, who is never subject to such control,³ nor is he liable for the acts of the employees and servants of such independent contractor.⁴ That this is the law is now generally conceded both in *England* and the *United States*,⁵

1. *Emmerson v. Fay*, 94 Va. 60.

2. **Question for Court.** — *Pioneer Fireproof Constr. Co. v. Hansen*, 176 Ill. 100; *Linnehan v. Rollins*, 137 Mass. 123, 50 Am. Rep. 287; *Robers v. Florence R. Co.*, 31 S. Car. 378.

3. **Nonliability of Employer.** — See the observations of Baron Rolfe in *Hobbit v. London*, etc., R. Co., 4 Exch. 255. And see *Berg v. Parsons*, 156 N. Y. 109.

4. **Nonliability for Acts of Contractor's Employees.** — In *Quarman v. Burnett*, 6 M. & W. 499, Baron Parke said: "Upon the principle that *qui facit per alium facit per se*, the master is responsible for the acts of his servant; and that person is undoubtedly liable, who stood in the relation of master to the wrongdoer; he who had selected him as his servant, from the knowledge of or belief in his skill and care, and who could remove him for misconduct, and whose orders he was bound to receive and obey. * * * But the liability, by virtue of the principle of relation of master and servant, must cease where the relation itself ceases to exist; and no other person than the master of such servant can be liable, on the simple ground that the servant is the servant of another, and his act the act of another."

One Principal Alone Liable. — In *Laugher v. Pointer*, 5 B. & C. 560, 12 E. C. L. 316, Little-dale, J., remarked, as to one employed by a contractor, that he was the servant of one or the other, but not the servant of one and the other, since the law does not recognize a several liability in two principals. To the same effect see *Reedie v. London*, etc., R. Co., 4 Exch. 244; *Clark v. Hannibal*, etc., R. Co., 36 Mo. 202; *Hauser v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 27 Misc. (N. Y.) 538; *Blake v. Ferris*, 5 N. Y. 48, 55 Am. Dec. 304.

The Impracticability and Injustice of a rule which would make the original employer liable for the acts of the contractor's servants is well brought out in *Blake v. Ferris*, 5 N. Y. 48, 55 Am. Dec. 304, where Mullett, J., speaking of a man about to build a house for himself, after saying that he might let out the building of the house to some person who would undertake to furnish all the materials and complete the building for a stipulated compensation, continued: "Would he thereby become the master of all the contractor's apprentices, servants and men employed by him, and render himself liable for all the injuries to third persons, which might be occasioned by their negligence or misconduct in doing any act tending to the construction of the house — for instance, by the carpenter's

men, in getting out timber in the forest; by the stonecutter's servants, in blasting stone in the quarry, or by the teamsters in handling materials? Such consequences would indeed shock the common sense of all men. The truth is, such a contract does not constitute the contractor the agent or servant of the employer, nor authorize him to pledge the responsibility of the employer for the conduct of servants, nor for anything to be done in the execution of his contract."

5. **Recognized Rule.** — The following cases, and practically all the other cases cited in this title, affirm or recognize this rule:

England. — *Dalton v. Angus*, 6 App. Cas. 740; *Knight v. Fox*, 5 Exch. 721; *Crawford v. Peel*, 20 L. R. Ir. 332; *Innocent v. Peto*, 4 F. & F. 8; *Sadler v. Henlock*, 4 El. & Bl. 570, 52 E. C. L. 570, 3 C. L. R. 760, 24 L. J. Q. B. 138, 1 Jur. N. S. 677, 3 W. R. 181; *Steel v. South-Eastern R. Co.*, 16 C. B. 550, 81 E. C. L. 550; *Blake v. Woolf*, (1898) 2 Q. B. 426.

Canada. — *Murphy v. Ottawa*, 13 Ont. 334; *Halifax v. Lordly*, 20 Can. Sup. Ct. 505; *Kerr v. Atlantic*, etc., R. Co., 25 Can. Sup. Ct. 197.

United States. — *Casement v. Brown*, 148 U. S. 615; *Robbins v. Chicago*, 4 Wall. (U. S.) 657; *Chicago v. Robbins*, 2 Black (U. S.) 418.

Alabama. — *Birmingham v. McCary*, 84 Ala. 469; *Alabama Midland R. Co. v. Martin*, 100 Ala. 511; *Drennen v. Smith*, 115 Ala. 396.

Arkansas. — *St. Louis*, etc., R. Co. v. *Yonley*, 53 Ark. 503; *St. Louis*, etc., R. Co. v. *Knott*, 54 Ark. 424.

California. — *Boswell v. Laird*, 8 Cal. 469, 68 Am. Dec. 345; *Spence v. Schultz*, 103 Cal. 208; *Cotter v. Lindgren*, 106 Cal. 602, 46 Am. St. Rep. 255; *Frassi v. McDonald*, 122 Cal. 400.

Colorado. — *Denver v. Rhodes*, 9 Colo. 554.

Connecticut. — *Geer v. Darrow*, 61 Conn. 220; *Norwalk Gaslight Co. v. Norwalk*, 63 Conn. 495.

Florida. — *St. Johns*, etc., R. Co. v. *Shalley*, 33 Fla. 397; *Mumby v. Bowden*, 25 Fla. 454.

Georgia. — *Harrison v. Kiser*, 79 Ga. 588; *Parker v. Waycross*, etc., R. Co., 81 Ga. 387; *Atlanta*, etc., R. Co. v. *Kimberly*, 87 Ga. 161, 27 Am. St. Rep. 231.

Illinois. — *Springfield v. Le Claire*, 49 Ill. 476; *Pfau v. Williamson*, 63 Ill. 16; *Jefferson v. Jameson*, etc., Co., 105 Ill. 138; *Pioneer Fireproof Constr. Co. v. Hansen*, 176 Ill. 100; *McDermott v. McDanel*, 55 Ill. App. 226.

Indiana. — *Ryan v. Curran*, 64 Ind. 345, 31 Am. Rep. 123; *Sessengut v. Posey*, 67 Ind. 408, 33 Am. Rep. 98; *Logansport v. Dick*, 70 Ind.

and the few early decisions in both countries adopting a different view ¹ have

65, 36 Am. Rep. 166; Vincennes Water Supply Co. v. White, 124 Ind. 376; Wabash, etc., R. Co. v. Farver, 111 Ind. 195, 60 Am. Rep. 696.

Iowa.—Kellogg v. Payne, 21 Iowa 575; Callahan v. Burlington, etc., R. Co., 23 Iowa 562; Wood v. Independent School Dist., 44 Iowa 27; Miller v. Minnesota, etc., R. Co., 76 Iowa 655, 14 Am. St. Rep. 258.

Kansas.—Kansas Cent. R. Co. v. Fitzsimmons, 18 Kan. 34; St. Louis, etc., R. Co. v. Willis, 38 Kan. 330.

Kentucky.—Baumeister v. Markham, (Ky. 1897) 39 S. W. Rep. 844; James v. McMinimy, 93 Ky. 471, 40 Am. St. Rep. 200.

Louisiana.—Peyton v. Richards, 11 La. Ann. 62; Gallagher v. Southwestern Exposition Assoc. 28 La. Ann. 943; Farren v. Sellers, 39 La. Ann. 1011, 4 Am. St. Rep. 256; Davie v. Levy, 39 La. Ann. 551, 4 Am. St. Rep. 225.

Maine.—Eaton v. European, etc., R. Co., 59 Me. 520, 8 Am. Rep. 430; Mayhew v. Sullivan Min. Co., 76 Me. 100; Leavitt v. Bangor, etc., R. Co., 89 Me. 509.

Maryland.—Anne Arundel County v. Duval, 54 Md. 350, 39 Am. Rep. 393; Smith v. Benick, 87 Md. 610; Deford v. State, 30 Md. 179.

Massachusetts.—Conners v. Hennessey, 112 Mass. 96; Linnehan v. Rollins, 137 Mass. 123, 50 Am. Rep. 287; Harding v. Boston, 163 Mass. 14; Hilliard v. Richardson, 3 Gray (Mass.) 349, 63 Am. Dec. 743.

Michigan.—Gardner v. Smith, 7 Mich. 410, 74 Am. Dec. 722; Bay City, etc., R. Co. v. Austin, 21 Mich. 390; Darmstaetter v. Moynahan, 27 Mich. 188; Continental Imp. Co. v. Ives, 30 Mich. 448; Grand Rapids, etc., R. Co. v. Southwick, 30 Mich. 444; McWilliams v. Detroit Cent. Mills Co., 31 Mich. 274; Piette v. Bavarian Brewing Co., 91 Mich. 605; De Forrester v. Wright, 2 Mich. 368; Riedel v. Moran, 103 Mich. 262.

Minnesota.—Barg v. Bousfield, 65 Minn. 355; Rait v. New England Furniture, etc., Co., 66 Minn. 76.

Mississippi.—New Orleans, etc., R. Co. v. Reese, 61 Miss. 581; New Orleans, etc., R. Co. v. Norwood, 62 Miss. 565, 52 Am. Rep. 191.

Missouri.—Barry v. St. Louis, 17 Mo. 121; Morgan v. Bowman, 22 Mo. 538; Fink v. Missouri Furnace Co., 82 Mo. 276, 52 Am. Rep. 376; Crenshaw v. Ullman, 113 Mo. 638; Long v. Moon, 107 Mo. 334; Independence v. Slack, 134 Mo. 66.

Montana.—Jensen v. Barbour, 15 Mont. 582.

New Hampshire.—Carter v. Berlin Mills Co., 58 N. H. 52, 42 Am. Rep. 572; Knowlton v. Hoyt, 67 N. H. 155; Manchester v. Warren, 67 N. H. 482.

New Jersey.—Cuff v. Newark, etc., R. Co. 35 N. J. L. 17, 10 Am. Rep. 205; Conway v. Furst, 57 N. J. L. 645.

New York.—King v. New York Cent., etc., R. Co., 66 N. Y. 181, 23 Am. Rep. 37; Pierrepont v. Loveless, 72 N. Y. 211; Hexamer v. Webb, 101 N. Y. 383, 54 Am. Rep. 703; McCann v. Kings County El. R. Co., (Brooklyn City Ct. Gen. T.) 19 N. Y. Supp. 668; Mahon v. Burns, (N. Y. City Ct. Gen. T.) 9 Misc. (N. Y.) 223; Kelly v. Cohoes Knitting Co., 84

Hun (N. Y.) 154; Hawke v. Brown, 28 N. Y. App. Div. 37; Neumeister v. Eggers, 29 N. Y. App. Div. 385; Jehle v. Ellicott Square Co., 31 N. Y. App. Div. 336; Weber v. Buffalo R. Co., 20 N. Y. App. Div. 292; Dillon v. Sixth Ave. R. Co., 48 N. Y. Super. Ct. 283, *affirmed* 97 N. Y. 627; Clare v. National City Bank, 40 N. Y. Super. Ct. 104; Vanderpool v. Husson, 28 Barb. (N. Y.) 196; Benedict v. Martin, 36 Barb. (N. Y.) 288; McCamus v. Citizens' Gas Light Co., 40 Barb. (N. Y.) 380; Potter v. Seymour, 4 Bosw. (N. Y.) 140; Gilbert v. Beach, 5 Bosw. (N. Y.) 445; O'Rourke v. Hart, 7 Bosw. (N. Y.) 511.

North Carolina.—Hunt v. Vanderbilt, 115 N. Car. 559.

Ohio.—Clark v. Fry, 8 Ohio St. 359, 72 Am. Dec. 590; Cincinnati v. Stone, 5 Ohio St. 38; Gwathney v. Little Miami R. Co., 12 Ohio St. 92; Carman v. Steubenville, etc., R. Co., 4 Ohio St. 399; Hawver v. Whalen, 49 Ohio St. 69; Painter v. Pittsburgh, 46 Pa. St. 213; Wray v. Evans, 80 Pa. St. 103.

Oregon.—McAllister v. Albany, 18 Oregon 426.

Pennsylvania.—Reed v. Allegheny City, 79 Pa. St. 300; Smith v. Simmons, 103 Pa. St. 32, 49 Am. Rep. 113; Welsh v. Lehigh, etc., Coal Co., (Pa. 1886) 5 Atl. Rep. 48; Welsh v. Parrish, 148 Pa. St. 599.

Rhode Island.—Williams v. Tripp, 11 R. I. 454; Sanford v. Pawtucket St. R. Co., 19 R. I. 537; Read v. East Providence F. Dist., 20 R. I. 574.

South Carolina.—Rogers v. Florence R. Co., 31 S. Car. 378; Conlin v. Charleston, 15 Rich. L. (S. Car.) 201.

Texas.—Cunningham v. International R. Co., 51 Tex. 503, 32 Am. Rep. 632; Taylor, etc., R. Co. v. Warner, 88 Tex. 642; Wallace v. Southern Cotton-Oil Co., 91 Tex. 18.

Vermont.—Clark v. Vermont, etc., R. Co., 28 Vt. 103; Bailey v. Troy, etc., R. Co., 57 Vt. 252, 52 Am. Rep. 129.

Virginia.—Bibb v. Norfolk, etc., R. Co., 87 Va. 711; Emerson v. Fay, 94 Va. 60.

Washington.—Cooper v. Seattle, 16 Wash. 462, 58 Am. St. Rep. 46; Easter v. Hall, 12 Wash. 160.

West Virginia.—Carrico v. West Virginia Cent., etc., R. Co., 39 W. Va. 86; Wilson v. Wheeling, 19 W. Va. 323, 42 Am. Rep. 780.

Wisconsin.—Hackett v. Western Union Tel. Co., 80 Wis. 187; Carlson v. Stocking, 91 Wis. 432, *quoting* 16 AM. AND ENG. ENCYC. OF LAW 471.

Wyoming.—Union Pac. R. Co. v. Hause, 1 Wyo. 27.

The Georgia Code, § 3818 (Code 1882, § 2962), declares: "The employer generally is not responsible for torts committed by his employee when the latter exercises an independent business, and in it is not subject to the immediate direction and control of the employer."

1. *Contrary Decisions.*—Bush v. Steinman, 1 B. & P. 404; Randleson v. Murray, 8 Ad. & El. 109, 35 E. C. L. 342; Lowell v. Boston, etc., R. Corp., 23 Pick. (Mass.) 24, 34 Am. Dec. 33; Stone v. Cheshire R. Corp., 19 N. H. 427, 51 Am. Dec. 192; Wiswall v. Brinson, 10 Ired. L. (32 N. Car.) 554.

been disapproved, expressly or impliedly, by all the courts in which the question has arisen.¹ The rule exempting the employer from liability has been applied in connection with many different classes of contracts of employment, among which may be mentioned building contracts,² contracts for trucking or drayage,³ for towage,⁴ for logging,⁵ for mining,⁶ to work as stevedore,⁷ to do plumbing,⁸ to do slating,⁹ to drive cattle,¹⁰ to clear land,¹¹ and to work a farm.¹²

Injuries Arising in Connection with Real Property. — At one time it was considered, or at least intimated, that a different principle applied in the case of injuries occasioned by the negligence or misconduct of a person while transacting any business connected with the improvement, use, or enjoyment of real property, and that in such a case the owner of the property was liable whether the wrongdoer was his servant or was executing an independent contract. This doctrine has, however, been entirely discarded, and it is now settled that an owner of real property incurs no greater liability on account of the acts of a contractor than does the owner of personal property.¹³

Liability for Acts of Subcontractors. — The principle of exemption enunciated above applies likewise in favor of the principal contractor as against any liability on his part for the acts of a subcontractor or of a subcontractor's servants, since he does not stand in the relation of master to the latter.¹⁴

1. For a Full Discussion of the English decisions and of the principles involved see:

California. — *Boswell v. Laird*, 8 Cal. 469, 68 Am. Dec. 345.

Iowa. — *Kellogg v. Payne*, 21 Iowa 575.

Maine. — *Eaton v. European, etc.*, R. Co., 59 Me. 531, 8 Am. Rep. 430.

Massachusetts. — *Hilliard v. Richardson*, 3 Gray (Mass.) 349, 63 Am. Dec. 743.

New Hampshire. — *Wright v. Holbrook*, 52 N. H. 120, 13 Am. Rep. 12.

New Jersey. — *Cuff v. Newark, etc.*, R. Co., 35 N. J. L. 17, 574, 10 Am. Rep. 205.

New York. — *Blake v. Ferris*, 5 N. Y. 48, 55 Am. Dec. 304.

Virginia. — *Bibb v. Norfolk, etc.*, R. Co., 87 Va. 711.

2. Building Contracts — *United States.* — *Case-*

ment v. Brown, 148 U. S. 615.

Connecticut. — *Geer v. Darrow*, 61 Conn. 220.

Illinois. — *Hale v. Johnson*, 80 Ill. 185; *Prairie State L. & T. Co. v. Doig*, 70 Ill. 52.

Kentucky. — *Robinson v. Webb*, 11 Bush (Ky.) 464.

Massachusetts. — *Brckett v. Lubke*, 4 Allen (Mass.) 138, 81 Am. Dec. 694.

New York. — *Wolf v. American Tract Soc.*, 25 N. Y. App. Div. 98; *Burke v. Ireland*, 26 N. Y. App. Div. 487; *Hexamer v. Webb*, 101 N. Y. 377, 54 Am. Rep. 703.

Virginia. — *Bibb v. Norfolk, etc.*, R. Co., 87 Va. 711.

3. Contracts for Trucking or Drayage. — *De Forrest v. Wright*, 2 Mich. 308; *Riedel v. Moran*, 103 Mich. 262; *Fink v. Missouri Furnace Co.*, 82 Mo. 276, 52 Am. Rep. 376.

4. Towage Contracts. — *McLoughlin v. New York Lighterage, etc.*, Co., (C. Pl. Gen. T.) 7 Misc. (N. Y.) 119.

5. Logging Contract. — *Moore v. Sanborne*, 2 Mich. 520, 59 Am. Dec. 209; *Carter v. Berlin Mills Co.*, 58 N. H. 52, 42 Am. Rep. 572; *Manchester v. Warren*, 67 N. H. 482; *Knowlton v. Hoyt*, 67 N. H. 155; *Easter v. Hall*, 12 Wash. 160.

6. Mining Contract. — *Harris v. McNamara*, 97 Ala. 181; *Smith v. Belshaw*, 89 Cal. 427; *Mayhew v. Sullivan Min. Co.*, 76 Me. 100.

7. Stevedore Contract. — *Murray v. Currie*, L. R. 6 C. P. 26; *Dwyer v. National Steamship Co.*, 17 Blachf. (U. S.) 472; *Rankin v. Merchants, etc.*, Transp. Co., 73 Ga. 229, 54 Am. Rep. 874; *Riley v. State Line Steamship Co.*, 29 La. Ann. 791, 29 Am. Dec. 349.

8. Plumber's Contract. — *Bennett v. Truebody*, 66 Cal. 509, 56 Am. Rep. 117.

9. Slater's Contract. — *McCarthy v. Second Parish*, 71 Me. 318, 36 Am. Rep. 320.

10. Contract to Drive Cattle. — *Miffigan v. Wedge*, 4 Per. & Dav. 714, 12 Ad. & El. 737, 40 E. C. L. 177, 10 L. J. Q. B. 19.

11. Contract for Clearing Land. — *Kellogg v. Payne*, 21 Iowa 575; *Ferguson v. Hubbell*, 97 N. Y. 507, 49 Am. Rep. 544.

12. Contract to Work Farm. — *Marsh v. Hand*, 20 N. Y. 315.

13. Injuries Arising in Connection with Real Property. — This distinction was suggested in *Bush v. Steinman*, 1 B. & P. 404, by Eyre, C. J., as a ground of the defendant's liability, and in *Laugher v. Pointer*, 5 B. & C. 579, 12 E. C. L. 325, and *Quarman v. Burnett*, 6 M. & W. 499, such distinction was enunciated as a ground for holding the owner of personal property exempt from liability. In *Reedie v. London, etc.*, R. Co., 4 Exch. 244, however, it was held that there was no such distinction, except when the acts complained of amounted to a nuisance. See also *Blake v. Woolf*, (1898) 2 Q. B. 426. Such a distinction, except perhaps in the early cases following *Bush v. Steinman*, 1 B. & P. 404, above referred to, has never obtained in the *United States* and has been expressly denied whenever adverted to. *Robinson v. Webb*, 11 Bush (Ky.) 464; *Gourdier v. Cormack*, 2 E. D. Smith (N. Y.) 254; *King v. New York Cent., etc.*, R. Co., 66 N. Y. 181, 23 Am. Rep. 37; *Boswell v. Laird*, 8 Cal. 496, 68 Am. Dec. 345; *Prentiss v. Holbrook*, 2 Mich. 372; *Hilliard v. Richardson*, 3 Gray (Mass.) 349, 63 Am. Dec. 743.

14. Acts of Subcontractors—Nonliability of Contractors — *England.* — *Rapson v. Cubitt*, 9 M. & W. 710; *Knight v. Fox*, 5 Exch. 721; *Pearson v. Cox*, 2 C. P. D. 369.

Injuries to Contractor's Servants. — This principle is also applicable in the case of injuries to the contractor's servants resulting from the negligence of such contractor,¹ so as to exempt the contractor's employer from liability therefor, and likewise in the case of injuries to the contractor's servants from the negligence of another independent contractor.²

2. Transfer of Employee. — Cases occasionally arise in which one transfers his servant to a contractor employed by him, and the question in such a case is, in whose work is the servant engaged, and who has the right to control and direct his conduct at the time; such person being the one liable for his acts. It has accordingly been held that if the employer of a contractor lends one of his servants to the contractor to aid in the latter's work, the latter and not the original employer is liable for the acts of the servant.³

Railroad Employees. — This question has arisen most frequently in regard to train hands employed by a railroad company, and placed by the company, together with a construction train, at the service and under the control of an independent contractor doing work on the railroad; the decisions are to the effect that in such a case the employee becomes a servant of the contractor, who alone is liable for the employee's negligence.⁴

Alabama. — *Alabama Midland R. Co. v. Martin*, 100 Ala. 511.

Kentucky. — *Baumeister v. Markham*, (Ky. 1897) 39 S. W. Rep. 844.

Illinois. — *Mohr v. McKenzie*, 60 Ill. App. 575.

Iowa. — *Johnson v. Owen*, 33 Iowa 512.

Missouri. — *Clark v. Hannibal, etc.*, R. Co., 36 Mo. 202.

New Jersey. — *Cuff v. Newark, etc.*, R. Co., 35 N. J. L. 17, 10 Am. Rep. 205.

New York. — *Slater v. Mersereau*, 64 N. Y. 138; *King v. Livermore*, 71 N. Y. 605; *Devlin v. Smith*, 89 N. Y. 470, 42 Am. Rep. 311; *Ditberner v. Rogers*, (Brooklyn City Ct. Gen. T.) 66 How. Pr. (N. Y.) 35; *Gourdier v. Cormack*, 2 E. D. Smith (N. Y.) 254.

Pennsylvania. — *Allen v. Willard*, 57 Pa. St. 374; *Wray v. Evans*, 80 Pa. St. 102.

Tennessee. — *Powell v. Virginia Constr. Co.*, 88 Tenn. 692, 17 Am. St. Rep. 925.

In *Overton v. Freeman*, 11 C. B. 867, 73 E. C. L. 867, the defendant, who had contracted with a parish to pave streets, made a subcontract for the laying of curbstones, and the subcontractor's servants left the stones on the street without any warning or safeguard, whereby the plaintiff was injured, and it was held that the defendant was not liable. Maule, J., said: "I think the present case falls within the principle of those authorities which have decided that the subcontractor, and not the person with whom he contracts, is liable civilly as well as criminally for any wrong done by himself or his servants in the execution of the work contracted for. I do not mean to say that in no case can a contractor be liable for the negligence of his subcontractor; but I say that the simple fact of his filling that character does not make him liable."

1. Injuries to Contractor's Servants — *Georgia.* — *Central R., etc., Co. v. Grant*, 46 Ga. 417.

Illinois. — *Hale v. Johnson*, 80 Ill. 185; *Chicago City R. Co. v. Hennessy*, 16 Ill. App. 153; *West v. St. Louis, etc., R. Co.*, 63 Ill. 545.

Indiana. — *Vincennes Water Supply Co. v. White*, 124 Ind. 376.

Louisiana. — *Gallagher v. Southwestern Exposition Assoc.*, 28 La. Ann. 943.

Michigan. — *Piette v. Bavarian Brewing Co.*, 91 Mich. 605.

New York. — *Cullom v. McKelvey*, 26 N. Y. App. Div. 46.

2. Injuries to Servants of Other Contractor. — *Harkins v. Standard Sugar Refinery*, 122 Mass. 400; *Murphy v. Altman*, 28 N. Y. App. Div. 472; *Jones v. Philadelphia Traction Co.*, 185 Pa. St. 75.

So one who employs master mechanics to do certain work under his agent's general direction, each to furnish the men, tools, and tackle necessary for his work, is not, in the absence of negligence in their selection, liable for an injury resulting to a servant employed by one master mechanic through the negligence of another in furnishing imperfect tackle, or in the manner of using it. *Harkins v. Standard Sugar Refinery*, 122 Mass. 400.

3. Transfer of Employee. — *Union Steamship Co. v. Claridge*, (1894) A. C. 185; *Murray v. Currie*, 40 L. J. C. Pl. 26, L. R. 6 C. P. 24, 23 L. T. N. S. 557, 19 W. R. 104; *Cotter v. Lindgren*, 106 Cal. 602, 46 Am. St. Rep. 255; *Brown v. Smith*, 86 Ga. 274, 22 Am. St. Rep. 456; *Pioneer Fireproof Constr. Co. v. Hansen*, 176 Ill. 100, affirming 69 Ill. App. 659; *Wood v. Cobb*, 13 Allen (Mass.) 58; *Ditberner v. Rogers*, (Brooklyn City Ct. Gen. T.) 66 How. Pr. (N. Y.) 35, 13 Abb. N. Cas. (N. Y.) 436.

In *Higgins v. Western Union Tel. Co.*, 156 N. Y. 75, reversing (N. Y. Super. Ct. Gen. T.) 11 Misc. (N. Y.) 32, it was decided that the owner of a building who had let out a contract for repairs thereon was not liable for injuries caused by the negligence of an employee of such owner who had been placed temporarily under the control of the contractor in order to run an elevator for carrying materials, he being a servant of the contractor for the time being.

4. Railroad Employees. — *Scarborough v. Alabama Midland R. Co.*, 94 Ala. 407 (citing 14 AM. AND ENG. ENCYC. OF LAW 838); *Miller v. Minnesota, etc., R. Co.*, 76 Iowa 655, 14 Am. St. Rep. 258; *Hitte v. Republican Valley R. Co.*, 19 Neb. 620; *Powell v. Virginia Constr. Co.*, 88 Tenn. 692, 17 Am. St. Rep. 925.

A Contrary Decision was rendered in *New*

Drivers of Vehicles. — These cases are to be distinguished from those in which the negligence of the driver of a vehicle is held to be chargeable, not to the hirer thereof, who, though at the time directing its movements, cannot be regarded as controlling the driver in the matter wherein he is negligent, but to the proprietor of the vehicle, who has intrusted the general management and control of the vehicle to his own servant, the driver.¹

3. Injury from Acts Contracted for. — If the injury results directly from the acts called for or rendered necessary by the contract, and not from acts which are merely collateral to the contract, the employer is liable as if he had himself performed such acts.²

Orleans, etc., R. Co. v. Norwood, 62 Miss. 565, 52 Am. Rep. 191, on the authority of the cases referred to in the next following note. And to the same effect see Burton v. Galveston, etc., R. Co., 61 Tex. 527, distinguishing Cunningham v. International R. Co., 51 Tex. 503, 32 Am. Rep. 632.

1. Drivers of Vehicles. — Laugher v. Pointer, 5 B. & C. 547, 12 E. C. L. 311; Quarman v. Burnett, 6 M. & W. 499; Jones v. Liverpool, 14 Q. B. D. 890; Little v. Hackett, 116 U. S. 366; Foster v. Wadsworth-Howland Co., 168 Ill. 514, affirming 50 Ill. App. 513; Huff v. Ford, 126 Mass. 24, 30 Am. Rep. 645; Michael v. Stanton, 3 Hun (N. Y.) 462; Boniface v. Relyea, (N. Y. Super. Ct. Gen. T.) 36 How. Pr. (N. Y.) 457; Weyant v. New York, etc., R. Co., 3 Duer (N. Y.) 360.

2. Injuries from Acts Contracted for — England. — Pitts v. Kingsbridge Highway Board, 25 L. T. N. S. 195, 19 W. R. 884; Butler v. Hunter, 7 H. & N. 826; Hole v. Sittingbourne, etc., R. Co., 6 H. & N. 489; Butler v. Hunter, 7 H. & N. 826; Ellis v. Sheffield Gas Consumers Co., 2 El. & Bl. 767, 75 E. C. L. 767; Pickard v. Smith, 10 C. B. N. S. 470, 100 E. C. L. 470; Angus v. Dalton, 4 Q. B. D. 184, 6 App. Cas. 829.

United States. — Robbins v. Chicago, 4 Wall. (U. S.) 679, affirming Chicago v. Robbins, 2 Black (U. S.) 418; St. Paul Water Co. v. Ware, 16 Wall. (U. S.) 576; McNamee v. Hunt, 87 Fed. Rep. 298.

California. — Andrews v. Runyon, 65 Cal. 623; Frassi v. McDonald, 122 Cal. 400.

Georgia. — Atlanta, etc., R. Co. v. Kimberly, 87 Ga. 161, 27 Am. St. Rep. 231.

Illinois. — Waller v. Lasher, 37 Ill. App. 609; Florsheim v. Dullaghan, 58 Ill. App. 593.

Indiana. — Cameron v. Oberlin, 19 Ind. App. 142.

Kentucky. — Matheny v. Woiffs, 2 Duv. (Ky.) 137; Baumeister v. Markham, (Ky. 1897) 39 S. W. Rep. 844.

Maine. — Eaton v. European, etc., R. Co., 59 Me. 520, 8 Am. Rep. 430; Leavitt v. Bangor, etc., R. Co., 80 Me. 509.

Maryland. — Deford v. State, 30 Md. 179.

Massachusetts. — Gorham v. Gross, 125 Mass. 232, 28 Am. Rep. 224.

Michigan. — Skelton v. Fenton Electric Light, etc., Co., 100 Mich. 87.

Minnesota. — Sewall v. St. Paul, 20 Minn. 511; Leber v. Minneapolis, etc., R. Co., 29 Minn. 256.

Missouri. — Williamson v. Fischer, 50 Mo. 198; Horner v. Nicholson, 56 Mo. 220; Crenshaw v. Ullman, 113 Mo. 638.

Nebraska. — Palmer v. Lincoln, 5 Neb. 136, 25 Am. Rep. 470.

New Hampshire. — Carter v. Berlin Mills Co., 58 N. H. 52, 42 Am. Rep. 572.

New York. — Buddin v. Fortunato, 16 Daly (N. Y.) 195; Engel v. Eureka Club, 59 Hun (N. Y.) 593; Weber v. Buffalo R. Co., 20 N. Y. App. Div. 292; Burmeister v. New York El. R. Co., 47 N. Y. Super. Ct. 264; Storrs v. Utica, 17 N. Y. 104, 72 Am. Dec. 437; Congreve v. Smith, 18 N. Y. 79; Lockwood v. New York, 2 Hilt. (N. Y.) 66; Johnston v. Phoenix Bridge Co., 44 N. Y. App. Div. 581.

Ohio. — Carman v. Steubenville, etc., R. Co., 4 Ohio St. 399; Tiffin v. McCormack, 34 Ohio St. 638, 32 Am. Rep. 408; Hughes v. Cincinnati, etc., R. Co., 39 Ohio St. 461; Fisher v. Tryon, 15 Ohio Cir. Ct. 541, 8 Ohio Cir. Dec. 556.

Rhode Island. — Sanford v. Pawtucket St. R. Co., 19 R. I. 537.

Vermont. — Bailey v. Troy, etc., R. Co., 57 Vt. 252, 52 Am. Rep. 129.

Washington. — Koch v. Sackman-Phillips Invest. Co., 9 Wash. 405.

Wisconsin. — Hundhausen v. Bond, 36 Wis. 29; Hamilton v. Fond du Lac, 40 Wis. 47; Whitney v. Clifford, 46 Wis. 138, 32 Am. Rep. 703; Hackett v. Western Union Tel. Co., 80 Wis. 187; Smith v. Milwaukee Builders', etc., Exch., 91 Wis. 360, 51 Am. St. Rep. 912; Carlson v. Stocking, 91 Wis. 432.

Contract for Repairing Canal. — In Williams v. Fresno Canal, etc., Co., 96 Cal. 14, 31 Am. St. Rep. 172, it was held that a canal company which contracted for the repair of its canal, the repairing to be made with soil taken from the plaintiff's land, was liable to the plaintiff for the damage to his land caused by the performance of the contract, and could not defend on the ground that the injury was actually done by the contractor.

Contract for Driving Logs. — So in McDonell v. Rifle Boom Co., 71 Mich. 61, where a boom company let to contractors the work of driving logs in a river in which the company had built a series of dams, it was held that if in order to fulfil the contract it was necessary that such quantities of logs should be kept below the lower dam as would cause a jam of several miles in length, and by this the water would be backed upon the plaintiff's land, the company was liable, but that if this was not necessary under the contract, the contractors alone would be liable.

Contract to Shore Walls. — In Ketcham v. Newman, 141 N. Y. 205, it was held that, since the New York law requires a landowner in New York City and Brooklyn when excavating for a building to shore up adjacent buildings only if "afforded the necessary license to enter on the adjoining land, and not otherwise,"

Defective Plans and Specifications furnished to the contractor are, upon this principle, a ground for imposing liability for injuries caused by such defects upon the employer who furnished the plans and specifications.¹

Contract for Nuisance. — The statement quite frequently found, that the employer is liable if the contract calls for the creation of a nuisance, is but an application, it seems, of the same idea.²

4. Legal Duties Not Transferable — *a. IN GENERAL.* — A person or corporation on whom positive duties are imposed by law cannot avoid liability for injuries resulting from failure to perform such duties, by employing a contractor for the purpose; nor, in such a case, is the fact that the injuries resulted from the contractor's negligence a defense.³

b. MUNICIPAL CORPORATIONS. — The most important application of this principle that one who is under a positive duty cannot relieve himself therefrom by delegating it to an independent contractor occurs in the case of a municipal corporation, which, by the decided weight of authority, is liable for injuries caused by defects in its streets or highways, though these are the direct result of the negligence of a contractor employed by it, since it is under the positive duty of keeping its streets in a safe condition;⁴ and the munici-

a contract to do such shoring " as required by law " did not necessarily involve a trespass on the adjacent buildings, and the owner was not liable for injuries caused by the entry of the contractor on the adjacent land without the license of the occupants of that land.

The Necessity of an Act to complete the work does not render the employer liable if the injury is not a necessary result of that act but results merely from the negligence of the contractor in doing it. *Brown v. McLeish*, 71 Iowa 381.

So a railroad company was held not liable for injuries caused by the negligence of a contractor in managing a steam shovel merely because the contract contemplated the use of such shovel, the work being lawful and the shovel a customary appliance for the work. *Hailey v. Troy, etc., R. Co.*, 57 Vt. 252, 52 Am. Rep. 129.

1. Defective Plans and Specifications. — *Evans v. Murphy*, 87 Md. 498; *Wilkinson v. Detroit Steel, etc., Works*, 73 Mich. 405; *Lancaster v. Connecticut Mut. L. Ins. Co.*, 92 Mo. 460, 1 Am. St. Rep. 739.

2. Contract for Nuisance — *England.* — *Knight v. Fox*, 5 Exch. 721; *Reedie v. London, etc., R. Co.*, 4 Exch. 244; *Butler v. Hunter*, 7 H. & N. 826.

United States. — *St. Paul Water Co. v. Ware*, 16 Wall. (U. S.) 566; *Robbins v. Chicago*, 4 Wall. (U. S.) 657, *affirming Chicago v. Robbins*, 2 Black (U. S.) 427.

Indiana. — *Logansport v. Dick*, 70 Ind. 65, 36 Am. Rep. 166; *Wabash, etc., R. Co. v. Farver*, 111 Ind. 195, 60 Am. Rep. 606.

Kentucky. — *Robinson v. Webb*, 11 Bush (Ky.) 464; *James v. McMinimy*, 93 Ky. 471, 40 Am. St. Rep. 200.

Maryland. — *Deford v. State*, 30 Md. 179; *City, etc., R. Co. v. Moores*, 80 Md. 352, 45 Am. St. Rep. 345, *cited in Bonaparte v. Wiseman*, 89 Md. 12.

Michigan. — *Wilkinson v. Detroit Steel, etc., Works*, 73 Mich. 405.

New York. — *King v. New York Cent., etc., R. Co.*, 66 N. Y. 185, 23 Am. Rep. 37; *Bensen v. Suarez*, (Supm. Ct. Gen. T.) 28 How. Pr.

(N. Y.) 511; *Osborn v. Union Ferry Co.*, 53 Barb. (N. Y.) 629.

Ohio. — *Clark v. Fry*, 8 Ohio St. 358, 72 Am. Dec. 590.

See also *infra*, this section, *Work Intrinsically Dangerous or Probably Injurious*.

3. Legal Duties Not Transferable — *England.* — *Pickard v. Smith*, 10 C. B. N. S. 470, 100 E. C. L. 470; *Gray v. Pullen*, 5 B. & S. 970, 117 E. C. L. 970; *Hole v. Sittingbourne, etc., R. Co.*, 6 H. & N. 488; *Mersey Docks, etc., v. Gibbs*, L. R. 1 H. L. 93; *Dalton v. Angus*, 6 App. Cas. 740; *Francis v. Cockrell*, L. R. 5 Q. B. 184; *Brazier v. Polytechnic Inst., I F. & F.* 507.

United States. — *Texas, etc., R. Co. v. June-man*, 71 Fed. Rep. 939.

Georgia. — *Wilson v. White*, 71 Ga. 506, 51 Am. Rep. 269.

Maryland. — *City, etc., R. Co. v. Moores*, 80 Md. 348, 45 Am. St. Rep. 345.

Massachusetts. — *Woodman v. Metropolitan R. Co.*, 149 Mass. 340, 14 Am. St. Rep. 427; *Lowell v. Boston, etc., R. Corp.*, 23 Pick. (Mass.) 24, 34 Am. Dec. 33, *explained in Hilliard v. Richardson*, 3 Gray (Mass.) 349, 63 Am. Dec. 743.

New Hampshire. — *Wright v. Holbrook*, 52 N. H. 120, 13 Am. Rep. 12.

Ohio. — *Hawver v. Whalen*, 49 Ohio St. 69.

Pennsylvania. — *Chartiers Valley Gas Co. v. Waters*, 123 Pa. St. 220.

Vermont. — *Willard v. Newbury*, 22 Vt. 458; *Batty v. Duxbury*, 24 Vt. 155.

One Who Was Bound to Keep in Repair a Lamp Hung by Him over the Highway, in order that it might not endanger passers, was held not to be relieved from liability merely by employing a contractor to repair it. *Tarry v. Ashton*, 1 Q. B. D. 314.

4. Municipality Liable for Defective Streets — *United States.* — *King v. Cleveland*, 28 Fed. Rep. 835.

Alabama. — *Birmingham v. McCary*, 84 Ala. 469.

Florida. — *Jacksonville v. Drew*, 19 Fla. 106, 45 Am. Rep. 5.

Georgia. — *Savannah v. Waldner*, 49 Ga. 322,

pality cannot protect itself in this regard by stipulations requiring the contractor to take proper precautions.¹ But a city is not liable for injuries caused by conditions resulting from the negligence of a contractor, if these conditions did not involve any neglect of municipal duty.²

Illinois. — *Scammon v. Chicago*, 25 Ill. 424, 79 Am. Dec. 334; *Bloomington v. Bay*, 42 Ill. 503; *Springfield v. Le Claire*, 49 Ill. 476; *Jefferson v. Chapman*, 127 Ill. 439, 11 Am. St. Rep. 136; *Sterling v. Schiffmacher*, 47 Ill. App. 141.

Indiana. — *Grove v. Ft. Wayne*, 45 Ind. 429, 15 Am. Rep. 262; *Centerville v. Woods*, 57 Ind. 192; *Logansport v. Dick*, 70 Ind. 65, 36 Am. Rep. 166; *Park v. Adams County*, 3 Ind. App. 536.

Maine. — *Butler v. Bangor*, 67 Me. 385.

Maryland. — *Baltimore v. O'Donnell*, 53 Md. 110, 36 Am. Rep. 395.

Massachusetts. — *Brooks v. Somerville*, 106 Mass. 271.

Minnesota. — *St. Paul v. Seitz*, 3 Minn. 297, 74 Am. Dec. 753.

Missouri. — *Barry v. St. Louis*, 17 Mo. 121; *Blake v. St. Louis*, 40 Mo. 569; *Bowie v. Kansas City*, 51 Mo. 454; *Bassett v. St. Joseph*, 53 Mo. 290, 14 Am. Rep. 446; *Welsh v. St. Louis*, 73 Mo. 71; *Russell v. Columbia*, 74 Mo. 491; *Haniford v. Kansas City*, 103 Mo. 172.

Nebraska. — *Omaha v. Jensen*, 35 Neb. 68, 37 Am. St. Rep. 432; *Beatrice v. Reid*, 41 Neb. 214.

New York. — *Storrs v. Utica*, 17 N. Y. 104, 72 Am. Dec. 437; *Brusso v. Buffalo*, 90 N. Y. 679; *Turner v. Newburgh*, 109 N. Y. 301, 4 Am. St. Rep. 453; *Pettengill v. Yonkers*, 116 N. Y. 558, 15 Am. St. Rep. 442, *affirming* 39 Hun (N. Y.) 449; *Scanlon v. Watertown*, 14 N. Y. App. Div. 1; *Weber v. Buffalo R. Co.*, 20 N. Y. App. Div. 292; *Dressell v. Kingston*, 32 Hun (N. Y.) 533; *Hawthurst v. New York*, 43 Hun (N. Y.) 588.

Ohio. — *Circleville v. Neuding*, 41 Ohio St. 465.

Oregon. — *McAllister v. Albany*, 18 Oregon 426.

Tennessee. — *Nashville v. Brown*, 9 Heisk. (Tenn.) 1, 24 Am. Rep. 289.

Washington. — *Seattle v. Buzby*, 2 Wash. Ter. 25.

West Virginia. — *Wilson v. Wheeling*, 19 W. Va. 323, 42 Am. Rep. 780.

Illustrations. — In *Jefferson v. Chapman*, 127 Ill. 439, 11 Am. St. Rep. 136, an incorporated village was held liable for injuries caused by the act of one employed to grade a street, in not fastening the boards on a walk which it had been necessary for him to remove in the course of the work. So in *Circleville v. Neuding*, 41 Ohio St. 465, a city was held liable for the value of a horse killed by falling into an unguarded cistern being constructed by a contractor for the city.

Contract to Lowest Bidder. — The fact that the law requires the contract to be let to the lowest bidder does not, it seems, exempt the municipality. *Detroit v. Corey*, 9 Mich. 165, 80 Am. Dec. 78. Compare, however, *California* decisions in note *infra*, under next paragraph of the text.

Charter Exemption from Liability. — In *Hincks v. Milwaukee*, 46 Wis. 559, 32 Am. Rep. 735, it was decided that a provision in the city char-

ter exempting the city from liability for injuries caused by the neglect of city contractors working in the streets was invalid as granting a special immunity.

1. Stipulations in Contract. — *Pettengill v. Yonkers*, 116 N. Y. 558, 15 Am. St. Rep. 442; *Scanlon v. Watertown*, 14 N. Y. App. Div. 1; *Weber v. Buffalo R. Co.*, 20 N. Y. App. Div. 292.

Different Ground of Liability. — In *Detroit v. Corey*, 9 Mich. 165, 80 Am. Dec. 78, in which a city was held liable for the negligence of a sewer contractor making an excavation in the street, the decision was based not on the duty of the city to keep the streets in repair, but on the ground that the donee of a power to construct sewers is bound to guard against accidents arising from the construction. Compare *Blumb v. Kansas City*, 84 Mo. 112, 54 Am. Rep. 87.

2. Municipality Generally Not Liable for Contractor's Acts — *Illinois*. — *East St. Louis v. Giblin*, 3 Ill. App. 219; *Nevins v. Peoria*, 41 Ill. 502, 89 Am. Dec. 392.

Michigan. — *Fuller v. Grand Rapids*, 105 Mich. 529.

Minnesota. — *Shute v. Princeton Tp.*, 58 Minn. 337.

Missouri. — *Blumb v. Kansas City*, 84 Mo. 112, 54 Am. Rep. 87.

New York. — *Pack v. New York*, 8 N. Y. 222; *Van Wert v. Brooklyn*, (Supm. Ct. Gen. T.) 28 How. Pr. (N. Y.) 451.

Pennsylvania. — *Heidenwag v. Philadelphia*, 168 Pa. St. 72.

Wisconsin. — *Kuehn v. Milwaukee*, 92 Wis. 263.

Lighting Streets. — So where the statutes did not oblige the city council to keep the streets lighted, but authorized it to make contracts for the purpose, and at the time of the accident in question the streets were lighted by a company under contract with the city, it was held that the failure to keep a particular street lighted was negligence on the part of the contractor, and that the city was not liable for injuries resulting therefrom. *Halifax v. Lordly*, 20 Can. Sup. Ct. 505.

Sewers. — And injuries to land caused by the negligence of a city contractor in constructing sewers were likewise held not to give a cause of action against the city. *Harding v. Boston*, 163 Mass. 14.

Blasting in Street. — A municipality has been held to be free from liability for injuries to one on the street caused by blasting done by a city contractor, the street itself being in good order. *Herrington v. Lansingburgh*, 110 N. Y. 145, 6 Am. St. Rep. 348. But see *Logansport v. Dick*, 70 Ind. 65, 36 Am. Rep. 166, where allowing blasting by a contractor without proper precautions was decided to be a breach of the city's duty to keep the streets in safe condition.

Delay in Completion of Work. — Where a city contractor began a certain work but delayed its completion long beyond the time fixed for completing it, the city was held to be liable for

Contrary Decisions. — The only states in which it is held that a city is exempt from liability for injuries caused by defects in streets and highways, resulting from the negligence of an independent contractor, are *California* and *Pennsylvania*, in which the rule exempting an employer from liability for the acts of a contractor has been applied in the case of injuries from defective streets, without reference to the municipal duty of keeping the streets in safe condition.¹ In the first-named state the fact that the municipality is required by statute to let the doing of the work to a contractor seems also to have been regarded as being in itself ground for exempting it from liability.²

c. RAILROAD COMPANIES. — It is no defense to an action by a passenger for injuries caused by the obstruction of the track by work being done thereon, that the obstruction resulted from the negligence of an independent contractor;³ and the company is liable for defects in a highway crossing resulting from the negligence of a contractor.⁴ So it is no excuse for failure to construct a railroad fence, that an independent contractor had contracted to do it.⁵ And a railroad company was held to be liable for injuries resulting from failure to fence, though the road was at the time in the hands of a contractor who was grading the track, the contract not referring to the building of fences.⁶

d. CANAL COMPANIES. — A canal company whose charter required it to keep the bridges across the canal in repair was held to be unable to transfer such duty to an independent contractor.⁷

e. TURNPIKE COMPANIES. — A turnpike company likewise has been decided to be under a positive duty to the public, which it cannot delegate to a contractor.⁸

f. MASTER AND SERVANT. — A master's duty to furnish to his employees a safe place to work cannot be delegated to an independent contractor.⁹ A scaffolding or staging, however, has been held to be not a place for work, but rather an appliance or instrumentality for the doing of work, and a master

damages arising from its own failure to complete the work. *Vogel v. New York*, 92 N. Y. 10, 44 Am. Rep. 349.

1. Municipality Not Liable for Defective Streets — California. — *James v. San Francisco*, 6 Cal. 528, 65 Am. Dec. 526; *O'Hale v. Sacramento*, 48 Cal. 212; *Krause v. Sacramento*, 48 Cal. 221.

Pennsylvania. — *School Dist. v. Fuess*, 98 Pa. St. 600, 42 Am. Rep. 627; *Reed v. Allegheny City*, 79 Pa. St. 300; *Erie v. Caulkins*, 85 Pa. St. 247, 27 Am. Rep. 642; *Susquehanna Depot v. Simmons*, 112 Pa. St. 384, 56 Am. Rep. 317; *Lancaster Ave. Imp. Co. v. Rhoads*, 116 Pa. St. 377, 2 Am. St. Rep. 608; *Eby v. Lebanon County*, 166 Pa. St. 632.

2. Obligation to Let Contract. — *James v. San Francisco*, 6 Cal. 528, 65 Am. Dec. 526.

3. Railroad Company — Duty to Passenger. — *Carrico v. West Virginia Cent., etc.*, R. Co., 39 W. Va. 86; *Virginia Cent. R. Co. v. Sanger*, 15 Gratt. (Va.) 230.

4. Highway Crossings. — *Taylor, etc., R. Co. v. Warner*, 88 Tex. 642, *affirming* (Tex. Civ. App. 1895) 31 S. W. Rep. 66; *West Riding, etc., R. Co. v. Wakefield*, 33 L. J. M. C. 174; *Veazie v. Penobscot R. Co.*, 49 Me. 119. But see remarks in *Eaton v. European, etc., R. Co.*, 59 Me. 532, 8 Am. Rep. 430.

5. Railroad Fences. — *Rockford, etc., R. Co. v. Heflin*, 65 Ill. 366; *Houston, etc., R. Co. v. Meador*, 50 Tex. 77.

6. Pound v. Port Huron, etc., R. Co., 54 Mich. 13.

7. Canal Company. — *Pennsylvania, etc., Canal Co. v. Graham*, 63 Pa. St. 290, 3 Am. Rep. 549. In this case the court said that "where a

corporation in consideration of the franchise granted to it is bound by its charter to keep a road or bridge in repair," it is not relieved from liability for injuries arising from want of repair by the fact that the work of construction was done under contract by competent workmen.

8. Turnpike Companies. — In *Lancaster Ave. Imp. Co. v. Rhoads*, 116 Pa. St. 377, 2 Am. St. Rep. 608, it was decided that a turnpike company undertaking to lower the grade of its road while in receipt of tolls from travelers must warn travelers of danger threatened by obstructions, and take measures to direct them in the proper route, and these duties cannot be shifted to an independent contractor.

But in *City, etc., R. Co. v. Moores*, 80 Md. 348, 45 Am. St. Rep. 345, while the general duty of the turnpike company to the public was recognized, it was decided not to be liable for the negligence of an independent contractor who, in using an engine on tracks already laid on the turnpike, is negligent in his mode of running it, the court distinguishing this from the case of an actual obstruction of the road.

9. Master's Duty to Furnish Safe Place for Work. — *Trainor v. Philadelphia, etc., R. Co.*, 137 Pa. St. 148; *Burnes v. Kansas City, etc., R. Co.*, 129 Mo. 41; *The Magdaline*, 91 Fed. Rep. 798. See the title MASTER AND SERVANT.

Illustration. — In *Herdler v. Buck's Stove, etc., Co.*, 136 Mo. 3, it was decided that a servant directed to work in an unsafe place had a right of action against the master though the place was rendered unsafe by the negligence of an independent contractor.

who lets the construction thereof to a skilful and experienced builder is not liable to his servant for injuries resulting from negligence in its construction.¹

g. DUTY TO GUESTS. — The owner of premises which are under his control, who employs an independent contractor to do upon them work which, from its nature, is likely to render the premises dangerous to persons who may come upon them by the invitation of the owner, is not relieved, by reason of the contract, from the obligation of seeing that due care is used to protect such persons.²

h. LANDLORD AND TENANT. — A landlord making repairs to premises occupied by a tenant owes to the latter a duty of exercising reasonable care during the making of the repairs to protect the tenant from injuries which might, otherwise result from the character of the work undertaken, and this duty he cannot escape by employing an independent contractor to make the repairs,³ unless there is an agreement between the landlord and tenant that the repairs shall be thus made.⁴

i. ADJOINING OWNERS. — It has been decided in some cases that adjoining owners owe certain duties to each other which cannot be delegated to a contractor. So it has been held that one who is bound to remove a wall to avoid injury to neighboring property cannot exempt himself from liability by making a contract for the removal of the wall;⁵ and that where one adjoining owner has an easement of support in the adjoining land, the owner of the latter is not relieved of liability for the withdrawal of such support, by the fact that the work was done by an independent contractor.⁶ And one having

1. *Scaffolding or Staging.* — *Devlin v. Smith*, 89 N. Y. 470, 42 Am. Rep. 311; *Butler v. Townsend*, 126 N. Y. 105; *Wittenberg v. Friederich*, 8 N. Y. App. Div. 433.

2. *Duty to Guests.* — *Curtis v. Kiley*, 153 Mass. 123.

So a company which by advertisement has induced persons to go on its premises to see an exhibition conducted by an independent contractor has been held liable for injuries to such persons resulting from the character of the exhibition itself, the company being in such case bound to warn or protect the persons invited. *Richmond, etc., R. Co. v. Moore*, 94 Va. 493; *Thompson v. Lowell, etc., St. R. Co.*, 170 Mass. 577. But see *Smith v. Benick*, 87 Md. 610.

3. *Landlord's Duty to Tenant.* — *Malony v. Brady*, (C. Pl. Gen. T.) 14 N. Y. Supp. 794, 18 N. Y. Supp. 757, 19 N. Y. Supp. 911; *Lasker Real Estate Assoc. v. Hatcher*, (Tex. Civ. App. 1894) 28 S. W. Rep. 404; *Wertheimer v. Saunders*, 95 Wis. 573; *Wilber v. Follansbee*, 97 Wis. 577. See the title LANDLORD AND TENANT.

Illustration. — In *Sulzbacher v. Dickie*, (C. Pl. Gen. T.) 51 How. Pr. (N. Y.) 500, 6 Daly (N. Y.) 469, it was held that where the owner of a building entered into a contract with the builder to put on a new roof at a stipulated price, and during the time of putting it on and after the removal of the old roof the tenant or subtenant was damaged by rain, because of the exposed condition of the building, the owner was liable for damages.

A *Contrary View* is apparently taken in *Lawrence v. Shipman*, 39 Conn. 587 (a decision by a Supreme Court judge as arbitrator). And in *Missouri* the landlord was held not to be liable for the death of the tenant's child caused by the negligence of a contractor employed by him in leaving unguarded an excavation called for by the contract. *Wiese v. Remme*, 140 Mo. 289. Compare *O'Connor v. Schnepel*, (N.

Y. Super. Ct. Gen. T.) 12 Misc. (N. Y.) 356, *Blake v. Woolf*, (1898) 2 Q. B. 426.

Surrender of Premises. — In some cases the landlord has been held liable for such injuries to the tenant, though the work was done under contract, merely because there was no surrender of the premises to the contractor, and, consequently, a want of independence of control. *Glickauf v. Maurer*, 75 Ill. 289, 20 Am. Rep. 238; *Bernauer v. Hartman Steel Co.*, 33 Ill. App. 491; *Mumby v. Bowden*, 25 Fla. 454.

4. *Agreement with Tenant for Repairs.* — *Jefferson v. Jameson, etc., Co.*, 165 Ill. 138; *Lasker Real Estate Assoc. v. Hatcher*, (Tex. Civ. App. 1894) 28 S. W. Rep. 404.

5. *Adjoining Owners — Removal of Walls.* — *Sessengut v. Posey*, 67 Ind. 408, 33 Am. Rep. 98; *Steinbock v. Covington, etc., Bridge Co.*, 6 Ohio Dec. 328, 4 Ohio N. P. 229. See also, as to liability for injuries caused by a contractor in the removal of a wall, *Engel v. Eureka Club*, 137 N. Y. 100, 33 Am. St. Rep. 692; *Dillon v. Hunt*, 105 Mo. 154, 24 Am. St. Rep. 374.

6. *Easement of Support.* — *Angus v. Dalton*, 4 Q. B. D. 184, 6 App. Cas. 740; *Bower v. Peate*, 1 Q. B. D. 321; *Bonaparte v. Wiseman*, 89 Md. 12. The decisions in these cases are likewise, it appears, based upon the liability of an employer contracting for dangerous work. See *infra*, this section, *Work Intrinsically Dangerous or Probably Injurious*. See also as to easement of support, *Stevenson v. Wallace*, 27 Gratt. (Va.) 77; *Lemaitre v. Davis*, 19 Ch. D. 281.

Statutory Right of Support. — In *Dorrity v. Rapp*, 72 N. Y. 307, it was decided that the statutory duty of a landowner intending to excavate, to support a wall upon adjoining land, was of a personal character of which he could not relieve himself by delegating the work of excavation to a contractor.

an interest in a party wall has been held to be bound to see that a contractor exercises reasonable care and skill in operations involving the use of the party wall.¹

Employer Not Liable. — Generally, however, the employer is not liable for injuries resulting to his adjoining owner from the negligence of a contractor.²

5. Work Intrinsically Dangerous or Probably Injurious. — If the work contracted for is of such a character that it is intrinsically dangerous or will probably result in injury to a third person, one contracting to have it done is liable for such injuries though the injury may be avoided if the contractor take proper precautions,³ a distinction being made between such a case and one in which the work contracted for is such that if properly done no injurious consequences can arise.⁴

1. Use of Party Wall. — The appellant and the respondent were owners of adjoining houses, between which was a party wall. The appellant's house also adjoined B.'s house, and between them was a party wall. The appellant employed a builder to pull down his house and rebuild it. In the course of rebuilding, the builder's workmen, in fixing a staircase, negligently and without the knowledge of the appellant cut into the party wall between the appellant's house and B.'s house, in consequence of which the appellant's house fell, and the fall injured the respondent's house. The cutting of the party wall was not authorized by the contract between the appellant and his builder, and it was held that the appellant could not get rid of the responsibility of seeing that the operations involving the use of the party wall were conducted with reasonable care, by delegating the performance to a third person, and that he was liable to the respondent for the injury to his house. *Hughes v. Percival*, 52 L. J. Q. B. 719, 8 App. Cas. 443, 49 L. T. N. S. 189, 31 W. R. 725, 47 J. P. 772.

But in *Earl v. Beadleston*, 42 N. Y. Super. Ct. Rep. 294, it was decided that one employing a contractor to take down a building whose beams rested in a party wall was not liable for the negligence of the contractor in doing this work in such a manner as to weaken the party wall to the injury of the adjoining owner, the presumption being that the contract was to have the house pulled down in a proper manner. Citing *Butler v. Hunter*, 7 H. & N. 826.

2. Employer Not Liable — England. — *Butler v. Hunter*, 7 H. & N. 826.

Alabama. — *Myer v. Hobbs*, 57 Ala. 175, 29 Am. Rep. 719.

California. — *Aston v. Nolan*, 63 Cal. 269.

Georgia. — *Harrison v. Kiser*, 79 Ga. 588.

Kentucky. — *Robinson v. Webb*, 11 Bush (Ky.) 464.

Massachusetts. — *Connors v. Hennessey*, 112 Mass. 96.

New York. — *Gilbert v. Beach*, 5 Bosw. (N. Y.) 455, 4 Duer (N. Y.) 423; *Benedict v. Martin*, 36 Barb. (N. Y.) 288.

3. Dangerous or Injurious Work — England. — *Hughes v. Percival*, 8 App. Cas. 443; *Hole v. Sittingbourne*, etc., R. Co., 6 H. & N. 488; *Hardaker v. Idle Dist. Council*, (1896) 1 Q. B. 335; *Pickard v. Smith*, 10 C. B. N. S. 470, 100 E. C. L. 470; *Bower v. Peate*, 1 Q. B. D. 321. *California.* — *Donovan v. Oakland*, etc., *Rapid Transit Co.*, 102 Cal. 245.

Georgia. — *Savannah v. Waldner*, 49 Ga. 316.

Illinois. — *Joliet v. Harwood*, 86 Ill. 110, 29

Am. Rep. 17; *Jefferson v. Chapman*, 127 Ill. 438, 11 Am. St. Rep. 136; *Capital Electric Co. v. Hauswald*, 78 Ill. App. 359.

Indiana. — *Dooley v. Sullivan*, 112 Ind. 451, 2 Am. St. Rep. 209.

Maryland. — *City, etc., R. Co. v. Moores*, 80 Md. 348, 45 Am. St. Rep. 345; *Bonaparte v. Wiseman*, 89 Md. 12.

Massachusetts. — *Stewart v. Putnam*, 127 Mass. 403; *Pye v. Faxon*, 156 Mass. 471; *Gorham v. Gross*, 125 Mass. 232, 28 Am. Rep. 224; *Woodman v. Metropolitan R. Co.*, 149 Mass. 340, 14 Am. St. Rep. 427.

Missouri. — *Dillon v. Hunt*, 105 Mo. 154, 24 Am. St. Rep. 374.

New York. — *Hexamer v. Webb*, 101 N. Y. 377, 54 Am. Rep. 703; *Downey v. Low*, 22 N. Y. App. Div. 460; *Johnston v. Phoenix Bridge Co.*, 44 N. Y. App. Div. 581; *Sulzbacher v. Dickie*, (C. Pl. Gen. T.) 51 How. Pr. (N. Y.) 523.

Ohio. — *Circleville v. Neuding*, 41 Ohio St. 465; *Covington, etc., Bridge Co. v. Steinbrock*, (Ohio 1899) 55 N. E. Rep. 618; *Southern Ohio R. Co. v. Morey*, 47 Ohio St. 207.

Texas. — *Houston v. Isaacks*, 68 Tex. 116.

Wisconsin. — *Wertheimer v. Saunders*, 95 Wis. 573; *Wilber v. Follansbee*, 97 Wis. 577.

A Gas Company Which Let a Contract for the Construction of Mains, which contract required explosive gas to be propelled through the mains before they were thoroughly cemented together, was held to be liable for resulting injuries, though the work was done by a contractor, the work being intrinsically dangerous. *Chicago Economic Fuel Gas Co. v. Myers*, 168 Ill. 130.

Clearing Up Land — Spread of Fire. — In *Black v. Christchurch Finance Co.*, (1894) A. C. 48, persons who employed a contractor to clear off brush from their lands, partly by cutting the brush and partly by burning it, were held liable for injuries to the property of an adjoining owner caused by the spreading of the fire, the operation of lighting a fire on open brush land being necessarily attended with danger.

See the title *FIRE*, vol. 13, p. 404.

4. Distinguished from Other Work. — *Wabash, etc., R. Co. v. Farver*, 111 Ind. 195, 60 Am. Rep. 696; *Wood v. Independent School Dist.*, 44 Iowa 30; *Maltbie v. Bolting*, (N. Y. Super. Ct. Gen. T.) 6 Misc. (N. Y.) 339; *Bailey v. Troy, etc., R. Co.*, 57 Vt. 262, 52 Am. Rep. 129. In *Bower v. Peate*, 1 Q. B. D. 321, Cockburn, C. J., says: "There is an obvious difference between committing work to a contractor to be executed, from which, if

Stipulations in the Contract that the contractor shall use the care to prevent harm which the hazardous nature of the work requires do not relieve him, since the employer is bound at his peril to see that such care is used.¹

6. Duties under License. — The grantee of a public license or privilege, who, by express provision in the grant or by necessary implication therefrom, is under an obligation to perform certain duties in consideration of the grant, is not, it seems, entitled to interpose the defense that he employed a contractor to do the work.²

properly done, no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless preventive measures are adopted. While it may be just to hold the party authorizing the work in the former case exempt from liability from injury resulting from negligence which he had no reason to anticipate, there is, on the other hand, good ground for holding him liable for injury caused by an act certain to be attended with injurious consequences if such consequences are not in fact prevented, no matter through whose default the omission to take the necessary measures for such prevention may arise."

New York Rule. — In *Engel v. Eureka Club*, 137 N. Y. 100, 33 Am. St. Rep. 692, reversing 59 Hun (N. Y.) 593, Andrews, C. J., laid down the rule that if the act to be done may safely be done in the exercise of due care, although in the absence of such care injurious consequences to third persons would be likely to result, the contractor alone is liable, provided it was his duty under the contract to exercise due care. In this case, the owner of property was held not to be liable for injuries caused in taking down a wall which, though weakened by age and decay, was not a nuisance in its existing state, but which fell, on removal of the roof by the contractor, through his failure to support it. Compare *Dillon v. Hunt*, 105 Mo. 154, 24 Am. St. Rep. 374.

1. Stipulations for Precautions. — *Norwalk Gas-Light Co. v. Norwalk*, 63 Conn. 495.

"A person causing something to be done the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed, by delegating it to a contractor. He may bargain with the contractor that he shall perform the duty, and stipulate for an indemnity from him if it is not performed, but he cannot thereby relieve himself from liability to those injured by the failure to perform it." Lord Blackburn in *Dalton v. Angus*, 6 App. Cas. 740, citing *Hole v. Sittingbourne*, etc., R. Co., 6 H. & N. 488; *Pickard v. Smith*, 10 C. B. N. S. 473, 100 E. C. L. 473; *Tarry v. Ashton*, 1 Q. B. D. 314, and approving *Bower v. Peate*, 1 Q. B. D. 321, in which it was held that a man who employed a contractor to remove soil constituting his neighbor's right of support could not exempt himself from liability by providing that the contractor should take measures to support the neighbor's house. See also to the same effect, *Black v. Christchurch Finance Co.*, (1894) A. C. 48; *Hardaker v. Idle Dist. Council*, (1896) 1 Q. B. 335.

Contrary Decisions. — But see *McCleary v. Kent*, 3 Duer (N. Y.) 27; *Sulzbacher v. Dickie*, (C. Pl. Gen. T.) 51 How. Pr. (N. Y.) 523, to the

effect that the employer may provide in the contract that the precautions shall be taken by the contractor.

Blasting by Independent Contractors. — See the title EXPLOSIONS AND EXLOSIVES, vol. 12, p. 499.

2. Duties under License or Privilege. — *Gray v. Pullen*, 5 B. & S. 970, 117 E. C. L. 970; *Colgrove v. Smith*, 102 Cal. 220; *Chicago Economic Fuel Gas Co. v. Myers*, 168 Ill. 139; *Woodman v. Metropolitan R. Co.*, 149 Mass. 340, 14 Am. St. Rep. 427; *Darmstaetter v. Moynahan*, 27 Mich. 188; *McWilliams v. Detroit Cent. Mills Co.*, 31 Mich. 274; *Downey v. Low*, 22 N. Y. App. Div. 460; *Reuben v. Swigart*, 15 Ohio Cir. Ct. 565, 7 Ohio Cir. Dec. 638.

Illustrations. — In *Bohrer v. Dienhart Harness Co.*, (Ind. App. 1896) 45 N. E. Rep. 668, it was decided that the owner of a building who directed an independent contractor to place material in the street, the city having given the owner permission to place it in the street provided the gutter was not obstructed, was liable for damages caused by the contractor obstructing the gutter with the material.

So a company which obtained leave to dig up streets and lay its pipes along them was held to be liable for injuries caused by the defective filling of a trench by one who had contracted to do the work for the company. *Colgrove v. Smith*, 102 Cal. 220; *McCamus v. Citizens' Gas Light Co.*, 40 Barb. (N. Y.) 380.

Contrary Decisions. — But see *Fulton County St. R. Co. v. McConnell*, 87 Ga. 756, where a railroad company was held not liable for the negligence of a contractor constructing the railroad in the street under a license to do so; *Simmons, J.*, saying: "It was argued, however, that this rule [of independent contractors] does not apply where the work is to be performed in a public thoroughfare; that the license to obstruct the street was given specially to the railroad company, and could not be delegated to the contractor, that where railroads are built in a public thoroughfare the rights of the public to the use of the thoroughfare are involved, and the rule should be stricter than where the rights of individuals merely are affected. We have been unable to find any case where this distinction is recognized." See also *Smith v. Simmons*, 103 Pa. St. 32, 49 Am. Rep. 113, where it was decided that one who dug a ditch in a street for the laying of a water pipe under a municipal license was not liable for injuries caused by the negligence of the contractor employed to do the work in leaving a trench unprotected.

Building Laws do not confer a privilege of building within this rule, so as to render the employer liable for the acts of the contractor. *Burke v. Ireland*, 26 N. Y. App. Div. 487.

7. Contract for Illegal Act. — The employer is liable for acts of the contractor done in the performance of an illegal act.¹ On this principle a landowner who employed a building contractor has been held to be liable for any injuries resulting from an excavation illegally made in the sidewalk by the contractor without authority from the city or state.²

8. Violation of Ordinance. — The violation of an ordinance requiring certain precautions to be taken to avoid injuries to third persons during the performance of certain work is not, it has been held, excused by the fact that the one sought to be charged contracted to have another do the work, and the latter failed to take the prescribed precautions.³

9. Delegation of Charter Powers. — The principle that charter powers cannot be delegated sometimes affects the liability of a corporation for the acts of a contractor employed by it. This doctrine has been applied in the case of railroads or other public corporations exercising the power of eminent domain, the corporation being held liable for the acts of a contractor done in the exercise of that power.⁴

In *Illinois* this ground for imposing liability on the corporation employer has been carried so far, apparently, as to make the corporation liable for any trespass on land caused by a railroad contractor engaged in the work of construction;⁵ a view not adopted in other states.⁶ But even in that state the liability of the employer does not, it is said, extend to cases in which the contractor is acting merely in the exercise of his powers as an individual.⁷

Operation of Railroad. — On the same principle a railroad company has been held liable for the negligence of a contractor to whom it has delegated the operation of its road.⁸

1. Illegal Act. — *Ellis v. Sheffield Gas Consumers Co.*, 2 El. & Bl. 767, 75 E. C. L. 767; *Walker v. McMillan*, 6 Can. Sup. Ct. 241; *Barry v. Terkildsen*, 72 Cal. 254, 1 Am. St. Rep. 55; *Smith v. Simmons*, 103 Pa. St. 32; 49 Am. Rep. 113; *Heidenwag v. Philadelphia*, 168 Pa. St. 72.

2. Excavation in Sidewalk. — *Congreve v. Smith*, 18 N. Y. 79, *affirming* 5 Duer (N. Y.) 495; *Creed v. Hartmann*, 29 N. Y. 591, 86 Am. Dec. 341; *Clark v. Fry*, 8 Ohio St. 359, 72 Am. Dec. 590.

In *Doran v. Flood*, 47 Fed. Rep. 543, where builders gave a contract for hauling piles for a building, at a particularly small price, to one who had no trucks or facilities for hauling them otherwise than by dragging them on the ground, it was held to be a question for the jury whether it was not the understanding that they should be hauled in that way, so as to render the employers liable for injuries caused thereby, such dragging being in violation of an ordinance.

3. Violation of Ordinance. — Where an ordinance required the owner of materials forming an obstruction in the street to place thereon, before dark, lights which would burn until daylight, such owner was held to be liable for an injury arising from the negligent performance of this duty by a contractor employed by him. *Wilson v. White*, 71 Ga. 506, 51 Am. Rep. 269. And so in the case of an ordinance requiring the protection of an excavation made in building, *Spence v. Schultz*, 103 Cal. 208; or the erection of a roofed passageway over the sidewalk after the completion of the first story of a building, *Smith v. Milwaukee Builders', etc., Exch.*, 91 Wis. 360, 51 Am. St. Rep. 912.

4. Exercise of Power of Eminent Domain. — In *Lesh v. Wabash Nav. Co.*, 14 Ill. 85, 56 Am.

Dec. 494, and *Hinde v. Wabash Nav. Co.*, 15 Ill. 73, it was held that when the charter of a company authorized it to enter on adjoining lands to take material therefrom, the company could be made liable for material so taken by a contractor for construction, though the contract required the contractor to furnish the material. To the same effect see *Vermont Cent. R. Co. v. Baxter*, 22 Vt. 365; *Waters v. Greenleaf-Johnson Lumber Co.*, 115 N. Car. 648.

5. Illinois Cases — Trespass by Contractor. — In *Chicago, etc., R. Co. v. McCarthy*, 20 Ill. 388, 71 Am. Dec. 285, the liability of the company was extended to the case of injuries caused to land through which the road was being built, by the removal of fences therefrom, on the ground that the contractor had no right to be on such land except through the authority of the company under the charter. And in *Rockford, etc., R. Co. v. Wells*, 66 Ill. 321, and *Cairo, etc., R. Co. v. Woosley*, 85 Ill. 370, the same rule was applied in the case of the wrongful entry by contractors on and injuries to land upon which the railroad company was not authorized to enter. See also *St. Louis, etc., R. Co. v. Drennan*, 26 Ill. App. 263.

6. See *infra*, Special Applications of Rule — Contracts for Railroad Construction.

7. Contractor's Exercise of Individual Rights. — *West v. St. Louis, etc., R. Co.*, 63 Ill. 546, where it was held that a railroad company was not liable to an employee of a contractor for injuries caused by the contractor's use of corrosive sublimate to preserve the timbers.

8. Operation of Railroad. — *Speed v. Atlantic, etc., R. Co.*, 71 Mo. 303.

In *Philadelphia, etc., R. Co. v. Hahn*, (Pa. 1888) 12 Atl. Rep. 479, it was decided that a railroad company which employed a contractor

An Electric-light Company furnishing light to a city has, on the same principle, been held to be liable for injuries caused by contractors operating its works.¹

10. Duties Imposed by Contract. — One who has by contract assumed certain liabilities cannot free himself therefrom by the employment of an independent contractor;² and this principle has been held to be applicable when the contract is merely one implied by law.³

11. Incompetent Contractor. — The employer is, it seems, under the obligation of choosing a fit and competent contractor, and is liable for injuries to third persons resulting from his employment of an incompetent one with knowledge of his incompetency;⁴ and it is said that to exempt him from lia-

to move its cars between certain parts of a city is nevertheless liable for injuries caused by the negligence of such contractor, the court saying: "If it can contract for horsepower so may it for steam, and it follows that it might relieve itself of all responsibility by contract with its engineers and conductors for the running of its locomotives and trains." But see to the contrary, *Schular v. Hudson River R. Co.*, 38 Barb. (N. Y.) 653.

The Carrying of Passengers, as distinct from construction materials, by a contractor for the construction of a railroad, has been made a ground for imposing liability upon the railroad company, *Macon, etc., R. Co. v. Mayes*, 49 Ga. 355, 15 Am. Rep. 678, but the contrary has likewise been decided. *Kansas Cent. R. Co. v. Fitzsimmons*, 18 Kan. 34; *Union Pac. R. Co. v. Hause*, 1 Wyo. 27.

Injuries to Cattle. — It has been held that a railroad company is liable for injuries to cattle by trains which are being run by a contractor. *Illinois Cent. R. Co. v. Finnigan*, 21 Ill. 646; *Chicago, etc., R. Co. v. Whipple*, 22 Ill. 105; *Illinois Cent. R. Co. v. Kanouse*, 39 Ill. 272, 89 Am. Dec. 307; *Toledo, etc., R. Co. v. Rumbold*, 40 Ill. 143. See also *infra*, *Special Applications of Rule — Contracts for Railroad Construction*.

Limitation of Doctrine. — It is stated that "the principle that a railroad company cannot delegate to a contractor its chartered rights and privileges, so as to exempt it from liability, does not extend to the use of the ordinary means employed for the construction of the roads, but to the use of such extraordinary powers as the corporation itself could not exercise without first having complied with the conditions of legislative grant. In other words, where the wrong and injury for which the action is brought were committed in the performance of acts by virtue of the authority of the corporation derived from its charter, and could have been performed in no other way, then the party injured has the right to hold the corporation responsible, because it is really the corporation that is acting." *Sanford v. Pawtucket St. R. Co.*, 19 R. I. 537; *Atlanta, etc., R. Co. v. Kimberly*, 87 Ga. 172, 27 Am. St. Rep. 231. See also remarks in *Rogers v. Florence R. Co.*, 31 S. Car. 378.

1. In Illinois. — *Capital Electric Co. v. Hauswald*, 78 Ill. App. 359.

2. Contract Obligations. — *Montgomery Gas-Light Co. v. Montgomery, etc., R. Co.*, 86 Ala. 733; *Atlanta, etc., R. Co. v. Kimberly*, 87 Ga. 161, 27 Am. St. Rep. 231; *Waller v. Lasher*, 37 Ill. App. 609.

In St. Paul Water Co. v. Ware, 16 Wall. (U. S.) 566, an incorporated company undertaking

to lay water pipes in the city agreed with the city to protect all persons against damages by reason of excavations made in laying the pipes, and to be responsible for damages resulting from the negligence of the defendant's employees; and it was decided that the company was liable for injuries to a traveler caused by the negligence of a person with whom it contracted for the doing of part of the work. But see *Blake v. Ferris*, 5 N. Y. 48, 55 Am. Dec. 304, in which it was decided that such a proviso did not inure to the benefit of a stranger.

Municipal Corporation. — In *Leeds v. Richmond*, 102 Ind. 372, it was decided that a municipality which, in securing a right of way through private property, expressly agreed to pay all damages caused by the construction of the improvement, could not evade the payment of such damages by having the work done by an independent contractor.

Contract with State. — In *Weber v. Buffalo R. Co.*, 20 N. Y. App. Div. 292, it was decided that a street-railway company which obtained permission from the state to reconstruct a bridge over a canal on condition that it should be responsible for and pay all damages arising from the reconstruction, as provided by statute, assumed the duty of the state to keep the roadway in proper condition, of which it could not divest itself by delegating the work of reconstruction to an independent contractor, and hence it was liable for the injuries caused by the contractor's failure to keep the roadway in safe condition.

3. Implied Contract. — In *Francis v. Cockrell*, L. R. 5 Q. B. 185, it was decided that one causing the erection of a building for a public exhibition impliedly warranted the safety of the building to persons entering it to view the exhibition, and that therefore he was liable to such person for injuries caused by defects in the building, though it was constructed by an independent contractor. This case is cited with approval in *Edwards v. New York, etc., R. Co.*, 98 N. Y. 245, 39 Am. Rep. 659; *Fox v. Buffalo Park*, 21 N. Y. App. Div. 321. But compare *Searle v. Laverick*, L. R. 9 Q. B. 122.

4. Incompetency of Contractor. — That the employer is liable if he knowingly chooses an incompetent contractor, is recognized in the following cases: *Brown v. Accrington Cotton Spinning, etc., Co.*, 3 H. & C. 511; *Connors v. Hennessey*, 112 Mass. 96; *Sturges v. Society, etc.*, 130 Mass. 414, 39 Am. Rep. 463; *Cuff v. Newark, etc., R. Co.*, 35 N. J. L. 17, 10 Am. Rep. 205; *Ardesco Oil Co. v. Gilson*, 63 Pa. St. 146; *Mansfield Coal, etc., Co. v. McEnery*, 91 Pa. St. 185, 36 Am. Rep. 662. So it was de-

bility it is not enough that he did not knowingly employ an incompetent contractor, but he must have exercised reasonable care to select a competent one.¹ The same principle seems to be involved in a decision that one who employs a contractor whom he knows to be in the habit of doing work in an unsafe manner, is liable as having impliedly contracted for that sort of work.² In *Tennessee*, however, it is expressly stated that the character of the contractor, and want of care in selecting him, are ordinarily immaterial;³ and the *New York* rule in this regard does not appear to be clearly settled.⁴

12. Unsafe Premises. — If injury results from the employer's failure to take precautions which he should have taken to render the premises safe, he is liable for such injuries to servants of the contractor, and to others presumably, whom he expressly or impliedly invites to come upon the premises during the doing of the work by the contractor.⁵

Employment of Architect. — But if one employs a competent architect to design a building, he is not liable to employees of a contractor injured by the collapse of the building during its construction.⁶

13. Defective Appliances. — The employer is likewise liable for injuries arising from defects in appliances furnished by him to the contractor for the doing of the work, if he failed to exercise ordinary care to furnish safe and proper appliances.⁷

Appliances on Vessels. — This rule has been quite frequently applied as against owners of vessels furnishing defective appliances for the loading or unloading

cided that one who employed a blacksmith to make alterations in a building was liable for the consequences of the latter's unskillfulness under circumstances which would not have rendered him liable if he had employed a competent builder. *Evans v. Murphy*, 87 Md. 498.

1. Negligence in Selection. — *Norwalk Gaslight Co. v. Norwalk*, 63 Conn. 495. But see *Kelley v. New York*, 4 E. D. Smith (N. Y.) 291.

2. Brannock v. Elmore, 114 Mo. 55.

3. Knoxville Iron Co. v. Dobson, 7 Lea (Tenn.) 367.

4. New York Decision. — In *Berg v. Parsons*, 156 N. Y. 109, which was an action for injuries to property from blasting, Gray, J., in a dissenting opinion concurred in by Bartlett and Haight, JJ., said: "It seems to me a proposition as clear as it is reasonable, that the assumption that there has been an exercise of due care in the selection of a competent and careful contractor, is a part of the foundation for the doctrine. I do not think that it would do to hold that a person, by the mere act of employing a contractor to do some work of a nature in itself obviously hazardous to others, thereby discharges himself of all responsibility." This language would seem to restrict the employer's duty in this respect to cases of contracts for work of a necessarily hazardous character. The majority opinion placed the defendant's liability upon the general doctrine of independent contractors, and made no reference, in reciting the recognized exceptions to the rule, or elsewhere, to the question of the employer's duty to exercise care to choose a competent contractor, though this was expressly made by the pleadings a ground of liability, and was the basis of the decision on the intermediate appeal, (84 Hun (N. Y.) 60) in favor of the plaintiff.

5. Unsafe Premises. — *Perkins v. Furness*, 167 Mass. 403, *Horner v. Nicholson*, 56 Mo. 220.

In *Lake Superior Iron Co. v. Erickson*, 39

Mich. 492, 33 Am. Rep. 423, it was decided that a mining company which let out the working of the mine to contractors was liable for the death of a servant of one of the contractors, who was struck by the fall of a piece of rock through the failure to insert a supporting timber, this being a duty which by the contract was imposed on the company and not on the contractor. A similar decision was rendered in *Kelly v. Howell*, 41 Ohio St. 438.

But if a contractor working the mine assumes complete control thereof, under the terms of the contract, the mine owner is not liable for injuries to a workman caused by a failure to properly inspect it, it being in a safe condition when turned over to the contractor. *Samuelson v. Cleveland Iron Min. Co.*, 49 Mich. 164, 43 Am. Rep. 456.

Injuries to Subcontractor's Servant. — So it was held that an employee of a subcontractor who was injured by the contractor's negligence in doing the portion of work not sublet could recover against the latter. *Johnston v. Ott*, 155 Pa. St. 17.

6. Employment of Architect. — *Burke v. Ireland*, 26 N. Y. App. Div. 487.

7. Defective Appliances. — *Heaven v. Pender*, 11 Q. B. D. 503; *Conlon v. Eastern R. Co.*, 135 Mass. 195; *Detroit v. Corey*, 9 Mich. 165, 80 Am. Dec. 78; *Roddy v. Missouri Pac. R. Co.*, 104 Mo. 234, 24 Am. St. Rep. 333; *Fell v. Rich Hill Coal Min. Co.*, 23 Mo. App. 216; *Whitney v. Clifford*, 46 Wis. 138, 32 Am. Rep. 703. Compare *Barrett v. Singer Mfg. Co.*, 1 Sweeny (N. Y.) 545.

A railroad company which furnished to a contractor an engine and train, upon which a fireman already in the service of the company was, by it, ordered to work, was held to be liable to him for personal injuries caused by defects in the engine attributable to the company's negligence, though the train was entirely in the control of the contractor. *Savannah, etc., R. Co. v. Phillips*, 90 Ga. 829.

of the vessels, where, because of such defects, injuries resulted to employees of the stevedore.¹

Unsafe Scaffolding. — So the owner of property who undertook to furnish a scaffold or staging for the use of the contractor's employees has been held liable for injuries to such employees resulting from his failure to use due diligence to secure a safe scaffold;² and in *Massachusetts* the owner, though himself free from negligence, has been held liable for injuries caused by a defective scaffold constructed by an independent contractor and accepted by the employer after its completion.³

Repair of Appliances. — But the employer is not liable for injuries resulting from his subsequent failure to keep the appliances in repair if it is not his duty under the contract to do so.⁴

14. Interference by Employer. — The employer is liable for the acts of a contractor originally occupying an independent position, if he assumes control of the work and directs the contractor in regard to the method of doing it.⁵

15. Completion and Acceptance of Work. — An employer who accepts the result of the work done by an independent contractor is, it seems, liable for injuries thereafter arising from defects in the work,⁶ provided he knew of the

1. Appliances on Vessels. — *The Rheola*, 19 Fed. Rep. 926; *The Carolina*, 30 Fed. Rep. 199; *The Tiuro*, 31 Fed. Rep. 158; *The William Branfoot*, 48 Fed. Rep. 914; *The Protos*, 48 Fed. Rep. 919; *The Serapis*, 49 Fed. Rep. 393; *The Para*, 56 Fed. Rep. 241, 23 U. S. App. 72; 60 Fed. Rep. 105; *Johnson v. Spear*, 76 Mich. 139, 15 Am. St. Rep. 298.

Liability Based on Negligence. — In such cases, as in the others, there is no liability in the absence of negligence. *McCall v. Pacific Mail Steamship Co.*, 123 Cal. 42; *Riley v. State Line Steamship Co.*, 29 La. Ann. 791, 29 Am. Rep. 349; *The Bentrack*, 33 Fed. Rep. 687; *The Concord*, 58 Fed. Rep. 913.

2. Unsafe Scaffolding. — *Bright v. Barnett*, etc., Co., 83 Wis. 299; *Coughtry v. Globe Woolen Co.*, 56 N. Y. 124, 15 Am. Rep. 387. See also *Devlin v. Smith*, 89 N. Y. 470, 42 Am. Rep. 311; *Hoffner v. Prettyman*, 6 Pa. Super. Ct. 20, 41 W. N. C. (Pa.) 258; *Matthes v. Kerrigan*, 53 N. Y. Super. Ct. 431. Compare *Larock v. Ogdensburg*, etc., R. Co., 26 Hun (N. Y.) 382.

3. Mulchey v. Methodist Religious Soc., 125 Mass. 487. Compare the cases in the next preceding note. See also *supra*, this section, *Legal Duties Not Transferable — Master and Servant*.

4. Repair of Appliances. — In *King v. New York Cent.*, etc., R. Co., 66 N. Y. 181, 23 Am. Rep. 37, the fact that the employer furnished the machine was held not to make him liable if it subsequently got out of repair while being used by the contractor, especially if the machine was not inherently dangerous.

Duties under Contract. — In *Toomey v. Donovan*, 153 Mass. 232, a workman employed by an independent contractor who had charge of a department in a factory was held to be entitled to recover as against the owner of the factory for injuries caused by a defective machine, such owner having engaged with the contractor to keep the machine in repair; the court stating that this liability arose not out of any contract, but merely from his neglect of a common-law duty.

5. Interference by Employer. — *Burgess v. Gray*, 1 C. B. 578, 50 E. C. L. 578; *Norwalk*

Gaslight Co. v. Norwalk, 63 Conn. 495; *Johnson Chair Co. v. Agresto*, 73 Ill. App. 384; *Chicago*, etc., R. Co. v. *Watkins*, 43 Kan. 50; *Ullman v. Hannibal*, etc., R. Co., 67 Mo. 118; *Larson v. Metropolitan St. R. Co.*, 110 Mo. 234; *Heffernan v. Benkard*, 1 Robt. (N. Y.) 432.

So in *Savannah*, etc., R. Co. v. *Phillips*, 90 Ga. 829, where, though the contract for the laying of a railroad track made the employee an independent contractor, the employer thereafter took charge of the work and while it was in progress required certain portions of it to be done over again in accordance with specific directions by the employer, whose officers gave personal attention to the details of the construction and assumed general management of the enterprise, and it was held that the employee was the mere servant of the employer, and that the latter was liable for his acts.

6. Completion and Acceptance of Work — *California*. — *Boswell v. Laird*, 8 Cal. 469, 68 Am. Dec. 345; *Donovan v. Oakland*, etc., Rapid Transit Co., 102 Cal. 245; *Cotter v. Lindgren*, 106 Cal. 602, 46 Am. St. Rep. 255.

Georgia. — *Atlanta*, etc., R. Co. v. *Kimberly*, 87 Ga. 161, 27 Am. St. Rep. 231.

Indiana. — *Bohrer v. Dienhart Harness Co.*, 19 Ind. App. 489.

Massachusetts. — *Khron v. Brock*, 144 Mass. 516; *Gorham v. Gross*, 125 Mass. 232, 28 Am. Rep. 224; *Mulchey v. Methodist Religious Soc.*, 125 Mass. 487.

New York. — *Vogel v. New York*, 92 N. Y. 10, 44 Am. Rep. 349; *Albany v. Cunliff*, 2 N. Y. 174.

Creation of Nuisance. — Apparently the same idea is involved in the statement that the employer is liable if the work creates a nuisance because improperly done. *Surges v. Society*, etc., 130 Mass. 414, 39 Am. Rep. 462; *Vogel v. New York*, 92 N. Y. 10, 44 Am. Rep. 349.

In *Deford v. State*, 30 Md. 179, it was held that the owner of a building in the course of erection by an independent contractor was liable for injuries caused by the blowing down of a wall which was so defectively constructed by the contractor as to constitute a nuisance.

Work of Subcontractor. — A contractor like-

defects or could have known of them by a careful examination of the work,¹ and provided also the defects which caused the accident affected the sufficiency of the structure or article for the purpose for which it was intended.² Nor is a formal acceptance of the work necessary to render the employer liable, if he in fact assumes control of the structure or premises.³

16. Special Applications of Rule—*a. EXCAVATIONS AND OBSTRUCTIONS IN STREETS.*—There is much confusion in the cases as to the liability of an abutting owner for injuries to travelers from excavations and obstructions in a street caused by an independent contractor working on abutting property. It has in some states been held that the owner of such property who makes a contract which expressly provides for or necessarily involves the making of an excavation in the highway, is liable for injuries caused by a failure to guard such excavation, the work being inherently dangerous, and the excavation if unguarded being a nuisance.⁴ In *Massachusetts* the rule would seem to be generally as just stated, subject to limitations which may be developed and established in future decisions;⁵ and such seems to be the law in *Ohio*, though the cases hardly justify a positive statement to that effect.⁶ In *New York* it

wise is liable for the defects in the work of a subcontractor which cause injury to third persons, if he accepts the work on its completion with knowledge of the defects. *Berberich v. Ebach*, 131 Pa. St. 165; *Carey v. Courcelle*, 17 La. Ann. 108; *Bast v. Leonard*, 15 Minn. 304.

1. Knowledge of Defects.—First Presb. Congregation *v. Smith*, 163 Pa. St. 576, 43 Am. St. Rep. 808; *Mahanoy Tp. v. Scholly*, 84 Pa. St. 136; *Mansfield Coal, etc., Co. v. McNery*, 91 Pa. St. 185, 36 Am. Rep. 662; *Chartiers Valley Gas Co. v. Lynch*, 118 Pa. St. 362; *Chartiers Valley Gas Co. v. Waters*, 123 Pa. St. 220, 23 W. N. C. (Pa.) 175.

2. Propriety of Use.—In *Fanjoy v. Seales*, 29 Cal. 244, it was decided that the owner of a building, by accepting it from the contractor and allowing it to remain in the condition in which it was accepted, assumed as to third persons its sufficiency for the uses and purposes for which it was constructed, but that he was not liable for injuries to a painter resulting from the fall of a cornice from which the painter had suspended a staging, since the cornice was not constructed for any such use or purpose and was intended merely for ornamental purposes.

3. Formal Acceptance Unnecessary.—*Philadelphia, etc., R. Co. v. Philadelphia, etc., Towboat Co.*, 23 How. (U. S.) 217; *Chicago Economic Fuel Gas Co. v. Myers*, 168 Ill. 139; *First Presb. Congregation v. Smith*, 163 Pa. St. 576, 43 Am. St. Rep. 808; *Read v. East Providence F. Dist.*, 20 R. I. 574.

4. Employer Liable.—*United States.*—*Chicago v. Robbins*, 2 Black (U. S.) 418; *Robbins v. Chicago*, 4 Wall. (U. S.) 657.

California.—*Barry v. Terkildsen*, 72 Cal. 254, 1 Am. St. Rep. 55; *Spence v. Schultz*, 103 Cal. 208. And see *Du Pratt v. Lick*, 38 Cal. 691. Compare *Frassi v. McDonald*, 122 Cal. 400, where it was decided that the owner of a building in the course of erection, though knowing that a plumbing contractor would have to remove parts of a temporary sidewalk built over the excavation made by the building contractor, was held not to be liable for injuries to one falling into the excavation through the opening so made.

Missouri.—*Wiggin v. St. Louis*, 135 Mo

558. Compare *Independence v. Slack*, 134 Mo. 66, where the abutting owner was held not to be liable for injuries caused by the action of the contractor for the construction of a sidewalk in leaving stone in front of the property without any guards around it.

Nebraska.—*Palmer v. Lincoln*, 5 Neb. 136, 25 Am. Rep. 470.

5. Massachusetts Decisions.—In *Woodman v. Metropolitan R. Co.*, 149 Mass. 335, 14 Am. St. Rep. 427, a railroad corporation had been authorized to lay a new track in a city street, and a contractor, to whom it committed the work, left the street in a dangerous condition. The railroad company was held liable. *Holmes, J.*, said: "If the performance of a lawful contract necessarily will bring wrongful consequences to pass unless guarded against, and if, as in the present case, the contract cannot be performed except under the right of the employer, who retains the right of access to the premises, the law may require the employer, at his peril, to see that due care is used to prevent harm, whatever the nature of his contract with those whom he employs. Laying the track for the defendant necessitated the digging up of the highway, and the obstruction of it with earth and materials. This obstruction would be a nuisance unless properly guarded against. The work was done under a permit issued to the defendant."

* * * We are of opinion that the defendant, having caused the highway to be obstructed, was bound at its peril to see that a nuisance was not created." This language is quoted and approved in *Downey v. Low*, 22 N. Y. App. Div. 460; *Johnston v. Phoenix Bridge Co.*, 44 N. Y. App. Div. 581. Compare dicta of *Gray, C. J.*, in *Gorham v. Gross*, 125 Mass. 232, 28 Am. Rep. 224, and see *Hilliard v. Richardson*, 3 Gray (Mass.) 349, 63 Am. Dec. 743, where it was decided that a property owner was not liable for injuries caused by the act of a servant of the contractor in placing boards in the street.

6. Ohio Decisions.—See *Southern Ohio R. Co. v. Morey*, 47 Ohio St. 207; *Hawver v. Whalen*, 49 Ohio St. 69; *Covington, etc. Bridge Co. v. Steinbrock*, (Ohio 1899) 55 N. E. Rep. 618. Compare *Clark v. Fry*, 8 Ohio St.

is held that one who makes an excavation in the street, without authority from a city or the state, is liable for injuries resulting from a failure to guard it, though he employs an independent contractor to do the work;¹ but the employer is not liable if the right to make the excavation is given by the state or city authorities,² nor where the excavation or obstruction was not called for by the contract.³ In other states it has been decided that a property owner is not liable for the failure of the contractor, who has exclusive control of the work, to maintain suitable guards about any excavation necessary for the carrying out of the contract,⁴ though the employer is of course liable if he retains direction and supervision of the work so that the contractor does not stand in an independent position.⁵

b. CONTRACTS FOR RAILROAD CONSTRUCTION. — With the exception of the cases above referred to, deciding that a railroad company cannot relieve itself from its legal duties by employing a contractor to perform them,⁶ nor delegate its charter powers,⁷ a railroad company is as free as any corporation or individual from liability for injuries caused by an independent contractor. Accordingly a railroad company has been held not to be liable for injuries caused to persons or property by the wrongful acts of a contractor in blasting,⁸ removing fences,⁹ clearing land by the use of fire,¹⁰ using appliances calculated to frighten horses,¹¹ managing construction train,¹² loading cars,¹³ or committing trespasses on neighboring property,¹⁴ or for failure to provide

358, 72 Am. Dec. 590, limited and partially overruled in the later cases; and see *Fuller v. Citizens' Nat. Bank*, 15 Fed. Rep. 875.

1. **New York Decisions.** — *Congreve v. Smith*, 18 N. Y. 79; *Creed v. Hartmann*, 29 N. Y. 591, 86 Am. Dec. 341.

2. *Blake v. Ferris*, 5 N. Y. 48, 55 Am. Dec. 304; *Creed v. Hartmann*, 29 N. Y. 591, 86 Am. Dec. 341; *Martin v. Tribune Assoc.*, 30 Hun (N. Y.) 391. But see *Downey v. Low*, 22 N. Y. App. Div. 460; *Johnston v. Phoenix Bridge Co.*, 44 N. Y. App. Div. 581.

3. *Ryder v. Thomas*, 13 Hun (N. Y.) 296; *Buffalo v. Clement*, (Buffalo Super. Ct. Gen. T.) 19 N. Y. Supp. 846; *Maltbie v. Bolting*, (N. Y. Super. Ct. Gen. T.) 6 Misc. (N. Y.) 339.

4. **Rule of Nonliability — Illinois.** — *Scammon v. Chicago*, 25 Ill. 424, 79 Am. Dec. 334, expressly disapproved in *Chicago v. Robbins*, 2 Black (U. S.) 418; *Pfau v. Williamson*, 63 Ill. 16; *Kepperly v. Ramsden*, 83 Ill. 354; *Moline v. McKinnie*, 30 Ill. App. 419.

Indiana. — *Ryan v. Curran*, 64 Ind. 345, 31 Am. Rep. 123, overruling *Silvers v. Nerdlinger*, 30 Ind. 53.

Pennsylvania. — *Allen v. Willard*, 57 Pa. St. 374. Compare *Homan v. Stanley*, 66 Pa. St. 464, 5 Am. Rep. 389.

5. **Retention of Control.** — *Baumeister v. Markham*, (Ky. 1897) 39 S. W. Rep. 844; *Allen v. Willard*, 57 Pa. St. 374; *Homan v. Stanley*, 66 Pa. St. 464, 5 Am. Rep. 389.

6. **Railroad Companies.** — See *supra*, this section, *Legal Duties Not Transferable*.

7. See *supra*, this section, *Delegation of Charter Powers*.

8. **Blasting.** — *McCafferty v. Spuyten Duyvil*, etc., R. Co., 61 N. Y. 178, 19 Am. Rep. 267; *Edmundson v. Pittsburgh*, etc., R. Co., 111 Pa. St. 316. See the title EXPLOSIONS AND EXPLOSIVES, vol. 12, p. 499.

9. **Removing Fences.** — *St. Louis*, etc., R. Co. v. Knott, 54 Ark. 424; *Clark v. Hannibal*, etc., R. Co., 36 Mo. 202; *McKinley v. Chicago*, etc.,

R. Co., 40 Mo. App. 449; *Clark v. Vermont*, etc., R. Co., 28 Vt. 103.

10. **Clearing Land by Fire.** — *St. Louis*, etc., R. Co. v. Yonley, 53 Ark. 503; *Callahan v. Burlington*, etc., R. Co., 23 Iowa 562; *Eaton v. European*, etc., R. Co., 59 Me. 520, 8 Am. Rep. 430. See the title FIRES, vol. 13, p. 404.

11. **Frightening Horses.** — *Wabash*, etc., R. Co. v. Farver, 111 Ind. 195, 60 Am. Rep. 696; *Bailey v. Troy*, etc., R. Co., 57 Vt. 252, 52 Am. Rep. 129.

12. **Management of Construction Train** — *Alabama*. — *Rome*, etc., R. Co. v. Chasteen, 88 Ala. 591.

Arkansas. — *St. Louis*, etc., R. Co. v. Knott, 54 Ark. 424.

Iowa. — *Miller v. Minnesota*, etc., R. Co., 76 Iowa 655, 14 Am. St. Rep. 258.

Kansas. — *Kansas Cent. R. Co. v. Fitzsimmons*, 18 Kan. 34; *St. Louis*, etc., R. Co. v. Willis, 38 Kan. 330.

Nebraska. — *Meyer v. Midland Pac. R. Co.*, 2 Neb. 319; *Hitte v. Republican Valley R. Co.*, 19 Neb. 620.

Texas. — *Cunningham v. International R. Co.*, 51 Tex. 503, 32 Am. Rep. 632.

Wyoming. — *Union Pac. R. Co. v. Hause*, 1 Wyo. 27.

Canada. — *Kerr v. Atlantic*, etc., R. Co., 25 Can. Sup. Ct. 199.

But under a statute making the company owning the railroad liable with the lessee "and other persons" running or controlling any railroad, for stock killed or injured, it was held to be liable for stock killed by cars run and exclusively controlled by the contractors. *Huey v. Indianapolis*, etc., R. Co., 45 Ind. 320.

13. **Loading Cars.** — *King v. New York Cent.*, etc., R. Co., 66 N. Y. 181, 23 Am. Rep. 37.

14. **Trespass by Contractor** — *Alabama*. — *Alabama Midland R. Co. v. Martin*, 100 Ala. 511. *Arkansas.* — *St. Louis*, etc., R. Co. v. Knott, 54 Ark. 424.

Indiana. — *Bloomfield R. Co. v. Grace*, 112 Ind. 130.

drains in constructing the railroad whereby injuries result before the road is turned over to the railroad company.¹ But in case of injuries to property resulting from the depth of cuts or excavations made in the grading of the roadbed by a contractor, the work is, it seems, conclusively presumed to be in accordance with plans furnished by the company's engineer.²

III. CONTRACTOR'S LIABILITY. — Though an independent contractor, as stated above,³ is not responsible for the acts of his subcontractors or their servants, he is liable for injuries caused by his own negligence or that of his servants in the course of his performance of the work.⁴ Independence of control on the part of the contractor in respect to the act which causes the injury is, it would seem, a prerequisite to the imposition of liability upon him;⁵ and so he is not liable for injuries caused by defective plans,⁶ nor for injuries caused by defects in the materials unless he has, by the contract, the right to select the materials; but if the contract does not reserve this right to the employer, the contractor will be presumed to have it.⁷

After Completion of Work. — The contractor is not liable, as a general rule, for injuries to a third person, occurring after his completion of the work and its acceptance by the employer, and resulting from his failure to properly carry out his contract.⁸ His exemption from liability in this respect is that which exists in favor of any person building a structure or furnishing an article, as against a third person injured by defects in such structure or article, and is based on the general rule of law that one is liable for a breach of contractual duty only to the other party to the contract.⁹ This general rule, however, is

Iowa. — *Waltmeyer v. Wisconsin, etc., R. Co.*, 71 Iowa 626.

Maine. — *Eaton v. European, etc., R. Co.*, 59 Me. 531, 8 Am. Rep. 430.

Mississippi. — *New Orleans, etc., R. Co. v. Reese*, 61 Miss. 581.

Missouri. — *Clark v. Hannibal, etc., R. Co.*, 36 Mo. 202.

North Carolina. — *Waters v. Greenleaf-Johnson Lumber Co.*, 115 N. Car. 648.

Ohio. — *Hughes v. Cincinnati, etc., R. Co.*, 39 Ohio St. 461.

Vermont. — *Clark v. Vermont, etc., R. Co.*, 28 Vt. 103. But compare *Illinois* cases under *Delegation of Charter Powers*, *supra*, this section.

1. Construction of Drains. — *Atlanta, etc., R. Co. v. Kimberly*, 87 Ga. 161, 27 Am. St. Rep. 231; *Charlebois v. Gogebic, etc., R. Co.*, 91 Mich. 59.

2. Grading. — *Alabama Midland R. Co. v. Coskry*, 92 Ala. 254; *Alabama Midland R. Co. v. Williams*, 92 Ala. 277.

3. Contractor's Liability. — See *supra*, II. 1. par. *Liability for Acts of Subcontractors*.

4. Howarth v. McGugan, 23 Ont. 396; *Holt v. Whatley*, 51 Ala. 569; *Whitney, etc., Co. v. O'Rourke*, 172 Ill. 177, *affirming* 68 Ill. App. 487; *Lechman v. Hooper*, 52 N. J. L. 253; *Slater v. Mersereau*, 64 N. Y. 138; *Reynolds v. Braithwaite*, 131 Pa. St. 416; *First Presb. Congregation v. Smith*, 163 Pa. St. 561, 43 Am. St. Rep. 808; *Beck v. Hood*, 185 Pa. St. 32.

So in *Baumeister v. Markham*, (Ky. 1897) 39 S. W. Rep. 844, building contractors who made an opening in the sidewalk which was not necessary to the improvement which they had contracted to make, were held to be liable to one injured by the failure to properly guard the excavation.

5. Independence of Control. — *Callan v. Bull*, 113 Cal. 593; *Charlock v. Freel*, 125 N. Y. 357,

affirming 50 Hun (N. Y.) 395; *First Presb. Congregation v. Smith*, 163 Pa. St. 561, 43 Am. St. Rep. 808.

Dangerous Work. — In *Lemaitre v. Davis*, 19 Ch. D. 281, it was held that for injuries caused by acts which involved danger to the property of an adjoining proprietor both the contractor and the employer were liable.

6. Defective Plans. — *Pearson v. Zable*, 78 Ky. 170.

7. Defective Materials. — *McCall v. Pacific Mail Steamship Co.*, 123 Cal. 42.

8. Injuries After Completion of Work. — *Daugherty v. Herzog*, 145 Ind. 255, 57 Am. St. Rep. 204; *Albany v. Cunliff*, 2 N. Y. 165; *First Presb. Congregation v. Smith*, 163 Pa. St. 561, 43 Am. St. Rep. 808.

9. Ground of Rule. — "The consequences of holding the opposite doctrine would be far reaching. If a contractor who erects a house, who builds a bridge, or performs any other work, a manufacturer who constructs a boiler, piece of machinery, or a steamship, owes a duty to the whole world that his work or his machine or his steamship shall contain no hidden defect, it is difficult to measure the extent of his responsibility, and no prudent man would engage in such occupations upon such conditions. It is safer and wiser to confine such liabilities to the parties immediately concerned." *Curtin v. Somerset*, 140 Pa. St. 80, 23 Am. St. Rep. 220.

Illustration. — In *Curtin v. Somerset*, 140 Pa. St. 70, 23 Am. St. Rep. 220, it was held that where a contractor for the erection of a hotel building uses improper material in its construction, and in other respects departs from the specifications embodied in his contract, so that when the building is completed it is structurally weak and unsafe, by reason of which an accident occurs after it is accepted and possession taken, the contractor is liable

subject to a proviso that the defect in the article or structure must not be such as to render it imminently dangerous to any person using it,¹ and defects in a scaffold built by an independent contractor have been decided to be within this exception.²

INDEPENDENT COVENANT.—See the title COVENANTS, vol. 8, p. 51.

INDEX. (See also the titles RECORDING ACTS; RECORDS.)—An index is that which points out; that which shows, indicates, or manifests. In ordinary use, it is a table of reference, pointing out the page of the book where a certain article or subject may be found.³

INDIAN.—See note 4.

to the owner thereof, but not liable to a guest of the hotel for an injury caused to him by such defective construction.

1. General Principle.—See the title NEGLIGENCE in this work.

The leading case illustrative of this principle is *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455, referred to in the next paragraph, where a seller of a poisonous drug who did not properly label it was held to be liable to all persons injured by his negligence.

2. Defective Scaffold.—In *Devlin v. Smith*, 89 N. Y. 470, 42 Am. Rep. 311, a contractor undertook to build a scaffold for the express purpose of enabling the workmen of one who had a contract for the painting of a court-house dome to stand upon it to do the work, and one of such workmen was killed by the fall of the scaffold. *Rapallo, J.*, said: "Any defect or negligence in its construction, which should cause it to give way, would naturally result in these men being precipitated from that great height. A stronger case where misfortune to third persons not parties to the contract would be a natural and necessary consequence of the builder's negligence can hardly be supposed, nor is it easy to imagine a more apt illustration of a case where such negligence would be an act imminently dangerous to human life. These circumstances seem to us to bring the case fairly within the principle of *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455." And see to the same effect the opinion of *Brett, M. R.*, in *Heaven v. Pender*, 11 Q. B. D. 506.

A Defective Brake on a freight car has, on the other hand, been decided not to be such a defect as to render a railroad company furnishing it liable to an employee of a shipper injured thereby. *Roddy v. Missouri Pac. R. Co.*, 104 Mo. 234, 24 Am. St. Rep. 333.

3. Index.—*Perkins v. Strong*, 22 Neb. 731.

Whether Part of Record.—In *Calwell v. Prindle*, 19 W. Va. 669, it was said: "The *index* is a guide to the docket; it saves labor and trouble in examining the docket, but is not the docket itself, nor a part of it." See also *Mutual L. Ins. Co. v. Dake*, (Supm. Ct. Spec. T.) 1 Abb. N. Cas. (N. Y.) 381, 4 Cent. L. J. 340. And see the titles RECORDING ACTS; RECORDS.

But in *Metz v. State Bank*, 7 Neb. 172, it was said: "Webster defines *index* to be that which points out; that which indicates or manifests. One great object of an *index* is to render the contents of a book readily accessible. At this time, when inventions to save labor are in active demand, it will not be presumed that the legislature, in providing for an

index to the judgment record, intended it to be a useless appendage, of no validity—a mere trap for the unwary—or that a purchaser, notwithstanding the *index*, must spend days or weeks examining the records, in order to ascertain the condition of the title of the property he is about to purchase. Such was not the legislative intent. The *index* affords a cheap, ready, and convenient method of ascertaining the condition of the title to real estate, and is made a part of the record, and a purchaser may rely upon it as being correct."

In *Perkins v. Strong*, 22 Neb. 725, however, it was held that a purchaser of real estate who took his deed to the office of the register of deeds, and deposited it with him for record, and paid the fees for recording it, had discharged his duty; and if through the fault of the register alone the deed was not entered in the *index*, such failure would not work to the prejudice of the title of such purchaser, even in favor of a subsequent purchaser without actual notice. See also the title PUBLIC OFFICERS.

4. Indian Title.—Prior to the treaty of June 3, 1825, with the Kansas Indians, they had the "*Indian title*," *i. e.*, a life interest in the usufruct of a body of land in eastern Kansas, including that in controversy, the United States holding the ultimate title charged with the interest of the *Indian* nation, so long as the *Indians* should remain a nation. This "*Indian title*" was, by the sixth article of that treaty, vested in certain individuals. *Brown v. Belmarde*, 3 Kan. 41.

Indian Tribes.—In *State v. Newell*, 84 Me. 465, it was held that the *Indian* residents within the state of *Maine* were not *Indian* tribes within the treaty-making power of the federal government.

Indian Country.—An Act of Congress of June 30, 1834, defined "*Indian country*" as "all that part of the United States west of the Mississippi and not within the states of Missouri and Louisiana, or the territory of Arkansas, and also that part of the United States east of the Mississippi river and not within any state to which the *Indian* title has not been extinguished." In *U. S. v. Le Bris*, 121 U. S. 278, the court said: "This section was not re-enacted in the Revised Statutes, though other parts of the statute were. Consequently the section was repealed by section 5596 of the revision; but still we held in *Ex p. Crow Dog*, 109 U. S. 556, 561, that it might be referred to for the purpose of determining what was meant by the term '*Indian country*' when

INDIAN LANDS. — See the title **INDIANS**, *post*.

found in sections of the Revised Statutes which were re enactments of other sections of this statute."

In the opinion of the Supreme Court by Mr. Justice Miller, in *Bates v. Clark*, 95 U. S. 208, the definition of "*Indian* country" is given as follows: "The simple criterion is that, as to all the lands thus described it was *Indian* country whenever the *Indian* title had not been extinguished, and it continued to be *Indian* country so long as the *Indians* had title to it, and no longer. As soon as they parted with the title it ceased to be *Indian* country without any further Act of Congress, unless by the treaty by which the *Indians* parted with their title, or by some Act of Congress, a different rule was made applicable to the case." And later, in the case of *Ex p. Crow Dog*, 109 U. S. 561, Matthews, J., said: "In our opinion, that definition now applies to all the country to which the *Indian* title has not been extinguished, within the limits of the United States, even when not within a reservation expressly set apart for the exclusive occupancy of *Indians*, although much of it has been acquired since the passage of the Act of 1834, and notwithstanding the formal definition in that act has been dropped from the statutes, excluding, however, any territory embraced within the exterior geographical limits of a state, not excepted from its jurisdiction by treaty or by statute, at the time of its admission into the Union." See also *U. S. v. Partello*, 48 Fed. Rep. 670; *U. S. v. Four Bottles Sour-Mash Whiskey*, 90 Fed. Rep. 722; *Waters*

v. Campbell, 4 Sawy. (U. S.) 124; *U. S. v. Winslow*, 3 Sawy. (U. S.) 337; *U. S. v. Seveloff*, 2 Sawy. (U. S.) 311.

The term "*Indian* country" includes such portions of the public domain as are expressly reserved for the use and occupation of the several bands and tribes of *Indians*, and which are included within the jurisdiction of any state or territorial government. *U. S. v. Knowlton*, 3 Dak. 58. The court said: "To define what is *Indian* country, within the meaning of the Act of Congress punishing crimes therein committed, is not entirely free from difficulty. The definition given in the Act of Congress, if not absolutely repealed, has become obsolete and without meaning, as applied to the present condition of the country west of the Mississippi river. Without entering into a more elaborate definition, it is sufficient for the purposes of this case to say that the term '*Indian* country' includes such portions of the public domain as are expressly reserved for the use and occupation of the several bands and tribes of *Indians*, and which are not included within the jurisdiction of any state or territorial government."

Indian Reservation and Indian Country. — In *U. S. v. Certain Property*, 1 Ariz. 40, it was said: "An *Indian* reservation and an *Indian* country are so far legal equivalents that the laws of the United States regulating trade and intercourse with the *Indians* apply alike to both. Licenses to trade in either are grantable by an *Indian* superintendent, agent, or sub-agent."

INDIANS.

BY JOSEPH R. LONG.

I. LEGAL STATUS OF INDIANS, 213.

1. *In Their Tribal Relations*, 213.
 - a. *Generally*, 213.
 - b. *Power of Self-Government*, 214.
 - (1) *Generally*, 214.
 - (2) *The Five Civilized Nations*, 214.
 - c. *Adoption of Whites*, 215.
2. *As Individuals*, 216.
 - a. *In General*, 216.
 - b. *Right to Sue and Be Sued*, 216.
 - c. *Right to Vote in State Elections*, 217.

II. WHO ARE INDIANS — PERSONS OF MIXED BLOOD, 217.

III. TREATIES WITH INDIANS, 218.

IV. CONTRACTS BETWEEN WHITES AND INDIANS, 219.

V. THE INDIAN COUNTRY, 220.

1. *Definition*, 220.
2. *Indian Reservations*, 220.
3. *The Indian Territory*, 221.

VI. GOVERNMENT OF INDIANS AND INDIAN COUNTRY, 221.

1. *Generally*, 221.
 - a. *Government Vested in United States*, 221.
 - b. *State and Territorial Jurisdiction*, 222.
2. *In Criminal Cases*, 223.
3. *Protection of Indians*, 225.
4. *Regulation of Commerce with Indians*, 227.
 - a. *Generally*, 227.
 - b. *Sale of Liquor to Indians*, 228.
 - c. *Indian Traders*, 228.
5. *Removal of Persons from Indian Country*, 228.

VII. INSTRUCTION OF INDIANS, 229.

VIII. INDIAN LANDS, 229.

1. *Nature of Indian Title*, 229.
2. *Extinguishment of Indian Title*, 231.
3. *Allotments in Severalty*, 232.
4. *Alienation of Indian Lands*, 233.
 - a. *By Indian Tribes*, 233.
 - b. *By Individual Indians*, 233.
5. *How Far Subject to State Laws*, 235.
 - a. *Generally*, 235.
 - b. *Adverse Possession*, 235.
 - c. *Descent*, 236.
 - d. *Taxation*, 236.

IX. OFFICERS OF INDIAN AFFAIRS, 236.

X. INDIAN DEPREDACTIONS, 237.

CROSS-REFERENCES.

For matters of *PROCEDURE*, see *ENCYCLOPEDIA OF PLEADING AND PRACTICE*, vol. 10, p. 341.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *CITIZENSHIP*, vol. 6, p. 14; *DOMINION OF CANADA*, vol. 10, p. 90; *ELECTIONS*, vol. 10, pp. 591, 607; *INTERSTATE COMMERCE*; *INTOXICATING LIQUORS*; *PUBLIC LANDS*; *TREATIES*; *UNITED STATES COURTS*.

I. LEGAL STATUS OF INDIANS — 1. In Their Tribal Relations — a. GENERALLY — Indian Tribes Domestic Dependent Nations. — The position of the Indian tribes within the limits of the United States is an anomalous one. Although in certain respects regarded as possessing the attributes of nationality, they are considered not as foreign but as "domestic dependent nations."¹

Indians Wards of Nation. — The Indians are denominated the "wards of the nation," and as such are entitled to the care and protection due from a guardian to his ward.²

Status of Particular Tribes. — The status of the Indian tribes varies somewhat in the different parts of the country according to their number, situation, and circumstances. Particular instances will be found discussed in the note.³

1. The Legal Position of the Indian Tribes was so defined by Chief Justice Marshall in the leading case of *Cherokee Nation v. Georgia*, 5 Pet. (U. S.) 1. See also *U. S. v. Kagama*, 118 U. S. 375.

The Indians are not a portion of the political community known as the "people of the United States," and, although not foreign nations or persons, they have always been regarded and treated as distinct and independent political communities. *U. S. v. Osborne*, 6 Sawy. (U. S.) 406.

See also, as to the status of the Indians and Indian tribes, *U. S. v. Rogers*, 4 How. (U. S.) 567; *Karraho v. Adams*, 1 Dill. (U. S.) 344; *McKay v. Campbell*, 2 Sawy. (U. S.) 118; *Roche v. Washington*, 19 Ind. 53, 81 Am. Dec. 376; *Goodell v. Jackson*, 20 Johns. (N. Y.) 693, 11 Am. Dec. 351; *Fellows v. Denniston*, 23 N. Y. 420; *Ryan v. Knorr*, 19 Hun (N. Y.) 540; *State v. Doxtater*, 47 Wis. 278.

Indians as Resident Aliens. — Under a statute providing that no person except a citizen of the United States, or an alien at the time a *bona fide* resident of the United States, shall take, hold, convey, or pass by descent lands, except, etc., an Indian, although not a citizen, may be a resident alien, and so be competent to transfer property by devise. *Parent v. Walmsly*, 20 Ind. 82.

2. Indians Wards of the Nation or State. — *Cherokee Nation v. Georgia*, 5 Pet. (U. S.) 1; *Felix v. Patrick*, 145 U. S. 317; *U. S. v. Boyd*, 68 Fed. Rep. 577, 83 Fed. Rep. 547; *Carter v. U. S.*, (Indian Ter. 1896) 37 S. W. Rep. 204.

The Indians in Maine and Massachusetts have from an early period been regarded as wards of the state. See note immediately following. And see *infra*, this title, *Government of Indians and Indian Country — Protection of Indians*.

3. Alaska Indians. — See *In re Sah Quah*, 31 Fed. Rep. 327; *In re Can-ah-couqua*, 29 Fed. Rep. 637.

Cherokee Indians in North Carolina. — See *Cherokee Trust Funds*, 117 U. S. 288; *U. S. v.*

Boyd, 68 Fed. Rep. 577, 83 Fed. Rep. 547; *State v. Ta-cha-na-tah*, 64 N. Car. 614.

By the Act of Congress of July 27, 1868 (15 Stat. at L. 228), these Indians were placed under the same supervisory charge of the commissioner of Indian affairs as other tribes of Indians. *Rollins v. Cherokee Indians*, 87 N. Car. 229.

Indians in Indian Territory. — See *infra*, this section, *Power of Self-Government — The Five-Civilized Nations*.

The Indians in Louisiana are not under the protection of the federal government, nor do they live on reservations set apart for them by that government, nor maintain tribal relations. The state courts therefore have jurisdiction over crimes committed by them. *State v. Chiqui*, 40 La. Ann. 131.

The Indians in Maine have from an early period been regarded as wards of the state and under its regulation and control. *Moor v. Veazie*, 32 Me. 343, 52 Am. Dec. 655; *John v. Sabattis*, 69 Me. 473.

Massachusetts Indians. — See *Andover v. Canton*, 13 Mass. 547; *Thaxter v. Grinnell*, 2 Met. (Mass.) 13; *Mayhew v. Gay Head*, 13 Allen (Mass.) 129; *Jaha v. Belleg*, 105 Mass. 258; *Danzell v. Webquish*, 108 Mass. 133; *Lynn v. Nahant*, 113 Mass. 433; *Coombs's Petitioner*, 127 Mass. 278; *Pells v. Webquish*, 129 Mass. 469.

By the statute of 1869 all Indians within the commonwealth are made and declared to be citizens thereof, and entitled to all the rights, privileges, and immunities, and subject to all the duties and liabilities, to which citizens are entitled or subject. Pub. Stat. Mass. (1882), c. 6, § 4.

The Indians in Mexico are citizens of that republic. *U. S. v. Ritchie*, 17 How. (U. S.) 525.

Miami Tribe in Indiana. — As to the status of this tribe, see *Roche v. Washington*, 19 Ind. 53, 81 Am. Dec. 376; *Ke-tuc-e-mun-guah v. McClure*, 122 Ind. 541.

Narragansetts in Rhode Island. — As to the

b. POWER OF SELF-GOVERNMENT — (1) *Generally.* — The power of Indians while maintaining their tribal relations, to regulate their internal domestic affairs, has been generally recognized by the courts,¹ though this power has been considerably abridged of late by the Acts of Congress enlarging the jurisdiction of the federal courts in respect to crimes committed by Indians.²

Judicial Notice of Tribal Laws. — The courts will not take judicial notice of the laws and customs of the Indian tribes.³

(2) *The Five Civilized Nations.* — Several of the more powerful Indian tribes occupying the Indian Territory, known as the "five civilized nations," namely the Cherokees, Chickasaws, Choctaws, Creeks, and Seminoles, and the tribes incorporated into these nations, have adopted to a great extent the habits of civilized life, and have established a well-organized constitutional government secured to them by treaties and Acts of Congress. Each nation has its elective executive head, a dual legislative and a judiciary system, with superior and inferior courts. They may enact laws for the regulation of their internal affairs provided such laws are not in conflict with the constitution and laws of the United States, and the proceedings and judgments of their courts in cases within their jurisdiction stand on the same footing and are entitled to

status of the Narragansett Indians, see *Narragansett Indians*, 20 R. I. 715.

The Pueblo Indians in New Mexico are not an Indian tribe within the meaning of the federal statutes. *U. S. v. Joseph*, 94 U. S. 614; *Pueblo Indians*, 20 Op. Atty.-Gen. 215; *U. S. v. Lucero*, 1 N. Mex. 422.

Seneca Nation in New York. — The Seneca Indians in New York are constituted and recognized by the statutes of the state as a distinct community known as the Seneca Nation, and their tribal government is also recognized by the United States. They are a public corporation having power to elect officers and perpetuate their government. *Seneca Nation of Indians v. John*, (Supm. Ct. Spec. T.) 27 Abb. N. Cas. (N. Y.) 253. See also *Crouse v. New York*, etc., R. Co., 49 Hun (N. Y.) 576; *Jemison v. Kennedy*, 55 Hun (N. Y.) 47.

Shawnees. — As to the Shawnees in Kansas, see *Kansas Indians*, 5 Wall. (U. S.) 737; *Brown v. Steele*, 23 Kan. 672; *Hannon v. Taylor*, 57 Kan. 1.

The Yuma Indians in California have never entered into treaty relations with the United States, nor been recognized as having a tribal character, but are merely a race. *Jaeger v. U. S.*, 29 Ct. Cl. 172.

1. Indian Tribes May Regulate Their Internal Affairs. — *Gray v. Coffman*, 3 Dill. (U. S.) 393; *Wall v. Williamson*, 8 Ala. 48, 11 Ala. 826; *Kobogum v. Jackson Iron Co.*, 76 Mich. 498; *U. S. v. Shanks*, 15 Minn. 369; *State v. McKenney*, 18 Nev. 182; *Dole v. Irish*, 2 Barb. (N. Y.) 639; *Jones v. Laney*, 2 Tex. 342.

Indian Marriages. — Where Indians maintain their tribal relations, marriages or divorces among them, or between them and white persons, according to their tribal forms and customs, are valid although not in accordance with the laws of the state. *Wall v. Williamson*, 8 Ala. 48, 11 Ala. 826; *Earl v. Godley*, 42 Minn. 361; *Fisher v. Allen*, 2 How. (Miss.) 611; *Johnson v. Johnson*, 30 Mo. 72, 77 Am. Dec. 598; *Boyer v. Dively*, 58 Mo. 510; *La Riviere v. La Riviere*, 77 Mo. 512, 97 Mo. 80; *Morgan v. McGhee*, 5 Humph. (Tenn.) 13. See 26 Stat. at L. 98, § 38.

So also though the marriage be polygamous. *Kobogum v. Jackson Iron Co.*, 76 Mich. 498.

But where an Indian tribe has lost all territorial jurisdiction, and the individual Indians have become subject to the state laws, an Indian marriage according to the tribal customs but not in accordance with the laws of the state is void. *Roche v. Washington*, 19 Ind. 53, 81 Am. Dec. 376; *State v. Ta-cha-na-tah*, 64 N. Car. 614.

A marriage between a white person and an Indian according to the Indian customs is void where a state statute expressly prohibits such marriages. *Wilbur's Estate*, 8 Wash. 35. See also *Kelley v. Kitsap County*, 5 Wash. 521.

A State Court of Probate Has No Jurisdiction over the estate of a deceased tribal Indian who at the time of his death was not a citizen of the United States nor of the state. *U. S. v. Payne*, 4 Dill. (U. S.) 387; *U. S. v. Shanks*, 15 Minn. 369; *Dole v. Irish*, 2 Barb. (N. Y.) 639.

Contra where the laws of the state have been extended over the tribe. *Reed v. Brasher*, 9 Port. (Ala.) 438. And see *Brashear v. Williams*, 10 Ala. 630.

Validity of Contracts Between Whites Not Affected by Indian Laws and Customs. — The validity of contracts between citizens of the United States, which are binding and valid under the laws of the United States, and of the states where made, is not affected by the customs or laws of the Indian tribes within whose territory the contract is made. *Anheuser-Busch Brewing Assoc. v. Bond*, 66 Fed. Rep. 653; *Walker Trading Co. v. Grady Trading Co.*, (Indian Ter. 1897) 39 S. W. Rep. 354.

2. See *infra*, this title, *Government of Indians and Indian Country* — *In Criminal Cases*.

3. **Judicial Notice.** — *Sioux Mixed Blood*, 20 Op. Atty.-Gen. 711; *Baldwin v. Squires*, 20 Kan. 280. See the title JUDICIAL NOTICE.

Customs. — The custom of the Creek nation as to the right of an Indian woman, when married to a white man, to hold in her own right the property which she had before marriage, is a fact to be proved as any other fact, and is for the jury. And one acquainted with the customs of the nation, although not a law-

the same faith and credit as those of the territories of the Union.¹ The members by blood of these tribes are not citizens of the United States, nor are they aliens in the sense that citizens of foreign and independent states are aliens. Like other Indians they are regarded as the wards of the nation. Subject to the provisions of the treaties under which their governments are organized, and to the fundamental limitations inherent in the form and character of American institutions, Congress has all the power of legislation over these nations and the area occupied by them that is combined in the federal and state governments.²

The Title to the Land Occupied by the Indian Nations is a title in fee simple,³ vested, however, in the nation and not in the individual citizens thereof.⁴ One not a citizen of an Indian nation cannot acquire any title to nor legally occupy lands within the nation, except with the consent or acquiescence of some citizen thereof.⁵

c. ADOPTION OF WHITES. — A white man may become a member of an Indian nation by adoption when so permitted by the laws of that nation, and the effect of such adoption is to vest the tribal courts with exclusive jurisdiction over civil and criminal cases arising between him and other members of the nation.⁶ But a citizen of the United States who becomes a member of one of the Indian nations by adoption does not thereby become an Indian, but remains a citizen of the United States;⁷ nor can he thereby obtain

yer, may testify thereto. *Wear v. Sanger*, 91 Mo. 348.

1. *The Five Civilized Nations*. — See *Keokuk v. Ulam*, 4 Okla. 5.

Consult the various treaties with these nations found in the several volumes of the Statutes at Large. See also the Act of May 2, 1890, 26 Stat. at L. 93, §§ 29-37.

Cherokee Nation. — As to the social and political condition and status of the Cherokee nation, consult *Cherokee Nation v. Georgia*, 5 Pet. (U. S.) 1; *Parks v. Ross*, 11 How. (U. S.) 362; *Mackey v. Cox*, 18 How. (U. S.) 100; *Cherokee Nation v. Southern Kansas R. Co.*, 135 U. S. 641; *Cherokee Nation v. Journeycake*, 155 U. S. 196, *affirming* 28 Ct. Cl. 281; *Talton v. Mayes*, 163 U. S. 376; *Mehlin v. Ice*, 56 Fed. Rep. 12; *Raymond v. Raymond*, 83 Fed. Rep. 721.

As to the incorporation of other tribes into the Cherokee nation under the treaty of 1866 between the nation and the United States (14 Stat. at L. 799, 803), see *Cherokee Nation v. Journeycake*, 155 U. S. 196; *Cherokee Nation v. Blackfeather*, 155 U. S. 218.

The Cherokee nation is a "territory," and its chief executive officer a "governor," within the meaning of a state statute authorizing the registration of deeds acknowledged out of the state, before a judge of the state or territory where the grantor is, when accompanied by a certificate from the governor of such state or territory attesting the official character of such judge. *Whitsett v. Forehand*, 79 N. Car. 230. See also *Mackey v. Cox*, 18 How. (U. S.) 100; *Mehlin v. Ice*, 56 Fed. Rep. 12.

The Proceedings and Judgments of the Courts of the Cherokee Nation in cases within their jurisdiction are on the same footing with proceedings and judgments of the courts of the territories of the Union, and are entitled to the same faith and credit. *Per Caldwell, J.*, in *Mehlin v. Ice*, 56 Fed. Rep. 12; *Raymond v. Raymond*, 83 Fed. Rep. 721.

Creek Nation. — As to the status of the Creek

nation, see *Crabtree v. Madden*, 54 Fed. Rep. 426.

Right of Indian Nation to Require Permits to Reside Therein. — In the absence of treaty or statutory provisions to the contrary, the Choctaw and Chickasaw nations have power to regulate their own rights of occupancy, and to say who shall participate therein and upon what conditions; and hence may require permits to reside in the nation from citizens of the United States, and levy a pecuniary exaction therefor. *Improvement of Great Kanawha River*, 19 Op. Atty.-Gen. 34. See also *Intruders on Lands of Choctaws, etc.*, 17 Op. Atty.-Gen. 134.

2. *Per Lewis, J.*, in *Carter v. U. S.*, (Indian Ter. 1896) 37 S. W. Rep. 204. In this case it was held that a member of the Chickasaw tribe, otherwise qualified, was competent to serve on the grand jury of the federal courts in the territory.

3. See *infra*, this title, *Indian Lands — Nature of Indian Title*.

4. A court of the Indian Territory will take judicial cognizance of the fact that the title to the lands in the Chickasaw nation is in the nation, and not in the individual citizens thereof. *Myers v. Mathis*, (Indian Ter. 1898) 46 S. W. Rep. 178.

5. *Myers v. Mathis*, (Indian Ter. 1898) 46 S. W. Rep. 178; *Case v. Hall*, (Indian Ter. 1898) 46 S. W. Rep. 180.

6. *Adoption of Whites*. — *Nofire v. U. S.*, 164 U. S. 657; *Raymond v. Raymond*, 83 Fed. Rep. 721. See also *Alberty v. U. S.*, 162 U. S. 499.

7. *Whites Do Not Become Indians by Adoption*. — *U. S. v. Rogers*, 4 How. (U. S.) 567; *U. S. v. Ragsdale*, Hempst. (U. S.) 497; *French v. French*, (Tenn. Ch. 1898) 52 S. W. Rep. 517; *Raymond v. Raymond*, 83 Fed. Rep. 721, *reversing* (Indian Ter. 1896) 37 S. W. Rep. 202.

In this last case the court said: "His adoption into one of these tribes has the effect to bestow on him the privileges and immunities

exemption from the laws of the United States regulating intercourse with the Indians.¹

Withdrawal of Citizenship by Tribe. — Citizenship conferred by an Indian tribe upon an alien may be afterwards withdrawn by the tribe, and upon such withdrawal the original status of the adopted member becomes restored.²

Marriage of Whites and Indians. — It has been held that the marriage of a man not an Indian to an Indian woman does not give him the status of a tribal Indian, and that he does not acquire such status from the fact that he resides upon an Indian reservation with his Indian wife.³ By the laws of some of the Indian tribes, however, a white man who marries an Indian woman becomes a member of her tribe by adoption.⁴

2. As Individuals — *a.* IN GENERAL. — The questions whether Indians are within the Fourteenth and Fifteenth Amendments to the United States Constitution,⁵ or within the habeas corpus act,⁶ are treated elsewhere.

b. RIGHT TO SUE AND BE SUED. — The right of Indians to sue in both federal⁷ and state⁸ courts is well established. So also, in the absence of

of its members, and subjects him to the laws and usages of the tribe, but it has no greater effect."

1. Trade with Cherokees, 2 Op. Atty.-Gen. 402. See also *U. S. v. Ragsdale*, Hempst. (U. S.) 497.

2. **Withdrawal of Citizenship.** — *Roff v. Burney*, 168 U. S. 218.

3. *Stiff v. M'Laughlin*, 19 Mont. 300.

4. See *Roff v. Burney*, 168 U. S. 218; *Stevenson v. Christie*, 64 Ark. 72.

5. See the titles CITIZENSHIP, vol. 6, pp. 18, 28; CIVIL RIGHTS, vol. 6, p. 68.

6. See the title HABEAS CORPUS, vol. 15, p. 125.

Dawes Bill Declaring Indians to Be Citizens. — Act of Feb. 8, 1887, 24 Stat. at L. 390, § 6. See *State v. Frazier*, 28 Neb. 438.

This statute is not in conflict with the provision of the Constitution (art. 1, § 8) that Congress shall have power to establish a uniform rule of naturalization. *State v. Norris*, 37 Neb. 299.

Under this section Indians and persons of Indian descent residing upon lands allotted to them in severalty, and upon which the preliminary patents have been issued, are citizens of the United States and qualified voters of the state in which they reside. *State v. Denoyer*, 6 N. Dak. 586.

And it is not necessary that the patents should have been actually issued or received, where the land has been allotted to the Indians and they have accepted and taken possession of it and have done all that is required of them by law to entitle them to the lands and the right of citizenship. *State v. Norris*, 37 Neb. 299.

This section has no application to a tribe of Indians, but is intended to cover the case of the individual Indian who has taken up his residence separate and apart from his tribe, and has adopted the habits of civilized life. *U. S. v. Boyd*, 83 Fed. Rep. 547.

Indians Who Have Become Citizens Not Released from Government Control. — But the fact that Indians have received allotments of land and have become citizens of the United States does not necessarily release them from the control of the United States, nor deprive them of such supervision as may be deemed necessary for

their protection. *Eells v. Ross*, 64 Fed. Rep. 417; *U. S. v. Flournoy Live-Stock, etc., Co.*, 69 Fed. Rep. 886, 71 Fed. Rep. 576; *U. S. v. Mullin*, 71 Fed. Rep. 682; *Renfrow v. U. S.*, 3 Okla. 161.

7. **Indians May Sue in Federal Courts.** — *Felix v. Patrick*, 36 Fed. Rep. 457. See also *Kansas Indians*, 5 Wall. (U. S.) 737.

The right of Indians to sue is recognized by implication in U. S. Rev. Stat., § 2126.

8. **Right to Sue in State Courts.** — *Swartzell v. Rogers*, 3 Kan. 374; *Ingraham v. Ward*, 56 Kan. 550.

The right of an Indian to sue in the state courts was recognized in *Missouri Pac. R. Co. v. Cullers*, 81 Tex. 382, citing 10 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 440.

A member of an Indian tribe located upon a reservation may maintain an action on a contract made while temporarily absent from the reservation in the courts of the state where the contract was made. *Whirlwind v. Von der Ahe*, 67 Mo. App. 628.

An Indian may recover in a state court in an action for assault and battery and false imprisonment. See *Wiley v. Keokuk*, 6 Kan. 94; *Wiley v. Man-a-to-wah*, 6 Kan. 111. Or for the diversion of water appropriated by him on the public lands. *Lobdell v. Hall*, 3 Nev. 507.

Indians Who Have Received Allotments and Patents therefor under the Act of Feb. 8, 1887, have the same standing in the state courts as any other citizens of the United States. *Walla-note-the-tynin v. Carter*, (Idaho 1898) 53 Pac. Rep. 106.

The Indians in New York cannot as tribes sue in the state courts, but they may sue as individuals on behalf of themselves and the other members of the tribe. *Strong v. Waterman*, 11 Paige (N. Y.) 607; *Montauk Tribe of Indians v. Long Island R. Co.*, 28 N. Y. App. Div. 470; *Onondaga Nation v. Thacher*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 428.

By the enabling Act of 1845 the Seneca nation may sue as a tribe. See *Seneca Nation of Indians v. Christie*, 126 N. Y. 124, 162 U. S. 283; *Seneca Nation of Indians v. Hugaboom*, 132 N. Y. 492.

Attorney for Indians — New York. — In New York various statutes have been passed providing for the appointment of attorneys for the

a statute providing otherwise, they may be sued in the state courts on contracts entered into by them.¹

Laches cannot be imputed to a tribal Indian;² but when the state of pupilage of the Indians is terminated by their becoming citizens of the United States they are charged with the same diligence as white people in the discovery of fraud in the dealings of the whites with them.³

Indian as Witness. — An Indian is a competent witness in a suit against or between white persons.⁴

c. **RIGHT TO VOTE IN STATE ELECTIONS.** — A state may make an Indian a voter,⁵ and in several states statutes have been passed giving Indians the right of suffrage.⁶ Obviously, Indians who have become citizens of the state or of the United States are entitled to vote.⁷

II. WHO ARE INDIANS — PERSONS OF MIXED BLOOD. — The statutes of the United States nowhere define an "Indian,"⁸ and several cases have arisen in which the courts have been called upon to decide whether a person of mixed blood was an Indian within the meaning of the federal laws. In an early case in the United States Circuit Court it was held that the condition of the offspring of an Indian and one of another race is not determined by the quantum of Indian blood in the veins, but by the condition of the mother.⁹ This decision is sustained as to the first point by subsequent decisions, but is clearly wrong on the last point so far as the offspring of free persons is concerned. In this respect it has been expressly overruled, it being held that the condition of the child follows that of the father.¹⁰

Indian tribes in the state, whose duty it is to prosecute and defend actions by and against the Indians. See 1 Banks's Rev. Stat. (8th ed.), title Indians, p. 300. See also *Jackson v. Reynolds*, 14 Johns. (N. Y.) 335; *Jackson v. King*, 18 Johns. (N. Y.) 506; *Jemison v. Kennedy*, 55 Hun (N. Y.) 47.

1. **Indians May Be Sued in State Courts.** — *Hicks v. Ewhartsonah*, 21 Ark. 106; *Stevenson v. Christie*, 64 Ark. 72; *Jones v. Eisler*, 3 Kan. 134; *Rubideaux v. Vallie*, 12 Kan. 28; *Stokes v. Rodman*, 5 R. I. 405; *Stacy v. La Belle*, 99 Wis. 520. See *infra*, this title, *Contracts Between Whites and Indians*.

Under New York Laws of 1813, c. 29 (4 Banks's Rev. Stat. (8th ed.) 300), no person can sue or maintain any action on any contract against any of the Indians of the Seneca tribe and certain other Indians. See *Hastings v. Farmer*, 4 N. Y. 293, reversing 3 Barb. (N. Y.) 492; *Dana v. Dana*, 14 Johns. (N. Y.) 181.

But where a Seneca Indian bought a sewing machine under a contract of conditional sale providing that title should remain in the vendor until payment, it was held that an action could be maintained against him for wrongful refusal to surrender the machine on demand upon default of payment, the action not arising on contract, but sounding in tort. *Singer Mfg. Co. v. Hill*, 60 Hun (N. Y.) 347.

2. **No Laches Imputable to Tribal Indians.** — *Laughton v. Nadeau*, 75 Fed. Rep. 789. See generally the title LACHES.

3. *Felix v. Patrick*, 145 U. S. 317. See also *Pka-o-wah-ash-kum v. Sorin*, 8 Fed. Rep. 740.

4. **Indian as Witness.** — *Smith v. Brown*, 8 Kan. 608; *Harris v. Newman*, 3 Smed. & M. (Miss.) 505; *Coleman v. Doe*, 4 Smed. & M. (Miss.) 40.

On the trial of an indictment for selling liquor to an Indian, the Indian to whom the liquor was sold is a competent witness. *Bru-*

guier v. U. S., 1 Dak. 5. See also Gen. Stat. *Kansas* (1889), § 3301.

Formerly, by statute in *Alabama*, Indians were incompetent as witnesses except for or against each other. *Carroll v. Pathkiller*, 3 Port. (Ala.) 279. See the early cases in *South Carolina*. *Miller v. Dawson*, Dudley L. (S. Car.) 174; *State v. Belmont*, 4 Strobb. L. (S. Car.) 445.

5. *U. S. v. Osborne*, 6 Sawy. (U. S.) 406. See the title ELECTIONS, vol. 10, p. 607.

6. 1 Stimson's Amer. Stat. Law., § 240. See Sanb. & B. Annot. Stat. *Wisconsin*, § 12a; *Hilgers v. Quinney*, 51 Wis. 62.

An Indian cannot vote in a state where the right of suffrage is restricted to white persons. *State v. Managers of Elections*, 1 Bailey L. (S. Car.) 21.

7. See *State v. Denoyer*, 6 N. Dak. 686; *State v. Norris*, 37 Neb. 299. See also the title ELECTIONS, vol. 10, p. 591.

As to national elections, see the title ELECTIONS, vol. 10, p. 607; *U. S. v. Elm*, 2 Cinc. L. Bul. 307, 25 Fed. Cas. No. 15,048; *Elk v. Wilkins*, 112 U. S. 120.

8. An Indian is one of the aboriginal inhabitants of America. *Bouvier's Law Dict.*

Whether a Person of Mixed Blood Is an Indian within the meaning of a treaty with an Indian tribe is to be determined by the laws and usages of the tribe. *Sioux Mixed Blood*, 20 Op. Atty.-Gen. 711.

Persons of More White than Indian Blood are to be regarded as whites under the constitution and laws of *Ohio*. *Jeffries v. Ankeny*, 11 Ohio 372; *Lane v. Baker*, 12 Ohio 237.

9. *U. S. v. Sanders*, Hempst. (U. S.) 483.

10. **Person of Mixed Blood Takes Condition of Father.** — *Ex p. Reynolds*, 5 Dill. (U. S.) 394; *Keith v. U. S.*, (Okla. 1899) 58 Pac. Rep. 507; *U. S. v. Ward*, 42 Fed. Rep. 320.

A case to a certain extent in conflict with the Volume XVI.

Half-breeds residing with their tribes are generally regarded as Indians.¹

Burden of Proving Condition in Criminal Case. — In a criminal case in the federal courts, where the jurisdiction of the court depends upon one of the parties concerned being a white person, and the defense is that such person is an Indian, the prosecution is bound to establish that he is a white person and not an Indian.²

III. TREATIES WITH INDIANS. — Until the year 1871 the United States conceded to the Indian tribes the right to treat with the United States upon terms of national equality, and numbers of treaties were made in reference to lands, supplies, education, intercourse, and other matters.³ The Act of March 3, 1871, however, provided that no Indian nation or tribe within the territory of the United States should be acknowledged or recognized as an independent nation, tribe, or power, with which the United States might contract by treaty, it being further provided that no obligation of any treaty law, fully made and ratified with any such Indian nation or tribe prior to the date of the Act, should be thereby invalidated or impaired.⁴ Since the passage of this Act, Indian affairs have been regulated by Acts of Congress and by contracts with the Indian tribes practically amounting to treaties.⁵

Treaties Between States and Indians. — Formerly several of the original states entered into treaties with the Indians within their borders, these treaties not being considered in violation of the constitutional provisions prohibiting any state from entering into any treaty, and vesting the treaty-making power in the President and Senate.⁶

Treaties with Indians, Laws of United States. — Treaties made by the United States with the Indian tribes are laws of the United States, and constitute a part of the supreme law of the land,⁷ and acts of a state legislature in

above decisions is *In re Camille*, 6 Sawy. (U. S.) 541, in which it was held that the son of a white Canadian father by an Indian woman was not a white person within the meaning of the naturalization laws.

1. *Sioux Mixed Blood*, 20 Op. Atty.-Gen. 742.

As to who is an Indian under certain *Indiana* statutes, see *Doe v. Avaline*, 8 Ind. 6.

2. *Famous Smith v. U. S.*, 151 U. S. 50.

Presumptively a person apparently of mixed blood, residing upon a reservation and claiming to be an Indian, is in fact an Indian. *Sioux Mixed Blood*, 20 Op. Atty.-Gen. 711.

3. **Treaties with Indian Tribes.** — See *Worcester v. Georgia*, 6 Pet. (U. S.) 575; *Meigs v. M'Clung*, 9 Cranch (U. S.) 11; *U. S. v. Forty-Three Gallons of Whiskey*, etc., 93 U. S. 188.

For the full text of the various Indian treaties consult the several volumes of the United States Statutes at Large, particularly volume 7, in which numerous treaties are collected.

As to the construction of the treaty of June 15, 1838, with the New York Indians, with reference to their removal to reservations in Kansas, see *New York Indians v. U. S.*, 170 U. S. 1, 614; *U. S. v. New York Indians*, 173 U. S. 464.

For a full account of all the treaties with the Cherokee, see *Cherokee Trust Funds*, 117 U. S. 288. See also *Holden v. Joy*, 17 Wall. (U. S.) 211.

Indian Claims under Treaties. — As to the claims of Indian tribes under various treaties, see: *Of the Cherokees*, *Cherokee Trust Funds*, 117 U. S. 288; *U. S. v. Old Settlers*, 148 U. S. 427. *Of the Choctaws*, *Choctaw Nation v. U.*

S., 119 U. S. 1. *Of the Chickasaws*, *Chickasaw Nation v. U. S.*, 22 Ct. Cl. 222. *Of the Creeks*, *Connor v. U. S.*, 19 Ct. Cl. 675. *Of the Chipewas*, *Parker v. Duff*, 47 Cal. 554; *Jones v. Meehan*, 175 U. S. 1.

Fishing Rights Secured by Treaty. — Under the treaty with the Makah Indians securing to them the rights of fishing, whaling, and sealing in Bering Sea in common with all citizens of the United States (12 Stat. at L. 940), the Indians secure only an equality of right, and no peculiar or superior rights or privileges denied to citizens in general. *The James G. Swan*, 50 Fed. Rep. 108. So also as to the fishery rights of the Indians in Washington under the treaty of Jan. 22, 1855. *U. S. v. Alaska Packers' Assoc.*, 79 Fed. Rep. 152.

As to the fishery rights of the Yakima tribe in Washington under the treaty of June 9, 1855, see *U. S. v. Taylor*, 3 Wash. Ter. 88; *U. S. v. Winans*, 73 Fed. Rep. 72.

4. *U. S. Rev. Stat.*, § 2079.

5. See *Sioux Mixed Blood*, 20 Op. Atty.-Gen. 711.

6. **Treaties with States.** — *Seneca Nation of Indians v. Christie*, 126 N. Y. 122. See *Stevens v. Thatcher*, 91 Me. 70.

If a treaty between a state and an Indian tribe is violated by the state, only the contracting tribe, and not a citizen of the state, nor a member of the tribe, nor any portion of such members, unless recognized by the state as such, can demand satisfaction. *Cayuga Nation of Indians v. State*, 99 N. Y. 235.

7. **Treaties with Indians, Laws of United States.** — *Worcester v. Georgia*, 6 Pet. (U. S.) 515; *U. S. v. Berry*, 2 McCrary (U. S.) 58; *U. S. v. Payne*, 2 McCrary (U. S.) 289; *In re Race*

conflict therewith are therefore void.¹

Treaties Construed Favorably to Indians. — Treaties with the Indian tribes are to be construed liberally in favor of the Indians.²

IV. CONTRACTS BETWEEN WHITES AND INDIANS — **Contracts Relating to Rights and Claims Derived from Federal Government.** — It is provided by Act of Congress that "no agreement shall be made by any person with any tribe of Indians, or individual Indians not citizens of the United States, for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands, or to any claims growing out of or in reference to annuities, instalments, or other moneys, claims, demands, or thing, under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States, unless such contract or agreement be executed and approved" in a manner prescribed by the statute.³ Moneys due the Indians under contracts properly made must be paid to them through the United States authorities; and moneys due to persons contracting with the Indians is paid by the United States upon proof of the due performance of the contract.⁴

Ordinary Contracts. — The power of Indians to enter into binding contracts with other persons according to the general law of contracts, where such contracts are not within the prohibition of this Act or similar Acts of Congress, is well established.⁵ But persons dealing with Indians must take notice of public treaties and Acts of Congress concerning them.⁶

Horse, 70 Fed. Rep. 598; Uhlig v. Garrison, 2 Dak. 71.

A treaty with an Indian tribe may be superseded by an Act of Congress. Cherokee Tobacco, 11 Wall. (U. S.) 616; U. S. v. McBratney, 104 U. S. 621. See also U. S. v. Old Settlers, 148 U. S. 427.

An Indian treaty is a public law of which the courts must take judicial notice. State v. Herold, 9 Kan. 194. See also the title JUDICIAL NOTICE.

1. State Laws in Conflict with Indian Treaties Void. — Worcester v. Georgia, 6 Pet. (U. S.) 515; Love v. Pamplin, 21 Fed. Rep. 755; *In re Race Horse*, 70 Fed. Rep. 598.

2. Treaties Construed Liberally in Favor of Indians. — Worcester v. Georgia, 6 Pet. (U. S.) 515; Kansas Indians, 5 Wall. (U. S.) 737; Waupe-man-quah v. Aldrich, 28 Fed. Rep. 489; Navarre v. U. S., 33 Ct. Cl. 235; Allen County v. Simons, 129 Ind. 193; Missouri River, etc., R. Co. v. Morris, 13 Kan. 302. See also Choctaw Nation v. U. S., 119 U. S. 1; U. S. v. Old Settlers, 148 U. S. 427; Chickasaw Nation v. U. S., 22 Ct. Cl. 222. See Miami County v. Brackenridge, 12 Kan. 114.

3. Contracts with Indians. — U. S. Rev. Stat., § 2103; Godfrey v. Scott, 70 Ind. 259; Holderman v. Pond, 45 Kan. 410; Rollins v. Cherokee Indians, 87 N. Car. 229.

This and the succeeding section are intended for the protection of the Indians and do not create a legal obligation on the part of the United States to see that the Indians perform their part of the contracts. *In re Sanborn*, 148 U. S. 222.

4. Payment of Money under Valid Contracts. — U. S. Rev. Stat., § 2104.

The rule of the statute as to the Creek Indians was changed by the Act of March 1, 1889

(25 Stat. at L. 759). U. S. v. Crawford, 47 Fed. Rep. 561.

5. Indians May Enter into Binding Contracts — Arkansas. — Hicks v. Ewhartsonah, 21 Ark. 106, distinguishing Clark v. Crosland, 17 Ark. 43; Taylor v. Drew, 21 Ark. 485.

Indiana. — Godfrey v. Scott, 70 Ind. 259; Ke-tuc-e-mun-guah v. McClure, 122 Ind. 541.

Kansas. — Jones v. Eisler, 3 Kan. 134; Rubideaux v. Vallie, 12 Kan. 28.

Maine. — Murch v. Tomer, 21 Me. 535.

Massachusetts. — Thaxter v. Grinnell, 2 Met. (Mass.) 13.

Washington. — Jack Gho v. Jules, 1 Wash. Ter. 325.

Indians living within a state and doing business as merchants are responsible by the laws of the state for the payment of their debts. Lowry v. Weaver, 4 McLean (U. S.) 82. See *supra*, this title, *Legal Status of Indians — As Individuals — Right to Sue and Be Sued*.

In Rollins v. Cherokee Indians, 87 N. Car. 229, it was held that contracts made with Indian tribes cannot be enforced against them in the state courts without the consent of the United States government.

Formerly, by statute in North Carolina, contracts with Cherokee Indians involving ten dollars or more were declared void unless executed in writing in the presence of two attesting witnesses. Lovingood v. Smith, 7 Jones L. (52 N. Car.) 601; Colvord v. Monroe, 63 N. Car. 288.

White Men Are Bound by Their Contracts with Indians, notwithstanding such contracts, if made by Indians, would be void under statutes designed for the protection of the Indians, Rogers v. Duval, 23 Ark. 77.

6. Loughton v. Nadeau, 75 Fed. Rep. 789.

Volume XVI,

V. THE INDIAN COUNTRY — 1. Definition. — The courts have frequently had occasion to define the term "Indian country" as used in various Acts of Congress, and to determine whether or not a particular section of territory was within the definition. It seems that the term now applies to all the country within the limits of the United States, whether within a reservation set apart for the exclusive occupancy of Indians or not, to which the Indian title has not been extinguished.¹

2. Indian Reservations. — From an early period it has been the policy and practice of the government, whenever the needs of advancing civilization made such a step necessary, to negotiate with the Indians for the extinguishment of their possessory right to the territory occupied by them and for their removal to reservations set apart for their use in the more remote parts of the country.² The mode of setting apart these reservations is by Act of Congress or executive order, or, prior to the Act of 1871 prohibiting treaties with the Indian tribes, by treaty.³ These reservations are clearly Indian country.⁴

1. Definition of Indian Country. — *Bates v. Clark*, 95 U. S. 204; *Ex p. Crow Dog*, 109 U. S. 556; *U. S. v. Certain Property*, 1 Ariz. 31. Compare *Pelcher v. U. S.*, 3 McCrary (U. S.) 510; *U. S. v. Martin*, 8 Sawy. (U. S.) 473.

Act of 1834. — The first section of the Indian Intercourse Act of June 30, 1834 (4 Stat. at L. 729), provides: "That all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and also that part of the United States east of the Mississippi river, and not within any state, to which the Indian title has not been extinguished, for the purposes of this Act, be taken and deemed to be the Indian country." This section has been repealed (U. S. Rev. Stat., § 5596), but it may still be referred to for the purpose of determining what was meant by the term "Indian country" when found in sections of the Revised Statutes which are reenactments of other sections of that statute. *Ex p. Crow Dog*, 109 U. S. 556; *U. S. v. Le Bris*, 121 U. S. 278.

Alaska is not Indian territory within the meaning of the United States Revised Statutes. *U. S. v. Seveloff*, 2 Sawy. (U. S.) 311; *Waters v. Campbell*, 4 Sawy. (U. S.) 121; *Kie v. U. S.*, 27 Fed. Rep. 351.

But by the Act of March 3, 1873 (17 Stat. at L. 530), extending sections 20 and 21 of the Intercourse Act of 1834 over Alaska, that territory becomes Indian country so far as the introduction and disposition of spirituous liquors therein are concerned. *In re Carr*, 3 Sawy. (U. S.) 316; *U. S. v. Stephens*, 8 Sawy. (U. S.) 116.

Alaska is Indian country within the meaning of the statutes prohibiting certain commerce in the Indian country, but not in the sense that the inhabitants thereof are subject to no law save the usages and customs of the Indians. *In re Sah Quah*, 31 Fed. Rep. 327. See also *U. S. v. Nelson*, 29 Fed. Rep. 202.

The Cherokee Outlet in Oklahoma is Indian country. *U. S. v. Pidgeon*, 153 U. S. 48.

The State of Nevada is not Indian country. *U. S. v. Leathers*, 6 Sawy. (U. S.) 17.

Nor Is Oregon. — *U. S. v. Tom*, 1 Oregon 26. **The Territory of Montana** was held to be Indian country. *U. S. v. 196 Buffalo Robes*, 1 Mont. 489.

So Also of Washington Territory. — *Fowler v. U. S.*, 1 Wash. Ter. 3.

2. Indian Reservations. — Consult the various Indian treaties.

The policy of the United States has from the earliest times been to protect all citizens in the occupation of ceded Indian country, and to secure cessions as fast as demanded by the increase of population by fair and large compensations paid to the Indians, and when territory has once been solemnly ceded by the Indians to the United States it is not thereafter considered or treated as Indian country for any purpose. *Clark v. Bates*, 1 Dak. 40.

An Indian reservation is a part of the public domain, set apart by proper authority for the use and occupation of a tribe or tribes of Indians. Forty-three Cases Cognac Brandy, etc., 14 Fed. Rep. 539; *U. S. v. Certain Property*, 1 Ariz. 31; *U. S. v. Knowlton*, 3 Dak. 58.

3. Reservations Established by Treaty, Statute, or Executive Order. — *U. S. v. Leathers*, 6 Sawy. (U. S.) 17; *U. S. v. Payne*, 2 McCrary (U. S.) 289, 8 Fed. Rep. 883; Forty-three Cases Cognac Brandy, etc., 14 Fed. Rep. 539; *Uhlig v. Garrison*, 2 Dak. 71; *U. S. v. Knowlton*, 3 Dak. 58. See *Langford v. Monteith*, 1 Idaho 612.

Custom — Prescription. — An Indian reservation cannot be established by custom or prescription. Forty-three Cases Cognac Brandy, etc., 14 Fed. Rep. 539.

4. Indian Reservations Are Indian Country. — *U. S. v. Crook*, 5 Dill. (U. S.) 453; *U. S. v. Leathers*, 6 Sawy. (U. S.) 17; *U. S. v. Sturgeon*, 6 Sawy. (U. S.) 29; *U. S. v. Bridleman*, 7 Sawy. (U. S.) 243, 7 Fed. Rep. 894; *U. S. v. Martin*, 8 Sawy. (U. S.) 473; *U. S. v. Partello*, 48 Fed. Rep. 670; *Ex p. Crow Dog*, 109 U. S. 556; *U. S. v. Le Bris*, 121 U. S. 278; *In re Wilson*, 140 U. S. 575; *McCall v. U. S.*, 1 Dak. 307; *Uhlig v. Garrison*, 2 Dak. 71; *U. S. v. Knowlton*, 3 Dak. 58; *U. S. v. 196 Buffalo Robes*, 1 Mont. 489; *Goodson v. U. S.*, 7 Okla. 117.

The Abandoned Klamath Reservation in California is not Indian country. *U. S. v. Forty-eight Pounds of Rising Star Tea*, etc., 35 Fed. Rep. 403, 38 Fed. Rep. 400.

The Indian Reservations in New York are not Indian country. *Benson v. U. S.*, 44 Fed. Rep. 178.

3. The Indian Territory. — The largest single district of Indian country is the Indian Territory, which is an unorganized territory of the United States, set apart in 1834 for the exclusive occupancy of the Indian tribes which were removed at that time from their original homes. This territory is occupied entirely by the five civilized nations.¹

VI. GOVERNMENT OF INDIANS AND INDIAN COUNTRY — 1. Generally — a. GOVERNMENT VESTED IN UNITED STATES. — The Indians and the territory which may have been specially set apart for their use are subject to the jurisdiction of the United States, and Congress may pass such laws as it sees fit prescribing the rules governing the intercourse of the Indians with one another and with citizens of the United States, and also the courts in which all controversies to which an Indian may be a party shall be submitted.² While the Indians, when preserving their tribal relations, are possessed of some of the attributes of sovereignty, having the power of regulating their internal and social relations,³ all such rights are subject to the supreme legislative authority of the United States.⁴ But the existence of the right in Congress to regulate the manner in which the local powers of an Indian nation shall be exercised does not render such local powers federal powers arising from and created by the Constitution of the United States. Hence the question as to whether a statute of an Indian nation, not repugnant to the Constitution of the United States or in conflict with any law or treaty of the United States, has been repealed by another statute of such nation, and the determination of what is the existing law of such nation on a particular point, are matters solely within the jurisdiction of the courts of the nation, and the decision of such a question in itself necessarily involves no infraction of the Constitution of the United States.⁵

Federal Authority Supreme. — The Constitution of the United States and the laws and treaties made in pursuance thereof constitute the supreme law of the land in Indian as well as in other affairs,⁶ and neither the constitution of a state nor an act of its legislature can prevent the application of an Act of Congress to the Indian tribes residing in the state but subject to the control of the general government.⁷

Power of Congress over Intercourse with Indian Tribes Independent of Locality. — The power of Congress to regulate intercourse between the whites and Indian tribes

1. See *supra*, this title, *Legal Status of Indians — In Their Tribal Relations — Power of Self-Government — The Five Civilized Nations*.

As to Acts of Congress relating to the Indian Territory, see *Cook v. U. S.*, 138 U. S. 157.

2. **Government of Indians Vested in United States.** — *Per Brewer, J.*, in *Roff v. Burney*, 168 U. S. 218.

The Indians being considered as the wards of the nation, whenever the United States has set apart any of its land as an Indian reservation, whether within a state or territory, it has full authority to pass such laws and authorize such measures as may be necessary to give to the Indians full protection in their persons and property, and to punish all offenses committed against or by them within such reservations. *U. S. v. Thomas*, 151 U. S. 577.

The Indian country is within the jurisdiction of the United States, and Congress may extend all laws within the constitutional limits of municipal legislation over the same. *U. S. v. Tobacco Factory*, 1 Dill. (U. S.) 264, *affirmed* in 11 Wall. (U. S.) 616.

The Internal Revenue Laws imposing taxes on manufactured tobacco are in force in the Indian country. *U. S. v. Tobacco Factory*, 1

Dill. (U. S.) 264, *affirmed* in 11 Wall. (U. S.) 616.

3. *U. S. v. Kagama*, 118 U. S. 375; *Talton v. Mayes*, 163 U. S. 376. See *supra*, this title, *Legal Status of Indians — In Their Tribal Relations — Power of Self-Government*.

4. *Cherokee Nation v. Southern Kansas R. Co.*, 135 U. S. 641; *Talton v. Mayes*, 163 U. S. 376.

5. *Talton v. Mayes*, 163 U. S. 376.

6. *U. S. v. Holliday*, 3 Wall. (U. S.) 407; *U. S. v. Flournoy Live-Stock, etc., Co.*, 69 Fed. Rep. 886; *U. S. v. Boyd*, 83 Fed. Rep. 547.

7. **State Legislature Cannot Interfere with Federal Authority over Indians.** — *U. S. v. Holliday*, 3 Wall. (U. S.) 407; *U. S. v. Boyd*, 83 Fed. Rep. 547; *Ryan v. Knorr*, 19 Hun (N. Y.) 540.

In a conflict between a law of a state and a treaty of the United States, in regard to Indian lands in the state, the former must give way; neither the title nor possession of the Indian owner secured by treaty with the United States can be disturbed by state legislation. *Krause v. Means*, 12 Kan. 335; *Maynes v. Veale*, 20 Kan. 374.

does not depend upon locality, but may be exercised wherever Indian tribes are found irrespective of state lines or governments.¹

President May Prescribe Regulations. — The President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs.²

Jurisdiction of Federal Courts in Indian Territory. — By the Act of May 2, 1890, jurisdiction was given to the federal courts in all civil cases in the Indian Territory, except cases over which the tribal courts have exclusive jurisdiction, also in all cases on contracts between citizens of any tribe or nation and citizens of the United States, over all controversies arising between members or citizens of one tribe or nation and those of another tribe or nation, and in other cases specially provided for in the Act. It is provided, however, that the judicial tribunals of the Indian nations shall retain exclusive jurisdiction in all civil and criminal cases arising in the country in which members of the nation by nativity or adoption shall be the only parties.³ Certain sections of the statute laws of *Arkansas* were by the same Act extended over and put in force in the territory.⁴

b. STATE AND TERRITORIAL JURISDICTION. — It does not follow because the authority of the federal government over the Indians and the Indian country is supreme, that the state and territorial governments have no jurisdiction whatever over them. Upon the admission of a state into the Union or the organization of a territory, in the absence of treaty provisions to the contrary, the lands embraced therein occupied by Indian tribes become a part of the state or territory so admitted or organized, and subject to its jurisdiction, except so far as concerns the government and protection of the Indians themselves, and for purposes relating to the treaties and agreements between the United States and the Indians, in which respects the jurisdiction of the United States is exclusive.⁵ But where such reservations are expressly excluded from the limits or jurisdiction of the state or territory, the state or territorial governments have no jurisdiction therein.⁶ The Indians themselves, when off

1. *U. S. v. Forty-three Gallons of Whiskey*, etc., 93 U. S. 188; *U. S. v. Bridleman*, 7 Fed. Rep. 894; *U. S. v. Martin*, 14 Fed. Rep. 817.

2. **President May Prescribe Regulations for Government of Indian Affairs.** — U. S. Rev. Stat., § 465; *Adams v. Freeman*, (Okla. 1897) 50 Pac. Rep. 135; *U. S. v. Clapox*, 35 Fed. Rep. 575.

3. **Jurisdiction of Courts in Indian Territory.** — 26 Stat. at L. 93, §§ 29, 30, 36.

The federal courts have no jurisdiction in an action to collect a tax imposed by an Indian tribe upon citizens of the United States. *Crabtree v. Madden*, 54 Fed. Rep. 426.

4. **Laws of Arkansas Made Applicable in Indian Territory.** — 26 Stat. at L. 94, § 31.

Upon the adoption of certain portions of the Arkansas statutes for the Indian Territory by this act the statutes so adopted become Acts of Congress for the territory, and it is the duty of the United States court to enforce them as such. *Leak Glove Mfg. Co. v. Needles*, 69 Fed. Rep. 68.

Common Law in Force. — Under the Act of Congress of March 1, 1889 (25 Stat. at L. 783), establishing a court for the Indian Territory, the common law prevails in the territory in the absence of statute, or of local laws, rules, or customs. *Pyeatt v. Powell*, 51 Fed. Rep. 551; *Arkansas City Bank v. Swift*, 57 Kan. 460.

5. **Indian Lands Included in Jurisdiction of State or Territory** — *United States*. — *U. S. v. Ward*, 1 Woolw. (U. S.) 17; *Langford v. Monteith*, 102 U. S. 145; *Utah*, etc., *R. Co. v. Fisher*, 116 U.

S. 28; *Thomas v. Gray*, 169 U. S. 264, reversing 5 Okla. 1; *Wagoner v. Evans*, 170 U. S. 588; *Truscott v. Hurlbut Land, etc., Co.*, 73 Fed. Rep. 60.

Alabama. — *Caldwell v. State*, 1 Stew. & P. (Ala.) 328. See also *Thomas v. Adams*, 2 Port. (Ala.) 188; *Reed v. Brasher*, 9 Port. (Ala.) 438.

Kansas. — *McCracken v. Todd*, 1 Kan. 148. *Nebraska*. — *Painter v. Ives*, 4 Neb. 122; *State v. Norris*, 37 Neb. 299.

Oklahoma. — *Keokuk v. Ulam*, 4 Okla. 5; *Gay v. Thomas*, 7 Okla. 184, overruling 5 Okla. 1. See *infra*, this title, *Indian Lands — How Far Subject to State Laws*.

A state may include an Indian reservation within the boundaries of a town. *Schriber v. Langlade*, 66 Wis. 616.

In *New York* the highway laws of the state are extended by statute over Indian reservations in the state. Laws 1881, c. 355. See *O'Meara v. Allegany*, 3 Thomp. & C. (N. Y.) 235; *France v. Erie R. Co.*, 5 Thomp. & C. (N. Y.) 12.

As to the exemption of Cherokee Indians from taxation under the *Tennessee Act of 1833* see *State v. Ross*, 7 Verg. (Tenn.) 74.

A state has no power to tax the personal property of an Indian trader on a reservation. *Foster v. Blue Earth County*, 7 Minn. 140; *Fremont County v. Moore*, 3 Wyo. 200.

6. **Federal Authority on Reservation Exclusive When So Reserved.** — *Harkness v. Hyde*, 98 U.

their reservations, or when they have severed their tribal relations or become citizens of the United States, are subject to the laws of the state or territory in which they reside.¹

2. In Criminal Cases — Federal Statutes. — By the Act of Congress of June 30, 1834, as modified somewhat by subsequent acts, it is provided that the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country, but that this shall not be construed to extend to crimes committed by one Indian against the person or property of another Indian, nor to any offense committed by an Indian in the Indian country for which he has been punished by the local law of the tribe, nor to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.²

Act of 1885. — By the Act of March 3, 1885, jurisdiction was conferred upon the territorial courts over certain enumerated crimes committed by an Indian against the person or property of another Indian within any territory of the United States and either within or without an Indian reservation; and it was further provided that Indians committing any of such crimes against the person or property of another Indian or other person within any state and within the limits of any reservation shall be subject to the same laws and penalties and tried in the same courts and in the same manner as are all other persons committing any of the crimes named within the exclusive jurisdiction of the United States.³ By this Act the authority previously accorded to tribal Indians, to administer their own criminal laws among themselves, was withdrawn so far as the crimes enumerated therein are concerned, and Indians who commit any of the specified crimes are punishable therefor notwithstanding

S. 476. See also *U. S. v. Berry*, 2 McCrary (U. S.) 58.

But in *Stiff v. M'Laughlin*, 19 Mont. 300, it was held that a provision in the enabling act of a state that all Indian lands therein should remain under the absolute jurisdiction and control of Congress does not prevent the levy of an execution by an officer of a state court on the personal property of a person not an Indian who resides on an Indian reservation.

1. Indians Subject to State Laws. — *Murch v. Tomer*, 21 Me. 535; *Moor v. Veazie*, 32 Me. 343, 52 Am. Dec. 655; *State v. Newell*, 84 Me. 465; *Stevens v. Thatcher*, 91 Me. 70; *Danzell v. Webquish*, 108 Mass. 133.

Game Laws. — Members of the Seneca Nation of Indians are amenable to the *New York Game Laws*, notwithstanding a reservation in conveyances made by them of the right to hunt and fish. *People v. Pierce*, 18 Misc. (N. Y.) 83.

It has been held that while the state authorities have a very extensive jurisdiction over the territory included in the White Earth Indian reservation, in *Minnesota*, the tribal Indians on the reservation have, under their treaties with the United States, and the acquiescence of the state for over thirty years, a license to hunt and fish on the reservation, in their usual and traditional manner, in order to procure food for themselves, notwithstanding that the state laws prohibit such fishing and hunting. *State v. Cooney*, (Minn. 1899) 80 N. W. Rep. 606.

Voting on Reservation — Jurisdiction of State. — It is no ground for rejecting votes cast in a

state election by Indians who have become citizens of the United States, that the polling places at which they were cast were located on their reservations, such reservations being within the jurisdiction of the state in which they are situated. *State v. Norris*, 37 Neb. 299.

2. United States Criminal Laws Extended over Indian Country. — U. S. Rev. Stat., §§ 2145-2146; *U. S. v. Bridleman*, 7 Sawy. (U. S.) 243, 7 Fed. Rep. 894; *U. S. v. Martin*, 14 Fed. Rep. 817; *U. S. v. Partello*, 48 Fed. Rep. 670; *In re Mayfield*, 141 U. S. 107; *In re Wilson*, 140 U. S. 575; *U. S. v. King*, 81 Fed. Rep. 625; *Ex p. Crow Dog*, 109 U. S. 556; *Famous Smith v. U. S.*, 151 U. S. 50; *U. S. v. Knowlton*, 3 Dak. 58; *U. S. v. Monte*, 3 N. Mex. 126.

The law as established by these sections is considerably modified by the Act of 1885, considered immediately below.

3. Act of 1885, 23 Stat. at L. 385; *U. S. v. Kagama*, 118 U. S. 375; *Gon-shay-ee*, Petitioner, 130 U. S. 343; *Captain Jack*, Petitioner, 130 U. S. 353; *U. S. v. Thomas*, 151 U. S. 577; *Goodson v. U. S.*, 7 Okla. 117.

This act is constitutional. *U. S. v. Kagama*, 118 U. S. 375.

The effect of this act is to transfer to territorial courts, not a part of the sole and exclusive jurisdiction of United States courts, but only a part of the limited jurisdiction then exercised by such courts together with jurisdiction over offenses not theretofore vested therein. *In re Wilson*, 140 U. S. 575.

The Act Not Applicable to Crime Committed on Private Property Within Reservation. — *U. S. v. Thomas*, 47 Fed. Rep. 488.

ing they may have acted in obedience to a decree of their tribal council.¹ But this act does not deprive the Indians of exclusive jurisdiction over crimes committed by one Indian against another not mentioned therein.²

Crimes Committed by Tribal Indians on Reservation — Jurisdiction of State Courts. — A state court has no jurisdiction over crimes committed by tribal Indians upon a reservation within the state.³

Crimes Committed on Reservation by Others than Indians. — Where, upon the admission of a state into the Union, the enabling act contains no exclusion of jurisdiction as to crimes committed on an Indian reservation by others than Indians or against Indians, the state courts are vested with exclusive jurisdiction over such crimes.⁴ But where the United States has reserved jurisdiction over a reservation for the purpose of protecting the possession, persons, and property of the Indians, the federal courts have jurisdiction over crimes committed on the reservation by whites against the Indians.⁵

Crime by Indian Who Has Severed His Tribal Relations. — An Indian who has severed his tribal relations may be prosecuted in the courts of the state in which he commits a crime, without regard to whether the crime was committed within or without the limits of a reservation.⁶

Crimes Committed by Indian Outside of Indian Country. — When an Indian commits a crime outside of the Indian country, whether upon one of his own race or another, he is amenable to the law of the place where the crime is committed.⁷ Accordingly tribal Indians may be prosecuted in the state courts for offenses against the state laws committed by them outside the limits of their reservation, although such offenses may be against members of the same tribe.⁸

1. *U. S. v. Whaley*, 37 Fed. Rep. 145. In this case certain Indians who had put to death one of their number in accordance with a determination of the tribal council were convicted of manslaughter, and it was held that the fact that they had no notice of the Act of 1885 was no defense.

2. *In re Mayfield*, 141 U. S. 107; *U. S. v. Barnaby*, 51 Fed. Rep. 20; *U. S. v. King*, 81 Fed. Rep. 625.

3. **No Jurisdiction in State Courts over Crimes Committed by Indians on Reservations.** — *U. S. v. Kagama*, 118 U. S. 375; *State v. Campbell*, 53 Minn. 354 (*disapproving* decision to the contrary in *State v. Doxtater*, 47 Wis. 278, decided prior to the Act of 1885); *Ex p. Cross*, 20 Neb. 417. See also *State v. McKenney*, 18 Nev. 182. Compare the early case of *State v. Foreman*, 8 Yerg. (Tenn.) 256.

But in *New York* it has been held that a Seneca Indian killing fish by exploding dynamite in a river within the limits of the Seneca Indian reservation is punishable under the New York Act of 1895, prohibiting such use of dynamite, this act being a valid police regulation. *People v. Pierce*, (County Ct.) 18 Misc. (N. Y.) 83.

4. **Exclusive Jurisdiction of State Courts over Crimes Committed on Reservations by Others than Indians.** — *U. S. v. Ward*, 1 Woolw. (U. S.) 17; *Ex p. Sloan*, 4 Sawy. (U. S.) 330; *U. S. v. McBratney*, 104 U. S. 621; *Draper v. U. S.*, 164 U. S. 240; *U. S. v. Ward*, McCahon (Kan.) 199; *State v. Campbell*, 53 Minn. 354; *Painter v. Ives*, 4 Neb. 122; *Marion v. State*, 16 Neb. 349. See also *State v. Harris*, 47 Wis. 298.

In *Draper v. U. S.*, 164 U. S. 240, it was held that a provision in the enabling act admitting Montana into the Union, that Indian lands within the state should remain under the absolute jurisdiction of Congress, did not deprive

that state of exclusive jurisdiction over crimes committed on a reservation by others than Indians or against Indians. Compare *U. S. v. Partello*, 48 Fed. Rep. 670.

In an early case it was held that the United States had no jurisdiction over crimes committed within the Indian country in a state, when such crimes had no relation to the Indians and could not affect their commerce. *U. S. v. Bailey*, 1 McLean (U. S.) 234.

5. **Federal Courts Have Jurisdiction When So Reserved.** — *U. S. v. Ewing*, 47 Fed. Rep. 809; *U. S. v. Berry*, 2 McCrary (U. S.) 58.

The federal courts have jurisdiction over crimes punishable by the laws of the United States committed by persons other than Indians on a reservation within the limits of a territory. *McCall v. U. S.*, 1 Dak. 307; *Goodson v. U. S.*, 7 Okla. 117. See also *In re Wilson*, 140 U. S. 575.

The federal courts have jurisdiction over crimes committed on the Ute reservation in Colorado. *U. S. v. Berry*, 2 McCrary (U. S.) 58.

In *U. S. v. Partello*, 48 Fed. Rep. 670, it was held that the federal courts had jurisdiction to punish the crime of rape committed by a white man upon a white woman on the Crow reservation in Montana.

6. **Where Indian Has Severed Tribal Relations.** — *People v. Ketchum*, 73 Cal. 635; *State v. Williams*, 13 Wash. 335. See also *People v. Antonio*, 27 Cal. 404.

The Brothertown Indians of New York are not a distinct nation or tribe, and are subject to the civil and criminal jurisdiction of the state. One of their number may therefore be tried in a state court for the murder of another. *Peters's Case*, 2 Johns. Cas. (N. Y.) 344.

7. *In re Wolf*, 27 Fed. Rep. 606.

8. **State Courts Have Jurisdiction of Crimes Committed by Tribal Indians Off Reservations.** —

Criminal Jurisdiction of Federal and Indian Courts in Indian Territory. — By the Act of Congress of May 2, 1890, providing for the government of the Indian Territory, it was provided that the judicial tribunals of the Indian nations shall retain exclusive jurisdiction in all civil and criminal cases arising in the country in which members of the nation by nativity or by adoption shall be the only parties; and further, that the constitution and laws of the United States prohibiting crimes and misdemeanors in places within the sole and exclusive jurisdiction of the United States should have the same force and effect in the Indian Territory as elsewhere in the United States; but that nothing in the Act should be so construed as to deprive the courts of the civilized nations of exclusive jurisdiction over all cases arising wherein members of such nations are the sole parties, nor so as to interfere with the right and power of such civilized nations to punish members for violation of the laws of the nations when not contrary to the treaties and laws of the United States.¹ Under this Act it is held that the federal courts have no jurisdiction over crimes by an Indian against a member of the same nation in the territory.²

Criminal Laws of Arkansas Extended over Territory. — By this Act the criminal laws of Arkansas, with certain exceptions, as far as applicable are extended over and put in force in the territory, and jurisdiction to enforce the same is conferred upon the United States courts.³

3. Protection of Indians. — The United States government, recognizing the dependent condition of the Indians as the wards of the nation, has assumed from the beginning the duty of exercising a general supervision over their affairs and of protecting them not only from the encroachments of the whites but also from the consequences of their own ignorance and improvidence.⁴ However imperfectly this duty may have been discharged in particular cases, owing to the inefficiency or dishonesty of the agents employed by the government, there can be no doubt that the United States has always shown a most solicitous regard for the rights of the Indians, and has earnestly sought to promote their interests so far as these have not been inconsistent with the general welfare of the nation. Various statutes have been passed from time to time, designed for the protection of the Indians in their rights

U. S. v. Yellow Sun, 1 Dill. (U. S.) 271; *Pablo v. People*, 23 Colo. 134. See *Yelm Jim v. Territory*, 1 Wash. Ter. 63.

A state court has jurisdiction over the crime of murder committed within its jurisdiction by one Indian upon another. *People v. Turner*, 85 Cal. 432; *Hunt v. State*, 4 Kan. 60.

So also a state court has jurisdiction of crimes committed by tribal Indians off their reservations against whites. *State v. Spotted Hawk*, 22 Mont. 33; *State v. Little Whirlwind*, 22 Mont. 425.

1. Jurisdiction of Federal and Indian Courts. — 26 Stat. at L. 96, §§ 30, 31. See also §§ 33-37.

Who Are Parties in Criminal Case. — The person who commits the crime and the person whose person or property has been wronged are the "parties" to a criminal case within the meaning of the statute. *Alberty v. U. S.*, 162 U. S. 499.

The Federal Courts Have Jurisdiction where one of the parties was not a member of the nation. *Alberty v. U. S.*, 162 U. S. 499.

The Burden is on the United States to prove its jurisdiction by showing that one of the parties was not a member of the nation. *Lucas v. U. S.*, 163 U. S. 612.

Crimes Against Officer in Indian Territory. —

16 C. of L.—15

A de facto deputy marshal is, even after he has ceased to perform his official duties, within the protection of the Act of June 9, 1888, (25 Stat. at L. 178), in reference to offenses against United States officials in the Indian Territory. *Wright v. U. S.*, 158 U. S. 232.

2. Federal Court Without Jurisdiction Where Indians Are Sole Parties. — *In re Mayfield*, 141 U. S. 107; *Talton v. Mayes*, 163 U. S. 376; *Ex p. Tiger*, (Indian Ter. 1898) 47 S. W. Rep. 304.

Effect of Naturalization of Accused. — Where a Cherokee court has acquired jurisdiction over a crime committed by a citizen of that nation this jurisdiction is not divested by the subsequent naturalization of the accused. *Ex p. Kyle*, 67 Fed. Rep. 306.

3. Criminal Laws of Arkansas Adopted. — 26 Stat. at L. 96, § 33.

Under the Act of Congress of 1890, adopting Mansfield's Dig. Laws of Arkansas, c. 20, when not locally inapplicable or in conflict with the Acts of Congress on the subject in the Indian Territory, the common law as to crimes is in force in the territory. *Carter v. U. S.*, (Indian Ter. 1896) 37 S. W. Rep. 204.

4. Duty of United States to Protect Indians. — See *U. S. v. Kagama*, 118 U. S. 375; *U. S. v. Boyd*, 83 Fed. Rep. 547.

Volume XVI.

of person and property, as well as for their instruction and maintenance.¹

Right of United States to Sue. — The United States, as guardian and trustee of the Indians, has the right to maintain a suit for the protection of their interests.²

Driving Stock on Indian Lands. — Driving stock or cattle to range or feed on land belonging to any Indian or Indian tribe, without the consent of such tribe, is prohibited.³

Settling on Indian Lands. — Every person who makes a settlement on any lands belonging, secured, or granted by treaty with the United States to an Indian tribe, or who surveys or attempts to survey such lands, or to designate any of the boundaries by marking trees or otherwise, is liable to a penalty of one thousand dollars, and the President may take such measures and employ such military force as he may judge necessary to remove any such person from the lands.⁴ This Act applies only to lands within Indian reservations, and does not prohibit settlement on lands to which the Indians have only the right of general occupancy.⁵

Protection of Indian Allottees. — Whenever an Indian, being a member of any band or tribe with whom the government has entered into treaty stipulations, being desirous to adopt the habits of civilized life, has had a portion of the lands belonging to his tribe allotted to him in severalty in pursuance of such treaty stipulations, he will be protected in the quiet enjoyment of the lands so allotted to him.⁶

Taking or Destroying Property of Indians. — It is provided that whenever in the commission by a white person of any crime or misdemeanor within the Indian country, the property of any friendly Indian is taken, injured, or destroyed, and a conviction is had for such offense, the guilty party shall be sentenced to pay to the Indian owner a sum equal to twice the value of the property, and in default of conviction or payment by the offender the value of the property shall be paid out of the treasury of the United States.⁷

Hunting on Indian lands is prohibited.⁸

1. See notes immediately below. Consult also the annual Indian appropriation acts.

Supplies for Indians — Liability of Government. — As to the liability of the government for supplies purchased by Indian officers for the benefit of the Indians, see *U. S. v. McDougall*, 121 U. S. 89; *Jackson's Case*, 1 Ct. Cl. 260; *Fremont's Case*, 2 Ct. Cl. 461, 4 Ct. Cl. 252; *Belt's Case*, 15 Ct. Cl. 92.

2. **United States May Sue on Behalf of Indians.** — *U. S. v. Boyd*, 68 Fed. Rep. 577; *U. S. v. Flournoy Live-Stock, etc., Co.*, 69 Fed. Rep. 886, 71 Fed. Rep. 576; *U. S. v. Winans*, 73 Fed. Rep. 72.

3. **Driving Stock on Indian Lands Prohibited.** — *U. S. Rev. Stat.*, § 2117; *U. S. v. Loving*, 34 Fed. Rep. 715.

Sheep are cattle within the meaning of the statute. *U. S. v. Mattock*, 2 Sawy. (U. S.) 148.

Delivering Cattle under Contract of Sale. — The statute is not violated by driving cattle into the Indian country for delivery to an Indian under a contract of sale. *Morris v. Cohn*, 55 Ark. 401.

Driving Stock on Adjoining Lands. — It is not necessary, to constitute an offense within the statute, that the stock should be actually driven on the Indian lands if they are driven so near as to range and feed upon them. *Trespass on Indian Lands*, 16 Op. Atty.-Gen. 568.

Grazing Cattle with Consent of Indians. — The occupation of Indian lands for grazing purposes only, with the consent of the Indians

and in subordination to and recognition of their title, is not within the prohibition of statute. *U. S. v. Hunter*, 4 Mackey (D. C.) 531, 21 Fed. Rep. 615.

One in possession of Indian lands with the consent of the Indians may recover for pasturing cattle thereon. *Kansas, etc., Land, etc., Co. v. Thompson*, 57 Kan. 792.

4. **Settling on or Surveying Indian Lands Prohibited.** — *U. S. Rev. Stat.*, § 2118; *Chinn v. Darnell*, 4 McLean (U. S.) 440; *Uhlig v. Garrison*, 2 Dak. 71; *Langford v. Monteith*, 1 Idaho 612.

The occupation of lands for grazing purposes only under license or lease from the Indians is not a settlement within the meaning of the statute. *U. S. v. Hunter*, 4 Mackey (D. C.) 531.

Settling on Pueblo Lands. — The Pueblo Indians in New Mexico have absolute title to the lands occupied by them, and are not an Indian tribe within the meaning of the statute; hence one who settles on their land is not punishable under this section. *U. S. v. Joseph*, 94 U. S. 614; *U. S. v. Lucero*, 1 N. Mex. 422.

5. *Caldwell v. Robinson*, 59 Fed. Rep. 653.

6. *U. S. Rev. Stat.*, § 2119; *U. S. v. Mullin*, 71 Fed. Rep. 682.

7. *U. S. Rev. Stat.*, §§ 2154-2155.

Under these sections the United States is not liable for the value of property stolen from an Indian in the Indian country by a negro. *U. S. v. Perryman*, 100 U. S. 235.

8. *U. S. Rev. Stat.*, § 2137.

Cutting Timber. — Every person who unlawfully cuts or wantonly destroys any timber standing upon any Indian reservation, or lands belonging to or occupied by any tribe of Indians under authority of the United States, is punishable by fine or imprisonment,¹ and the United States may maintain an action to recover possession of timber so unlawfully cut and sold.² By the Act of Feb. 16, 1889, the President is empowered to authorize Indians residing on reservations or allotments, the fee to which remains in the United States, to cut or remove dead timber standing or fallen on such reservations or allotments and dispose of the same for their own benefit.³

4. Regulation of Commerce with Indians — *a. GENERALLY* — Congress Has Power to Regulate Commerce with Indian Tribes. — It is provided by the Constitution that Congress shall have power to regulate commerce with the Indian tribes.⁴ Under this provision Congress has power to prohibit all intercourse with the Indians except under a license;⁵ and under this power and the treaty-making power numerous treaties have been entered into and laws enacted for the regulation of commercial intercourse with the Indians.⁶

Regulation of Commerce by President. — The President is authorized, whenever in his opinion the public interest may require it, to prohibit the introduction of goods, or of any particular article, into the country belonging to any Indian tribe, and to direct all licenses to trade with such tribe to be revoked and all applications therefor to be rejected.⁷

Who Are Indian Tribes Within Power to Regulate Commerce. — It has been held that the Indian tribes within the meaning of the Constitution are those tribes which are in a condition to determine for themselves with whom they will

1. Cutting Timber on Indian Lands. — Act of June 4, 1888 (25 Stat. at L. 166), *amending* U. S. Rev. Stat., § 5388. See U. S. v. Reese, 5 Dill. (U. S.) 405.

The act is applicable to an Indian sustaining tribal relations, who cuts timber for speculative purposes on the reservation occupied by the tribe. *Labadie v. U. S.*, 6 Okla. 400.

But an Indian may cut timber on his land, for the purpose of improving or cultivating it. *U. S. v. Cook*, 19 Wall. (U. S.) 591; *Thayer v. U. S.*, 20 Ct. Cl. 137.

An Indian who, for the purpose of building a house on land allotted to him in an Indian reservation, removes timber cut on the reservation by another Indian, is not guilty of an offense under this statute. *U. S. v. Koukapot*, 43 Fed. Rep. 64.

As to the sale of standing timber by the Eastern Band of Cherokee Indians in North Carolina, see *U. S. v. Boyd*, 83 Fed. Rep. 547.

As to the sale of timber or grass on Indian lands under the *Maine Act of 1824*, see *Boies v. Blake*, 13 Me. 381; *Marks v. Hapgood*, 24 Me. 407.

As to the cutting and sale of timber on Indian lands in *New York* under the statutes of that state, see *Seneca Nation v. Hammond*, 3 Thomp. & C. (N. Y.) 347; *Seneca Nation v. Hammond*, 6 Thomp. & C. (N. Y.) 595.

And see generally, as to cutting timber on public lands, the title PUBLIC LANDS.

2. *U. S. v. Cook*, 19 Wall. (U. S.) 591; *U. S. v. Pine River Logging, etc., Co.*, 89 Fed. Rep. 907.

3. 25 Stat. at L., c. 172, p. 673; *U. S. v. Pine River Logging, etc., Co.*, 78 Fed. Rep. 319, 89 Fed. Rep. 907.

4. Regulation of Commerce with Indians. — U. S. Const., art. 1, § 8; *U. S. v. Holliday*, 3

Wall. (U. S.) 407; *U. S. v. Bridleman*, 7 Sawy. (U. S.) 243; *U. S. v. Certain Property*, 1 Ariz. 31.

Under this clause of the Constitution, Congress has power to regulate all traffic and commercial intercourse among or with Indians, even when the tribe is located wholly within the limits of a single state. *Stacy v. La Belle*, 99 Wis. 520.

Congress has the exclusive and unfettered power to regulate commerce with the Indian tribes, to treat them as wards in this respect to whom protection is due, and to extend that regulation to intercourse with the individual members of the tribe, not only in the Indian country, but through the states themselves, wherever the Indians who belong to any tribal organization may be found, and to say with whom and by what terms they shall deal. *Adams v. Freeman*, (Okla. 1897) 50 Pac. Rep. 135.

Jurisdiction of Courts. — In making such regulations Congress may undoubtedly give to the federal courts exclusive jurisdiction. State courts may be precluded from taking jurisdiction in such cases, not only by congressional enactments, but by treaty between the particular tribe and the federal government, since such treaty, when made, under the Constitution, becomes a part of the supreme law of the land. But the state courts may take jurisdiction of actions on contracts between the whites and Indians in the absence of any federal statute or treaty to the contrary. *Stacy v. La Belle*, 99 Wis. 520.

5. *U. S. v. Cisna*, 1 McLean (U. S.) 254.

6. *U. S. v. Cisna*, 1 McLean (U. S.) 254. See various provisions in U. S. Rev. Stat., title Indians, c. 4.

7. U. S. Rev. Stat., § 2132.

have commerce, or are in a condition to have Congress determine it for them; and not those small tribes or remnants of tribes, remaining in the original states, which prior to the Constitution were, and have since continued to be, under the control and guardianship of the state, and which are without power to carry on commerce or trade except by permission and under the regulation of the state.¹

b. SALE OF LIQUOR TO INDIANS. — This topic is discussed elsewhere in this work.²

c. INDIAN TRADERS. — Citizens of the United States of good moral character are permitted to trade with Indian tribes upon giving bond conditioned upon their faithful observance of all laws and regulations made for the government of trade and intercourse with the Indian tribes.³ But such traders must be duly licensed.⁴ The commissioner of Indian affairs has the sole power and authority to appoint traders to the Indian tribes, and to make such rules and regulations as he may deem just and proper, specifying the kind and quantity of goods, and the prices at which such goods shall be sold to the Indians.⁵

5. Removal of Persons from Indian Country. — The superintendent of Indian affairs and Indian agents and subagents are authorized to remove from the Indian country all persons found therein contrary to law, and the President is authorized to direct military force to be employed in such removal.⁶ The commissioner of Indian affairs is authorized and required, with the approval of the secretary of the interior, to remove from any tribal reservation any person being therein without authority of law, or whose presence within the limits of the reservation may, in the judgment of the commissioner, be detrimental to the peace and welfare of the Indians, and he may employ such force as may be necessary to enable the agent to effect the removal of such person.⁷

Removal Discretionary with Officer. — The removal of persons from the Indian country under these statutes is a matter entirely within the discretion of the officers to whom the power of removal is committed, and their action is not subject to review by the courts.⁸

1. *Moor v. Veazie*, 32 Me. 343, 52 Am. Dec. 655.

2. See the title INTOXICATING LIQUORS.

3. U. S. Rev. Stat., § 2128.

4. **License to Trade with Indians Required.** — U. S. Rev. Stat., §§ 2129-2131, 2133.

A license to trade with the Indians is not assignable, but is a personal privilege. *U. S. v. 196 Buffalo Robes*, 1 Mont. 489. To the same effect see *Gould v. Kendall*, 15 Neb. 549.

No license is required to trade with Indians outside of the Indian country. *U. S. v. Certain Property*, 1 Ariz. 31.

Where a person having a license to trade with Indians upon a reservation took a partner and procured for him a permit to live upon the reservation, and the latter carried on the firm's business without being himself licensed, it was held that this was not in violation of the statute. *Dunn v. Carter*, 30 Kan. 294.

5. 19 Stat. at L., c. 289, § 5, p. 280.

6. Removal of Persons from Indian Country. — U. S. Rev. Stat., § 2147; *U. S. v. Sturgeon*, 6 Sawy. (U. S.) 29. See *Removal of Intruders from Cherokee Lands*, 16 Op. Atty.-Gen. 404; *Intruders on Lands of the Choctaws and Chickasaws*, 17 Op. Atty.-Gen. 134.

A white person, not a citizen of the Creek nation, who refuses to pay an occupation tax to which he is by the laws of such nation subject, may be removed by the interior department. *Maxey v. Wright*, (Indian Ter. 1900) 54 S. W. Rep. 807.

A white man licensed to trade in the Indian country, who sells out his business and abandons his post, has no right to remain in such country, and he, together with his property, may be ousted therefrom. *Echols v. Tate*, 53 Ark. 12.

An Indian agent has no authority to forcibly eject persons from premises not within the limits of an Indian reservation. Thus where a person entered in good faith under the homestead law, upon land not within the boundaries of a reservation, and made valuable improvements thereon, but the government, after receiving his homestead application, included the land in allotments made to certain Indians in fulfillment of a treaty, and canceled the homestead filing, it was held that an agent had no authority to forcibly eject such person from the land, and might be enjoined from so doing until the validity of the homestead claim should be determined. *La Chapelle v. Bubb*, 62 Fed. Rep. 545, 69 Fed. Rep. 481.

State Statute. — A state may pass a law providing for the removal of intruders from Indian lands within the state, this being a valid police regulation. *New York v. Dibble*, 21 How. (U. S.) 366, affirming 16 N. Y. 203.

7. U. S. Rev. Stat., § 2149; *U. S. v. Crook*, 5 Dill. (U. S.) 453.

8. Removal of Persons from Indian Country Discretionary with Officer. — *U. S. v. Sturgeon*, 6

Employment of Military Forces. — The military forces of the United States may be employed in such manner and under such regulations as the President may direct in the apprehension of every person who may be in the Indian country in violation of law, and in conveying him immediately from the Indian country, by the nearest convenient and safe route, to the civil authority of the territory or judicial district in which such person shall be found, to be proceeded against in due course of law; and also in preventing the introduction of persons or property into the Indian country contrary to law.¹

Return After Removal. — If any person who has been removed from the Indian country shall thereafter at any time return or be found within the Indian country, he is liable to a penalty of one thousand dollars.²

VII. INSTRUCTION OF INDIANS. — The President is empowered, in every case where he shall judge that improvement in the habits and condition of the Indians is practicable, and that the means of instruction can be introduced with their own consent, to employ capable persons of good moral character to instruct them in the mode of agriculture suited to their situation, and for teaching their children in reading, writing, and arithmetic, and performing such other duties as may be enjoined, according to such instructions and rules as the President may give and prescribe for the regulation of their conduct in the discharge of their duties.³ Where any of the tribes are, in the opinion of the secretary of the interior, competent to direct the employment of their blacksmiths, mechanics, teachers, farmers, or other persons engaged for them, the direction of such persons may be given to the proper authority of the tribe.⁴

VIII. INDIAN LANDS — 1. **Nature of Indian Title.** — Following the policy adopted by the European nations in respect to their American possessions, the colonial governments recognized in the Indian tribes a possessory right to the land occupied by them, but asserted in themselves the ultimate title to the soil. Since the Revolution the original states as to lands within their respective jurisdictions, and the United States as to all other lands, have

Sawyer. (U. S.) 29; *Echols v. Tate*, 53 Ark. 12; *Adams v. Freeman*, (Okla. 1897) 50 Pac. Rep. 135; *Indian Affairs Commissioner*, 20 Op. Atty.-Gen. 245.

1. **Employment of Military Forces.** — U. S. Rev. Stat., § 2150.

Where military forces are employed to effect the removal of persons, this authority must be exercised in the manner provided by the statute, that is, such persons must be conveyed, by the nearest convenient and safe route, to the civil authority of the territory or judicial district in which they shall be found, to be proceeded against in due course of law. The statute does not authorize the removal of persons from one part of the country to another in time of peace, against their consent. *U. S. v. Crook*, 5 Dill. (U. S.) 453.

2. **Return to Indian Country After Being Removed Therefrom.** — U. S. Rev. Stat., § 2148; *U. S. v. Sturgeon*, 6 Sawyer. (U. S.) 29.

The penalty provided for in this section may be recovered by indictment or information. *U. S. v. Howard*, 17 Fed. Rep. 639, 9 Sawyer. (U. S.) 155; *U. S. v. Stocking*, 87 Fed. Rep. 957, *disapproving* *U. S. v. Payne*, 22 Fed. Rep. 426, and *Matter of Seagraves*, 4 Okla. 422. Or in a civil suit in the nature of an action of debt. See *U. S. v. Payne*, 2 McCrary (U. S.) 289, 8 Fed. Rep. 883.

3. **Instruction of Indians.** — U. S. Rev. Stat., § 2071. Numerous acts have been passed by Congress providing for the education of the Indians, and annual appropriations are made

for this purpose. By the Act of May 17, 1882 (22 Stat. at L. 70), the President is authorized to appoint an inspector of Indian schools. By the Act of July 4, 1884 (23 Stat. at L. 98, § 9), the agent in his annual report is required to submit a census of the number of school children between the ages of six and sixteen years, the number of schoolhouses at his agency, the number of schools in operation and the attendance at each, and the names of the teachers employed and the salaries paid such teachers.

The government does not assume to force an education upon the Indians against their consent, nor have the Indians surrendered to the United States the right to compel their children to attend school. Hence a writ of habeas corpus will not lie in favor of an Indian agent to recover the custody of Indian children taken from an agency school, where this was not done against the consent of their parents. *U. S. v. Imoda*, 4 Mont. 38.

As to the education of Indian children in Alaska, see *In re Can-ah-conqua*, 29 Fed. Rep. 687.

The *North Carolina* Act of 1885, as amended by the Act of 1889, providing separate schools for Croatan Indians, is not unconstitutional. *McMillan v. District No. 4*, 107 N. Car. 609.

As to the education of Indian children in Rhode Island, see *Ammons v. School Dist. No. 5*, 7 R. I. 596.

4. U. S. Rev. Stat., § 1072.

adopted the same policy. The Indians have a right to the use and occupancy of the land, subject to the dominion and control of the state or the United States, but they are not permitted to sell or transfer their right to the land without the consent of the dominant power, while on the other hand this right can be extinguished only by the voluntary consent of the Indians.¹

United States May Dispose of Fee. — The United States may dispose of the fee of lands to which the Indian title has not been extinguished, subject, however, to the Indian right of occupancy.² Moreover, the national government may dispose of public lands within an Indian reservation without the consent

1. Indian Title a Mere Right of Occupancy — *United States.* — *Johnson v. M'Intosh*, 8 Wheat. (U. S.) 543; *Mitchel v. U. S.*, 9 Pet. (U. S.) 711; *Clark v. Smith*, 13 Pet. (U. S.) 195; *Doe v. Wilson*, 23 How. (U. S.) 457; *U. S. v. Cook*, 19 Wall. (U. S.) 591; *Beecher v. Wetherby*, 95 U. S. 517; *U. S. v. Kagama*, 118 U. S. 375; *Buttz v. Northern Pac. R. Co.*, 119 U. S. 55; *Spalding v. Chandler*, 160 U. S. 394; *U. S. v. Alaska Packers' Assoc.*, 79 Fed. Rep. 152; *Northern Pac. R. Co. v. Dudley*, 85 Fed. Rep. 82; *U. S. v. Pine River Logging, etc., Co.*, 89 Fed. Rep. 907; *U. S. v. Four Bottles Sour-Mash Whisky*, 90 Fed. Rep. 720. See also *Fletcher v. Peck*, 6 Cranch (U. S.) 87; *U. S. v. Flournoy Live-Stock, etc., Co.*, 69 Fed. Rep. 886.

Arizona. — *U. S. v. Certain Property*, 1 Ariz. 31.

California. — See *Thompson v. Doaksum*, 68 Cal. 593.

Indiana. — *Wheeler v. Me-shing-go-me-sia*, 30 Ind. 402.

Kansas. — *Brown v. Belmarde*, 3 Kan. 41; *Grinter v. Kansas Pac. R. Co.*, 23 Kan. 642.

Kentucky. — See *Halloway v. Doe*, 4 Litt. (Ky.) 293.

Louisiana. — *Breaux v. Johns*, 4 La. Ann. 141. See *Reboul v. Nero*, 5 Mart. (La.) 490; *Martin v. Johnson*, 5 Mart. (La.) 655; *Spencer v. Grimball*, 6 Mart. N. S. (La.) 355; *Maes v. Gillard*, 7 Mart. N. S. (La.) 314; *Brooks v. Norris*, 6 Rob. (La.) 175.

Maine. — *Penobscot Tribe of Indians v. Veazie*, 58 Me. 402; *Granger v. Avery*, 64 Me. 292; *John v. Sabattis*, 69 Me. 473.

Mississippi. — *Minter v. Shirley*, 45 Miss. 376.

New York. — *Fellows v. Denniston*, 23 N. Y. 420; *Howard v. Moot*, 64 N. Y. 262; *Seneca Nation of Indians v. Christie*, 126 N. Y. 122.

North Carolina. — *Den v. Cathey*, 1 Murph. (5 N. Car.) 152, 3 Am. Dec. 683.

Oklahoma. — *Keokuk v. Vlam*, 4 Okla. 5.

Tennessee. — *Cornet v. Winton*, 2 Yerg. (Tenn.) 143; *Blair v. Pathkiller*, 2 Yerg. (Tenn.) 407.

Canada. — *St. Catharines Milling, etc., Co. v. Reg.*, 13 Can. Sup. Ct. 577. *affirmed* in 14 App. Cas. 46.

Formerly in *Massachusetts* the title to Indian lands within the commonwealth was in the state, and the use and improvement of such lands were regulated by the legislature. See cases cited *supra*, this title. *Legal Status of Indians.*

In Their Tribal Relations — Generally. — This has now been changed by statute. Under the statutes of 1869, c. 463, and 1870, c. 293, every Indian became entitled to have his share of the

common lands of his tribe set out to him or sold for his benefit, and acquired both the legal and equitable rights of tenants in common which could be conveyed by deed. *Coombs's Petition*, 127 Mass. 278; *Drew v. Carroll*, 154 Mass. 181.

The New York Indians have an unquestionable right to the use, possession, and occupancy of the lands of their respective reservations which they have not voluntarily ceded to the state nor granted to individuals by its permission. The ultimate fee of such reservations is vested in the state, or in its grantees, subject to such right of use and occupancy by the Indians until they shall voluntarily relinquish the same. *Strong v. Waterman*, 11 Paige (N. Y.) 607; *Ogden v. Lee*, 6 Hill (N. Y.) 546; *Wadsworth v. Buffalo Hydraulic Assoc.*, 15 Barb. (N. Y.) 83; *Fellows v. Denniston*, 23 N. Y. 420; *Howard v. Moot*, 64 N. Y. 262; *Seneca Nation of Indians v. Christie*, 126 N. Y. 122, 162 U. S. 283; *Montauk Tribe of Indians v. Long Island R. Co.*, 28 N. Y. App. Div. 470. See also *People v. Dibble*, 16 N. Y. 203, 21 How. (U. S.) 366.

Indian Right of Occupancy Held Sacred. — The right of the Indians to their occupancy is as sacred as that of the United States to the fee. *U. S. v. Cook*, 19 Wall. (U. S.) 591; *Leavenworth, etc., R. Co. v. U. S.*, 92 U. S. 733. It has been the uniform policy of the government to prohibit settlements on Indian lands and to make grants of such lands only subject to the Indian right of occupancy. See *Preston v. Browder*, 1 Wheat. (U. S.) 115; *Danforth v. Thomas*, 1 Wheat. (U. S.) 155; *Danforth v. Wear*, 9 Wheat. (U. S.) 673; *Gaines v. Nicholson*, 9 How. (U. S.) 356; *Hot Springs Cases*, 11 Ct. Cl. 238; *Langford's Case*, 12 Ct. Cl. 338; *Avery v. Strother*, Conf. Rep. (1 N. Car.) 434; *Brown v. Brown*, 103 N. Car. 213.

2. United States May Dispose of Fee of Indian Lands. — *Beecher v. Wetherby*, 95 U. S. 517; *Buttz v. Northern Pac. R. Co.*, 119 U. S. 55; *Roberts v. Missouri, etc., R. Co.*, 43 Kan. 102; *Stockton v. Williams*, 1 Dougl. (Mich.) 546; *Veeder v. Guppy*, 3 Wis. 502.

Osage Ceded Lands. — As to the title of railroads and individuals to the Osage ceded lands in *Kansas*, see *Leavenworth, etc., R. Co. v. U. S.*, 92 U. S. 733; *Wood v. Missouri, etc., R. Co.*, 11 Kan. 323; *Lownsberry v. Rakestraw*, 14 Kan. 151; *Leavenworth, etc., R. Co. v. Cothran*, 16 Kan. 510.

Patent by State. — In *Clark v. Smith*, 13 Pet. (U. S.) 195, it was held that a patent from the state of Kentucky to Indian lands therein passed the title subject to the Indian right of occupancy. See also *Lattimer v. Poteet*, 14 Pet. (U. S.) 4.

of the Indians.¹

Grant of Right of Way through Indian Country. — The United States government may grant a right of way through the Indian country to a railroad company for its line.²

Title of the Five Civilized Tribes. — While it has not in general been the policy or practice of the United States to convey the absolute title to lands upon which it has located Indian tribes to such Indians while they sustain their tribal relations, a contrary policy has been adopted in several instances. The five civilized tribes, the Cherokees, Chickasaws, Choctaws, Creeks, and Seminoles, have received from the United States grants and patents conveying to them their lands in fee simple, subject, however, to the proviso that such lands shall revert to the United States if the Indians become extinct or abandon the same.³

2. Extinguishment of Indian Title. — As has already been stated, the Indian title to land can be extinguished only by the consent of the Indians and by its surrender by them to the United States.⁴ Numerous treaties have been entered into between the United States and the various Indian tribes, by which the Indians have ceded their right to the lands occupied by them to the United States, in exchange for money and other lands, the land so ceded being then opened for settlement.⁵ So also the original states, both before

1. U. S. v. Alaska Packers' Assoc., 79 Fed. Rep. 152; *Veeder v. Guppy*, 3 Wis. 502. See *Jackson v. Hudson*, 3 Johns. (N. Y.) 375, 3 Am. Dec. 500.

2. *Cherokee Nation v. Southern Kansas R. Co.*, 135 U. S. 641; *Grinter v. Kansas Pac. R. Co.*, 23 Kan. 642. See also *Buttz v. Northern Pac. R. Co.*, 119 U. S. 55; *Atlanta, etc., R. Co. v. Mingus*, 165 U. S. 413.

Interference by Government with Building of Railroad. — The federal government has no right to interfere with the construction of a line of railroad on lands embraced in the Puyallup reservation, which were granted to Indians pursuant to the treaty of December 26, 1854 (10 Stat. at L. 1132), when the person so constructing the line was proceeding with the license of such grantees. *Ross v. Eells*, 56 Fed. Rep. 855.

3. Title to Lands Granted to Certain Tribes in Fee Simple. — See *Keokuk v. Ulam*, 4 Okla. 5.

By section 3 of the Act of May 28, 1830 (4 Stat. at L. 411), providing for the exchange of lands with the Indians residing in any of the states or territories, and for their removal west of the Mississippi river, it was provided that in the making of any such exchange it should be lawful for the President solemnly to assure the tribe or nation with which the exchange was made that the United States would forever secure and guarantee to them and their heirs or successors the country so exchanged with them, and if they should prefer it, would cause a patent or grant to be executed to them for the same, provided that such lands should revert to the United States if the Indians became extinct or abandoned them. See the following treaties: With the Creeks, March 24, 1832, 7 Stat. at L. 366; February 14, 1833, 7 Stat. at L. 417. With the Cherokees, February 14, 1833, 7 Stat. at L. 414; December 29, 1835, 7 Stat. at L. 478. With the Chickasaws, May 24, 1834, 7 Stat. at L. 450; June 22, 1855, 11 Stat. at L. 611. With the Choctaws, September 27, 1830, 7 Stat. at L. 333; June 22, 1855, 11 Stat. at L. 611. With the Seminoles,

May 9, 1832, 7 Stat. at L. 368; March 28, 1833, 7 Stat. at L. 423.

Cherokee Nation. — Under the patent of December 31, 1838, the Cherokee nation acquired a fee simple title to their land, subject to the possibility of reversion to the United States should the nation become extinct or abandon the land. *Holden v. Joy*, 17 Wall. (U. S.) 211; *U. S. v. Reese*, 5 Dill. (U. S.) 405; *U. S. v. Rogers*, 23 Fed. Rep. 658; *Cherokee Nation v. Southern Kansas R. Co.*, 135 U. S. 641; *Cherokee Strip Live-Stock Assoc. v. Cass Land, etc., Co.*, 138 Mo. 394.

One not a citizen of the Cherokee nation cannot acquire any title to land situated therein, nor legally occupy the same except with the consent and acquiescence of some citizen of the Cherokee nation. *Case v. Hall*, (Indian Ter. 1898) 46 S. W. Rep. 180.

4. See *supra*, this section, *Nature of Indian Title*.

5. Extinguishment of Indian Title by United States. — For examples of such treaties, see those with the five civilized nations cited *supra*, this section, *Nature of Indian Title*. See also *Mitchel v. U. S.*, 9 Pet. (U. S.) 711; *Fee v. Brown*, 162 U. S. 602; *Wood v. Missouri, etc., R. Co.*, 11 Kan. 323; *Stockton v. Williams*, 1 Dougl. (Mich.) 545.

Where an Indian tribe makes an agreement with the United States to cede all its interest in certain lands theretofore occupied as a reservation, and such agreement is ratified by Congress, and allotments are provided for by the agreement for the individual Indians, and accepted by them, the interest of the tribe in such lands becomes extinguished. *U. S. v. Choctaw, etc., R. Co.*, 3 Okla. 404.

As to the extinguishment of the Indian title by Act of Congress providing that mineral lands in a reservation shall be subject to entry, see *U. S. v. Four Bottles Sour-Mash Whisky*, 90 Fed. Rep. 720.

As to the restoration of Indian reservations to the public domain, see *Northern Pac. R. Co. v. Dudley*, 85 Fed. Rep. 82.

and after the adoption of the Federal Constitution, assumed the right of entering into treaties with the Indian tribes for the extinguishment and acquisition of their title to lands within their respective jurisdictions.¹

When Indian Land Sold Ceases to Be Indian Country. — When the Indians part with their title to the land occupied by them, it thereupon ceases to be Indian country without any further act of Congress, unless by the treaty under which the Indians parted with their title, or by some Act of Congress or executive order, a different rule is made applicable to the case.² In this latter case a country purchased from the Indians does not *ipso facto* cease to be Indian country.³

Power to Compel Removal of Indians upon Sale of Lands. — Where an Indian tribe has sold its lands within a state and agreed to remove elsewhere, the power to compel such removal resides in the United States, and the state courts have no jurisdiction in the matter.⁴

3. Allotments in Severalty — Under Treaties. — Under various treaties with the Indian tribes, individual Indians have acquired lands in severalty, either with or without full power of alienation.⁵

Under Acts of Congress. — Congress has also passed numerous acts providing for

Where the United States in a treaty with an Indian tribe for the release of their rights to their lands acts merely as the agent of the tribe, the United States is not responsible to the purchasers for expenses and losses incurred by the purchasers by reasons of the failure of the Indians to deliver possession. *McKeon v. Tillotson*, 3 Abb. App. Dec. (N. Y.) 110.

1. Extinguishment of Indian Title by State. — *Seneca Nation of Indians v. Christie*, 126 N. Y. 122.

The Rhode Island Act of March 31, 1880, providing for the purchase of Indian lands in that state, is constitutional, and under its provisions the conveyances executed by the Narragansett tribe vest title in the state, and purchasers from the state acquire a valid title. *Narragansett Indians*, 20 R. I. 715.

2. Bates v. Clark, 95 U. S. 204; *Sundry Goods, etc. v. U. S.*, 2 Pet. (U. S.) 358; *U. S. v. Payne*, 2 McCrary (U. S.) 289. See also *Crommelin v. Minter*, 9 Ala. 594.

3. U. S. v. Forty-Three Gallons of Whiskey, etc., 93 U. S. 188; *U. S. v. Payne*, 2 McCrary (U. S.) 289.

4. Fellows v. Blacksmith, 19 How. (U. S.) 366. See also *New York v. Dibble*, 21 How. (U. S.) 366.

5. Individual Allotments under Treaties. — See *Doe v. Wilson*, 23 How. (U. S.) 457; *Crews v. Burcham*, 1 Black (U. S.) 352; *Gaines v. Nicholson*, 9 How. (U. S.) 356; *U. S. v. Brooks*, 10 How. (U. S.) 442; *Wilson v. Wall*, 6 Wall. (U. S.) 85; *Best v. Polk*, 18 Wall. (U. S.) 112; *Godfrey v. Beardsley*, 2 McLean (U. S.) 412; *Wiggam v. Conolly*, 163 U. S. 56; *Ross v. Eells*, 56 Fed. Rep. 855; *Sloan v. U. S.*, 95 Fed. Rep. 193; *Meehan v. Jones*, 70 Fed. Rep. 453; *Dequindre v. Williams*, 31 Ind. 444; *Stockton v. Williams*, 1 Dougl. (Mich.) 546; *Newman v. Doe*, 4 How. (Miss.) 522; *Niles v. Anderson*, 5 How. (Miss.) 365; *Harris v. Newman*, 3 Smed. & M. (Miss.) 565; *Coleman v. Doe*, 4 Smed. & M. (Miss.) 40; *Wray v. Doe*, 10 Smed. & M. (Miss.) 452; *Hardin v. Ho-yo-po-nubby*, 27 Miss. 567; *Turner v. Fish*, 28 Miss. 306.

Cherokee Indians — Tennessee — North Carolina — Alabama. — For decisions relating to the acquisition of land by Cherokee Indians in Ten-

nessee, under the treaties of July 8, 1817, and February 27, 1819, see *Cornet v. Winton*, 2 Yerg. (Tenn.) 143; *Blair v. Pathkiller*, 2 Yerg. (Tenn.) 407; *Riley v. Elliston*, 2 Yerg. (Tenn.) 431; *Grubbs v. M'Clatchy*, 2 Yerg. (Tenn.) 432; *M'Connell v. Mousepaine*, 2 Yerg. (Tenn.) 438; *Morgan v. Fowler*, 2 Yerg. (Tenn.) 450; *West v. Donoho*, 3 Yerg. (Tenn.) 445; *Tuten v. Martin*, 3 Yerg. (Tenn.) 452; *Jones v. Evans*, 5 Yerg. (Tenn.) 323; *M'Intosh v. Cleveland*, 7 Yerg. (Tenn.) 46; *M'Connell v. M'Gee*, 7 Yerg. (Tenn.) 63; *Neddy v. State*, 8 Yerg. (Tenn.) 251; *Evans v. Jones*, 8 Yerg. (Tenn.) 461; *Tuten v. Byrd*, 1 Swan (Tenn.) 108. For construction of these treaties in North Carolina, see *Doe v. Welsh*, 3 Hawks (10 N. Car.) 155; *Belk v. Love*, 1 Dev. & B. L. (18 N. Car.) 65; *Sutton v. Moore*, 3 Ired. L. (25 N. Car.) 66; *Welch v. Trotter*, 8 Jones L. (53 N. Car.) 197. And in Alabama, *Kennedy v. M'Cartney*, 4 Port. (Ala.) 141.

Creek Indians — Alabama. — For decisions under the treaty of 1832 (7 Stat. at L. 366) with the Creek Indians, see *Chinnubbee v. Nicks*, 3 Port. (Ala.) 362; *Herring v. M'Elderry*, 5 Port. (Ala.) 161; *Jones v. Inge*, 5 Port. (Ala.) 327; *Clarliko v. Elliott*, 5 Port. (Ala.) 403; *Fipps v. M'Gehee*, 5 Port. (Ala.) 413; *Rosser v. Bradford*, 9 Port. (Ala.) 354; *Rowland v. Ladiga*, 9 Port. (Ala.) 458, *reversed* in 2 How. (U. S.) 581; *Johnson v. Thomas*, 1 Ala. 186; *Wells v. Thompson*, 13 Ala. 793, 48 Am. Dec. 76; *Haden v. Ware*, 15 Ala. 149; *Corprew v. Arthur*, 15 Ala. 525; *Stephens v. Westwood*, 20 Ala. 275, 25 Ala. 716; *Rowland v. Ladiga*, 21 Ala. 9; *Iveson v. Dubose*, 27 Ala. 418; *Doe v. Long*, 29 Ala. 376; *Rose v. Griffin*, 33 Ala. 717; *Dillingham v. Brown*, 38 Ala. 311. As to the treaty of 1814 (7 Stat. at L. 121), see *James v. Scott*, 9 Ala. 579; *Crommelin v. Minter*, 9 Ala. 594, *reversed* in 18 How. (U. S.) 87; *Saltmarsh v. Crommelin*, 24 Ala. 347, 39 Ala. 54.

Wyandot Indians — Kansas. — As to treaties with the Wyandot Indians providing for allotments to members of the tribe, see *Gray v. Coffman*, 3 Dill. (U. S.) 393; *Hicks v. Buttrick*, 3 Dill. (U. S.) 413; *Summers v. Spybuck*, 1 Kan. 395; *McAlpin v. Henshaw*, 6 Kan. 176.

the allotment of lands in severalty to Indians under certain conditions and with certain restrictions.¹

Homesteads. — Congress has passed several statutes enabling Indians to avail themselves of the homestead laws.²

4. Alienation of Indian Lands — *a.* BY INDIAN TRIBES. — The title of the Indian tribes to the lands occupied by them being a mere title by occupancy, it follows necessarily that such tribes are incapable of conveying a valid title to the land. Nor can their right of occupancy be extinguished except by the consent of the United States.³ These principles were established in an early case decided by Chief Justice Marshall, in which it was held that a title to lands derived from a grant made by an Indian tribe could not be recognized by the courts of the United States.⁴ And in 1834 it was provided by Act of Congress that no purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe, should be valid unless made by treaty or convention entered into pursuant to the Constitution.⁵

b. BY INDIVIDUAL INDIANS. — In making allotments of lands to individual Indians the United States may impose such restrictions on alienation as may be deemed proper, and the regulations of the federal government in this respect constitute the supreme law of the land in this as in other Indian affairs, anything in the state laws to the contrary notwithstanding.⁶ It is the general practice of the government in making allotments to prescribe that the lands so allotted shall not be alienated without the consent of the President or of the secretary of the interior, or until after the expiration of a stated period. These restraints are designed for the protection of the allottees, and are

1. Statutes Providing for Allotment of Lands in Severalty. — For examples, see U. S. Rev. Stat., § 2315; 18 Stat. at L. 516; 19 Stat. at L. 55; 21 Stat. at L. 199; 22 Stat. at L. 42, 341; 23 Stat. at L. 340, 351; 24 Stat. at L. 367; 25 Stat. at L. 94, 113, 240, 642, 687, 888, 1013; 26 Stat. at L. 749, 1017, 1033.

As to allotments among the Brothertown Indians in Wisconsin, see *Fowler v. Scott*, 64 Wis. 509.

Under the Act of 1843 (5 Stat. at L. 645) an allottee of the Stockbridge tribe in Wisconsin took such an estate in the premises as he could convey by deed, and a patent subsequently issued to him would inure to the benefit of his grantee. *Quinney v. Denney*, 18 Wis. 485. See also *Ruggles v. Marsilliott*, 19 Wis. 159.

Dawes Bill of 1887. — The most important of these acts is the act to provide for the allotment of lands in severalty to Indians, approved February 8, 1887, and known as the Dawes Bill, 24 Stat. at L. 388. See Amendment of February 28, 1891, 26 Stat. at L., c. 383, p. 794.

2. Indians May Take Up Homesteads. — See U. S. Rev. Stat., §§ 2310-2311; 18 Stat. at L. 420; 23 Stat. at L. 96; *Taylor v. Brown*, 147 U. S. 640, *affirming* 5 Dak. 335; U. S. v. Saunders, 96 Fed. Rep. 268; *Mays v. Frieberg*, (Indian Ter. 1899) 49 S. W. Rep. 52. See also the titles **HOMESTEAD**, vol. 15, p. 516; **PUBLIC LANDS**.

3. See *supra*, this section, *Nature of Indian Title*.

4. *Johnson v. McIntosh*, 8 Wheat. (U. S.) 543. See also *St. Regis Indians v. Drum*, 19 Johns. (N. Y.) 127.

5. **Conveyance of Land by Indian Tribe Void Unless Made by Treaty or Convention.** — 4 Stat. at L., p. 730, § 12; U. S. Rev. Stat., § 2116; *Libby v. Clark*, 118 U. S. 250; *Mayer v. Cherokee Strip Livestock Assoc.*, 58 Kan. 712; *Cherokee Strip Livestock Assoc. v. Cass Land*,

etc., Co., 138 Mo. 394; *Buffalo, etc., R. Co. v. Lavery*, 75 Hun (N. Y.) 396.

The Executive has no power to authorize a sale except in the execution of the terms of a treaty or statute. *Hale v. Wilder*, 8 Kan. 535. See also *Lease of Indian Lands, etc.*, 18 Op. Atty.-Gen. 235.

Individual Indians. — The inhibition contained in U. S. Rev. Stat., § 2116, has the same application to individual Indians that it has to the Indian nations and tribes. *Indian Leases*, 18 Op. Atty.-Gen. 486.

In *Murray v. Wooden*, 17 Wend. (N. Y.) 531, it was held that a deed to land from an Indian, executed and ratified in conformity to the laws of *New York*, was a valid conveyance notwithstanding the provisions of this section.

Lease for Grazing Purposes. — A lease of lands from the Indians for grazing purposes only is not within the meaning of the statute. U. S. v. Hunter, 21 Fed. Rep. 615, 4 Mackey (D. C.) 531. And see Act of February 28, 1891 (26 Stat. at L. 795, § 3); *Strawberry Valley Cattle Co. v. Chipman*, 13 Utah 454.

Lease by Seneca Indians — New York. — As to leases of land by the Seneca Indians in New York prior and subsequent to the Act of Congress of February 19, 1875 (18 Stat. at L., c. 90, p. 330), see *Ryan v. Knorr*, 19 Hun (N. Y.) 540; *Baker v. Johns*, 38 Hun (N. Y.) 625.

6. **But After the Extinguishment of the Original Indian Title**, and the disappearance from the state limits of the tribal organization, the law of the state comes into full operation and effect over persons and property within the former limits of the Indian country except as modified by vested rights under existing treaties and laws of the United States. *Love v. Pamplin*, 21 Fed. Rep. 755. See also *Mungosah v. Steinbrook*, 3 Dill. (U. S.) 418; *Krause v. Means*, 12 Kan. 335; *Maynes v. Veale*, 20 Kan. 374.

generally recognized as valid and reasonable regulations.¹

Conveyance in Contravention of Restraints on Alienation Void. — Any grant or conveyance of lands so allotted made in contravention of such restraints on alienation is absolutely void.² But where land is patented to an Indian with a restriction upon his right to convey unless with the approval of the President or the secretary of the interior, a conveyance so approved passes a good title, free from all restrictions or alienation.³ And such approval may be given after the execution of the conveyance, and will relate back to the time of execution so as to vest title in the grantee from that time.⁴

Effect of Citizenship of Allottee upon Restraints on Alienation. — Where an Act of Congress providing for the allotment of lands to Indians in severalty imposes cer-

1. See cases cited in notes immediately following.

2. **Conveyances of Allotted Lands in Contravention of Restraints on Alienation Void** — *United States*. — *Smith v. Stevens*, 10 Wall. (U. S.) 321; *Swope v. Purdy*, 1 Dill. (U. S.) 349; *Smythe v. Henry*, 41 Fed. Rep. 705; *Briggs v. Sample*, 43 Fed. Rep. 102; *Eells v. Ross*, 64 Fed. Rep. 417; *Laughton v. Nadeau*, 75 Fed. Rep. 789; *Libby v. Clark*, 118 U. S. 250, *Wiggan v. Conolly*, 163 U. S. 56. See also *Love v. Pamplin*, 21 Fed. Rep. 755.

Alabama. — *Herring v. M'Elderry*, 5 Port. (Ala.) 161; *Clarliko v. Elliott*, 5 Port. (Ala.) 403; *Haden v. Ware*, 15 Ala. 149. See also *Lewis v. Love*, 1 Ala. 335; *Doe v. Long*, 29 Ala. 376; *Pettit v. Pettit*, 32 Ala. 288.

California. — See *Sunol v. Hepburn*, 1 Cal. 255; *Hicks v. Coleman*, 25 Cal. 122, 85 Am. Dec. 103.

Kansas. — *Stevens v. Smith*, 2 Kan. 243; *Pennock v. Monroe*, 5 Kan. 578; *Scoffins v. Grandstaff*, 12 Kan. 468; *Clark v. Libbe*, 24 Kan. 435, 17 Kan. 634, *affirmed* in 118 U. S. 250; *Clark v. Akers*, 16 Kan. 166; *McGannon v. Straightlege*, 32 Kan. 524; *Sheldon v. Donohoe*, 40 Kan. 346; *Baldwin v. Letson*, 6 Kan. App. 11. See also *Frederick v. Gray*, 12 Kan. 518; *Campbell v. Paramore*, 17 Kan. 639; *Baldwin v. Squires*, 20 Kan. 280; *Maynes v. Veale*, 20 Kan. 374; *Clark v. Lord*, 20 Kan. 390.

Mississippi. — *Harmon v. Partier*, 12 Smed. & M. (Miss.) 425.

Wisconsin. — *Farrington v. Wilson*, 29 Wis. 383.

Act of 1887. — By the Act of February 8, 1887, any conveyance of the lands set apart and allotted under the act, or any contract touching the same, made before the expiration of twenty-five years, is absolutely null and void. 24 Stat. at L. 389, § 5; *Beck v. Flournoy Live-Stock, etc., Co.*, 65 Fed. Rep. 30; *U. S. v. Flournoy Live-Stock, etc., Co.*, 69 Fed. Rep. 886, 71 Fed. Rep. 576; *Pilgrim v. Beck*, 69 Fed. Rep. 895.

Dedication of Highway by Indian. — An Indian under disability to convey his lands without the consent of the secretary of the interior has no power to dedicate a highway, and no presumption of a dedication by him can arise from user of the land by the public as a highway, or from his acts and conduct in reference thereto. *State v. O'Laughlin*, 19 Kan. 504.

Indian May Convey Right of Occupancy. — While the sale of land in the Choctaw nation by a member of the tribe to a citizen of the United States does not pass title to the land, it

does pass the grantee's right of occupancy, and the grantor may defend such right as against third persons. *Kelly v. Johnson*, (Indian Ter. 1897) 39 S. W. Rep. 352.

Lease for Grazing or Mining Purposes. — An allotment may be leased for grazing or mining purposes where the allottee cannot personally occupy or improve it. Act of February 28, 1891 (26 Stat. at L. 795, § 3); *Mosgrove v. Harper*, 33 Oregon 252.

Patents to Heirs of Deceased Allottees — Conveyances by Heirs Before Patent. — By the Act of Congress of August 4, 1886, § 2 (24 Stat. at L. 219), it is made the duty of the secretary of the interior upon the death of an allottee under the treaty of 1862 with the Kickapoo Indians in Kansas, leaving heirs and without having obtained a patent, to issue a patent in the name of the original allottee. For decisions under this act, see *Briggs v. Wash-pukqua*, 37 Fed. Rep. 135; *Briggs v. McClain*, 43 Kan. 653.

Under the treaties and Acts of Congress with and concerning the Indian tribes in Kansas, conveyances by the heirs of a deceased allottee before the issuance of a patent are valid. *Briggs v. Wash-pukqua*, 37 Fed. Rep. 135; *Oliver v. Forbes*, 17 Kan. 113.

3. **Conveyances Duly Approved Pass Valid Title.** — *Jones v. Inge*, 5 Port. (Ala.) 327; *Rosser v. Bradford*, 9 Port. (Ala.) 354; *Haden v. Ware*, 15 Ala. 149; *Doe v. King*, 21 Ala. 429; *Long v. McDougald*, 23 Ala. 413; *Tarver v. Smith*, 38 Ala. 135; *Dillingham v. Brown*, 38 Ala. 311; *Ingraham v. Ward*, 56 Kan. 550; *Dagenett v. Jenks*, 7 Kan. App. 499.

Where the President has given his permission to a conveyance of land by an Indian, such permission cannot be revoked or annulled by his successor. *Godfrey v. Beardsley*, 2 McLean (U. S.) 412.

4. **Approval of Conveyance After Execution Relates Back to Time of Execution.** — *Pickering v. Lomax*, 145 U. S. 310, 173 U. S. 26; *Ashley v. Eberts*, 22 Ind. 55; *Steeple v. Downing*, 60 Ind. 478. See *Jackson v. Hill*, 5 Wend. (N. Y.) 532.

In *Murray v. Wooden*, 17 Wend. (N. Y.) 531, it was held, under the *New York* statutes requiring conveyances by an Indian to be approved by the surveyor-general, that though a conveyance of land by an Indian be subsequent to its date duly approved, it was still inoperative if previous to such approval the Indian had conveyed the land to a second grantee, and the second conveyance had been approved before the first.

tain restraints on alienation, such restraints are not affected by the fact that the same act declares that the Indians to whom the lands have been so allotted shall be citizens of the United States.¹

Conveyance of Lands Where There Is No Restraint on Alienation. — Where lands are allotted to individual Indians by treaty or statute without any restraints on alienation, the allottees may make a valid conveyance of the same even before the issuance of patents to them, and the patents when issued inure to the benefit of the assignees or grantees.²

Indirect Alienation. — It has been held that land allotted to an Indian with certain restraints on alienation may nevertheless be sold under execution upon an attachment at law against the allottee, and that such sale passes a good title to the purchaser although the conditions imposed have not been complied with.³ This decision seems to be opposed to the policy of the government in imposing such restrictions upon the power to convey for the protection of the Indians, for by such means a conveyance which could not be made directly may be accomplished by indirection; and it has been expressly held that this cannot be done by subjecting Indian lands to sale for taxes levied by the state.⁴

5. How Far Subject to State Laws — *a. GENERALLY.* — The general rule deducible from the authorities is, that so long as the Indian title to lands is not extinguished, and the Indians themselves maintain their tribal relations or remain under federal protection and control, and in the absence of provisions in the organic or enabling act of the territory or state to the contrary, Indian lands lying within the limits of a state or territory are not subject to the state or territorial laws respecting real estate. But when these conditions cease to exist or become inoperative, Indian lands become subject to local laws to the same extent as lands of other persons.⁵

b. ADVERSE POSSESSION. — So long as land granted to Indians remains inalienable, no title thereto can be acquired by adverse possession;⁶ but when Indian lands become taxable, and subject to unrestricted alienation, the owners are under the same necessity of exercising vigilance in asserting their rights as rests upon other owners, and adverse possession of such land for the statutory period vests title in the adverse holder.⁷

1. *Smythe v. Henry*, 41 Fed. Rep. 705; *Eells v. Ross*, 64 Fed. Rep. 417; *U. S. v. Flournoy Live-Stock, etc., Co.*, 69 Fed. Rep. 886, 71 Fed. Rep. 576. See also *Maynes v. Veale*, 20 Kan. 374.

2. *Doe v. Wilson*, 23 How. (U. S.) 457; *Crews v. Burcham*, 1 Black (U. S.) 352; *Quinney v. Denney*, 18 Wis. 485. See also *Ruggles v. Marsilliott*, 19 Wis. 159.

By the New York Act of 1843 (4 Banks's Rev. Stat. (8th ed.), § 2425), it is provided that any native Indian may purchase, take, hold, and convey lands in the state in the same manner as a citizen.

As to conveyances by Indians under earlier acts, see *Jackson v. Wood*, 7 Johns. (N. Y.) 290; *Jackson v. Sharp*, 14 Johns. (N. Y.) 472; *Jackson v. Brown*, 15 Johns. (N. Y.) 264; *Goodell v. Jackson*, 20 Johns. (N. Y.) 693, 11 Am. Dec. 351; *Lee v. Glover*, 8 Cow. (N. Y.) 189; *Murray v. Wooden*, 17 Wend. (N. Y.) 531; *Gillett v. Stanley*, 1 Hill (N. Y.) 121.

3. *Saffarans v. Terry*, 12 Smed. & M. (Miss.) 690.

4. *Auditor-Gen. v. Williams*, 94 Mich. 180. See *infra*, this section, *How Far Subject to State Laws — Taxation.*

5. **When Indian Lands Subject to State Laws.** — See the sections immediately following. See

also *Love v. Pamplin*, 21 Fed. Rep. 755; *Krause v. Means*, 12 Kan. 335; *Maynes v. Veale*, 20 Kan. 374.

Lands not under Indian government, but held by individual Indians as tenants in common, are subject to the jurisdiction of the state or territory in which they lie. *Telford v. Barney*, 1 Greene (Iowa) 575; *Wright v. Marsh*, 2 Greene (Iowa) 94; *Barney v. Chittenden*, 2 Greene (Iowa) 165.

Occupying Claimant Act — Kansas. — Prior to the Act of 1874, c. 79, § 2, there was no law authorizing any person evicted from Indian lands to recover his purchase money from the successful adverse claimant. *Lemert v. Barnes*, 18 Kan. 9.

So much of this act as requires the repayment of the purchase money where the Indian title has not been extinguished is void. *McGannon v. Straightlege*, 37 Kan. 87.

As to improvements, see the title **IMPROVEMENTS**, *ante*, p. 62.

6. **Adverse Possession.** — *McGannon v. Straightlege*, 32 Kan. 524; *Sheldon v. Donohoe*, 40 Kan. 346; *O'Brien v. Bugbee*, 46 Kan. 1.

7. *Forbes v. Higginbotham*, 44 Kan. 94; *Schrimphcher v. Stockton*, 58 Kan. 758; *New Orleans, etc., R. Co. v. Moye*, 39 Miss. 374. See Gen. Stat. Kansas, (1889), §§ 3304-3305.

c. DESCENT. — Lands belonging to individual Indians who are members of an organized tribe descend according to the laws and customs of the tribe, and not according to the laws of the state in which the lands lie.¹ But land which has been allotted to Indians in severalty, who have acquired title thereto in fee simple, descends according to the laws of the state.²

d. TAXATION. — Lands secured to Indians either as tribes or as individuals by treaties expressly exempting such lands from taxation, or imposing restraints on alienation, are not subject to taxation by the state in which they lie.³ But land held by an Indian under a patent vesting in him the absolute ownership free from any restraint on alienation, and not exempted from taxation by any treaty provisions, may be taxed by the state.⁴ But the mere unrestricted right to alienate does not make Indian lands taxable which otherwise would not be.⁵ Where lands allotted to Indians are made exempt from state taxation for the protection of the allottees, this exemption ceases upon the passing of the title from the Indian owners.⁶

IX. OFFICERS OF INDIAN AFFAIRS. — The secretary of the interior is charged with the supervision of public business relating to the Indians.⁷ For the administration of Indian affairs there are also the following special officers:

See generally the title ADVERSE POSSESSION, vol. 1, p. 787.

1. Descent of Lands Cast According to Laws of Tribe. — *Brown v. Steele*, 23 Kan. 672; *O'Brien v. Bugbee*, 46 Kan. 1; *Hannon v. Taylor*, 57 Kan. 1.

2. Lands Held by Indians in Fee Simple Descend According to State Laws. — *Clark v. Lord*, 20 Kan. 390; *Edde v. Pash-pah-o*, 5 Kan. App. 115. See also *Brown v. Belmarde*, 3 Kan. 41; *McCullagh v. Allen*, 10 Kan. 120; *Clark v. Lord*, 20 Kan. 390.

Land which has been allotted to Indians in severalty descends according to the laws of the state in which it is situated, and may be held responsible for the payment of the decedent's debts. *Lowry v. Weaver*, 4 McLean (U. S.) 82; *Taylor v. Vandegrift*, 126 Ind. 325.

3. Indian Lands in General Not Subject to Taxation by State. — *Kansas Indians*, 5 Wall. (U. S.) 737, reversing *Blue-Jacket v. Johnson* County, 3 Kan. 299; *Miami County v. Wau-zop-pe-che*, 3 Kan. 364; *New York Indians*, 5 Wall. (U. S.) 761; *Swope v. Purdy*, 1 Dill. (U. S.) 349; *Parker v. Winsor*, 5 Kan. 362; *Douglas County v. Union Pac. R. Co.*, 5 Kan. 615; *Missouri River, etc., R. Co. v. Morris*, 13 Kan. 302; *Fellows v. Denniston*, 23 N. Y. 420.

Land held by an Indian in severalty under a patent containing a proviso that it shall never be alienated without the consent of the secretary of the interior cannot be taxed by the state. *Auditor-Gen. v. Williams*, 94 Mich. 180.

In *Foster v. Blue Earth County*, 7 Minn. 140, it was held that the state of *Minnesota* could not tax property within the Indian reservations.

Under the third section of the ordinance of 1787, and the treaties subsequently made with the Indians, lands patented to Indians sustaining tribal relations are exempt from taxation by the state of *Indiana*. *Wau-pe-man-quia v. Aldrich*, 28 Fed. Rep. 489; *Me-shing-go-me-sia v. State*, 36 Ind. 310; *Allen County v. Simons*, 129 Ind. 193.

This is the case notwithstanding the lands

are patented to individual Indians in fee simple without any restraint upon alienation, and for their own use and not for the benefit of the tribe. *Allen County v. Simons*, 129 Ind. 193; *Wau-pe-man-quia v. Aldrich*, 28 Fed. Rep. 489.

But when such lands pass to a white man they are subject to taxation, notwithstanding they may be subsequently reconveyed to Indians. *Revoir v. State*, 137 Ind. 332.

In *Wisconsin* it is provided by statute that the property of Indians who are not citizens, except lands held by them by purchase, is exempt from taxation. *Sanb. & B. Annot. Stat.*, § 1038; *Farrington v. Wilson*, 29 Wis. 383.

Lands held by purchase may be taxed. *Quinney v. Stockbridge*, 33 Wis. 505; *Hilgers v. Quinney*, 51 Wis. 62.

Osage Trust Lands in Kansas. — Congress having full control over the "Osage trust and diminished reserve lands" in Kansas, may make them subject to state taxation under such conditions as are deemed proper, not in conflict with the constitution of the state. *Logan v. Clark County*, 51 Kan. 747.

4. *Pennock v. Commissioners*, 103 U. S. 44, distinguishing *Kansas Indians*, 5 Wall. (U. S.) 737, and affirming 18 Kan. 579; *McMahon v. Welsh*, 11 Kan. 280.

By statute in *Indiana* all lands reserved to or for any individual by any treaty between the United States and any Indian tribe or nation, are liable to taxation from the time of the confirmation of such treaty. *Frederickson v. Fowler*, 5 Blackf. (Ind.) 409; *State v. Miami County*, 63 Ind. 497. The statute applies only to reservations for individuals, and not to a reservation for a band of Indians. *Me-shing-go-me-sia v. State*, 36 Ind. 310.

5. *Wau-pe-man-quia v. Aldrich*, 28 Fed. Rep. 489, distinguishing *Pennock v. Commissioners*, 103 U. S. 44; *Allen County v. Simons*, 129 Ind. 193.

6. *Peck v. Miami County*, 4 Dill. (U. S.) 370; *Miami County v. Brackenridge*, 12 Kan. 114.

7. Officers over Indian Affairs. — See U. S. Rev. Stat., § 441.

the commissioner of Indian affairs,¹ the board of Indian commissioners,² Indian inspectors,³ superintendents,⁴ and agents.

Agents. — The most numerous class of Indian officers are agents. These are appointed by the President by and with the advice and consent of the Senate.⁵ They hold office for a term of four years,⁶ and are required to furnish bonds before entering upon the duties of their office.⁷ The President may require any military officer of the United States to execute the duties of an Indian agent, provided this does not separate him from his company or otherwise interfere with his military duties proper.⁸ The duties of an Indian agent are to manage and superintend the intercourse with the Indians, within his agency, agreeably to law; and to execute and perform such regulations and duties, not inconsistent with law, as may be prescribed by the President, the secretary of the interior, the commissioner of Indian affairs, or the superintendent of Indian affairs.⁹

X. INDIAN DEPREDACTIONS. — Congress has passed several acts providing for the payment of claims arising out of depredations by Indians.¹⁰ By the Act of March 3, 1891, jurisdiction was conferred upon the Court of Claims over all claims for property of citizens of the United States taken or destroyed by Indians belonging to any band, tribe, or nation in amity with the United States, without just cause or provocation on the part of the owner or agent in charge, and not returned or paid for. Numerous cases have arisen under this act in which the rights of persons injured by the Indians have been adjudicated.¹¹

1. See U. S. Rev. Stat., §§ 462, 463, 464, 468, 469; 27 Stat. at L. 272, 19 Stat. at L. 200. There is also an assistant commissioner now provided for. 29 Stat. at L. 168.

2. See U. S. Rev. Stat., §§ 2039-2040; 22 Stat. at L. 70.

3. U. S. Rev. Stat., § 2043; 18 Stat. at L. 422.

Although the general functions and duties of Indian inspectors do not include specifically the disbursement of public money, and these officers are not required by statute to give bond, yet the secretary of the interior may lawfully assign to them other duties relating to business concerning the Indians, in addition to those prescribed, whenever the exigencies of the public service require it, and when such other duties involve the receipt or disbursement of public money, the secretary may require a bond. Indian Inspector, 17 Op. Atty.-Gen. 391.

As to inspector's traveling expenses, see U. S. v. Smith, 35 Fed. Rep. 490.

4. See U. S. Rev. Stat., §§ 2046-2051; U. S. v. Earhart, 4 Sawy. (U. S.) 245; U. S. v. Wirt, 3 Sawy. (U. S.) 161; U. S. v. Odeneal, 10 Fed. Rep. 616.

The superintendent of Indian affairs cannot be held personally liable for the torts of the Indians under his charge which he has neither authorized nor adopted. Huebschman v. Baker, 7 Wis. 542.

5. **Appointment of Indian Agents.** — U. S. Rev. Stat., § 2052. The appointment of Indian agents is regulated from time to time under the annual appropriation acts.

6. **Term of Office.** — U. S. Rev. Stat., § 2056.

7. **Bond of Indian Agent.** — U. S. Rev. Stat., § 2057; U. S. v. McClane, 74 Fed. Rep. 153.

An Indian agent who has given bond to secure the faithful performance of his duties as agent on a particular reservation is not liable on such bond for his delinquencies while

acting as agent on another reservation. U. S. v. Barnhart, 17 Fed. Rep. 579.

In an action on the bond of an Indian agent for delinquencies in office, a transcript of the books and proceedings of the treasury department is admissible in evidence under U. S. Rev. Stat., § 856, and is sufficient *prima facie* evidence to establish an indebtedness on the part of the agent to the government for moneys received by him and not properly disbursed or accounted for. U. S. v. Smith, 35 Fed. Rep. 490; U. S. v. Allen, 36 Fed. Rep. 174; U. S. v. Young, 44 Fed. Rep. 168.

An agent and his sureties are liable on his official bond for money paid out by him contrary to his authority. U. S. v. Sinnott, 26 Fed. Rep. 84, 89.

8. **Employment of Military Officer as Indian Agent.** — U. S. Rev. Stat., § 2062; 19 Stat. at L. 240; 27 Stat. at L. 120; Minis v. U. S., 15 Pet. (U. S.) 424.

9. U. S. Rev. Stat., § 2058.

Liability of Agent for Negligence of Clerks. — An Indian agent is not liable for the negligence, errors, or breach of duty of doctors and clerks appointed and furnished by the government, unless by the exercise of reasonable diligence he could have prevented such negligence, etc.; and where the government fails to furnish the agent with a clerk, the agent is only responsible for the performance of the clerical duties of the agency in the best way practicable for him. U. S. v. Young, 44 Fed. Rep. 168. See also U. S. v. Patrick, 73 Fed. Rep. 800.

Expenditures by Agent. — In U. S. v. Duval, Gilp. (U. S.) 356, it was held that expenditures by an Indian agent for the benefit of the Indians, and on a tract of land reserved and held by themselves, could not be charged to the United States.

10. See U. S. Rev. Stat., §§ 2098, 2156.

11. **Claims for Indian Depredations.** — 26 Stat. at L. 851. See generally Leighton v. U. S., 161

Indians Must Be in Amity with United States. — In order to come within the provisions of the statute the depredations must have been committed by an Indian or Indians belonging to a tribe in amity with the United States.¹

Claimant Must Be Citizen of United States. — In order to maintain an action in the court of claims under this statute, the claimant must have been a citizen of the United States at the time the depredations were committed.²

Transfers of Claim — Attorney's Fees. — By the terms of the statute, all sales, transfers or assignments of claims theretofore or thereafter made, except in the administration of the estates of persons deceased, and all contracts theretofore made for fees and allowances to the claimant's attorneys, are declared void; and all treasury warrants in payment of the judgments of the court shall be made payable and delivered only to the claimant, or to his heirs, executors, or administrators, except so much thereof as the court at the time of rendering the judgment, and as part thereof, shall allow to be paid directly to the claimant's attorney, not exceeding in any case twenty per cent. of the amount recovered.³

U. S. 291; Marks *v.* U. S., 161 U. S. 297; Stone *v.* U. S., 164 U. S. 380; U. S. *v.* Sorham, 165 U. S. 316; Jaeger *v.* U. S., 29 Ct. Cl. 172, 27 Ct. Cl. 278; Love *v.* U. S., 29 Ct. Cl. 332; Weston *v.* U. S., 29 Ct. Cl. 420; Friend *v.* U. S., 29 Ct. Cl. 425; Barrow *v.* U. S., 30 Ct. Cl. 54; Garrison *v.* U. S., 30 Ct. Cl. 272; Labadi *v.* U. S., 31 Ct. Cl. 205, 32 Ct. Cl. 368, 33 Ct. Cl. 476; Tully *v.* U. S., 32 Ct. Cl. 1; Crow *v.* U. S., 32 Ct. Cl. 16; Brice *v.* U. S., 32 Ct. Cl. 23; Welch *v.* U. S., 32 Ct. Cl. 106; Montoya *v.* U. S., 32 Ct. Cl. 349; Herring *v.* U. S., 32 Ct. Cl. 536; Moore *v.* U. S., 32 Ct. Cl. 593; Osborn *v.* U. S., 33 Ct. Cl. 304; Dobbs *v.* U. S., 33 Ct. Cl. 308; Conners *v.* U. S., 33 Ct. Cl. 317.

Claims Allowed by Interior Department. By this statute the jurisdiction of the Court of Claims was also extended to all cases which had been examined and allowed by the interior department, and to such cases as were authorized to be allowed under the Act of March 3, 1885 (23 Stat. at L. 376), and under subsequent acts. See Johnson *v.* U. S., 160 U. S. 546; Marks *v.* U. S., 161 U. S. 297; U. S. *v.* Navarre, 173 U. S. 77, *affirming* 33 Ct. Cl. 235; Yerke *v.* U. S., 173 U. S. 439; Price *v.* U. S., 28 Ct. Cl. 422; Bush *v.* U. S., 29 Ct. Cl. 144; Mares *v.* U. S., 29 Ct. Cl. 197.

The United States Are Responsible for Damages under the Depredation Act only in two classes of cases, first, where the Indian defendants are responsible, but without funds to respond in damages; second, where the depredations were committed by Indians whose tribal relations cannot be ascertained. Woolverton *v.* U. S., 29 Ct. Cl. 107.

Judgment Against United States Alone. — The Court of Claims may render judgment against the United States alone under the Depredation Act where the tribe of Indians to which the depredators belong cannot be identified, and such inability is stated and judgment rendered against the United States only. U. S. *v.* Gorham, 165 U. S. 316, *affirming* 29 Ct. Cl. 97.

No Claim for Personal Injuries. — The Depredation Act relates exclusively to claims for property, and does not authorize a recovery for personal injuries. Friend *v.* U. S., 29 Ct. Cl. 425; Swope *v.* U. S., 33 Ct. Cl. 223.

Creditors have no rights under the act. Labadie *v.* U. S., 32 Ct. Cl. 368, 33 Ct. Cl. 476.

Laches in Presenting Claim. — Though no statute of limitation may attach to an Indian depredation case, the fact that the government has again and again notified claimants by statutes to present their claims, and the fact that the claimant has wholly neglected to do so, suggest moral presumptions against the claim, and these presumptions must be overcome by satisfactory evidence. Stone *v.* U. S., 29 Ct. Cl. 111, *affirmed* in 164 U. S. 380.

1. Indians Must Be in Amity with the United States. — Leighton *v.* U. S., 161 U. S. 291; Marks *v.* U. S., 161 U. S. 297, *affirming* 28 Ct. Cl. 147; Valk *v.* U. S., 168 U. S. 703, *affirming* 29 Ct. Cl. 62; Collier *v.* U. S., 173 U. S. 79; Cox *v.* U. S., 29 Ct. Cl. 349; Friend *v.* U. S., 29 Ct. Cl. 425; Salois *v.* U. S., 33 Ct. Cl. 326. See also Ross *v.* U. S., 29 Ct. Cl. 176; Love *v.* U. S., 29 Ct. Cl. 332. See also, as to the meaning of the term "in amity," and when particular tribes were or were not in amity with the United States, Leighton *v.* U. S., 161 U. S. 291; Valencia *v.* U. S., 31 Ct. Cl. 388; Carter *v.* U. S., 31 Ct. Cl. 441; Duran *v.* U. S., 32 Ct. Cl. 273; Litchfield *v.* U. S., 32 Ct. Cl. 585, 33 Ct. Cl. 203; Crow *v.* U. S., 32 Ct. Cl. 599; Mascarnas *v.* U. S., 33 Ct. Cl. 94; McKee *v.* U. S., 33 Ct. Cl. 99; Painter *v.* U. S., 33 Ct. Cl. 114; Osborn *v.* U. S., 33 Ct. Cl. 304; Dobbs *v.* U. S., 33 Ct. Cl. 308; Conners *v.* U. S., 33 Ct. Cl. 317; Salois *v.* U. S., 33 Ct. Cl. 326; Scott *v.* U. S., 33 Ct. Cl. 486.

2. Claimant Must Be Citizen of United States. — Johnson *v.* U. S., 160 U. S. 546, *affirming* 29 Ct. Cl. 1; Yerke *v.* U. S., 173 U. S. 439; Valk *v.* U. S., 28 Ct. Cl. 241; Hosford *v.* U. S., 29 Ct. Cl. 42. See also Coutzen *v.* U. S., 33 Ct. Cl. 475; Rhine *v.* U. S., 33 Ct. Cl. 481.

Corporations created under the laws of a state are citizens within the act. U. S. *v.* Northwestern Express Stage, etc., Co., 164 U. S. 686.

3. Transfer of Claims — Attorney's Fees. — Ball *v.* Halsell, 161 U. S. 72; Redfield *v.* U. S., 27 Ct. Cl. 473; Beddo *v.* U. S., 28 Ct. Cl. 69; Mullan *v.* Clark, (Idaho 1894) 38 Pac. Rep. 247.

INDICATE. — See note 1.

INDICAVIT. — In English practice, a writ of prohibition.²

INDICTMENT. — See ENCYC. OF PL. AND PR., title INDICTMENTS, INFORMATIONS, AND COMPLAINTS, vol. 10, p. 344.

INDIFFERENT. — Impartial; unbiased.³

INDIGENT — See note 4.

1. Indicate and Show. — The trial court instructed that a declaration under the circumstances, in view of the condition of the deceased when it was made, "*indicates* that she then realized she was about to die." The appellate court said: "The word *indicates*, as here used, is the same as 'shows,' and renders the instruction a charge upon the effect of the evidence, which the statute forbids." *White v. State*, 111 Ala. 92.

On a trial for grand larceny, the court instructed the jury, that if satisfied, beyond a reasonable doubt, "that defendant killed, or had the calf killed, by the witnesses, and that she then cut out the brand and cut off the ears of the calf, and burned up the ears and part of the hide so cut out, this would be a circumstance to be considered by you, *indicating* that the defendant was not the owner of the calf, and of her knowledge that she was not the owner," etc. It was held that the word *indicating*, as used in the instruction, would be understood by the jury as tending to show a certain result, and that the language of the instruction was not in violation of the constitutional provision prohibiting the court from charging the jury with respect to matters of fact. *State v. Loveless*, 17 Nev. 424.

But in *Coyle v. Com.*, 104 Pa. St. 133, it was said: "It is true, perhaps, that what is merely *indicated* by certain facts may not be shown by them. Although the words 'show' and *indicate* are sometimes interchangeable in popular use, they are not always so. The present ordinary use of the words discloses a difference in signification, and that difference is perhaps more recognizable when these terms are applied to the law or to medical science. To show is to make apparent or clear by evidence, to prove; whilst an *indication* may be merely a symptom, that which points to or gives direction to the mind. The commonwealth, however, had a right, we think, to inquire in proper form, of a competent expert, whether any condition of facts assumed either proved or *indicated* insanity; whether such facts were conclusive or merely symptomatic, or neither."

2. In State v. Road Com'rs, 1 Mill (S. Car.) 55. 12 Am. Dec. 601, the court said: "In *Fitzherbert's Nat. Brev.*, p. 70, it is said, 'A person who is sued in the spiritual court may purchase a writ which is called *indicavit*, which writ is a prohibition,' etc. This last authority is cited merely to show the special names which writs of the same nature often assumed as they happened to be adapted to particular cases."

3. Indifferent. — Under an act requiring the appointment of *indifferent* appraisers of land taken under execution, an uncle of the plaintiff is not *indifferent*. *Tweedy v. Pickett*, 1 Day (Conn.) 109. Nor is a nephew by marriage *indifferent*. "The legislature, in directing

that the appraisers should be *indifferent*, must have intended that there should not be such a relation between them and the parties as could bias their minds and induce them to act with partiality. As the degree of relationship is not designated, it is reasonable to adopt the rule presented by statute as to the cases in which judges are disqualified to judge between parties." *Fox v. Hills*, 1 Conn. 295. An appraiser who bears the relation of tenant to one of the parties is not *indifferent*. *Mitchell v. Kirkland*, 7 Conn. 229.

Jury and Jury Trial. (See also the title JURY AND JURY TRIAL.) — Upon the question who is an *indifferent* juror the court in *People v. Vermilyea*, 7 Cow. (N. Y.) 122, said: "What is meant by a person standing *indifferent*? Manifestly, that the mind is in a state of neutrality, as respects the person, and the matter to be tried; that there exists no bias for or against either party, in the mind of the juror, calculated to operate upon him; that he comes to the trial with a mind uncommitted, and prepared to weigh the evidence in impartial scales." See also *State v. Pike*, 49 N. H. 399.

Highways. — In *Anthony v. South Kingstown*, 13 R. I. 129, it was held that the petitioners for the laying out of a highway were not "*indifferent* men" and therefore could not act as committeemen to mark out a highway under the *Rhode Island* highway act.

4. A Trust to aid "*indigent* young men * * * in fitting themselves for the evangelical ministry" is not void for uncertainty. "Neither of the words *indigent* or 'evangelical' is of rare use or hidden meaning. They are quite within ordinary intelligence and point with a sufficient degree of certainty to the individual to enable the statute of charitable uses to distinguish him from all others. It is a sufficiently accurate statement in this connection to say that they describe a man who is without sufficient means of his own, and whom no person is bound and able to supply, to enable him to prepare himself for preaching the gospel." *Storrs Agricultural School v. Whitney*, 54 Conn. 352, 35 Alb. L. J. 384. See generally the title CHARITIES AND TRUSTS FOR CHARITABLE USES, vol. 5, p. 893.

A Statute enacted that any person unable to maintain himself should be provided for or assisted by a municipality. The court said: "No other word perhaps in the language more appropriately describes the persons here designated than the word *indigent*. It means the needy, the poor, those who are destitute of property and the means of comfortable subsistence." *City of Lynchburg v. Slaughter*, 75 Va. 62.

Indigent Insane. (See also the titles INSANITY, *post*; POOR AND POOR LAWS.) — The Constitution of *North Carolina* provided that the legislature might enact a statute for the care of

INDIGNITY. — Indignity means unmerited contemptuous conduct towards another.¹

INDIRECT. — See note 2.

INDIRECTLY. — See note 3.

INDISPENSABLE PARTIES. (See also ENCYC. OF PL. AND PR., title PARTIES TO ACTIONS, vol. 15, p. 611.) — Indispensable parties are those who have not only an interest in the subject-matter of the controversy, but an interest of such a nature that a final decree cannot be made without either affecting their interests or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.⁴

INDISPUTABLE. — See note 5.

INDIVIDUAL. — "Individual" is frequently used in the sense of a natural person,⁶ as opposed to a corporation.

the *indigent* insane. In conformity with this, Code N. Car., § 2273, provides that "priority of admission shall be given to the *indigent* insane." It was held that by the term "*indigent* insane" were meant all those who had no income over and above what was sufficient to support those who might be legally dependent on the estate. *In re Hybart*, 119 N. Car. 359.

Paupers and Indigent Insane Distinguished. — See *People v. Schjarlie County*, 121 N. Y. 350.

1. Indignity to the Person. — In construing a statute law allowing divorce for *indignity* to the person, the court said: "What is an *indignity* to the person? *Indignity* is defined by Mr. Webster to be 'unmerited contemptuous conduct towards another; any action towards another which manifests contempt for him; contumely; incivility, or injury accompanied with insult.' It is manifest from this definition that an *indignity* to the person may be offered without striking the body, or even touching it in a rude and offensive manner. Contumelious words, especially when accompanied with a contemptuous demeanor towards a person, may amount to an *indignity* which would be felt by a sensitive mind with far keener anguish than would be inflicted by a blow." *Coble v. Coble*, 2 Jones Eq. (55 N. Car.) 395. See also the title DIVORCE, vol. 9, p. 811.

2. Indirect. — The vendor of a stage line pledged himself "not to be concerned, direct or *indirect*, in any line of stages in opposition to" the purchaser. It was held that the word *indirect* was used for the special purpose of guarding against any kind of interference by the defendant in aiding or in any manner promoting the use or carrying on of any opposition. *Davis v. Barney*, 2 Gill & J. (Md.) 402. And see *Guerand v. Dandeleit*, 32 Md. 570. See also the title RESTRAINT OF TRADE.

Indirect Tax. (See also the title TAXATION.) — In *Springer v. U. S.*, 102 U. S. 602, it was said: "All taxes are usually divided into two classes, those which are direct and those which are *indirect*, and * * * under the former denomination are included taxes on land or real property, and under the latter taxes on consumption."

3. Usury. (See also the title USURY.) — Where the expression "shall take directly or *indirectly* for loan of money" is used in a usury statute, any contrivance, if the substance of it be a loan, will come under the word *indirectly*. *Floyer v. Edwards*, 1 Cowp. 112.

Indirectly or Secondarily Liable. — In *Bell v. Ottawa Trust, etc., Co.*, 28 Ont. 519, it was held that a partner who had individually joined as a maker in a promissory note of his firm for its accommodation was not *indirectly* or secondarily liable for the firm to the holder, but was primarily liable.

4. Chadbourn v. Coe, 10 U. S. App. 83, 51 Fed. Rep. 479; *Shields v. Barrow*, 17 How. (U. S.) 130; *King v. Throckmorton County*, 10 Tex. Civ. App. 114. See also *Mallow v. Hinde*, 12 Wheat. (U. S.) 193; *Robertson v. Carson*, 19 Wall. (U. S.) 94; *Williams v. Bankhead*, 19 Wall. (U. S.) 563; *Ribon v. Chicago, etc., R. Co.*, 16 Wall. (U. S.) 450; *Abbot v. American Hard Rubber Co.*, 4 Blatchf. (U. S.) 492; *Kendig v. Dean*, 97 U. S. 423; *Alexander v. Horner*, 1 McCrary (U. S.) 634; *Coiron v. Millaudon*, 19 How. (U. S.) 113; *Lewis v. Elrod*, 38 Ala. 21; *Lynch v. Rotan*, 39 Ill. 20; *Douglas County v. Walbridge*, 38 Wis. 188.

5. Indisputable Title. (See also the titles COVENANTS, vol. 8, p. 43; VENDOR AND PURCHASER.) — In *Courcier v. Graham*, 1 Ohio 330, it was held that where one covenanted to make an *indisputable* title, a complete connected paper title was necessary.

Indisputable Presumption. — See the title PRESUMPTIONS.

6. Natural and Artificial Persons. — *Com. v. Pittsburgh*, 41 Pa. St. 283, cited in *Seybert v. Pittsburg*, 1 Wall. (U. S.) 273, note.

In an act giving to *individuals* the right to use the road of a railroad and to place cars thereon, *individual* includes partnerships and corporations. *Pennsylvania R. Co. v. Canal Com'rs*, 21 Pa. St. 20. So in an act providing that "no abatement shall be made of the taxes assessed upon any *individual* until," etc. *Otis Co. v. Ware*, 8 Gray (Mass.) 509.

A statute provided that every company operating a telegraph line in a state should receive dispatches from and for other telegraph lines and from and for any *individual*. In construing this statute the court said: "The word *individual* is here used in the sense of person, and embraces artificial or corporate persons as well as natural. The dispatches so received 'from or for' must be transmitted 'with impartiality,' that is, without discrimination, either in respect to persons or in the time or manner of transmission." *State v. Bell Telephone Co.*, 36 Ohio St. 310. And see the title TELEGRAPH COMPANIES.

Name of an Individual. (See also the title Volume XVI.

As an adjective, it means personal.¹

INDOOR.—See note 2.

INDORSEMENT — INDORSER — INDORSEE.—See the title **BILLS OF EXCHANGE AND PROMISSORY NOTES**, vol. 4, p. 65.

INDUBITABLE.—See note 3.

TRADEMARK.—In *In re Holt*, (1896) 1 Ch. 711, it was held that a fictitious name, such as the name of a character in fiction, was a word capable of being registered as a trademark, the court holding that "Trilby" was not a name of an *individual*. Lindley, L. J., said: "It is hardly to be supposed that the legislature meant *individual* to be taken in a fanciful or metaphorical sense, or meant it to denote an imaginary person who has not, and never had, any real existence. I do not think that such words as Hamlet, Sam Weller, Jupiter, Venus, etc., can be called names of *individuals*."

Indians.—In an Indian treaty providing for the assignment of lands to families and *individuals*, it was held that the word *individual* meant a person not a member of the family. *Summers v. Spybuck*, 1 Kan. 394.

Civil Damage Act. (See the title **CIVIL DAMAGE ACTS**, vol. 6, p. 36.)—Under a statute providing that persons licensed to sell intoxicating liquors "shall pay all damages that the community or *individuals* may sustain in consequence of such traffic," a person himself purchasing and drinking such liquor may maintain an action against the seller for a personal injury sustained in consequence thereof. *Buckmaster v. McElroy*, 20 Neb. 557, 57 Am. Rep. 843. The court said that the decision turned upon the question whether the word *individuals* included a person who participates in the traffic by purchasing the liquor, and held that it did.

1. **Individual Banker.**—A New York statute provided that every private and *individual* banker might charge six per cent. interest, and that if he knowingly charged a greater rate, double the amount might be recovered from the private or *individual* banker receiving the same. In construing this statute the court said: "Notwithstanding the fact that the terms '*individual* banker' and 'private banker' are used as synonyms in section 99, of chapter 409, Laws of 1882, and in the statute from which that section is derived, we think the terms are independent, and each had a well-understood meaning when chapter 567, Laws of 1880, and chapter 409, Laws of 1882, were enacted. Since the passage of chapter 363, Laws of 1840, the term '*individual* banker' has been frequently used in our statutes and reports, and has acquired a definite meaning. It denotes a person who, having complied with the statutory requirements, has received authority from the banking department to engage in the business of banking, subject to its inspection, supervision, and to the burdens imposed. *People v. Doty*, 80 N. Y. 225, 228. Private bankers are persons or firms engaged in banking without having any special privileges or authority from the state." *Perkins v. Smith*, 116 N. Y. 441.

Liability of Directors. (See also the title **PUBLIC OFFICERS.**)—Under an act making every

neglect to keep and preserve the road in good repair a misdemeanor in the president and *individual* directors of a turnpike company, the liability of the directors is personal and several. "If the *individual* officers are deemed guilty of an offense, they must be *individually* punishable, which of course must be personal." *Kane v. People*, 3 Wend. (N. Y.) 363.

Individually—Stockholders. (See also the title **STOCKHOLDERS.**)—*Individually* is used of the liability of stockholders in distinction from their liability in their corporate capacity. *Sewall v. Allen*, 6 Wend. (N. Y.) 347. It means "personally," not "severally." *Mann v. Pentz*, 2 Sandf. Ch. (N. Y.) 270.

Upon the question whether the term, as used within a statute imposing additional liability upon stockholders, raised joint or several liabilities, the court said: "In some of the cases referred to the word 'each' is used, and in some the word 'severally'; and it is argued that the word *individually*, as used here, is in no sense equivalent to either of those words, and that there is no several liability. The word *individually* means separately, and this again means singly. Again, the word 'severally' means separately. To separate is to disunite, to divide, to disconnect, to sever. Things which are equal to the same thing are equal to each other." *Meisser v. Thompson*, 9 Ill. App. 370.

2. **Wills.** (See also the title **WILLS.**)—Promissory notes do not pass by a bequest of "*indoor* movables." *Penniman v. French*, 17 Pick. (Mass.) 404, 28 Am. Dec. 309.

A bequest of "all that I possess, *indoors* and outdoors," will pass real estate. *Tolar v. Tolar*, 3 Hawks (to N. Car.) 74, 14 Am. Dec. 575.

3. **Indubitable Proof.**—"When such terms as clear, precise, explicit, unequivocal, and *indubitable* are used by the courts in defining the requisite proof of a particular fact to be made out by verbal testimony, it is meant that a conviction shall be fastened in the minds of jurors as strong as verbal testimony is able to convey. It is meant that witnesses shall be found to be credible; that the facts to which they testify are distinctly remembered; that details are narrated exactly and in due order, and that their statements are true. The word *indubitable* * * * was used in a sense subject to these limitations, and would necessarily so be understood. Absolute certainty is of course out of the question. Terms are used with relation to their subject-matter." *Spencer v. Colt*, 89 Pa. St. 318.

Indubitable Proof is evidence that is found to be not only credible, but of such weight and directness as to make out beyond reasonable doubt the facts alleged. *Boyertown Nat. Bank v. Hartman*, 147 Pa. St. 562. See also the title **REASONABLE DOUBT**.

INDUCE. — See note 1.

INDUCEMENT. — See ENCYC. OF PL. AND PR., vol. 10, p. 581.

INDULGENCE. — See note 2.

INDUSTRIAL. — Industrial is defined as consisting in or appertaining to industry.³

INDUSTRIAL SCHOOLS. — See the titles HOUSES OF REFUGE AND CORRECTION, vol. 15, p. 777; PRISONS.

INDUSTRY. — Industry is defined to be habitual diligence in any employment, either bodily or mentally.⁴

INEBRIATE. — See the title INTOXICATION.

INEFFECTUAL. — See note 5.

INELIGIBLE. (See also the title PUBLIC OFFICERS.) — Ineligible means not eligible; not qualified to be chosen for an office.⁶

INEQUALITIES. — See the titles SPECIAL ASSESSMENT; TAXATION.

INEVITABLE ACCIDENT OR CASUALTY. (See also ACCIDENT, vol. 1, p. 272; and see the titles ACT OF GOD, vol. 1, p. 584; CARRIERS OF GOODS, vol. 5, pp. 234, 258; CARRIERS OF LIVE STOCK, vol. 5, p. 452; CARRIERS OF PASSENGERS, vol. 5, p. 531; NAVIGATION.) — A fortuitous event; an accident which cannot be foreseen or prevented.⁷

1. **Persuade as Synonymous with Induce.** — See Wilson v. State, 38 Ala. 413.

2. **Indulgence.** — In Gatlin v. Walton, 1 Winst. L. (60 N. Car.) 382, it was said: "An *indulgence* is defined to be 'a favor granted.' * * * An illustration is given when a creditor enters into an agreement with his debtor by which the time of payment is extended."

3. **Carver Mercantile Co. v. Hulme**, 7 Mont. 566.

Industrial Business. — The Revised Statutes of the United States, § 1889, provide that the legislative assemblies of the territories may by general acts permit persons to associate themselves together as bodies corporate, for mining, manufacturing, and other *industrial* pursuits. It was held that a mercantile business for the sale of goods, mining supplies, etc., was an *industrial* business within this statute. Bashford-Burmister Co. v. Agua Fria Copper Co., (Ariz. 1894) 35 Pac. Rep. 983. See also Carver Mercantile Co. v. Hulme, 7 Mont. 566. In Wells v. Northern Pac. R. Co., 23 Fed. Rep. 469, it was held that the express business was an *industrial* pursuit.

Mill. — A statute provided that railroads might grant special rates to any person or corporation, to aid in the development of "any *industrial* enterprise" in the state. It was held that a mill was an *industrial* enterprise. The court said: "It cannot be disputed that '*industrial* enterprises' include all kinds of manufacturing. Mr. Worcester defines *industrial* as 'relating to manufactures or to the product of industry or labor.' It being in evidence that the plaintiff was a miller, and used the coal shipped to him in the manufacture of corn into meal, we are constrained to hold that the plaintiff had the right to rely on the promised rebate, and that the claim here made should be allowed." Louisville, etc., R. Co. v. Fulgham, 91 Ala. 555.

Industrial Assurance Company. — See Newbold Friendly Soc. v. Barlow, (1893) 2 Q. B. 129.

4. **Carver Mercantile Co. v. Hulme**, 7 Mont. 566.

5. **Ineffectual.** — A statute provided for certain exemptions, and further provided that "a

mortgage hereafter executed upon property so exempt is *ineffectual* until the exemption has been canceled as prescribed in this section." It was held that the mortgage, after it was executed, was not void. The court said: "The word *ineffectual* seems to have been chosen to express that the mortgage was *ineffectual* to cancel the exemption. It is not equivalent to 'void.' For it will be seen that it is *ineffectual* only till the exemption has been canceled. Therefore, it is plainly only as to the exemption that it is *ineffectual*. And the judgment appealed from so treats it." Peck v. Ormsby, 55 Hun (N. Y.) 267.

6. **Carroll v. Green**, 148 Ind. 362.

In State v. Murray, 28 Wis. 99, it was said: "The term *ineligible* means as well disqualification to hold an office as disqualification to be elected to an office." This case was distinguished in Smith v. Moore, 90 Ind. 307.

Ineligible and Disqualified. — These terms, as applied to candidates for public offices, have been held equivalent. Carroll v. Green, 148 Ind. 362.

7. **Bouv. L. Dict.**

Inevitable Accident. — An accident is said to be *inevitable* when it is not occasioned in any degree, either remotely or directly, by the want of such care and skill as the law holds every man bound to exercise. Dygert v. Bradley, 8 Wend. (N. Y.) 473.

"To make an accident, or casualty, or, as the law sometimes states it, *inevitable accident*, it must be such an accident as the defendant could not have avoided by the use of the kind and degree of care necessary to the exigency, and in the circumstances in which he was placed." If one who is doing a lawful and proper act, using due care and proper precautions necessary to the exigency of the case to avoid injuring others, accidentally does injure another, it is the result of pure accident, or is involuntary and unavoidable, and no action will lie. Brown v. Kendall, 6 Cush. (Mass.) 296.

Negligence Distinguished from Inevitable Accident. — In The Schwan, (1892) P. D. 429, Esher, M. R., said: "What is the proper

definition of *inevitable accident*? To my mind these cases show clearly what is the proper definition of *inevitable accident* as distinguished from mere negligence—that is, a mere want of reasonable care and skill. In my opinion, a person relying on *inevitable accident* must show that something happened over which he had no control, and the effect of which could not have been avoided by the greatest care and skill. That seems to me to be the very distinction which was taken, and was meant to be taken, between the case of *inevitable accident* and a mere want of reasonable care and skill."

Inevitable Accident and Act of God Distinguished.—In *Fergusson v. Brent*, 12 Md. 33, it was said: "It is true that every 'act of God' is an *inevitable accident*, because no human agency can resist it; but, because it is so, it does not therefore follow, in the sense of the books, that every *inevitable accident* is an act of God. Damage done by lightning is an *inevitable accident* and also an act of God; but the collision of two vessels in the dark is an *inevitable accident*, but not an act of God, such as the stroke of lightning, nor is it so considered by the authorities."

"All causes of *inevitable accident*—*casus fortuitus*—may be divided into two classes, those which are occasioned by the elementary forces of nature, unconnected with the agency of man or other cause, and those which have their origin either in the whole or in part in the agency of man, whether in acts of commission or omission, of nonfeasance or of misfeasance, or in any other cause independent of the agency of natural forces. It is obvious that it would be altogether incongruous to apply the term 'act of God' to the latter class of *inevitable accident*." *Nugent v. Smith*, 1 C. P. D. 435, citing *Forward v. Pittard*, 1 T. R. 27.

"The general principle is clear. The act of God is natural necessity, as wind and storms, which arise from natural causes, and is distinct from *inevitable accident*." Lord Mansfield, C. J., in *Trent, etc., Nav. Co. v. Wood*, 4 Dougl. 287, 26 E. C. L. 358.

And in the following cases the distinction pointed out above between *inevitable accident* and act of God was recognized: *Trent, etc., Nav. Co. v. Wood*, 4 Dougl. 290, 26 E. C. L. 361; *Forward v. Pittard*, 1 T. R. 27; *Fay v. Pacific Imp. Co.*, 93 Cal. 261; *McHenry v. Philadelphia, etc., R. Co.*, 4 Harr. (Del.) 448; *Central Line of Boats v. Lowe*, 50 Ga. 511; *Chicago, etc., R. Co. v. Shea*, 66 Ill. 471; *Merchants' Dispatch Co. v. Smith*, 76 Ill. 542; *Hall v. Cheney*, 36 N. H. 32; *McArthur v. Sears*, 21 Wend (N. Y.) 198; *Merritt v. Earle*, 29 N. Y. 115; *Michaels v. New York Cent. R. Co.*, 30 N. Y. 571; *Dennis v. Massachusetts Ben. Assoc.*, 47 Hun (N. Y.) 343; *Hays v. Kennedy*, 41 Pa. St. 379.

The term, however, in some cases has been held to be synonymous with "act of God." Thus, in *Neal v. Saunderson*, 2 Smed. & M. (Miss.) 576, it was said: "Indeed, *inevitable accident* is now used as a phrase synonymous with 'the act of God.' Judge Story says by the act of God is meant *inevitable accident*, or casualty. Story on Bailments 318. See also *Carman v. Gilmore*, in MS." See also *In re*

Binford, 3 Hughes (U. S.) 304, 3 Fed. Cas. No. 1,411a; *Fish v. Chapman*, 2 Ga. 356; *Walpole v. Bridges*, 5 Blackf. (Ind.) 222; *Neal v. Saunderson*, 2 Smed. & M. (Miss.) 572; *Lewis v. Ludwick*, 6 Coldw. (Tenn.) 371.

In *Crosby v. Fitch*, 12 Conn. 419, 31 Am. Dec. 747, it was said: "'The act of God,' *inevitable accident*, 'dangers of the sea,' etc., are expressions of very similar legal import." Compare *Merritt v. Earle*, 29 N. Y. 116.

Where a car was blown from a track by a violent wind storm and the goods in it were destroyed by a fire which immediately followed, upon the distinction between *inevitable accident* and "act of God," the appellate court said: "Considerable attention is given to the eighth instruction, in which the learned judge charged: 'Where one is pursuing a lawful avocation, in a lawful manner, and something occurs which no human skill or precaution could foresee or prevent, and as a consequence the accident takes place, this is called *inevitable accident* or the "act of God." The objection urged is more technical than substantial. While it is possibly not technically correct, and while there is a legal distinction between *inevitable accident* and the 'act of God,' we can see nothing in it to the prejudice of the plaintiff, or that could have misled the jury. The immediate resulting cause producing the loss was the fire, which might properly be termed an *inevitable accident* growing out of the former disaster; while the direct cause of the agency that worked the destruction was the 'act of God,' putting the resulting agent at work." *Blythe v. Denver, etc., R. Co.*, 15 Colo. 338.

Irresistible Superhuman Cause.—The words "irresistible superhuman cause" are equivalent to and are used in the same sense as "act of God," which is natural necessity, as wind and storms, which arise from natural causes, and which operate without any aid or interference from man. The term is distinct from *inevitable accident*. *Clay County v. Simonson*, 1 Dak. 387.

Unavoidable Accident and Inevitable Accident Synonymous.—*Fish v. Chapman*, 2 Ga. 356.

Navigation. (See also the title NAVIGATION.)—*Inevitable accident*, as applied to maritime collisions, is that which cannot be prevented by the exercise of ordinary caution and maritime skill. *The Europa*, 2 Eng. L. & Eq. 559; *The Virgil*, 2 W. Rob. 201; *The Marpesia*, L. R. 4 P. C. 212; *The Pladda*, 2 P. D. 38; *The Merchant Prince*, (1892) P. D. 190; *The Schwan*, (1892) P. D. 428; *Brainard v. The Worcester, Betts' Scr. Bk.* 536½, 4 Fed. Cas. No. 1,804a; *Amoskeag Mfg. Co. v. The Steam Ferry-Boat John Adams*, 1 Cliff. (U. S.) 412; *The Olympia*, 61 Fed. Rep. 127; *The Michigan*, 52 Fed. Rep. 507; *The Leland*, 19 Fed. Rep. 777.

Inevitable accident must be understood to mean a collision which occurs when both parties have endeavored, by every means in their power, with due care and caution and proper display of nautical skill, to prevent the occurrence of the accident. *Union Steamship Co. v. New York, etc., Steamship Co.*, 24 How. (U. S.) 307. See also *The Lochlibo*, 3 W. Rob. 318; *The Rose*, 7 Jur. 381; *Cushing v. Ship John Fraser*, 21 How. (U. S.) 184; *The Ferry-*

INFAMOUS. — See note 1.

Boat Baltic, 2 Ben. (U. S.) 452, 2 Fed. Cas. No. 823; Lucas v. The Steamboat Thomas Swann, 6 McLean (U. S.) 282; The Brazos, 14 Blatchf. (U. S.) 446; The Teutonia, 23 Wall. (U. S.) 84; Judd Linseed, etc., Oil Co. v. Steamer Java, Holmes (U. S.) 18.

A casualty which might have been prevented by the use of known and proper precautions against the danger is not an *inevitable accident*. Ladd v. Foster, 12 Sawy. (U. S.) 547.

Where a master proceeds carelessly on his voyage, and afterwards circumstances arise when it is too late for him to do what is fit and proper to be done, an accident ensuing is not an *inevitable accident*. He must show that he acted seasonably and that he "did everything which an experienced mariner could do, adopting ordinary caution," and that the collision ensued in spite of such exertions. The Rose, 7 Jur. 381, citing The Juliet Erskine, 6 Notes Cas. (Eng.) 634; The Virgil, 2 W. Rob. 201; Union Steamship Co. v. New York, etc., Steamship Co., 24 How. (U. S.) 313.

Same — Darkness. — A collision resulting from the darkness of the night, neither party being in fault, is an *inevitable accident*. The Morning Light, 2 Wall. (U. S.) 550; The Teutonia, 23 Wall. (U. S.) 84.

Same — Relative Term. — In Amoskeag Mfg. Co. v. The Steam Ferry-Boat John Adams, 1 Cliff (U. S.) 412, it was said: "*Inevitable accident*, in the absolute and strict sense of the term, says Dr. Lushington, in the case of The Europa, 2 Eng. L. & Eq. 559, very seldom takes place. According to his view, the word *inevitable* must be considered as a relative term, and must be construed, not absolutely, but reasonably, with regard to the circumstances of each particular case." See also The Grace Girdler, 7 Wall. (U. S.) 203; Ladd v. Foster, 12 Sawy. (U. S.) 553.

Inevitable Dangers of the River. — Evidence of usage or custom fixing the construction of the words "*inevitable dangers of the river*," in a bill of lading for the transportation of goods by inland navigation, is admissible. Gordon v. Little, 8 S. & R. (Pa.) 533.

Leases. (See also the titles LANDLORD AND TENANT; LEASES.) — Fire, against the will and without the negligence or other default of the lessee, happening from some cause to him wholly unknown, is an *inevitable casualty* within the meaning of the term as used in an exception in a covenant to keep in good repair. The court said: "It is admitted that a casualty may be *inevitable* without happening by the act of God or by the public enemies of the country. In the present case, the expression seems to me to mean only such casualties as are *inevitable* by the defendant, and not such as might not be avoided by the united efforts of the whole society. * * * An accident which happens without the slightest degree of negligence or default of the defendant is, as to him, an *inevitable casualty*." Hodgson v. Dexter, 1 Cranch (C. C.) 109, 1 Cranch (U. S.) 345. See also Kelly v. Duffy, (Pa. 1887) 9 Cent. Rep. 410.

A lease contained a proviso that in case the warehouse, or any part thereof, should at any time during the term "be destroyed or damaged by fire, flood, storm, tempest, or other *inevitable accident*," the rent, or a just proportion thereof, should cease or abate so long as the premises should continue wholly or partly untenable or unfit for use or occupation in consequence of such destruction or damage. During the period in which the lessor was executing the repairs the lessee was excluded from the use and occupation of the whole or a part of the premises, and he claimed an abatement of rent under the proviso. It was held that the words "*inevitable accident*" imported something *ejusdem generis* with what had been previously mentioned, and did not apply to that which, though not avoidable so far as the lessee was concerned, was not in its nature *inevitable*, but resulted from the default of the lessor, and that the lessee was not entitled to an abatement of rent. Saner v. Bilton, 7 Ch. D. 815, followed in Manchester Bonded Warehouse Co. v. Carr, 5 C. P. D. 513.

A tenant was bound to restore the premises in good order, "loss by fire or *inevitable accident* or ordinary wear excepted." Upon the construction of this lease the court said: "A window broken by a stone accidentally kicked by a passing team is not broken by *inevitable accident*. The kicking of the stone, so far as appellee is concerned, may have been *inevitable*, but not the breaking of the window; that might have been protected by a blind or wire netting." Peck v. Scoville Mfg. Co., 43 Ill. App. 362.

1. Infamous Conduct in Professional Respect. (See generally the title PHYSICIANS AND SURGEONS.) — An English statute provided that if the general council of medical education and registration should judge any medical practitioner to have been guilty of *infamous conduct* in any professional respect, the general council might, if it saw fit, direct the register to erase the name of the practitioner from the register. In Allinson v. General Council, etc., (1894) 1 Q. B. 760, 763, the court adopted the following definition of *infamous conduct*: "If it is shown that a medical man, in the pursuit of his profession, has done something with regard to it which would be reasonably regarded as disgraceful or dishonorable by his professional brethren of good repute and competency, then it is open to the general medical council to say that he has been guilty of '*infamous conduct* in a professional respect.' That is at any rate evidence of '*infamous conduct*' within the meaning of section 29."

The publication by a medical man of a book setting forth prescriptions to prevent conception has been held to be *infamous conduct*, within this statute. Allbutt v. General Council, etc., 23 Q. B. D. 400.

In Lecson v. General Council, etc., 38 W. R. 303, it was held that where a medical man allowed his name to be used as a "cover" for an unqualified person he was guilty of *infamous conduct*.

INFAMY AND INFAMOUS CRIMES.

By A. S. H. BRISTOW.

I. DEFINITIONS, 245.

II. As DISQUALIFICATION OF WITNESS, 246.

1. *What Crimes Are Infamous*, 246.
2. *Infamy Determined by Crime and Not by Punishment*, 247.
3. *Sentence or Judgment as Prerequisite to Disqualification*, 248.
4. *Mode of Proof of Conviction*, 249.
5. *Effect of Conviction in Another Jurisdiction*, 250.
6. *Removal of Disqualification*, 250.
 - a. *Pardon*, 250.
 - (1) *In General*, 250.
 - (2) *Effect of Pardon Where Disability Annexed to Crime by Statute*, 251.
 - (3) *Mere Remission or Commutation of Punishment*, 251.
 - (4) *Conditional Pardon*, 251.
 - (5) *Proof of Pardon*, 252.
 - b. *Reversal of Judgment*, 252.
 - c. *Serving Out Sentence*, 252.
7. *Abolition of Common-law Rule by Statute*, 252.

III. As DISQUALIFICATION OF JUROR, 253.

IV. As AFFECTING RIGHT TO HOLD OFFICE, 253.

V. As AFFECTING RIGHT OF SUFFRAGE, 253.

VI. As GROUND FOR DIVORCE, 253.

VII. As AFFECTING CRIMINAL PROCEDURE UNDER FEDERAL CONSTITUTION, 253.

CROSS-REFERENCES.

For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the following titles: JUDGMENTS; JURY AND JURY TRIAL; PARDON; RECORDS; WITNESSES.

I. DEFINITIONS. — Infamy, at common law, is that loss of character, or public disgrace, which a convict incurs, and by which he is rendered incapable of being a witness or a juror.¹

An **Infamous Crime** is an offense which works such infamy in the person who has committed it.²

"Infamous Crime" Within Meaning of Federal Constitution. — Within the meaning of the Fifth Amendment of the Constitution of the United States, an "infamous

1. **Infamy Defined.** — Webster's Dict.; Com. v. Shaver, 3 W. & S. (Pa.) 342.

2. **Definition of Infamous Crime at Common Law.** — Butler v. Wentworth, 84 Me. 30. See also King v. State, 17 Fla. 183.

Other Definitions. — An infamous crime is such as involves moral turpitude, or such as renders the offender incompetent as a witness in court, upon the theory that a person would not commit so infamous a crime unless he were so depraved as to be unworthy of credit. State v. Bixler, 62 Md. 354; Holmes v. Holmes, 64 Ill. 294.

In U. S. v. Maxwell, 3 Dill. (U. S.) 275, Judge Dillon said: "The words 'infamous crime' have a fixed and settled meaning. In a legal sense they are descriptive of an offense that subjects a person to infamous punishment or prevents his being a witness."

"Infamous" in Popular Sense. — The term "infamous" in its popular and general sense has been said to be synonymous with "detestable, odious, scandalous, disgraceful, base, vile, shameful, ignominious." Webster's Dictionary; Polson v. Polson, 140 Ind. 310; Com. v. Shaver, 3 W. & S. (Pa.) 343.

crime" is an offense punishable by imprisonment in a state prison or penitentiary with or without hard labor.¹

II. As DISQUALIFICATION OF WITNESS — 1. What Crimes Are Infamous. — To render a witness incompetent by his having been convicted of a crime, the crime must be such as to render him infamous, and therefore unworthy of credit for truth. What crimes will render a witness thus infamous, it is difficult in some cases to decide.² A conviction of treason³ or felony,⁴ according to the

1. Infamous Crime Within Meaning of Federal Constitution. — *Mackin v. U. S.*, 117 U. S. 348; *U. S. v. Sutton*, 47 Fed. Rep. 129.

2. Utley v. Merrick, 11 Met. (Mass.) 302; *Com. v. Shaver*, 3 W. & S. (Pa.) 342.

Dying Declarations. — As to inadmissibility of dying declarations of infamous persons, see the title DYING DECLARATIONS, vol. 10, p. 375.

3. Commission of Treason as Disqualification of Witness. — *Ex p. Wilson*, 114 U. S. 423; *Utley v. Merrick*, 11 Met. (Mass.) 302; *Com. v. Shaver*, 3 W. & S. (Pa.) 342.

4. Commission of Felony as Disqualification of Witness. — *Ex p. Wilson*, 114 U. S. 423; *Baltimore, etc., R. Co. v. Rambo*, 16 U. S. App. 277; *Utley v. Merrick*, 11 Met. (Mass.) 302; *Com. v. Shaver*, 3 W. & S. (Pa.) 342.

Grand Larceny, at common law, is a felony, and a conviction for it is a disqualification for a witness. *Taylor v. State*, 62 Ala. 164; *State v. Gardner*, 1 Root (Conn.) 485.

In *Kansas* the common-law doctrine obtains in criminal cases, but it seems that by statute a different rule is applied in civil cases. *State v. Clark*, 60 Kan. 450; *State v. Howard*, 19 Kan. 505.

In *Kentucky*, where disqualification is attached to certain crimes by statute, a person convicted of larceny is not disqualified as a witness, that crime not being embraced in the statute. *Com. v. McGuire*, 84 Ky. 57.

Horse Stealing, in *Tennessee*, has been said to constitute a separate offense from larceny, and as it is not mentioned in the statute authorizing the judgment of infamy in certain crimes, it has been declared that the incident of infamy does not attach to it. *Wilcox v. State*, 3 Heisk. (Tenn.) 110. But see *Coldwell v. State*, 3 Baxt. (Tenn.) 431.

The Violation of a Municipal Ordinance Against Larceny has been held not to render the person incompetent to testify on the ground of infamy. *Cheatham v. State*, 59 Ala. 40; *Burns v. Campbell*, 71 Ala. 271.

Petit Larceny, at common law, is a felony, and the offender an incompetent witness after conviction and sentence. *Rex v. Davis*, 5 Mod. 75, note; *Pendock v. Mackinder*, Willes 665, 2 Wils. C. Pl. 19; *Sylvester v. State*, 71 Ala. 25; *Lyford v. Farrar*, 31 N. H. 316; *Carpenter v. Nixon*, 5 Hill (N. Y.) 260. See also *James v. Bostwick*, Wright (Ohio) 143.

But in many states it is otherwise under statutes. *Pruitt v. Miller*, 3 Ind. 16; *State v. Grant*, 79 Mo. 113, 49 Am. Rep. 218; *Carpenter v. Nixon*, 5 Hill (N. Y.) 260; *People v. Rawson*, 61 Barb. (N. Y.) 631; *Shay v. People*, (Supm. Ct. Gen. T.) 4 Park. Crim. (N. Y.) 353, 22 N. Y. 317; *Welsh v. State*, 3 Tex. App. 114; *Barbour v. Com.*, 80 Va. 200; *State v. Payne*, 6 Wash. 570. See also *Uhl v. Com.*, 6 Gratt. (Va.) 706. Compare *Com. v. Keith*, 8 Met. (Mass.) 531.

Receiving Stolen Goods, in *Pennsylvania*, is a misdemeanor, conviction whereof does not render the person convicted an incompetent witness. *Com. v. Murphy*, 3 Pa. L. J. Rep. 290, 5 Pa. L. J. 217.

But under statute in *Massachusetts* one convicted of this offense is not competent as a witness. *Com. v. Rogers*, 7 Met. (Mass.) 503, 41 Am. Dec. 458. See also *Rohan v. Sawin*, 5 Cush. (Mass.) 287.

Disposing of a Crop under Lien, in *South Carolina*, does not render one an incompetent witness, the offense not being felony nor falling in the class known as *crimen falsi*. *State v. Green*, 48 S. Car. 136.

Adultery is not felony, not *crimen falsi*, and a conviction therefor does not disqualify a person as a witness. *Little v. Gibson*, 39 N. H. 505.

Bigamy. — So a conviction of bigamy has been held not to destroy the competency of a witness. Buller's N. P. (7th ed.) 292, note b.

Unchastity does not render a person infamous so as to make her an incompetent witness. *Jones v. State*, 13 Tex. 176, 62 Am. Dec. 550.

The Offense of Being a Common Prostitute, under statute in *Connecticut*, has been held not to work infamy in this sense. *State v. Randolph*, 24 Conn. 363.

Conviction of Keeping a Bawdy-house does not render the person convicted an incompetent witness. *Deer v. State*, 14 Mo. 348.

Conviction for Arson, at common law, renders a person incompetent to testify as a witness, but it is otherwise as to a person convicted of the statutory offense of "arson in the third degree." *Harrison v. State*, 55 Ala. 239; *Williams v. Dickenson*, 28 Fla. 90.

Burglary, at common law, is a felony, and a conviction therefor renders a witness incompetent. *Taylor v. State*, 62 Ala. 164. *Aliter* as to burglary in the third degree under the *New York* statute. *People v. Park*, 41 N. Y. 24.

Assault and Battery with Intent to Murder has been held not such a crime as to render one convicted thereof incompetent as a witness. *U. S. v. Brockius*, 3 Wash. (U. S.) 99.

Obstructing Railway Cars by laying a log across the track has been held not to render one an incompetent witness. *Com. v. Dame*, 8 Cush. (Mass.) 384.

Keeping a Public Gaming House is not an infamous crime so as to render a person convicted therefor incompetent as a witness. *Rex v. Grant*, R. & M. 270.

A Conviction for Dealing Faro, under the *Kentucky* statute, has been held not to work infamy in this sense. *Holloway v. Com.*, 11 Bush (Ky.) 344.

The Publishing of a Malicious Libel has been held not to be such an offense that a person convicted thereof was an incompetent witness. *Chater v. Hawkins*, 3 Lev. 426; *Rex v. Davis*,

well-settled doctrine of the common law, renders a witness incompetent. The same result follows conviction for any form of the *crimen falsi*,¹ but what crimes are to be designated by the term *crimen falsi* is not so well settled. Under this head have been enumerated: ² "forgery,³ perjury,⁴ subornation of perjury,⁵ suppression of testimony by bribery,⁶ or conspiracy to procure the absence of a witness,⁷ or other conspiracy to accuse one of a crime,⁸ and barratry."⁹ From these instances, the deduction has been made that, at common law, a crime involving a charge of falsehood or fraud must, to be a *crimen falsi*, and consequently to be infamous, not only involve a falsehood or fraud of such a nature and purpose as make it probable that the party committing it is devoid of truth and insensible to the obligation of an oath, but the falsehood or fraud must be calculated to affect injuriously the public administration of justice.¹⁰ Accordingly the effect of disqualification to testify seems not to be extended to cases of private cheats, such as the obtaining of goods under false pretenses,¹¹ embezzlement,¹² or conspiracy to defraud some private person.¹³

Statutory Enumeration of Infamous Crimes. — In some states wherein the doctrine of infamy exists, the common-law tests as to what are infamous crimes are superseded by a statutory enumeration, and the incident of infamy attaches only to the offenses enumerated.¹⁴

2. Infamy Determined by Crime and Not by Punishment. — The infamy which disqualifies a convict was formerly held to arise from two sources, the conviction of certain offenses, and the infliction of certain penalties. The mere conviction, properly evidenced, of some crimes, was always sufficient to render the offender infamous, while some punishments of a personally degrading character had also the same effect, whatever the crimes might be for which they were inflicted.¹⁵ But at present it is the settled rule of the common law that it is the character of the crime, and not the nature of the punishment,

5 Mod. 75; *Campbell v. State*, 23 Ala. 44; *Utley v. Merrick*, 11 Met. (Mass.) 303. Compare *Baldwin v. State*, 39 Tex. Crim. 245.

1. Crimen Falsi as Disqualification of Witness. — *Ex p. Wilson*, 114 U. S. 423; *Utley v. Merrick*, 11 Met. (Mass.) 302; *Com. v. Shaver*, 3 W. & S. (Pa.) 342.

2. 1 Greenl. Ev., § 373.

3. Forgery as Disqualifying Witness. — *Rex v. Davis*, 5 Mod. 75; *State v. Candler*, 3 Hawks (10 N. Car.) 393.

Under Statute in Ohio the same rule has been laid down. *Poage v. State*, 3 Ohio St. 229.

The Subsequent Infamy of a Subscribing Witness to a bond, by reason of a conviction of forgery, has the effect to render proof of his handwriting permissible, as though he were dead. *Jones v. Mason*, 2 Stra. 833. And see the title EXECUTION AND PROOF OF DOCUMENTS, vol. II, p. 597.

4. Perjury as Disqualifying Witness. — 2 Hale's P. C. 277; Anonymous, 3 Salk. 155; *Ex p. Wilson*, 114 U. S. 423; *Com. v. Shaver*, 3 W. & S. (Pa.) 342. See also *Heward v. Shipley*, 4 East 180.

5. Subornation of Perjury as Disqualifying Witness. — *Ex p. Hannen*, 6 Jur. 669; *In re Sawyer*, 2 Gale & D. 141; *Ex p. Wilson*, 114 U. S. 423.

6. Bribing Witness as Crimen Falsi. — *Clancy's Case*, Fortescue 208.

7. Conspiracy to Bribe Witness as Crimen Falsi. — *Bushell v. Barrett*, R. & M. 434. Compare *State v. Keyes*, 8 Vt. 65, 30 Am. Dec. 450.

8. Conspiracy to Accuse One of Crime as Crimen Falsi. — *Rex v. Priddle*, 1 Leach C. C. 442.

9. Barratry as Crimen Falsi. — *Rex v. Ford*, 2 Salk. 690.

10. General Definition of Crimen Falsi. — 1 Greenl. on Ev., § 373; *U. S. v. Block*, 4 Sawy. (U. S.) 211; *Ex p. Wilson*, 114 U. S. 423; *U. S. v. Yates*, 6 Fed. Rep. 863; *Utley v. Merrick*, 11 Met. (Mass.) 302. See also *Com. v. Shaver*, 3 W. & S. (Pa.) 338.

11. Obtaining Goods by False Pretenses Not Crimen Falsi. — *Fisher v. Crescent Ins. Co.*, 33 Fed. Rep. 544; *Utley v. Merrick*, 11 Met. (Mass.) 302.

Under statute in *Missouri* a different rule has been laid down. *Ritter v. Democratic Press Co.*, 68 Mo. 458.

12. Embezzlement Not Crimen Falsi. — *Schuylkill County v. Copley*, 67 Pa. St. 390, 5 Am. Rep. 441. In this case it was held that a conviction for embezzlement as a public officer did not render a witness incompetent, though the punishment therefor was imprisonment at hard labor.

13. Conspiracy to Defraud Not Crimen Falsi. — In the case of *Ville de Varsovie's Case*, 2 Dods. 174, the testimony of a person who had been convicted of a conspiracy to defraud was admitted in the court of admiralty.

And in *Crowther v. Hopwood*, 3 Stark. 21, 14 E. C. L. 149, the testimony of such a person was admitted on a trial at common law. To the same effect see *Bickel v. Fasig*, 33 Pa. St. 463.

14. See *Foster v. State*, 9 Baxt. (Tenn.) 353; also *infra*, this section, *Abolition of Common-law Rule by Statute*, notes.

15. See *Pendock v. Mackinder*, Willes 665, 2

which creates the infamy and destroys the competency of the witness.¹ At present, therefore, a conviction of treason or felony, or of any species of the *crimen falsi*, will incapacitate the party convicted from giving evidence while it continues in force, without regard to the punishment inflicted.²

Sentence of Minor to House of Refuge. — Under statute in *New York* it has been held that where a person is convicted of burglary in the third degree, which is a felony within the statutory definition of that term, he will be incompetent as a witness, though he is but sixteen years of age and is therefore exempt from punishment by imprisonment in the state prison, and is sentenced to the house of refuge instead.³

3. Sentence or Judgment as Prerequisite to Disqualification. — The competency of a witness guilty of an infamous crime is not affected by conviction merely, and nothing short of a final judgment on the conviction will be sufficient.⁴

Reason of Rule. — This rule is founded on the reason that it is always within the power of the court, on motion in arrest or for a new trial, to set aside a verdict illegally and improperly rendered at any time before judgment; and the prosecution may, in the end, result in the defendant's acquittal.⁵

Wils. C. Pl. 18; *People v. Whipple*, 9 Cow. (N. Y.) 708.

1. Infamy Determined by Crime and Not by Punishment. — *Gilbert's Ev.* 143; *Pendock v. Mackinder*, Wils. 665, 2 Wils. C. Pl. 19; *Rex v. Priddle*, 1 Leach C. C. 442; *Rex v. Ford*, 2 Salk. 690; *U. S. v. Yates*, 6 Fed. Rep. 861; *Ex p. Wilson*, 114 U. S. 417; *People v. Whipple*, 9 Cow. (N. Y.) 708; *Schuykill County v. Copley*, 67 Pa. St. 390, 5 Am. Rep. 441; *Wheeler v. Wheeler*, 2 Pa. Dist. 567. See also *Ex p. Wilson*, 114 U. S. 417.

2. People v. Whipple, 9 Cow. (N. Y.) 708.

3. Minor Sentenced to House of Refuge. — *People v. Park*, 41 N. Y. 21.

Under a statute in *Ohio* a similar decision has been made in the case of a minor sentenced to the house of refuge for forgery. *Poage v. State*, 3 Ohio St. 229.

In *Kansas* it has been held that where a boy about seventeen years of age had been convicted of grand larceny and was sentenced to be taken to the state industrial reformatory in accordance with a statute which left it to the discretion of the court whether the offender should be sentenced to the state penitentiary or the reformatory, he was incompetent to testify as a witness; but the test employed in determining the infamy in this case was that adopted by the Supreme Court of the United States to determine whether an offense is infamous as that term is used in the Fifth Amendment of the Constitution of the United States (see *infra*, this title, VII. *As Affecting Criminal Procedure under Federal Constitution*), and not the test ordinarily applied in determining the competency of witnesses, it being held that the character of the punishment which may be inflicted for the crime is the true test, but that if the statutes authorize the court to award an infamous punishment the convict is deemed to be infamous, although the punishment actually administered is not infamous. *State v. Clark*, 60 Kan. 450.

4. The Sentence or Judgment as Prerequisite to Disqualification — England. — *Lee v. Gansel*, 1 Cowp. 1; *Barber v. Gingell*, 3 Esp. 60; *Fitch v. Smalbrook*, T. Raym. 32; *Reg. v. George*, C. & M. 111, 41 E. C. L. 66.

United States. — *U. S. v. Dickinson*, 2 McLean (U. S.) 325.

Florida. — *Bishop v. State*, (Fla. 1899) 26 So. Rep. 703.

Indiana. — *Dawley v. State*, 4 Ind. 128.

Massachusetts. — *Cushman v. Loker*, 2 Mass. 108.

New York. — *People v. Whipple*, 9 Cow. (N. Y.) 707; *Jackson v. Osborn*, 2 Wend. (N. Y.) 555, 20 Am. Dec. 649.

North Carolina. — *State v. Valentine*, 7 Ired. L. (29 N. Car.) 225.

Pennsylvania. — *Skinner v. Perot*, 1 Ashm. (Pa.) 57; *Com. v. Miller*, 6 Pa. Super. Ct. 35.

Tennessee. — *Boyd v. State*, 94 Tenn. 508, citing 10 AM. AND ENG. ENCYC. OF LAW (1st ed.) 606, 607.

Texas. — *Hurley v. State*, 35 Tex. Crim. 282; *Evans v. State*, 35 Tex. Crim. 485; *Wright v. State*, (Tex. Crim. 1898), 45 S. W. Rep. 723; *Stanley v. State*, 39 Tex. Crim. 482.

Virginia. — *Brown v. Com.*, 86 Va. 935.

See also the title CONVICTION, vol. 7, p. 502, where numerous additional authorities are cited.

Under the *Texas* statute it has been held that incompetence does not attach to a person convicted of felony, until there is a final disposition of his case by a sentence not appealed from, or, if an appeal is taken, until the judgment is affirmed by the appellate court. *Jones v. State*, 32 Tex. Crim. 135; *Foster v. State*, 39 Tex. Crim. 309; *Underwood v. State*, 38 Tex. Crim. 193; *Robinson v. State*, 36 Tex. Crim. 104; *Luna v. State*, (Tex. Crim. 1898) 47 S. W. Rep. 656. Compare *Woods v. State*, 26 Tex. App. 490.

Defective Judgment. — A conviction of larceny before a justice of the peace in a case within his jurisdiction, and the performance of the sentence, render the convict an incompetent witness, although the complaint on which the justice proceeded was so defective that judgment might have been arrested or reversed on error. *Com. v. Keith*, 8 Met. (Mass.) 531.

Delaware — Infamy Held to Attach on Conviction. — Under the statute of Delaware it has been ruled that conviction of felony renders a witness disqualified before judgment or sentence. *State v. Anderson*, 5 Harr. (Del.) 493.

5. Com. v. Gorham, 99 Mass. 422.

Admission of Infamous Crime. — Thus the mere admission of the commission of an infamous crime does not render the person so admitting an incompetent witness.¹

4. Mode of Proof of Conviction. — It has been laid down as a general rule, that the conviction and sentence of an infamous crime can be proved only by the record or by an authenticated copy thereof.² Accordingly it has been held that the admission as to his conviction of an infamous crime, made by a witness in response to a question upon cross-examination, is not admissible for the purpose of establishing his incompetency when the production of the record of conviction was demanded before exclusion of the witness, since, in such case, his admission would not be the best evidence of which the case was susceptible.³ But it has been held that the right to have the record produced may be waived, and the conviction may be shown by the testimony of the witness himself in the absence of objection to that manner of making the proof.⁴

Right of Witness to Refuse to Testify as to His Infamy. — It has been held that not only is an admission of a witness made on cross-examination inadmissible to establish his incompetency upon his objection thereto, but he may, either on the *voir dire* or on cross-examination, refuse to answer any question which is asked for the purpose of eliciting an answer which would render him infamous and hence incompetent.⁵ But it seems that this rule does not apply when the

1. *State v. Valentine*, 7 Ired. L. (29 N. Car.) 227.

Admission of False Swearing. — In *Rex v. Teal*, 11 East 307, it was held that a witness admitting himself to have sworn falsely before upon a particular point is not an incompetent witness, but the objection goes strongly to his credit.

But it has been held that a witness on a cross-examination, in order to discredit him, may be asked if he has not committed perjury in another state. *State v. March*, 1 Jones L. (46 N. Car.) 526.

2. Conviction and Sentence to Be Proved by Record in General. — *Rex v. Castell Careinion*, 8 East 77; *U. S. v. Biebusch*, 1 McCrary (U. S.) 42; *Bartholomew v. People*, 104 Ill. 601, 44 Am. Rep. 97; *Burke v. Stewart*, 81 Ill. App. 506; *Castellano v. Peillon*, 2 Mart. N. S. (La.) 466; *Com. v. Green*, 17 Mass. 515; *People v. Herrick*, 13 Johns. (N. Y.) 82, 7 Am. Dec. 364; *Hilts v. Colvin*, 14 Johns. (N. Y.) 182; *Boyd v. State*, 94 Tenn. 512, *citing* AM. AND ENG. ENCYC. OF LAW (1st ed.), vol. 10, p. 609; *State v. Payne*, 6 Wash. 568. See also *Baltimore, etc., R. Co. v. Rambo*, 16 U. S. App. 277.

In *Hilts v. Colvin*, 14 Johns. (N. Y.) 182, it was held that where the clerk's office of the county had been burnt down and the record probably destroyed conviction should be proved by the transcript delivered into the Court of Exchequer by the district attorney; and that, so long as the existence of the transcript was not disproved, parol evidence was not admissible.

In *Illinois*, in civil cases the previous conviction of a witness may be proved by the witness himself or by other parol evidence, but in criminal cases it seems that it can only be proved by producing the record of the conviction. *Burke v. Stewart*, 81 Ill. App. 506; *Gage v. Eddy*, 167 Ill. 102.

Admissibility of Defective Record. — A record of a conviction of felony without a caption showing by what authority the indictment was found,

is not admissible in evidence to incapacitate a witness. *Cooke v. Maxwell*, 2 Stark. 183, 3 E. C. L. 368.

Parol Evidence as to Transported Convict. — In *Maryland* it was at one time held that parol evidence was admissible to prove that a man was a convict transported from Great Britain to the colonies to serve a term of years for some felonious or infamous offense. *State v. Ridgely*, 2 Har. & M. (Md.) 120; *Clarke v. Hall*, 2 Har. & M. (Md.) 378. See also *Cole v. Cole*, 1 Har. & J. (Md.) 572.

3. Admission of Infamy Elicited on Cross-examination. — *Rex v. Castell Careinion*, 8 East 77; *People v. Herrick*, 13 Johns. (N. Y.) 82, 7 Am. Dec. 364; *Boyd v. State*, 94 Tenn. 505; *Bratton v. State*, 34 Tex. Crim. 477; *Cooper v. State*, 7 Tex. App. 194; *Perez v. State*, 8 Tex. App. 610, 10 Tex. App. 327. But see the third note *infra*; and farther *infra*, this section, subdiv. 7. *Abolition of Common-law Rule by Statute.*

In *Com. v. Hanlon*, 3 Brews. (Pa.) 461, it was held that a witness is not disqualified by his own acknowledgment on cross-examination of a conviction of felony in another state, no record being produced.

4. Waiver of Right to Have Record Produced. — *White v. State*, 33 Tex. Crim. 177, where the examination of the witness by parol as to his previous conviction was made before he testified. If, however, the witness has already testified without objection, an admission of a previous conviction made by him on cross-examination will go merely to his credit. *Batson v. State*, 36 Tex. Crim. 606. See also *Moore v. State*, 39 Tex. Crim. 266.

Admission by a Witness of a Conviction for an Infamous Offense dispenses with further proof thereof. *Cash v. Cash*, (Ark. 1899) 54 S. W. Rep. 744.

5. Right of Witness to Refuse to Testify as to His Infamy. — *People v. Herrick*, 13 Johns. (N. Y.) 82, 7 Am. Dec. 364; *White v. State*, 33 Tex. Crim. 177.

credibility of a witness only is sought to be attacked on examination, for in that state of the case he may be compelled to answer as to his previous conviction of infamous crimes.¹

5. Effect of Conviction in Another Jurisdiction. — In some jurisdictions it has been held that a conviction in another state of a crime which, by the laws of that state, disqualifies the party from being heard as a witness, and which, if committed in the state where the witness is to testify, would have operated as a disqualification, is sufficient to exclude his testimony in the same manner as if the offense had been committed and the conviction had been taken in the latter jurisdiction.² But the better view appears to be that at common law, and on general principles of jurisprudence, when not controlled by express statute giving effect within the state which enacts it to a conviction and sentence in another state, such conviction and sentence can have no effect by way of disqualification of a witness beyond the limits of the state in which the judgment is rendered.³

6. Removal of Disqualification — *a. PARDON* — (1) *In General.* — It is settled law that the pardon of an offense not only blots out the crime committed, but removes the disability to testify in court.⁴

Pardon Prior to Conviction. — If the power to pardon before conviction exists, its exercise prevents the disability to testify from attaching.⁵

Effect of Pardon After Endurance of Punishment. — And a full pardon by the President of the United States or by the governor of a state, although granted after the prisoner had served out his term of imprisonment,⁶ thenceforth takes away all disqualifications as a witness, and restores his competency to testify

1. Where Credit Only Is Attacked, Witness Compelled to Answer. — *Wilbur v. Flood*, 16 Mich. 40, 93 Am. Dec. 203; *People v. Cummins*, 47 Mich. 334; *White v. State*, 33 Tex. Crim. 177. See also *Hollingsworth v. State*, 53 Ark. 387; *Com. v. Bonner*, 97 Mass. 588; *State v. March*, 1 Jones L. (46 N. Car.) 526; *Carroll v. State*, 32 Tex. Crim. 431, 40 Am. St. Rep. 786; *Batson v. State*, 36 Tex. Crim. 606; *Lights v. State*, 21 Tex. App. 308.

Under the code of *California* a witness may be impeached by asking him with respect to his conviction. *People v. Rodrigo*, 69 Cal. 601; *People v. Chin Mook Sow*, 51 Cal. 597.

And the same rule has been laid down under statute in *New York*. *Spiegel v. Hays*, 118 N. Y. 660, 27 Am. St. Rep. 855. See also *Real v. People*, 42 N. Y. 282.

And in *Minnesota*, *State v. Adamson*, 43 Minn. 196.

In *Illinois* by statute a witness may, in civil cases, be compelled to testify as to his own previous conviction. *Burke v. Stewart*, 81 Ill. App. 506; *Gage v. Eddy*, 167 Ill. 102.

2. View Holding Conviction in One State a Disqualification in Another. — *State v. Foley*, 15 Nev. 64, 37 Am. Rep. 458; *Chase v. Blodgett*, 10 N. H. 24; *State v. Candler*, 3 Hawks. (10 N. Car.) 393. See also *Barbour v. Com.*, 80 Va. 289. Compare *Uhl v. Com.*, 6 Gratt. (Va.) 706.

Under statute in *Texas* it has been held that a person convicted of felony in another state is disqualified to testify as a witness in criminal cases in *Texas*, and the judgment of such other state offered to disqualify a witness need not show on its face that the offense was a felony by the law of the state where committed, but extraneous proof may be given of that fact. *Pitner v. State*, 23 Tex. App. 366. See also *Logan v. U. S.*, 144 U. S. 263.

But the rule is otherwise in this state as to

civil cases. *Missouri*, etc., *R. Co. v. De Bord*, (Tex. Civ. App. 1899) 53 S. W. Rep. 593.

3. View Holding Conviction in Another State Inoperative as Disqualification. — *Logan v. U. S.*, 144 U. S. 303; *Langdon v. Evans*, 3 Mackey (D. C.) 1; *Com. v. Green*, 17 Mass. 515; *Sims v. Sims*, 75 N. Y. 466; *National Trust Co. v. Gleason*, 77 N. Y. 400, 33 Am. Rep. 632. See also *State v. Ridgely*, 2 Har. & M. (Md.) 120; *Clarke v. Hall*, 2 Har. & M. (Md.) 378.

Conviction in Another State Provable to Affect His Credibility. — *Com. v. Knapp*, 9 Pick. (Mass.) 496, 20 Am. Dec. 491. See also *State v. March*, 1 Jones L. (46 N. Car.) 526.

4. Removal of Disability to Testify by Pardon. — *Boyd v. U. S.*, 142 U. S. 453; *Ex p. Garland*, 4 Wall. (U. S.) 333; *U. S. v. Jones*, 26 Fed. Cas. No. 15,493, 2 Wheel. Crim. (N. Y.) 451; *Werner v. State*, 44 Ark. 122; *State v. Baptiste*, 26 La. Ann. 134. See also *State v. Williams*, 14 W. Va. 851.

A Pardon Incorrectly Stating the Date of Conviction is sufficient to restore the competency of a witness, if it is possible to show that it was intended to cover, and does cover, the offense of which the record shows the witness to be guilty. *Com. v. Ohio*, etc., *R. Co.*, 1 Grant Cas. (Pa.) 329; *Martin v. State*, 21 Tex. App. 11.

5. Attaching of Disability Prevented by Pardon Prior to Conviction. — *Ex p. Garland*, 4 Wall. (U. S.) 334; *State v. Baptiste*, 26 La. Ann. 136.

6. Effect of Pardon on Disability After Endurance of Punishment. — *Logan v. U. S.*, 144 U. S. 303; *State v. Baptiste*, 26 La. Ann. 134; *State v. Blaisdell*, 33 N. H. 388; *U. S. v. Jones*, (U. S. Cir. Ct.) 2 Wheel. Crim. (N. Y.) 460; *State v. Dodson*, 16 S. Car. 453; *Hunnicut v. State*, 18 Tex. App. 498, 51 Am. Rep. 330, 20 Tex. App. 632. See also *Singleton v. State*, 38 Fla. 302.

to any facts within his knowledge, even if they came to his knowledge before his disqualification was removed by pardon.¹

Conviction May Be Proved After Pardon to Affect Credit. — While a pardon restores the competency of a witness, it has been held that the conviction is still provable against him to affect his credit.²

(2) *Effect of Pardon where Disability Annexed to Crime by Statute.* — In *England*, however, a special exception was made in the case of perjury, where a distinction was taken between conviction on an indictment at common law and on an indictment under the statute of 5 Eliz., c. 9, which declares that no person so convicted shall thenceforth be received as a witness to be deposed and sworn in any court of record until such judgment be reversed.³ This rule has been followed by the decisions in a few jurisdictions in the *United States*.⁴ But in a recent case in *Pennsylvania* it was held that no distinction can be made between the effect of a pardon upon a conviction for perjury under statute, and upon a conviction at common law.⁵

(3) *Mere Remission or Commutation of Punishment.* — It has been held that a mere remission or commutation of punishment cannot restore a felon's competency as a witness.⁶

(4) *Conditional Pardon.* — It has been held that every condition and restriction annexed to a pardon must be reasonable and consistent with the sound rules of law, and that, where a pardon contained the proviso that it should not be construed to remove the disabilities which attached to the prisoner on his conviction and condemnation, the incongruity between the pardon and the proviso rendered the rejection of the proviso indispensable in order to give legal effect to the pardon, and the person pardoned was a competent witness notwithstanding the proviso.⁷ In *Texas*, however, a distinction is made. If a conditional pardon is issued before the convict has served out his term, the condition being valid, the pardon is subject to revocation and the convict is not restored to his rights of citizenship.⁸ But if the pardon

1. *Logan v. U. S.*, 144 U. S. 303; *Thornton v. State*, 20 Tex. App. 519.

2. **Proving Conviction to Affect Credit After Pardon.** — *U. S. v. Jones* 26 Fed. Cas. No. 15,493, 2 Wheel. Crim. (N. Y.) 451; *Werner v. State*, 44 Ark. 122; *Curtis v. Cochran*, 50 N. H. 242; *Baum v. Clause*, 5 Hill (N. Y.) 196; *Bennett v. State*, 24 Tex. App. 73, 5 Am. St. Rep. 875; *Anglea v. Com.*, 10 Gratt. (Va.) 699; 7 Bacon's Abr. (Bouvier's ed.) 416, title Pardon (H). See also *Com. v. Green*, 17 Mass. 550; *Howser v. Com.*, 51 Pa. St. 332.

3. **English Rule as to Effect of Pardon upon Conviction for Perjury.** — *Rex v. Greepe*, 2 Salk. 514; *Rex v. Crosby*, 2 Salk. 689; *Rex v. Ford*, 2 Salk. 691; *Anonymous*, 3 Salk. 155.

In *Rex v. Ford*, 2 Salk. 690, Holt, J., said: "If one be convicted of perjury upon the statute, he cannot be restored to his credit by the king's pardon. for, by the statute, it is a part of the judgment that he be infamous and lose the credit of testimony; but he may by a statute pardon. But in other cases, where the infamy is only the consequence of the judgment, the king's pardon may restore the party to his testimony."

4. **Infamy Created by Conviction under Certain Statutes Not Removed by Pardon.** — *Foreman v. Baldwin*, 24 Ill. 298 (larceny); *Houghtaling v. Kelderhouse*, (Supm. Ct. Gen. T.) 1 Park. Crim. (N. Y.) 241 (perjury). See also *Holridge v. Gillespie*, 2 Johns. Ch. (N. Y.) 35.

In *Tennessee*, by statute (Shannon's Code Tenn. 1896, § 5595), a person convicted of any

one of a number of enumerated crimes becomes incompetent, and this incompetency is not removed by pardon. See *Evans v. State*, 7 Baxt. (Tenn.) 12. See also *Foster v. State*, 9 Baxt. (Tenn.) 353.

5. *Diehl v. Rodgers*, 169 Pa. St. 321, 47 Am. St. Rep. 908, 41 Curt. L. J. 273.

6. **Competency Not Restored by Commutation of Punishment.** — *Perkins v. Stevens*, 24 Pick. (Mass.) 277. In this case there was a remission to the criminal of "the residue of the punishment he was sentenced to endure." To the same effect see *State v. Timmons*, 2 Harr. (Del.) 528.

But in *Hoffman v. Coster*, 2 Whart. (Pa.) 453, it was held that a pardon by the President of the United States reciting that J. B. was convicted at a circuit court of the United States of passing a counterfeit bank-note and sentenced to three years' imprisonment, and declaring: "I do hereby remit unto him, the said J. B., the remainder of the said sentence, and order him to be liberated from further imprisonment on payment of the costs," removed the incompetency of J. B. as a witness.

7. *People v. Pease*, 3 Johns. Cas. (N. Y.) 333.

8. **Texas — Effect of Conditional Pardon.** — *Dudley v. State*, 24 Tex. App. 163; *McGee v. State*, 29 Tex. App. 596; *Carr v. State*, 19 Tex. App. 635, 53 Am. Rep. 395. See *Taylor v. State*, (Tex. Crim. 1899) 51 S. W. Rep. 1106, wherein the earlier Texas cases are explained.

Effect on Full Pardon of Previous Conditional Pardon. — The fact that a previous conditional

is granted after the convict's term of imprisonment has expired, the condition is void, and the convict is restored to his full rights, as if the pardon were absolute.¹

(5) *Proof of Pardon.* — The pardon is proved, as a general rule, by its production under seal.² But it has been held that where a witness for the commonwealth stated, in answer to the prisoner's counsel, that he had been convicted of a felony and pardoned, he was a competent witness without producing the pardon.³

b. *REVERSAL OF JUDGMENT.* — It has been said that the competency of a witness may be restored by reversal of the judgment, and the reversal of the judgment is proved in the same manner as the judgment itself.⁴

c. *SERVING OUT SENTENCE.* — At common law, the endurance of the penalty, or the serving out the time of punishment, has no effect in removing infamy or restoring the competency of a witness.⁵ But a different rule obtains under statute in some states.⁶

7. *Abolition of Common-law Rule by Statute.* — In *England*, and in many jurisdictions in the *United States*, the common-law rule as to the competency of persons convicted of infamous crimes has been abolished, and the convict is just as competent as any other person to testify in any civil or criminal proceeding, but the conviction of such crimes may be shown to affect the credibility of the witness.⁷

pardon had been granted to and accepted by the prisoner, cannot affect the validity or effect of a full pardon subsequently granted or accepted by him. *Martin v. State*, 21 Tex. App. 1.

1. *Taylor v. State*, (Tex. Crim. 1899) 51 S. W. Rep. 1106, *distinguishing* earlier cases.

2. *Proof of Pardon by Its Production under Seal.* — 1 Phill. on Ev. (6th Am. from 9th Lond. ed.) 21; *State v. Blaisdell*, 33 N. H. 388.

3. *Houser v. Com.*, 51 Pa. St. 332.

4. *Restoration of Competency by Reversal of Judgment.* — 1 Phill. on Ev. (6th Am. from 9th Lond. ed.) 21.

5. *Serving Out Sentence Inoperative to Restore Competency.* — *State v. Benoit*, 16 La. Ann. 273.

6. *U. S. v. Hall*, 53 Fed. Rep. 352 (construing the *Pennsylvania* statute); *State v. Williams*, 14 W. Va. 851.

7. *Abolition of Common-law Rule as to Disqualification by Infamy.* — 6 & 7 Vict., c. 85; 15 & 16 Vict., c. 27; 2 Tayl. on Ev., §§ 1346, 1347.

Illinois. — *Burke v. Stewart*, 81 Ill. App. 506; *Bartholomew v. People*, 104 Ill. 601, 44 Am. Rep. 97.

Louisiana. — *State v. Mack*, 41 La. Ann. 1079; *State v. McManus*, 42 La. Ann. 1194; *State v. Washington*, 49 La. Ann. 1604; *State v. Asbury*, 49 La. Ann. 1741. See also *State v. Reed*, 50 La. Ann. 992.

Maine. — *State v. Watson*, 65 Me. 74.

Massachusetts. — *Newhall v. Jenkins*, 2 Gray (Mass.) 562; *Com. v. Gorham*, 99 Mass. 420.

Minnesota. — *State v. Sauer*, 42 Minn. 261.

Missouri. — *State v. Grant*, 79 Mo. 113, 49 Am. Rep. 218; *State v. Loney*, 82 Mo. 82; *Ex p. Marmaduke*, 91 Mo. 228, 60 Am. Rep. 250; *State v. Loehr*, 93 Mo. 103.

New York. — *Delamater v. People*, 5 Lans. (N. Y.) 332; *People v. O'Neil*, 48 Hun (N. Y.) 36; *People v. Schring*, (Supm. Ct.) 14 Misc. (N. Y.) 31; *Donohue v. People*, 56 N. Y. 208; *National Trust Co. v. Gleason*, 77 N. Y. 400, 33 Am. Rep. 632; *Perry v. People*, 86 N. Y. 353; *People v. McGloin*, 91 N. Y. 241.

North Carolina. — *State v. Harston*, 63 N. Car. 294.

Ohio. — *Steen v. State*, 20 Ohio St. 333; *Baltimore, etc., R. Co. v. Rambo*, 16 U. S. App. 277, quoting and applying *Ohio* statutes.

Oklahoma. — *Hyde v. Territory*, (Okla. 1899) 56 Pac. Rep. 851.

Wisconsin. — *Sutton v. Fox*, 55 Wis. 531, 42 Am. Rep. 744.

See also the statutes of the several states.

In *Kentucky* the common-law doctrine has been modified by statute, and it is only when a conviction is for perjury, false swearing, or subornation of perjury, that the party convicted is disqualified from testifying. *Com. v. McGuire*, 84 Ky. 57; *Combs v. Com.*, (Ky. 1894) 25 S. W. Rep. 590; *Patterson v. Com.*, 86 Ky. 313. Thus it has been held that a person convicted of murder is not an incompetent witness in this state. *Combs v. Com.*, (Ky. 1894) 25 S. W. Rep. 590. See also *Com. v. Minor*, 89 Ky. 555.

In *Arkansas* a statute containing a somewhat similar enumeration exists, and is applicable in civil cases. *Werner v. State*, 44 Ark. 122.

In *Pennsylvania* the common-law rule is abolished except as to perjury and subornation of perjury, so that a convicted murderer is competent. *Com. v. Clemmer*, 190 Pa. St. 202. See also *Com. v. Barry*, 8 Pa. Co. Ct. 216.

The *Kansas* statute removes the disability for infamy of witnesses in civil cases, but not in criminal cases. *State v. Clark*, 60 Kan. 450.

So in *Arkansas* the statute which modifies the common-law rule as to disqualification for infamy applies only in civil cases. *Werner v. State*, 44 Ark. 122; *Warner v. State*, 25 Ark. 447.

In *Virginia* under statutes in force in 1845, while the general doctrine of incompetency for infamy obtained, yet when a convict from the penitentiary was on trial for felony, another convict therein confined for felony was competent for the prosecution. *Johnson v. Com.*, 2 Gratt. (Va.) 581.

III. As DISQUALIFICATION OF JUROR. — Infamy may, at common law, exclude from the jury service.¹

IV. As AFFECTING RIGHT TO HOLD OFFICE. — Under the constitution of *Pennsylvania*, providing that officers "shall be removed on conviction of misbehavior in office or of any infamous crime," it has been held that the offense of bribing a voter by a sheriff previously to his election to that office is not an infamous crime within the meaning of the constitution.²

V. As AFFECTING RIGHT OF SUFFRAGE. — The question as to the effect of the commission of infamous crime under the various state constitutions, upon the right of suffrage, has been discussed in another portion of this work.³

VI. As GROUND FOR DIVORCE. — Under statute in some states, the conviction of an infamous crime is a ground for divorce.⁴

VII. As AFFECTING CRIMINAL PROCEDURE UNDER FEDERAL CONSTITUTION. — Under the Fifth Amendment to the Constitution of the United States, providing that no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger, the proposition was at one time laid down that no crime is infamous within the meaning of this amendment that has not been so declared by Congress.⁵ But in the later decisions this doctrine has been overturned, and it has been held that a crime which is punishable by imprisonment in the state prison or penitentiary is an infamous crime, whether the accused is or is not sentenced or put to hard labor, and that, in determining whether the crime is infamous, the question is whether it is one for which the statute authorizes the court to award an infamous punishment, and not whether the punishment ultimately awarded is an infamous one.⁶

Effect of Statute Permitting Defendant to Testify in His Own Behalf. — Under Gen. Stat. S. Car., § 2643, providing that in the trial of all criminal cases the defendant shall be allowed to testify (if he chooses to do so, and not otherwise) as to the facts and circumstances of the case, it has been held that a defendant who is infamous in character cannot make himself a general witness against his codefendants by simply exercising the right to be sworn in his own behalf. *State v. Peterson*, 35 S. Car. 279.

It has been held that if a defendant has lost the privilege of testifying in courts of justice, by the commission of an infamous crime, this will attach to him and prevent him from testifying in his own behalf, notwithstanding the Act of March 16, 1878 (20 Stat. at Large 30) providing that a defendant charged with crime shall at his own request, but not otherwise, be a competent witness. *U. S. v. Hollis*, 43 Fed. Rep. 248. But compare *Ransom v. State*, 49 Ark. 176; *Morgan v. State*, 86 Tenn. 472.

Whether Other than Infamous Crimes Affect Credibility. — In *Illinois* it has been held under statute that the convictions which may be proved to discredit a witness are those only which, at common law, were infamous and might have been shown to disable and exclude him. *Bartholomew v. People*, 104 Ill. 601, 44 Am. Rep. 97; *Burke v. Stewart*, 81 Ill. App. 506; *Lamkin v. Burnett*, 7 Ill. App. 143. So also in *Missouri*, and the case is the same when the defendant in a criminal case is testifying for himself. *State v. Smith*, 125 Mo. 2; *State v. Donnelly*, 130 Mo. 642; *State v. Dyer*, 139 Mo. 212.

But in *Minnesota* a different rule has been laid down under statute. *State v. Sauer*, 42 Minn. 261.

1. Infamy as Disqualification of Juror. — 1 Co. Litt. 6 b; 2 Hawk. P. C., c. 43, § 25. See also the title JURY AND JURY TRIALS.

2. Infamy as Ground for Removal from Office. — Com. v. Shaver, 3 W. & S. (Pa.) 338. For a further discussion of this question, see the title PUBLIC OFFICERS.

3. Infamy as Affecting Right of Suffrage. — See the title ELECTIONS, vol. 10, p. 609.

4. Infamy as Ground for Divorce. — See the title DIVORCE, vol. 9, p. 815.

5. U. S. v. Wynn, 3 McCrary (U. S.) 266, 9 Fed. Rep. 886; *U. S. v. Cross*, 1 McArthur (D. C.) 149; *U. S. v. Baugh*, 1 Fed. Rep. 784.

Stealing from the Mails. — Under this rule, it has been held that the offense of stealing from the mails was not an infamous crime. *U. S. v. Wynn*, 9 Fed. Rep. 886; *U. S. v. Baugh*, 1 Fed. Rep. 784.

Omitting Assets from Inventory of Bankrupt. — It has been held that the offense under the United States statute, of wilfully and fraudulently omitting assets of a bankrupt from the inventory of his effects, is not an infamous crime, although the punishment prescribed was "imprisonment with or without hard labor for not more than three years." *U. S. v. Block*, 4 Sawy. (U. S.) 211.

6. Meaning of Infamous Crime under Federal Constitution. — *Ex p. Wilson*, 114 U. S. 417; *Mackin v. U. S.*, 117 U. S. 348; *Ex p. Bain*, 121 U. S. 1; *Parkinson v. U. S.*, 121 U. S. 281; *U. S. v. De Walt*, 128 U. S. 393; *Medley*, Petitioner, 134 U. S. 160; *In re Mills*, 135 U. S. 263; *In re Claasen*, 140 U. S. 200; *Bannon v. U. S.*, 156 U. S. 464; *U. S. v. Johannessen*, 35 Fed. Rep. 411; *Ex p. McClusky*, 40 Fed. Rep. 71; *Ex p. Brown*, 40 Fed. Rep. 81; *U. S. v. Smith*, 40 Fed. Rep. 755; *U. S. v. Wong* Dep

Under this rule, the uttering or passing a counterfeit interest-bearing coupon bond of the United States,¹ or counterfeit coin,² or embezzlement and making false entries as president of a national bank,³ or conspiracy to commit an offense against the United States, or to defraud the United States,⁴ or an attempt to defraud the United States by means of false pension vouchers,⁵ or an unlawful and fraudulent voting at an election,⁶ has been held to be an infamous crime not to be prosecuted except upon accusation by a grand jury.

INFANTICIDE. — See the title MURDER AND MANSLAUGHTER.

Ken, 57 Fed. Rep. 206; Stokes v. U. S., 60 Fed. Rep. 598. See also U. S. v. Waddell, 112 U. S. 82; People v. Sponsler, 1 Dak. 287.

Under the constitution of *Maine* a rule similar to that in the text has been laid down as applying to the procedure in the state courts. Butler v. Wentworth, 84 Me. 25.

In *Massachusetts* a similar decision has been made under the declaration of rights in that state. Jones v. Robbins, 8 Gray (Mass.) 329.

In *Texas* the same rule prevails. See Pitner v. State, 23 Tex. App. 366.

Under the constitution of *Rhode Island* it has been held that it is not necessary that every offense punishable by imprisonment should be prosecuted by indictment. State v. Nolan, 15 R. I. 529. See also State v. Bixler, 62 Md. 359.

Rule under Federal Constitution Confined to Proceedings in Federal Courts. — It has been held that the Fifth Amendment of the Constitution of the United States, referred to in the text, has reference only to proceedings in the tribunals of the United States. Pitner v. State, 23 Tex. App. 366; State v. Keyes, 8 Vt. 57, 30 Am. Dec. 450.

Larceny is an infamous crime within the meaning of this clause of the Federal Constitution. U. S. v. Fuller, 3 N. Mex. 367; Ex p. McClusky, 40 Fed. Rep. 71.

Assault with Intent to Kill is an infamous offense. Ex p. Brown, 40 Fed. Rep. 81.

1. Passing Counterfeit Bond of the United States an Infamous Crime. — Ex p. Wilson, 114 U. S. 417.

2. Passing Counterfeit Coin an Infamous Crime. — U. S. v. Petit, 114 U. S. 429. Compare U. S. v. Yates, 6 Fed. Rep. 861; U. S. v. Burgess, 9 Fed. Rep. 896; U. S. v. Field, 16 Fed. Rep. 778.

3. Embezzlement by President of National Bank an Infamous Crime. — U. S. v. De Walt, 128 U. S. 393. Compare U. S. v. Reilly, 20 Fed. Rep. 46.

Bank Officers Issuing False and Fraudulent Reports, contrary to U. S. Rev. Stat., §§ 5200, 5211, are guilty of an infamous crime. Ex p. Bain, 121 U. S. 1.

4. Conspiracy to Commit Offense Against United States an Infamous Crime. — Mackin v. U. S., 117 U. S. 348; U. S. v. Butler, 4 Hughes (U. S.) 513; U. S. v. Brady, (D. C.) 3 Crim. L. Mag. 69.

5. Attempt to Defraud United States by False Pension Vouchers an Infamous Crime. — U. S. v. Tod, 25 Fed. Rep. 815.

6. Fraudulent Voting at Election an Infamous Crime. — Parkinson v. U. S., 121 U. S. 281.

Unlawfully Hindering or Obstructing Citizens from Voting is an infamous crime. U. S. v. Smith, 40 Fed. Rep. 755.

INFANTS.

BY A. P. HALLETT.

I. DEFINITION, 258.

II. COMMENCEMENT AND DURATION OF INFANCY, 258.

1. *Infants en Ventre Sa Mere*, 258.
 - a. *Capacity to Take Property*, 258.
 - b. *Rights of Action*, 261.
 - (1) *For Death of Parent by Wrongful Act*, 261.
 - (2) *Under Civil Damage Act*, 261.
 - (3) *For Personal Injuries Before Birth*, 261.
2. *When Majority Attained*, 262.
 - a. *In General*, 262.
 - b. *At What Moment Infant Attains Majority*, 262.
3. *Legislative Relief from Disabilities of Nonage*, 262.

III. CAPACITY TO MARRY, 263.

1. *Age of Consent*, 263.
 - a. *At Common Law*, 263.
 - b. *In the United States*, 263.
2. *Effect of Marriage Below Age of Consent*, 263.
 - a. *Where Infant under Seven Years*, 263.
 - b. *Where Infant over Seven Years*, 263.
3. *Effect of Marriage After Age of Consent*, 264.
4. *Liability for Breach of Promise*, 265.

IV. CAPACITY TO DISPOSE OF PROPERTY BY WILL, 265.

1. *At Common Law*, 265.
2. *Under Statutes*, 265.

V. CAPACITY TO HOLD OFFICE, 266.

1. *In General*, 266.
2. *Capacity to Serve Process*, 266.
3. *Capacity to Act as Executor or Administrator*, 267.
4. *Capacity to Act as Trustee*, 267.

VI. CAPACITY TO TESTIFY AS WITNESSES, 267.

1. *Presumption as to Competency*, 267.
2. *Examination as to Infant's Competency*, 267.
3. *Tests of Competency*, 268.
4. *Instructing Witness as to Nature of Oath*, 270.
5. *Competency a Matter for Discretion of Court*, 270.
6. *Credibility a Question for Jury*, 271.
7. *Receiving Unsworn Testimony of Infants*, 271.

VII. LIABILITY UPON CONTRACTS, 271.

1. *In General*, 271.
2. *Contracts Which Are Void*, 272.
 - a. *At Common Law*, 272.
 - b. *Under Statutes*, 273.
3. *Contracts Which Are Binding*, 273.
 - a. *Contracts in Discharge of Legal Obligations*, 273.
 - b. *Contracts for Military Service*, 274.
 - c. *Contracts of Apprenticeship*, 275.
 - d. *Executed Contracts of Marriage*, 275.
- e. *Contracts for Necessaries*, 275.
 - (1) *Implied Contracts*, 275.

INFANTS.

- (2) *Express Contracts*, 276.
- (3) *What Are Necessaries*, 276.
 - (a) *Considerations Determining the Question*, 276.
 - (b) *General Considerations*, 276.
 - aa. *Must Supply Personal Wants*, 276.
 - (aa) *In General*, 276.
 - ↓ (bb) *Things for Infant's Estate*, 276.
 - (cc) *Things Required in Conducting Business*, 277.
 - (dd) *Necessaries for Family*, 278.
 - bb. *Must Be Useful*, 278.
 - (aa) *Articles of Luxury or Convenience*, 278.
 - (bb) *Ornaments*, 278.
 - (c) *Particular Considerations*, 278.
 - aa. *In General*, 278.
 - bb. *Suitability for Infant's Condition*, 279.
 - cc. *Infant's Need of It*, 279.
 - (aa) *Over-Supply of Infant's Needs*, 279.
 - (bb) *When Infant Is Supported by Parent or Guardian*, 280.
 - (d) *Questions of Law and Fact*, 281.
- (4) *Liability for Money Paid by Third Person*, 281.
- (5) *Liability for Money Borrowed to Purchase Necessaries*, 281.
- 4 *Contracts Which Are Voidable*, 282.
 - a. *In General*, 282.
 - b. *Illustrations*, 282.
 - (1) *Conveyances of Property*, 282.
 - ↓ (a) *Sales of Real and Personal Property*, 282.
 - (b) *Mortgages*, 283.
 - (c) *Leases*, 284.
 - (d) *Marriage Settlements*, 284.
 - (e) *Assignments for Benefit of Creditors*, 284.
 - (2) *Bills and Notes*, 284.
 - (3) *Contracts of Suretyship*, 285.
 - (4) *Contracts for Service*, 285.
 - (5) *Awards and Compromises*, 286.
 - (a) *Arbitration and Award*, 286.
 - (b) *Compromise of Causes of Action*, 286.
 - aa. *Claims Due Infants*, 286.
 - bb. *Torts Committed by Infants*, 286.
 - (6) *Partnership Contracts*, 287.
 - (7) *Contracts in Respect to Corporation Stock*, 287.
 - *Disaffirmance and Avoidance*, 287.
 - (1) *Right of Infants to Repudiate Their Contracts*, 287.
 - (a) *General Principles*, 287.
 - (b) *Executory Contracts*, 287.
 - (c) *Executed Contracts*, 288.
 - aa. *In General*, 288.
 - bb. *Sales of Real and Personal Property*, 288.
 - (aa) *Recovery of Thing Sold*, 288.
 - (bb) *Mode of Disaffirmance*, 288.
 - aaa. *In General*, 288.
 - bbb. *Actions at Law*, 289.
 - ccc. *Conveyances After Majority*, 289.
 - cc. *Purchases of Real or Personal Property*, 290.
 - dd. *Lease of Real Property to Infant*, 290.
 - ee. *Contracts of Service*, 290.
 - (d) *Ignorance of One Contracting Party of Infancy of Other*, 291.

INFANTS.

- (e) *Effect of Infant's Misrepresentations as to Age*, 291.
 - aa. *At Law*, 291.
 - bb. *In Equity*, 292.
- (f) *Avoidance of Whole Transaction Necessary*, 293.
- (g) *Restoration of the Consideration*, 293.
 - aa. *At Common Law*, 293.
 - (aa) *Statement of the Rule*, 293.
 - (bb) *When the Consideration Has Passed Out of the Infant's Hands*, 293.
 - (cc) *When the Infant Never Received the Consideration*, 294.
 - (dd) *When the Infant Has All or Any Part of the Consideration*, 294.
 - (ee) *When the Nature of the Consideration Prevents Its Restoration*, 295.
 - bb. *Under Statutes*, 296.
- (2) *Who May Avail Himself of the Right*, 296.
 - (a) *Plea of Infancy a Personal Privilege*, 296.
 - (b) *Heirs and Personal Representatives*, 297.
 - (c) *Committee in Lunacy*, 298.
 - (d) *Privies in Estate*, 298.
- (3) *When the Right May or Must Be Exercised*, 298.
 - (a) *Right to Avoid During Infancy*, 298.
 - (b) *How Soon After Majority*, 299.
 - aa. *Time Limited by Statute of Limitations*, 299.
 - bb. *Disaffirmance Within Reasonable Time*, 299.
- d. *Ratification and Confirmation*, 300.
 - (1) *In General*, 300.
 - (2) *Who May Ratify and Confirm*, 301.
 - (3) *When Ratification May Be Made*, 301.
 - (4) *Mode of Ratification*, 301.
 - (a) *Executory Contracts*, 301.
 - aa. *Express Ratification*, 301
 - (aa) *In General*, 301.
 - (bb) *Acknowledgment of Liability Insufficient*, 302.
 - (cc) *Necessity of Writing*, 302.
 - (dd) *Ratification Must Be Voluntary*, 302.
 - (ee) *Knowledge of Nonliability*, 302.
 - (ff) *To Whom Made*, 303.
 - (gg) *Conditional Ratification*, 303.
 - bb. *Implied Ratification*, 303.
 - (aa) *Retention or Disposition of Consideration*, 303.
 - (bb) *Part Payment of Debt*, 304.
 - (b) *Executed Contracts*, 304.
 - aa. *Express Ratification*, 304.
 - bb. *Implied Ratification*, 305.
 - (aa) *In General*, 305.
 - (bb) *Sales and Conveyances of Property*, 306.
 - (cc) *Mortgage Given by Infant*, 306.
 - (dd) *Lease of Land by Infant*, 307.
 - (ee) *Lease of Land to Infant*, 307.
 - (ff) *Contracts of Service*, 307.

VIII. LIABILITY FOR TORTS, 307.

- 1. *Pure Torts*, 307.
 - a. *In General*, 307.
 - b. *Coercion of Parent or Guardian*, 308.
 - c. *Liability for Acts of Agent*, 308.

2. *Torts Connected with or Growing out of Contract*, 308.a. *In General*, 308.b. *Conversion of Things Bailed*, 309.c. *Fraud in Making Contracts*, 310.(1) *Fraud in Sale of Property*, 310.(2) *Fraud in Purchase of Property*, 310.(a) *In General*, 310.(b) *False Representations as to Age*, 311.**IX. CRIMINAL RESPONSIBILITY AND PUNISHMENT OF INFANTS**, 311.1. *Criminal Responsibility*, 311.a. *Mental Capacity*, 311.(1) *In General*, 311.(2) *Age at Which Criminal Responsibility Begins*, 312.(3) *Burden of Proof as to Capacity*, 313.(4) *Burden of Proof of Age*, 314.(5) *Evidence*, 315.b. *Physical Capacity*, 315.2. *Punishment*, 315.**X. STATUTES FOR THE PROTECTION OF INFANTS**, 316.1. *In General*, 316.2. *Regulations Concerning Custody and Care*, 316.3. *Employment of Infants*, 316.4. *Admitting to Places of Amusement*, 317.5. *Sale of Prohibited Articles to Infants*, 317.**CROSS-REFERENCES.**

For matters of *PROCEDURE*, see the title *INFANTS*, in the *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*, vol. 10, p. 581.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *AGENCY*, vol. 1, p. 930; *ALLOWANCES*, vol. 2, p. 156; *APPRENTICES*, vol. 2, p. 488; *ASSAULT AND BATTERY*, vol. 2, p. 976; *CITIZENSHIP*, vol. 6, p. 20; *CONCEALMENT OF BIRTH OR DEATH*, vol. 6, p. 424; *CONTRIBUTORY NEGLIGENCE*, vol. 7, p. 368; *CRIMINAL LAW*, vol. 8, p. 296; *CRUELTY TO CHILDREN*, vol. 8, p. 456; *DIVORCE*, vol. 9, p. 866; *DOMICIL*, vol. 10, p. 20; *DOWER*, vol. 10, p. 122; *EXECUTORS AND ADMINISTRATORS*, vol. 11, p. 744; *EXEMPLARY DAMAGES*, vol. 12, p. 23; *FAMILY*, vol. 12, p. 866; *FAMILY AGREEMENTS OR SETTLEMENTS*, vol. 12, p. 875; *FELLOWSHIP SERVANTS*, vol. 12, p. 989; *FENCES*, vol. 12, p. 1084; *FINES AND PENALTIES*, vol. 13, p. 53; *GIFTS*, vol. 14, p. 1027; *GUARDIAN AD LITEM*, vol. 15, p. 2; *GUARDIAN AND WARD*, vol. 15, p. 16; *HABEAS CORPUS*, vol. 15, p. 125; *HIGHWAYS*, vol. 15, p. 343; *HOUSES OF REFUGE AND CORRECTION*, vol. 15, p. 777; *LABOR REGULATIONS*; *MASTER AND SERVANT*; *MURDER AND MANSLAUGHTER*; *PARENT AND CHILD*; *PROCHEIN AMI*.

I. DEFINITION. — The term "infant" in its legal signification embraces any person who has not yet arrived at the age prescribed by law as full age.¹

In English Probate Practice the term is used to denote a person under the age of seven years, as opposed to a minor who is a person between the ages of seven and twenty-one years.²

II. COMMENCEMENT AND DURATION OF INFANCY — 1. *Infants en Ventre Sa Mere* — a. *CAPACITY TO TAKE PROPERTY* — Considered in Being for Purposes of Property. — In some early English cases it was held that a child *en ventre sa*

1. *Infant Any Person under Age of Majority.* — Black's L. Dict. 619; Rap. & Law. L. Dict. Co. Litt. 171; 1 Black. Com. 463-466; 2 651.
Kent's Com. 233; Bouvier's L. Dict. 1029; 2. Rap. & Law. L. Dict. 651.

mere was not to be regarded as *in esse* for the purpose of taking by descent; ¹ but it is now the well-settled doctrine both in *England* and in the *United States* that an unborn infant is to be regarded as in being from the time of conception, for the purpose of taking any estate which is for its benefit. ² Thus a child *en ventre sa mere* is held to be included in a bequest or devise to "children," ³ or to "grandchildren," ⁴ or to persons "living at the death." ⁵ Such child can take an estate in remainder in the same manner as if born in the lifetime of the testator, ⁶ and is entitled to share under the statute of distributions. ⁷

Deemed in Being from Time of Conception. — The distinction between a woman's being pregnant and being quick with child is applicable mainly, if not exclusively, to criminal cases, and does not apply to cases of descents, devises, and

1. Early English Decisions. — *Pierson v. Garnet*, 2 Cro. C. C. 38; *Ellison v. Airey*, 1 Ves. 111; *Musgrave v. Parry*, 2 Vern. 710. See also *Bate v. Amherst*, T. Raym. 83.

2. Deemed in Esse for Purposes of Property — England. — *Thellusson v. Woodford*, 4 Ves. Jr. 334; *Doe v. Clarke*, 2 H. Bl. 399; *Scatterwood v. Edge*, 1 Salc. 229; *Trower v. Butts*, 1 Sim. & St. 181; *Wallis v. Hodson*, 2 Atk. 115; *Snow v. Tucker*, Sid. 153; *Millar v. Turner*, 1 Ves. 85; *Burnet v. Mann*, 1 Ves. 156; *Beale v. Beale*, 1 P. Wms. 244; *Burdet v. Hopegood*, 1 P. Wms. 486; *Clarke v. Blake*, 2 Bro. C. C. 320; *Crook v. Hill*, 3 Ch. D. 773.

Alabama. — *Gillespie v. Nabors*, 59 Ala. 441, 31 Am. Rep. 20.

Georgia. — *Morrow v. Scott*, 7 Ga. 535; *Groce v. Rittenberry*, 14 Ga. 232.

Illinois. — *Detrick v. Migatt*, 19 Ill. 146, 68 Am. Dec. 584; *McConnel v. Smith*, 23 Ill. 611.

Kentucky. — *Haskins v. Spiller*, 1 Dana (Ky.) 170.

Maryland. — *Crisfield v. Storr*, 36 Md. 129, 11 Am. Rep. 480.

Massachusetts. — *Hall v. Hancock*, 15 Pick. (Mass.) 255, 26 Am. Dec. 598.

Mississippi. — *Harper v. Archer*, 4 Smed. & M. (Miss.) 99, 43 Am. Dec. 472.

New York. — *Marsellis v. Thalhimier*, 2 Paige (N. Y.) 35, 21 Am. Dec. 66; *Jenkins v. Freyer*, 4 Paige (N. Y.) 47; *Hawley v. James*, 5 Paige (N. Y.) 318; *Mason v. Jones*, 2 Barb. (N. Y.) 229; *Hone v. Van Schaick*, 3 Barb. Ch. (N. Y.) 489; *Steadfast v. Nicoll*, 3 Johns. Cas. (N. Y.) 18.

North Carolina. — *Picot v. Armistead*, 2 Ired. Eq. (37 N. Car.) 226; *Hill v. Moore*, 1 Murph. (5 N. Car.) 233; *Petway v. Powell*, 2 Dev. & B. Eq. (22 N. Car.) 308.

Pennsylvania. — *Barker v. Pearce*, 30 Pa. St. 173, 72 Am. Dec. 691; *Laird's Appeal*, 85 Pa. St. 339; *Swift v. Duffield*, 5 S. & R. (Pa.) 38.

South Carolina. — *Pearson v. Carlton*, 18 S. Car. 47.

Tennessee. — *Smart v. King*, Meigs (Tenn.) 149, 33 Am. Dec. 137.

In *Thellusson v. Woodford*, 4 Ves. Jr. 322, Mr. Justice Buller said: "He [an unborn child] may be vouched in a recovery, though it is for the purpose of making him answer over in value. He may be an executor. He may take under the statute of distributions. He may take by devise. He may be entitled under a charge for raising portions. He may

have an injunction; and he may have a guardian."

In *Pearce v. Carrington*, L. R. 8 Ch. 969, a testator gave property to his married daughter for life, and if she had no children at the expiration of five years from the death of his wife, then over to certain persons named, as if the daughter had died without heirs. Her first child was born five years and six months after the testator's widow's death. It was held that as the daughter had a child *en ventre sa mere* within the five years, the gift over had not taken effect.

Child Having No Legitimate Existence. — Under a devise whereunder the children and remoter issue, living at the father's death, of a son of the testator took as joint tenants, it was held that where one of the son's daughters, who was unmarried at his death, married ten days afterwards and had a child born six months after her marriage, such child, though born within the period of gestation after the son's death, could have had no legitimate existence then, and consequently was not entitled to share under the will. *In re Corlass*, 1 Ch. D. 460.

3. Included in Devise or Bequest to "Children." — *Doe v. Clarke*, 2 H. Bl. 399; *Trower v. Butts*, 1 Sim. & St. 181; *Haskins v. Spiller*, 1 Dana (Ky.) 170; *Petway v. Powell*, 2 Dev. & B. Eq. (22 N. Car.) 308.

4. Included under "Grandchildren." — *Crook v. Hill*, 3 Ch. D. 773; *Hall v. Hancock*, 15 Pick. (Mass.) 255, 26 Am. Dec. 598; *Hone v. Van Schaick*, 3 Barb. Ch. (N. Y.) 488; *Swift v. Duffield*, 5 S. & R. (Pa.) 38; *Smart v. King*, Meigs (Tenn.) 149, 33 Am. Dec. 137.

5. Is a Person "Living at the Death." — *Clarke v. Blake*, 2 Bro. C. C. 320; *Millar v. Turner*, 1 Ves. 85; *Beale v. Beale*, 1 P. Wms. 244; *Burdet v. Hopegood*, 1 P. Wms. 486; *Rawlins v. Rawlins*, 2 Cox Ch. 425; *Groce v. Rittenberry*, 14 Ga. 232; *Laird's Appeal*, 85 Pa. St. 339.

6. Can Take Estate in Remainder. — *Steadfast v. Nicoll*, 3 Johns. Cas. (N. Y.) 18; *Barker v. Pearce*, 30 Pa. St. 173, 72 Am. Dec. 691.

7. Entitled to Share under Statute of Distributions. — *Wallis v. Hodson*, 2 Atk. 115; *Hill v. Moore*, 1 Murph. (5 N. Car.) 233; *Pearson v. Carlton*, 18 S. Car. 47.

Posthumous Brother of Half Blood. — In *Burnet v. Mann*, 1 Ves. 156, it was held that a posthumous brother of the half blood was entitled under the statute of distribution to share in the personal estate of his intestate brother.

other gifts.¹ In the latter cases the child is considered *in esse* from the time of its conception.²

Fiction for Benefit of Child Only. — The fiction is for the interest of the unborn child, and applies only where it will enable the child to take a benefit which, if born, he would be entitled to.³

Existence Inchoate and Conditional. — The existence of a child *en ventre sa mère* is inchoate and conditional, and confers no right of property unless the infant be born alive after such a period of foetal existence that its continuance in life may reasonably be expected;⁴ and if it is born dead, or in such an early stage of pregnancy as to be incapable of living, it is to be considered as if it had never been born or conceived.⁵ Consequently a person claiming property through such a child is bound to establish the fact that it was born alive.⁶

Interest Not Divested by Judicial Sale Before Birth. — The interest of an unborn child in real estate will not be divested by a decree and judicial sale made before its birth;⁷ and he may recover such interest from the other heirs or devisees, or from purchasers at the judicial sale.⁸ But the profits of the estate

1. Distinction Between "Pregnant" and "Quick with Child" Not Applicable. — *Hall v. Hancock*, 15 Pick. (Mass.) 255, 26 Am. Dec. 598. See the title ABORTION, vol. 1, p. 186.

2. Deemed in Being from Time of Conception. — *Hall v. Hancock*, 15 Pick. (Mass.) 255, 26 Am. Dec. 598; *Harper v. Archer*, 4 Smed. & M. (Miss.) 99, 43 Am. Dec. 472; *Hone v. Van Schaick*, 3 Barb. Ch. (N. Y.) 489; *Marsellis v. Thalhimer*, 2 Paige (N. Y.) 35, 21 Am. Dec. 66.

Presumption as to Time of Conception. — The time of conception of a child is presumed to be at a period nine months previous to its birth, and where there is no evidence to rebut this presumption it is conclusive. *Hall v. Hancock*, 15 Pick. (Mass.) 255, 26 Am. Dec. 598.

3. Fiction for Benefit of Child. — *Blasson v. Blasson*, 2 De G. J. & S. 665; *M'Knight v. Read*, 1 Whart. (Pa.) 213; *Armistead v. Dangerfield*, 3 Munf. (Va.) 20, 5 Am. Dec. 501. See also *Hall v. Hancock*, 15 Pick. (Mass.) 255, 26 Am. Dec. 598; *Harper v. Archer*, 4 Smed. & M. (Miss.) 99, 43 Am. Dec. 472; *Marsellis v. Thalhimer*, 2 Paige (N. Y.) 35, 21 Am. Dec. 66; *Hone v. Van Schaick*, 3 Barb. Ch. (N. Y.) 489.

4. Existence Inchoate and Conditional. — *Gillespie v. Nabors*, 59 Ala. 441, 31 Am. Rep. 20; *Harper v. Archer*, 4 Smed. & M. (Miss.) 99, 43 Am. Dec. 472; *Hone v. Van Schaick*, 3 Barb. Ch. (N. Y.) 489.

Presumption as to Capability of Living. — Children born within the first six months after conception are presumed to be incapable of living, and therefore cannot take and transmit property by descent, unless they actually survive long enough to rebut the presumption. *Marsellis v. Thalhimer*, 2 Paige (N. Y.) 35, 21 Am. Dec. 66.

Beck, *Medical Jurisprudence*, vol. 1, p. 407 (12th ed.) says: "As a general rule it seems now to be generally conceded that no infant can be born viable, or capable of living, until one hundred and fifty days, five months, after conception. There are, however, cases mentioned to the contrary. * * * We may * * * conclude that between five and seven months there have been instances of infants living, though most rare; and even at seven, the chance of surviving six hours after birth is much against the child." And see *Chitty Med. Jur.* 406.

5. Must Be Capable of Continuance in Life. — *Marsellis v. Thalhimer*, 2 Paige (N. Y.) 35, 21 Am. Dec. 66.

6. Person Claiming through Child Must Prove Existence. — *Marsellis v. Thalhimer*, 2 Paige (N. Y.) 35, 21 Am. Dec. 66.

Child Delivered by Cæsarean Operation. — Where the mother dies before the birth of the child, and the latter is delivered by the Cæsarean operation, it is considered in existence before its birth, for its own benefit to take the estate of the mother by descent, but not for the benefit of the father to enable him to hold as tenant by the curtesy. *Marsellis v. Thalhimer*, 2 Paige (N. Y.) 35, 21 Am. Dec. 66. See also *Matter of Winne*, 1 Lans. (N. Y.) 508.

7. Interest Not Divested by Judicial Sale Before Birth. — *Gillespie v. Nabors*, 59 Ala. 441, 31 Am. Rep. 20; *Detrick v. Migatt*, 19 Ill. 146, 68 Am. Dec. 584; *McConnell v. Smith*, 23 Ill. 611; *Massie v. Hiatt*, 82 Ky. 314; *Pearson v. Carlton*, 18 S. Car. 47. And see *Bowman v. Tallman*, (N. Y. Super. Ct. Gen. T.) 27 How. Pr. (N. Y.) 212.

Title Not Divested by Bill of Revivor. — Where land in which a child *en ventre sa mère* is interested is judicially sold before its birth, a bill of revivor cannot subsequently be filed against such child so as to divest its title. *McConnell v. Smith*, 23 Ill. 611.

8. May Recover Interest in Lands Sold. — *Haskins v. Spiller*, 1 Dana (Ky.) 170; *Massie v. Hiatt*, 82 Ky. 314.

As to contribution for pretermitted children see the title WILLS.

Estate Devolves in Its Then Condition. — Where the interest of children then born, or the enjoyment of the dower right of the widow, requires the conversion of real estate into a personal fund, a child *en ventre sa mère* does not, until born, possess any estate therein which can affect the power of the court to pass a decree directing such conversion. Whatever estate devolves on such a child at its birth is an estate in the property in its then condition. *Knotts v. Stearns*, 91 U. S. 638.

In Michigan the rights of posthumous children in their father's estate vest immediately, subject to the contingencies of administration. *Supreme Council, etc. v. Finnane*, 50 Mich. 82.

Massachusetts — Share Taken from Readuary

are his only from the time of his birth.¹

Statutory Provisions for Posthumous Children. — In some states it is provided by statute that a child *en ventre sa mere* not mentioned in its parent's will shall take the share in the estate to which it would have been entitled if the parent had died intestate.² And statutes providing in some way for pretermitted posthumous children exist in a majority of the states.³

b. RIGHTS OF ACTION—(1) *For Death of Parent by Wrongful Act.* — It has been held that, under a statute giving a right of action for death by wrongful act to the children of the deceased, a child *en ventre sa mere* at the time of the death may, after its birth, maintain such action.⁴

(2) *Under Civil Damage Act.* — And so a civil damage act, giving a right of action to children injured in their means of support in consequence of the intoxication of any person, has been held to apply to a posthumous child of a man killed by reason of intoxication.⁵

(3) *For Personal Injuries Before Birth.* — In the few cases in which the question has been considered the courts have invariably held that the common law gives no right of action to an infant for injuries sustained by it while *en ventre sa mere*.⁶ However, the reasoning in support of these decisions is not eminently convincing, and the dissenting opinions in the most recent case on

Bequest. — Under Pub. Stat. Mass., c. 127, § 27, the share of a posthumous child should be taken entirely from the residuary bequest in the will, if such residue is sufficient for that purpose. *Bowen v. Hoxie*, 137 Mass. 527.

1. Entitled to Profits Only from Time of Birth. — *Basset v. Basset*, 3 Atk. 203; *Goodtitle v. Newman*, 3 Wils. C. Pl. 516.

Interest Only from Time of Birth is allowed on a fund vesting in an unborn child. *Rawlins v. Rawlins*, 2 Cox Ch. 425.

2. Entitled to Distributive Share. — Pub. Stat. Mass., c. 127, § 22; *Bowen v. Hoxie*, 137 Mass. 527; *Comp. Stat. Neb.*, p. 229, § 148; *Chicago, etc., R. Co. v. Wasserman*, 22 Fed. Rep. 872. See *Stim. Am. Stat.*, §§ 2844, 2622, 1413.

3. Provision by Statute for Posthumous Children. — See *Stim. Am. Stat.*, §§ 2844, 2622, 1413.

And as to the rights of pretermitted or post-testamentary children in general, see the title **WILLS**.

New Jersey. — A posthumous child not provided for by settlement, nor disinherited by the will of his father is entitled under N. J. Rev. Stat., p. 1246, § 19, to a contribution from the other children of the testator of such portions of their estate derived under the will as will make the share of such child equal to what it would have been had his father died intestate; but the will should not otherwise be disturbed. *Wilson v. Fritts*, 32 N. J. Eq. 59.

Maryland. — The Maryland Code, art. 93, § 134, allows posthumous children of an intestate to take as other children, but declares that no other posthumous relation shall be considered as entitled to distribution in his or her own right. Therefore, one born after his father's death, but before his aunt's, is not a posthumous relation to his aunt. *Shriver v. State*, 65 Md. 278.

4. Right of Action for Death by Wrongful Act. — *The George*, L. R. 3 A. & E. 466; *Nelson v. Galveston, etc., R. Co.*, 78 Tex. 621, 22 Am. St. Rep. 81.

In *Missouri Pac. R. Co. v. Lehmberg*, 75 Tex. 61, a posthumous child recovered dam-

ages under the statute, though its right to maintain the action was not questioned. See also the title **DEATH BY WRONGFUL ACT**, vol. 8, p. 897.

5. Right of Action under Civil Damage Act. — *Laws N. Y.*, 1873, c. 646; *Quinlen v. Welch*, 69 Hun (N. Y.) 584, affirmed 141 N. Y. 158.

6. No Right of Action for Pre-natal Injuries. — *Allaire v. St. Luke's Hospital*, 76 Ill. App. 441, affirmed 184 Ill. 359; *Dietrich v. Northampton*, 138 Mass. 14, 52 Am. Rep. 242; *Walker v. Great Northern R. Co.*, 28 L. R. Ir. 69, 26 Am. L. Rev. 50.

In *Allaire v. St. Luke's Hospital*, 76 Ill. App. 441, affirmed 184 Ill. 359, *Adams, P. J.*, said: "That a child before birth is, in fact, a part of the mother, and is only severed from her at birth, cannot, we think, be successfully disputed. The doctrine of the civil law and the ecclesiastical and admiralty courts, therefore, that an unborn child may be regarded as *in esse* for some purposes when for its benefit, is a mere legal fiction, which, so far as we have been able to discover, has not been indulged in by the courts of common law to the extent of allowing an action by an infant for injuries occasioned before its birth. If the action can be maintained, it necessarily follows that an infant may maintain an action against its own mother for injuries occasioned by the negligence of the mother while pregnant with it. We are of opinion that the action will not lie."

Injury while Traveling on Railroad. — In *Walker v. Great Northern R. Co.*, 28 L. R. Ir. 69, 26 Am. L. Rev. 50, it was held that an infant was not entitled to recover damages against a railroad company for injuries sustained before birth while the mother was a passenger upon the railroad. The decision was placed upon the ground that the railroad company had contracted only to carry the mother, to whom alone it was liable for any injury resulting from the negligence of its servants. Stress was laid upon the point that the defendant had no notice of the existence of any other person, nor did it receive compensation for an additional passenger. "The car-

the subject are entitled to respectful consideration.¹

2. When Majority Attained — a. IN GENERAL. — By the common law the age of majority is fixed at twenty-one years for both sexes, and, in the absence of any statute to the contrary, every person under that age, whether male or female, is an infant.² And the same limit seems to prevail under the civil law.³

Statutory Changes. — In some states, however, females attain their legal majority at eighteen.⁴ And in others the common-law rule has been otherwise modified by statute.⁵

b. AT WHAT MOMENT INFANT ATTAINS MAJORITY. — Under the principles of the common law a person comes of age on the first moment of the day *before* the anniversary of his birth, which is fixed by law as the age of majority.⁶

By Statute in Some States, however, he comes of age at the first minute of his proper birthday.⁷

Conflict of Laws. — In case of any conflict of laws arising over the time at which an infant arrives at majority, the law of the place where the contract is made or the act done furnishes the rule of decision.⁸ The fact that in the state of his residence a person is considered of full age will not render him so in a foreign jurisdiction.⁹

3. Legislative Relief from Disabilities of Nonage. — In several states the statutes allow a minor, under certain circumstances, to obtain a decree of court rendering him of age for all purposes of property and contract.¹⁰ Thus a minor who

rier," said Mr. Justice O'Brien, "saw the person he was going to carry. His duty was to that person. The carrier would be surprised to hear, while he was paid for one, that he was carrying two, or even three, for it might be a case of twins."

Premature Birth Caused by Defect in Highway. — In *Dietrich v. Northampton*, 138 Mass. 14, 52 Am. Rep. 242, a woman, between four and five months advanced in pregnancy, sustained an injury on a defective highway, by reason of which her child was prematurely born, surviving its birth but a few minutes. It was held that such child was not "a person" for the loss of whose life an action could be maintained against the town by his administrator, under Pub. Stat. Mass., c. 52, § 17.

1. Dissenting Opinion of Windes, J., in Allaire v. St. Luke's Hospital, 76 Ill. App. 441, and of Boggs, J., in the same case on appeal to the Illinois Supreme Court, 154 Ill. 359.

2. Twenty-one Age of Majority at Common Law. — *Hearle v. Greenbank*, 3 Atk. 695; *Rowland v. McGuire*, 64 Ark. 412; *Dent v. Cock*, 65 Ga. 400; Stim. Am. Stat., § 6601.

3. Same Limit under Civil Law. — Means v. Robinson, 7 Tex. 502.

4. Where Females of Age at Eighteen. — By statute a woman is of age at eighteen in *Arkansas, California, Colorado, Dakota, Idaho, Illinois, Iowa, Kansas, Maryland, Minnesota, Missouri, Nebraska, Nevada, Ohio, Oregon, Vermont, and Washington*. See *Rowland v. McGuire*, 64 Ark. 412; *Jackson v. Allen*, 4 Colo. 263; *Stevenson v. Westfall*, 18 Ill. 209; *Cogel v. Raph*, 24 Minn. 194; *Parker v. Starr*, 21 Neb. 680; *Sparhawk v. Buell*, 9 Vt. 41.

5. Where Married Infants Considered of Age. — In *Maryland, Oregon, and Texas* a woman is of age on marriage. See *Chubb v. Johnson*, 11 Tex. 469; *White v. Latimer*, 12 Tex. 61.

In *Nebraska* a married woman over sixteen is of age. See *Ward v. Lavery*, 19 Neb. 429.

In *Iowa, Texas, and Louisiana* all minors, whether male or female, attain their majority

on marriage; and in *Washington* a woman married to a man of full age is deemed to be of age. See Stim. Am. Stat., § 6601.

6. Person of Age on Day Before Birthday. — *Herbert v. Turball*, 1 Keb. 589; Anonymous, 1 Salk. 44; *Fitz-Hugh v. Dennington*, 6 Mod. 259; *Matter of Richardson*, 2 Story (U. S.) 571; *State v. Clarke*, 3 Harr. (Del.) 557; *Wells v. Wells*, 6 Ind. 447; *Hamlin v. Stevenson*, 4 Dana (Ky.) 597; *Phelan v. Douglass*, (Supm. Ct. Spec. T.) 11 How. Pr. (N. Y.) 193; *Ross v. Morrow*, 85 Tex. 172.

For a discussion of contrary opinions see the title AGE, vol. 1, p. 929.

7. By Statute of Age on First Moment of Birthday. — Civ. Code Cal., § 5026; Civ. Code S. Dak. 10.

8. Conflict of Laws. — *Huey's Appeal*, 1 Grant Cas. (Pa.) 51. See also *Male v. Roberts*, 3 Esp. 163; *Saul v. His Creditors*, 5 Mart. N. S. (La.) 569; *Story Conf. Laws*, §§ 75, 82, 332.

In *Thompson v. Ketcham*, 8 Johns. (N. Y.) 189, suit was brought on a promissory note made in Jamaica. The defendant pleaded infancy. It was held that he must show that the plea would be good in Jamaica.

9. Laws of State in Which Suit Brought Govern. — *State v. Bunce*, 65 Mo. 349. But see *Barra v. Alpuente*, 6 Mart. N. S. (La.) 69.

Where a female infant of nine years moved from Ohio (where the age of majority of a female is eighteen) into Indiana (where the age of majority is twenty-one), and at the age of eighteen chose the latter state as her permanent home, it was held that, her domicile being changed from Ohio to Indiana, the time when she reached majority was governed by the laws of Indiana. *Hiestand v. Kuns*, 8 Blackf. (Ind.) 345, 46 Am. Dec. 481.

10. Removal of Disabilities Allowed by Statute. — Code Ala. 1876, §§ 2735-2741; *Cox v. Johnson*, 80 Ala. 22; *Mansf. Dig. Ark.*, § 1362; *Doles v. Hilton*, 48 Ark. 305; *Gen. Stat. Kan.* 1897, c. 123, art. 5; *Civil Code La.*, art. 385; *Emancipation of Pochelu*, 41 La. Ann. 331,

has had his disabilities removed may be appointed an administrator,¹ or become a surety on an appeal bond.² But the decree can have no force outside of the state in which rendered.³

Must Be Capable of Managing Own Affairs. — Such statutes are construed as applying only to such minors as appear affirmatively to be fully capable of managing their own affairs.⁴

III. CAPACITY TO MARRY — 1. Age of Consent — a. AT COMMON LAW. — The common law, following the civil law, has established an age of consent at which infants may contract valid marriages. This age is intended to follow the age of puberty, and is fixed at fourteen for males and twelve for females.⁵

b. IN THE UNITED STATES. — In some of the states the common-law rule fixing the age of consent has been adopted by statute,⁶ but in many others those limits have been raised.⁷

In the Absence of Any Statutory Enactment on the subject the age of consent remains as at the common law.⁸

2. Effect of Marriage Below Age of Consent — a. WHERE INFANT UNDER SEVEN YEARS. — Marriages of infants under seven years of age are regarded as absolutely void.⁹

b. WHERE INFANT OVER SEVEN YEARS. — By the common law and under the statutes of most of the states a marriage contracted by an infant under the age of consent but above seven years of age is not absolutely void, but voidable only.¹⁰ This doctrine has been to some extent modified by

Cooper v. Rhodes, 30 La. Ann. 533; 2 Sayles's Stat. Tex., art. 3361a; *Brown v. Wheelock*, 75 Tex. 385.

Under Laws S. Dak. 1891, c. 39, p. 100, minors are authorized to hold stock in building and loan associations.

Power Exercised in Summary Manner. — The power to remove the disabilities of infants is a special one, and is to be exercised in a summary manner and not according to the course of the common law. *Hindman v. O'Connor*, 54 Ark. 627.

Decree Open to Collateral Attack. — In affording such relief to minors the chancery court exercises a limited jurisdiction, or special statutory power, which stands on the same footing with the proceedings of courts of limited and inferior jurisdiction; and it is permissible to attack such a decree collaterally by extrinsic proof showing that the recitals of notice or appearance were in fact false. *Cox v. Johnson*, 80 Ala. 22.

Arkansas — Must Be Resident of County. — In Arkansas an infant seeking relief from his disabilities must be a resident of the county in which the court is held to which the application is made, and the record must show that fact. *Hindman v. O'Connor*, 54 Ark. 627.

Alabama — Infant Must Sign Petition in Person. — Where the infant has a guardian the petition for the removal of disabilities must be signed by the infant in person and by the guardian; and where it is signed for the infant without his knowledge or consent the decree will be set aside. *Cox v. Johnson*, 80 Ala. 22.

1. May Be Appointed Administrator. — *Lyne's Succession*, 12 La. Ann. 155; *Gaines's Succession* 42 La. Ann. 699.

2. May Be Surety on Appeal Bond. — *Cooper v. Rhodes*, 30 La. Ann. 533.

3. Decree of No Force in Foreign State. — *State v. Bunce*, 65 Mo. 349.

4. Must Be Capable of Managing Own Affairs. — *Emancipation of Pochelu*, 41 La. Ann. 331;

Doles v. Hilton, 48 Ark. 305, wherein an order removing the disabilities of a minor under fourteen years of age was declared void.

5. Age of Consent at Common Law. — Co. Litt. 79b; *Rex v. Gordon*, R. & R. C. C. 48; *Arnold v. Earle*, 2 Lee Ecc. 529; *Beggs v. State*, 55 Ala. 108; *Goodwin v. Thompson*, 2 Greene (Iowa) 329; *Parton v. Hervey*, 1 Gray (Mass.) 119; *Bennett v. Smith*, 21 Barb. (N. Y.) 439; *Koonce v. Wallace*, 7 Jones L. (52 N. Car.) 194; *Shaffer v. State*, 20 Ohio 1; *Warwick v. Cooper*, 5 Sneed (Tenn.) 659; *Pool v. Pratt*, 1 D. Chip. (Vt.) 252; *Fisher v. Bernard*, 65 Vt. 663.

6. The Common-law Rule Is Adopted by statute in *Kentucky, Louisiana, New Hampshire, Virginia, and West Virginia*. *Stim. Am. Stat.*, § 6110.

7. Age of Consent Raised by Statute. — See the codes and statutes of the several states.

Iowa — Statute Cumulative of Common Law. — In *Goodwin v. Thompson*, 2 Greene (Iowa) 329, it was held that a statute providing that males of the age of eighteen and females of the age of fourteen might be joined in marriage was cumulative merely, and did not abrogate the common law, fixing the age of consent at fourteen and twelve years respectively.

8. In Absence of Statute. — *Fisher v. Bernard*, 65 Vt. 663, wherein it was held that Acts Vt., 1886, No. 63, fixing the age under which a female was held incapable of consenting to unlawful carnal knowledge at fourteen years, did not alter the common law in regard to the age at which an infant female might contract a valid marriage. See also *Bennett v. Smith*, 21 Barb. (N. Y.) 439.

9. Marriage under Seven Void. — 2 Burn's Eccl. Law 434a; 1 Bl. Com. 436, note 11 by Chitty; *Swinburne, Spousals* 20, 23; 1 Bishop on Marriage and Divorce, § 147; *Schouler, Husband and Wife*, § 24.

10. Marriage Not Void. — Co. Litt. 79; 1 Bl. Com. 436; *Beggs v. State*, 55 Ala. 108; *Bonker*

Volume XVI.

statute in the United States,¹ but it is still the general rule that such marriage is not void, and until disaffirmed or annulled is sufficient to support a prosecution for bigamy on the ground of a subsequent marriage.²

Ratification on Reaching Age of Consent. — According to the common law an infant married while under the age of consent can, on reaching that age, ratify the marriage without any further ceremony,³ and ratification will be inferred from continued cohabitation or other circumstances after that age is reached.⁴

Disaffirming on Reaching Age of Consent. — Under the common law an infant married under the age of consent can, on attaining that age, disaffirm and avoid the marriage without any divorce or judicial decree.⁵ But by statute in some of the United States such marriage is valid until avoided by a judicial decree.⁶

3. Effect of Marriage After Age of Consent. — Infants who have arrived at the age of consent can contract a valid marriage which will be binding though entered into without the consent of parents or guardians.⁷

Statutes Forbidding Marriage of Infants. — In many states there are statutes forbidding the issuance of marriage certificates to infants,⁸ or the solemnization of a marriage by a magistrate or clergyman without the consent of parents or

v. People, 37 Mich. 4; *State v. Cone*, 86 Wis. 498. But see *Shaffer v. State*, 20 Ohio 1, wherein it was held that a marriage by an infant under the age of consent was void unless confirmed by cohabitation after reaching that age.

Marriage Procured by Fraud or Undue Influence. — Where the marriage with an infant is brought about by fraud or undue influence, it will be set aside. *Harford v. Morris*, 2 Hag. Cons. 423; *Robertson v. Cole*, 12 Tex. 356.

In *Lyndon v. Lyndon*, 69 Ill. 43, the family coachman inveigled an infant female under the age of consent into marriage with him. He procured the license by falsely swearing as to her age, and the girl never cohabited with him, but repudiated the marriage at once. It was held that the marriage was void.

Infant Taken under Protection of Court. — Where a man was married to an infant under twelve years of age, who immediately declared her ignorance of the nature and consequences of the marriage, and her dissent to it, the court, on a bill filed by her next friend, ordered her to be placed under its protection as a ward of the court, and forbade all intercourse or correspondence with her by the defendant under pain of contempt. *Aymar v. Roff*, 3 Johns. Ch. (N. Y.) 49. And see *Eyre v. Shaftsbury*, 2 P. Wms. 111.

1. Statutes in United States. — In a few states marriages contracted while either party is below the age of consent are declared void by statute. In other states such marriages are declared voidable, and may be annulled on petition or suit from the date of the decree. There are other provisions in other jurisdictions. See the statutes of the several states.

Action to Annul — Alimony Not Granted. — Where an action is brought by a parent under Code Civ. Pro. N. Y., § 1744, to annul the marriage of her infant son who is under the age of consent, alimony cannot be awarded against the plaintiff. *Stivers v. Wise*, 18 N. Y. App. Div. 316.

2. Will Support Prosecution for Bigamy. — *Beggs v. State*, 55 Ala. 108; *Walls v. State*, 32 Ark. 565; *State v. Cone*, 86 Wis. 498. See

also *People v. Slack*, 15 Mich. 193. But see *contra*, *Shaffer v. State*, 20 Ohio 1.

3. Marriage Affirmed on Reaching Age of Consent. — Co. Litt. 79; 2 Kent's Com. 78, 79; *Goodwin v. Thompson*, 2 Greene (Iowa) 329; *Koonce v. Wallace*, 7 Jones L. (52 N. Car.) 194; *Warwick v. Cooper*, 5 Sneed (Tenn.) 659; *Governor v. Rector*, 10 Humph. (Tenn.) 57; *Pool v. Pratt*, 1 D. Chip. (Vt.) 252.

4. Ratification Inferred from Continued Cohabitation. — *Koonce v. Wallace*, 7 Jones L. (52 N. Car.) 194.

5. Infant May Disaffirm on Reaching Age of Consent. — *Beggs v. State*, 55 Ala. 108; *Goodwin v. Thompson*, 2 Greene (Iowa) 329; *People v. Bennett*, 39 Mich. 208; *Governor v. Rector*, 10 Humph. (Tenn.) 57; *Pool v. Pratt*, 1 D. Chip. (Vt.) 252.

Where One Party Above Age of Consent. — Under Mich. Comp. L., § 3223, providing that, "in case of a marriage solemnized when either of the parties was under the age of legal consent, if they shall separate during such nonage and not cohabit together afterwards, * * * the marriage shall be deemed void without any decree of divorce or other legal process," it was held that where only one of the parties was under the age of consent the marriage could not be avoided by the one above that age without the consent of the other, or unless the latter repudiated the marriage on reaching the age of consent. *People v. Slack*, 15 Mich. 193.

6. Judicial Decree Necessary. — *Walls v. State*, 32 Ark. 565; *State v. Cone*, 86 Wis. 498.

7. Marriage Without Consent of Parent or Guardian Valid. — *Hunter v. Milam*, (Cal. 1895) 41 Pac. Rep. 332; *Parton v. Hervey*, 1 Gray (Mass.) 119; *Fitzpatrick v. Fitzpatrick*, 6 Nev. 63; *Bennett v. Smith*, 21 Barb. (N. Y.) 439; *Warwick v. Cooper*, 5 Sneed (Tenn.) 659; *Governor v. Rector*, 10 Humph. (Tenn.) 57; *Pool v. Pratt*, 1 D. Chip. (Vt.) 252.

So under the English Statute 4 Geo. IV., c. 76, repealing in this respect 26 Geo. II., c. 32; *Rex v. Birmingham*, 8 B. & C. 29, 15 E. C. L. 151; *Governor v. Rector*, 10 Humph. (Tenn.) 57.

8. Issuance of Certificate Forbidden. — See *Stim. Am. Stat.*, § 6122, and the local statutes.

guardians, where there is reason to suppose that either party is a minor;¹ but the violation of such a provision will not invalidate the marriage, although the officer or clergyman may thereby incur a penalty, such statutes being deemed directory only.²

4. Liability for Breach of Promise. — Although the law holds an executed contract of marriage binding on an infant, the same does not hold true of executory contracts of marriage, which stand upon the same footing as other executory contracts. While, if the other party to the promise be an adult, it is binding on him, yet the infant can avoid the promise without incurring any liability.³

IV. CAPACITY TO DISPOSE OF PROPERTY BY WILL — **1. At Common Law** — **Personal Property.** — Under the common law males of fourteen and females of twelve years are capable of disposing of personalty by will.⁴

Real Property. — But real property cannot be devised by a person under twenty-one years of age.⁵

2. Under Statutes — **Personal Property.** — By statute in *England* no person under twenty-one years of age can now make a valid disposition of personalty by will;⁶ and the rule is the same in some of the *United States*.⁷ But in a great many states the statutes fix other age limits, their provisions varying quite widely.⁸ Under a statute allowing a minor to dispose of personalty, but not realty, by will, a legacy by such minor cannot, in case of insufficiency of the personalty, be charged on the realty.⁹

Real Property. — The rule of the common law that no valid devise of realty could be made by a person under twenty-one years of age still obtains in *England*,¹⁰ and in some of the *United States*.¹¹ But in a considerable number

1. Statutes Forbidding Marriage of Infants. — See Stim. Am. Stat., § 6134, and the local statutes.

2. Violation of Statute Will Not Invalidate Marriage. — *Hunter v. Milam*, (Cal. 1895) 41 Pac. Rep. 332; *Parton v. Hervey*, 1 Gray (Mass.) 119. See also *Milford v. Worcester*, 7 Mass. 48; *Londonderry v. Chester*, 2 N. H. 268, 9 Am. Dec. 61.

3. Not Liable for Breach of Promise. — *Morris v. Graves*, 2 Ind. 354; *Feibel v. Obersky*, (Supm. Ct. Spec. T.) 13 Abb. Pr. N. S. (N. Y.) 403, note. And see the title BREACH OF PROMISE OF MARRIAGE, vol. 4, p. 883.

Ratification After Coming of Age. — Such promise may be ratified by the infant after he is of age, and the jury may determine whether language used by him amounts to ratification or a fresh promise. *Northcote v. Doughty*, 4 C. P. D. 385; *Coxhead v. Mullis*, 3 C. P. D. 439.

Cannot Be Avoided by Act of Guardian. — A promise of marriage made by an infant under the age of consent can be avoided by the act of the infant only, and not by the act of the infant's guardian. *Parks v. Maybee*, 2 U. C. C. P. 257.

4. Capacity to Bequeath Personalty at Common Law. — Co. Litt. 89b; *Hyde v. Hyde*, Prec. Ch. 316; *Bishop v. Sharp*, 2 Vern. 469; *Arnold v. Earle*, 2 Lee Ecc. 529; *Whitmore v. Weld*, 2 Ch. Rep. 383; *Davis v. Baugh*, 1 Sneed (Tenn.) 477. See also *Hinckley v. Simmons*, 4 Ves. Jr. 160.

Origin of Rule. — The rule as to the capacity of infants to dispose of personal property by will is derived originally from the civil law, and was adopted by the English ecclesiastical courts having jurisdiction of the subject of

wills and intestates' estates. *Davis v. Baugh*, 1 Sneed (Tenn.) 477.

5. Cannot Devise Realty at Common Law. — 4 Kent's Com. 505; 1 Jarman on Wills 34.

6. England. — By the statute 1 Vict., c. 26, § 7, it is provided that no will made by any person under the age of twenty-one shall be valid, thus abolishing the distinction between personalty and realty in that respect.

7. In What States Minors Cannot Make Will. — Twenty-one is the age prescribed without any exception in a number of states.

8. Statutes in United States. — Thus in *Georgia* every person over fourteen may bequeath personalty. *O'Byrne v. Feeley*, 61 Ga. 77.

Exceptions in Favor of Married Infants. — In *Texas* every married person of whatsoever age, and in no other case. *Moore v. Moore*, 23 Tex. 637. Similar exceptions exist in other states. See the various statutes.

9. Legacy Not Chargeable on Realty. — *Banks v. Sherrod*, 52 Ala. 207.

Where Minor's Interest in Land Regarded as Personalty. — Under Code Ala. 1886, § 1951, providing that "all persons over the age of eighteen years by their last will may dispose of their personal property," it was held that where a testator devised real estate to his wife for life, directing the same to be sold at her death and the proceeds to be divided among his children, the interests of the children would be treated as personalty, and could be disposed of by will during the lifetime of the mother by a minor over eighteen years of age. *Allen v. Watts*, 98 Ala. 384.

10. England. — 1 Vict., c. 26, § 7.

11. United States. — *Banks v. Sherrod*, 52 Ala. 207; *Wells v. Seeley*, 47 Hun (N. Y.) 109; Stim. Am. Stat., § 2606.

of the states the common-law rule has been altered or modified to some extent by statute.¹

V. CAPACITY TO HOLD OFFICE — 1. In General. — Offices where judgment, discretion, and experience are essentially necessary to the proper discharge of the duties they impose, or offices of pecuniary and public responsibility, cannot be held by infants.² Thus it has been held that a minor cannot hold a judicial office, such as that of justice of the peace;³ nor can he hold the office of constable;⁴ nor serve as a juror.⁵

Offices Purely Ministerial. — In the absence of any statute to the contrary, a minor is eligible to hold an office which is purely ministerial in its nature, calling for the exercise of skill and diligence only, and not concerning the administration of justice.⁶ Thus a minor may properly hold the office of notary public.⁷

2. Capacity to Serve Process. — Since an infant cannot hold such offices as those of sheriff or constable, it follows that he is not capable of making a valid service of process on his own responsibility.⁸ Consequently the magistrate signing a mesne process cannot depute a minor to serve it.⁹ In some states, however, minors above a specified age are authorized by statute to serve process.¹⁰

May Serve as Deputy Sheriff or Constable. — In the absence of any statutory provision in that regard, a deputy sheriff is not an "officer," but is rather an agent of the sheriff under whose direction he is presumed to act and who is responsible for his conduct in that relation; and therefore a sheriff may appoint a minor as his deputy to execute process.¹¹ And for the same reason

1. Statutes in United States. — See the several statutes.

In *Georgia* every person over fourteen may devise realty. *O'Byrne v. Feeley*, 61 Ga. 77.

In *Iowa* and *Texas*, every married person of whatever age; and in the latter state, only in that case. *Moore v. Moore*, 23 Tex. 637.

2. Cannot Hold Office Requiring Judgment and Discretion. — *Golding's Petition*, 57 N. H. 146, 24 Am. Rep. 66.

In *New York*, by statute, no person can hold a civil office who at the time of his election or appointment is less than twenty-one years old. *Green v. Burke*, 23 Wend. (N. Y.) 490; *People v. Dean*, 3 Wend. (N. Y.) 438. But it is not the province of the officer to whom he makes application to have the oath of office administered, to refuse to administer the oath on account of the applicant's infancy. It is the duty of such officer, on the production of the commission, to administer the oath. *People v. Dean*, 3 Wend. (N. Y.) 438.

Clerk of Court of Requests. — An infant cannot be appointed to the office of clerk of a Court of Requests, where it is a part of the duties of that office to receive the money of the suitors. *Claridge v. Evelyn*, 5 B. & Ald. 81, 7 E. C. L. 32.

3. Cannot Be Justice of the Peace. — *Golding's Petition*, 57 N. H. 146, 24 Am. Rep. 66.

4. Cannot Be Constable. — *McConnell v. Kennedy*, 29 S. Car. 180; *Green v. Burke*, 23 Wend. (N. Y.) 490, wherein it was held that a minor executing process as a constable was a trespasser.

5. Minor Not Competent to Serve as Juror. — *Hines v. State*, 8 Humph. (Tenn.) 598.

Not Ground for Setting Aside Verdict. — Under Mass. Gen. Stat., c. 132, § 1, and c. 6, § 1, a minor is not qualified to serve on a jury. But where a minor was impaneled and sat as a juror it was held that the verdict would not be

set aside on that account, although the losing party did not learn of the infancy of the juror until after the verdict. *Wassum v. Feeney*, 121 Mass. 93, 23 Am. Rep. 258. To same effect see *Givens v. State*, (Tenn. 1899) 55 S. W. Rep. 1107.

6. May Hold Ministerial Office. — *U. S. v. Bixby*, 9 Fed. Rep. 78.

Deputy County Clerk. — In *Texas* there is no statute prohibiting a minor from serving as a deputy county clerk, and such deputy clerk, though a minor, may administer an oath to an applicant for a marriage license. *Harkreader v. State*, 35 Tex. Crim. 243.

Clerk of Militia Company. — In *Massachusetts* an infant over eighteen may act as clerk of a militia company. *Dewey, Petitioner*, 11 Pick. (Mass.) 265.

May Act as Agent. — An infant may be an agent, and his acts will bind his principal. See the article AGENCY, vol. 1, p. 945.

7. May Be Notary Public. — *U. S. v. Bixby*, 9 Fed. Rep. 78.

8. Cannot Serve Process on Own Responsibility. — *Tyler v. Tyler*, 2 Root (Conn.) 519; *Cuckson v. Winter*, 2 M. & R. 313, 17 E. C. L. 306.

9. Magistrate Cannot Deputize Infant. — *Harvey v. Hall*, 22 Vt. 211; *Vail v. Rowell*, 53 Vt. 109.

10. California — Eighteen Years of Age. — Under Code Civ. Pro. Cal., § 410, "any * * * person over the age of eighteen, not a party to the action," may serve process. *Williamson v. Cummings Rock Drill Co.*, 95 Cal. 652; *Barnes v. Vigoureaux*, 75 Cal. 376; *Lyons v. Cunningham*, 66 Cal. 42; *Doerfler v. Schmidt*, 64 Cal. 265; *Howard v. Galloway*, 60 Cal. 10.

11. May Serve as Deputy Sheriff. — *Moore v. Graves*, 3 N. H. 408; *Jamesville, etc., R. Co. v. Fisher*, 109 N. Car. 1; *State v. Toland*, 36 S. Car. 515; *Barrett v. Seward*, 22 Vt. 176.

an infant may serve as a deputy constable in executing process.¹

3. Capacity to Act as Executor or Administrator — Executor. — At common law infancy did not disqualify a person for the office of executor. By statute, however, an infant is disqualified from acting during his minority, and administration with the will annexed is to be granted if the infant was sole executor. But if he is one of several executors, they who are of sufficient age may execute the will.²

Administrator. — An infant is incompetent to act as administrator.³

4. Capacity to Act as Trustee. — A court will never appoint an infant as trustee, and if he is named as such in any instrument, some one, generally his guardian, will be appointed to act in his stead.⁴

VI. CAPACITY TO TESTIFY AS WITNESSES — 1. Presumption as to Competency — At Common Law. — Under the principles of the common law there is a presumption that every person over the age of fourteen years has common discretion and understanding until the contrary is shown,⁵ and a witness over that age will not be examined respecting his capacity, unless some reason creating suspicion is made to appear.⁶ But under the age of fourteen there is no presumption of competency.⁷

Under Statutes. — In some states there are statutory provisions changing the age limit fixed by the common law.⁸

2. Examination as to Infant's Competency. — There being no presumption that an infant under the age of fourteen years — or in some states, by statute, under ten — is competent to testify, it is the duty of the court, when such a witness is offered, to examine him and ascertain whether he has sufficient intelligence and understanding of the nature and obligation of an oath to be a competent witness;⁹ and the court should carry such investigation far enough to make the infant's competency apparent.¹⁰

In *Indiana* an infant may be deputed to serve a particular writ, but cannot act as a general deputy. *New Albany, etc., R. Co. v. Grooms*, 9 Ind. 243.

1. May Serve as Deputy Constable. — *McConnell v. Kennedy*, 29 S. Car. 180, wherein it was held that an arrest made by a special deputed minor was lawful.

2. See the title **EXECUTORS AND ADMINISTRATORS**, vol. 11, p. 752. And see also *Gusman's Succession*, 36 La. Ann. 299.

3. See the title **EXECUTORS AND ADMINISTRATORS**, vol. 11, p. 780. And see also *Pitcher v. Armat*, 5 How. (Miss.) 288; *Saum v. Coffelt*, 79 Va. 510; *Hindmarsh v. Southgate*, 3 Russ. 324.

After Removal of Disabilities. — Where a minor has been emancipated from the disabilities of nonage, under a statute allowing such a course, he may be appointed an administrator. *Lyne's Succession*, 12 La. Ann. 155; *Gaines's Succession*, 42 La. Ann. 699.

4. Capacity to Act as Trustee. — See the title **TRUSTS AND TRUSTEES**.

5. Competency Presumed at Fourteen. — *Flanagan v. State*, 25 Ark. 92; *People v. Bernal*, 10 Cal. 67; *Blackwell v. State*, 11 Ind. 196; *Vincent v. State*, 3 Heisk. (Tenn.) 120; *Missouri, etc., R. Co. v. Johnson*, (Tex. Civ. App. 1896) 37 S. W. Rep. 771; *Brown v. State*, 2 Tex. App. 115; *Oliver v. Com.*, 77 Va. 590; *State v. Michael*, 37 W. Va. 565.

6. Witness over Fourteen Not Examined as to Competency. — *Den v. Vancleve*, 5 N. J. L. 680.

7. Competency Not Presumed under Fourteen. — *People v. Bernal*, 10 Cal. 66; *Blackwell v. State*, 11 Ind. 196; *State v. Richie*, 28 La. Ann.

327, 26 Am. Rep. 100; *Brashears v. Western Union Tel. Co.*, 45 Mo. App. 433; *Missouri, etc., R. Co. v. Johnson*, (Tex. Civ. App. 1896) 37 S. W. Rep. 771; *Brown v. State*, 2 Tex. App. 115; *Oliver v. Com.*, 77 Va. 590.

8. Indiana. — Under Rev. Stat. Ind. 1881, §§ 1798, 496, and 497, persons over ten years of age are presumed to be competent as witnesses. *Blackwell v. State*, 11 Ind. 196; *Holmes v. State*, 88 Ind. 145.

Missouri. — Under Rev. Stat. Mo. 1889, § 8925, the age at which an infant is deemed *prima facie* incapable of testifying is fixed at ten years. *Brashears v. Western Union Tel. Co.*, 45 Mo. App. 433; *Ridenhour v. Kansas City Cable R. Co.*, 102 Mo. 270.

9. Court Must Examine Infant as to Competency. — *Carter v. State*, 63 Ala. 52, 35 Am. Rep. 4; *Donnelley v. Territory*, (Ariz. 1898) 52 Pac. Rep. 368; *People v. Bernal*, 10 Cal. 66; *Blackwell v. State*, 11 Ind. 197; *Holmes v. State*, 88 Ind. 145; *State v. Richie*, 28 La. Ann. 327, 26 Am. Rep. 100; *Hughes v. Detroit, etc., R. Co.*, 65 Mich. 10; *Brashears v. Western Union Tel. Co.*, 45 Mo. App. 433; *Brown v. State*, 2 Tex. App. 115.

Party May Require Examination. — The party against whom a witness of tender years is called to testify, may require that he be examined as to his understanding of the nature and obligations of an oath. *People v. McNair*, 21 Wend. (N. Y.) 608.

10. Insufficient Examination. — An examination for the purpose of testing the competency of a child of tender years to testify as a witness, which develops nothing except that he does not know his age, but does know his

Examination Should Be in Open Court. — The examination is part of the trial and should be made publicly in open court by the judge.¹

One Examination Sufficient. — The examination is only for the purpose of satisfying the judge as to the child's competency,² and after the witness has been pronounced competent by the judge he cannot again be examined before the jury in that regard.³

Examination After Witness Has Testified. — It has been held that the examination need not be made before the witness is sworn, and that, if the necessary information is elicited after he has testified in the case, it is sufficient.⁴

3. Tests of Competency — No Age Limit Fixed by Law. — The ancient rule of the common law seems to have been that no infant should be sworn who was under nine years of age.⁵ But in modern times the law fixes no precise age at which infants are deemed too young to testify.⁶

Intelligence the Proper Test. — Intelligence and not age is the proper test by which the competency of such witnesses must be determined; and where it appears that an infant has sufficient intelligence to receive just impressions of the facts respecting which he is to testify, and sufficient capacity to relate them correctly, and has received sufficient instruction to appreciate the nature and obligations of an oath, he should be admitted to testify, no matter what his age.⁷ And this is so even where there is a statute making infants not

father's name and the number and names of the days of the week, and can count to thirty-two, is not sufficiently comprehensive to authorize a conclusion that such child understands the nature of an oath. *Gaines v. State*, 99 Ga. 703.

In *Murphy v. State*, 36 Tex. Crim. 24, where the preliminary examination of a child of ten years showed only that he partially understood the nature of an oath, but was ignorant regarding the punishment of perjury by the courts, it was held that such investigation was incomplete, and should have been pushed further, so that it might appear whether or not the infant had sufficient intelligence to understand the obligations of the oath.

1. Examination Should Be in Open Court. — *State v. Morea*, 2 Ala. 275; *Simpson v. State*, 31 Ind. 90; *People v. McNair*, 21 Wend. (N. Y.) 608. But see *McGuire v. People*, 44 Mich. 286, 38 Am. Rep. 265.

The court should act on its own judgment, upon a public examination when the defendant is present, and it is improper to rely on the result of a private examination conducted by gentlemen appointed by the court to make such an examination. *Simpson v. State*, 31 Ind. 90. See also *State v. Morea*, 2 Ala. 275.

2. Examination Only to Satisfy Judge. — *State v. Whittier*, 21 Me. 341, 38 Am. Dec. 272.

3. Cannot Be Again Examined Before Jury. — *Oliver v. Com.*, 77 Va. 590.

Examination on Previous Trial of Same Case. — Where an infant witness had been examined on a previous trial of the same case it was held that another examination was not necessary if the judge was satisfied of her competency. *People v. Baldwin*, 117 Cal. 244.

4. Examination After Witness Has Testified. — *State v. Whittier*, 21 Me. 341, 38 Am. Dec. 272. See also *People v. Welsh*, 63 Cal. 167.

5. Early Rule — Infant under Nine Incompetent. — *Rex v. Travers*, 1 Stra. 700; *State v. Whittier*, 21 Me. 341, 38 Am. Dec. 272; *Com. v. Hutchinson*, 10 Mass. 225; *State v. Edwards*, 79 N. Car. 648.

6. No Precise Age Fixed by Law. — *Rex v. Brasier*, 1 Leach C. C. 199; *Donnelley v. Territory*, (Ariz. 1898) 52 Pac. Rep. 368; *Flanagin v. State*, 25 Ark. 92; *People v. Bernal*, 10 Cal. 66; *Draper v. Draper*, 68 Ill. 17; *State v. Denis*, 19 La. Ann. 119; *State v. Richie*, 28 La. Ann. 327, 26 Am. Rep. 100; *State v. Nelson*, 132 Mo. 184; *Davis v. State*, 31 Neb. 247; *State v. Jackson*, 9 Oregon 457; *Vincent v. State*, 3 Heisk. (Tenn.) 120; *Brown v. State*, 2 Tex. App. 115.

7. Intelligence, Not Age, the Proper Test — England. — *Rex v. Brasier*, 1 Leach C. C. 199. *Alabama.* — *Wade v. State*, 50 Ala. 164; *State v. Morea*, 2 Ala. 275; *Grimes v. State*, 105 Ala. 86.

Arizona. — *Donnelley v. Territory*, (Ariz. 1898) 52 Pac. Rep. 368.

Arkansas. — *Flanagin v. State*, 25 Ark. 92.

California. — *People v. Bernal*, 10 Cal. 66.

Georgia. — *Minton v. State*, 99 Ga. 254.

Illinois. — *Draper v. Draper*, 68 Ill. 17; *Eppstein v. Berkowsky*, 64 Ill. App. 498.

Indiana. — *Blackwell v. State*, 11 Ind. 196.

Kentucky. — *White v. Com.*, 96 Ky. 180.

Louisiana. — *State v. Washington*, 49 La. Ann. 1602; *State v. Denis*, 19 La. Ann. 119; *State v. Ross*, 18 La. Ann. 342.

Massachusetts. — *Com. v. Hutchinson*, 10 Mass. 225; *Com. v. Mullins*, 2 Allen (Mass.) 295.

Michigan. — *McGuire v. People*, 44 Mich. 286, 38 Am. Rep. 265; *Washburn v. People*, 10 Mich. 372.

Missouri. — *State v. Scanlan*, 58 Mo. 204; *State v. Doyle*, 107 Mo. 36.

Nebraska. — *Davis v. State*, 31 Neb. 247.

North Carolina. — *State v. Edwards*, 79 N. Car. 648.

Oregon. — *State v. Jackson*, 9 Oregon 457.

Pennsylvania. — *Com. v. Wilson*, 186 Pa. St. 1; *Com. v. Carey*, 2 Brews. (Pa.) 404.

Tennessee. — *Logston v. State*, 3 Heisk. (Tenn.) 414; *Vincent v. State*, 3 Heisk. (Tenn.) 120.

Texas. — *Davidson v. State*, 39 Tex. 129;

punishable for perjury.¹ Mere ignorance of the punishment prescribed by law for false swearing will not disqualify a witness, if he shows that he is intelligent, comprehends the obligation to speak the truth, and believes that any deviation therefrom will be followed by appropriate punishment of some kind.² But if it appears that an infant offered as a witness is not possessed of sufficient intelligence to understand the meaning of the oath or to narrate facts accurately, the court should exclude him.³

Necessity for Sense of Moral Responsibility. — A child may be intelligent enough to relate facts correctly, and yet not be sufficiently intelligent to understand the nature of an oath;⁴ and therefore some courts lay particular stress on the point that the admissibility of such a witness depends not only upon his possessing a competent amount of understanding, but also, in part, upon his having received such a degree of religious instruction as will enable him to comprehend the moral obligations imposed upon him by the oath.⁵ But in

Brown v. State, 2 Tex. App. 115; *Missouri*, etc. R. Co. v. *Johnson*, (Tex. Civ. App. 1896) 37 S. W. Rep. 771; *Chapman v. State*, (Tex. Crim. 1897) 42 S. W. Rep. 559; *Partin v. State*, (Tex. Crim. 1895) 30 S. W. Rep. 1067; *Comer v. State*, (Tex. Crim. 1892) 20 S. W. Rep. 547; *Parker v. State*, 33 Tex. Crim. 111.

Virginia. — *Oliver v. Com.*, 77 Va. 590.

In *Arkansas* a child under ten cannot testify in civil cases, but the common-law rule applies to criminal cases. *Warner v. State*, 25 Ark. 447.

Examples of Infants Held to Be Competent. — In *Missouri*, etc., R. Co. v. *Johnson*, (Tex. Civ. App. 1896) 37 S. W. Rep. 771, a child of ten who stated that it was wrong to tell a story, and that if he did the old buggerman would get him and burn him, was held to be competent.

In *State v. Scanlan*, 58 Mo. 204, a child of nine who stated that she was the daughter of the defendant, that she knew her prayers, could read some, believed in God, and thought it wrong to tell lies, was held to be competent.

In *Minton v. State*, 99 Ga. 254, a child of eight who stated that he did not know what an oath was, but also said he knew what it was "to go up in the court-house and swear you have to tell the truth," that the law would punish him if he told a story, and that he was bound to tell the truth when sworn, was held to be competent.

In *Parker v. State*, 33 Tex. Crim. 111, a boy of twelve who stated that "it was wrong to tell a lie," and that if he told a lie he would be punished, was held competent.

Infant Held Incompetent on Former Trial. — The fact that an infant was too young to be sworn on a former trial will not prevent it from being competent on a new trial of the same case. *Kelly v. State*, 75 Ala. 21, 51 Am. Rep. 422.

Application Involving Custody of Infant. — Upon an application involving the question of the custody of a boy of thirteen, the boy himself is a competent witness, and his wishes ought to be consulted in the matter. *Spears v. Snell*, 74 N. Car. 210.

1. **Where Infant Not Punishable for Perjury.** — *Code Ga.*, § 4295; *Johnson v. State*, 61 Ga. 25.

2. **Ignorance of Punishment for Perjury Will Not Disqualify.** — *Blackwell v. State*, 11 Ind. 196; *Com. v. Mullins*, 2 Allen (Mass.) 295. See also *State v. Doyle*, 107 Mo. 36; *Epstein v. Berkowsky*, 64 Ill. App. 498.

In *Davidson v. State*, 39 Tex. 129, a child of ten years who stated that she "did not know what God or the laws of the country would do to her if she swore falsely, but that she would tell the truth," was allowed to testify.

3. **Infants Incompetent from Lack of Intelligence.** — *Williams v. State*, 12 Tex. App. 127; *Smith v. State*, 41 Tex. 352.

In *Donnelley v. Territory*, (Ariz. 1898) 52 Pac. Rep. 368, where a child six years and eleven months of age revealed on his examination practically no knowledge of the nature of an oath or the consequences of falsehood, except that he answered that people that told a lie would go to jail; and it appeared that he was under the instructions of his mother, whose evidence he strongly corroborated; it was held that the child was incompetent.

Dying Declaration of Incompetent Infant. — In *Rex v. Pike*, 3 C. & P. 598, 14 E. C. L. 473, the dying declaration of a child four years of age was held inadmissible because of the youth of the declarant.

4. **Ignorance of Nature of Oath.** — *Holst v. State*, 23 Tex. App. 1, 59 Am. Rep. 770.

5. **Must Have Sense of Moral Responsibility.** — *Beason v. State*, 72 Ala. 191; *Carter v. State*, 63 Ala. 52, 35 Am. Rep. 4; *State v. Washington*, 49 La. Ann. 1602; *State v. Edwards*, 79 N. Car. 648; *State v. Belton*, 24 S. Car. 185, 58 Am. Rep. 245; *State v. Michael*, 37 W. Va. 565.

Examples of Incompetent Infants. — In *Beason v. State*, 72 Ala. 191, a child eleven years old who said she had never heard of God, heaven, or hell, and did not know that she would be punished if she swore falsely, otherwise than by being put in jail, was held to be incompetent. See also *Carter v. State*, 63 Ala. 52, 35 Am. Rep. 4.

In *State v. Belton*, 24 S. Car. 185, 58 Am. Rep. 245, a boy of twelve who could repeat the Lord's prayer, but had never heard of a God, or of a heaven, or of a hell, or of a devil, and who had heard that the bad man caught those who lied and cursed, etc., was held incompetent. (*McGowan, J., dissenting.*)

In *State v. Michael*, 37 W. Va. 565, a child of five, who to the question asked her by the judge, "Is it bad to tell stories?" answered, "Yes, ma'am;" to the question, "What becomes of little girls that tell stories?" answered, "The bad man gets them;" and to the question, "What does the court do with them?" answered, "Puts them in jail;" and who, when asked on the witness stand if her

some cases infants have been admitted to testify where they showed themselves able to give intelligent answers, although ignorant of God and the Bible.¹

Where Belief in Divine Punishment Not Essential. — Where, by statute, no belief in divine rewards and punishments is essential to the competency of a witness, a child who understands that he is brought into court to tell the truth, that it is wrongful to testify falsely, and that he will be punished if he does so, is competent.²

Allowance Made for Nervous Agitation. — In arriving at an opinion concerning the competency of an infant witness, the court may properly make allowance for the embarrassment and nervous agitation of a child placed among unfamiliar surroundings.³

4. Instructing Witness as to Nature of Oath. — Where it appears to the presiding judge that the witness does not sufficiently understand the nature and obligations of an oath, it is within his discretion to permit the child to be properly instructed in that respect and afterward to be sworn, provided such child be of sufficient age and intellect to receive instruction.⁴ But where the infant is too young to receive instruction intelligently, or to comprehend properly the meaning and consequences of the oath, such instruction will not render it competent to testify.⁵

5. Competency a Matter for Discretion of Court. — Whether an infant of tender years has sufficient mental capacity and sense of moral obligation to be competent as a witness, is a question for the discretion of the trial judge,⁶ and

mother had ever taught her anything about God or Christ, answered "No," and said that she knew nothing about God, "except that he makes babies and throws them down to the doctors," was held not competent.

1. Infants Competent though Ignorant of God and the Bible. — In *White v. Com.*, 96 Ky. 180, an infant under twelve who has sufficient intelligence to narrate truthfully the facts to which his attention is directed is competent although wholly ignorant of God and of the evil of giving false testimony.

In *Com. v. Carey*, 2 Brews. (Pa.) 404, a child of eight who said if she did not tell the truth she would "go to the big fires of hell," but did not know what an oath was or what the Bible was, was allowed to testify, after being instructed regarding the nature of an oath.

And see the dissenting opinion of McGowan, J., in *State v. Belton*, 24 S. Car. 185, 58 Am. Rep. 245.

2. Minnesota — Belief in Divine Punishment Unnecessary. — *State v. Levy*, 23 Minn. 104, 23 Am. Rep. 678.

3. Allowance for Nervous Agitation of Witness. — See *State v. Scanlan*, 58 Mo. 204.

4. Witness May be Instructed as to Nature of Oath. — *Rex v. White*, 1 Leach C. C. 430, note a; *Com. v. Lynes*, 142 Mass. 577, 56 Am. Rep. 709; *Com. v. Carey*, 2 Brews. (Pa.) 404; *Com. v. Wilson*, 186 Pa. St. 1; *Ake v. State*, 6 Tex. App. 398, 32 Am. Rep. 586. See also *Reg. v. Nicholas*, 2 C. & K. 246, 61 E. C. L. 246; *Carter v. State*, 63 Ala. 52, 35 Am. Rep. 4; *Donnelley v. Territory*, (Ariz. 1898) 52 Pac. Rep. 368.

In *Com. v. Lynes*, 142 Mass. 577, 56 Am. Rep. 709, a child of thirteen, between the time she was first offered as a witness and the next day, when she was sworn, was instructed by a minister as to the nature of an oath, and was told that if after taking the oath she told what was not true God would punish her. It was

held that she was not incompetent on that account.

5. Infant Incapable of Receiving Instruction Intelligently. — *Reg. v. Nicholas*, 2 C. & K. 246, 61 E. C. L. 246; *Donnelley v. Territory*, (Ariz. 1898) 52 Pac. Rep. 368; *State v. Michael*, 37 W. Va. 565.

In *Rex v. Williams*, 7 C. & P. 320, 32 E. C. L. 524, it appeared that at the time of the crime, sixteen weeks before the trial, the infant had never heard of God or of a future state of rewards or punishments, and that she never prayed, and did not know the nature of an oath. She had, before the trial, been twice visited by a clergyman, who instructed her as to the nature of an oath. At the trial she said she would go to hell if she told a lie, and hell was under the kitchen grate. She showed no intelligence as to religion or the future state. Her evidence was rejected, the court saying that "the effect of the oath upon the conscience of the child should arise from religious feelings of a permanent nature, and not merely from instructions, confined to the nature of an oath, recently communicated to her for the purpose of this trial."

6. Question for Discretion of Trial Judge — *Alabama*. — *Wade v. State*, 50 Ala. 164.

California. — *People v. Bernal*, 10 Cal. 67.

Georgia. — *Johnson v. State*, 61 Ga. 35.

Illinois. — *Epstein v. Berkowsky*, 64 Ill. App. 498.

Louisiana. — *State v. Denis*, 19 La. Ann. 119.

Maryland. — *Freeny v. Freeny*, 80 Md. 406.

Massachusetts. — *Com. v. Mullins*, 2 Allen (Mass.) 295.

Missouri. — *State v. Nelson*, 132 Mo. 184; *State v. Doyle*, 107 Mo. 36; *Ridenhour v. Kansas City Cable R. Co.*, 102 Mo. 270.

Nebraska. — *Davis v. State*, 31 Neb. 247.

New Jersey. — *Van Pelt v. Van Pelt* 3 N. J. L. 236; *Anonymous*, 3 N. J. L. 487.

his ruling in that regard will not be disturbed except in case of a manifest abuse of discretion or where the witness is admitted or rejected upon an erroneous view of a legal principle.¹ But the trial judge should be cautious in admitting such witnesses,² and where it clearly appears from the record that he has abused his discretion, it will furnish ground for reversal on appeal.³

6. Credibility a Question for Jury. — The amount of credit to be given to the testimony of a witness of tender years is a question for the consideration of the jury, who should regard the age, the understanding, and the sense of accountability for moral conduct, in coming to their conclusion.⁴

7. Receiving Unsworn Testimony of Infants. — In some states it is provided by statute that infants of tender years may be permitted to testify without being sworn.⁵

In the Absence of Statutory Authority, however, an infant cannot under any circumstances be allowed to testify except on oath.⁶

VII. LIABILITY UPON CONTRACTS — 1. In General — Contracts of Infants Distinguished. — The contracts of infants, in respect to their validity, may be divided into three classes: First, those which are absolutely void; second, those which are merely voidable; and third, those which are valid and binding upon the infant.⁷

Ancient Rule. — The rule which distinguishes these classes was formerly laid down as follows: When the contract is necessarily prejudicial to the interest of the infant, it is void; when it is manifestly for his benefit, it is valid; and

New York. — *People v. Smith*, 86 Hun (N. Y.) 485.

North Carolina. — *State v. Manuel*, 64 N. Car. 601; *State v. Edwards*, 79 N. Car. 648.

Oregon. — *State v. Jackson*, 9 Oregon 457.

Texas. — *Davidson v. State*, 39 Tex. 129; *Parker v. State*, 33 Tex. Crim. 111; *Williams v. State*, 12 Tex. App. 127; *Missouri, etc., R. Co. v. Johnson*, (Tex. Civ. App. 1896) 37 S. W. Rep. 771.

Admitting Witness Equivalent to Decision on Competency. — Where the trial judge allows an infant to testify after objection has been made on account of his youth, it amounts to a decision that the witness is competent in the opinion of the court. *Ridenhour v. Kansas City Cable R. Co.*, 102 Mo. 270.

1. Ruling Not Disturbed Except for Manifest Abuse — Alabama. — *Wade v. State*, 50 Ala. 164.

California. — *People v. Craig*, 111 Cal. 460; *People v. Baldwin*, 117 Cal. 244.

Georgia. — *Peterson v. State*, 47 Ga. 524; *Minton v. State*, 99 Ga. 254.

Louisiana. — *State v. Richie*, 28 La. Ann. 327, 26 Am. Rep. 100.

Michigan. — *People v. Walker*, 113 Mich. 367.

Minnesota. — *State v. Levy*, 23 Minn. 104, 23 Am. Rep. 678.

Missouri. — *State v. Scanlan*, 58 Mo. 204; *Ridenhour v. Kansas City Cable R. Co.*, 102 Mo. 270; *State v. Nelson*, 132 Mo. 184.

Oregon. — *State v. Jackson*, 9 Oregon 457.

Texas. — *Davidson v. State*, 39 Tex. 129; *Brown v. State*, 2 Tex. App. 115; *Brown v. State*, 6 Tex. App. 286; *Ake v. State*, 6 Tex. App. 398, 32 Am. Rep. 586; *Parker v. State*, 33 Tex. Crim. 111.

West Virginia. — *State v. Michael*, 37 W. Va. 565.

Where Witness in Fact over Fourteen. — Where in fact, a witness was upwards of fourteen, but it did not so appear at the trial, the court refused to reverse on account of the rejection

of the witness. *Van Pelt v. Van Pelt*, 3 N. J. L. 236.

2. Trial Judge Should Be Cautious. — *Simpson v. State*, 31 Ind. 90.

3. Reversal for Abuse of Discretion. — *Williams v. State*, 12 Tex. App. 127.

4. Credibility a Question for the Jury. — *State v. Whittier*, 21 Me. 341. 38 Am. Dec. 272; *Com. v. Hutchinson*, 10 Mass. 225; *Washburn v. People*, 10 Mich. 372; *McGuire v. People*, 44 Mich. 286, 38 Am. Rep. 265; *State v. Scanlan*, 58 Mo. 204; *Davis v. State*, 31 Neb. 247; *State v. Le Blanc*, 3 Brev. (S. Car.) 339.

5. Michigan. — Under 3 How. Annot. Stat. Mich., § 7546a, where a child under ten years of age shows on examination to the satisfaction of the court that it has sufficient intelligence and sense of obligation to tell the truth to be safely admitted to testify, it may be allowed to give its testimony on a promise to tell the truth instead of upon oath. *People v. Walker*, 113 Mich. 367.

New York — Necessity for Corroboration. — Code Crim. Pro. N. Y., § 392, provides that when a child under the age of twelve does not, in the opinion of the court, understand the nature of an oath, its unsworn testimony may be received, "but no person shall be held or convicted of an offense upon such testimony unsupported by other evidence." However, where an infant under twelve testifies on oath, no corroboration is required. *People v. O'Brien*, 74 Hun (N. Y.) 264.

6. Must Be Sworn. — *Rex v. Powell*, 1 Leach C. C. 110; *Rex v. Brasier*, 1 Leach C. C. 199. See also *People v. Frindel*, 58 Hun (N. Y.) 482.

Statements of Infant to Others Not Admissible. — Where an infant is adjudged incompetent on account of its youth, evidence of statements made by such infant to its mother, regarding the offense for which the defendant is being tried, is not admissible. *Reg. v. Nicholas*, 2 C. & K. 246, 61 E. C. L. 246.

7. Classification of Contracts. — *Robinson v.*

when of an uncertain nature as to prejudice or benefit, it is neither void nor binding, but voidable only at his election.¹

Rule Abandoned. — Although this rule has come down to us from a very early period of the common law, it will be found to rest on little real authority, and it is doubtful if the courts have ever felt themselves bound by it in determining the validity of infants' contracts.² But whether this be true or not, it is certain that they have long since abandoned it as unsatisfactory and unsafe in its application, and as often contravening the principle upon which it was founded, namely, the benefit of the infant. It is certainly more conducive to his benefit, to afford him the opportunity of affirming, when of age, a contract which he may determine to be beneficial, than for the court or jury to determine the question for him.³ No court of the present day would hold an infant's contract void simply because it was shown to be to his prejudice, or hold it binding merely because it was manifestly for his benefit. It might be for the benefit of an infant to appoint an attorney or agent to sell his lands, but such an act would be clearly void; but a conveyance by the infant himself of his lands might be to his prejudice, and yet under certain circumstances would be voidable only.⁴

Modern Rule. — The validity of an infant's contract at the present day is to be determined, therefore, by other considerations than its prejudice or benefit to him. There is no general test that can be applied, but the character of every contract which is now held either absolutely void or binding is determined by reasons peculiar to it, though in all, public policy may perhaps be recognized as the dominant factor. These contracts together form only a small part of the obligations which an infant may assume, and can therefore be more conveniently treated as exceptions to the general rule, which is that the contracts of infants are voidable by them.⁵

2. Contracts Which Are Void — *a.* **AT COMMON LAW.** — Just what contracts of infants were absolutely void at ancient common law, is a matter which is involved in doubt on account of the loose use of the terms "void" and "voidable" in the books.⁶ Of them, however, none have survived the evolu-

Weeks, 56 Me. 102; *Philpot v. Bingham*, 55 Ala. 435; *Wambole v. Foote*, 2 Dak. 1.

1. Validity of Infants' Contracts — **Ancient Rule.** — 2 Kent's Com. 193; *Keane v. Boycott*, 2 H. Bl. 511; *Green v. Wilding*, 59 Iowa 679, 44 Am. Rep. 696; *Robinson v. Weeks*, 56 Me. 102; *Baker v. Lovett*, 6 Mass. 78, 4 Am. Dec. 88; *Oliver v. Houdlet*, 13 Mass. 237, 7 Am. Dec. 134; *Lynch v. Johnson*, 109 Mich. 640; *Radford v. Westcott*, 1 Desaus. (S. Car.) 596; *Wheaton v. East*, 5 Yerg. (Tenn.) 41, 26 Am. Dec. 251.

2. Rule Criticised. — See Pollock on Contracts (4th Eng. ed.), pp. 52-59.

3. Rule Abandoned. — *Clark v. Goddard*, 39 Ala. 164, 84 Am. Dec. 777.

In *Hyer v. Hyatt*, 3 Cranch (C. C.) 276, the court say: "The question whether the contract be prejudicial to the infant is a question of fact, not of law, and is too uncertain to become the test of the validity of the contract. It is a question which depends upon many circumstances, and cannot always be ascertained at the time of the contract." And see *Reed v. Batchelder*, 1 Met. (Mass.) 559.

4. *Fonda v. Van Horne*, 15 Wend. (N. Y.) 631, 30 Am. Dec. 77.

5. Contracts of Infants Voidable — *Arkansas*, — *Savage v. Lichlyter*, 59 Ark. 1.

Colorado. — *Kendrick v. Neisz*, 17 Colo. 506.

Georgia. — *Strain v. Wright*, 7 Ga. 568; *Bryan v. Walton*, 14 Ga. 135.

Massachusetts. — *Oliver v. Houdlet*, 13 Mass. 237, 7 Am. Dec. 134; *Whitney v. Dutch*, 14 Mass. 457, 7 Am. Dec. 229; *Thompson v. Hamilton*, 12 Pick. (Mass.) 425, 23 Am. Dec. 619.

New York. — *Slocum v. Hooker*, 13 Barb. (N. Y.) 536.

Texas. — *Carpenter v. Pridgen*, 40 Tex. 32; *Munk v. Weidner*, 9 Tex. Civ. App. 491.

6. Confusion of Terms "Void" and "Voidable."

— In many cases the courts seem to have used the terms "void" and "voidable" as interchangeable, and the word "void" has merely denoted that the contract at the time the suit was brought was not binding, the question whether the contract might not be ratified being left undecided. Thus the case of *Conroe v. Birdsall*, 1 Johns. Cas. (N. Y.) 127, 1 Am. Dec. 105, is cited as an authority that an infant's bond is void, and the headnote of the case so states the decision; but the language used was that "the bond is voidable only at the election of the infant." And in *Curtin v. Patton*, 11 S. & R. (Pa.) 305, the court, in speaking of an infant's contract of suretyship, calls it in one place "absolutely void," and yet in the very next line are found the expressions "confirming" and "distinct act of confirmation," showing that the court did not mean to hold the contract incapable of ratification. So also in *Thornton v. Illingworth*, 2 B. & C. 824, 9 E. C. L. 256, Bayley, J., calls an infant's trading

tion of ideas as shown in the abandonment of the old and the adoption of the modern rule, save one, warrant of attorney. The reason why this was left has never been satisfactorily explained, and it stands upon authority purely the sole remaining representative of the class of void contracts.¹

b. UNDER STATUTES. — **England — Infants' Relief Act 1874.** — By statute in England it is now provided that "all contracts, whether by specialty or by simple contract, entered into by infants for the repayment of money lent or to be lent, or for goods supplied (other than contracts for necessities), and all accounts stated with infants, shall be absolutely void;" and that "no action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age."²

The Effect of This Act is to reduce all voidable contracts which are subsequently ratified to the position of agreements of imperfect obligation, that is, such as cannot be directly enforced, but are valid for all other purposes.³

3. Contracts Which Are Binding — **a. CONTRACTS IN DISCHARGE OF LEGAL OBLIGATIONS.** — Turning to the other extreme and considering the contracts

contract "void," but all that the case decided was that ratification after action brought would not avail, and the case plainly shows that if the ratification had been before suit brought, the infant would have been held. For other cases showing how "void" is often interpreted to mean "voidable," see *Van Shaack v. Robbins*, 36 Iowa 201; *Allis v. Billings*, 6 Met. (Mass.) 415, 39 Am. Dec. 744; *State v. Richmond*, 26 N. H. 232; *Pearsoll v. Chapin*, 44 Pa. St. 9; *Terrill v. Auchauer*, 14 Ohio St. 80.

1. See the title **AGENCY**, vol. 1, p. 940.

Release of Guardian. — A release executed by a minor to his guardian is regarded as void; for the law, considering the character of the relation subsisting between the parties, the state of ignorance in which an infant usually is in relation to the condition of his affairs, and the inducement to a guardian who has abused his trust, to seek shelter behind a release improperly obtained, will not allow him to take advantage of his position to secure an advantage over the ward. *Fridge v. State*, 3 Gill & J. (Md.) 103 20 Am. Dec. 463.

But a female eighteen years of age may execute a valid release to her former guardian, who has been removed, and his place supplied by another. *McClellan v. Kennedy*, 8 Md. 230. And see the title **GUARDIAN AND WARD**, vol. 15, p. 85.

2. 37 & 38 Vict., c. 62.

3. Effect of Infants' Relief Act 1874. — *Pollock on Contr.* 62.

Application. — The Act has been held to apply to ratifications made, after the passage of the Act, of contracts made before that time. *Ex p. Kibble*, 44 L. J. Bankr. 63, L. R. 10 Ch. 373, 32 L. T. N. S. 138.

A Promise to Marry is within the act. *Coxhead v. Mullis*, 3 C. P. D. 439. But see, as to whether a ratification after majority may not be regarded as a new promise, *Northcote v. Doughty*, 4 C. P. D. 385; *Ditcham v. Worrall*, 5 C. P. D. 410; *Holmes v. Brierley*, 36 W. R. 795.

Compromise of Debt. — The defendant, who

had during infancy become jointly with the others indebted to a firm, compromised the matter after attaining his majority by giving her two acceptances for fifty pounds each. One of these bills was indorsed to the plaintiff, who took it with notice of the circumstances under which it was given. It was held that the defendant was not liable. *Smith v. King*, (1892) 2 Q. B. 543.

Acceptance of Bill of Exchange. — But in *Belfast Banking Co. v. Doherty*, 4 L. R. Ir. 124, it was held that an action may be maintained by an indorsee against the acceptor of a bill of exchange accepted by the latter after attaining his majority for a debt contracted during infancy, and after the passage of the Infants' Relief Act 1874.

For Cases Where the Ratification Was Held Equivalent to a New Contract see *Brown v. Harper*, 3 Reports 585, 68 L. T. N. S. 488; *In re Foulkes*, 69 L. T. N. S. 183; *Whittingham v. Murdy*, 60 L. T. N. S. 956.

By Statute in Connecticut it is provided that "no person under the government of a parent, guardian or master shall be able to make any contract or bargain, which in the law shall be accounted valid." In *Alsop v. Todd*, 2 Root (Conn.) 105, the court considered the above statute as reviving the common law and rendering absolutely void all contracts made within its prohibitions; but in *Rogers v. Hurd*, 4 Day (Conn.) 57, 4 Am. Dec. 182, where the construction of the statute came a second time under review, the court limited the doctrine before announced by holding void only such contracts by infants as were against their interests, contracts with the semblance of advantage, being merely voidable.

If the infant could derive, in any event, no possible benefit from the contract, it is void. Thus a promissory note executed by an infant as the surety of another is a contract against interest, and has been held void. *Maples v. Wightman*, 4 Conn. 376, 10 Am. Dec. 149.

Admissions. — As a general rule, infants are not bound by their admissions. *Lunday v. Thomas*, 26 Ga. 537.

which are binding upon an infant, it may in the first place be laid down as an elementary rule that, if an infant is under a legal obligation to do an act, he may by a fair and reasonable contract bind himself to perform it.¹

Execution of Trust. — Thus, if he takes the legal title to property in trust for another, and in the execution of that trust makes a deed, he cannot afterwards disaffirm or avoid it on the plea of infancy, since the act is merely one that a court of equity would have compelled him to perform.²

Bond for Support of Bastard Child. — So, also, if an infant who is under a legal obligation to indemnify the city, town, or county against the expense of maintaining his bastard child, executes a bond in a bastardy proceeding,³ or contracts with the mother for its support,⁴ such a contract is binding upon him.

Bond for Fine in Criminal Prosecution. — An infant's property is liable to be taken in execution to satisfy a fine and costs imposed upon him in a criminal prosecution, and if in such case the infant gives security for the fine and costs, and the surety pays the same and on motion takes judgment over against the minor, this judgment, though arising out of a civil contract, is valid and binding upon the infant.⁵

b. CONTRACTS FOR MILITARY SERVICE. — The second exception to the general rule is that of contracts for enlistment in the military and naval service. This exception is based upon the terms of an express statute granting authority to enlist in the public service minors of sufficient age and capacity to bear arms. These contracts of enlistment are consequently held binding, from the very necessity of the case, for of what avail would the services of a soldier or sailor be if he might on the plea of infancy desert at will?⁶

1. Contracts in Discharge of Legal Obligations. — *People v. Moores*, 4 Den. (N. Y.) 519, 47 Am. Dec. 272; *Bavington v. Clarke*, 2 P. & W. (Pa.) 115, 21 Am. Dec. 432. See also *Bradford v. Robinson*, 7 Houst. (Del.) 29; *Coke Litt.* 172a. And see the title **BONDS**, vol. 4, p. 626. But the doctrine does not apply in the case of a voluntary distribution, for the law, though it would have coerced a distribution, might not have made just such a one as was made by the parties. *Kilcrease v. Shelby*, 23 Miss. 161.

2. Execution of Trusts. — *Zouch v. Parsons*, 3 Burr. 1801; *Elliott v. Horn*, 10 Ala. 348, 44 Am. Dec. 488; *Nordholt v. Nordholt*, 87 Cal. 552, 22 Am. St. Rep. 268; *Prouty v. Edgar*, 6 Iowa 353; *Bridges v. Bidwell*, 20 Neb. 185; *Starr v. Wright*, 20 Ohio St. 97. See also *Sheldon v. Newton*, 3 Ohio St. 494; *Diffin v. Simpson*, 5 N. Bruns. 194.

A father who entered land in the name of his son, for the purpose of defrauding his creditors, afterwards sold the land, and by his direction the son conveyed during infancy to the purchaser. On his coming of age, he conveyed the same land to another, who brought suit. It was held that as his conveyance during infancy was such as the law would have compelled him to make, he could not disaffirm it on attaining his majority. *Elliott v. Horn*, 10 Ala. 348, 44 Am. Dec. 488.

Conveyance by Minor Who Is Merely Equitable Mortgagee. — When a title bond for land purchased is assigned by a father to a minor son as security for a liability assumed by the latter as surety for his father on a bond, the assignment is merely in the nature of an equitable mortgage (see the title **EQUITABLE MORTGAGES**, vol. 11, p. 130), and becomes inoperative when the debt for which the son is surety is paid, so that the father having sold the property to a

third person conveying title by a deed in which the son joins, the title passes to such purchaser upon the satisfaction of the debt, and the son, on coming of age, is not entitled to have the sale set aside and the property decreed to him. *Trader v. Jarvis*, 23 W. Va. 100.

3. Bond for Support of Bastard Child. — *People v. Moores*, 4 Den. (N. Y.) 519, 47 Am. Dec. 272; *McCall v. Parker*, 13 Met. (Mass.) 372, 46 Am. Dec. 735; *Bordentown Tp. v. Wallace*, 50 N. J. L. 13. See also the titles **BASTARDY**, vol. 3, p. 890, note; **BONDS**, vol. 4, pp. 626, 627.

4. Contract with Mother of Bastard. — *Gavin v. Burton*, 8 Ind. 69; *Stowers v. Hollis*, 83 Ky. 544.

5. Bond for Fine in Criminal Prosecution. — *Dial v. Wood*, 9 Baxt. (Tenn.) 206.

An Infant Imprisoned in Execution in a Civil Suit is entitled to a discharge from imprisonment on assigning his property, in compliance with the provisions of the statutes, and such assignment is valid notwithstanding his non-age. *People v. Mullin*, 25 Wend. (N. Y.) 698.

A Bond to Answer a Criminal Charge binds an infant. See the title **BONDS**, vol. 4, p. 627, note.

6. Contracts for Military Service — United States. — *U. S. v. Bainbridge*, 1 Mason (U. S.) 71; *U. S. v. Anderson, Cooke* (Tenn.) 143; *Tarble's Case*, 13 Wall. (U. S.) 397; *In re McDonald*, 1 Lowell (U. S.) 100; *Seavey v. Seymour*, 3 Cliff. (U. S.) 439.

Connecticut. — *Lanahan v. Birge*, 30 Conn. 438.

Massachusetts. — *Com. v. Harrison*, 11 Mass. 65.

Pennsylvania. — *Com. v. Murray*, 4 Binn. (Pa.) 487, 5 Am. Dec. 412; *Com. v. Gamble*, 11 S. & R. (Pa.) 93.

Vermont. — *Boutwell v. Thompson, Brayt.* (Vt.) 119.

c. **CONTRACTS OF APPRENTICESHIP.** — The third exception to be mentioned is that of contracts of apprenticeship. Whether an infant could bind himself by a contract of apprenticeship at common law, is a question upon which the authorities are not clear. The power of an infant to bind himself by such a contract is denied in some cases,¹ but it appears by other adjudications that a contract of apprenticeship was regarded as binding the infant, on the ground that it was manifestly for his benefit,² at least to the extent that another contract of apprenticeship made by him before the termination of the period of indenture is void³ and that he cannot avoid it on coming of age,⁴ but not to the extent of giving the master an action against the apprentice in the covenants in the indenture.⁵ The statute 5 Eliz., c. 4, declaring an infant's power to bind himself by indenture of apprenticeship, has been held not to be in force in the *United States*.⁶

d. **EXECUTED CONTRACTS OF MARRIAGE.** — The fourth exception is that of executed contracts of marriage. This exception is a necessary consequence of the fact that the marriageable age is below the age of legal maturity.⁷

e. **CONTRACTS FOR NECESSARIES** — (1) *Implied Contracts.* — The fifth and last exception is that of implied contracts for necessities.⁸ This exception is introduced for the benefit of the infant himself, for since he "must live as well as a man" the law enables him to provide himself with necessities by allowing a reasonable price to those who furnish him with them.⁹

Wisconsin. — *In re Higgins*, 16 Wis. 351; *In re Tarble*, 25 Wis. 300, 3 Am. Rep. 85.

1. **Contract of Apprenticeship Not Binding.** — *Clark v. Goddard*, 39 Ala. 164, 84 Am. Dec. 777; 6 Bac. Abr. (Bouvier's Dict.) 508.

2. **Such Contract Beneficial to Infant.** — *In Rex v. Great Wigston*, 3 B. & C. 486, 10 E. C. L. 162, Abbott, C. J., said: "It is a general rule of law that an infant cannot do any act to bind himself unless it be manifestly for his benefit. Binding himself an apprentice has been considered such an act, and therefore it has been held that an infant is competent to make such a contract." See also *Gybert v. Fletcher*, Cro. Car. 179; *Rex v. Hindringham*, 6 T. R. 557; *Rex v. Arundel*, 5 M. & S. 257; *Overseers of Poor v. Overseers of Poor*, 13 N. J. L. 227; *Pardey v. American Ship-Windlass Co.*, 20 R. I. 147. And see the title APPRENTICES, vol. 2, p. 490.

If an infant bound by his own indenture misbehave, his master may correct him or complain to a justice of the peace and have him punished. *Gybert v. Fletcher*, Cro. Car. 179.

Even if an infant's contract of apprenticeship is voidable, it is not avoided by merely quitting the master's service. *Ashcroft v. Bertles*, 6 T. R. 652.

3. *Rex v. Great Wigston*, 3 B. & C. 484, 10 E. C. L. 161. See also *Ashcroft v. Bertles*, 6 T. R. 652. But compare *Clark v. Goddard*, 39 Ala. 164, 84 Am. Dec. 777.

Where the Master Absconded it was held that it was manifestly for the infant's benefit to seek employment, and that he might acquire a settlement by hiring himself in another parish. *Rex v. Mountsorrel*, 3 M. & S. 407.

4. *Pardey v. American Ship-Windlass Co.*, 20 R. I. 147. In this case it was held that a person who had bound himself as an apprentice while a minor, and had left his master's service on attaining majority, could not recover a part of his wages retained by the master under the contract of apprenticeship.

5. *Gybert v. Fletcher*, Cro. Car. 179; *Lylly's Case*, 7 Mod. 15.

Such a suit could not be brought against an infant even though the indenture was executed by his parent or guardian. See the title APPRENTICES, vol. 2, p. 510.

6. *Clark v. Goddard*, 39 Ala. 164, 84 Am. Dec. 777.

7. *Parton v. Hervey*, 1 Gray (Mass.) 119.

8. **Contract for Necessaries — Implied Contract** — *England.* — *Ford v. Fothergill*, 1 Esp. 212. *Georgia.* — *Oliver v. McDuffie*, 28 Ga. 522.

Illinois. — *Hunt v. Thompson*, 4 Ill. 179, 36 Am. Dec. 538.

Indiana. — *Price v. Sanders*, 60 Ind. 310; *Fruchey v. Eagleson*, 15 Ind. App. 88.

Massachusetts. — *Trainer v. Trumbull*, 141 Mass. 527; *McCarty v. Murray*, 3 Gray (Mass.) 578.

Michigan. — *Squier v. Hydliff*, 9 Mich. 274.

Mississippi. — *Epperson v. Nugent*, 57 Miss. 45, 34 Am. Rep. 434.

New York. — *Gay v. Ballou*, 4 Wend. (N. Y.) 403, 21 Am. Dec. 158; *Shaw v. Bryant*, 65 Hun (N. Y.) 57.

North Carolina. — *Hyman v. Cain*, 3 Jones L. (48 N. Car.) 111; *Smith v. Young*, 2 Dev. & B. L. (19 N. Car.) 26.

Vermont. — *Scofield v. White*, 29 Vt. 330; *Bent v. Manning*, 10 Vt. 225.

An agreement with an infant to give him board, clothing, and schooling in payment for his labor, if reasonable under all the circumstances, cannot be repudiated by the infant after it has been executed. *Squier v. Hydliff*, 9 Mich. 274; *Mountain v. Fisher*, 22 Wis. 93.

Where necessities are furnished with things that are not necessities, there is a remedy for the former, but none for the latter. *Turberville v. Whitehouse*, 12 Price 602; *Maddox v. Miller*, 1 M. & S. 738; *Bent v. Manning*, 10 Vt. 225; *Johnson v. Lines*, 6 W. & S. (Pa.) 80, 40 Am. Dec. 542.

9. **Reason of the Rule.** — *Ryder v. Wombwell*, L. R. 4 Exch. 32; *Squier v. Hydliff*, 9 Mich. 274; *Berler v. Young*, 1 Bibb (Ky.) 519.

Exemption from Arrest on Civil Process. — An infant is not liable to arrest for debt either

Obligation Imposed by Law. — The obligation of the infant to pay for necessities furnished him is, however, one imposed by law rather than one which arises from his contract.¹

(2) *Express Contracts* — **Doctrine Denying Liability.** — Hence an infant is only bound for the actual value of necessities furnished him, and not for what he may have foolishly agreed to pay for them.² In some of the states no action can be maintained on the express promise of the infant, but the seller must recover upon the implied assumpsit.³ Consequently an infant will not be bound by an account stated, though the items are for necessities,⁴ or by his acceptance of a bill of exchange⁵ or his negotiable promissory note,⁶ although given for the price of necessities.

Doctrine Permitting Action. — In other jurisdictions, however, it is held that the action can be maintained, provided the contract is embodied in such a form as will leave the consideration open to inquiry.⁷ Hence a promissory note, while it remains in the hands of the original payee, will be enforced, at least to the extent of the value of the necessities for which it was given,⁸ but it cannot be sued upon by an indorsee.⁹

(3) *What Are Necessaries* — (a) **Considerations Determining the Question.** — Whether an article supplied to an infant is a necessary or not, depends upon its general character, its suitability to the particular infant's means and station in life, and his actual need of it.

(b) **General Considerations** — *aa.* MUST SUPPLY PERSONAL WANTS — (*aa*) *In General.* — Concerning the general character of the things furnished, it may be laid down as a primary requisite that they must supply the personal needs of the infant, either those of his body, as food, clothing, lodging, and the like, or those of his mind, as instruction suitable and requisite for the proper development of his intellectual powers.¹⁰

(*bb*) *Things for Infant's Estate* — **Improvement of Infant's Lands.** — Hence labor and material expended in erecting a building upon the land of an infant,¹¹ or in repairing one already erected,¹² is not a necessary for which the infant will be

upon execution or mesne process under Pub. Stat. Mass., c. 162. *Cassier's Case*, 139 Mass. 458.

But this exemption does not entitle him to maintain an action for an illegal arrest and false imprisonment against a person aiding an officer in making the arrest, and this although the infant notified the defendant of his infancy at the time of the arrest. *Cassier v. Fales*, 139 Mass. 461.

1. *Gregory v. Lee*, 64 Conn. 407.

Executory Contracts for Necessaries. — An infant is not bound by his executory contract for necessities, but only to pay a reasonable price for those which have been actually furnished him. Hence an infant may disaffirm a contract for the lease of a room suitable to his needs and situation in life, and is not liable for the rent of the room after such disaffirmance and after he has ceased to occupy it, although such period was within the term covered by his contract. *Gregory v. Lee*, 64 Conn. 407.

2. **Infant Only Bound for Value of Necessaries.** — *Petrie v. Williams*, 68 Hun (N. Y.) 589; *Locke v. Smith*, 41 N. H. 346; *Rainwater v. Durham*, 2 Nott & M. (S. Car.) 524, 10 Am. Dec. 637.

3. **Not Bound by Express Contract.** — *Beeler v. Young*, 1 Hibb (Ky.) 519.

4. **Account Stated.** — *Trucman v. Hurst*, 1 T. R. 40.

5. **Acceptance of Bill of Exchange.** — *William-*

son v. Watts, 1 Campb. 552; *In re Soltykoff*, (1891) 1 Q. B. 413.

6. **Negotiable Promissory Note.** — *Henderson v. Fox*, 5 Ind. 489; *Ayers v. Burns*, 87 Ind. 245, 44 Am. Rep. 759; *Swasey v. Vanderheyden*, 10 Johns. (N. Y.) 33; *Bouchell v. Clary*, 3 Brev. (S. Car.) 194; *McCrillis v. How*, 3 N. H. 348; *McMinn v. Richmonds*, 6 Yerg. (Tenn.) 9. *Compare* *Dubose v. Wheddon*, 4 McCord L. (S. Car.) 221.

7. **When Bound by Express Promise.** — *Stone v. Dennison*, 13 Pick. (Mass.) 1, 23 Am. Dec. 654.

8. **Promissory Note Sued upon by Payee.** — *Earle v. Reed*, 10 Met. (Mass.) 387; *Dubose v. Wheddon*, 4 McCord L. (S. Car.) 221; *Askey v. Williams*, 74 Tex. 294. *Compare* *Bouchell v. Clary*, 3 Brev. (S. Car.) 194. See also the title **BILLS OF EXCHANGE AND PROMISSORY NOTES**, vol. 4, p. 166.

9. **Suit by Indorsee.** — *Morton v. Steward*, 5 Ill. App. 533; *Fenton v. White*, 4 N. J. L. 111.

10. *Tupper v. Cadwell*, 12 Met. (Mass.) 561, 46 Am. Dec. 704.

11. **Improvement of Infant's Lands.** — *Allen v. Lardner*, 78 Hun (N. Y.) 603. See also *McCarty v. Carter*, 40 Ill. 53, 95 Am. Dec. 572.

12. **Repairs to Buildings.** — *Tupper v. Cadwell*, 12 Met. (Mass.) 562, 46 Am. Dec. 704; *Wallis v. Bardwell*, 126 Mass. 366; *Hostmeyer v. Connors*, 56 Mo. App. 115; *Phillips v. Lloyd*, 18 R. I. 99; *Mathes v. Dobschuetz*, 72 Ill. 438; *West v. Gregg*, 1 Grant Cas. (Pa.) 53; *Price v.*

bound by his contract to pay, although the repairs were required to prevent immediate and serious injury to the building;¹ nor will the property be subject to a mechanic's lien on account thereof.² The fact that the infant has real estate which requires attention furnishes the proper occasion for the appointment of a guardian, through whose agency necessary repairs can presumably be more judiciously made than through the agency of the minor.³

So a Contract for the Insurance of His Property against loss or damage by fire is not a contract for necessities which will bind the infant absolutely.⁴

Services of Attorney. — Nor will he be bound by his contract with an attorney to pay for services rendered in respect to the property.⁵

(cc) **Things Required in Conducting Business.** — The principle finds further exemplification in things which an infant purchases for use in business. Under no circumstances, at common law, can these be considered necessities.⁶ The law does not contemplate that an infant shall open a shop and become a trader, or engage in any other business which involves the making of contracts on his own responsibility; and his presumed incapacity will protect him from their enforcement against him, notwithstanding it may appear that the infant derives his livelihood solely from his business and the particular contract was necessary to enable him successfully to carry it on.⁷ If, however, of articles sold to him for trade, any be actually consumed by him or his family as necessities, he will be liable to the vendor *pro tanto* for their value.⁸

Sanders, 60 Ind. 310; Freeman v. Bridger, 4 Jones L. (49 N. Car.) 1, 67 Am. Dec. 258.

1. Tupper v. Cadwell, 12 Met. (Mass.) 559, 46 Am. Dec. 704; Wallis v. Bardwell, 126 Mass. 366; Phillips v. Lloyd, 18 R. I. 99.

2. Bloomer v. Nolan, 36 Neb. 51, 38 Am. St. Rep. 690.

Mechanics' Lien. — There can be no lien upon the land of an infant under the mechanics' lien law. Hall v. Kjer, 47 N. J. L. 340.

3. Tupper v. Cadwell, 12 Met. (Mass.) 562, 46 Am. Dec. 704.

Money Loaned to an Infant to Pay Off a Mortgage on Property inherited by him is not regarded as a necessary. Magee v. Welsh, 18 Cal. 155. And see Bicknell v. Bicknell, 111 Mass. 265; West v. Gregg, 1 Grant. Cas. (Pa.) 53.

4. **Contract of Fire Insurance.** — New Hampshire Mut. F. Ins. Co. v. Noyes, 32 N. H. 345. See the title FIRE INSURANCE, vol. 13, p. 135.

5. **Services of Attorney.** — Cobbe v. Buchanan, 48 Neb. 391; Phelps v. Worcester, 11 N. H. 51. See also the title ATTORNEY AND CLIENT, vol. 3, p. 416.

Services rendered by an attorney as guardian *ad litem* in defending a suit to foreclose a mortgage made by the infant's ancestor are not necessities which would render a deed of land by the infant in consideration thereof valid, as Comp. Stat. 1893, c. 7, § 14, provides compensation for such guardians. Englebert v. Troxell, 40 Neb. 195, 42 Am. St. Rep. 665.

6. **Requisites for Conducting Business.** — Tupper v. Cadwell, 12 Met. (Mass.) 560, 46 Am. Dec. 704.

Illustrations. — A horse purchased by an infant to be used in cultivating a farm is not a necessary. Rainwater v. Durham, 2 Nott & M. (S. Car.) 524, 10 Am. Dec. 637. See also Grace v. Hale, 2 Humph. (Tenn.) 27, 36 Am. Dec. 296. Neither is a wagon bought by him for use on the farm. Paul v. Smith, 41

Mo. App. 275. Nor are supplies consumed thereon. Decell v. Lewenthal, 57 Miss. 331, 34 Am. Rep. 449. The board of horses owned by an infant who is engaged in business as a hackman is not a necessary. Merriam v. Cunningham, 11 Cush. (Mass.) 40. Nor will an infant be held liable on his promise to pay for feed furnished for horses owned by him and another as partners engaged in business as teamsters and common carriers. Mason v. Wright, 13 Met. (Mass.) 306.

In Ryan v. Smith, 165 Mass. 303, it was held that a barber's chair and divers other articles of furniture designed to be used in furnishing a barber's shop were not necessities.

Goods bought to replenish a stock of merchandise owned by an infant engaged in trade are not necessities. Whittingham v. Hill, Cro. Jac. 494; Whywall v. Champion, 2 Stra. 1083. Nor will the infant be liable for work done for him in the course of business. Dilk v. Keighley, 2 Esp. 480.

In Pennsylvania it seems to be held that if a guardian, instead of leasing the infant's land, puts him in possession of it to cultivate it, the infant will be bound for things purchased to enable him to carry on the employment. Rundel v. Keeler, 7 Watts (Pa.) 237; Mohney v. Evans, 51 Pa. St. 80.

7. Ryan v. Smith, 165 Mass. 303.

Under the Georgia Code, § 3050 (Code 1882, § 2733), "if an infant, by permission of his parent or guardian or by permission of law, practices any profession or trade, or engages in any business as an adult, he shall be bound for all contracts connected with such profession, trade, or business." McKamy v. Cooper, 81 Ga. 679.

A minor employed as a clerk will not be rendered liable by this section on a contract for the purchase of a buggy. Howard v. Simpkins, 70 Ga. 322.

8. Turberville v. Whitehouse, 1 C. & P. 94, 11 E. C. L. 326, 12 Price 692.

(*dd*) *Necessaries for Family*. — But when it is said that things furnished, in order to be deemed necessaries, must supply personal wants, the expression is not to be understood as applying merely to the personal wants of the infant himself. If he be married he is as liable for necessaries furnished his family as for those supplied for his own use and consumption.¹

bb. MUST BE USEFUL — (*aa*) *Articles of Luxury or Convenience*. — Another requisite is that the things furnished shall be of practical use. Articles of mere luxury or convenience are always excluded, though luxurious articles of utility are in some cases allowed.² Thus while a common-school education is a necessary for which an infant may bind himself, a collegiate³ or professional⁴ education has been held to be a luxury or convenience for which he will not be bound.

(*bb*) *Ornaments*. — So articles that are purely ornamental in their character are to be rejected.⁵ Whether an article is useful or is a mere ornament, is a question of fact for the jury.⁶

(*e*) *Particular Considerations* — *aa. IN GENERAL*. — When the general character of the thing as an article of personal utility has been established, the only remaining consideration is the particular infant's need of it. This is a mixed question of law and fact.

Things Supplying Physical and Intellectual Needs. — Obviously such things as are indispensable for the decent maintenance of the infant's person,⁷ the proper care of his health,⁸ and the suitable development of his intellectual faculties,⁹ are necessaries.

1. Necessaries for Family. — The necessaries for a single infant are those which pertain to him individually; those of a married infant are such as pertain to himself and his family. *Turner v. Trisby*, 1 Stra. 168; *Turberville v. Whitehouse*, 12 Price 692; *Cantine v. Phillips*, 5 Harr. (Del.) 428; *Beeler v. Young*, 1 Bibb (Ky.) 520; *Chapman v. Hughes*, 61 Miss. 339; *Abell v. Warren*, 4 Vt. 152.

An Infant Husband Is Liable for the Antenuptial Debts of His Wife. — *Butler v. Breck*, 7 Met. (Mass.) 164; *Roach v. Quick*, 9 Wend. (N. Y.) 238. See also the title HUSBAND AND WIFE, vol. 15, p. 871.

An Infant Widow Is Bound by Her Contract for the furnishing of the funeral of her husband who has left no property to be administered. *Chapple v. Cooper*, 13 M. & W. 252.

2. Articles of Luxury or Convenience. — *Chapple v. Cooper*, 13 M. & W. 252; *Beeler v. Young*, 1 Bibb (Ky.) 519.

In *Ryder v. Wombwell*, L. R. 4 Exch. 32, it was held that a silver-gilt goblet purchased by an infant as a present for a friend was *prima facie* not a necessary, and that the burden was upon the seller to show some peculiar circumstances making it a necessary in the particular case.

So in *Brooker v. Scott*, 11 M. & W. 67, confectionery and fruit furnished to an infant undergraduate at a college were held not to be *prima facie* necessaries, and, no special circumstances being shown, the court directed a nonsuit to be entered in an action for their value.

A Journey by a Child without the permission of the parent is not a necessary. *McKanna v. Merry*, 61 Ill. 177.

In *Peters v. Fleming*, 6 M. & W. 42, the jury found that fine rings and a watch and chain were necessaries for an infant. It was held, on a motion for a new trial, that the watch and chain might be necessaries, and therefore it was proper to submit the whole claim to the jury.

3. Collegiate Education. — *Middlebury College v. Chandler*, 16 Vt. 683, 42 Am. Dec. 537. See also *Gayle v. Hayes*, 79 Va. 542.

In *Stanton v. Willson*, 3 Day (Conn.) 37, 3 Am. Dec. 255, there was a recovery for schooling at college and also for "classic books," but the question was not specifically raised. See also *Oliver v. McDuffie*, 28 Ga. 522. But teaching an infant a trade is regarded as a necessary. *Cooper v. Simmons*, 7 H. & N. 707.

4. Professional Education. — *Turner v. Gaither*, 83 N. Car. 357, 35 Am. Rep. 574.

Religious Instruction. — *St. John's Parish v. Bronson*, 40 Conn. 75, 16 Am. Rep. 17.

5. Peters v. Fleming, 6 M. & W. 42.

6. Ornaments. — In *Peters v. Fleming*, 6 M. & W. 42, it was held to be a question for the jury whether a breastpin and a watch-chain were to be considered articles for use or merely for ornament.

7. Board for Infant. — *Kilgore v. Rich*, 83 Me. 305, 23 Am. St. Rep. 780; *Bradley v. Pratt*, 23 Vt. 378.

8. Services of Nurse in Time of Illness. — *Werner's Appeal*, 91 Pa. St. 222.

The Professional Services of a Dentist, in the repair and preservation of an infant's teeth, are a necessary for which the infant will be bound. *Strong v. Foote*, 42 Conn. 203.

9. A Common-school Education is a necessary for which an infant may bind himself by contract. *Middlebury College v. Chandler*, 16 Vt. 683, 42 Am. Dec. 537. See also *Raymond v. Loyl*, 10 Barb. (N. Y.) 483.

"It has been ruled that an infant may be liable for schooling, and if it becomes a question how much schooling is necessary, then you must inquire what situation in life he is required to fill. A knowledge of the learned languages may be necessary for one, a mere knowledge of reading and writing may be sufficient for another." *Peters v. Fleming*, 6 M. & W. 42; *Manby v. Scott*, Sid. 112.

Maintenance of Personal Liberty and Legal Rights. — So too is the maintenance of his personal liberty and legal rights. Hence a recognizance executed by an infant to secure his release from arrest,¹ or his promise to pay for the services of an attorney retained to defend him in a criminal prosecution² or a bastardy proceeding³ or to bring an action for him for personal injury⁴ or breach of promise of marriage,⁵ is a contract by which he will be bound.

bb. SUITABILITY FOR INFANT'S CONDITION. — But the law does not confine the signification of the term "necessaries" to such things as these. It extends its application to everything necessary to maintain the infant in the estate, station, and degree of life in which he is.⁶ What are necessaries is therefore a relative fact to be determined by the fortune and circumstances of the particular infant. Articles that are mere conveniences or matters of taste may be considered necessaries where the usages of society render them proper for a person in the rank of life in which the infant moves.⁷

Illustrations. — For example, a bicycle bought by a female domestic,⁸ and a buggy⁹ contracted for by a clerk, have been held not to be necessaries for them, while on the other hand a riding horse for one youth of wealth and position,¹⁰ and a servant's livery¹¹ for another who was an officer in the English army, have been held to be suitable for their station in society, and therefore necessary.

Peculiar Circumstances. — The infant's need of things may sometimes depend upon the peculiar circumstances under which they are purchased, and the use to which they are put. Thus articles purchased by an infant for his wedding may be deemed necessary while under ordinary circumstances the same articles might not be so considered.¹²

Real Circumstances the Test. — In every case, however, things are to be deemed necessaries which correspond with the real circumstances of the infant and not merely with his appearance in life.¹³

cc. INFANT'S NEED OF IT—(aa) Over-Supply of Infant's Needs. — The last consideration is, was the infant in actual need of the thing purchased? Though an article may belong to a class of things that are unquestionably necessary, and though the particular article furnished may correspond in quality and price with the

1. **Recognizance.** — *State v. Weatherwax*, 12 Kan. 463; *Atty.-Gen. v. Baker*, 9 Rich. Eq. (S. Car.) 521. See also *Clarke v. Leslie*, 5 Esp. 28; *Fagin v. Goggin*, 12 R. I. 398; and the title **BONDS**, vol. 4, p. 627 note. Compare *Patchin v. Cromach*, 13 Vt. 330.

2. **Services of Attorney—Defense in Criminal Prosecution.** — *Askey v. Williams*, 74 Tex. 294.

3. **Bastardy Proceeding.** — *Barker v. Hibbard*, 54 N. H. 539, 20 Am. Rep. 160. And see *Thrall v. Wright*, 38 Vt. 494; *Epperson v. Nugent*, 57 Miss. 45, 34 Am. Rep. 434.

4. **Bringing Action for Personal Injury.** — *Hanlon v. Wheeler*, (Tex. Civ. App. 1898) 45 S. W. Rep. 821.

5. **Breach of Promise of Marriage.** — *Petrie v. Williams*, 68 Hun (N. Y.) 589.

In cases where, under peculiar circumstances, a civil suit is the only means by which an infant can procure the absolute necessaries which he requires, he may, it appears, bind himself by retaining an attorney and making other contracts necessary for the commencement and prosecution of the suit. *Munson v. Washband*, 32 Conn. 303, 83 Am. Dec. 151, where this principle was applied in the case of a female infant who had been seduced and got with child under promise of marriage, and she retained an attorney to bring suit for breach of promise.

6. **Suitability for Infant's Condition.** — *Peters v. Fleming*, 6 M. & W. 42. See also *Smith on Contracts*, 269.

7. *Ford v. Fothergill*, 1 Esp. 212.

8. **What Are and What Are Not Necessaries—Bicycle.** — *Rice v. Butler*, 25 N. Y. App. Div. 388. See also *Pyne v. Wood*, 145 Mass. 558, where the bicycle was bought by a clerk in a store.

9. **Buggy.** — *Howard v. Simpkins*, 70 Ga. 322. See also *Rice v. Boyer*, 108 Ind. 472, 58 Am. Rep. 53.

10. **Riding Horse.** — *Barber v. Vincent*, 1 Freem. K. B. 531.

Horseback exercise, when prescribed by a physician, may be a necessary. *Hart v. Prater*, 1 Jur. 623; *Cornelia v. Ellis*, 11 Ill. 584; *Wharton v. Mackenzie*, 5 Q. B. 606, 48 E. C. L. 606.

11. **Servant's Livery.** — *Hands v. Slaney*, 8 T. R. 578.

12. **Wedding Presents for the Bride of the Infant** may be necessaries. *Jenner v. Walker*, 19 L. T. N. S. 398, 3 Am. L. Rev. 590.

13. **May Wedding Garments** within reason. *Sams v. Stockton*, 14 B. Mon. (Ky.) 187; *Jordan v. Coffield*, 70 N. Car. 110.

A Solicitor's Bill for Drawing a Marriage Settlement may be a necessary. *Helps v. Clayton*, 17 C. B. N. S. 553, 112 E. C. L. 553.

13. *Ford v. Fothergill*, 1 Esp. 212.

infant's means, yet if it should turn out that the infant was already bountifully supplied with the thing purchased, it is not a necessary in the particular case.¹ It therefore behooves one who sells goods to an infant to inquire into his circumstances, so as to determine not only whether the thing sold is such an article as an infant in the purchaser's station of life would require, but whether in the particular case the purchaser had need of it, for if the infant did not require it the seller cannot recover.²

Reason of the Rule. — The reason for this is a plain one. The rule of law is, that no one may deal with a minor; the exception to it is, that a stranger may supply him with necessities proper for him, in default of supply by any one else; but the stranger's interference with what is properly a guardian's business must rest upon an actual necessity of which he must judge in a measure at his peril. When he assumes the business of guardian for purposes of present relief, he is bound to execute it as a prudent guardian would, and consequently to make himself acquainted with the ward's necessities and circumstances. The credit which the infant's necessities gives to him ceases when these necessities cease; and as nothing further is requisite when these are relieved, the exception to the rule is at an end.³

(bb) *When Infant Is Supported by Parent or Guardian.* — So an Infant Who Resides at Home under the care of a parent, and is supported by him, cannot be held liable for things furnished, on the ground that they are necessities.⁴

1. Over-Supply of Infant's Needs. — *Ford v. Fothergill*, 1 Esp. 212; *Burghart v. Angerstein*, 6 C. & P. 699, 25 E. C. L. 605.

"The true question is not a mere abstract one whether the articles supplied were in their nature necessities, but a practical question whether they were necessities for the defendant, that is, necessary to him, and they could not be if he already had plenty of them." *Lindley, L. J.*, in *Johnstone v. Marks*, 35 W. R. 806, 19 Q. B. D. 509. So the infant may show that he was already fully supplied with similar goods, and it is immaterial whether the plaintiff knew it or not. *Barnes v. Toye*, 13 Q. B. D. 410; *Mortara v. Hall*, 6 Sim. 465; *McKanna v. Merry*, 61 Ill. 180; *Trainer v. Trumbull*, 141 Mass. 530; *Hoyt v. Casey*, 114 Mass. 397, 19 Am. Rep. 371; *Rivers v. Gregg*, 5 Rich. Eq. (S. Car.) 274. See, however, *Brayshaw v. Eaton*, 7 Scott 183.

2. Story v. Pery. 4 C. & P. 526, 19 E. C. L. 508; *Cook v. Deaton*, 3 C. & P. 114, 14 E. C. L. 232.

Inquiry Not Condition Precedent to Recovery. — In *Brayshaw v. Eaton*, 5 Bing. N. Cas. 231, 35 E. C. L. 99, which was a suit against an infant by a tailor, it was held that an inquiry by the plaintiff as to the defendant's circumstances is not a condition precedent to recovery. See also *Dalton v. Gib*, 5 Bing. N. Cas. 198, 35 E. C. L. 83. And compare *Eames v. Sweetser*, 101 Mass. 80.

3. Johnson v. Lines, 6 W. & S. (Pa.) 80, 40 Am. Dec. 542.

4. When Infant Is Supported by Parent — *England*, — *Bainbridge v. Pickering*, 2 W. Bl. 1325.

Alabama. — *Tilton v. Russell*, 11 Ala. 497.

Illinois. — *Sinklear v. Emert*, 18 Ill. 63.

Massachusetts. — *Angel v. McLellan*, 16 Mass. 31, 8 Am. Dec. 118; *Hoyt v. Casey*, 114 Mass. 397, 19 Am. Rep. 371.

Missouri. — *Tharp v. Connelly*, 48 Mo. App. 59.

New Hampshire. — *Locke v. Smith*, 41 N. H. 346.

New York. — *Wailing v. Toll*, 9 Johns. (N. Y.) 141; *Kline v. L'Amoureux*, 2 Paige (N. Y.) 419, 22 Am. Dec. 652.

Pennsylvania. — *Guthrie v. Murphy*, 4 Watts (Pa.) 80, 28 Am. Dec. 681.

South Carolina. — *Connolly v. Hull*, 3 McCord L. (S. Car.) 6, 15 Am. Dec. 612; *Kraker v. Byrum*, 13 Rich. L. (S. Car.) 163.

Tennessee. — *Nichol v. Steger*, 2 Tenn. Ch. 323, 6 Lea (Tenn.) 393.

The fact that the parent is poor and unable to pay will not make the infant liable. *Hoyt v. Casey*, 114 Mass. 397, 19 Am. Rep. 371. But see *Werner's Appeal*, 91 Pa. St. 222, where two minors died intestate leaving their father as their heir at law. The latter was imbecile and possessed of no estate. A sister of the deceased nursed them through their last illness and prepared the bodies for interment. For these services she presented a claim to the administrator, who refused payment on the ground that the charges were exorbitant, and paid the balance to the father as distributee. It was held that the claim being for necessities, and the parent unable to pay it, the estate of the minors was liable.

Presumption. — If the minor resides with his parents there is a presumption, rebuttable by proof, that he is fully supplied with necessities. *Perrin v. Wilson*, 10 Mo. 451; *Freeman v. Bridger*, 4 Jones L. (49 N. Car.) 1, 67 Am. Dec. 258; *Connolly v. Hull*, 3 McCord L. (S. Car.) 6, 15 Am. Dec. 612; *Jones v. Colvin*, 1 McMull. L. (S. Car.) 14.

When it is shown that a minor has been furnished with money sufficient to supply her with necessities, the presumption of law is, that she has been fully supplied from that fund, and the burden rests upon the plaintiff to negative that presumption. *Nicholson v. Wilborn*, 13 Ga. 467.

In *Texas* it is held that where the defense is

If the Infant Is under the Care of a Guardian the latter is not personally liable for necessities furnished the infant without his order.¹ In case the guardian neglects his duty of supporting his ward, it appears that a third person may furnish the ward with necessities and hold the infant liable² or by proper proceedings subject the latter's estate in the hands of the guardian, to the payment of the debt.³

(d) *Questions of Law and Fact.* — Whether articles are of those classes for which an infant shall be bound to pay, is a matter of law for the court; if they fall under those general descriptions, then whether they were actually necessary and suitable to the condition and estate of the particular infant, is a question of fact for the jury.⁴

(4) *Liability for Money Paid by Third Person.* — An infant is liable for money paid at his request to satisfy a debt which he had contracted for necessities.⁵

The Reason Why This Is Allowed is that the infant's liability is in no way increased by owing the debt to one person rather than to another, but on the contrary the right to transfer the debt may under certain circumstances be a great inconvenience to him. The original creditor may be unwilling or unable to wait for payment, while a friend, as a substitute, may be more indulgent.⁶

(5) *Liability for Money Borrowed to Purchase Necessaries — At Law.* — But an infant is not liable at law for money borrowed by him although the sum be actually expended in the purchase of necessities.⁷ For it is upon the lending that the contract must arise, and this is complete when the money is paid over, and being voidable it cannot be rendered binding by matter *ex post facto*, but only by the borrower's affirmance of it after attaining his majority.⁸

In Equity. — The rule is, however, different in equity. If for any reason the

that the infant was already supplied with necessities, the burden of proof is upon the defendant to establish that fact. *Parsons v. Keys*, 43 Tex. 557.

1. *Guardian Not Personally Liable.* — See the title *GUARDIAN AND WARD*, vol. 15, p. 78.

2. *Call v. Ward*, 4 W. & S. (Pa.) 118, 39 Am. Dec. 64. And see the title *GUARDIAN AND WARD*, vol. 15, p. 85.

3. See the title *GUARDIAN AND WARD*, vol. 15, p. 78.

But where the guardian personally contracts for the infant ward's board, the guardian is personally liable (see title last cited, vol. 15, pp. 70, 77), and the infant's really cannot be charged, although the guardian has squandered the infant's personal estate and is insolvent. *St. Joseph's Academy v. Augustini*, 55 Ala. 493.

4. *Questions of Law and Fact — England.* — *Peters v. Fleming*, 6 M. & W. 42; *Wharton v. Mackenzie*, 5 Q. B. 614, 48 E. C. L. 614; *Maddox v. Miller*, 1 M. & S. 738.

Connecticut. — *Stanton v. Willson*, 3 Day (Conn.) 37, 3 Am. Dec. 255.

Kentucky. — *Beeler v. Young*, 1 Bibb (Ky.) 519.

Massachusetts. — *Tupper v. Cadwell*, 12 Met. (Mass. 559), 46 Am. Dec. 704.

Michigan. — *Lynch v. Johnson*, 109 Mich. 64.

Nebraska. — *Cobbey v. Buchanan*, 48 Neb. 391.

South Carolina. — *Glover v. Ott*, 1 McCord L. (S. Car.) 572.

Texas. — *Melton v. Katzenstein*, (Tex. Civ. App. 1899) 49 S. W. Rep. 173.

Vermont. — *Bent v. Manning*, 10 Vt. 225.

5. *Liability for Money Paid by Third Party.* — *Swift v. Bennett*, 10 Cush. (Mass.) 436; *Kilgore v. Rich*, 83 Me. 305, 23 Am. St. Rep. 780; *Randall v. Sweet*, 1 Den. (N. Y.) 460.

In *Clarke v. Leslie*, 5 Esp. 28, where the plaintiff paid a sum of money to secure the release of the defendant, an infant, who was arrested for debt, it was held that if the debt for which the money was paid was for necessities the plaintiff was entitled to recover the amount from the defendant, but that the burden was upon the plaintiff to show this, and this not being done, judgment for the defendant was entered.

Payment of Note by Surety. — If an infant purchases necessities and gives a promissory note signed by himself and a surety, and the surety afterwards pays the note, he is entitled to recover the amount so paid from the infant. *Conn v. Coburn*, 7 N. H. 368, 26 Am. Dec. 746; *Haine v. Tarrant*, 2 Hill L. (S. Car.) 400. *Contra*, *Ayers v. Burns*, 87 Ind. 245, 44 Am. Rep. 759.

6. *Kilgore v. Rich*, 83 Me. 305, 23 Am. St. Rep. 780.

7. *Liability for Money Borrowed to Purchase Necessaries — At Law.* — *Price v. Sanders*, 60 Ind. 310; *Bent v. Manning*, 10 Vt. 225.

8. *Reason of the Rule.* — *Earle v. Peale*, 1 Salk. 386; *Darby v. Boucher*, 1 Salk. 279; *Probart v. Knouth*, 2 Esp. 472, note.

The reason given by the authorities is that the lender by intrusting money to the infant enabled him to spend it in dissipation if he had been so minded; and his subsequent judicious use of it could not confer a right of action, where none existed at the time of the loan. *Smith v. Oliphant*, 2 Sandf. (N. Y.) 306.

matter comes before a court of chancery the lender will obtain relief by being subrogated to the rights of the seller of the goods.¹

When Lender Applies Money to Purchase of Necessaries. — This principle is sometimes applied in law, where the contract of lending and the laying out of the money constitute one transaction. If the lender does not pay the money to the infant, but applies it directly to the purchase of necessities, thus using his more mature judgment in respect to price and quality, the transaction is beneficial to the infant, and it has been held that he will be bound by it.²

4. Contracts Which Are Voidable — *a. IN GENERAL.* — The general rule that the contracts of infants are voidable by them applies to all persons below the age of legal maturity. The fact that a minor is emancipated³ or married,⁴ or is engaged in business upon his own responsibility,⁵ gives no additional binding force to his contracts. A minor who has nearly attained majority may be as able in fact to protect his interests in a contract, as a person who has passed that period; but the law cannot measure the individual capacity of minors, and therefore makes no distinctions in respect to ages or conditions, but conclusively presumes all persons under age to be lacking in judgment and understanding sufficient to enable them to guard their own interests,⁶ and allows them to avoid all acts, contracts, and conveyances not within the exceptions heretofore considered, to which they are parties, and to place themselves *in statu quo*.

b. ILLUSTRATIONS — (1) *Conveyances of Property* — (a) *Sales of Real and Personal Property.* — An infant's sale of his property, whether it is real estate⁷

1. In Equity. — In *Marlow v. Pitfield*, 1 P. Wms. 558, it was held that if an infant borrows money and applies it to the buying of necessities, and after coming of age devises his lands for the payment of his debts, this debt is within the trust.

Where money is loaned under authority of the court in good faith, the infant must repay. *Cane v. Cawthon*, 32 La. Ann. 953.

2. Smith v. Oliphant, 2 Sandf. (N. Y.) 306.

3. Right to Disaffirm — Emancipated Infant. — *Mason v. Wright*, 13 Met. (Mass.) 306; *Person v. Chase*, 37 Vt. 647, 88 Am. Dec. 630.

4. Married Infant. — *Harrod v. Myers*, 21 Ark. 592, 76 Am. Dec. 409; *Hoyt v. Swar*, 53 Ill. 134; *Scranton v. Stewart*, 52 Ind. 68; *Youse v. Norcum*, 12 Mo. 549, 51 Am. Dec. 175; *Barker v. Wilson*, 4 Heisk. (Tenn.) 268.

5. Infant Engaged in Business. — *Miller v. Blankley*, 38 L. T. N. S. 527; *Bruce v. Warwick*, 6 Taunt. 118, 1 E. C. L. 332; *Tupper v. Cadwell*, 12 Met. (Mass.) 560, 46 Am. Dec. 704; *Merriam v. Cunningham*, 11 Cush. (Mass.) 40; *Ryan v. Smith*, 165 Mass. 303.

In Iowa by statute (Rev. Code 1897, § 3190) a minor's contract cannot be disaffirmed, where, from his having engaged in business as an adult, the other party had good reason to believe him capable of contracting. *Jaques v. Sax*, 39 Iowa 367. If, however, the other contracting party knew of the infancy, the statute does not apply. *Beller v. Marchant*, 30 Iowa 350.

Kansas. — A similar statute exists in Kansas. Comp. L. Kan., c. 67, § 3; *Dillon v. Burnham*, 43 Kan. 77.

6. Brooke v. Gally, 2 Atk. 34; *McCarty v. Carter*, 49 Ill. 53, 95 Am. Dec. 572.

7. Conveyances of Real Estate — England. — *Bouch v. Parsons*, 3 Burr. 1794.

Canada. — *Doe v. Woodruff*, 7 U. C. Q. B. 332; *Mills v. Davis*, 9 U. C. C. P. 510; *Doe v. Lee*, 13 N. Bruns. 486,

United States. — *Tucker v. Moreland*, 10 Pet. (U. S.) 58; *Irvine v. Irvine*, 9 Wall. (U. S.) 617. *Alabama.* — *Schaffer v. Lavretta*, 57 Ala. 14; *Slaughter v. Cunningham*, 24 Ala. 260, 60 Am. Dec. 463.

Arkansas. — *Harrod v. Myers*, 21 Ark. 592, 76 Am. Dec. 409; *Bagley v. Fletcher*, 44 Ark. 153.

Delaware. — *Wallace v. Lewis*, 4 Harr. (Del.) 75.

Illinois. — *Illinois Land, etc., Co. v. Bonner*, 75 Ill. 315; *Tunison v. Chamblin*, 88 Ill. 378; *Hoyt v. Swar*, 53 Ill. 134; *Cole v. Pennoyer*, 14 Ill. 158.

Indiana. — *Doe v. Abernathy*, 7 Blackf. (Ind.) 442; *Babcock v. Doe*, 8 Ind. 110; *Gillenwaters v. Campbell*, 142 Ind. 529; *Johnson v. Rockwell*, 12 Ind. 76; *Chapman v. Chapman*, 13 Ind. 396; *Scranton v. Stewart*, 52 Ind. 68.

Iowa. — *Jenkins v. Jenkins*, 12 Iowa 195.

Kentucky. — *Phillips v. Green*, 5 T. B. Mon. (Ky.) 344.

Maine. — *Davis v. Dudley*, 70 Me. 236, 35 Am. Rep. 318.

Maryland. — *Lowe v. Gist*, 5 Har. & J. (Md.) 106, note.

Massachusetts. — *Kendall v. Lawrence*, 22 Pick. (Mass.) 540; *Boston Bank v. Chamberlain*, 15 Mass. 220; *Worcester v. Eaton*, 13 Mass. 371, 7 Am. Dec. 155.

Minnesota. — *Dixon v. Merritt*, 21 Minn. 196.

Mississippi. — *Allen v. Poole*, 54 Miss. 323; *Cook v. Toumbs*, 36 Miss. 685.

Missouri. — *Ferguson v. Bell*, 17 Mo. 347; *Youse v. Norcum*, 12 Mo. 549, 51 Am. Dec. 175; *Shipley v. Bunn*, 125 Mo. 445.

New Hampshire. — *Roberts v. Wigginn*, 1 N. H. 73, 8 Am. Dec. 38.

New York. — *Gillett v. Stanley*, 1 Hill (N. Y.) 121; *Green v. Green*, 69 N. Y. 553, 25 Am. Rep. 233; *Boal v. Mix*, 17 Wend. (N. Y.) 119, 31 Am. Dec. 285; *O'Rourke v. Hall*, 38 N. Y. App. Div. 534; *Dominick v. Michael*, 4 Sandf.

or personalty,¹ transmits the title, and is voidable only. Its validity does not depend on the ratification after the minor has attained his majority, but to avoid it he must, by some act clear and unmistakable in its character, disaffirm its validity.

(b) **Mortgages.** — A mortgage or deed of trust of real² or personal³ property executed by an infant is voidable only.

(N. Y.) 374, *Merchants' F. Ins. Co. v. Grant* 2 Edw. (N. Y.) 544; *Van Nostrand v. Wright*, Hill & D. Supp. (N. Y.) 260.

Tennessee. — *Wheaton v. East*, 5 Yerg. (Tenn.) 45, 26 Am. Dec. 251; *Barker v. Wilson*, 4 Heisk. (Tenn.) 268; *White v. Flora*, 2 Overt. (Tenn.) 426.

Texas. — *Cummings v. Powell*, 8 Tex. 80.

Vermont. — *Wiser v. Lockwood*, 42 Vt. 720.

West Virginia. — *Gillespie v. Bailey*, 12 W. Va. 70, 29 Am. Rep. 445.

See also the title **DEEDS**, vol. 9, p. 114.

In *Bouch v. Parsons*, 3 Burr. 1794, the rule was laid down by Lord Mansfield that all deeds that take effect by delivery by the infant are voidable, while those delivered by another hand are void; and this technical rule has been repeated in later cases, although it has no significance at the present day. *Boal v. Mix*, 17 Wend. (N. Y.) 119, 31 Am. Dec. 285; *Conroe v. Birdsall*, 1 Johns. Cas. (N. Y.) 127, 1 Am. Dec. 105; *State v. Plaisted*, 43 N. H. 413.

Land was conveyed to A to hold in trust for B, then an infant, for life. The deed provided that the land should be sold if B should at any time so request in writing. B made such a request by the persuasion of her father when ten years old. It was held that she could avoid the sale on reaching majority. *Hill v. Clark*, 4 Lea (Tenn.) 405.

Joining in Conveyance of Wife's Lands. — If an infant husband joins with his wife who is of full age, in the conveyance of her real estate, the deed is voidable at the election of the husband. *Barker v. Wilson*, 4 Heisk. (Tenn.) 268.

An Infant Wife Is Not Bound by Her Release of Dower. — *Watson v. Billings*, 38 Ark. 278, 42 Am. Rep. 1; *Drew v. Drew*, 40 N. J. Eq. 458. And see *Barker v. Wilson*, 4 Heisk. (Tenn.) 268.

Infant's Instrument Inoperative to Divest Title. — The execution of an instrument of an infant with other heirs cannot operate by estoppel to divest him of his title to land under his father's will. *Clapp v. Byrnes*, 155 N. Y. 535.

A Deed Made During Infancy but Not Delivered until After Majority is valid. *Sims v. Smith*, 99 Ind. 469, 50 Am. Rep. 99. See also the title **DEEDS**, vol. 9, p. 114, note 2.

An Exchange of Property is voidable by the infant. *Williams v. Brown*, 34 Me. 594; *Miller v. Ostrander*, 12 Grant Ch. (U. C.) 349. See also the title **DEEDS**, vol. 9, p. 114, note 2.

A Deed of Gift executed by a minor in trust for his children is not void, but voidable merely. *Slaughter v. Cunningham*, 24 Ala. 260, 60 Am. Dec. 463.

So an Absolute Gift of Articles of Personal Property is only voidable. *Person v. Chase*, 37 Vt. 647, 88 Am. Dec. 630.

Infant's Voluntary Deed Void. — But in *Tennessee* it is held that an infant's deed conveying his lands without any, or upon a mere nominal, consideration, is absolutely void and invests his vendee with no title whatever. *Robinson*

v. Coulter, 90 Tenn. 705, 25 Am. St. Rep. 708; *Swafford v. Ferguson*, 3 Lea (Tenn.) 292.

Correction of Voluntary Deed. — A minor who executes as a gift a conveyance to a sister, in which by mistake the land is incorrectly described, cannot be compelled after attaining his majority to execute a deed for the land intended to be conveyed, though after arriving of age he promised to do so. The promise in such a case is without consideration to support it. *Oxley v. Tryon*, 25 Iowa 95.

A Bond for Title Given by an Infant is voidable only, and not absolutely void. *Mustard v. Wohlford*, 15 Gratt. (Va.) 329, 76 Am. Dec. 209.

A Parol Contract for the Conveyance of Land made by an infant is voidable by him. *Yeager v. Knight*, 60 Miss. 730.

Specific Performance Will Not Be Decreed in Favor of the Assignee of an Agreement for the Conveyance of Land, where the purchaser in such agreement was an infant when the agreement was executed, and assigned the same during his minority to the complainant, but has since come of age — upon a bill for that purpose, filed within five months after such infant attained his majority — without proof of some act of affirmance of the original agreement, and of the assignment thereof, by the purchaser after reaching his majority. *Carrell v. Potter*, 23 Mich. 377.

Color of Title. — A grantee holding land under a deed from an infant has color of title. *Cole v. Pennoyer*, 14 Ill. 158. See also *Sanders v. Bennett*, (Ky. 1886) 1 S. W. Rep. 436.

Trespass to Try Title. — An infant's deed invests the grantee with sufficient interest to permit him to maintain trespass to try title during the grantor's minority. *Marlin v. Kosmyroski*, (Tex. Civ. App. 1894) 27 S. W. Rep. 1042.

1. Sales of Personal Property. — *Roof v. Stafford*, 7 Cow. (N. Y.) 179; *Johnson v. Packer*, 1 Nott. & M. (S. Car.) 1.

Rejecting Infant's Bid at Public Auction. — An officer selling property at public vendue is not bound to receive the bid of an infant, and is consequently not liable to the owner for the difference between the infant's bid and the price at which the property was sold. *Kinney v. Showdy*, 1 Hill (N. Y.) 544.

2. Mortgage of Real Estate — Canada. — *Gilchrist v. Ramsay*, 27 U. C. Q. B. 500.

Arkansas. — *Cooper v. State*, 37 Ark. 421.

Maryland. — *Monumental Bldg. Assoc. v. Herman*, 33 Md. 128.

New Hampshire. — *State v. Plaisted*, 43 N. H. 413.

New York. — *Eagle F. Co. v. Lent*, 6 Paige (N. Y.) 635; *Palmer v. Miller*, 25 Barb. (N. Y.) 399; *Hangen v. Hachmeister*, 49 N. Y. Super. Ct. 34.

Vermont. — *Richardson v. Boright*, 9 Vt. 368. See also the title **DEEDS**, vol. 9, p. 114, note.

3. Chattel Mortgages. — *Corey v. Burton*, 32 Mich. 30; *Barney v. Rutledge*, 104 Mich. 289;

(c) **Leases.** — And so is a lease of his lands, although the rent reserved may not be the best obtainable.¹

(d) **Marriage Settlements.** — A marriage settlement executed by an infant is voidable by him, but is valid until avoided, and passes an estate.²

(e) **Assignments for Benefit of Creditors.** — An assignment of property made by an infant, or by a firm of which he is a member, for the benefit of creditors, is not void, but voidable only at the election of the infant, and the property assigned cannot be attached by a creditor in the hands of the assignee,³ nor will the assignment be set aside at the suit of a creditor.⁴

(2) **Bills and Notes — Liability of Infant as Maker or Acceptor.** — Despite some early cases to the contrary,⁵ it is now the universal rule that promissory notes and bills of exchange issued and accepted by infants are voidable and not void, and this whether they are negotiable or not.⁶

Miller v. Smith, 25 Minn. 248, 37 Am. Rep. 407; Chapin v. Shafer, 49 N. Y. 407; Skinner v. Maxwell, 66 N. Car. 45.

1. **Leases.** — Slaton v. Brady, 14 Ir. C. L. R. 61.

A Rent Charge Granted by an Infant is voidable only. Hudson v. Jones, 3 Mod. 310, note. And see Co. Litt. 308 a.

A Lease to an Infant is Voidable. — Holmes v. Blogg, 2 Moo. 552, 8 Taunt. 508, 4 E. C. L. 189; Gregory v. Lee, 64 Conn. 407; Griffith v. Schwendeman, 27 Mo. 412; Baxter v. Bush, 29 Vt. 465, 70 Am. Dec. 429.

Charter of Vessel to Infant. — In an action for not delivering goods shipped on board a vessel which was chartered by parol to an infant, it was held that the contract of charter was not void but voidable, and it not having been avoided by the infant, the shipper had no cause of action against the general owners. Thompson v. Hamilton, 12 Pick. (Mass.) 425, 23 Am. Dec. 619.

2. **Marriage Settlements.** — Temple v. Hawley, 1 Sandf. Ch. (N. Y.) 153; Jones v. Butler, 30 Barb. (N. Y.) 641.

3. **Assignment for Benefit of Creditors.** — Soper v. Fry, 37 Mich. 236. And see the title ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, vol. 3, p. 22.

4. Yates v. Lyon, 61 N. Y. 344.

5. **Bills and Notes — Held Void.** — Swasey v. Vanderheyden, 10 Johns. (N. Y.) 33; Bouchell v. Clary, 3 Brev. (S. Car.) 194; M'Ninn v. Richmonds, 6 Yerg. (Tenn.) 9.

6. **Bills and Notes — Voidable Only — England.** — Harris v. Wall, 1 Exch. 122; Hunt v. Massey, 5 B. & Ad. 902, 27 E. C. L. 230.

Canada. — Fisher v. Jewett, 2 N. Bruns. 69.

United States. — Young v. Bell, 1 Cranch (C. C.) 342; Baldwin v. Rosier, 1 McCrary (U. S.) 384.

Alabama. — Fant v. Cathcart, 8 Ala. 725.

California. — Buzzell v. Bennett, 2 Cal. 101.

Connecticut. — Alsop v. Todd, 2 Root (Conn.) 105.

Georgia. — Strain v. Wright, 7 Ga. 568.

Indiana. — Gavin v. Burton, 8 Ind. 69; La-Grange Collegiate Institute v. Anderson, 63 Ind. 367, 30 Am. Rep. 224; Fetrow v. Wiseman, 40 Ind. 148.

Kentucky. — Best v. Givens, 3 B. Mon. (Ky.) 72; Stern v. Freeman, 4 Met. (Ky.) 309; Beeler v. Young, 1 Bibb (Ky.) 519; Tandy v. Master-son, 1 Bibb (Ky.) 330.

Maine. — Boody v. McKenney, 23 Me. 517; Lawson v. Lovejoy, 8 Me. 405, 23 Am. Dec. 526.

Massachusetts. — Reed v. Batchelder, 1 Met. (Mass.) 559; Whitney v. Dutch, 14 Mass. 462, 7 Am. Dec. 229; Earle v. Reed, 10 Met. (Mass.) 389.

Michigan. — Minock v. Shortridge, 21 Mich. 304.

Missouri. — Baker v. Kennett, 54 Mo. 82.

New Hampshire. — Aldrich v. Grimes, 10 N. H. 194; State v. Plaisted, 43 N. H. 413; Wright v. Steele, 2 N. H. 51.

New Jersey. — Houston v. Cooper, 3 N. J. L. 431.

New York. — Goodsell v. Myers, 3 Wend. (N. Y.) 479; Baldwin v. Van Deusen, 37 N. Y. 487; Everson v. Carpenter, 17 Wend. (N. Y.) 419.

North Carolina. — Armfield v. Tate, 7 Ired. L. (29 N. Car.) 258.

Pennsylvania. — Hesser v. Steiner, 5 W. & S. (Pa.) 476.

South Carolina. — Du Bose v. Wheddon, 4 McCord L. (S. Car.) 221; Little v. Duncan, 9 Rich. L. (S. Car.) 55, 64 Am. Dec. 760.

Vermont. — Patchin v. Cromach, 13 Vt. 330.

Virginia. — Wamsley v. Lindenberger, 2 Rand. (Va.) 478.

Wisconsin. — Stokes v. Brown, 3 Pin. (Wis.) 311.

And see the title **BILLS OF EXCHANGE AND PROMISSORY NOTES**, vol. 4, p. 165.

A Sealed Note is voidable only. Parson v. Hill, 8 Mo. 135; Conroe v. Birdsall, 1 Johns. Cas. (N. Y.) 127, 1 Am. Dec. 105; Little v. Duncan, 9 Rich. L. (S. Car.) 55, 64 Am. Dec. 760.

Where an Infant Is a Co-Maker with an Adult the latter is held although the infant disaffirms. Taylor v. Dansby, 42 Mich. 82. See further the title **BILLS OF EXCHANGE AND PROMISSORY NOTES**, vol. 4, p. 167.

But if an infant gives his note for land purchased, and at his majority disaffirms the contract, the sureties on the note will not be liable. Baker v. Kennett, 54 Mo. 82.

An Injunction to Restrain Proceedings at Law upon a Note of an Infant indorsed by his father, given for the purchase of lands by the infant, issued on a bill filed by the infant to disaffirm the sale, will be dissolved as to the father, but be allowed to stand as to the infant. Parker v. Baker, Clarke (N. Y.) 136.

A Bill of Exchange Drawn on an Infant, but Accepted by Him After Arriving at Full Age, cannot be avoided by him. Stevens v. Jackson, 4 Campb. 164.

Right of Infant Payee to Indorse. — Nor is a bill or note drawn to the order of an infant payee a nullity. If the infant indorses it, he transfers a valid title so far as the maker¹ or acceptor² is concerned, and the infancy of the indorser cannot avail as defense in a suit upon it. And this for two reasons: In the first place, the plea of infancy is a personal privilege intended for the benefit of the infant only;³ and in the second place, the defendant, by uttering the note or accepting the bill, has asserted to the world the competency of the payee to negotiate it, and is therefore henceforward estopped to deny his capacity.⁴

(3) **Contracts of Suretyship.** — Although it has been held in some early decisions that an infant's contract of suretyship is absolutely void,⁵ and that a mortgage executed by an infant wife to secure a debt of her husband's⁶ or of a firm of which he was a member⁷ is incapable of confirmation, it is now very generally held that contracts of suretyship are not void, but voidable merely at the option of the infant.⁸ Hence an infant surety upon a guardian's bond⁹ or upon an undertaking as bail¹⁰ or on a forthcoming bond to secure a stay of execution¹¹ will be bound unless he chooses to plead his infancy.

Surety upon Promissory Note. — So if he executes a promissory note as surety for another, he incurs a liability thereby, although he may by proper plea relieve himself of it.¹²

(4) **Contracts for Service.** — An infant's contract for service is voidable by him,¹³ but until avoided by the infant, or until the parent asserts his para-

An Account Stated by an infant is not absolutely void, but voidable only. *Williams v. Moor*, 11 M. & W. 256.

1. **Indorsement of Note or Bond.** — *Grey v. Cooper*, 3 Dougl. 65, 26 E. C. L. 36; *Briggs v. McCabe*, 27 Ind. 327, 89 Am. Dec. 503; *Frazier v. Missey*, 14 Ind. 382; *Garner v. Cook*, 30 Ind. 331; *Hardy v. Waters*, 38 Me. 450; *Nightingale v. Withington*, 15 Mass. 272, 8 Am. Dec. 101; *Blake v. Livingston County*, 61 Barb. (N. Y.) 149; *Duly v. Brownfield*, 1 Pa. St. 497.

In an action by an indorsee against the maker of a promissory note payable to the order of a firm, the defendant cannot set up as a defense, that the name of the firm was indorsed by an infant partner. *Duly v. Brownfield*, 1 Pa. St. 497.

If the indorsement of the infant and the note to him has been rescinded and a new note given by the maker of the original note to the father of the infant payee in consideration of discharge from liability on the old note, it will bar a recovery on the first note. *Willis v. Twambly*, 13 Mass. 204.

2. **Indorsement of Bill of Exchange.** — *Taylor v. Croker*, 4 Esp. 187; *Jones v. Darch*, 4 Price 303.

3. See *infra*, this section, *Disaffirmance and Avoidance*.

4. See the title **BILLS OF EXCHANGE AND PROMISSORY NOTES**, vol. 4, p. 175.

5. **Contracts of Suretyship Void.** — *Wheaton v. East*, 5 Yerg. (Tenn.) 41, 26 Am. Dec. 251.

6. *Chandler v. McKinney*, 6 Mich. 217, 74 Am. Dec. 686; *Colcock v. Ferguson*, 3 Desaus. (S. Car.) 482.

7. *Cronise v. Clark*, 4 Md. Ch. 403.

8. **Contracts of Suretyship Voidable Only.** — *Curtin v. Patton*, 11 S. & R. (Pa.) 305.

"The mere fact that the infant assumed to become a surety for another is not in itself ground sufficient to say that such dealing was

a wrong to the infant. The most that can be said is that the court cannot see how the infant could derive benefit from such an act; but that is not sufficient if he himself, after arriving at maturity, deliberately has determined the matter for himself." *Williams v. Harrison*, 11 S. Car. 412.

9. *Wills v. Evans*, (Ky. 1897) 38 S. W. 1090.

10. *Reed v. Lane*, 61 Vt. 481.

11. *Harner v. Dipple*, 31 Ohio St. 72, 27 Am. Rep. 496.

Replevin Bond. — If an infant becomes security in a twelve months replevin bond, it is voidable by him, and a court of equity will grant a perpetual injunction even against an assignee without notice. *Allen v. Minor*, 2 Call (Va.) 70.

12. *Fetrow v. Wiseman*, 40 Ind. 148; *Owen v. Long*, 112 Mass. 403; *Hinely v. Margaritz*, 3 Pa. St. 428; *Williams v. Harrison*, 11 S. Car. 412.

13. **Infants' Contract for Service Voidable** — *Illinois*. — *Ray v. Haines*, 52 Ill. 485.

Indiana. — *Garner v. Board*, 27 Ind. 323; *Van Pelt v. Corwine*, 6 Ind. 363; *Dallas v. Hollingsworth*, 3 Ind. 537; *Wheatly v. Miscal*, 5 Ind. 142; *Kerwin v. Myers*, 71 Ind. 359; *Wright v. McLarinan*, 92 Ind. 103.

Maine. — *Derocher v. Continental Mills*, 53 Me. 217, 4 Am. Rep. 286; *Doane v. Covell*, 56 Me. 527; *Judkins v. Walker*, 17 Me. 38, 35 Am. Dec. 229.

Maryland. — *Wilhelm v. Hardman*, 13 Md. 140.

Massachusetts. — *Dube v. Beaudry*, 150 Mass. 448, 15 Am. St. Rep. 228; *Morse v. Ely*, 154 Mass. 458, 26 Am. St. Rep. 263; *Vent v. Osgood*, 19 Pick. (Mass.) 572; *Stone v. Dennison*, 13 Pick. (Mass.) 1, 23 Am. Dec. 654; *Gaffney v. Hayden*, 110 Mass. 137, 14 Am. Rep. 580; *Moses v. Stevens*, 2 Pick. (Mass.) 332; *Bishop v. Shepherd*, 23 Pick. (Mass.) 492; *Nickerson v. Easton*, 12 Pick. (Mass.) 110.

Michigan. — *Spicer v. Earl*, 41 Mich. 191, 32

mount right to put an end to the contract by reclaiming the services of his minor child, it remains in force and subjects his employer to liability as master.¹

(5) *Awards and Compromises* — (a) *Arbitration and Award*. — If an infant submits to arbitration a cause of action which he has, or upon which he may be liable, the award is not absolutely void, but he may, because of his presumed incompetency to choose suitable arbitrators, execute or avoid it at his election.²

(b) *Compromise of Causes of Action* — *aa. CLAIMS DUE INFANTS*. — Upon like principle, if an infant who has a cause of action for a tort³ or breach of contract⁴ attempts himself to ascertain the damages due him, and enters into a compromise of them, he may afterwards, if he chooses, avoid the agreement and recover at law such sum as the jury may award him. The law, however, will not permit these principles to be made an engine of fraud and injustice; and if the jury on trial are convinced that the satisfaction received was a compensation for the injury, they will assess for the plaintiff but nominal damages. But if the compensation should be found inadequate, the jury will give such further sum as, with the money received, will amount to a reasonable satisfaction.⁵

bb. TORTS COMMITTED BY INFANTS. — Although an infant is liable for a tort committed by him, he is not bound by a compromise entered into in respect to it, consequently he may avoid the same, and recover what money he had paid

Am. Rep. 152; *Widrig v. Taggart*, 51 Mich. 103; *Squier v. Hydliff*, 9 Mich. 274; *Thorpe v. Bateman*, 37 Mich. 68, 26 Am. Rep. 497.

Missouri. — *Craighead v. Wells*, 21 Mo. 404; *Lowe v. Sinklear*, 27 Mo. 308; *Thompson v. Marshall*, 50 Mo. App. 145.

New Hampshire. — *Danville v. Amoskeag Mfg. Co.*, 62 N. H. 133; *Lufkin v. Mayall*, 25 N. H. 82; *Brown v. Whittemore*, 44 N. H. 369; *Hagerty v. Nashua Lock Co.*, 62 N. H. 576; *Roundy v. Thatcher*, 49 N. H. 526.

New York. — *Medbury v. Watrous*, 7 Hill (N. Y.) 110; *Whitmarsh v. Hall*, 3 Den. (N. Y.) 375; *McCoy v. Huffman*, 8 Cow. (N. Y.) 84.

North Carolina. — *Francis v. Felmit*, 4 Dev. & B. L. (20 N. Car.) 498.

Rhode Island. — *Dearden v. Adams*, 19 R. I. 217.

South Carolina. — *Frazier v. Rowan*, 2 Brev. (S. Car.) 47.

Vermont. — *Meeker v. Hurd*, 31 Vt. 639; *Thomas v. Dike*, 11 Vt. 273, 34 Am. Dec. 690; *Hudson v. Worden*, 39 Vt. 382; *Taft v. Pike*, 14 Vt. 405, 39 Am. Dec. 228; *Hoxie v. Lincoln*, 25 Vt. 206; *Abell v. Warren*, 4 Vt. 149.

Wisconsin. — *Davies v. Turton*, 13 Wis. 185; *Mountain v. Fisher*, 22 Wis. 93.

1. *Nashville, etc., R. Co. v. Elliott*, 1 Coldw. (Tenn.) 612, 78 Am. Dec. 506.

2. See the title *ARBITRATION AND AWARD*, vol. 2, pp. 616, 617, 771.

3. *Compromise of Right of Action for Tort*. — *Pittsburg, etc., R. Co. v. Haley*, 170 Ill. 610; *Baker v. Lovett*, 6 Mass. 78, 4 Am. Dec. 88; *Young v. West Virginia Cent., etc., R. Co.*, 42 W. Va. 112.

4. *Compromise of Breach of Contract*. — *Kansas City, etc., R. Co. v. Moon*, 66 Ark. 409.

A Compromise Made by an Infant Legatee, whereby he receives specific chattels of less value than the legacy, is not obligatory on him; but he is bound to account for the value of the things received, and a deduction of that amount will be made from the legacy. *Tipton v. Tipton*, 3 Jones L. (48 N. Car.) 552.

Agreement for Pecuniary Consideration in Lieu

of Dower. — An agreement by an infant widow to accept a pecuniary consideration in lieu of dower is not a bar for a claim for dower; but she cannot claim dower and at the same time enforce the payment of a promissory note given to secure such consideration. *Drew v. Drew*, 40 N. J. Eq. 458.

Settlement with Guardian. — An infant ward fraudulently representing himself to be of age made a settlement with his guardian and executed a discharge. By reason of the settlement and discharge, the guardian was induced to surrender a certain security he had taken for his own protection in managing the estate. It was not charged that any advantage was taken of the infant in the settlement. It was held that the ward could not afterwards disregard the discharge, and in a court of equity call upon the estate of the deceased guardian to account. *Hayes v. Parker*, 41 N. J. Eq. 630.

Indiana Statute. — But under the Indiana statute (2 Rev. Stat. 1876, p. 591) which provides that "the marriage of any female ward to a person of full age shall operate as a legal discharge of the guardianship, and the guardian shall be authorized to account to the wife with the assent of the husband," if the husband of such ward with her consent and direction makes a final settlement with her guardian she is bound thereby. *Haines v. State*, 60 Ind. 41.

A Court of Equity Will Not Disturb a Settlement Made by an Attorney with a Client after his majority, in respect to a compromise of litigation affecting the interest of the latter when a minor, unless it is impeached for fraud, unfairness, or mistake. *Bennett v. Walker*, 100 Ill. 525.

5. *Baker v. Lovett*, 6 Mass. 78, 4 Am. Dec. 88. *Restoration of Sum Received in Satisfaction*. — In *Texas* it is held that before the infant can repudiate the compromise and sue at law for damages he must return or tender the sum he had accepted in satisfaction. *Lane v. Dayton Coal, etc., Co.*, 101 Tenn. 581.

in satisfaction of it, leaving the other party to proceed at law for his damages.¹

A Promissory Note to Compromise a Tort is no more binding than any other contract of an infant.²

(6) *Partnership Contracts.* — An infant's partnership agreement is voidable and not void. He may enter into partnership and bind the firm by his acts, but he cannot be held individually liable for its debts.³ The property which he contributed to the assets of the firm is, however, subject to the demands of the firm's creditors, and he cannot compel his partners to bear the burden of these debts until the entire assets of the firm have been exhausted. But this is a matter which is determined by the equitable principles governing the law of partnership accounting, and may be more properly discussed in that connection.⁴

(7) *Contracts in Respect to Corporation Stock.* — An infant may subscribe to and purchase the stock of a corporation and become a stockholder therein, but his contracts in respect thereto are voidable. The rights and liabilities of infant stockholders are not very clearly defined, and can be more satisfactorily considered in connection with the main subject.⁵

c. **DISAFFIRMANCE AND AVOIDANCE** — (1) *Right of Infants to Repudiate their Contracts* — (a) **General Principles.** — The right of an infant to avoid his contracts is one conferred by law for his protection against his own improvidence and the designs of others; and though its exercise is not infrequently the occasion of injury to those who have in good faith dealt with him, this is a consequence which they might have avoided by declining to enter into the contract. It is the policy of the law to discourage adults from contracting with infants, and the former cannot complain if, as a consequence of their violation of this rule of conduct, they are injured by the exercise of the right with which the law has purposely invested the latter,⁶ nor charge that the infant, in exercising the right, is guilty of fraud.⁷

(b) **Executory Contracts.** — The right in respect to executory contracts is exercised by interposing the plea of infancy to an action upon the contract, or for its breach.⁸

1. **Compromise of Infant's Torts.** — *Ware v. Carledge*, 24 Ala. 622, 60 Am. Dec. 489; *Pitcher v. Turin Plank Road Co.*, 10 Barb. (N. Y.) 436.

2. *Hanks v. Deal*, 3 McCord L. (S. Car.) 257. **Contra.** — *Ray v. Tubbs*, 50 Vt. 688, 28 Am. Rep. 519.

3. **Partnership Contracts — No Individual Liability upon Infant.** — *England.* — *Goode v. Harrison*, 5 B. & Ald. 147, 7 E. C. L. 49.

Canada. — *Murphy v. Yeomans*, 29 U. C. C. P. 421; *Woods v. Woods*, 3 Manitoba 33.

Louisiana. — *James v. Alford*, 15 La. Ann. 506.

Maryland. — *Bush v. Linthicum*, 59 Md. 344. *Massachusetts.* — *Mason v. Wright*, 13 Met. (Mass.) 306.

Michigan. — *Osburn v. Farr*, 42 Mich. 134; *Dunton v. Brown*, 31 Mich. 182.

Minnesota. — *Folds v. Allardt*, 35 Minn. 488. *New York.* — *Avery v. Fisher*, 28 Hun (N. Y.) 508.

And see the title **PARTNERSHIP**.

An Infant Who Was a Secret Partner in a Firm represented falsely that the ostensible partner was worthy of credit for their mutual profit. It was held that infancy was a defense to a suit for the price of the goods, although the vendor would have been entitled to rescind the sale on ground of fraud. *Vinsen v. Lockard*, 7 Bush (Ky.) 458. But it has been held in *Maryland* that the infant by the mere act of forming a partnership holds himself out as an

adult, and practices a fraud which estops him from setting up his infancy in defense. *Kemp v. Cook*, 18 Md. 130, 70 Am. Dec. 681. This is not, however, generally regarded as law. *Bates on Partnership*, § 142.

Under the Iowa Statute (Code, § 2239) which provides that no contract of a minor can be disaffirmed in cases where, on account of his having engaged in business as an adult, the other party had good reason to believe the minor capable of contracting, it is held that the fact that a minor, engaged in business as a member of a copartnership, had no property in the stock and only an interest in the profits of the business, does not operate to discharge his liability upon his contracts. *Jaques v. Sax*, 39 Iowa 367.

General Partner in Limited Partnership. — An infant may become interested in business as a general partner in a limited partnership; he is responsible for all the partnership engagements until he elects to set up a personal plea of infancy, and the presumption is that he will not do this. The fact, therefore, that one of the general partners is an infant, does not affect the liability of a special partner. *Continental Nat. Bank v. Strauss*, 137 N. Y. 148.

4. See the title **PARTNERSHIP**.

5. See the titles **STOCK**; **STOCKHOLDERS**.

6. *Tucker v. Moreland*, 10 Pet. (U. S.) 58.

7. *Burns v. Hill*, 19 Ga. 22.

8. See the cases cited in this section under notes to *Contracts Which Are Voidable* — *Illustra-*

(c) **Executed Contracts** — *aa. IN GENERAL.* — The fact that a contract has been executed gives it no additional binding force. Such a contract may be disaffirmed by the infant as well as an executory contract; there is no distinction between them in law.¹

bb. SALES OF REAL AND PERSONAL PROPERTY — (*aa*) *Recovery of Thing Sold.* — Thus if an infant sells his real or personal property, he may, after coming of age, repudiate the sale and recover the thing sold.²

Equity of Bona-fide Purchaser. — This right is absolute and paramount to all equities in favor of third persons, even *bona-fide* purchasers without notice.³

Recovery for Use. — The effect of the disaffirmance of a conveyance of land by an infant is to render the transaction void *ab initio* by relation,⁴ and entitle him to charge the purchaser for rents during the whole time that he occupied the property.⁵ The latter may recoup for valuable improvements erected on the land.⁶

(*bb*) *Mode of Disaffirmance* — *aaa. In General.* — In order to disaffirm a deed executed

tions, such as *Bills and Notes, Contracts of Suretyship, Awards and Compromises, Partnership Contracts, etc.*

Disaffirmance of Executory Agreement. — The heirs at law to a tract of land affected by a will employed an attorney to prosecute a suit to set the will aside, agreeing to compensate him for his services in case of success by conveying to him one-half of the land. Through the exertions of the attorney, the will was set aside. It was held that a minor heir, although benefited by the result equally with the others, was not bound by the agreement. *Dillon v. Bowles*, 77 Mo. 603, 8 Mo. App. 419.

1. **Disaffirmance — Executed Contracts.** — *Robinson v. Weeks*, 56 Me. 102; *Hill v. Anderson*, 5 Smed. & M. (Miss.) 216; *Abell v. Warren*, 4 Vt. 149; *Price v. Furman*, 27 Vt. 268, 65 Am. Dec. 104; *Person v. Chase*, 37 Vt. 647, 88 Am. Dec. 630.

If a minor pays his bounty money to his master in consideration of his consent to the minor's enlistment, the minor's administrator may rescind the contract and recover back the money. *Dinsmore v. Webber*, 50 Me. 103.

An Infant Purchased a Share in the Defendant's Trade, and advanced a certain sum thereupon, to be retained by the defendant as a forfeiture in case the infant should fail to fulfil an agreement to enter into partnership with the defendant. He did fail to do so, but it was held that the infant could recover the sum advanced. *Corpe v. Overton*, 10 Bing. 252, 25 E. C. L. 121.

The Fact that an Infant Was Empowered by an Act of the General Assembly to sell her real estate provided she invested the proceeds in a note secured by a mortgage, did not take away her right, or that of her administrator, to avoid her act in parting with the note before it fell due, in consideration of its payment by the maker. *Tillinghast v. Holbrook*, 7 R. I. 230.

An Infant May Avoid a Usurious Contract entered into by him, and recover the money lent upon such contract under the count for money had and received. *Millard v. Hewlett*, 19 Wend. (N. Y.) 301.

2. **Repudiation of Sale of Property.** — *Williams v. Norris*, 2 Litt. (Ky.) 157; *Hill v. Anderson*, 5 Smed. & M. (Miss.) 216; *French v. McAndrew*, 61 Miss. 187; *Moscowitz v. Hom-*

berger, (N. Y. City Ct. Gen. T.) 19 Misc. (N. Y.) 429; *Gillespie v. Bailey*, 12 W. Va. 70, 29 Am. Rep. 445.

An Infant, at the Request of her Guardian, Wrote Her Name upon the Back of a Stock Certificate belonging to her, without being told for what purpose he desired her signature, and without any arrangement that the shares could be transferred to him, and he pledged the stock as collateral for his own debt. It was held that the infant was not bound by her signature, or estopped from disputing the validity of the title acquired by the person to whom the certificate was assigned. *Smith v. Baker*, 42 Hun (N. Y.) 504.

A Decree for the Sale of Mortgaged Premises and a Sale Made Thereunder Will Be Set Aside where it appears that some of the mortgagors were infants, and there is no evidence that they received any part of the money loaned or that there was any fraud in the transaction. *Monumental Bldg. Assoc. v. Herman*, 33 Md. 128.

Equity Will Not Enjoin Disaffirmance. — An infant sold her interest in a tract of land, and executed a bond conditioned to make a conveyance at a time after she should come of age. All the purchase money was paid, and the purchaser went into possession. When the vendor came of age, she refused to ratify the sale, execute the deed, or repay the purchase money, but brought ejectment to recover possession of the land. It was held that she was not liable to be restrained by injunction. *Brawner v. Franklin*, 4 Gill (Md.) 463.

But if an Infant Assigns an Article of Personal Property to a Creditor with license to take it away when he chooses, the infant cannot, without rescinding the contract, maintain trespass against the creditor for taking the property away. *Hoyt v. Chapin*, 6 Vt. 42.

3. **Right Paramount to Equity of Bona Fide Purchasers.** — *Jenkins v. Jenkins*, 12 Iowa 195; *Brantley v. Wolf*, 60 Miss. 420; *Miles v. Lingerian*, 24 Ind. 385; *Searcy v. Hunter*, 81 Tex. 644, 26 Am. St. Rep. 837. See also *Hill v. Anderson*, 5 Smed. & M. (Miss.) 216.

4. *Mette v. Feltgen*, 148 Ill. 357.

5. *Tucker v. Moreland*, 10 Pet. (U. S.) 71; *Weaver v. Jones*, 24 Ala. 420; *French v. McAndrew*, 61 Miss. 187; *Mustard v. Wohlford*, 15 Gratt. (Va.) 320, 76 Am. Dec. 209.

6. *Weaver v. Jones*, 24 Ala. 420.

during infancy, some act must be performed, either by the infant himself after attaining his majority, or by his legal representative in case of his death, evidencing an intention to disaffirm, and such act must be inconsistent with the continued validity of the deed.¹ In some early decisions it was asserted that the infant must manifest his dissent by an act of equal dignity with the contract which he elected to avoid,² but this principle has never been fully recognized.

bbb. Actions at Law. — Action of Ejectment. — A deed executed by an infant may be avoided by an action of ejectment instituted by him after attaining his majority, but it seems that the grantee or tenant in possession ought to be notified of the intention to disaffirm before the commencement of the action.³

Writ of Entry. — In some of the New England states the land may be recovered by a writ of entry.⁴

ccc. Conveyances After Majority. — An infant's conveyance of land by bargain and sale may be disaffirmed after his majority by the conveyance of the same land to another person,⁵ and this whether the last be a quitclaim deed or a deed with covenants of warranty.⁶ The second grantee may recover possession of the land in ejectment.⁷

Actual or Constructive Possession. — In some of the states, however, it has been deemed necessary that the grantor should be in actual or constructive possession of the land in order to give validity to the second deed.⁸

Necessity of Entry. — In some other jurisdictions it has been held that to enable the grantor to pass title by the second conveyance, his actual entry upon the land is an indispensable requisite in all cases⁹ except where the infant had never been out of possession of the land,¹⁰ or where at the time of

1. Mode of Disaffirmance. — Illinois Land, etc., Co. v. Beem, 2 Ill. App. 390. And see the title DEEDS, vol. 9, p. 115.

An act showing a clear intention not to be bound by a mortgage is a disaffirmance. State v. Plaisted, 43 N. H. 413.

2. Jackson v. Carpenter, 11 Johns. (N. Y.) 539; Jackson v. Burchin, 14 Johns. (N. Y.) 124.

If an Infant Makes Two Sales of the Same Property to Different Persons, the ratification of one of these sales after majority is a disaffirmance of the other; for the infant cannot ratify both. Derrick v. Kennedy, 4 Port. (Ala.) 41.

3. Doe v. Abernathy, 7 Blackf. (Ind.) 442; Brawner v. Franklin, 4 Gill (Md.) 463.

4. Chadbourn v. Rackliff, 30 Me. 354.

5. Conveyance After Majority — United States.

— Tucker v. Moreland, 10 Pet. (U. S.) 58.

Alabama. — Eureka Co. v. Edwards, 71 Ala. 248, 46 Am. Rep. 314.

California. — Hastings v. Dollarhide, 24 Cal. 195.

Indiana. — Losey v. Bond, 94 Ind. 67; Pitcher v. Laycock, 7 Ind. 398.

Kentucky. — Vallandigham v. Johnson, 85 Ky. 288.

Michigan. — Prout v. Wiley, 28 Mich. 164; Haynes v. Bennett, 53 Mich. 15.

Minnesota. — Dixon v. Merritt, 21 Minn. 196; Dawson v. Helmes, 30 Minn. 107.

Missouri. — Peterson v. Laik, 24 Mo. 541, 69 Am. Dec. 441; Youse v. Norcum, 12 Mo. 549, 51 Am. Dec. 175.

New York. — Voorhies v. Voorhies, 24 Barb. (N. Y.) 150; Jackson v. Carpenter, 11 Johns. (N. Y.) 539; Jackson v. Burchin, 14 Johns. (N. Y.) 124; Dominick v. Michael, 4 Sandf. (N. Y.) 374; Bool v. Mix, 17 Wend. (N. Y.) 119, 31 Am. Dec. 285.

16 C. of L.—19

North Carolina. — Hoyle v. Stowe, 2 Dev. & B. L. (19 N. Car.) 320.

Ohio. — Cresinger v. Welch, 15 Ohio 156, 45 Am. Dec. 565.

Tennessee. — McGan v. Marshall, 7 Humph. (Tenn.) 121.

Texas. — Searcy v. Hunter, 81 Tex. 644, 26 Am. St. Rep. 837.

Virginia. — Mustard v. Wohlford, 15 Gratt. (Va.) 329, 76 Am. Dec. 209.

And see the title DEEDS, vol. 9, p. 115.

If an Infant Creates by Writing a Private Easement in His Land, and afterwards conveys the land by absolute deed to another, and ratifies the deed after his majority, this is in effect a disaffirmance of the easement, and a subsequent ratification of the contract creating the easement is inoperative as against the grantee in the deed. McCarthy v. Nicrosi, 72 Ala. 332, 47 Am. Rep. 418.

6. Bagley v. Fletcher, 44 Ark. 153. See further the title DEEDS, vol. 9, p. 115, note.

7. Ejectment. — Haynes v. Bennett, 53 Mich. 15; Corbett v. Spencer, 63 Mich. 731.

8. Actual or Constructive Possession Necessary. — A conveyance made by a grantor of land and held by one claiming the title thereto under a conveyance made by the same grantor during his infancy is void as against the adverse holder, but it operates as a disaffirmance to the first deed, and authorizes the grantee to sue the adverse holder in the name of the grantor for the recovery of such land. Riggs v. Fisk, 64 Ind. 100. See also Harrison v. Adcock, 8 Ga. 68; Harris v. Cannon, 6 Ga. 382.

9. Entry Necessary. — Dominick v. Michael, 4 Sandf. (N. Y.) 374.

10. Tucker v. Moreland, 10 Pet. (U. S.) 58.

Volume XVI.

the second deed the land was wholly vacant;¹ but in some states it is held that re-entry on the land is not necessary.²

Second Deed Must Be Inconsistent with First. — Where a disaffirmance is sought to be accomplished by a conveyance, the subsequent deed must be inconsistent with the deed executed during infancy, so that the two cannot properly stand together.³

cc. PURCHASES OF REAL OR PERSONAL PROPERTY. — An infant who has purchased property, real or personal, may repudiate the purchase after coming of age, tender back the property to the vendor, and recover what he may have paid upon the price, or whatever he has given in exchange.⁴

Lien for Reimbursement. — And it has been held that the same equitable principle which gives the vendor a lien for the unpaid purchase money, gives the infant a lien upon the property for the amount he has paid.⁵

Infant Not Liable for Use. — The infant is not liable to the vendor for the use of the property during the time it has been in the infant's possession.⁶

Not Liable for Depreciation. — Nor can the vendor recoup for its depreciation.⁷ If the thing purchased, as, for example, a horse, is injured by the infant, not by any tortious act wilfully committed, but merely through ignorance and want of skill in the management, it constitutes no defense to the infant's claim for money paid.⁸

dd. LEASE OF REAL PROPERTY TO INFANT. — An infant may disaffirm a lease of real property, and is not liable for rent after such disaffirmance and after he has ceased to occupy the property, although such period is within the term covered by the contract.⁹ But the infant cannot recover rent which he has already paid.¹⁰

ee. CONTRACTS OF SERVICE. — An infant's contract to serve for a given time at a definite rate of wages may be repudiated by him at any time during minority, whether before or after the completion of the term.¹¹

Recovering Value of Services after Avoidance. — After the contract has been avoided the parties stand in the same relation to each other as they would had the transaction taken place without any contract, and the infant may recover for his services on an implied promise to pay a reasonable price therefor, taking into consideration any benefit already received by him.¹²

1. *Jackson v. Carpenter*, 11 Johns. (N. Y.) 539; *Jackson v. Burchin*, 14 Johns. (N. Y.) 124.

2. *Contra.* — *Haynes v. Bennett*, 53 Mich. 15.

3. **Second Deed Must Be Inconsistent with First.** — *Illinois Land, etc.*, Co. v. *Beem*, 2 Ill. App. 390; *Eagle F. Co. v. Lent*, 6 Paige (N. Y.) 635. See also the title *DEEDS*, vol. 9, p. 115, note.

4. **Disaffirmance of Purchase.** — *Riley v. Mallory*, 33 Conn. 201; *House v. Alexander*, 105 Ind. 109, 55 Am. Rep. 189; *Willis v. Twambly*, 13 Mass. 204; *Pyne v. Wood*, 145 Mass. 558; *McCarthy v. Henderson*, 138 Mass. 310; *Welch v. Olmstead*, 90 Mich. 492; *Cooper v. Allport*, 10 Daly (N. Y.) 352; *Rice v. Butler*, 25 N. Y. App. Div. 388; *Skinner v. Maxwell*, 66 N. Car. 45; *Grace v. Hale*, 2 Humph. (Tenn.) 27, 36 Am. Dec. 266; *Rapid Transit Land Co. v. Sanford*, (Tex. Civ. App. 1893) 24 S. W. Rep. 587; *Hoyt v. Wilkinson*, 57 Vt. 404.

But a married infant cannot demand the return of payments which her husband may have made upon the purchase price. *Jennings v. Hare*, 47 S. Car. 279.

It is no defense to such an action that the infant stole the money from another person, if the owner of the money makes no claim upon the defendant therefor. *Riley v. Mallory*, 33 Conn. 201.

Effect of Disaffirmance. — An infant who re-

ceives property under a contract of sale to him, and then surrenders it to the seller, intending to give up all his interest in it, cannot afterwards avoid such surrender and retake the property from the possession of the seller. *Edgerton v. Wolf*, 6 Gray (Mass.) 453.

5. *Morris v. Holland*, 10 Tex. Civ. App. 474.

6. **Infant Not Liable for Use of Thing Purchased.** — *McCarthy v. Henderson*, 138 Mass. 310.

7. *Whitcomb v. Joslyn*, 51 Vt. 79, 31 Am. Rep. 678.

8. **Infant Not Liable for Depreciation.** — *Carpenter v. Carpenter*, 45 Ind. 142; *Stack v. Cavanaugh*, 67 N. H. 149; *Price v. Furman*, 27 Vt. 268, 65 Am. Dec. 194.

Testimony that the article returned is depreciated in value is inadmissible either to defeat the action or in mitigation of damages. *Price v. Furman*, 27 Vt. 268, 65 Am. Dec. 194; but see *Bartholomew v. Finnemore*, 17 Barb. (N. Y.) 428.

9. **Disaffirmance of Lease.** — *Gregory v. Lee*, 64 Conn. 407.

10. *Holmes v. Blogg*, 8 Taunt. 508, 4 E. C. L. 189; *Valentini v. Canali*, 24 Q. B. 166.

11. See *supra*, this title and section, *Contracts Which Are Voidable — Contracts for Service.*

12. **Right to Recover for Value of Services.** — *Illinois.* — *Ray v. Haines*, 52 Ill. 485.

Part Payment. — If an infant has received a portion of his wages prior to his election to avoid the contract, the amount paid him must be deducted from the sum due him.¹

Damages from Breach of Contract. — Whether the employer can claim as a set-off the damage caused by the breach of contract, is a question upon which authorities are divided. In some of the states it is held that no such deduction can be allowed, since to permit it would be in effect to hold the infant liable for the breach of the contract.² But in other jurisdictions it has been allowed, though the courts seem to recognize that in so holding, they have departed from the strict rules of law, being influenced in their decisions by the desire to make an equitable adjustment of the rights of the parties.³

Necessaries as a Consideration. — Where the consideration for an infant's contract to serve is the agreement of the employer to furnish him with necessaries during the term of service, and the agreement is faithfully performed by the employer, the value of the necessaries furnished him may be pleaded as a set-off to the infant's claim for compensation, even to the extinction of his demand.⁴

(d) **Ignorance of One Contracting Party of Infancy of Other.** — The fact that one party to a contract was ignorant of the infancy of the other party at the time the contract was made, does not estop the latter from asserting his infancy as a ground for repudiating it.⁵

(e) **Effect of Infant's Misrepresentations as to Age** — *aa.* **AT LAW.** — Even the fact that

Indiana. — *Dallas v. Hollingsworth*, 3 Ind. 537; *Wheatly v. Miscal*, 5 Ind. 142; *Van Pelt v. Corwine*, 6 Ind. 363; *Kerwin v. Myers*, 71 Ind. 359.

Maine. — *Judkins v. Walker*, 17 Me. 38, 35 Am. Dec. 229.

Massachusetts. — *Dube v. Beaudry*, 150 Mass. 448, 15 Am. St. Rep. 228; *Morse v. Ely*, 154 Mass. 458, 26 Am. St. Rep. 263; *Vent v. Osgood*, 19 Pick. (Mass.) 572; *Gaffney v. Hayden*, 110 Mass. 137, 14 Am. Rep. 580; *Moses v. Stevens*, 2 Pick. (Mass.) 332; *Bishop v. Shepherd*, 23 Pick. (Mass.) 492; *Nickerson v. Easton*, 12 Pick. (Mass.) 110.

Michigan. — *Widrig v. Taggart*, 51 Mich. 103.

Missouri. — *Lowe v. Sinklear*, 27 Mo. 308; *Thompson v. Marshall*, 50 Mo. App. 145.

New Hampshire. — *Lufkin v. Mayall*, 25 N. H. 82; *Danville v. Amoskeag Mfg. Co.*, 62 N. H. 133; *Hagerty v. Nashua Lock Co.*, 62 N. H. 576.

New York. — *Whitmarsh v. Hall*, 3 Den. (N. Y.) 375.

Rhode Island. — *Dearden v. Adams*, 19 R. I. 217; *Shurtleff v. Millard*, 12 R. I. 272, 34 Am. Rep. 640.

Vermont. — *Abell v. Warren*, 4 Vt. 149; *Thomas v. Dike*, 11 Vt. 273, 34 Am. Dec. 690; *Taft v. Pike*, 14 Vt. 405, 39 Am. Dec. 228; *Hoxie v. Lincoln*, 25 Vt. 206; *Meeker v. Hurd*, 31 Vt. 639.

An infant agreed to work for his creditor and to allow part of the wages due him to be applied to a debt which he had contracted, none of the items of which, however, were for necessaries. He afterwards repudiated the contract, and it was held that he might recover the full amount of the wages due him. *Morse v. Ely*, 154 Mass. 458, 26 Am. St. Rep. 263.

1. **Deduction of Part Payment.** — *Hagerty v. Nashua Lock Co.*, 62 N. H. 576; *Taft v. Pike*, 14 Vt. 405, 39 Am. Dec. 228.

2. **Damages for Breach Not Set-off.** — *Derocher*

v. Continental Mills, 58 Me. 217, 4 Am. Rep. 286; *Widrig v. Taggart*, 51 Mich. 103.

3. **Contra.** — *Lowe v. Sinklear*, 27 Mo. 308; *Thomas v. Dike*, 11 Vt. 273, 34 Am. Dec. 690; *Hoxie v. Lincoln*, 25 Vt. 206.

Injunction to Restrain Breach of Contract. — An infant agreed, in consideration of being employed as a milk carrier, not to compete in business within a radius of five miles for two years after leaving his employer. He left shortly after attaining his majority. An injunction was granted to restrain a breach of the agreement by the servant. *Evans v. Ware*, (1892) 3 Ch. 502.

4. **Necessaries as a Set-off** — *Indiana.* — *Garner v. Board*, 27 Ind. 323.

Maryland. — *Wilhelm v. Hardman*, 13 Md. 140.

Michigan. — *Squier v. Hydliff*, 9 Mich. 274; *Spicer v. Earl*, 41 Mich. 191, 32 Am. Rep. 152; *Thorp v. Bateman*, 37 Mich. 68, 26 Am. Rep. 497.

Massachusetts. — *Stone v. Dennison*, 13 Pick. (Mass.) 1, 23 Am. Dec. 654.

New Hampshire. — *Roundy v. Thatcher*, 49 N. H. 526.

Pennsylvania. — *Defrance v. Austin*, 9 Pa. St. 309.

The agreement of hiring should always be looked to, whether the infant's services were to be paid for in money or by board and education. *Mountain v. Fisher*, 22 Wis. 93. And see *Garner v. Board*, 27 Ind. 323; *Breed v. Judd*, 1 Gray (Mass.) 455.

Where an infant is taken into the family and supported there is no presumption that payment is to be made for services rendered. *Thorp v. Bateman*, 37 Mich. 68, 26 Am. Rep. 497; *Defrance v. Austin*, 9 Pa. St. 309. But see *Wright v. McLarinan*, 92 Ind. 103.

5. **Ignorance of Other Party No Estoppel.** — *Stack v. Cavanaugh*, 67 N. H. 149; *Sewell v. Sewell*, 92 Ky. 500, 36 Am. St. Rep. 606.

the other party was induced to enter into the contract by the infant's misrepresentation that he was of age, will not, at common law, estop the infant from afterwards repudiating it,¹ though he may be liable in tort for his fraud.²

Statutes. — In a few of the states it is provided by statute that the contract of a minor cannot be disaffirmed where, on account of his own misrepresentations, the other party has been led to believe the infant capable of contracting.³

bb. IN EQUITY. — There has always been a tendency in equity, however, to hold an infant responsible for any contract that he may have induced by his misrepresentations as to his age, especially when his appearance bears out his assertion.⁴ But the mere failure of the infant to inform the other party of his nonage will not bind him,⁵ unless the circumstances of the case make it a fraud for the infant to remain silent.⁶ It is essential that the other party

1. Effect of Infant's Misrepresentations Estopped — *England.* — *Liverpool Adelphi Loan Assoc. v. Fairhurst*, 9 Exch. 422; *Johnson v. Pie*, Sid. 258, 1 Keb. 913; *Wright v. Leonard*, 11 C. B. N. S. 258, 103 E. C. L. 258; *Bartlett v. Wells*, 1 B. & S. 836, 101 E. C. L. 836; *Cannam v. Farmer*, 3 Exch. 698.

United States. — *Sims v. Everhardt*, 102 U. S. 300.

Indiana. — *Carpenter v. Carpenter*, 45 Ind. 142.

Kentucky. — *Wilson v. Wilson*, (Ky. 1899) 50 S. W. Rep. 260.

Massachusetts. — *Merriam v. Cunningham*, 11 Cush. (Mass.) 40; *Baker v. Stone*, 136 Mass. 405.

Minnesota. — *Conrad v. Lane*, 26 Minn. 389, 37 Am. Rep. 412; *Alt v. Graff*, 65 Minn. 191.

Missouri. — *Lacy v. Pixler*, 120 Mo. 383.

Nebraska. — *Cobbe v. Buchanan*, 48 Neb. 391.

New Hampshire. — *Burley v. Russell*, 10 N. H. 184, 34 Am. Dec. 146; *Prescott v. Norris*, 32 N. H. 101.

New Jersey. — *Pemberton Bldg., etc., Assoc. v. Adams*, 53 N. J. Eq. 258.

New York. — *Brown v. McCune*, 5 Sandf. (N. Y.) 225; *Johnson v. Clark*, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 346; *New York Bldg. Loan Banking Co. v. Fisher*, 23 N. Y. App. Div. 363, (Supm. Ct. Spec. T.) 20 Misc. (N. Y.) 242; *Heath v. Mahoney*, 7 Hun (N. Y.) 100; *Studwell v. Shapter*, 54 N. Y. 249; *Conroe v. Birdsall*, 1 Johns. Cas. (N. Y.) 127, 1 Am. Dec. 105.

North Carolina. — *Carolina Interstate Bldg., etc., Assoc. v. Black*, 119 N. Car. 323.

Texas. — *Vogelsang v. Null*, 67 Tex. 465.

West Virginia. — *Williamson v. Jones*, 43 W. Va. 562.

2. See *infra*, this title, *Liability for Torts*.

3. Statutes — Iowa and Kansas. — *Rev. Code Iowa* 1897, § 3100; *Comp. Laws Kansas*, c. 67, § 3; *Prouty v. Edgar*, 6 Iowa 353; *Oswald v. Broderick*, 1 Iowa 380; *Harrison v. Burnes*, 84 Iowa 446; *Dillon v. Burnham*, 43 Kan. 77.

4. Fraudulent Misrepresentations as to Age — In Equity. — Where an infant has, by fraudulently misrepresenting that he was of age, induced another person to enter into contract with him, under which materials were supplied and work done, such person may maintain an action against such infant to obtain a return of the materials in the possession of the infant, and an account and payment of the value of so much of such materials as are no longer

in his control and disposition; and where the infant has accepted a bill of exchange for the whole sum claimed to be due, he will be held to pay it. *Campbell v. Ridgely*, 13 Vict. L. R. (Australia) 701.

In *Lemprière v. Lange*, 12 Ch. D. 675, where an infant had obtained a lease of a furnished house on the false representation that he was of age, it was held that the lease must be declared void and possession given up, and the infant enjoined from parting with the furniture, although he could not be made liable for use and occupation.

Recovery of Land Sold. — If an infant, by his representations as to his age, induces one to purchase land from him, he will be estopped by his fraud from calling on a court of equity to cancel the deed. *Schmitheimer v. Eiseleman*, 7 Bush (Ky.) 298; *Ryan v. Growney*, 125 Mo. 474. See also *Dafidson v. Young*, 38 Ill. 145.

Where an Infant Cestui Que Trust induces the trustee to make payment to him by misrepresenting his age, the payment is a discharge of the sum due. *Overton v. Banister*, 3 Hare 503.

So a Settlement with a Guardian Induced by Fraud, on the part of an infant ward, falsely representing himself to be of age, will not be avoided by a court of equity. *Hayes v. Parker*, 41 N. J. Eq. 630.

Estate Liable in Bankruptcy. — An infant, to all appearances over twenty-one years of age, engaged in business and borrowed money, representing himself to be twenty-two years old. His estate in bankruptcy was held liable in equity to pay the debt. *Ex p. Unity Joint-Stock Mut. Banking Assoc.*, 3 De G. & J. 63.

5. Failure to State Infancy. — *Baker v. Stone*, 136 Mass. 405; *Brantley v. Wolf*, 60 Miss. 420; *Thormaehlen v. Kaepfel*, 86 Wis. 378.

6. When Circumstances Render It a Fraud to Remain Silent. — In *Watts v. Creswell*, 9 Vin. Abr. 415, 3 Eq. Cas. Abr. 515, par. 3, a tenant for life borrowed money, and his son, who was next in remainder and an infant, was witness to the mortgage deed, and the court relieved on the ground of the fraud in the infant by not giving notice to the mortgagee of his title. See also *Savage v. Foster*, 9 Mod. 35; *Clare v. Bedford*, 13 Vin. Abr. 536.

In *Ferguson v. Bobo*, 54 Miss. 121, a female infant of nineteen, knowing her rights, conveyed land to her father for the purpose of enabling him to borrow money by giving a mortgage thereon to one who was ignorant of

should be deceived by the infant's assertion.¹

(f) **Avoidance of Whole Transaction Necessary.** — The right of disaffirmance which an infant possesses must, in respect to a particular contract, be exercised as a whole. He must avoid or affirm the entire transaction; he cannot be permitted to affirm a part which may be to his advantage, and at the same time avoid another part which imposes a liability.²

Conveyance and Purchase-money Mortgage. — Thus where land is conveyed to an infant and a mortgage taken back for the purchase money, the deed and mortgage together constitute but one transaction, and the title only passes by the deed subject to the mortgage. The infant may disaffirm the mortgage, but by so doing he annuls the sale to himself.³ The same principle obtains in the purchase and mortgaging of chattels.⁴

(g) **Restoration of the Consideration** — *aa.* AT COMMON LAW — (*aa.*) *Statement of the Rule.* — To give effect to an infant's disaffirmance of his contract, it is not necessary that the other party should be placed *in statu quo*;⁵ for if the law in every case required restitution of the consideration as a condition precedent to the disaffirmance of the contract, it would often result in accomplishing indirectly what it expressly says shall not be done directly, and the very purpose of the law in permitting infants to avoid their contracts would be defeated.⁶ For example, if an infant borrows money, and improvidently disposes of it, as the law, from his want of discretion, presumes he may do, this very indiscretion which the law endeavors to shield and protect becomes the means of fastening the imperfect obligation upon him, and his inability to refund what he has borrowed affirms his contract to repay it.⁷

(*bb.*) *When the Consideration Has Passed Out of the Infant's Hands.* — Consequently, if the consideration has passed from the infant's hands, either wasted or expended during his minority, so that he cannot restore it to the party from whom he received it, he is not deprived of his right or capacity to avoid the contract,⁸

the infant's minority. The money was loaned, and subsequently, the lender being still ignorant of her minority, the father conveyed the land to pay the debt. The infant, on reaching full age, brought ejectment, and it was held that a court of equity would enjoin her from asserting her legal title and thus perpetrating a fraud.

1. Misrepresentations Must Deceive. — *Nelson v. Stocker*, 4 De G. & J. 458. See also *Dibble v. Jones*, 5 Jones Eq. (58 N. Car.) 389. And see generally the title FRAUD AND DECEIT, vol. 14, p. 106.

2. Avoidance of Whole Transaction Necessary. — *Overbach v. Heermance*, Hopk. (N. Y.) 337.

An infant owner of a piece of land upon which there were valid liens for unpaid purchase money and taxes, borrowed money and executed a deed of trust upon the land, and applied the money so borrowed to the discharge of the liens. Upon arriving at majority the infant disaffirmed the contract and deed of trust, and refused to pay the money borrowed. It was held that, the deed having been disaffirmed, the infant was entitled, as between herself and the lender, to be protected only in the enjoyment of such rights in the property as she had at the time the deed of trust was executed, and that the lender was entitled to be subrogated to the rights of the lienholders whose liens the lender's money was used to discharge. *MacGreal v. Taylor*, 167 U. S. 688.

But an Infant Partner may avoid personal liability by disaffirming a contract made by the firm, without disaffirming the contract of partnership. *Mehlhop v. Rae*, 90 Iowa 30.

3. Deed and Purchase-money Mortgage — *Maine* — *Dana v. Coombs*, 6 Me. 89, 19 Am. Dec. 194; *Hubbard v. Cummings*, 1 Me. 11.

Michigan. — *Young v. McKee*, 13 Mich. 552.

Nebraska. — *Uecker v. Koehn*, 21 Neb. 559, 59 Am. Rep. 849. See also *Bridges v. Bidwell*, 20 Neb. 185.

New Hampshire. — *Robbins v. Eaton*, 10 N. H. 561.

North Carolina. — *Skinner v. Maxwell*, 66 N. Car. 45.

New York. — *Walsh v. Powers*, 43 N. Y. 23, 3 Am. Rep. 654.

Pennsylvania. — *Kennedy v. Baker*, 159 Pa. St. 146, 33 W. N. C. (Pa.) 498.

Vermont. — *Richardson v. Boright*, 9 Vt. 368; *Bigelow v. Kinney*, 3 Vt. 353.

4. Purchase of Goods and Chattel Mortgage. — *Cogley v. Cushman*, 16 Minn. 397; *Heath v. West*, 28 N. H. 101; *Ottman v. Moak*, 3 Sandf. Ch. (N. Y.) 431; *Skinner v. Maxwell*, 66 N. Car. 45; *Curtiss v. McDougal*, 26 Ohio St. 66; *Knaggs v. Green*, 48 Wis. 601, 33 Am. Rep. 838.

5. Restoration of Consideration. — *Dawson v. Helmes*, 30 Minn. 107; *Ruchizky v. De Haven*, 97 Pa. St. 202.

6. Miller v. Smith, 26 Minn. 248, 37 Am. Rep. 407.

7. Corey v. Burton, 32 Mich. 30; *Miller v. Smith*, 26 Minn. 248, 37 Am. Rep. 407; *Green v. Green*, 69 N. Y. 553, 25 Am. Rep. 233.

8. When the Consideration Has Passed Out of the Infant's Hands — *Alabama*. — *Manning v. Johnson*, 26 Ala. 446, 62 Am. Dec. 732.

Arkansas. — *Fox v. Drewry*, 62 Ark. 316.

or required to return an equivalent therefor.¹

(cc) *When the Infant Never Received the Consideration.* — So if the infant never received the consideration, as where it was misapplied by an agent appointed to receive it,² or was appropriated by his parent,³ or, in the case of an infant *feme covert*, was applied to the payment of her husband's debts,⁴ the infant cannot be made to account for it.

(dd) *When the Infant Has All or Any Part of the Consideration.* — But when at the time of disaffirmance the infant still has in his possession all or any part of the consideration received by him under the contract, common honesty and fair dealing require that he should restore it to the other party.⁵

Contracts of Purchase. — Thus while an infant may escape personal liability on his contract of purchase, he cannot, after avoiding it, retain as his own, property in his possession which he has obtained by means of it.⁶ In *New Hampshire* it is held that if an infant does not restore the goods purchased, when it is in his power to do so, he is liable in a suit by the vendor for so much of the price as is equal to the benefit derived by the infant from the purchase;⁷ but the usual rule is that a disaffirmance of the contract merely reverts the title to the property sold in the vendor or his legal representative,⁸ and the infant, on demand, must account for it.⁹ If he refuses to deliver the property it may be

Illinois. — *Reynolds v. McCurry*, 100 Ill. 356.

Indiana. — *Dill v. Bowen*, 54 Ind. 204.

Massachusetts. — *Walsh v. Young*, 110 Mass. 396; *Chandler v. Simmons*, 97 Mass. 508, 93 Am. Dec. 117.

Michigan. — *Corey v. Burton*, 32 Mich. 30.

Mississippi. — *Brantley v. Wolf*, 60 Miss. 420; *Harvey v. Briggs*, 68 Miss. 60.

Missouri. — *Lacy v. Pixler*, 120 Mo. 383.

New York. — *Green v. Green*, 69 N. Y. 553, 25 Am. Rep. 233; *Petrie v. Williams*, 68 Hun (N. Y.) 589; *Kane v. Kane*, 13 N. Y. App. Div. 544.

Pennsylvania. — *Shaw v. Boyd*, 5 S. & R. (Pa.) 309, 9 Am. Dec. 368.

Vermont. — *Price v. Furman*, 27 Vt. 268, 65 Am. Dec. 194.

When Property Has Been Taken in Execution. — If an infant purchases personalty, he may recover back the consideration paid without restoring the property sold and delivered to him, where it has been taken from him, whether rightfully or not upon an execution against a third person. In such case he is not required, as a condition of his right to recover, to take any steps to recover the property taken from him. It is sufficient in such case that the property ceases to be in his possession or subject to his control. *Lemmon v. Beeman*, 45 Ohio St. 505.

Money Expended upon Property. — A mortgage executed by an infant on his land is voidable at his election, and he cannot be compelled to make restitution of the money obtained upon the mortgage if it has been expended in filling in a portion of the mortgaged premises. *New York Bldg. Loan Banking Co. v. Fisher*, 23 N. Y. App. Div. 363.

1. *Bloomer v. Nolan*, 36 Neb. 51, 38 Am. St. Rep. 690; *Englebert v. Troxell*, 40 Neb. 195, 42 Am. St. Rep. 665.

2. **Consideration Never Received.** — *Vogelsang v. Null*, 67 Tex. 465.

3. *O'Connor v. Vineyard*, (Tex. Civ. App. 1897) 43 S. W. Rep. 55.

4. *Stull v. Harris*, 51 Ark. 294; *Bradshaw v. Van Valkenburg*, 97 Tenn. 316.

5. **When the Infant Retains the Consideration.**

— *Buchanan v. Hubbard*, 119 Ind. 187.

In *Iowa* the statutes require that upon a disaffirmance of contracts the infant must restore to the other party all money or property received by him by virtue of the contracts and remaining within his control at any time after attaining his majority. Code Iowa, § 2238; *Jenkins v. Jenkins*, 12 Iowa 195; *Stout v. Merrill*, 35 Iowa 47.

The statute has been construed to require only the return of the identical money or property, and not the payment of other money or property which he may have at the time of the disaffirmance. *Hawes v. Burlington, etc., R. Co.*, 64 Iowa 315.

6. **Restoration of Consideration upon Disaffirmance of Executory Contract.** — *Evans v. Morgan*, 69 Miss. 328.

The maker of a promissory note cannot plead his infancy as a defense to it, and at the same time retain the property for the price for which it was given. *Curry v. St. John Plow Co.*, 55 Ill. App. 82.

7. *Hall v. Butterfield*, 59 N. H. 354, 47 Am. Rep. 209; *Bartlett v. Bailey*, 59 N. H. 408; *Stack v. Cavanaugh*, 67 N. H. 149.

If an Infant Exchange His Property with an Adult, he must, before rescinding the bargain and seeking to recover the property which he has given, offer to return that which he has received, and which is still in his possession. *Carr v. Clough*, 26 N. H. 280, 59 Am. Dec. 345.

8. **Revesting of Title in Vendor.** — *Strain v. Wright*, 7 Ga. 568; *Badger v. Phinney*, 15 Mass. 359, 8 Am. Dec. 105; *Brantley v. Wolf*, 60 Miss. 420; *Evans v. Morgan*, 69 Miss. 328; *Kitchen v. Lee*, 11 Paige (N. Y.) 107, 42 Am. Dec. 101.

If an Infant, to Defeat Such Revesting of Title, fraudulently conveys the property to another not a *bona fide* purchaser, the seller may in equity have the conveyance canceled, and the property restored to him. *Evans v. Morgan*, 69 Miss. 328.

9. *Eureka Co. v. Edwards*, 71 Ala. 248, 46 Am. Rep. 314.

recovered from him by replevin.¹

Infant Not Liable for Depreciation in Property. — The vendor must take the property in the condition in which he finds it, except perhaps where the property was tortiously injured by the infant, and the latter cannot be made to make good the loss from depreciation.²

Contracts of Sale. — The same principle applies where after maturity the infant disaffirms a contract of sale, and seeks to recover the lands or personalty conveyed under it; he must restore to the vendee so much of the consideration as remains in the infant's hands *in specie*. In a few jurisdictions the infant is not bound to tender the consideration as a precedent to disaffirmance, the act merely giving to the vendee a right to its recovery,³ but in most states it is held that where it is shown that he has the power to restore the consideration, he cannot be allowed to rescind the contract of sale and recover the property without first making restitution.⁴

Restoration to Subsequent Purchaser. — But though the infant must restore to his vendee the whole consideration, or such part of it as remains in his possession, he is not required to restore to a subsequent purchaser the consideration which the latter may have paid to the infant's vendee.⁵

(*ce*) **When the Nature of the Consideration Prevents Its Restoration.** — A limitation upon the right of an infant to repudiate his contract and to recover whatever sum he may have paid upon it, has been held to occur when the contract is shown to be fair and reasonable, and to have been wholly or partially executed on both sides, so that the infant has enjoyed the benefits of it, or where the benefits are of such a nature that he cannot restore them. In such a case it has been held that he cannot recover.⁶

1. **Replevin Will Lie.** — Shannon *v.* Shannon, 1 Sch. & Lef. 324; Bennett *v.* McLaughlin, 13 Ill. App. 349; Nolan *v.* Jones, 53 Iowa 387; Badger *v.* Phinney, 15 Mass. 359, 8 Am. Dec. 105; Hsley *v.* Stubbs, 5 Mass. 284.

A Court of Equity will not permit a defendant to protect himself against the enforcement of a contract under which he has secured a loan of money, under the plea of infancy, without returning the money paid. Pemberton Bldg., etc., Assoc. *v.* Adams, 53 N. J. Eq. 258.

Where After Part Payment an Infant Purchaser Retains the Property Purchased, a court of equity, upon the infant's disaffirming the purchase, may decree the sale of the property and out of the proceeds reimburse the infant the amount paid by him, and decree that the balance be paid to the vendor or his legal representative Strain *v.* Wright, 7 Ga. 568. See also Thomson *v.* Phillips, 73 Ga. 140.

2. White *v.* Branch, 51 Ind. 210; Price *v.* Furman, 27 Vt. 268, 65 Am. Dec. 194.

3. **Contract of Sale.** — St. Louis, etc., R. Co. *v.* Higgins, 44 Ark. 293; Pitcher *v.* Laycock, 7 Ind. 398; Miles *v.* Lingerman, 24 Ind. 385; White *v.* Branch, 51 Ind. 210; Dill *v.* Bowen, 54 Ind. 204; Self *v.* Taylor, 33 La. Ann. 769.

In Georgia, where, under the code, the contracts of infants are void, when an action is brought by an infant to recover property conveyed by him in exchange for other property it is not an indispensable requisite to the maintenance of the action that the defense should tender back the property received. Shuford *v.* Alexander, 74 Ga. 293.

If Property Mortgaged by a Person While an Infant is taken from his possession under the mortgage without his consent, he may reclaim the same upon disaffirmance of the contract

without returning or offering to return the money borrowed, if it does not remain *in specie*. Carpenter *v.* Carpenter, 45 Ind. 142; Cresinger *v.* Welch, 15 Ohio 156, 45 Am. Dec. 565.

4. **Restoration as a Condition Precedent**—United States. — Utermehle *v.* McGreal, 1 App. Cas. (D. C.) 359.

Alabama. — Manning *v.* Johnson, 26 Ala. 446, 62 Am. Dec. 732.

Arkansas. — Bozeman *v.* Browning, 31 Ark. 364.

Kentucky. — Petty *v.* Roberts, 7 Bush (Ky.) 410; Bailey *v.* Barnberger, 11 B. Mon. (Ky.) 113.

Missouri. — Kerr *v.* Bell, 44 Mo. 120; Betts *v.* Carroll, 6 Mo. App. 518.

New York. — Dickerson *v.* Gordon, (Supm. Ct. Gen. T.) 5 N. Y. Supp. 310.

Tennessee. — Smith *v.* Evans, 5 Humph. (Tenn.) 70.

Texas. — Womack *v.* Womack, 8 Tex. 397, 58 Am. Dec. 119; Kilgore *v.* Jordan, 17 Tex. 341; Stuart *v.* Baker, 17 Tex. 417; Bingham *v.* Barley, 55 Tex. 281, 40 Am. Rep. 801; Wade *v.* Love, 69 Tex. 522.

Virginia. — Bedinger *v.* Wharton, 27 Gratt. (Va.) 857.

5. Downing *v.* Stone, 47 Mo. App. 144.

6. **Executed Contracts Involving Risk of Loss.**

— Where the consideration of an infant's contract consisted partly of money paid for him and partly of an undertaking by the defendant involving uncertain risks, if the infant seeks to recover back money paid in execution of the contract, it must be left to the jury to determine what, under all the circumstances, it was reasonable the infant should engage to buy, and that sum should be allowed to the

Payments upon Life Insurance. — Thus if an infant obtains a policy of life insurance, and pays the premiums during his minority, he cannot, upon his disaffirmance of the contract on coming of age, recover the whole premiums, but only the excess above the value of the insurance which he has received.¹

Payments for Rent. — So it has been held that rent which an infant has paid upon a lease of land cannot be recovered by him upon his disaffirmance of the contract.²

bb. UNDER STATUTES. — Under the Code of *California*, an infant over eighteen years of age can disaffirm his contracts only upon condition that he restore the consideration to the party from whom it was received, or pay its equivalent.³ So in *Indiana*, restoration of the purchase money must be made to avoid the conveyance of an infant *feme covert*, in which her husband, being of full age, has joined,⁴ or to avoid the conveyance of an infant who falsely represents himself to be of age.⁵

(2) *Who May Avail Himself of the Right* — (a) **Plea of Infancy a Personal Privilege.** — The right of an infant to avoid contracts is personal to himself, and cannot be taken advantage of by an adult with whom he deals⁶ or by third

defendant against the money paid in execution of the contract, and the balance if any recovered by the plaintiff. *Heath v. Stevens*, 48 N. H. 251.

The plaintiff, while an infant, in consideration of an outfit to enable him to go to *California* agreed to give the defendant, who furnished the outfit, one-third of all the avails of his labor during his absence, which agreement he performed. After coming of age he repudiated the contract, and sought to recover of the defendant the sum paid him, less the value of the outfit furnished. The jury having found that the agreement was fairly made, and for a reasonable consideration, and beneficial to the infant, it was held that he could not recover. *Breed v. Judd*, 1 Gray (Mass.) 455. See also *Craighead v. Wells*, 21 Mo. 404.

Executed Agency. — If an infant directs that money in the hands of his brother should be used by him for the support of their parents, and the brother applies the money as instructed the infant cannot, on coming of age, recover the sum from the brother. *Welch v. Welch*, 103 Mass. 562.

So if an infant lays a wager and loses, and directs the stakeholder to pay the money to the winner, he cannot recover from the stakeholder his portion of the sum bet after the money has been paid over. *McLean v. Wilson*, 36 Ill. App. 657.

1. *Johnson v. Northwestern Mut. L. Ins. Co.*, 56 Minn. 365, 45 Am. St. Rep. 473.

Where an Infant Assigned a Policy of Insurance of which he was the beneficiary, he was allowed to avoid the assignment only upon condition that he repay to the assignee the amount which he had expended in premiums in keeping the policy alive, on the ground that the assignment was an implied request and authority to do what was necessary to keep it in force and protect the insurance. *City Sav. Bank v. Whittle*, 63 N. H. 587.

2. *Holmes v. Blogg*, 8 Taunt. 508, 4 E. C. L. 189; *Valentini v. Canali*, 24 Q. B. D. 166.

3. *California Statute.* — Civ. Code Cal., § 35. Thus, if an infant borrows money on his oral promise to secure it by conveyance of real property on coming of age, and after coming

of age refuses to execute the contract, he is liable to the lender in an action for money had and received, although the infant no longer has the identical money loaned him. *Whyte v. Rosencrantz*, 123 Cal. 634.

4. *Indiana Statute.* — Rev. Stat. 1894, §§ 3364, 3365. The words of the statute, "conveyance of real estate," have been held to comprehend mortgages of real estate, as well as deeds of conveyance; and before a *feme covert* can disaffirm her mortgage, she must restore the consideration received, although she may disaffirm the note secured by the mortgage and thus avoid personal liability. *U. S. Saving Fund, etc., Co. v. Harris*, 142 Ind. 226.

5. *Gillenwaters v. Campbell*, 142 Ind. 529.

6. **Adult Bound by Contract with Infant** — *California.* — *Hastings v. Dollarhide*, 24 Cal. 195; *Taylor v. Hill*, 115 Cal. 143.

Indiana. — *Johnson v. Rockwell*, 12 Ind. 76; *Beeson v. Carlton*, 13 Ind. 354; *Garner v. Cook*, 30 Ind. 331.

Louisiana. — *Arnos v. Lesassier*, 10 La. 592.

Maine. — *Towle v. Dresser*, 73 Me. 252.

Massachusetts. — *Boyd v. Boyden*, 9 Met. (Mass.) 519; *Nightingale v. Withington*, 15 Mass. 272, 8 Am. Dec. 101; *Worcester v. Eaton*, 13 Mass. 371, 7 Am. Dec. 155; *Oliver v. Houdlet*, 13 Mass. 240, 7 Am. Dec. 134; *Whitney v. Dutch*, 14 Mass. 463, 7 Am. Dec. 229; *Corey v. Corey*, 19 Pick. (Mass.) 29, 31 Am. Dec. 117.

New Jersey. — *Voorhees v. Wait*, 15 N. J. L. 343; *Patterson v. Lippincott*, 47 N. J. L. 457, 54 Am. Rep. 178.

New York. — *Hartness v. Thompson*, 5 Johns. (N. Y.) 160; *Gates v. Davenport*, 29 Barb. (N. Y.) 160; *Van Bramer v. Cooper*, 2 Johns. (N. Y.) 279.

Pennsylvania. — *Brown v. Caldwell*, 10 S. & R. (Pa.) 114, 13 Am. Dec. 660; *McGinn v. Shaeffer*, 7 Watts (Pa.) 412.

South Carolina. — *Rose v. Daniel*, 3 Brev. (S. Car.) 438; *Crymes v. Day*, 1 Bailey L. (S. Car.) 320.

Tennessee. — *Nashville, etc., R. Co. v. Elliott*, 1 Coldw. (Tenn.) 611, 78 Am. Dec. 506.

Texas. — *Harris v. Musgrove*, 59 Tex. 401; *Washington v. Washington*, (Tex. Civ. App. 1895) 31 S. W. Rep. 88.

persons in any collateral proceedings.¹ When an adult enters into a contract with an infant, he does so at his peril; for while the infant may decline to perform his part of the agreement, or may disaffirm it even after it has been fully performed, the adult is bound by the contract as fully and completely as if the other party had been of full age, and he will be held liable for its breach.²

Specific Performance Not Enforceable. — It is because of this want of mutuality in the enforcement of contracts between infants and adults, that a court of equity will not ordinarily decree specific performance in favor of the former.³

(b) **Heirs and Personal Representatives.** — Although the privilege of avoiding his contracts is said to be personal to the infant, it does not die with him, but, upon his death, descends to those who succeed to his estate⁴ or represent him.⁵

Vermont. — Putnam v. Hill, 38 Vt. 85; Oaks v. Oaks, 27 Vt. 410.

Wisconsin. — Davies v. Turton, 13 Wis. 185.

An Adult Is Bound by a Promise of Marriage to an Infant. — Warwick v. Cooper, 5 Sneed (Tenn.) 659.

An Insurance Company Cannot Repudiate a Contract of Insurance on the ground of the infancy of the insured. Monaghan v. Agricultural F. Ins. Co., 53 Mich. 238.

1. Plea of Infancy Not Available to Third Parties — *England.* — Keane v. Boycott, 2 H. Bl. 511. *United States.* — Baldwin v. Rosier, 48 Fed. Rep. 810, 1 McCrary (U. S.) 384.

Alabama. — Hooper v. Payne, 94 Ala. 223.

Kentucky. — Breckenridge v. Ormsby, 1 J. J. Marsh. (Ky.) 236, 19 Am. Dec. 71.

Maine. — Doane v. Covell, 56 Me. 527.

Massachusetts. — Winchester v. Thayer, 129 Mass. 129.

Michigan. — Holmes v. Rice, 45 Mich. 142.

Mississippi. — Alsworth v. Cordtz, 31 Miss. 32.

Missouri. — Ward v. Steamboat "Little Red," 8 Mo. 358; Hill v. Taylor, 125 Mo. 331; Horine v. Horine, 11 Mo. 649; Craig v. Van Bubber, 100 Mo. 684, 18 Am. St. Rep. 569.

New York. — Beardsley v. Hotchkiss, 96 N. Y. 201; Blake v. Livingston County, 61 Barb. (N. Y.) 149; Dominick v. Michael, 4 Sandf. (N. Y.) 374.

South Carolina. — Rose v. Daniel, 3 Brev. (S. Car.) 433.

Creditors Cannot Question an assignment by an infant of wages to become due, the consideration for the assignment being a less amount supplied the infant for necessities. McCarty v. Murray, 3 Grav (Mass.) 578.

A Creditor Who Attaches His Debtor's Land which had been conveyed by the latter while an infant cannot avoid the deed on the ground of the infancy of the grantor. Kendall v. Lawrence, 22 Pick. (Mass.) 549.

Trustee under Marriage Settlement Cannot Question Its Validity on the ground that the parties to it were infants. Jones v. Butler, 30 Barb. (N. Y.) 641.

The Maker of a Note Cannot Refuse Payment to an Indorsee because the indorsee is an infant. Taylor v. Croker, 4 Esp. 187; Frazier v. Massey, 14 Ind. 382; Hardy v. Waters, 38 Me. 450; Nightingale v. Withington, 15 Mass. 272, 8 Am. Dec. 101.

Sureties and Indorsers for, and All Joint Promisers with, an Infant, are bound, even though the infant escapes liability. Motteux v. St. Aubin, 2 W. Bl. 1133; Taylor v. Dansby, 42

Mich. 82; Hartness v. Thompson, 5 Johns. (N. Y.) 160; Mason v. Denison, 15 Wend. (N. Y.) 64.

In an Action for Enticing Away the Servant of the Prosecutor, it is no defense that the servant was an infant, and not bound by his contract of service. Murrell v. State, 44 Ala. 367.

2. Adult Liable for Breach of Contract. — In Warwick v. Bruce, 2 M. & S. 205, the defendant, an adult, agreed to sell to the plaintiff, a minor, all the potatoes then growing on three acres of land, to be dug and carried away by the plaintiff; the infant paid forty pounds on the agreement, and dug and carried away part of the potatoes, and was prevented by the defendant from removing the balance; and it was held that the infant was entitled to recover for this breach of the agreement.

3. Flight v. Bolland, 4 Russ. 298.

4. Heirs and Privies in Blood — *England.* — Brown v. Brown, L. R. 2 Eq. 481.

Alabama. — Sharp v. Robertson, 76 Ala. 343.

Arkansas. — Bozeman v. Browning, 31 Ark. 364.

Illinois. — Illinois Land, etc., Co. v. Bonner, 75 Ill. 315.

Indiana. — Nolte v. Libbert, 34 Ind. 163; Gillenwaters v. Campbell, 142 Ind. 529.

Kentucky. — Breckenridge v. Ormsby, 1 J. J. Marsh. (Ky.) 248, 19 Am. Dec. 71.

Louisiana. — Wilson v. Porter, 13 La. Ann. 407.

Maryland. — Levering v. Heighe, 2 Md. Ch. 88, 3 Md. Ch. 365.

Massachusetts. — Smith v. Mayo, 9 Mass. 62, 6 Am. Dec. 28; Austin v. Charlestown Female Seminary, 8 Met. (Mass.) 196, 41 Am. Dec. 497.

Mississippi. — Harvey v. Briggs, 68 Miss. 60.

Missouri. — Ferguson v. Bell, 17 Mo. 348; Harris v. Ross, 86 Mo. 89, 56 Am. Rep. 411.

New York. — O'Rourke v. Hall, 38 N. Y. App. Div. 534; Nelson v. Eaton, 1 Redf. (N. Y.) 498.

Texas. — Veal v. Fortson, 57 Tex. 482.

5. Personal Representatives — *Alabama.* — Jefford v. Ringgold, 6 Ala. 544; Sharp v. Robertson, 76 Ala. 343; Shropshire v. Burns, 46 Ala. 108.

Maine. — Dinsmore v. Webber, 59 Me. 103.

Massachusetts. — Hussey v. Jewett, 9 Mass. 100; Martin v. Mayo, 10 Mass. 137, 6 Am. Dec. 103.

Missouri. — Parson v. Hill, 8 Mo. 135.

New York. — Dominick v. Michael, 4 Sandf. (N. Y.) 374.

South Carolina. — Counts v. Bates, Harp. L. (S. Car.) 464.

(c) **Committee in Lunacy.** — If the infant becomes insane, the right of avoidance may be exercised by his committee.¹

(d) **Privies in Estate.** — But while privies in blood may take advantage of this privilege, the same right does not pass to those in privity of estate merely with the infant.² Hence an assignee in insolvency cannot avoid an infant's conveyance,³ nor can his guardian.⁴

(3) **When the Right May or Must Be Exercised** — (a) **Right to Avoid During Infancy.** — A Conveyance of Real Property by an infant cannot be avoided by him until he becomes of age,⁵ though he may enter and take the rents and profits in the meanwhile,⁶ or may apply by his guardian for a receiver to collect them.⁷

Executory Contracts and Contracts Respecting Personality. — But in other transactions, especially where personal property or executory contracts are involved, the infant may avoid at any time.⁸

This Distinction Is for the Infant's Benefit, to enable him to recover personal property before it is lost, or to avoid immediate consequences of his contracts,

Vermont. — Person v. Chase, 37 Vt. 647, 88 Am. Dec. 630.

1. *Ledger Bldg. Assoc. v. Cook*, 12 Phila. (Pa.) 434, 34 Leg. Int. (Pa.) 5.

2. **Privies in Estate.** — Whittingham's Case, 8 Coke 43; *Harris v. Ross*, 112 Ind. 314; *Singer Mfg. Co. v. Lamb*, 81 Mo. 221; *Hoyle v. Stowe*, 2 Dev. & B. L. (19 N. Car.) 323.

A few old cases hold that privies in estate may avoid. *Beeler v. Bullitt*, 3 A. K. Marsh. (Ky.) 280, 13 Am. Dec. 161; *Jackson v. Burchin*, 14 Johns. (N. Y.) 124.

3. **Assignee in Insolvency.** — *Mansfield v. Gordon*, 144 Mass. 168.

4. **Guardian.** — *Parks v. Maybee*, 2 U. C. C. P. 257; *Irvine v. Crockett*, 4 Bibb (Ky.) 437; *Oliver v. Houdlet*, 13 Mass. 237, 7 Am. Dec. 134.

5. **Conveyance of Land by Infant Not Voidable During Infancy** — *United States*. — *Tucker v. Moreland*, 10 Pet. (U. S.) 58; *Sims v. Everhardt*, 102 U. S. 300.

Alabama. — *Slaughter v. Cunningham*, 24 Ala. 260, 60 Am. Dec. 463; *McCarthy v. Nicrosi*, 72 Ala. 332, 47 Am. Rep. 418.

California. — *Hastings v. Dollarhide*, 24 Cal. 195.

Indiana. — *Welch v. Bunce*, 83 Ind. 382.

Kentucky. — *Phillips v. Green*, 3 A. K. Marsh. (Ky.) 7, 13 Am. Dec. 124.

Mississippi. — *Allen v. Poole*, 54 Miss. 323.

Missouri. — *Baker v. Kennett*, 54 Mo. 82; *Schneider v. Staihr*, 20 Mo. 269; *Shipley v. Bunn*, 125 Mo. 445.

New Hampshire. — *Emmons v. Murray*, 16 N. H. 385.

New York. — *Walsh v. Powers*, 43 N. Y. 23, 3 Am. Rep. 654.

North Carolina. — *McCormic v. Leggett*, 8 Jones L. (53 N. Car.) 425.

Rhode Island. — *Tillinghast v. Holbrook*, 7 R. I. 230.

Tennessee. — *Scott v. Buchanan*, 11 Humph. (Tenn.) 468.

Texas. — *Cummings v. Powell*, 8 Tex. 80. See further the title DEEDS, vol. 9, p. 114, note 5.

Contracts of Record. — The old common-law rule that contracts of record must be avoided by some act during minority (Co. Litt. 380b; Bacon's Abr., Infancy, I. 5; 2 Kent's Com. 237; *Tucker v. Moreland*, 10 Pet. (U. S.) 71), being

founded on a course of reasoning which no longer applies under modern methods of trial, probably does not obtain at this day. See Metcalf on Contr. (2d ed.) 50; Ewell's Cases on Infancy, etc., 232.

An Infant May, However, Avoid During Infancy a Mortgage given by him; and defending an ejectment suit by the mortgagee is a disaffirmance. *Gilchrist v. Ramsay*, 27 U. C. Q. B. 500.

6. *Bool v. Mix*, 17 Wend. (N. Y.) 119, 31 Am. Dec. 285.

7. *Matthewson v. Johnson*, Hoffm. (N. Y.) 560.

8. **Executory Contracts, and Contracts Respecting Personal Property, Voidable During Infancy** — *Connecticut.* — *Shipman v. Horton*, 17 Conn. 481; *Riley v. Mallory*, 33 Conn. 201.

Indiana. — *Rice v. Boyer*, 108 Ind. 472, 58 Am. Rep. 53; *Briggs v. McCabe*, 27 Ind. 327, 89 Am. Dec. 503; *Doe v. Abernathy*, 7 Blackf. (Ind.) 442; *Indianapolis Chair Mfg. Co. v. Wilcox*, 59 Ind. 429; *Clark v. Van Court*, 100 Ind. 113, 50 Am. Rep. 774; *House v. Alexander*, 105 Ind. 109, 55 Am. Rep. 189.

Illinois. — *Walker v. Ellis*, 12 Ill. 470.

Iowa. — *Murphy v. Johnson*, 45 Iowa 57; *Childs v. Dobbins*, 55 Iowa 205.

Kentucky. — *Bailey v. Barnberger*, 11 B. Mon. (Ky.) 113.

Maine. — *Thing v. Libbey*, 16 Me. 55; *Towle v. Dresser*, 73 Me. 252.

Maryland. — *Adams v. Beall*, 67 Md. 53, 1 Am. St. Rep. 379; *Monumental Bldg. Assoc. v. Herman*, 33 Md. 128.

Massachusetts. — *Willis v. Twambly*, 13 Mass. 204.

Michigan. — *Dunton v. Brown*, 31 Mich. 182.

Minnesota. — *Cogley v. Cushman*, 16 Minn. 397.

New Hampshire. — *Carr v. Clough*, 26 N. H. 280, 59 Am. Dec. 345; *Heath v. West*, 26 N. H. 191.

New York. — *Kitchen v. Lee*, 11 Paige (N. Y.) 107, 42 Am. Dec. 101; *Stafford v. Roof*, 9 Cow. (N. Y.) 626; *Bool v. Mix*, 17 Wend. (N. Y.) 119, 31 Am. Dec. 285; *Petrie v. Williams*, 68 Hun (N. Y.) 589.

Tennessee. — *Grace v. Hale*, 2 Humph. (Tenn.) 27, 36 Am. Dec. 296.

Vermont. — *Hoyt v. Wilkinson*, 57 Vt. 404; *Price v. Furman*, 27 Vt. 268, 65 Am. Dec. 194.

while land may be recovered at any time.¹

(b) **How Soon After Majority** — *aa. TIME LIMITED BY STATUTE OF LIMITATIONS.* — How soon after attaining majority the quondam infant, or those claiming under him, must disaffirm his contract or conveyance in order to make the plea of infancy effective, is a question upon which the decisions are at variance; but the preponderance of authority is that in contracts executed by infants, mere inertness or silence continued for a period less than that prescribed by the statute of limitations, unless accompanied by affirmative acts manifesting an intent to assent to the contract, will not bar the right to avoid it.²

When the Disabilities of Infancy and Coverture Concur at the time of the execution of the contract, or the latter begins before the former is released, the right to disaffirm continues until both disabilities are removed, and until the statutory period thereafter, without regard to the length of time which may elapse between the date of the contract and the time of the avoidance.³

Where the Infant Dies Before Attaining His Majority, leaving as his sole heir a minor, the latter is entitled to the statutory period after attaining his majority within which to disaffirm a conveyance by his ancestor,⁴ but if the infant dies after attaining majority, the statute of limitations begins to run from the moment he becomes of age, and will continue against his heirs, and no disability in the latter will arrest it.⁵

bb. DISAFFIRMANCE WITHIN REASONABLE TIME. — The other doctrine in regard to the time when disaffirmance must be made is that the privilege of avoiding his acts must be exercised by the infant or those in privity with him, with some regard to the rights of the other contracting party, and therefore it is held in many jurisdictions that the infant must exercise his election within a reasonable time after coming of age.⁶ In some jurisdictions the statutes pro-

1. *Scott v. Buchanan*, 11 Humph. (Tenn.) 468.

2. **Time After Majority Limited by Statute of Limitations**—*Canada.*—*Doe v. Lee*, 13 N. Bruns. 486.

United States. — *Irvine v. Irvine*, 9 Wall. (U. S.) 617; *Sims v. Everhardt*, 102 U. S. 300; *Wells v. Seixas*, 24 Fed. Rep. 82; *Gilkinson v. Miller*, 74 Fed. Rep. 131; *Tucker v. Moreland*, 10 Pet. (U. S.) 58.

Alabama. — *McCarthy v. Nicrosi*, 72 Ala. 332, 47 Am. Rep. 418; *Hill v. Nelms*, 86 Ala. 442.

Arkansas. — *Kountz v. Davis*, 34 Ark. 590; *Vaughan v. Parr*, 20 Ark. 600; *Bozeman v. Browning*, 31 Ark. 364; *Fox v. Drewry*, 62 Ark. 316; *Stull v. Harris*, 51 Ark. 294.

Maine. — *Boody v. McKenney*, 23 Me. 517; *Davis v. Dudley*, 70 Me. 236, 35 Am. Rep. 318.

Michigan. — *Prout v. Wiley*, 28 Mich. 164; *Durfee v. Abbott*, 61 Mich. 471; *Donovan v. Ward*, 100 Mich. 601.

Mississippi. — *Wallace v. Latham*, 52 Miss. 291; *Thompson v. Strickland*, 52 Miss. 574; *Allen v. Poole*, 54 Miss. 323; *Brantley v. Wolf*, 60 Miss. 420.

Missouri. — *Huth v. Carondelet Marine R., etc., Co.*, 56 Mo. 202; *Lacy v. Pixler*, 120 Mo. 383.

New Hampshire. — *Emmons v. Murray*, 16 N. H. 385; *Robbins v. Eaton*, 10 N. H. 561.

New York. — *McMurray v. McMurray*, 66 N. Y. 175; *Jackson v. Burchin*, 14 Johns. (N. Y.) 124; *Voorhies v. Voorhies*, 24 Barb. (N. Y.) 150; *Spencer v. Carr*, 45 N. Y. 406, 6 Am. Rep. 112; *Eagan v. Scully*, 29 N. Y. App. Div. 617; *Jackson v. Carpenter*, 11 Johns. (N. Y.) 542; *O'Rourke v. Hall*, 38 N. Y. App. Div. 534.

Ohio. — *Hughes v. Watson*, 10 Ohio 127; *Drake v. Ramsay*, 5 Ohio 251; *Cresinger v. Welch*, 15 Ohio 156, 45 Am. Dec. 565.

Pennsylvania. — *Urban v. Grimes*, 2 Grant Cas. (Pa.) 96.

Virginia. — *Birch v. Linton*, 78 Va. 584, 49 Am. Rep. 381.

West Virginia. — *Gillespie v. Bailey*, 12 W. Va. 70, 29 Am. Rep. 445.

3. *Sims v. Everhardt*, 102 U. S. 300; *Feitner v. Lewis*, 55 N. Y. Super. Ct. 519; *Wilson v. Branch*, 77 Va. 65, 46 Am. Rep. 709; *Birch v. Linton*, 78 Va. 584, 49 Am. Rep. 381.

4. *Harris v. Ross*, 86 Mo. 89, 56 Am. Rep. 411.

5. *Bozeman v. Browning*, 31 Ark. 364.

6. **Disaffirmance Within Reasonable Time.** — *England.* — *Holmes v. Blogg*, 8 Taunt. 38; *Dublin, etc., R. Co. v. Black*, 8 Exch. 181.

Canada. — *Featherston v. McDonnell*, 15 U. C. C. P. 162.

California. — *Hastings v. Dollarhide*, 24 Cal. 195.

Connecticut. — *Kline v. Beebe*, 6 Conn. 404.

Delaware. — *Wallace v. Lewis*, 4 Harr. (Del.) 80.

Indiana. — *Scranton v. Stewart*, 52 Ind. 69; *Richardson v. Pate*, 93 Ind. 423, 47 Am. Rep. 374; *Buchanan v. Hubbard*, 96 Ind. 1; *Sims v. Smith*, 86 Ind. 577; *Sims v. Bardoner*, 86 Ind. 87, 44 Am. Rep. 263; *Long v. Williams*, 74 Ind. 115; *Stringer v. Northwestern Mut. L. Ins. Co.*, 82 Ind. 100; *Hartman v. Kendall*, 4 Ind. 403.

Kentucky. — *Petty v. Roberts*, 7 Bush (Ky.) 410; *Deason v. Boyd*, 1 Dana (Ky.) 45.

Louisiana. — *Jamison v. Smith*, 35 La. Ann. 609.

vide that the election must be exercised within such reasonable time.¹

What Is a Reasonable Time will depend upon the peculiar circumstances of each case.²

d. RATIFICATION AND CONFIRMATION — (1) *In General.* — The conception of a voidable contract not only includes the idea that it may be avoided, but also that it may be ratified and confirmed.³

No New Consideration Is Necessary to support the ratification, the antecedent obligation being sufficient.⁴

The Effect of the Ratification of an executory contract is to exclude all right to

Minnesota. — *Goodnow v. Empire Lumber Co.*, 31 Minn. 468, 47 Am. Rep. 798.

Tennessee. — *Scott v. Buchanan*, 11 Humph. (Tenn.) 468; *Dodd v. Benthall*, 4 Heisk. (Tenn.) 601; *Walton v. Gaines*, 94 Tenn. 420.

Texas. — *Simkins v. Searcy*, 10 Tex. Civ. App. 406; *Searcy v. Hunter*, 81 Tex. 644, 26 Am. St. Rep. 837; *Hicatt v. Dixon*, (Tex. Civ. App. 1894) 26 S. W. Rep. 263; *Rapid Transit Land Co. v. Sanford*, (Tex. Civ. App. 1893) 24 S. W. Rep. 587; *Bingham v. Barley*, 55 Tex. 281, 40 Am. Rep. 801.

Vermont. — *Bigelow v. Kinney*, 3 Vt. 353; *Richardson v. B. Wright*, 9 Vt. 368.

Wisconsin. — *O'Dell v. Rogers*, 44 Wis. 136; *Thormaehlen v. Kaepffel*, 86 Wis. 378.

1. **Statutes** — *Georgia.* — *Bentley v. Greer*, 100 Ga. 35.

Iowa. — *Weaver v. Carpenter*, 42 Iowa 343; *Jenkins v. Jenkins*, 12 Iowa 199; *Green v. Wilding*, 59 Iowa 679, 44 Am. Rep. 696; *Wright v. Germain*, 21 Iowa 585; *Jones v. Jones*, 46 Iowa 466; *Hoover v. Kinsey Plow Co.*, 55 Iowa 668; *Murphy v. Johnson*, 45 Iowa 57.

Nebraska. — *O'Brien v. Gaslin*, 20 Neb. 347; *Ward v. Laverty*, 19 Neb. 429; *Johnson v. Storie*, 32 Neb. 610; *Englebert v. Troxell*, 40 Neb. 195, 42 Am. St. Rep. 665. See also *Hegler v. Faulkner*, 153 U. S. 109.

Under the Revised Statutes of Illinois, c. 24, § 10, a person must commence an action to recover land alienated by him within three years after attaining his majority. *Blankenship v. Stout*, 25 Ill. 132; *Cole v. Pennoyer*, 14 Ill. 158.

2. **What Is a Reasonable Time.** — *Hastings v. Dollarhide*, 24 Cal. 195; *Wallace v. Lewis*, 4 Harr. (Del.) 80; *Wright v. Germain*, 21 Iowa 585; *Jones v. Jones*, 46 Iowa 466; *Hoover v. Kinsey Plow Co.*, 55 Iowa 668.

Thus it would be material to inquire whether the minor was a nonresident of the state on attaining his majority, to ascertain his capacity for transacting business; what influences, if any, were brought to bear upon him by those interested in preventing a disaffirmance; whether any suits were pending, the determination of which was material in electing to disaffirm. These and many other inquiries would naturally and properly arise in considering what would be "reasonable time." *Jenkins v. Jenkins*, 12 Iowa 199.

If an infant disaffirms a contract of purchase of land within four months after reaching his majority, it is within a reasonable time. *Rapid Transit Land Co. v. Sanford*, (Tex. Civ. App. 1893) 24 S. W. Rep. 587.

A note and mortgage having been executed by an infant, her disaffirmance thereof within three and one-half months after she attained majority is held to have been within a reason-

able time, it not appearing that there was during said time any material change in the relation of the parties to the securities or in the value of the mortgaged land. *Thormaehlen v. Kaepffel*, 86 Wis. 378.

In *Green v. Wilding*, 59 Iowa 679, 44 Am. Rep. 696, where the plaintiff did not bring action until three years and eight months after attaining her majority, and three months after being legally advised that she could disaffirm, it was held that the action was not brought within a reasonable time. The fact that she was informed by persons not qualified to give legal advice, that she could not bring action until her infant brother became of age, was not, in the eye of the law, a sufficient reason for delay.

For Cases Where the Infant Was a Married Woman, see *Scranton v. Stewart*, 52 Ind. 69; *Sims v. Bardoner*, 86 Ind. 87, 44 Am. Rep. 263; *Sims v. Smith*, 86 Ind. 577; *Richardson v. Pate*, 93 Ind. 423, 47 Am. Rep. 374; *Buchanan v. Hubbard*, 96 Ind. 1; *Scott v. Buchanan*, 11 Humph. (Tenn.) 468; *Dodd v. Benthall*, 4 Heisk. (Tenn.) 601; *Walton v. Gaines*, 94 Tenn. 420.

For Other Cases holding that the contract was not disaffirmed within a reasonable time, see *Hoover v. Kinsey Plow Co.*, 55 Iowa 668; *Weaver v. Carpenter*, 42 Iowa 343; *Goodnow v. Empire Lumber Co.*, 31 Minn. 468, 47 Am. Rep. 798.

3. **Power to Ratify Contract Made During Infancy** — *Arkansas.* — *Vaughan v. Parr*, 20 Ark. 600.

Louisiana. — *Taylor v. Rundell*, 2 La. Ann. 367; *Johnson v. Alden*, 15 La. Ann. 505.

Maine. — *Lawson v. Lovejoy*, 8 Me. 405, 23 Am. Dec. 526.

Massachusetts. — *Whitney v. Dutch*, 14 Mass. 457, 7 Am. Dec. 229; *Boyden v. Boyden*, 9 Mct. (Mass.) 519; *Kennedy v. Doyle*, 10 Allen (Mass.) 161.

Mississippi. — *Mayer v. McLure*, 36 Miss. 389, 72 Am. Dec. 190.

New Hampshire. — *Aldrich v. Grimes*, 10 N. H. 194; *New Hampshire Mut. F. Ins. Co. v. Noyes*, 32 N. H. 345.

New York. — *Delano v. Blake*, 11 Wend. (N. Y.) 85, 25 Am. Dec. 617; *Henry v. Root*, 33 N. Y. 526.

South Carolina. — *Alexander v. Heriot*, Bailey Eq. (S. Car.) 223.

Vermont. — *Forsyth v. Hastings*, 27 Vt. 646; *Farr v. Sumner*, 12 Vt. 28, 36 Am. Dec. 327.

4. **No New Consideration Necessary.** — *Kendrick v. Neisz*, 17 Colo. 506; *Heady v. Boden*, 4 Ind. App. 475; *Thompson v. Linscott*, 2 Me. 186, 11 Am. Dec. 57; *Grant v. Beard*, 50 N. H. 129. And see generally the title **CONSIDERATION**, vol. 6, p. 681.

afterwards disavow it, and to make it obligatory as against the defense of infancy. The confirmation reaches back and renders the original contract binding from the time it was made, and the agreement, having in its entirety received the assent of the promisor after the ceasing of his disability, is made in all its parts the binding contract of the parties.¹ So if an infant grantor, after arriving at full age, ratifies a conveyance made by him during infancy, he will have no power to revoke the ratification and disaffirm such conveyance thereafter.²

(2) *Who May Ratify and Confirm.* — Ratification may be made by the quondam infant, or after his death by his personal representative.³

The Disability of Coverture does not preclude a married woman from affirming her deed executed while an infant *feme sole*.⁴

Ratification by an Agent is good if the agent is duly authorized to act.⁵

(3) *When Ratification May Be Made.* — No binding ratification of a contract can be made by an infant until he comes of age,⁶ for, all his acts being voidable, the ratification would be no more effective than the contract which he essays to confirm. A ratification made after majority will not avail in the case of an executory contract, unless made before suit is brought upon it.⁷

(4) *Mode of Ratification* — (a) **Executory Contracts** — *aa.* **EXPRESS RATIFICATION** — (*aa.*) *In General.* — An express ratification of an executory contract made during infancy will be effected by the use of any words by the debtor which clearly indicate an intention to pay the debt.⁸

The Terms of the Ratification need not be such as import a direct promise to pay. All that is necessary is that the debtor should expressly recognize his contract by words which import its confirmation.⁹

1. Minock v. Shortridge, 21 Mich. 304.

2. **Confirmation of Conveyance.** — Hastings v. Dollarhide, 24 Cal. 195; Curry v. St. John Plow Co., 55 Ill. App. 82.

The ratification relates back to delivery so as to cut out intermediate voluntary conveyances. Palmer v. Miller, 25 Barb. (N. Y.) 399.

Arresting Statute of Limitations. — If a minor makes a payment on a joint note given by him and an adult, and after he comes of age makes an oral promise to pay the balance, he thereby so ratifies his former payment that it will take the note out of the operation of the statute of limitations as to himself, but not as to the adult. Peirce v. Tobey, 5 Met. (Mass.) 168.

3. **An Executor or Administrator May Ratify** the contract of his intestate made during his infancy, although the intestate died before he attained his majority; and such ratification will be obligatory, though it was verbally made, without any new consideration. Jefford v. Ringgold, 6 Ala. 544.

4. **Infant Married Woman.** — *In re* Hodson, 8 Reports 346, (1894) 2 Ch. 421.

5. **Agent's Ratification.** — Carrell v. Potter, 23 Mich. 377. And see Orvis v. Kimball, 3 N. H. 314.

6. **No Ratification Binding During Infancy.** — Rawley v. Rawley, 1 Q. B. D. 400; Hastings v. Dollarhide, 24 Cal. 195; Dunton v. Brown, 31 Mich. 182; Corey v. Burton, 32 Mich. 30; Minock v. Shortridge, 21 Mich. 304; Armitage v. Widoie, 36 Mich. 124; Shanks v. Edmondson, 28 Gratt. (Va.) 804; O'Dell v. Rogers, 44 Wis. 136.

7. **Ratification After Bringing Suit.** — Thrupp v. Fielder, 2 Esp. 628; Thornton v. Illingworth, 2 B. & C. 824, 9 E. C. L. 256; Thing v. Libbey, 16 Me. 55; Ford v. Phillips, 1 Pick.

(Mass.) 202; Freeman v. Nichols, 138 Mass. 313; Merriam v. Wilkins, 6 N. H. 432, 25 Am. Dec. 472; Hale v. Gerrish, 8 N. H. 374.

8. Kendrick v. Neisz, 17 Colo. 500.

9. Whitney v. Dutch, 14 Mass. 457, 7 Am. Dec. 229.

Illustrations of Ratification. — The recognition after majority of the existence of a debt contracted during infancy, coupled with a promise to pay it, is a ratification. Hartley v. Wharton, 11 Ad. & El. 934, 39 E. C. L. 276; Barnaby v. Barnaby, 1 Pick. (Mass.) 221; Bobo v. Hansell, 2 Bailey L. (S. Car.) 114.

After Majority, Authorizing a Banker or Agent to Pay an obligation made during infancy, is a ratification. Hunt v. Massey, 5 B. & Ad. 902, 27 E. C. L. 230; Orvis v. Kimball, 3 N. H. 314.

A person, while a minor, executed a note for part of the purchase price of land. After he attained his majority, he and the vendor made an arrangement by which the latter agreed to remit the accrued interest, and the former promised to keep the land and pay the principal of the note. It was held that this amounted to an affirmation of the contract, at least to the extent of the amount promised to be paid. Houlton v. Manteuffel, 51 Minn. 185.

What Is Not a Ratification. — Where an infant, who was sued on a note given for two old slaves, after he came of age proposed in writing to give them back and pay half the note, and added: "If they will not accept of the above offer I will have to pay them, I suppose, but I shall do so at my convenience, as it will be nothing less than a free gift on my part," it was held that this was no such new promise as would avoid the plea of infancy. Dunlap v. Hales, 2 Jones L. (47 N. Car.) 381.

(bb) *Acknowledgment of Liability Insufficient.* — A mere acknowledgment of liability, however, such as will suffice to arrest the statute of limitations, will not have that effect.¹

(cc) *Necessity of Writing.* — At common law a merely verbal promise is sufficient to constitute a ratification,² but by statute in *England* it is now provided that no action shall be maintained to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing signed by the party to be charged therewith.³ This statute has been substantially re-enacted in several of the *United States*.⁴

(dd) *Ratification Must Be Voluntary.* — A ratification, in order to be effective, must be deliberately and voluntarily made; for if it be extorted from the promisor by threats, it will not avail.⁵

(ee) *Knowledge of Nonliability.* — It has also been held by some courts that the ratification must be made by the promisor with knowledge of his nonliability;⁶

A Promise to Pay a Part of the Debt is binding only as to that part. *Edgerly v. Shaw*, 25 N. H. 514, 57 Am. Dec. 349.

The Promise Must Be that the Promisor Will Pay, and not that some one else will. *Mawson v. Blane*, 26 Eng. L. & Eq. 560.

In *Ford v. Phillips*, 1 Pick. (Mass.) 202, the defendant, after he became of age, acknowledged that he owed the plaintiff, but said he was unable to pay him, and would endeavor to get his brother bound with him. This was held to be no ratification of the contract. See also *Hale v. Gerrish*, 8 N. H. 374.

1. Acknowledgment of Liability Not Sufficient — *England*. — *Rowe v. Hopwood*, L. R. 4 Q. B. 1. See also *Harris v. Wall*, 1 Exch. 122; *Mawson v. Blane*, 10 Exch. 206; *Thrupp v. Fielder*, 2 Esp. 628.

Colorado. — *Kendrick v. Neisz*, 17 Colo. 506.

Connecticut. — *Wilcox v. Roath*, 12 Conn. 550.

Georgia. — *Martin v. Byrom*, *Dudley* (Ga.) 203.

Indiana. — *Conklin v. Ogborn*, 7 Ind. 553.

Massachusetts. — *Smith v. Mayo*, 9 Mass. 62.

6 Am. Dec. 28; *Proctor v. Sears*, 4 Allen (Mass.) 95; *Whitney v. Dutch*, 14 Mass. 457, 7 Am. Dec. 229; *Ford v. Phillips*, 1 Pick. (Mass.) 202; *Jackson v. Mayo*, 11 Mass. 147, 6 Am. Dec. 167; *Martin v. Mayo*, 10 Mass. 137, 6 Am. Dec. 103.

New Hampshire. — *Hale v. Gerrish*, 8 N. H. 374; *Edgerly v. Shaw*, 25 N. H. 514, 57 Am. Dec. 349.

New York. — *Millard v. Hewlett*, 19 Wend. (N. Y.) 301; *Silver Creek Bank v. Browning*, (Supm. Ct. Gen. T.) 16 Abb. Pr. (N. Y.) 272; *Bigelow v. Grannis*, 2 Hill (N. Y.) 120; *Goodsell v. Myers*, 3 Wend. (N. Y.) 479; *Taft v. Sergeant*, 18 Barb. (N. Y.) 320; *Ackerman v. Runyon*, 1 Hilt (N. Y.) 169.

North Carolina. — *Turner v. Gaither*, 83 N. Car. 357, 35 Am. Rep. 574; *Alexander v. Hutcheson*, 2 Hawks (9 N. Car.) 535; *Dunlap v. Hales*, 2 Jones L. (47 N. Car.) 381; *Bresee v. Stanley*, 119 N. Car. 278; *Armfield v. Tate*, 7 Ired. L. (29 N. Car.) 258.

Pennsylvania. — *Hinely v. Margaritz*, 3 Pa. St. 428.

Tennessee. — *Reed v. Boshears*, 4 Sneed (Tenn.) 118.

Virginia. — *Buchner v. Smith*, 1 Wash. (Va.) 296, 1 Am. Dec. 403.

Wisconsin. — *Stokes v. Brown*, 4 Chand. (Wis.) 39.

In *Hale v. Gerrish*, 8 N. H. 374, the defendant in reply to the plaintiff's question said, "Yes, I owe the debt, and you will get your pay; and I suppose that is all you want," but at the same time refused to give a note for the debt. It was held that this was a mere acknowledgment of indebtedness and not a ratification.

An Acknowledgment to Keep the Statute from Running, and a Ratification to Repel the Plea of Infancy, were early distinguished. While it was held that the slightest acknowledgment was sufficient for the former purpose, nothing but an express ratification made after reaching maturity would deprive an infant of the protection thrown around him by the law. *Dunlap v. Hales*, 2 Jones L. (47 N. Car.) 381. See also *Wilcox v. Roath*, 12 Conn. 550; *Edmunds v. Mister*, 58 Miss. 765; *Tibbets v. Gerrish*, 25 N. H. 41, 57 Am. Dec. 307.

An Offer by an Adult to Compromise a Claim arising from a commission of a tort by him when he was an infant is not a ratification of the claim. *Bennett v. Collins*, 52 Conn. 1.

2. Writing Not Necessary at Common Law. — *West v. Penny*, 16 Ala. 186; *Martin v. Mayo*, 10 Mass. 137, 6 Am. Dec. 103.

3. Lord Tenterdon's Act. — 9 Geo. IV., c. 14, § 5 (1828).

Any written instrument signed by the party, which in case of adults would have amounted to the adoption of the act of an agent, will, in the case of an infant who has attained his majority, amount to a ratification. *Harris v. Wall*, 1 Exch. 122.

It is not necessary that the writing should be addressed or dated, or that the sum for which the promisor is to be bound should be shown therein. *Hartley v. Wharton*, 11 Ad. & El. 934, 39 E. C. L. 276.

4. See the statutes of Arkansas, Kentucky, Maine, Mississippi, Missouri, New Jersey, South Carolina, Virginia, and West Virginia; *Stern v. Freeman*, 4 Met. (Ky.) 309; *Thurlow v. Gilmore*, 40 Me. 378.

5. Voluntary. — *Harmer v. Killing*, 5 Esp. 102; *Ford v. Phillips*, 1 Pick. (Mass.) 202. See also *Smith v. Mayo*, 9 Mass. 62, 6 Am. Dec. 28.

6. Knowledge of Nonliability Necessary. —

but these decisions are founded upon a dictum,¹ and are contrary to the general principle that ignorance of law will not excuse. It is the better rule that the promisor need not be aware of his right to avoid the contract.² If, however, deliberate advantage is taken of the promisor's ignorance, it seems that a court of equity will avoid the ratification.³

(ff) *To Whom Made.* — The affirmance must be made to the party in interest; a promise to a stranger is but a declaration of intention, and will not avail.⁴

A Promise to an Agent of the Creditor is sufficient, although there is no evidence that the party disclosed his agency at the time, or that the promisor had knowledge of it.⁵

(gg) *Conditional Ratification.* — As a person may wholly avoid a contract made during infancy, *a fortiori* he may avoid it in part or may undertake a conditional performance of it.⁶ If a ratification be conditional, the condition must be shown to have happened or have been complied with, before an action can be maintained.⁷

An Engagement to Pay When Able is a conditional promise, and the promisor, to avail himself of it, must prove the ability of the promisor.⁸ It would not be necessary to show an ability to pay without inconvenience, but evidence that there is property from which the debt might be paid, or an income from some source which would enable the promisor to pay, would be sufficient.⁹

bb. IMPLIED RATIFICATION — (aa) *Retention or Disposition of Consideration* — **Retention of Land Purchased.** — If an infant enters upon real estate purchased by him, and after attaining full age continues in possession, exercising acts of ownership

Davis v. Kerr, 17 Can. Sup. Ct. 235; Petty v. Roberts, 7 Bash (Ky.) 410; Thing v. Libbey, 16 Me. 57; Hinely v. Margaritz, 3 Pa. St. 428; Curtin v. Patton, 11 S. & R. (Pa.) 305; Norris v. Vance, 3 Rich. L. (S. Car.) 164; Chambers v. Wherry, 1 Bailey L. (S. Car.) 28; Reed v. Boshears, 4 Sneed (Tenn.) 118.

1. Harmer v. Killing, 5 Esp. 102.

2. **Knowledge of Nonliability Not Necessary** — Alabama. — American Mortg. Co. v. Wright, 101 Ala. 658.

Connecticut. — Bestor v. Hickey, 71 Conn. 181.

Indiana. — Clark v. Van Court, 100 Ind. 113, 50 Am. Rep. 774, disapproving Fetrow v. Wiseman, 40 Ind. 148.

Massachusetts. — Morse v. Wheeler, 4 Allen (Mass.) 570.

Missouri. — Ring v. Jamison, 2 Mo. App. 584, 66 Mo. 424.

New York. — Taft v. Sergeant, 18 Barb. (N. Y.) 320.

Ohio. — Anderson v. Soward, 40 Ohio St. 325, 48 Am. Rep. 687.

3. **Equitable Relief from Confirmation.** — In Brooke v. Gally, 2 Atk. 34, a young man at college contracted a debt of fifty-nine pounds for wines sent to his lodgings during a period of five months. A few days after he came of age his creditor prevailed on him to give a note for the amount, without producing any account or delivering him a bill. Lord Chancellor Hardwicke, upon the circumstances of the case, decreed the note to be delivered up and canceled.

4. **Promise to Party.** — Chandler v. Glover, 32 Pa. St. 509; Bigelow v. Grannis, 2 Hill (N. Y.) 120; Goodsell v. Myers, 3 Wend. (N. Y.) 479. See also Mayer v. McLure, 36 Miss. 389, 72 Am. Dec. 190.

5. Hoyt v. Underhill, 10 N. H. 220, 34 Am. Dec. 148.

6. **Conditional Ratification.** — Thompson v. Lay, 4 Pick. (Mass.) 48, 16 Am. Dec. 325; Peacock v. Binder, 57 N. J. L. 374.

But in Minock v. Shortridge, 21 Mich. 304, it was held that the agreement of a party to terms which created a conditional or restrictive liability for, or on account of, the contract made during the minority of the promisor, is not a ratification of the contract, but becomes, upon the condition being performed, a new contract, and as such becomes binding from its date.

A conditional promise by one, after reaching his majority, to pay a note given during his infancy, the promise being hedged about with the statement that he will pay when he can do so without inconvenience to himself, and with a refusal to fix a time for payment, does not amount to a ratification. Bresee v. Stanly, 119 N. Car. 278.

7. Proctor v. Sears, 4 Allen (Mass.) 95; Thompson v. Lay, 4 Pick. (Mass.) 48, 16 Am. Dec. 325.

8. **Engagement to Pay When Able.** — Kendrick v. Neisz, 17 Colo. 506; Thompson v. Lay, 4 Pick. (Mass.) 48, 16 Am. Dec. 325; Proctor v. Sears, 4 Allen (Mass.) 95; Everson v. Carpenter, 17 Wend. (N. Y.) 419; Chandler v. Glover, 32 Pa. St. 509; Bobo v. Hansell, 2 Bailey L. (S. Car.) 114.

Burden of Proof. — A conditional promise by an infant, after reaching maturity, to pay the debt when able, is not binding upon him unless the proof thereof be supplemented by proof of his ability to pay. The burden of showing such ability, by some evidence relating to his property or income, devolves upon the plaintiff. Kendrick v. Neisz, 17 Colo. 506.

9. Thompson v. Lay, 4 Pick. (Mass.) 48, 16 Am. Dec. 325.

over the property, it has been held that this amounts to a ratification of the contract of purchase, and renders him liable upon a note given for the purchase money.¹ But if he sells the land before attaining his majority, a mere retention of the proceeds after he becomes of age will not constitute a ratification.²

Retention of Goods Purchased. — So, upon like principle, if an infant buys goods on credit, and retains them in his own hands and uses them for his own purposes for an unreasonable time after he becomes of age, without restoring them to the seller or giving him notice of the intention to avoid the contract, this operates as a ratification of it, and renders the buyer liable in an action for the price of the goods.³ But the retention of property by the infant after he has tendered it back to the vendor and done all in his power to secure a rescission of the contract will not constitute a ratification.⁴

Sale of Property Purchased. — If an infant, after becoming of age, sells the property purchased, and receives the money for it, he must be considered as having elected to affirm the contract, and he cannot afterwards avoid the payment of the consideration.⁵

(bb) **PART PAYMENT OF DEBT.** — If an infant incurs a debt, a mere payment on account after coming of age is not a ratification of the balance of the debt.⁶

(b) **Executed Contracts** — aa. **EXPRESS RATIFICATION.** — **Confirmation by Deed.** — If, after attaining majority, a grantor takes up a deed executed during infancy, and recon-

1. Implied Ratification — Executory Contracts. — *Henry v. Root*, 33 N. Y. 526; *Armfield v. Tate*, 7 Ired. L. (29 N. Car.) 258; *Dawey v. Burbank*, 77 N. Car. 259. See also *American Freehold Land Mortg. Co. v. Dykes*, 111 Ala. 178, 56 Am. St. Rep. 38.

2. *Walsh v. Powers*, 43 N. Y. 23, 3 Am. Rep. 654.

3. Retention of Goods Purchased. — *Hilton v. Shepherd*, 92 Me. 160; *Benham v. Bishop*, 9 Conn. 330, 23 Am. Dec. 358; *McKamy v. Cooper*, 81 Ga. 679; *Boyden v. Boyden*, 9 Met. (Mass.) 519; *Philpot v. Sandwich Mfg. Co.*, 18 Neb. 54.

An infant, ten days before his majority, in the purchase of a note, drew an order on a third person, of the nonpayment of which he had notice. Being sued several years after, upon the order, it was held that his omission to return the note or disaffirm the contract, after he attained his majority, warranted the implication that he intended to abide by his contract, and countervailed the defense of infancy. *Thomasson v. Boyd*, 13 Ala. 419.

But if the infant assigns the goods purchased, to secure the payment of another debt, the retaining of these goods for sale by the minor as the servant of the assignee until after he becomes of full age, will not constitute a ratification. *Thing v. Libbey*, 16 Me. 55.

4. *House v. Alexander*, 105 Ind. 109, 55 Am. Rep. 189.

Retention of Goods by Attaching Officer. — An infant bought goods that were not necessities, and the sellers, three days before he came of age, brought an action against him for the price, and attached the goods on their writ. The goods remained in the hands of the attaching officer at the time of the trial of the action, and the defendant gave no notice to the plaintiffs, after he came of age, of his intention not to be bound by the contract of sale. It was held that there was not a ratification of the contract of sale, by the defendant, and that

the action could not be maintained. *Smith v. Kelley*, 13 Met. (Mass.) 309.

5. *Robinson v. Hoskins*, 14 Bush (Ky.) 393; *Boody v. McKenney*, 23 Me. 517; *Cheshire v. Barrett*, 4 McCord L. (S. Car.) 241, 17 Am. Dec. 735.

Sale of Goods After Commencement of Suit. — If an infant disposes of personal property for which he has given his note in payment after suit has been commenced upon the note, the fact may be admitted in evidence to show a ratification of the contract of purchase. *Curry v. St. John Plow Co.*, 55 Ill. App. 82.

6. Part Payment of Debt. — *Thrupp v. Fielder*, 2 Esp. 628; *Ford v. Phillips*, 1 Pick. (Mass.) 202.

The mere indorsement of a receipt of money, of date after the maker has attained majority, is not a ratification of a note given during infancy. *Catlin v. Haddox*, 49 Conn. 492, 44 Am. Rep. 249.

The fact that an infant who has purchased land and given his notes in payment of the purchase price, pays two of the notes within four months after coming of age, does not of itself constitute a ratification of the contract. *Rapid Transit Land Co. v. Sanford*, (Tex. Civ. App. 1893) 24 S. W. Rep. 587. Compare *Hook v. Donaldson*, 9 Lea (Tenn.) 56.

No Ratification of Partnership. — Upon the dissolution of a firm composed of A, a minor, and B, an adult, A sold and conveyed to B all his interest in the partnership property, for which he received B's note secured by a mortgage on personal property, and his obligation to pay the debts of the firm. After coming of age, A proved his note against the estate of B, who had taken the benefit of the insolvent law, and also instituted proceedings with a view to enforce his claim under the mortgage. It was held that by these proceedings A did not ratify the partnership or make himself liable for the partnership debts. *Dana v. Stearns*, 3 Cush. (Mass.) 372.

veys by another, the original conveyance is thereby rendered valid *ab initio*.¹

Redelivery of Deed. — So if a grantor redelivers a deed which he has made during infancy, this is a confirmation of it.²

Verbal Confirmation. — It has been held that a verbal declaration made by a grantor, evidencing an intention to be bound by his conveyance, is a ratification;³ but a mere promise upon some contingency to make a deed of affirmance is not.⁴

Registry Laws. — It has been held, however, that the ratification of a deed made by an infant is within the policy of the registry laws, and must be registered in order to defeat the title of a subsequent purchaser from the grantor after his majority.⁵

Married Women. — It has also been held that a married woman cannot, after attaining her majority, affirm her deed made while she was an infant *feme covert*, by an instrument which is not executed in conformity with the statute regulating the conveyance of lands by married women.⁶

bb. IMPLIED RATIFICATION — (aa) *In General.* — If a contract be executed, any slight acknowledgment of liability, or admission of the contract, is a sufficient ratification of it.⁷ So, if an infant, after attaining his majority, continues to occupy a position explicable only on the supposition that he intends to stand by his contract, he will be considered as having ratified it.⁸

Ratification a Question of Fact. — The question as to what acts will or will not amount to a confirmation is one of intention, to be submitted to the jury

1. **By Deed.** — *Phillips v. Green*, 5 T. B. Mon. (Ky.) 344; *Cox v. McGowan*, 116 N. Car. 131. See also as to mortgage deed *In re Foulkes*, 3 Reports 682, 69 L. T. N. S. 183.

2. *Davidson v. Young*, 38 Ill. 145; *Murray v. Shanklin*, 4 Dev. & B. L. (20 N. Car.) 289.

3. **Verbal Confirmation of Deed.** — In *Houser v. Reynolds*, 1 Hayw. (2 N. Car.) 143, the declaration of a grantor, "I will never take advantage of my having been an infant at the time of executing the deed, and it is my wish that you should keep the land," was held to be a confirmation of the deed.

In *Ferguson v. Bell*, 17 Mo. 347, an infant executed a deed, and after coming of age expressed satisfaction with her bargain, received part of the consideration money, and spoke of her intention to make an affirmatory deed, but died suddenly without doing so. It was held that her acts and declarations were sufficient ratification.

4. *Clamorgan v. Lane*, 9 Mo. 446.

An Offer to Make a Deed of Ratification upon the condition that the unpaid purchase price is paid or secured, is not evidence of confirmation. It rather shows a disposition to disaffirm should the proposed condition not be performed. *Craig v. Van Bebber*, 100 Mo. 584, 18 Am. St. Rep. 569.

5. **Effect of Registry Laws.** — An infant conveyed land, and on attaining his majority ratified the conveyance. He afterwards conveyed to a third person, who had notice of the deed made during infancy but no notice of the ratification. It was held that the last named purchaser held the land; the court saying that if the ratification of a deed made in infancy is by a written instrument, such instrument is within the policy of the registry laws, but if it is by acts *in pais*, notice of such acts must be brought home to the subsequent purchaser. *Black v. Hills*, 36 Ill. 376, 87 Am. Dec. 224; *Holbrook v. Dickinson*, 56 Ill. 500. And see *Weaver v. Carpenter*, 42 Iowa 343; *Mustard v.*

Wohlford, 15 Gratt. (Va.) 329, 76 Am. Dec. 209.

6. *Walton v. Gaines*, 94 Tenn. 420.

7. **Implied Ratification of Executed Contracts.** — *Middleton v. Hoge*, 5 Bush (Ky.) 478; *Ihley v. Padgett*, 27 S. Car. 300.

Where the contract is executed, ratification may be inferred from circumstances, and any acknowledgment of liability by the infant after coming of age, or holding the property and treating it as his own, will amount to such ratification. *Petty v. Rousseau*, 94 N. Car. 315.

The cases generally show a repugnance to setting aside a solemn deed at the caprice of an infant. So it is said that a deed will be confirmed by any deliberate act after twenty-one, "by which the infant takes benefit under the deed, or expressly recognizes its validity." *McCormic v. Leggett*, 8 Jones L. (53 N. Car.) 425; *Irvine v. Irvine*, 9 Wall. (U. S.) 617; *Phillips v. Green*, 5 T. B. Mon. (Ky.) 344; *Scott v. Buchanan*, 11 Humph. (Tenn.) 468.

8. *Askey v. Williams*, 74 Tex. 294.

If an Infant Submits a Claim to Arbitration, and, after attaining full age, receives from his guardian the sum awarded and omits to disaffirm the submission for two years, he will be held to have ratified it, and cannot enforce his original claim. *Jones v. Phoenix Bank*, 8 N. Y. 228.

Payment of Annuity in Lien of Dower. — Accepting an estate free of dower, and entering into and enjoying it for several years after coming of age, is a ratification of the contract by the heir to pay an annuity to the widow in lieu of dower. *Barnaby v. Barnaby*, 1 Pick. (Mass.) 221.

An Infant Legatee Accepted the Note of the Executor in Payment of a Legacy then due and payable, and held the note after attaining her majority. It was held in a suit brought on the residuary legatee's bond, that the retention of the note was not of itself a ratification. *Durfee v. Abbott*, 61 Mich. 471.

under proper instructions from the court.¹

(bb) *Sales and Conveyances of Property — Failure to Disaffirm.* — In those states where the doctrine obtains that an infant must disaffirm his contracts within a reasonable time after attaining majority, it follows that a failure so to disaffirm operates as a ratification of the contract.²

Equitable Circumstances. — Even in those states where this doctrine does not obtain, mere acquiescence, when accompanied by other circumstances, may sometimes constitute a confirmation.³ Thus, if an infant grantor, after coming of age, sees the purchaser making large expenditures in valuable improvements upon the land, and says nothing in disaffirmance for a long time, it has been held that he will be estopped from afterwards disaffirming his conveyance.⁴

(cc) *Mortgage Given by Infant.* — A mortgage executed by an infant on his lands will be ratified by any conduct on his part, after attaining majority, which manifests an intention to abide by his contract.⁵

Conveying Lands Subject to Mortgage. — If, after coming of age, he conveys the same land subject to the mortgage, the second deed is a confirmation of the first.⁶

Purchase-money Mortgage. — If an infant purchases land, and at the same time reconveys it in mortgage as security for the purchase money, the transaction must stand or fall as a whole; and the ratification of the purchase by the infant after he becomes of age ratifies the mortgage.⁷ Hence, if he sells the land after reaching majority, this will be considered a confirmation of the mortgage,⁸ constituting it a valid charge upon the land in the hands of the purchaser.⁹

1. Question for Jury. — *Durfee v. Abbott*, 61 Mich. 471.

If there is any evidence of ratification it is for the jury to determine whether there is an affirmation or not. *Irvine v. Irvine*, 9 Wall. (U. S.) 617.

2. See *supra*, this section, *Disaffirmance and Avoidance*.

3. Equitable Circumstances. — *Irvine v. Irvine*, 9 Wall. (U. S.) 617; *Terrell v. Weymouth*, 32 Fla. 255, 37 Am. St. Rep. 94; *Jamison v. Smith*, 35 La. Ann. 609; *Lacy v. Pixler*, 120 Mo. 383; *Houston v. Houston*, (Tex. 1891) 18 S. W. Rep. 688.

Failure of Infant to Assert Title. — The fact that an infant whose property is sold by another person, knowing of the sale, neglects to state his title to the purchaser, does not estop him from afterwards recovering the property, for the law presumes the infant to be incapable of understanding or protecting his rights. *Norris v. Wait*, 2 Rich. L. (S. Car.) 148, 44 Am. Dec. 283.

4. Seeing Purchaser Making Improvements. — *Wallace v. Lewis*, 4 Harr. (Del.) 75; *Nathans v. Arkwright*, 66 Ga. 170; *Hartman v. Kendall*, 4 Ind. 405; *Deason v. Boyd*, 1 Dana (Ky.) 45; *Highley v. Barron*, 49 Mo. 103; *Davis v. Dudley*, 70 Me. 236, 35 Am. R. p. 318; *Allen v. Poole*, 54 Miss. 323; *Bostwick v. Atkins*, 3 N. Y. 53; *Dolph v. Hand*, 156 Pa. St. 91; *Wheaton v. East*, 5 Yerg. (Tenn.) 41, 26 Am. Dec. 251. See also *ante*, the title IMPROVEMENTS, p. 62.

5. The Payment of Interest Coupon Notes, after attaining majority, is a ratification of a mortgage given by an infant. *American Mortg. Co. v. Wright*, 101 Ala. 658.

Recital in Second Mortgage. — A recital in a mortgage that it is made subject to a prior mortgage by the mortgagor while an infant, is a confirmation of the first mortgage. *Ward v. Anderson*, 111 N. Car. 115.

Procuring Releases of Portions of Mortgaged Premises. — If, after attaining majority, the mortgagor procures releases of portions of the mortgaged premises, and does not raise the question as to the validity of the mortgage until foreclosure proceedings are begun, more than two years after the mortgagor becomes of age, such acts will be considered as a confirmation. *Wilson v. Darragh*, (Supm. Ct. Gen. T.) 7 N. Y. Supp. 810.

Confirmation by Will. — A provision in a will, directing that all the just debts of the testator be satisfied, has been held to be an affirmation of a mortgage executed to secure the repayment of a loan while the testator was an infant, although the instrument was not mentioned in the will. *Merchants' F. Ins. Co. v. Grant*, 2 Edw. (N. Y.) 544.

6. Conveyance Subject to Mortgage. — *Losey v. Bond*, 94 Ind. 67; *Boston Bank v. Chamberlin*, 15 Mass. 220; *Allen v. Poole*, 54 Miss. 323; *Eagle F. Co. v. Lent*, 1 Edw. (N. Y.) 301, 6 Paige (N. Y.) 635.

7. *Robbins v. Eaton*, 10 N. H. 561; *Dana v. Coombs*, 6 Me. 89, 19 Am. Dec. 194.

8. *Hubbard v. Cummings*, 1 Me. 11; *Langdon v. Clayton*, 75 Mich. 204; *Uecker v. Koehn*, 21 Neb. 559, 59 Am. Rep. 849; *Callis v. Day*, 38 Wis. 643.

9. *Lynde v. Budd*, 2 Paige (N. Y.) 191, 21 Am. Dec. 84.

Permitting Judgment by Default. — An infant gave a mortgage which was foreclosed some time after she became of age, and though personally served she allowed the bill to be taken as confessed, apparently without any disposition to contest it. It was held that she had no equity entitling her to set up a defense of infancy to defeat a subsequent bill brought by an assignee of the foreclosure decree to enforce it against her. *Terry v. McClintock*, 41 Mich. 492.

(dd) *Lease of Land by Infant.* — If an infant makes a lease of land for a term extending beyond the time of his infancy, and after coming of age accepts rent upon the lease, this is a ratification of it, and he cannot afterwards avoid the lease.¹

(ee) *Lease of Land to Infant.* — If, after coming of age, a person continues in possession of premises leased to him during his infancy, this is a ratification of the lease, and renders all its provisions obligatory upon him.²

(ff) *Contracts of Service.* — If an infant continues in the service of a master after coming of age, on the same terms, he will be held to have ratified the contract of service.³

VIII. LIABILITY FOR TORTS — 1. Pure Torts — a. IN GENERAL. — The principle is well settled that an infant is liable in an action *ex delicto* for all injuries to person or property committed by him. The privilege of infancy, being founded upon the infant's presumed want of prudence and discretion, cannot protect him from the consequences of his wrongful acts; for when civil injuries are committed by force, the intent of the perpetrator is not regarded.⁴

1. Smith v. Low, 1 Atk. 489; Van Doren v. Everitt, 5 N. J. L. 528.

2. Evelyn v. Chichester, 3 Barr. 1719; Baxter v. Bush, 29 Vi. 465, 70 Am. Dec. 429.

3. *Contracts of Service.* — McDonald v. Sargent, 171 Mass. 492; Spicer v. Earl, 41 Mich. 191, 32 Am. Rep. 152; Forsyth v. Hastings, 27 Vt. 646.

Joining in Suit as Colibellant. — A sailor, four months after coming of age, having heard that his associates had libeled a vessel for their wages, obtained the services of the same lawyer who was acting for the rest, and joined in the suit. He was not an intelligent or a provident person, and joined in the suit simply because the others had done so. It was held that this was not a sufficient ratification of his contract for service. *Burdett v. Williams*, 30 Fed. Rep. 697.

Enjoining Breach of Ratified Contract of Service. — The defendant while an infant entered the plaintiff's service, and executed a penal bond conditioned that he would not solicit their customers after the expiration of his term of service. He remained in the plaintiff's employ for five years after reaching majority, and then left their service, and committed a breach of the agreement not to solicit their customers. It was held that the continuance in service was a ratification of the contract, and that an injunction should be granted to restrain the breach on its terms. *Brown v. Harper*, 3 Reports 585, 63 L. T. N. S. 488.

4. **Liability for Torts — In General** — Cooley on Torts 103; 2 Kent's Com. 241.

England. — Mills v. Graham, 1 B. & P. N. R. 140; Burnard v. Haggis, 14 C. B. N. S. 45, 108 E. C. L. 45; Walley v. Holt, 35 L. T. N. S. 631; Bristow v. Eastman, Peake N. P. (ed. 1795) 223.

Canada. — Wilbur v. Jones, 21 N. Bruns. 4. *United States.* — Vasse v. Smith, 6 Cranch (U. S.) 231.

Alabama. — Oliver v. McClellan, 21 Ala. 675.

Illinois. — Mathews v. Cowan, 59 Ill. 341; Wilson v. Garrard, 59 Ill. 51.

Indiana. — Peterson v. Haffner, 59 Ind. 130, 26 Am. Rep. 81; Lee v. Hefley, 21 Ind. 98.

Louisiana. — Guidry v. Davis, 6 La. Ann. 91; Christian v. Welch, 7 La. Ann. 533.

Maine. — Shaw v. Coffin, 58 Me. 254, 4 Am. Rep. 290; Scott v. Watson, 46 Me. 362, 74 Am. Dec. 457; Lewis v. Littlefield, 15 Me. 233; Marshall v. Wing, 50 Me. 62.

Massachusetts. — Homer v. Thwing, 3 Pick. (Mass.) 492; Walker v. Davis, 1 Gray (Mass.) 506; Sikes v. Johnson, 16 Mass. 389.

Michigan. — Becker v. Mason, 93 Mich. 336.

Missouri. — Conway v. Reed, 66 Mo. 346, 27 Am. Rep. 354; O'Brien v. Loomis, 43 Mo. App. 29.

New Hampshire. — Eaton v. Hill, 50 N. H. 235, 9 Am. Rep. 189; School Dist. No. 1 v. Bragdon, 23 N. H. 507; Fitts v. Hall, 9 N. H. 441.

New York. — Bullock v. Babcock, 3 Wend. (N. Y.) 391; Wallace v. Morss, 5 Hill (N. Y.) 391; Tift v. Tift, 4 Den. (N. Y.) 175; Robbins v. Mount, (N. Y. Super. Ct. Gen. T.) 33 How. Pr. (N. Y.) 24; Campbell v. Stakes, 2 Wend. (N. Y.) 139, 19 Am. Dec. 561; Conklin v. Thompson, 29 Barb. (N. Y.) 218; Eckstein v. Frank, 1 Daly (N. Y.) 334.

Rhode Island. — Freeman v. Boland, 14 R. I. 39, 51 Am. Rep. 340.

South Carolina. — Peigne v. Sutcliffe, 4 McCord L. (S. Car.) 387, 17 Am. Dec. 756; Word v. Vance, 1 Nott & M. (S. Car.) 197, 9 Am. Dec. 683; Hanks v. Deal, 3 McCord L. (S. Car.) 257.

Tennessee. — Barham v. Turbeville, 1 Swan (Tenn.) 437, 57 Am. Dec. 782.

Vermont. — Elwell v. Martin, 32 Vt. 217; Ray v. Tubbs, 50 Vt. 688, 28 Am. Rep. 519; Humphrey v. Douglass, 10 Vt. 71, 33 Am. Dec. 177; Towne v. Wiley, 23 Vt. 355, 56 Am. Dec. 85; Green v. Sperry, 16 Vt. 390, 42 Am. Dec. 519; West v. Moore, 14 Vt. 447, 39 Am. Dec. 235.

Virginia. — Fry v. Leslie, 87 Va. 269.

Wisconsin. — Huchting v. Engel, 17 Wis. 230, 84 Am. Dec. 741.

Assault and Battery. — Infancy is no defense to a suit to recover compensatory damages for an assault and battery. *Conway v. Reed*, 66 Mo. 346, 27 Am. Rep. 354.

In *Bullock v. Babcock*, 3 Wend. (N. Y.) 391, the defendant, when about twelve years of age, shot an arrow and hit the plaintiff, putting out one of his eyes. Although the injury was unintentional the defendant was held

The Extent of the Infant's Liability, however, seems to be limited to compensatory damages,¹ even in the case of slander,² although there seems to be no good reason why an infant who is of sufficient age and discretion to be criminally responsible for his acts should not, in a case where malice was distinctly shown, have judgment for exemplary damage rendered against him.

b. COERCION OF PARENT OR GUARDIAN. — The fact that a minor commits a trespass by the command of his parent or guardian does not affect his liability to respond in damages.³

c. LIABILITY FOR ACTS OF AGENT. — An infant's liability also extends to torts which he procures another to commit.⁴

Authority to Commit Act Must Be Express. — These acts, however, must be committed under the infant's immediate direction or by his express authority, for as he cannot legally create an agent, he cannot be held responsible for the torts of one assuming to act under his implied authority.⁵ Hence he cannot be held liable for the malicious prosecution of a suit brought in his name by his next friend, without his knowledge, although he afterwards assents to it, before he comes of age;⁶ but he would be, it seems, if he carried on such a suit after arriving at full age.⁷

2. Torts Connected with or Growing out of Contracts — a. IN GENERAL — When Infant Is Not Liable. — But while an infant is liable for his torts, he is not liable for the tortious consequences of his breaches of contract, and though the action may be in form as for a tort, yet if the subject of it be based on contract, the suit will be attended with all the incidents of an action *ex contractu*. The principle is as well established as any rule of the common law, that a plaintiff cannot convert an action, founded on a contract, into a tort in order to deprive the defendant of the benefit of his plea of infancy.⁸

Form of Action Not Material. — It is the substance of the action, therefore, and not the form, which determines the infant's liability, for though the infant cannot be held liable in tort for a cause the substantial ground of which is contract,⁹ yet he may, on the other hand, be sued in assumpsit where the

liable. See also *Peterson v. Haffner*, 59 Ind. 130, 26 Am. Rep. 81, stated under the title ASSAULT AND BATTERY, vol. 2, p. 989, note 4.

Seduction. — The plea of infancy is no bar to an action for damages for seduction. *Lee v. Helley*, 21 Ind. 98; *Becker v. Mason*, 93 Mich. 336; *Fry v. Leslie*, 87 Va. 269. See also *Hamilton v. Lomax*, 26 Barb. (N. Y.) 615.

Frightening Horses. — An infant is liable in an action *ex delicto* for throwing a lighted firecracker under a horse, where it exploded and caused his death from fright. *Conklin v. Thompson*, 29 Barb. (N. Y.) 218. Or for causing the plaintiff's horse to run away and throw the plaintiff out of his wagon, by hitting the horse with a baseball while negligently engaged in a game near a highway. *Neal v. Gillett*, 23 Conn. 437.

Nuisance. — An infant occupying land is liable for a nuisance and injury to neighbors for the negligent use of his land. *McCoon v. Smith*, 3 Hill (N. Y.) 147, 38 Am. Dec. 623; *McCabe v. O'Connor*, 4 N. Y. App. Div. 354.

Trespass upon Land. — An infant six years old is liable in damages for breaking and entering the plaintiff's premises, and breaking down and destroying his shrubbery and flowers. *Huchting v. Engel*, 17 Wis. 230, 84 Am. Dec. 741.

Disseizin. — An infant is liable in ejectment, as disseizin is a tort. *Marshall v. Wing*, 50 Me. 62; *Beckley v. Newcomb*, 24 N. H. 363.

1. Compensatory Damages Only. — *Peterson v. Haffner*, 59 Ind. 130, 26 Am. Rep. 81; *Conway v. Reed*, 66 Mo. 354, 27 Am. Rep. 354; *O'Brien v. Loomis*, 43 Mo. App. 29; *Huchting v. Engel*, 17 Wis. 230, 84 Am. Dec. 741. See also the title EXEMPLARY DAMAGES, vol. 12, p. 23.

2. Defries v. Davis, 1 Bing. N. Cas. 692, 27 E. C. L. 547, 1 Scott 594.

3. Tort at Instances of Parent or Guardian. — *Scott v. Watson*, 46 Me. 362, 74 Am. Dec. 457; *Smith v. Kron*, 96 N. Car. 392; *O'Leary v. Brooks Elevator Co.*, 7 N. Dak. 554; *Humphrey v. Douglass*, 10 Vt. 71, 33 Am. Dec. 177.

4. Liability for Acts of Agent. — *Sikes v. Johnson*, 16 Mass. 389.

5. Not Responsible for Acts Committed by Implied Authority. — *Robbins v. Mount*, 4 Robt. (N. Y.) 553.

An infant cannot be held responsible for trespasses committed by his guardian. *Cunningham v. Illinois Cent. R. Co.*, 77 Ill. 178.

6. Burnham v. Seaverns, 101 Mass. 360, 100 Am. Dec. 123.

7. Sterling v. Adams, 3 Day (Conn.) 411.

8. Torts Connected with or Growing out of Contracts. — *Prescott v. Norris*, 32 N. H. 101; *Schenk v. Strong*, 4 N. J. L. 97; *Penrose v. Curren*, 3 Rawle (Pa.) 351, 24 Am. Dec. 356; *Wilt v. Welsh*, 6 Watts (Pa.) 9; *Gilson v. Spear*, 38 Vt. 311, 88 Am. Dec. 659.

9. Jennings v. Rundall, 8 T. R. 335; *Green v. Greenbank*, 2 Marsh. 485, 4 E. C. L. 375; *Prescott v. Norris*, 32 N. H. 101; *Wilt v. Welsh*,

substance of the demand is a tort.¹

When Infant Is Liable. — The mere fact, however, that the cause of action grows out of or is connected with a contract will not in every case shield the infant from liability. If the tort is subsequent to or independent of the contract, and not a mere breach of it, but is a distinct, wilful, and positive wrong in itself, then, notwithstanding the contract, the infant is liable.²

b. CONVERSION OF THINGS BAILED. — This distinction may be frequently observed in actions arising from injury to things bailed. While it is sometimes difficult to discriminate between acts that are to be regarded as mere breaches of contracts of bailment and positive and wilful torts, there are many cases where the distinction is clear.

Want of Skill and Care. — When the infant stipulates for ordinary skill and care in the use or preservation of the thing bailed, but fails for want of skill and experience, and not from any wrongful intent, it is in accordance with the policy of the law that his privilege, based upon his presumed want of capacity, should shield him. A failure in such a case from mere want of ordinary care or skill might well be regarded as in substance a breach of contract for which the infant is not liable, even though in ordinary cases an action *ex delicto* might be sustained.³

Wilful Injury to or Destruction of Thing Bailed. — But when, on the other hand, the infant wholly departs from his character as bailee, and by some positive act wilfully destroys or injures the thing bailed, or converts it to his own use, the act is in its nature essentially a tort, the same as if there had been no bailment, even if assumpsit might be maintained in the case of an adult, on an implied promise to return the thing safely.⁴

Hiring of Horses. — A common application of these principles arises in the use of hired horses. If an infant hires a horse to be moderately ridden or driven, and the infant from lack of experience rides or drives the horse immoderately, or injures him by unskilful management, it is a mere breach of contract, and

6 Watts (Pa.) 9; Curtin v. Patton, 11 S. & R. (Pa.) 305.

1. Assumpsit for Money Had and Received lies against an infant to recover money embezzled by him. Bristow v. Eastman, Peake N. P. (ed. 1795) 223.

An infant is liable in assumpsit for money stolen and for the proceeds of property stolen by him and converted into money. Shaw v. Coffin, 58 Me. 254, 4 Am. Rep. 290; Elwell v. Martin, 32 Vt. 217.

2. Tort Subsequent to and Independent of the Contract. — Prescott v. Norris, 32 N. H. 101.

3. Infant Bailee Not Liable for Want of Care. — Eaton v. Hill, 50 N. H. 235, 9 Am. Rep. 139.

4. Infancy Is No Defense to an Action of Trover, although the goods converted be in his possession in virtue of a previous contract. The conversion is still in its nature a tort; it is not an act of omission, but of commission, and is within that class of offenses for which infancy cannot afford protection. Vasse v. Smith, 6 Cranch (U. S.) 226.

In Lewis v. Littlefield, 15 Me. 233, an infant in whose hands money had been put by the plaintiff to abide the result of an illegal wager, and who paid it to the winner after a notice from the plaintiff not to do so, was held liable in trover.

In Green v. Sperry, 16 Vt. 390, 42 Am. Dec. 519, the defendant, who was an infant, borrowed the plaintiff's watch for a week, and afterwards refused or neglected to return it. It was held he was liable for its conversion.

If an infant receives goods for the purpose of bestowing labor on them, and subsequently refuses to return them on demand, he is liable for the conversion. Mills v. Graham, 1 B. & P. N. R. 140; Peigne v. Sutcliffe, 4 McCord L. (S. Car.) 387, 17 Am. Dec. 756.

Conversion of Crop by Infant Lessee. — The infancy of a lessee constitutes no defense to an action of trover for the conversion of the crop raised upon the leased premises, since his liability does not arise from any breach of contract, but from an unlawful appropriation of the lessor's property. Baxter v. Bush, 29 Vt. 465, 70 Am. Dec. 429.

Conversion, However, Is Always to Be Distinguished from the Breach of a Contract to sell and account for the proceeds. Munger v. Hess, 28 Barb. (N. Y.) 75; Burns v. Hill, 19 Ga. 22.

If money is left with an infant to be paid over to a third party, and it is contemplated that merely the sum deposited and not the specific money is to be paid, the transaction creates the relation of debtor and creditor between the parties and not that of bailor and bailee, and the infant's misappropriation of the money is not a conversion of it, rendering him liable in trover. Root v. Stevenson, 24 Ind. 115.

Replevin. — Where goods are detained by an infant in violation of a contract of conditional sale, replevin, being an action of tort, is maintainable against him. Wheeler, etc., Mfg. Co. v. Jacobs, (C. Pl. Gen. T.) 2 Misc. (N. Y.) 236.

the plea of infancy is a complete defense to an action therefor.¹ But if the infant wilfully and intentionally injures the animal,² or uses him for a different purpose from that for which he was hired,³ or drives him elsewhere or beyond the place contemplated in the contract,⁴ it is a conversion of the animal which terminates the bailment, and renders the infant liable in trover for its value.

c. FRAUD IN MAKING CONTRACTS — (1) *Fraud in Sale of Property.* — It is the general rule that infancy is a good defense to an action on the case for deceit and false warranty in the sale of property.⁵

(2) *Fraud in Purchase of Property* — (a) *In General.* — If an infant vendee obtains possession of goods through the pretense of a purchase, but intending at the time not to pay for them, the vendor may, on discovering the fraud, reclaim the goods by replevin, as never having parted with his property in them,⁶ or, if the vendee has disposed of the goods, recover judgment in case or in trover against him for their value.⁷ An action to enforce damages for

1. *Immoderate or Unskilful Use of Horse.* — *Eaton v. Hill*, 50 N. H. 235, 9 Am. Rep. 189; *Stack v. Cavanaugh*, 67 N. H. 149.

In *Jennings v. Rundall*, 8 T. R. 335, the defendant, a lad, hired the plaintiff's mare to ride a short distance, and in the course of the journey an accident happened, the mare being strained. In an action for damages Lord Kenyon, C. J., said: "The question is whether this action can be maintained. I am clearly of opinion that it cannot. It is founded on a contract. If it were in the power of a plaintiff to convert that which arises out of a contract into a tort, there would be an end of that protection which the law affords to infants."

2. *Campbell v. Stakes*, 2 Wend. (N. Y.) 139, 19 Am. Dec. 561.

3. *Use of Horse for Different Purpose.* — In *Burnard v. Haggis*, 14 C. B. N. S. 45, 108 E. C. L. 45, the defendant, an infant, hired a horse for riding, on the express condition that it was not to be used for jumping. He went out with a friend, who rode this horse, by his desire, and making a cut across country, they jumped divers hedges and ditches, and the horse staked himself on a fence and was fatally injured. It was held that the defendant was liable.

4. *Homer v. Thwing*, 3 Pick. (Mass.) 492; *Freeman v. Boland*, 14 R. I. 39, 51 Am. Rep. 340; *Ray v. Tubbs*, 50 Vt. 688, 28 Am. Rep. 519.

Departure from Route. — *Fish v. Ferris*, 5 Duer (N. Y.) 49.

In *Walley v. Holt*, 35 L. T. N. S. 631, an infant hired a horse and cart to go to C. and back, and with the express agreement that he should go nowhere else and carry but two persons. He drove to B., four miles beyond C., and on the return trip carried four persons. He also beat and abused the horse, which, in consequence of this treatment, had to be killed. The infant was held liable.

In *Towne v. Wiley*, 23 Vt. 355, 56 Am. Dec. 85, in an action of trover for a horse, it appeared that the defendant, an infant, hired of the plaintiff the horse in question to go to a certain place and back the same day. The defendant went to the place specified, but returned by a circuitous route, nearly doubling the distance, and while on his return stopped at a house from about eight o'clock in the evening until four o'clock the next morning.

The night was cold and windy, and the horse was exposed during the whole night without sheltering or covering of any kind, in consequence of which overdriving and exposure he died. It was held that the use of the horse in this way was a departure from the object of the bailment, and constituted a conversion for which the defendant was liable.

A Plaintiff Loaned a Horse to One H., Who Exchanged It for Another Horse with the defendant, who was a minor, without the consent of the plaintiff, but on a stipulation that the exchange was not to be final until it was ratified by him. In a few days after the exchange took place, the plaintiff refused to ratify it, and insisted upon having his own horse restored to him, but the defendant refused to restore it. In an action of detinue to recover the horse, the defendant interposed a plea of infancy, which he fully sustained by proof, but it was held that the action of detinue, when founded on a conversion and detention, is in fact an action *ex delicto*, and that infancy was no defense. *Oliver v. McClellan*, 21 Ala. 675.

Contra. — For cases denying the validity of the principle stated in the text, see *Schenk v. Strong*, 4 N. J. L. 97; *Penrose v. Curren*, 3 Rawle (Pa.) 351, 24 Am. Dec. 356; *Wilt v. Welsh*, 6 Watts (Pa.) 9.

5. *Fraud in Sale of Property.* — An action upon the case in nature of deceit, on sale by the defendant of goods as his own, whereas in truth they were another's, does not lie against an infant. *Grove v. Nevill*, 1 Keb. 778; *Doran v. Smith*, 49 Vt. 353.

So an infant is not liable for false representation as to the soundness of a horse. *Green v. Greenbank*, 2 Marsh. 485, 4 E. C. L. 375; *Howlett v. Haswell*, 4 Campb. 118; *Prescott v. Norris*, 32 N. H. 101; *Morrill v. Aden*, 19 Vt. 505; *West v. Moore*, 14 Vt. 447, 39 Am. Dec. 235; *Gilson v. Spear*, 38 Vt. 311, 88 Am. Dec. 659.

Contra. — *Word v. Vance*, 1 Nott & M. (S. Car.) 197, 9 Am. Dec. 683.

6. *Fraud in Purchase of Property* — *Replevin.* — *Badger v. Phinney*, 15 Mass. 359, 8 Am. Dec. 105.

7. *Action of Case or Trover.* — *Ashlock v. Virell*, 29 Ill. App. 388; *Wallace v. Morss*, 5 Hill (N. Y.) 391; *Gaunt v. Taylor*, (Supm. Ct. Gen. T.) 15 N. Y. Supp. 589; *Harsein v. Cohen*, (Tex. Civ. App. 1894) 25 S. W. Rep. 977.

In *Walker v. Davis*, 1 Gray (Mass.) 506, it

such a tort is not an attempt to enforce the contract indirectly by counting on the infant's refusal to perform it, for no contract existed, but recovery is allowed for the damages occasioned by the wrongful and fraudulent act of the infant.

(b) **False Representations as to Age.** — How far this principle applies when the infant's fraud consists merely in his assertion, when he made the contract, that he was of age, is a disputed question. In some jurisdictions it is held that such an assertion, though fraudulently made, is not enough to rob the infant of his plea,¹ but the weight of authority is that if the plaintiff was induced to believe that the defendant was of age when the contract was entered into, by the positive affirmation of the defendant to that effect, and the defendant sought to entrap the plaintiff into the contract which he then secretly intended to repudiate to his own profit and the plaintiff's loss, the case falls within that class of cases which hold infants liable for their frauds though they originate in contracts.²

This Result Is No Violation of the Principle that an infant is not liable in any form of action where the consequence of a recovery would be an indirect enforcement of a contract, for the recovery is not upon the contract, as that is treated as of no effect; nor is he made to pay the contract price of the article purchased by him, as he is only held to answer for the actual loss caused by his fraud.³

IX. CRIMINAL RESPONSIBILITY AND PUNISHMENT OF INFANTS — 1. Criminal Responsibility — a. MENTAL CAPACITY — (1) In General. — One of the essential elements of crime is that the act upon which the charge is predicated should have been committed with a criminal intent.⁴ No matter how serious the consequences of an unlawful deed may be, unless the perpetrator was *doli capax*, that is, mentally capable of entertaining a criminal intent, he cannot receive the punishment of the law. An infant's criminal responsibility, consequently, does not begin until he has developed sufficient intelligence and moral perception to distinguish between right and wrong, and to comprehend the legal consequences of his acts.⁵

appeared that the defendant, an infant, intending to defraud the plaintiff, made the latter drunk, and took advantage of his condition to trade for a cow, giving him a promissory note in payment therefor. The note not being paid when due, the plaintiff brought an action upon it, in which action the defendant prevailed on a plea of infancy. The plaintiff then demanded a return of the cow, and the defendant not returning her, brought an action for her conversion. It was held that the action lay.

Giving Worthless Check. — If an infant obtains goods by giving a check upon a bank in which he has no funds, and which he has no reason to suppose will honor the check, he is guilty of fraud and liable to the vendor in case of trover. *Mathews v. Cowan*, 59 Ill. 341.

1. False Representations as to Age — Infant Not Liable. — *Curtin v. Patton*, 11 S. & R. (Pa.) 305; *Nash v. Jewett*, 61 Vt. 501, 15 Am. St. Rep. 931. See also *Whitcomb v. Joslyn*, 51 Vt. 79, 31 Am. Rep. 678.

In *Johnson v. Pie*, 1 Keb. 905, 913, 1 Lev. 169, where the defendant had falsely and fraudulently asserted himself to be of full age, and had as such executed a mortgage to the plaintiff, which he afterwards repudiated, it was held that the defendant was not answerable, because the action was founded on the very contract in which the defendant had cheated the plaintiff.

But mere silence by the infant does not constitute fraud. *Stikeman v. Dawson*, 1 De G. & Sm. 90.

2. Infant Liable. — *Rice v. Boyer*, 108 Ind. 472, 58 Am. Rep. 55; *Fitts v. Hall*, 9 N. H. 441; *Eckstein v. Frank*, 1 Daly (N. Y.) 334; *Schunemann v. Paradise*, (Supm. Ct. Spec. T.) 46 How. Pr. (N. Y.) 426; *Wallace v. Morss*, 5 Hill (N. Y.) 391; *Hughes v. Gallans*, 10 Phila. (Pa.) 618, 31 Leg. Int. (Pa.) 349; *Kilgore v. Jordan*, 17 Tex. 341. See also *Yeager v. Knight*, 60 Miss. 730.

In *Schmitheimer v. Eiseman*, 7 Bush (Ky.) 298, it was held that a deed made by an infant *feme covert* cannot be avoided by her on the ground of her infancy, when, to induce an innocent purchaser to make the purchase, she and her husband made oath before a notary that to the best of their knowledge and information she was more than twenty-one years of age.

3. Rice v. Boyer, 108 Ind. 472, 58 Am. Rep. 55.

4. See the title CRIMINAL LAW, vol. 8, p. 284.

5. Criminal Responsibility of Infants. — *Com. v. Mead*, 10 Allen (Mass.) 398; *State v. Aaron*, 4 N. J. L. 263; *State v. Yeargan*, 117 N. Car. 706.

It is not necessary to show actual knowledge by the defendant of the unlawfulness of the act, if sufficient legal capacity to commit crime was otherwise proved. If capacity is

(2) *Age at Which Criminal Responsibility Begins.* — The precise age at which this state of mental development in children is attained varies necessarily according to the natural acuteness, education, and condition in life of each individual. In one child it is reached much earlier than in another, but in all the line between capacity and incapacity is so shadowy and uncertain that the law has wisely cut off all speculation upon the matter by arbitrarily fixing an age under which children are conclusively presumed to be incapable of crime, no matter what circumstances of mischievous discretion may appear in the particular case.¹ At common law this age was fixed at seven years,² but the tendency of modern legislation has been to increase the limit, being fixed in *Texas* at nine,³ in *Illinois* at ten,⁴ and in *Arkansas* even as high as twelve years of age.⁵

After a Child Has Reached the Age of Criminal Accountability he may, in a proper case, be convicted despite his tender years, for though the legal punishment of one so young is a lamentable occurrence, and one which the mind cannot sanction without a conflict of the emotions, yet, as it has been justly said, there are many crimes of a most heinous nature which children are very capable of committing, and it might be of dangerous consequences to the public to propagate the notion that children might commit such atrocious crime with impunity.⁶ Hence, instances are not lacking, though it must be admitted none of the cases are very recent, where children have been subjected to the severest punishments.⁷

Confessions. — The capacity to commit a crime necessarily supposes the

established, knowledge may be presumed. *Com. v. Mead*, 10 Allen (Mass.) 398.

A Sense of Moral Guilt Only on the part of the infant, in the absence of a knowledge of his legal responsibility for his wrongful act, will not authorize a conviction. *Willet v. Com.* 13 Bush (Ky.) 230.

In *State v. Yeargan*, 117 N. Car. 706, where a boy under fourteen years of age was indicted for gambling with dice, it was held that he could not be convicted unless it was shown that he knew the act to be unlawful.

1. When Criminal Responsibility Begins. — *State v. Aaron*, 4 N. J. L. 263.

2. At Common Law — Criminal Accountability Begins at Seven. — 1 Hale P. C. 27; 1 Hawk. P. C. 2; 1 Russell on Crimes 1; 1 Bish. Crim. L., § 368; Broom's Leg. Maxims (2d ed.) 232; 4 Black. Com. 23.

England. — *Marsh v. Loader*, 14 C. B. N. S. 535, 108 E. C. L. 535; *Reg. v. Smith*, 1 Cox C. C. 260.

Kentucky. — *Willet v. Com.*, 13 Bush (Ky.) 230.

Massachusetts. — *Com. v. Mead*, 10 Allen (Mass.) 398.

Missouri. — *State v. Tice*, 90 Mo. 112.

New Jersey. — *State v. Guild*, 10 N. J. L. 163, 18 Am. Dec. 404; *State v. Aaron*, 4 N. J. L. 263.

New York. — *People v. Townsend*, 3 Hill (N. Y.) 479.

Tennessee. — *State v. Goin*, 9 Humph. (Tenn.) 175.

A child under seven years cannot be a vagrant. *Rex v. King's Langley*, 1 Stra. 631.

A child under seven years of age cannot commit a nuisance on his own land. *People v. Townsend*, 3 Hill (N. Y.) 479.

3. Texas. — *Parker v. State*, 20 Tex. App. 451; *Wusnig v. State*, 33 Tex. 651; *McDaniel v. State*, 5 Tex. App. 475.

4. Illinois. — *Angelo v. People*, 96 Ill. 209, 36 Am. Rep. 132.

5. Arkansas. — *Dove v. State*, 37 Ark. 261.

6. 4 Black. Com. 23; Yorke's Case, Foster 70, 1 Hale P. C. 26 note; *Law v. Com.*, 75 Va. 885, 40 Am. Rep. 750.

7. Infants Convicted of Murder. — In *Godfrey v. State*, 31 Ala. 323, 70 Am. Dec. 494, a slave boy between ten and eleven years of age was indicted for the murder of his master's child. The killing was done with a hatchet, from which the prisoner carefully washed the blood after committing the deed, and when questioned about the murder, said an Indian had done it. It appeared that he had been made very angry with the child the day before the murder, and had knocked the child down and threatened to kill him. He afterwards confessed to the murder, and was convicted and executed. See also *Yorke's Case*, Foster 70, 1 Hale P. C. 26 note, and instances mentioned in 4 Black. Com. 23.

In *State v. Aaron*, 4 N. J. L. 263, a slave boy under twelve years of age was convicted on his own confession of the murder of a child of two years by throwing him into a well.

In *State v. Guild*, 10 N. J. L. 163, 18 Am. Dec. 404, a negro boy between twelve and thirteen years of age was convicted of the murder of an old woman, and was executed. He confessed to have killed her in a fit of anger, engendered by her refusal to loan him a gun.

In *Rex v. Wild*, 1 Moody 452, a boy was indicted for the murder of a small child by pushing him off a bank into a pond, and was on his own confession convicted, and was transported for life.

Convictions of Manslaughter. — In *State v. Milholland*, 89 Iowa 5, a boy between thirteen and fourteen years of age was convicted of manslaughter, by drowning another, while in

capacity to confess it. But the confessions of children, especially where the offense is highly penal, ought to be received with the strictest caution, and investigated with a desire to obviate their force. If from any circumstances the jury believe that the confession was incorrectly made, it ought to be disregarded; and unless corroborated by circumstances, should never in capital offenses warrant a conviction.¹

Cannot Plead Constraint of Parent. — An infant who is criminally responsible for his acts cannot plead in justification of them that he was under the constraint of a parent or master.²

(3) **Burden of Proof as to Capacity** — **When upon Prosecution.** — Although when an infant reaches the age of criminal accountability he forfeits that absolute exemption from legal punishment which has hitherto been accorded him, his want of discretion and self-control still entitles him to a compassionate consideration, and though the law no longer holds him absolutely incapable of crime, it considers him for many years *prima facie* so, and unless the prosecu-

swimming with him; and in *Martin v. State*, 90 Ala. 602, 24 Am. St. Rep. 844, a boy of the same age was convicted for killing another in a fit of anger. See also *Reg. v. Vamplew*, 3 F. & F. 520.

Arson. — In *Dean's Case*, 1 Hale P. C. 25, 4 Black. Com. 23, a boy of eight years of age was tried for firing two barns, and it appearing that he had malicious revenge and cunning, he was found guilty, condemned, and hanged accordingly. See also *State v. Nickleson*, 45 La. Ann. 1172, and *State v. Bostick*, 4 Harr. (Del.) 563.

Convictions of Burglary. — *Linhart v. State*, 33 Tex. Crim. 504; *Carr v. State*, 24 Tex. App. 562, 5 Am. St. Rep. 905.

For cases where the evidence of capacity was held insufficient to warrant conviction, see *Ford v. State*, 100 Ga. 63; *Keith v. State*, 33 Tex. Crim. 341; *Parker v. State*, 20 Tex. App. 451.

Indictments for Larceny. — In the following cases children have been indicted for larceny, but have either been acquitted on trial or the verdict of guilty has been set aside for want of proof of mischievous discretion. *Rex v. Owen*, 4 C. & P. 236, 19 E. C. L. 362; *Dove v. State*, 37 Ark. 261; *Com. v. French*, Thach. Crim. Cas. (Mass.) 163; *Walker's Case*, 5 City Hall Rec. (N. Y.) 137; *Stag's Case*, 5 City Hall Rec. (N. Y.) 177; *People v. Davis*, 1 Wheel. Crim. (N. Y.) 230; *People v. Teller*, 1 Wheel. Crim. (N. Y.) 231; *Allen v. State*, (Tex. Crim. 1895) 37 S. W. Rep. 757; *Gardiner v. State*, 33 Tex. 692.

Assault with Intent to Kill. — In *McCormack v. State*, 102 Ala. 156, a boy was convicted of assault upon his schoolmaster with intent to kill.

Assaults and Batteries Between Children. — In the case of common assaults and batteries between children, where no serious damage is done, it is usually considered better to leave such matters to the correction which the parent or schoolmaster may in his discretion inflict, than give importance to it by bringing the offender into court. *State v. Pugh*, 7 Jones L. (52 N. Car.) 61. But if the battery be of an aggravated kind, or a deadly weapon be used, the offender may be indicted and punished. *Hill v. State*, 63 Ga. 578, 36 Am. Rep. 120. *State v. Fowler*, 52 Iowa 103; *State v. Pugh*, 7

Jones L. (52 N. Car.) 62; *State v. Goin*, 9 Humph. (Tenn.) 175.

See generally the title ASSAULT AND BATTERY, vol. 2, p. 976.

Malicious Trespass. — In *State v. Toney*, 15 S. Car. 409, a boy under fourteen years of age was convicted of malicious trespass for injuring a cow.

Bastardy. — The fact that the father of a bastard child is an infant does not relieve him from a prosecution, under the statute, for its support. *Chandler v. Com.*, 4 Met. (Ky.) 66.

Refusing to Support Wife. — A minor cannot be convicted under a statute, *How. Stat. Mich.*, c. 51, for refusing to support his wife, if the testimony fails to show his emancipation, or that he is the owner of any property. *People v. Todd*, 61 Mich. 234.

Disposing of Mortgaged Goods. — An infant cannot be guilty of the statutory offense of disposing of personal property which he has mortgaged, for the reason that his subsequent disposition of the property disaffirms and renders void the previous mortgage. *State v. Howard*, 88 N. Car. 650; *Jones v. State*, 31 Tex. Crim. 252.

Larceny by Bailee. — But it has been held that an infant who receives the possession of personal property under a lease is indictable for larceny in disposing of it by sale. *Reg. v. McDonald*, 15 Q. B. D. 323.

False Pretenses. — And an infant may be convicted of obtaining goods under false pretenses when he represents himself to be the owner of property which does not belong to him and thus fraudulently induces the owner to sell the goods to him on credit. *People v. Kendall*, 25 Wend. (N. Y.) 399, 37 Am. Dec. 240.

1. See the title CONFESSIONS, vol. 6, p. 570.

2. **Cannot Plead Constraint of Parent.** — 1 Hale P. C. 44; 1 Hawk. P. C., c. 1, § 14; *People v. Richmond*, 29 Cal. 415; *State v. Learned*, 41 Vt. 585. And see the titles DURESS, vol. 10, p. 348; PARENT AND CHILD.

But where a boy ten years old was indicted, together with his father and mother, for having coining implements in their possession, it was held that he could not be convicted, the court remarking that "it would be going too far to say that one so young was a joint possessor with them of the property." *Reg. v. Boober*, 4 Cox C. C. 272.

tion establishes his capacity beyond a reasonable doubt, will not permit him to suffer for his deeds. This is the period of life which jurists have called the "dubious stage of discretion," and according to the common law extended from the seventh to the fourteenth year,¹ but by statute in some of the states it is made to terminate somewhat earlier.²

When upon the Accused. — After this period has terminated, the infant becomes presumptively capable of crime, and if he pleads his incapacity as a defense, the burden is upon him to establish it.³

(4) *Burden of Proof of Age.* — The burden of proof as to the age of the

1. When Burden of Proof of Capacity Is upon Prosecution. — 4 Black. Com. 24; 1 Hale P. C. 27.

England. — *Rex v. Owen*, 4 C. & P. 236, 19 E. C. L. 362; *Rex v. Groombridge*, 7 C. & P. 582, 32 E. C. L. 641; *Reg. v. Vamplew*, 3 F. & F. 520.

United States. — *Allen v. U. S.*, 150 U. S. 551.

Alabama. — *Godfrey v. State*, 31 Ala. 323, 70 Am. Dec. 494; *Martin v. State*, 90 Ala. 602, 24 Am. St. Rep. 844; *McCormack v. State*, 102 Ala. 156.

Delaware. — *State v. Bostick*, 4 Harr. (Del.) 563.

Georgia. — *Irby v. State*, 32 Ga. 496; *Hill v. State*, 63 Ga. 578, 36 Am. Rep. 120; *Ford v. State*, 100 Ga. 63. But see *Broadnax v. State*, 100 Ga. 62.

Illinois. — *Angelo v. People*, 96 Ill. 209, 36 Am. Rep. 132.

Indiana. — *Stephenson v. State*, 28 Ind. 272.

Iowa. — *State v. Fowler*, 52 Iowa 103; *State v. Milholland*, 89 Iowa 5.

Kentucky. — *Willet v. Com.*, 13 Bush (Ky.) 230; *Heilman v. Com.*, 84 Ky. 457, 4 Am. St. Rep. 207; *McClure v. Com.*, 81 Ky. 448.

Louisiana. — *State v. Nickleson*, 45 La. Ann. 1172.

Massachusetts. — *Com. v. Mead*, 10 Allen (Mass.) 398.

Missouri. — *State v. Adams*, 76 Mo. 355; *State v. Tice*, 90 Mo. 112.

New Jersey. — *State v. Guild*, 10 N. J. L. 163, 18 Am. Dec. 404.

New York. — *People v. Davis*, 1 Wheel. Crim. (N. Y.) 230; *Stag's Case*, 5 City Hall Rec. (N. Y.) 177.

North Carolina. — *State v. Pugh*, 7 Jones L. (52 N. Car.) 61; *State v. Yeargan*, 117 N. Car. 706. But see *State v. Arnold*, 13 Ired. L. (35 N. Car.) 184.

Ohio. — *Williams v. State*, 14 Ohio 222, 45 Am. Dec. 536; *Hiltabiddle v. State*, 35 Ohio St. 52, 35 Am. Rep. 592.

Pennsylvania. — *Com. v. M'Keagy*, 1 Ashm. (Pa.) 248.

South Carolina. — *State v. Toney*, 15 S. Car. 409.

Tennessee. — *State v. Goin*, 9 Humph. (Tenn.) 175; *State v. Doherty*, 2 Overt. (Tenn.) 80.

Texas. — *Carr v. State*, 24 Tex. App. 562, 5 Am. St. Rep. 905; *Parker v. State*, 20 Tex. App. 451; *Keith v. State*, 33 Tex. Crim. 341; *Wusnig v. State*, 33 Tex. 651, *Allen v. State*, (Tex. Crim. 1890) 37 S. W. Rep. 757; *Rocha v. State*, 38 Tex. Crim. 69; *McDaniel v. State*, 5 Tex. App. 475; *Gardiner v. State*, 33 Tex. 692.

Vermont. — *State v. Learnard*, 41 Vt. 585.

Virginia. — *Law v. Com.*, 75 Va. 885, 40 Am. Rep. 750.

Between the age of seven and the age of fourteen years, an infant shall be presumed to be incapable of committing crime, the presumption being very strong at seven and decreasing with the progress of his years. But this presumption may be encountered by proof; and if it shall appear by strong and irresistible evidence that he had sufficient discernment to distinguish good from evil, to comprehend the nature and consequences of his acts, he may be convicted and punished. *State v. Aaron*, 4 N. J. L. 263.

A charge of felony can be established against an infant of eleven years of age only by the strongest and clearest proof of his capacity to entertain a criminal intent. *Angelo v. People*, 96 Ill. 209, 36 Am. Rep. 132.

An instruction that the age of presumptive legal accountability for crime begins at eleven instead of fourteen is prejudicial error although the accused was concededly two months over fourteen years when he committed the act. *Allen v. U. S.*, 150 U. S. 551.

2. Statutes. — In *Minnesota* and *New York* the age of presumptive legal incapacity ends at twelve. Penal Code Minn., § 17; *State v. Kluseman*, 53 Minn. 541; Penal Code N. Y., § 19.

Under the Texas Statutes (Pasch. Dig., art. 1638), which provides that no person shall be convicted of any offense committed between the years of nine and thirteen, "unless it shall appear by proof that he had discretion sufficient to understand the nature and illegality of the act constituting the offense," it is not sufficient for the state to prove that the defendant knew the difference between good and evil; nor is it enough to prove that the child had the intelligence of ordinary boys of his age. To warrant a conviction the state must prove that the defendant knew that the act charged was a great crime, prohibited by law under severe penalties. *Wusnig v. State*, 33 Tex. 651; *Parker v. State*, 20 Tex. App. 451; *Carr v. State*, 24 Tex. App. 562, 5 Am. St. Rep. 905; *Keith v. State*, 33 Tex. Crim. 341; *Allen v. State*, (Tex. Crim. 1896) 37 S. W. Rep. 757; *Rocha v. State*, 38 Tex. Crim. 69.

3. When Burden Is upon Defense. — Russell on Crimes (3d Eng. ed.) 2; *State v. Handy*, 4 Harr. (Del.) 566; *Irby v. State*, 32 Ga. 496; *State v. Kluseman*, 53 Minn. 541.

Where one charged with crime is above the age at which capacity to commit crime is presumed, his own testimony that he did not know it was wrong to do the act constituting the crime will not, in the absence of any evidence as to his mental capacity, tend to remove the presumption. *State v. Kluseman*, 53 Minn. 541.

defendant is upon him, since the reputed age of every one is a fact peculiarly within his own knowledge, as are also the persons by whom it can be directly proved. When no proof of the defendant's age is produced, the court and jury may determine it by inspection.¹

(5) *Evidence*. — To prove that a child is *doli capax*, witnesses who are acquainted with him may testify as to his mental capacity.²

Expert Testimony is also admissible for this purpose.³

Circumstantial Evidence. — But it is not necessary that such proof should be made by direct and positive testimony. In most instances circumstances of education, habits of life, general character, moral and religious instruction, and oftentimes the circumstances connected with the offense charged, may be so proved as to satisfy the jury whether the accused had the discretion required by the law.⁴

b. PHYSICAL CAPACITY — To Commit Rape or Attempt to Commit It. — In addition to the necessity of mental capacity to entertain a criminal intent, the crime of rape, from its peculiar characteristic, introduces another element, viz., the physical ability of the infant to commit it. This ability depends upon the fact of puberty.

The Common Law as it exists in England and as adopted in some of our states fixes the age of a boy's presumed puberty at fourteen years, and from considerations of decency refuses to admit evidence of its earlier existence. A boy under fourteen cannot, therefore, under this ruling be convicted of rape or of an attempt to commit it,⁵ though it seems he may be punished for an indecent assault.⁶

Rule in Some of the States. — In some of the states, however, this presumption has been held to be rebuttable, and if a boy though under fourteen be shown to be physically capable of committing the act, he may be convicted.⁷

2. Punishment — Exemption from Capital Punishment. — In *Texas* it is provided by statute that a person, for an offense committed before he arrived at the age of seventeen years, shall in no case be punished with death, but may, according to the nature and degree of the offense, be punished by imprisonment for life, or receive any of the other punishments affixed by the code to the offense of which he is guilty.⁸ The burden is, however, upon the defendant to prove his nonage.⁹

1. *State v. Arnold*, 13 Ired. L. (35 N. Car.) 181.

2. *Evidence*. — *Martin v. State*, 90 Ala. 602, 24 Am. St. Rep. 844.

3. *State v. Nickleson*, 45 La. Ann. 1172.

In *Carr v. State*, 24 Tex. App. 562, 5 Am. St. Rep. 905, it was decided that the opinions of nonexpert witnesses might be received upon the question of the defendant's capacity. The court held such a case within the rule that nonexpert witnesses, when the issue is sanity, may state their opinions and conclusions upon the facts to which they testify. See the title EXPERT AND OPINION EVIDENCE, vol. 12, p. 492.

4. *Com. v. Mead*, 10 Allen (Mass.) 398; *State v. Toney*, 15 S. Car. 409; *Wusnig v. State*, 33 Tex. 651; *Carr v. State*, 24 Tex. App. 562, 5 Am. St. Rep. 905.

5. *Boy under Fourteen Cannot Be Convicted of Rape*. — *Rex v. Eldershaw*, 3 C. & P. 396, 14 E. C. L. 367; *Rex v. Groombridge*, 7 C. & P. 582, 32 E. C. L. 641; *Reg. v. Phillips*, 8 C. & P. 736, 34 E. C. L. 610; *Reg. v. Jordan*, 9 C. & P. 118, 38 E. C. L. 63; *Reg. v. Brimilow*, 9 C. & P. 366, 38 E. C. L. 158; *Reg. v. Waite*, (1892) 2 Q. B. 600, 17 Cox. C. C. 554; *State v. Handy*, 4 Harr. (Del.) 566; *Com. v. Green*, 2

Pick. (Mass.) 380; *State v. Sam*, 1 Winst. L. (60 N. Car.) 300. See also *McKinny v. State*, 29 Fla. 565, 30 Am. St. Rep. 140; *Williams v. State*, 20 Fla. 777.

6. *Indecent Assault*. — *Reg. v. Williams*, (1893) 1 Q. B. 320, 41 W. R. 332; *Rex v. Eldershaw*, 3 C. & P. 396, 14 E. C. L. 367; *State v. Pugh*, 7 Jones L. (52 N. Car.) 61.

7. *Boy under Fourteen May Commit Rape — Georgia*. — *Gordon v. State*, 93 Ga. 531, 44 Am. St. Rep. 189.

Kentucky. — *Heilman v. Com.*, 84 Ky. 457, 4 Am. St. Rep. 207.

Louisiana. — *State v. Jones*, 39 La. Ann. 935.

New York. — *People v. Randolph*, (Supra. Ct. Gen. T.) 2 Park. Crim. (N. Y.) 174; *People v. Croucher*, 2 Wheel. Crim. (N. Y.) 42.

Ohio. — *Williams v. State*, 14 Ohio 222, 45 Am. Dec. 536; *O'Meara v. State*, 17 Ohio St. 515; *Moore v. State*, 17 Ohio St. 521; *Hillabiddle v. State*, 35 Ohio St. 52, 35 Am. Rep. 592.

Tennessee. — *Wagoner v. State*, 5 Lea (Tenn.) 352, 40 Am. Rep. 36.

8. *Pasch. Dig.*, art. 1639.

9. *Ake v. State*, 6 Tex. App. 398, 32 Am. Rep. 586. But see *Ingram v. State*, 29 Tex. App. 33; *Perry v. State*, 44 Tex. 473.

Place of Imprisonment. — In some of the states statutes have been passed providing for the imprisonment of criminals under a prescribed age in the county jails instead of in the penitentiary.¹ In other states houses of correction have been provided by law for the reformation of infant offenders.²

X. STATUTES FOR THE PROTECTION OF INFANTS — 1. In General. — The statutes which have been enacted in the different states of the Union for the protection of the life,³ person, health, and morals of infants embrace so great a variety of subjects, and vary so widely in their provisions, that a concise compilation of them is impracticable. The most that will be attempted is a brief notice of some of the more important. These may be roughly classified under four general heads.

2. Regulations Concerning Custody and Care. — The first group of statutes concerns the custody and care of infants. These prescribe a punishment for the abandonment of infants,⁴ for trafficking in them, for enticing them from their parents, and kidnapping with intention to extort money,⁵ for the wilful and negligent abuse of them,⁶ and also make provision for the regulation, licensing, and inspection of infant boarding-houses.⁷

3. Employment of Infants. — The second group embraces prohibitions against the employment of infants under a prescribed age in certain occupations. These are intended to forbid, first, such occupations as are hazardous to the personal safety of the infant, as his employment in manufacturing establishments,⁸ about elevators, or as an acrobat; second, such as are injurious to his health, as his employment in mines or in other underground works; and, third, such as are subversive of his morals, as his use as a mendicant, his performance in theatrical exhibitions,⁹ or his employment in dance halls or in other

1. *Monaghan v. People*, 24 Ill. 340; *State v. Barton*, 71 Mo. 288.

2. **Commitment to Reformatory.** — Under the statutes of *Texas* (Acts 21st Leg., p. 97), where the accused is not more than sixteen years of age, and when the punishment for the offense committed is imprisonment for not over five years, the jury are required to say in their verdict whether the convict shall be sent to the reformatory or the penitentiary. *Duncan v. State*, 29 Tex. App. 141. See also the statutes of *Maryland* (Laws 1892, c. 311, p. 435) and *Virginia* (Pub. Acts 1889-90, c. 173, p. 131).

Under the *Washington* statutes (Laws of 1891, p. 195) it is provided that when a child between eight and sixteen years of age shall be found guilty of any crime except murder or manslaughter, or to be, for want of proper parental care, growing up in mendicancy or vagrancy, or incorrigible, and complaint thereof is made and properly sustained, the court may, if in its opinion the accused is a proper subject therefor, instead of entering judgment, cause an order to be entered that such boy or girl be sent to the state reform school. *Matter of Barbee*, 19 Wash. 306.

And see the title HOUSES OF REFUGE AND CORRECTION, vol. 15, p. 777.

Truancy. — The statutes of *Maine* (Laws 1887, c. 22, as amended by Acts 1893, c. 206) provide that boys between the ages of ten and fifteen years who refuse to attend school, and wander around the streets while the school is in session, are truants, and upon conviction as such may be sentenced to the reform school, at the cost for subsistence and clothing of the towns where the boys resided when committed. *Cushing v. Friendship*, 89 Me. 525.

3. See the title CONCEALMENT OF BIRTH OR DEATH, vol. 6, p. 424.

4. See ABANDON, vol. 1, p. 2.

5. See the title KIDNAPPING.

6. See CRUELTY TO CHILDREN, vol. 8, p. 456.

7. **Baby Farming.** — The *Massachusetts* statute of 1892, c. 318, § 7, which requires any person receiving under his care or control, or placing under the care or control of another, for compensation, an infant under two years of age, to give notice within two days to the state board of lunacy and charity, applies to a case where an infant was placed by a mother in the care of another person for the agreed term of ten days, although the infant, in fact, remained in such person's care but one hour. *Com. v. Johnson*, 162 Mass. 506.

8. **Employment of Minors in Manufacturing Establishment.** — The *New York* Laws of 1886, c. 409, § 2, as amended by Laws of 1889, c. 560, Laws of 1892, c. 673, provide that: "No child under fourteen years of age shall be employed in any manufacturing establishment within this state."

In *Murphy v. Bennett*, 11 N. Y. App. Div. 298, it was held that the employment of a boy in a lumber yard one-quarter of a mile from the mill was not prohibited by the statute.

9. **Employment of Children in Theatrical Exhibitions.** — Under the Penal Code of *New York*, § 292, as amended by Laws of 1886, c. 31, "A person who employs or causes to be employed, or who exhibits, uses, or has in custody, or trains for the purpose of the exhibition, use, or employment of, any child apparently or actually under the age of sixteen years, * * * in peddling, singing, or playing upon a musical instrument, or in a theatrical exhibition, or in any wandering occupation," is guilty of a misdemeanor. *People v. Meade*, (N. Y. Gen. Sess.) 24 Abb. N. Cas. (N. Y.) 357. See as to licensing infant musicians

places where liquors are sold.¹

4. Admitting to Places of Amusement. — The third group prohibits the admission of minors to certain places of amusement. The restrictions apply usually to dance halls, concert halls, billiard and pool rooms,² and similar places where wines and liquors are sold.

5. Sale of Prohibited Articles to Infants. — The fourth and last group prohibits the sale of certain prescribed articles, among which may be mentioned intoxicating liquors,³ substances containing alcohol,⁴ tobacco and cigarettes,⁵ immoral literature,⁶ and deadly weapons.⁷

INFECT — INFECTION. (See also the titles ANIMALS, vol. 2, p. 380; INTERSTATE COMMERCE; POLICE POWER.) — See note 8.

INEFFMENT. — See FEOFFMENT, vol. 12, p. 1085.

INFERENCE. — An inference is a deduction which the reason of the jury makes from the facts proved, without an express direction of law to that effect; in other words, a conclusion inferred of the existence of one fact from others proved.⁸

People v. Grant, 70 Hun (N. Y.) 233; *Matter of Stevens*, 70 Hun (N. Y.) 243.

1. See generally the title LABOR REGULATIONS.

2. **Permitting Infants to Play at Pool or Billiards.** — In *Missouri* it has been made a misdemeanor for a licensed keeper of a billiard or pool table to permit a minor to play thereon without his father's or guardian's permission. *State v. Mackin*, 51 Mo. App. 129.

There is a similar statute in *Indiana*. *Taylor v. State*, 107 Ind. 483; *Kiley v. State*, 120 Ind. 65.

Permitting Infant to Play Cards. — In *Washington* if a householder allows a minor to play at cards in his house without the written consent of the parent or guardian, the householder is liable to the same penalties as for furnishing to such minor intoxicating liquors. Ball Annot. Codes and Stat. Wash. (1897), § 7314 (Laws 1891, c. 69, par. 19).

3. See the title INTOXICATING LIQUORS.

4. **Sale of Articles Containing Alcohol.** — In *Massachusetts* it is a misdemeanor to sell to children under sixteen years of age any candy or other article enclosing liquid or syrup containing more than one per centum of alcohol. Mass. Acts of 1891, c. 333, p. 179.

5. **Sale of Tobacco to Minors.** — In several of the states it has been made a misdemeanor to sell or give away to a minor under a prescribed age tobacco in any form or in the form of cigarettes.

Alabama. — Acts 1890-91, No. 85, p. 201.

Arizona. — Acts 1891, No. 88, p. 137.

California. — Acts 1891, c. 70, p. 64.

Colorado. — Laws 1891, p. 131.

Florida. — Laws 1890-91, c. 4024, p. 54.

North Carolina. — Laws 1891, c. 276, p. 228.

Rhode Island. — Laws 1892, p. 30.

Tennessee. — Acts 1891, c. 107, p. 242.

6. **Sale of Immoral Literature to Minors.** — In *Illinois* it is a misdemeanor punishable with severe penalties, for any person to sell, lend, give away, or show, or have in his possession with intent to sell or give away or to show, or advertise, or otherwise offer for loan, gift, or distribution, to any minor, any book, pamphlet, magazine, newspaper, story paper, or other printed paper devoted to the publication or

principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures and stories of deeds of bloodshed, lust, or crime, or to hire, use, or employ any minor to sell or give away, or in any manner to distribute, any such publication. Starr & Curt. Annot. Stat. Ill. (1896), c. 38, §§ 289, 291 (Laws Ill. 1889, p. 114).

In *Strohm v. People*, 160 Ill. 582, affirming 60 Ill. App. 128, it was held that this statute embraced pictures of such deeds with or without stories, and stories of such deeds with or without pictures.

7. **Sale of Weapons to Minors.** — In *Louisiana* it is a misdemeanor to sell, give, or lease to any minor any pistol, bowie-knife, dirk, or other weapon. Louisiana Acts of 1890, No. 40, p. 39.

8. **Infection and Contagion.** — Upon an appeal from a conviction of the offense of keeping an animal infected by a contagious disease in a place where other animals could become infected by it, the court said: "The words *infection* and 'contagion' are nearly synonymous, the only difference being, not in the infectious or contagious matter, but in the manner of its communication. *Infection* is communicated from the sick to the well by a morbid miasm or exhalation diffused in the air. Contagion is communicated by actual contact." *Wirth v. State*, 63 Wis. 55.

9. *Smith v. Western Union Tel. Co.*, 57 Mo. App. 259; *Tanner v. Hughes*, 53 Pa. St. 289.

Precedent Matter. — In *Chambers v. Hunt*, 18 N. J. L. 354, it was said: "An *inference* is something inferred from precedent matter, separated from which it is a mere absurdity in language. There may be precedent matter and no *inference*, but there can be no *inference* without precedent matter; they must stand together, and cannot be separated; and as a special traverse is an *inference* from the inducement, they must stand together, because the traverse as an *inference*, taken alone, is a mere absurdity."

Instruction. — There being conflicting testimony upon whether notes were given as collateral or in payment of a debt, it was held that the jury might determine the question from circumstantial as well as from direct evi-

INFERIOR COURTS. (See also the titles COURTS, vol. 8, p. 37; JURISDICTION; JUSTICES OF THE PEACE.)—The technical meaning of the term "inferior courts" is courts of special and limited jurisdiction, which are erected on such principles that their judgments taken alone are entirely disregarded, and their proceedings must show their jurisdiction. The expression is also used as synonymous with courts not of record. In American constitutional law the term also applies to courts from which an appeal or writ of error lies to a higher court.¹

dence, and that it was error to instruct that such an agreement could not be found in the affirmative by *inference*, but must be established by affirmative proof. The court said: "As we understand the first branch of the instruction, it is equivalent to saying that this question cannot be found in the affirmative except upon direct and positive proof in favor of the affirmative. *Inference* is a deduction or conclusion from facts or propositions known to be true. When the facts themselves are directly attested, the jury may deduce or infer or presume from them the truth or falsity of the main proposition; and the principal question may be thereby determined in the affirmative or in the negative, as the conclusion may necessarily follow the attested premises." *Gates v. Hughes*, 44 Wis. 336.

The trial court instructed that fraud is never *inferred*. The appellate court said: "We think the judge made the maxim more misleading by substituting *inferred* for 'presumed.' The former is a stronger word than the latter (in connection with the words 'can not'), for the purpose of excluding indirect evidence. To infer is derived from the Latin *inferre*, compounded of *in*, from, and *ferre*, to carry or bring, and its strict meaning is to bring a result or conclusion from something back of it, that is, from some evidence or data from which it may be logically deduced. But to presume is from the Latin *presumere*, consisting of *præ*, before, and *sumere*, to take, and signifies to take or assume a matter beforehand, without proof—to take for granted." *Morford v. Peck*, 46 Conn. 385.

Inferred and Implied.—In a murder case the court charged that intent to kill might be *inferred*. It was held that the word *inferred* was synonymous with the statutory word "implied." *State v. Millain*, 3 Nev. 409.

1. Inferior Courts.—In *Bailey v. Winn*, 113 Mo. 155, it was said: "The distinction between superior and *inferior courts* is not clearly defined. When different courts are compared, it is generally said those courts are *inferior* which are subordinate to other courts; also, those of a very limited jurisdiction." *Bouvier's Law Dictionary*, title Courts; 4 AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW 453. The test of inferiority may be solved by showing that the court is either placed under the supervisory or appellate control of other courts, or that the jurisdiction as to the subject-matter is limited and confined. *State v. Daniels*, 66 Mo. 201. Applying these tests, there can be no doubt but this Common Pleas Court is a tribunal *inferior* to the Circuit Court."

All courts from which an appeal lies are *inferior courts*, in relation to the appellate court before which their judgment may be carried;

but they are not therefore *inferior courts* in the technical sense of those words. They apply to courts of special and limited jurisdiction, which are erected on such principles that their judgments taken alone are entirely disregarded, and the proceedings must show their jurisdiction. *Marshall, C. J.*, in *Kempe v. Kennedy*, 5 Cranch (U. S.) 185.

The American constitutional use of the word *inferior*, as applied to courts, refers to relative rank and authority, and not to intrinsic quality. *Swift v. Judges*, 64 Mich. 480, 7 West. Rep. 800. And see *Davey v. Burlington, etc.*, R. Co., 31 Iowa 553.

"All courts from which an appeal or writ of error lies are *inferior courts* in relation to the court before which their judgments may be carried and by which they may be reviewed, annulled, or affirmed. * * * It is in this latter sense that the framers of our constitution used the words *inferior courts*. They meant thereby courts whose judgments could be reviewed and their errors corrected by another and a higher tribunal." *Nugent v. State*, 18 Ala. 524, cited in *Ex p. Roundtree*, 51 Ala. 42, and *Sanders v. State*, 55 Ala. 42.

The common-law definition of *inferior court* is one other than the four great courts of the realm; that is, the Court of Chancery and the three great common-law courts sitting at Westminster. *Toml. L. Dict.*, quoted in *Swift v. Judges*, 64 Mich. 480.

An *inferior court*, according to the technical meaning of that term, is a court whose judgments, standing alone, are mere nullities, and in order to give validity to them its proceedings must show jurisdiction. *La Croix v. Fairfield County*, 49 Conn. 596. See also *Kempe v. Kennedy*, 5 Cranch (U. S.) 173, *M'Cormick v. Sullivan*, 10 Wheat. (U. S.) 192.

In *Hahn v. Kelly*, 34 Cal. 414, it was said: "The use of the words 'superior' and *inferior*, or 'limited' and 'general,' and 'proceeding according to the course of the common law,' in the statement of the rule in question, however apt they may have once been, are less so at this time and place, and their duties, in view of our system and mode of procedure, would be better performed by the terms 'courts of record' and 'courts and tribunals not of record.' If anything further is added, the phrase 'proceeding according to the course of the statute which regulates proceedings in civil cases' should be employed instead of the phrase under consideration; for the statute has superseded the common law, without, however, abrogating the rule in hand, the conditions being changed, but not the principle. Our District Courts, County Courts, and Probate Courts, the latter having been put in this respect upon the level of superior courts at common law by express statutory provision

INFIDEL. (See also the title WITNESSES.) — One who does not believe in the Christian religion.¹

INFINITESIMAL. — See note 2.

INFIRMARY. — See note 3.

(Statutes 1858, p. 95; 1863, p. 339, § 46), are superior courts in the sense of this rule, while courts held by justices of the peace, boards of supervisors, and other boards exercising judicial functions of a limited and special character, are *inferior*. Superior courts at common law, in the sense of this rule, were those which sat in Westminster Hall — the King's Bench, the Common Pleas, and Exchequer; the former, as originally instituted, having jurisdiction in criminal cases, the second in civil actions, and the latter in matters of revenue. In a certain sense, their jurisdiction was limited and special, but in the sense of this rule it was general — that is to say, general within their sphere of action. So with our courts of record. Each is confined to its limits as fixed by the constitution, and in that sense is limited as to its jurisdiction, but in the sense of this rule it has general jurisdiction of the particular department of the law allotted to it."

Relative Term. — In one sense all courts from whose judgments an appeal or writ of error lies are *inferior courts*, in relation to the courts before which their judgments may be carried and by which they may be reversed, annulled, or affirmed. *Ex p. Watkins*, 3 Pet. (U. S.) 205; *Nugent v. State*, 18 Ala. 521; *Ex p. Smith*, 23 Ala. 118; *La Croix v. Fairfield County*, 49 Conn. 596.

Examples. — The Civil District Court for the parish of Orleans is a court of record of original jurisdiction, and is not an *inferior court*, in the technical sense of that term. It has the power and authority to punish for contempt of court, and though the proceedings in cases of constructive contempt differ from those in cases of actual contempt, the power of that court under proper proceedings extends to both. *State v. Judge*, 45 La. Ann. 1250.

In *Appo v. People*, 20 N. Y. 549, it was said: "The term *inferior*, as applied to courts, has no very definite meaning. It is used in different senses. In the sense of being courts of very narrow and restricted jurisdiction, Courts of Oyer and Terminer are not *inferior*; but in the sense of being subordinate to the Supreme Court, and subject in common with all other minor tribunals to its supervisory control, they certainly are."

In *Ames v. Williams*, 72 Miss. 770, it was said: "We are at a loss to conceive upon what principle it could be held that the chancery court, as to the jurisdiction conferred upon it by the constitution, is an *inferior court* in that sense in which the word *inferior* is used to characterize courts whose records must affirmatively show their authority to act in the particular cause. If the Court of Chancery be such *inferior court*, so also must be the Circuit Court and this court, for each is equally limited, in the sense that its jurisdiction is not universal."

Circuit and District Courts of the United States are not *inferior courts*. See *Cuddy, Petitioner*, 131 U. S. 280; *M'Cormick v. Sullivan*, 10 Wheat. (U. S.) 192, 199; *Ex p. Wat-*

kins, 3 Pet. (U. S.) 193; *Kennedy v. Georgia State Bank*, 8 How. (U. S.) 611; *Ruckman v. Cowell*, 1 N. Y. 507. See also the title UNITED STATES COURTS.

The London Lord Mayor's Court has been held to be an *inferior court*. *London v. Cox*, 36 L. J. Exch. 225, L. R. 2 H. L. 239; *Appleford v. Judkins*, 3 C. P. D. 489.

Inferior Tribunal. — A statute provided that mandamus might be issued by any court in the state to any *inferior* tribunal, corporation, board, or person. In holding that mandamus might issue to the governor, the court said: "It is obvious that the word *inferior*, as here used, is a qualification confined to the word 'tribunal.' The intention was to prevent any court from issuing the writ to any other court superior in authority to itself, in any case in which the writ should be directed to another tribunal; it must, therefore, be one *inferior* to the court issuing the writ. As thus applied, the word *inferior* has a familiar signification, for 'superior' and *inferior* are terms applied to the courts as indicating the general character of the jurisdiction they respectively exercise." *Harpending v. Haight*, 39 Cal. 212.

But upon a similar statute, *Fuller, J.*, in a concurring opinion in *Woods v. Sheldon*, 9 S. Dak. 411, said: "Obviously, the executive department of government is neither an '*inferior* tribunal, corporation, board, or person,' and the use to which the word *inferior* has been put conveys to my mind a reasonable inference that the legislature intended to exempt from the coercive influence of mandamus the chief executive of this state." See also the title MANDAMUS.

Inferior Tribunal. — A statute of *West Virginia* gave to the Circuit Court of that state jurisdiction to review upon certiorari the proceedings of *inferior* tribunals. It was held that the board of supervisors was an *inferior* tribunal. *Cunningham v. Squires*, 2 W. Va. 422, 98 Am. Dec. 770.

1. **Infidel.** — *Omichund v. Barker*, Willes 541. And see *Hale v. Everett*, 53 N. H. 57.

"The *infidel* is one who does not recognize the inspiration or obligation of the Holy Scriptures, or the generally recognized features of the Christian religion. The 'atheist' is one who does not believe in the existence of a God." In an action upon an insurance policy it is not competent to show that the deceased was an *infidel* in order to draw the inference of suicide. *Gibson v. American Mut. L. Ins. Co.*, 37 N. Y. 584.

2. **Infinitesimal.** — In *Pharmaceutical Soc. v. Armson*, (1894) 2 Q. B. 724, it was said: "The meaning of the word *infinitesimal*, when used in a court of law, is that a thing is so small that the court will treat it as not existing at all. The maxim *de minimis non curat lex*, when construed into English, means that a matter is so *infinitesimally* small that the court will not take any notice of it."

3. **Infirmary.** — In a contract by physicians to prescribe for and attend the inmates of the

INFIRMITY. (See also the title LIFE INSURANCE.)—An infirmity is an imperfection or weakness, especially a disease, a malady.¹

INFLAMMATORY.—See note 2.

INFLAMMABLE. (See also the title FIRE INSURANCE, vol. 13, p. 290.)—See note 3.

INFLICT.—See note 4.

county *infirmary*, the *infirmary* may consist of several buildings. *Johnson v. Santa Clara County*, 28 Cal. 545.

1. **Infirmity.**—*Bernays v. U. S. Mutual Acc. Assoc.*, 45 Fed. Rep. 456, in which case it was held, where an applicant for insurance warranted that he had never had any *infirmity*, and it appeared that he had had erysipelas, that this was not a breach of the warranty.

Disease and Infirmity.—In *Meyer v. Fidelity, etc., Co.*, 96 Iowa 385, it was said: "As used in this policy, we think the words 'disease' and *infirmity* mean practically the same thing. When speaking of an *infirmity*, we generally mean the state or quality of being *infirm* physically or otherwise—debility or weakness; and by the use of the word 'disease' we desire to convey the impression of a morbid condition, resulting from some functional disturbance or failure of physical function which tends to undermine the constitution. We do not, as a general rule, apply either term to a slight and temporary disorder, or to the imperfect working of some function, which is over in a short period of time, and which, when recovered from, leaves the body in its normal condition. In using either of the words we do not, as a rule, refer to a slight and mere temporary disturbance or enfeeblement."

Temporary Infirmity.—In *In re Buck*, (1896) 2 Ch. 734, it was held that the term *infirmity*, as applied to the beneficiary of a benevolent society, meant "some permanent disease, accident, or anything of that kind rendering the member an object deserving of the assistance of the society." See also *Manufacturers' Acc. Indemnity Co. v. Dorgan*, 16 U. S. App. 308.

Depositions. (See also the title DEPOSITIONS, vol. 9, p. 311.)—A statute provided that a witness's deposition might be taken when by reason of bodily *infirmity* such witness could not attend. In construing this statute the court said: "What is bodily *infirmity*? Mr. Webster defines *infirmity* as 'a disease; a malady; feebleness.' Mr. Bouvier says *infirm* means 'weak; feeble;' and he remarks that 'where a witness is *infirm* to an extent likely to destroy his life, or to prevent his attendance at a trial, his testimony *de bene esse* may be taken at any age.'" *Collins v. State*, 24 Tex. App. 149.

Insanity. (See generally the title INSANITY.)—In *Stewart v. State*, (Tex. Crim. 1894) 26 S. W. Rep. 203, it was held that the term "bodily *infirmity*" was broad enough to cover a disease of the brain, as in any part of the body; and in that case evidence of insanity was held admissible to form a predicate for the admission of a deposition of the witness.

But in *Accident Ins. Co. v. Crandal*, 120 U. S. 532, it was said: "The words 'bodily *infirmities* or disease' do not include insanity."

See also *Mutual L. Ins. Co. v. Terry*, 15 Wall. (U. S.) 580.

2. **Inflammatory.**—In *Clair v. State*, 40 Neb. 534, the defendant in contempt proceedings had criticised the charge of the judge to the grand jury as *inflammatory*. The court said: "The first question suggested by the record is whether the term *inflammatory*, as applied to the charge of the judge, is an unmerited criticism. The adjective *inflammatory*, as here used, is derived from the verb 'inflamm,' which is thus defined: 1. 'To set on fire; to kindle; to inflame.' 2. 'To excite or increase, as passion or appetite; to enkindle into violent action.' 3. 'To exaggerate, aggravate, in description.' 4. 'To heat; to excite excessive action in the blood vessels.' 5. 'To provoke; to irritate to anger.' 6. 'To increase; to exasperate.' 7. 'To increase; to augment.' (Vide Webster's Dictionary.) Fairly construed, the charge under consideration is an impassioned appeal, it not indeed an express direction, to the grand jury to present by indictment certain persons not named, but who are assumed to be guilty of the crime of bribery. In that sense, if not *inflammatory*, it is at least what in the science of medicine is denominated 'heroic treatment.'"

3. **Inflammable.**—In holding that the court would not take judicial notice that kerosene oil was *inflammable*, *Folger, J.*, said: "It is only designated, if at all, by the phrase 'any other *inflammable* liquid.' This phrase follows the mentioning by name of camphene, spirit gas, phosgene, etc., and *nosctur a sociis*. To be warranted against, the liquid must be *inflammable*, as are those enumerated articles. But there is no finding or proof of the character of kerosene in this regard. The defendants ask us to take judicial notice of its qualities, and that it is in its nature like those. If we do this, we are to know that they are not only so slowly *inflammable* as to give harmless light by their gradual combustion, but that they are also suddenly explosive, and thus dangerous and harmful. It is this last characteristic inflammability which is warranted against, in the classes of hazard upon the back of the policy. But judicial notice comes in the place of proof. It is to be exercised by a tribunal which has the power to pass upon the facts. That, this court has not in this case." *Wood v. North Western Ins. Co.*, 46 N. Y. 426.

4. **InFLICT.**—A statute made it a criminal offense to *inflict* grievous bodily harm upon another. In construing this statute *Stephens, J.*, said: "If a man by the grasp of the hand infects another with smallpox, it is impossible to trace out in detail the connection between the act and the disease, and it would, I think, be an unnatural use of language to say that a man by such an act *inflicted* smallpox on another. It would be wrong in interpreting an

INFLUENCE. (See also the title **UNDUE INFLUENCE**.) — See note 1.

INFLUENZA is "an epidemic catarrh, caused by the seasons, weather and its vicissitudes."²

INFORMAL ISSUE. — See note 3.

INFORMALITY. — See note 4.

IN FORMA PAUPERIS. — See **ENCYC. OF PL. AND PR.**, title **POOR PERSONS**, vol. 16, p. 673.

INFORMATION. (For full treatment of informations, see the title **INDICTMENTS, INFORMATIONS, AND COMPLAINTS**, 10 **ENCYC. OF PL. AND PR.** 344.) — Instances of the legal use of the word "information" in the sense of a communication of knowledge are cited in the notes.⁵

Act of Parliament to lay much stress on etymology, but I may just observe that *inflict* is derived from *infligo*, for which, in Facciolati's Lexicon, three Italian and three Latin equivalents are given, all meaning 'to strike,' viz., *dare*, *ferire*, and *percutere* in Italian, and *infero*, *impingo*, and *percutio* in Latin." Reg. v. Clarence, 22 Q. B. D. 42. This case was upon the indictment of a man who had communicated gonorrhea to his wife. See also upon the construction of this statute *Hegarty v. Shine*, 4 L. R. Ir. 288; *R. v. Halliday*, 34 S. J. 129.

Direct Violence. — The *Massachusetts* statutes in regard to murder spoke of a mortal wound given, "or other violence or injury *inflicted*," or poison administered. In construing these enactments in *Com. v. Macloon*, 101 Mass. 23, the court said: "*Inflict* does not necessarily imply direct violence. There is no more appropriate use of the word *inflict* than in connection with punishment; and 'to *inflict* punishment' clearly includes imprisonment and involuntary restraint, as well as hanging, beheading, or whipping. We can have no doubt that any bodily harm which is caused to be suffered by the act of the accused is an 'injury *inflicted*,' within the meaning of the statute."

Inflict any Punishment. — In *State v. Porter*, 25 W. Va. 689, it was held that the words "*inflict any punishment*" in a penal statute contemplated an act of trespass.

1. Local Influence — Removal of Cause. (See also the title **REMOVAL OF CAUSES**, 18 **ENCYC. OF PL. AND PR.** 239.) — A federal statute provided for the removal of the cause from a state court to a federal court in certain cases where it should appear that from prejudice or local *influence* the petitioner would not be able to obtain justice. In construing this statute the court said: "The term 'local *influence*,' if not synonymous with 'prejudice,' manifestly refers to an improper *influence* exerted by or existing in favor of one side, or against the other, which will prevent the latter from obtaining justice in the state courts." *Adelbert College v. Toledo, etc.*, R. Co., 47 Fed. Rep. 844.

2. *Wirth v. State*, 63 Wis. 55, which case was on the question whether a horse had an infectious disease. See also **INFECT — INFECTION**, *ante*, p. 317.

3. Informal Issue. — In *Garrard v. Willet*, 4 J. J. Marsh. (Ky.) 629, it was said: "An immaterial issue is where that which is materially alleged by the pleadings is not traversed, but an issue taken on such a point as will not determine the case; an *informal issue* is when

such allegation is not traversed in a proper manner."

4. Informality. — A statute provided that *informality* might be amended upon the trial. In construing this statute in *Franklin v. Mackey*, 16 S. & R. (Pa.) 118, the court said: "They [counsel for the defendant in error] also insist upon the plain words of the Act of Assembly, and say that the word *informality* is the only term used in the law, describing what may be amended on the trial. It is so; *informality* is the word in the law; yet it appears to me that were we to hold matters of mere form only to be amendable, after the jury sworn, we should go far towards declaring this part of the act useless. Matters of mere form in the record are not often inquired into before the jury. Besides, the very next words of the act seem to show the meaning of the legislature, for it must be absolutely impossible for the adverse party to be taken by surprise by an amendment which does not touch the merits or substance of a cause."

Judicial Sales. (See also the title **JUDICIAL SALES**.) — A statute provided that if the sale should prove invalid on account of any *informality* in the proceedings of any officer having any duty to perform in relation thereto, the purchaser should have a writ against the owner and a lien upon the land. In construing this statute the court said: "All the steps in the process, from the assessment to the execution of the tax deed, are related to the sale, and any substantial omission of legal duty, misconduct, or irregularity of any officer connected with the process, for which the sale should be held invalid, may be deemed an *informality* within the meaning of the act. We are not disposed to take the word in a strict literal sense, and thereby limit the obvious purpose of the statute." *Hunt v. Curry*, 37 Ark. 108.

5. Giving Information. — Where an indictment charged that the defendant knowingly deposited in the mail a letter giving *information* when, how, and of whom an article or thing designed and intended to prevent conception could be procured, and the letter was in answer to a fictitious letter and addressed to a person who had no existence, the letter was held not to be within the Act of Congress of July 12, 1876, prohibiting mailing obscene books, etc. The court said: "The letter written and mailed by defendant was addressed to a person who had no existence. On its face it did not show that it was within the prohibited statute. If it had been suffered to go through the mail to the place to which it was

INFORMATION AND BELIEF—INFORMATION OF INTRUSION.

INFORMATION AND BELIEF.— See 10 ENCYC. OF PL. AND PR. 854.

INFORMATION OF INTRUSION. (See generally the titles PUBLIC LANDS; STATE LANDS.)— Information of intrusion is a proceeding by the state prosecuting officer against intruders upon the public domain.¹

addressed it would not have been called for, but would have been sent to the dead-letter office, and could not have given to any person the prohibited *information*. The defendant doubtless intended to give the inhibited *information*, but the statute does not apply to a letter merely intended by the writer to give such *information*, but to a letter 'actually giving the *information*.' If a letter of inquiry seeks: g the prohibited *information* had been written by an actual person, although under a feigned name, an answer in reply giving such *information* would present a case distinguishable, it would seem, from the one under consideration." *Per* Dillon, J., in *U. S. v. Whittier*, 5 Dill. (U. S.) 41.

In Statute — Physicians Prevented from Giving.— The word *information*, as used in the statute of *New York* providing that "no person authorized to practice physic or surgery shall be allowed to disclose any *information* which he may have acquired in attending any patient in a professional character, and which *information* was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon," comprehends the knowledge which physicians acquire in any way, while attending the patient, "whether by their own insight or by verbal statements from him or from members of his household, or from nurses or strangers, given in aid of the physician in the performance of his duty. * * * Knowledge, however communicated, is *information*." *Per* Gilbert, J., in *Edington v. Mutual L. Ins. Co.*, 5 Hun (N. Y.) 8. See generally the title PHYSICIANS AND SURGEONS.

Reward. (See also the title REWARD.)— Under a statute making a reward payable "to the person or persons who shall make discovery and give *information* against any other person or persons guilty of" a crime, one who is the means of convicting the guilty party, though an accomplice substantially made the discovery and gave the *information*, is entitled to the reward. *Matter of Kelly*, 39 Conn. 162.

Where by a public advertisement a reward was offered to any person who would give such *information* as should lead to the apprehension

and conviction of the party guilty of the offense, and B, whom the plaintiff had taken into custody on suspicion of being concerned in the offense, offered to make disclosures if furnished with something to eat and drink, and the plaintiff communicated this offer to a sub-inspector of police, to whom B made a confession which resulted in his conviction, it was held that the plaintiff was entitled to the reward. *Smith v. Moore*, 1 C. B. 438, 50 E. C. L. 438.

A Hired Driver of a Cabriolet having brought home the horse apparently much ill-used by him, the owner's son (in the owner's absence) called in a policeman and told him that the driver had ill-used the horse. The policeman said that if the complainant charged the driver with cruelty to the horse he would arrest him; the complainant said "I do," and the policeman apprehended the driver under the statute 5 & 6 Wm. IV., c. 59, § 9. imposing penalties upon persons wantonly and cruelly ill-treating any horse, etc. It was held that the complainant must be considered not as a person giving *information* to the officer, in consequence of which the driver was arrested, but as a principal causing the arrest to be made. *Hopkins v. Crowe*, 4 Ad. & El. 774, 31 E. C. L. 177.

1. Information of Intrusion.— *Bour. L. Dict.*

In *England* it is filed in the exchequer by the king's attorney-general, for any trespass committed upon the lands of the crown. It is grounded on no writ under seal, but merely on intimation of the king's officer, who "gives the court to understand and be informed of" the matter in question. *Nannage v. Rowland*, 3 Black. Com. 261; *Cro. Jac.* 212.

In *America*, in *Massachusetts* and *Virginia* the remedy is resorted to in case of an intrusion upon escheated lands. *Com. v. Andre*, 3 Pick. (Mass.) 224; *Com. v. Hite*, 6 Leigh (Va.) 588.

Pub. Stat. Mass., c. 182, authorizes the filing of an *information* of intrusion by the district attorney in case of any intrusion upon lands held by the state for the benefit or use of any tribe of Indians or any individual thereof, or any descendants of them.

INFORMERS.

BY A. S. H. BRISTOW.

- I. DEFINITION, 323.**
- II. RIGHT TO COMPENSATION, 323.**
 - 1. *In General, 323.*
 - 2. *Out of What Fines or Forfeitures Informer's Share Allowed, 323.*
 - 3. *Constitutionality of Statutory Provision for Informers, 324.*
- III. WHO MAY CLAIM INFORMER'S SHARE, 325.**
 - 1. *In General, 325.*
 - 2. *Government Officers, 325.*
 - 3. *Joint Informers, 325.*
- IV. WHEN INFORMER'S SHARE VESTS, 326.**
- V. HOW SHARE MAY BE DIVESTED, 326.**
 - 1. *Repeal of Statute, 326.*
 - 2. *Pardon, 326.*
 - 3. *Remission of Fine or Forfeiture by Secretary of Treasury, 327.*
 - 4. *Release by Informer, 327.*
 - 5. *Misconduct of Informer, 327.*
- VI. ENFORCEMENT OF INFORMER'S RIGHTS, 327.**

CROSS-REFERENCES.

See also the titles PUBLIC OFFICERS; REWARDS.

I. DEFINITION. — An informer is one who, with the intention of having his information acted upon, first gives information of a violation of law which induces the prosecution and contributes to the recovery of the fine, penalty, or forfeiture which is eventually recovered.¹

II. RIGHT TO COMPENSATION — 1. **In General.** — A person who gives material information is not entitled at common law or in chancery to a share or moiety of the fine or forfeiture recovered as a result of such information, since it is the duty of every citizen to aid in detecting violations of the law and enforcing the administration of public justice. No compensation will be allowed except in pursuance of some statutory provision.² But in certain cases statutes have been enacted with a view to encouraging information of breaches of the law by giving to informers a certain proportion of the penalties and forfeitures annexed to such breaches.³

2. **Out of What Fines or Forfeitures Informer's Share Allowed.** — The adjudications involving the rights of informers to compensation have occurred most frequently under the Revised Statutes of the United States in connection with such violations of the law as fraud upon the customs revenue⁴ and

1. **Informer Defined.** — *U. S. v. Simons*, 7 Fed. Rep. 709; *The City of Mexico*, 32 Fed. Rep. 105; *U. S. v. George*, 6 Blatchf. (U. S.) 406; *Westcot v. Bradford*, 4 Wash. (U. S.) 492; *U. S. v. The Bark Isla de Cuba*, 2 Cliff. (U. S.) 458; *One Hundred Barrels Whiskey*, 2 Ben. (U. S.) 14; *Fifty Thousand Cigars*, 1 Lowell (U. S.) 22. See also *Lancaster v. Walsh*, 4 M. & W. 16; *Sanner v. State*, 85 Md. 523; *City Bank v. Bangs*, 2 Edw. (N. Y.) 95.

2. **Right of Informer to Compensation in General.** — *The Langdon Cheeves*, 2 Mason (U. S.) 85; *Robinson v. Hook*, 4 Mason (U. S.) 139; *In re Brittingham*, 5 Fed. Rep. 191.

3. See the cases generally throughout this title.

4. **Information as to Fraud upon Customs Revenue.** — *U. S. v. Simons*, 7 Fed. Rep. (U. S.) 709.

breaches of the internal-revenue laws,¹ of the neutrality laws,² and of the confiscation acts.³ But cases have arisen under the statutes of the various states, as in the case of information as to the illegal sales of liquor,⁴ keeping bawdy houses,⁵ keeping houses for the sale of lottery tickets,⁶ failure to ring the bell or sound the whistle of a locomotive at public crossings,⁷ and overcharges by express companies.⁸

Money Recovered on Contract with United States. — Under the federal laws granting to informers in certain cases certain shares of fines, penalties, and forfeitures incurred by violations of law, informers have no shares in money recovered in a suit on a contract with the United States.⁹

Sum Recovered from Surety on Recognizance. — It has been held that the sum recovered from sureties on a recognizance for the appearance of a person charged with a criminal offense under the federal Customs Act of 1799 did not take the place of a fine which would be imposed upon conviction in any such sense that it was subject to an informer's share, though the fine itself might have been.¹⁰

3. Constitutionality of Statutory Provision for Informers. — The constitutionality of various state statutory provisions giving to informers specified shares in fines and forfeitures recovered through information given by them has been attacked in several recent cases on the ground that such a provision authorizes a misappropriation or diversion of the fine or penalty, contrary to constitutional provisions setting apart for the literary or public school funds fines, penalties, and forfeitures recovered for violations of the laws of the state; but these contentions have not been sustained, and it has been held that the legislature, in imposing penalties for violation of its laws, may in its discretion, for the purpose of securing the enforcement of its laws and the collection of the penalties imposed, give a part thereof to an informer.¹¹

1. Violation of Internal-revenue Laws. — See *U. S. v. Connor*, 138 U. S. 61; *One Still Boiler*, 1 Ben. (U. S.) 374; *One Large Water Tub*, 3 Ben. (U. S.) 436; *Ramsey's Case*, 14 Ct. Cl. 367, 21 Ct. Cl. 443; *U. S. v. Twelve Barrels Paraffine Oil*, 28 Fed. Cas. No. 16,552, 6 Int. Rev. Rec. 203; *Ex p. Gans*, 5 McCrary (U. S.) 303; *U. S. v. Funkhouser*, 4 Biss. (U. S.) 186; *U. S. v. Hook*, 3 Pittsb. (Pa.) 54.

But the statute allowing a share to an informer in the case of violation of the internal-revenue laws has been repealed, and a new mode of compensation of the informer is provided. *Ramsay v. U. S.*, 21 Ct. Cl. 443; *U. S. v. Connor*, 138 U. S. 61.

2. Violation of Neutrality Laws. — Under a statute of the United States providing that for a violation of the neutrality laws a ship or vessel "shall be forfeited, one-half to the use of the informer and the other half to the use of the United States," it has been held that the whole forfeiture will not go to the United States in case no person establishes his right as an informer. *U. S. v. The Resolute*, 40 Fed. Rep. 543. The court said that "such a case seems to have been left without any provision as to the disposal of the share set apart for the informer."

3. Under Confiscation Act. — Although under the Act of Aug. 6, 1861, to confiscate property used for insurrectionary purposes, an informer may file an information along with the attorney-general, and so make the proceedings inure under the act to his own benefit as well as to the benefit of the United States, yet after the proceedings have been instituted by the attorney-general alone, and wholly for the

benefit of the United States, and after issue has been joined and proofs have been furnished by other parties, no person can come in asserting that he was the informer and share the benefits of the proceedings. *Francis v. U. S.*, 5 Wall. (U. S.) 338.

In *Titus v. U. S.*, 20 Wall. (U. S.) 475, it was held that an informer did not acquire a right to a moiety under the Confiscation Act of Aug. 6, 1861, in regard to public lands captured from the Confederate government and informed against after a complete title had been acquired by the federal government by conquest.

4. Illegal Sale of Liquor. — *Hull v. Welsh*, 82 Iowa 117; *Wing v. Smilie*, 63 Vt. 532.

5. Keeping Bawdy House. — *Sanner v. State*, 83 Md. 648.

6. Sale of Lottery Tickets. — *Sanner v. State*, 85 Md. 523.

7. Neglect of Duty by Railroad. — *State v. Wabash, etc.*, R. Co., 89 Mo. 562; *State v. Hannibal, etc.*, R. Co., 89 Mo. 571.

8. Overcharge by Express Company. — *Southern Express Co. v. Com.*, 92 Va. 59.

9. No Share in Money Recovered on Contract with United States. — *Internal Revenue*, 13 Op. Atty.-Gen. 115, where it was so held in the case of an export bond given under the internal-revenue laws. See also *Hoyt v. U. S.*, 10 How. (U. S.) 109.

10. U. S. v. Fanjul, 1 Lowell (U. S.) 117.

11. Constitutionality of Statutory Provision for Informers. — *State v. Wabash, etc.*, R. Co., 89 Mo. 562; *State v. Hannibal, etc.*, R. Co., 89 Mo. 571; *Sutton v. Phillips*, 116 N. Car. 502; *Goodwin v. Caraleigh Phosphate, etc., Works*,

III. WHO MAY CLAIM INFORMER'S SHARE — 1. In General. — He who, with the intention of having his information acted upon, first gives information of a violation of the law which induces the prosecution and contributes to the recovery of the fine, penalty, or forfeiture, is entitled to receive the fruits of his diligence to the exclusion of all the others.¹ Hence it has been held that he who first commences a *qui tam* action attaches to himself a right to the penalty, which cannot be divested by a subsequent suit brought by another informer though the judgment be first recovered in such subsequent suit.² The fact that a person has procured valuable testimony making a strong case against the offenders, but for which it is doubtful whether any conviction could have been had or any money recovered from them, does not entitle the person procuring such testimony to any portion of the fine, where the offense has been discovered and disclosed by others and proceedings have been commenced in pursuance of that information.³

Disclosing Conspiracy. — A party who furnishes the original information upon which a part of certain conspirators were arrested should be considered the informer as to all the conspirators in the same fraud, where it appears that the other conspirators were arrested, not upon any information given by any third party, but by the confession of the parties who had already been arrested.⁴

2. Government Officers. — In some instances, as in the case of information concerning any fraud upon the customs revenue, the statutes expressly exclude officers of the government from the benefit of the shares or moieties of informers.⁵ And apart from any such statutory provision officers of the government can be considered informers only where they incidentally, and not in the direct prosecution or course of their duty, or under a special retainer to investigate the matter, acquire information useful to the government.⁶ But under a statute expressly giving to an officer a proportion of a fine or forfeiture for information given, it has been held that he will be entitled to his share whether the information was obtained while he was engaged in the appropriate duties of an officer or otherwise.⁷

3. Joint Informers. — The information may be given by two or more persons in common, and in such case they will be entitled to the informer's share

119 N. Car. 120; Southern Express Co. v. Com., 92 Va. 59.

1. Who May Claim Informer's Share in General. — *Llewellyn v. Vale* of Glamorgan R. Co., (1898) 1 Q. B. 473; *U. S. v. Simons*, 7 Fed. Rep. 709; *U. S. v. The Bark Isla de Cuba*, 2 Cliff. (U. S.) 458; *One Hundred Barrels Whiskey*, 2 Ben. (U. S.) 14; *Sawyer v. Steele*, 3 Wash. (U. S.) 464; *Westcot v. Bradford*, 4 Wash. (U. S.) 492; *Jones v. Shore*, 1 Wheat. (U. S.) 462; *Van Ness v. Buel*, 4 Wheat. (U. S.) 74; *U. S. v. Funkhouser*, 4 Biss. (U. S.) 176.

A Witness sworn in support of an indictment founded on a statute which, in case of conviction, gives one-half the penalty to the informer is not, from the mere fact that he is the only witness in the case, to be considered the informer. *Williamson v. State*, 16 Ala. 431.

2. Pike v. Madbury, 12 N. H. 262; *Beadleston v. Sprague*, 6 Johns. (N. Y.) 101.

3. Person Procuring Valuable Testimony Not Necessarily Informer. — *U. S. v. Simons*, 7 Fed. Rep. 709; *U. S. v. George*, 6 Blatchf. (U. S.) 406; *Brewster v. Gelston*, 1 Paine (U. S.) 433. See also *One Hundred Barrels Whiskey*, 2 Ben. (U. S.) 14; *Westcot v. Bradford*, 4 Wash. (U. S.) 492.

In *U. S. v. Simons*, 7 Fed. Rep. 709, the court said: "The statute gives the informer's share to the one who furnishes the original information which shall lead to the recovery

of the fine, but, whether justly or unjustly, awards nothing to those who furnish evidence to confirm the truth of the statements of the original informers; and this although the applicant may have spent much time and expended money in ferreting out the details of the fraud, since their action cannot be said to have induced the prosecutions."

4. Disclosing Conspiracy. — *U. S. v. Simons*, 7 Fed. Rep. 709. See also *Sanner v. State*, 85 Md. 523.

5. Statutory Prohibition of Informer's Share to Government Officers. — *U. S. v. Simons*, 7 Fed. Rep. 709, holding further that a person who is in the pay of the government and receives a salary or wages of any kind for his services in his endeavor to discover violations of the customs revenue is an officer within the meaning of the statute.

6. When Officer May Receive Compensation Apart from Statute. — *The City of Mexico*, 32 Fed. Rep. 105; *Four Cutting Machines*, 3 Ben. (U. S.) 220; *U. S. v. One Hundred Barrels Distilled Spirits*, 1 Lowell (U. S.) 244; *U. S. v. Simons*, 7 Fed. Rep. 709. See also *U. S. v. Thirty-four Barrels Whiskey*, 9 Int. Rev. Rec. 169, 28 Fed. Cas. No. 16,462; *U. S. v. Funkhouser*, 4 Biss. (U. S.) 176.

7. Statutory Allowance of Compensation to Officer. — *Steele v. Bennett*, 3 S. & R. (Pa.) 553. See also *Sawyer v. Steele*, 3 Wash. (U. S.) 467.

jointly or in common, and this though one or more of the informers were more active and influential than the others in bringing about the final result.¹ And it has been held that though the first information of a fraud on the customs was communicated to the government from an individual discovery and knowledge of one of the claimants, yet, if the act of information subsequently assumed the form of an authoritative communication in being reduced to writing and put in the name of all, it became the joint act of all and gave to each individual an inchoate interest in the results.²

IV. WHEN INFORMER'S SHARE VESTS. — Under some statutes the informer's share becomes vested on the recovery of judgment.³ But under other statutes the title of the informer does not become vested until the money representing the fine or forfeiture is actually paid over and is ready for distribution.⁴ Under a statute of the latter class it has been held that the amount of the informer's share is to be determined by the law in force at the time of the payment over for distribution.⁵

V. HOW SHARE MAY BE DIVESTED — 1. Repeal of Statute. — The rights of informers are liable to be divested by repealing statutes at any time before they become vested by judgment or payment over for distribution.⁶

2. Pardon. — After a judgment in proceedings for a fine, penalty, or forfeiture has been rendered, by which a share thereof has become vested in an informer, it is not within the pardoning power to remit or release by a pardon the moiety thus accruing to the informer, and the power is limited to the remission of the share of the government alone.⁷ But it has been held that until an order of distribution of the proceeds of property sold under the Confiscation Acts is made, or until the proceeds are actually paid into the hands of the party entitled as informer to receive them, or into the treasury of the

1. **Joint Informers.** — *Sawyer v. Steele*, 3 Wash. (U. S.) 464; *The City of Mexico*, 32 Fed. Rep. 105.

2. *Jayne v. U. S.*, 21 Ct. Cl. 311.

3. **Vesting of Informer's Share on Recovery of Judgment.** — *The Laura*, 114 U. S. 411; *U. S. v. Lancaster*, 4 Wash. (U. S.) 64; *St. Mary's Bank v. State*, 12 Ga. 495.

4. **Vesting of Informer's Share on Payment Over for Distribution.** — *U. S. v. Morris*, 10 Wheat. (U. S.) 290; *Norris v. Crocker*, 13 How. (U. S.) 429; 25,000 Gallons Distilled Spirits, 1 Ben. (U. S.) 372; *Confiscation Cases*, 7 Wall. (U. S.) 454; *U. S. v. 25,000 Segars*, 5 Blatchf. (U. S.) 503. See also *U. S. v. Krum*, 3 McCrary (U. S.) 381.

Money Paid Over by Way of Compromise. — Under a federal statute it has been held that an action cannot be maintained in the courts of *Massachusetts* to recover a share of a forfeiture incurred by a violation of the customs revenue laws where the money forfeited has been paid over to the collector before the rendition of any decree or judgment, and by way of compromise of pending legal proceedings. This decision was based on the ground that it could not be said that the money was "recovered" as required by statute. *Lapham v. Almy*, 13 Allen (Mass.) 301.

But under statute in *Iowa* giving the informer a share of fines "collected by action" for a violation of a statute against the illegal sale of liquors, it was held that if the amount is collected by action, it is as much a recovery if paid to settle the action as if paid after final adjudication. *Hull v. Welsh*, 82 Iowa 117.

5. 25,000 Gallons Distilled Spirits, 1 Ben. (U. S.) 367.

6. In *Georgia* it has been held that an informer who begins suit under a penal statute acquires thereby only an inchoate right, and such right can become vested only by judgment; and hence at any time before judgment his right is liable to be divested by a repealing statute. *St. Mary's Bank v. State*, 12 Ga. 495.

Violation of Internal-revenue Laws. — Under the United States statutes provision was at one time made that informers should receive certain shares of the fines and penalties recovered in cases of violation of the internal-revenue laws. See *U. S. v. Connor*, 138 U. S. 61; *One Large Water Tub*, 3 Ben. (U. S.) 436. Under a later statute, however, repealing this law, it has been held that any rights which an informer might have to a share in a fine, penalty, or forfeiture under the provisions of the prior statute were taken away unless the amount of the fine, penalty, or forfeiture was fixed and settled by judgment or compromise and by payment before the passage of the later act. *U. S. v. Connor*, 138 U. S. 61. Compare *Ramsey's Case*, 14 Ct. Cl. 367; *Bailee v. U. S.*, 23 Ct. Cl. 502. But it has been held that where a compromise was effected under the internal-revenue laws and the money was paid into the treasury prior to the repealing act, the informer might recover the amount awarded to him by the secretary of the treasury though the award was not made until after the repealing act was enacted. *Horton v. U. S.*, 31 Ct. Cl. 148.

7. **Effect of Pardon on Informer's Right.** — *Foster's Case*, 11 Coke 66; *U. S. v. Harris*, 1 Abb. (U. S.) 110. See also *U. S. v. Lancaster*, 4 Wash. (U. S.) 64.

United States, they are within the control of the court, and no vested right in the informer accrues so as to prevent the pardon of the President from restoring them to the original owner.¹

3. Remission of Fine or Forfeiture by Secretary of Treasury. — In some instances power is granted by Congress to the secretary of the treasury to remit fines and forfeitures, including the informer's share, and this power is not unconstitutional as being an invasion of the President's right of pardon.² The power to make the remission after suit has been instituted, but before judgment, is expressly conferred in some cases;³ and in other cases the power extends to remitting the informer's share of the penalty at any time before or after a final decree or judgment until the money is actually paid over for distribution.⁴

Conditional or Partial Remission. — It has been held that the remission by the secretary of the treasury need not be absolute, but he has the power to remit any part less than the whole fine or forfeiture, or to remit upon a condition consistent with law.⁵

4. Release by Informer. — Where an informer's right has become vested by judgment it has been held that he may release his share of the judgment, but his release will not affect the remainder.⁶ But under a statute allowing an action for a certain penalty to be brought by any person who may sue for it, it has been held that no interest which can be the subject of compromise or arbitration is acquired by an informer until the demand for the penalty is asserted by the institution of a suit for its recovery.⁷

5. Misconduct of Informer. — It has been held that if, after the seizure of a vessel for a violation of the revenue laws, the informer is intrusted with the custody of the property, and endeavors to defraud the revenue of the United States of the fruit of the seizure by connivance with the party informed against, in which attempt he fails, this will not defeat his right to a part of the forfeiture, since his right as informer cannot be affected by his misconduct as agent.⁸

VI. ENFORCEMENT OF INFORMER'S RIGHTS. — Under statutes providing that a fine or forfeiture shall go in whole or in part to the informer, it may be laid down as a general rule that an informer cannot maintain an action for the penalty unless power is given to him for that purpose by the statute in express terms or by necessary implication.⁹ But he will be entitled to bring suit for

1. *Brown v. U. S.*, 1 Woolw. (U. S.) 198.

2. **Remission of Fine or Forfeiture by Secretary of Treasury.** — *The Laura*, 114 U. S. 411; *The Margaretta*, 2 Gall. (U. S.) 515.

3. *The Laura*, 114 U. S. 411; *U. S. v. Lancaster*, 4 Wash. (U. S.) 64. See also *The Margaretta*, 2 Gall. (U. S.) 515; *The Brig Hollen*, 1 Mason (U. S.) 431.

Where by statute the informer's title vests upon the recovery of the judgment, it is not the subject of compromise by the secretary of the treasury after judgment. *U. S. v. Griswold*, 30 Fed. Rep. 762.

4. *U. S. v. Morris*, 10 Wheat. (U. S.) 246.

But where by statute the informer's share becomes vested when the proceeds of a forfeiture are paid over to the officer for distribution, such share cannot be affected by regulations of the secretary of the treasury subsequently made. *Eight Barrels Distilled Spirits*, 1 Ben. (U. S.) 472; *U. S. v. 25,000 Segars*, 5 Blatchf. (U. S.) 500.

5. **Conditional Remission by Secretary of Treasury.** — *Jungbluth v. Redfield*, 4 Blatchf. (U. S.) 219. See also *The Palo Alto*, *Davies* (U. S.) 343.

6. **Release of Penalty by Informer.** — *Wardens v. Cope*, 2 Ired. L. (24 N. Car.) 44. See also *Sawyer v. Steele*, 3 Wash. (U. S.) 464.

But in *Raynham v. Rounseville*, 9 Pick. (Mass.) 44, it was held, under a statute giving a penalty to be recovered by a *qui tam* action, one half to the use of the prosecutor and the other half to the use of the town, that if a person, having brought such an action, afterwards compromised it by receiving a sum of money of the defendant and had the action entered "neither party" on the docket, the town could not maintain assumpsit against the plaintiff in the *qui tam* suit to recover a part of the money received by him.

7. *Middleton v. Wilmington, etc.*, R. Co., 95 N. Car. 167.

8. **Right Not Divested by Informer's Subsequent Misconduct.** — *Westcot v. Bradford*, 4 Wash. (U. S.) 492.

9. **No Right of Action on Part of Informer at Common Law—England.** — *Barnard v. Gostling*, 2 East 569; *Flemming v. Bailey*, 5 East 313; *Davis v. Edmonson*, 3 B. & P. 382.

United States. — *Matthews v. Offley*, 3 Sumn. (U. S.) 115; *Briscoe v. Hinman*, *Deady* (U. S.)

the penalty if authorized by statute, as where the statute gives the penalty or forfeiture, or a part of it, to any person who shall prosecute therefor.¹

Whether Two or More May Sue for Penalty. — Two or more persons may not unite in an action as informers for the recovery of a penalty unless the right is conferred by statute, and hence a statute giving a moiety of a fine or penalty to the person who shall sue therefor does not authorize a suit by two or more informers jointly.²

Effect of Death of Defendant. — Under statute in *Massachusetts* giving an action of tort to a common informer to recover of the owner of a place in which property is lost by gaming treble the value thereof, it has been held that the action does not survive against the representatives of the defendant.³

INFRINGEMENT. — See the titles COPYRIGHT, vol. 7, p. 508; PATENTS.

INGRESS. — See note 4.

INGROSS. — See ENGROSS — ENGROSSMENT, vol. 11, p. 37.

INHABIT — INHABITANT. (See also the titles ATTACHMENT, vol. 3, pp. 195, 197; CITIZENSHIP, vol. 6, p. 14; DOMICIL, vol. 10, p. 6; ELECTIONS, vol. 10, p. 552; JURISDICTION; POOR AND POOR LAWS; RESIDENT.) — “Inhabitant” is a word of great variation of meaning. The necessary element in its signification is “locality of existence.” The permanency of the residence indicated, however, depends in a great degree upon the context. The word has been variously construed to mean an occupier of lands, a resident, a permanent resident, one having a domicile, a citizen, a qualified voter. The construction is generally governed by the connection in which the word is used.⁵

588; *Washington v. Eaton*, 4 Cranch (C. C.) 352.

Arkansas. — *St. Louis, etc., R. Co. v. State*, 56 Ark. 166.

Massachusetts. — *Colburn v. Swett*, 1 Met. (Mass.) 232; *Smith v. Look*, 108 Mass. 139; *Com. v. Look*, 108 Mass. 452.

Nebraska. — *Omaha, etc., R. Co. v. Hale*, 45 Neb. 418.

Ohio. — *Hunter v. Field*, 20 Ohio 340.

See also *Miners' Trust Co. Bank v. Roseberry*, 81 Pa. St. 309.

Compare *Stevens v. Cady*, 2 Curt. (U. S.) 200; *Higby v. People*, 5 Ill. 165; *Chicago, etc., R. Co. v. Howard*, 38 Ill. 414; *Toledo, etc., R. Co. v. Foster*, 43 Ill. 480; *Ryder v. Hulscher*, 40 Ill. App. 77.

1. **Statutory Right of Action in Informer** — *United States.* — *U. S. v. Morris*, 2 Bond (U. S.) 23; *Pollock v. The Steamboat Sea Bird*, 3 Fed. Rep. 573; *The Laura M. Starin*, 11 Fed. Rep. 177; *Pentlarge v. Kirby*, 19 Fed. Rep. 501. See also *U. S. v. Laescki*, 29 Fed. Rep. 699.

Alabama. — *State v. Fillyaw*, 3 Ala. 735.

Connecticut. — *Canfield v. Mitchell*, 43 Conn. 169.

Kentucky. — *Prior v. Lucas*, 3 Bibb (Ky.) 96, 1 A. K. Marsh. (Ky.) 305; *Hickman v. Littlepage*, 2 Dana (Ky.) 344.

Massachusetts. — *Nye v. Lamphere*, 2 Gray (Mass.) 295.

New Jersey. — *Phillips v. Bevans*, 23 N. J. L. 373.

North Carolina. — *Norman v. Dunbar*, 8 Jones L. (53 N. Car.) 317; *McRae v. Keller*, 10 Ired. L. (32 N. Car.) 395; *Middleton v. Wilmington, etc., R. Co.*, 95 N. Car. 167, *overruling* *Duncan v. Philpot*, 64 N. Car. 479; *Burrell v. Hughes*, 116 N. Car. 430; *Sutton v. Phillips*,

116 N. Car. 502, 117 N. Car. 228; *Goodwin v. Caraleigh Phosphate, etc., Works*, 119 N. Car. 120.

Ohio. — *Higgins v. Grove*, 40 Ohio St. 521.

Pennsylvania. — *Megergell v. Hazleton Coal Co.*, 8 W. & S. (Pa.) 342. See also *Com. v. Davenger*, 10 Phila. (Pa.) 478, 30 Leg. Int. (Pa.) 321.

Vermont. — *Drew v. Hilliker*, 56 Vt. 642.

Wisconsin. — *Lynch v. The Steamer Economy*, 27 Wis. 69.

Canada. — *Garrett v. Roberts*, 10 Ont. App. 650.

See also *Caswell v. Morgan*, 1 El. & Bl. 809, 102 E. C. L. 809.

2. *Ferrett v. Atwill*, 1 Blatchf. (U. S.) 155; *Vinton v. Welsh*, 9 Pick. (Mass.) 87. See also *Weavers Co. v. Forrest*, 2 Stra. 1241; *Hill v. Davis*, 4 Mass. 137.

3. **Effect of Defendant's Death on Informer's Right of Action.** — *Yarter v. Flagg*, 143 Mass. 280.

4. **Ingress.** — A deed from a railway company giving to the grantee a right of free “*ingress*, egress, and regress” to and from certain private roads which bounded the close and led to a station and to the highway, entitled the grantee to pass from the close to the private roads and thence to the public highways, or in the reverse direction. *Somerset v. Great Western R. Co.*, 46 L. T. N. S. 883.

5. **Inhabitants.** — “Webster * * * defines an *inhabitant* to be a dweller, one who dwells or resides permanently in a place, or who has a fixed residence, as distinguished from an occasional lodger or visitor; as, the *inhabitants* of a house or cottage; the *inhabitants* of a town, city, or state.” *Matter of Wrigley*, 4 Wend. (N. Y.) 605.

The word *inhabitant* has been defined to be

Volume XVI.

"one who has his domicile in a place; one who has an actual fixed residence in a place." *Bouv. L. Dict.*, followed in *Merrill v. Morrissett*, 76 Ala. 437; *Crawford v. Wilson*, 4 Barb. (N. Y.) 504; *Ryall v. Kennedy*, 67 N. Y. 386.

"No words are capable of a larger or more limited interpretation." Lord Eldon in *Atty.-Gen. v. Forster*, 10 Ves. Jr. 339.

In *Spragins v. Houghton*, 3 Ill. 396, it was said: "The term *inhabitant* is derived from the Latin *habito*, and signifies to live in, to dwell in, and is applied exclusively to one who lives in a place and has there a fixed and legal settlement. It embraces locality of existence. It refers to the place of a person's actual residence, and excludes the idea of an occasional or temporary residence; and as used in the section referred to, the place where the elector dwells at the time of his voting." See also *Holmes v. Oregon*, etc., R. Co., 5 Fed. Rep. 526; *Gormully*, etc., Mfg. Co. v. *Pope Mfg. Co.*, 34 Fed. Rep. 819; *U. S. v. The Schooner Penelope*, 2 Pet. Adm. 450; *State v. Ross*, 23 N. J. L. 517; *Matter of Wrigley*, 8 Wend. (N. Y.) 140; *Union Hotel Co. v. Hersce*, 79 N. Y. 461, *quoting* *Jacob's Law Dict.*; *Thurneyssen v. Vouthier*, 1 Miles (Pa.) 427; *Barnet's Case*, 1 Dall. (Pa.) 153.

Construed with Reference to Context and Subject-matter.—In *Rex v. Mashiter*, 6 Ad. & El. 153, 33 E. C. L. 38, Coleridge, J., said: "Any lawyer who was asked the interpretation of the word *inhabitants* would say: 'I must see where it is used, for by itself it has no definite meaning.' If its signification varies, we must resort to the context for explanation." See also *Withnell v. Gartham*, 6 T. R. 398; *Russell v. Devon County*, 2 T. R. 672; *Rex v. Davies*, 6 Ad. & El. 374, 33 E. C. L. 90; *Atty.-Gen. v. Forster*, 10 Ves. Jr. 339; *Chilton v. London*, 7 Ch. D. 735.

Question for Jury.—"In general terms, one may be designated as an *inhabitant* of that place which constitutes the principal seat of his residence, of his business pursuits, connections, attachments, and of his political and municipal relations. It is manifest, therefore, that it embraces the fact of residence at a place with the intent to regard it and make it his home. The act and intent must concur, and the intent may be inferred from declarations and conduct. It is often a question of great difficulty, depending upon minute and complicated circumstances, leaving the question in so much doubt that a slight circumstance may turn the balance. * * * But it is a question of fact for the jury, to be determined from all the circumstances of the case." *Lyman v. Fiske*, 17 Pick. (Mass.) 234, 28 Am. Dec. 293. See also the title **QUESTIONS OF LAW AND FACT**.

A Legacy to the poor inhabitants of the parish was held good, but confined to those poor who did not receive alms. "The word *inhabitant* bears a very general sense, and may extend to everybody living in the parish." *Atty.-Gen. v. Clarke*, Amb. 422.

Inhabitant and Parishioner.—In *Atty.-Gen. v. Parker*, 3 Atk. 577, it was said: "*Inhabitants* is still a larger word [than 'parishioners'], takes in housekeepers, though not rated to the poor, takes in also persons who are not housekeepers; as, for instance, such who

have gained a settlement, and by that means become *inhabitants*."

Inhabit.—In *School Dist. No. 2 v. Pollard*, 55 N. H. 504, it was said: "The word *inhabit* is derived from the Latin verb *habito*, which is defined, 'to dwell, to abide, to *inhabit*, or live in.' 'Reside' is from *re* and *sedco*, 'to sit down;' and 'dwell,' from the Danish *dwellger*, 'to abide.' All these terms are usually classed as synonyms, but not, in strictness, properly so; for the word *inhabit* does not convey the idea of permanent residence."

To *inhabit* is to occupy a place as a settled residence. *Hinds v. Hinds*, 1 Iowa 41.

Temporary Residence.—"The popular meaning of the term *inhabitant* is a resident or dweller in a place, in opposition to a mere sojourner or transient person." *Long v. Brown*, 4 Ala. 630. See also *State v. Primrose*, 3 Ala. 546; *Crawford v. Wilson*, 4 Barb. (N. Y.) 520; *State v. Boyd*, 31 Neb. 727; *Boardman v. Bickford*, 2 Aik. (Vt.) 345.

Inhabitant means "one who dwells or resides permanently in a place, or who has a fixed residence, as distinguished from an occasional lodger or visitor." *Imperial Dict.*, *quoted* in *Gormully*, etc., Mfg. Co. v. *Pope Mfg. Co.*, 34 Fed. Rep. 819.

One who has an actual but merely temporary residence in a place is not in any proper sense an *inhabitant* of that place. *State v. Casper*, 36 N. J. L. 368. See also *State v. Ross*, 23 N. J. L. 520.

In *Bicycle Stepladder Co. v. Gordon*, 57 Fed. Rep. 529, it was held that a resident of Kentucky who was temporarily in Illinois was not an *inhabitant* of Illinois within the meaning of the United States statute providing that no civil suit should be brought against any person in another district than that whereof he was a resident.

A foreigner who resides and transacts business in New York for seven years, and then leaves without intention of returning, taking his property with him, and at the end of a few weeks returns merely for a temporary purpose, is not an *inhabitant* within the meaning of an insolvent act. *Matter of Wrigley*, 4 Wend. (N. Y.) 603, *affirmed* 8 Wend. (N. Y.) 134.

One who came into a parish with one load, intending to return with another, did not come to *inhabit*. *Rex v. St. James*, 10 East 25.

Sleeping once or twice in a place does not constitute one an *inhabitant*. *Reg v. Exeter*, L. R. 4 Q. B. 113.

But where a statute provided that "in action on joint contracts, if all the defendants are not *inhabitants* of this state, the service of the process upon such as are *inhabitants* of this state shall be sufficient notice to maintain the suit against all the defendants," the court said: "It is said that the statute does not apply to a case where none of the defendants permanently reside in the state. But we think otherwise. It would be giving too narrow a construction to the word *inhabitant* as used in the statute. We think the statute should be held to include, by a fair and liberal construction, every person who is in the state, whether here for a longer or shorter period." *Bishop v. Vose*, 27 Conn. 9.

Legal Settlement.—In *Boardman v. Bickford*,
Volume XVI.

2 Aik. (Vt.) 345, it was held that a legal settlement within the state was not necessary to constitute one an *inhabitant* thereof, within the meaning of the act directing proceedings against the trustees of a concealed or absconding debtor.

Definite Absence.—The incumbent of a benefice claimed to be entitled to vote in respect of the occupation by him of his rectory house. The claimant was absent from his house from October to June, under a license for nonresidence, obtained from his bishop, for a definite period. Three rooms in the house were retained by the claimant and kept locked up, but the house was occupied by his curate. It was admitted by the claimant that he could not have returned to reside in the house without providing some other residence for the curate. It was held that the claimant was not an *inhabitant* during the qualifying year, as required by the statute. *Durant v. Carter*, L. R. 9 C. P. 261.

But militiamen absent on duty are *inhabitants* of the place where they have dwelling houses and their families reside, within the meaning of a local election act. *Rex v. Mitchell*, 10 East 511.

Avowed Intention of Leaving State.—While a man remains in the state, though avowing an intention to withdraw from it, he must be considered an *inhabitant*. "The having once been an *inhabitant* will not, however, protect a man forever from a foreign attachment, where he has notoriously emigrated from the state and settled elsewhere." *Lyle v. Foreman*, 1 Dall. (Pa.) 480.

Two Residences—Living in One Place and Carrying On Business in Another.—Where a person occupied premises in one parish and carried on his business in person there, but resided in his dwelling house in another, he was held not an *inhabitant* of the former. *Rex v. Adlard*, 4 B. & C. 772, 10 E. C. L. 458; *Rex v. Nicholson*, 12 East 330; *Holledge's Case*, 1 Bott. 134.

Where a citizen, having lived many years at W., in the county of M., purchased and furnished a house at B., in the county of S., and afterwards with his family spent his summers at his house in W., where he continued to pay his taxes, and his winters at his house in B., and died while so residing in B., it was held that he was an *inhabitant* of W. within the meaning of a probate statute. *Harvard College v. Gore*, 5 Pick. (Mass.) 369.

Objection being taken to process of outlawry because it described the defendant as an *inhabitant* of W., whereas he worked there but resided elsewhere, the court said: "It is necessary to state the township; but if the defendant is proved to have been there, it is enough to satisfy the designation. The first day a man comes into a place he is a stranger; the second day he is considered as a guest; and the third day he becomes an *inhabitant*. But if any one comes from New Jersey and stays only an hour in Pennsylvania, during which he commits an offense, he must be charged as of the township in which he was at the time, for he cannot be called of New Jersey." *Respublica v. Steele*, 2 Dall. (Pa.) 92.

"The term *inhabitant* * * * means something more than a person having a mere

temporary residence. It imports citizenship and municipal relations; and if the term were less unequivocal than it is, it could never be presumed, in the absence of the most explicit enactment, that the legislature designed to impose a poll tax upon the citizens of another state." *Inhabitaney* and residence are synonymous with domicil, and a citizen of Georgia having a house and establishment in New Jersey, where he spends five or six months of the year, is not an *inhabitant* within a poll-tax act. *State v. Ross*, 23 N. J. L. 517.

But under an act for the taxation of personal property, one is an *inhabitant* of a town which is in the state of which he is a citizen and in which he has a summer residence, if he is dwelling there at the time of assessment. *Bell v. Pierce*, 48 Barb. (N. Y.) 51.

Inhabitant and Domicil.—Upon the meaning of the word *inhabitant* as used in a statute regulating the probate of wills, the court in *Merrill v. Morrisett*, 76 Ala. 437, said: "We take it that the word *inhabitant*, as used in the * * * code, having reference to testamentary cases, is used as a synonym for domiciliary resident, or one who has his domicil in a given county." And so the meaning of one who has his domicil in a certain place has frequently been given to the term *inhabitant*. *State v. Ross*, 23 N. J. L. 527; *Crawford v. Wilson*, 4 Barb. (N. Y.) 504; *Kellogg v. Winnebago County*, 42 Wis. 107; *Hall v. Hall*, 25 Wis. 600.

In *Ryall v. Kennedy*, 67 N. Y. 386, Judge Miller, in discussing the question of domicil and residence, said: "Generally speaking, domicil and residence mean the same thing. And an *inhabitant* is defined to be one who has his domicil in a place or a fixed residence there." See also *Matter of Colebrook*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 142.

Under an act regulating the probate of wills, it has been held that one is an *inhabitant* of the place of his domicil. *Isham v. Gibbons*, 1 Bradd. (N. Y.) 70.

In *Massachusetts* it is provided by law that every person shall be considered an *inhabitant*, for the purpose of electing and being elected into any office, in the town, district, or plantation where he dwells or has his home. This makes the question one of domicil. *Opinion of Justices*, 5 Met. (Mass.) 588.

In *Borland v. Boston*, 132 Mass. 89, it was held that the word *inhabitant*, when used in reference to being elected to office, meant one having his home in or being domiciled in the place mentioned. In this case the court *disapproved* *Briggs v. Rochester*, 16 Gray (Mass.) 337; *Colton v. Longmeadow*, 12 Allen (Mass.) 598. See also *Boston Invest. Co. v. Boston*, 158 Mass. 461.

In that state the question is treated as one of domicil. By a departure from the state, going to Europe, leasing his house at home and hiring another in Paris, where he remains sixteen months, one does not cease to be an *inhabitant* for the purpose of taxation of his personality. The court said: "If the departure from one's fixed and settled abode is for a purpose in its nature temporary, whether it be business or pleasure, accompanied with an intent of returning and resuming the former place of abode as soon as such purpose is

accomplished, in general, such a person continues to be an *inhabitant* at such place of abode, for all purposes of enjoying civil and political privileges, and of being subject to civil duties." *Sears v. Boston*, 1 Met. (Mass.) 250. But if the removal is permanent the inhabitancy terminates. *Thayer v. Boston*, 124 Mass. 132.

But within a statute providing that a County Court should have exclusive power to grant letters of administration upon the estate of a person who was an *inhabitant* of the county, it was held that the word *inhabitant* had a narrower and more limited signification than "domicil," and implied a personal presence in the county as a dweller therein. *Holmes v. Oregon*, etc., R. Co., 5 Fed. Rep. 523. See also *Briggs v. Rochester*, 16 Gray (Mass.) 337; *Hinds v. Hinds*, 1 Iowa 43.

Inhabitant and Resident.—In a plea of a discharge under an insolvency act it was stated that the defendant was a resident of a certain county, where the act required that the insolvent should be an *inhabitant*. The court said: "These words signify the same thing; a person resident is defined to be one 'dwelling or having his abode in any place,' an *inhabitant*, 'one that resides in a place.'" *Roosevelt v. Kellogg*, 20 Johns. (N. Y.) 210.

In an act requiring the appointment of substantial *inhabitants* to collect the rate on real estate, this word means residents. The court said: "The word *inhabitant* may mean either occupier or resident. The latter is the proper sense when it is used to denote persons on whom a personal (and not a pecuniary) charge is to be imposed. *Rex v. Adlard*, 4 B. & C. 772, 10 E. C. L. 458. Here a personal service is imposed." *Donne v. Martyr*, 8 B. & C. 62, 15 E. C. L. 154.

And in the following cases the terms "resident" and *inhabitant* were held synonymous: *Rex v. Nicholson*, 12 East 330; *Rex v. Rochester*, 12 East 353; *Reg. v. Exeter*, L. R. 4 Q. B. 113; *Zambrino v. Galveston*, etc., R. Co., 38 Fed. Rep. 452; *Bicycle Stepladder Co. v. Gordon*, 57 Fed. Rep. 531; *Shaw v. Quincy Min. Co.*, 145 U. S. 444; *Hartford F. Ins. Co. v. Hartford*, 3 Conn. 24; *McCormick v. Johnson County*, 68 Ind. 217; *Hinds v. Hinds*, 1 Iowa 43; *Matter of Wrigley*, 8 Wend. (N. Y.) 140; *People v. Platt*, 50 Hun (N. Y.) 458; *Munroe v. Williams*, 37 S. Car. 86; *Brown v. Boulden*, 18 Tex. 434.

But it has been held that the word implies a more fixed and permanent abode than "resident," and frequently imports many privileges and duties which a mere resident could not claim or be subject to. *Tazewell County v. Davenport*, 40 Ill. 206.

Thus in *Givanovich's Succession*, (La. 1897) 24 So. Rep. 680, *McEnery, J.*, said: "An *inhabitant* is one who dwells or resides permanently in a place, or who has a fixed residence, as distinguished from an occasional lodger or visitor; as, the *inhabitant* of a house or cottage; the *inhabitants* of a town, city, county, or state. Webster. The words 'resident' and *inhabitant* are not synonymous, the latter implying a more fixed and permanent abode than the former, and frequently imports many privileges and duties to which a nonresident could not lay claim or be subject.

Abb. Law Dict. The word *inhabitant* imports citizenship and municipal obligations."

So in *Frost v. Brisbin*, 19 Wend. (N. Y.) 11, it was said that the word *inhabitant* "implies a more fixed and permanent abode" than the word "resident."

And in *School Dist. No. 2 v. Pollard*, 55 N. H. 504, it was said that *inhabit* conveys the idea of a home, but not necessarily of a full and fixed settlement, such as is conveyed by the term "residence."

In *Opinion of Justices*, 1 Har. & M. (Md.) 558, it was said: "The act has declared who shall be deemed *inhabitants*, for a certain purpose; but you must go further, and say an *inhabitant* is a resident; and in doing so you go beyond the act, when, on the contrary, for the reason above, it ought to be construed most strictly. This part of the case may be further explained by an instance: Suppose a number of people should be incorporated under the name of the *inhabitants* of Dale, and be made capable of suing and being sued; an action brought by or against them in the name of the residents of Dale could not be supported."

And for the distinction between *inhabitant* and resident see *Barney v. Oelrichs*, 138 U. S. 532; *Tazewell County v. Davenport*, 40 Ill. 206; *Harvard College v. Gore*, 5 Pick. (Mass.) 369.

Inhabitant and Citizen.—"The words *inhabitants* or 'residents' may comprehend aliens, or they may be restrained to such *inhabitants* or residents who are citizens, according to the subject-matter to which they are applied." *Opinion of Justices*, 7 Mass. 525.

Thus the terms *inhabitants* and "citizens" are frequently used synonymously. *Shaw v. Quincy Min. Co.*, 145 U. S. 444; *Galveston*, etc., R. Co. v. *Gonzales*, 151 U. S. 501; *State v. Primrose*, 3 Ala. 546; *McKenzie v. Murphy*, 24 Ark. 155; *Risewick v. Davis*, 19 Md. 93; *Opinion of Justices*, 7 Mass. 525; *State v. Boyd*, 31 Neb. 727; *State v. Ross*, 23 N. J. L. 520; *Union Hotel Co. v. Hersee*, 79 N. Y. 461.

In laws prescribing qualifications of electors and of office, the word *inhabitant* is generally construed to be equivalent to "citizen." "The words *inhabitant*, 'citizen,' and 'resident,' as employed in different constitutions to define the qualifications of electors, mean substantially the same thing; and one is an *inhabitant*, resident, or citizen at the place where he has his domicile or home." *Cooley's Const. Lim.* (6th ed.) 754. See also *Thorndike v. Boston*, 1 Met. (Mass.) 242.

The Constitution of *New Hampshire* provided that "every male *inhabitant* of each town * * * in this state, of twenty-one years of age and upwards," should have a right to vote. In construing this constitution in the *Opinion of Justices*, 8 N. H. 574, the court said: "The term *inhabitant*, as used in this relation, was not intended to include all residents; and reasons of public policy seem to show conclusively that it must be confined to such *inhabitants* as are citizens of the state."

The Judiciary Act of 1789, § 11, provides that "no civil suit shall be brought before either of said courts [Circuit and District Courts] against an *inhabitant* of the United

States by any original process in any other district than that whereof he is an *inhabitant*, or in which he shall be found at the time of serving the writ." In construing this act, Story, J., said: "I lay no particular stress upon the word *inhabitant*, and deem it a mere equivalent description of 'citizen' and 'alien' in the general clause conferring jurisdiction over parties. A person might be an *inhabitant* without being a citizen; and a citizen might not be an *inhabitant*, though he retained his citizenship. Alienage or citizenship is one thing, and inhabitancy, by which I understand local residence *animo manendi*, quite another. I read, then, the clause thus: 'No civil suit shall be brought before either of said courts against an alien or a citizen by any original process, in any other district than that whereof he is an *inhabitant* or in which he shall be found at the time of serving the writ.'" *Picquet v. Swan*, 5 Mason (U. S.) 35, *followed* in *Toland v. Sprague*, 12 Pet. (U. S.) 328.

In construing this statute in *Shaw v. Quincy Min. Co.*, 145 U. S. 447, the court said: "The word *inhabitant*, in that act, was apparently used, not in any larger meaning than 'citizen,' but to avoid the incongruity of speaking of a citizen of anything less than a state when the intention was to cover not only a district which included a whole state, but also two districts in one state, like the districts of Maine and Massachusetts in the state of Massachusetts and the districts of Virginia and Kentucky in the state of Virginia, established by section 2 of the same act."

A much less restricted meaning was put upon the word in *Spragins v. Houghton*, 3 Ill. 377, where it was decided that under a constitutional provision that every white male *inhabitant* of the age of twenty-one years, who has resided in the state six months immediately preceding any general election, is entitled to vote at such election, an unnaturalized Irishman is qualified to vote. The court said: "The term *inhabitant* is derived from the Latin *habito*, and signifies to live in, to dwell in; and is applied exclusively to one who lives in a place and has there a fixed and legal settlement. It embraces locality of existence. It refers to the place of a person's actual residence, and excludes the idea of an occasional or temporary residence; and as used in the section referred to, the place where the elector dwells at the time of his voting. The term is conceived to be entirely free from technicality, and has a known and universally accepted meaning, all agreeing in considering *inhabitant* as directly connected with habitation and abode. It is supposed that a term of no technicality, so simple and expressive in itself, and so clear and definite in its character, is susceptible of but one meaning. This residence, however, is to be *bona fide*, and not casual or temporary. To determine, then, the qualifications of an elector in this state, it would seem to be wholly unnecessary to inquire whether the elector was a citizen of the United States. * * * The word *inhabitant* comprehends a single fact, locality of existence; that of citizen, a combination of civil privileges, some of which may be enjoyed in any state of the Union. The word 'citizen' may properly be construed, a member of a political

society; and although he might be absent for years and cease to be an *inhabitant* of its territory, the right of citizenship may not thereby be forfeited, but may be resumed whenever he may choose to return.' From what has already been said, it must appear that the words 'citizen' and *inhabitant* cannot be considered synonymous." And see Opinion of Justices, 122 Mass. 594.

In *Ex p. Blumer*, 27 Tex. 737, it was said: "Vattel says: 'The *inhabitants*, as distinguished from citizens, are strangers who are permitted to settle and stay in the country. Bound by their residence to the society, they are subject to the laws of the state whilst they reside there; and they are obliged to defend it because it grants them protection, though they do not participate in all the rights of citizens.'" See also *Matter of Wrigley*, 4 Wend. (N. Y.) 605; *Picquet v. Swan*, 5 Mason (U. S.) 40.

An *inhabitant* of a county during one year preceding his appointment to the office of county superintendent is not ineligible thereto because not a citizen thereof during so long a time. A citizen is a native or naturalized person. An *inhabitant* is one having a fixed and permanent residence in a county. *State v. Kilroy*, 86 Ind. 118.

A man born in Pennsylvania, who on December 26, 1776, departed and joined the enemy, and was subsequently brought back into the state as a prisoner of war, was upon his return an *inhabitant*, but not a subject of the state within the meaning of an act of attainder. *Respublica v. Chapman*, 1 Dall. (Pa.) 53.

In *State v. Primrose*, 3 Ala. 546, it was said that it by no means follows that an *inhabitant* is a subject or citizen; a foreigner, permanently resident, is as much an *inhabitant* as if he were a citizen or subject. In that case, however, it was held that the word *inhabitant* was used in the sense of citizen.

An allegation that defendants are *inhabitants* of a certain state is not a sufficient allegation of citizenship to confer jurisdiction upon a federal court on the ground of diverse citizenship. The court said: "There is here no allegation of the citizenship of either of the individual defendants, and the term *inhabitant* or 'resident,' it is well settled, does not necessarily imply citizenship, and cannot be substituted for it." *Allen B. Wrisley Co. v. George E. Rouse Soap Co.*, 90 Fed. Rep. 6, *citing Grace v. American Cent. Ins. Co.*, 109 U. S. 278.

Inhabitants includes qualified voters of a town, and is frequently used to mean such. *Baldwin v. North Branford*, 32 Conn. 47.

"Our constitution and statutes, with great uniformity, use the word 'citizen' to designate one who is a citizen of the state and of the United States, and the term *inhabitant* to designate the domiciled resident of a town, and such is the general acceptance of the terms." *Bull v. Warren*, 36 Conn. 85.

Where an Act of Congress vests the title to certain lands in the *inhabitants* of a township, and a subsequent act authorizes their sale with the consent of the *inhabitants*, which is to be ascertained by a vote of the qualified electors, a sale under the latter act is binding on the *inhabitants*. *Long v. Brown*, 4 Ala. 622.

In *Bryan v. Lincoln*, 50 Neb. 622, it was said: "It was stated in an act that towns and cities might submit a proposition to the vote of the *inhabitants*. The word *inhabitants* was held to mean 'voters.'" *Citing 6 AM. AND ENG. ENCYC. OF LAW* (1st ed.) 445; *Walnut v. Wade*, 103 U. S. 693.

In an act authorizing municipal corporations to subscribe to railway stock, on approval by the *inhabitants* of the city, *inhabitants* means "legal voters." The court said: "In its broadest sense this would include all sexes, ages, and conditions. To require the approval by a vote of the *inhabitants* in this sense would be an absurdity. The act itself is its own interpreter, and shows that this is not its meaning. * * * The act, though carelessly drawn, clearly meant to restrict the election to the voters, and the approval of the *inhabitants* was to be indicated by the vote of a majority of the legal voters." *Walnut v. Wade*, 103 U. S. 694. See generally the title MUNICIPAL AID.

Under an act providing that no school district shall be abolished without the consent of a majority of the "taxable *inhabitants*," aliens cannot vote, but only those qualified to vote for officers. *State v. Deshler*, 25 N. J. L. 180, the court saying: "The words 'taxable *inhabitants*,' it is clear, cannot have their full, unrestrained meaning, so as to include every resident liable to be taxed, or they must be held to include not only females but infants of the most tender age. Some restrictions must therefore be put upon them. What it shall be must depend upon the connection in which they are used and the constitution and statutes relating to the same subject." *State v. Deshler*, 25 N. J. L. 180.

Householder.—"An *inhabitant* is defined to be a householder in a place, as *inhabitants* in a vill are the householders in a vill. The word *inhabitants* includes tenants in fee simple, tenants for life, tenants at will, and he that has no interest but his habitation and dwelling. He who hath a house in his hands in a town may be said to be an *inhabitant*." *Matter of Wrigley*, 8 Wend. (N. Y.) 141.

Corporations. (See also the titles CORPORATIONS (PRIVATE), vol. 7, p. 694; FOREIGN CORPORATIONS, vol. 13, p. 834.)—The term *inhabitant* has in many cases been held to include a corporation. *Rex v. Gardner*, 1 Cowp. 79; *Zambrino v. Galveston, etc.*, R. Co., 38 Fed. Rep. 452; *Louisville, etc.*, R. Co. v. *Letson*, 2 How. (U. S.) 497; *Jenkins v. California State Co.*, 22 Cal. 538; *Davis v. Central R., etc. Co.*, 17 Ga. 328; *Baldwin v. Ministerial Fund*, 37 Me. 369; *Greene Foundation v. Boston*, 12 Cush. (Mass.) 54; *Ontario Bank v. Bunnell*, 10 Wend. (N. Y.) 193; *People v. Utica Ins. Co.*, 15 Johns. (N. Y.) 382; *Tripp v. Merchants' Mut. F. Ins. Co.*, 12 R. I. 435; *Crookston v. Centennial Eureka Min. Co.*, 13 Utah 117.

In *U. S. Bank v. Deveaux*, 5 Cranch (U. S.) 88, it was stated by Chief Justice Marshall that the word *inhabitant*, in the statute of Hen. VIII., concerning bridges and highways, which provided that they should be made and repaired by the "*inhabitants* of the city, shire, or riding," was held to include a corporation that had lands within said city, shire,

or riding, although it might reside elsewhere. See also *Rex v. Hall*, 1 B. & C. 136, 8 E. C. L. 59.

In *Rex v. Gardner*, 1 Cowp. 79, it was held that a corporation seized of lands in fee for its own profit was, within the meaning of the statute 43 Eliz., c. 2, an *inhabitant* or occupier of such lands.

In *Ontario Bank v. Bunnell*, 10 Wend. (N. Y.) 193, it was said: "There can be no doubt the term *inhabitant* includes a corporation occupying an office or building in a town, ward, or village, in conducting the business of their corporation for many purposes, and especially with reference to the burdens of taxation for public purposes."

In *Gormully, etc., Mfg. Co. v. Pope Mfg. Co.*, 34 Fed. Rep. 820, it was said: "I am not aware that the term *inhabitant*, as applicable to a corporation in a case like this, has ever been judicially defined, but it seems to me a corporation must be held to be an *inhabitant* of the place where it has its principal place of business, where its corporate offices and records are kept and its corporate meetings are lawfully held. A corporation, like an individual, may have agents representing it in a district of which it is not an *inhabitant*."

But a foreign corporation has been held to be an *inhabitant* of any state in which it operates its lines and maintains offices for the transaction of business. *U. S. v. Southern Pac. R. Co.*, 49 Fed. Rep. 304; *East Tennessee, etc., R. Co. v. Atlanta, etc., R. Co.*, 49 Fed. Rep. 608; *Gilbert v. New Zealand Ins. Co.*, 49 Fed. Rep. 884; *Miller v. Eastern Oregon Gold Min. Co.*, 45 Fed. Rep. 347; *U. S. Bank v. Deveaux*, 5 Cranch (U. S.) 88. See also the title UNITED STATES COURTS.

In *Zambrino v. Galveston, etc., R. Co.*, 38 Fed. Rep. 452, it was held that a railroad company doing business in one district, although its principal office is in another district, may be considered as *inhabiting* both districts, within the United States statute which provides that no suit shall be brought before the federal courts in any district other than that whereof the defendant is an *inhabitant*.

In *Home Ins. Co. v. City Council*, 50 Ga. 540, it was held that a foreign corporation having officers and an office and doing business in Augusta, Georgia, was an *inhabitant* of that state within a license act.

In *Shainwald v. Davids*, 69 Fed. Rep. 704, a foreign insurance company doing business within the state was held to be an *inhabitant*, within a United States statute conferring jurisdiction upon United States courts.

In *Pennsylvania Co. v. Sloan*, 1 Ill. App. 371, it was held that a corporation created by the law of one state and doing business by permission in another, although a citizen in the former, was an *inhabitant* of the latter for purposes of jurisdiction. See also *Stillwell v. Empire F. Ins. Co.*, 4 Cent. L. J. 463.

In *Tripp v. Merchants' Mut. F. Ins. Co.*, 12 R. I. 435, the court said: "It is contended that the provision recited [imposing a tax on personal property] does not subject them [corporations], because it only extends to personal property belonging to the *inhabitants* of the state, and a corporation cannot be an *inhabitant* in any proper sense of the word. We

should be inclined to consider the argument conclusive if the statute itself did not refute it. Section 2 of cap. 38 designates the property which is exempt from taxation. Among the property so designated is 'the property, real and personal, held for or by any incorporated library society,' and 'the property, real and personal, not exceeding twenty thousand dollars in value, held for or by any church or incorporated religious society or incorporated charitable society.' If the property were not liable to taxation, any exemption would be unnecessary."

But that a corporation is not an *inhabitant* within the natural, ordinary, and literal meaning of the word, see *People v. Schoonmaker*, 63 Barb. (N. Y.) 44.

And in *Hartford F. Ins. Co. v. Hartford*, 3 Conn. 24, it was said: "This word has a technical sense which has no bearing on this inquiry. The popular sense of the term is the same as resident, or one who lives in a place. An *inhabitant* necessarily implies an habitation, an abode, a place of dwelling. It requires no reflection to determine that in this sense a corporation resides nowhere. It is an artificial person, a creature of the imagination, subsisting only in intendment and consideration of law." This reasoning was followed in *State Bank v. City Council*, 3 Rich. L. (S. Car.) 348, where it was said: "Is a bank an *inhabitant* of Charleston? Surely not! It is a body in law, but not in fact; it exists altogether in paper—its charter—and cannot be an *inhabitant* living and dwelling in the city."

A banking corporation is not an *inhabitant* of a county for the purpose of taxation of its capital stock, though it may be for some purposes. *Cherokee Ins., etc., Co. v. Justices*, 28 Ga. 121.

A *Massachusetts* statute provided that all personal property within or without the commonwealth should be assessed to the owner in the city or town where he was an *inhabitant*. It was held that this did not refer to foreign corporations. The court said that the word *inhabitant* in the statute meant one whose domicile was in the place referred to. *Boston Investment Co. v. Boston*, 158 Mass. 462, citing *Borland v. Boston*, 132 Mass. 89.

Occupier.—In the early English rate acts, *inhabitant* was interpreted to mean occupier, landholder. 2 Inst. 702; *Rex v. Hall*, 1 B. & C. 136, 8 E. C. L. 59; *Rex v. Gardner*, 1 Cowp. 79; *Rex v. Guardians of Poor*, 3 T. R. 523. But see *Rex v. Liverpool*, 8 East 456, note c.

In an act authorizing guardians of the poor to apprentice poor children to any *inhabitant* or occupier of lands in the parish, *inhabitant* and occupier are synonymous. The idea of residence is not necessarily included. *Rex v. Guardians of Poor*, 3 T. R. 523.

Infant. (See also the title INFANTS, ante, p. 255.)—"All the *inhabitants*" living within certain limits, in an act of incorporation, intends "all those who were *inhabitants* of the several towns from which the new town was taken, who were of full age and *sui juris*." The expression does not include an infant whose father has a settlement elsewhere, but whose mother, who is also his guardian, is divorced from his father, and is settled in

the town. *Marlborough v. Hebron*, 2 Conn. 22.

School. (See also the title SCHOOLS.)—A statute provided that no person should have a right to attend school or to send any scholar to the school in any district in which he was not an *inhabitant*. It was held that the minor children of paupers, supported at the county poor farms, had a right to attend the public school in the district in which such county farm was located. *School Dist. No. 2 v. Polard*, 55 N. H. 503.

But a person temporarily and fraudulently located in a district for the sole purpose of acquiring an education is not an *inhabitant*. *School Dist. No. 1 v. Bragdon*, 23 N. H. 507.

Inhabited Building.—In *State v. Collins*, 2 Idaho 1182, a jail occupied by two prisoners was held to be an *inhabited* building within an arson statute.

Inhabitant of House.—An act providing that an entry into a house for the purpose of committing theft is not burglary when made by a domestic servant or other *inhabitant* of such house, does not cover the case of a boarder in a boarding house entering the room of another boarder. The act applies only to those who have a recognized right of entry, which one guest has not into the room of another. *Ullman v. State*, 1 Tex. App. 221.

Inhabitants of Street.—Persons residing in houses abutting on a street are *inhabitants* of the street, within an act making it penal to disturb such *inhabitants* by loud, indecent, and profane language. *Keller v. State*, 25 Tex. App. 325.

Attachment.—An unmarried man who took lodgings in a place, rented a store, and declared his intention of taking up a permanent residence there, and after six months absconded, is an *inhabitant* within a domestic attachment law. *Kennedy v. Baillie*, 3 Yeates (Pa.) 55.

But one who sails as a supercargo, taking with him the bulk of his property, making a partial assignment of the rest for the benefit of his creditors, and leaving his wife and child behind, and who is absent nine months and is silent as to his return, is not an *inhabitant* within a foreign attachment act. *Nailor v. French*, 4 Yeates (Pa.) 241. In this case the court refused to lay down a general rule to govern this class of cases.

Inhabitants in the Sense of Persons.—The Constitution of *Montana* provided that the legislative assembly should not levy taxes upon the *inhabitants* or property in any county, city, or town, or municipal corporation, for county, town, or municipal purposes. It was held that this did not apply to a license tax. It was argued by counsel that the word *inhabitants* meant persons, and that the only kind of tax that could be levied upon persons would be a license tax, which is personal, while the tax upon property is not personal; and therefore that the use of the word *inhabitant* could mean nothing but a prohibition against the legislature levying the only kind of a personal tax, i. e., a license tax. The court refused to sustain this provision, saying: "It was not important that the section uses the word *inhabitants* as well as 'property,' for the result is the same, and the taxation re-

INHALE. — See note 1.

INHERIT — INHERITOR. — See note 2.

INHERITANCE. (See also the titles ESTATES, vol. 11, p. 364; SUCCESSION; TAXATION.) — The term "inheritance" is usually applied in law to

ferred to meant a property tax; that is to say, a tax upon a person, levied upon the basis of the property owned by him." *State v. Camp Sing*, 18 Mont. 128. See also *People v. Martin*, 60 Cal. 153.

Nonresident Property Holders. — *Inhabitant* has been held not to include nonresident property owners under an act exempting the *inhabitants* of a city "from working upon any road beyond the limits of the city, and from paying any tax to procure laborers to work upon the same." *Fletcher v. Oliver*, 25 Ark. 289.

Out of the Commonwealth. — A *Kentucky* statute authorized service by publication where the defendant was shown to be "out of this commonwealth." In construing this statute the court said: "We think the legislative meaning of the words 'out of this commonwealth' imply and embrace the case of one who is properly described as not 'an inhabitant.'" In law, the term *inhabitant* is used technically with varying meaning in respect of permanency of abode." *Century Dict.* To be an *inhabitant* does not imply the relation of the *inhabitant* to the commonwealth. It refers primarily to one's abode or residence for the time being. If one is not an *inhabitant*, it is understood that he has no abode in the place spoken of. To be 'out of this commonwealth' implies, as we think, one permanently out, as a nonresident or non-inhabitant, and that the act, by authorizing constructive service of notice upon one 'out of this commonwealth,' meant one who had neither domicile nor habitation within it." *Foster v. Givens*, 67 Fed. Rep. 693.

Letters of Administration. — In an action for damages for negligently causing the death of the plaintiff's child, it appeared that at the time of the accident the plaintiff lived, and for seven months prior thereto had lived, in New York; he came from England, and his wife and child were coming to join him and live with him. It was held that the evidence showed *prima facie* that he was domiciled in New York, so that his child was an *inhabitant* thereof, and that the surrogate of that county properly issued letters of administration to him. *Ryall v. Kennedy*, 67 N. Y. 380.

Divorce. — In *Winship v. Winship*, 16 N. J. Eq. 107, a citizen of another state who had brought his effects into New Jersey, and established a residence there, but with the manifest intention of procuring a divorce, and had immediately commenced a suit for that purpose, was held not to be an *inhabitant* of New Jersey, within the meaning of the act concerning divorces.

Legacy, Gift, etc. (See generally the title WILLS.) — A legacy for the benefit of the *inhabitants* of a place would seem to be a good charitable bequest. *Atty.-Gen. v. Clarke*, Amb. 422. See also the title CHARITIES AND TRUSTS FOR CHARITABLE USES, vol. 5, p. 893. And in *Rogers v. Thomas*, 2 Keen 8, the word *inhabitants*, in a gift to the *inhabitants* of a

certain parish, was held to be *designatio personarum*. As to prescriptions see *Willingale v. Maitland*, L. R. 3 Eq. 103, and see the title PRESCRIPTIONS.

1. Inhale. (See also the title LIFE INSURANCE.) — An exception in an insurance policy that the insurance shall not extend to any bodily injury "by the taking of poison, contact with poisonous substances, or *inhaling* of gas, or by any surgical operation or medical treatment," does not cover a case of death caused by breathing illuminating gas which in some way escaped in the room of the insured while he slept. "*Inhaling* of gas" is here used to designate its use in dentistry, surgery, etc. "It contemplated a voluntary and intelligent act by the assured, not an involuntary and unconscious act." *Paul v. Travelers' Ins. Co.*, 45 Hun (N. Y.) 313, affirmed 112 N. Y. 472. To the same effect see *Pickett v. Pacific Mut. L. Ins. Co.*, 144 Pa. St. 79, distinguishing *Pollock v. U. S. Mut. Acc. Assoc.*, 102 Pa. St. 230.

And that the term imports a voluntary act see *McGlother v. Provident Mut. Acc. Co.*, 89 Fed. Rep. 688; *Fidelity, etc., Co. v. Waterman*, 161 Ill. 635.

2. Inheritor. — In *Boys v. Bradley*, 10 Hare 389, it was held that the word *inheritor* had been used merely in the sense of "taker."

Inherit. — In *De Kay v. Irving*, 5 Den. (N. Y.) 646, it was held that the term *inherit* would be held applicable to lands devised by a parent or ancestor to the child or descendant, to effectuate the intention of the testator. See also *Jemison v. Scottish-American Mortg. Co.*, 19 Tex. Civ. App. 232.

In *Rountree v. Pursell*, 11 Ind. App. 522, the terms "descent" and *inherit* were held to have been used synonymously.

Inherited. — At the expiration of the particular estate, a testator provided that the lands should be *inherited* and equally divided among his grandchildren. The court said: "The word *inherited* (which is applied to the real estate only) implies taking immediately from the testator upon his death, as heirs take immediately from their ancestor upon his death." *McArthur v. Scott*, 113 U. S. 380.

Inherit and Pay. — In *Donald v. Forger*, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 16, it was held that the fact that, in an artificial instrument by which a father and his family "pledged" to an employee five hundred dollars within thirty days after the father's death, use was made of the word *inherit* instead of the word "pay," did not make the beneficiary a legatee nor make the agreement one which must be enforced against the estate of the father, since deceased; and that the surviving guarantors were personally liable to the employee. The court said: "The word *inherit*, if used in the instrument in a strictly legal sense, was utterly meaningless, since the expression, when confined to the definition as accepted in law, is applicable only to a right of possession as vested in a lineal heir."

express the passage of real estate from the ancestor to the heir; but when used in connection with goods and chattels, it aptly, if not technically, signifies the succession to the ownership.¹ The term is also applied to an estate which descends or may descend to the heir upon the death of the ancestor.²

INHERITANCE TAX.—See the title SUCCESSION TAX.

INHUMAN TREATMENT.—See the title DIVORCE, vol. 9, p. 786.

INIQUITY.—See note 3.

INITIAL.—See note 4.

INITIALS.—See the title NAMES.

1. *Horner v. Webster*, 33 N. J. L. 391.

So in *East v. Twyford*, 9 Hare 729, the term *inheritance* was held to mean succession.

2. 2 Black. Com. 201.

Inheritance.—*Inheritance* is defined as a perpetuity in lands to a man and his heirs; the right to succeed to the estate of a person who dies intestate. The term is applied to lands. The property which is inherited is called an *inheritance*. The term *inheritance* includes not only lands and tenements which have been acquired by descent, but every fee simple or fee tail which a person has acquired by purchase may be said to be an *inheritance*. In civil law the term means the succession to all the rights of the deceased. Bouv. L. Dict., followed in *Adams v. Akerlund*, 168 Ill. 639.

An estate acquired by *inheritance* is one that has descended to the heir, and has been cast upon him by the single operation of law. *Matter of Donahue*, 36 Cal. 332.

Inheritance in the Sense of Distributive Shares.—A testator directed that on the happening of a certain event his farm should be so'd and the proceeds divided among his several children, and if any one or more of them "should die before inheriting, his, her, or their *inheritance* to be equally divided amongst the remainder." The court said: "The words 'inheriting' and *inheritance*, in the same clause, unquestionably refer to the same thing, and are used in the same sense; and the *inheritance* to which the testator referred must have been the distributive share of the proceeds arising from the sale of the farm. True, it would not be an *inheritance*, in the technical sense of that word, but this will was not drawn with professional accuracy. There is no doubt that the so-called *inheritance* referred to the proceeds of the sale, as there was nothing else to which it could refer; and, indeed, the entire sentence admits of no other

construction." *Ridgeway v. Underwood*, 67 Ill. 426.

Including Personal Property. (See also *INHERIT*—*INHERITOR*, ante, p. 335.)—The words "inherit" and *inheritance* ordinarily relate to real estate. *Rountree v. Pursell*, 11 Ind. App. 522. But when a will directed that no child should control the part given to him, or which should come to him by *inheritance* from another, until of a certain age, it was held that the word *inheritance* was here used as designating anything that the child might be entitled to by succession and included personal property. *Stevens v. Stevens*, 23 N. J. Eq. 300. And in the following cases the term was held to apply to personalty: *Matter of Donahue*, 36 Cal. 329; *Ridgeway v. Underwood*, 67 Ill. 426; *Horner v. Webster*, 33 N. J. L. 390; *Simmons v. Burrell*, (Supm. Ct. Spec. T.) 8 Misc. (N. Y.) 388; *Shippen v. Izard*, 1 S. & R. (Pa.) 222; *Swanson v. Swanson*, 2 Swan (Tenn.) 457; *Matter of Fort*, 14 Wash. 10.

3. Iniquity. (See also the title *EQUITY*, vol. 11, p. 162.)—As used in the maxim, "He that hath committed iniquity shall not have equity," it was said: "This means *iniquity*, not merely moral, nor necessarily what is against sound morals, but anything illegal." *Tufts v. Tufts*, 3 Woodb. & M. (U. S.) 490, citing *Thomson v. Thomson*, 7 Ves. 473; 1 Hovenden on Frauds 163; 1 Spence's Eq. Jur. 422; *Jones v. Randall*, 1 Cowp. 38; *Farmer v. Russell*, 1 B. & P. 296.

4. Initial Terminus.—In *Citizens' St. R. Co. v. Africa*, 100 Tenn. 37, it was said: "By the terms 'initial terminus' and 'final terminus' is meant that there must be a definite beginning point and a definite ending point, fixed by the charter, and that each line must be distinct in respect of its terminus and general route."

INJUNCTIONS.

BY W. A. MARTIN AND S. B. FISHER.

I. DEFINITION, 342.

II. CLASSES OF INJUNCTIONS, 342.

1. *Mandatory and Preventive Injunctions*, 342.
2. *Perpetual or Interlocutory Injunctions*, 344.
 - a. *Perpetual Injunctions*, 344.
 - b. *Interlocutory Injunctions*, 345.
 - (1) *Nature and Object*, 345.
 - (2) *Discretion of Court as to Issuance*, 345.
 - (a) *In General*, 345.
 - (b) *Mandamus to Compel Issuance*, 347.
 - (3) *Necessity of Caution in Issuance*, 347.
3. *Common and Special Injunctions*, 348.
4. *Cross Injunctions*, 348.

III. RESTRAINING ORDERS, 349.

IV. JURISDICTION, 349.

1. *Inherent Power of Courts of Chancery*, 349.
2. *Jurisdiction Conferred by Statutory Provision*, 350.
3. *Power of Federal Courts and Judges*, 350.
4. *Power of State Supreme Courts and Judges*, 351.
5. *Jurisdiction as Affected by Amount Involved*, 351.

V. VENUE, 352.

VI. MATTERS TO BE CONSIDERED IN DETERMINING RIGHT TO INJUNCTION, 352.

1. *Adequacy of Remedy at Law*, 352.
 - a. *In General*, 352.
 - b. *Remedies Provided by Statute*, 354.
2. *Inadequacy of Remedy at Law*, 354.
3. *Laches of Party Seeking Relief by Injunction*, 356.
 - a. *When a Bar to Relief*, 356.
 - b. *When Not a Bar to Relief*, 357.
 - c. *How Laches Determined*, 358.
4. *Certainty or Doubtfulness of Right Sought to Be Protected*, 358.
5. *Nature of Injury Against Which Relief Is Sought*, 360.
 - a. *Substantial Injury Necessary*, 360.
 - b. *Irreparable Injury Necessary*, 360.
 - c. *Apprehended Injury Insufficient*, 361.
 - d. *Whether Relief Granted as to Past Injuries*, 362.
6. *Criminality or Illegality of Act Which It Is Sought to Enjoin*, 363.
7. *Absence of Precedent for Injunction Sought*, 363.
8. *Balance of Convenience*, 363.
9. *Whether Injunction Will Require Change of Possession*, 364.

VII. SECOND INJUNCTIONS, 365.

VIII. ACTIONS AT LAW, 365.

1. *Nature and Extent of Jurisdiction*, 365.
2. *Where Remedy at Law Is Adequate*, 365.
 - a. *Statement of Rule*, 365.
 - b. *Application of Rule*, 366.
3. *Where Remedy at Law Is Inadequate*, 367.
4. *Where There Has Been Fraud, Accident, or Mistake*, 367.

INJUNCTIONS.

5. *Confining Action to Original Forum*, 386.
6. *Enjoining Actions Against Officers of Courts*, 369.
7. *To Prevent Inequitable Defenses*, 369.
8. *Where Discovery Is Necessary to Defense*, 370.
9. *Criminal Prosecutions*, 370.
 - a. *Statement of Rule*, 370.
 - b. *Applications of Rule*, 371.
 - c. *Exceptions to Rule*, 372.
10. *Proceedings in Same Court of Equity*, 372.
11. *Actions Relating to Real Property*, 373.
12. *To Prevent Multiplicity of Suits*, 373.
13. *Necessity of Confessing Judgment*, 373.

IX. JUDGMENTS AND DECREES, 374.

1. *Necessity of Taking Advantage of Legal Remedies*, 374.
 - a. *Introductory Statement*, 374.
 - b. *Failure to Make Defense at Law*, 374.
 - (1) *Defenses Purely Legal*, 374.
 - (a) *Statement of Rule*, 374.
 - (b) *Illustrations of Rule*, 376.
 - (2) *Defenses Cognizable Both at Law and in Equity*, 376.
 - c. *Failure to Take Advantage of Remedy by Appeal, Certiorari, Motion, or Supersedeas*, 377.
2. *Defenses Not Available in Action at Law*, 378.
3. *Judgments Obtained by Fraud*, 379.
 - a. *Statement of General Rule*, 379.
 - b. *Concealment or Suppression of Material Facts*, 381.
 - c. *Loss of Defense or Remedy by Violation of Agreement*, 381.
4. *Fraudulent Alteration of Judgment*, 382.
5. *Judgments Obtained Through Mistake*, 383.
6. *Judgments Obtained Through Accident*, 383.
7. *Judgments Obtained Through Surprise*, 385.
8. *Void Judgments*, 385.
 - a. *Judgments Void for Want of Jurisdiction of Subject-matter*, 385.
 - b. *Judgments Void for Want of Jurisdiction of Person*, 385.
 - (1) *Want of Notice or Process*, 385.
 - (2) *False Return of Service of Process*, 388.
9. *Erroneous or Irregular Judgments*, 389.
 - a. *Statement of Rule*, 389.
 - b. *Applications of Rule*, 389.
10. *Judgments Obtained through Unauthorized Appearance of Attorney*, 391.
11. *Judgments Obtained through Negligence, Incompetence, or Mistake of Attorney*, 392.
12. *Judgments by Default or Confession*, 393.
13. *Judgments Based on Gaming Contracts*, 394.
14. *Judgments Based on Usurious Contracts*, 395.
15. *Judgments Affecting Title to Real Estate*, 396.
16. *Satisfied Judgments*, 396.
17. *Judgments in Criminal Cases*, 397.
18. *Judgments of Other States*, 397.
19. *Judgments or Decrees of Courts of Concurrent Jurisdiction*, 398.
20. *Enjoining Judgment by Agreement*, 398.
21. *Injunctive Relief Against Awards*, 398.
22. *Injunction to Obtain Benefit of Set-off*, 399.

X. EXECUTIONS, 401.

1. *Right to Levy and Sell in General*, 401.
2. *Relief in General — Adequacy of Legal Remedy*, 401.
3. *When Remedy at Law Inadequate*, 403.
4. *Irregularities in Process or Proceedings Thereunder*, 403.
 - a. *Rule Stated*, 403.

INJUNCTIONS.

- b. Application of Rule, 404.*
 - (1) *Irregularity in Writ or Issuance Thereof, 404.*
 - (2) *Irregularity in Proceedings under Writ, 405.*
 - (a) *In General, 405.*
 - (b) *Levy upon Exempt Property, 405.*
- 5. *Seizure of Property of Stranger to Writ, 405.*
 - a. In General, 405.*
 - b. Remedy by Trial of Right of Property, 406.*
 - c. Where Owner Can Defend His Title, 406.*
 - d. When Remedy at Law Is Inadequate, 406.*
 - (1) *In General, 406.*
 - (2) *Property of Peculiar Value to Owner, 407.*
 - e. Claimant under Execution Debtor Must Show Good Title, 408.*
- 6. *To Prevent Cloud upon Title, 408.*
 - a. Power in General, 408.*
 - b. Circumstances Justifying Interference, 408.*
 - (1) *Broad General Rule as to Void Sale, 408.*
 - (2) *Conflict of Authority, 409.*
 - (3) *Doubt as to Title — Attack upon Good Faith, 411.*

XI. POWER OF FEDERAL COURTS TO ENJOIN PROCEEDINGS IN STATE COURTS, 411.

- 1. *Where State Court First Acquires Jurisdiction, 411.*
- 2. *Where Federal Court First Acquires Jurisdiction, 413.*
- 3. *Where Suit Has Been Removed to Federal Court, 414.*
- 4. *Under Bankruptcy Laws, 414.*
 - a. Under Act of 1898, 414.*
 - (1) *Where Time After Which Petition May Be Filed Has Not Elapsed, 414.*
 - (2) *Where Creditor Has Acquired Unlawful Liens Within Four Months of Bankruptcy Proceedings, 415.*
 - (3) *Where Claims Are Such as a Discharge in Bankruptcy Would Release, 417.*
 - (4) *Where Property Is in Actual Possession of Bankruptcy Court, 417.*
 - b. Under Former Bankruptcy Laws, 418.*

XII. POWER OF STATE COURTS TO ENJOIN PROCEEDINGS IN FEDERAL COURTS, 420.

XIII. POWER OF COURTS OF ONE STATE OR COUNTRY TO ENJOIN PROCEEDINGS IN ANOTHER STATE OR COUNTRY, 420.

- 1. *Power to Enjoin Proceedings of Courts of Foreign Country, 420.*
- 2. *Power to Enjoin Proceedings of Courts of Sister State, 421.*
 - a. Under What Circumstances Injunction Granted, 421.*
 - b. Under What Circumstances Injunction Denied, 422.*

XIV. ENJOINING LEGISLATIVE OR EXECUTIVE ACTION, 423.

XV. MODIFICATION, DISSOLUTION, REINSTATEMENT, AND CONTINUANCE, 423.

- 1. *Modification of Injunction, 423.*
- 2. *Dissolution of Injunction, 423.*
 - a. What Courts Have Power to Dissolve, 423.*
 - b. Discretion of Court in Dissolving Injunction, 424.*
 - c. Dissolution by Court of Its Own Motion, 425.*
 - d. Ipso Facto Dissolution, 425.*
 - e. Abatement of Suit, 425.*
 - f. Dissolution and Discharge Distinguished, 425.*
 - g. Grounds of Dissolution, 426.*
 - (1) *Want of Jurisdiction to Issue, 426.*
 - (2) *Improvident Issuance of Injunction, 426.*
 - (3) *Vagueness and Uncertainty of Writ, 427.*
 - (4) *Laches in Prosecuting Cause, 427.*
 - (5) *Laches in Seeking Dissolution, 428.*
 - (6) *Defective Service of Process, 428.*

INJUNCTIONS.

- (7) *Want of Notice of Application*, 428.
- (8) *Complainant's Disobedience of Writ*, 429.
- (9) *Defective or Insufficient Bond*, 429.
 - (a) *In General*, 429.
 - (b) *Requiring Additional Security*, 430.
- (10) *Statute Legalizing Acts Enjoined*, 430.
- (11) *Unconstitutionality of Statute on Which Injunction Based*, 430.
- (12) *Misrepresentation or Suppression of Material Facts*, 431.
- (13) *Technical Errors or Inaccuracies in Bill or Order*, 431.
- (14) *Where Injunction Has Become Useless*, 431.
 - h. *Effect of Dissolution*, 431.
- 3. *Continuance of Injunction*, 432.
 - a. *Judicial Discretion as to Continuance*, 432.
 - b. *Grounds for Continuing Injunction*, 433.
- 4. *Reinstatement or Revival of Injunction*, 435.

XVI. VIOLATION OF INJUNCTION, 435.

- 1. *Duty to Obey and Consequences of Disobedience*, 435.
- 2. *What Constitutes Violation*, 436.
- 3. *Violation by Corporation*, 437.
- 4. *Violation by Agents, Attorneys, and Servants*, 437.
- 5. *Violation by Strangers*, 437.
- 6. *Matters in Excuse or Mitigation*, 438.
 - a. *In General*, 438.
 - b. *Order Erroneously or Improvidently Granted*, 438.
 - c. *Invalidity of Order*, 439.

XVII. BOND, DAMAGES, COSTS, AND EXPENSES, 439.

- 1. *The Bond*, 439.
 - a. *Necessity for*, 439.
 - (1) *At Common Law*, 439.
 - (2) *Under Statutes*, 440.
 - (3) *When Unnecessary*, 441.
 - (4) *Execution of Bond Requisite to Effectiveness of Order*, 443.
 - (a) *General Rule*, 443.
 - (b) *Effect of Issuance Before Execution of Bond*, 443.
 - b. *Purpose of Bond*, 443.
 - c. *By What Statutes Construed*, 444.
 - d. *Execution, Signature, and Approval of Bond*, 444.
 - e. *To Whom Payable*, 445.
 - f. *Consideration for Bond*, 445.
 - g. *To Whose Benefit Bond Inures*, 446.
 - h. *Form and Conditions of Bond*, 446.
 - (1) *When Prescribed by Statute*, 446.
 - (2) *Terms Discretionary with Court in Absence of Statute*, 447.
 - (3) *Necessity for Direction in Order*, 447.
 - (4) *Insertion of Unnecessary Conditions Surplusage*, 447.
 - i. *Amount of Bond*, 447.
 - j. *Insertion of Names of Sureties*, 448.
 - k. *Misrecitals in Bond*, 448.
 - l. *Filing*, 448.
 - m. *Order for Delivery of Bond for Prosecution*, 449.
 - n. *Sureties*, 449.
 - (1) *Necessity for*, 449.
 - (2) *Justification by Sureties*, 449.
 - (3) *Liability of Sureties*, 450.
 - (a) *When Attaches in Case of Signature in Blank*, 450.
 - (b) *Liability to Be Strictly Construed*, 450.
 - aa. *General Rule*, 450.
 - bb. *Liability Limited by Express Terms of Bond*, 450.

INJUNCTIONS.

- cc. May Not Be Varied by Stipulation of Parties to Suit*, 450.
- dd. Parol Evidence Inadmissible to Contradict or Vary Terms*, 451.
- (c) No Liability Beyond Statutory Requirements*, 451.
- (d) Extent of Liability for Damages and Costs*, 451.
- (e) Sureties' Liability After Death of Principal*, 451.
- (f) Liability for Damages Accruing After Injunction Made Permanent*, 452.
- (g) Liability for Damages Pending Appeal After Dissolution*, 452.
- (h) Operation of Bond as Estoppel on Sureties*, 452.
- (4) Sureties Bound by Decree in Injunction Suit*, 453.
- (5) Right of Surety to Appeal from Judgment in Injunction Suit*, 453.
- a. Action on Bond*, 453.
 - (1) Right of Action*, 453.
 - (a) Merger of Common-law Remedy*, 453.
 - (b) Necessity for Actual Issuance of Injunction*, 454.
 - (c) Necessity for Final Decree*, 454.
 - aa. General Rule*, 454.
 - bb. Accrual of Right on Discontinuance or Dismissal*, 456.
 - (d) Accrual of Right on Partial Dissolution*, 457.
 - (e) Right of Action on Dissolution of Injunction Against Judgment*, 457.
 - (2) Defenses to Action on Bond*, 458.
 - (a) General Rule as to Merits of Injunction Suit*, 458.
 - (b) Solvency of Principal*, 458.
 - (c) Want of Jurisdiction*, 458.
 - (d) Disobedience to Writ*, 458.
 - (e) Issuance of Second Injunction*, 458.
 - (f) Reversal of Judgment Enjoined*, 459.
 - (3) Evidence in Action on Bond*, 459.
- 2. Damages*, 459.
 - a. Manner of Assessing*, 459.
 - (1) At Common Law*, 459.
 - (2) Under Statutes*, 460.
 - b. Assessment as Prerequisite to Action on Bond*, 461.
 - c. Effect of Assessment*, 462.
 - d. Right of Court Dissolving Injunction to Enforce Payment*, 462.
 - (1) Rendition of Judgment Against Principal*, 462.
 - (2) Rendition of Judgment Against Principal and Sureties*, 462.
 - e. Enforcement by Action on Bond*, 463.
 - f. Measure of Damages*, 463.
 - (1) Only Proximate Damages Recoverable*, 463.
 - (a) General Rule*, 463.
 - (b) Necessity for Exercise of Care and Prudence by Defendant*, 464.
 - (c) Recovery of Damages on Partial Dissolution*, 464.
 - (d) Recovery of Exemplary Damages*, 464.
 - (2) Amount of Recovery Limited by Bond*, 464.
 - (3) Discretion of Court as to Amount*, 465.
 - (4) Damages on Dissolution of Injunction Against Judgments*, 465.
 - (5) Damages on Dissolution of Injunction Restraining Acts of Ownership*, 466.
 - (6) Damages on Dissolution of Injunction Restraining Sale or Disposal of Goods*, 466.

- (7) *Damages for Enjoining Sale of Property under Deed of Trust*, 466.
3. *Costs and Expenses*, 466.
- a. *In General*, 466.
- b. *Recovery of Counsel Fees on Dissolution of Injunction*, 467.
- (1) *In Federal Courts*, 467.
- (2) *In State Courts*, 467.
- (a) *General Rule*, 467.
- (b) *Limitation of Recovery*, 469.
- (c) *Whether Actual Payment of Counsel Fees Necessary*, 469.
- (d) *Evidence as to Rendition and Value of Services*, 470.
- ! (e) *Amount Question for Fury*, 470.
- (f) *Amount as Affected by Interests Involved*, 470.

CROSS-REFERENCES.

For matters of *PROCEDURE*, see *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*, vol. 10, p. 869.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *CONTEMPT*, vol. 7, p. 25; *EQUITY*, vol. 11, p. 145; *JURISDICTION*; *LACHES*; *LEGISLATURE*; *LIMITATION OF ACTIONS*; *MULTIPLICITY OF SUITS*; *STATES AND STATE OFFICERS*; *UNITED STATES*; *UNITED STATES COURTS*. And see such titles as *COPYRIGHT*, vol. 7, p. 508; *ELECTIONS*, vol. 10, p. 552; *ELEVATED RAILROADS*, vol. 19, p. 896; *LABOR COMBINATIONS*; *MONOPOLIES*; *NUISANCES*; *PATENTS*; *RECEIVERS*; *TAXATION*; *TAX SALES*; *TRADEMARKS*; *TRESPASS*; *ULTRA VIRES*; *WASTE*.

I. DEFINITION. — An injunction is a judicial process issuing out of a court of chancery, whereby a party is required to do or to refrain from doing a particular thing. The most ordinary form of injunction is that which operates to prevent the performance of an act. The other form of injunction commands that an act shall be done.¹

II. CLASSES OF INJUNCTIONS—1. **Mandatory and Preventive Injunctions.** — According to one classification, injunctions are mandatory or preventive. The remedy given by injunction is usually preventive in its character and operates to restrain the commission or continuance of an act or series of acts resulting in injury to the applicant. Nevertheless, it is settled beyond question that equity has jurisdiction in a proper case to compel affirmative performance of an act as well as to restrain it.² These injunctions are called mandatory, and

1. Injunction Defined. — See *Gaines v. Hale*, 26 Ark. 199; *McDonogh v. Calloway*, 7 Rob. (La.) 444; *Pelzer v. Hughes*, 27 S. Car. 414; *Ex p. Jones*, 2 Ark. 93; *Ex p. Grimbail*, T. U. P. Charl. (Ga.) 154.

Definition by Louisiana Code. — Code Prac. La., § 296, provides: "Injunction * * * is a mandate obtained from a court by a plaintiff, prohibiting one from doing an act which he contends may be injurious to him or impair a right which he claims." *State v. Young*, 38 La. Ann. 926.

2. Jurisdiction of Equity to Compel Performance of Acts Recognized — *England*. — *Kelk v. Pearson*, L. R. 6 Ch. 809; *Loog v. Bean*, 26 Ch. D. 306; *Lumley v. Wagner*, 1 De G. M. & G. 604; *Beadel v. Perry*, L. R. 3 Eq. 468; *Bonner v. Great Western R. Co.*, 24 Ch. D. 10; *Spencer v. London, etc., R. Co.*, 8 Sim. 193; *Lane v. Newdigate*, 10 Ves. Jr. 192; *Rankin v. Huskisson*, 4 Sim. 13; *Mexborough v. Bower*, 7 Beav. 127; *Hervey v. Smith*, 1 Kay & J. 389; *Robinson v. Byron*, 1 Bro. C. C. 588.

United States. — *In re Lennon*, 166 U. S. 548; *Webb v. Portland Mfg. Co.*, 3 Sumn. (U. S.) 190.

California. — *Gardner v. Stroeever*, 89 Cal. 26. *Kansas*. — *Webster v. Cooke*, 23 Kan. 637.

Maryland. — *Carlisle v. Stevenson*, 3 Md. Ch. 499.

Massachusetts. — *Lynch v. Union Sav. Inst.*, 159 Mass. 306.

New Hampshire. — *Bailey v. Collins*, 59 N. H. 459.

New Jersey. — *Stanford v. Lyon*, 37 N. J. Eq. 94.

New York. — *Eno v. Christ*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 24; *Wheelock v. Noonan*, 108 N. Y. 179, 2 Am. St. Rep. 405; *Hammond v. Fuller*, 1 Paige (N. Y.) 197;

will never be granted unless extreme or very serious damage at least will ensue from withholding that relief; and each case must of course depend on its own circumstances.¹ The earlier decisions, while reluctant to compel performance of an affirmative act, have accomplished this result by indirection; in other words, an order was granted restraining the person against whom the injunction was asked from allowing the thing to continue, which had the effect of compelling him to take some active measure.² The fact that the work complained of has been completed before the filing of the bill will not affect the petitioner's right to a mandatory injunction if he has been guilty of no acquiescence or delay.³

Whether Granted on Interlocutory Application. — In a number of decisions it is either said or held without qualification that a mandatory injunction will not be issued on an interlocutory application; that an injunction, unless issued after the decree, when it becomes a judicial process, can be used only for the purpose of prevention and protection.⁴ This view, however, is not supported by the weight of authority. While it is conceded that mandatory injunctions should rarely be granted except on final judgment, and only where a plain and imperative case for equitable interference is shown,⁵ they have been frequently issued on interlocutory applications.⁶ It is to be noted, however, that most

People v. McKane, 78 Hun (N. Y.) 154; *Corning v. Troy Iron, etc., Factory*, 40 N. Y. 191.

Ohio. — *Harrison v. Pike*, 4 Cinc. L. Bul. 156, 7 Ohio Dec. (Reprint) 603.

Oklahoma. — *Woodruff v. Wallace*, 3 Okla. 355; *Sproat v. Durland*, 2 Okla. 24.

Pennsylvania. — *Cooke v. Boynton*, 135 Pa. St. 110; *Black Lick Mfg. Co. v. Saltsburg Gas Co.*, 139 Pa. St. 448.

Injury to Private Individual Necessary. — A mandatory injunction will not be granted unless the defendants have done an act which has caused injury and given a right of action to a private individual. *Glossop v. Heston Local Board*, 49 L. J. Ch. 89.

Necessity of Notice. — A mandatory injunction issued without notice is void. *Smith v. People*, 2 Colo. App. 99.

When Mandatory Injunction Will Operate Oppressively. — A mandatory injunction will not be granted on final hearing when it will operate oppressively on the defendant, and when the injury complained of is capable of compensation in damages. *Mayer's Appeal*, 73 Pa. St. 164; *Leibig v. Ginther*, 4 Leg. Gaz. (Pa.) 245.

1. Mandatory Injunctions Granted Only to Prevent Serious Damage. — *Durell v. Pritchard*, L. R. 1 Ch. 244; *Great North of England Clarence, etc., R. Co. v. Clarence R. Co.*, 1 Coll. Ch. Cas. 507; *Westminster Brymbo Coal, etc., Co. v. Clayton*, 36 L. J. Ch. 476; *Longwood Valley R. Co. v. Baker*, 27 N. J. Eq. 171; *Delaware, etc., R. Co. v. Central Stock Yard, etc., Co.*, 43 N. J. Eq. 605; *Bailey v. Schnitzius*, 45 N. J. Eq. 178.

2. Spencer v. London, etc., R. Co., 8 Sim. 193; *Lane v. Newdigate*, 10 Ves. Jr. 192; *Ran-kin v. Huskisson*, 4 Sim. 13; *Mexborough v. Bower*, 7 Beav. 127; *Hervey v. Smith*, 1 Kay & J. 389; *Robinson v. Byron*, 1 Bro. C. C. 588.

Illustration of Rule. — In *Lane v. Newdigate*, 10 Ves. Jr. 192, the object of the injunction was to compel the restoration of a stopgate which had been wrongfully removed. The order granted was not that the stopgate be restored, but to restrain the prevention of use of

the water by the complainant by removal of the stopgate, which was in effect an order to restore it.

3. Right to Injunction Not Affected by Completion of Work Before Application. — *Goodson v. Richardson*, 43 L. J. Ch. 790; *Holmes v. Up-ton*, L. R. 9 Ch. 214, note 2.

4. View that Injunction Will Not Be Granted on Interlocutory Application. — *Gale v. Abbot*, 8 Jur. N. S. 987; *Child v. Douglas*, Kay 577; *McCauley v. Kellogg*, 2 Woods (U. S.) 13; *Washington University v. Green*, 1 Md. Ch. 97; *Audenried v. Philadelphia, etc., R. Co.*, 68 Pa. St. 376, 8 Am. Rep. 195; *Loughlin v. Railroad Co.*, 11 W. N. C. (Pa.) 463.

5. Contrary View. — *Westminster Brymbo Coal, etc., Co. v. Clayton*, 36 L. J. Ch. 476; *Durell v. Pritchard*, L. R. 1 Ch. 244; *Great North of England Clarence, etc., R. Co. v. Clarence R. Co.*, 1 Coll. Ch. Cas. 507; *Fulton Irrigation Ditch Co. v. Twombly*, 6 Colo. App. 554; *Lord v. Carbon Iron Mfg. Co.*, 38 N. J. Eq. 452; *Delaware, etc., R. Co. v. Central Stock-Yard, etc., Co.*, 43 N. J. Eq. 77; *Bailey v. Schnitzius*, 45 N. J. Eq. 184; *White-car v. Michenor*, 37 N. J. Eq. 6; *Close v. Flesher*, (C. Pl. Gen. T.) 8 Misc. (N. Y.) 300; *Ward v. Kelsey*, (Supm. Ct. Spec. T.) 14 Abb. Pr. (N. Y.) 106.

6. Issuance on Interlocutory Application. — *Eng-land*. — *Bonner v. Great Western R. Co.*, 24 Ch. D. 10; *Atty.-Gen. v. Metropolitan Board of Works*, 1 Hem. & M. 320; *Goodson v. Rich-ardson*, L. R. 9 Ch. 221; *Durell v. Pritchard*, L. R. 1 Ch. 244.

Canada. — *Toronto Brewing, etc., Co. v. Blake*, 2 Ont. 175.

United States. — *Cole Silver Min. Co. v. Virginia, etc., Water Co.*, 1 Sawy. (U. S.) 470; *In re Lennon*, 166 U. S. 548; *Toledo, etc., R. Co. v. Pennsylvania Co.*, 54 Fed. Rep. 746; *Pokegama Sugar-Pine Lumber Co. v. Klamath River Lumber, etc., Co.*, 86 Fed. Rep. 528.

Louisiana. — *Black v. Good Intent Tow-Boat Co.*, 31 La. Ann. 497; *Pierce v. New Orleans*, 18 La. Ann. 242; *McDonogh v. Calloway*, 7 Rob. (La.) 444.

of the cases in which mandatory injunctions were ordered on preliminary applications were cases in which some erection was placed and maintained by the defendant to effect the injury complained of, and its removal was ordered or its maintenance forbidden on the ground that by continuing such erection the defendant effected the act from doing which he was restrained.¹ Yet a mandatory injunction on preliminary application is not confined strictly to this class of cases. It has been held that where a chattel is of peculiar value (such as a monument), and the loss of it cannot be fully compensated in damages, equity will interfere and grant full relief by requiring specific delivery on an interlocutory application.²

2. Perpetual or Interlocutory Injunctions — *a. PERPETUAL INJUNCTIONS.* — With regard to the time during which injunctions are operative, they may be classed as interlocutory and perpetual. The nature and effect of an interlocutory injunction are explained in another connection.³ The effect of a perpetual injunction is perpetually to prohibit the defendant from asserting an alleged right, or perpetually to restrain him from the commission of an act contrary to equity and good conscience.⁴ Perpetual injunctions are awarded, or their issuance is directed, or the preliminary injunction already issued is made final or perpetual, by the final decree of the court, or when the rights of the parties so far as relates to the subject of the injunction are finally adjudicated or disposed of by the order or decree of the court.⁵ An injunction will not be perpetuated against a party until he is before the court.⁶ The burden of establishing a right to this kind of injunction is upon the party claiming it. A court will grant a perpetual injunction only when a clear right thereto is shown.⁷ In order to grant relief on the merits of the case by perpetual injunction it is not a prerequisite that a temporary injunction should have been applied for and granted.⁸ When a perpetual injunction is granted in the final decree, the preliminary injunction is merged therein, and its function and operative effect are thereby terminated.⁹ Where the relief sought is purely preventive, a court of equity will not continue or make perpetual an injunction after the cause for which it was granted has been removed and when danger

New Jersey. — Longwood Valley R. Co. v. Baker, 27 N. J. Eq. 106.

New York. — Hanover F. Ins. Co. v. Germania F. Ins. Co., 33 Hun (N. Y.) 539.

1. Preventing Maintenance of Nuisance. — Rankin v. Huskisson, 4 Sim. 13; Pokegama Sugar-Pine Lumber Co. v. Klamath River Lumber, etc., Co., 86 Fed. Rep. 528; Cole Silver Min. Co. v. Virginia, etc., Water Co., 1 Sawyer, (U. S.) 470; McDonogh v. Calloway, 7 Rob. (La.) 442; Black v. Good Intent Tow-Boat Co., 31 La. Ann. 497; Rogers Locomotive, etc., Works v. Erie R. Co., 20 N. J. Eq. 389.

2. Requiring Delivery of Chattel. — McCullom v. Morrison, 14 Fla. 414.

3. See infra, this section, *Interlocutory Injunctions*.

4. Effect of Perpetual Injunctions. — High on Injunctions (2d ed.), § 3.

5. Rights of Parties Must Be Finally Adjudicated. — Bouv. L. Dict.; Day v. Snee, 3 Ves. & B. 170.

Not Provisional Remedy. — A permanent injunction is in no sense a provisional remedy. It is always, and must be, final relief. A court of equity may grant aid in an action where the pleadings show its necessity and the remedy is asked as the element of final relief sought; but after a judgment which does not award it, and which judgment is a final dis-

position of the case, there can be no permanent injunction granted upon affidavits and on orders. Jackson v. Bunnell, 113 N. Y. 216.

6. Defendant Must Be Before Court. — State v. Anderson, 5 Kan. 90; Chapman v. Harrison, 4 Rand. (Va.) 336.

7. Burden of Establishing Right to Injunction. — Spangler v. Cleveland, 43 Ohio St. 526; Grimstone v. Carter, 3 Paige (N. Y.) 421, 24 Am. Dec. 230.

8. Temporary Injunction Not Prerequisite. — Nicholson v. Campbell, 15 Tex. Civ. App. 317; Gale v. Abbot, 8 Jur. N. S. 987; Bacon v. Jones, 4 Mvl. & C. 433.

Improvident Award of Temporary Injunction — Effect. — Although an injunction may have been improvidently granted, yet if it is in effect when the final decree is made in the case, and the complainant shows himself entitled to the relief prayed for, it is proper to make the injunction perpetual so far as the complainant may show himself entitled to relief. Clark v. Young, 2 B. Mon. (Ky.) 59.

Erroneous Refusal to Dissolve Temporary Injunction. — A judgment granting a perpetual injunction is not affected by error in refusing to dissolve a temporary injunction because of failure to give an injunction bond. Nicholson v. Campbell, 15 Tex. Civ. App. 317.

9. Merger of Preliminary Injunction. — Sheward v. Citizens' Water Co., 90 Cal. 635.

Volume XVI.

to the rights of the plaintiff no longer exists,¹ or where the complainant has parted with his interest in the subject-matter of the suit.²

b. INTERLOCUTORY INJUNCTIONS — (1) *Nature and Object.* — An interlocutory or preliminary injunction is a provisional remedy granted before a hearing on the merits, and its sole object is to preserve the subject in controversy in its then existing condition, and without determining any question of right, merely to prevent a further perpetration of wrong or the doing of any act whereby the right in controversy may be materially injured or endangered, until a full and deliberate investigation of the case is afforded to the party.³ In many cases the court will interfere to preserve the property *in statu quo* during the pendency of a suit in which the rights to it are to be decided; and that without expressing, and often without having the means of forming, any opinion as to such rights. It is true that the court will not so interfere if it thinks that there is no real question between the parties; but seeing that there is a substantial question to be decided, it will preserve the property until such question can be disposed of. In order to support an injunction for such purpose, it is not necessary for the court to decide upon the merits in favor of the plaintiff.⁴ The court must satisfy itself, not that the plaintiff has certainly the right, but that he has a fair question to raise as to the existence of such a right. The complainant may be entitled to preliminary injunction in cases where his right to the relief prayed may fail on a hearing on the merits.⁵ A preliminary injunction will never be granted unless from the pressure of an urgent necessity. The damage threatened, and which it is legitimate to prevent, during the pendency of the suit, must be in an equitable point of view of an irreparable character.⁶ The writ will not usually be allowed where its effect is to give the plaintiff the principal relief he seeks without ever bringing the cause to trial.⁷

(2) *Discretion of Court as to Issuance* — (a) *In General.* — A preliminary injunction is not a matter of strict right. Its issuance rests in the sound discretion of the court, and the exercise of this discretion in granting or refusing the injunction will not as a general rule be reviewed on appeal, or otherwise controlled or interfered with.⁸

1. *Where Cause for Injunction Has Ceased.* — *Wiswell v. First Cong. Church*, 14 Ohio St. 31; *Reynolds v. Everett*, 67 Hun (N. Y.) 294.

Perpetuation of Inoperative Injunction. — Where no injunction bond was executed and no injunction process issued, it is error to render a decree that "the injunction be perpetuated." *Plicher v. Higgins*, 2 J. J. Marsh. (Ky.) 17.

2. *Where Complainant Has Parted with Interest.* — *Piedmont, etc., R. Co. v. Speelman*, 67 Md. 260.

3. *Nature of Remedy* — *United States*. — *Andrae v. Redfield*, 12 Blatchf. (U. S.) 425.

Michigan. — *Ladd v. Flynn*, 90 Mich. 181.

Montana. — *Fabian v. Collins*, 2 Mont. 510.

Nebraska. — *Calvert v. State*, 34 Neb. 631.

New Jersey. — *Thompson v. Paterson*, 9 N. J. Eq. 624; *Citizens Coach Co. v. Camden Horse R. Co.*, 29 N. J. Eq. 303.

New York. — *Van Veghten v. Howland*, (Supm. Ct. Spec. T.) 12 Abb. Pr. N. S. (N. Y.) 461.

North Carolina. — *Harrison v. Bray*, 92 N. Car. 488.

Oregon. — *Helm v. Gilroy*, 20 Oregon 520.

South Carolina. — *Pelzer v. Hughes*, 27 S. Car. 408.

Canada. — *Erie, etc., R. Co. v. Great Western R. Co.*, 21 Grant Ch. (U. C.) 171.

4. *Decision on Merits Unnecessary.* — *Great Western R. Co. v. Birmingham, etc., R. Co.*,

2 Phil. 597; *Glascott v. Lang*, 3 Myl. & C. 455; *Flippin v. Knaflle*, 2 Tenn. Ch. 238.

5. *Right to Preliminary Injunction Where Right to Relief Fails.* — *Shrewsbury, etc., R. Co. v. Shrewsbury, etc., R. Co.*, 1 Sim. N. S. 410; *Flippin v. Knaflle*, 2 Tenn. Ch. 238.

6. *Not Granted Except in Case of Pressing Necessity.* — *Citizens Coach Co. v. Camden Horse R. Co.*, 29 N. J. Eq. 303.

7. *Refused when Equivalent to Final Relief.* — *Van Veghten v. Howland*, (Supm. Ct. Spec. T.) 12 Abb. Pr. N. S. (N. Y.) 461.

A Preliminary Injunction Should Not Be Granted Before Answer, unless it is necessary to protect some interest or right of the complainant which may be injured, impaired, or endangered by the proceedings of the defendant in the meantime, as it frequently turns out when the answer comes in that the sole object of obtaining the preliminary injunction was to embarrass the defendant's proceedings and thus compel a compromise. *Osborn v. Taylor*, 5 Paige (N. Y.) 515.

8. *Discretion* — *United States*. — *Norton v. Hood*, 12 Fed. Rep. 763; *Poor v. Carleton*, 3 Sumn. (U. S.) 70; *Clark v. Wooster*, 119 U. S. 322.

Alabama. — *Davis v. Sowell*, 77 Ala. 262.

Arkansas. — *Miller v. O'Bryan*, 36 Ark. 200.

California. — *Goldstein v. Kelly*, 51 Cal. 301.

Connecticut. — *Roath v. Driscoll*, 20 Conn.

Discretion Defined. — The discretion which is vested in the chancellor does not authorize him to grant a preliminary injunction in any and all kinds of cases with or without a reasonable showing.¹ The discretion which he may exercise in granting or refusing a preliminary injunction is a sound judicial discretion, not an arbitrary one, nor a discretion exercised contrary to the facts shown or inapplicable thereto.² If in granting or refusing an injunction errors of law are committed by the chancellor, the judgment will be reversed, and that too although he may be right on the facts.³ A preliminary injunction may sometimes be properly refused upon the same facts which would entitle the party

537, 52 Am. Dec. 352; *Gallup v. Manning*, 48 Conn. 25; *Goodwin v. New York, etc., R. Co.*, 43 Conn. 494.

Dakota. — *Wood v. Bangs*, 1 Dak. 172.

District of Columbia. — *Fayolle v. Texas, etc., R. Co.*, 3 Am. & Eng. R. Cas. 532.

Florida. — *McKinne v. Dickenson*, 24 Fla. 366.

Georgia. — *East Rome Town Co. v. Cothran*, 81 Ga. 359; *Jones v. Rountree*, 92 Ga. 571; *Driskill v. Cobb*, 66 Ga. 649; *Shelton v. Ellis*, 70 Ga. 299; *Bell v. Singer Mfg. Co.*, 65 Ga. 452.

Illinois. — *Hanford v. Blessing*, 80 Ill. 188.

Indiana. — *Logansport v. Uhl*, 99 Ind. 539, 50 Am. Rep. 109.

Iowa. — *Lamb v. Burlington, etc., R. Co.*, 39 Iowa 333; *Rice v. Smith*, 9 Iowa 570; *Fuson v. Connecticut Gen. L. Ins. Co.*, 53 Iowa 609.

Kansas. — *Mead v. Anderson*, 40 Kan. 203; *Olmshead v. Koester*, 14 Kan. 463; *Wood v. Millsbaugh*, 15 Kan. 14.

Louisiana. — *Cameron v. Godchaux*, 48 La. Ann. 1345.

Maine. — *Morse v. Machias Water Power, etc., Co.*, 42 Me. 119.

Maryland. — *Spencer v. Falls Turnpike Road Co.*, 70 Md. 136; *Reddall v. Bryan*, 14 Md. 444, 74 Am. Dec. 550; *Welde v. Scotten*, 59 Md. 76.

Massachusetts. — *Carleton v. Rugg*, 149 Mass. 556, 14 Am. St. Rep. 446; *Owen v. Field*, 12 Allen (Mass.) 457.

Minnesota. — *Pineo v. Heffelfinger*, 29 Minn. 183.

Mississippi. — *Jones v. Commercial Bank*, 5 How. (Miss.) 43, 35 Am. Dec. 419; *Brown v. Speight*, 30 Miss. 45.

Montana. — *Red Mt. Consol. Min. Co. v. Esler*, 18 Mont. 174; *Bennett Bros. Co. v. Congdon*, 20 Mont. 208; *Heinze v. Boston, etc., Consol. Copper, etc., Min. Co.*, 20 Mont. 528; *Butte, etc., Consol. Min. Co. v. Montana Ore Purchasing Co.*, 21 Mont. 539.

Nevada. — *Sierra Nevada Silver Min. Co. v. Sears*, 10 Nev. 346.

New Jersey. — *Scudder v. Trenton Delaware Falls Co.*, 1 N. J. Eq. 694, 23 Am. Dec. 756; *Citizens Coach Co. v. Camden Horse R. Co.*, 29 N. J. Eq. 302.

New York. — *Roberts v. Anderson*, 2 Johns. Ch. (N. Y.) 202; *Wormser v. Brown*, 149 N. Y. 163; *Pratt v. New York Cent., etc., R. Co.*, 90 Hun (N. Y.) 83; *Pond v. Harwood*, 139 N. Y. 111; *Orden v. Kip*, 6 Johns. Ch. (N. Y.) 160; *New York Printing, etc., Establishment v. Fitch*, 1 Paige (N. Y.) 97.

Oklahoma. — *Couch v. Orne*, 3 Okla. 508; *Reaves v. Oliver*, 3 Okla. 62.

Oregon. — *Longshore Printing Co. v. Howell*,

26 Oregon 527, 46 Am. St. Rep. 640; *Burton v. Moffitt*, 3 Oregon 29.

Pennsylvania. — *Richards's Appeal*, 57 Pa. St. 105, 98 Am. Dec. 202.

South Carolina. — *Pelzer v. Hughes*, 27 S. Car. 408.

Tennessee. — *Flippin v. Knaffle*, 2 Tenn. Ch. 238.

Utah. — *Leitham v. Cusick*, 1 Utah 242.

Vermont. — *Griffith v. Hilliard*, 64 Vt. 643; *Stetson v. Stevens*, 64 Vt. 649.

Virginia. — *Jenkins v. Waller*, 80 Va. 668.

Wisconsin. — *Pioneer Wood-Pulp Co. v. Bensley*, 70 Wis. 476; *Sheldon v. Rockwell*, 9 Wis. 166, 76 Am. Dec. 265; *Pettibone v. La Crosse, etc., R. Co.*, 14 Wis. 443; *Cobb v. Smith*, 16 Wis. 661.

1. **Definition.** — *Schilling v. Reagan*, 19 Mont. 508.

2. **Sound Judicial Discretion Meant** — *Alabama*. — *English v. Progress Electric Light, etc., Co.*, 95 Ala. 262.

California. — *Gower v. Andrew*, 59 Cal. 119, 43 Am. Rep. 242.

Georgia. — *Citizens' Bank v. Cook*, 63 Ga. 159.

Indiana. — *College Corner, etc., Gravel Road Co. v. Moss*, 77 Ind. 139.

Louisiana. — *Beebe v. Guinault*, 29 La. Ann. 795.

Montana. — *Schilling v. Reagan*, 19 Mont. 508; *Butte, etc., Consol. Min. Co. v. Montana Ore Purchasing Co.*, 21 Mont. 539.

Nevada. — *Thorn v. Sweeney*, 12 Nev. 251.

New York. — *Rowley v. Van Benthuyssen*, 16 Wend. (N. Y.) 374; *Campbell v. Seaman*, 63 N. Y. 569, 20 Am. Rep. 567; *Strasser v. Moonelis*, 108 N. Y. 611; *McHenry v. Jewett*, 90 N. Y. 58.

This Discretion Depends in General upon Settled and Well-defined Principles which have been established by a long course of adjudication in courts of equity; and in awarding or dissolving an injunction the chancellor is no more at liberty to depart from approved precedents than is a judge who presides on the final decision in a court of law. *Rowley v. Van Benthuyssen*, 16 Wend. (N. Y.) 374; *English v. Progress Electric Light, etc., Co.*, 95 Ala. 262.

When Error in Refusing Injunction Harmless. — An error in refusing a temporary injunction is harmless and unavailing where the trial of the application for a permanent injunction shows that the plaintiff's petition is without merit. *Wood v. Rice*, 68 Ind. 320.

3. **Reversal in Case of Errors of Law.** — *Poole v. Sims*, 67 Ga. 36; *Selchow v. Baker*, 93 N. Y. 59, 45 Am. Rep. 169; *Birge v. Berlin Iron Bridge Co.*, 133 N. Y. 477. See also *Lee v. Montgomery, Walk. (Miss.)* 109.

of right to an injunction on final hearing.¹

(b) **Mandamus to Compel Issuance.** — The granting or refusing of an injunction is not an act ministerial in its character, but an exercise of judicial discretion; and according to the weight of authority, mandamus will not lie to control this discretion and to compel the issuance of an injunction.² Mandamus does not lie to compel the dissolution of an injunction.³

(3) **Necessity of Caution in Issuance.** — The power to grant preliminary injunctions should be exercised with great caution, and an injunction should not be granted except in cases of the most urgent necessity.⁴ Interference by injunction rests on the principle of a clear and certain right to the enjoyment of the subject matter in question and an injurious interruption of that right which on just and equitable grounds ought to be prevented.⁵ The rule that great caution should be exercised is especially applicable in the granting of preliminary injunctions on an *ex parte* hearing, as experience shows that an *ex parte* statement seldom presents the full truth.⁶ The fact that an injunction will not operate injuriously on the party against whom it is sought should not influence the chancellor to grant an injunction in a case where no injunction is necessary.⁷ In determining whether an injunction should be awarded, the facts and particulars of each particular case are to be considered.⁸

1. *Akin v. Davis*, 14 Kan. 143.

2. **Mandamus to Compel Issuance of Injunction.** — *McMillen v. Smith*, 26 Ark. 613; *Ex p. Hays*, 26 Ark. 510 [explaining *Ex p. Conway*, 4 Ark. 302, and *Ex p. Hodges*, 24 Ark. 197, in which cases it was held that mandamus would lie, and stating that under the statutes in force when these decisions were handed down there was no remedy whatever, and that the injunctions were void on this account]; *State v. Judge*, 37 La. Ann. 400; *State v. Police Jury*, 37 La. Ann. 759; *State v. Judge*, 28 La. Ann. 905, 26 Am. Rep. 115.

3. **Mandamus to Compel Dissolution of Injunction.** — *Ex p. Montgomery*, 24 Ala. 98; *State v. Judge*, 36 La. Ann. 394; *Ex p. Schwab*, 98 U. S. 240. See also *Detroit, etc., R. Co. v. Newton*, 61 Mich. 33. *Contra*, *Port Huron, etc., R. Co. v. Judge*, 31 Mich. 456.

4. **Caution to Be Exercised** — *England*. — *Brown v. Newall*, 2 Myl. & C. 570.

United States. — *Bonaparte v. Camden, etc., R. Co.*, *Baldw.* (U. S.) 205; *Potter v. Schenck*, 1 Biss. (U. S.) 515; *Shoemaker v. National Mechanics' Bank*, 2 Abb. (U. S.) 416; *Rend v. Venture Oil Co.*, 48 Fed. Rep. 248; *Avery v. Fox*, 1 Abb. (U. S.) 246; *Morris v. Lowell Mfg. Co.*, 3 Fish. Pat. Cas. 67.

Alabama. — *Vaughan v. Marable*, 64 Ala. 60, *McBryde v. Sayre*, 86 Ala. 458.

Arkansas. — *Ex p. Martin*, 13 Ark. 198, 58 Am. Dec. 321.

Connecticut. — *Bigelow v. Hartford Bridge Co.*, 14 Conn. 580, 36 Am. Dec. 502; *Goodwin v. New York, etc., R. Co.*, 43 Conn. 500.

Georgia. — *Gunn v. Woolfolk*, 66 Ga. 682; *Empire Loan, etc., Assoc. v. Atlanta*, 77 Ga. 496.

Illinois. — *Baxter v. Board of Trade*, 83 Ill. 146.

Indiana. — *Logansport v. Uhl*, 99 Ind. 531, 50 Am. Rep. 109.

Kansas. — *State v. Anderson*, 5 Kan. 90.

Maine. — *Morse v. Machias Water Power, etc., Co.*, 42 Me. 119.

Maryland. — *Maryland Sav. Inst. v. Schroeder*, 8 Gill & J. (Md.) 93, 29 Am. Dec. 528;

Garrett County v. Franklin Coal Co., 45 Md. 470; *Hefebower v. Buck*, 64 Md. 15.

Massachusetts. — *Wing v. Fairhaven*, 8 Cush. (Mass.) 363.

Nebraska. — *Calvert v. State*, 34 Neb. 616.

New Jersey. — *Cornelius v. Post*, 9 N. J. Eq. 196; *Cross v. Morristown*, 18 N. J. Eq. 305; *Mullen v. Jennings*, 9 N. J. Eq. 192; *Booraem v. North Hudson County R. Co.*, 40 N. J. Eq. 557; *Roake v. American Telephone, etc., Co.*, 41 N. J. Eq. 35; *Hackensack Imp. Commission v. New Jersey Midland R. Co.*, 22 N. J. Eq. 94; *West Jersey R. Co. v. Cape May, etc., R. Co.*, 34 N. J. Eq. 164; *Citizens Coach Co. v. Camden Horse R. Co.*, 29 N. J. Eq. 295; *Morris, etc., R. Co. v. Prudden*, 20 N. J. Eq. 530.

New York. — *Gentil v. Arnand*, (N. Y. Super. Ct. Spec. T.) 38 How. Pr. (N. Y.) 96; *Smith v. Lockwood*, 13 Barb. (N. Y.) 209; *Ramsey v. Erie R. Co.*, (Supm. Ct. Spec. T.) 38 How. Pr. (N. Y.) 193; *Woodward v. Harris*, 2 Barb. (N. Y.) 440; *Androvette v. Bowne*, (Supm. Ct.) 4 Abb. Pr. (N. Y.) 440; *Jerome v. Ross*, 7 Johns. Ch. (N. Y.) 315, 11 Am. Dec. 484; *Livingston v. Livingston*, 6 Johns. Ch. (N. Y.) 497, 10 Am. Dec. 353; *Murray v. Knapp*, (Supm. Ct. Spec. T.) 42 How. Pr. (N. Y.) 462.

Pennsylvania. — *Com. v. Rush*, 14 Pa. St. 186.

Oregon. — *Longshore Printing Co. v. Howell*, 26 Oregon 527, 46 Am. St. Rep. 640; *Mendenhall v. Harrisburg Water Co.*, 27 Oregon 38; *Smith v. Gardner*, 12 Oregon 221, 53 Am. Rep. 342.

5. **Rights Must Be Clear and Certain.** — *Morse v. Machias Water Power, etc., Co.*, 42 Me. 119; *Maryland Sav. Inst. v. Schroeder*, 8 Gill & J. (Md.) 93, 29 Am. Dec. 528.

6. **Rule Especially Applicable in Case of Ex Parte Hearings.** — *Murray v. Knapp*, (Supm. Ct. Spec. T.) 42 How. Pr. (N. Y.) 462.

7. *Mullen v. Jennings*, 9 N. J. Eq. 192.

8. **Facts of Each Case Must Be Considered.** — *Camp v. Bates*, 11 Conn. 11, 27 Am. Dec. 707; *Canton Co. v. Northern Cent. R. Co.*, 21 Md.

3. Common and Special Injunctions. — Interlocutory injunctions are sometimes classed as common and special. In the *United States* common injunctions are seldom issued, and the distinction is therefore of little practical importance. Common injunctions are in aid of and secondary to another equity.¹ Their office is to stay proceedings at law until the defendant shall appear and answer to the bill. A common injunction issues as of course on the defendant's default or delay in answering the bill, and only as a means of compelling him to appear and answer.²

A **Special Injunction** is founded, not on the equity existing in the controversy at law between the parties, but on something collateral to it — as, for instance, the necessity of protecting the property in dispute pending the litigation — and is granted only on special application.³ So injunctions of this latter class are usually granted only on notice.⁴ The principles regulating the dissolution of these two classes of injunctions are different.⁵ A common injunction is usually dissolved as a matter of course on the coming in of the answer denying the merits, and without any inquiry into the truth of the allegations, unless some special reason is alleged for continuing it.⁶ In the case of special injunctions the bill may be read as an affidavit to contradict the answer where there is any conflict and the injury to the plaintiff will be irreparable if the relief be not granted; but the injunction will not be dissolved on motion, but will be continued to the hearing to enable the parties to support by proofs their respective allegations.⁷ To dissolve a special injunction before hearing the cause on proof, the defendant must show that the plaintiff has no cause fit to be heard; and if from the answer it appears that there is any question on the matter that should be further inquired into, the injunction will be continued until the hearing.⁸

4. Cross Injunctions. — Where one person obtains an injunction restraining another from interference with or disposition of certain property, and the person thus enjoined appears to be equally entitled to the possession of this property, he may, on application, obtain a like injunction against the other party without any proof of insolvency or other special cause for depriving him of the control.⁹

383; *McCreery v. Sutherland*, 23 Md. 471, 87 Am. Dec. 578; *Matter of Sloan*, 5 N. Mex. 590.

The **Criterion** by which the issuance of a writ of injunction is to be allowed or refused is to be found in the question, Does the position of the parties and the status of the matters involved at this present moment justify the exercise of the power? "Writs of injunction are not to be scattered loosely by the court for a tentative purpose only, but there must appear an impending injury which demands instant preventive action, to justify their allowance." *Mexican Ore Co. v. Mexican Guadalupe Min. Co.*, 47 Fed. Rep. 351.

1. *Purnell v. Daniel*, 8 Ired. Eq. (43 N. Car.) 9.

2. **Office and Nature of Common Injunction.** — *Nelthorpe v. Law*, 13 Ves. Jr. 323; *James v. Downes*, 18 Ves. Jr. 522; *Woodworth v. Rogers*, 3 Woodb. & M. (U. S.) 135; *Bidd v. Shackelford*, 38 Ala. 613; *Marvel v. Ortlip*, 3 Del. Ch. 18; *Buckley v. Corse*, 1 N. J. Eq. 507; *Heilig v. Stokes*, 63 N. Car. 612; *Chadwell v. Jordan*, 2 Tenn. Ch. 637.

3. **Basis of Special Injunction.** — *Jarman v. Saunders*, 64 N. Car. 369; *Buckley v. Corse*, 1 N. J. Eq. 507.

4. **Special Injunctions Granted Only on Notice.** — *Lawrence v. Bowman*, McAll. (U. S.) 419; *High on Injunctions* (2d ed.), § 6.

5. **Distinction in Regard to Dissolution.** — *Capehart v. Mhoon*, Busb. Eq. (45 N. Car.) 34.

6. **Common Injunction Dissolved as Matter of Course.** — *Woodworth v. Rogers*, 3 Woodb. & M. (U. S.) 147; *Jarman v. Saunders*, 64 N. Car. 369; *Marvel v. Ortlip*, 3 Del. Ch. 18; *Heilig v. Stokes*, 63 N. Car. 612.

7. **Hearing Evidence in Support of Allegations.** — *Troy v. Norment*, 2 Jones Eq. (55 N. Car.) 318; *Peterson v. Matthis*, 3 Jones Eq. (56 N. Car.) 31; *Purnell v. Daniel*, 8 Ired. Eq. (43 N. Car.) 11; *McBrayer v. Hardin*, 7 Ired. Eq. (42 N. Car.) 1, 53 Am. Dec. 389.

8. *Purnell v. Daniel*, 8 Ired. Eq. (43 N. Car.) 11.

9. **Cross Injunctions.** — *McCrackan v. Ware*, 3 Sandf. (N. Y.) 688.

Enjoining Plaintiff on His Own Application. — Where the plaintiff in an injunction suit is himself a wrongdoer in first invading the rights of the defendant whom he seeks to enjoin, and should therefore be denied all equitable relief on that account, he cannot complain that, instead of dismissing his complaint, as demanded in the defendant's answer, the court grants a further relief to the defendant by enjoining the plaintiff and thus adjudicating all the equities between the parties growing out of the facts alleged or litigated. *Power v. Athens*, 99 N. Y. 592.

III. RESTRAINING ORDERS.—There is a material distinction between a restraining order and an injunction. A restraining order is intended only as a restraint upon the defendant until the propriety of granting a preliminary injunction can be determined, and it does no more than restrain proceedings until such determination.¹

The Purpose of a Restraining Order is to preserve property which is the subject of controversy in its existing condition until the hearing and determination of the cause, and the order should be limited so as to simply preserve the *status quo*, and should not give an advantage to either party by proceedings in the acquisition or alteration of the property the right to which is disputed, while the hands of the other party are tied.² A restraining order without notice should run only until the hearing of the application for a temporary injunction.³ It ceases to be operative on the expiration of the date fixed by its terms.⁴ And where the injunction is refused on the hearing the restraining order expires by limitation; no formal order setting it aside is necessary.⁵ So the force of the order ceases upon the granting of the injunction.⁶

IV. JURISDICTION—1. **Inherent Power of Courts of Chancery.**—The term "jurisdiction," as used in this section, has no reference to the question whether the facts before the court present a case for the proper exercise of the power of a court of equity. In this connection it means no more than the power to hear or determine a cause; in other words, the power inherent in or conferred upon judicial officers and tribunals to deal with the general subject involved in the action. In this section the inquiry will be directed to the ascertainment of the court or judicial officer before whom proceedings to obtain an injunction should be instituted. Jurisdiction as dependent upon the facts which may appear in a particular case is elsewhere considered. The authority to allow injunctions is an incident of chancery jurisdiction and can be exercised

1. **Restraining Order Defined**—*United States*.—*Fenwick Hall Co. v. Old Saybrook*, 66 Fed. Rep. 389; *Chicago, etc., R. Co. v. Burlington, etc., R. Co.*, 34 Fed. Rep. 481; *Northern Pac. R. Co. v. Spokane*, 52 Fed. Rep. 430.

California.—*Hicks v. Michael*, 15 Cal. 107. *Georgia*.—*Strickland v. Griffin*, 70 Ga. 542. *Indiana*.—*Cincinnati, etc., R. Co. v. Huncheon*, 16 Ind. 436; *Wallace v. McVey*, 6 Ind. 300; *Pleasants v. Vevay, etc., Turnpike Co.*, 42 Ind. 391.

Nebraska.—*State v. Greene*, 48 Neb. 327. *Ohio*.—*Vornholt v. Gordon*, 4 Ohio Dec. 498. *Washington*.—*State v. Lichtenberg*, 4 Wash. 407.

Nature of Restraining Order in Quebec.—The provisional injunction or restraining order in the province of Quebec is assimilated to a writ of mandamus. *Crawford v. Protestant Hospital for Insane*, 4 Montreal Super. Ct. 215.

Modification of Restraining Order.—A temporary restraining order may be so modified as to protect the rights of all the parties thereby affected. *Lake Erie, etc., R. Co. v. Young*, 135 Ind. 426, 41 Am. St. Rep. 430.

Issued by Judge Outside of State.—A judge of the state of Indiana cannot sit in chambers in the state of Michigan and issue a valid restraining order. Where an appeal, however, was not taken until after a trial of the cause on its merits and a final judgment in the appellee's favor which vacated the temporary injunction, the error, though properly saved by the appellant, was held not an available error. *Price v. Bayless*, 131 Ind. 437.

2. **Purpose of Order.**—*Northern Pac. R. Co. v. Spokane*, 52 Fed. Rep. 430; *State v. Licht-*

enberg, 4 Wash. 407; *State v. Greene*, 48 Neb. 327.

3. **Duration of Order.**—*Fenwick Hall Co. v. Old Saybrook*, 66 Fed. Rep. 389; *San Diego Water Co. v. Pacific Coast Steamship Co.*, 101 Cal. 218; *Strickland v. Griffin*, 70 Ga. 542; *Vornholt v. Gordon*, 4 Ohio Dec. 498.

4. *State v. Greene*, 48 Neb. 327.

5. *Hicks v. Michael*, 15 Cal. 107; *San Diego Water Co. v. Pacific Coast Steamship Co.*, 101 Cal. 216; *Walton v. Develing*, 61 Ill. 201; *Leech v. State*, 78 Ind. 570; *Central R. Co. v. Standard Oil Co.*, 33 N. J. Eq. 372.

6. **Effect of Injunction Order.**—*Cohen v. Gray*, 70 Cal. 85.

Dismissal of Cause Before Hearing of Application for Injunction.—Where a restraining order has been granted without notice to the adverse party, and an order made requiring the adverse party to show cause on the day cited why a temporary injunction should not be granted, but before hearing upon the application for temporary injunction the court dismisses the cause, the restraining order cannot be kept in force pending an appeal from the judgment of dismissal. *State v. Lichtenberg*, 4 Wash. 407.

Where Motion for Injunction Is Not Kept Alive.—A restraining order pending an order to show cause why an injunction should not be issued and until the further order of the court is authorized only pending the motion for an injunction, and where there is no appearance at the time when the order to show cause is returnable, and the motion for injunction is not completed or kept alive in any mode, a restraining order falls and ends naturally with

only by courts clothed with general chancery powers or by virtue of legislative enactment.¹ But the fact that the court has both common-law and chancery jurisdiction in no way changes or obliterates its equitable jurisdiction in the absence of express legislative restriction.²

A Stipulation by Parties cannot give jurisdiction to grant an injunction.³

2. Jurisdiction Conferred by Statutory Provision.—Jurisdiction, in determining applications for injunctions, is very largely a matter of statutory regulation under constitutional provisions authorizing it. In all cases the practitioner should carefully consult his own constitutional provisions and statutes. If the statutes are silent on the subject, any court having inherent chancery jurisdiction, as already shown, may hear and determine applications for injunctions.⁴

3. Power of Federal Courts and Judges.—The judges of the Circuit Court have power to grant writs of injunction only in cases where they might be granted by the Circuit Court. If the case is one in which the injunction might be granted only by the Supreme Court, then the application must be made to that court, or to a judge thereof.⁵ The United States Supreme Court, the Circuit Court, and the District Court have the power to issue writs not specifically provided for by statute which may be necessary for the exercise of their jurisdiction and agreeable to the uses and principles of law.⁶ And writs of injunction may be granted by any justice of the Supreme Court in cases where they might be granted by the Supreme Court, or by any judge of the Circuit Court in cases where they might have been granted by such court.⁷ The writ cannot be granted by any court of the United States to

the motion. *San Diego Water Co. v. Pacific Coast Steamship Co.*, 101 Cal. 216.

1. Power to Grant Incidental to Chancery Jurisdiction.—*Cummings v. Des Moines, etc.*, R. Co., 36 Iowa 174; *Bailey v. Stevens*, 11 Utah 175. See also *Emporia v. Soden*, 25 Kan. 588, 37 Am. Rep. 265; *Traverse City, etc., R. Co. v. Seymour*, 81 Mich. 378.

2. Courts Possessing Both Common-law and Chancery Jurisdiction.—*Bailey v. Stevens*, 11 Utah 175.

3. Effect of Stipulation.—*Daly v. Smith*, 38 N. Y. Super. Ct. 158.

4. In California the District Courts are invested, under the constitution, with such equity jurisdiction as was administered in the High Court of Chancery in England. An application for an injunction may be made to the District Court. *People v. Davidson*, 30 Cal. 379. So, by authority of statute, a county judge may grant an injunction in cases in the District Court. *Ruthrauff v. Kresz*, 13 Cal. 639. But the grant of authority to a county judge to award an injunction in cases in the District Court is a mere power to issue mesne process auxiliary to the proper jurisdiction of the District Court, and is not trenching upon it. *Thompson v. Williams*, 6 Cal. 88; *People v. Placer County*, 27 Cal. 151.

There is no prohibition in the constitution against the grant of authority to a county judge to grant injunctions, and the implication is decidedly in favor of its exercise. *Thompson v. Williams*, 6 Cal. 88.

The county judge's act has the same force and efficacy for all intents and purposes as if it was the direct act of the District Court. *Crandall v. Woods*, 6 Cal. 449.

In Louisiana it has been held that a parish judge, acting in place of a district judge dur-

ing his absence from the parish, may issue an injunction. *Green v. Huey*, 23 La. Ann. 705.

By an amendment of the Code of Practice, power to grant orders of injunction in the absence of the judge from the parish, or when he is interested in the cause, is vested in the clerks of District Courts; but they are in all cases required to take bond and security from the party at whose suit the order of injunction is granted. *Witkowski v. Selby*, 15 La. Ann. 328.

In Texas District Courts have power to issue writs of injunction in cases in which a court of chancery would, under the rules of equity, have power to issue it. *Stein v. Frieberg*, 64 Tex. 271. An injunction may be granted by one county judge and made returnable before another. *George v. Dyer*, 1 Tex. App. Civ. Cas., § 780.

Under the Virginia Code of 1873, c. 175, § 6, which authorized every judge of the County Court to grant injunctions, whether the judgment or proceeding enjoined be of a superior or inferior court of his county or district, it was held that a county judge might award an injunction on a bill addressed to the judge of the Circuit Court, and the fact that the bill was afterwards filed in the Circuit Court did not affect the validity of the injunction. *Rosenberger v. Bowen*, 84 Va. 660.

5. Power of Federal Judges.—*Murray v. Overstolz*, 1 McCrary (U. S.) 606.

6. Power of Supreme and Circuit Courts.—Rev. Stat. U. S., § 716. See also *Georgia v. Brailsford*, 3 Dall. (U. S.) 1; *Marine Ins. Co. v. Hodgson*, 7 Cranch (U. S.) 332; *Mississippi v. Johnson*, 4 Wall. (U. S.) 475; *Parker v. Judges*, 12 Wheat. (U. S.) 561.

7. Rev. Stat. U. S., § 719.

stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.¹

As Affected by Diverse Citizenship. — Jurisdiction of a Circuit Court of the United States to enjoin a proceeding in such court does not depend on diverse citizenship of the parties, the proceeding to enjoin not being an original suit, or ancillary and dependent, but supplementary merely to the suit out of which it arose.²

4. Power of State Supreme Courts and Judges. — In a few states the power to grant injunctions has been conferred on the Supreme Courts by constitutional provisions.³ In most jurisdictions where the question has arisen it has been decided that the Supreme Court is without this power.⁴ Constitutional authority therefore is necessary. The power cannot be conferred by statute.⁵ The grant of power to a Supreme Court found in the constitution cannot be limited, abridged, enlarged, or interfered with in any manner by the legislature.⁶ It would seem, however, that the fact that the Supreme Court has no constitutional authority to grant injunctions will not prevent the legislature from conferring this power on a judge of that court.⁷

5. Jurisdiction as Affected by Amount Involved. — The jurisdiction to issue an injunction as affected by the amount in controversy is determined by the value of the object to be obtained by the bill.⁸ An injunction may be of much greater value to the complainant than the amount in controversy in cases of disputes which have already arisen.⁹

Where Amount Involved Is Trifling. — A court of equity will not assume jurisdiction to grant an injunction where the amount involved is trifling. The principle *de minimis non curat lex* would seem to apply as well in courts

1. **When Proceedings in Another State Enjoined.** — Rev. Stat. U. S., § 720. See also *Diggs v. Wolcott*, 4 Cranch (U. S.) 179; *Haines v. Carpenter*, 91 U. S. 254.

2. **Diverse Citizenship.** — *Krippendorf v. Hyde*, 110 U. S. 276; *Freeman v. Howe*, 24 How. (U. S.) 450; *Bradshaw v. Miners' Bank*, 81 Fed. Rep. 902.

3. **Constitutional Authority.** — The Supreme Court of *Alabama* has power to grant injunctions in a proper case. *Davis v. Tuscumbia*, etc., R. Co., 4 Stew. & P. (Ala.) 421.

The power is expressly conferred by Const. Ala. 1875, art. 6, § 2.

The *Texas* Court of Appeals has a limited jurisdiction to grant injunctions. It can exercise such power where the writ may be necessary to enforce its own jurisdiction. *Lopez v. Rodrigues*, 3 Tex. App. Civ. Cas., § 112.

In *Wisconsin* the Supreme Court has original jurisdiction of a writ of injunction as a quasi-prerogative writ, where that is the proper remedy in matters *publici juris*, within the scope of the jurisdiction upon information of the attorney-general, but not in suits between private parties, or for the determination of mere private rights. *Atty.-Gen. v. Chicago*, etc., R. Co., 35 Wis. 425.

4. **Supreme Court Without Jurisdiction in Most States** — *Arkansas*. — *Jones v. Little Rock*, 25 Ark. 284; *Carnall v. Crawford County*, 11 Ark. 617.

Illinois. — *Campbell v. Campbell*, 22 Ill. 664; *Hall v. O'Brien*, 5 Ill. 410; *Bryant v. People*, 71 Ill. 32.

Iowa. — *Reed v. Murphy*, 2 Greene (Iowa) 568.

Michigan. — *Traverse City*, etc., R. Co. v. *Seymour*, 81 Mich. 378.

Missouri. — *State v. Wilson*, 49 Mo. 146; *Lane v. Charles*, 5 Mo. 285.

Ohio. — *Kent v. Mahaffy*, 2 Ohio St. 498; *Pittsburg*, etc., R. Co. v. *Hurd*, 17 Ohio St. 144.

5. **Necessity of Constitutional Authority.** — *Jones v. Little Rock*, 25 Ark. 284; *Campbell v. Campbell*, 22 Ill. 664; *Bryant v. People*, 71 Ill. 32; *Kent v. Mahaffy*, 2 Ohio St. 498. See also *People v. Cook County*, 169 Ill. 205.

6. **Power Not Enlarged by Legislative Action.** — *Campbell v. Campbell*, 22 Ill. 664.

7. **Power Exercised by Judge of Supreme Court.** — *Campbell v. Campbell*, 22 Ill. 664; *Hall v. O'Brien*, 5 Ill. 410; *Reed v. Murphy*, 2 Greene (Iowa) 568; *Mayo v. Haines*, 2 Munf. (Va.) 423.

8. **How Jurisdiction Determined.** — *Mississippi* etc., R. Co. v. *Ward*, 2 Black (U. S.) 485; *Texas*, etc., R. Co. v. *Kuteman*, 13 U. S. App. 99; *Whitman v. Hubbell*, 30 Fed. Rep. 81; *Rainey v. Herbert*, 55 Fed. Rep. 443; *Symonds v. Greene*, 28 Fed. Rep. 834.

Illustrations. — In a suit brought to restrain the maintenance of an awning over a part of the street adjoining the plaintiff's premises, the matter in dispute is the value of the right to maintain the awning, not the amount of damage done by it to the plaintiff. *Whitman v. Hubbell*, 30 Fed. Rep. 81.

In a suit to enjoin the infringement of a trademark, the amount in dispute as determining the question of jurisdiction does not depend on the profits sought to be recovered. *Symonds v. Greene*, 28 Fed. Rep. 834.

9. **Injunction of Greater Value than Amount in Controversy.** — *Texas*, etc., R. Co. v. *Kuteman*, 13 U. S. App. 99; *Symonds v. Greene*, 28 Fed. Rep. 834.

of equity as in courts of law.¹

V. VENUE. — Where the county in which suit to obtain an injunction must be brought is designated by statute, a suit for an injunction cannot be brought in any county other than that designated.²

Power to Grant Injunction Throughout State. — Under a statute which provides that an injunction may be granted by "the district court or any judge thereof," a district judge may grant a temporary order or injunction in an action out of his own district, but he can do so only where the office of judge in such district is vacant, or where it is shown that the judge thereof is absent, or from some cause is unable to act.³

VI. MATTERS TO BE CONSIDERED IN DETERMINING RIGHT TO INJUNCTION —

1. Adequacy of Remedy at Law — *a.* IN GENERAL. — An injunction will not be granted where the remedy at law for the injury complained of is full, adequate, and complete.⁴ The ground of jurisdiction of a court of equity is its ability

1. Trifling Amount Involved. — *Brush v. Carbondale*, 78 Ill. 74; *Purdy v. Manhattan El. R. Co.*, (C. Pl. Gen. T.) 36 N. Y. St. Rep. 43. See also *Yantis v. Burdett*, 3 Mo. 457, in which case it was held that a court of chancery will under no circumstances allow a judgment at law to be stayed for very paltry sums, unless in cases of the grossest fraud; *Woodbury v. Portland Marine Soc.*, 90 Me. 18.

In Texas it is held that under the several provisions of the constitution the District Courts have power to issue writs of injunction in cases in which a court of chancery, under the settled rules of chancery, would have the power to issue them, and this without reference to the amount in controversy. *Anderson County v. Kennedy*, 58 Tex. 616. It is apprehended that what was said in this case was not intended to deny the rule stated in the text, that a court of equity will not take jurisdiction where the amount involved is trifling.

In Illinois there is a statutory provision to the effect that no writ of injunction shall be granted to stay proceedings under a judgment rendered by a justice of the peace for a sum not exceeding twenty dollars, exclusive of costs. *York v. Kile*, 67 Ill. 233; *Starr & Curt. Annot. Stat. Ill.* (1896), c. 69, par. 6.

2. Suit Must Be Brought in County Designated. — *Gorham v. Toomey*, 9 Cal. 77; *Uhlfelder v. Levy*, 9 Cal. 607; *Rickett v. Johnson*, 8 Cal. 34; *Anthony v. Dunlap*, 8 Cal. 26; *Phelan v. Smith*, 8 Cal. 520; *Chipman v. Hibbard*, 8 Cal. 268; *Garretson v. Appleton Mfg. Co.*, 61 Ill. App. 443; *Phelan v. Johnson*, 80 Iowa 727; *Chambers v. King Wrought-Iron Bridge Manufacturing Co.*, 16 Kan. 270; *Norfolk, etc., R. Co. v. Postal Tel. Cable Co.*, 88 Va. 932; *Beckley v. Palmer*, 11 Gratt. (Va.) 625.

Where Injunction Is Ancillary to Relief Sought. — Where it is provided by statute that a suit shall be brought in the county in which the judgment sought to be enjoined is rendered, or in which the act or proceeding sought to be enjoined is being done or apprehended, only a pure bill of injunction is meant, not a bill seeking other relief, to which the injunction sought is merely ancillary. *Muller v. Bayly*, 21 Gratt. (Va.) 521. See also *Beckley v. Palmer*, 11 Gratt. (Va.) 625.

Bringing Suit in County Where Judgment Was Rendered. — It is very commonly provided that where an injunction is granted to stay a suit or judgment at law, the proceeding must be in

the county where the judgment is obtained or the suit is pending. *Garretson v. Appleton Mfg. Co.*, 61 Ill. App. 443.

3. Ellis v. Karl, 7 Neb. 381.

4. Injunction Does Not Lie where Legal Remedy Adequate — *England.* — *Southampton Dock Co. v. Southampton Harbour, etc., Board*, L. R. 11 Eq. 254.

Canada. — *Webster v. Watters*, 21 Rev. Lég. 447; *Fish v. Argenteuil*, 3 Themis 87; *Troop v. Bonnett*, Russ. Eq. Dec. (Nova Scotia) 186; *McKinnon v. McDougall*, Russ. Eq. Dec. (Nova Scotia) 342; *Moren v. Shelburne Lumber Co.*, Russ. Eq. Dec. (Nova Scotia) 134.

United States. — *Pullman Palace Car Co. v. Central Transp. Co.*, 34 Fed. Rep. 357.

Arkansas. — *Ft. Smith v. Brogan*, 49 Ark. 306; *Murphy v. Harbison*, 29 Ark. 340; *Jacks v. Bigham*, 36 Ark. 481; *Ex p. Foster*, 11 Ark. 304; *Driggs' Bank v. Norwood*, 49 Ark. 136, 4 Am. St. Rep. 30.

California. — *Borland v. Thornton*, 12 Cal. 440; *Richards v. Kirkpatrick*, 53 Cal. 433; *Rahm v. Minis*, 40 Cal. 421; *Leach v. Day*, 27 Cal. 643; *Pico v. Sunol*, 6 Cal. 294.

Connecticut. — *Whittlesey v. Hartford, etc., R. Co.*, 23 Conn. 421; *Stannard v. Whittlesey*, 9 Conn. 556; *Hine v. Stephens*, 33 Conn. 505.

Delaware. — *Burton v. Willen*, 6 Del. Ch. 403.

Florida. — *Columbia County v. Bryson*, 13 Fla. 281.

Georgia. — *Camp v. Matheson*, 30 Ga. 170.

Illinois. — *Finley v. Thayer*, 42 Ill. 350; *Goodell v. Lassen*, 69 Ill. 145; *Dickey v. Reed*, 78 Ill. 261; *Turner v. Norton*, 31 Ill. App. 423.

Indiana. — *Laughlin v. Lamasco City*, 6 Ind. 223; *Henderson v. Bates*, 3 Blackf. (Ind.) 460; *Gas Light, etc., Co. v. New Albany*, 139 Ind. 660; *Shoemaker v. Axtell*, 78 Ind. 561; *Hendricks v. Gilchrist*, 76 Ind. 369; *Caskey v. Greensburgh*, 78 Ind. 233; *Sims v. Frankfort*, 79 Ind. 446; *Smith v. Goodknight*, 121 Ind. 312; *Martin v. Murphy*, 129 Ind. 464.

Iowa. — *Stubenrauch v. Neyenesch*, 54 Iowa 567; *Phillips v. Watson*, 63 Iowa 28; *Wilson v. Hughell*, 1 Morr. (Iowa) 461.

Kansas. — *Neeland v. State*, 39 Kan. 162.

Kentucky. — *Ellis v. Gosney*, 1 J. J. Marsh. (Ky.) 348; *Nesmieth v. Bowler*, 3 Bibb (Ky.) 488.

Louisiana. — *Thibodaux v. Wright*, 3 La. Ann. 130; *State v. Judge*, 39 La. Ann. 1108.

Maryland. — *Cockey v. Carroll*, 4 Md. Ch. 344; *Banks v. Busey*, 34 Md. 437; *Whalen v.*

to afford more complete remedies than courts of law can afford — bound and tied down to remedies which they are not capable of moulding and adapting to the necessities of particular cases — thereby preventing irreparable injuries, preventing a multiplicity of suits, and avoiding vexatious litigations. As the court is not in the exercise of its ordinary jurisdiction, but is interfering to supply the deficiency of legal remedies, it interferes only where there is immediate pressing necessity for the prevention of injury, incapable of ade-

Dalashmutt, 59 Md. 250; *Bosley v. M'Kim*, 7 Har. & J. (Md.) 468; *Glenn v. Fowler*, 8 Gill & J. (Md.) 340.

Massachusetts. — *Saunders v. Huntington*, 166 Mass. 96.

Michigan. — *Hathaway v. Mitchell*, 34 Mich. 164; *Beekman v. Fletcher*, 48 Mich. 156; *East Saginaw St. R. Co. v. Wildman*, 58 Mich. 286.

Minnesota. — *Hart v. Marshall*, 4 Minn. 294; *Normandin v. Mackey*, 38 Minn. 417.

Mississippi. — *Learned v. Holmes*, 49 Miss. 290; *Planters' Compress Assoc. v. Hanes*, 52 Miss. 469.

Missouri. — *Wyman v. Hardwick*, 52 Mo. App. 621; *Burgess v. Kattleman*, 41 Mo. 480; *Arnold v. Klepper*, 24 Mo. 273; *Damschroeder v. Thias*, 51 Mo. 100; *Victor Min. Co. v. Morning Star Min. Co.*, 50 Mo. App. 525; *Hopkins v. Lovell*, 47 Mo. 102; *Steines v. Franklin County*, 48 Mo. 167, 8 Am. Rep. 87.

Montana. — *Atchison v. Peterson*, 1 Mont. 561.

Nebraska. — *Warlier v. Williams*, 53 Neb. 143; *Eidemiller Ice Co. v. Guthrie*, 42 Neb. 238.

Nevada. — *Champion v. Sessions*, 1 Nev. 478; *Conley v. Chedic*, 6 Nev. 222.

New Hampshire. — *Winnipissiopee Lake Co. v. Worster*, 29 N. H. 433; *Perkins v. Foye*, 60 N. H. 496; *Eastman v. Amoskeag Mfg. Co.*, 47 N. H. 71.

New Jersey. — *Morris Canal, etc., Co. v. Central R. Co.*, 16 N. J. Eq. 419; *Warne v. Morris Canal, etc., Co.*, 5 N. J. Eq. 410; *New York, etc., R. Co. v. Montclair Tp.*, 47 N. J. Eq. 591; *Morris Canal, etc., Co. v. Society, etc.*, 5 N. J. Eq. 203; *Cornelius v. Post*, 9 N. J. Eq. 196; *Morris Canal, etc., Co. v. Central R. Co.*, 16 N. J. Eq. 420; *Doughty v. Somerville, etc., R. Co.*, 7 N. J. Eq. 51; *Morris Canal, etc., Co. v. Fagin*, 22 N. J. Eq. 430; *Jarvis v. Henwood*, 25 N. J. Eq. 460; *Tichenor v. Wilson*, 8 N. J. Eq. 197; *Columbia Steam Boat Co. v. Wildrin*, 1 Stew. N. J. Dig. 624; *Quackenbush v. Van Riper*, 3 N. J. Eq. 350, 29 Am. Dec. 716; *Wooden v. Wooden*, 3 N. J. Eq. 429; *Higbee v. Camden, etc., R. etc., Co.*, 20 N. J. Eq. 435.

New York. — *Rogers v. Michigan Southern, etc., R. Co.*, 28 Barb. (N. Y.) 539; *Balcom v. Julien*, (N. Y. Super. Ct. Spec. T.) 22 How. Pr. (N. Y.) 349; *Stevenson v. Fayerweather*, (Supm. Ct. Spec. T.) 21 How. Pr. (N. Y.) 449; *Savage v. Allen*, 54 N. Y. 458, 59 Barb. (N. Y.) 291; *Broadwell v. Holcomb*, (N. Y. Super. Ct.) 65 How. Pr. (N. Y.) 502; *Hudson, etc., Canal Co. v. New York, etc., R. Co.*, 9 Paige (N. Y.) 323; *Bouton v. Brooklyn*, 15 Barb. (N. Y.) 375; *Ward v. Kelsey*, (Supm. Ct. Spec. T.) 14 Atb. Pr. (N. Y.) 106; *Marks v. Wilson*, (N. Y. Super. Ct.) 11 Abb. Pr. (N. Y.) 87.

North Carolina. — *Wilkins v. Hogue*, 2 Jones Eq. (55 N. Car.) 479; *McNamee v. Alexander*, 109 N. Car. 242; *Clement v. Foster*, 71 N. Car.

36; *Neville v. Pope*, 95 N. Car. 346; *Daughtry v. Warren*, 85 N. Car. 136; *Jordan v. Lanier*, 73 N. Car. 90.

Ohio. — *McCoy v. U. S. Bank*, 5 Ohio 548; *Hulse v. Wright*, *Wright* (Ohio) 61.

Oklahoma. — *Winans v. Beidler*, 6 Okla. 603.

Oregon. — *Wells v. Wall*, 1 Oregon 295.

Pennsylvania. — *Hewitt's Appeal*, 88 Pa. St. 55; *Shell v. Kemmerer*, 2 Pearson (Pa.) 293; *Stanton v. Akerly*, 1 Lack. Leg. Rec. (Pa.) 449; *Parry's Appeal*, 14 Lanc. Bar (Pa.) 21; *Wilkes-Barre Gas Co. v. Wilkes Barre*, 6 Kulp (Pa.) 431; *Seal v. Railroad Co.*, 2 Leg. Gaz. (Pa.) 182; *Parker v. Spillin*, 10 Phila. (Pa.) 8, 30 Leg. Int. (Pa.) 52; *Sparhawk v. Union Pass. R. Co.*, 54 Pa. St. 401; *Harkinson's Appeal*, 78 Pa. St. 196, 21 Am. Rep. 9.

Texas. — *Geers v. Scott*, (Tex. Civ. App. 1895) 33 S. W. Rep. 587.

Virginia. — *Nicolson v. Hancock*, 4 Hen. & M. (Va.) 491.

West Virginia. — *Kuhn v. Mack*, 4 W. Va. 186; *Surber v. McClintic*, 10 W. Va. 236.

Wisconsin. — *Wilkinson v. Rewey*, 59 Wis. 554.

Remedy by Ejectment. — An injunction will not be granted where an action of ejectment will restore the complainant to all his rights. *Morris Canal, etc., Co. v. Fagin*, 22 N. J. Eq. 430.

Remedy by Action for Damages. — An injunction will not be granted where there is an adequate remedy at law by an action for damages. *Atchison v. Peterson*, 1 Mont. 561; *Cohen v. Goldsboro*, 77 N. Car. 2; *Clement v. Foster*, 71 N. Car. 36; *Martin v. Murphy*, 129 Ind. 464; *Laughlin v. Lamasco City*, 6 Ind. 223.

Remedy by Motion to Quash. — Where a judgment debtor has been arrested on a *capias*, there is a complete and adequate remedy at law by a motion to quash the writ. An injunction to prohibit the further retention of the debtor should not be issued. *Turner v. Norton*, 31 Ill. App. 423.

When General Rule Does Not Apply. — The rule that an injunction will not be granted where there is an adequate remedy at law does not apply where both parties represent the public, so that the loss must fall on the public whichever party succeeds, as, for example, where the commissioners of the sinking fund apply for an injunction to restrain the board of health from interfering with a public market. *Hoffman v. Schultz*, (Supm. Ct. Spec. T.) 31 How. Pr. (N. Y.) 385.

Waiving Benefit of Rule. — Where the defendants come to a hearing upon the merits, it is too late for them to say that the plaintiffs have an adequate remedy at law where no such objection to the jurisdiction of the court was raised in the answer. *Morris Canal, etc., Co. v. Jersey City*, 12 N. J. Eq. 252; *Holmes v. Jersey City*, 12 N. J. Eq. 299.

quate compensation in damages at law, or such as from its continuance or permanent mischief must occasion a constantly recurring grievance which cannot be otherwise prevented but by an injunction.¹ The fact that the matters of defense will be more complicated and difficult of presentation in a court of law is no reason for granting an injunction.²

6. REMEDIES PROVIDED BY STATUTE. — Where a remedy for any particular wrong or injury has been provided by statute, the general rule is that no relief in equity can be afforded in such case by injunction.³ An injunction will be refused on the same general grounds as where there is an adequate remedy at law.⁴ It seems that this general doctrine is applicable although the provisions of the statute may conflict with the notions of natural justice entertained by a court of chancery.⁵ The rule is subject to a few exceptions. It has been held that the fact that a statutory method of procedure is provided does not take away the right of a court of equity to interfere by injunction for the prevention of a multiplicity of suits where the circumstances render such interposition proper.⁶ Under the English Judicature Act 1873, § 25, subsec. 8, which enables the court to grant an injunction in all cases in which it shall appear to the court to be just or convenient, it would seem that the existence of a statutory remedy would be no obstacle in the way of granting an injunction.⁷

2. Inadequacy of Remedy at Law. — A court of equity has jurisdiction in cases of rights recognized and protected by municipal jurisprudence where a plain, adequate, and complete remedy cannot be had in the courts of common law.

The Remedy Must Be Plain, for if it be doubtful and obscure equity will not assert jurisdiction.⁸

1. Ground of Jurisdiction. — *Ogletree v. McQuaggs*, 67 Ala. 580, 42 Am. Rep. 112.

2. Defense More Complicated and Difficult at Law. — *Pullman Palace Car Co. v. Central Transp. Co.*, 34 Fed. Rep. 357.

3. No Relief in Equity where Statutory Remedy Exists. — *Maryland*, — *Cumberland, etc., R. Co. v. Pennsylvania R. Co.*, 57 Md. 267; *Glenn v. Fowler*, 8 Gill & J. (Md.) 340; *Powles v. Dilley*, 9 Gill (Md.) 239.

Minnesota, — *Weber v. Timlin*, 37 Minn. 274. *Pennsylvania*, — *Heckscher v. Shaefer*, 1 Leg. Rec. (Pa.) 285; *Hamersly v. Germantown, etc., Turnpike Co.*, 8 Phila. (Pa.) 314; *Ferree v. Board of Surveyors*, 9 Phila. (Pa.) 518, 29 Leg. Int. (Pa.) 212; *Sparhawk v. Union Pass. R. Co.*, 54 Pa. St. 401; *Brown's Appeal*, 66 Pa. St. 157.

South Carolina, — *Hornesby v. Burdell*, 9 S. Car. 308.

Enjoining Statutory Proceedings. — An injunction will not lie to restrain the execution of the judgment of a special tribunal created by statute for the purpose of affording a cheap and expeditious mode of ejecting a tenant who holds over after the expiration of his lease in a case of which it has jurisdiction. *Hornesby v. Burdell*, 9 S. Car. 308.

Enjoining Order for Election. — In *Minnesota* an injunction will not lie to restrain county commissioners from ordering an election for the removal of a county-seat, because the statute which provides a mode for contesting elections furnishes a full remedy. *Weber v. Timlin*, 37 Minn. 274.

4. Adequate Remedy at Law. — *Cumberland, etc., R. Co. v. Pennsylvania R. Co.*, 57 Md. 267.

5. Injustice of Provisions Immaterial. — *Glenn v. Fowler*, 8 Gill & J. (Md.) 340.

6. Exceptions to Rule — Multiplicity of Suits. — *Bishop v. Rosenbaum*, 58 Miss. 84.

7. Cooper v. Whittingham, 15 Ch. D. 501.

8. Where Remedy Doubtful — England. — *Hanson v. Gardiner*, 7 Ves. Jr. 308; *Norway v. Rowe*, 19 Ves. Jr. 147; *Weymouth v. Boyer*, 1 Ves. Jr. 416; *Hodgson v. Duce*, 4 W. R. 576; *Southampton Dock Co. v. Southampton Harbour, etc., Board*, L. R. 11 Eq. 254.

Canada, — *Halifax v. Nova Scotia Electric Tel. Co.*, *Cochran* 83.

United States, — *La Mothe v. Fink*, 8 Biss. (U. S.) 493; *Watson v. Sutherland*, 5 Wall. (U. S.) 79; *Emack v. Kane*, 34 Fed. Rep. 51; *Cœur d'Alene Consol., etc., Co. v. Miners' Union*, 51 Fed. Rep. 260; *Osborn v. U. S. Bank*, 9 Wheat. (U. S.) 845; *Blindell v. Hagan*, 54 Fed. Rep. 40; *Franklin Tel. Co. v. Harrison*, 145 U. S. 459; *Joy v. St. Louis*, 138 U. S. 1; *Coosaw Min. Co. v. South Carolina*, 144 U. S. 550.

Alabama, — *Ogletree v. McQuaggs*, 67 Ala. 580, 42 Am. Rep. 112; *Teague v. Russell*, 2 Stew. (Ala.) 420; *Nininger v. Norwood*, 72 Ala. 277, 47 Am. Rep. 412.

Arkansas, — *Mooney v. Cooledge*, 30 Ark. 640; *Ex p. Conway*, 4 Ark. 302.

Colorado, — *Fuller v. Swan River Placer Min. Co.*, 12 Colo. 12.

Florida, — *Pensacola, etc., R. Co. v. Spratt*, 12 Fla. 26, 91 Am. Dec. 747.

Illinois, — *Hubbard v. Jasinski*, 46 Ill. 160.

Indiana, — *Kaufman v. Stein*, 138 Ind. 49, 46 Am. St. Rep. 368; *English v. Smock*, 34 Ind. 115, 7 Am. Rep. 215; *Bolster v. Catterlin*, 10 Ind. 117; *Mt. Vernon First Nat. Bank v. Sarlls*, 129 Ind. 201, 28 Am. St. Rep. 185; *Clark v. Jeffersonville, etc., R. Co.*, 44 Ind. 248; *Central Union Telephone Co. v. State*, 110 Ind. 203; *Kern v. Isgrigg*, 132 Ind. 4;

It Must Be Adequate, for if at law it falls short of what a party is entitled to, that founds a jurisdiction in equity.¹

And It Must Be Complete, *i. e.*, it must contain the full end and justice of the case. It must reach the whole mischief and secure the whole right of the party in a perfect manner at the present time and in future. Otherwise equity will interfere and give such relief and aid as the exigency of the particular case may require.² It is not enough that there is a remedy at law. It must be as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.³ Where equity can give relief, the complainant will not be compelled to speculate upon the chance of his obtaining relief at law.⁴ This doctrine has been applied in numberless instances, a few of which are given by way of illustration. Where the damages caused by the injury complained of are in their nature not susceptible of proof or estimation, an injunction will lie.⁵ Another application of this doctrine is in cases where a

Bishop v. Moorman, 98 Ind. 1, 49 Am. Rep. 731; *Denny v. Denny*, 113 Ind. 22; *McAfee v. Reynolds*, 130 Ind. 33, 30 Am. St. Rep. 194; *Winamac v. Huddleston*, 132 Ind. 217; *Baker v. Pottmeyer*, 75 Ind. 451; *Martin v. Murphy*, 129 Ind. 466; *Radican v. Buckley*, 138 Ind. 582.
Iowa. — *Williams v. Peinny*, 25 Iowa 436; *Zorger v. Rapids Tp.*, 36 Iowa 175; *Brandirff v. Harrison County*, 50 Iowa 164; *Cattell v. Lowry*, 45 Iowa 478; *Olmstead v. Henry County*, 24 Iowa 33; *Spencer v. Wheaton*, 14 Iowa 38.

Kansas. — *Webster v. Cooke*, 23 Kan. 640.

Maryland. — *Thruston v. Minke*, 32 Md. 487.

Massachusetts. — *Angier v. Webber*, 14 Allen (Mass.) 211, 92 Am. Dec. 748; *Sherry v. Perkins*, 147 Mass. 212, 9 Am. St. Rep. 689; *Boston Water Power Co. v. Boston, etc.*, R. Corp., 16 Pick. (Mass.) 525.

Minnesota. — *Kolff v. St. Paul Fuel Exch.*, 48 Minn. 215; *Hodgman v. Chicago, etc.*, R. Co., 20 Minn. 48.

Mississippi. — *Irwin v. Lewis*, 50 Miss. 363.

Missouri. — *Western Union Tel. Co. v. Guernsey, etc.*, Electric Light Co., 46 Mo. App. 120; *Parks v. People's Bank*, 97 Mo. 132, 10 Am. St. Rep. 295; *Springfield R. Co. v. Springfield*, 85 Mo. 674.

Montana. — *Sankey v. St. Mary's Female Academy*, 8 Mont. 265; *Northern Pac. R. Co. v. Carland*, 5 Mont. 201.

New Hampshire. — *Webber v. Gage*, 39 N. H. 182.

New Jersey. — *Barr v. Essex Trades Council*, 53 N. J. Eq. 101.

New York. — *Griffith v. Brown*, 3 Robt. (N. Y.) 627; *McIntyre v. Hernandez*, (N. Y. Super. Ct. Spec. T.) 7 Abb. Pr. N. S. (N. Y.) 214; *Valoton v. Seignett*, (Supm. Ct. Spec. T.) 2 Abb. Pr. (N. Y.) 125; *Gilman v. Prentice*, (N. Y. Super. Ct. Spec. T.) 11 Civ. Pro. (N. Y.) 310; *Pettit v. Shepherd*, 5 Paige (N. Y.) 501; *Campbell v. Seaman*, 63 N. Y. 568, 20 Am. Rep. 567; *Knox v. Metropolitan El. R. Co.*, 58 Hun (N. Y.) 517; *American Ins. Co. v. Fisk*, 1 Paige (N. Y.) 92; *Rathbone v. Warren*, 10 Johns. (N. Y.) 595; *Whitlock v. Duffield*, 2 Edw. (N. Y.) 366; *King v. Baldwin*, 17 Johns. (N. Y.) 387, 8 Am. Dec. 415; *Crawford v. Kastner*, (Supm. Ct. Gen. T.) 63 How. Pr. (N. Y.) 90, 26 Hun (N. Y.) 440, *citing* *Graham v. James*, 7 Robt. (N. Y.) 473; *Lewis v. Dodge*, (Supm. Ct. Gen. T.) 17 How. Pr. (N. Y.) 229.

Oregon. — *Weiss v. Jackson County*, 9 Ore-

gon 470; *Longshore Printing Co. v. Howell*, 26 Oregon 527, 46 Am. St. Rep. 640.

Pennsylvania. — *Westmoreland, etc.*, Natural Gas Co. v. De Witt, 130 Pa. St. 235.

Texas. — *Delz v. Winfree*, 80 Tex. 400, 26 Am. St. Rep. 755; *Olive v. Van Patten*, 7 Tex. Civ. App. 630; *Anderson v. Rowland*, 18 Tex. Civ. App. 460.

1. **Remedy Must Be Adequate**. — *Teague v. Russell*, 2 Stew. (Ala.) 420; *Winnipissiogee Lake Co. v. Worster*, 29 N. H. 445; *Rathbone v. Warren*, 10 Johns. (N. Y.) 587; *King v. Baldwin*, 17 Johns. (N. Y.) 384, 8 Am. Dec. 415; *American Ins. Co. v. Fisk*, 1 Paige (N. Y.) 92.

2. **Remedy Must Be Complete**. — *Boyce v. Grundy*, 3 Pet. (U. S.) 215; *Davis v. Wakelee*, 156 U. S. 686; *English v. Smock*, 34 Ind. 115, 7 Am. Rep. 215; *Irwin v. Lewis*, 50 Miss. 363; *Winnipissiogee Lake Co. v. Worster*, 29 N. H. 445; *Barr v. Essex Trades Council*, 53 N. J. Eq. 101.

3. **Mere Remedy at Law Insufficient**. — *Boyce v. Grundy*, 3 Pet. (U. S.) 215; *Watson v. Sutherland*, 5 Wall. (U. S.) 79; *Parks v. People's Bank*, 97 Mo. 132, 10 Am. St. Rep. 295; *Irwin v. Lewis*, 50 Miss. 363.

4. *Davis v. Wakelee*, 156 U. S. 686.

5. **Damages Not Susceptible of Estimation**. — *England*. — *Clowes v. Staffordshire Potteries Waterworks Co.*, L. R. 8 Ch. 125.

Arkansas. — *Mooney v. Cooledge*, 30 Ark. 640.

Colorado. — *Fuller v. Swan River Placer Min. Co.*, 12 Colo. 12.

Indiana. — *Sheeks v. Irwin*, 130 Ind. 31; *Baker v. Pottmeyer*, 75 Ind. 451; *Martin v. Murphy*, 129 Ind. 464.

Massachusetts. — *Angier v. Webber*, 14 Allen (Mass.) 211, 92 Am. Dec. 748.

Missouri. — *Springfield R. Co. v. Springfield*, 85 Mo. 674.

New Hampshire. — *Webber v. Gage*, 39 N. H. 182.

New York. — *House v. Clemens*, (C. Pl. Spec. T.) 24 Abb. N. Cas. (N. Y.) 381.

Pennsylvania. — *Westmoreland, etc.*, Natural Gas Co. v. De Witt, 130 Pa. St. 235.

Instances. — Where a right of way has been claimed and used for over twenty years without interruption or dispute, it cannot be closed against the person acquiring such right by prescription. An action for damages would not afford adequate relief, and an injunction

party has equitable rights by way of defense of which he cannot avail himself in a court of law. In this case a court of equity will interfere by injunction.¹ So, also, where a party has been prevented by fraud, surprise, or accident from making his defense at law.² And an injunction has been granted to prevent the setting up of a threatened defense in case an action at law is brought, on the ground that the defendant is equitably estopped from so doing.³ Equity will also interfere to protect rights when it sufficiently appears that the evidence by which such rights can be established is liable to be lost.⁴

3. Laches of Party Seeking Relief by Injunction — *a. WHEN A BAR TO RELIEF.* — Relief by injunction is not controlled by arbitrary or technical rules, but the application for its exercise is addressed to the conscience and sound discretion of the court.⁵ Where a party seeks the intervention of a court of equity to protect his rights by injunction, the application must be seasonably made, or the rights may be lost, at least so far as equitable intervention is concerned.⁶ It is a rule practically without exception that a court of equity will not grant relief by injunction where the party seeking it, being cognizant of his rights, does not take those steps to assert them which are open to him, but lies by and suffers his adversary to incur expenses and enter into burdensome engagements which would render the granting of an injunction against the completion of his undertaking, or the use thereof when completed, a great injury to him.⁷ A suitor who by laches has made it impossible for a court to enjoin

is the proper remedy to prevent obstruction of it. *Sheeks v. Erwin*, 130 Ind. 31.

So the appropriate remedy for acts which render the development of a mining claim impossible is in equity. It would be impossible to show the extent of the injury to an undeveloped mining claim by acts which render its development impossible. *Fuller v. Swan River Placer Min. Co.*, 12 Colo. 12.

An injunction will lie to prevent the breach of a covenant not to engage in a particular business, because the damages accruing from such a breach are incapable of estimation. *Anderson v. Rowland*, 18 Tex. Civ. App. 460; *Baker v. Pottmeyer*, 75 Ind. 451; *Martin v. Murphy*, 129 Ind. 464.

1. Equitable Rights Not Available in Court of Law. — *Damschroeder v. Thias*, 51 Mo. 100; *Gilman v. Prentice*, (N. Y. Super. Ct. Spec. T.) 11 Civ. Pro. (N. Y.) 310. See also *infra*, this title, *Judgments and Decrees—Defenses Not Available in Action at Law*.

2. Prevention from Making Defense by Fraud or Surprise. — *McIntyre v. Hernandez*, (N. Y. Super. Ct. Spec. T.) 7 Abb. Pr. N. S. (N. Y.) 214. See also *infra*, this title, *Judgments and Decrees*.

3. Davis v. Wakelee, 156 U. S. 680.

4. Where Evidence is Liable to Be Lost. — *Northern Pac. R. Co. v. Carland*, 5 Mont. 201.

Enjoining Illegal Sale. — An injunction has been allowed to prevent an illegal sale under legal process, in order to preserve the property from a cloud upon the title. *Irwin v. Lewis*, 50 Miss. 363; *Pettit v. Shepherd*, 5 Paige (N. Y.) 501.

5. Application Addressed to Discretion of Court. — *Robins v. Latham*, 134 Mo. 466.

6. Application Must Be Seasonably Made — *England.* — *Beck v. Dean*, 3 Jur. N. S. 14.

Alabama. — *Western Union Tel. Co. v. Judkins*, 75 Ala. 428.

Georgia. — *Dulin v. Caldwell*, 28 Ga. 117.

Indiana. — *Barnard v. Sherley*, 135 Ind. 547, 41 Am. St. Rep. 454.

Maryland. — *Binney's Case*, 2 Bland (Md.) 100.

Massachusetts. — *Tash v. Adams*, 10 Cush. (Mass.) 252; *Fuller v. Melrose*, 1 Allen (Mass.) 166.

New Hampshire. — *Bassett v. Salisbury Mfg. Co.*, 47 N. H. 439.

New Jersey. — *Scudder v. Trenton Delaware Falls Co.*, 1 N. J. Eq. 695, 23 Am. Dec. 756.

Pennsylvania. — *Grey v. Ohio, etc.*, R. Co., 1 Grant Cas. (Pa.) 412.

Texas. — *Pillow v. Thompson*, 20 Tex. 206.

Virginia. — *Callaway v. Alexander*, 8 Leigh (Va.) 114, 31 Am. Dec. 640.

7. Opposite Party Induced to Change His Position by Laches of Applicant — *England.* — *Rochdale Canal Co. v. King*, 16 Beav. 630; *Wood v. Sutcliffe*, 2 Sim. N. S. 163; *Cooper v. Hubback*, 7 Jur. N. S. 457; *Saunders v. Smith*, 3 Myl. & C. 711; *Greenhalgh v. Manchester, etc.*, R. Co., 3 Myl. & C. 784; *Birmingham Canal Co. v. Lloyd*, 18 Ves. Jr. 515; *Ripon v. Hobart*, 3 Myl. & K. 169; *Barret v. Blagrave*, 6 Ves. Jr. 104.

United States. — *Haight v. Morris Aqueduct*, 4 Wash. (U. S.) 601.

Alabama. — *Burden v. Stein*, 27 Ala. 115, 62 Am. Dec. 758; *Western Union Tel. Co. v. Judkins*, 75 Ala. 428.

Arkansas. — *Organ v. Memphis, etc.*, R. Co., 51 Ark. 235.

California. — *Real Del Monte Consol. Gold, etc.*, Min. Co. v. *Pond Gold, etc.*, Min. Co., 23 Cal. 83.

Florida. — *Pensacola, etc.*, R. Co. v. *Jackson*, 21 Fla. 146.

Georgia. — *Griffin v. McKenzie*, 7 Ga. 164, 50 Am. Dec. 389; *Wood v. Macon, etc.*, R. Co., 68 Ga. 539; *Water-Lot Co. v. Bucks*, 5 Ga. 315.

Indiana. — *Logansport v. Uhl*, 99 Ind. 531, 50 Am. Rep. 109; *Midland R. Co. v. Smith*, 113 Ind. 233.

Kansas. — *Sleeper v. Bullen*, 6 Kan. 306.

Maryland. — *Binney's Case*, 2 Bland (Md.) 99.

his adversary without inflicting great injury upon him will be left to pursue his ordinary legal remedy.¹ This rule is especially applicable where the object of the injunction is to restrain the completion or use of public works, and where the granting of the injunction will operate injuriously to the public as well as to the party against whom the injunction is sought.² A party who by his laches has made it impossible to prevent the completion or use of public works without great injury or inconvenience to the public will be confined to the relief obtainable by ordinary means in a court of law.³

Laches in Conjunction with Other Causes will operate as a bar to the right to an injunction. Thus, it has been held that where there has been delay in the assertion of legal right and the damage sustained is trifling, an injunction will not be granted.⁴ Nor will this remedy be granted where the applicant has been guilty of laches and has a remedy at law.⁵ A mere objection or protest or threat to take proceedings is not sufficient to exclude the consequences of laches or acquiescence.⁶

Effect of Coverture. — An estoppel against seeking equitable relief by injunction resulting from laches is not affected by the fact that the applicant is a married woman.⁷

b. WHEN NOT A BAR TO RELIEF. — The mere fact that a person applying for an injunction has been guilty of laches will not in all cases operate as a bar to his right to the remedy of an injunction. Thus, where a court of law cannot possibly deal with the subject-matter, delay in filing the bill to enjoin an action at law will not deprive the party of his rights to an injunction.⁸ So it has been said that there can be no reason for applying the general doctrine

Massachusetts. — *Tash v. Adams*, 10 Cush. (Mass.) 252.

Missouri. — *Skrainka v. Oertel*, 14 Mo. App. 474.

Nebraska. — *Clark v. Cambridge, etc.*, Irrigation, etc., Co., 45 Neb. 808; *Brown v. Merrick County*, 18 Neb. 355.

New Hampshire. — *Bassett v. Salisbury Mfg. Co.*, 47 N. H. 440.

New Jersey. — *Carlisle v. Cooper*, 18 N. J. Eq. 241; *Traphagen v. Jersey City*, 29 N. J. Eq. 206; *Scanlan v. Howe*, 24 N. J. Eq. 273; *Erie R. Co. v. Delaware, etc.*, R. Co., 21 N. J. Eq. 283; *Scudder v. Trenton Delaware Falls Co.*, 1 N. J. Eq. 695, 23 Am. Dec. 756; *East Newark County v. Gilbert*, 12 N. J. Eq. 78.

New York. — *Hentz v. Long Island R. Co.*, 13 Barb. (N. Y.) 655; *Ninth Ave. R. Co. v. New York El. R. Co.*, (C. Pl. Gen. T.) 3 Abb. N. Cas. (N. Y.) 347.

Ohio. — *Kellogg v. Ely*, 15 Ohio St. 64; *Chapman v. Mad River, etc.*, R. Co., 6 Ohio St. 136; *Goodin v. Cincinnati, etc.*, Canal Co., 18 Ohio St. 169, 98 Am. Dec. 95.

Oregon. — *Curtis v. La Grande Hydraulic Water Co.*, 20 Oregon 34.

Pennsylvania. — *Seal v. Northern Cent. R. Co.*, 1 Pearson (Pa.) 547.

Vermont. — *McAulay v. Western Vermont R. Co.*, 33 Vt. 311, 78 Am. Dec. 627.

Wisconsin. — *Sheldon v. Rockwell*, 9 Wis. 166, 76 Am. Dec. 265; *Pettibone v. La Crosse, etc.*, R. Co., 14 Wis. 443; *Warden v. Fond du Lac County*, 14 Wis. 618.

1. Party Left to Ordinary Legal Remedies. — *Traphagen v. Jersey City*, 29 N. J. Eq. 206.

2. Where Granting of Injunction Will Operate Injuri-ously to Public — *England.* — *Greenhalgh v. Manchester, etc.*, R. Co., 3 Myl. & C. 784;

Birmingham Canal Co. v. Lloyd, 18 Ves. Jr. 515.

Arkansas. — *Organ v. Memphis, etc.*, R. Co., 51 Ark. 235.

Florida. — *Pensacola, etc.*, R. Co. v. Jackson, 21 Fla. 146.

Indiana. — *Midland R. Co. v. Smith*, 113 Ind. 233.

New Jersey. — *Scanlan v. Howe*, 24 N. J. Eq. 273; *Erie R. Co. v. Delaware, etc.*, R. Co., 21 N. J. Eq. 283.

New York. — *Ninth Ave. R. Co. v. New York El. R. Co.*, (C. Pl. Gen. T.) 3 Abb. N. Cas. (N. Y.) 347; *Hentz v. Long Island R. Co.*, 13 Barb. (N. Y.) 646.

Ohio. — *Goodin v. Cincinnati, etc.*, Canal Co., 18 Ohio St. 169, 98 Am. Dec. 95. See also *Kellogg v. Ely*, 15 Ohio St. 64.

Vermont. — *McAulay v. Western Vermont R. Co.*, 33 Vt. 311, 78 Am. Dec. 627.

3. Party Guilty of Laches Must Seek Legal Remedy. — *Clark v. Cambridge, etc.*, Irrigation, etc., Co., 45 Neb. 798; *Goodin v. Cincinnati, etc.*, Canal Co., 18 Ohio St. 169, 98 Am. Dec. 95.

4. Laches and Trifling Damage. — *Wintle v. Bristol, etc.*, R. Co., 6 L. T. N. S. 20.

5. Laches and Adequate Remedy at Law. — *Seal v. Northern Cent. R. Co.*, 1 Pearson (Pa.) 547; *Parker v. Spillin*, 10 Phila. (Pa.) 8, 30 Leg. Int. (Pa.) 52.

6. Effect of Threat to Take Proceedings. — *Atty.-Gen. v. New York, etc.*, R. Co., 24 N. J. Eq. 50.

7. Coverture as Effecting Estoppel by Laches. — *Seal v. Railroad Co.*, 2 Leg. Gaz. (Pa.) 182; *Parker v. Spillin*, 10 Phila. (Pa.) 8, 30 Leg. Int. (Pa.) 52.

8. Where Subject-matter Not of Legal Cognizance. — *South Eastern R. Co. v. Brogden*, 3 Macn. & G. 8. See also *Fullwood v. Fullwood*, 9 Ch. D. 176.

where the right of the complainant is clear and the injury is of a character which would entitle him to call on the court to entertain jurisdiction without resorting to law in the first instance.¹ In determining whether the right to an injunction is barred by laches, the question whether the defendant has been prejudiced by delay must also be taken into consideration. It has been held that laches which is not in any way prejudicial to the opposite party will not deprive the complainant of his right to an injunction.² Acquiescence in an act or the operation of works which caused merely trifling damage will not bar the right to an injunction for subsequent acts or for a different method of operating the works which will result in great damage.³ Mere delay in applying for an injunction until the right is actually invaded is no ground for refusing an injunction where the injury inflicted is serious and permanent in its nature, or such as would continue to operate in all future time.⁴

Delay from Attempt to Compromise. — And the right to an interlocutory injunction is not barred by laches when the party seeking it has forborne in a reasonable hope of an accommodation and the defendant has not incurred expense or injury from the delay.⁵

c. HOW LACHES DETERMINED. — There is no rule of law which requires that an action by injunction for equitable relief shall be brought within any fixed and definite time. Whether there has been an unreasonable delay in the application for an injunction is a question to be determined from all the circumstances.⁶

4. Certainty or Doubtfulness of Right Sought to Be Protected. — An injunction will not usually be granted where the complainant's right is doubtful.⁷

1. Where Injury Entitles Party to Go into Equity in First Instance. — *Burden v. Stein*, 27 Ala. 115, 62 Am. Dec. 758.

2. Where Opposite Party Is Not Injured by Laches. — *Henwood v. Jarvis*, 27 N. J. Eq. 247.

3. Acquiescence in Acts which Subsequently Become Injurious. — *Western v. Macdermot*, 12 Jur. N. S. 366; *Bankart v. Houghton*, 27 Beav. 425.

4. Where Injury Is Serious and Permanent. — *Davis v. Londgreen*, 8 Neb. 43; *Pyle v. Richards*, 17 Neb. 180.

5. Attempt to Compromise. — *Lee v. Haley*, 18 W. R. 181.

6. How Laches Determined. — *Richards v. Hatfield*, 40 Neb. 879.

7. Doubtful Right — England. — *Turner v. Evans*, 2 De G. M. & G. 740.

Canada. — *Delaney v. Guilbault*, 19 Rev. Lég. 544; *White v. Whitehead*, 7 Montreal Lg. N. 292; *Mallette v. Montreal*, 24 L. C. Jur. 264; *Dobie v. Board of Management*, 9 Rev. Lég. 574.

United States. — *Bonaparte v. Camden*, etc., R. Co., *Baldw. (U. S.)* 205; *Sickles v. Gloucester Mfg. Co.*, 1 Fish. Pat. Cas. 222; *Truly v. Wanzer*, 5 How. (U. S.) 141.

Colorado. — *Union Iron Works Co. v. Bassick Min. Co.*, 10 Colo. 24.

Connecticut. — *Bigelow v. Hartford Bridge Co.*, 14 Conn. 565, 36 Am. Dec. 502; *Roath v. Driscoll*, 20 Conn. 539, 52 Am. Dec. 352.

Florida. — *Ruge v. Apalachicola Oyster Canning*, etc., Co., 25 Fla. 656; *Shivery v. Streep*, 24 Fla. 103.

Maryland. — *State v. Jarrett*, 17 Md. 309.

Michigan. — *Brown v. Gardner*, *Harr. (Mich.)* 291; *Bennett v. Seligman*, 32 Mich. 500; *Bradfield v. Dewell*, 48 Mich. 9.

Missouri. — *Chouteau v. Union R., etc., Co.*, 22 Mo. App. 286.

New Hampshire. — *Eastman v. Amoskeag Mfg. Co.*, 47 N. H. 78.

New Jersey. — *Hackensack Imp. Commission v. New Jersey Midland R. Co.*, 22 N. J. Eq. 94; *Morris Canal, etc., Co. v. Central R. Co.*, 16 N. J. Eq. 419; *Morris Canal, etc., Co. v. Matthieson*, 16 N. J. Eq. 443; *Morris Canal, etc., Co. v. Fagin*, 22 N. J. Eq. 430; *Brown v. Folwell*, 7 N. J. Eq. 593; *Delaware, etc., Canal v. Camden*, etc., R. Co., 16 N. J. Eq. 321; *Erie R. Co. v. Delaware, etc., R. Co.*, 21 N. J. Eq. 284; *Black v. Delaware, etc., Canal Co.*, 22 N. J. Eq. 130, 24 N. J. Eq. 455; *Stevens v. Paterson*, etc., R. Co., 20 N. J. Eq. 126; *Citizens Coach Co. v. Camden Horse R. Co.*, 29 N. J. Eq. 299; *Jersey City Gaslight Co. v. Consumers Gas Co.*, 40 N. J. Eq. 431; *Atlantic City Water Works Co. v. Consumers Water Co.*, 44 N. J. Eq. 427; *Pennsylvania R. Co. v. National Docks, etc., R. Co.*, 53 N. J. Eq. 178; *Mandeville v. Harman*, 42 N. J. Eq. 185; *Pool v. Boylan*, 1 N. J. L. J. 158; *Albright v. Teas*, 37 N. J. Eq. 171; *Hinchman v. Paterson Horse R. Co.*, 17 N. J. Eq. 75, 86 Am. Dec. 252; *Torrey v. Camden*, etc., R. Co., 18 N. J. Eq. 293; *Thompson v. Paterson*, 9 N. J. Eq. 624; *Butler v. Rogers*, 9 N. J. Eq. 487; *Morris Canal, etc., Co. v. Society, etc.*, 5 N. J. Eq. 203; *Delaware, etc., R. Co. v. Central Stock-Yard, etc., Co.*, 43 N. J. Eq. 77, 605; *National Docks, etc., R. Co. v. Pennsylvania R. Co.*, 54 N. J. Eq. 10; *Shields v. Arndt*, 4 N. J. Eq. 234; *Dodge v. Pennsylvania R. Co.*, 43 N. J. Eq. 351, 45 N. J. Eq. 366; *Halsey v. Rapid Transit St. R. Co.*, 47 N. J. Eq. 380; *Hagerty v. Lee*, 45 N. J. Eq. 255; *Stockton v. North Jersey St. R. Co.*, 54 N. J. Eq. 263; *Atty.-Gen. v. Delaware, etc., R. Co.*, 27 N. J. Eq. 1; *Demarest v. Hardham*, 34 N. J. Eq. 469; *Harper v. McElroy*, 42 N. J. Eq. 280; *Greenville Tp. v. Seymour*, 22 N. J. Eq. 458.

Where the right of a party is doubtful, an injunction will not in general be granted to prevent an interference therewith until the right is established at law.¹ Nothing is better settled as a rule of equity procedure than that the complainant is not entitled to a preliminary injunction to protect a right which depends on a disputed question of law, and which question has never been adjudged in his favor by a court of law.² When the principles of law on

New York. — *Redfield v. Middleton*, 7 Bosw. (N. Y.) 649; *Manhattan Gaslight Co. v. Barker*, (N. Y. Super. Ct. Spec. T.) 36 How. Pr. (N. Y.) 233; *North River Steam Boat Co. v. Livingston*, 3 Cow. (N. Y.) 713; *Mapleson v. Del Puente*, (N. Y. Super. Ct. Spec. T.) 13 Abb. N. Cas. (N. Y.) 144; *Daly v. Smith*, (N. Y. Super. Ct. Spec. T.) 49 How. Pr. (N. Y.) 150; *Noonan v. Grace*, 49 N. Y. Super. Ct. 116; *Electrical Power Storage Co. v. Whiting*, 17 N. Y. Wkly. Dig. 263; *Hart v. Albany*, 3 Paige (N. Y.) 213; *Dry Dock, etc., R. Co. v. New York*, 47 Hun (N. Y.) 221.

North Carolina. — *Atty.-Gen. v. Hunter*, 1 Dev. Eq. (16 N. Car.) 12.

Oregon. — *Taylor v. Welch*, 6 Oregon 198; *Ladd v. Ramsby*, 10 Oregon 207; *Tongue v. Gaston*, 10 Oregon 328; *Wattier v. Miller*, 11 Oregon 329.

Pennsylvania. — *Schroder's Appeal*, 1 W. N. C. (Pa.) 528; *Norristown Junction R. Co. v. Citizens' Pass. R. Co.*, 9 Montg. Co. Rep. (Pa.) 103; *Hay v. Immell*, 7 York Leg. Rec. (Pa.) 110; *Getting v. Union Imp. Co.*, 7 Kulp (Pa.) 493, 1 Lack. Leg. N. (Pa.) 51; *Scranton v. Delaware, etc., Canal Co.*, 12 Pa. Co. Ct. 283; *Post v. Young*, 7 Kulp (Pa.) 102; *Parry v. Sensenig*, 12 Lanc. Bar (Pa.) 89; *Brader's Estate*, 2 Kulp (Pa.) 107; *Cadwallader v. Sloan*, 36 Pittsb. Leg. J. 191; *Florey v. Railroad Co.*, 1 Lehigh Val. L. Rep. 125; *Lehigh, etc., Coal Co. v. Delaware, etc., Canal Co.*, 11 Pa. Co. Ct. 185; *Lebanon, etc., St. R. Co. v. Philadelphia, etc., R. Co.*, 2 Pa. Dist. 835; *Cooper v. Second, etc., St. Pass. R. Co.*, 3 Phila. (Pa.) 262, 15 Leg. Int. (Pa.) 357; *Germantown Water Co. v. McCallum*, 5 Phila. (Pa.) 93, 19 Leg. Int. (Pa.) 380; *Harkinson's Appeal*, 78 Pa. St. 203, 21 Am. Rep. 9; *Picar v. Bovolak*, 7 Kulp (Pa.) 241; *Biddle v. Ash*, 2 Ashm. (Pa.) 211; *Brown's Appeal*, 62 Pa. St. 17; *Waring v. Cram*, 1 Pars. Eq. Cas. (Pa.) 516; *Baxter v. Buchanan*, 3 Brews. (Pa.) 435; *Moore v. Green St., etc., Pass. R. Co.*, 3 Phila. (Pa.) 210, 15 Leg. Int. (Pa.) 318; *Windrim v. Philadelphia*, 8 Phila. (Pa.) 361; *McDonald v. Bromley*, 6 Phila. (Pa.) 302, 24 Leg. Int. (Pa.) 157; *Volmar v. Greer*, 7 Phila. (Pa.) 453; *Kelly v. Long*, 7 Phila. (Pa.) 455; *Whetham v. Clyde*, 1 Leg. Gaz. Rep. (Pa.) 53; *Johnson v. Kier*, 3 Pittsb. (Pa.) 204; *Patterson's Appeal*, 129 Pa. St. 109; *Mammoth Vein Consol. Coal Co.'s Appeal*, 54 Pa. St. 183; *Grayson v. Gas Co.*, 4 Lanc. L. Rev. (Pa.) 41; *Lutz v. Lutz*, 34 Pa. L. J. 260; *Trenwith v. Dealy*, 12 Phila. (Pa.) 386, 35 Leg. Int. (Pa.) 68; *Rhea v. Forsyth*, 37 Pa. St. 503; *Minnig's Appeal*, 82 Pa. St. 373; *Washburn's Appeal*, 105 Pa. St. 480.

Applications of Rule. — In *Delaware, etc., R. Co. v. Central Stock-Yard, etc., Co.*, 43 N. J. Eq. 71, 605, the complainants sought an injunction to compel the defendants to receive at their stock yards, from the complainants, live freight carried over their road, and consigned for delivery at the defendant's yards. The injunc-

tion was refused because the question whether the defendants were subject to any duty to the complainants to receive such freight was, as a matter of law, unsettled.

A doubt as to the authority of a corporation to do an act is fatal to an application for an injunction to restrain such act on the ground of want of authority. *Atty.-Gen. v. Delaware, etc., R. Co.*, 27 N. J. Eq. 1; *Bonaparte v. Camden, etc., R. Co.*, *Baldw. (U. S.)* 205; *Morris Canal, etc., Co. v. Society, etc.*, 5 N. J. Eq. 203.

A preliminary injunction will not be granted to enjoin an alleged nuisance, on the ground that the damage is imminent or irreparable, where the evidence is conflicting as to the right of plaintiff and the fact on which the right rests. *Post v. Young*, 7 Kulp (Pa.) 102.

1. Necessity of Establishing Right at Law. — *Alabama.* — *Ogletree v. McQuaggs*, 67 Ala. 580, 42 Am. Rep. 112.

Georgia. — *White v. Crew*, 16 Ga. 416.

New Hampshire. — *Marston v. Durgin*, 54 N. H. 347.

New Jersey. — *Stanford v. Lyon*, 37 N. J. Eq. 94; *Morris Canal, etc., Co. v. Central R. Co.*, 16 N. J. Eq. 419; *Hackensack Imp. Commission v. New Jersey Midland R. Co.*, 22 N. J. Eq. 94; *Stevens v. Paterson, etc., R. Co.*, 20 N. J. Eq. 126; *Shields v. Arndt*, 4 N. J. Eq. 234.

New York. — *Hart v. Albany*, 3 Paige (N. Y.) 213.

North Carolina. — *Atty.-Gen. v. Hunter*, 1 Dev. Eq. (16 N. Car.) 12.

Pennsylvania. — *Rhea v. Forsyth*, 37 Pa. St. 503; *Washburn's Appeal*, 105 Pa. St. 482; *Mammoth Vein Consol. Coal Co.'s Appeal*, 54 Pa. St. 183.

2. United States. — *Bonaparte v. Camden, etc., R. Co.*, *Baldw. (U. S.)* 205.

New Jersey. — *Citizens Coach Co. v. Camden Horse R. Co.*, 29 N. J. Eq. 299; *Long Branch Com'rs v. West End R. Co.*, 29 N. J. Eq. 566; *National Docks R. Co. v. Central R. Co.*, 32 N. J. Eq. 755; *West Jersey R. Co. v. Cape May, etc., R. Co.*, 34 N. J. Eq. 164; *Jersey City Gaslight Co. v. Consumers Gas Co.*, 40 N. J. Eq. 427; *Atty.-Gen. v. Delaware, etc., R. Co.*, 27 N. J. Eq. 24; *Hackensack Imp. Commission v. New Jersey Midland R. Co.*, 22 N. J. Eq. 94; *Black v. Delaware, etc., Canal Co.*, 22 N. J. Eq. 130; *Stevens v. Paterson, etc., R. Co.*, 20 N. J. Eq. 126; *Delaware, etc., R. Co. v. Central Stock-Yard, etc., Co.*, 43 N. J. Eq. 77; *Mandeville v. Harman*, 42 N. J. Eq. 185; *Atlantic City Water Works Co. v. Consumers Water Co.*, 44 N. J. Eq. 427; *Pennsylvania R. Co. v. National Docks, etc., R. Co.*, 53 N. J. Eq. 178; *Thompson v. Paterson*, 9 N. J. Eq. 624; *Greenville Tp. v. Seymour*, 22 N. J. Eq. 458; *Hagerty v. Lee*, 45 N. J. Eq. 1.

New York. — *Noonan v. Grace*, 49 N. Y. Super. Ct. 116.

which rights are disputed will admit of doubt, a court of equity, although satisfied as to what is the correct conclusion of law upon the facts, will not, without a decision of the courts at law establishing such principles, grant an injunction.¹ So if the facts on which the right to the injunction is based are in dispute the injunction will not be granted.² But where the facts upon which the right depends are established or admitted, and the principles of law which on these facts would give the right are settled and established, a court of equity may apply the principles as settled by the court of law to the facts and allow an injunction.³

5. Nature of Injury Against Which Relief Is Sought — a. SUBSTANTIAL INJURY NECESSARY. — To entitle a person to injunctive relief he must establish as against the defendant an actual and substantial injury, and not merely a technical and inconsequential wrong entitling him to nominal damages only; and this is true whether such injury be single or continuous, or whether it be the subject of one act only or of successive acts.⁴

b. IRREPARABLE INJURY NECESSARY. — To warrant the allowance of a writ of injunction it must clearly appear that some act has been done, or is threatened, which will produce irreparable injury to the party asking an injunction. Unless this be made to appear, an injunction should be denied.⁵ If,

Pennsylvania. — Lebanon, etc., St. R. Co. v. Philadelphia, etc., R. Co., 2 Pa. Dist. 835; Patterson's Appeal, 129 Pa. St. 111.

1. Hackensack Imp. Commission v. New Jersey Midland R. Co., 22 N. J. Eq. 94.

2. Conflict as to Facts on which Right Depends. — Roath v. Driscoll, 20 Conn. 539, 52 Am. Dec. 352; Chouteau v. Union R., etc., Co., 22 Mo. App. 286; Mammoth Vein Consol. Coal Co.'s Appeal, 54 Pa. St. 183; Post v. Young, 7 Kulp (Pa.) 102; Trenwith v. Dealy, 12 Phila. (Pa.) 386, 35 Leg. Int. (Pa.) 68.

3. Enfield Toll Bridge Co. v. Hartford, etc., R. Co., 17 Conn. 66, 42 Am. Dec. 716; Hackensack Imp. Commission v. New Jersey Midland R. Co., 22 N. J. Eq. 94; Hacke's Appeal, 101 Pa. St. 245.

4. Necessity of Substantial Injury — *England.* — Holyoake v. Shrewsbury, etc., R. Co., 5 R. & Can. Cas. 421; Ingram v. Morecraft, 33 Beav. 49; Atty.-Gen. v. Gee, L. R. 10 Eq. 136; Atty.-Gen. v. Nichol, 16 Ves. Jr. 342.

Connecticut. — Bigelow v. Hartford Bridge Co., 14 Conn. 580, 36 Am. Dec. 502.

Maine. — Woodbury v. Portland Marine Soc., 90 Me. 18.

Michigan. — Brown v. Gardner, Harr. (Mich.) 291.

Missouri. — Dickhaus v. Olderheide, 22 Mo. App. 76.

New Hampshire. — Bassett v. Salisbury Mfg. Co., 47 N. H. 426.

New Jersey. — Quackenbush v. Van Riper, 3 N. J. Eq. 350, 29 Am. Dec. 716; Hackensack Imp. Commission v. New Jersey Midland R. Co., 22 N. J. Eq. 94; Morris, etc., R. Co. v. Prudden, 20 N. J. Eq. 531, reversing 19 N. J. Eq. 386; Shreve v. Voorhees, 3 N. J. Eq. 25.

New York. — McSorley v. Gomprecht, (N. Y. Super. Ct. Eq. T.) 30 Abb. N. Cas. (N. Y.) 412; Neiman v. Butler, (C. Pl. Gen. T.) 46 N. Y. St. Rep. 928; Hull v. Ely, (Supm. Ct.) 2 Abb. N. Cas. (N. Y.) 440; Campbell v. Seaman, 63 N. Y. 568, 20 Am. Rep. 507; Jerome v. Ross, 7 Johns. Ch. (N. Y.) 315, 11 Am. Dec. 484; Wormser v. Brown, 149 N. Y. 163; McHenry v. Jewett, 90 N. Y. 58; Rogers v. Michigan

Southern, etc., R. Co., 28 Barb. (N. Y.) 542; Brush v. Manhattan R. Co., (C. Pl. Eq. T.) 26 Abb. N. Cas. (N. Y.) 73; Hoffman v. Manhattan El. R. Co., (C. Pl. Gen. T.) 1 Misc. (N. Y.) 155; Gray v. Manhattan R. Co., 128 N. Y. 499; Purdy v. Manhattan El. R. Co., (C. Pl. Gen. T.) 13 N. Y. Supp. 295.

Pennsylvania. — Second, etc., St. Pass. R. Co. v. Morris, 8 Phila. (Pa.) 304.

Vermont. — Sargent v. George, 56 Vt. 627.

Wisconsin. — Head v. James, 13 Wis. 641.

Even at law the principle that for every wrong there is a remedy is not of universal prevalence, but is qualified by those other maxims, *de minimis non curat lex* and *injuria sine damno*. Purdy v. Manhattan El. R. Co., (C. Pl. Gen. T.) 36 N. Y. St. Rep. 43.

If the injury is merely nominal an injunction will not be granted, even though an action at law might be maintained for the same injury. Neiman v. Butler, (C. Pl. Gen. T.) 46 N. Y. St. Rep. 928; Sargent v. George, 56 Vt. 627.

5. Injunction Refused where Irreparable Injury Not Shown — *Arkansas.* — Vaughan v. Bowie, 30 Ark. 278.

United States. — Bonaparte v. Camden, etc., R. Co., Baldw. (U. S.) 206.

California. — Mechanics' Foundry v. Ryall, 75 Cal. 601; Waldron v. Marsh, 5 Cal. 119; Crescent City Wharf, etc., Co. v. Simpson, 77 Cal. 286; Richards v. Dower, 64 Cal. 63.

Connecticut. — Whittlesey v. Hartford, etc., R. Co., 23 Conn. 433; Hine v. Stephens, 33 Conn. 505.

Florida. — Crawford v. Bradford, 23 Fla. 404.

Iowa. — Dubuque, etc., R. Co. v. Cedar Falls, etc., R. Co., 76 Iowa 702.

Kentucky. — Shinkle v. Covington, 83 Ky. 420.

Maryland. — Cockey v. Carroll, 4 Md. Ch. 344.

Michigan. — Edwards v. Allouez Min. Co., 38 Mich. 46, 31 Am. Rep. 301; Brown v. Gardner, Harr. (Mich.) 291.

Minnesota. — Hart v. Marshall, 4 Minn. 296.

however, the injury threatened be irreparable, chancery will interfere by injunction.¹ An injury is irreparable either from its own nature, as when the party injured cannot be adequately compensated therefor in damages or when the damages which may result therefrom cannot be measured by any certain pecuniary standard,² or when it is shown that the party who must respond is insolvent, and for that reason incapable of responding in damages.³

c. APPREHENDED INJURY INSUFFICIENT. — The court cannot grant an injunction to allay the fears and apprehensions of individuals. They must show the court that the acts against which they ask for protection are not only threatened, but will in all probability be committed, to their injury.⁴ An injunction should not be issued to prevent the doing of an act unless the petitioner shows reasonable grounds for apprehending that it will otherwise be done.⁵ If, however, it is shown that the defendants threaten to do the

Mississippi. — Jones *v.* Brandon, 60 Miss. 556.
Nebraska. — Eidemiller Ice Co. *v.* Guthrie, 42 Neb. 238.

Nevada. — Thorn *v.* Sweeney, 12 Nev. 251; Champion *v.* Sessions, 1 Nev. 478; Conley *v.* Chedic, 6 Nev. 222.

New Hampshire. — Eastman *v.* Amoskeag Mfg. Co., 47 N. H. 71; Perkins *v.* Foye, 60 N. H. 406.

New Jersey. — Kerlin *v.* West, 4 N. J. Eq. 449; Morris Canal, etc., Co. *v.* Central R. Co., 16 N. J. Eq. 420; Booraem *v.* North Hudson County R. Co., 40 N. J. Eq. 557; Citizens Coach Co. *v.* Camden Horse R. Co., 29 N. J. Eq. 299; West Jersey R. Co. *v.* Cape May, etc., R. Co., 34 N. J. Eq. 164; Halsey *v.* Rapid Transit St. R. Co., 47 N. J. Eq. 380; Thompson *v.* Paterson, 9 N. J. Eq. 624; West *v.* Walker, 3 N. J. Eq. 280; Cornelius *v.* Post, 9 N. J. Eq. 196; Brown *v.* Folwell, 7 N. J. Eq. 593.

New York. — Fargo *v.* New York, etc., R. Co., (Supm. Ct.) 3 Misc. (N. Y.) 205; Hart *v.* Albany, 3 Paige (N. Y.) 214; McSorley *v.* Gomprecht, (N. Y. Super. Ct. Eq. T.) 30 Abb. N. Cas. (N. Y.) 412; Johnston Harvester Co. *v.* Meinhardt, (Supm. Ct. Spec. T.) 9 Abb. N. Cas. (N. Y.) 393; Power *v.* Athens, 19 Hun (N. Y.) 165.

North Carolina. — Lewis *v.* John L. Roper Lumber Co., 99 N. Car. 11; Irwin *v.* Davidson, 3 Ired. Eq. (38 N. Car.) 311; Eborn *v.* Waldo, 6 Jones Eq. (59 N. Car.) 111; Frink *v.* Stewart, 94 N. Car. 484; Lyerly *v.* Wheeler, Busb. Eq. (45 N. Car.) 267, 59 Am. Dec. 596; Howell *v.* Howell, 5 Ired. Eq. (40 N. Car.) 258; Thompson *v.* McNair, Phil. Eq. (62 N. Car.) 121.

Pennsylvania. — McCall *v.* Barrie, 14 W. N. C. (Pa.) 419; Courtright's Estate, 16 W. N. C. (Pa.) 443; Kelly *v.* Philadelphia, 12 Phila. (Pa.) 423, 35 Leg. Int. (Pa.) 274; Kennedy *v.* Burgin, 1 Phila. (Pa.) 441, 10 Leg. Int. (Pa.) 114; Loughery *v.* McIlvain, 8 Phila. (Pa.) 278; Pfund *v.* Berlinger, 9 Phila. (Pa.) 549, 29 Leg. Int. (Pa.) 68; Park Coal Co. *v.* O'Donnell, 7 Leg. Gaz. (Pa.) 149, 4 Luz. Leg. Reg. (Pa.) 127; Spring Brook R. Co. *v.* Bryan, 4 Luz. Leg. Reg. (Pa.) 117; Iron, etc., Co. *v.* Coal Co., 4 C. Pl. Rep. (Pa.) 129.

Wisconsin. — Janesville Bridge Co. *v.* Stoughton, 1 Pin. (Wis.) 667.

1. Injunction Granted where Injury Irreparable. — Western Union Tel. Co. *v.* Nerman, 77 Fed. Rep. 13; Erhardt *v.* Boaro, 113 U. S. 537; Schneider *v.* Brown, 85 Cal. 205; Bolton *v.* McShane, 67 Iowa 207; Hunter *v.* Bertram,

6 Ky. L. Rep. 593; Phillips *v.* Winslow, 18 B. Mon. (Ky.) 448, 68 Am. Dec. 729; Jones *v.* Brandon, 60 Miss. 556; Williamston, etc., R. Co. *v.* Battle, 66 N. Car. 540; Marshall *v.* Stanly County, 89 N. Car. 103; Flippin *v.* Knaffle, 2 Tenn. Ch. 238; McMinnville, etc., R. Co. *v.* Huggins, 7 Coldw. (Tenn.) 226. See also the preceding note.

2. What Is Irreparable Injury. — Eidemiller Ice Co. *v.* Guthrie, 42 Neb. 238; Kerlin *v.* West, 4 N. J. Eq. 449; Smallman *v.* Onions, 3 Bro. C. C. 623.

3. Insolvency of Defendant. — *England.* — Smallman *v.* Onions, 3 Bro. C. C. 623.

California. — West *v.* Smith, 52 Cal. 322; Richards *v.* Dower, 64 Cal. 63; Crescent City Wharf, etc., Co. *v.* Simpson, 77 Cal. 286.

Georgia. — Ponder *v.* Cox, 28 Ga. 305.

Iowa. — Council Bluffs *v.* Stewart, 51 Iowa 385.

Nebraska. — Eidemiller Ice Co. *v.* Guthrie, 42 Neb. 238.

Nevada. — Champion *v.* Sessions, 1 Nev. 478; Conley *v.* Chedic, 6 Nev. 222.

New Jersey. — Kerlin *v.* West, 4 N. J. Eq. 449.

4. Apprehended Injury Not Ground for Injunction. — Truly *v.* Wanzer, 5 How. (U. S.) 141; Negro Jenny *v.* Crase, 1 Cranch (C. C.) 443; Home Ins. Co. *v.* Nobles, 63 Fed. Rep. 642; Burnett *v.* Whitesides, 13 Cal. 156; Keyes *v.* Little York Gold Washing, etc., Co., 53 Cal. 724; German Evangelical Lutheran Church *v.* Maschop, 10 N. J. Eq. 57; Pennsylvania R. Co. *v.* National Docks, etc., R. Co., 52 N. J. Eq. 555; Mariposa Co. *v.* Garrison, (Supm. Ct. Spec. T.) 26 How. Pr. (N. Y.) 448; Watrous *v.* Rodgers, 16 Tex. 410.

A Mere Possibility, or anything short of a reasonable probability, of injury is insufficient to warrant an injunction against any proposed use of property by its owner. Lorenz *v.* Waldron, 96 Cal. 243.

Present Intention to Neglect Future Duty. — Injunctions will not be granted against the construction of a railroad on the ground that the corporation does not intend to finish such road. Present intention not to do future duty is not ground for present judicial action. Aurora, etc., R. Co. *v.* Lawrenceburgh, 56 Ind. 80; Aurora, etc., R. Co. *v.* Miller, 56 Ind. 88; State *v.* Kingan, 51 Ind. 142.

5. Reasonable Grounds for Apprehension Necessary. — Goodwin *v.* New Yerk, etc., R. Co., 43 Conn. 499; Bigelow *v.* Hartford Bridge Co., 14 Conn. 582, 36 Am. Dec. 502.

wrong, and that they have the power, the court will issue the writ.¹

d. WHETHER RELIEF GRANTED AS TO PAST INJURIES. — An injunction is usually a preventive remedy. Its province is not to afford a remedy for what is past, but to prevent future mischief. It is not used for the purpose of punishment, or to compel persons to do right, but merely to prevent them from doing wrong. It is a general rule, therefore, that rights already lost and wrongs already perpetrated cannot be corrected by injunction, and that the party aggrieved must seek some other remedy for redress.² Nevertheless, a remedy for an injury already committed may sometimes be given as an incident to an injunction.³ But this is only where a sufficient showing for an injunction is made out and the injury resulted from the act which it is sought to enjoin.⁴

1. Threatened Injury with Power to Injure Sufficient. — *McArthur v. Kelly*, 5 Ohio 140; *Bonaparte v. Camden*, etc., R. Co., Baldw. (U. S.) 205.

Reasonable Probability Necessary. — To make out a case for injunction it must appear that there is at least a reasonable probability, not a bare possibility, that a real injury will occur if the writ is not granted. *Sherman v. Clark*, 4 Nev. 138, 97 Am. Dec. 516.

When Injunction Granted, though Threats of Injury Not Made. — An action to enjoin is not prematurely brought where the defendants have made no threats or declarations of intention to act, if there is good reason to believe that the defendants will proceed to act and complete measures then in progress for such acts. *Newton v. Mahoning County*, 26 Ohio St. 618.

Right to Act on Appearances. — A party seeking to enjoin a defendant from doing an injurious act has the right, in determining the defendant's intention, to act on appearances. *Western Union Tel. Co. v. Guernsey*, etc., *Electric Light Co.*, 46 Mo. App. 120.

Injury through Persons Acting under Color of Law. — If lawless danger impends from persons acting under color of law when it is abused, misapplied, exceeded, or not strictly pursued, and the act impending would subject the party committing it to damages in a court of law for a trespass, a court of equity will enjoin its commission. *Bonaparte v. Camden*, etc., R. Co., Baldw. (U. S.) 205.

2. Usually Not Remedy for Past Injuries — *United States*. — *Lacassagne v. Chapnis*, 144 U. S. 124.

California. — *Gardner v. Stroever*, 81 Cal. 148.

Florida. — *Pensacola*, etc., R. Co. v. *Spratt*, 12 Fla. 26, 91 Am. Dec. 747.

Illinois. — *Mead v. Cleland*, 62 Ill. App. 294; *Menard v. Hood*, 68 Ill. 121.

Indiana. — *Cole v. Duke*, 79 Ind. 107.

Kansas. — *Alma v. Loehr*, 42 Kan. 368.

Louisiana. — *Trevigne v. School Board*, 31 La. Ann. 105; *State v. Judge*, 34 La. Ann. 89.

Maryland. — *Washington University v. Gree*, 1 Md. Ch. 97.

Michigan. — *Cooper v. Detroit*, 42 Mich. 585.

Missouri. — *Owen v. Ford*, 49 Mo. 436; *Verdin v. St. Louis*, 131 Mo. 117.

Nevada. — *Sherman v. Clark*, 4 Nev. 138, 97 Am. Dec. 516; *Webster v. Fish*, 5 Nev. 190.

New Jersey. — *United New Jersey R., etc., Co. v. Standard Oil Co.*, 33 N. J. Eq. 124;

Atty.-Gen. v. New Jersey R., etc., Co., 3 N. J. Eq. 136; *Rogers Locomotive, etc., Works v. Erie R. Co.*, 20 N. J. Eq. 379; *Southard v. Morris Canal, etc., Co.*, 1 N. J. Eq. 518; *Society, etc., v. Morris Canal, etc., Co.*, 1 N. J. Eq. 157, 21 Am. Dec. 41.

New York. — *Pancoast v. American Heating, etc., Co.*, (Supm. Ct. Spec. T.) 66 How. Pr. (N. Y.) 49.

Pennsylvania. — *McDonough v. Bullock*, 2 Pearson (Pa.) 191; *Whitman v. Shoemaker*, 2 Pearson (Pa.) 320.

West Virginia. — *Chesapeake, etc., R. Co. v. Patton*, 5 W. Va. 234.

Wisconsin. — *Cobb v. Smith*, 16 Wis. 661.

Illustration of Rule. — In applying the rule stated, it has been held that equity will not entertain a bill to restrain the issuing of municipal bonds in aid of a subscription to a railroad company when the bonds have been actually issued and delivered to the company. *Alma v. Loehr*, 42 Kan. 368.

So warrants already issued by a county auditor are beyond the reach of an injunction suit brought to restrain him from issuing such bonds. *Webster v. Fish*, 5 Nev. 190.

And a creditor's suit for an injunction to prevent the disposal of a debtor's property instituted after a receiver has been appointed will be dismissed. *Pancoast v. American Heating, etc., Co.*, (Supm. Ct. Spec. T.) 66 How. Pr. (N. Y.) 49.

Proper Remedy for Past Injuries. — For past injuries or trespasses the proper and only remedy is an action at law for compensation in damages. *Owen v. Ford*, 49 Mo. 436; *Verdin v. St. Louis*, 131 Mo. 117.

An Injunction Will Not Be Retained where it appears that the acts the performance of which are sought to be restrained had been performed before the order for injunction was made or served. *Delger v. Johnson*, 44 Cal. 182.

3. Relief Sometimes Granted as Incident to Injunction. — *Mexborough v. Bower*, 7 Beav. 127; *Krehl v. Burrell*, 7 Ch. D. 551; *Hervey v. Smith*, 1 Kay & J. 389; *Beadel v. Perry*, L. R. 3 Eq. 468; *Garth v. Cotton*, 1 Ves. 528; *Lane v. Newdigate*, 10 Ves. Jr. 192; *Rankin v. Huskisson*, 4 Sim. 13; *Spencer v. London, etc., R. Co.*, 8 Sim. 193; *Gardner v. Stroever*, 89 Cal. 30; *Tucker v. Howard*, 128 Mass. 361; *Sherman v. Clark*, 4 Nev. 138, 97 Am. Dec. 516; *Hammond v. Fuller*, 1 Paige (N. Y.) 197.

4. *Sherman v. Clark*, 4 Nev. 138, 97 Am. Dec. 516.

6. Criminality or Illegality of Act Which It Is Sought to Enjoin. — A court of equity has no criminal jurisdiction and cannot interfere to prevent the commission of criminal or illegal acts unless there is some interference, actual or threatened, with property or rights of a pecuniary nature; but when there is such interference, and there is no adequate remedy at law, the fact that the act may be criminal will not divest the jurisdiction of equity to prevent it.¹

7. Absence of Precedent for Injunction Sought. — While it has been said that the writ of injunction will not be awarded in new and doubtful cases not coming within the well-established principles of equity,² yet the absence of precedent, though not to be overlooked entirely, does not of itself determine questions of jurisdiction.³ It is not a fatal objection that the use of the writ for the particular purpose for which it is sought is novel.⁴ Courts may amplify remedies and apply rules and general principles for the advancement of substantial justice. If this were not so, and courts were confined to particular precedents, there would be no power to grant relief in new cases constantly occurring.⁵

8. Balance of Convenience. — On an application for an interlocutory injunction the court will always consider the balance of convenience; in other words, it will consider whether a greater injury would be done by granting an injunction than would result from a refusal,⁶ unless perhaps in cases where the wrong complained of is so wanton and unprovoked in its character as properly to deprive the wrongdoer of any consideration as to its injurious consequences.⁷ The courts will require a very strong case for the granting of an injunction which will cause more injury than it will remedy,⁸ and it may be said, as a general rule, that an injunction will not be granted where it will be productive of greater injury than will result from a refusal of it.⁹ This rule is especially

1. Criminal Acts — Property Rights Violated —
England. — *Gee v. Pritchard*, 2 Swanst. 414;
Springhead Spinning Co. v. Riley, L. R. 6
Eq. 558; *Soltau v. De Held*, 2 Sim. N. S. 153;
Best v. Drake, 1 W. R. 229; *Austria v. Day*,
3 De G. F. & J. 217; *Macaulay v. Shackell*, 1
Bligh N. S. 96; *Atty.-Gen. v. Terry*, L. R. 9
Ch. 423; *Atty.-Gen. v. Forbes*, 2 Myl. & C. 123.

United States. — *In re Debs* 158 U. S. 503;
Coosaw Min. Co. v. South Carolina, 144 U. S.
550; *Toledo, etc., R. Co. v. Pennsylvania Co.*,
54 Fed. Rep. 730; *Nashville, etc., R. Co. v.*
McConnell, 82 Fed. Rep. 65.

Alabama. — *Mobile v. Louisville, etc., R.*
Co., 84 Ala. 115, 5 Am. St. Rep. 342.

Kentucky. — *Neaf v. Palmer*, (Ky. 1898) 45
S. W. Rep. 506.

Maryland. — *Hamilton v. Whitridge*, 11 Md.
128, 69 Am. Dec. 184.

Massachusetts. — *Atty.-Gen. v. Jamaica Pond*
Aqueduct Corp., 133 Mass. 361.

New York. — *Cranford v. Tyrrell*, 128 N. Y.
341; *Atty.-Gen. v. Utica Ins. Co.*, 2 Johns. Ch.
(N. Y.) 371; *Gilbert v. Mickle*, 4 Sandf. Ch.
(N. Y.) 357; *Hudson v. Thorne*, 7 Paige (N.
Y.) 261.

Pennsylvania. — *Sparhawk v. Union Pass.*
R. Co., 54 Pa. St. 401; *Campbell v. Scholfield*,
3 Pittsb. (Pa.) 443.

And see the title EQUITY, vol. 11, p. 195 et
seq.

2. Precedent Unnecessary. — *Hardesty v. Taft*,
23 Md. 512; *Bonaparte v. Camden, etc., R.*
Co., *Baldw.* (U. S.) 218.

3. Absence of Precedent Must Not Be Overlooked.
— *Hamilton v. Whitridge*, 11 Md. 145, 69 Am.
Dec. 184.

4. Novelty Not a Bar. — *Nashville, etc., R.*
Co. v. McConnell, 82 Fed. Rep. 65; U. S. v.

Debs, 64 Fed. Rep. 724; *Toledo, etc., R. Co.*
v. Pennsylvania Co., 54 Fed. Rep. 751;
Niagara Falls International Bridge Co. v.
Great Western R. Co., 39 Barb. (N. Y.) 212;
Hamilton v. Whitridge, 11 Md. 145, 69 Am.
Dec. 184.

5. Hamilton v. Whitridge, 11 Md. 145, 69
Am. Dec. 184.

6. Balance of Convenience Considered — Eng-
land. — *Doherty v. Allman*, 3 App. Cas. 709;
Atty.-Gen. v. Guardians of Poor, 20 Ch. D.
595; *Read v. Richardson*, 45 L. T. N. S. 54;
Shrewsbury, etc., R. Co. v. Shrewsbury, etc.,
R. Co., 1 Sim. N. S. 410.

United States. — *Barnard v. Gibson*, 7 How.
(U. S.) 650; *North v. Kershaw*, 4 Blatchf. (U.
S.) 70.

California. — *Real Del Monte Consol. Gold,*
etc., Min. Co. v. Pond Gold, etc., Min. Co.,
23 Cal. 82.

New Jersey. — *Scanlan v. Howe*, 24 N. J.
Eq. 277.

New York. — *Abraham v. Meyers*, (Supm.
Ct. Spec. T.) 29 Abb. N. Cas. (N. Y.) 384.

Pennsylvania. — *Grey v. Ohio, etc., R. Co.*,
1 Grant Cas. (Pa.) 412.

Tennessee. — *Flippin v. Knaffle*, 2 Tenn. Ch.
238.

7. Where Injury Is Wanton. — *Morris, etc., R.*
Co. v. Prudden, 20 N. J. Eq. 530.

8. Atchison v. Peterson, 1 Mont. 561.

9. Refused when Injunction Would Produce
More Injury than Refusal — England. — *Shrews-*
bury, etc., R. Co. v. Shrewsbury, etc., R. Co.,
1 Sim. N. S. 410; *Garrett v. Banstead, etc., R.*
Co., 11 Jur. N. S. 591; *Ryde Com'rs v. Isle of*
Wight Ferry Co., 30 Beav. 616; *Atty.-Gen. v.*
Liverpool, 1 Myl. & C. 171; *Hilton v. Gran-*
ville, Cr. & Ph. 292; *Cory v. Yarmouth, etc.,*

applicable when the party applying for an injunction has by his own laches made it impossible to grant the injunction without inflicting serious injury on the party so to be enjoined.¹

In Determining Which Way the Balance of Convenience Lies, the resultant benefit and detriment to the parties litigant are not the only matters to be considered. The court will also consider the injuries which may be inflicted on strangers to the suit and to the public generally. The latter injuries, superadded to those which will be inflicted on the defendant, make a still stronger case for refusing an injunction,² and may of themselves be a sufficient ground for refusing it.³

9. Whether Injunction Will Require Change of Possession. — The ground on which courts of equity intervene by injunction in cases where there are conflicting claims as to the right and possession of property is the preservation of the property which is the subject-matter of the litigation, pending the controversy.⁴ The sole object of a preliminary injunction is to preserve the subject-matter of the controversy in the condition in which it is until the merits can be heard. It is a rule of almost universal application, therefore, that an injunction will not issue to take property out of the possession of one party and put it in the possession of another.⁵ The general rule stated admits,

R. Co., 3 Hare 593; Atty.-Gen. v. Eastern Counties R. Co., 3 R. & Can. Cas. 337; Langford v. Brighton, etc., R. Co., 4 R. & Can. Cas. 69.

Canada. — White v. Whitehead, 7 Montreal Leg. N. 292; Mallette v. Montreal, 2 Montreal Leg. N. 379.

United States. — Barnard v. Gibson, 7 How. (U. S.) 650; North v. Kershaw, 4 Blatchf. (U. S.) 70.

Connecticut. — Whittlesey v. Hartford, etc., R. Co., 23 Conn. 427.

Georgia. — Hartridge v. Rockwell, R. M. Charl. (Ga.) 260.

Maine. — Varney v. Pope, 60 Me. 192.

Michigan. — Edwards v. Allouez Min. Co., 38 Mich. 46, 31 Am. Rep. 301; Hall v. Rood, 40 Mich. 46, 29 Am. Rep. 528.

Montana. — Atchison v. Peterson, 1 Mont. 561.

New Jersey. — Duncan v. Hayes, 22 N. J. Eq. 25; Torrey v. Camden, etc., R. Co., 18 N. J. Eq. 293; Higbee v. Camden, etc., R. Co., 20 N. J. Eq. 435; Morris Canal, etc., Co. v. Central R. Co., 16 N. J. Eq. 419; Atty.-Gen. v. New York, etc., R. Co., 24 N. J. Eq. 49-59; Jones v. Newark, 11 N. J. Eq. 452.

New York. — Abraham v. Meyers, (Supm. Ct. Spec. T.) 29 Abb. N. Cas. (N. Y.) 384; McSorley v. Gomprecht, (N. Y. Super. Ct. Eq. T.) 30 Abb. N. Cas. (N. Y.) 412; Power v. Athens, 19 Hun (N. Y.) 165.

North Carolina. — McCorkle v. Brem, 76 N. Car. 407.

Pennsylvania. — Richards's Appeal, 57 Pa. St. 105, 98 Am. Dec. 202; Harkinson's Appeal, 78 Pa. St. 196, 21 Am. Rep. 9; Grey v. Ohio, etc., R. Co., 1 Grant Cas. (Pa.) 412; Mocanaqua Coal Co. v. Northern Cent. R. Co., 4 Brews. (Pa.) 158, 9 Phila. (Pa.) 250, 29 Leg. Int. (Pa.) 45; Iron, etc., Co. v. Gas, etc., Co., 3 L. T. N. S. (Pa.) 1; McDonough v. Bullock, 2 Pearson (Pa.) 191; Andrews v. Stefansky, 5 Kulp (Pa.) 339.

Wisconsin. — Sheldon v. Rockwell, 9 Wis. 166, 76 Am. Dec. 265.

1. See *supra*, this section, *Laches of Party Seeking Relief by Injunction*.

2. Injury to Public. — Spencer v. London, etc., R. Co., 1 R. & Can. Cas. 159; Cory v. Yarmouth, etc., R. Co., 3 Hare 593; Stoddart v. Vanlaningham, 14 Kan. 36; Torrey v. Camden, etc., R. Co., 18 N. J. Eq. 297; Society, etc., v. Butler, 12 N. J. Eq. 499; Gray v. Manhattan R. Co., 128 N. Y. 499.

3. Society, etc., v. Butler, 12 N. J. Eq. 499; Mathiessen, etc., Sugar Refining Co. v. Jersey City, 26 N. J. Eq. 247; Coe v. M. R. Co., 1 Stew. N. J. Dig. 620.

4. Grounds and Object of Intervention. — Cheever v. Rutland, etc., R. Co., 39 Vt. 653.

5. Property Not Taken from One Party and Placed in Possession of Another — United States. — Lacassagne v. Chapuis, 144 U. S. 119.

Arkansas. — *Ex p.* Conway, 4 Ark. 302.

Delaware. — Tatem v. Gilpin, 1 Del. Ch. 13.

Georgia. — Kelly v. Morris, 31 Ga. 54.

Michigan. — McCombs v. Merryhew, 40 Mich. 725; Hemingway v. Preston, Walk. (Mich.) 528; People v. Simonson, 10 Mich. 335; Arnold v. Bright, 41 Mich. 207; Toledo, etc., R. Co. v. Detroit, etc., R. Co., 61 Mich. 9; Barry v. Briggs, 22 Mich. 201; Lewis v. Campau, 14 Mich. 458, 90 Am. Dec. 245; Tawas, etc., R. Co. v. Circuit Judge, 44 Mich. 479.

Mississippi. — McLaughlin v. Green, 48 Miss. 208.

Nebraska. — Calvert v. State, 34 Neb. 616.

New York. — Deklyn v. Davis, Hopk. (N. Y.) 143; Akrill v. Selden, 1 Barb. (N. Y.) 316.

Pennsylvania. — Kutz v. Hepler, 1 Leg. Rec. (Pa.) 357; O'Brien v. Wilson, 10 Montg. Co. Rep. (Pa.) 169; Farmers' R. Co. v. Reno, etc., R. Co., 53 Pa. St. 224.

South Carolina. — Columbia Water Power Co. v. Columbia, 4 S. Car. 388.

Vermont. — Cheever v. Rutland, etc., R. Co., 39 Vt. 653.

A court of chancery has no more power than any other court to condemn a man unheard and to dispossess him of property *prima facie* his own, and hand over its enjoyment to another on an *ex parte* claim to it, for this can be done only by a final decree. Arnold v. Bright, 41 Mich. 207.

Where a mortgagor or his assigns are in

however, of this apparent exception: If the possession of the defendant is a mere interruption of the prior possession of the plaintiff, the interruption will be remedied by injunction if the right is clear and certain, without driving the plaintiff to establish his title at law.¹

VII. SECOND INJUNCTIONS. — Where an injunction has been refused or has been dissolved by the court, it is irregular to apply for a new injunction upon a new bill containing the same grounds, and if granted it should be dissolved.² As a general rule, a second injunction will not be granted while the first is in force, unless the first has been withdrawn by agreement and satisfactory grounds are shown for a renewal.³ While a second injunction may be granted after dissolution of the first on a supplemental bill setting up new grounds, these grounds must be grounds which were not in existence when the first bill was filed. Successive injunctions upon different grounds which might be put at issue in one proceeding will not be allowed.⁴

VIII. ACTIONS AT LAW — 1. Nature and Extent of Jurisdiction. — When an injunction is granted to stay proceedings in courts of law it is in no just sense a prohibition to those courts in the exercise of their jurisdiction. It is not addressed to them and does not even affect to interfere with them. The process is directed only to the parties. It neither assumes any superiority over the court in which the proceedings are had nor denies its jurisdiction.⁵ An injunction cannot, therefore, be granted to restrain a judge in the exercise of his judicial functions. The suitors of his court may be restrained in proper cases from proceeding before him, but no such process can run against him.⁶ The injunction is granted solely on the ground that there are certain equitable circumstances of which the court granting the process has cognizance, and it is against conscience that the party inhibited should proceed in the cause. The object of the rule, therefore, is to prevent a vexatious use of the court of law in order to deprive another party of his just rights or subject him to some unjust vexation or injury which is wholly irremediable by a court of law.⁷

2. Where Remedy at Law Is Adequate — a. STATEMENT OF RULE. — It is a well-settled rule that a court of equity will not usually enjoin an action at

possession, and deny the right of the mortgagee to a foreclosure, the court will not, by preliminary injunction, predicated on the mortgagee's asserted right at law as mortgagee, transfer to him the possession pending the litigation. *Cheever v. Rutland, etc., R. Co.*, 39 Vt. 653.

1. *Pokegama Sugar-Pine Lumber Co. v. Klamath River Lumber, etc., Co.*, 86 Fed. Rep. 528; *Ex p. Conway*, 4 Ark. 302. See also *Fredericks v. Huber*, 180 Pa. St. 572.

2. **Not Granted on New Bill Containing Same Grounds.** — *Clark v. Young*, 2 B. Mon. (Ky.) 58; *Endicott v. Mathis*, 9 N. J. Eq. 110; *Cummins v. Bennett*, 8 Paige (N. Y.) 79. To the same effect see *Harrington v. American L. Ins., etc., Co.*, 1 Barb. (N. Y.) 244, in which case it was held that after the court has dissolved an injunction it is irregular for the complainant to dismiss his bill and on a new bill substantially the same as the former apply to the judge of the court at chambers for a new injunction.

3. **Second Injunction Not Granted While First in Force.** — *Dickinson v. Eichorn*, 78 Iowa 710; *Livingston v. Gibbons*, 4 Johns. Ch. (N. Y.) 571.

Exception to Rule. — While as a general rule a second injunction will not be granted for precisely the same purpose for which an injunction has already been obtained, yet where a certain defendant was enjoined from main-

taining a liquor nuisance on certain premises or elsewhere within the judicial district, it was held that a second proceeding might be maintained against the same person and the owner of other premises, as joint defendants, to restrain the maintenance of a liquor nuisance on such premises. *Carter v. Steyer*, 93 Iowa 533.

4. *Grubbs v. Lipscomb*, 1 Bibb (Ky.) 145; *Fluker v. Davis*, 12 La. Ann. 613; *U. S. Bank v. Schultz*, 3 Ohio 61. Compare *Fanning v. Dunham*, 4 Johns. Ch. (N. Y.) 35, in which case it was held that where new facts are stated in the supplemental bill a fresh injunction may be granted, although the one granted on the original bill has been dissolved on the merits. It did not appear in this case whether the new facts set up in the supplemental bill were or were not in existence at the time of filing the original bill.

5. **Injunction Does Not Operate on Courts or Judges.** — *Tyler v. Hammersley*, 44 Conn. 420, 26 Am. Rep. 479; *Sandage v. Studebaker Brothers Mfg. Co.*, 142 Ind. 157, 51 Am. St. Rep. 165; *Dehon v. Foster*, 4 Allen (Mass.) 545; *Sanders v. Metcalf*, 1 Tenn. Ch. 419.

6. **Cannot Restrain Exercise of Judicial Functions.** — *Sanders v. Metcalf*, 1 Tenn. Ch. 419.

7. **Preventing Vexatious Use of Court of Law.** — *Oxford's Case*, 1 Ch. Rep. 1; *Tyler v. Hammersley*, 44 Conn. 420, 26 Am. Rep. 479.

law on grounds which may be urged as a defense to such action.¹ Even in cases of concurrent jurisdiction the action will not be interfered with by a court of equity unless that court can give a more perfect remedy or the case can be better tried by the procedure of that court.² The court which first assumes jurisdiction will hold it,³ and the mere neglect of the defendants in chancery to object to the jurisdiction of that court will not entitle the complainant to an injunction.⁴ The rule stated applies where by statute the distinction between actions at law and suits in equity is abolished. The principle remains as it was when actions at law and suits in equity were distinct.⁵

b. APPLICATION OF RULE. — In applying the rule stated it has been held that a court of equity will not enjoin an action at law on the ground that the court in which the action is pending is without jurisdiction,⁶ or because the claim which it is sought to enforce is not well founded,⁷ or because the claim sued on has been paid,⁸ or because a certain credit on a note in suit had not

1. Equity Will Not Enjoin where Remedy at Law Is Adequate — *England.* — *Barnard v. Wallis*, Cr. & Ph. 85; *De Worms v. Mellier*, L. R. 16 Eq. 554; *Ochsenbein v. Papelier*, L. R. 8 Ch. 695; *Kemp v. Tucker*, L. R. 8 Ch. 369; *Hoare v. Brembridge*, L. R. 8 Ch. 22; *Johnston v. Young*, 10 Ir. R. Eq. 403; *Gray v. Mathias*, 5 Ves. Jr. 286; *Life Assoc. v. McBlane*, Ir. R. 9 Eq. 176.

Canada. — *Morrison v. McLean*, 7 Grant Ch. (U. C.) 167.

United States. — *Northern Pac. R. Co. v. Cannon*, 49 Fed. Rep. 517; *Atkinson v. Allen*, 71 Fed. Rep. 58; *Burhans v. Jefferson*, 76 Fed. Rep. 25, 40 U. S. App. 302.

Alabama. — *Womack v. Powers*, 50 Ala. 5; *Wingo v. Hardy*, 94 Ala. 184; *Holt v. Pickett*, 111 Ala. 362.

Arkansas. — *Earle v. Hale*, 31 Ark. 473.

California. — *Waymire v. San Francisco*, etc., R. Co., 112 Cal. 646; *Ritchie v. Dorland*, 6 Cal. 33; *Smith v. Sparrow*, 13 Cal. 597.

Connecticut. — *Beardsly v. Curtice*, 1 Root (Conn.) 499.

Delaware. — *Hayes v. Hayes*, 2 Del. Ch. 191, 73 Am. Dec. 709.

Florida. — *Freeman v. Timanus*, 12 Fla. 393; *Cohen v. L'Engle*, 24 Fla. 542.

Georgia. — *Powell v. Chamberlain*, 22 Ga. 123; *Bryan v. Windsor*, 99 Ga. 176; *Carr v. Lee*, 44 Ga. 376; *Williams v. Stewart*, 56 Ga. 663.

Illinois. — *Cook County v. Chicago*, 158 Ill. 524; *Yates v. Batavia*, 79 Ill. 500; *Beauchamp v. Putnam*, 34 Ill. 378; *Catholic Bishop v. Chiniquy*, 74 Ill. 317.

Indiana. — *Hartman v. Heady*, 57 Ind. 545; *Martin v. Orr*, 96 Ind. 27; *Shoemaker v. Axtell*, 78 Ind. 561.

Iowa. — *Central Iowa R. Co. v. Moulton*, etc., R. Co., 57 Iowa 249; *Smith v. Short*, 11 Iowa 523.

Louisiana. — *Bonin v. Monot*, 28 La. Ann. 597.

Maryland. — *Banks v. Busey*, 34 Md. 437.

Massachusetts. — *Fuller v. Cadwell*, 6 Allen (Mass.) 503; *Payson v. Lamson*, 134 Mass. 593, 45 Am. Rep. 348; *Jones v. Newhall*, 115 Mass. 244, 15 Am. Rep. 97; *Anthony v. Valentine*, 130 Mass. 119.

Michigan. — *Detroit*, etc., R. Co. v. *Detroit*, 91 Mich. 444; *St. Johns Nat. Bank v. Bingham Tp.*, 113 Mich. 203; *Shaw v. Chambers*, 48 Mich. 355; *Pardridge v. Brennan*, 64 Mich. 575.

Nevada. — *Elder v. Shaw*, 12 Nev. 78; *Hamer v. Kane*, 7 Nev. 63.

New Jersey. — *Chase v. Chase*, 50 N. J. Eq. 143; *Hewitt v. Kuhl*, 25 N. J. Eq. 24; *Roemer v. Conlon*, 45 N. J. Eq. 234; *Sweeney v. Williams*, 36 N. J. Eq. 459.

New York. — *Winfield v. Bacon*, 24 Barb. (N. Y.) 154; *People v. Wasson*, 64 N. Y. 167; *Bomeisler v. Forster*, 10 N. Y. App. Div. 43; *New York Dry Dock Co. v. American L. Ins., etc., Co.*, 11 Paige (N. Y.) 384.

Pennsylvania. — *Hammond v. Weidow*, 8 Luz. Leg. Reg. (Pa.) 70; *Vanarsdalen v. Whitaker*, 10 Phila. (Pa.) 153, 31 Leg. Int. (Pa.) 196; *Olmsted's Appeal*, 86 Pa. St. 284.

Rhode Island. — *Clarke v. Clarke*, 7 R. I. 45; *Clark v. Clapp*, 14 R. I. 248.

Tennessee. — *Huddleston v. Williams*, 1 Heisk. (Tenn.) 579.

Texas. — *Gulf*, etc., R. Co. v. *Bacon*, 3 Tex. Civ. App. 55; *Gibson v. Moore*, 22 Tex. 611.

2. Rule in Cases of Concurrent Jurisdiction. — *Ochsenbein v. Papelier*, L. R. 8 Ch. 695; *Hoare v. Brembridge*, L. R. 8 Ch. 22; *Chadwell v. Jordan*, 2 Tenn. Ch. 638; *McLin v. Marshall*, 1 Heisk. (Tenn.) 678.

3. Chadwell v. Jordan, 2 Tenn. Ch. 638.

Illustration. — A bill having been filed by an insurance company for the cancellation of a life policy as having been obtained by concealment and misrepresentation, a motion was made to restrain the action at law which had been commenced immediately after the filing of the bill. It was held that although the court of chancery had complete jurisdiction in such a case, yet the court of law was the most suitable tribunal for dealing with disputed facts respecting a policy of insurance, and the motion for an injunction was refused. *Hoare v. Brembridge*, L. R. 8 Ch. 22.

4. Neglect to Object for Want of Jurisdiction. — *New York Dry Dock Co. v. American L. Ins., etc., Co.*, 11 Paige (N. Y.) 384.

5. Rule in Code States. — *Shoemaker v. Axtell*, 78 Ind. 561.

6. Want of Jurisdiction. — *St. Louis*, etc., R. Co. v. *Reynolds*, 89 Mo. 146; *Jones v. Stalisworth*, 55 Tex. 138; *Gibson v. Moore*, 22 Tex. 611; *Smith v. Ryan*, 20 Tex. 661.

7. Claims Not Well Founded. — *Butchers' Benev. Assoc. v. Cutler*, 26 La. Ann. 500; *Chadoin v. Magee*, 20 Tex. 476.

8. Claims Which Have Been Paid. — *Chase v. Chase*, 50 N. J. Eq. 143; *Clark v. Clapp*, 14 R. I. 248.

been entered,¹ or because the cause of action arose under a statute claimed to be in violation of the constitution,² or because the plaintiff in the action at law has executed a release for a valuable consideration,³ or because the defense relied on is an equitable estoppel.⁴

3. Where Remedy at Law Is Inadequate. — A court of equity has power to enjoin an action at law where the defense is purely of equitable cognizance and not available at law, or where the complainant cannot have full and adequate relief in the action at law, although the matters relied on as a ground for equitable relief may be set up as a defense to such action.⁵ Thus, where the litigation involves the adjustment of complicated accounts and the remedy at law is inadequate and embarrassed, and a full and complete defense at law is impossible, equity may enjoin the action at law.⁶ So where a party is induced to sign a note on the understanding that he will not be held responsible, and an action is brought thereon against him, the action will be enjoined and relief granted in equity;⁷ and where a note void for want of consideration is valid on its face, and negotiable, an action thereon will be enjoined and the note cancelled, as in case of discontinuance or nonsuit it might be held until the evidence of its being without consideration could not be had.⁸

4. Where There Has Been Fraud, Accident, or Mistake — Statement of Rule by Judge Story. — It has been said⁹ that "in general, * * * in all cases where by accident¹⁰ or mistake¹¹ or fraud,¹² or otherwise, a party has an unfair advantage in proceedings in a court of law, which must necessarily make that court an instrument of injustice, and it is therefore against conscience that he should use that advantage, a court of equity will interfere and restrain him from

1. Failure to Enter Credit. — *Powell v. Chamberlain*, 22 Ga. 123.

That a plaintiff in a suit at law to recover moneys due upon certain notes and checks has assigned a mortgage given to him by the defendant in that suit and intended merely as collateral security, furnishes no ground for an injunction to restrain the prosecution of the suit. The assignment would be a payment *pro tempore* of which such defendant might avail himself in the suit at law. *Hewitt v. Kuhl*, 25 N. J. Eq. 24.

2. Cause of Action Arising under Unconstitutional Statute. — *Jones v. Stallworth*, 55 Tex. 138.

3. Release of Claim for Valuable Consideration. — *Bomeisler v. Forster*, 70 N. Y. App. Div. 43.

4. Equitable Estoppel. — *Barnard v. German American Seminary*, 49 Mich. 444.

5. Where Legal Remedy Inadequate — Connecticut. — *Ferguson v. Fisk*, 28 Conn. 501.

Georgia. — *Carswell v. Macon Mfg. Co.*, 38 Ga. 403; *Pollock v. Gilbert*, 16 Ga. 398, 60 Am. Dec. 732.

Illinois. — *Catholic Bishop v. Chiniquy*, 74 Ill. 317.

Michigan. — *Seager v. Cooley*, 44 Mich. 14.

New Jersey. — *Metler v. Metler*, 19 N. J. Eq. 459.

New York. — *Hamilton v. Cummings*, 1 Johns. Ch. (N. Y.) 517.

Tennessee. — *Bell v. Gamble*, 9 Humph. (Tenn.) 118; *Hough v. Chaffin*, 4 Sneed (Tenn.) 238.

Virginia. — *Staples v. Turner*, 29 Gratt. (Va.) 330; *Tillar v. Cook*, 77 Va. 477; *Penn v. Ingles*, 82 Va. 65; *Warwick v. Norwell*, 1 Rob (Va.) 326.

6. Adjustment of Complicated Accounts. — *Hough v. Chaffin*, 4 Sneed (Tenn.) 238; *Penn v. Ingles*, 82 Va. 65; *Staples v. Turner*, 29 Gratt. (Va.) 330; *Tillar v. Cook*, 77 Va. 477.

7. Note Signed with Understanding that Party Will Not Be Responsible. — *Bell v. Gamble*, 9 Humph. (Tenn.) 118.

8. Void Negotiable Note Valid on Its Face. — *Metler v. Metler*, 18 N. J. Eq. 270. See also *Ferguson v. Fisk*, 28 Conn. 501, holding that where the consideration for which an instrument is given has entirely failed, and the instrument, though overdue, is still transferable, the fact that the defense of want of consideration may be made at law is no reason for denying an injunction prohibiting an action thereon, since the suit might be withdrawn and the instrument made the basis of other suits against the petitioner.

9. 2 Story's Eq. Jur. (13th ed.), § 885.

10. Accident. — See *Lash v. Butch*, 4 Iowa 215, in which it was said that where the plaintiff brought his action at law to recover of the defendant the possession of a lot, both parties claiming from a common grantor, and where the defendant's title was derived from an unrecorded lost deed, the defendant might maintain a suit in equity to enjoin such action at law and to establish his lost deed and perfect his chain of title. In such case the court has jurisdiction on the ground of accident and to remove a cloud upon a title. See also *Phalen v. Clark*, 19 Conn. 435, 50 Am. Dec. 253, where the language used in the text was adopted.

11. Mistake. — *Phalen v. Clark*, 19 Conn. 435, 50 Am. Dec. 253; *Maps v. Cooper*, 39 N. J. Eq. 316; *Dale v. Roosevelt*, 5 Johns. Ch. (N. Y.) 174.

Mistakes in Bill of Exceptions. — The prosecution of a writ of error will not be enjoined for mistakes or omissions of facts in the bill of exceptions. *Ford v. Weir*, 24 Miss. 563.

12. Fraud. — The language of the text was adopted in *Phalen v. Clark*, 19 Conn. 435, 50 Am. Dec. 253.

using the advantage which he has thus improperly gained; and it will also generally proceed to administer all the relief which the particular case requires, whether it be by a partial or a total restraint of such proceedings." ¹

This Statement Is Very Broad and somewhat difficult to interpret accurately. If by it is meant no more than that the fraud for which the cause of action will be enjoined is such that a court of law cannot give complete and adequate relief, it is unquestionably correct and supported by the decisions,² for it is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.³ It may be necessary that an instrument in suit be canceled for fraud in its procurement, because the evidence of fraud may not always be obtainable or the defense of fraud may not always be available at law; and in such case it is but a natural consequence of this equitable jurisdiction to decree the cancellation of a fraudulent instrument, that the court should inhibit the defendant from continuing any legal proceedings through which he is attempting to assert a right based on the existence of that instrument.⁴ There are, indeed, a number of decisions in which the rule seems to be stated without any qualification that an action may be enjoined on the ground of fraud although the party may successfully defend and obtain full relief in a court of law.⁵

The Weight of Authority, however, is unquestionably to the effect that while fraud is of itself a ground of equitable jurisdiction, the fraud which will authorize an injunction to proceedings at law is a fraud against which complete and adequate redress cannot be had at law. If there is nothing in the nature of the fraud or the inquiries to which it gives rise which affords a reason why complete and adequate redress cannot be had at law, an injunction should be denied.⁶

5. Confining Action to Original Forum. — Where a court whose power is adequate to the administration of complete justice in the premises has acquired jurisdiction of a case, the litigation should be confined to that forum, and any attempt by either party to divert the litigation to another court will be restrained by injunction,⁷ especially after an adverse decision on the claim of the party seeking relief in a new forum,⁸ and the propriety of the remedy by injunction is not affected by the fact that the court subsequently

1. Substantially the same language is used in the discussion of this question in *High on Injunctions* (2d ed.), § 47.

2. **Where Court of Law Cannot Give Adequate Relief.** — *Boyce v. Grundy*, 3 Pet. (U. S.) 215; *Ferguson v. Fisk*, 28 Conn. 501; *Wyckoff v. Victor Sewing Mach. Co.*, 43 Mich. 309; *Kempson v. Kempson*, (N. J. 1899) 43 Atl. Rep. 97; *Becker v. Church*, 115 N. Y. 565; *Smith v. Hays*, 1 Jones Eq. (54 N. Car.) 322; *Donelson v. Young*, Meigs (Tenn.) 155.

3. **More Fact than There Is a Remedy at Law Insufficient.** — *Boyce v. Grundy*, 3 Pet. (U. S.) 215.

Illustration. — Thus, if the nature of the instrument is such that although the party seeking relief by injunction can make a good defense to the action at law, he may be harassed by other suits upon it, an action thereon will be enjoined and the instrument ordered to be delivered up and canceled. *Ferguson v. Fisk*, 28 Conn. 501. To the same effect see *Becker v. Church*, 115 N. Y. 565.

4. *Becker v. Church*, 115 N. Y. 565. To the same effect see *Atlantic De Laine Co. v. Treddick*, 5 R. I. 171.

5. **View that Adequate Remedy at Law Is No Bar to Injunction.** — *Innes v. Stewart*, 36 Mich.

285; *Wright v. Hake*, 38 Mich. 525; *Henriques v. Ypsilanti Sav. Bank*, 84 Mich. 168.

6. **Contrary View.** — *Dickinson v. Lewis*, 34 Ala. 638; *Knotts v. Tarver*, 8 Ala. 744; *Dougherty v. Scudder*, 17 N. J. Eq. 248; *Roe-mer v. Conlon*, 45 N. J. Eq. 234; *Crane v. Bun-nell*, 10 Paige (N. Y.) 333; *White v. Semper*, 4 Ohio Cir. Dec. 408, 8 Ohio Cir. Ct. 346; *Fort v. Orndoff*, 7 Heisk. (Tenn.) 167. See also, as sustaining this view, *infra*, this title, *Judgments and Decrees — Judgments Obtained by Fraud*.

7. **Confining Action to Original Forum.** — *Pusey v. Bradley*, 1 Thomp. & C. (N. Y.) 661; *Conover v. New York*, 25 Barb. (N. Y.) 531; *Hadfield v. Bartlett*, 66 Wis. 634.

Application of Rule. — A contractor having a claim against a railroad company filed a mechanic's lien, brought suit to foreclose thereon, and subsequently filed a petition in bankruptcy against the company. In a suit against such contractor by another contractor and the company for an equitable adjustment of the claims of the contractors, it was held that a continuance of bankruptcy proceedings would be enjoined. *Pusey v. Bradley*, 1 Thomp. & C. (N. Y.) 661.

8. **Decision Adverse to Party Seeking Relief.** — *Conover v. New York*, 25 Barb. (N. Y.) 531.

acquiring jurisdiction of the matter has equity as well as common-law powers.¹ If a suit is originally commenced in a court of equity the court in which suit was so commenced will enjoin an action at law subsequently commenced in relation to the same subject-matter.²

6. Enjoining Actions Against Officers of Courts. — Courts of equity will usually interfere by injunction to restrain actions at law against their officers acting under their direction,³ and it is immaterial that the persons by whom such actions were instituted are not parties to the suit in the court of equity.⁴ The court will always interfere by injunction when it is claimed that the orders under which its officers acted were invalid or that the process executed by them was irregularly issued. A court of equity is alone competent to decide upon the validity of its own orders, and it must assume exclusive jurisdiction of the matters of complaint.⁵ If, however, the misconduct of an officer of the court in executing its orders becomes the subject of civil proceedings before any tribunal, the court in its discretion may either itself take cognizance of the complaint or may leave the matter to be dealt with upon such proceedings.⁶ Even where an officer of a court of equity is proceeded against by indictment for something done while executing the orders of the court, the court will grant an order restraining the prosecution of the indictment. While a court of equity has no jurisdiction over an indictment in general, as it would have over a mere civil proceeding, such action on its part is merely with reference to its own jurisdiction.⁷

7. To Prevent Inequitable Defenses. — The jurisdiction of courts of equity in the matter of granting injunctions is very frequently exercised for the purpose of preventing a defendant in an action at law from setting up unconscientious and inequitable defenses.⁸

Statute of Limitations. — One of the most frequent examples of the exercise of this jurisdiction arises where the prosecution of an action is enjoined and the cause of action is barred by the statute of limitations because of the operation of the injunction. An injunction does not stop the running of the statute, and as it would be manifestly inequitable to the party whose action is enjoined to lose his remedy because of the injunction, equity will enjoin the defendant in the action at law from setting up the statute of limitations as a defense.⁹ An injunction may be granted although the party whom it is sought to restrain

1. Concurrent Jurisdiction of Law and Equity. — *Conover v. New York*, 25 Barb. (N. Y.) 531.

2. Suits Originally Commenced in Court of Equity. — *Wilson v. Wetherherd*, 2 Meriv. 406.

3. Actions Against Officers of Courts of Equity. — *Ex p. Clarke*, 1 Russ. & M. 563; *Bailey v. Devereux*, 1 Vern. 269; *Frowd v. Lawrence*, 1 Jac. & W. 636; *May v. Hook*, cited in *Dove v. Dove*, 2 Dick. 619; *Aston v. Heron*, 2 Myl. & K. 390; *Wardle v. Lloyd*, 2 Molloy, 338; *Nugent v. Nugent*, 2 Molloy 372; *Batchelor v. Blake*, Hog. 98; *Tink v. Rundle*, 10 Beav. 318; *Turner v. Turner*, 15 Jur. 218; *Matter of Merritt*, 5 Paige (N. Y.) 125.

4. Actions by Persons Not Parties. — *Matter of Merritt*, 5 Paige (N. Y.) 125.

5. Officers Acting under Invalid Orders. — *Aston v. Heron*, 2 Myl. & K. 390; *Bailey v. Devereux*, 1 Vern. 269.

6. Misconduct of Officer in Executing Orders. — *Aston v. Heron*, 2 Myl. & K. 390.

7. Enjoining Indictment Against Officer. — *Turner v. Turner*, 15 Jur. 218.

8. Prevention of Inequitable Defenses. — *Pulteney v. Warren*, 6 Ves. Jr. 73; *Baker v. Mellish*, 10 Ves. Jr. 544; *Doughty v. Doughty*, 10 N. J.

Eq. 349. See also cases cited in subsequent notes in this section.

9. Defense of Statute of Limitations — England. — *Baker v. Mellish*, 10 Ves. Jr. 544; *Bond v. Hopkins*, 1 Sch. & Lef. 428.

United States. — *Union Mut. L. Ins. Co. v. Dice*, 14 Fed. Rep. 523.

Illinois. — *Kelly v. Donlin*, 70 Ill. 382; *Henry County v. Winnebago Swamp Drainage Co.*, 52 Ill. 301.

Mississippi. — *Marshall v. Minter*, 43 Miss. 666; *Sugg v. Thrasher*, 30 Miss. 135; *Wilkinson v. Flowers*, 37 Miss. 579, 75 Am. Dec. 78.

New Jersey. — *Lehigh Coal, etc., Co. v. Central R. Co.*, 42 N. J. Eq. 591; *Doughty v. Doughty*, 10 N. J. Eq. 347. See also *Holloway v. Appelget*, 55 N. J. Eq. 583.

New York. — *Wilkinson v. First Nat. F. Ins. Co.*, 72 N. Y. 409, 28 Am. Rep. 166.

As Was Said by Lord Eldon: "If there be a principle upon which courts of justice ought to act without scruple, it is this: To relieve parties against that injustice occasioned by its own acts or oversights at the instance of the party against whom the relief is sought." *Pulteney v. Warren*, 6 Ves. Jr. 73.

has not pleaded the statute nor even stated that he intended to do so.¹

Mistake as to Existence of Injunction. — It is no ground for relief by injunction, however, that a party permitted his claim to become barred by the statute of limitations under a mistake as to the existence of an injunction prohibiting him to sue thereon, where the mistake was not superinduced by the debtor.²

Supposed Inequity. — And when a demand, purely legal, has been barred by lapse of time, the court of equity has no power on account of any supposed inequity to enjoin the party from pleading or relying upon the statute of limitations in an action at law brought for its recovery.³

Deed Obtained by False Representations. — As a further application of the rule authorizing injunctions to restrain inequitable defenses, it has been held that where a party signs a deed on the faith of the representations of his adversary that certain rights will not be affected thereby, and the deed is afterwards pleaded in bar of such right, an injunction will be granted against the use of the deed as a defense to a suit at law.⁴

So Where Actual Payment Discharges a Bond or Judgment at Law, it will not do so in equity, if justice requires the parties in interest to be restrained from alleging it or insisting on their legal rights.⁵

8. Where Discovery Is Necessary to Defense. — A court of equity may compel a discovery in aid of a defense at law and enjoin proceedings at law until an answer to the bill of discovery has been obtained.⁶ The discovery sought, however, must be of facts which are material and incapable of proof without the answer of the defendant,⁷ and it must be shown wherein the facts are material; the court will not rely exclusively upon the party's own opinion as to the materiality of the disclosure sought.⁸

9. Criminal Prosecutions — *a.* **STATEMENT OF RULE.** — At one time the Court of Chancery in *England* exercised a jurisdiction partaking of a criminal character, but it was not without objection and protest from the Commons and the common-law courts. It was excused, rather than justified, because of the inability of other tribunals to maintain internal peace and order, and because it was exercised for the defense of the poor and helpless. It passed away when the necessity for its exercise ceased, and the common-law tribunals were restored to power sufficient for the repression of violence and wrong.⁹ It is a well-settled rule, both in *England* and *America*, that a court of equity has no jurisdiction to interfere by injunction to restrain a criminal prosecution, whether the prosecution be for violations of statutes¹⁰ or for an infraction of

1. Immaterial that Party Has Not Pleased Statute. — *Lamb v. Ryan*, 40 N. J. Eq. 67.

2. Mistake as to Existence of Injunction. — *Chilton v. Scruggs*, 5 Lea (Tenn.) 308.

3. Supposed Inequity Not Ground for Injunction. — *Walker v. Smith*, 8 Verg. (Tenn.) 238.

4. Signature to Deed Obtained by False Representations. — *Green v. Morris, etc.*, R. Co., 12 N. J. Eq. 165, affirmed in 15 N. J. Eq. 469.

5. Payment of Bond or Judgment. — *McCormick v. Irwin*, 35 Pa. St. 116.

6. Discovery Necessary for Defense. — *Partington v. Hobson*, 16 Ves. Jr. 220; *Appleyard v. Seton*, 16 Ves. Jr. 223; *Earnshaw v. Thornhill*, 18 Ves. Jr. 485; *White v. Steinwacks*, 19 Ves. Jr. 83; *Bowden v. Hodge*, 2 Swanst. 258; *Horton v. Moseley*, 17 Ala. 794; *Crothers v. Lee*, 29 Ala. 337; *Dickinson v. Lewis*, 34 Ala. 638; *Bartlett v. Marshall*, 2 Bibb (Ky.) 467; *Wright v. King*, Harr. (Mich.) 12; *Williams v. Sadler*, 4 Jones Eq. (57 N. Car.) 378, 75 Am. Dec. 424.

In Aid of Trial Before Justice of Peace. — The chancellor has power, on bill filed for that purpose, to enjoin proceedings at law before a

justice of the peace and compel a discovery of facts to be used on the trial at law before the justice. *Semple v. Murphy*, 8 B. Mon. (Ky.) 272.

Where Testimony of Codefendant Is Necessary. — A party who can prove his defense only by the testimony of a codefendant may have relief in chancery after a judgment at law against him. In such case, it seems, it would not be proper to file a bill of discovery pending the action at law. *Jordan v. Loftin*, 13 Ala. 547.

7. Materiality of Facts Sought to Be Discovered Necessary. — *Crothers v. Lee*, 29 Ala. 337; *Perrine v. Carlisle*, 19 Ala. 686; *Dickinson v. Lewis*, 34 Ala. 638; *Horton v. Moseley*, 17 Ala. 794; *Seymour v. Seymour*, 4 Johns. Ch. (N. Y.) 409; *Williams v. Sadler*, 4 Jones Eq. (57 N. Car.) 378, 75 Am. Dec. 424.

8. *Partington v. Hobson*, 16 Ves. 220; *M'Intyre v. Mancius*, 3 Johns. Ch. (N. Y.) 47.

9. Former Jurisdiction of English Courts of Equity. — See *In re Sawyer*, 124 U. S. 210; *Moses v. Mobile*, 52 Ala. 208.

10. Prosecution for Violation of Statutes—*Eng-*

municipal ordinances.¹ The rule applies whether the prosecution is by indictment or by summary process,² and to prosecutions which are merely threatened or anticipated as well as to those which have already been commenced.³ So it is not within the power of the parties to waive the question relating to the jurisdiction of the court and to compel it to try the cause.⁴ If the prosecution is under an ordinance, no ground for enjoining it is constituted by the fact that the ordinance is void,⁵ or that the party seeking the injunction has not committed a violation of the ordinance,⁶ or that the complaint in the prosecution under the ordinance states no cause of action.⁷

b. APPLICATIONS OF RULE. — Under the rule stated it has been held that an injunction does not lie to restrain a prosecution under an ordinance requiring peddlers to take out a license⁸ or an ordinance relating to the traffic in intoxicating liquors,⁹ as, for instance, an ordinance requiring a license for the sale of intoxicating liquors.¹⁰ So an injunction will not be granted to prevent a prosecution under an ordinance against obstructing streets,¹¹ or an ordinance prohibiting the carrying on of a dairy business within certain limits in the municipality,¹² or an ordinance prohibiting gaming,¹³ or an ordinance requiring the taking out of a license for the exhibition of a show.¹⁴ And it has been held that a court of equity has no power to enjoin proceedings to remove a state officer upon charges filed against him for malfeasance in office,¹⁵ or to

land. — *Atty.-Gen. v. Cleaver*, 18 Ves. Jr. 220; *Kerr v. Preston*, 6 Ch. D. 463; *Montague v. Dudman*, 2 Ves. 396; *Holderstaffe v. Saunders*, 6 Mod. 16; *York v. Pilkington*, 2 Atk. 302; *Saull v. Brown*, L. R. 10 Ch. 64; *Turner v. Turner*, 15 Jur. 218.

United States. — *In re Sawyer*, 124 U. S. 210; *Suess v. Noble*, 31 Fed. Rep. 855; *Spink v. Francis*, 20 Fed. Rep. 567.

Alabama. — *Moses v. Mobile*, 52 Ala. 208. *District of Columbia.* — Washington, etc., R. Co. v. District of Columbia, 6 Mackey (D. C.) 570.

Georgia. — *Paulk v. Sycamore*, 104 Ga. 24; *O'Brien v. Harris*, 105 Ga. 732; *Gault v. Wallis*, 53 Ga. 675.

Illinois. — *Poyer v. Des Plaines*, 123 Ill. 111, 5 Am. St. Rep. 491.

Mississippi. — *C. ighton v. Dahmer*, 70 Miss. 602, 35 Am. St. Rep. 666; *Ex p. Wimberly*, 57 Miss. 437.

Ohio. — *Predigested Food Co. v. McNeal*, 4 Ohio Dec. 356.

Pennsylvania. — *McLaughlin v. Jones*, 3 W. N. C. (Pa.) 203.

1. Infraction of Municipal Ordinance — *United States.* — *Rogers v. Cincinnati*, 5 McLean (U. S.) 337.

Alabama. — *Forcheimer v. Mobile*, 84 Ala. 126; *Moses v. Mobile*, 52 Ala. 198; *Burnett v. Craig*, 30 Ala. 135, 68 Am. Dec. 115.

Arkansas. — *Du Val v. Hot Springs*, 34 Ark. 560; *Taylor v. Pine Bluff*, 34 Ark. 603; *Waters Peirce Oil Co. v. Little Rock*, 39 Ark. 412; *Portis v. Fall*, 34 Ark. 375.

Georgia. — *Pope v. Savannah*, 74 Ga. 365; *Garrison v. Atlanta*, 68 Ga. 64; *Paulk v. Sycamore*, 104 Ga. 24; *Phillips v. Stone Mountain*, 61 Ga. 336.

Illinois. — *Chicago etc., R. Co. v. Ottawa*, 47 Ill. App. 73, *affirmed* 148 Ill. 397; *Yates v. Batavia*, 79 Ill. 500; *Gartside v. East St. Louis*, 43 Ill. 47.

Indiana. — *Schwab v. Madison*, 49 Ind. 329.

Iowa. — *Ewing v. Webster City*, 103 Iowa 226.

Louisiana. — *Devron v. First Municipality*, 4 La. Ann. 11; *Hottinger v. New Orleans*, 42 La. Ann. 629.

New York. — *Marvin Safe Co. v. New York*, 38 Hun (N. Y.) 146; *Wallack v. Society, etc.*, 67 N. Y. 23.

North Carolina. — *Cohen v. Goldsboro*, 77 N. Car. 3; *St. Peter's Episcopal Church v. Washington*, 109 N. Car. 21.

2. Prosecution by Indictment or Summary Process. — *In re Sawyer*, 124 U. S. 210.

3. Anticipated or Threatened Prosecutions. — *New Home Sewing Mach. Co. v. Fletcher*, 44 Ark. 139; *Chisholm v. Adams*, 71 Tex. 678.

4. Waiver of Jurisdiction. — *Yates v. Batavia*, 79 Ill. 500.

5. Void Ordinance. — *Burnett v. Craig*, 30 Ala. 135, 68 Am. Dec. 115; *Paulk v. Sycamore*, 104 Ga. 24; *Poyer v. Des Plaines*, 123 Ill. 112, 5 Am. St. Rep. 494; *Chicago, etc., R. Co. v. Ottawa*, 148 Ill. 397; *Cohen v. Goldsboro*, 77 N. Car. 3.

6. Innocence of Charge. — *Poyer v. Des Plaines*, 123 Ill. 112, 5 Am. St. Rep. 494.

7. Failure of Complaint to State Cause of Action. — *Schwab v. Madison*, 49 Ind. 329.

8. Ordinance Requiring Peddler to Take Out License. — *American Wringer Co. v. Ionia*, 76 Fed. Rep. 6; *Waters Peirce Oil Co. v. Little Rock*, 39 Ark. 412.

9. Ordinances Relating to Liquor Traffic. — *Yates v. Batavia*, 79 Ill. 500.

10. Ordinance Requiring License for Sale of Liquor. — *Burnett v. Craig*, 30 Ala. 135, 68 Am. Dec. 115.

11. Ordinance Prohibiting Obstruction of Street. — *Pope v. Savannah*, 74 Ga. 365.

12. Prohibiting Dairy Business Within Designated Limits. — *Hottinger v. New Orleans*, 42 La. Ann. 629.

13. Ordinance Prohibiting Gaming. — *Moses v. Mobile*, 52 Ala. 198; *Portis v. Fall*, 34 Ark. 375.

14. Ordinance Requiring License for Show. — *Rogers v. Cincinnati*, 5 McLean (U. S.) 337.

15. *In re Sawyer*, 124 U. S. 200.

enjoin a prosecution under a statute for failure to pay a license for operating a railroad.¹

c. EXCEPTIONS TO RULE. — There are some exceptions to the rule set forth and illustrated in the preceding sections, which will now be considered. Probably the best-settled exception exists where the criminal proceedings are instituted by a party to a suit already pending before a court of equity to try the same right that is in issue there. Under these circumstances the prosecution will be enjoined.² In such cases the injunction is merely incidental to the ordinary power of the court to impose terms upon parties who seek its aid in furtherance of their rights.³

Prosecution of Officer of Court of Equity. — So where a criminal prosecution is commenced against an officer of the court of equity, based on an act done in pursuance of an order of such court, it will enjoin the prosecution of the action.⁴

Injury to Property Rights. — There is also another line of decisions which establish an exception to the rule. In these cases, where the enforcement of an ordinance or statute would work great injury to property rights, injunctions were allowed. In the majority of these cases the question of the power to enjoin arose where property rights were invaded by the attempted enforcement of void ordinances or statutes, and it was held that substantial grounds were presented for equitable interference and relief.⁵ Some decisions, however, go even further and hold that although the ordinance or statute under which prosecutions are begun or threatened is not void, equity will enjoin the enforcement thereof if this will impair property rights.⁶

10. Proceedings in Same Court of Equity. — As a general rule, a court of equity will not interfere by injunction to stay proceedings in another equitable suit in the same court;⁷ and the rule applies whether the application is made by parties, privies, or a stranger to the litigation.⁸ An exception is recognized, however, in the case of interpleader suits.⁹ It has been held that where one of the defendants to a bill of interpleader is suing the plaintiff in equity and another is suing him at law, the court will grant him an injunction to restrain the suit in equity as well as the action at law;¹⁰ and where there are two claimants to a fund and one files a bill against the stakeholder, without making the other a party, the stakeholder may file an interpleader to restrain proceedings in the suit of the other claimant.¹¹

1. **Statute Requiring License for Operation of Railroad.** — *Washington, etc., R. Co. v. District of Columbia*, 6 Maskey (D. C.) 570.

2. **Prosecution to Try Right under Consideration in Court of Equity.** — *York v. Pilkington*, 2 Atk. 302; *Montague v. Dudman*, 2 Ves. 396; *Atty.-Gen. v. Cleaver*, 18 Ves. Jr. 211; *Stull v. Browne*, L. R. 10 Ch. 64; *Spink v. Francis*, 19 Fed. Rep. 670, 20 Fed. Rep. 567; *Wadley v. Blount*, 65 Fed. Rep. 667; *In re Sawyer*, 124 U. S. 200.

3. 2 Store's Eq. Jur. (13th ed.), § 893.

4. **Enjoining Prosecution of Officer.** — *Turner v. Turner*, 15 Jur. 218, in which case a criminal prosecution of an officer for tearing down houses which were the subject of litigation was restrained.

5. **Injury to Property Rights.** — *Louisiana State Lottery Co. v. Fitzpatrick*, 3 Woods (U. S.) 222; *M. Schandler Bottling Co. v. Welch*, 42 Fed. Rep. 563; *Central Trust Co. v. Citizens' St. R. Co.*, 80 Fed. Rep. 225; *Mobile v. Louisville, etc., R. Co.*, 84 Ala. 116, 5 Am. St. Rep. 342; *Atlanta v. Gate City Gas Light Co.*, 71 Ga. 107; *Davis v. Fasig*, 128 Ind. 271; *Baltimore v. Radecke*, 49 Md. 217, 33 Am. Rep. 239; *Schuster v. Metropolitan Board of Health*, 49 Barb. (N. Y.) 450; *Austin v. Austin*

City Cemetery Assoc., 87 Tex. 330, 47 Am. St. Rep. 114.

6. *Louisville v. Gray*, 1 Litt. (Ky.) 147; *Shinkle v. Covington*, 83 Ky. 430. But see *Crichton v. Dahmer*, 70 Miss. 602, 35 Am. St. Rep. 666, where it was said that a court of equity cannot grant an injunction against the prosecution of criminal proceedings, even in a criminal prosecution for trespass in which a disputed property right is involved, to which equity has jurisdiction to afford relief.

7. **Enjoining Another Equitable Suit in Same Court.** — *Redd v. Blandford*, 54 Ga. 123; *Smith v. American L. Ins., etc., Co., Clarke* (N. Y.) 307; *Lane v. Clark, Clarke* (N. Y.) 309; *Dayton v. Relf*, 34 Wis. 86.

8. **Immaterial by Whom Application Made.** — *Smith v. American L. Ins., etc., Co., Clarke* (N. Y.) 307; *Lane v. Clark, Clarke* (N. Y.) 309.

9. **Exception to Rule — Interpleader Suits.** — *Prudential Assur. Co. v. Thomas*, L. R. 3 Ch. 78; *Warrington v. Wheatstone*, Jac. 202; *Sieveling v. Behrens*, 2 Myl. & C. 581; *Crawford v. Fisher*, 10 Sim. 480.

10. *Crawford v. Fisher*, 10 Sim. 479.

11. *Prudential Assur. Co. v. Thomas*, L. R. 3 Ch. 74.

11. Actions Relating to Real Property. — Actions relating to real property will not be enjoined where there is a full and adequate remedy at law.¹ Thus an action of ejectment will not be enjoined on the ground that it is barred by the statute of limitations;² nor will a bill to enjoin an action of forcible entry and detainer be sustained when it shows that the complainant has a full and complete defense at law.³ So a court of equity will not restrain a person from asserting title to real estate in the course of judicial proceedings, or decree a release by one party to another, unless in a case entirely free from doubt.⁴ On the other hand, the jurisdiction of courts of equity is frequently exercised to restrain actions of ejectment on the ground of preventing a multiplicity of suits.⁵ If, however, there be a proper case for consolidation of causes, there is no reason for equitable interference, as a court of law is fully competent to afford relief.⁶ Actions of ejectment have also been enjoined on the ground that the plaintiff in such action has by his conduct estopped himself from maintaining it,⁷ and also to prevent a cloud upon the title where a party claims under a conveyance which vests in him an apparently perfect title.⁸ So it has been held that an action on a vendee's bond for purchase money might be enjoined where the vendor had no title at the time when he agreed to convey.⁹

12. To Prevent Multiplicity of Suits. — One of the most frequent grounds for the intervention of equity to afford relief by injunction is to prevent a multiplicity of suits. This question will be found discussed elsewhere in this work.¹⁰

13. Necessity of Confessing Judgment. — It has been stated that the general rule is that when a party comes into equity to be relieved against proceedings at law he confesses judgment at law and relies solely on the court of equity for relief.¹¹ The rule has been held to apply where no discovery is sought in aid of a defense at law, and the matters referred to the court of equity for relief against proceedings at law are the sole ground on which the party under such rule claims right; or, in other words, where the party seeking equitable relief has no defense at law.¹² So in a number of decisions the rule was held to apply where it either did not appear that the party seeking equitable relief had a legal as well as an equitable defense to the action at law, or, if it did appear that the party had defenses of both characters, the court attached no importance to such fact.¹³ On the other hand, it has been held that if besides the

1. Where Adequate Remedy at Law Exists. — *Womack v. Powers*, 50 Ala. 5; *Horner v. Jobs*, 13 N. J. Eq. 19; *De Groot v. Washington Banking Co.*, 3 N. J. Eq. 198; *Morris Canal, etc., Co. v. Jersey City*, 12 N. J. Eq. 227; *Paterson, etc., R. Co. v. Jersey City*, 9 N. J. Eq. 434.

2. Statute of Limitations Barring Claim. — *Horner v. Jobs*, 13 N. J. Eq. 19.

3. Forcible Entry and Detainer. — *Womack v. Powers*, 50 Ala. 5.

Action to Recover Possession of Leased Premises. — An action to recover possession of premises leased from year to year will not be enjoined on the ground that the lessee has made valuable improvements which he will lose. *West v. Flanagan*, 4 Md. 36.

4. Case Not Entirely Free from Doubt. — *Stockton v. Williams*, 1 Dougl. (Mich.) 546.

5. To Prevent Multiplicity of Suits. — See the title MULTIPPLICITY OF SUITS.

6. Where Causes May Be Consolidated. — *Peters v. Prevost*, 1 Paine (U. S.) 64.

7. Estoppel to Enforce Claim. — *Trenton Banking Co. v. McKelway*, 8 N. J. Eq. 84.

8. To Prevent Cloud upon Title. — *Sieman v. Austin*, 33 Barb. (N. Y.) 9.

9. Enjoining Collection of Purchase Money of Land. — *Dorsey v. Hobbs*, 10 Md. 412.

10. See the title MULTIPPLICITY OF SUITS.

11. Confession of Judgment. — See *Warwick v. Norvell*, 1 Rob. (Va.) 326.

12. Where Party Has No Defense to Action at Law. — *White v. Steinwacks*, 19 Ves. Jr. 85; *Conway v. Ellison*, 14 Ark. 360; *Ham v. Schuyler*, 2 Johns. Ch. (N. Y.) 140; *Chadwell v. Jordan*, 2 Tenn. Ch. 635.

Offer to Make Defense Solely in Equity. — Where a defendant in a suit at law comes into a court of equity to enjoin the proceedings, and offers in his bill to make his defense only in equity and to abide the decision of that court, he complies substantially with the rule requiring confession of judgment. *Exp. Hodges*, 24 Ark. 197.

13. Cases in Which It Did Not Appear Whether Party Had Legal and Equitable Defenses. — *Anonymous*, 1 Vern. 120; *Barnard v. Wallis*, Cr. & Ph. 85; *Drummond v. Pigou*, 2 Myl. & K. 168; *Nelson v. Owen*, 3 Ired. Eq. (38 N. Car.) 175; *Williams v. Sadler*, 4 Jones Eq. (57 N. Car.) 378, 75 Am. Dec. 424. See also *Jones v. Bassett*, 2 Russ. 405; *Carroll v. Sand*, 10 Paige (N. Y.) 298.

grounds of relief in equity the party has distinct and substantive grounds of defense at law, not cognizable in equity, he may, without being compelled to waive his legal defense by confessing judgment, have a hearing in a court of chancery on the merits of his case, and a decree for the proper relief;¹ and in other decisions the rule laid down seems to be that it is entirely in the discretion of the chancellor in each case whether he shall require a confession of judgment,² and that if a confession of judgment in the action at law is required the order should require the judgment to be taken to be dealt with as the court shall direct.³ A court of chancery will not, on a bill filed by the plaintiff in an action at law, enjoin the defendant therein from making his defense to such action and yet allow the plaintiff to proceed. The plaintiff, having elected his forum, should abandon his action if he discovers that he has commenced in the wrong forum.⁴

IX. JUDGMENTS AND DECREES — 1. Necessity of Taking Advantage of Legal Remedies — a. INTRODUCTORY STATEMENT. — Applications for relief in chancery against judgments at law will at all times be viewed with close scrutiny, and an injunction to prevent the enforcement of such judgment will not be granted except upon facts which show the clearest and strongest reasons for the interposition of chancery. That court will not entertain a party seeking relief against a judgment which has been rendered against him in a court of law in consequence of his default in regard to steps which might have been successfully taken in the court of law, unless some reason founded in fraud, surprise, or some adventitious circumstances beyond the control of the party be shown to excuse such default.

b. FAILURE TO MAKE DEFENSE AT LAW — (1) Defenses Purely Legal — (a) Statement of Rule. — Probably the most frequent application of this general rule arises in cases where the grounds on which the complainant seeks to enjoin the judgment are such as would have constituted a good defense to the action in which the judgment was rendered, but which the party seeking equitable relief negligently and without excuse failed to present. Under these circumstances it is a rule of general application that the injunction will be denied.⁵ The only cases in which equity will relieve against a judgment

Instance. — Thus it has been held that where the suit at law is upon a bond, note, or like instrument, signed by the party, the complainant must not only give judgment, but must waive errors, or, what is equivalent, confess judgment, which will be a waiver of errors. Anonymous, 1 Vern. 120; Mathews v. Douglass, Cooke (Tenn.) 136.

1. Where Party Has Both Legal and Equitable Defenses. — Warwick v. Norvell, 1 Rob. (Va.) 326.

2. Discretion of Court as to Granting Injunction. — Great Falls Mfg. Co. v. Henry, 25 Gratt. (Va.) 575. See also Hooper v. Cooke, 2 Jur. N. S. 527.

3. Nature of Order Granted. — Hooper v. Cooke, 2 Jur. N. S. 527; Great Falls Mfg. Co. v. Henry, 25 Gratt. (Va.) 575.

4. Jones v. Ramsey, 3 Ill. App. 303.

5. Failure to Make Defense at Law — England. — Bateman v. Willoe, 1 Sch. & Lef. 201; Williams v. Lee, 3 Atk. 223; Evans v. Solly, 9 Price, 525.

United States. — Skirving v. National L. Ins. Co., 59 Fed. Rep. 742; Grand Chute v. Winegar, 15 Wall. (U. S.) 373; Hungerford v. Sigerson, 20 How. (U. S.) 156; Creath v. Sims, 5 How. (U. S.) 192; Sample v. Barnes, 14 How. (U. S.) 70; Muscatine v. Mississippi, etc., R. Co., 1 Dill. (U. S.) 536; Edmanson v. Best, 57 Fed. Rep. 531, 18 U. S. App. 288; Smith v.

M'Iver, 9 Wheat. (U. S.) 532; Marine Ins. Co. v. Hodgson, 7 Cranch (U. S.) 332.

Alabama. — Foshee v. McCreary, (Ala. 1899) 26 So. Rep. 309; Rucker v. Morgan, (Ala. 1899) 25 So. Rep. 242; Garrett v. Lynch, 44 Ala. 683; Howell v. Motes, 54 Ala. 3; Lucas v. Darien Bank, 2 Stew. (Ala.) 280.

Arkansas. — Cummins v. Bentley, 5 Ark. 6.

California. — Beaudry v. Felch, 47 Cal. 183; Agard v. Valencia, 39 Cal. 292.

Colorado. — Fisher v. Greene, 5 Colo. 541.

Connecticut. — Post v. Tradesmen's Bank, 28 Conn. 428.

Georgia. — Stroup v. Sullivan, 2 Ga. 275, 46 Am. Dec. 389; Bostwick v. Perkins, 1 Ga. 136; Richardson v. Lumsden, 83 Ga. 391; Griffin v. Smyly, 105 Ga. 475; Bailey v. State Sav. Bank, 97 Ga. 398; Brinson v. Wessolowsky, 58 Ga. 293; Starnes v. Mutual Loan, etc., Co., 97 Ga. 400, 24 S. E. Rep. 138; Bellamy v. Woodson, 4 Ga. 175, 48 Am. Dec. 221.

Illinois. — Walker v. Shreve, 87 Ill. 474; Mellendy v. Austin, 69 Ill. 15; Fuller v. Little, 69 Ill. 230; Spraker v. Banlett, 73 Ill. App. 522; Higgins v. Bullock, 73 Ill. 205; Carney v. Marseilles, 136 Ill. 401, 29 Am. St. Rep. 328; Lewis v. Firemen's Ins. Co., 67 Ill. App. 195.

Indiana. — Center Tp. v. Marion County, 110 Ind. 579.

Iowa. — Faulkner v. Campbell, 1 Morr. (Iowa) 148; Lamb v. Drew, 20 Iowa 15.

on grounds which might have been availed of as a defense to the action at law are where the party was prevented from making such defense, not through any lack of diligence on his part, but through fraud, accident, surprise, or some adventitious circumstances beyond his control.¹ This proposition has been so repeatedly affirmed that it has become a principle and maxim of equity,² and it is so inflexible that it will not be abrogated even where the judgment is manifestly wrong in law or fact³ or will work injustice and hardship,⁴ as, for instance, when the effect of allowing the judgment to stand will be to compel the payment of a debt which the defendant does not owe or which he owes to a third party.⁵ The fact that the party was ignorant of matters constituting the defense does not alter the rule, unless by the exercise of ordinary diligence he could not have discovered them, or was prevented from using such diligence by fraud, accident, or the act of the opposite party, unmixed with any negligence on his own part.⁶ If the facts constituting the defense can be established only by an appeal to the conscience of the adverse

Kansas.—Kimball v. Hutchison, (Kan. 1899) 59 Pac. Rep. 275.

Kentucky.—Mershon v. Commonwealth Bank, 6 J. J. Marsh. (Ky.) 440; Harrison v. Lee, 7 J. J. Marsh. (Ky.) 172; Walker v. Ogden, 1 Dana (Ky.) 253.

Louisiana.—Hall v. Carroll, 10 La. Ann. 412; Taylor v. Clark, 11 La. Ann. 560; Rudman v. Bockel, 28 La. Ann. 276; Matta v. Gayle, 10 La. Ann. 347; Butman v. Forshay, 21 La. Ann. 166; State v. Langton, 6 La. Ann. 282; Lee v. Hubbel, 20 La. Ann. 551; Mahan v. Accommodation Bank, 26 La. Ann. 34; Greene v. Johnson, 21 La. Ann. 465; Monroe v. McMicken, 8 Mart. N. S. (La.) 513.

Maryland.—Gorsuch v. Thomas, 57 Md. 334; Ahern v. Fink, 64 Md. 161; Lyday v. Duple, 17 Md. 188; Windwart v. Allen, 13 Md. 196; Little v. Price, 1 Md. Ch. 182; Dorsey v. Monnett, (Md. 1890) 20 Atl. Rep. 196.

Massachusetts.—McBride v. Little, 115 Mass. 308.

Michigan.—Farmers' F. Ins. Co. v. Johnston, 113 Mich. 426.

Minnesota.—Clark v. Lee, 58 Minn. 410.

Mississippi.—Montgomery v. Griffin, Walk. (Miss.) 453; Miller v. Palmer, 55 Miss. 323; Green v. Robinson, 5 How. (Miss.) 80; McRaven v. Forbes, 6 How. (Miss.) 569; Yeizer v. Burke, 3 Smed. & M. (Miss.) 439; Nevitt v. Hamer, 5 Smed. & M. (Miss.) 145.

Nebraska.—Lining v. Glenn, 33 Neb. 187; Kittle v. Wilson, 7 Neb. 77; Norwegian Plow Co. v. Bollman, 47 Neb. 186.

New York.—Stover v. Cogswell, 57 Barb. (N. Y.) 448; Barker v. Elkins, 1 Johns. Ch. (N. Y.) 465; Le Guen v. Gouverneur, 1 Johns. Cas. (N. Y.) 436, 1 Am. Dec. 121.

New Jersey.—Brick v. Burr, 47 N. J. Eq. 189.

North Carolina.—Jones v. Cameron, 81 N. Car. 154.

Ohio.—M'Carty v. Burrows, 2 Ohio 20; Wood v. Archer, 2 Ohio 22; Duckwall v. Zimmerman, 2 Ohio 23; Reynolds v. Reynolds, 3 Ohio 268; Lieby v. Ludlow, 4 Ohio 469.

Oregon.—Brenner v. Alexander, 16 Oregon 349, 8 Am. St. Rep. 301.

Pennsylvania.—Waldo v. Denton, 135 Pa. St. 181; Burke v. Gibson, 6 Kulp (Pa.) 310; Maher's Appeal, (Pa. 1886) 2 Cent. Rep. 846.

South Carolina.—Kibler v. Cureton, Rich.

Eq. Cas. (S. Car.) 143; Jackson v. Patrick, 10 S. Car. 197.

Tennessee.—Lindsley v. Thompson, 1 Tenn. Ch. 272; Reeves v. Hogan, Cooke (Tenn.) 175, 5 Am. Dec. 684; Perkins v. Hadley, 4 Hayw. (Tenn.) 148; Kearney v. Smith, 3 Yerg. (Tenn.) 127, 24 Am. Dec. 550; White v. Cahal, 2 Swan (Tenn.) 551; Moore v. McGaha, 3 Tenn. Ch. 416; Rowland v. Jones, 2 Heisk. (Tenn.) 328; Schwab v. Mount, 4 Coldw. (Tenn.) 60.

Texas.—Ballow v. Wichita County, 74 Tex. 339; York v. Gregg, 9 Tex. 85; Gibson v. Moore, 22 Tex. 611; Prewitt v. Peirry, 6 Tex. 260; Coleman v. Goyne, 37 Tex. 552.

Vermont.—Emerson v. Udall, 13 Vt. 477, 37 Am. Dec. 604.

Virginia.—Holland v. Trotter, 22 Gratt. (Va.) 141; Mason v. Nelson, 11 Leigh (Va.) 234; Mosby v. Haskins, 4 Hen. & M. (Va.) 427.

West Virginia.—Smith v. McLain, 11 W. Va. 654; Braden v. Reitzenberger, 18 W. Va. 289; Alford v. Moore, 15 W. Va. 597; Knapp v. Snyder, 15 W. Va. 434.

Wisconsin.—Marsh v. Edgerton, 2 Pin. (Wis.) 230.

1. *Cases in Which Equity Will Relieve Enumerated*.—Howell v. Motes, 54 Ala. 1; Waldo v. Denton, 135 Pa. St. 181; Holland v. Trotter, 22 Gratt. (Va.) 141; Mosby v. Haskins, 4 Hen. & M. (Va.) 427; Mason v. Nelson, 11 Leigh (Va.) 234.

2. *Holland v. Trotter*, 22 Gratt. (Va.) 140.

3. *Immaterial that Judgment Is Wrong*.—Newman v. Schueck, 58 Ill. App. 328; Braden v. Reitzenberger, 18 W. Va. 289.

4. *Injustice and Hardship of Judgment*.—Higgins v. Bullock, 73 Ill. 205; Finch v. Hollinger, 47 Iowa 173; Miller v. Palmer, 55 Miss. 335; Nevins v. McKee, 61 Tex. 412.

5. *Braden v. Reitzenberger*, 18 W. Va. 289.

6. *Ignorance of Defense—Alabama*.—Garrett v. Lynch, 44 Ala. 683; Stinnett v. Branch of State Bank, 9 Ala. 120.

Kansas.—Tutt v. Ferguson, 13 Kan. 45.

Maryland.—Falls v. Robinson, 5 Md. 365; Kirby v. Pascault, 53 Md. 531.

New York.—Metropolitan El. R. Co. v. Johnston, 84 Hun (N. Y.) 83; Barker v. Elkins, 1 Johns. Ch. (N. Y.) 465.

Tennessee.—Hubbard v. Ewing, 4 Baxt. (Tenn.) 404.

Virginia.—Green v. Massie, 21 Gratt. (Va.) 359.

party, it is his duty to file a bill of discovery and obtain a stay of the trial until this discovery is obtained.¹ If he does not do so, and in consequence fails to make out his defense, he cannot after the verdict against him obtain the aid of the court of equity to enjoin the judgment.²

(b) *Illustrations of Rule.* — As illustrative of the principles enunciated in the preceding section, it may be stated that equity will not relieve by injunction against a judgment on the following grounds which the defendant neglected to set up as a defense to the action in which the judgment was rendered: a discharge in bankruptcy;³ the statute of limitations;⁴ rescission of the contract in suit prior to judgment;⁵ infancy;⁶ coverture;⁷ failure of consideration;⁸ that the contract in suit was against public policy;⁹ that the bond in suit was procured by fraud and deception;¹⁰ that the note in suit was without consideration;¹¹ that the plaintiff in the action at law was not legally incorporated;¹² that the plaintiff, a foreign corporation, was without authority to sue because of noncompliance with the requirements of domestic statutes;¹³ that the defendant in the original suit was discharged from liability as surety by an extension of time granted to the principal;¹⁴ that because of collusion the complainant's right to a set-off was defeated;¹⁵ that the complainant did not execute the note in suit;¹⁶ that a credit to which he was entitled was not given to the complainant;¹⁷ that coupons which the complainant had contracted to buy were invalid because severed from the bonds before issue;¹⁸ and that the debt on which the judgment was founded had been paid.¹⁹

(2) *Defenses Cognizable Both at Law and in Equity.* — The defenses considered in the preceding section are such as were purely legal, but the rules therein stated and the reasons on which they are based apply with practically the same force where the defense is cognizable either at law or in equity. If a defendant in a suit at law neglected to avail himself of a defense which he might have made there, he cannot be permitted to come into equity to make

1. *Duty to File Bill of Discovery.* — *Green v. Massie*, 21 Gratt. (Va.) 358.

2. *Garrett v. Lynch*, 44 Ala. 683; *Kirby v. Pascault*, 53 Md. 536; *Dilly v. Barnard*, 8 Gill & J. (Md.) 170; *Barker v. Elkins*, 1 Johns. Ch. (N. Y.) 465; *Green v. Massie*, 21 Gratt. (Va.) 359.

3. *Discharge in Bankruptcy.* — *Bellamy v. Woodson*, 4 Ga. 175, 48 Am. Dec. 221; *Palmer v. Moore*, 3 La. Ann. 208; *Jones v. Coker*, 53 Miss. 195.

4. *Statute of Limitations.* — *Thorndike v. Thorndike*, 142 Ill. 450, 34 Am. St. Rep. 90, *affirming* 42 Ill. App. 491; *Clark v. Bond*, *Wright* (Ohio) 282.

5. *Rescission of Contract.* — *Moore v. Dial*, 3 Stew. (Ala.) 155.

6. *Infancy.* — *Clark v. Bond*, *Wright* (Ohio) 282.

7. *Coverture.* — *Evans v. Calman*, 92 Mich. 427, 31 Am. St. Rep. 606.

8. *Failure of Consideration.* — *Isbell v. Morris*, 1 Stew. & P. (Ala.) 41; *McMillion v. Pigg*, 3 Stew. (Ala.) 165; *Howell v. Motes*, 54 Ala. 1.

9. *Contract Against Public Policy.* — *Green v. Robinson*, 5 How. (Miss.) 80.

10. *Fraud in Procuring Bond in Suit.* — *Lacy v. Garrard*, 2 Ohio 7; *Haden v. Garden*, 7 Leigh (Va.) 157.

11. *Instrument Without Consideration.* — *Garrett v. Lynch*, 44 Ala. 683; *Peyton v. Rawlens*, 4 Hayw. (Tenn.) 77.

12. *Incapacity of Plaintiff to Sue.* — *Mahan v. Accommodation Bank*, 26 La. Ann. 34.

13. *Noncompliance of Foreign Corporation with*

Domestic Statutes. — *Schilling v. Reagan*, 19 Mont. 508.

14. *Discharge of Surety by Extension of Time.* — *Vilas v. Jones*, 1 N. Y. 274.

15. *Collusion Preventing Right of Set-off.* — *Thurmond v. Durham*, 3 Yerg. (Tenn.) 99.

Misrepresentation as to Vessel Insured. — In an action on a valued policy, a misrepresentation of the age and tonnage of the vessel, whereby the underwriters were induced to agree to a high valuation, if a defense at all, must be taken at law, and cannot be the basis of an injunction against the judgment at law. *Marine Ins. Co. v. Hodgson*, 7 Cranch (U. S.) 332.

16. *Non Est Factum.* — *Harrison v. Lee*, 7 J. J. Marsh. (Ky.) 171; *Duckwall v. Zimmerman*, 2 Ohio 23.

17. *Failure to Give Credit.* — *Reeves v. Hogan*, *Cooke* (Tenn.) 178, 5 Am. Dec. 684, 1 Overt. (Tenn.) 513.

18. *Invalidity of Coupons.* — *McMullen v. Ritchie*, 64 Fed. Rep. 253.

19. *Payment of Debt in Suit.* — *M'Connel v. Ficklin*, 4 Bibb (Ky.) 414; *Whittington v. Roberts*, 4 T. B. Mon. (Ky.) 175; *Woodfin v. Smith*, 1 Dev. & B. Eq. (21 N. Car.) 451; *Voight v. Voight*, 10 Am. L. Rec. 564, 6 Ohio Dec. (Reprint) 1127.

The *Kentucky* decisions seem to make a distinction between payment at the day of payment and payment afterwards, the rule being that payment in full at the day can be relied on after judgment, but that payment after the day cannot be so relied on, because it cannot be pleaded at law. *Whittington v. Roberts*, 4 T. B. Mon. (Ky.) 175.

it, whether the defense was purely legal or in its nature both legal and equitable.¹ There must be, as in the case of defenses purely legal, a clear showing of fraud, accident, or surprise, and a lack of negligence on the part of the party in asserting such defense. These cases proceed upon the theory that where the jurisdiction is concurrent the court which first assumes jurisdiction will hold it.²

There Is, However, This Distinction between the two classes of defenses under consideration: If a defense be purely legal, no neglect on the part of the defendant in chancery in insisting on the want of jurisdiction will prevent his availing himself of it at the hearing; in other words, neglecting to demur and answering over upon the merits will not, in such case, give jurisdiction; but if the defense be both legal and equitable, if the defendant in chancery neglects to object to the want of jurisdiction on this ground, and answers over upon the merits, he waives the objection by his own act and will not be permitted to insist upon it.³

c. FAILURE TO TAKE ADVANTAGE OF REMEDY BY APPEAL, CERTIORARI, MOTION, OR SUPERSEDEAS. — Where a party has an adequate remedy by appeal, and through his own negligence this remedy is lost, he cannot obtain equitable relief by injunction against the judgment.⁴ This is equally true whether the party has neglected altogether to take an appeal⁵ or has

1. Defenses Cognizable Both at Law and in Equity — *England*. — *Harrison v. Nettleship*, 2 Myl. & K. 423, 3 L. J. Ch. 86.

Alabama. — *Foster v. State Bank*, 17 Ala. 672; *Howell v. Motes*, 54 Ala. 1; *Haughy v. Strang*, 2 Port. (Ala.) 177, 27 Am. Dec. 648; *Nelson v. Dunn*, 15 Ala. 502.

California. — *Dutil v. Pacheco*, 21 Cal. 438, 82 Am. Dec. 749.

Florida. — *Columbia County v. Bryson*, 13 Fla. 281.

Mississippi. — *Miller v. Palmer*, 55 Miss. 335.

Tennessee. — *Galbrath v. Martin*, 5 Humph. (Tenn.) 52; *Rice v. S. W. R. R. Bank*, 7 Humph. (Tenn.) 42.

2. Smith v. M'Iver, 9 Wheat. (U. S.) 532; *Hendrickson v. Hinckley*, 17 How. (U. S.) 443; *Burton v. Hynson*, 14 Ark. 32; *Dickson v. Richardson*, 16 Ark. 114; *Harlan v. Wingate*, 2 J. J. Marsh. (Ky.) 139; *Curtis v. Cisna*, 1 Ohio 429; *Chadwell v. Jordan*, 2 Tenn. Ch. 639; *McLin v. Marshall*, 1 Heisk. (Tenn.) 678; *Turney v. Young*, 2 Overt. (Tenn.) 266; *Bumpass v. Reams*, 1 Sneed (Tenn.) 597.

Reason for Rule. — The reason is that the individual had his election of the forum in which he would bring his suit, and by that election he should be bound, after going through and subjecting his adversary to the expense of a lengthy investigation in a court of law. *Turney v. Young*, 2 Overt. (Tenn.) 266.

3. Galbrath v. Martin, 5 Humph. (Tenn.) 50; *Henderson v. Overton*, 2 Yerg. (Tenn.) 399, 24 Am. Dec. 492.

4. Neglect of Remedy by Appeal — *Alabama*. — *Birmingham R., etc., Co. v. Birmingham Traction Co.*, (Ala. 1899) 25 So. Rep. 777.

California. — *Hollenbeak v. McCoy*, (Cal. 1899) 59 Pac. Rep. 201; *Pico v. Sunol*, 6 Cal. 294.

Georgia. — *Combs v. Choven*, 89 Ga. 779.

Illinois. — *Lewis v. Firemen's Ins. Co.*, 67 Ill. App. 195.

Indiana. — *Baragree v. Cronkwhite*, 33 Ind. 192; *Ricketts v. Spraker*, 77 Ind. 371; *Marshall v. Gill*, 77 Ind. 402; *Simis v. Frankfort*,

79 Ind. 446; *Cauldwell v. Curry*, 93 Ind. 363; *Terre Haute v. Beach*, 96 Ind. 143; *Adams v. Harrington*, 114 Ind. 66; *Shoemaker v. Axtell*, 78 Ind. 561; *Schwab v. Madison*, 49 Ind. 329.

Iowa. — *Phillips v. Watson*, 63 Iowa 28.

Kansas. — *Howard v. Eddy*, 56 Kan. 498.

Louisiana. — *Sartorius v. Dawson*, 13 La. Ann. 111; *Savoie v. Thibodaux*, 29 La. Ann. 51; *Naughton v. Dinkgrave*, 25 La. Ann. 538.

Maryland. — *Chappell v. Cox*, 18 Md. 513.

Missouri. — *Wyman v. Hardwick*, 52 Mo. App. 621; *Renfro v. Renfro*, 54 Mo. App. 429.

New York. — *Bliss v. Murray*, (Supm. Ct. Spec. T.) 17 Civ. Pro. (N. Y.) 64; *Leet v. Leet*, 12 N. Y. App. Div. 11.

North Carolina. — *Neville v. Pope*, 95 N. Car. 346.

Pennsylvania. — *Rockwell v. Tupper*, 7 Pa. Super. Ct. 174; *Reynolds v. Davis*, 1 Kulp (Pa.) 342.

Tennessee. — *Epperson v. Robertson*, 91 Tenn. 407; *Thompson v. Meek*, 3 Sneed (Tenn.) 271; *Greenlaw v. Kernahan*, 4 Sneed (Tenn.) 380.

Texas. — *McHugh v. Sparks*, 15 Tex. Civ. App. 57; *Manning v. Hunt*, 36 Tex. 118; *Houston, etc., R. Co. v. Ellisor*, 14 Tex. Civ. App. 706.

Washington. — *Bowman v. McGregor*, 6 Wash. 118.

Exceptions to Rule. — In one case this exception to the rule seems to be recognized. Where there was no service of process on the defendant in the suit at law, the court said that the party was not obliged to take an appeal instead of resorting to equity; that the case was one for equitable interference, though presented independently of mere reversible error. *Robinson v. Reid*, 50 Ala. 69. See also *infra*, this section, *Void Judgments*, where the question is discussed at length. The weight of authority is probably against this view.

5. Failure to Take Appeal. — See cases cited in the preceding note.

prosecuted a defective or insufficient appeal.¹ So where a party has an adequate remedy by writ of error,² certiorari,³ supersedeas,⁴ or a motion in the original cause in the trial court⁵ or in the court having appellate jurisdiction,⁶ equity will not relieve him against the consequences of his own neglect by enjoining the judgment. The correctness of a judgment cannot be reviewed in an independent action upon grounds which were available to the litigant in the original action.⁷

2. Defenses Not Available in Action at Law — Defense of Purely Equitable Character. — A court of equity will enjoin a judgment at law where the complainant could not avail himself of a meritorious defense in the action at law because it was of a purely equitable character and not cognizable at law.⁸ The rule

1. Defective or Insufficient Appeal. — *Long v. Smith*, 39 Tex. 160; *Dunson v. Spradley*, (Tex. Civ. App. 1897) 40 S. W. Rep. 327.

Failure to Give Bond or Giving Insufficient Bond. — Where a party against whom judgment has been rendered fails to give bond (*Dunson v. Spradley*, (Tex. Civ. App. 1897) 40 S. W. Rep. 327), or gives a bond which is radically defective in form (*Long v. Smith*, 39 Tex. 160), the judgment will not be enjoined.

Neglect to Take Bill of Exceptions. — Where a party might have the benefit of a bill of exceptions, but neglects to avail himself of it, a court of equity will not interpose to perform the legitimate office of such bill of exceptions by way of relief against the judgment at law. *Dibble v. Truluck*, 12 Fla. 185.

Where a Party Negligently Allows the Time for an Appeal to Pass, he is not entitled to enjoin the judgment. This presents no ground for equitable interference. *Hollenbeak v. McCoy*, (Cal. 1899) 59 Pac. Rep. 201.

2. Neglect of Remedy by Writ of Error. — *Wyman v. Hardwick*, 52 Mo. App. 621; *Brennen v. Cist*, 6 Ohio N. P. 1, 9 Ohio Dec. 18.

3. Neglect of Remedy by Certiorari — Illinois. — *Booth v. Koehler*, 51 Ill. App. 370.

Iowa. — *Stubenrauch v. Neyenesch*, 54 Iowa 567.

Pennsylvania. — *Rockwell v. Tupper*, 7 Pa. Super. Ct. 174; *Reynolds v. Davis*, 1 Kulp (Pa.) 342.

Texas. — *Musgrove v. Chambers*, 12 Tex. 32; *Fitzhugh v. Orton*, 12 Tex. 4; *Smith v. Ryan*, 20 Tex. 661; *McHugh v. Sparks*, 15 Tex. Civ. App. 57; *Texas-Mexican R. Co. v. Wright*, 88 Tex. 346; *Manning v. Hunt*, 36 Tex. 118; *Jordan v. Corley*, 42 Tex. 285.

4. Neglect of Remedy by Supersedeas. — *Perrine v. Carlisle*, 19 Ala. 686, in which case it was held that a part payment of a judgment constitutes no ground for resort to equity, since the party has a complete remedy at law by supersedeas.

5. Neglect of Remedy by Motion — In Trial Court. — *Pickens v. Yarborough*, 30 Ala. 408; *Borland v. Thornton*, 12 Cal. 440; *Moyo v. Bryte*, 47 Cal. 626; *Leet v. Leet*, 12 N. Y. App. Div. 11; *Faison v. McIlwaine*, 72 N. Car. 312; *Jarman v. Saunders*, 64 N. Car. 367; *Mason v. Miles*, 63 N. Car. 564; *Ross v. McCarty*, 3 Humph. (Tenn.) 169; *Rowlett v. Williamson*, 18 Tex. Civ. App. 28.

Motion for New Trial. — Where a party knows, or, in the exercise of ordinary diligence, could know, before final judgment, that such prejudice exists in the community as will deprive him of a fair trial, he should move for

a new trial, and, if refused, appeal. *Graham v. Citizens' Nat. Bank*, 45 W. Va. 701.

Where the plaintiff in an action at law failed for want of evidence as to the identity of the slaves sued for, this was matter on which to base a motion for a new trial, but was not ground for relief in equity. *Pickens v. Yarborough*, 30 Ala. 408.

Motion to Retax Costs. — Errors committed by the clerk of the court of law in taxing costs under its orders cannot be corrected by a court of equity on a bill by one of the parties in a suit against the other. The parties litigant, with the complainant, being free from fraud, the remedy is by motion to the court. *Ross v. McCarty*, 3 Humph. (Tenn.) 169.

6. In Appellate Court. — *Phelan v. Johnson*, 80 Iowa 727; *Laffoon v. Fretwell*, 24 Mo. App. 258.

Irregular Affirmance of Judgment. — Irregular affirmance of judgment by the Supreme Court can be corrected by motion in that court, and furnish no ground of equitable interposition. *McClure v. Colclough*, 6 Ala. 492; *McCollum v. Prewitt*, 37 Ala. 573; *Roebeling Sons Co. v. Stevens Electric Co.*, 93 Ala. 39.

7. Hollenbeak v. McCoy, (Cal. 1899) 59 Pac. Rep. 201; *Johnson v. Reed*, 125 Cal. 74.

8. Defense Purely Equitable — England. — *Bateman v. Willoe*, 1 Sch. & Lef. 205.

United States. — *Crim v. Handley*, 94 U. S. 652; *Hendrickson v. Hinkley*, 17 How. (U. S.) 443; *Marine Ins. Co. v. Hodgson*, 7 Cranch (U. S.) 332; *Johnson v. Christian*, 128 U. S. 374.

Alabama. — *Calloway v. McElroy*, 3 Ala. 406.

Arkansas. — *Newton v. Field*, 16 Ark. 216.

California. — *Kelley v. Kiess*, 68 Cal. 210.

Delaware. — *Kersey v. Rash*, 3 Del. Ch. 334.

Georgia. — *Clifton v. Livor*, 24 Ga. 91.

Illinois. — *Hawkins v. Harding*, 37 Ill. App. 564; *Vennum v. Davis*, 35 Ill. 568; *Hubbard v. Jasinski*, 46 Ill. 160.

Maryland. — *Briesch v. McCauley*, 7 Gill (Md.) 189; *Webster v. Hardisty*, 28 Md. 592; *Hill v. Reifsnider*, 46 Md. 555; *Darling v. Baltimore*, 51 Md. 1; *Young v. Reynolds*, 4 Md. 375; *Jones v. Shibey*, 5 Har. & J. (Md.) 372; *Huston v. Ditto*, 20 Md. 305.

Mississippi. — *Ferriday v. Selcer*, *Freem.* (Miss.) 258.

Missouri. — *Anderson v. Biddle*, 10 Mo. 23.

New Hampshire. — *Hibbard v. Eastman*, 47 N. H. 507, 93 Am. Dec. 467.

New York. — *King v. Baldwin*, 2 Johns. Ch. (N. Y.) 554.

applies whether the party suffered judgment to go against him without attempting to make the defense,¹ or whether, on attempting it, it was adjudged to be purely equitable and not a defense to an action at law.² Equity will relieve against the judgment, however, not by compelling a new trial at law, but by dealing with the subject as one of its own original jurisdiction. This involves no conflict of the two jurisdictions, for each court, though acting upon the same subject-matter, and to contrary results, deals with distinct rights or relations of the parties — the one with those which are legal, the other with those which are equitable.³

Defense Not Available Because of Forms of Pleading. — So equity may relieve against a judgment if the matter relied on could not have been received as a defense by reason of the forms of legal pleading.⁴

Defenses Not Available at Time of Trial. — And relief will be granted in equity against a judgment at law when a defense could not at the time or under the circumstances be made available at law without any laches on the part of the complainant.⁵

Defense at Law Doubtful or Embarrassed. — If, according to the jurisdiction of a court of common law, it be doubtful whether the grounds of the plaintiff's defense were legally available,⁶ or if there is great difficulty and embarrassment in the complainant's legal remedy,⁷ the judgment may be enjoined, especially if such difficulty and embarrassment is produced by the conduct of the defendant.⁸

3. Judgments Obtained by Fraud — a. STATEMENT OF GENERAL RULE. — Courts of equity have inherent jurisdiction to relieve against judgments or decrees obtained by fraud. Where a judgment or decree has been so obtained, without fault or negligence of the party against whom it was rendered, he is entitled to relief by injunction.⁹ The most usual instance in which relief is

Tennessee. — *Cornelius v. Thomas*, 1 Tenn. Ch. 283.

Wisconsin. — *Lamb v. Anderson*, 2 Pin. (Wis.) 251.

1. Where No Attempt to Defend Is Made. — *Johnson v. Christian*, 128 U. S. 374; *Clifton v. Livor*, 24 Ga. 91; *Vennum v. Davis*, 35 Ill. 568; *Greenlee v. Gaines*, 13 Ala. 108, 48 Am. Dec. 49.

2. Where Defense Is Attempted. — *Johnson v. Christian*, 128 U. S. 374; *Haughy v. Strang*, 2 Port. (Ala.) 177, 27 Am. Dec. 649; *Calloway v. McElroy*, 3 Ala. 406; *Nelson v. Dunn*, 15 Ala. 502; *Newton v. Field*, 16 Ark. 216; *King v. Baldwin*, 17 Johns. (N. Y.) 384, 8 Am. Dec. 415; *Cornelius v. Thomas*, 1 Tenn. Ch. 283; *Dunham v. Downer*, 31 Vt. 249.

3. Equity Will Not Compel New Trial at Law. — *Kersey v. Rash*, 3 Del. Ch. 334.

4. Defense Not Available Because of Forms of Pleading. — *Ferriday v. Selcer*, Freem. (Miss.) 258.

5. Defense Not Available at Time of Trial. — *Baltzell v. Randolph*, 9 Fla. 366; *Bassett v. Henry*, 34 Mo. App. 548; *Wilhite v. Ferry*, 66 Mo. App. 453.

Facts Discovered After Trial. — If a fact material to the merits should be discovered after trial, and could not by ordinary diligence have been discovered before trial, the judgment may be enjoined. *Baltzell v. Randolph*, 9 Fla. 366.

6. Defense Doubtful or Embarrassed. — *West v. Wayne*, 3 Mo. 16; *King v. Baldwin*, 2 Johns. Ch. (N. Y.) 554; *Newborn v. Glass*, 5 Humph. (Tenn.) 522; *Crawford v. Thurmond*, 3 Leigh (Va.) 85.

7. Bedford v. Brady, 10 Yerg. (Tenn.) 350; *Cornelius v. Morrow*, 12 Heisk. (Tenn.) 630.

8. Embarrassment Produced by Defendant's Conduct. — *Bedford v. Brady*, 10 Yerg. (Tenn.) 350.

9. Judgments Obtained by Fraud — United States. — *Marine Ins. Co. v. Hodgson*, 7 Cranch (U. S.) 332; *Truly v. Wanzer*, 5 How. (U. S.) 141; *Davis v. Tileston*, 6 How. (U. S.) 114; *Nelson v. Killingley First Nat. Bank*, 70 Fed. Rep. 526; *U. S. v. Throckmorton*, 98 U. S. 61. *California.* — *Merriman v. Walton*, 105 Cal. 403, 45 Am. St. Rep. 50; *Thompson v. Laughlin*, 91 Cal. 313; *Kelley v. Kriess*, 68 Cal. 210; *McLeran v. McNamara*, 55 Cal. 508.

Colorado. — *Fisher v. Greene*, 5 Colo. 541. *Connecticut.* — *Pearce v. Olney*, 20 Conn. 554; *Carrington v. Holabird*, 17 Conn. 530.

Florida. — *Purviance v. Edwards*, 17 Fla. 140; *Dibble v. Truluck*, 12 Fla. 185.

Georgia. — *Marchman v. Sewell*, 93 Ga. 653. *Illinois.* — *Wierich v. De Zoya*, 7 Ill. 385.

Indiana. — *Greenwaldt v. May*, 127 Ind. 511, 22 Am. St. Rep. 660; *Brake v. Payne*, 137 Ind. 479; *Nealis v. Dicks*, 72 Ind. 374; *Hogg v. Link*, 90 Ind. 349.

Iowa. — *Oliver v. Riley*, 91 Iowa 740.

Kansas. — *Kimble v. Short*, 2 Kan. App. 100; *Hentig v. Sweet*, 27 Kan. 172.

Louisiana. — *Lazarus v. McGuirk*, 42 La. Ann. 194.

Maine. — *Devoll v. Scales*, 49 Me. 320.

Maryland. — *Kearney v. Sascor*, 37 Md. 264; *Wagner v. Shank*, 59 Md. 313; *Kent v. Ricards*, 3 Md. Ch. 392.

Michigan. — *Burpee v. Smith*, Walk. (Mich.) 327.

Minnesota. — *True v. True*, 6 Minn. 458.

granted on this ground is where the party seeking an injunction against the judgment or decree had a meritorious defense which he was prevented from making by the fraud and contrivance of his adversary;¹ but an injunction will also be granted where, by reason of fraud, the party loses his right to move for a new trial² or to take an appeal.³ The fact that a judgment has been affirmed on appeal does not affect the right of the party to come into equity to enjoin the judgment for the fraud of the person procuring it.⁴

Fraud in Procurement of Judgment Necessary. — It must be borne in mind, however, that the fraud which will authorize a court of equity to enjoin a judgment or decree is fraud practiced in the procurement of the judgment or decree itself. A court of equity will not enjoin the judgment merely because it is founded on a cause of action vitiated by fraud,⁵ unless the interposition of the fraud as a defense has been prevented by fraud of the opposite party.⁶

Constructive Fraud Insufficient. — The fraud in procuring a judgment or decree

Missouri. — *Sanderson v. Voelcker*, 51 Mo. App. 328; *Charter Oak L. Ins. Co. v. Cummings*, 90 Mo. 267; *Dobbs v. St. Joseph F. & M. Ins. Co.*, 72 Mo. 189; *State v. Engelmann*, 86 Mo. 551.

Nebraska. — *Buchanan v. Griggs*, 18 Neb. 121, 20 Neb. 165; *Cadwallader v. McClay*, 37 Neb. 359, 40 Am. St. Rep. 496.

New Hampshire. — *Adams v. Adams*, 51 N. H. 388, 12 Am. Rep. 134; *Bellows v. Stone*, 14 N. H. 203; *Hibbard v. Eastman*, 47 N. H. 510, 93 Am. Dec. 467.

New Jersey. — *Hoboken First Baptist Church v. Syms*, 52 N. J. Eq. 545; *Herbert v. Herbert*, 47 N. J. Eq. 11; *Tomkins v. Tomkins*, 11 N. J. Eq. 512.

North Carolina. — *Dudley v. Cole*, 1 Dev. & B. Eq. (21 N. Car.) 429.

Ohio. — *Howenstine v. Sweet*, 13 Ohio Cir. Ct. 239, 7 Ohio Cir. Dec. 498.

Oregon. — *Friese v. Hummel*, 26 Oregon 145; *Handley v. Jackson*, 31 Oregon 552.

Tennessee. — *Taylor v. Nashville, etc., R. Co.*, 86 Tenn. 228; *Smith v. Harrison*, 2 Heisk. (Tenn.) 232; *Kinzer v. Helm*, 7 Heisk. (Tenn.) 677.

Texas. — *Hardy v. Broadbuss*, 35 Tex. 668; *Manwarring v. Kouns*, 35 Tex. 171; *Park v. Casey*, 35 Tex. 536; *Gulf, etc., R. Co. v. King*, 80 Tex. 681.

Utah. — *Mosby v. Gisborn*, 17 Utah 257.

Wisconsin. — *Brown v. Parker*, 28 Wis. 21; *Merritt v. Baldwin*, 6 Wis. 439; *Garlick v. M'Arthur*, 6 Wis. 450; *Wright v. Eaton*, 7 Wis. 595; *Ableman v. Roth*, 12 Wis. 81.

Judgment by Consent. — Even though a judgment be entered by consent it may be enjoined if there was fraud in obtaining it. *Hahn v. Hart*, 12 B. Mon. (Ky.) 426.

Collusive Judgment to Defraud Third Party. — A judgment obtained by collusion for the purpose of defrauding a third person will be enjoined. *Hardy v. Broadbuss*, 35 Tex. 668. See also *Hoboken First Baptist Church v. Syms*, 52 N. J. Eq. 545; *Broadis v. Broadis*, 86 Fed. Rep. 951.

Limitation of Rule. — In one decision it was held, by a divided court, that the rule stated in the text does not apply in all its strictness to suits where the defendants have been brought in only by newspaper notice and have had no actual notice of the suit, and therefore no real opportunity to defend. *Irvine v. Leyh*, 102 Mo. 200.

1. Meritorious Defense Prevented by Fraud. — *California.* — *Thompson v. Laughlin*, 91 Cal. 313.

Connecticut. — *Pearce v. Olney*, 20 Conn. 554.

Georgia. — *Dunnahoo v. Holland*, 51 Ga. 147;

Markham v. Angier, 57 Ga. 43.

Indiana. — *State v. Holmes*, 69 Ind. 589;

Coon v. Welborn, 83 Ind. 234; *Brake v. Payne*, 137 Ind. 479.

Iowa. — *Baker v. Redd*, 44 Iowa 179.

Kansas. — *Kimble v. Short*, 2 Kan. App. 130.

Maryland. — *Wagner v. Shank*, 59 Md. 313.

Mississippi. — *Webster v. Skipwith*, 26 Miss.

341.

Missouri. — *Bresnehan v. Price*, 57 Mo. 422.

Nebraska. — *Buchanan v. Griggs*, 18 Neb.

121, 20 Neb. 165.

New York. — *Hinckley v. Miles*, 15 Hun (N. Y.) 170.

Virginia. — *Poindexter v. Waddy*, 6 Munf. (Va.) 418.

See also cases cited in the preceding note.

2. Loss of Right to New Trial through Fraud. — *Thompson v. Laughlin*, 91 Cal. 313.

3. Loss of Right to Appeal through Fraud. — *Sanderson v. Voelcker*, 51 Mo. App. 328.

4. Effect of Affirmance of Judgment. — *Chambers v. Crook*, 42 Ala. 171, 94 Am. Dec. 637; *State v. Engelmann*, 86 Mo. 551.

5. Cause of Action Vitiated by Fraud Not Ground for Injunction. — *United States.* — *U. S. v. Throckmorton*, 98 U. S. 61; *Muscatine v. Mississippi, etc., R. Co.*, 1 Dill. (U. S.) 536.

Alabama. — *Noble v. Moses*, 74 Ala. 604;

Watts v. Frazer, 80 Ala. 186.

California. — *Zellerbach v. Allenberg*, 67 Cal. 296; *Amador Canal, etc., Co. v. Mitchell*, 59 Cal. 179; *Pico v. Cohn*, 91 Cal. 129, 25 Am. St. Rep. 159.

Georgia. — *Morris v. Morris*, 76 Ga. 733.

Missouri. — *Murphy v. De France*, 101 Mo. 151; *Irvine v. Leyh*, 124 Mo. 361; *Link v. Link*, 48 Mo. App. 345; *Payne v. O'Shea*, 84 Mo. 129; *Smith v. Sims*, 77 Mo. 270.

Nebraska. — *Shufeldt v. Gandy*, 34 Neb. 32.

New York. — *Ross v. Wood*, 70 N. Y. 8.

Oregon. — *Friese v. Hummel*, 26 Oregon 145, 46 Am. St. Rep. 610.

Virginia. — *Griffith v. Reynolds*, 4 Gratt. (Va.) 46.

Compare *Crawford v. Crawford*, 4 Desaus. (S. Car.) 176.

6. Murphy v. De France, 101 Mo. 151; *Payne v. O'Shea*, 84 Mo. 129.

which will justify equitable interference must be actual and positive, and not merely constructive.¹

Laches a Bar to Relief. — And in addition to the fraud complained of, the party seeking an injunction must have been free from negligence,² especially where the rights of innocent third parties have intervened.³ The fraud or practices of the other party are no excuse to him for not attempting to counteract them.⁴

Necessity of Meritorious Defense. — He must also show that he has a meritorious defense,⁵ and strict proof of the fraud alleged is necessary.⁶ While the defense need not be made out clearly and beyond any doubt, enough should be shown to make it reasonably doubtful in the mind of the court whether the merits have been fully and fairly determined.⁷ So it must be shown that the fraud was successfully perpetrated. There is no ground for equitable intervention where the fraud, if attempted, was unsuccessful.⁸

Solvency of Defendant. — Where a party has obtained a judgment by fraud it is no ground for refusing to enjoin the judgment that he is solvent.⁹

b. CONCEALMENT OR SUPPRESSION OF MATERIAL FACTS. — Concealment of material facts which if known would have constituted a good defense is sufficient ground for equitable relief by injunction. Active representations by the party perpetrating the fraud are not necessary.¹⁰

c. LOSS OF DEFENSE OR REMEDY BY VIOLATION OF AGREEMENT. — The jurisdiction of equity to relieve against judgments obtained by fraud is exercised very frequently where a party is prevented from presenting his defense, or taking advantage of remedies to which he is entitled, because of the violation by his adversary of some express agreement with him.¹¹ The fraud for which the judgment may be enjoined may be that of the attorney as well as that of the party himself.¹² Equity will enjoin a judgment taken in violation of an

1. **Fraud Must Be Actual and Positive.** — *Noble v. Moses*, 74 Ala. 604; *Amador Canal, etc., Co. v. Mitchell*, 59 Cal. 179; *Ross v. Wood*, 70 N. Y. 8.

2. **Party Should Be Free from Negligence.** — *Marine Ins. Co. v. Hodgson*, 7 Cranch (U. S.) 332; *Furnald v. Glenn*, 64 Fed. Rep. 49; *Brown v. Buena Vista County*, 95 U. S. 157; *Noble v. Moses*, 74 Ala. 604; *Zellerbach v. Allenberg*, 67 Cal. 296; *Wierich v. De Zoya*, 7 Ill. 385; *Indiana, etc., R. Co. v. Bird*, 116 Ind. 217, 9 Am. St. Rep. 842; *Ratliff v. Stretch*, 117 Ind. 526; *Sanderson v. Voelcker*, 51 Mo. App. 328; *Ross v. Wood*, 70 N. Y. 8; *Gilder v. Merwin*, 6 Whart. (Pa.) 522.

3. **Intervention of Rights of Third Parties.** — *Indiana, etc., R. Co. v. Bird*, 116 Ind. 217, 9 Am. St. Rep. 842.

4. *Riddle v. Baker*, 13 Cal. 304.

5. **Party Must Have Meritorious Defense.** — *White v. Crow*, 110 U. S. 183; *Noble v. Moses*, 74 Ala. 604; *Riddle v. Baker*, 13 Cal. 299; *Pearce v. Olney*, 20 Conn. 544; *Handley v. Jackson*, 31 Oregon 552; *Overton v. Blum*, 50 Tex. 417; *Ratto v. Levy*, 63 Tex. 278; *Ableman v. Roth*, 12 Wis. 81.

6. **Strict Proof of Fraud Necessary.** — See *Lee v. Arnsdorff*, 86 Ga. 264; *Jones v. South*, 3 A. K. Marsh. (Ky.) 352; *Briesch v. McCauley*, 7 Gill (Md.) 189.

7. **Degree of Certainty Necessary in Showing Defense.** — *Ableman v. Roth*, 12 Wis. 92.

8. **Unsuccessful Attempt to Perpetrate Fraud.** — *Allen v. Allen*, 97 Fed. Rep. 525; *Gulf, etc., R. Co. v. Henderson*, 82 Tex. 70.

9. **Effect of Solvency of Defendant.** — *Sanderson v. Voelcker*, 51 Mo. App. 328.

10. **Concealment or Suppression of Facts.** — *Pratt*

v. Northam, 5 Mason (U. S.) 95; *Capital Bank v. Rutherford*, 70 Ga. 57; *Noyes v. Loeb*, 23 La. Ann. 13; *Currier v. Esty*, 110 Mass. 536; *Fish v. Lane*, 2 Hayw. (3 N. Car.) 342.

11. **Violation of Agreement—England.** — *Gainsborough v. Gifford*, 2 P. Wms. 424.

California. — *California Beet Sugar Co. v. Porter*, 68 Cal. 369.

Connecticut. — *Chambers v. Robbins*, 28 Conn. 552.

Indiana. — *Moon v. Martin*, 122 Ind. 214; *Spahr v. Hollingshead*, 8 Blackf. (Ind.) 415; *Johnson v. Unversaw*, 30 Ind. 435.

Maryland. — *Kent v. Ricards*, 3 Md. Ch. 392. **Mississippi.** — *Newman v. Meek, Smed. & M. Ch. (Miss.)* 331.

New Hampshire. — *Hibbard v. Eastman*, 47 N. H. 507, 93 Am. Dec. 467.

New York. — *Briggs v. Law*, 4 Johns. Ch. (N. Y.) 22.

Tennessee. — *Stokes v. Keebler*, 3 Webb & M. Tenn. Dig. 1922; *Newnan v. Stuart*, 5 Hayw. (Tenn.) 78; *Rowland v. Jones*, 2 Heisk. (Tenn.) 321.

Texas. — *Gulf, etc., R. Co. v. Stephenson*, (Tex. Civ. App. 1894) 26 S. W. Rep. 236.

Virginia. — *Dandridge v. Harris*, 1 Wash. (Va.) 326, 1 Am. Dec. 465.

12. **Fraud of Attorney.** — *Thompson v. Laughlin*, 91 Cal. 313; *Pearce v. Olney*, 20 Conn. 544; *Purviance v. Edwards*, 17 Fla. 140; *Kent v. Ricards*, 3 Md. Ch. 392; *Holland v. Trotter*, 22 Gratt. (Va.) 136.

Effect of Appearance. — When the appearance of an attorney is entered on the record, it is always considered that it is by the authority of the party, and whatever is done in the progress of the cause by such attorney is con-

agreement to compromise or to dismiss or to discontinue a suit,¹ or to submit the matter in controversy to arbitration,² or that the cause shall not be called for trial except by consent,³ or to allow certain set-offs,⁴ or to credit a sum paid after the commencement of suit,⁵ or that the plaintiff in the action at law was not to take a personal judgment against the defendant in a suit in ejectment,⁶ or an agreement, on payment of a certain sum of money, not to enforce a judgment already obtained.⁷ So equity will relieve against a judgment obtained by inducing the defendants thereto to withdraw an equitable plea that they had filed in the case, by the promise of the plaintiff that if such plea were withdrawn he would do the equity set up in the plea, and would enter into writing to that effect, all of which he failed to do;⁸ and also where the maker of a note held a receipt acknowledging payment thereof from the indorsee, who sued upon the note, representing to the maker that he did not intend to enforce its collection against him, but against the payee, and judgment was accordingly rendered by default.⁹ If the agreement relied on is made by the attorney of the adverse party, the violation of it will not constitute a ground for equitable interference, unless it be shown that the attorney had authority to make such agreement, or that it had been ratified.¹⁰

4. Fraudulent Alteration of Judgment. — Where the record of the judgment is fraudulently altered, as to the amount of the judgment, without consent of the judgment debtor, a court of equity has jurisdiction to interpose by injunction to prevent its collection and relieve against the fraud.¹¹

sidered as done by the party and binding upon him. *Kent v. Ricards*, 3 Md. Ch. 392.

1. Agreement to Dismiss Suit — *Arkansas*. — *Pelham v. Moreland*, 11 Ark. 442.

California. — *California Beet Sugar Co. v. Porter*, 68 Cal. 369; *McLeran v. McNamara*, 55 Cal. 508.

Connecticut. — *Gates v. Steele*, 58 Conn. 316, 18 Am. St. Rep. 268.

Georgia. — *Bigham v. Gorham*, 52 Ga. 329.

Indiana. — *Nealis v. Dicks*, 72 Ind. 380; *Greenwaldt v. May*, 127 Ind. 511, 22 Am. St. Rep. 660.

Iowa. — *Rogers v. Gwinn*, 21 Iowa 58.

Nebraska. — *Cadwallader v. McClav*, 37 Neb. 359, 40 Am. St. Rep. 496; *Keeler v. Elston*, 22 Neb. 311.

Virginia. — *Holland v. Trotter*, 22 Gratt. (Va.) 136.

Wisconsin. — *Blakesley v. Johnson*, 13 Wis. 530.

Threats to Enforce Not Essential to Jurisdiction. — To entitle a party to enjoin a judgment obtained in violation of an express agreement, it is not necessary that the judgment debtor should have threatened to enforce it; it is indispensable to the security of the party that it be discharged, and a refusal to discharge it is equivalent to a threat to enforce it. *Chambers v. Robbins*, 28 Conn. 552.

2. Agreement to Arbitrate. — *Bresnehan v. Price*, 57 Mo. 422.

3. Agreement Not to Try Case Except by Consent. — *Gulf, etc., R. Co. v. King*, 80 Tex. 681. See also *Moore v. Lipscombe*, 82 Va. 546. In this case judgment by default, in an action at law, was taken against the complainant owing to his absence and want of defense. It was held that as he relied on the statements of the defendant's attorney that the case would not be tried at the ensuing term, that he might rest assured that there would be no trial at that time, and that he (the attorney) was incapable

of attending court, there was sufficient ground for equitable relief.

4. Agreement to Allow Set-offs. — *Gainsborough v. Gifford*, 2 P. Wms. 424, where the judgment was enjoined to the extent of the set-offs.

5. Agreement to Credit Sum Paid. — *Dickenson v. McDermott*, 13 Tex. 248.

6. Agreement Not to Take Personal Judgment. — *Brake v. Payne*, 137 Ind. 479.

7. Agreement Not to Enforce Judgment. — *Thompson v. Laughlin*, 91 Cal. 313.

8. Agreement Whereby Defendant Withdraws Plea. — *Markham v. Angier*, 57 Ga. 43.

9. Baker v. Redd, 44 Iowa 179.

10. Newman v. Taylor, 69 Miss. 670.

Agreement to Dismiss on Part Payment of Claim. — The violation of an agreement to dismiss a suit on part payment of the amount involved will not entitle the defendant to enjoin the collection of the entire judgment. *Alexander v. Baylor*, 20 Tex. 560.

Violation of Agreement to Transfer Property. — The collection of a judgment by default, on agreement of the adverse party to transfer certain property, will not be restrained merely because he failed to make such transfer. Equity considers as done that which ought to be done, and that by the agreement to transfer the property becomes the property of the plaintiff, and that the defendants hold it as trustees for the plaintiff's benefit. *Rollins v. National Casket Co.*, 40 W. Va. 590.

Where a Judgment Is Irregularly Affirmed on Appeal, in violation of an agreement of settlement, whereby the appeal was abandoned, this will constitute no ground for enjoining the judgment if it appears that sufficient time remains to set aside the affirmance at the term at which it was rendered. *J. A. Roebling Sons Co. v. Stevens Electric Co.*, 93 Ala. 39.

11. Fraudulent Alteration of Judgment. — *Babcock v. McCamant*, 53 Ill. 214. See also *Chester v. Miller*, 13 Cal. 559, in which case it

5. Judgments Obtained Through Mistake — Mistake of Law. — It is well settled that where a judgment is obtained through a mistake of law by a defendant, not induced by the fraud of the other party, equity has no jurisdiction to grant relief by injunction.¹ This is true even where the mistake is due to an erroneous statement made by the trial judge.² Relief, however, may be decreed in cases of mistakes in law induced by the fraud or circumvention of the party profiting thereby.³

Mistake of Fact. — Equity will relieve against a judgment obtained through a mistake of fact by the party which is in no way attributable to the negligence of himself or counsel.⁴ Relief will be granted, however, only where a party proceeds without unreasonable delay after the discovery of the mistake,⁵ and he must both allege and prove facts constituting his excuse for not defending himself at law.⁶ To entitle a party to relief against a judgment on the ground of a mistake made by him, the mistake must have been caused without his negligence. Equity will not relieve against a mistake where the exercise of ordinary and reasonable diligence would have disclosed the truth.⁷ The fact that a judgment has been affirmed on a writ of error does not affect the party's right to equitable relief against it. A judgment which has been affirmed stands in the same position after the mandate is sent down that it occupied before the writ of error was allowed.⁸

Mistake of Court. — In some cases equity has assumed jurisdiction to relieve against judgments on the ground of mistake of fact made by the court.⁹ It is believed, however, that these cases are not in accordance with the weight of authority.¹⁰

6. Judgments Obtained Through Accident. — Where a party having a meritorious defense is by accident, unmixed with negligence on his part, prevented from making his defense or from taking steps for the preservation of his rights, such as moving for a continuance or for a new trial, or taking up the proceedings for review by appeal or error, a court of equity has power to grant relief by enjoining the judgment.¹¹ Mere accident, however, though unmixed with

was held that equity has jurisdiction to vacate a judgment fraudulently altered so as to include a defendant not served with process and not originally included in the judgment.

1. No Relief Against Mistake of Law — Alabama. — Jones v. Watkins, 1 Stew. (Ala.) 81. **Colorado.** — Snider v. Rinehart, 20 Colo. 448.

Georgia. — Ponder v. Cox, 26 Ga. 485. **Indiana.** — Dickerson v. Ripley County, 6 Ind. 128, 63 Am. Dec. 373.

Iowa. — Shrickler v. Field, 9 Iowa 366. **Missouri.** — Risher v. Roush, 2 Mo. 95, 22 Am. Dec. 442.

Nebraska. — Broken Bow v. Broken Bow Water-Works Co., 57 Neb. 548.

Tennessee. — Drew v. Clarke, Cooke (Tenn.) 374, 5 Am. Dec. 698; Hubbard v. Martin, 8 Yerg. (Tenn.) 498.

Virginia. — Richmond, etc., R. Co. v. Shippen, 2 Patt. & H. (Va.) 327; Meem v. Rucker, 10 Gratt. (Va.) 506.

2. Mistake Caused by Statement of Court. — Risner v. Roush, 2 Mo. 95, 22 Am. Dec. 442.

3. Mistake Caused by Fraud of Opposite Party. — Jones v. Watkins, 1 Stew. (Ala.) 81.

4. Mistake Not Attributable to Party's Negligence. — Nelson v. Killingley First Nat. Bank, 70 Fed. Rep. 526; Bibend v. Kreutz, 20 Cal. 110; Carrington v. Holabird, 17 Conn. 537; English v. Aldrich, 132 Ind. 500, 32 Am. St. Rep. 270; Barthell v. Roderick, 34 Iowa 517; Handley v. Jackson, 31 Oregon 552.

5. Laches in Applying for Relief. — English v. Aldrich, 132 Ind. 500, 32 Am. St. Rep. 270.

6. Showing Facts Constituting Excuse. — Meem v. Rucker, 10 Gratt. (Va.) 506.

7. Mistake Caused by Party's Negligence. — Slappey v. Hodge, 99 Ala. 300; Lowe v. Hamilton, 132 Ind. 406; English v. Aldrich, 132 Ind. 500, 32 Am. St. Rep. 270; Center Tp. v. Marion County, 110 Ind. 579; Williams v. Grooms, 122 Ind. 391.

8. Effect of Affirmance of Judgment. — Nelson v. Killingley First Nat. Bank, 70 Fed. Rep. 526.

9. Mistake of Court. — Kohn v. Lovett, 43 Ga. 180; Biewer v. Jones, 44 Ga. 71; Chase v. Manhardt, 1 Bland (Md.) 333; Wilson v. Boughton, 50 Mo. 17.

10. See infra, this section, Erroneous or Irregular Judgments.

11. Accident Not Attributable to Neglect — United States. — Humphreys v. Leggett, 9 How. (U. S.) 297.

Alabama. — Haughey v. Strang, 2 Port. (Ala.) 177, 27 Am. Dec. 648.

Arkansas. — Carroll v. Pryor, 38 Ark. 283; Kansas, etc., R. Co. v. Fitzhugh, 61 Ark. 341, 54 Am. St. Rep. 211; Leigh v. Armor, 35 Ark. 126; Harkey v. Tillman, 40 Ark. 551.

Colorado. — Fisher v. Greene, 5 Colo. 541.

Kentucky. — Wilson v. Davis, 1 A. K. Marsh. (Ky.) 219.

Mississippi. — Ford v. Ford, Walk. (Miss.) 505, 12 Am. Dec. 587.

negligence of the party, will not of itself furnish a ground for relief in equity. A party who has obtained a judgment after a full investigation of the controversy by a competent tribunal will not be forced by a court of equity to submit to a new trial unless justice imperatively demands it. It must clearly appear to the court that it would be contrary to good conscience to allow the judgment to be enforced; in other words, a meritorious defense must be alleged and proved;¹ and it must appear that the accident was unavoidable or in no way attributable to the negligence of the party seeking equitable relief.²

Applications of Rule. — In applying the rule just stated the following have been held cases of accident sufficient to authorize relief: Death of a party with whom the defendant sued at law by the administrator had rescinded the contract sued on (the relief being asked on the ground of the rescission);³ sudden illness of the counsel of a nonresident defendant, preventing the counsel from attending the trial;⁴ sickness of a party at the time of service of process, and for many months after, the sickness being of such a character as to incapacitate him altogether from attending to business and causing him to fail to recollect the service of the summons;⁵ prevention from moving for a new trial by the dispersion of the justices composing the court;⁶ disability of the judge, caused by sudden sickness, to dispose of a motion for a new trial during the term at which judgment was rendered;⁷ loss of a bill of exceptions essential to enable a party to obtain a writ of certiorari, because the justice died without signing it;⁸ and loss of the right to appeal by the death of the judge without signing the bill of exceptions.⁹

Grounds Insufficient for Equitable Relief. — On the other hand, the fact that the complainant did not remember the grounds of his defense when the judgment at law was rendered, which grounds, had they been presented, would have been a good defense at law, is not such an accident as will authorize relief in equity.¹⁰ So it has been held that the mere sickness of a party will not of itself authorize equitable interference, since an application should have been made by the defense, and the party should have sent an agent to the court, or put his attorney in possession of the facts necessary to procure a continuance.¹¹ And it is likewise not a ground for relief that the witness failed to state a material fact, and that the complainant did not know of the omission until after the trial, as he could not hear very well and could not know what the witness said.¹²

Nebraska. — Radzuweit v. Watkins, 53 Neb. 412.

Oregon. — Handley v. Jackson, 31 Oregon 552; Galbraith v. Barnard, 21 Oregon 67.

Tennessee. — Winchester v. Jackson, 3 Hayw. (Tenn.) 305; Rice v. S. W. R. R. Bank, 7 Humph. (Tenn.) 42; Lewis v. Brooks, 6 Yerg. (Tenn.) 167; Rowland v. Jones, 2 Heisk. (Tenn.) 321. See also Burem v. Foster, 6 Heisk. (Tenn.) 339.

Virginia. — Vathir v. Zane, 6 Gratt. (Va.) 246.

West Virginia. — Grafton, etc., R. Co. v. Davison, 45 W. Va. 12.

1. **Showing of Meritorious Defense Necessary.** — French v. Garner, 7 Port. (Ala.) 549; Whitehill v. Butler, 51 Ark. 342; Harkey v. Tillman, 40 Ark. 551; Radzuweit v. Watkins, 53 Neb. 412; Galbraith v. Barnard, 21 Oregon 67.

2. **Party Must Be Free from Negligence.** — Crim v. Handley, 94 U. S. 652; Roots v. Cohen, (Miss. 1893) 12 So. Rep. 593; Ford v. Ford, Walk. (Miss.) 505, 12 Am. Dec. 587; Stone v. Moody, 6 Yerg. (Tenn.) 31.

3. **Lewis v. Brooks**, 6 Yerg. (Tenn.) 167.

4. **Sudden Illness of Counsel.** — Hiller v. Cotton, 48 Miss. 593.

5. **Continued Sickness of Party.** — Rice v. S. W. R. R. Bank, 7 Humph. (Tenn.) 42. See also Burem v. Foster, 6 Heisk. (Tenn.) 339.

6. **Prevention of Motion for New Trial.** — Knifong v. Hendricks, 2 Gratt. (Va.) 212, 44 Am. Dec. 385.

7. **Disability of Judge to Sign Bill of Exceptions.** — Leigh v. Armor, 35 Ark. 123.

8. **Grafton, etc., R. Co. v. Davison**, 45 W. Va. 12.

9. **Kansas, etc., R. Co. v. Fitzhugh**, 61 Ark. 341, 54 Am. St. Rep. 211; Little Rock, etc., R. Co. v. Wells, 61 Ark. 354, 54 Am. St. Rep. 216.

10. **Forgetfulness of Grounds of Defense.** — Bailey v. Anderson, 6 Humph. (Tenn.) 149.

11. **Sickness of Party.** — Pharr v. Reynolds, 3 Ala. 521.

Sickness of One of Two Counsel. — If one of the counsel of the defendant is present, but by reason of the sickness of the other he is unprepared for the defense, this should be made the ground for an application for a continuance or for a new trial after verdict. It furnishes no ground for relief in equity. McBroom v. Sommerville, 2 Stew. (Ala.) 515.

12. **Failure of Witness to Prove Material Fact.** — Stone v. Moody, 6 Yerg. (Tenn.) 31.

7. Judgments Obtained Through Surprise. — Equitable relief against a judgment may be had in the case of surprise, unmixed with negligence of the party seeking the relief,¹ or where the facts constituting the surprise are tantamount to a perpetration of fraud by the opposite party.² Thus a party will be entitled to equitable relief where he had no knowledge of the suit until after judgment had been obtained,³ or where at a subsequent day of the term judgment was taken in a litigated case, the defendant and his counsel having in the meantime left the court, relying upon an order of continuance of all cases until the next term,⁴ or where a witness who immediately before the trial assured the defendant that he could prove material facts either designedly or from lapse of memory failed to do so.⁵ On the other hand an injunction will not be allowed where there was no surprise but such as the party might reasonably have anticipated.⁶

8. Void Judgments — a. JUDGMENTS VOID FOR WANT OF JURISDICTION OF SUBJECT-MATTER. — There is great conflict of authority as to the power of courts of equity to enjoin judgments void for want of jurisdiction, and decisions even in the same state are not always uniform. According to some decisions, the fact that the judgment is void because the court in which it was rendered had no jurisdiction of the subject-matter will constitute no ground for enjoining it, it being held that the party has an adequate remedy at law of which he must avail himself.⁷ In other decisions the power of a court of equity to enjoin such a judgment has been upheld;⁸ but where this view obtains, such want of jurisdiction must be alleged and proved.⁹

b. JUDGMENTS VOID FOR WANT OF JURISDICTION OF PERSON — (1) Want of Notice or Process. — While there are some decisions which seem to hold, without any qualification, that a judgment void because the defendant was not served with process cannot be relieved against in equity by injunction or otherwise,¹⁰ the great weight of authority is unquestionably to the effect that courts of chancery have the power to enjoin judgments rendered against a party without service of process upon him or notice of suit, by reason whereof he

1. Surprise Unmixed with Negligence of Party. — *Dibble v. Truluck*, 12 Fla. 185; *Dilly v. Barnard*, 8 Gill & J. (Md.) 170; *Jones v. Kincaid*, 5 Lea (Tenn.) 677; *White v. Washington*, 5 Gratt. (Va.) 647; *Mosby v. Haskins*, 4 Hen. & M. (Va.) 427.

2. Surprise Resulting from Fraud of Adverse Party. — *Dibble v. Truluck*, 12 Fla. 185; *Post v. Boardman*, 10 Paige (N. Y.) 580.

3. Want of Knowledge of Suit until After Judgment. — *Mosby v. Haskins*, 4 Hen. & M. (Va.) 427.

4. Judgment Taken in Case Continued to Next Term. — *Jones v. Kincaid*, 5 Lea (Tenn.) 677.

5. Failure of Witness to Prove Facts Which He Promised to Prove. — *White v. Washington*, 5 Gratt. (Va.) 647.

6. Surprise Such as Party Could Have Reasonably Anticipated. — *Shannon v. Reese*, 38 Ala. 593; *Williams v. Lockwood*, *Clarke* (N. Y.) 172; *Fowler v. Roe*, 11 N. J. Eq. 367. See also *Fisk v. Miller*, 20 Tex. 572; *Goss v. McClaren*, 17 Tex. 108, 67 Am. Dec. 646.

7. View that Injunction Does Not Lie. — *Morris v. Morris*, 76 Ga. 733; *Stockton v. Ransom*, 60 Mo. 535; *Crandall v. Bacon*, 20 Wis. 639, 91 Am. Dec. 451.

Loss of Jurisdiction by Adjournment. — Where a justice loses jurisdiction by adjourning the cause without specifying the hour of the day and the place to which it is adjourned, the judgment is void, but the remedy is by cer-

tiorari and not by injunction. *Crandall v. Bacon*, 20 Wis. 639, 91 Am. Dec. 451.

8. View that Injunction Lies. — *Dial v. Olsen*, (Ariz. 1894) 36 Pac. Rep. 175; *Connell v. Stelson*, 33 Iowa 147; *Hernandez v. James*, 23 La. Ann. 483 (in this case it was held that jurisdiction was conferred by a statutory provision); *U. S. Mutual Acc. Ins. Co. v. Reisinger*, 43 Mo. App. 571, *overruled* in *St. Louis, etc., R. Co. v. Lowder*, 138 Mo. 533, 60 Am. St. Rep. 565, a case in which the judgment sought to be enjoined was void for want of service of process; *Smith v. Deweese*, 41 Tex. 594.

Presumption as to Jurisdictional Amount. — Where suit to enjoin a judgment is brought twenty years after the rendition of the judgment, it will not be presumed that the amount involved was not within the jurisdiction of the court rendering the judgment, where the declaration contained a number of counts which in the aggregate claimed a greater amount, although the judgment rendered was for less than the jurisdictional amount. *Hill v. Gordon*, 45 Fed. Rep. 276.

9. Averment and Proof of Want of Jurisdiction Necessary. — *Johnson v. Van Cleve*, 23 Neb. 550.

10. View that Want of Jurisdiction Does Not Authorize Injunction. — *Hart v. Lazaron*, 46 Ga. 396; *Emmons v. McKesson*, 5 Jones Eq. (58 N. Car.) 92; *Partin v. Luterloh*, 6 Jones Eq. (59 N. Car.) 341. Another *North Carolina* decision,

does not appear and make defense to the action.¹ This rule has been held to apply whether the record affirmatively shows want of service of process² or merely omits to show the service, leaving it to be presumed *prima facie*.³ So, according to the weight of authority, a judgment may be enjoined even where it appears to be valid and regular on its face. The decisions on this question, however, are not harmonious.⁴

Necessity of Showing Defense. — According to some decisions, the issuance of the injunction is not dependent upon the question whether the complainant shows a defense to the action wherein the judgment is sought to be enjoined.⁵ The great weight of authority, however, is to the contrary. Equity will not interfere to relieve against a judgment obtained without service of process, unless the judgment defendant has a meritorious defense to the action in which such judgment was obtained. A condition precedent required by courts of equity

Myers v. Daniels, 6 Jones Eq. (59 N. Car.) 1, is in conflict with this view.

1. Power of Courts of Chancery to Enjoin — In General. — *Alabama.* — Stubbs v. Leavitt, 30 Ala. 352; Grier v. Campbell 21 Ala. 327; Rice v. Tobias, 89 Ala. 214.

California. — Martin v. Parsons, 49 Cal. 94.

Colorado. — Wilson v. Hawthorne, 14 Colo. 530, 20 Am. St. Rep. 290; San Juan, etc., Min., etc., Co. v. Finch, 6 Colo. 214; Smith v. Morrill, 11 Colo. App. 284.

Connecticut. — Jeffery v. Fitch, 46 Conn. 601; Blakeslee v. Murphy, 44 Conn. 188.

Illinois. — Wilday v. McConnel, 63 Ill. 278; Propst v. Meadows, 13 Ill. 157; Grand Tower Min., etc., Co. v. Schirmer, 64 Ill. 106; Moore v. Cohen, 70 Ill. App. 160.

Indiana. — Nicholson v. Stephens, 47 Ind. 185.

Iowa. — Givens v. Campbell, 20 Iowa 79; Newcomb v. Dewey, 27 Iowa 381; Arnold v. Hawley, 67 Iowa 313; State Ins. Co. v. Waterhouse, 78 Iowa 674; Stone v. Skerry, 31 Iowa 582; Gerrish v. Hunt, 66 Iowa 682; Gerrish v. Seaton, 73 Iowa 15; Jamison v. Weaver, 84 Iowa 611; Leonard v. Capital Ins. Co., 101 Iowa 482.

Kansas. — Chambers v. King Wrought-Iron Bridge Manufactory, 16 Kan. 270.

Minnesota. — Magin v. Lamb, 43 Minn. 80, 19 Am. St. Rep. 216.

Mississippi. — Wilson v. Montgomery, 14 Smed. & M. (Miss.) 205; Hale v. Bozeman, 60 Miss. 965; Newman v. Taylor, 69 Miss. 670; Stewart v. Brooks, 62 Miss. 492; Newman v. Taylor, 69 Miss. 670; Duncan v. Gerdine, 59 Miss. 550.

Nebraska. — Wilson v. Shipman, 34 Neb. 573, 33 Am. St. Rep. 660.

New Jersey. — Herbert v. Herbert, 49 N. J. Eq. 70.

North Carolina. — Myers v. Daniels, 6 Jones Eq. (59 N. Car.) 1.

Pennsylvania. — Miller v. Gorman, 38 Pa. St. 309.

Tennessee. — Wooten v. Daniel, 16 Lea (Tenn.) 156; Kinzer v. Helm, 7 Heisk. (Tenn.) 672; Bell v. Williams, 1 Head (Tenn.) 229; Caruthers v. Hartsfield, 3 Yerg. (Tenn.) 366, 24 Am. Dec. 580; Rucker v. Moore, 1 Heisk. (Tenn.) 728; Ingle v. McCurry, 1 Heisk. (Tenn.) 26; Lane v. Marshall, 1 Heisk. (Tenn.) 30; Ogg v. Leinart, 1 Heisk. (Tenn.) 40.

Texas. — Edrington v. Allsbrooks, 21 Tex. 186; Willis v. Gordon, 22 Tex. 241; Galveston,

etc., R. Co. v. Ware, 74 Tex. 47; Wofford v. Booker, 10 Tex. Civ. App. 171; Glass v. Smith, 66 Tex. 548; Cooke v. Burnham, 32 Tex. 129; Jennings v. Shiner, (Tex. Civ. App. 1897) 43 S. W. Rep. 276; Gulf, etc., R. Co. v. Rawlins, 80 Tex. 579.

Effect of Statutory Provisions Relating to Enjoining Judgments. — The right of a judgment debtor to enjoin a judgment void for want of service of summons is not taken away by a statute which authorizes relief from a judgment taken against a party through mistake or excusable neglect, or from a judgment without personal service of summons. Smith v. Morrill, 12 Colo. App. 233.

Where No Notice Is Required. — Where, on a proceeding for final distribution of an estate, personal notice is not required by statute, the want of such notice furnishes no ground for enjoining the judgment. Daly v. Pennie, 86 Cal. 552, 21 Am. St. Rep. 61.

Admission that Part of Judgment Is Due. — Where a party admits that he owes part of an amount awarded by the judgment, an injunction will not be granted unless he tenders what he admits is justly due. Parsons v. Nutting, 45 Iowa 404.

Enjoining Judgment as to Part of Claim. — An injunction against the enforcement of a judgment at law may be allowed if a good defense is established against the entire claim upon which it is founded, or against the enforcement of part of the judgment, if the defense goes only to a part of the claim. Jeffery v. Fitch, 46 Conn. 602.

Effect of Affirmance of Judgment. — The affirmance of judgment on appeal does not affect the party's rights. The affirmance of a void judgment upon grounds not touching but overlooking its invalidity does not make it valid. Wilson v. Montgomery, 14 Smed. & M. (Miss.) 205; Chambers v. Hodges, 23 Tex. 104.

2. Where Record Shows Want of Service. — San Juan, etc., Min., etc., Co. v. Finch, 6 Colo. 219; Bell v. Williams, 1 Head (Tenn.) 229.

3. Where Record Omits to Show Service. — Hill v. Newman, 47 Ind. 187.

4. See infra, this section, False Return of Service of Process.

5. View that Valid Defense Need Not Be Shown. — Magin v. Lamb, 43 Minn. 80, 19 Am. St. Rep. 216; Bell v. Williams, 1 Head (Tenn.) 229; Ridgeway v. State Bank, 11 Humph. (Tenn.) 523; Caruthers v. Hartsfield, 3 Yerg. (Tenn.) 366, 24 Am. Dec. 580.

before they will enjoin the execution of such judgment is that if relief is granted, a different result will be attained than that already decreed by the void judgment.¹

Want of Notice or Knowledge Is Not Enough.—The applicant for an injunction must go further and show both in averment and proof that he had and has a defense good in law, and in what that defense consists. The court must be put in possession of the facts, where the sufficiency of the defense is an indispensable element of the issue.²

Showing Want of Service.—So where a defendant in a judgment or decree seeks relief against it in equity and avers that he was not served with process, though the averment is negative in its character, the burden of proving it rests on him, and he must adduce evidence sufficient to overcome the sworn return of the officer.³

Effect of Adequate Remedy at Law on Right to Injunction.—In a considerable number of the decisions cited relating to the injunction of judgments void for want of service of process it did not appear whether the party had or had not any other remedy than by injunction, and so far as these decisions are concerned it is a legitimate inference that the question whether there was any remedy at law was considered a matter of no importance. There are, however, a number of decisions in which the question is directly raised, and the conclusions reached are by no means harmonious. According to some decisions, equity will grant relief by injunction although there may be an adequate remedy in the original cause.⁴ But the weight of authority, it is believed, asserts the contrary doctrine.⁵ These decisions proceed upon the theory that where there is an ordinary remedy for error an extraordinary one will not be allowed.⁶

Against Whom Action Lies.—An action to enjoin the enforcement of a judg-

1. **View that Valid Defense Must Be Shown**—*Alabama*.—*Secor v. Woodward*, 8 Ala. 500; *Dunklin v. Wilson*, 64 Ala. 162.

Arkansas.—*State v. Hill*, 50 Ark. 458.

Connecticut.—*Jeffery v. Fitch*, 46 Conn. 602.

Florida.—*Budd v. Gamble*, 13 Fla. 265.

Illinois.—*Garden City Wire, etc., Co. v. Kause*, 67 Ill. App. 108; *Combs v. Hamlin Wizard Oil Co.*, 58 Ill. App. 123.

Iowa.—*Gerrish v. Hunt*, 66 Iowa 682; *Gerrish v. Seaton*, 73 Iowa 15.

Kentucky.—*Taylor v. Lewis*, 2 J. J. Marsh. (Ky.) 400, 19 Am. Dec. 139.

Maryland.—*Fowler v. Lee*, 10 Gill & J. (Md.) 358, 32 Am. Dec. 172.

Mississippi.—*Stewart v. Brooks*, 62 Miss. 492; *Newman v. Taylor*, 69 Miss. 670.

Montana.—*Hauswirth v. Sullivan*, 6 Mont. 203.

New Jersey.—*Herbert v. Herbert*, 49 N. J. Eq. 70.

Exception to Rule.—It has been said that the rule and the reason for it entirely fail when the defendant comes into court with the money and offers to pay the judgment as a condition precedent to its being set aside. *Hauswirth v. Sullivan*, 6 Mont. 203.

2. *Dunklin v. Wilson*, 64 Ala. 168; *Crafts v. Dexter*, 8 Ala. 767, 42 Am. Dec. 666; *Harnish v. Bramer*, 71 Cal. 155; *Gregory v. Ford*, 14 Cal. 138 73 Am. Dec. 639.

3. **Burden of Showing Want of Service.**—*Dunklin v. Wilson*, 64 Ala. 162; *Cullum v. Casey*, 1 Ala. 351; *State v. Hill*, 50 Ark. 458; *Tatum v. Curtis*, 9 Baxt. (Tenn.) 360; *Preston v. Kendrick*, 94 Va. 760.

4. **Remedy at Law as Affecting Right to Injunction.**—*Robinson v. Reid*, 50 Ala. 69; *Leonard v. Capital Ins. Co.*, 101 Iowa 482; *Connell v. Stelson*, 33 Iowa 147; *Landrum v. Farmer*, 7 Bush (Ky.) 46; *Caruthers v. Hartsfield*, 3 Verg. (Tenn.) 366, 24 Am. Dec. 580; *Ridgeway v. State Bank*, 11 Humph. (Tenn.) 523; *M'Nairy v. Eastland*, 10 Verg. (Tenn.) 310. See also *Johnson v. Coleman*, 23 Wis. 452, 99 Am. Dec. 193.

5. *Arkansas*.—*Shaul v. Duprey*, 48 Ark. 331; *Fuller v. Townsly-Myrick Dry Goods Co.*, 58 Ark. 314.

California.—*Luco v. Brown*, 73 Cal. 3, 2 Am. St. Rep. 772; *Sanchez v. Carriaga*, 31 Cal. 170; *Gates v. Lane*, 49 Cal. 266.

Louisiana.—*Thibodaux v. Wright*, 3 La. Ann. 130.

Mississippi.—*State v. Ricketts*, 67 Miss. 409.

Missouri.—*St. Louis, etc., R. Co. v. Lowder*, 138 Mo. 533, 60 Am. St. Rep. 565 [overruling *U. S. Mutual Acc. Ins. Co. v. Reisinger*, 43 Mo. App. 571; *Bornschein v. Finck*, 13 Mo. App. 120]; *Missouri, etc., R. Co. v. Hoereth*, 144 Mo. 136; *St. Louis, etc., R. Co. v. Reynolds*, 89 Mo. 146.

Texas.—*Windisch v. Gussett*, 30 Tex. 744; *Galveston, etc., R. Co. v. Ware*, 74 Tex. 47; *Gulf, etc., R. Co. v. Rawlins*, 80 Tex. 579; *San Antonio, etc., R. Co. v. Glass*, (Tex. Civ. App. 1897) 40 S. W. Rep. 339; *Hamblin v. Knight*, 81 Tex. 351, 26 Am. St. Rep. 818; *Jennings v. Shiner*, (Tex. Civ. App. 1897) 43 S. W. Rep. 276; *Texas Mexican R. Co. v. Wright*, 88 Tex. 346.

6. **Reason for Rule.**—*State v. Ricketts*, 67 Miss. 409; *Windisch v. Gussett*, 30 Tex. 744.

ment for want of jurisdiction of the defendant's person may be maintained against any person who attempts to put such judgment in force and who has apparent authority for so doing.¹

Where Action Brought. — And it has been held that the action may be maintained in any county in which the attempt to enforce the judgment is made, although it may have been rendered in another county.²

(2) **False Return of Service of Process.** — The weight of authority seems to be that if the process is returned executed upon the defendant at law, and was not in fact executed, and judgment was rendered without appearance or opportunity to defend, chancery has power to enjoin the judgment, if it be alleged and proved that the party aggrieved has a good defense to the action.³ According to these decisions, the return of the officer to the writ is only *prima facie* evidence of the fact stated by it, and may be contradicted in a collateral proceeding.⁴ There are, however, some decisions which deny without qualification that a judgment may be enjoined because of a false return of service of process.⁵ So there are other decisions which modify very materially the rule as stated. The rule as formulated by them is to the effect that the judgment cannot be enjoined unless the plaintiff in the action at law actively participated in procuring the false return of service;⁶ that if he acted in good faith the judgment is conclusive as between him and the defendant. Redress can be had only in a court of law where the record was made, and if relief cannot be had there, the party injured must seek his remedy against the officer making the false return.⁷ While there are a few decisions holding that it is not necessary to allege or prove that the party has a good defense to the action at law,⁸ the weight of authority is clearly to the effect that the party must allege and prove that he has a meritorious defense, and this is certainly in accord with the decisions in which it has been sought to enjoin judgments upon other grounds.⁹

1. **Who May Be Enjoined.** — *Chambers v. King Wrought-Iron Bridge Manufactory*, 16 Kan. 270.

2. **Where Action Brought.** — *Chambers v. King Wrought-Iron Bridge Manufactory*, 16 Kan. 270. See also *State Ins. Co. v. Waterhouse*, 78 Iowa 674, wherein it was held that where a judgment is absolutely void because no notice was served on the defendant, an original action in equity to cancel the judgment and enjoin its collection may be maintained in any court having equitable jurisdiction, regardless of the court from which the execution has issued.

3. **False Return of Service of Process** — *Alabama*. — *Crafts v. Dexter*, 8 Ala. 767, 42 Am. Dec. 666; *Givens v. Tidmore*, 8 Ala. 745; *Rice v. Tobias*, 89 Ala. 214; *Dunklin v. Wilson*, 64 Ala. 162.

Arkansas. — *State v. Hill*, 50 Ark. 458.

California. — *Martin v. Parsons*, 49 Cal. 94; *Gregory v. Ford*, 14 Cal. 139, 73 Am. Dec. 639.

Illinois. — *Hickey v. Stone*, 60 Ill. 458; *Owens v. Ranstead*, 22 Ill. 161.

Iowa. — *Newcomb v. Dewey*, 27 Iowa 381.

Kansas. — *Chambers v. King Wrought-Iron Bridge Manufactory*, 16 Kan. 270; *McNeill v. Edie*, 24 Kan. 108.

Mississippi. — *Walker v. Gilbert, Freem.* (Miss.) 85; *Jones v. Commercial Bank*, 5 How. (Miss.) 43, 35 Am. Dec. 419; *Duncan v. Gerdine*, 59 Miss. 550.

Montana. — *Hauswirth v. Sullivan*, 6 Mont. 203.

Nebraska. — *Wilson v. Shipman*, 34 Neb. 573, 33 Am. St. Rep. 660.

Pennsylvania. — *Miller v. Gorman*, 38 Pa. St. 309.

Tennessee. — *Ridgeway v. State Bank*, 11 Humph. (Tenn.) 525.

Appearance Notwithstanding False Return. — A judgment will not be enjoined upon the ground that there was a false return of service upon one of the defendants where he waived notice by appearing and pleading to the action. *Walker v. Robbins*, 14 How. (U. S.) 584.

4. **Return Only Prima Facie Evidence of Service.** — *Owens v. Ranstead*, 22 Ill. 161.

5. *Stites v. Knapp*, Ga. Dec., pt. ii, 36; *Godard v. Harbour*, 56 Kan. 744, 54 Am. St. Rep. 608.

6. **View that Collusion Between Plaintiff and Officer Is Necessary.** — *Walker v. Robbins*, 14 How. (U. S.) 584; *Knox County v. Harshman*, 133 U. S. 152; *Taylor v. Lewis*, 2 J. J. Marsh. (Ky.) 400, 19 Am. Dec. 135; *Thomas v. Ireland*, 88 Ky. 581, 21 Am. St. Rep. 356; *Johnson v. Jones*, 2 Neb. 133. See also *Hamblen v. Knight*, 60 Tex. 37.

7. **Remedy by Action for False Return.** — See the cases in the two preceding notes.

8. **Whether Necessary to Show Good Defense.** — *Ryan v. Boyd*, 33 Ark. 778, *overruled* in later *Arkansas* decisions; *Ridgeway v. State Bank*, 11 Humph. (Tenn.) 523.

9. *Crafts v. Dexter*, 8 Ala. 767, 42 Am. Dec. 666; *Givens v. Tidmore*, 8 Ala. 745; *State v. Hill*, 50 Ark. 458, *overruling* *Ryan v. Boyd*, 33 Ark. 778; *Gregory v. Ford*, 14 Cal. 139, 73 Am. Dec. 639; *Walker v. Gilbert, Freem.* (Miss.) 85; *Wilson v. Shipman*, 34 Neb. 573, 33 Am. St. Rep. 660.

9. Erroneous or Irregular Judgments — *a. STATEMENT OF RULE.* — It is well settled that where a court in which a judgment or decree is rendered has jurisdiction of the subject-matter and of the parties, equity has no jurisdiction to enjoin such judgment or decree for errors or irregularities in the proceedings leading thereto or in the judgment or decree itself,¹ and it is altogether immaterial that the judgment or the decree was unjust² or that the error was such as to warrant a new trial.³ So it is likewise immaterial that the judgment was rendered by default.⁴

b. APPLICATIONS OF RULE. — In applying the doctrine stated in the preceding section it has been held that a judgment will not be enjoined for the following irregularities and errors: Insufficiency of the evidence to support

1. Irregularities and Errors Not Ground for Injunction — *United States.* — *Marine Ins. Co. v. Hodgson*, 7 Cranch (U. S.) 332; *Ludlow v. Ramsey*, 11 Wall. (U. S.) 581.

Alabama. — *Saunders v. Albritton*, 37 Ala. 716; *Lucas v. Darien Bank*, 2 Stew. (Ala.) 280.

Arkansas. — *Ex p. Christian*, 23 Ark. 641; *Carnall v. Crawford County*, 11 Ark. 604; *Clopton v. Carlross*, 42 Ark. 500.

California. — *Murdock v. De Vries*, 37 Cal. 527; *Daly v. Pennie*, 86 Cal. 552, 21 Am. St. Rep. 61.

Florida. — *Budd v. Long*, 13 Fla. 288.

Georgia. — *Gibson v. Cohen*, 85 Ga. 850; *Baker v. McDaniel*, 87 Ga. 18; *Stites v. Knapp*, Ga. Dec., pt. ii. 36.

Illinois. — *Gibbons v. Bressler*, 61 Ill. 110.

Indiana. — *Cassel v. Scott*, 17 Ind. 514; *Davis v. Clements*, 148 Ind. 605; *Earl v. Matheney*, 60 Ind. 202; *Baragree v. Cronkhite*, 33 Ind. 192; *Schwab v. Madison*, 49 Ind. 329; *Parsons v. Pierson*, 128 Ind. 479; *Shrack v. Covault*, 144 Ind. 260; *Gall v. Fryberger*, 75 Ind. 98; *Featherston v. Small*, 77 Ind. 143; *Stout v. Woods*, 79 Ind. 108; *Davis v. Davis*, 85 Ind. 309; *De Haven v. Covalt*, 83 Ind. 344; *Fitch v. Byall*, 149 Ind. 554; *Hume v. Conduitt*, 76 Ind. 598; *Hart v. O'Rourke*, 151 Ind. 205; *Dunn v. Fish*, 8 Blackf. (Ind.) 409.

Iowa. — *Hampson v. Weare*, 4 Iowa 13, 66 Am. Dec. 116; *Parkins v. Alexander*, 105 Iowa 74.

Kansas. — *Meixell v. Kirkpatrick*, 28 Kan. 315; *Burke v. Wheat*, 22 Kan. 722.

Kentucky. — *Reynolds v. Horine*, 13 B. Mon. (Ky.) 234; *Cameron v. Bell*, 2 Dana (Ky.) 328.

Maryland. — *Boyd v. Chesapeake, etc., Canal Co.*, 17 Md. 195, 79 Am. Dec. 646; *Richardson v. Baltimore*, 8 Gill (Md.) 433; *Methodist Protestant Church v. Baltimore*, 6 Gill (Md.) 391, 48 Am. Dec. 540; *Miller v. Duvall*, 26 Md. 47.

Massachusetts. — *Jennison v. Hapgood*, 7 Pick. (Mass.) 1, 19 Am. Dec. 258.

Mississippi. — *Ammons v. Whitehead*, 31 Miss. 99.

Missouri. — *Risher v. Roush*, 2 Mo. 95, 22 Am. Dec. 442; *Davis v. Wade*, 58 Mo. App. 641; *Missouri, etc., R. Co. v. Warden*, 73 Mo. App. 117.

Nebraska. — *Fox v. McClay*, 48 Neb. 820.

New York. — *Donovan v. Finn*, Hopk. (N. Y.) 59; *Shottenkirk v. Wheeler*, 3 Johns. Ch. (N. Y.) 275; *Holmes v. Remsen*, 7 Johns. Ch. (N. Y.) 286; *Simpson v. Hart*, 1 Johns. Ch. (N. Y.) 91.

New Jersey. — *Amey v. Calkins*, (N. J. 1890) 19 Atl. Rep. 388; *Cutter v. Kline*, 35 N. J. Eq. 534; *Holmes v. Steele*, 28 N. J. Eq. 173.

North Carolina. — *Stockton v. Briggs*, 5 Jones Eq. (58 N. Car.) 309; *Scofield v. Van Bokkelen*, 5 Jones Eq. (58 N. Car.) 342; *McRae v. Atlantic, etc., R. Co.*, 5 Jones Eq. (58 N. Car.) 395; *Bissell v. Bozman*, 2 Dev. Eq. (17 N. Car.) 160; *Giantham v. Kennedy*, 91 N. Car. 148; *Dudley v. Cole*, 1 Dev. & B. Eq. (21 N. Car.) 429.

Ohio. — *Curtis v. Cisna*, 1 Ohio 429; *Stiver v. Stiver*, 3 Ohio 19; *Buell v. Cross*, 4 Ohio 327; *Spencer v. King*, 5 Ohio 182.

Oregon. — *Nicklin v. Hobin*, 13 Oregon 406.

Pennsylvania. — *Eyster's Appeal*, 65 Pa. St. 473; *Pine-Knot Coal Co. v. Neugardt*, 1 Leg. Chron. (Pa.) 143.

Rhode Island. — *Barr v. Carpenter*, 16 R. I. 724.

Tennessee. — *Nicholson v. Patterson*, 6 Humph. (Tenn.) 395; *Blount v. Garen*, 3 Hayw. (Tenn.) 88; *Whiteside v. Latham*, 2 Coldw. (Tenn.) 92; *Greenlaw v. Kernahan*, 4 Sneed (Tenn.) 380; *Shepard v. Akers*, 3 Tenn. Ch. 215; *Austin v. Ramsey*, 3 Tenn. Ch. 119; *Moore v. McGaha*, 3 Tenn. Ch. 415; *Glenn v. Maguire*, 3 Tenn. Ch. 695.

Texas. — *McCrimmin v. Cooper*, 37 Tex. 423; *Halcomb v. Kelly*, 57 Tex. 618; *Wood v. Lenox*, 5 Tex. Civ. App. 318; *Rountree v. Walker*, 46 Tex. 200; *Wills Point Bank v. Bates*, 76 Tex. 329.

Vermont. — *Dunham v. Downer*, 31 Vt. 249.

Virginia. — *Turpin v. Thomas*, 2 Hen. & M. (Va.) 139, 3 Am. Dec. 615.

Wisconsin. — *Jilsun v. Stebbins*, 41 Wis. 235; *Bond v. Kenosha*, 17 Wis. 284; *Miltimore v. Rock County*, 15 Wis. 9; *Kellogg v. Oshkosh*, 14 Wis. 624; *Warden v. Fond du Lac County*, 14 Wis. 618; *Ableman v. Roth*, 12 Wis. 81.

A court before which the records of another having jurisdiction are used cannot review the proceedings to spy out irregularities that may have intervened, or erroneous orders that may have been made, or wrong conclusions arrived at. This is the province of a court of revision, and no other can notice their existence. *Greenlaw v. Kernahan*, 4 Sneed (Tenn.) 371.

2. Immaterial that Judgment Is Unjust. — *Wood v. Lenox*, 5 Tex. Civ. App. 318.

3. Errors Authorizing New Trial No Ground to Enjoin. — *Reynolds v. Horine*, 13 B. Mon. (Ky.) 234; *Nicholson v. Patterson*, 6 Humph. (Tenn.) 394.

4. Judgment Rendered by Default. — *Turpin v. Thomas*, 2 Hen. & M. (Va.) 139, 3 Am. Dec. 615.

the judgment;¹ want of a finding of fact to support the judgment;² erroneous exclusion of evidence;³ erroneous admission of evidence;⁴ error in holding that matters set up in defense are insufficient⁵ or that they were not cognizable at law;⁶ illegal refusal of a continuance;⁷ erroneous allowance of a change of venue;⁸ trial without a jury, contrary to statute;⁹ error in denying a new trial;¹⁰ that the judgment was rendered for a greater amount than claimed;¹¹ that the judgment was excessive;¹² allowance of interest by the judgment where the verdict gives none;¹³ errors or irregularities in entering judgments;¹⁴ rendition of a judgment at the wrong term¹⁵ or after the time fixed by statute,¹⁶ or before the return day of process;¹⁷ error in taxing costs;¹⁸ disqualification of the judge on account of interest;¹⁹ failure of the court to appoint a guardian *ad litem* for an infant;²⁰ errors in the settlement of an executor's administration account;²¹ consolidation of causes without an order of the court;²² erroneous rulings as to the allowance of filing amended pleadings in joining issues;²³ that the land described in the judgment differs from that described in the complaint;²⁴ erroneous amendment of a decree;²⁵ adjournment of the cause for longer time than allowed by statute;²⁶ an irregular private examination of a *feme covert* as to a deed executed by her;²⁷ irregulari-

1. **Insufficiency of Evidence.** — Norman v. Burns, 67 Ala. 248; Pico v. Sunol, 6 Cal. 294; Nashville, etc., R. Co. v. Mattingly, (Ky. 1897) 40 S. W. Rep. 673; Brigot v. Brigot, 49 La. Ann. 1428; Rotzein v. Cox, 22 Tex. 66; Jordan v. Corley, 42 Tex. 287.

2. **Want of Finding of Fact.** — Petalka v. Fitle, 33 Neb. 756.

3. **Erroneous Exclusion of Evidence.** — Edman-son v. Best, 57 Fed. Rep. 531; Moore v. Dial, 3 Stew. (Ala.) 155; Vaughn v. Johnson, 9 N. J. Eq. 173.

4. **Erroneous Admission of Evidence.** — Vaughn v. Johnson, 9 N. J. Eq. 173, where the error relied on was allowing parol proof of judgment.

5. **Error in Rulings as to Sufficiency of Defense.** — Marine Ins. Co. v. Hodgson, 7 Cranch (U. S.) 332; Reynolds v. Dothard, 7 Ala. 664; Thomas v. Hearn, 2 Port. (Ala.) 262; Baker v. Pool, 56 Ala. 14; Dunn v. Fish, 8 Blackf. (Ind.) 407; Hooper v. Rhodes, 7 La. Ann. 137; Chester v. Scott, 4 Hayw. (Tenn.) 14.

6. Moore v. Dial, 3 Stew. (Ala.) 155.

A defense which has been fully and fairly tried at law cannot be set up in equity, although it may be the opinion of the court that the defense ought to have been sustained at law. Marine Ins. Co. v. Hodgson, 7 Cranch (U. S.) 332.

7. **Erroneous Refusal of Continuance.** — Western v. Woods, 1 Tex. 1; Syme v. Montague, 4 Hen. & M. (Va.) 180. See also Hamilton v. Dobbs, 19 N. J. Eq. 227.

8. **Allowing Change of Venue Erroneously.** — Triplett v. Scott, 5 Bush (Ky.) 81.

9. **Allowing Trial Without Jury Erroneously.** — Maxwell v. Stewart, 22 Wall. (U. S.) 77; Blanck v. Speckman, 23 La. Ann. 146. Trial with more than the legal number of jurymen, though objected to by the defendant, does not entitle him to enjoin the judgment. Rhodes Burford Furniture Co. v. Mattox, 135 Ind. 372.

10. **Error in Pleading New Trial.** — Railroad Co. v. Neal, 1 Woods (U. S.) 353; Haughy v. Strung, 2 Port. (Ala.) 177, 27 Am. Dec. 648; Smith v. Lowry, 1 Johns. Ch. (N. Y.) 320; Meredith v. Johns, 1 Hen. & M. (Va.) 585.

11. **Rendering Judgment for Greater Amount**

than Claimed. — Gum-Elastic Roofing Co. v. Mexico Pub. Co., 140 Ind. 158.

12. **Rendering Excessive Judgment.** — Walker v. Villavaso, 26 La. Ann. 42; Rogers v. Stokes, 87 Tenn. 294.

13. **Erroneous Allowance of Interest.** — Mc-Micken v. Millandon, 2 La. 181.

14. **Errors in Entering Judgments.** — Logan v. Hillegass, 16 Cal. 202; Boyd v. Chesapeake, etc., Canal Co., 17 Md. 106, 79 Am. Dec. 646; McIndoe v. Hazelton, 19 Wis. 567.

The Entry of Judgment by a Justice Without a Written Verdict constitutes no ground for enjoining the judgment. Parsons v. Pierson, 128 Ind. 479.

15. **Rendition at Wrong Term.** — Shricker v. Field, 9 Iowa 366.

16. **Rendition After Time Fixed by Statute.** — Gould v. Loughran, 19 Neb. 392; Lininger v. Glenn, 33 Neb. 187.

17. **Rendition Before Return Day of Process.** — McAlpine v. Sweetser, 76 Ind. 78.

18. **Error in Taxing Costs.** — Calderwood v. Trent, 9 Rob. (La.) 227; McGindley v. Newton, 75 Mo. 115; Stiver v. Stiver, 3 Ohio 19; Nicklin v. Hobin, 13 Oregon 406; Thompson v. Meek, 3 Sneed (Tenn.) 271.

19. **Disqualification of Judge.** — Dunson v. Spradley, (Tex. Civ. App. 1897) 40 S. W. Rep. 327.

20. **Failure to Appoint Guardian ad Litem.** — Drake v. Hanshaw, 47 Iowa 291; Myers v. Davis, 47 Iowa 325.

21. **Errors in Settlement of Administration Account.** — Jennison v. Hapgood, 7 Pick. (Mass.) 1, 19 Am. Dec. 258.

22. **Consolidation of Causes Without Order.** — Saunders v. Albritton, 37 Ala. 716.

23. **Error in Rulings as to Allowance of Amendments.** — Howard v. Eddy, 56 Kan. 498.

24. **Erroneous Description of Property in Judgment.** — Reast v. Hughes, (Tex. Civ. App. 1896) 33 S. W. Rep. 1003.

25. **Erroneous Amendment of Decree.** — Gregory v. Tingley, 18 Neb. 318.

26. **Irregular Adjournment.** — Ewing v. Mickle, 45 Md. 413.

27. **Irregular Examination of Married Woman.** — Campbell v. Taul, 3 Yerg. (Tenn.) 548.

ties or defects in the service of process;¹ a defective return of process;² and a mistake of commissioners appointed in proceedings for partition.³

10. Judgments Obtained through Unauthorized Appearance of Attorney — View that Injunction Does Not Lie if Attorney Is Solvent. — There is much difference of opinion as to whether a court of equity has jurisdiction to relieve by injunction or otherwise from a judgment rendered against a party on the unauthorized appearance of an attorney. According to some decisions, where a regular attorney of the court appears and answers for a defendant in a suit at law a judgment recovered by the plaintiff will not be vacated and execution enjoined by a court of equity though the attorney appeared without authority from the defendant, unless it be shown that the attorney is not of sufficient ability to answer for the damages caused by his unauthorized appearance, or there has been collusion between him and the plaintiff in the suit at law. In such a case redress must be sought against the attorney.⁴

View that Relief by Injunction Is Never Permissible. — In some jurisdictions it is well settled that a judgment obtained on an unauthorized appearance of an attorney will in no case be enjoined, whether the attorney be or be not solvent and able to respond in damages.⁵ In these jurisdictions the remedy at law is considered adequate, and to put it in operation it is not necessary that the attorney be unable to respond in damages.⁶ The usual remedy is by motion in the original cause to stay the proceedings on the judgment and to permit the party aggrieved to come in and defend on the merits,⁷ or by motion to set aside or vacate the judgment.⁸

1. Irregularities in Service of Process. — *Bonsall v. Isett*, 14 Iowa 309; *Cooper v. Sunderland*, 3 Iowa 114, 66 Am. Dec. 52; *Morrow v. Weed*, 4 Iowa 77, 66 Am. Dec. 122; *Myers v. Davis*, 47 Iowa 330; *Coon v. Jones*, 10 Iowa 131; *Ballinger v. Tarbell*, 16 Iowa 491, 85 Am. Dec. 527; *Gardner v. Jenkins*, 14 Md. 58; *Harris v. Gwin*, 10 Smed. & M. (Miss.) 563; *Proctor v. Pettitt*, 25 Neb. 96; *Mayer v. Nelson*, 54 Neb. 434.

Defects in Writ. — It is not a ground to enjoin a judgment, that the notice of the suit in which it was rendered was without revenue stamps attached, *Wilsey v. Maynard*, 21 Iowa 107; or without the seal of the court from which it was issued, *Krug v. Davis*, 85 Ind. 309.

Less Time than Required by Statute. — It is not ground to enjoin judgment, that the service was defective in that the statute required five days' notice, and only four were given. *Ballinger v. Tarbell*, 16 Iowa 491, 85 Am. Dec. 527.

Procuring Service by Subterfuge. — It is not a ground for injunction, that the defendant, a nonresident, was enticed into the state and then served with process. *Vastine v. Bast*, 41 Mo. 493.

2. Defective Return of Process. — *Logan v. Hillegass*, 16 Cal. 202.

3. Mistake of Commissioners in Partition Proceedings. — *Pardue v. West*, 1 Lea (Tenn.) 729.

4. Rule that Party Must Look to Attorney for Redress. — *Bunton v. Lyford*, 37 N. H. 512, 75 Am. Dec. 144; *Everett v. Warner Bank*, 58 N. H. 340.

Suit Brought for Plaintiffs Without Authority. — When an attorney brings suit without any authority from the plaintiffs, and the defendant obtains a judgment for costs, a court of equity will restrain the enforcement of such judgment by perpetual injunction, if it be

shown that the attorney is poor and unable to respond. *Smyth v. Balch*, 40 N. H. 363.

5. View that Injunction Is Never the Remedy — Indiana. — *Hollinger v. Reeme*, 138 Ind. 372, 46 Am. St. Rep. 402; *Coon v. Welborn*, 83 Ind. 230; *Bush v. Bush*, 46 Ind. 70; *Wiley v. Pratt*, 23 Ind. 628; *Pierson v. Holman*, 5 Blackf. (Ind.) 482.

New York. — *Vilas v. Plattsburgh, etc., R. Co.*, 123 N. Y. 440, 20 Am. St. Rep. 771; *American Ins. Co. v. Oakley*, 9 Paige (N. Y.) 496, 38 Am. Dec. 561; *Denton v. Noyes*, 6 Johns. (N. Y.) 296, 5 Am. Dec. 237 (the leading case in America on this subject); *Ellsworth v. Campbell*, 31 Barb. (N. Y.) 134; *Blodgett v. Conklin*, (Supm. Ct. Spec. T.) 9 How. Pr. (N. Y.) 442; *Brown v. Nichols*, 42 N. Y. 26; *Campbell v. Bristol*, 19 Wend. (N. Y.) 101; *Grazebrook v. M'Creddie*, 9 Wend. (N. Y.) 437.

Ohio. — *Critchfield v. Porter*, 3 Ohio 519; *Pillsbury v. Dugan*, 9 Ohio 118, 34 Am. Dec. 427.

See also *Reynolds v. Howell*, L. R. 8 Q. R. 398; *Robson v. Eaton*, 1 T. R. 62; *Hubbart v. Phillips*, 13 M. & W. 702.

6. Remedy at Law Considered Adequate. — See the cases cited in the preceding note.

7. Motion to Stay Judgment. — *Hollinger v. Reeme*, 138 Ind. 372, 46 Am. St. Rep. 402; *Coon v. Welborn*, 83 Ind. 230; *Pierson v. Holman*, 5 Blackf. (Ind.) 482; *Bush v. Bush*, 46 Ind. 70; *Vilas v. Plattsburgh, etc., R. Co.*, 123 N. Y. 453, 20 Am. St. Rep. 771; *Denton v. Noyes*, 6 Johns. (N. Y.) 296, 5 Am. Dec. 237; *Ellsworth v. Campbell*, 31 Barb. (N. Y.) 134; *Grazebrook v. M'Creddie*, 9 Wend. (N. Y.) 437.

8. Motion to Set Aside Judgment. — *Campbell v. Bristol*, 19 Wend. (N. Y.) 101; *Vilas v. Plattsburgh, etc., R. Co.*, 123 N. Y. 453, 20 Am. St. Rep. 771; *Critchfield v. Porter*, 3 Ohio 519.

View that Injunction Lies Irrespective of Attorney's Solvency or Insolvency. — There yet remains a third line of decisions which do not square with either of the views already stated. According to these decisions the enforcement of the judgment obtained and resting upon an unauthorized appearance for the party may be restrained in equity, irrespective of the question whether the attorney is responsible or irresponsible, or acted by procurement or collusion with his antagonist.¹ Nevertheless it is incumbent on the party assailing the judgment on the ground of want of authority in the attorney to appear to make out a clear and unmixed case, free from fault or negligence on his part. Public policy requires this in view of the fact that it is easy for one party, especially after the lapse of time, to deny the attorney's authority, and difficult for the other party to show the authority. It is therefore a sound rule to require the party assailing a judgment or decree on this ground to show clear merits, to take prompt action, and to establish his right by cogent and strong proof.²

11. Judgments Obtained Through Negligence, Incompetence, or Mistake of Attorney. — A judgment will not be enjoined because of negligence, incompetence, or mistake of the attorney. If a party loses the opportunity of making his defense or of taking other steps necessary for the preservation or enforcement of his rights, by reason of the neglect, inattention, or mistaken advice of his own attorney, without any fraud or unfairness of the adverse party, it is in law, as between him and the adverse party, the same as if he had lost it by his own neglect, inattention, or fault.³ And the rule is in no wise affected by the fact that the attorney is insolvent and unable to respond in damages.⁴ In applying the rule it has been held no ground to enjoin the judgment that

1. View that Injunction Is Proper Remedy. — *Mills v. Scott*, 43 Fed. Rep. 452; *U. S. v. Throckmorton*, 98 U. S. 61; *Harshy v. Blackmarr*, 20 Iowa 161, 89 Am. Dec. 520; *Parsons v. Nutting*, 45 Iowa 404; *Newcomb v. Dewey*, 27 Iowa 381; *Ridge v. Alter*, 14 La. Ann. 880; *Handley v. Jackson*, 31 Oregon 552; *Boro v. Harris*, 13 Lea (Tenn.) 43; *Jones v. Williamson*, 5 Coldw. (Tenn.) 375; *Coles v. Anderson*, 8 Humph. (Tenn.) 489.

2. Party Must Show Want of Negligence on His Part. — *Jones v. Williamson*, 5 Coldw. (Tenn.) 380; *Harris v. Gwin*, 10 Smed. & M. (Miss.) 563.

3. Negligence, Incompetence, or Mistake of Counsel — *United States v. Wynn v. Wilson*, Hempst. (U. S.) 698; *Cowley v. Northern Pac. R. Co.*, 46 Fed. Rep. 325; *Crim v. Handley*, 94 U. S. 659; *Barhorst v. Armstrong*, 42 Fed. Rep. 2; *Rogers v. Parker*, 1 Hughes (U. S.) 148.

Alabama. — *Ex p. Walker*, 54 Ala. 577; *Broda v. Greenwald*, 66 Ala. 541; *Duckworth v. Duckworth*, 35 Ala. 70; *Watts v. Gayle*, 20 Ala. 817; *Shields v. Burns*, 31 Ala. 535; *McBroom v. Sommerville*, 2 Stew. (Ala.) 515.

Arkansas. — *Scroggin v. Hammett Grocer Co.*, 66 Ark. 183; *Vallentine v. Holland*, 40 Ark. 338; *Burton v. Hynson*, 14 Ark. 32.

California. — *Borland v. Thornton*, 12 Cal. 440.

Florida. — *Dibble v. Truluck*, 12 Fla. 185.

Georgia. — *Sasser v. Olliff*, 91 Ga. 84; *Brown v. Wilson*, 56 Ga. 534; *Hambrick v. Crawford*, 55 Ga. 335.

Illinois. — *Kern v. Strausberger*, 71 Ill. 413; *Clark v. Ewing*, 93 Ill. 574; *Winchester v. Grosvenor*, 48 Ill. 517; *Yates v. Monroe*, 13 Ill. 212; *Dinet v. Eigenmann*, 66 Ill. 39; *Fuller v. Little*, 69 Ill. 230; *Bardonski v. Bardonski*, 144 Ill. 284, *affirming* 44 Ill. App. 201.

Indiana. — *Brumbaugh v. Stockman*, 83 Ind. 583; *Sharp v. Moffit*, 94 Ind. 240; *Center Tp. v. Marion County*, 110 Ind. 579; *Parker v. v. Indianapolis Nat. Bank*, 1 Ind. App. 462.

Iowa. — *Jackson v. Gould*, 96 Iowa 488; *Baker v. Ryan*, 67 Iowa 708. See also *Jones v. Leech*, 46 Iowa 187.

Kentucky. — *Barrow v. Jones*, 1 J. J. Marsh. (Ky.) 471.

Maryland. — *Ruppertsberger v. Clark*, 53 Md. 402.

Mississippi. — *Carter v. Lyman*, 33 Miss. 171; *Newman v. Morris*, 52 Miss. 402.

Missouri. — *Matson v. Field*, 10 Mo. 100; *Dunn v. Hansard*, 37 Mo. 199; *Bowman v. Field*, 11 Mo. App. 594; *Miller v. Bernecker*, 46 Mo. 194; *Ketchum v. Harlowe*, 84 Mo. 225; *Dobbs v. St. Joseph F. & M. Ins. Co.*, 72 Mo. 189.

Nebraska. — *Ganzer v. Schiffbauer*, 40 Neb. 633; *Scott v. Wright*, 50 Neb. 849; *Funk v. Kansas Mfg. Co.*, 53 Neb. 450.

North Carolina. — *Fentress v. Rotins*, Term (4 N. Car.) 177, 7 Am. Dec. 704.

Pennsylvania. — *Waldo v. Denton*, 135 Pa. St. 181.

Tennessee. — *Morton v. Nunnally*, 3 Hayw. (Tenn.) 210; *Chester v. Apperson*, 4 Heisk. (Tenn.) 639.

Vermont. — *Burton v. Wiley*, 26 Vt. 430.

Virginia. — *Richmond Enquirer Co. v. Robinson*, 24 Gratt. (Va.) 548.

Wisconsin. — *Farmers L. & T. Co. v. Walworth County Bank*, 23 Wis. 249.

Contra. — The rule in *New York* seems to be in opposition to that stated in the text. *Sharp v. New York*, 31 Barb. (N. Y.) 576.

4. Effect of Attorney's Insolvency. — *Bardonski v. Bardonski*, 144 Ill. 284; *Kern v. Strausberger*, 71 Ill. 413.

counsel managed the trial of the cause unskillfully;¹ neglected to file a plea for the party;² absented himself from court during the trial, intentionally or otherwise;³ failed to notify his client of the time of trial;⁴ advised his client to remain away from court;⁵ failed to introduce material witnesses;⁶ neglected to take an appeal within the proper time;⁷ lost the right of appeal through delay in signing the bill of exceptions⁸ or by neglect to assign errors⁹ or by failure to call up a motion for a new trial through the mistaken impression that such motion had been overruled;¹⁰ advised the party that the proof of a material fact was unnecessary, whereby the party failed to prove it;¹¹ failed to enter a credit on the execution according to agreement;¹² caused the rendition of a judgment on a stipulation, in disobedience of the client's instructions;¹³ or lost the right to new trial by adopting the statement of the reporter of the testimony taken down by him, without observing the errors in such statement.¹⁴

12. Judgments by Default or Confession — Judgments by Default. — Where a party having an available legal defense neglects to present it and suffers judgment to go against him by default, he cannot obtain relief against the judgment by injunction, in the absence of surprise, accident, mistake, or fraud.¹⁵ Where a judgment by default is obtained against a party by his own neglect, it constitutes no ground for equitable intervention that his adversary obtained more relief than he was entitled to.¹⁶ So, although the defense is lost by neglect of counsel, there can be no relief, as the attorney's neglect will be imputed to his client;¹⁷ and entry of default in vacation is likewise insufficient ground for an injunction where the rules of the court in which the judgment was rendered authorize the entry of judgments in vacation.¹⁸ It is a good ground for enjoining a default judgment that it was obtained through the fraud of the adverse party.¹⁹ In any event, to authorize relief by injunction from a judg-

1. Unskillful Management of Cause. — *Burton v. Hynson*, 14 Ark. 32; *Barrow v. Jones*, 1 J. Marsh. (Ky.) 471.

2. Neglect to File Plea. — *Bardonski v. Bardonski*, 144 Ill. 284, affirmed in 44 Ill. App. 201; *Morton v. Nunnally*, 3 Hayw. (Tenn.) 210.

3. Absence from Trial. — *Crim v. Handley*, 94 U. S. 659; *Dinet v. Eigenmann*, 96 Ill. 39; *Shields v. Burns*, 31 Ala. 535; *Watts v. Gayle*, 20 Ala. 817; *Bowman v. Field*, 11 Mo. App. 594.

Attorney Having Evidence in His Possession. — Where a defendant was well represented by counsel on the trial, which was fairly conducted, the fact that by mistake one of his attorneys, who had cumulative evidence in his possession, did not attend the trial, and did not arrive until the case had been submitted to the jury, and that the court subsequently refused to permit the party to introduce such evidence and denied his motion for a new trial, is no ground for an injunction to restrain the judgment. *Waldo v. Denton*, 135 Pa. St. 181.

4. Failure to Notify Client of Time of Trial. — *Bowman v. Field*, 11 Mo. App. 594.

5. Advice to Client Not to Attend Trial. — *Sasser v. Olliff*, 91 Ga. 84.

6. Failure to Introduce Material Witnesses. — *Ex p. Walker*, 54 Ala. 577.

7. Neglect to Appeal Within Proper Time. — *Bowman v. Field*, 11 Mo. App. 594.

8. Loss of Right to Appeal by Delay in Signing Bill of Exceptions. — *Ruppertsberger v. Clark*, 53 Md. 402.

9. Neglect to Assign Errors. — *Miller v. Bernecker*, 46 Mo. 194.

10. Failure to Call Up Motion for New Trial. — *Scroggin v. Hammett Grocer Co.*, 60 Ark. 183.

11. Advising Client that Proof of Material Fact

Is Unnecessary. — *Fentress v. Robins*, Term (4 N. Car.) 177, 7 Am. Dec. 704.

Loss of Right to Set-Off. — A court of equity will not grant relief against a probate court by establishing a credit or set-off which might have been allowed in the probate court, merely on the ground that the plaintiff's attorney advised him that it was not necessary to bring it forward before that court. *Duckworth v. Duckworth*, 35 Ala. 70.

12. Failure to Enter Credit on Execution. — *Brown v. Wilson*, 56 Ga. 534.

13. Disobedience of Instructions. — *Cowley v. Northern Pac. R. Co.*, 46 Fed. Rep. 325.

14. Adopting Erroneous Transcript of Reporter. — *Quinn v. Wetherbee*, 41 Cal. 247.

15. Judgments by Default Not Usually Relieved Against. — *England*. — *Protheroe v. Forman*, 2 Swanst. 227.

United States. — *Sohier v. Merrill*, 3 Woodb. & M. (U. S.) 179.

Alabama. — *Bibb v. Hitchcock*, 49 Ala. 468, 20 Am. Rep. 288.

California. — *Murdock v. De Vries*, 37 Cal. 527; *Pico v. Sunol*, 6 Cal. 294.

Iowa. — *Faulkner v. Campbell*, 1 Morr. (Iowa) 148.

Texas. — *Ivey v. McConnell*, (Tex. Civ. App. 1892) 21 S. W. Rep. 403.

16. Party Obtaining More Relief than Authorized. — *Murdock v. De Vries*, 37 Cal. 527.

17. Loss of Defense by Attorney's Neglect. — *Payton v. McQuown*, 97 Ky. 757, 53 Am. St. Rep. 437.

18. Entry of Default Judgment in Vacation. — *Porter v. Moffett*, 1 Morr. (Iowa) 108.

19. Default Obtained by Fraud. — *Porter v. Moffett*, 1 Morr. (Iowa) 108; *Larson v. Williams*, 100 Iowa 110.

ment taken by default it must be alleged and shown that the defendant has a meritorious defense to the cause of action on which the judgment is based,¹ that he has no adequate remedy at law,² and that the party himself is not guilty of negligence.³

Judgment by Confession. — Where a party to an action at law voluntarily confesses judgment he is not usually entitled to equitable relief against the judgment, unless without negligence on his part he was prevented from making his defense by fraud, accident, surprise, or mistake.⁴ A judgment by confession will not be enjoined because the warrant of the attorney who confessed judgment was defectively executed,⁵ nor because the affidavit to the complaint on which the judgment was rendered was defective.⁶ A judgment by confession procured by fraud may be enjoined.⁷ If judgment is confessed for a balance claimed, with the privilege of correcting errors, if any, it can be enjoined only upon proof of errors.⁸ To entitle a party to equitable relief he must show a meritorious defense. If the party seeking relief can say nothing against the judgment, equity will not interfere;⁹ and if the plaintiff in equity does not show a case for relief the injunction granted is properly dissolved on hearing, whether an exception has or has not been taken.¹⁰

13. Judgments Based on Gaming Contracts. — It has been said that "where the consideration for the contract on which the action at law is founded was money lost at gaming, and judgment is obtained against defendant, courts of equity are inclined to be somewhat more liberal in the exercise of their restraining jurisdiction than in ordinary cases, and upon considerations of public policy and the necessity of the prevention of gaming they will generally restrain proceedings under the judgment."¹¹ This is clearly a misstatement of the law relating to this subject. In a number of jurisdictions there are statutes which expressly declare that judgments based upon gaming contracts

Violation of Agreement to Satisfy Judgment Out of Certain Property. — Where a judgment was rendered by default upon agreement that it should be satisfied only out of certain specified property, it was held that an injunction was properly granted in an action by the debtor to restrain its enforcement against property other than that agreed upon. *Montgomery v. Gibbs*, 40 Iowa 652.

Staying Out Execution After Time for Appeal Has Elapsed. — Where a judgment is taken by default, fraud sufficient to entitle the defendant to enjoin the judgment is not shown by the fact that the defendant was not notified of the entry of the judgment, and that execution was not sued out thereunder until after the time in which the defendant might petition for a writ of review had elapsed. *Amherst College v. Allen*, 165 Mass. 178.

1. Necessity of Showing Meritorious Defense. — *Massachusetts Ben. L. Assoc. v. Lohmiller*, 74 Fed. Rep. 23; *White v. Crow*, 110 U. S. 183; *Bibb v. Hitchcock*, 49 Ala. 468, 20 Am. Rep. 288; *Reagan v. Fitzgerald*, 75 Cal. 230; *Bankers L. Ins. Co. v. Robbins*, 53 Neb. 44.

2. Inadequate Remedy at Law. — *Reagan v. Fitzgerald*, 75 Cal. 230; *Logan v. Hillegass*, 16 Cal. 200; *Woodward v. Pike*, 43 Neb. 777; *Bankers L. Ins. Co. v. Robbins*, 53 Neb. 44.

3. Absence of Negligence. — *Bankers L. Ins. Co. v. Robbins*, 53 Neb. 44.

4. No Relief in Absence of Fraud. — *Moore v. Barclay*, 23 Ala. 739; *Morehead v. De Ford*, 6 W. Va. 316.

Withdrawing Defense Made. — Where the record shows that a defense was put in and then

withdrawn in the suit at law, and judgment by confession was rendered, equity will not entertain a bill to enjoin such judgment and set up the same defense in equity, unless it was a defense which could be made only in equity. *Ragsdale v. Gossett*, 2 Lea (Tenn.) 730.

5. Defectively Executed Warrant of Attorney. — *Burch v. West*, 134 Ill. 258.

6. Defective Affidavit to Complaint. — *Reiley v. Johnston*, 22 Wis. 279.

7. Judgment Procured by Fraud. — *Babcock Hardware Co. v. Farmers', etc., Bank*, 54 Kan. 273; *Shufeldt v. Gandy*, 25 Neb. 602; *Oakley v. Young*, 6 N. J. Eq. 453; *United Brethren Church v. Vandusen*, 37 Wis. 54. See also *Union Bank v. Geary*, 5 Pet. (U. S.) 99; *Keighler v. Savage Mfg. Co.*, 12 Md. 383, 71 Am. Dec. 600.

8. Judgment Confessed with Privilege of Correcting Errors. — *Gear v. Parish*, 5 How. (U. S.) 168.

9. Necessity of Showing Meritorious Defense. — *King v. Watts*, 23 La. Ann. 563; *Philadelphia v. Dobson*, 10 Pa. Co. Ct. 34; *Ford v. Hill*, 92 Wis. 188, 53 Am. St. Rep. 902.

Unauthorized Confession of Judgment. — The fact that the president of a corporation had no power to bind it by the execution of a power of attorney to confess judgment does not authorize equitable interposition against a judgment taken pursuant to it, if the claim in judgment is a just and equitable one. *Ford v. Hill*, 92 Wis. 188, 53 Am. St. Rep. 902.

10. Dissolution of Injunction. — *Morehead v. De Ford*, 6 W. Va. 316.

11. See High on Injunctions (2d ed.), § 235.

shall be void. Where statutes of this character prevail it is undoubtedly the rule that equity will grant relief against a judgment founded upon a gaming consideration, although no defense was made at law,¹ and it is altogether immaterial that the judgment was recovered by a *bona fide* assignee, for value, without notice.² In all other jurisdictions where there is no statutory declaration that judgments founded on gaming contracts shall be void, the party is bound to make his defense at law, and having failed to do so cannot come into equity to enjoin the judgment on the ground of illegality of consideration.³

14. Judgments Based on Usurious Contracts. — Courts of law and equity have concurrent jurisdiction of the subject of usury, and the court which first has jurisdiction of the subject must finally conclude it by its judgment or decree.⁴ The general rule is well settled that where the defendant at law failed to make his defense of usury and was not prevented by fraud or the fault of the other party, nor by accident, unmixed with negligence on his part, a court of chancery will not take jurisdiction to afford relief.⁵ A few decisions, however, have recognized certain qualifications to the general rule, which may be stated as follows: Where there is some embarrassment and difficulty in the remedy at law in consequence of the number of usurious securities and number of contracts, and the complex nature of the transactions, or where the suits at law and the judgments are to be regarded as usurious securities constituting a part of the devices resorted to to conceal and secure the usury, in all such cases chancery may give relief by injunction.⁶ So in another decision it was

1. Where Judgments Based on Gaming Contracts Void — *Illinois*. — Mallett v. Butcher, 41 Ill. 382, overruling Abrams v. Camp, 4 Ill. 290; West v. Carter, 129 Ill. 249.

Kentucky. — Clay v. Fry, 3 Bibb (Ky.) 248, 6 Am. Dec. 654; Brown v. Watson, 6 B. Mon. (Ky.) 588.

Maryland. — Gough v. Pratt, 9 Md. 526; Emerson v. Townsend, 73 Md. 224.

Mississippi. — Lucas v. Waul, 12 Smed. & M. (Miss.) 157; Humphries v. Bartee, 10 Smed. & M. (Miss.) 282.

Virginia. — Woodson v. Barrett, 2 Hen. & M. (Va.) 80, 3 Am. Dec. 612; White v. Washington, 5 Gratt. (Va.) 648; Skipwith v. Strother, 3 Rand. (Va.) 217.

These Decisions Rest Expressly on the Fact that the Judgment Is Declared Void by the Statute, and in one of them it was said: "No relief can be had against a void contract when the defense ought to have been made at law; but if the judgment itself be void it is a different question. Hence, on gaming contracts chancery will give relief, because the judgment is void, although the defense might have been made at law." Humphries v. Bartee, 10 Smed. & M. (Miss.) 295.

Furthermore, These Statutes Are Strictly Construed. — If the statute declares void judgments for money won at cards or other games, a party who fails to make defense at law against an action for money won on an election bet will have no right to equitable relief against the judgment. Lucas v. Nichols, 66 Ill. 41.

2. Recovery of Judgment by Bona Fide Assignee. — Gough v. Pratt, 9 Md. 526; Lucas v. Waul, 12 Smed. & M. (Miss.) 157; Woodson v. Barrett, 2 Hen. & M. (Va.) 80, 3 Am. Dec. 612.

3. Party Must Make Defense Where Judgment Not Void. — Owens v. Van Winkle Gin, etc., Co., 96 Ga. 408; Jones v. Jones, Term (4 N. Car.) 110; Smith v. Kammerer, 152 Pa. St. 98; Giddens v. Lea, 3 Humph. (Tenn.) 133. As

sustaining this proposition see also Young v. Beardsley, 11 Paige (N. Y.) 93. See generally the title GAMBLING CONTRACTS, vol. 14, p. 576.

In one of these cases the court recognizes the correctness of the decisions already mentioned in jurisdictions where the statute declares judgments on gaming contracts void, and holds that in the absence of such a statute the general rule that the party must make his defense at law unless prevented by fraud, accident, or mistake, applies. Owens v. Van Winkle Gin, etc., Co., 96 Ga. 408.

And in another the court, in support of the conclusions reached, invokes the doctrine that he who seeks the aid of a court of equity must come into equity with clean hands. Smith v. Kammerer, 152 Pa. St. 98.

4. Concurrent Jurisdiction of Courts of Law and Equity. — Lindsley v. James, 3 Coldw. (Tenn.) 477.

5. Equity Will Not Usually Interfere — *England*. — Scott v. Nesbit, 2 Bro. C. C. 641; Ware v. Horwood, 14 Ves. Jr. 31.

Georgia. — Gatewood v. City Bank, 49 Ga. 45. *Kentucky*. — Chinn v. Mitchell, 2 Met. (Ky.) 92.

Mississippi. — Yeizer v. Burke, 3 Smed. & M. (Miss.) 439; McRaven v. Forbes, 6 How. (Miss.) 569.

New York. — Thompson v. Berry, 3 Johns. Ch. (N. Y.) 399; Lansing v. Eddy, 1 Johns. Ch. (N. Y.) 49.

Ohio. — Morgan v. England, Wright (Ohio) 112.

South Carolina. — Pickett v. Pickett, 2 Hill Eq. (S. Car.) 470.

Tennessee. — Frierson v. Moody, 3 Humph. (Tenn.) 561; Buchanan v. Nolin, 3 Humph. (Tenn.) 63; Chester v. Apperson, 4 Heisk. (Tenn.) 639.

Compare Ennis v. Ginn, 5 Del. Ch. 180.

6. Qualifications of Rule — Embarrassment and Difficulty in Legal Remedy. — Frierson v. Moody,

held that injunctive relief may be had against a usurious judgment entered upon a warrant of attorney to confess judgment.¹ In any event, however, the defense of usury is a personal privilege, and advantage of it cannot be taken by any one other than the debtor himself; and where the debtor fails to defend at law on the ground of usury, no one else is, under any circumstances, entitled to enjoin the judgment because of usury in the contract upon which it is founded.² And in any case, to entitle a party to enjoin an usurious judgment the bill must show a tender of the amount equitably due.³

15. Judgments Affecting Title to Real Estate. — A bill to enjoin the enforcement of a judgment by sale of the judgment debtor's real property will not be sustained on the ground of errors or irregularities in the proceedings leading up to the judgment;⁴ but it has been held that a sale of lands under execution issued on a judgment which is fraudulent will be enjoined at the instance of the purchaser at a former sale under a number of executions, one of which was issued on the same fraudulent judgment. The fraud gives to the purchaser a claim to equitable relief for the removal of the cloud on his title.⁵ So it has been held that a judgment on a bond given for the purchase money for land will be perpetually enjoined where there is a complete failure of title,⁶ and if there is a partial failure of title the judgment will be enjoined and the vendor compelled to make allowance to the purchaser for the value of such part of the land as he may fail to give possession of at the time agreed on.⁷ A sale of land belonging to a person other than the judgment debtor will be enjoined, as such sale will create a cloud upon the title.⁸

16. Satisfied Judgments — View that Satisfied Judgment May Be Enjoined. — There is some difference of opinion as to whether a court of chancery has power to enjoin the enforcement of a judgment which has been satisfied. According to some decisions an application for injunction under this state of facts should be granted,⁹ and that, too, notwithstanding the fact that the court in which the judgment was rendered might have the power to grant the same relief upon motion to stay the execution.¹⁰ Of course what has been said must be taken with the qualification that the payment must be made to some one having authority to receive the money.¹¹

3 Humph. (Tenn.) 563; *Lindsley v. James*, 3 Coldw. (Tenn.) 477; *Buchanan v. Nolin*, 3 Humph. (Tenn.) 63.

1. Judgments by Confession. — *Pickett v. Pickett*, 2 Hill Eq. (S. Car.) 470.

2. Usury as Defense Available by Debtor Alone. — *Phillips v. Walker*, 48 Ga. 55; *Gatewood v. City Bank*, 49 Ga. 50; *French v. Shotwell*, 5 Johns. Ch. (N. Y.) 505; *Pickett v. Pickett*, 2 Hill Eq. (S. Car.) 470.

3. Tender of Amount Due. — *Shelton v. Gill*, 11 Ohio 417.

4. Errors or Irregularities in Obtaining Judgment. — *Ewing v. St. Louis*, 5 Wall. (U. S.) 413.

5. Fraud in Obtaining Judgment. — *Ragland v. Cantrell*, 49 Ala. 294.

6. Complete Failure of Title. — *Buchanan v. Lorman*, 3 Gill (Md.) 51.

7. Partial Failure of Title. — *Strodes v. Patton*, 1 Brock. (U. S.) 228; *Hilleary v. Crow*, 1 Har. & J. (Md.) 542.

Apprehended Interference with Possession. — It is no ground to enjoin a judgment for the purchase money of land against a person who has held undisturbed possession for a number of years, that he had heard that some person might at some future time assert title to the property. *Truly v. Wanzer*, 5 How. (U. S.) 141.

8. Sale of Third Person's Property under Judgment. — *Bell v. Murray*, 13 Colo. App. 217.

9. Injunction of Satisfied Judgment. — *Thompson v. Laughlin*, 91 Cal. 314 [*overruling*, without mention, *Green v. Thomas*, 17 Cal. 86; *Imlay v. Carpentier*, 14 Cal. 173]; *Meyer v. Tully*, 46 Cal. 70; *Ashcraft v. Knoblock*, 146 Ind. 169; *Florat v. Handy*, 35 Ia. Ann. 816; *Marcy v. Praeger*, 34 La. Ann. 54; *Kallander v. Neidhold*, 98 Mich. 517; *Sharp v. New York*, 31 Barb. (N. Y.) 578; *Mallory v. Norton*, 21 Barb. (N. Y.) 424; *Shaw v. Dwight*, 16 Barb. (N. Y.) 536; *Heath v. Garrett*, 50 Tex. 264; *Buie v. Crouch*, 37 Tex. 53; *Crawford v. Thurmond*, 3 Leigh (Va.) 85.

Where Amount Due Has Been Tendered. — An injunction lies to prevent proceedings on a satisfied judgment, or where the amount due has been tendered and refused by the judgment plaintiff. *Bowen v. Clark*, 46 Ind. 405.

Part Payment of Judgment. — Good ground to enjoin the collection of a judgment is shown by the facts that the plaintiff had paid to the defendant a certain amount thereof for which no credit had been given, and that a levy and sale of his property would be made to pay this sum unless prevented. *Hunter v. Bertram*, 6 Ky. L. Rep. 593.

10. Effect on Right of Remedy at Law. — *Thompson v. Laughlin*, 91 Cal. 313; *Crawford v. Thurmond*, 3 Leigh (Va.) 85.

11. Payment to Person Having Authority to Receive Necessary. — *Akin v. Denny*, 37 Md. 81.

View that Satisfied Judgment Cannot Be Enjoined. — Some decisions, however, take a view in direct opposition to that just stated, and hold that equity has no jurisdiction to relieve against a judgment which has been satisfied.¹

17. Judgments in Criminal Cases. — From its nature and organization, a court of equity has no jurisdiction to stay or prevent the execution of a judgment in a criminal case.²

18. Judgments of Other States. — There is some difficulty in determining the exact limit of power exercisable by courts of equity in granting relief against judgments obtained in another state. It has been held that where a judgment on which a domestic judgment is based has been reversed by the court of the state in which it was rendered, a bill may be maintained in the domestic courts to enjoin the domestic judgment, if the party seeking relief has been guilty of no laches.³ If a judgment has been merely set aside by the reviewing court, leaving, so far as appears, the suit in which it was rendered still pending, the injunction against the domestic judgment based thereon will merely stay the proceedings on the domestic judgment until the determination of the original suit.⁴

Actions on Foreign Judgments. — An action on a foreign judgment will not be enjoined for causes which might have been urged as a defense in the original action, unless the party has been prevented from setting up his defense by accident, mistake, surprise, or fraud of the opposite party.⁵ If, however, the party has been prevented from making his defense in the original action by the fraud of his adversary, the domestic courts will enjoin action on the judgment,⁶ and the same is the case where the adverse party has by accident or mistake obtained an unfair advantage in the original action.⁷

Enjoining Judgments Based on Foreign Judgments. — Where judgment on a foreign judgment is recovered in the domestic courts, the power of a domestic court of equity to enjoin such judgment has been frequently recognized.⁸ It has been said that a domestic judgment based on a foreign judgment will, in general, be enjoined for any cause sufficient to authorize a court of equity to enjoin a judgment originally rendered by the domestic courts.⁹ A domestic judgment will not be enjoined for causes which might have been set up as a defense in the original action¹⁰ or for causes which might have been set up as

where it was held no ground to enjoin the judgment that the debtor paid it to a constable who had entered it satisfied, the constable having no authority to receive the money or make such entry.

1. View that Equity Cannot Enjoin Satisfied Judgment. — *McRae v. Davis*, 5 Jones Eq. 153 (N. Car.) 140; *Perrine v. Carlisle*, 19 Ala. 686; *Green v. Thomas*, 17 Cal. 86; *Imlay v. Carpentier*, 14 Cal. 173. These *California* decisions, as shown *supra* in this section, are *overruled* in *Thompson v. Laughlin*, 91 Cal. 313.

Discharge in Bankruptcy Subsequent to Judgment. — Where a judgment debtor has obtained his discharge as a bankrupt subsequent to the judgment he may enjoin the suing out or levy of any execution upon the judgment. *Pearson v. McLaughlin*, 6 Gratt. (Va.) 64.

2. Enjoining Judgment in Criminal Cases. — *Stuart v. La Salle County*, 83 Ill. 341, 25 Am. Rep. 397.

3. Reversed Foreign Judgment. — *McJilton v. Love*, 13 Ill. 487, 54 Am. Dec. 449; *Howard v. Simmons*, 25 La. Ann. 668.

4. Where Original Suit Is Still Pending. — *Huntington v. Metzger*, 58 Ill. App. 372.

5. Defenses Cognizable in Original Action. — *Conway v. Ellison*, 14 Ark. 362.

6. Defense Prevented by Fraud. — *Pearce v. Olney*, 20 Conn. 544; *Stanton v. Embry*, 46 Conn. 65; *Dobson v. Pearce*, 12 N. Y. 156, 62 Am. Dec. 152. See also *Turley v. Taylor*, 6 Baxt. (Tenn.) 376.

7. Defense Lost through Accident or Mistake. — See *Stanton v. Embry*, 46 Conn. 65.

Domestic and Foreign Judgments Relating to Same Claim. — Where suit is commenced in two states against the same person, and for the same demand, and judgment is recovered in one state, and satisfied, and by reason of the fraudulent representations of the plaintiff no defense is made to the action in the other state, and judgment is obtained there by default for the same demand, a court of equity sitting in the state where judgment was recovered and satisfied will perpetually enjoin the plaintiff from collecting judgment in the latter state. *Engel v. Scheuerman*, 40 Ga. 206, 2 Am. Rep. 573.

8. Wilson v. Robertson, 1 Overt. (Tenn.) 266. See also cases cited in subsequent notes in this section.

9. Black v. Smith, 13 W. Va. 703.

10. Causes Which Might Have Been Set Up in Original Action. — *Black v. Smith*, 13 W. Va. 730.

a defense to the action on the judgment in the domestic forum,¹ unless some reason founded in fraud, accident, or surprise, or some adventitious circumstances beyond the control of the defendant, be shown in explanation of the failure to make such defenses.²

19. Judgments or Decrees of Courts of Concurrent Jurisdiction. — No court has the power to interfere by injunction with the judgments or decrees of a court of concurrent or co-ordinate jurisdiction having equal power to grant the relief sought by injunction.³ The fact that the parties to the injunction proceeding are not the same as the parties to the judgment or decree which it is sought to enjoin does not relieve the case from the operation of the rule, nor can the consent of the parties change the rule or relax its binding force in any particular case;⁴ it is not established and enforced so much to protect the rights of parties as to protect the rights of courts of co-ordinate jurisdiction to avoid conflict of jurisdiction, confusion, and delay in the administration of justice.⁵ Nor does the fact that the judge of the court where the judgment which it is sought to enjoin was rendered is disqualified from sitting in the case constitute any exception to the rule.⁶ It has been said that the only case in which interference with the judgments or decrees of a court of co-ordinate jurisdiction will be allowed is where the court in which the action or proceeding is pending is unable by reason of its jurisdiction to afford the relief sought.⁷ Proceedings for relief should always be had in the court rendering the judgment or decree.⁸

20. Enjoining Judgment by Agreement. — While a cause of action, when prosecuted to judgment, becomes merged in the judgment, and such judgment is a bar to a second prosecution of the same cause of action, yet it is competent for the parties to agree that such judgment may be set aside and enjoined, upon condition that it shall not affect the right of the plaintiff therein to prosecute a suit on his original cause of action which formed the basis of the judgment.⁹

21. Injunctive Relief Against Awards. — Where a judgment has been duly entered on an award of arbitrators, equity will not usually grant relief by enjoining the judgment on any ground which might have been set up as a

1. Causes Which Might Have Been Set Up as Defense to Action on Judgment. — *Lucas v. Darien Bank*, 2 Stew. (Ala.) 280.

2. See *supra*, this section, subdvs. 3, 5, 6, and 7.

3. Judgments or Decrees of Courts of Concurrent Jurisdiction. — *California.* — *Hockstacker v. Levy*, 11 Cal. 76; *Crowley v. Davis*, 37 Cal. 263; *Anthony v. Dunlap*, 8 Cal. 27; *Flaherty v. Kelly*, 51 Cal. 145; *Rickett v. Johnson*, 8 Cal. 35; *Chipman v. Hibbard*, 8 Cal. 268; *Gorham v. Toomey*, 9 Cal. 77; *Uhlfelder v. Levy*, 9 Cal. 607; *Revalk v. Kraemer*, 8 Cal. 66.

Georgia. — *Reynolds v. Dunlap*, 94 Ga. 727, 19 S. E. Rep. 906.

Indiana. — *Indiana, etc., R. Co. v. Williams*, 22 Ind. 198; *Plunkett v. Black*, 117 Ind. 14.

New York. — *Dyckman v. Kernochan*, 2 Paige (N. Y.) 26; *Grant v. Quick*, 5 Sandf. (N. Y.) 612; *Bennett v. Le Roy*, (N. Y. Super. Ct. Spec. T.) 14 How. Pr. (N. Y.) 178; *Hunt v. Farmers' L. & T. Co.*, (Supm. Ct. Spec. T.) 8 How. Pr. (N. Y.) 416.

Tennessee. — *Deaderick v. Smith*, 6 Humph. (Tenn.) 138; *Whiteside v. Latham*, 2 Coldw. (Tenn.) 91. *Compare* *Douglas v. Joyner*, 1 Baxt. (Tenn.) 32.

Wisconsin. — *Platto v. Deuster*, 22 Wis. 482; *Stein v. Benedict*, 83 Wis. 603; *Ender v. Lennon*, 46 Wis. 299; *Orient Ins. Co. v. Sloan*, 70

Wis. 611; *Cardinal v. Eau Claire Lumber Co.*, 75 Wis. 404.

Rule under Kentucky Code. — By virtue of express statutory provision in Kentucky (*Bullitt's Civ. Code Ky.* 1895, § 285), the court in which a judgment was rendered alone has jurisdiction to enjoin it. *McConnell v. Raive*, (Ky. 1886) 1 S. W. Rep. 582; *Davis v. Davis*, 10 Bush (Ky.) 274; *Neeters v. Clements*, 12 Bush (Ky.) 359. And this doctrine applies to any party seeking to stay the judgment. *Mallory v. Dauber*, 83 Ky. 239.

4. Where Parties to Judgment and to Injunction Proceedings Are Different. — *Crowley v. Davis*, 37 Cal. 269.

5. *Crowley v. Davis*, 37 Cal. 269.

6. Effect of Disqualification of Judge. — *Flaherty v. Kelly*, 51 Cal. 145.

7. Court Unable to Grant Relief. — *Crowley v. Davis*, 37 Cal. 268; *Anthony v. Dunlap*, 8 Cal. 27.

8. Proceedings Should Be in Court Granting Judgment. — *Crowley v. Davis*, 37 Cal. 269; *Dederick v. Hoysradt*, (Supm. Ct.) 4 How. Pr. (N. Y.) 351; *Smith v. American L. Ins., etc., Co.*, *Clarke* (N. Y.) 307; *Lane v. Clark, Clarke* (N. Y.) 309; *Stein v. Benedict*, 83 Wis. 603.

9. Wilson v. St. Louis, etc., R. Co., 87 Mo. 431.

defense, unless the party, without any neglect on his part, was prevented by accident, mistake, or by fraud perpetrated by his opponent.¹ Thus it cannot be urged as a ground for enjoining a judgment entered upon an award that the matters passed upon by the arbitrators were not within the submission, and that legal and sufficient notice of the proceedings was not given,² or that there was never a submission of the controversy to the parties assuming to act as arbitrators,³ or that the party seeking injunctive relief was mistaken as to the extent of the inquiry made by the arbitrators, it not being shown that such mistake was superinduced by the fraud of the other party;⁴ neither will equity relieve against an award on the ground that it is void, if its invalidity appears on the face of the papers.⁵ There is some conflict of authority as to whether fraud or corruption on the part of the arbitrators can be urged as a ground for equitable relief. According to a number of decisions the party who has had an opportunity to interpose the defense of fraud and corruption on the part of the arbitrators in an action on the award cannot have an injunction in an action by him to restrain the proceedings under this suit, either before or after judgment.⁶ Other decisions hold, however, that partiality, misconduct, fraud, and mistake of the arbitrators are grounds of defense exclusively of equitable cognizance.⁷

22. Injunction to Obtain Benefit of Set-off — Where Defense Made at Law. — Where a party applies in the first instance to a court of law to allow a set-off, and that court, after full consideration of all the circumstances of the case, refuses to allow it, a court of equity will refuse to sustain a bill filed for an injunction and a set-off. A decision of a court of competent jurisdiction, being *res judicata*, is conclusive and binding on other courts of concurrent jurisdiction.⁸

Where Defense Not Made at Law — Statement of Rule. — It may also be stated as a general rule that injunction against the enforcement of a judgment at law will not be granted to allow the defendant to set up payments or set-offs which he might have pleaded in an action at law.⁹ A defendant having a cross-demand available as a set-off either at law or in equity, and failing to bring it forward

1. Equity Will Not Usually Relieve Against Judgments on Award. — *Gibson v. Armstrong*, 32 Ark. 438; *Johnson v. Laughhead*, Tappan (Ohio) 93; *Jones v. Frosh*, 6 Tex. 202; *Emerson v. Udall*, 13 Vt. 477, 37 Am. Dec. 604.

2. Matters Not Within Submission to Arbitrators. — *Emerson v. Udall*, 13 Vt. 482, 37 Am. Dec. 604.

3. That Matters Were Not Submitted to Arbitration. — *Snediker v. Pearson*, 2 Barb. Ch. (N. Y.) 107.

4. Mistakes as to Extent of Inquiry. — *Gibson v. Armstrong*, 32 Ark. 438.

5. Void Awards. — *Meloy v. Dougherty*, 16 Wis. 269.

6. Fraud or Corruption on Part of Arbitrators. — *Stover v. Cogswell*, 57 Barb. (N. Y.) 448; *Snediker v. Pearson*, 2 Barb. Ch. (N. Y.) 107; *Johnson v. Laughhead*, Tappan (Ohio) 93.

7. Sisk v. Garey, 27 Md. 402; *Emerson v. Udall*, 13 Vt. 482, 37 Am. Dec. 604.

8. Where Defense Made at Law. — *Simpson v. Hart*, 1 Johns. Ch. (N. Y.) 91.

9. Defense Which Might Have Been Made at Law — United States. — *Hendrickson v. Hinckley*, 17 How. (U. S.) 443.

Alabama. — *Duckworth v. Duckworth*, 35 Ala. 70.

Arkansas. — *Cummins v. Bentley*, 5 Ark. 9.

Illinois. — *Winchester v. Grosvenor*, 48 Ill. 517.

Kentucky. — *Hunter v. Bertram*, 6 Ky. L. Rep. 593.

Maryland. — *Cook v. Murphy*, 7 Gill & J. (Md.) 282; *Twigg v. Hopkins*, 85 Md. 301.

New Jersey. — *Jackson v. Bell*, 31 N. J. Eq. 554.

Ohio. — *Allen v. Medill*, 14 Ohio 446.

Tennessee. — *Smith v. Ross*, 3 Humph. (Tenn.) 220; *Palmer v. Malone*, 1 Heisk. (Tenn.) 550.

Virginia. — *Jarrett v. Goodnow*, 39 W. Va. 602.

But see *Hughes v. M'Coun*, 3 Bibb (Ky.) 254, where it was said that payments and set-offs against a judgment at law are subject to equity jurisdiction, and where the defense was not made at law, equity will relieve. In *Chicago, etc., R. Co. v. Field*, 86 Ill. 270, it was said that the rule that an injunction will not be granted against enforcing a judgment where defense might have been made in the action at law, does not apply to the defense of set-off, but only to such defenses as are required to be made to the suit in which the judgment is rendered.

Election of Remedies. — A party sued at law has his election to set off his claim or resort to his separate action, and if he deliberately elects the latter he cannot come into a court of equity and ask to be allowed to make a different determination, and to be restored to the right which he has once voluntarily waived. *Hendrickson v. Hinckley*, 17 How. (U. S.) 445.

in an action at law, cannot make it the basis of equitable relief against the judgment at law without showing some sufficient excuse for his failure to avail himself of it at the trial of the action;¹ and if a discovery was necessary to prove the set-off he should have, filed his plea of discovery in aid of his defense.²

Unliquidated Demands Arising Out of Same or Different Transactions. — The rule stated is especially applicable in the case of unliquidated demands,³ and it is immaterial whether the demand arises out of the same⁴ or different transactions.⁵

Erroneous Advice as Affecting Right. — So the rule is applicable although the party seeking equitable relief had been advised that the law court had no jurisdiction to allow his set-off⁶ or that it was not necessary to bring his claim before the court in which the judgment was rendered.⁷

Exceptions to Rule — Fraud, Accident, or Mistake. — As is the case with other defenses, if a party is prevented from seeking to obtain his set-off in an action at law by the fraud of his adversary, equity may relieve against the judgment on that ground;⁸ and it would seem that unavoidable accident preventing the party from interposing his set-off as a defense at law will constitute a sufficient ground for equitable relief.⁹

Claims Which Cannot Be Satisfied by Ordinary Suit. — It has likewise been held that a court of equity, upon bill filed, will compel an equitable set-off when the parties have mutual demands against each other which are so situated that it is impossible for the party claiming a set-off to obtain satisfaction for his claim by an ordinary suit at law or in equity.¹⁰

Insolvency of Judgment Creditor. — According to some decisions the mere insolvency of the judgment creditor will not of itself justify an injunction against the enforcement of a judgment at law in order to let in a set-off which might have been pleaded at law at the time when such judgment was recovered.¹¹ The rule laid down by the weight of authority, however, is to the effect that the insolvency of the party seeking to enforce a judgment furnishes a suffi-

1. Excuse for Failure to Make Defense at Law Necessary. — *Pearce v. Winter Iron-Works*, 32 Ala. 68; *Wolcott v. Jones*, 4 Allen (Mass.) 367.

2. Filing Bill of Discovery in Aid of Defense. — *George v. Strange*, 10 Gratt. (Va.) 499.

3. Rule Especially Applicable where Demand Unliquidated. — *Rawson v. Samuel*, Cr. & Ph. 161; *Whyte v. O'Brien*, 1 Sim. & St. 551; *Dugan v. Cureton*, 1 Ark. 31, 31 Am. Dec. 727; *Jackson v. Bell*, 31 N. J. Eq. 554; *Duncan v. Lyon*, 3 Johns. Ch. (N. Y.) 359, 8 Am. Dec. 513; *Laughlin v. Finley*, 5 W. N. C. (Pa.) 144.

4. Demands Arising Out of Same Transaction. — *Rawson v. Samuel*, Cr. & Ph. 161; *Dugan v. Cureton*, 1 Ark. 31, 31 Am. Dec. 727.

5. Demands Arising Out of Different Transactions. — *Brown v. Scott*, 2 Bibb (Ky.) 635; *Jackson v. Bell*, 31 N. J. Eq. 554.

6. Advice that Court Has No Jurisdiction to Allow Set-off. — *Pearce v. Winter Iron-Works*, 32 Ala. 68.

7. Advice that It Was Unnecessary to Present Set-off. — *Duckworth v. Duckworth*, 35 Ala. 70.

8. Fraud of Adversary Ground for Relief. — *Davis v. Tilston*, 6 How. (U. S.) 114; *Allen v. Medill*, 14 Ohio 446.

Illustration. — Thus where a payment was made after the commencement of suit, in confidence that it would be credited, and particularly where there was an agreement to that effect, and the credit was not given, but judgment was taken, in the absence of the defendant, for the whole amount, it was held that

the party thus wronged might have his remedy by injunction. *Dickenson v. McDermott*, 13 Tex. 248.

9. Unavoidable Accident Ground for Relief. — *Cummins v. Bentley*, 5 Ark. 9. But compare *Hudson v. Kline*, 9 Gratt. (Va.) 379, in which case it was held that where a person has a plain remedy at law or in equity for recovery of his claims against a judgment creditor he cannot enjoin the judgment until the claims can be established, in order that they may be set off against the judgment merely on the ground that he was prevented by accident from pleading the claims as set-offs at law.

10. Inadequate Remedy by Ordinary Suit. — *Russell v. Conway*, 11 Cal. 93.

11. View that Insolvency of Judgment Creditor Insufficient. — *Rives v. Rives*, 7 Rich. Eq. (S. Car.) 353; *Zinn v. Dawson*, (W. Va. 1899) 34 S. E. Rep. 784; *Sartyre v. Harpold*, 33 W. Va. 553; *Faulconer v. Stinson*, 44 W. Va. 546.

Insolvency Combined with Negligent Mistake.

— Where a party has been summoned to answer an action at law for the recovery of money, and allows judgment by default to go against him, although at the time of such recovery he had judgments against the plaintiff which he might have pleaded as a set-off, he cannot, on the ground that he mistook the time at which the case was to be tried, combined with the fact of the insolvency of the plaintiff, come into equity to obtain the benefit of such set-off. *Zinn v. Dawson*, (W. Va. 1899) 34 S. E. Rep. 784.

cient ground for the interposition of a court of equity to enable the debtor to avail himself of a set-off.¹ Even though insolvency should not of itself be considered a sufficient ground on which to base equitable relief, it is always an important factor and may with other grounds of equitable relief justify the interposition of the court of equity by the process of injunction.²

Failure to Name Sum Claimed as Due. — Where a party seeking to enjoin a judgment to let in a set-off fails to name the sum claimed to be due as a set-off an injunction should not be granted.³

Where Whole Judgment Not Enjoined. — If a case for equitable relief is presented, but the amount due on the set-off is less than the amount of the judgment, the court should not enjoin the whole execution.⁴

Injunction Not Release of Errors. — An injunction against a judgment at law because certain claims are valid set-offs does not operate as a release of errors by the defendant at law, where no order was made that the injunction should be allowed only on condition of a release of errors.⁵

X. EXECUTIONS — 1. Right to Levy and Sell in General. — Ordinarily a judgment creditor has a right to levy his execution upon any property of the judgment debtor which is subject to levy and sale, and equity will not interfere with this right.⁶

2. Relief in General — Adequacy of Legal Remedy — By Motion or by Action. — There must be some special element of equitable jurisdiction to justify an interference — some impending mischief otherwise irremediable, some want or peculiar obstruction of legal redress; and it may be laid down as a general rule, not always uniformly applied, however, that a court of equity will not interpose to restrain proceedings under an execution where there is an adequate remedy at law, as by motion to quash or to stay, or affidavit of illegality, in the court having control of the process⁷ (for such courts usually have full and ample supervisory power over their own process and can correct or pre-

1. View that Insolvency of Judgment Creditor Sufficient. — *California*. — *Hobbs v. Duff*, 23 Cal. 629; *Russell v. Conway*, 11 Cal. 93.

Kentucky. — *Saunders v. Saunders*, 1 Bibb (Ky.) 558; *Thompson v. Sansberry*, 2 J. J. Marsh. (Ky.) 362; *Markham v. Todd*, 2 J. J. Marsh. (Ky.) 364.

Maryland. — *Levy v. Steinbach*, 43 Md. 212; *Marshall v. Cooper*, 43 Md. 47.

Missouri. — *Sumner v. Whitley*, 1 Mo. 708.

New Jersey. — *Brewer v. Norcross*, 17 N. J. Eq. 219.

Oregon. — *McDonald v. Mackenzie*, 24 Oregon 573.

Virginia. — *McClellan v. Kinnaid*, 6 Gratt. (Va.) 352.

West Virginia. — *Beard v. Beard*, 25 W. Va. 486 52 Am. Rep. 219; *Jarrett v. Goodnow*, 39 W. Va. 602. But see *West Virginia* cases cited in the preceding note.

Rights of Assignee of Judgment. — An injunction lies to restrain the execution by the assignee of a judgment so as to allow the judgment debtor to enforce an equitable set-off against the judgment creditor. *Marshall v. Cooper*, 43 Md. 46.

Setting Off Judgment Against Judgment. — Equity will enjoin the collection of a judgment in favor of an insolvent plaintiff who is a judgment debtor to the defendant, to the extent of such indebtedness. *Beard v. Beard*, 25 W. Va. 486, 52 Am. Rep. 219.

Debt in Excess of Judgment. — In *Payne v. Loudon*, 1 Bibb (Ky.) 518, it was held that where a judgment creditor was insolvent and owed to the judgment debtor a sum largely

in excess of the judgment a good cause for an injunction was presented.

Purchase of Set-off After Suit Brought. — Where a set-off has been purchased by the defendant after suit brought at law, it cannot be made available at law, and if the plaintiff at law is insolvent the defendant is entitled to come into equity to have the set-off allowed. *Fields v. Carney*, 4 Baxt. (Tenn.) 141.

2. Insolvency Always Considered Important Factor. — *Mason v. Oberne*, 25 Ill. App. 216.

3. Faison v. McIlwaine, 72 N. Car. 312.

4. Palfrey v. Shuff, 2 Mart. N. S. (La.) 51.

5. Not Release of Errors. — *Gano v. White*, 3 Ohio 20.

6. Levy upon Any Property Subject to Execution. — Where an execution was levied upon a painting which was subject to levy, but for which there was no market in the state where the levy was made, it was held that this was no reason for interfering between the debtor and creditor. *Nashville Trust Co. v. Weaver*, 102 Tenn. 66.

And the fact that an advantageous sale cannot be made at the time is no cause for restraining the sale. *Poullain v. English*, 57 Ga. 492.

7. By Motion in Action. — *Alabama*. — *Balbridge v. Eason*, 99 Ala. 516; *Triest v. Enslen*, 106 Ala. 188.

Arkansas. — *King v. Clay*, 34 Ark. 299; *Anthony v. Shannon*, 8 Ark. 52; *Scanlan v. Mixer*, 34 Ark. 354; *Jacks v. Bigham*, 30 Ark. 481; *Driggs' Bank v. Norwood*, 49 Ark. 136, 4 Am. St. Rep. 30; *Fowler v. Williams*, 20 Ark. 641.

vent any abuse of it¹), or where the party has an adequate remedy by an action at law to recover possession or an action of trespass for the damages he has sustained.² Thus it is held that the holder of a prior lien, or an incumbrancer,³ or trustees, or *cestuis que trustent*, will not be heard to restrain a sale of the property under an execution upon the ground that the prior lien or trust is superior to the lien of the judgment or execution, because under the general rule there is an adequate remedy at law;⁴ and the same rule is applied to an attempt on the part of attachment creditors to restrain proceedings under executions alleged to be injurious to the superior interests of the attachment creditors.⁵

Injunction Incidental to Original Jurisdiction.—On the other hand, however, it seems that the character of the matters involved is often deemed such as to justify the exercise of equitable jurisdiction,⁶ and in such cases executions have

California.—Moulton v. Knapp, 85 Cal. 385; Gregory v. Ford, 14 Cal. 138, 73 Am. Dec. 639; Richards v. Kirkpatrick, 53 Cal. 434.

Delaware.—Hastings v. Cropper, 3 Del. Ch. 165.

Georgia.—Hitchcock v. Culver, 107 Ga. 184; Platt v. Sheffield, 63 Ga. 627; Brown v. Wilson, 56 Ga. 534; Hambrick v. Crawford, 55 Ga. 335.

Illinois.—Chittenden v. Rogers, 42 Ill. 99; Babcock v. McCamant, 53 Ill. 214; Fahs v. Roberts, 54 Ill. 192; Farrell v. McKee, 36 Ill. 226.

Indiana.—Lasselle v. Moore, 1 Blackf. (Ind.) 226.

Louisiana.—State v. Judge, 18 La. Ann. 110; Hudson v. Dangerfield, 2 La. 63, 20 Am. Dec. 207.

Maryland.—Nelson v. Turner, 2 Md. Ch. 73; Chappell v. Cox, 18 Md. 513; Welde v. Scotten, 59 Md. 80; Lewis v. Levy, 16 Md. 85; Freeland v. Reynolds, 16 Md. 421; Wilson v. Miller, 30 Md. 82, 96 Am. Dec. 568.

Mississippi.—Ricks v. Richardson, 70 Miss. 424.

Missouri.—Mellier v. Bartlett, 89 Mo. 134. *New York.*—Lansing v. Eddy, 1 Johns. Ch. (N. Y.) 49.

North Carolina.—Parker v. Jones, 5 Jones Eq. (58 N. Car.) 276, 75 Am. Dec. 441; Foard v. Alexander, 64 N. Car. 69; Coward v. Chastain, 99 N. Car. 443, 6 Am. St. Rep. 533; Faison v. McIlwaine, 72 N. Car. 312.

Oregon.—Parsons v. Hartman, 25 Oregon 547, 42 Am. St. Rep. 803; Leinenweber v. Brown, 24 Oregon 548.

Pennsylvania.—Erie Canal Co. v. Lowrie, 5 Pa. L. J. Rep. 464.

South Carolina.—Wagner v. Peques, 10 S. Car. 259; Sullivan v. Shell, 36 S. Car. 578, 31 Am. St. Rep. 894.

Tennessee.—Williams v. Wright, 9 Humph. (Tenn.) 502; Lafferty v. Conn, 3 Sneed (Tenn.) 221; Nicholson v. Patterson, 6 Humph. (Tenn.) 394; Marsh v. Haywood, 6 Humph. (Tenn.) 210.

West Virginia.—Hall v. Taylor, 18 W. Va. 544; Howell v. Thomason, 34 W. Va. 794.

Execution Sent into Another County.—In Miller v. Longacre, 26 Ohio St. 291, it was held that the appropriate remedy upon an execution erroneously issued was upon an application to the court issuing it to set it aside, but that where the execution had been sent to another county, and a suit had been brought to enjoin its enforcement, and the execution creditor

answered to the merits without objection to the jurisdiction or mode of proceedings, an injunction would be granted. But see McTeer v. Mooror, Bailey Eq. (S. Car.) 62.

1. Supervisory Power of Courts over Their Own Process.—Farrell v. McKee, 36 Ill. 225; Robinson v. Chesseldine, 5 Ill. 332; Chittenden v. Rogers, 42 Ill. 99. See also cases in the last preceding note.

Stay of Execution Pending Appeal.—Where the clerk of the court refuses to approve an undertaking to stay an execution pending an appeal, an application should be made to the court in which he is an officer to compel him to perform that duty, and in the absence of such an application an action for an injunction cannot be maintained. Supreme Lodge, etc. v. Carey, 57 Kan. 655. To the same point see State v. Judge, 18 La. 542; Beck v. Fransham, 21 Mont. 117.

2. Remedy by Action.—Amis v. Myers, 16 How. (U. S.) 492; Driggs' Bank v. Norwood, 49 Ark. 136, 4 Am. St. Rep. 30; Sanders v. Sanders, 20 Ark. 610; Markley v. Rand, 12 Cal. 276; Bryan v. Long, 14 Fla. 366; Allen v. Winstandley, 135 Ind. 105; Chappell v. Cox, 18 Md. 513; Sevier v. Ross, Freem. (Miss.) 519; Du Pre v. Williams, 5 Jones Eq. (58 N. Car.) 96; Perkins v. Bullinger, 1 Hayw. (2 N. Car.) 368; Hammond v. St. John, 4 Yerg. (Tenn.) 107. See also *infra*, this section, *Seizure of Property of Stranger to Writ*.

3. Holder of Prior Lien or Incumbrancer.—Stillwell v. Oliver, 35 Ark. 189; Wiedner v. Thompson, 66 Iowa 283; Union Bank v. Poultney, 8 Gill & J. (Md.) 325; Bowyer v. Creigh, 3 Rand. (Va.) 25.

A mortgagee whose rights under peculiar facts and circumstances cannot be shown except by matters not of record may have an injunction to restrain an execution sale, upon the doctrine that a sale will be prevented when the title of the plaintiff will be embarrassed and that such an embarrassment will result where the plaintiff's rights cannot be shown except by extrinsic proof. Ivory v. Kempner, 2 Tex. Civ. App. 474.

4. Trustee or Cestui Que Trust.—Kuhn v. Mack, 4 W. Va. 186; Watkins v. Logan, 3 T. B. Mon. (Ky.) 21. See also *infra*, this section, *Seizure of Property of Stranger to Writ*.

5. Attaching Creditor.—Chittenden v. Rogers, 42 Ill. 96. But see Blum v. Schram, 58 Tex. 528.

6. Incidental to Original Jurisdiction.—Allen

been enjoined incidentally to the relief to be awarded, as where the jurisdiction is exercised to prevent a multiplicity of suits and by one decree to quiet title to a number of lots,¹ or in cases involving the guardianship of trusts or the administration of trust estates,² or to protect the superior equities of an innocent purchaser as against the enforcement of a secret lien.³

Estoppel. — So where judgment creditors assent to a deed of trust made by their debtors and by their conduct induce third parties to purchase land bound by the judgments and to believe that the creditors will look to the trustees and not to the land for payment, execution of the judgment will be restrained.⁴

3. When Remedy at Law Inadequate. — It is equally well established, however, that where the remedy of one complaining of an execution or the proceedings thereunder is not adequate at law, equity will interfere in his behalf, and he may invoke the aid of its injunctive process.⁵ Thus, an injunction will be issued where the officer is acting beyond his territorial jurisdiction⁶ or where the plaintiff in the execution is a nonresident and notice of a motion to quash must be served by publication, and for that reason cannot be given in time to avoid the danger apprehended.⁷ So where the sheriff rejects an affidavit of illegality, in a case in which such affidavit is the proper remedy against an execution, an injunction will lie.⁸

4. Irregularities in Process or Proceedings Thereunder — *a. RULE STATED.* — Where there is not some special element of equitable jurisdiction, some want or peculiar obstruction of legal redress, courts of chancery will not correct even the grossest errors or irregularities in the form of an execution or the proceedings thereunder, but the party will be left to the ordinary remedies in the court having control of the process.⁹

v. Winstandly, 135 Ind. 105 [*citing Elson v. O'Dowd*, 40 Ind. 300; *Stout v. La Follette*, 64 Ind. 365; *Vincennes Nat. Bank v. Cockrum*, 80 Ind. 355; *Vincennes Nat. Bank v. Hargrove*, 80 Ind. 364; *Nicholson v. Stephens*, 47 Ind. 185; *Eversole v. Cook*, 92 Ind. 222; *Burch v. Dooley*, 123 Ind. 288; *Greenwaldt v. May*, 127 Ind. 511, 22 Am. St. Rep. 660]; *Click v. Stewart*, 36 Tex. 280, holding that an injunction is the proper equitable method of enforcing a landlord's lien as against an execution creditor's tenant. See also *Ford v. Rigby*, 10 Cal. 450; *Bowling v. Garrett*, 49 Kan. 504, 33 Am. St. Rep. 377; *McFarland v. Dilly*, 5 W. Va. 135, holding that a court of equity could enjoin the sale of property at the instance of one who claims it as owner and charges fraud in the sale of it to him by the defendant in the execution and between the judgment debtor and creditor in the procurement of the judgment.

1. To Prevent Multiplicity of Suits. — *Kendall v. Dow*, 46 Ga. 607.

2. Trust Property. — *Lambert v. Mallett*, 50 Ala. 73; *Balkum v. Harper*, 50 Ala. 429; *Anderson v. Crist*, 113 Ind. 65; *Hollingsworth v. Trueblood*, 59 Ind. 542; *Trueblood v. Hollingsworth*, 48 Ind. 537; *Pawley v. Vogel*, 42 Mo. 303; *Howard v. Cannon*, 11 Rich. Eq. (S. Car.) 23, 75 Am. Dec. 736; *Nashville Trust Co. v. Weaver*, 102 Tenn. 66.

Separate Property of Wife. — In *Bridges v. McKenna*, 14 Md. 268, the decision rested upon the established jurisdiction of the court of chancery over the separate property of *femes covert*, the court holding that a *feme covert* holding property to her sole and separate use was entitled to relief in equity to an execution thereon by a creditor of her husband. To the

same point see *Bridges v. Phillips*, 25 Ala. 136, 60 Am. Dec. 495; *Crabb v. Thomas*, 25 Ala. 212; *Smith v. Smith*, 4 Jones Eq. (57 N. Car.) 304.

3. Protection Against Secret Lien. — *Predohl v. O'Sullivan*, (Neb. 1899) 80 N. W. Rep. 903.

4. Estoppel. — *Doub v. Barnes*, 4 Gill. (Md.) 1.

5. Remedy Inadequate. — *Sanders v. Sanders*, 20 Ark. 610; *Hall v. Lyon*, 37 Ga. 636; *Denny v. Denny*, 113 Ind. 22; *Newcombe v. Irving Nat. Bank*, 51 Hun (N. Y.) 222; *Bristol v. Hallyburton*, 93 N. Car. 384; *Sims v. Harrison*, 4 Leigh (Va.) 346; *Kelly v. Scott*, 5 Gratt. (Va.) 479; *Bowyer v. Creigh*, 3 Rand. (Va.) 25; *Allen v. Freeland*, 3 Rand. (Va.) 170; *McFarland v. Dilly*, 5 W. Va. 135. See also *State v. Judge*, 18 La. Ann. 110.

After Tender of Property under Judgment in Replevin. — The defendant in an action of replevin tendered to the plaintiff the property involved and for the value of which judgment had been awarded, and it was refused. It was held that equity would enjoin the collection of the value of the property under an execution. *McClellan v. Marshall*, 19 Iowa 561, 87 Am. Dec. 454.

To Prevent Dispossessing under Writ Without Authority. — *Goodnough v. Sheppard*, 28 Ill. 81; *Williamson v. Russell*, 18 W. Va. 612.

6. Acts Beyond Territorial Jurisdiction. — *Needles v. Frost*, 2 Okla. 19.

7. Where Notice of Motion Cannot Be Given. — *Snively v. Harkrader*, 30 Gratt. (Va.) 487.

8. Rejection of Affidavit of Illegality. — *Newton Mfg. Co. v. White*, 47 Ga. 400; *Johnson v. Hanye*, 103 Ga. 542. See also *Manning v. Lacey*, 97 Ga. 384.

9. Mere Irregularities — *Alabama.* — *Triest v. Enslen*, 106 Ala. 188.

b. APPLICATION OF RULE — (1) Irregularity in Writ or Issuance Thereof. — Applying this rule the court has refused to interfere by injunction where the writ issued without a seal,¹ where there was a misdescription in the execution and the writ did not follow the judgment,² where the execution was for an amount in excess of the judgment,³ where the execution issued improvidently, as without judgment,⁴ and where the execution issued prematurely, as where a judgment was confessed under an agreement between the parties that execution should be stayed for a certain period and the execution was sued out in violation of the agreement.⁵

Execution Issued on Dormant Judgment. — Equity will not, as a rule, interfere by injunction where an execution issues on a dormant judgment.⁶ In some cases, however, an injunction to restrain an execution issued upon a dormant judgment has been allowed.⁷

Arkansas. — Scanland v. Mixer, 34 Ark. 354.
California. — Gregory v. Ford, 14 Cal. 138, 73 Am. Dec. 639.

Delaware. — Hastings v. Cropper, 3 Del. Ch. 172.

Florida. — Davidson v. Floyd, 15 Fla. 669; Davidson v. Seegar, 15 Fla. 671.

Illinois. — Chittenden v. Rogers, 42 Ill. 96; Farrell v. McKee, 36 Ill. 225.

Louisiana. — Hudson v. Dangerfield, 2 La. 63, 20 Am. Dec. 297. See also Morgan v. Whitesides, 14 La. 277.

Maryland. — Nelson v. Turner, 2 Md. Ch. 73.
Mississippi. — Ammons v. Whitehead, 31 Miss. 99.

Oregon. — Pursel v. Deal, 16 Oregon 295.

Pennsylvania. — Nelson v. Guffey, 131 Pa. St. 273.

South Carolina. — Wagner v. Peques, 10 S. Car. 259.

See also Foard v. Alexander, 64 N. Car. 71.

1. Writ Without Seal. — Jilsun v. Stebbins, 41 Wis. 235.

2. Misdescription in Execution. — Dunson v. Spradley, (Tex. Civ. App. 1897) 40 S. W. Rep. 327.

3. Execution for More than Judgment. — Walker v. Villavaso, 26 La. Ann. 42; Robb v. Halsey, 11 Smed. & M. (Miss.) 140. See also Triest v. Enslin, 106 Ala. 188.

Offer to Do Equity. — In Eaton v. Markley, 126 Ind. 125, it was held that under the rule that a suitor who seeks equitable relief must show that he offers to do equity, an execution on a judgment which draws interest will not be enjoined on the ground that it is for a greater amount than the judgment unless the complainant first offers to pay all that is due on the execution.

Injunction as to Part Not Due. — In Louisiana it was held that an execution for a greater amount of interest than that allowed by the judgment would not be enjoined as to the whole judgment, but only as to the amount of the excess. Barrow v. Robichaux, 14 La. Ann. 203.

4. Execution Without Judgment. — Davidson v. Floyd, 15 Fla. 669; Lasselle v. Moore, 1 Blackf. (Ind.) 226. But see Alsup v. Allen, 43 Tex. 593.

Record Destroyed. — But equity has enjoined an execution where the record of judgment had been destroyed. Cyrus v. Hicks, 20 Tex. 483.

Discharge of Levy After Reversal of Judgment. — Where after the issuance and levy of an

execution the judgment upon which it issued is reversed, the levy may be discharged on motion, and therefore there is no reason for the interference of a court of chancery by an injunction. Fahs v. Roberts, 54 Ill. 192.

5. Premature Issuance — Violation of Agreement. — Fowler v. Williams, 20 Ark. 641; Moulton v. Knapp, 85 Cal. 385.

Where Judgment Is Unpaid After Expiration of Stay Period. — Where, by an agreement the judgment was to be paid within a specified time, and execution issued in violation of such agreement, but the judgment had not been paid after the expiration of the time agreed upon, it was held that an injunction against the execution would not be granted without an offer of performance on the part of the plaintiff. He who asks equity must first do equity. Anamosa v. Wurzbacher, 37 Iowa 25.

Where Another Execution May Issue Immediately an injunction will not be granted against an execution prematurely issued. Dayton v. Commercial Bank, 6 Rob. (La.) 17. See also Hudson v. Dangerfield, 2 La. 63, 20 Am. Dec. 297.

6. Execution on Dormant Judgment — Injunction Not Proper. — Hanson v. Johnson, 20 Minn. 194; Coward v. Chastain, 99 N. Car. 443, 6 Am. St. Rep. 533; Foard v. Alexander, 64 N. Car. 70. See also Pursel v. Deal, 16 Oregon 295.

7. Execution on Dormant Judgment Enjoined. — Krinke v. Parish, 9 Ohio Cir. Ct. 141, 6 Ohio Cir. Dec. 30, 2 Ohio Dec. 85, wherein it was said that while a motion to recall an execution may be made, yet in Ohio an injunction has been maintained under the claim that an execution has been erroneously issued [citing Miller v. Longacre, 26 Ohio St. 291, in which case it appears that the execution had been sent to another county, and upon a suit brought to enjoin its enforcement the execution creditor appeared and answered without objection to the jurisdiction or mode of procedure]; North v. Swing, 24 Tex. 193; Gabel v. McMahan, 1 Tex. App. Civ. Cas., § 716; Jordan v. Corley, 42 Tex. 284; Seymour v. Hill, 67 Tex. 385, upon the theory of presumption of payment, but it is held that when this presumption is rebutted to perpetuate the injunction would be to refuse to apply the well-settled principle or rule in equity that when no legal injury to the applicant can result from this denial an injunction cannot be granted.

Dormant Judgment in Hands of Innocent Assignee. — In Predohl v. O'Sullivan, (Neb. 1899)

(2) *Irregularity in Proceedings under Writ* — (a) *In General*. — Irregularities in the proceedings under an execution are cognizable in the court issuing the writ, and a court of equity will not ordinarily interfere upon such ground.¹

Excessive Levy — Appraisement. — An excessive levy is not a ground for equitable interference by injunction where the statute provides a remedy by appraisement and a reduction of the seizure in proper cases, the latter remedy being adequate and exclusive of the resort to equitable interference.²

(b) **Levy upon Exempt Property.** — A bill in equity will not be allowed to restrain the sale of chattels under an execution upon the ground that the property is exempt, because adequate relief may be had by superseding the execution, or by an action for the conversion of the property, or for the possession thereof, or after sale by having the sale set aside, or by suing for possession of the property or damages for its conversion.³

Exemptions in Land — Homestead. — When an execution is levied upon exempt land, but the exemption depends upon extrinsic facts, wherefore the judgment would stand as an apparent lien upon the land and a sale would cast a cloud upon the title, the party is entitled to relief in equity by an injunction restraining a sale under the execution.⁴ This question is most often involved in cases of homestead exemptions, and a homestead right is thus protected.⁵

5. Seizure of Property of Stranger to Writ — *a. IN GENERAL.* — As a general rule, a bill in equity will not lie for a specific delivery of chattels or to prevent their sale under an execution, because by an action at law full compensation in damages may be obtained or the recovery of the possession of the property may be had. For these purposes, then, the remedy at law being adequate as a general rule, when property of one person is seized under an execution

80 N. W. Rep. 903, it was held that after a judgment has become dormant in the hands of an assignee or one who has become subrogated to the rights of the original judgment creditor, execution will be enjoined at the instance of an innocent purchaser of the land claiming through the judgment debtor.

1. Proceedings under Execution — Equity Will Not Interfere. — *Wilson v. Miller*, 30 Md. 82, 96 Am. Dec. 568; *Skillman v. Holcomb*, 12 N. J. Eq. 131.

Failure to Exhaust Property of Principal. — *Kilpatrick v. Tunstall*, 5 J. J. Marsh. (Ky.) 80.

Irregularity in Sale — Injunction Pending Action to Annul. — Where the execution debtor fails to embrace an opportunity to object to the manner of the sale of the property seized under the execution, an injunction will not lie to restrain a purchaser from the enjoyment of the property pending an action by the execution debtor to annul the sale. *City Bank v. McIntyre*, 8 Rob. (La.) 467.

2. Excessive Levy — Appraisement. — *Robinson v. Chesseldine*, 5 Ill. 332; *Gusman v. Deporet*, 33 La. Ann. 333; *Hefner v. Hesse*, 29 La. Ann. 149; *Lambeth v. Sentell*, 38 La. Ann. 691. See also *Farrell v. McKee*, 36 Ill. 225; *Smith v. Frederick*, 32 Tex. 256. But see *Robinson v. Perry*, 4 Tex. 273.

3. Levy on Exempt Personalty. — *Jacks v. Bigham*, 36 Ark. 483; *Driggs' Bank v. Norwood*, 49 Ark. 136, 4 Am. St. Rep. 30; *Bryan v. Long*, 14 Fla. 366; *Baxter v. Baxter*, 77 N. Car. 118; *Parsons v. Hartman*, 25 Oregon 547, 42 Am. St. Rep. 803.

Contra, *Nichols v. Claiborne*, 39 Tex. 363; *Alexander v. Holt*, 59 Tex. 205; *Stein v. Frieberg*, 64 Tex. 271; *Cunningham v. Conway*, 25 Neb. 615, in which case, however, the per-

sonal-property exemption was in lieu of the homestead exemption, and the cases cited by the court related to injunctions granted to restrain the creation of clouds upon titles or to prevent trespasses upon real estate.

4. Exemption in Land. — *Buffum v. Forster*, 77 Hun (N. Y.) 27. See also *Hitchcock v. Culver*, 107 Ga. 184.

5. Homestead Exemptions — California. — *Roth v. Insley*, 86 Cal. 134; *Dunn v. Tozer*, 10 Cal. 170, which was an injunction against a sheriff's deed; *Culver v. Rogers*, 28 Cal. 520; *Marriner v. Smith*, 27 Cal. 650, which was a suit by the vendee of the homesteader, the lien of the judgment not having attached to the homestead.

Florida. — *McMichael v. Grady*, 34 Fla. 219, under a statute enlarging the equitable jurisdiction of Circuit Courts.

Mississippi. — *Irwin v. Lewis*, 50 Miss. 363; *Koen v. Brill*, 75 Miss. 870.

New Hampshire. — *Tucker v. Kenniston*, 47 N. H. 267, 93 Am. Dec. 425.

Texas. — *Webb v. Hayner*, 49 Fed. Rep. 601; *Best v. Ray*, (Tex. Civ. App. 1895) 33 S. W. Rep. 292; *Leachman v. Capps*, 89 Tex. 690 [citing *Van Ratcliff v. Call*, 72 Tex. 491; *Seligson v. Collins*, 64 Tex. 314; *Winnie v. Grayson*, 3 Tex. 429]. In *Spencer v. Rosenthal*, 58 Tex. 5, it was held that while it was a settled rule that the mere levy upon lands belonging to one person under an execution against another would not entitle the former to an injunction, there was a recognized exception in a case where the wife applied for an injunction to restrain the sale of the homestead upon an execution against the husband. *Citing Baxter v. Dear*, 24 Tex. 17, 76 Am. Dec. 89.

Wisconsin. — *Goodell v. Blumer*, 41 Wis. 436, at the suit of the vendee of the homesteader.

against another the former cannot resort to the injunctive process of a court of equity to restrain the sale or proceedings under the execution.¹

Levy upon Individual Property — Judgment Against Firm. — On the principle that the court out of which the process issues is perfectly able to prevent an abuse of its own process, equity will not enjoin a threatened levy upon the property of an individual member of a partnership on a judgment against the firm.²

Levy upon Partnership Property for Individual Debt. — On the other hand, it is held that equity will interfere by injunction to restrain the sale of the interest of one as a member of a copartnership in the copartnership property, under a judgment against such individual and an execution levied upon such property, until his interest can be ascertained.³

b. REMEDY BY TRIAL OF RIGHT OF PROPERTY. — A wrongful levy upon the property of a stranger is not a ground for interference by injunction, as the person wronged has an adequate remedy under statutes providing for the trial of the right of property.⁴

c. WHERE OWNER CAN DEFEND HIS TITLE. — In like manner equity will not interfere where the owner of property can defend his title in an action for the recovery of property based upon proceedings under such execution.⁵

d. WHEN REMEDY AT LAW IS INADEQUATE — (1) *In General.* — But a court of equity will not withhold relief from a party in such a situation that a sale of his property under an execution would subject him to irremediable loss, notwithstanding he may in some sort have a remedy at law, such remedy,

1. Seizure of Stranger's Property — General Rule — *United States.* — *Amis v. Myers*, 16 How. (U. S.) 492.

Arkansas. — *Sanders v. Sanders*, 20 Ark. 610; *Stillwell v. Oliver*, 35 Ark. 189.

California. — *Markley v. Rand*, 12 Cal. 276. *Connecticut.* — *Johnson v. Connecticut Bank*, 21 Conn. 148.

Indiana. — *Henderson v. Bates*, 3 Blackf. (Ind.) 460; *Allen v. Winstandly*, 135 Ind. 105.

Kentucky. — *Watkins v. Logan*, 3 T. B. Mon. (Ky.) 21; *Hall v. Davis*, 5 J. J. Marsh. (Ky.) 290; *Bouldin v. Alexander*, 7 T. B. Mon. (Ky.) 425. But see *Brummel v. Hurt*, 3 J. J. Marsh. (Ky.) 709.

Maryland. — *Frazier v. White*, 49 Md. 1; *Chappell v. Cox*, 18 Md. 513; *Freeland v. Reynolds*, 16 Md. 416; *Lewis v. Levy*, 16 Md. 85.

Mississippi. — *Beatty v. Smith*, 2 Smed. & M. (Miss.) 570; *Sevier v. Ross*, Freem. (Miss.) 519.

New York. — *Newcombe v. Irving Nat. Bank*, 51 Hun (N. Y.) 221.

North Carolina. — *Du Pre v. Williams*, 5 Jones Eq. (58 N. Car.) 96.

Ohio. — *Scheferling v. Huffman*, 4 Ohio St. 241, 62 Am. Dec. 281.

Tennessee. — *Hammond v. St. John*, 4 Verg. (Tenn.) 107.

Texas. — *Perrin v. Stevens*, (Tex. Civ. App. 1895) 29 S. W. Rep. 927.

Virginia. — *Allen v. Freeland*, 3 Rand. (Va.) 170; *Miller v. Crews*, 2 Leigh (Va.) 576. In *Wilson v. Butier*, 3 Munf. (Va.) 559, the court seemed to lay down a contrary rule as prevailing in that state. But in *Bowyer v. Creigh*, 3 Rand. (Va.) 25, it was held otherwise, the court *distinguishing* the last case and *Scott v. Halliday*, 5 Munf. (Va.) 105, and *Sampson v. Bryce*, 5 Munf. (Va.) 175, in that in all these cases the plaintiff claimed as owner and the property consisted of slaves.

West Virginia. — *Dunn v. Baxter*, 30 W. Va. 672 [citing *Baker v. Rinehard*, 11 W. Va. 238; *White v. Stender*, 24 W. Va. 615, 49 Am. Rep. 283]; *Kuhn v. Mack*, 4 W. Va. 186; *Walker v. Hunt*, 2 W. Va. 491, 98 Am. Dec. 779.

2. Baldridge v. Eason, 99 Ala. 516.

3. Levy upon Partnership Property for Individual Debt. — *Place v. Sweetzer*, 16 Ohio 142 [approved in *Sutcliffe v. Dohrman*, 18 Ohio 181, 51 Am. Dec. 450], holding that the sale may be restrained until the interest of the partner is ascertained; *Turner v. Smith*, (C. Pl. Spec. T.) 1 Abb. Pr. N. S. (N. Y.) 304, holding that an injunction would be granted where the complaint showed that the copartner whose interest had been seized had in fact no interest in the assets; *Cropper v. Coburn*, 2 Curt. (U. S.) 465, holding that an injunction would be granted where it was admitted that the partner whose interest was supposed to have been seized had no interest which could pass by sale.

Contra. — *Mowbray v. Lawrence*. (Supm. Ct. Spec. T.) 22 How. Pr. (N. Y.) 107; *Moody v. Payne*, 2 Johns. Ch. (N. Y.) 548, holding that the interest of a partner is subject to an execution on a judgment for an individual debt and equity will not stop execution and sale of such interests by injunction until the partnership accounts are taken and liquidated.

4. Trial of Right of Property. — Where a statute provides for an action of claim and delivery such remedy is considered to be plain, speedy, and adequate; and when no reason is given why one cannot obtain the relief to which he is entitled in such action, a sale under the execution cannot be enjoined. *Richards v. Kirkpatrick*, 53 Cal. 433; *Ferguson v. Herring*, 49 Tex. 129.

5. See *infra*, this section, *To Prevent Cloud upon Title*,

however, being altogether inadequate under the equitable circumstances of the particular case.¹

Loss of Trade and Business Prospects. — Where goods of a stranger are seized and are not sold, damages at law are not recoverable beyond the injury done to them, or, if they are sold, beyond their value when taken; and it is held that under such circumstances the owner is entitled to an injunction to prevent the destruction of his credit, loss of his trade, and the failure of his business prospects.²

Ordinary Legal Remedies Not Available. — And where the owner is in such a position that the ordinary remedies available to a party to the action are not available to him, equity will afford him relief.³

Where Stranger Cannot Make Affidavit of Illegality. — Where the owner of property levied upon under an execution which is good and regular upon its face cannot make an affidavit of illegality by reason of not being a party to the execution, he may have an injunction.⁴

Protection to Stranger Pending Appeal by Garnishee. — In *Georgia* a temporary injunction was held to have been properly granted at the instance of one claiming property in the hands of a garnishee when the latter had appealed from a judgment sustaining a traverse to his denial of property in his hands belonging to the judgment debtor, but had given no supersedeas bond, the applicant executing good security and the judgment creditor being insolvent.⁵

(2) **Property of Peculiar Value to Owner.** — A court of equity will interfere to prevent the sale of property which is of such a character that the owner cannot be fully compensated by the verdict of the jury — property which may be fairly supposed to have a peculiar and additional value in the estimation of the owner, which could not enter into the consideration of a jury in assessing the damage for its conversion.⁶

Application of Principle to Slave. — This principle was applied to the seizure and sale of a slave not the property of the execution debtor,⁷ the nature of the

1. **Remedy at Law Inadequate.** — *Sanders v. Sanders*, 20 Ark. 610; *Ford v. Rigby*, 10 Cal. 450; *Denny v. Denny*, 113 Ind. 22; *Martin v. Jewell*, 37 Md. 530. See also *Cooper v. Newell*, 36 Miss. 319.

2. **Loss of Trade and Business Prospects.** — *Watson v. Sutherland*, 5 Wall. (U. S.) 74; *McCreery v. Sutherland*, 23 Md. 471, 87 Am. Dec. 578; *Walker v. Hunt*, 2 W. Va. 491, 98 Am. Dec. 779.

Irremediable Loss Not Made to Appear. — But where the complainant claims goods in a store upon which an execution has been levied under a judgment against a third party under whom the plaintiff asserts title without showing that the property is of such a character or possessed of such peculiar value or interest to the owner that he could not be adequately compensated by damages at law, an injunction cannot be granted. *Lewis v. Levy*, 16 Md. 85; *Freeland v. Reynolds*, 16 Md. 416. See also *Frazier v. White*, 49 Md. 1.

3. **Ordinary Remedies Not Available.** — *Ford v. Rigby*, 10 Cal. 449, an injunction at the instance of the purchaser from the lessor of leased property, the former not being in nor entitled to possession, to restrain a sale under an execution against his vendor; *Orr v. Pickett*, 3 J. J. Marsh. (Ky.) 269; *Martin v. Jewell*, 37 Md. 530; *Wood v. Stanberry*, 21 Ohio St. 142.

Trial of Right of Property Inadequate for Trustee. — In *Sumner v. Crawford*, (Tex. Civ. App. 1897) 41 S. W. Rep. 825, it was held that a trustee might have an injunction to restrain

the sale of goods under an execution against another, because the right of trial of property would not have been an adequate and complete remedy for the reason that in such a proceeding the trustee would have waived all damages that were incurred by reason of the alleged seizure.

Sheriff and Plaintiff in Execution Insolvent. — A court of equity may interfere by injunction where personal property not belonging to the judgment debtor is levied upon and the sheriff and the plaintiff in the execution are both insolvent. *Bristol v. Hallyburton*, 93 N. Car. 384.

4. *Hall v. Lyon*, 37 Ga. 636.

5. **Pending Appeal by Garnishee.** — *Hitt v. Ehrlich*, 89 Ga. 824.

6. **Property of Peculiar Value.** — *Sanders v. Sanders*, 20 Ark. 610 [citing *Somerset v. Cookson*, 3 P. Wms. 390; *Fells v. Read*, 3 Ves. Jr. 70; *Lloyd v. Loaring*, 6 Ves. Jr. 773; *Lowther v. Lowther*, 13 Ves. Jr. 95; *Peane v. Lisle*, Ambl. 77; *Arundell v. Phipps*, 10 Ves. Jr. 140; *Nutbrown v. Thornton*, 10 Ves. Jr. 163; *Maclesfield v. Davis*, 3 Ves. & B. 16; *Henderson v. Vaulx*, 10 Verg. (Tenn.) 37]; *Randolph v. Randolph*, 6 Rand. (Va.) 194; *Kelley v. Scott*, 5 Gratt. (Va.) 479.

7. **Principle Applied to Slaves.** — *Savery v. Spence*, 13 Ala. 561; *Sanders v. Sanders*, 20 Ark. 610 [overruling *Lovette v. Longmire*, 14 Ark. 339]; *Mallery v. Dudley*, 4 Ga. 52; *Beatty v. Smith*, 2 Smed. & M. (Miss.) 570; *Sevier v. Ross*, Freem. (Miss.) 519; *Murphy v. Clark*, 1

property itself being considered sufficient by some of the decisions to justify the interference of a court of chancery,¹ while in other cases it has been considered that the peculiar circumstances must be shown, as that the slaves were family servants.²

c. CLAIMANT UNDER EXECUTION DEBTOR MUST SHOW GOOD TITLE. — Where the party seeking the injunction claims title under the judgment debtor, acquired recently, before the rendition of the judgment, he must make out a clear and undisputed title of purchase for a *bona fide* consideration.³

6. To Prevent Cloud upon Title — a. POWER IN GENERAL. — There is no doubt that it is within the province of a court of chancery, upon a proper case made, to interpose by way of accomplishing precautionary justice;⁴ and if a court of chancery would have jurisdiction to set aside a sheriff's deed given on a sale and to order that it be delivered up and canceled as casting a cloud upon the complainant's title, it follows as a necessary consequence that the court may interpose its aid to prevent such a cloud from being cast upon the title when the defendant evinces a fixed determination to proceed with the sale.⁵

b. CIRCUMSTANCES JUSTIFYING INTERFERENCE — (1) *Broad General Rule as to Void Sale.* — So far as the statement of a general rule is concerned, it seems that the controlling question is, would the sale be void so that no recovery or defense could be successfully based on the title acquired under the execution sale? If so, then the legal remedy is considered adequate, and equity will not interfere to prevent the sale.⁶ And in many cases it seems that under no circumstances, except where the complainant's title could not prevail over that of the purchaser at the execution sale without supporting evidence, as in the cases hereinafter instanced where the judgment stands as a *prima facie* valid lien,⁷ will a court of equity interfere, and the allegation in a bill that the complainant has the legal title and that the land is not subject to sale under the judgment is sufficient to show a want of equity;⁸ and

Smed. & M. (Miss.) 221; Butler v. Hicks, 11 Smed. & M. (Miss.) 78; Du Pre v. Williams, 5 Jones Eq. (58 N. Car.) 96; Williams v. Howard, 3 Murph. (7 N. Car.) 80; Bryan v. Robert, 1 Strobb. Eq. (S. Car.) 341; McTeer v. Moorer, Bailey Eq. (S. Car.) 62; Hammond v. St. John, 4 Yerg. (Tenn.) 107; Randolph v. Randolph, 6 Rand. (Va.) 201; Kelly v. Scott, 5 Gratt. (Va.) 479. But see Watkins v. Logan, 3 T. B. Mon. (Ky.) 21; Hall v. Davis, 5 L. J. Marsh. (Ky.) 290.

1. Character of Slave Sufficient Without Showing Peculiar Value. — Sanders v. Sanders, 20 Ark. 610; Sevier v. Ross, Freeman. (Miss.) 519; Murphy v. Clark, 1 Smed. & M. (Miss.) 221; Butler v. Hicks, 11 Smed. & M. (Miss.) 78; Hammond v. St. John, 4 Yerg. (Tenn.) 107; Loftin v. Espy, 4 Yerg. (Tenn.) 84; Henderson v. Vaulx, 4 Yerg. (Tenn.) 37; Kelly v. Scott, 5 Gratt. (Va.) 479.

2. Peculiar Value of Slave Must Be Shown. — Mallery v. Dudley, 4 Ga. 52; Du Pre v. Williams, 5 Jones Eq. (58 N. Car.) 96; McTeer v. Moorer, Bailey Eq. (S. Car.) 62, which, however, was a suit by a mortgagee; Allen v. Freeland, 3 Rand. (Va.) 170. See also Amis v. Myers, 16 How. (U. S.) 492.

More Merchandise. — So it was held that where the slave had no peculiar value to the owner, but was held by him as mere merchandise, equity would not interfere, and the owner should be left to his legal remedy. Randolph v. Randolph, 6 Rand. (Va.) 194.

3. Title of Claimant under Judgment Debtor. — Wanick v. Michael, 11 Gill & J. (Md.) 153. See also Erdman v. Rosenthal, 60 Md. 312; Chappell v. Cox, 18 Md. 513.

4. Power in General. — Crawford v. Lamar, 9 Colo. App. 83; Young v. Hailey First Nat. Bank, (Idaho 1895) 39 Pac. Rep. 557; Welde v. Scotten, 59 Md. 72.

5. Where Deed Would Be Set Aside. — Martin v. Hewitt, 44 Ala. 436; Shattuck v. Carson, 2 Cal. 588; Pixley v. Huggins, 15 Cal. 132; Sharpe v. Tatnall, 5 Del. Ch. 302; Pettit v. Shepherd, 5 Paige (N. Y.) 501; Couch v. Ulster etc., Branch Turnpike Co., 4 Johns. Ch. (N. Y.) 26; Buflum v. Forster, 77 Hun (N. Y.) 27; Kenyon v. Clark, 2 R. I. 70. See also Dyer v. Armstrong, 5 Ind. 438.

As to what constitutes a cloud on title, see the title CLOUD ON TITLE, vol. 6, p. 149.

6. Void Sale — General Rule. — Roman Catholic Archbishop v. Shipman, 69 Cal. 590; Good v. Merkowitz, 35 Mo. App. 660; Swayze v. Hackettstown Nat. Bank, 44 N. J. Eq. 9; Freeman v. Elmendorf, 7 N. J. Eq. 475; Sheldon v. Stokes, 34 N. J. Eq. 87; Bristol v. Haliburton, 93 N. Car. 384; Small's Appeal, (Pa. 1887) 9 Atl. Rep. 337; Davis v. Michener, 106 Pa. St. 395; Carlin v. Hudson, 12 Tex. 202, 62 Am. Dec. 521; Dunn v. Baxter, 30 W. Va. 672.

Where Purchaser Would Be Charged with Notice. — Where a judgment debtor's proceeding by action to have the judgment set aside, an injunction to restrain a sale under execution pending such action will not be granted, as the purchaser at such sale would be concluded by the result of the action to set aside the judgment. Hart v. Marshall, 4 Minn. 294.

7. See *infra*, this section, Conflict of Authority.

8. No Equity Where Complainant Shows Title in Himself — Missouri. — Drake v. Jones, 27

the mere fact that the judgment debtor once had title to the land is not sufficient reason for restraining a sale under an execution against him at the instance of the owner claiming under a deed from him prior to the judgment.¹

(2) *Conflict of Authority.* — Conflict of authority is to be found in the decisions of the several states as to when a court of equity ought to interfere either by way of removing a cloud already existing or preventing the casting of a cloud on the title.²

Levy upon Land of Stranger to Writ. — Upon the principle of the general rule last stated, it is held that if the land of a stranger to a judgment is seized for the debt of the judgment debtor, since the owner could recover his property against the purchaser or could successfully defend his title in an action at law by the purchaser, the bare fact of the seizure under such circumstances is no cause for equitable relief to prevent the sale,³ unless without evidence to rebut it the deed which would be made under the execution sale would convey a *prima facie* good title to the purchaser under such sale.⁴

Prevention of Cloud though Sale Would Be Void. — But where the circumstances are considered such that a cloud would be cast by a sale under the execution, it is held that the fact that the judgment is not a lien and that a sale would not convey a title which could be made effective against the real owner is not material upon the question of equitable jurisdiction to prevent the cloud;⁵ or, in other words, in this view of the general rule first stated, that if a sale would

Mo. 428; Kuhn v. McNeil, 47 Mo. 389; Wilcox v. Walker, 94 Mo. 88; Good v. Merkowitz, 35 Mo. App. 658. But in this state it was held that while the court would not enjoin the sale of land upon a common execution, it had uniformly enjoined and would always enjoin the sale of lands for the payment of taxes although the assessment was illegal, upon the ground that thereby a cloud would be cast upon the title. McPike v. Pen, 51 Mo. 63; Lockwood v. St. Louis, 24 Mo. 20; Wells v. Weston, 22 Mo. 384. And it was further held in this state that the weight of authority and reason sustain the position that if the defect is such as to require legal acumen to discover it, whether it appears on the deed or proceedings or is to be proven *aliunde*, courts of equity will entertain jurisdiction to remove the cloud. Merchants Bank v. Evans, 51 Mo. 345, holding that the remarks of Napton, J., in Gamble v. St. Louis, 12 Mo. 617, were too broad if he intended to be understood as holding that in all cases where a defect appears on the face of proceedings a court of equity would not interfere, but would leave the parties to their remedies at law; Withaus v. Washington Sav. Bank, 18 Mo. App. 184.

New Jersey. — Swayze v. Hackettstown Nat. Bank, 44 N. J. Eq. 9; Emery v. Vansickel, 15 N. J. Eq. 144; Darves v. Taylor, 35 N. J. Eq. 40.

North Carolina. — Bristol v. Hallyburton, 93 N. Car. 384. See also Bostic v. Young, 116 N. Car. 766; Gatewood v. Burns, 99 N. Car. 357; Francis v. Herren, 101 N. Car. 407.

1. Even When Complainant Claims under Judgment Debtor. — The rule upon the subject assumes that, the title of the party complaining being shown as it appears of record, the cloud to be removed is apparently a good title against it though really defective by reason of something not appearing on the record. Pelican River Milling Co. v. Maurin, 67 Minn. 418; Swayze v. Hackettstown Nat. Bank, 44 N. J. Eq. 9; Schroeder v. Gurney, 73 N. Y.

434; Carlin v. Hudson, 2 Tex. 202, 62 Am. Dec. 521; Moore v. Cord, 14 Wis. 216. See also the last preceding note.

2. Conflict of Authority. — Bell v. Murray, 13 Colo. App. 217; Key City Gas Light Co. v. Munsell, 19 Iowa 306; Welde v. Scotten, 59 Md. 72.

3. Levy upon Land of Stranger to Writ. — Roman Catholic Archbishop v. Shipman, 69 Cal. 591; Pelican River Milling Co. v. Maurin, 67 Minn. 418; Taylor's Appeal, 93 Pa. St. 21; Small's Appeal, (Pa. 1887) 9 Atl. Rep. 337; Davis v. Michener, 106 Pa. St. 395; Purinton v. Davis, 66 Tex. 455; Mann v. Wallis, 75 Tex. 611; Spencer v. Rosenthal, 58 Tex. 5.

4. Where Rebutting Evidence Necessary — California. — Pixley v. Huggins, 15 Cal. 127; Tibbetts v. Fore, 70 Cal. 242; Roth v. Insley, 86 Cal. 134; Roman Catholic Archbishop v. Shipman, 69 Cal. 591.

Missouri. — Parks v. People's Bank, 97 Mo. 132, 10 Am. St. Rep. 295; Wilcox v. Walker, 94 Mo. 88.

Texas. — Mann v. Wallis, 75 Tex. 611; Ryburn v. Getzendaner, 1 Tex. Unrep. Cas. 353; Henderson v. Mortill, 12 Tex. 1; Carlin v. Hudson, 12 Tex. 202, 62 Am. Dec. 521; Rodriguez v. Buckley, (Tex. Civ. App. 1895) 30 S. W. Rep. 1123.

Wisconsin. — Goodell v. Blumer, 41 Wis. 436; Moore v. Cord, 14 Wis. 216.

5. Prevention of Cloud though Sale Would Be Void — Alabama. — Downing v. Mann, 43 Ala. 266.

California. — Englund v. Lewis, 25 Cal. 338; Porter v. Pico, 55 Cal. 165; Shattuck v. Carson, 2 Cal. 588.

Delaware. — Sharpe v. Tatnall, 5 Del. Ch. 302.

Illinois. — Bennett v. McFadden, 61 Ill. 334; Christie v. Hale, 46 Ill. 117.

Iowa. — Key City Gas Light Co. v. Munsell, 19 Iowa 306.

Missouri. — Vogler v. Montgomery, 54 Mo. 578.

be void and would convey no title equity will not restrain it, that rule seems to be too broadly stated and should be limited to cases where the defects which would render the sale void appear without extraneous evidence.

Relief though Judgment Not a Lien. — Under the rule thus modified, where a judgment creditor is seeking to subject to execution land which had been previously conveyed by the judgment debtor the sale will be enjoined at the instance of the grantee of such debtor upon the ground that it would embarrass the plaintiff's title,¹ and a deed valid on its face, in the absence of anything on the face thereof or on the face of the proceedings leading to it to show its invalidity as against the real owner, is held to be sufficient to cast such a cloud as the court will restrain.² So, also, the same effect would be given to a threatened sale under a judgment which was once a lien, but the lien of which has become inoperative after the lapse of a statutory period as against a *bona fide* purchaser from the judgment debtor,³ or where the plaintiff seeking to restrain the sale acquired his title by purchase at a sale under a former execution.⁴

Homestead Exemption. — And where the judgment is not in fact a lien, though for aught appearing on the record it would be so, and evidence *in pais* is necessary to overcome this presumption, as in the case of a homestead exemption, the rule is applied for the protection of the purchaser from the judgment debtor.⁵

Apparent Lien — Complainant Having Equitable Title. — Where the claimant under a deed from the judgment debtor had, before the judgment was rendered, a complete equitable title which is not supplemented by a conveyance of the legal title until after judgment against his vendor, an injunction will lie to restrain the sale, because the sheriff's deed would *prima facie* carry a good title.⁶

Protection of Wife's Separate Estate. — Further, the rule is applied for the protection of the separate estate of a married woman from sale under an execution against her husband,⁷ in this case, however, not so much because the deed of the purchaser at the execution sale would *prima facie* convey a good title and thus force the owner to exhibit her deed, as for the reason that the owner would be under the necessity of proving the character of her estate by evidence outside of her deed.

Ohio. — *Olin v. Hungerford*, 10 Ohio 268; *U. S. Bank v. Schultz*, 2 Ohio 471; *Norton v. Beaver*, 5 Ohio 179.

Oregon. — *Wilhelm v. Woodcock*, 11 Oregon 518.

Rhode Island. — *Kenyon v. Clarke*, 2 R. I. 70.
1. Where Judgment Not a Lien — Conveyance Before Judgment. — *Fitzgibbon v. Laumeister*, (Cal. 1898) 51 Pac. Rep. 1078; *Englund v. Lewis*, 25 Cal. 338; *Roman Catholic Archbishop v. Shipman*, 69 Cal. 591; *Wilhelm v. Woodcock*, 11 Oregon 518.

2. *Lyon v. Hunt*, 11 Ala. 295, 46 Am. Dec. 216; *Martin v. Hewitt*, 44 Ala. 436; *Downing v. Mann*, 43 Ala. 266.

3. *Pettit v. Shepherd*, 5 Paige (N. Y.) 501. See also *Riggin v. Mulligan*, 9 Ill. 50.

So where the judgment debtor sold while the judgment was dormant. *Norton v. Beaver*, 5 Ohio 178.

4. *Hickman v. O'Neal*, 10 Cal. 293. But see *Ryburn v. Getzendaner*, 1 Tex. Unrep. Cas. 349.

5. Homestead Exemption. — See *supra*, this section, *Levy upon Exempt Property*.

6. Apparent Lien — Complainant Having Equitable Title. — *Parks v. People's Bank*, 97 Mo. 132, 10 Am. St. Rep. 295, holding that such

protection would be afforded to the purchaser from the judgment debtor because the fact that the purchaser's equitable estate antedated the judgment would not appear in the published record of titles and would require proof in an action of ejectment. *Rodriguez v. Buckley*, (Tex. Civ. App. 1895) 30 S. W. Rep. 1123; *Goodell v. Blumer*, 41 Wis. 436. See also *Burt v. Cassety*, 12 Ala. 734; *Schroeder v. Gurney*, 73 N. Y. 430.

7. Protection of Wife's Separate Estate. — *Calhoun v. Cozens*, 3 Ala. 498; *Tibbetts v. Fore*, 70 Cal. 242, wherein it appears that, under the statute in *California*, the presumption attending the possession of property by either husband or wife is that it belongs to the community and that exceptions to the rule must be proved; *Alverson v. Jones*, 10 Cal. 9, 70 Am. Dec. 689; *Dunn v. Tozer*, 10 Cal. 167; *Hunter's Appeal*, 40 Pa. St. 197; *Mann v. Wallis*, 75 Tex. 611.

Where the Wife's Deed Shows upon Its Face that the estate is her separate property an execution against the husband levied thereon will not be enjoined for the reason that a sale would not create a cloud upon the wife's title. *Spencer v. Rosenthal*, 58 Tex. 4; *Purinton v. Davis*, 66 Tex. 455. See, however, *Young v.*

Rule that Stranger to Writ May Enjoin Sale. — In still other cases the very broad rule is announced that the mere fact that a person whose property is seized under an execution is a stranger to the writ is sufficient to entitle him to relief in equity through its injunctive process to restrain the sale, upon the ground that such a sale would necessarily embarrass the true title.¹

Under the Code Provisions, too, which abolish the distinction between legal and equitable actions and vest both legal and equitable jurisdiction in one court, to be administered according to the facts presented, pre-existing rules as to the adequacy of the remedy at law in this connection are relaxed.²

(3) **Doubt as to Title — Attack upon Good Faith.** — It is held that where there are serious doubts in regard to the validity of the complainant's title, or where the title to the property is in dispute, an injunction should not be granted to restrain a sale under an execution, the proper remedy in such a case being by an action at law.³ And where a wife seeks to enjoin the sale of property levied upon under an execution against her husband, upon the ground that the property is her separate estate, equity will not interfere where her title is denied;⁴ and if the title of the complainant is resisted upon the ground that it was procured in fraud of the rights of the husband's creditor, the sale should not be enjoined, but the judgment creditor should be permitted to proceed to sell under his execution, the question of the *bona fides* being left to be tried in an action at law.⁵

XI. POWER OF FEDERAL COURTS TO ENJOIN PROCEEDINGS IN STATE COURTS —

1. **Where State Court First Acquires Jurisdiction.** — A Federal Statute Provides that "the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."⁶

In Construing This Statute it has been held in a great number of decisions, both state and federal, that the statute, apart from the exception therein mentioned, absolutely prohibits any interference by the United States courts with proceedings in the state courts, providing the latter courts first acquire jurisdiction.⁷

Hailey First Nat. Bank, (Idaho 1895) 39 Pac. Rep. 558; Broussard v. Le Blanc, 43 La. Ann. 937, 44 La. Ann. 880.

1. **Rule that Stranger to Writ May Enjoin Sale.** — King v. Clay, 34 Ark. 209; Budd v. Long, 13 Fla. 288; Bennett v. McFadden, 61 Ill. 334; Scobey v. Walker, 114 Ind. 254; Davis v. Clark, 26 Ind. 424, 89 Am. Dec. 471.

2. **Relaxation of Rule as to Adequate Remedy under Code.** — Bell v. Murray, 13 Colo. App. 217. See also Young v. Hailey First Nat. Bank, (Idaho 1895) 39 Pac. Rep. 558.

3. **Doubt as to Title — Equity Will Not Interfere.** — Crawford v. Lamar, 9 Colo. App. 83; Union Iron Works v. Bassick Min. Co., 10 Colo. 45.

4. **Wife's Title Denied.** — Dyer v. People's Bank, 9 Phila. (Pa.) 159, 31 Leg. Int. (Pa.) 28; Shuster v. Bennett, 9 Phila. (Pa.) 208, 31 Leg. Int. (Pa.) 204; Allen v. Gordon, 7 Phila. (Pa.) 280; Dunn v. Baxter, 30 W. Va. 672.

5. **Fraud in Procuring Title.** — Welde v. Scotten, 59 Md. 72 [*distinguishing* McCann v. Taylor, 10 Md. 418]; Freeman v. Elmendorf, 7 N. J. Eq. 475, 655; Winch's Appeal, 61 Pa. St. 426 [*explaining and approving* Hunter's Appeal, 40 Pa. St. 194]; Dyer v. People's Bank, 9 Phila. (Pa.) 159, 31 Leg. Int. (Pa.) 28; Shuster v. Bennett, 9 Phila. (Pa.) 208, 31 Leg. Int. (Pa.) 204. Compare Erdman v. R. senthal, 60 Md. 312; Pettit v. Shepherd, 5 Paige (N. Y.) 501.

6. **Federal Statute.** — Rev. Stat. U. S., § 720. Section 720 Not Repealed by Section 1979. — Hemsley v. Myers, 45 Fed. Rep. 283.

7. **Statute Prohibits Interference with Proceedings Already Begun — United States.** — Reinach v. Atlantic, etc., R. Co., 58 Fed. Rep. 43; Ex p. Schulenburg, 25 Fed. Rep. 211; Molony v. Massachusetts Ben. Assoc., 53 Fed. Rep. 209; Freeney v. Plattsouth First Nat. Bank, 16 Fed. Rep. 433; Missouri, etc., R. Co. v. Scott, 13 Fed. Rep. 793; Watson v. Jones, 13 Wall. (U. S.) 679; Orton v. Smith, 18 How. (U. S.) 263; McAlpine v. Tourtelotte, 24 Fed. Rep. 69; Evans v. Pack, 2 Flipp. (U. S.) 267, 8 Fed. Cas. No. 4,566; Carpenter v. Talbot, 33 Fed. Rep. 537; Domestic, etc., Missionary Soc. v. Hinman, 13 Fed. Rep. 161; *In re* Sawyer, 124 U. S. 219; Moran v. Sturges, 154 U. S. 267; Dillon v. Kansas City Suburban Belt R. Co., 43 Fed. Rep. 109; Dial v. Reynolds, 96 U. S. 340; Diggs v. Wolcott, 4 Cranch (U. S.) 179; Daly v. Sheriff, 1 Woods (U. S.) 179; Riggs v. Johnson County, 6 Wall. (U. S.) 195; Haines v. Carpenter, 91 U. S. 255; The Mamie, 110 U. S. 742.

Georgia. — Bryan v. Hickson, 40 Ga. 405; Strozier v. Howes, 30 Ga. 578.

Illinois. — Munson v. Harroun, 34 Ill. 422, 85 Am. Dec. 316; Logan v. Lucas, 59 Ill. 237.

Rhode Island. — Chapin v. James, 11 R. I. 87, 23 Am. Rep. 412.

Texas. — Arthur v. Batte, 42 Tex. 159.

But Independently of Any Statutory Provisions it is a doctrine too long established to require citation of authorities that where a court has jurisdiction it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court, and where the jurisdiction of a court and the right of a plaintiff to prosecute his suit in it have once attached, that right cannot be arrested or taken away by proceedings in any other court.¹ It will thus be seen that this statute is scarcely more than a legislative affirmation of an ancient and well-settled rule in equity.²

The Prohibition Contained in the Statute applies not only to injunctions aimed at the state court itself, but also to injunctions issued to all parties before the court, its officers or litigants therein.³ So the prohibition extends to all steps taken by the court or by its officers under its process, from the institution of the suit until the close of the final process of execution which may be issued therein.⁴

Illustrations. — It has accordingly been held that a federal court cannot enjoin service of process issued by a state court,⁵ or the prosecution of an action already begun in a state court,⁶ or the enforcement of judgments of a state court,⁷ or sales under execution against property on the judgment of a state court.⁸

Where Property of Third Person Sold. — There is some difference of opinion on the question whether this rule applies when the property sold is that of some person other than the judgment debtor. The earliest decision on this question holds that under these circumstances the statute has no application, and that

Proceedings in Violation of Federal Constitution. — A federal court has no power to enjoin proceedings in a state court to enforce a state law, although it is in violation of the Federal Constitution. *Slaughter House Case*, 1 Woods (U. S.) 21; *Yick Wo v. Crowley*, 26 Fed. Rep. 207; *Rensselaer, etc., R. Co. v. Bennington, etc., R. Co.*, 18 Fed. Rep. 617. But compare *Tuchman v. Welch*, 42 Fed. Rep. 548.

As was said in a recent decision: "This section, save the exception, is as old as the judicial system of the United States. Its prohibition is absolute and unqualified, except where the injunction is authorized by law in proceedings in bankruptcy. This exception serves to emphasize the prohibition as to all other cases." *Hemsley v. Myers*, 45 Fed. Rep. 289.

1. Equitable Doctrine Independent of Statute. — *Peck v. Jenness*, 7 How. (U. S.) 612; *Reinach v. Atlantic, etc., R. Co.*, 58 Fed. Rep. 44; *Harkrader v. Wadley*, 172 U. S. 143.

2. See also *infra*, this title, *Power of State Courts to Enjoin Proceedings in Federal Courts*. It is there shown that no statutory prohibition is necessary to prevent state courts from interfering with the proceedings of federal courts.

3. Application of Statute to Courts, Officers, and Litigants. — *Chicago Trust, etc., Bank v. Bentz*, 59 Fed. Rep. 647; *Peck v. Jenness*, 7 How. (U. S.) 625; *Tuchman v. Welch*, 42 Fed. Rep. 553; *Haines v. Carpenter*, 91 U. S. 254; *Dial v. Reynolds*, 96 U. S. 310; *Wagner v. Drake*, 31 Fed. Rep. 849; *Belknap v. Schild*, 161 U. S. 11.

4. Application to All Steps Taken in Proceedings. — *U. S. v. Collins*, 4 Blatchf. (U. S.) 142; *Louisville Trust Co. v. Cincinnati*, 73 Fed. Rep. 716; *Cropper v. Coburn*, 2 Curt. (U. S.)

465, 6 Fed. Cas. No. 3,416; *Dillon v. Kansas City Suburban Belt R. Co.*, 43 Fed. Rep. 112.

5. Service of Process. — *Yick Wo v. Crowley*, 26 Fed. Rep. 207, in which case the federal court refused to issue an injunction to prevent a police officer of a city from serving warrants of arrest issued by a state court for violation of a city ordinance claimed to be in violation of the Federal Constitution.

6. Action Already Begun in State Court. — *City Bank v. Skelton*, 2 Blatchf. (U. S.) 26; *Bertha Zinc, etc., Co. v. Carico*, 61 Fed. Rep. 132; *Hamilton v. Walsh*, 23 Fed. Rep. 420; *Chicago Trust, etc., Bank v. Bentz*, 59 Fed. Rep. 645; *McWhirter v. Halsted*, 24 Fed. Rep. 828; *In re Chetwood*, 165 U. S. 443; *Chicago, etc., R. Co. v. St. Joseph Union Depot Co.*, 92 Fed. Rep. 22; *Rensselaer, etc., R. Co. v. Bennington, etc., R. Co.*, 18 Fed. Rep. 617; *Coeur D'Alene R., etc., Co. v. Spalding*, 93 Fed. Rep. 280.

The unconstitutionality of the statute on which the action is based furnishes no reason for the federal court to enjoin the action. *Rensselaer, etc., R. Co. v. Bennington, etc., R. Co.*, 18 Fed. Rep. 617.

7. Judgments of State Court. — *Baker v. Ault*, 78 Fed. Rep. 394; *Louisville Trust Co. v. Cincinnati*, 73 Fed. Rep. 716; *Strozier v. Howes*, 30 Ga. 578; *Logan v. Lucas*, 59 Ill. 237.

Judgments Obtained by Fraud. — It has been held that the federal courts may relieve against a judgment of a state court obtained by fraud, by enjoining the enforcement. *Perry v. Johnston*, 95 Fed. Rep. 322. See also *McNeil v. McNeil*, 78 Fed. Rep. 834.

8. Sales under Execution — Generally. — *Rugles v. Simonton*, 3 Biss. (U. S.) 325; *Pickett v. Filer, etc., Co.*, 40 Fed. Rep. 313; *Ameri-*

the federal court may issue an injunction.¹ All the other decisions, including a very recent one, hold the contrary, taking the view that such act on the part of the officer, though unauthorized, is none the less a "proceeding" within the meaning of the statute.²

Agreement of Parties Sanctioned by State Court. — So it has been held that under the statute the federal court cannot restrain a party from carrying out an agreement sanctioned by a state court.³

Receivership. — Or enjoin a receiver in possession of a railroad under appointment of a state court from issuing receiver's certificates.⁴

Taking Possession of Property. — Or restrain a party from taking possession of property which the judgment of a state court requires to be delivered to him.⁵

Distribution of Funds. — Or prevent the distribution of funds to the heirs at law by an administrator duly appointed by the court and directed so to do.⁶

Municipal Assessments — Levy and Sale of Property. — Or enjoin a town from levying upon and selling property for the purpose of collecting an assessment of benefits for the layout of a highway, which assessment the court, pursuant to the state statutes, has ordered to be collected in the manner pursued in the collection of the town taxes.⁷

Condemnation Proceedings. — Nor, pending a condemnation suit in a state court, enjoin the petitioner from entering upon the land which it is sought to condemn.⁸

Property Held under Process. — Nor in any manner interfere with property seized and held under mesne or final process of a state court.⁹

On the Other Hand, a foreclosure sale by a public officer under a chattel mortgage is not a "proceeding" in a state court, within the meaning of the statute,¹⁰ and it has been held that where the ordinary of a county is required by statute to examine the returns, count the votes, and declare the result of a local election, his action in this regard is not such a "proceeding" as will inhibit an injunction from the federal court.¹¹

2. Where Federal Court First Acquires Jurisdiction. — It is well settled, upon grounds that cannot be questioned, that the restriction of the statute in question is to be limited to actions begun in the state courts before proceedings commenced in the federal courts, and that it has no application where jurisdiction of the federal courts has first attached.¹² These decisions proceed

can Assoc. v. Hurst, 59 Fed. Rep. 1; Provident L., etc., Co. v. Mills, 91 Fed. Rep. 435. See also Sargent v. Helton, 115 U. S. 348.

1. Property of Third Person — View that Court May Enjoin. — Cropper v. Coburn, 2 Curt. (U. S.) 465.

2. View that Court Cannot Enjoin. — Daly v. Sheriff, 1 Woods (U. S.) 175; Watson v. Bondurant, 2 Woods (U. S.) 166; Perry v. Sharpe, 8 Fed. Rep. 23; American Assoc. v. Hurst, 59 Fed. Rep. 1; Provident L., etc., Co. v. Mills, 91 Fed. Rep. 435. See also Watson v. Bondurant, 30 La. Ann. 1.

3. Agreement of Parties Sanctioned by State Court. — Reinach v. Atlantic, etc., R. Co., 58 Fed. Rep. 33.

4. Issuance of Certificates by Receiver. — Reinach v. Atlantic, etc., R. Co., 58 Fed. Rep. 33.

5. Taking Possession of Property under Judgment. — Louisville Trust Co. v. Cincinnati, 73 Fed. Rep. 734; Watson v. Jones, 13 Wall. (U. S.) 679. See also Domestic, etc., Missionary Soc. v. Hinman, 13 Fed. Rep. 161.

6. Distribution of Funds by Administrator. — Whitney v. Wilder, 54 Fed. Rep. 551.

7. Levy and Sale of Property by Municipality for Taxes. — Fenwick Hall Co. v. Old Saybrook, 66 Fed. Rep. 389.

8. Entry on Land by Petitioner in Condemnation Proceedings. — Dillon v. Kansas City Suburban Belt R. Co., 43 Fed. Rep. 109.

9. Interference with Property Held under Process of State Court. — Tefft v. Sternberg, 40 Fed. Rep. 6.

10. Foreclosure Sale under Chattel Mortgage. — Carpenter v. Talbot, 33 Fed. Rep. 537.

11. Official Count of Votes. — Weil v. Calhoun, 25 Fed. Rep. 865.

12. Where Federal Courts First Acquire Jurisdiction. — Yick Wo v. Crowley, 26 Fed. Rep. 208; Rensselaer, etc., R. Co. v. Bennington, etc., R. Co., 18 Fed. Rep. 618; Fisk v. Union Pac. R. Co., 10 Blatchf. (U. S.) 520; Missouri, etc., R. Co. v. Scott, 13 Fed. Rep. 795; Wagner v. Drake, 31 Fed. Rep. 851; Hensley v. Myers, 45 Fed. Rep. 289; Cornell v. Green, 88 Fed. Rep. 821; Hamilton v. Walsh, 23 Fed. Rep. 420; Dietzsch v. Huidekoper, 103 U. S. 497; Texas, etc., R. Co. v. Kutean, 54 Fed. Rep. 547; Garner v. Providence Second Nat. Bank, 67 Fed. Rep. 833; Bowdoin College v. Merritt, 59 Fed. Rep. 6; Sharon v. Terry, 36 Fed. Rep. 365; French v. Hay, 22 Wall. (U. S.) 231; Fidelity Ins., etc., Co. v. Norfolk, etc., R. Co., 88 Fed. Rep. 815; Bryan v. Hickson, 40 Ga. 405.

upon the theory that the federal courts must have full control over the enforcement of their judgments and decrees as well as over the rendition of them.¹ If the rule were otherwise, after suit brought in the federal court, a party defendant could, by resorting to a suit in a state court, defeat in many ways the effective jurisdiction and action of the federal court after it had obtained full jurisdiction of person and subject-matter.² The statute under consideration must be construed in connection with another statute³ providing that the federal courts shall have power to issue all writs which may be necessary for the exercise of their respective jurisdictions.⁴

3. Where Suit Has Been Removed to Federal Court. — The statute also has no application where a cause originating in a state court has been lawfully removed to the federal court.⁵ When a case is legally removed to the federal court all jurisdiction in the state court is at an end. The cause itself being transferred, no cause any longer exists in the state court, which is then absolutely without authority over the person and subject-matter of litigation. An injunction in such case by the federal court restraining the parties before it from proceeding elsewhere is not an injunction within the meaning and intention of the statute staying proceedings in a state court, because after removal there is no proceeding left in the state court, and no jurisdiction to be interfered with.⁶ Furthermore, if after removal the plaintiff could continue or renew his litigation in the state court the whole purposes of the removal might be defeated.⁷ Nevertheless, to give the federal court jurisdiction to enjoin proceedings in a state court, every step requisite to the legal removal of the cause must be taken,⁸ and an injunction will not issue until the question of the right to remove the cause is finally decided.⁹

4. Under Bankruptcy Laws — a. UNDER ACT OF 1898 — (1) Where Time After Which Petition May Be Filed Has Not Elapsed. — The statute, as already shown, excepts from its operation cases where an injunction of proceedings in a state court by a federal court "may be authorized by any law relating to proceedings in bankruptcy."¹⁰ The recently enacted bankruptcy law of 1898 contains a number of provisions which the courts have construed as authorizing courts of bankruptcy to enjoin proceedings in the state courts under certain circumstances. One of the provisions of the act is that it shall go into force upon its passage, but no petition for involuntary bankruptcy shall be filed within four months of its passage. In the first decision handed down after the passage of the act, the court, relying on sections 2, 23 (subdiv. c), and 67 (subdiv. f), the material parts of which are set out in the notes,¹¹ held that when the time within which a petition may be filed for involuntary bank-

1. Reasons for Rule. — *Rensselaer, etc., R. Co. v. Bennington, etc., R. Co.*, 18 Fed. Rep. 617; *Dietzsch v. Huidekoper*, 103 U. S. 494; *French v. Hay*, 22 Wall. (U. S.) 250.

2. Fisk v. Union Pac. R. Co., 10 Blatchf. (U. S.) 520.

3. Statute to Be Construed in Connection with Another Provision. — Act of Sept. 24, 1789, § 14, Rev. Stat. U. S., § 716.

4. Fisk v. Union Pac. R. Co., 10 Blatchf. (U. S.) 520; *Sharon v. Terry*, 36 Fed. Rep. 338.

5. Where Cause Is Removed to Federal Court. — *Dietzsch v. Huidekoper*, 103 U. S. 497; *Wagner v. Drake*, 31 Fed. Rep. 852; *French v. Hay*, 22 Wall. (U. S.) 250; *Missouri, etc., R. Co. v. Scott*, 13 Fed. Rep. 793; *Coeur D'Alene R., etc., Co. v. Spalding*, 93 Fed. Rep. 280; *Frishman v. Insurance Co.'s*, 41 Fed. Rep. 449; *Terre Haute, etc., R. Co. v. Peoria, etc., R. Co.*, 82 Fed. Rep. 943; *Bridges v. Sheldon*, 7 Fed. Rep. 19; *Abeel v. Culberson*, 56 Fed. Rep. 330. And see ENCYC. OF PL. AND PR., article REMOVAL OF CAUSES, vol. 18, p. 388.

6. Jurisdiction of State Court Ends on Removal. — *Wagner v. Drake*, 31 Fed. Rep. 851. See also ENCYC. OF PL. AND PR., article REMOVAL OF CAUSES, vol. 18, p. 347 *et seq.*

7. Wagner v. Drake, 31 Fed. Rep. 851.

8. Every Step Requisite to Removal Must Be Taken. — *Coeur D'Alene R., etc., Co. v. Spalding*, 93 Fed. Rep. 280, in which case it was held that a federal court would not enjoin the further prosecution of a suit in the state court on the ground of removal, where, although a petition and bond had been filed, no action had been taken by the state court, nor any copy of the record entered in the federal court.

9. Right to Remove Must Have Been Decided. — *Frishman v. Insurance Co.'s*, 41 Fed. Rep. 449; *Wagner v. Drake*, 31 Fed. Rep. 849.

10. Rev. Stat. U. S., § 720.

11. Bankruptcy Act of 1898 — Text of Sections 2, 23, and 67 — Section 2. — "That the courts of bankruptcy as hereinbefore defined, viz., the District Courts of the United States in the several states, * * * are hereby made courts

ruptcy (four months after the passage of the act) has not elapsed and the debtor has committed an act of bankruptcy by suffering one creditor to obtain a preference through legal proceedings in state courts, the District Court, sitting in bankruptcy, may enjoin the sale of the property by such creditor under process in such proceeding until the time arrives when the petition in bankruptcy may be filed against him.¹

(2) *Where Creditor Has Acquired Unlawful Liens Within Four Months of Bankruptcy Proceedings* — *Where Debtor Has Assigned for Benefit of Creditors.* — Under section 3 of the act a general assignment for the benefit of creditors is an act of bankruptcy, and where, in accordance with the provisions of section 67, subdiv. f,² a petition for involuntary bankruptcy is filed within four months after such assignment, the bankruptcy court may, pending or after the adjudication, enjoin all proceedings commenced or being prosecuted in the state courts in pursuance of the assignment.³ This is true whether the assignment is made under state insolvency laws⁴ or in pursuance of a general statute regulating the administration of a trust created by a general assignment for the benefit of creditors.⁵ It has accordingly been held that pending the adjudication in bankruptcy an assignee who has taken possession of the estate and had it appraised, and who is proceeding to sell it, may be enjoined by the bankruptcy court from proceeding further with the administration of the estate, and a marshal may be appointed to take possession of the property

of bankruptcy, and are hereby invested, within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms, as they are now or may be hereafter held, to * * * (2) allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates; (3) appoint receivers or the marshals, upon application of parties in interest, in case the courts shall find it absolutely necessary, for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified; * * * (7) cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, except as herein otherwise provided; * * * (15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act."

Section 27, Subdiv. c. — "The United States Circuit Courts shall have concurrent jurisdiction with the courts of bankruptcy, within their respective territorial limits, of the offenses enumerated in this act."

Section 67, Subdiv. f. — "That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the

court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid."

1. *Blake v. Francis-Valentine Co.*, 89 Fed. Rep. 691. See also *In re Bruss-Ritter Co.*, 90 Fed. Rep. 651.

2. Provisions of this section are set out in the preceding note.

3. *Bankruptcy Court May Enjoin Proceedings in State Court.* — *Lea v. George M. West Co.*, 91 Fed. Rep. 237; *In re Smith*, 92 Fed. Rep. 135; *Leidigh Carriage Co v. Stengel*, 95 Fed. Rep. 638; *In re Gutwillig*, 92 Fed. Rep. 337; *In re Sievers*, 91 Fed. Rep. 366; *Davis v. Hohle*, 92 Fed. Rep. 325; *In re John A. Etheridge Furniture Co.*, 92 Fed. Rep. 329. See also *In re Bruss-Ritter Co.*, 90 Fed. Rep. 651. Compare *In re Abraham*, 93 Fed. Rep. 767.

4. *Assignment under Insolvency Laws.* — *In re Smith*, 92 Fed. Rep. 135; *Lea v. George M. West Co.*, 91 Fed. Rep. 237.

Assignee under Insolvency Laws Takes No Title. — The assignee under the insoperative state insolvency law takes no title as against the creditors by the deed of assignment, and all of his acts touching the estate of the bankrupt, as well as all acts by the state court in the administration thereof, are unauthorized and void, and will be treated as nullities wherever drawn in question. *In re Smith*, 92 Fed. Rep. 138.

5. *Assignment under Statute Administration of Trust Created by Assignment.* — *In re Sievers*, 91 Fed. Rep. 369; *Davis v. Hohle*, 92 Fed. Rep. 325.

Bankruptcy Act Supersedes State Laws. — *In re Smith*, 92 Fed. Rep. 137. To the same effect see *In re Bruss-Ritter Co.*, 90 Fed. Rep. 651; *In re Smith*, 92 Fed. Rep. 137; *Parmentier Mfg. Co. v. Hamilton*, 172 Mass. 178; *Carpenter v. O'Connor*, 9 Ohio Cir. Dec. 201, 16

and hold it until the petition is dismissed or a trustee is appointed to take charge of the property.¹ So after the assignor has been adjudged a bankrupt the bankruptcy court may enjoin any disposition of the assets by the assignee,² or require him to hold them subject to the orders of the court of bankruptcy,³ or deliver them up to the trustee or receiver in bankruptcy.⁴

Where Unlawful Liens Are Procured by Attachment. — So where the petition for involuntary bankruptcy is based on the fact that attaching creditors have procured liens in contravention of section 67, subdiv. *f*, and in accordance with the provisions of that section a petition is filed within four months after the creation of such liens, it has been held that the bankruptcy court may, after the debtor has been declared a bankrupt, on a rule to show cause, enjoin the further prosecution of the attachment suits.⁵ This power, it was held, is not affected by the fact that the creditors' causes of action were such as would not be affected by a discharge in bankruptcy. Section 11, subdiv. *a*, providing that suits pending against a bankrupt may be stayed when "founded upon a claim from which a discharge would be a release," has no application to a petition in bankruptcy based on the provisions of section 67, subdiv. *f*.⁶ On the other hand, it has been held that the mere filing of the petition in bankruptcy against the debtor within four months of the time when the liens by attachment were created does not render the attaching creditors amenable to the control of the bankruptcy court, and that where they are not regularly made parties to the petition in bankruptcy, and served with process, the bankruptcy court cannot enjoin them from disposing of the property in their hands held adversely to the debtor and to the petitioning creditors.⁷

Where Unlawful Liens Are Otherwise Acquired. — Under the provisions of section 67, subdiv. *f*,⁸ if the petition in involuntary bankruptcy is filed within four months after action begun and writ issued and levy on property of the debtor, the court of bankruptcy may on summary petition order the sheriff holding the property under the levy to deliver it to the trustee;⁹ and that, too, notwith-

Ohio Cir. Ct. 526. And see the title *INSOLVENCY AND BANKRUPTCY*, *post*, where this question is fully discussed.

1. Enjoining Assignee from Administering Estate Pending Adjudication. — *In re Sievers*, 91 Fed. Rep. 366; *Davis v. Bohle*, 92 Fed. Rep. 325; *In re Gutwillig*, 92 Fed. Rep. 337.

2. Enjoining Disposition of Assets by Assignee After Adjudication. — *Leidigh Carriage Co. v. Stengel*, 95 Fed. Rep. 638; *Lea v. George M. West Co.*, 91 Fed. Rep. 237.

3. Requiring Assignee to Hold Assets Subject to Order of Bankruptcy Court. — *Leidigh Carriage Co. v. Stengel*, 95 Fed. Rep. 638. *Contra*, dictum in *In re Abraham*, 93 Fed. Rep. 767, where it was said that the remedy of the trustee in bankruptcy for the recovery of the property assigned or its proceeds is not by summary petition in the court of bankruptcy, but by plenary action at law or in equity in the proper state or federal court.

4. Requiring Assignee to Deliver Assets to Trustee in Bankruptcy. — *In re Smith*, 92 Fed. Rep. 135.

5. Where Unlawful Liens Are Procured by Attachment. — *Bear v. Chase*, 99 Fed. Rep. 920. Compare *Heath v. Shaffer*, 93 Fed. Rep. 647, in which case it was held that where holders of chattel mortgages of the debtor's property had taken possession thereof and brought suit to foreclose before institution of bankruptcy proceedings, the court of bankruptcy would not enjoin the prosecution of the action, but would leave the trustee to appear and assert his

rights in the state court. In this case the petition in bankruptcy was filed within four months after the suit was brought, and the bill for injunction was filed after the adjudication in bankruptcy. In support of the conclusions reached, the court relied mainly on *Eyster v. Gaff*, 91 U. S. 521, a decision under the Bankruptcy Act of 1867.

6. Power to Enjoin Not Affected by Section 11. — *Bear v. Chase*, 99 Fed. Rep. 920, in which it was said: "Under subdivision *f*, section 67, of the Bankrupt Act, all levies, judgments, attachments, or other liens obtained through legal proceedings against an insolvent person within four months of the filing of the petition in bankruptcy are annulled, and no exceptions from the sweeping provisions of the act are made as to the kind or character of claims sued on."

7. *In re Ogles*, 93 Fed. Rep. 426. In this case, judging from the language of the opinion, the court probably would have reached the same conclusion if when the proceedings to enjoin were instituted the debtor had been regularly adjudged a bankrupt.

8. For the full text of this provision see the note at the beginning of this subsection of this title.

9. Directing Sheriff to Deliver Property to Trustee. — *In re Francis-Valentine Co.*, 93 Fed. Rep. 953, *affirmed* 94 Fed. Rep. 793. But compare *In re Franks*, 95 Fed. Rep. 635, which criticises the above decision and holds that where a petition is filed within four months

standing the pendency of an action of replevin in a state court against the sheriff by a stranger claiming the ownership of the property.¹ So if property has been sold under execution, a stay may be granted by the bankruptcy court against the payment of the moneys made on the execution by the sheriff, and an order may be issued directing the sheriff to pay over the money to the trustee when appointed.² Furthermore, no sufficient reason why the sheriff should not obey the order of the court is constituted by the fact that after such order is made the judgment creditor files a bill in equity in the United States Circuit Court to enjoin the sheriff from paying the money to the trustee and to require him to pay it to the complainant. A bill of this character is merely an unauthorized attempt to oust the jurisdiction of the bankruptcy court, and is without merit.³ So in another decision proceedings in the state court were enjoined where a receiver had been appointed in a suit to set aside a fraudulent conveyance of property, the fraudulent grantee having, however, voluntarily restored the title to the grantor against whom the petition in bankruptcy had been filed.⁴

(3) *Where Claims Are Such as a Discharge in Bankruptcy Would Release.* — Section 11 of the Bankruptcy Act provides that "a suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of the petition against him, shall be stayed until after an adjudication or the dismissal of the petition." According to one decision the application for the stay mentioned must be made to the state court, and not to the court of bankruptcy.⁵ Another decision, however, holds that the bankruptcy court has jurisdiction to order such stay;⁶ and in another it was held that under section 11 and section 2, clause 15,⁷ the bankrupt court could stay proceedings in a state court though begun after the filing of a petition in bankruptcy.⁸ If the claim in suit is not such as a discharge in bankruptcy would release there is, of course, no authority under section 11 for staying the action pending the adjudication in bankruptcy.⁹

(4) *Where Property Is in Actual Possession of Bankruptcy Court.* — Where there has been an adjudication in bankruptcy and the property of the bankrupt is in the actual custody and possession of an officer of the court, it is not competent for parties who claim to be the owners of such property to maintain a suit in a state court against the trustee in bankruptcy for its possession, the remedy of such parties being by petition in the court of bankruptcy, and the court of bankruptcy will enjoin such suit.¹⁰ So when by an adjudication in

after attachment of a debtor's property, but the sheriff has in the meantime sold the property to a *bona fide* purchaser and collected the proceeds, the proceeds constitute a part of the estate in bankruptcy, to be recovered by the trustee when appointed, on application to the state court for an order from such court directing the sheriff to turn over to him the proceeds, or by action against the sheriff, and that the federal court has no jurisdiction on a summary petition by the trustee to order the sheriff to pay over the proceeds to the trustee.

Supplementary Proceedings Begun Within Four Months of Bankruptcy Proceedings. — Proceedings supplementary to execution in the state court against the bankrupt begun within four months before the commencement of the bankruptcy proceedings should be enjoined after an adjudication in bankruptcy. "Section 67 provides that any lien obtained by such proceedings within four months shall be dissolved by the adjudication. It is the duty of this court to enforce that provision." *In re Kleitchka*, 92 Fed. Rep. 901.

1. Effect of Pendency of Action of Replevin for

74 C. of L.—27

Property. — *In re Francis-Valentine Co.*, 94 Fed. Rep. 793.

2. Directing Sheriff to Pay Over Proceeds of Sale to Trustee. — *In re Kenney*, 95 Fed. Rep. 427.

3. Effect of Bill to Enjoin Sheriff from Paying Money. — *In re Kenney*, 97 Fed. Rep. 554.

4. *In re Brown*, 91 Fed. Rep. 358.

5. View that Bankrupt Court Cannot Stay Proceedings. — *In re Geister*, 97 Fed. Rep. 322.

6. View that Bankrupt Court May Stay Proceedings. — *In re Challoner*, 98 Fed. Rep. 82.

7. The provisions of section 2 are set out in full *supra*, in the second note of this subsection.

8. Proceedings Begun After Petition Filed. — *In re Busch*, 97 Fed. Rep. 761.

9. Claims Which Discharge in Bankruptcy Would Not Release. — *In re Nowell*, 99 Fed. Rep. 931; *In re Shepard*, 97 Fed. Rep. 187.

What Are Claims Released by Discharge. — For illustrations of claims which are or which are not released by discharge see *In re Challoner*, 98 Fed. Rep. 82; *In re Nowell*, 99 Fed. Rep. 931; *In re Shepard*, 97 Fed. Rep. 187.

10. *Keegan v. King*, 96 Fed. Rep. 759.

Volume XVI.

bankruptcy the property is in the custody of the bankruptcy court and is afterwards seized on a writ of replevin from a state court, the bankruptcy court may, even though a trustee has not been appointed, enjoin the sale of the property under the writ of replevin and order its restoration to the custody of the court of bankruptcy.¹

b. UNDER FORMER BANKRUPTCY LAWS. — Decisions under former bankruptcy laws may be of some value in determining the construction of the various provisions of the Act of 1898, and without attempting to state the substance of these provisions a short summary of the rulings thereunder is here given.

Property in Possession of Bankruptcy Court. — Under the Act of 1867, as under the Act of 1898, if the property of the bankrupt was in the actual possession of the assignee in bankruptcy, such possession could not lawfully be disturbed or ousted by any person.²

Attachment Suits. — Hence attachment suits instituted after the property has passed into the assignee's hands were enjoined.³ After an adjudication in bankruptcy the bankrupt court might enjoin the prosecution of attachment suits begun before the proceedings in bankruptcy were commenced,⁴ and it was not essential to the exercise of this power that an assignee in bankruptcy should have been appointed.⁵

Action to Foreclose Mortgage. — After adjudication the court might enjoin the prosecution of an action commenced after the adjudication to enforce a mortgage upon property in possession of the assignee.⁶

So the Enforcement of Judgments rendered subsequently to the adjudication, although the action had been commenced after the petition was filed but before the adjudication, might be enjoined.⁷

Restraining Execution Sale. — And an injunction would lie after adjudication to restrain the sale of the property of the bankrupt levied on under an execution on a judgment which was obtained before the commencement of the proceedings in bankruptcy.⁸ It has also been held that although judgment was obtained and execution issued and levied on property of the bankrupt prior to the commencement of the proceedings in bankruptcy the bankrupt court might enjoin the enforcement of the levy.⁹ Until sale is actually made the bankrupt was not divested of his interest in the property under seizure, and the assignee appointed before sale made acquired the bankrupt's interest for the general benefit of creditors.¹⁰

1. *In re Schloerb*, 97 Fed. Rep. 326.

2. **Where Property Is in Actual Possession of Bankruptcy Court.** — *Matter of People's Mail Steamship Co.*, 2 Nat. Bankr. Reg. 553, 3 Ben. (U. S.) 226; *Jones v. Leach*, 1 Nat. Bankr. Reg. 595; *Matter of Ulrich*, 6 Ben. (U. S.) 483.

3. **Attachment Suits After Assignee Acquires Possession.** — *In re People's Mail Steamship Co.*, 2 Nat. Bankr. Reg. 553.

4. **Attachment Suits Begun Before Bankruptcy Proceedings.** — *In re Clark*, 9 Blatchf. (U. S.) 372.

5. **Where Assignee Has Not Been Appointed.** — *Matter of Ulrich*, 6 Ben. (U. S.) 483.

6. **Action to Foreclose Mortgage Begun After Adjudication.** — *Matter of Kerosene Oil Co.*, 3 Ben. (U. S.) 35, 14 Fed. Cas. No. 7,725; *In re Snedaker*, 3 Nat. Bankr. Reg. 529.

7. **Judgments Rendered After Adjudication.** — *In re Wallace*, 2 Nat. Bankr. Reg. 134.

8. **Sale under Execution on Judgment Obtained Before Bankruptcy Proceeding Commenced.** — *Matter of Ulrich*, 6 Ben. (U. S.) 490.

9. **Where Execution Was Levied Prior to Commencement of Bankruptcy Proceedings.** — *In re*

Atkinson, 7 Nat. Bankr. Reg. 143; *In re Schnepf*, Bankr. Reg. Supp. 41, 2 Ben. (U. S.) 72; *Matter of Bernstein*, 2 Ben. (U. S.) 44, 3 Fed. Cas. No. 1,350; *Beattie v. Gardner*, 4 Ben. (U. S.) 479, 3 Fed. Cas. 1,195; *Matter of Wilbur*, 1 Ben. (U. S.) 527; *In re Lady Bryan Min. Co.*, 6 Nat. Bankr. Reg. 252; *In re Barrow*, 1 Nat. Bankr. Reg. 482.

10. *In re Barrow*, 1 Nat. Bankr. Reg. 482; *Jones v. Leach*, 1 Nat. Bankr. Reg. 597.

When Sheriff May Sell. — In *Pennington v. Lowenstein*, 1 Nat. Bankr. Reg. 570, the court held that when a levy was made before commencement of bankruptcy proceedings, the possession being in the sheriff for the purpose of satisfying the process in his hands, he, as trustee, might go on and sell the property, unless enjoined from so doing, and that in such case an injunction would not be granted without a statement showing that a sale under such circumstances would be injurious to the general creditors or to some one having a prior lien.

Supplementary Proceedings on Judgment Rendered Before Commencement of Bankruptcy Pro-

Concurrent Jurisdiction. — It has been stated, however, by the Supreme Court of the United States that the jurisdiction conferred upon the federal courts for the benefit of an assignee in bankruptcy is concurrent with and does not divest that of the state courts in suits of which they had full cognizance. In accordance with this view it was held that where the assignee in bankruptcy of a mortgagor was appointed during the pendency of the proceedings for the foreclosure and sale of the mortgaged premises, he stood as any other purchaser would stand on whom the title had fallen after the commencement of the suit, and that if there was any reason for interposing, the assignee should have himself substituted for the bankrupt, or be made a defendant on petition.¹ While this decision differs somewhat on the facts from those already cited in this section, it is very difficult to reconcile the conclusions reached in this decision with the holdings of the courts in the decisions already cited.

Under the Twenty-first Section of the act it has been held that proceedings by creditors on appeal from a judgment in a state court would be stayed on motion of the bankrupt pending the bankruptcy proceedings.² So where a judgment was obtained in the state court and levy was made before the appointment of an assignee in bankruptcy, but the suit in which judgment was rendered was not instituted until after the petition in bankruptcy was filed, the bankruptcy court might enjoin a sale under the levy.³

Injunction Allowed Only to Aid Assignee. — Under that section of the Act of 1867 (Rev. Stat. U. S., § 5024), authorizing a federal court sitting in bankruptcy when a petition in involuntary bankruptcy was filed to restrain all persons from interference with the debtor's property, an injunction to stay proceedings in a state court was allowed only for the purpose of aiding the assignee in bankruptcy to discharge his duty and of protecting the property of the bankrupt estate for equitable distribution among creditors.⁴

Court in Which Bankruptcy Proceedings Pending, Could Alone Enjoin. — Under the 21st section of the Act of 1867 no other court than that in which the bankruptcy proceedings were pending had power to enjoin interference by action or otherwise with the bankrupt's property.⁵

ceedings. — Where judgment had been obtained in a state court, execution issued and returned unsatisfied, and an order made on proceedings supplementary to execution by the examination of the judgment debtor, a stay of all proceedings on the order might be directed by the bankruptcy court until the question of the discharge of the bankrupt should have been determined. *In re Reed*, 1 Nat. Bankr. Reg. 1, 20 Fed. Cas. No. 11,637.

Actions Commenced to Save Statute of Limitations. — If a creditor who asserted that his claim against a bankrupt would not be barred by a discharge was allowed to commence suit in the state court for the purpose of saving the statute of limitations or securing testimony, the suit, after this object had been obtained, could be stayed to await the question of the debtor's discharge. *In re Ghirardelli*, 1 Sawy. (U. S.) 343, 10 Fed. Cas. No. 5,376.

1. Concurrent Jurisdiction. — *Eyster v. Gaff*, 91 U. S. 521, in which case it was said: "It is a mistake to suppose that the bankrupt law avoids of its own force all judicial proceedings in the state or other courts the instant one of the parties is adjudged a bankrupt. There is nothing in the act which sanctions such a proposition. * * * The opinion seems to have been quite prevalent in many quarters at one time that the moment a man is declared bankrupt, the District Court which has so adjudged draws to itself by that act not only all control of the bankrupt's property and credits,

but that no one can litigate with the assignee contested rights in any other court, except in so far as the Circuit Courts have concurrent jurisdiction, and that other courts can proceed no further in suits of which they had at that time full cognizance; and it was a prevalent practice to bring any person who contested with the assignee any matter growing out of disputed rights of property or of contracts into the bankrupt court by the service of a rule to show cause, and to dispose of their rights in a summary way. This court has steadily set its face against this view."

2. Stay of Appeal Pending Bankruptcy Proceedings. — *Matter of Meyers*, 2 Ben. (U. S.) 424; *Matter of Leszynsky*, 3 Ben. (U. S.) 487; *Matter of Metcalf*, 2 Ben. (U. S.) 78.

3. Chapman v. Brewer, 114 U. S. 158, in which case it was further said that by express statutory provision the assignment related back to the commencement of proceedings in bankruptcy and vested title in the assignee as of that date.

4. Injunction Allowed Only to Aid Assignee. — *Sargent v. Helton*, 115 U. S. 348, where it was further held that the statute did not authorize an injunction, at the suit of a purchaser of property sold under order of the bankruptcy court, to enjoin a sale of the same lands about to be made upon the order of a state court.

5. Court in Which Bankruptcy Proceedings Were Held Could Alone Enjoin. — *Matter of Richardson*, 2 Ben. (U. S.) 517.

Adverse Claimants. — The power to enjoin the prosecution of suits in the state courts and to punish those interfering with property in possession of the assignee presupposes that the adverse claimant may go into the bankruptcy court and have his rights there adjusted.¹

Under the Law of 1841. — Under the bankruptcy law of 1841 it was held that where a party took advantage of the insolvency laws of a state after the act named went into operation, and an assignee was duly appointed in pursuance of the state law, and the party subsequently filed a petition to be declared a bankrupt, an injunction would issue against the assignee under the state laws to restrain him from intermeddling with the property of the bankrupt.²

XII. POWER OF STATE COURTS TO ENJOIN PROCEEDINGS IN FEDERAL COURTS.

— As shown in the preceding section, a federal court cannot, except in the few instances specified, enjoin proceedings in a state court which has first acquired jurisdiction of the cause. It is equally well settled, on the other hand, that a state court has no power to enjoin proceedings in a federal court.³ The rule is to be limited, however, to proceedings begun in a federal court before proceedings begun in the state courts. It does not apply where jurisdiction of the state courts has first attached.⁴ Where the state and federal courts have concurrent jurisdiction of the subject-matter and parties to the controversy, that tribunal which first actually takes the jurisdiction will retain it.⁵

XIII. POWER OF COURTS OF ONE STATE OR COUNTRY TO ENJOIN PROCEEDINGS IN ANOTHER STATE OR COUNTRY — 1. Power to Enjoin Proceedings of Courts of Foreign Country. — In the earliest reported case in which this question arose it was held that the courts of one country had no jurisdiction to enjoin proceedings in the courts of another country.⁶ That decision, however, met with general dissatisfaction, and the power of a court of equity of one country to restrain its own citizens from the prosecution of suits in foreign countries is now well established.⁷ An injunction will be granted to stay proceedings

1. **Rights of Adverse Claimant.** — *In re Litchfield*, 13 Fed. Rep. 867.

Where Bankrupt's Property Is Situated in Another District. — In *In re Litchfield*, 13 Fed. Rep. 863, it was held that where there were adverse claimants of the property of the bankrupt, situated in districts other than the one in which the bankruptcy proceedings were pending, the assignee might defend his title in a state court and file a bill in the Circuit or District Court of the United States praying that the rights of the adverse claimants be adjusted and that the actions in the state courts be enjoined. The assignee could not proceed by summary petition.

2. *Ex p. Eames*, 2 Story (U. S.) 322.

3. **State Courts Cannot Enjoin Proceedings in Federal Courts** — *United States*. — *Bell v. Ohio L., etc., Co.*, 1 Biss. (U. S.) 260; *U. S. v. Keokuk*, 6 Wall. (U. S.) 517; *Riggs v. Johnson County*, 6 Wall. (U. S.) 196; *Duncan v. Darst*, 1 How. (U. S.) 306.

California. — *Phelan v. Smith*, 8 Cal. 521.

Georgia. — *Hines v. Rawson*, 40 Ga. 356, 2 Am. Rep. 581; *Bryan v. Hickson*, 40 Ga. 405.

Illinois. — *Munson v. Harroun*, 34 Ill. 422, 85 Am. Dec. 316.

New York. — *Schuyler v. Pelissier*, 3 Edw. (N. Y.) 191; *Coster v. Griswold*, 4 Edw. (N. Y.) 364.

Rhode Island. — *Chapin v. James*, 11 R. I. 87, 23 Am. Rep. 412; *Kendall v. Winsor*, 6 R. I. 453.

South Carolina. — *English v. Miller*, 2 Rich. Eq. (S. Car.) 320.

Wisconsin. — *Akerly v. Vilas*, 15 Wis. 401.

4. **Proceedings Begun First in Federal Courts.** — *Home Ins. Co. v. Howell*, 24 N. J. Eq. 238; *Akerly v. Vilas*, 15 Wis. 401.

Where Process in State Court Is Not Served. — Where process has been served and an injunction issued in the federal court, jurisdiction attaches to the exclusion of a state court in which a suit has been previously commenced but no process served. After the issuing of such an injunction the state court has no authority to take action or make orders in regard to the subject-matter over which jurisdiction had been exercised by the federal court, nor have its officers any right to the possession of or control over such subject-matter. *Bell v. Ohio L., etc., Co.*, 1 Biss. (U. S.) 260.

5. *Hines v. Rawson*, 40 Ga. 356, 2 Am. Rep. 581; *Akerly v. Vilas*, 15 Wis. 401. See generally the title JURISDICTION.

6. *Love v. Baker*, 1 Ch. Cas. 67.

7. **Court may Enjoin Where Proper Case Presented.** — *Portarlington v. Soulby*, 3 Myl. & K. 104; *Wedderburn v. Wedderburn*, 2 Beav. 208; *Harrison v. Gurney*, 2 Jac. & W. 563; *Beauchamp v. Huntley*, Jac. 546; *Cranstown v. Johnston*, 3 Ves. Jr. 170; *Bunbury v. Bunbury*, 3 Jur. 648; *Bushby v. Munday*, 5 Madd. 207; *Carron Iron Co. v. Maclaren*, 5 H. L. Cas. 416; *Blackford v. Kemble*, 1 Sim. & St. 7; *Penn v. Baltimore*, 1 Ves. 444; *Gage v. Riverside Trust Co.*, 86 Fed. Rep. 984.

Restraining Actions in Consular Court. — An injunction may be granted by a state court to restrain persons from prosecuting a claim be-

between citizens of one country begun in another country subsequent to a decree in the courts of the first-named country¹ or to an action commenced in such courts.² It is not essential to the jurisdiction of the court, however, that litigation should have been subsequently commenced in the foreign country;³ and even where there is no question as to the foreign litigation being or not being necessary or being or not being likely to be so effectual as litigation in the domestic courts, still if a person within the jurisdiction of the court of chancery is instituting in a foreign court proceedings the institution of which is contrary to equity and good conscience, the court will restrain the prosecution of such foreign suit.⁴ While the jurisdiction to enjoin proceedings in a foreign court is undoubted, an injunction will nevertheless be refused if from any cause it appears likely to be more conducive to substantial justice that the foreign proceedings should be left to take their course.⁵

2. Power to Enjoin Proceedings of Courts of Sister State — a. UNDER WHAT CIRCUMSTANCES INJUNCTION GRANTED — Statement of Rule. — In a few of the early decisions it was held that courts of chancery will not enjoin a suit or proceeding previously commenced in a court of another state.⁶ This doctrine, however, has been very generally repudiated, and it is now well settled that whether suit was or was not first commenced in the court of another state, a court of chancery of the domestic state, upon a proper cause being shown, has authority to restrain persons within its jurisdiction from proceeding in suits in the courts of other states.⁷

Clear Equity Must Be Shown. — All that is necessary to sustain the jurisdiction in such cases is that the plaintiff should show a clear equity and that the defendant should be subject to the authority and within the reach of the process of the court.⁸

To Prevent Injustice and Oppression a court of equity of one state will always enjoin a party to an action before it from prosecuting an action subsequently commenced in another state where the matters litigated and the relief which may be had are substantially the same in both cases.⁹

Evasion of Domestic Laws. — And the courts very frequently exercise their jurisdiction to enjoin a citizen of one state from prosecuting an action against another citizen of the same state in a sister state, for the purpose of evading

fore an American consul abroad, where the consul has not jurisdiction of the proceedings instituted before him. *Dainese v. Allen*, (Supm. Ct. Gen. T.) 3 Abb. Pr. N. S. (N. Y.) 212.

1. Proceedings Commenced Subsequent to Decree. — *Wedderburn v. Wedderburn*, 2 Beav. 208; *Harrison v. Gurney*, 2 Jac. & W. 563; *Beckford v. Kemble*, 1 Sim. & St. 7.

2. Proceedings Subsequent to Action. — *Gage v. Riverside Trust Co.*, 86 Fed. Rep. 984.

3. Where Action Is First Commenced in Foreign Country. — *Bushby v. Munday*, 5 Madd. 297.

4. Where Action in Foreign Court Is Contrary to Good Conscience. — *Carron Iron Co. v. MacLaren*, 5 H. L. Cas. 439; *Portarlington v. Soulbey*, 3 Myl. & K. 104.

5. When Proceedings in Foreign Court Will Not Be Enjoined. — *Carron Iron Co. v. MacLaren*, 5 H. L. Cas. 439; *Jones v. Geddes*, 1 Phil. 724; *Elliott v. Minto*, 6 Madd. 16; *Moor v. Anglo-Italian Bank*, 10 Ch. D. 681.

6. Suits Previously Commenced in Court of Sister State. — *Carroll v. Farmers'*, etc., Bank, Harr. (Mich.) 197; *Mead v. Merritt*, 2 Paige (N. Y.) 402; *Williams v. Avrault*, 31 Barb. (N. Y.) 364.

7. Power of Court of Equity to Enjoin. — *Pickett v. Ferguson*, 45 Ark. 177, 55 Am. Rep. 515; *Engel v. Scheuerman*, 40 Ga. 206, 2 Am. Rep.

573; *Sandage v. Studabaker Bros. Mfg. Co.*, 142 Ind. 157, 51 Am. St. Rep. 165; *Teager v. Landsley*, 69 Iowa 725; *Hager v. Adams*, 70 Iowa 746; *Keyser v. Rice*, 47 Md. 213, 28 Am. Rep. 448; *Dehon v. Foster*, 4 Allen (Mass.) 545; *Kidder v. Tufts*, 48 N. H. 121; *Claffin v. Hamlin*, (Supm. Ct. Spec. T.) 62 How. Pr. (N. Y.) 284; *Vail v. Knapp*, 49 Barb. (N. Y.) 299; *Snook v. Snetzer*, 25 Ohio St. 520; *Vermont, etc., R. Co. v. Vermont Cent. R. Co.*, 46 Vt. 792.

As the Decree of the Court in Such Case Is Pointed Solely at the Party, and does not extend to the tribunal where the suit or proceeding is pending, it is wholly immaterial that the party is prosecuting his action in the courts of a foreign state or country. *Sandage v. Studabaker Bros. Mfg. Co.*, 142 Ind. 157, 51 Am. Rep. 165; *Teager v. Landsley*, 69 Iowa 725; *Dehon v. Foster*, 4 Allen (Mass.) 545; *Claffin v. Hamlin*, (Supm. Ct. Spec. T.) 62 How. Pr. (N. Y.) 284; *Kittle v. Kittle*, 8 Daly (N. Y.) 74; *Snook v. Snetzer*, 25 Ohio St. 520.

8. Dehon v. Foster, 4 Allen (Mass.) 545.

9. Where Court of Domestic State First Acquires Jurisdiction — *Kittle v. Kittle*, 8 Daly (N. Y.) 72; *Mead v. Merritt*, 2 Paige (N. Y.) 402; *Field v. Holbrook*, (N. Y. Super. Ct. Spec. T.) 3 Abb. Pr. (N. Y.) 377.

the laws of his own state.¹ Jurisdiction here proceeds on the principle that the citizens of a state are bound by its laws and cannot be permitted to evade them to the injury of other citizens.² It has accordingly been held that a court of equity of one state will enjoin an action by one of its citizens against another citizen in the courts of another state in which it is sought to subject to the payment of a claim or judgment wages or personal earnings which by the laws of the former state are exempt from being applied to the payment of such claim.³ Especially is this true where it is made an offense by statute to send a claim against the debtor out of the state for collection, in order to evade the exemption law;⁴ and the fact that the plaintiff has other legal defenses available in the court in which the action is brought does not affect his right to an injunction.⁵ So an action in the courts of another state will be enjoined where the effect of allowing suit to go to judgment would be to give to the party instituting it a preference over other creditors and to defeat the operation of the domestic insolvency law.⁶

"Full Faith and Credit" Clause. — The granting of an injunction under such circumstances is not in violation of that provision of the Federal Constitution which requires that full faith and credit shall be given in each state to the judicial proceedings of every other state.⁷

Attempt to Avoid Effect of Decision of Domestic Court. — A domestic court of equity will also enjoin the prosecution of an action in the court of another state brought to avoid a decision of the court of the domestic state differing from the rule upon the same subject in the state where the action is commenced.⁸

b. UNDER WHAT CIRCUMSTANCES INJUNCTION DENIED. — On the other hand, it is a good ground for refusing an injunction to restrain proceedings in the courts of another state, that the court in which the injunction is sought is unable to enforce its writ if granted, because the parties to be enjoined reside outside of the state and have no property within it upon which a writ of sequestration might operate.⁹ Nor will the domestic court interfere where the parties seeking the injunction can obtain full and adequate relief in the court in which the action is brought.¹⁰ It is not a sufficient ground for the issuance of an injunction that the complainant prefers to have the matter adjudicated by his own tribunals,¹¹ or that the rules of evidence in an action

1. **Proceedings in Sister State to Evade Laws of Domestic State** — *United States*. — *Cole v. Cunningham*, 133 U. S. 107.

Indiana. — *Wilson v. Joseph*, 107 Ind. 490; *Sandage v. Studabaker Bros. Mfg. Co.*, 142 Ind. 148, 51 Am. St. Rep. 165.

Iowa. — *Hager v. Adams*, 70 Iowa 746.

Kansas. — *Zimmerman v. Franke*, 34 Kan. 650.

Louisiana. — *Hayden v. Yale*, 45 La. Ann. 362.

Maryland. — *Keyser v. Rice*, 47 Md. 203, 28 Am. Rep. 448.

Massachusetts. — *Cunningham v. Butler*, 142 Mass. 47, 56 Am. Rep. 657.

Missouri. — *Kelly v. Siefert*, 71 Mo. App. 147; *Wyeth Hardware, etc., Co. v. Lang*, 54 Mo. App. 147.

New York. — *Dinsmore v. Neresheimer*, 32 Hun (N. Y.) 204.

Ohio. — *Snook v. Snetzer*, 25 Ohio St. 516.

2. **Grounds for Exercise of Equitable Jurisdiction.** — *Wyeth Hardware, etc., Co. v. Lang*, 54 Mo. App. 147, *affirmed* 127 Mo. 242.

3. **Proceedings in Sister State to Subject Exempt Wages to Satisfaction of Claim.** — *Hager v. Adams*, 70 Iowa 746; *Teager v. Landsley*, 69 Iowa 725; *Zimmerman v. Franke*, 34 Kan. 650; *Keyser v. Rice*, 47 Md. 203, 28 Am. Rep. 448;

Wyeth Hardware, etc., Co. v. Lang, 54 Mo. App. 147; *Snook v. Snetzer*, 25 Ohio St. 516.

4. **Statutes Making It an Offense to Prosecute Action in Sister State.** — *Wilson v. Joseph*, 107 Ind. 490.

5. **Effect of Legal Defenses Available in Foreign Court.** — *Sandage v. Studabaker Bros. Mfg. Co.*, 142 Ind. 148, 51 Am. St. Rep. 165.

6. **Proceedings in Foreign State to Evade Domestic Insolvency Laws.** — *Cole v. Cunningham*, 133 U. S. 107; *Carson v. Dunham*, 149 Mass. 53, 14 Am. St. Rep. 397; *Cunningham v. Butler*, 142 Mass. 47, 56 Am. Rep. 657.

7. **Injunction Not in Violation of Federal Constitution.** — *Cole v. Cunningham*, 133 U. S. 107.

8. **Proceedings to Avoid Effect of Decisions in Domestic State.** — *Dinsmore v. Neresheimer*, 32 Hun (N. Y.) 204.

9. **Inability of Domestic Court to Enforce Injunction.** — *Bellows Falls Bank v. Rutland, etc.*, R. Co., 28 Vt. 470.

10. **Where Adequate Relief Obtainable in Court of Either State.** — *Harris v. Pullman*, 84 Ill. 20, 25 Am. Rep. 416; *Wyeth Hardware, etc., Co. v. Lang*, 54 Mo. App. 147.

11. **Preference for Adjudication of Domestic Court.** — *Bellows Falls Bank v. Rutland, etc.*, R. Co., 28 Vt. 470. See also *Edgell v. Clarke*, 19 N. Y. App. Div. 199.

against the representative or survivor of a decedent are more liberal in the state where the action is commenced,¹ or that the decision of the court in which the action is brought may differ from that of the court of the domestic state, or those of other courts of equal authority.²

XIV. ENJOINING LEGISLATIVE OR EXECUTIVE ACTION.—Legislative enactments of a state or of a municipal corporation, within the scope of its powers, cannot be restrained by injunction even if the threatened act, if passed, will be unconstitutional and void. After its passage the judiciary may declare it unconstitutional, but previous to that time judicial relief cannot be invoked.³ Nor will a bill lie to enjoin officers representing the executive authority of a government from performing their official functions, such as carrying into execution certain Acts of Congress;⁴ and it makes no difference whether the officer against whom the injunction is sought is described in the bill as an incumbent of an office or simply as a citizen of the state.⁵ A detailed treatment of this question so far as it relates to elections will be found in an earlier volume of this work.⁶

XV. MODIFICATION, DISSOLUTION, REINSTATEMENT, AND CONTINUANCE—

1. Modification of Injunction.—The court has power to modify or partially dissolve a preliminary injunction where the peculiar equities of the case render such action necessary in order to do exact justice between the parties.⁷ This power is in no way affected by the fact that the court in granting the injunction may have chosen to discuss the merits of the case. This circumstance cannot operate to change the real character of the injunction.⁸ The order of modification of an injunction will not be disturbed unless there has been an abuse of discretion by the court granting it.⁹

2. Dissolution of Injunction—*a.* **WHAT COURTS HAVE POWER TO DISSOLVE.**—The power vested in a court to grant an injunction necessarily implies the power of the same court to dissolve or modify it;¹⁰ and this power

1. More Liberal Rules of Evidence in Courts of Sister State.—*Edgell v. Clarke*, 19 N. Y. App. Div. 199.

2. Difference of Views of Domestic and Foreign Courts.—*Carson v. Dunham*, 149 Mass. 52, 14 Am. St. Rep. 397.

3. Enjoining Legislative Action.—*Des Moines Gas Co. v. Des Moines*, 44 Iowa 505, 24 Am. Rep. 756.

4. Enjoining Executive Action.—*Mississippi v. Johnson*, 4 Wall. (U. S.) 475; *Georgia v. Stanton*, 6 Wall. (U. S.) 50.

5. *Mississippi v. Johnson*, 4 Wall. (U. S.) 475.

6. See the title **ELECTIONS**, vol. 10, p. 816 *et seq.*

7. Power of Court to Modify Injunction—*United States*.—*Baker Mfg. Co. v. Washburn, etc.*, Mfg. Co., 5 McCrary (U. S.) 504; *Westerly Waterworks v. Westerly*, 77 Fed. Rep. 783.

Alabama.—*Miller v. Bates*, 35 Ala. 580; *Moses v. Tompkins*, 84 Ala. 613; *Columbus, etc., R. Co. v. Witherow*, 82 Ala. 190.

California.—*Hobbs v. Amador, etc.*, Canal Co., 66 Cal. 161.

Georgia.—*Hill v. Sledge*, 51 Ga. 539; *Savannah, etc., R. Co. v. Fort*, 84 Ga. 300; *Ketchens v. Howard*, 30 Ga. 931.

Iowa.—*Walker v. Ayres*, 1 Iowa 449.

Maryland.—*Hutzler v. Lord*, 64 Md. 534.

Mississippi.—*Wildy v. Bonney*, 35 Miss. 77; *Hill v. Billingsly*, 53 Miss. 111; *Anderson v. Walton, Freem.* (Miss.) 347.

New Jersey.—*Hugg v. Fath*, 37 N. J. Eq. 46; *Capner v. Flemington Min. Co.*, 3 N. J. Eq. 467; *Fitzgerald v. Elliot*, (N. J. 1889) 18 Atl. Rep. 579.

New York.—*Ham v. Schuyler*, 2 Johns. Ch. (N. Y.) 140; *Hawke v. Hawke*, 74 Hun (N. Y.) 370; *Parker v. Williams*, 4 Paige (N. Y.) 439.

Oklahoma.—*Mason v. Cromwell*, 3 Okla. 240.

Enjoining Action at Law.—It is always in the power of the defendant who has been enjoined from further proceedings at law to move for a modification of the injunction so far as to allow a trial of the action of ejectment, and it would be the duty of the court to make modification or not, according to the circumstances and the character of the relief sought. *Hill v. Billingsly*, 53 Miss. 117; *Ham v. Schuyler*, 2 Johns. Ch. (N. Y.) 140; *Anderson v. Walton, Freem.* (Miss.) 347.

Injunction Against Completion of Landing.—The defendant had driven piles at the shore line in front of the complainants' fishery, and was about to erect a platform with a roof over it, as a landing place. It was held that a preliminary injunction which prohibited the defendant from finishing the landing should be modified so as to allow it to be finished, it appearing that the complainants' right to relief on final hearing would not be prejudiced thereby. *Hugg v. Fath*, 37 N. J. Eq. 46.

8. Consideration of Merits—Effect.—*Westerly Waterworks v. Westerly*, 77 Fed. Rep. 783.

9. Discretion of Court Not Lightly Disturbed.—*Hobbs v. Amador, etc.*, Canal Co., 66 Cal. 161. See also *Hollis v. Williams*, 43 Ga. 214.

10. Court Granting Has Inherent Power to Dissolve.—*United States*.—*Muller v. Henry*, 5 Sawy. (U. S.) 464.

is expressly given by statute in some jurisdictions.¹ If the dissolving power is to be exercised by any one else than the same judge who made the order, statutory authority therefor is necessary.²

b. DISCRETION OF COURT IN DISSOLVING INJUNCTION. — The dissolution of an injunction, like the granting of it, is largely a matter of judicial discretion, to be determined by the facts of each particular case; and except in cases of palpable abuse of this discretion, or a clear showing of error on the part of the trial court, the reviewing court will not interfere with or in any manner control this discretion.³

Arkansas. — *Sanders v. Plunkett*, 40 Ark. 507.

California. — *Hobbs v. Amador, etc.*, Canal Co., 66 Cal. 161; *Creaner v. Nelson*, 23 Cal. 464.

Georgia. — *Howard v. Lowell Mach. Co.*, 75 Ga. 325; *Semmes v. Columbus*, 19 Ga. 471.

Kansas. — *Foote v. Forbes*, 25 Kan. 359.

Maryland. — *Binney's Case*, 2 Bland (Md.) 99; *Frostburg Bldg. Assoc. v. Stark*, 47 Md. 338.

New York. — *National Gaslight Co. v. O'Brien*, (N. Y. Super. Ct. Spec. T.) 38 How. Pr. (N. Y.) 271; *Adams v. Grey*, (N. Y. City Ct. Gen. T.) 11 Misc. (N. Y.) 446; *Peck v. Yorks*, 41 Barb. (N. Y.) 547.

Oklahoma. — *Couch v. Orne*, 3 Okla. 508.

1. *Statutory Authority to Dissolve.* — *Sanders v. Plunkett*, 40 Ark. 507; *Ingles v. Straus*, 91 Va. 209; *Howard v. Lowell Mach. Co.*, 75 Ga. 325; *Brown v. Edwards, etc.*, *Lumber Co.*, 44 Neb. 361.

2. *Dissolution by Court Other than That Granting Injunction.* — *Sanders v. Plunkett*, 40 Ark. 510, wherein it was further said: "An express power, for instance, given to a chancellor to dissolve an injunction ordered by a county judge would not give him power to dissolve one ordered by another chancellor, because there might be a clash of discretion between co-ordinate authorities."

3. *Judicial Discretion in Dissolving Injunction* — *England.* — *Caird v. Campbell*, 1 Molloy 484.

Canada. — *Dobie v. Board of Management*, 9 Rev. Lég. 574.

United States. — *Young v. Grundy*, 6 Cranch (U. S.) 51; *Poor v. Carleton*, 3 Sumn. (U. S.) 70; *Norton v. Hood*, 12 Fed. Rep. 765; *Tucker v. Carpenter*, *Hempst.* (U. S.) 440; *Orr v. Littlefield*, 1 Woodb. & M. (U. S.) 13; *Thomas v. Wooldridge*, 23 Wall. (U. S.) 288; *Moses v. Mobile*, 15 Wall. (U. S.) 390.

Alabama. — *Harrison v. Yerby*, 87 Ala. 185; *Reid v. Moulton*, 51 Ala. 255; *Barnard v. Davis*, 54 Ala. 565; *Planters, etc.*, *Bank v. Lauchheimer*, 102 Ala. 454.

California. — *Rogers v. Tennant*, 45 Cal. 184; *De Godey v. Godey*, 39 Cal. 157; *Patterson v. Santa Cruz County*, 50 Cal. 344; *Coolot v. Central Pac. R. Co.*, 52 Cal. 65; *Porter v. Jennings*, 89 Cal. 440; *Parrott v. Floyd*, 54 Cal. 534; *Hicks v. Compton*, 18 Cal. 209; *White v. Nunan*, 60 Cal. 406; *Efford v. South Pac. Coast R. Co.*, 52 Cal. 277.

Florida. — *Linton v. Denham*, 6 Fla. 533; *Allen v. Hawley*, 6 Fla. 142, 63 Am. Dec. 198; *Hayden v. Thrasher*, 20 Fla. 715.

Georgia. — *Taylor v. Harp*, 37 Ga. 358; *Upson County R. Co. v. Sharman*, 37 Ga. 644; *Woolfolk v. Rumph*, 37 Ga. 684; *Fouché v. Rome St. R. Co.*, 84 Ga. 233; *Howard v.*

Lowell Mach. Co., 75 Ga. 328; *Semmes v. Columbus*, 19 Ga. 471; *Gullatt v. Thrasher*, 42 Ga. 429; *Douglass v. Thomson*, 39 Ga. 134; *Louis v. Bamberger*, 36 Ga. 589; *Shellman v. Scott*, R. M. Charl. (Ga.) 380; *Johnson v. Allen*, 35 Ga. 252; *Edwards v. Banksmith*, 35 Ga. 213; *Carroll v. Martin*, 35 Ga. 261; *Field v. Howell*, 6 Ga. 423; *Dent v. Summerlin*, 12 Ga. 8; *West v. Rouse*, 14 Ga. 715; *Rhodes v. Lee*, 32 Ga. 470; *Hemphill v. Ruckersville Bank*, 3 Ga. 445.

Iowa. — *Clark v. American Coal Co.*, 86 Iowa 451; *Fargo v. Ames*, 45 Iowa 494; *Rice v. Smith*, 9 Iowa 570; *Stewart v. Johnston*, 44 Iowa 435; *Kelley v. Briggs*, 58 Iowa 332.

Kansas. — *Wood v. Millspaugh*, 15 Kan. 14; *Long v. Kasebeer*, 28 Kan. 226.

Massachusetts. — *Wing v. Fairhaven*, 8 Cush. (Mass.) 363.

Michigan. — *Atty.-Gen. v. Oakland County Bank, Walk.* (Mich.) 90.

Minnesota. — *Pineo v. Heffelfinger*, 29 Minn. 183.

Mississippi. — *Bowen v. Hoskins*, 45 Miss. 183, 7 Am. Rep. 728; *Miller v. McDougall*, 44 Miss. 682.

Montana. — *Klein v. Davis*, 11 Mont. 155.

New Jersey. — *Chetwood v. Brittan*, 2 N. J. Eq. 438; *Dellett v. Kemble*, 23 N. J. Eq. 58; *Dey v. Dey*, 23 N. J. Eq. 88; *Murray v. Elston*, 23 N. J. Eq. 127; *Salomon v. Hertz*, 40 N. J. Eq. 400; *Van Horn v. Talmage*, 8 N. J. Eq. 108; *Carr v. Weld*, 18 N. J. Eq. 41; *Bechtel v. Carslake*, 11 N. J. Eq. 244; *Irick v. Black*, 17 N. J. Eq. 189.

New York. — *Steele v. Pittsburgh, etc.*, R. Co., (Supm. Ct. Gen. T.) 36 N. Y. St. Rep. 198; *Jerome v. Ross*, 7 Johns. Ch. (N. Y.) 315, 11 Am. Dec. 484; *Pfchl v. Sampson*, 59 N. Y. 174; *Paul v. Munger*, 47 N. Y. 469; *People v. Schoonmaker*, 50 N. Y. 409; *Young v. Campbell*, 75 N. Y. 525; *Grill v. Wiswall*, 82 Hun (N. Y.) 281; *Adams v. Grey*, (N. Y. City Ct. Gen. T.) 11 Misc. (N. Y.) 446.

North Carolina. — *Moore v. Hylton*, 1 Dev. Eq. (16 N. Car.) 434; *McBrayer v. Hardin*, 7 Ired. Eq. (42 N. Car.) 1, 53 Am. Dec. 389.

South Dakota. — *Huron Waterworks Co. v. Huron*, 3 S. Dak. 610.

Texas. — *Friedlander v. Ehrenworth*, 58 Tex. 350.

Utah. — *Leitham v. Cusick*, 1 Utah 242.

Virginia. — *Clinch River Mineral Co. v. Harrison*, 91 Va. 122; *Ingles v. Siraus*, 91 Va. 209; *Beale v. Digges*, 6 Gratt. (Va.) 582; *Nelson v. Armstrong*, 5 Gratt. (Va.) 354.

Wisconsin. — *Koeffler v. Milwaukee*, 85 Wis. 397.

In Regard to the Dissolution of Restraining Orders the court exercises the same discretion as in dissolving preliminary injunctions.

Nature of Discretion. — This discretion is not an arbitrary one, but a sound legal discretion to be exercised with a proper regard to established rules; and if it is abused or is exercised upon insufficient grounds the order of the trial court will be reversed.¹ In determining whether an injunction should be dissolved, the court should always consider the inconvenience and injury which a continuance will cause to the defendant or which a dissolution will cause to the complainant, and its discretion should always be exercised in favor of the party who is most likely to suffer injury.² Stating this proposition in another form, the court, on motion to dissolve, will balance the inconvenience which would arise from continuing the injunction and from dissolving it; and if there is a greater risk of doing mischief by continuing the injunction than by dissolving it, it will be dissolved.³

c. DISSOLUTION BY COURT OF ITS OWN MOTION. — Where it appears certain that an injunction has been issued in a case where the party asking it had no right to it, the court will dissolve the injunction on its own motion.⁴

d. IPSO FACTO DISSOLUTION. — The dismissal of the bill operates *ipso facto* as a dissolution of the injunction.⁵ Where an injunction is granted restraining the defendant until further order of the court, a failure to procure an order making it perpetual does not *ipso facto* dissolve the injunction; it continues in force until dissolved or modified.⁶

e. ABATEMENT OF SUIT. — The abatement of the suit does not dissolve the injunction or make it inoperative.⁷ The rule is that if the suit abates by the death of either the plaintiff or the defendant, the party against whom the injunction issued or his representatives may have an order requiring the plaintiff or his representatives to revive within a stated time, or that the injunction be dissolved.⁸

f. DISSOLUTION AND DISCHARGE DISTINGUISHED. — Some of the courts make a distinction between discharge and dissolution of an injunction.

This discretion will not be controlled or interfered with by a reviewing court unless it has been abused. Harrell v. Griffin, 92 Ga. 571; Cotter v. Cotter, 16 Mont. 63.

Adequate Security. — In the exercise of its discretion the court will also consider the fact that the defendants are protected by adequate security for any loss they may sustain. Cornell v. Utica, etc., R. Co., 61 How. Pr. (N. Y.) 190; Church of Holy Innocents v. Keech, 5 Bosw. (N. Y.) 691; Spear v. Cutter, 5 Barb. (N. Y.) 486; Huron Waterworks Co. v. Huron, 3 S. Dak. 610; Hicks v. Compton, 18 Cal. 206.

Solvency of Defendant. — And the court will consider the defendant's solvency and ability to respond in damages. Stevenson v. Fayerweather, (Supm. Ct. Spec. T.) 21 How. Pr. (N. Y.) 449; Sixth Ave. R. Co. v. Kerr, (Supm. Ct. Gen. T.) 28 How. Pr. (N. Y.) 382; Storer v. Coe, 2 Bosw. (N. Y.) 661.

1. Discretion Should Not Be Arbitrary. — DeGodey v. Godey, 39 Cal. 157; Connally v. Cruger, 40 Ga. 259; Sinner v. Moles, 38 Iowa 31; Fleischman v. Young, 9 N. J. Eq. 620; Chetwood v. Brittan, 2 N. J. Eq. 438; Dent v. Summerlin, 12 Ga. 5.

2. Consideration of Balance of Convenience. — Hicks v. Compton, 18 Cal. 206. See also New York Printing, etc., Establishment v. Fitch, 1 Paige (N. Y.) 97; Michel v. O'Brien, (Supm. Ct. Spec. T.) 6 Misc. (N. Y.) 408; Huron Waterworks Co. v. Huron, 3 S. Dak. 610.

3. Atty.-Gen. v. Liverpool, 1 Myl. & C. 208.

4. Dissolution ex Mero Motu. — Conover v. Ruckman, 32 N. J. Eq. 685; National Gaslight

Co. v. O'Brien, (N. Y. Super. Ct. Spec. T.) 38 How. Pr. (N. Y.) 271.

5. Dismissal of Bill Dissolves Injunction. — Green v. Pulsford, 2 Beav. 70; Thomsen v. McCormick, 136 Ill. 135; Rubon v. Stephan, 25 Miss. 253; Kimball v. Alcorn, 45 Miss. 149; Yale v. Baum, 70 Miss. 225; Disbro v. Disbro, (Supm. Ct. Gen. T.) 37 How. Pr. (N. Y.) 148.

Effect of Appeal Bond. — An undertaking on appeal upon the decree dismissing the bill does not operate to continue the injunction. Disbro v. Disbro, (Supm. Ct. Gen. T.) 37 How. Pr. (N. Y.) 147.

6. Failure to Procure Order Perpetuating Injunction. — Curtis v. Crane, 38 Iowa 459.

7. Abatement of Suit. — Fowler v. Scott, 11 Ark. 675; Hawley v. Bennett, 4 Paige (N. Y.) 163.

8. Revivor on Abatement by Death of Parties. — Chandos v. Talbot, Sel. Cas. in Ch. 24; Hill v. Hoare, 2 Cox Ch. 50; Hawley v. Bennett, 4 Paige (N. Y.) 164; Kenner v. Hord, 1 Hen. & M. (Va.) 204; Carter v. Washington, 1 Hen. & M. (Va.) 203.

Punishment for Breach — When Application Made. — Where a suit abates by the death of a complainant, those who succeed to his rights may apply to the court to punish a breach of an injunction which has taken place either before or after his death, as soon as they have taken the preliminary steps to revive the suit, either by filing a bill of revivor or otherwise; and it is not necessary for them to wait until a decree of revivor is actually obtained. Hawley v. Bennett, 4 Paige (N. Y.) 164.

A motion to dissolve, it is held, can be founded only on a want of equity in the bill or the full and complete denial of its equity by the answer, and is a waiver of any irregularity which has occurred in the granting of the writ. A motion to discharge is directed at irregularities in granting and issuing the writ.¹

g. GROUNDS OF DISSOLUTION — (1) *Want of Jurisdiction to Issue*. — An injunction will always be dissolved where the court by which it was granted was for any reason without jurisdiction so to do,² as where there is an adequate remedy at law,³ or where the amount involved is insufficient,⁴ or where the bill for the injunction is brought in the wrong county,⁵ or where the court is without jurisdiction to grant injunctions at all.⁶

(2) *Improvident Issuance of Injunction*. — As a general rule, where an injunction has been improvidently issued through some mistake or misapprehension of the chancellor, it may be dissolved.⁷ Nevertheless, an injunction,

1. Distinction Between Dissolution and Discharge. — *Vipan v. Mortlock*, 2 Meriv. 477; *Jones v. Ewing*, 56 Ala. 362; *East, etc., R. Co. v. East Tennessee, etc., R. Co.*, 75 Ala. 275; *Ex p. Sayre*, 95 Ala. 288; *Clark v. Young*, 2 B. Mon. (Ky.) 59; *Judah v. Chiles*, 3 J. J. Marsh. (Ky.) 302.

Effect of Discharge on Right to Set Up Usury. — If an injunction enjoining a judgment at law on the ground of usury be properly dissolved, the ground of usury cannot be legitimately relied upon in a suit in chancery brought to set up a lost injunction bond; but if the injunction be discharged because the complainant refused to execute a new injunction bond, it constitutes no bar to the administrator and surety of the complainant in a new bill setting up usury in the original transaction. *Clark v. Young*, 2 B. Mon. (Ky.) 58.

2. Want of Jurisdiction to Issue. — *Campbell's Case*, 1 Abb. (U. S.) 185; *Hall v. Davis*, 5 J. J. Marsh. (Ky.) 290; *Shields v. Pipes*, 31 La. Ann. 765.

Waiver of Objection to Jurisdiction. — When a foreign citizen appears and by counsel pleads to the jurisdiction, he is not held to have waived his exemption by appearance. On the other hand, appearance and pleading and answering to the merits constitute a waiver of his exemption and an assent to the jurisdiction. *Adams v. Lamar*, 8 Ga. 83.

3. Adequate Remedy at Law. — *Hall v. Davis*, 5 J. J. Marsh. (Ky.) 290; *Brewer v. Day*, 23 N. J. Eq. 418; *Van Horn v. Talmage*, 8 N. J. Eq. 108; *Mallett v. Weybossett Bank*, 1 Barb. (N. Y.) 217; *Hudson v. Eline*, 9 Gratt. (Va.) 379.

4. Insufficient Amount Involved. — *York v. Kile*, 67 Ill. 233.

5. Bill for Injunction Brought in Wrong County. — *Phelan v. Johnson*, 80 Iowa 727; *Norfolk, etc., R. Co. v. Postal Tel. Cable Co.*, 88 Va. 932; *Beckley v. Palmer*, 11 Gratt. (Va.) 625.

6. Court Without Jurisdiction to Grant Injunction. — *American Colonization Soc. v. Wade*, 8 Smed. & M. (Miss.) 610; *Scott v. Searles*, 5 Smed. & M. (Miss.) 25.

Injunctions Granted by Federal Courts Against Proceedings in State Courts. — United States courts not having jurisdiction to enjoin proceedings at law in state courts, or executions thereunder, an injunction by a federal court against such proceedings or executions will be dissolved. *Campbell's Case*, 1 Abb. (U. S.) 185; *Ruggles v. Simonton*, 3 Biss. (U. S.) 325.

See also *supra*, this title, *Power of Federal Courts to Enjoin Proceedings in State Courts*.

7. Improvident Issuance of Injunction — *Alabama*. — *Mobile School Com'rs v. Putnam*, 44 Ala. 506.

California. — *King v. Hall*, 5 Cal. 83; *Borland v. Thornton*, 12 Cal. 440; *Perrine v. Marsden*, 34 Cal. 14.

Georgia. — *Howard v. Lowell Mach. Co.*, 75 Ga. 325.

Illinois. — *Wangelin v. Goe*, 50 Ill. 459; *Marble v. Bonhotel*, 35 Ill. 240; *Fahs v. Roberts*, 54 Ill. 192; *Northern Electric R. Co. v. Chicago, etc., R. Co.*, 57 Ill. App. 409; *Lake Shore, etc., R. Co. v. Taylor*, 134 Ill. 603.

Indiana. — *Gray v. Baldwin*, 8 Blackf. (Ind.) 164.

Iowa. — *Small v. Somerville*, 58 Iowa 362.

Kansas. — *Atchison, etc., R. Co. v. Troy*, 10 Kan. 513.

Kentucky. — *Kilpatrick v. Tunstall*, 5 J. J. Marsh. (Ky.) 80.

Louisiana. — *Lee v. Hubbell*, 20 La. Ann. 551; *Mahan v. Accommodation Bank*, 26 La. Ann. 34; *Devron v. First Municipality*, 4 La. Ann. 11; *Barrow v. Robichaux*, 15 La. Ann. 70; *Lafon v. Desessart*, 1 Mart. N. S. (La.) 71.

Maryland. — *George's Creek Coal, etc., Co. v. Detmold*, 1 Md. Ch. 371.

Massachusetts. — *Wing v. Fairhaven*, 8 Cush. (Mass.) 303.

Mississippi. — *Freeman v. Lee County*, 66 Miss. 1; *Davis v. Davis*, 65 Miss. 498; *Sinking Fund Com'rs v. Patrick, Smed. & M. Ch. (Miss.)* 110; *Portwood v. Feld*, 72 Miss. 542.

Montana. — *McCormick v. Riddle*, 10 Mont. 467.

New Jersey. — *Endicott v. Mathis*, 9 N. J. Eq. 110; *Kinney v. Ogden*, 3 N. J. Eq. 168; *Collings v. Camden*, 27 N. J. Eq. 293; *Society, etc., v. Butler*, 12 N. J. Eq. 498.

New York. — *Mead v. Merritt*, 2 Paige (N. Y.) 402; *Fullan v. Hooper*, (Supm. Ct.) 66 How. Pr. (N. Y.) 75; *Bruce v. Delaware, etc., Canal Co.*, 19 Barb. (N. Y.) 371; *National Gaslight Co. v. O'Brien*, (N. Y. Super. Ct. Spec. T.) 38 How. Pr. (N. Y.) 271; *Fellows v. Fellows*, 4 Johns. Ch. (N. Y.) 25.

Oregon. — *Garrett v. Bishop*, 27 Oregon 349.

Virginia. — *Robertson v. Tapscott*, 81 Va. 533; *Baltimore, etc., R. Co. v. Wheeling*, 13 Gratt. (Va.) 40; *Vass v. Magee*, 1 Hen. & M. (Va.) 2; *Wise v. Lamb*, 9 Gratt. (Va.) 294; *Slack v. Wood*, 9 Gratt. (Va.) 40; *Norfolk, etc.,*

though improvidently sued out, will not be dissolved if the facts of the case show that on the dissolution the party will immediately be entitled to that form of remedy on other grounds.¹

(3) *Vagueness and Uncertainty of Writ.* — It is good ground for the dissolution of an injunction that it is so vague and uncertain in its terms that the defendant is not able to determine therefrom what he is restrained from doing.²

(4) *Laches in Prosecuting Cause.* — Where an injunction has been granted the complainant must use due diligence in the prosecution of his case, or the injunction will be dissolved.³ In applying the rule as stated, it has frequently been held that the neglect of the complainant to take out and serve a subpoena within a reasonable time, or within the time fixed by rules of court, is just ground for dissolving the injunction.⁴ So it has been held a ground for dissolving an injunction that the complainant has failed to use due dili-

R. Co. v. Postal Tel. Cable Co., 88 Va. 936; Pulliam v. Winston, 5 Leigh (Va.) 324.

Wisconsin. — Chicago, etc., R. Co. v. Ft. Howard, 21 Wis. 44, 91 Am. Dec. 458.

1. *Where Party Entitled to Injunction on Other Grounds.* — Chambliss v. Atchison, 2 La. Ann. 491; Crane v. Baillio, 7 Mart. N. S. (La.) 273; Exnicios v. Weiss, 3 Mart. N. S. (La.) 480; Bushnell v. Brown, 4 Mart. N. S. (La.) 499.

2. *Vagueness and Uncertainty of Writ.* — Dalglish v. Jarvie, 2 Macn. & G. 231; Avery v. Onillon, 10 La. Ann. 127; Lyon v. Botchford, 25 Hun (N. Y.) 57; Moat v. Holbein, 2 Edw. (N. Y.) 188.

What Injunction Order Should Show. — The injunction order should show upon its face all those things which it is necessary for the defendant to know in order to obey it, and should plainly and specifically indicate to the defendant all the acts which he is thereby restrained from doing, without calling upon him for inferences or conclusions to be arrived at only by a more or less uncertain process of reasoning, and about which the parties might well differ in opinion either as to the facts or as to the law. The act prohibited must be the doing of some tangible or distinct thing or series of things, to be clearly pointed out and described. Lyon v. Botchford, 25 Hun (N. Y.) 57; Sullivan v. Judah, 4 Paige (N. Y.) 444; Moat v. H. Ibein, 2 Edw. (N. Y.) 188.

3. *Due Diligence in Prosecuting Cause Necessary* — *England.* — Grey v. Northumberland, 17 Ves. Jr. 281.

Delaware. — Russell v. Stockley, 4 Del. Ch. 567.

Florida. — Perry v. Wittich, 37 Fla. 237; Scarlett v. Hicks, 13 Fla. 314.

Illinois. — Coulterville v. Gillen, 72 Ill. 599; Duncan v. Finch, 10 Ill. 296.

Mississippi. — Payne v. Cowan, Smed. & M. Ch. (Miss.) 26.

New Jersey. — Hendrickson v. Norcross, 19 N. J. Eq. 417; West v. Smith, 2 N. J. Eq. 309; Brown v. Fuller, 13 N. J. Eq. 271; Schalk v. Schmidt, 14 N. J. Eq. 268; Lee v. Cargill, 10 N. J. Eq. 331; Hoagland v. Titus, 14 N. J. Eq. 81; Corey v. Voorhies, 2 N. J. Eq. 5; Robinson v. Davis, 11 N. J. Eq. 303, 69 Am. Dec. 591; Huffman v. Hummer, 17 N. J. Eq. 264; Dodd v. Flavell, 17 N. J. Eq. 255.

New York. — Seebor v. Hess, 5 Paige (N. Y.) 85; Depeyster v. Graves, 2 Johns. Ch. (N. Y.) 148; Higgins v. Woodward, Hopk.

(N. Y.) 342; Ward v. Van Bokkelen, 1 Paige (N. Y.) 100; Waffle v. Vanderheyden, 8 Paige (N. Y.) 46.

Pennsylvania. — Barrett v. Building Assoc., 5 Lanc. L. Rev. (Pa.) 269; White v. Schlect, 9 W. N. C. (Pa.) 77.

Vermont. — Howe v. Willard, 40 Vt. 654.

The Rule Rests upon the Soundest Principles of Justice. — The injunction deprives the party enjoined of the exercise of his legal rights. It is designed to prevent irreparable or serious injury to the legal rights of the complainant until the merits of the controversy can be heard and adjusted. Justice requires that the defendant should be restrained from the exercise of his rights no longer than is essential to investigate the matter at issue. When the restraint is extended further it operates injuriously to the rights of the defendant. Hoagland v. Titus, 14 N. J. Eq. 81.

4. *Failure to Serve Subpoena in Proper Time* — *Mississippi.* — Payne v. Cowan, Smed. & M. Ch. (Miss.) 26.

New Jersey. — Brown v. Fuller, 13 N. J. Eq. 271; Schalk v. Schmidt, 14 N. J. Eq. 268; Lee v. Cargill, 10 N. J. Eq. 331; Hoagland v. Titus, 14 N. J. Eq. 81; Corey v. Voorhies, 2 N. J. Eq. 5; Robinson v. Davis, 11 N. J. Eq. 303, 69 Am. Dec. 591; Huffman v. Hummer, 17 N. J. Eq. 264; Dodd v. Flavell, 17 N. J. Eq. 255.

New York. — Waffle v. Vanderheyden, 8 Paige (N. Y.) 46.

Vermont. — Howe v. Willard, 40 Vt. 654.

Effect of Service on Some of the Defendants. — The neglect of the complainant to serve a subpoena and injunction on some of the defendants named in the bill is not a ground for dissolving the injunction as to the defendants on whom the service is made. Seebor v. Hess, 5 Paige (N. Y.) 85.

Failure to Serve Process — When Not Ground for Dissolution. — The rule stated in the text does not apply when the defendant resides abroad beyond the reach of the process of the court, otherwise than he may be affected by the service of it upon his attorney at law upon the special order of the court. In such a case the delay in the prosecution of the case is not imputable to the plaintiff; on the contrary, the defendant may be brought into contempt if within a reasonable time he does not answer the bill, and it is the duty of his representative in court to obtain his answer. Read v. Consequa, 4 Wash. (U. S.) 174.

gence in taking testimony and setting down the cause for hearing,¹ or that he has failed to bring all the parties interested before the court,² or that he has failed to use due diligence in obtaining an answer from the defendants.³

Exceptions to Rule. — The rule that want of diligence is ground for dissolving the injunction does not apply where the situation of the cause enables the defendant to proceed.⁴ So if the delay is not without reasonable excuse, and is not wilful, and a dissolution of the injunction will put it out of the power of the court to do effectual justice, the injunction will not be dissolved.⁵

(5) *Laches in Seeking Dissolution.* — After a long acquiescence in an order for an injunction an application for its dissolution will be refused in cases where the delay and acquiescence of the defendant in the injunction have so changed the status of the parties that the subsequent dissolution would injuriously and inequitably affect the complainant or permit the defendant to exercise some inequitable or unfair advantage acquired by reason of his acquiescence or delay.⁶ Where no circumstances appear which would render the dissolution of the injunction inequitable or injurious to the complainants by reason of the delay of the defendant in moving for a dissolution, or by reason of his acquiescence therein for a long period of time, such delay and acquiescence will constitute no ground for refusing to dissolve the injunction.⁷

(6) *Defective Service of Process.* — The fact that the injunction has been served out of the jurisdiction of the court and in a manner not conformable to the settled practice is not a ground for dissolution.⁸ So where process has been regularly sued out, but irregularly served, and the complainant proceeds to take out new process as soon as the irregularity is discovered, the irregular service constitutes no ground for dissolution.⁹

(7) *Want of Notice of Application.* — Notice of an application for a

1. *Failure to Use Diligence in Taking Testimony.* — *Hoagland v. Titus*, 14 N. J. Eq. 81.

2. *Failure to Bring All Parties Interested Before Court.* — *Coulterville v. Gillen*, 72 Ill. 599; *Classen v. Danforth*, 56 Ill. App. 554; *Atkins v. Billings*, 72 Ill. 597; *Hopkins v. Roseclare Lead Co.*, 72 Ill. 373.

3. *Failure to Use Due Diligence in Obtaining Answer.* — *Ward v. Van Bokkelen*, 1 Paige (N. Y.) 100; *Depeyster v. Graves*, 2 Johns. Ch. (N. Y.) 148; *Hastings v. Palmer, Clarke* (N. Y.) 52.

On an application to dissolve an injunction for want of due diligence on the part of the complainant in not taking the testimony and setting the cause down for hearing, it is no answer to say that both parties are actors, and that the defendant might have entered a rule to close testimony, taken his evidence, and brought the case on for hearing. *Hoagland v. Titus*, 14 N. J. Eq. 81.

4. *Where Situation of Cause Enables Defendant to Proceed.* — *Schermerhorn v. Merrill*, 1 Barb. (N. Y.) 514.

5. *Where Delay Is Not Without Reasonable Excuse.* — *Schermerhorn v. L'Espenasse*, 2 Dall. (U. S.) 364; *Scarlett v. Hicks*, 13 Fla. 314.

6. *Laches of Defendant — When Ground to Refuse Application.* — *Bickford v. Skewes*, 4 Myl. & C. 498; *Glascott v. Lang*, 3 Myl. & C. 451; *Feistel v. King's College*, 10 Beav. 491; *Great Western R. Co. v. Oxford, etc.*, R. Co., 3 De G. M. & G. 341; *Jennings v. Brighton Intercepting, etc., Sewers Board*, 4 De G. J. & S. 735; *Bell v. Hull, etc.*, R. Co., 1 R. & Can. Cas. 616; *Cardinal v. Molyneux*, 4 De G. F. & J. 117; *Perry v. Wittich*, 37 Fla. 237; *Baird v. Moses*, 21 Ga. 249.

Instance. — An injunction was obtained before answer. The defendant filed his answer, but delayed moving to dissolve until several months after replication, and at a period when the evidence would have been published but for the defendant having obtained an enlargement of the publication. The motion for dissolution was on that ground refused. *Feistel v. King's College*, 10 Beav. 491.

7. *When Not Ground to Refuse Application.* — *Perry v. Wittich*, 37 Fla. 237.

8. *Defective Service of Process.* — *Corey v. Voorhies*, 2 N. J. Eq. 5, in which case it was said that defective service might very properly be urged on a motion for attachment for contempt in case of disobedience to its requirements, but was no reason for setting aside the injunction and order.

9. *Process Regularly Sued Out but Irregularly Served.* — *Payne v. Cowan, Smed. & M. Ch.* (Miss.) 26.

Irregularity in Service of Notice of Motion for Injunction. — Upon a motion to dissolve an injunction, informality in the service of notice of motion for injunction is cured by the appearance of the defendant and the filing of answers in the case. Under these circumstances, objection on account of informality, or even necessity of notice, is waived. *Brammer v. Jones*, 2 Bond (U. S.) 100.

Failure to Serve Both Injunction and Subpœna — Effect. — Although it is irregular to serve an injunction upon a party without serving him also with a subpœna to appear and answer the bill, it is too late to give notice of an application to dissolve an injunction on that ground after a subpœna has been served on him. *Seabor v. Hess*, 5 Paige (N. Y.) 85.

temporary injunction is largely a matter of statutory regulation. In the absence of a statute requiring notice the necessity thereof must depend largely on the particular circumstances of each case. If notice is required by statute, or if the circumstances of the case are such that the defendant is entitled to notice, the want of it will constitute a good ground for dissolving the injunction,¹ unless the right to notice is waived by the defendant. This, it seems, may result from the voluntary appearance of the defendant,² or from a failure, until the cause is heard on appeal, to object for want of notice.³ The court will not set aside an injunction for want of notice if the case appears to be one in which the rule to give notice might properly be dispensed with. In such case the court will retain the injunction and order the complainant to pay the costs of the application.⁴

(8) *Complainant's Disobedience of Writ.* — It is a good ground for the dissolution of an injunction that the complainant has neglected or refused to comply with the terms upon which the injunction was granted.⁵

(9) *Defective or Insufficient Bond* — (a) *In General.* — In a number of cases the court has dissolved temporary injunctions on the ground that no bond was given, or that the bond given was insufficient, or has said that this was a good ground for a motion to dissolve.⁶ If by these decisions it is meant that no opportunity to give bond or to rectify a deficient bond should be given to the complainant, they are against the weight of authority, which is to the effect that an injunction should not be dissolved absolutely and unconditionally because of failure to give bond or because the bond given is for any reason defective. The proper practice on motion to dissolve is to make an order that within a reasonable time a sufficient bond shall be given or that the injunction shall be dissolved.⁷ This practice is especially commendable when it is mani-

1. *When Want of Notice Ground to Dissolve.* — *Mowrey v. Indianapolis, etc., R. Co.,* 4 Biss. (U. S.) 78; *Texas, etc., R. Co. v. Rust,* 5 McCrary (U. S.) 348; *Marsh v. Bennett,* 5 McLean (U. S.) 117; *Gray v. Baldwin,* 8 Blackf. (Ind.) 164; *Hughes v. Eckerson,* 55 Iowa 641; *District Tp. v. Barrett,* 47 Iowa 110; *Couch v. Orne,* 3 Okla. 508.

2. *Waiver of Notice.* — *Marsh v. Bennett,* 5 McLean (U. S.) 117. To the contrary see *Hughes v. Eckerson,* 55 Iowa 641.

3. *Couch v. Orne,* 3 Okla. 508.

4. *When Want of Notice Not Ground to Dissolve.* — *Buckley v. Corse,* 1 N. J. Eq. 504.

Insufficiency of Notice is not a ground for dissolution of an injunction; the court should, if possible, correct the error. *Gamble v. Campbell,* 6 Fla. 347.

5. *Complainant's Noncompliance with Injunction.* — *Clayton v. Submaker,* 67 Md. 216; *Morris Canal, etc., Co. v. Bartlett,* 3 N. J. Eq. 9; *Livingston v. Kane,* 3 Johns. Ch. (N. Y.) 224.

6. *Whether Sufficient Ground to Dissolve.* — *Farni v. Tesson,* 51 Ill. 393; *Boswell v. Wheat,* 37 Miss. 614; *Christie v. Bogartus,* 1 Barb. Ch. (N. Y.) 167; *Chappell v. Potter,* (Supm. Ct.) 11 How. Pr. (N. Y.) 365; *Ryckman v. Coleman,* (Supm. Ct. Spec. T.) 21 How. Pr. (N. Y.) 404; *Fullan v. Hooper,* (Supm. Ct.) 66 How. Pr. (N. Y.) 75; *Jenkins v. Wilde,* 2 Paige (N. Y.) 394; *Pillow v. Thompson,* 20 Tex. 206; *Gaskins v. Peebles,* 44 Tex. 390.

Denial of Validity of Bond by Party Filing It. — Where on the granting of an injunction an insufficient bond is filed, and subsequently a sufficient bond is filed, and suit is brought thereafter upon the bond, the defendants in

such suit cannot set up as a defense that they did not have leave of court to file the bond. They should not be permitted to deny the validity of their own act. *Farni v. Tesson,* 51 Ill. 393.

7. *Allowing Reasonable Time to File Sufficient Bond* — *Alabama.* — *Jones v. Ewing,* 56 Ala. 363.

Delaware. — *Palmer v. Ellegood,* 4 Del. Ch. 53.

Florida. — *Gamble v. Campbell,* 6 Fla. 347; *Fuller v. Cason,* 26 Fla. 476.

Georgia. — *Macon, etc., R. Co. v. Gibson,* 85 Ga. 2, 21 Am. St. Rep. 135.

Illinois. — *Beauchamp v. Kankakee County,* 45 Ill. 274.

Iowa. — *Massie v. Mann,* 17 Iowa 131; *Crawford v. Paine,* 19 Iowa 172.

Maryland. — *Alexander v. Ghiselin,* 5 Gill (Md.) 138; *Williams v. Hall,* 1 Bland (Md.) 182, note.

Mississippi. — *Smith v. Harrington,* 49 Miss. 771.

Montana. — *Lee v. Watson,* 15 Mont. 228.

New Jersey. — *Phillips v. Pullen,* 45 N. J. Eq. 157; *Marlatt v. Perrine,* 17 N. J. Eq. 49.

New York. — *Manley v. Leggett,* 62 Hun (N. Y.) 562; *New York Attrition Pulverizing Co. v. Van Tuyl,* 2 Hun (N. Y.) 373; *Beebe v. Coleman,* 8 Paige (N. Y.) 397; *Skinner v. Dayton,* 2 Johns. Ch. (N. Y.) 226; *Harrington v. American L. Ins., etc., Co.,* 1 Barb. (N. Y.) 244.

Virginia. — *Ross v. Pleasants,* 1 Hen. & M. (Va.) 1.

West Virginia. — *Mason v. Harper's Ferry Bridge Co.,* 17 W. Va. 396; *Chesapeake, etc., R. Co. v. Patton,* 5 W. Va. 234.

fest from the record that the complainant would be immediately entitled to another writ in case the one which had been granted were dissolved.¹ Of course, if it is apparent that irrespective of the absence of a bond no injunction should have been granted, the injunction should be dissolved without giving to the complainant an opportunity to file bond.²

(b) **Requiring Additional Security.** — If, during the pendency of an injunction, the solvency of the surety in an injunction bond be doubtful, the defendant may move the court to dissolve the injunction unless additional and satisfactory security be given.³

Court May Require or Permit Additional Security — General Rule. — Either by express statutory authority or in accordance with the rules of equity practice, it is competent for the court, in the case of prolonged litigation in which an injunction is in force, to require an additional bond and further security.⁴ Where it appears that the party will be immediately entitled to the same remedy an injunction will not be dismissed on account of insufficient security, but the judge may, in his discretion, permit the giving of additional security.⁵

Requirement of Bond with New Conditions on Continuing Injunction. — In continuing an injunction on the complainant's application the court may require, as a condition, the giving of additional or new security, or a bond with new and enlarged conditions calculated completely to indemnify the parties affected if it is finally adjudged that the injunction was allowed without right.⁶ In requiring a new bond the court may order that it be given in the place of and as a substitute for the bond originally given, and the latter will be thereby discharged, even without the consent of the obligee therein.⁷

(10) **Statute Legalizing Acts Enjoined.** — An injunction will be dissolved where, subsequent to its granting, a statute which legalizes the acts restrained is enacted.⁸

(11) **Unconstitutionality of Statute on Which Injunction Based.** — An

Error to Dissolve Without Giving Time to Perfect Bond. — In *Smith v. Harrington*, 49 Miss. 771, the motion to dissolve was on the ground that "no good and sufficient bond" was filed with the "conditions prescribed by law" and "duly approved." It was held that it was error to dissolve the injunction without giving the statutory time to the complainants to perfect their bond.

Effect on Sureties on Original Bond. — Where a new bond is given because the original bond is insufficient, all the sureties on the original bond signing the new bond with additional sureties are bound alike. *Odell v. Henry*, 8 Baxt. (Tenn.) 302.

1. **Where Complainant Would Be Immediately Entitled to Another Writ.** — *Henderson v. Maxwell*, 22 La. Ann. 357; *Lewis v. Daniels*, 23 La. Ann. 170.

2. **Where Injunction Should Be Refused though Bond Given.** — *Fuller v. Cason*, 26 Fla. 476.

3. **Additional Security.** — *Anderson v. Bradford*, 5 J. J. Marsh. (Ky.) 69. See also *Dobie v. Board of Management*, 23 L. C. Jur. 71.

4. **Power of Court to Require Additional Security.** — *Crawford v. Paine*, 19 Iowa 172. See also *Lambert v. Haskell*, 80 Cal. 611.

5. *Woolfolk v. Woolfolk*, 22 La. Ann. 206.

Additional Security for Person Not a Party. — Where the ordinary injunction bond would furnish no security to a person not a party to the proceeding, but whose interests are affected thereby, the court may, it seems, order that an additional bond be given to protect such interests; and if the plaintiff takes the benefit of an injunction obtained on such terms he

will not be heard afterwards to insist that such additional bond was without warrant of law and void. *Kinealy v. Staed*, 55 Mo. App. 176.

6. **Right of Court to Require.** — *Kent v. Bierce*, 6 Ohio 336. See also *Newton v. Russell*, 24 Hun (N. Y.) 40.

Necessity for New Bond on Continuing Restraining Order. — In *Preiss v. Cohen*, 112 N. Car. 278, it was held that where an undertaking had been given before the issue of a restraining order, it was not necessary for the court, on the return of the order to show cause and upon continuing the injunction to the trial, to require a new undertaking from the plaintiffs unless it was shown that the bond already given was insufficient.

Power of Supreme Court to Require New Bond — New York. — In *Disbro v. Disbro*, (Supm. Ct. Gen. T.) 37 How. Pr. (N. Y.) 147, it was held that the Supreme Court has the power at general or special term to revive and continue an injunction in its discretion in all proper cases, and upon such terms as to security and otherwise as it may deem just. But it should be upon the giving of a new undertaking, in the same manner as upon the granting of the original injunction.

7. **Effect of Noncompliance with Order of Court.** — Where the court orders that a second injunction bond be given, which order is not substantially complied with, the first bond is not discharged. *Kent v. Bierce*, 7 Ohio (pt. ii) 209, 6 Ohio 336.

8. **Statute Authorizing Acts Enjoined.** — *Baird v. Shore Line R. Co.*, 6 Blatchf. (U. S.) 461.

injunction will be dissolved where the sole foundation for it is a statute which has been declared unconstitutional.¹

(12) *Misrepresentation or Suppression of Material Facts.* — When it is shown on a motion to dissolve an *ex parte* injunction that the plaintiff has misstated the case, by either the misrepresentation or the suppression of material facts, the injunction will be dissolved on that ground alone.² The reason is that the utmost good faith must be required of those who seek to put in motion the power of a court of equity through this extraordinary process.³ Where an injunction has been obtained on a misrepresentation of facts, it does not alter the case that the misrepresentation was through inadvertence, misinformation, or otherwise.⁴ It is no excuse for the complainant to say that he was not aware of the importance of any facts which he has omitted to bring forward.⁵ A motion to dissolve an injunction obtained by misrepresentation will be entertained even though the injunction is about to expire.⁶

(13) *Technical Errors or Inaccuracies in Bill or Order.* — On a motion to dissolve an injunction, mere technical errors or inaccuracies of form in the bill on which the injunction is granted or in the order granting the injunction are not available. Errors involving matters of substance only will be regarded.⁷

(14) *Where Injunction Has Become Useless.* — Where an injunction can no longer subserve any useful purpose because the grounds on which it was granted no longer exist, or because of matters which have occurred since it was granted, it will be dissolved.⁸

h. EFFECT OF DISSOLUTION. — The dissolution of an injunction does not

1. *Injunction Based on Unconstitutional Statute.* — *White v. Schlect*, 9 W. N. C. (Pa.) 77.

2. *Misrepresentation of Concealment of Material Facts — England.* — *Dalglish v. Jarvie*, 2 Macn. & G. 231; *Brown v. Newall*, 2 Myl. & C. 558; *Stedman v. Webb*, 4 Myl. & C. 346; *Hilton v. Granville*, 4 Beav. 130; *Clifton v. Robinson*, 16 Beav. 355; *Sturgeon v. Hooker*, 1 De G. & Sm. 484; *Hemphill v. M'Kenna*, 2 Dr. & War. 183; *Fuller v. Taylor*, 9 Jur. N. S. 743; *Castelli v. Cook*, 7 Hare 98; *Phillips v. Prichard*, 1 Jur. N. S. 750; *Pinchin v. London, etc., R. Co.*, 1 Jur. N. S. 241; *Ley v. McDonald*, 2 Grant Ch. (U. C.) 398; *McMaster v. Callaway*, 6 Grant Ch. (U. C.) 577; *Fisken v. Rutherford*, 7 U. C. L. J. 124.

Canada. — *Griffin v. Taylor*, Russ. Eq. Dec. (Nova Scotia) 427; *St. John v. Brown*, 14 N. Bruns. 100; *Ward v. Clark*, 3 British Columbia 356.

New Jersey. — *Endicott v. Mathis*, 9 N. J. Eq. 110.

Tennessee. — *Black v. Huggins*, 2 Tenn. Ch. 782.

Misrepresentation Must Be of Material Facts. — The misrepresentation or suppression must be of material facts and must affect the merits. If the facts misrepresented or misstated were not such as to lead the court to grant the injunction, it will not be dissolved therefor. *Brown v. Newall*, 2 Myl. & C. 571; *Frome v. Chosen Freeholders*, 33 N. J. Eq. 464.

Misrepresentation as Bar to Second Injunction. — The dissolution of an *ex parte* injunction on the ground of misrepresentation and suppression of material facts is no bar to an application for a second injunction. *Fitch v. Rochfort*, 18 L. J. Ch. 458.

Laches in Applying for Dissolution. — Although an injunction obtained *ex parte* upon a statement upon which material facts are concealed or misrepresented would, on a speedy applica-

tion, be dissolved with costs, yet such concealment or misrepresentation is not a sufficient ground for a motion to dissolve after a period of several months has elapsed before notice of such motion is given; nor will the question whether there has been such concealment or misrepresentation be considered on appeal from an order made by the court in which the injunction was granted, and by which order the injunction was continued and the costs reserved. *Bell v. Hull, etc., R. Co.*, 1 R. & Can. Cas. 616.

3. *Reason for Rule.* — *Hilton v. Granville*, 4 Beav. 130; *Black v. Huggins*, 2 Tenn. Ch. 782.

4. *Causes Leading to Misrepresentation Immaterial.* — *Endicott v. Mathis*, 9 N. J. Eq. 110.

5. *Belief that Facts Were Unimportant.* — *Dalglish v. Jarvie*, 2 Macn. & G. 231; *Clifton v. Robinson*, 16 Beav. 355.

6. *Injunction About to Expire.* — *Wimbledon Local Board v. Croydon Rural Sanitary Authority*, 32 Ch. D. 421.

7. *Technical Errors and Inaccuracies.* — *Jones v. Ewing*, 56 Ala. 360; *Nelson v. Dunn*, 15 Ala. 501; *Robertson v. Walker*, 51 Ala. 484; *Beauchamp v. Kankakee County*, 45 Ill. 274; *Taylor v. Snyder*, Walk. (Mich.) 490.

8. *Where Injunction No Longer Necessary.* — *Shrewsbury, etc., R. Co. v. London, etc., R. Co.*, 20 L. J. Ch. 90; *In re Jackson*, 9 Fed. Rep. 493; *Steiner v. Scholze*, 105 Ala. 607; *Crook v. People*, 16 Ill. 534; *Bechtel v. Carslake*, 11 N. J. Eq. 244; *Fulton v. Greacen*, 44 N. J. Eq. 443.

Illustration of Rule. — Where a reservoir enjoined as a nuisance is changed by the defendant so as to prevent injury to the plaintiff, the defendant is entitled to apply to the court to have the injunction modified or dissolved. *Sylvester v. Jerome*, 19 Colo. 128.

necessarily operate as a dismissal of the bill. If further proceedings are necessary for relief, the complainant is entitled to continue his cause as an original suit,¹ and no motion to retain the bill is necessary.² Where the dissolution of the injunction leaves nothing more to be decided in the injunction suit the court may properly order that the cause be stricken from the docket.³

3. Continuance of Injunction — *a.* JUDICIAL DISCRETION AS TO CONTINUANCE. — The continuance of an injunction rests very largely in the discretion of the trial judge, and must be governed by the nature and circumstances of each particular case;⁴ and it is a settled rule that a reviewing court will not interfere with the action of the trial judge unless there has been abuse of this discretion.⁵ Except in cases entirely free from doubt, a reviewing court will not interfere with or control the discretion of the trial judge in continuing an

1. Where Further Proceedings Necessary for Relief — *Arkansas*. — *Johnston v. Alexander*, 6 Ark. 302; *Herndon v. Higgs*, 15 Ark. 389; *Bettison v. Jennings*, 8 Ark. 287.

Illinois. — *Titus v. Mabce*, 25 Ill. 257; *Wilson v. Weber*, 3 Ill. App. 125.

Iowa. — *Fisher v. Beard*, 30 Iowa 625; *Massey v. Mann*, 17 Iowa 131; *Russell v. Wilson*, 37 Iowa 378; *Walters v. Fredericks*, 11 Iowa 181.

Mississippi. — *Drane v. Winter*, 41 Miss. 517; *Maury v. Smith*, 46 Miss. 81; *Beatty v. Smith*, 2 Smed. & M. (Miss.) 567.

Tennessee. — *Cole v. Sands*, 1 Overt. (Tenn.) 183.

Texas. — *Fulgham v. Chevallier*, 10 Tex. 518; *Dearborn v. Phillips*, 21 Tex. 451; *Kelley v. Whitmore*, 41 Tex. 647.

Virginia. — *Ruffners v. Barrett*, 6 Munf. (Va.) 207; *Blow v. Taylor*, 4 Hen. & M. (Va.) 159.

Where Case Is Made for Injunction. — Where the plaintiff by his petition makes a case for injunction, and if sustained by evidence would be entitled on final decree to an injunction as asked, it is error to dismiss the petition. *Russell v. Wilson*, 37 Iowa 377.

The sustaining of a motion to dissolve a preliminary injunction only determines that upon the showing there made the plaintiffs are not entitled to a preliminary injunction. Such order is not a bar to the right of perpetual injunction upon full proof at the final hearing. *Fisher v. Beard*, 40 Iowa 625; *Barnes v. Racine*, 4 Wis. 454.

Dissolution of Injunction Against Judgment. — Where the answer denies all the material allegations of a bill for an injunction, the court should dissolve the injunction and decree damages on the amount of the judgment enjoined; but the bill should not be dismissed if there be sufficient equity on its face to give jurisdiction to the court. *Bettison v. Jennings*, 8 Ark. 287.

Bill for Injunction and General Relief. — The assignor and assignee of a bond being made defendants to the bill exhibited by the obligor for an injunction and for general relief, he alleging that he paid the money to the assignor without notice of the assignment, if the allegation be afterwards disproved, whereupon the injunction is dissolved and the bill dismissed as to the assignee, the cause ought yet to be retained and further proceedings had to give to the complainant relief against the

assignor. *Ruffners v. Barrett*, 6 Munf. (Va.) 207.

2. Motion to Retain Bill Unnecessary. — *Cole v. Sands*, 1 Overt. (Tenn.) 183.

3. Dissolution Leaving Nothing More to Be Decided. — *Titus v. Mabce*, 25 Ill. 257; *Wade v. London*, 30 La. Ann. 660.

4. Discretion of Court — *United States*. — *Poor v. Carleton*, 3 Sumn. (U. S.) 70.

Alabama. — *Birmingham Min., etc., Co. v. Mutual L. & T. Co.*, 96 Ala. 369.

California. — *Hicks v. Michael*, 15 Cal. 107; *More v. Massini*, 32 Cal. 594; *Parrott v. Floyd*, 54 Cal. 534; *Jewell v. McKinley*, 54 Cal. 600; *Payne v. McKinley*, 54 Cal. 532; *De Godey v. Godey*, 39 Cal. 167.

Georgia. — *Edwards v. Banksmith*, 35 Ga. 213; *Dent v. Summerlin*, 12 Ga. 5; *Loyless v. Howell*, 15 Ga. 554; *Semmes v. Columbus*, 19 Ga. 471.

Minnesota. — *Pineo v. Heffelfinger*, 29 Minn. 185.

Nevada. — *Magnet Min. Co. v. Page, etc., Silver Min. Co.*, 9 Nev. 346.

New Jersey. — *Morris Canal, etc., Co. v. Jersey City*, 12 N. J. Eq. 227; *Doughty v. Sommerville, etc., R. Co.*, 7 N. J. Eq. 629, 51 Am. Dec. 267; *Jersey City v. Morris Canal, etc., Co.*, 12 N. J. Eq. 545; *Fleischman v. Young*, 9 N. J. Eq. 622; *Murray v. Elston*, 23 N. J. Eq. 127; *Henwood v. Jarvis*, 27 N. J. Eq. 247; *Irick v. Black*, 17 N. J. Eq. 189; *Firmstone v. De Camp*, 17 N. J. Eq. 309; *Stotesbury v. Vail*, 13 N. J. Eq. 390; *Merwin v. Smith*, 2 N. J. Eq. 182; *Heber v. Diebold*, 25 N. J. Eq. 170; *Chetwood v. Brittan*, 2 N. J. Eq. 439; *Carr v. Weld*, 18 N. J. Eq. 41; *Van Mater v. Holmes*, 6 N. J. Eq. 575.

New York. — *Roberts v. Anderson*, 2 Johns. Ch. (N. Y.) 202; *Monroe Bank v. Schermerhorn*, 1 Clarke (N. Y.) 303.

Pennsylvania. — *Athens, etc., Electric St. R. Co. v. Sayre*, 156 Pa. St. 23.

Virginia. — *Kahn v. Kerngood*, 80 Va. 346; *Baltimore, etc., R. Co. v. Wheeling*, 13 Gratt. (Va.) 58; *Nelson v. Armstrong*, 5 Gratt. (Va.) 354.

5. When Interference with Discretion Authorized. — *Jewell v. McKinley*, 54 Cal. 600; *Parrott v. Floyd*, 54 Cal. 534; *De Godey v. Godey*, 39 Cal. 167; *Edwards v. Banksmith*, 35 Ga. 213; *Dent v. Summerlin*, 12 Ga. 5; *Fleischman v. Young*, 9 N. J. Eq. 622; *Jersey City v. Morris Canal, etc., Co.*, 12 N. J. Eq. 545; *Athens v. Electric St. R. Co. v. Sayre*, 156 Pa. St. 23.

injunction until the final hearing.¹ It is not necessary to the continuance of an injunction that it should be clear that the complainant will succeed at the hearing. Where upon the whole case there is probable cause to believe that he will succeed, the injunction should be continued.²

6. GROUNDS FOR CONTINUING INJUNCTION — Where Dissolution Would Amount to Denial of Relief. — Where the dissolution of an injunction would be practically a denial of the relief to which the complainant might show himself entitled on final hearing, the injunction should be continued.³

Where Dissolution Would Effect Irreparable Injury. — If upon the hearing of a motion to dissolve an injunction it appears that a dissolution might work an irreparable injury to the complainant, the injunction should be continued to the hearing.⁴

Where Dissolution Would Work Greater Injury than Continuance. — Although the equity of the bill may be fully answered, the court will continue the injunction to the final hearing if the dissolution would work a greater injury than the continuance of the process.⁵ It is not an inflexible rule that when the special equities of a bill are denied the injunction must be dissolved. The court considers all the circumstances, and if greater injury is likely to ensue from the order of dissolution than from the order retaining the injunction, the safer and customary rule is not to dissolve until a hearing is had on the merits.⁶ The granting and continuing of injunctions rest merely on equitable grounds, and are not exercised for the mere purpose of protecting legal rights irrespective of the claim of the party to equitable relief.⁷ An injunction may be retained under the special circumstances of the case although the defendant has filed

1. Cases Free from Doubt. — *Jersey City v. Morris Canal, etc., Co.*, 12 N. J. Eq. 545; *Fleischman v. Young*, 9 N. J. Eq. 622.

2. Probability of Success Authorizes Continuance. — *Huffman v. Hummer*, 17 N. J. Eq. 263; *Key v. Dobson*, Phil. Eq. (62 N. Car.) 170; *Sherrill v. Harrell*, 1 Ired. Eq. (36 N. Car.) 194.

3. Where Dissolution Would Prevent Relief Sought — *Michigan*. — *Atty.-Gen. v. Oakland County Bank*, Walk. (Mich.) 90.

Mississippi. — *Alcora v. Sadler*, 66 Miss. 221; *Stewart v. Belt*, (Miss. 1896) 19 So. Rep. 957.

New Jersey. — *Hoagland v. Titus*, 14 N. J. Eq. 81; *Fleischman v. Young*, 9 N. J. Eq. 620; *Simon v. Townsend*, 27 N. J. Eq. 302.

North Carolina. — *Lowe v. Davidson County*, 70 N. Car. 532.

Tennessee. — *Owen v. Brien*, 2 Tenn. Ch. 295.

West Virginia. — *Shonk v. Knight*, 12 W. Va. 683.

4. Irreparable Injury to Complainant Ground for Continuing — *United States*. — *Poor v. Carleton*, 3 Sumn. (U. S.) 70.

Alabama. — *Harrison v. Yerby*, 87 Ala. 185; *Scholz v. Steiner*, 100 Ala. 148; *Satterfield v. John*, 53 Ala. 127; *Bibb v. Shackelford*, 38 Ala. 611.

California. — *Porter v. Jennings*, 89 Cal. 440.

Delaware. — *Kersey v. Rash*, 3 Del. Ch. 322.

Florida. — *Randall v. Jacksonville St. R. Co.*, 19 Fla. 427; *Linton v. Denham*, 6 Fla. 533.

Louisiana. — *New Orleans Water-works Co. v. Oser*, 36 La. Ann. 918.

Mississippi. — *Jones v. Brandon*, 60 Miss. 557.

New Jersey. — *Mosser v. Pequest Min. Co.*, 26 N. J. Eq. 200; *Dey v. Dey*, 23 N. J. Eq. 83; *French v. Snell*, 29 N. J. Eq. 95; *Silt v. Hil-*

ton, 30 N. J. Eq. 579; *Salomon v. Hertz*, 40 N.

J. Eq. 400; *Southmayd v. McLaughlin*, 24 N. J. Eq. 181; *Stanton Mfg. Co. v. McFarland*, 52 N. J. Eq. 85.

North Carolina. — *McBrayer v. Hardin*, 7 Ired. Eq. (42 N. Car.) 1, 53 Am. Dec. 389; *Heilig v. Stokes*, 63 N. Car. 612; *Purnell v. Daniel*, 8 Ired. Eq. (43 N. Car.) 9; *Lloyd v. Heath*, Busb. Eq. (45 N. Car.) 39.

South Dakota. — *Huron Waterworks Co. v. Huron*, 3 S. Dak. 610.

Illustrations. — Where irreparable injury might result from the dissolution of a special injunction restraining the erection of a dam which would create a malarious pond injurious to the health of the surrounding community, the chancellor may in his discretion retain the injunction until the hearing notwithstanding the denials of the answer. *Bibb v. Shackelford*, 38 Ala. 611.

Where the effect of a dissolution will be to permit the defendants to proceed at law to enforce their claim against a fund in controversy, and to compel the holders of the fund, in order to protect themselves against loss from conflicting claims, to seek the aid of a court of equity, the injunction will be retained. *Mosser v. Pequest Min. Co.*, 26 N. J. Eq. 200.

5. Where Dissolution More Injurious than Continuance. — *Harrison v. Yerby*, 87 Ala. 185; *Birmingham Min., etc., Co. v. Mutual L. & T. Co.*, 96 Ala. 369; *Davis v. Sowell*, 77 Ala. 262; *Planters, etc., Bank v. Lauchheimer*, 102 Ala. 457; *Kinney v. Ensminger*, 87 Ala. 341; *Whitley v. Dumham Lumber Co.*, 89 Ala. 497; *Chetwood v. Brittan*, 2 N. J. Eq. 438; *Firmstone v. De Camp*, 17 N. J. Eq. 309; *New v. Bame*, 10 Paige (N. Y.) 502; *Owen v. Brien*, 2 Tenn. Ch. 298.

Birmingham Min., etc., Co. v. Mutual L. & T. Co., 96 Ala. 369.

7. Continuing Injunction Rests on Equitable Grounds. — *Hilles v. Parrish*, 14 N. J. Eq. 380.

an answer fully denying the equities of the bill.¹

Doubtful Cases. — If on the coming in of the answer the mind of the court is not free from doubt whether the equities of the bill are sufficiently answered, the injunction will be continued until the final hearing.²

Where Doubtful Questions of Law Are at Issue. — The injunction should be continued where the equity of the complainant's case rests on important questions of law which cannot be met by an answer.³

Where Sufficient Time Has Elapsed after the granting of a temporary injunction within which the case could have been reached for trial and disposed of on the merits, an order continuing the injunction is proper.⁴

Relief Obtainable by Final Decree. — A temporary injunction will not be continued where to allow its remaining in force would be practically to give to the complainant all the relief which he could obtain by means of a final decree.⁵ Nor should an injunction be continued where the statements to sustain it are improbable.⁶

Where Answer Sets Up New Matter. — Where new matter is set up in the answer by way of avoidance, the injunction should be continued.⁷

Effect of Final Judgment. — An injunction which has been granted upon an interlocutory order is superseded by the judgment in the action. If it is intended that it shall remain in force, it must be expressly continued.⁸

1. *Shellman v. Scott*, R. M. Charl. (Ga.) 380.

2. **Doubt as to Whether Equities Sufficiently Answered.** — *Iowa*. — *Sinnett v. Moles*, 38 Iowa 25; *Fargo v. Ames*, 45 Iowa 494.

Kansas. — *St. Joseph, etc., R. Co. v. Dryden*, 11 Kan. 186.

New Jersey. — *Jersey City v. Morris Canal, etc., Co.*, 12 N. J. Eq. 545; *McKibbin v. Brown*, 14 N. J. Eq. 13; *Huffman v. Hummer*, 17 N. J. Eq. 263; *Van Kuren v. Trenton Locomotive, etc., Mfg. Co.*, 13 N. J. Eq. 302.

New York. — *Caldwell v. Commercial Warehouse Co.*, 4 Thomp. & C. (N. Y.) 179.

North Carolina. — *Whittaker v. Hill*, 96 N. Car. 2; *McNeely v. Steele*, Busb. Eq. (45 N. Car.) 240; *Nimocks v. Cape Fear Shingle Co.*, 110 N. Car. 230; *Miller v. Washburn*, 3 Ired. Eq. (38 N. Car.) 161; *Harrison v. Bray*, 92 N. Car. 488; *Turner v. Cuthrell*, 94 N. Car. 239; *Whittaker v. Hill*, 96 N. Car. 4.

Where the complaint states facts sufficient to authorize a temporary injunction, and the answer raises serious issues the determination of which is doubtful, it is not error to continue the injunction to the hearing on the merits, especially where it appears that the subject-matter of the case will remain unimpaired. *Whittaker v. Hill*, 96 N. Car. 2.

Where Additional Evidence Indispensable. — Where it is apparent from the answer that there are still questions respecting which additional information is indispensable to the decision of the case, a dissolution should not be granted, especially where the relief was asked for the prevention of irreparable injury. *Fargo v. Ames*, 45 Iowa 494; *Huffman v. Hummer*, 17 N. J. Eq. 263.

3. **Important Questions of Law at Issue.** — *Alcorn v. Sadler*, 66 Miss. 221; *Pope v. Bell*, 35 N. J. Eq. 1; *Camden, etc., R. Co. v. Atlantic City Pass. R. Co.*, 26 N. J. Eq. 69; *Morris, etc., R. Co. v. Kaskins*, 26 N. J. Eq. 295; *Owen v. Brien*, 2 Tenn. Ch. 297.

Where Continuance Will Work Great Injury to Defendant. — The fact that the continuance of an injunction will work a great injury to the

defendant will have much weight with the court in the consideration of the question whether the injunction should be continued. *Furman v. Clark*, 11 N. J. Eq. 135.

Where the Questions Involved Are of Great Importance and it is manifestly to the interest of both parties that they should be deliberately heard and finally decided, and the court is of the opinion that the case is not free from doubt, an order refusing to dissolve an injunction should be sustained. *Jersey City v. Morris Canal, etc., Co.*, 12 N. J. Eq. 545; *Van Kuren v. Trenton Locomotive, etc., Mfg. Co.*, 13 N. J. Eq. 302.

Where the Answer Is Unsatisfactory. — An injunction will not be dissolved where the answer is unsatisfactory as to any matter which is an essential part of the complainant's equity. *Gibby v. Hall*, 27 N. J. Eq. 282.

4. **Where Sufficient Time Has Elapsed for Trial.** — *Consolidated Gas Co. v. New York*, 63 Hun (N. Y.) 629, 17 N. Y. Supp. 826.

5. **Relief Obtainable by Final Decree.** — *Steele v. Pittsburgh, etc., R. Co.*, (Supm. Ct. Gen. T.) 12 N. Y. Supp. 576.

6. **Improbability of Statements in Bill.** — *Fowler v. Roe*, 11 N. J. Eq. 367.

7. **New Matter Set Up by Answer.** — *Johnston v. Corey*, 25 N. J. Eq. 311; *West Jersey R. Co. v. Thomas*, 21 N. J. Eq. 205; *Richardson v. Lightcap*, 52 Miss. 508; *Coleman v. Hudspeth*, 49 Miss. 566; *Burnley v. Cook*, 13 Tex. 586, 65 Am. Dec. 79.

It is a well-established rule that on a motion to dissolve an injunction on bill and answer the defendant can ask for a dissolution of the injunction upon so much of his answer alone as is properly responsive to the bill. *In re Bellona Co.*, 3 Bland (Md.) 445.

8. **Effect of Final Judgment.** — *Kerr on Injunctions* 637; *Gardner v. Gardner*, (Ct. App.) 62 How. Pr. (N. Y.) 265; *Christopher, etc., R. Co. v. Central Cross-Town R. Co.*, 4 Hun (N. Y.) 630; *People v. Randall*, 73 N. Y. 416.

Continuance of Injunction by Supersedeas. — If an appeal be taken on a supersedeas from a

Fraud. — Where fraud is the gravamen of the application for an injunction, it does not necessarily follow that the injunction will be dissolved on the coming in of an answer denying all the material allegations of the petition. The court, in its discretion, may continue the injunction until the final hearing; and this, it is apprehended, is the usual course.¹

4. Reinstatement or Revival of Injunction. — A court of equity is always open for the reinstatement of a preliminary injunction.² While the suit remains undetermined it may be reinstated or revived on a showing that the dissolution thereof was irregularly or improperly obtained. It may be reinstated on an application to the court dissolving it;³ it may be reinstated by the appellate court;⁴ or the court dissolving it may be directed by the appellate court to reinstate it.⁵ Even after the injunction has ceased to exist the court has power to reinstate it on a proper showing.⁶ The reinstatement of an injunction is not as a matter of course, but cause must be shown by further evidence.⁷

XVI. VIOLATION OF INJUNCTION — 1. Duty to Obey and Consequences of Disobedience. — It is the duty of the parties to obey the injunction so long as it

judgment dissolving a temporary injunction, the injunction is continued in force by the supersedeas. If the judgment is affirmed, the supersedeas bond covers the damage sustained by reason of the injunction during the pendency of the appeal. *Barber v. Edelen*, 9 Ky. L. Rep. 971.

1. Fraud as Gravamen of Complaint — *Florida*. — *Hayden v. Thrasher*, 20 Fla. 715.

Georgia. — *Dent v. Summerlin*, 12 Ga. 5.

Iowa. — *Stewart v. Johnston*, 44 Iowa 437; *Johnston v. Chicago, etc.*, R. Co., 58 Iowa 537; *Sinnett v. Moles*, 38 Iowa 25; *Dubuque, etc.*, R. Co. v. *Cedar Falls, etc.*, R. Co., 76 Iowa 702; *Walker v. Stone*, 70 Iowa 103.

Mississippi. — *Madison County v. Paxton*, 56 Miss. 679.

New Jersey. — *Cregar v. Creamer*, 27 N. J. Eq. 281; *Jackson v. Darcy*, 1 N. J. Eq. 194; *Leigh v. Clark*, 11 N. J. Eq. 110.

New York. — *Roberts v. Anderson*, 2 Johns. Ch. (N. Y.) 204.

Texas. — *Friedlander v. Ehrenworth*, 58 Tex. 350.

2. Reinstatement of Injunction. — *Billingslea v. Gilbert*, 1 Bland (Md.) 566; *Radford v. Innes*, 1 Hen. & M. (Va.) 8.

3. Grounds of Reinstatement — Dissolution Irregularly Obtained. — *Tucker v. Carpenter*, Hempst. (U. S.) 440; *Hicks v. Michael*, 15 Cal. 107; *Peck v. Spencer*, 26 Fla. 23; *Baldwin v. Bellocq*, 35 La. Ann. 983; *Billingslea v. Gilbert*, 1 Bland (Md.) 566; *Penny v. Holberg*, 53 Miss. 569; *Tone v. Brace*, Clark (N. Y.) 503; *Radford v. Innes*, 1 Hen. & M. (Va.) 8; *Gilliam v. Allen*, 1 Rand. (Va.) 414.

4. Reinstatement by Appellate Court. — *Baldwin v. Bellocq*, 35 La. Ann. 983.

5. Directing Reinstatement by Court Dissolving Injunction. — *Price v. Browning*, 4 Gratt. (Va.) 72.

6. Injunction Which Has Ceased to Exist. — *Parker v. Judges*, 12 Wheat. (U. S.) 461.

Appeal Not Reinstatement of Injunction. — After an order dissolving an injunction is duly entered no subsequent appeal can of itself affect the validity of the order or revive the process and give force and effect to it. If an injunction could be revived by the mere act of the party in filing an appeal, it would give to

him not only the power of control over the orders of the court, but of creating an injunction. *Hicks v. Michael*, 15 Cal. 111; *Wood v. Dwight*, 7 Johns. Ch. (N. Y.) 295.

Affirmance of Order of Dissolution as Affecting Right to Reinstatement. — In *Tone v. Brace*, Clarke (N. Y.) 503, it was held that the court had power to reinstate or renew an injunction after a dissolution, even though the order of dissolution had been affirmed by the chancellor upon appeal and an appeal had been taken from the chancellor's decision to the Court for the Correction of Errors; but the court said that this power would not be exercised except in extreme cases and upon new facts presented either by petition or supplemental bill.

Effect of Reinstatement on Execution Issued. — The order of a judge of the Court of Appeals reinstating an injunction does not reach back and render irregular an execution issued in the interim. *Young v. Davis*, 1 T. B. Mon. (Ky.) 153.

Reversal of Order Dissolving Injunction. — If a preliminary injunction is dissolved on granting a nonsuit, and the judgment is afterwards reversed on appeal, the plaintiff, on a proper application, will be entitled to a renewal of the injunction upon filing the remittitur in the court below. *Harris v. McGregor*, 29 Cal. 125.

7. Reinstatement Not Matter of Course. — *James v. Downes*, 18 Ves. Jr. 522; *Tucker v. Carpenter*, Hempst. (U. S.) 440; *Livingston v. Gibbons*, 5 Johns. Ch. (N. Y.) 250; *Low v. M'Gee*, 5 Yerg. (Tenn.) 238; *North v. Perrow*, 4 Rand. (Va.) 4; *Toll-bridge v. Free bridge*, 1 Rand. (Va.) 206; *Gallaher v. Moundsville*, 34 W. Va. 730, 26 Am. St. Rep. 942.

Dissolution as to Person Improperly Made Party. — Where a person not interested in the subject-matter of the suit, and who is not contemplating the commission of the grievance complained of, has been joined as a party defendant, the injunction should be dissolved as to him. *Brammer v. Jones*, 2 Bond (U. S.) 100.

Suspending Operation of Injunction. — Either a perpetual (*Penitlarge v. Beeston*, 18 Blatchf. (U. S.) 41, or a temporary (*Edison Electric-Light Co. v. U. S. Electric Lighting Co.*, 59 Fed. Rep. 501) injunction may be suspended

remains in force. The violation of an injunction is a contempt of the court from which the process issues, and is punishable by it as such.¹ The defendant is bound at his peril to obey the injunction,² and if he is in doubt as to what he may do without violating the injunction, he should ask a modification of it or a construction of its terms.³ The punishment imposed is by fine or imprisonment, or both.⁴

Violation Pending Appeal. — The violation of an injunction pending an appeal is a contempt, and is punishable as such. It is well settled that an appeal from an order granting an injunction or from a decree for a perpetual injunction does not operate as a supersedeas and does not permit the defendant to disregard the injunction.⁵

2. What Constitutes Violation — Knowledge of Injunction. — To put a person in contempt for violating an injunction it is necessary that he should have knowledge of the injunction.⁶ If, however, he has actual knowledge thereof he is punishable as for contempt for its violation although he has not been served with notice.⁷ It is altogether immaterial how the defendant acquires the information of the existence of the injunction; when once he has been apprised of the fact he is legally bound to desist from what he is restrained and inhibited from doing.⁸ In the notes hereto are set out some decisions illustrative of specific acts held in violation or not in violation of injunctions.⁹

for a given time by the action of the court when such a suspension is necessary in order to do complete justice between the parties.

1. Violation a Punishable Contempt. — *Menard v. Hood*, 63 Ill. 121; *Elliot v. Whitmore*, 10 Utah 240. See the title *CONTEMPT*, vol. 7, p. 54.

2. Laurie v. Laurie, 9 Paige (N. Y.) 234.

3. When in Doubt Construction Should Be Asked. — *Shirk v. Cox*, 141 Ind. 301; *Wilber v. Woolley*, 44 Neb. 739.

4. Violation Punishable by Fine or Imprisonment. — *Eads v. Brazelton*, 22 Ark. 499, 79 Am. Dec. 88; *Menard v. Hood*, 63 Ill. 121; *Zimmerman v. State*, 46 Neb. 13; *Boone v. McGucken*, (Supm. Ct. Gen. T.) 23 Civ. Pro. (N. Y.) 115; *Columbia Water Power Co. v. Columbia*, 4 S. Car. 388; *Elliot v. Whitmore*, 10 Utah 240; *Simpson v. Putnam*, 41 Vt. 235. See the title *CONTEMPT*, vol. 7, p. 53.

Limit of Fine and Imprisonment. — In contempt for a violation of an injunction, the limit of fine and imprisonment to be inflicted is within the sole discretion of the court which issued the injunction. *Rogers Mfg. Co. v. Rogers*, 38 Conn. 123.

5. Violation of Injunction Pending Appeal. — *Kentucky*, etc., *Bridge Co. v. Krieger*, 91 Ky. 625. See the title *CONTEMPT*, vol. 7, p. 55.

Supersedeas on Dissolution of Injunction — Effect. — The entire force of a judgment dissolving an injunction is rendered temporarily nugatory by the execution and service of a supersedeas; the injunction is left where it was before the rendition of the suspended judgment, and the appellee is guilty of contempt if he disregards it. *Smith v. Western Union Tel. Co.*, 83 Kv. 299; *Elizabethtown*, etc., *R. Co. v. Ashland*, etc., St. R. Co., 91 Kv. 478.

6. Knowledge of Injunction Necessary. — *De Cosmos v. Victoria*, etc., *Telephone Co.*, 3 British Columbia 347. See the title *CONTEMPT*, vol. 7, p. 55.

7. Actual Notice Sufficient. — *In re Lennon*, 166 U. S. 548; *Danville Banking*, etc., *Co. v. Parks*, 88 Ill. 170; *Milne v. Van Buskirk*, 9

Iowa 558. See the title *CONTEMPT*, vol. 7, p. 55.

8. Knowledge from Any Source Sufficient. — *Ulman v. Ritter*, 72 Fed. Rep. 1000.

What Notice Is Sufficient. — Notice of an injunction will be sufficient if it proceeds from a source which is entitled to credit and informs the defendant plainly and unequivocally what acts he must refrain from doing. *Cape May*, etc., *R. Co. v. Johnson*, 35 N. J. Eq. 422.

9. Acts Held to Constitute Violation of Injunction — In General. — It is a violation of an injunction restraining the defendant from disposing of property to deliver the property, though sold previously to the service of the injunction. *Jewett v. Bowman*, 27 N. J. Eq. 171.

The commencement of an action for the purpose of settling the rights of the parties in certain lands described in the complaint and to obtain an accounting for rents and profits is a violation of an injunction order granted in another action which restrained the plaintiff in the first-named action from in any manner interfering with or disposing of such real estate. *Stubbs v. Ripley*, 39 Hun (N. Y.) 625.

Procuring Dissolution by Court Having No Authority and then doing what the injunction forbids is punishable as a contempt. *People v. Van Buren*, 63 Hun (N. Y.) 635, 18 N. Y. Supp. 734.

Continuance of Act Complained of. — That the injury complained of was done before the service of the injunction, and that the defendant's acts since the service have done no further injury to the complainant, will not relieve the defendant from the effect of his violation of the injunction, when such acts were intended to make the injury complete, and the obvious intention of the interdict was to prohibit him from continuing the injury. *Thropp v. Field*, 25 N. J. Eq. 166.

Forbidding Acts "Except in Extraordinary Emergencies." — Where the injunction commands the defendant absolutely to desist from the doing of certain acts "except in extraordinary

The Violation of the Spirit of an Injunction, even though its strict letter may not have been disregarded, is a breach of the mandate of the court,¹ which will not allow its process to be disregarded or evaded on merely technical grounds.²

Acts Not Prohibited by Injunction. — The defendant will not be punishable as for contempt for the performance of acts which are not within the terms of the injunction³ or where the injunction order has not taken effect.⁴ So one will not be punished for disobeying an injunction which the parties have previously stipulated shall be dissolved, even though the order vacating the writ is needed to complete the record.⁵ Furthermore, an injunction is never retroactive. It can never make violative of or disobedient to its provisions an act which was done before the injunction was granted.⁶

3. Violation by Corporation. — An injunction against a corporation is binding upon it and the individuals through whom it acts; and where such injunction is violated the corporation may be fined and the officers through whom it acts may be punished.⁷

4. Violation by Agents, Attorneys, and Servants. — The injunction not only requires the defendant himself to refrain from doing the acts prohibited, but also prohibits him from procuring or permitting the acts by his agents, servants, or attorneys. He is not liable, however, for acts done by his agents, servants, or attorneys in disobedience of his commands.⁸

5. Violation by Strangers. — The defendant is not punishable for acts done by strangers without his knowledge or consent;⁹ but he may render himself punishable by aiding, counseling, or abetting others in the violation thereof.¹⁰

emergencies it becomes unavoidable," the defendant, in order to escape the consequences of disobedience to the order, must show that the acts were unavoidable. *Thompson v. Pennsylvania R. Co.*, 48 N. J. Eq. 105.

Acts Held Not Violation of Injunction. — Employing counsel to protect the interests of an association is not a violation of an injunction against the further transaction of business. *Beneville v. Whalen*, 14 Daly (N. Y.) 508.

Bringing an action on a note is not a violation of an injunction against negotiating it. *Mason v. Jones*, 1 Hayw. & H. (D. C.) 329.

The bringing of an action to recover possession of personal property is not a violation of an injunction obtained by a third person restraining the plaintiff in a replevin suit for disposing of or interfering with such property. *Van Wagoner v. Terpenning*, 46 Hun (N. Y.) 423.

Where an injunction enjoined the defendants from affixing certain words, among which was the word "porous," to any plasters manufactured or sold by them, or to the boxes in which they were put up, and this was the extent of the prohibition, their employment of the word "porous" in newspaper advertisements, circulars, etc., to announce the manufacture, but not to designate the plaster, by name applied or affixed, as a porous plaster, was held not a violation of the injunction. *Porous Plaster Co. v. Seabury*, (Supm. Ct. Gen. T.) 16 N. Y. St. Rep. 35.

Failure to Give Bond — Effect. — Where an injunction is allowed in a cause pending, but an undertaking therefor is never given, fine and imprisonment for contempt in disobeying such injunction are not authorized, and an arrest will constitute false imprisonment. *Diehl v. Friester*, 37 Ohio St. 473.

Burden of Proving Violation. — A party who alleges that an injunction has been violated, and proceeds for the contempt to punish the

offender, must show with reasonable certainty the facts by which the charge may be established. *Verplank v. Hall*, 21 Mich. 469.

1. Violation of Spirit of Injunction. — *Grand Junction Canal Co. v. Dimes*, 17 Sim. 38; *Partington v. Booth*, 3 Meriv. 148; *Bickford v. Welland R. Co.*, 17 Grant Ch. (U. C.) 484; *Muller v. Henry*, 5 Sawy. (U. S.) 464; *Magenis v. Parkhurst*, 4 N. J. Eq. 433; *Pesant v. Garcia*, 64 N. Y. 622; *Blair v. Nelson*, 8 Baxt. (Tenn.) 1; *Campbell v. Tarbell*, 55 Vt. 455.

Obscure Phraseology of Writ. — If the phraseology of the writ be inartificial or obscure, but its spirit or intention be manifest, the party will not be excused for its violation. *Blair v. Nelson*, 8 Baxt. (Tenn.) 1.

2. Evasion on Technical Grounds. — *Endicott v. Mathis*, 9 N. J. Eq. 110.

3. Acts Not Within Terms of Injunction. — *Bosley v. Susquehanna Canal*, 3 Bland (Md.) 63.

4. Injunction Which Has Not Taken Effect. — *Winslow v. Navson*, 113 Mass. 411.

5. Stipulation to Dissolve. — *Ten Eyck v. Wing*, 1 Mich. 40.

6. Injunction Not Retroactive. — *People v. Albany, etc., R. Co.*, (Supm. Ct. Spec. T.) 11 Abb. Pr. (N. Y.) 136; *Witter v. Lyon*, 34 Wis. 564.

7. Violation by Corporation. — See the title CORPORATIONS (PRIVATE), vol. 7, p. 847.

8. Violation by Agents, Attorneys, and Servants. — *Trimmer v. Pennsylvania, etc., R. Co.*, 36 N. J. Eq. 411; *Pennsylvania R. Co. v. Thompson*, 49 N. J. Eq. 318; *Wheeler v. Gilsey*, (C. Pl. Spec. T.) 35 How. Pr. (N. Y.) 139. See the titles CONTEMPT, vol. 2, pp. 44, 58; ATTORNEY AND CLIENT, vol. 3, p. 278.

9. Violation by Strangers. — *Slater v. Merritt*, 75 N. Y. 268; *Batterman v. Finn*, (Supm. Ct. Gen. T.) 32 How. Pr. (N. Y.) 501.

10. Société, etc., v. Western Distilling Co., 42 Fed. Rep. 96; *Blood v. Martin*, 21 Ga. 127;

Usually an injunction only binds those who are named in the injunction order, and one not named therein is not punishable for disobedience thereof.¹

6. Matters in Excuse or Mitigation — *a.* IN GENERAL. — The motive with which a person acts in committing a violation of an injunction is immaterial and furnishes no excuse.² Thus a common rumor that an injunction has been dissolved will not excuse the breach of it;³ nor can a corporation excuse its violation of an injunction upon the ground that its imperative duty to the public demanded such violation.⁴ It is likewise no excuse for disobedience of the terms of an injunction that the defendant acted under the advice of counsel,⁵ especially where he performs acts other than those which he is advised he may do.⁶ Nevertheless, if the advice was given and acted upon in good faith, the court is authorized to take this fact into consideration in determining the extent of the punishment which shall be awarded for the breach of the injunction.⁷ The fact that the contempt was not wilful may be considered in mitigation of punishment.⁸ Failure to comply with an injunction requiring affirmative action on the part of the defendant may be sufficiently excused by a showing of poverty and sickness.⁹

b. ORDER ERRONEOUSLY OR IMPROVIDENTLY GRANTED. — Disobedience of an injunction order cannot be justified by setting up that it was improvidently or erroneously granted. Until the order is vacated it must be obeyed, unless it can be shown that it is absolutely void. The order must be questioned by direct proceedings to review it, not by disobedience.¹⁰ In proceeding

New York v. New York, etc., Ferry Co., 64 N. Y. 622.

1. United States. — *Bate Refrigerating Co. v. Gillett*, 30 Fed. Rep. 685. See, however, *Ex p. Lennon*, 64 Fed. Rep. 320.

Iowa. — *Buhlman v. Humphrey*, 86 Iowa 597; *Newcomer v. Tucker*, 89 Iowa 486, *distinguishing and disapproving* *Silvers v. Traverse*, 82 Iowa 52.

Kansas. — *State v. Miller*, 54 Kan. 244; *Raff v. State*, 48 Kan. 44. But see *State v. Cutler*, 13 Kan. 131.

Louisiana. — *Barthe v. Larquie*, 42 La. Ann. 131.

Maryland. — *Murdock's Case*, 2 Bland (Md.) 461, 20 Am. Dec. 381.

Nebraska. — *Boyd v. State*, 19 Neb. 128.

New York. — *Batterman v. Finn*, (Supm. Ct. Gen. T.) 32 How. Pr. (N. Y.) 501; *People v. Randall*, 73 N. Y. 416; *Lansing v. Easton*, 7 Paige (N. Y.) 354.

But see *Buffandeau v. Edmondson*, 17 Cal. 437, 79 Am. Dec. 139.

2. Motive Immaterial. — *Quackenbush v. Van Riper*, 3 N. J. Eq. 350, 29 Am. Dec. 716; *Thompson v. Pennsylvania R. Co.*, 48 N. J. Eq. 105.

3. Rumor of Dissolution of Injunction. — *Morris v. Hill*, 28 N. J. Eq. 33.

4. Imperative Duty to Public. — *Kentucky, etc., Bridge Co. v. Krieger*, 91 Kv. 625.

Vote of Municipality Authorizing Use of Property. — Where by the terms of an injunction the defendant is ordered to refrain from the occupation of a lot, it is not an excuse for so doing that the vote of the municipality in which the lot was situated authorized him to do so. *Fowler v. Beckman*, 66 N. H. 424.

5. Advice of Counsel No Excuse. — *Kimpton v. Eve*, 2 Ves. & B. 349; *Ciancimino's Towing, etc., Co. v. Ciancimino*, (Supm. Ct. Gen. T.) 17 N. Y. Supp. 125; *Mead v. Norris*, 21 Wis. 310. See the title CONTEMPT, vol. 7, p. 77.

6. Performance of Acts Other than Advised. — *Société, etc., v. Western Distilling Co.*, 42 Fed. Rep. 96.

7. Advice of Counsel as Mitigation of Punishment. — *Erie R. Co. v. Ramsey*, 45 N. Y. 654; *Sullivan v. Judah*, 4 Paige (N. Y.) 447. See the title ADVICE OF COUNSEL, vol. 1, p. 898.

8. Absence of Wilful Intent. — *Morris v. Domestic Sewing Mach. Co.*, 38 Fed. Rep. 482; *Comly v. Buchanan*, 81 Fed. Rep. 58. See also *Longwood Valley R. Co. v. Baker*, 27 N. J. Eq. 170.

Disobedience to Test Question of Law. — Where the defendant in disobeying an injunction merely intends thereby to test the legal question that he desires to raise, the punishment for the violation of the injunction will be moderate. *People v. Bouchard*, (Supm. Ct. Spec. T.) 6 Misc. (N. Y.) 459.

9. Poverty and Sickness. — *Scott v. Layng*, 59 Mich. 43.

10. Disobedience of Erroneous Order a Punishable Contempt. — *England.* — *Russell v. East Anglian R. Co.*, 3 Macn. & G. 104; *Woodward v. Lincoln*, 3 Swanst. 626; *Partington v. Booth*, 3 Meriv. 148.

Canada. — *Valentine v. Hazleton*, New Bruns. Dec. 1870, *Stevens New Bruns. Dig.* 1083.

United States. — *In re Eaton*, 51 Fed. Rep. 804.

Illinois. — *Dickey v. Reed*, 78 Ill. 261.

Iowa. — *Jordan v. Circuit Ct.*, 69 Iowa 177.

New York. — *Sheffield v. Cooper*, 21 N. Y. App. Div. 518.

North Dakota. — *State v. Markuson*, 7 N. Dak. 155.

Pennsylvania. — *McDonough v. Bullock*, 2 Pearson (Pa.) 194.

West Virginia. — *Osborn v. Glasscock*, 39 W. Va. 749.

Wisconsin. — *State v. Circuit Ct.*, 98 Wis. 143.

And see the title CONTEMPT, vol. 7, p. 56.

against a party for contempt in violating an injunction the court will not look into the merits of the case in which the injunction issued. The only question is whether the injunction has been violated.¹

c. **INVALIDITY OF ORDER.** — Where the court is without jurisdiction to grant an injunction, and the injunction is absolutely void, a violation thereof does not render the defendant liable to punishment as for contempt.²

XVII. BOND, DAMAGES, COSTS, AND EXPENSES—1. **The Bond**—a. **NECESSITY FOR**—(1) *At Common Law—Formerly Unnecessary.*—In the early stages of equity jurisprudence temporary injunctions were often issued simply on an *ex parte* showing by the plaintiff, without requiring any bond or other security, and if on a final hearing it transpired that the injunction was issued without just cause, and it was therefore dissolved, the party enjoined could not recover damages occasioned thereby unless it was shown that the injunction was sued out through malice and without probable cause. In other words, the only relief for injury, however grievous or oppressive, which the defendant had on defeating a wrongful writ of injunction was an action as in other cases for malicious prosecution, to sustain which it was necessary to allege and prove that the injunction was sued out through malice and without probable cause.³

Resultant Injustice to Defendant Gave Rise to Practice of Requiring Bond.—The frequent injustice and the great and irreparable damage thus following hasty and ill-advised injunctions encouraged the equity courts to require of the plaintiff, in their discretion, when asking this extraordinary writ, some pledge or security to answer for such damages as might be done to the defendant in case on final hearing it should be determined that there were no grounds for such injunction.⁴

Right of Court to Require Bond Now Unquestioned.—At the present time, independently of any statutory provision on the subject, the power of courts of equity, on application for a preliminary injunction, to require from the complainant a bond to indemnify the defendant against whom the injunction is sought, as a condition precedent to granting the injunction, is too well established to be open to question.⁵

Requirement of Bond Discretionary at Common Law.—Where there is no statute expressly directing that a bond shall be given before the issuance of an injunc-

No Matter How Unreasonable and Unjust the Injunction May Be in its terms, it must, nevertheless, be obeyed until dissolved. *Stimpson v. Putnam*, 41 Vt. 238.

Failure to Indorse Order on Petition.—The fact that the order allowing an injunction is not indorsed on the petition, but is indorsed on a separate piece of paper, will not prevent a violation of such injunction being contempt. *Jordan v. Circuit Ct.*, 69 Iowa 177.

Papers Insufficient to Make Out Case.—In proceedings to punish for contempt any violation of an injunction it is no defense that the injunction was granted on papers which did not make nor tend to make a sufficient case for injunction. *Koehler v. Farmers', etc., Nat. Bank*, (Supm. Ct. Gen. T.) 17 Civ. Pro. (N. Y.) 307.

Defective Service.—In a proceeding to punish an agent of the defendant for violating an injunction it cannot be set up as a defense that the writ had not been served on the defendant himself, it being intended to restrain his agents and servants as well as himself. *Daly v. Amberg*, (Supm. Ct. Gen. T.) 13 N. Y. Supp. 379, 126 N. Y. 490.

Injunction Granted under Unconstitutional Statute.—It is no defense to a prosecution for violation of an injunction that the statute

prohibiting the act enjoined is unconstitutional; the injunction, though erroneous, is not void. *People v. Bouchard*, (Supm. Ct. Spec. T.) 6 Misc. (N. Y.) 459.

1. **Merits of Case Not Considered.**—*People v. Spalding*, 2 Paige (N. Y.) 326.

2. **Violation of Void Injunctions—Effect.**—See the title **CONTEMPT**, vol. 7, p. 56.

3. **Bonds Formerly Not Required.**—*Harless v. Consumers' Gas Trust Co.*, 14 Ind. App. 545; *St. Louis v. St. Louis Gaslight Co.*, 82 Mo. 349; *Teasdale v. Jones*, 40 Mo. App. 243; *Disbro v. Disbro*, (Supm. Ct. Gen. T.) 37 How. Pr. (N. Y.) 147.

4. *Harless v. Consumers' Gas Trust Co.*, 14 Ind. App. 545; *Teasdale v. Jones*, 40 Mo. App. 243; *St. Louis v. St. Louis Gaslight Co.*, 82 Mo. 349.

5. **Courts May Require Bond Without Statutory Authority.**—*Consolidated Fruit Jar Co. v. Whitney*, 1 B. & A. Pat. Cas. 361; *Tobey Furniture Co. v. Colby*, 35 Fed. Rep. 594; *Shelly v. Brannan*, 4 Fish. Pat. Cas. 198; *Lowenfeld v. Curtis*, 72 Fed. Rep. 105; *Wagner v. Shank*, 59 Md. 313; *White v. Davidson*, 8 Md. 169, 63 Am. Dec. 699; *Alexander v. Ghiselin*, 5 Gill (Md.) 138; *Foster v. Goodrich*, 127 Mass. 176; *Newell v. Partee*, 10 Humph. (Tenn.) 326.

tion to stay the execution of a judgment, the matter is left to the discretion of the court;¹ but the practice of requiring bonds, except, perhaps, in extreme and exceptional cases, seems to be almost universally prevalent.²

Plaintiff's Liability Dependent on Bond in Absence of Malice. — The liability of the plaintiff in an injunction suit to respond to the defendant depends upon the obligation exacted from the plaintiff before awarding an injunction to him,³ and without some security given before the granting of an injunction order, or without some order of the court or judge requiring some act on the part of the plaintiff which is equivalent to the giving of security, the defendant has no remedy for any damages which he may sustain from the issuing of the injunction unless the conduct of the plaintiff has been such as to give ground for an action for malicious prosecution.⁴

(2) **Under Statutes.** — The Justice of Requiring Some Security from the party applying for an injunction, that he will indemnify the defendant against any loss which the latter may sustain by the wrongful issue of the injunction, is so apparent that the codes and statutes of most of the states expressly provide that a bond shall be required as a condition of granting an injunction.⁵

1. Discretion as to Requiring Bond. — *Wagner v. Shank*, 59 Md. 313; *White v. Davidson*, 8 Md. 159, 63 Am. Dec. 699; *Cape Sable Co.'s Case*, 3 Bland (Md.) 606; *School Com'rs v. School Com'rs*, 77 Md. 283.

2. Bonds Usually Required. — *Wagner v. Shank*, 59 Md. 313; *Alexander v. Ghiselin*, 5 Gill (Md.) 138; *Walsh v. Smyth*, 3 Bland (Md.) 9; *Mayer v. Tyson*, 1 Bland (Md.) 559. See also *Neal v. Taylor*, 56 Ark. 521; *Smith v. Gufford*, 36 Fla. 481, 51 Am. St. Rep. 37; *Macon, etc., R. Co. v. Gibson*, 85 Ga. 1, 21 Am. St. Rep. 135; *Teasdale v. Jones*, 40 Mo. App. 243.

3. Liability Dependent on Bond. — *St. Louis v. St. Louis Gaslight Co.*, 82 Mo. 349.

4. Exception — Action for Malicious Prosecution. — *Palmer v. Foley*, 71 N. Y. 106. See also *Russell v. Farley*, 105 U. S. 433; *Gorton v. Brown*, 27 Ill. 489, 81 Am. Dec. 245; *Lexington, etc., R. Co. v. Applegate*, 8 Dana (Ky.) 289, 33 Am. Dec. 497; *Ricard v. Harrison*, 19 La. Ann. 181; *Iron Mountain Bank v. Mercantile Bank*, 4 Mo. App. 505; *St. Louis v. St. Louis Gaslight Co.*, 82 Mo. 349; *Lawton v. Green*, 5 Hun (N. Y.) 157; *Sturgis v. Knapp*, 33 Vt. 486.

5. Bond Required by Statute — Alabama. — *Ex p. Fechheimer*, 103 Ala. 154; *Bolling v. Tate*, 65 Ala. 417, 39 Am. Rep. 5; *Buckner v. Stewart*, 34 Ala. 529; *Jones v. Ewing*, 56 Ala. 360; *Thorington v. Gould*, 59 Ala. 461.

Arizona. — *Richards v. Green*, (Ariz. 1890) 32 Pac. Rep. 266.

Arkansas. — *Hunt v. Burton*, 18 Ark. 188; *Ex p. State*, 15 Ark. 263; *Marshall v. Green*, 24 Ark. 410; *Neal v. Taylor*, 56 Ark. 521.

California. — *Elliott v. Osborne*, 1 Cal. 306; *Rice v. Cook*, 92 Cal. 144; *Lambert v. Haskell*, 80 Cal. 611.

Florida. — *Stockton v. Harmon*, 32 Fla. 312; *Smith v. Gufford*, 36 Fla. 481, 51 Am. St. Rep. 37; *Thompson v. Maxwell*, 16 Fla. 773; *Lewton v. Hower*, 18 Fla. 872.

Georgia. — In Georgia it was provided by the Act of 1811 that no injunction could be granted until the party applying for it had previously given to the party against whom the injunction was to operate a bond with good and sufficient security for the eventual

condemnation money, together with all future costs. *Guerry v. Durham*, 11 Ga. 9; *Habersham v. Carter*, R. M. Charl. (Ga.) 526. By the amendatory Act of 1842 the judges of the Superior Courts of the state were authorized to grant injunctions upon such security and under such terms as in their discretion the court might require. *Guerry v. Durham*, 11 Ga. 9. See also *Macon, etc., R. Co. v. Gibson*, 85 Ga. 1, 21 Am. St. Rep. 135; *Nacoochee Hydraulic Min. Co. v. Davis*, 40 Ga. 309; *Barnesville Sav. Bank v. Respass*, 73 Ga. 103.

Illinois. — *Gorton v. Brown*, 27 Ill. 489, 81 Am. Dec. 245; *Brough v. Schanzenbach*, 59 Ill. App. 407; *Billings v. Sprague*, 49 Ill. 509.

Indiana. — *Stone v. Keller*, 4 Ind. App. 436; *State Bank v. Macy*, 4 Ind. 362; *Osborn v. Ellis*, 1 Ind. 451; *Lewis v. Rowland*, 131 Ind. 103; *Lemon v. Morehead*, 8 Blackf. (Ind.) 561; *Robertson v. Smith*, 129 Ind. 422.

Iowa. — *Way v. Lamb*, 15 Iowa 79; *State v. Simpkins*, 77 Iowa 676; *Hardin v. White*, 63 Iowa 633.

Kansas. — *State v. Kearney County*, 42 Kan. 739; *State v. Eggleston*, 34 Kan. 714; *State v. Rush County*, 35 Kan. 150.

Kentucky. — *Hanley v. Wallace*, 3 B. Mon. (Ky.) 184; *Cox v. Taylor*, 10 B. Mon. (Ky.) 17; *Johnson v. Vaughan*, 9 B. Mon. (Ky.) 217.

Louisiana. — *Lafon v. Gravier*, 1 Mart. N. S. (La.) 243; *Peterson v. Stewart*, 6 La. Ann. 808; *Ricard v. Harrison*, 19 La. Ann. 181; *Gillaspie v. Scott*, 32 La. Ann. 767; *Hodgson v. Roth*, 33 La. Ann. 941; *Berens v. Boutte*, 31 La. Ann. 112.

Maine. — *Union Wharf v. Mussey*, 48 Me. 307.

Michigan. — *Lawton v. Richardson*, 115 Mich. 12; *Hinkle v. Baldwin*, 93 Mich. 422; *Jennets v. Smith*, 58 Mich. 281; *Torrent v. Muskegon*, 47 Mich. 115, 41 Am. Rep. 715; *Manistique Lumbering Co. v. Lovejoy*, 55 Mich. 189; *Carroll v. Farmers', etc., Bank, Harr. (Mich.)* 197.

Mississippi. — *Freeman v. Lee County*, 66 Miss. 1.

Missouri. — *Dorriss v. Carter*, 67 Mo. 544; *Teasdale v. Jones*, 40 Mo. App. 243; *St. Louis v. St. Louis Gaslight Co.*, 82 Mo. 349.

Montana. — *Lee v. Watson*, 15 Mont. 228.

Statutes Mandatory. — It has been held that such statutes are mandatory,¹ and that the court cannot dispense with the filing of a bond as preliminary to the injunction when it is required by the statute.²

As Condition for Issuing Restraining Orders. — In some states where an undertaking is expressly required as a condition of issuing an injunction the statute discriminates between injunctions and restraining orders, and no bond is required before issuing the latter,³ though even in these jurisdictions it would seem proper for the court to require bond.⁴ In one state, however, it is expressly held that before making an order for temporary restraint, security may be required as upon the allowance of an injunction.⁵

(3) **When Unnecessary** — **Injunction on Final Decree.** — The statutes requiring bond apply only to temporary injunctions. They have no application to final injunctions which conclusively settle the rights of the parties, leaving no

Nebraska. — State v. Greene, 48 Neb. 327.

New Jersey. — Marlatt v. Perrine, 17 N. J. Eq. 49; Phillips v. Pullen, 45 N. J. Eq. 157; Cairo, etc., R. Co. v. Titus, 26 N. J. Eq. 94.

New York. — Manufacturers, etc., Bank v. C. W. F. Dare Co., 67 Hun (N. Y.) 44; Gilman v. Prentice, (N. Y. Super. Ct. Spec. T.) 11 Civ. Pro. (N. Y.) 310; Sweetser v. Smith, (Supm. Ct. Spec. T.) 22 Abb. N. Cas. (N. Y.) 319; Rossov v. Bank of Commerce, 22 N. Y. Wkly. Dig. 448; Pratt v. Underwood, (Supm. Ct. Gen. T.) 4 Civ. Pro. (N. Y.) 107; Leffingwell v. Chave, 5 Bosw. (N. Y.) 703; Dickey v. Craig, 5 Paig. (N. Y.) 283; Cook v. Dickerson, 2 Sandf. (N. Y.) 691.

North Carolina. — Wilson v. Featherstone, 120 N. Car. 449; Howze v. Green, Phil. Eq. (62 N. Car.) 250; Burnett v. Nicholson, 79 N. Car. 548; James v. Withers, 114 N. Car. 474.

Pennsylvania. — Erie, etc., R. Co. v. Casey, 26 Pa. St. 237; Com. v. Franklin Canal Co., 21 Pa. St. 117.

South Carolina. — Garlington v. Copeland, 43 S. Car. 389; Tryon v. Robenson, 10 Rich. L. (S. Car.) 160.

Texas. — Gaskins v. Peebles, 44 Tex. 390; James v. Reynolds, 2 Tex. 250; Taylor v. Gillean, 23 Tex. 508; Ricker v. Douglas, 75 Tex. 180; Williams v. Huff, Dall. (Tex.) 554.

Virginia. — Lomax v. Picot, 2 Rand. (Va.) 247.

Washington. — Keeler v. White, 10 Wash. 420; Cherry v. Western Washington Industrial Exposition Co., 11 Wash. 586.

West Virginia. — Holliday v. Myers, 11 W. Va. 276.

Wisconsin. — Cooper v. Tappan, 4 Wis. 362.

Canada. — Board of Temporalities v. Dobie, 23 L. C. Jur. 229; Dobie v. Board of Management, 23 L. C. Jur. 71.

A Judgment Entered by Confession upon a bond with warrant of attorney is within the provisions of the *New Jersey* statute requiring that the defendant shall give security before the issuing of an injunction to stay proceedings at law in any personal action after verdict or judgment. Marlatt v. Perrine, 17 N. J. Eq. 49. See also Farrington v. Freeman, 2 Edw. (N. Y.) 572.

1. Statutes Mandatory. — James v. Withers, 114 N. Car. 474; Wilson v. Featherstone, 120 N. Car. 449; Hunt v. Smith, 1 Rich. Eq. (S. Car.) 277.

Security Required Even Where Complainant Sues in Forma Pauperis. — In *North Carolina* it is

held that under a statute providing that no injunction shall issue except upon security, a complainant, even if permitted to sue *in forma pauperis*, must give bond, on the ground that the statute allowing a suit *in forma pauperis* does not embrace an injunction. Howze v. Green, Phil. Eq. (62 N. Car.) 250.

2. Courts Cannot Dispense with Bond Required by Statute. — Russell v. Farley, 105 U. S. 433; State v. Kearny County, 42 Kan. 739; Carroll v. Farmers', etc., Bank. Harr. (Mich.) 197; State v. Greene, 48 Neb. 327; Phillips v. Pullen, 45 N. J. Eq. 157; Miller v. Parker, 73 N. Car. 58; Hunt v. Smith, 1 Rich. Eq. (S. Car.) 277; Lomax v. Picot, 2 Rand. (Va.) 247. See also Harless v. Consumers' Gas Trust Co., 14 Ind. App. 545, holding that in *Indiana* the court has no discretion except in a few cases specially provided by statute, but can issue a temporary injunction only upon the filing of an undertaking.

Bond by Administrators or Other Fiduciaries. — In some cases, statutes in reference to bonds as a condition to the issuance of an injunction have been held to embrace executors, administrators, and other fiduciaries. Habersham v. Carter, R. M. Charl. (Ga.) 526; Osborn v. Ellis, 1 Ind. 451; Mahan v. Tydings, 10 B. Mon. (Ky.) 351. In others the contrary has been held. State v. Johnson, 28 W. Va. 73; Lomax v. Picot, 2 Rand. (Va.) 247.

In *Brown v. Speight*, 30 Miss. 45, it was held that it is right and proper that the court or chancellor should require such bond when an injunction is granted at the instance of an administrator, to restrain proceedings at law before judgment.

Receivers Required to Give Bond. — It is erroneous to grant an injunction at the suit of a receiver without requiring him to give the usual injunction bond, and the bond given by him as a receiver for the purpose of his general duties is not sufficient. Keeler v. White, 10 Wash. 420; Cherry v. Western Washington Industrial Exposition Co., 11 Wash. 586.

3. Restraining Orders. — San Diego Water Co. v. Pacific Coast Steamship Co., 101 Cal. 216; *In re* Mitchell, McCahon (Kan.) 256; Burnett v. Nicholson, 79 N. Car. 548.

4. Requirement of Bond Held Discretionary with Court. — Adams v. Crittenden, 4 Woods (U. S.) 618; San Diego Water Co. v. Pacific Coast Steamship Co., 101 Cal. 216.

5. Methodist Churches v. Barker, 18 N. Y. 463.

question of future damages.¹

Where Complainant's Right Is Clear. — So it has been held that where upon the case made by the bill the right of the complainant is clear and the infraction of that right is established, the complainant will not be required to give security for such damages as the defendant may sustain by reason of the injunction.² Under such circumstances the fact that the injunction occasions a serious loss to the defendant affords no just ground of complaint, since he is merely deprived of the enjoyment of that which belongs to another.³

Where Answers Show Case for Perpetual Injunction. — Though upon failure to file a bond before the issuance of an injunction the defendants might petition for an order requiring the giving of the bond by a reasonable time,⁴ yet when the answers have come in and show on their face a case for a perpetual injunction, and the continuance of the writ is not dependent upon a question of law or fact to be subsequently established, it would, it has been held, be wholly unnecessary to require a bond.⁵

Injunctions to Restrain Sales of Exempt Property. — Injunctions granted simply to restrain the forced sale of property claimed to be exempt from sale under the constitution of a state are not injunctions to stay proceedings at law within the meaning of a statute prohibiting the granting of injunctions to stay proceedings at law unless bond is given.⁶

Suits Instituted in Courts of Foreign State on Judgment. — In one state it has been held that where a judgment has been recovered and a suit has been brought thereon in the courts of another state, such suit does not come within the prohibition that no injunction shall issue to stay proceedings at law in any personal action, after verdict or judgment, on the application of the defendant in such proceedings unless a deposit be made or a bond be given.⁷

Where Complainant Is Unable to Give Bond. — In at least one state, where the statute requires that bond shall be given before an injunction is issued, it has been held that where summary process by injunction is prayed, and the bill justifies such process, and affidavit is made of the truth of the statements of the bill and that the complainant is unable to give the bond of indemnity or other security, the chancellor shall receive *ex parte* evidence of the truth of the statements of the bill and of the accompanying affidavit, and if they appear to be true shall grant such process without requiring security.⁸

Specific Statutory Exceptions. — In some jurisdictions, while as a general rule a bond is required before the issuance of an injunction, it is provided that a defendant in executory process can arrest the proceeding without bond, by alleging one of several specified reasons.⁹

1. **Injunction on Final Decree.** — *Lake Erie, etc., R. Co. v. Cluggish*, 143 Ind. 347; *Com. v. Franklin Canal Co.*, 21 Pa. St. 130. See also *Denny v. Moore*, 13 Ind. 418.

2. **Where Right to Injunction Is Clear.** — *Dodd v. Flavell*, 17 N. J. Eq. 255.

Bond Dispensed with Because of Bad Faith of Defendant. — In *Pasteur Chamberland Filter Co. v. Funk*, 52 Fed. Rep. 146, a preliminary injunction against the infringement of a patent was granted without requiring a bond, for the reason that the defendant had been guilty of bad faith towards the plaintiff to such an extent that he was held not equitably entitled to the protection of the usual bond.

3. **Reason for Rule.** — *Dodd v. Flavell*, 17 N. J. Eq. 255.

4. See *infra*, this section, *Effect of Issuance Before Execution of Bond*.

5. *Alexander v. Ghiselin*, 5 Gill (Md.) 138.

6. **Enjoining Sales of Exempt Property.** — *Smith v. Gufford*, 36 Fla. 481, 51 Am. St. Rep. 37; *Lewton v. Hower*, 18 Fla. 872.

7. **Suit in Foreign Jurisdiction.** — *Cairo, etc., R. Co. v. Titus*, 26 N. J. Eq. 94, in which case the court said: "I am of opinion that the legislature meant, by the expression 'proceedings at law in a personal action after verdict or judgment,' proceedings at law in the suit by execution, or otherwise. It would be a reasonable construction to extend the prohibition to a suit at law here upon judgment recovered in this state. A suit at law in another state upon the judgment is not within the meaning of the provision."

8. **Inability to Give Bond.** — *M'Michael v. Grady*, 34 Fla. 219; *Thompson v. Maxwell*, 16 Fla. 773. See also *Swepton v. Call*, 13 Fla. 337.

9. **In Louisiana, under Code Prac., art. 739, 740,** the defendant in executory process can arrest the proceeding without bond, by alleging some of the following reasons: (1) That he has paid the debt for which he is sued; (2) that he has been remitted by the creditor; (3) that it has been extinguished by transaction,

(4) Execution of Bond Requisite to Effectiveness of Order — (a) General Rule.

— As a general rule, where the giving of a bond is a condition precedent an injunction should not take effect until the requisite bond is executed.¹

(b) Effect of Issuance Before Execution of Bond — Injunction Irregular and Not Void.

Although the general rule is as just stated, yet it would seem that if by accident the injunction is made to take effect before the bond is executed, this fact will not be sufficient ground for reversing the order granting it.² An injunction thus improperly issued without a bond is irregular but not void.³

Allowance of Time to Execute Proper Bond. — The proper practice in such a case would seem to be to allow a reasonable time after the attention of the party is called to the defect in which to execute a bond, and in default of the execution of a bond within a reasonable time the injunction should be dissolved.⁴

Waiver. — Where during a number of years a defendant makes no objection to the omission of one who has obtained an injunction against him to give bond, it would seem that the defendant may be held to have waived the irregularity by his delay.⁵

6. PURPOSE OF BOND — In General. — An injunction bond is intended as security for damages in case it is finally decided that the injunction ought not to have been granted.⁶ It is designed to indemnify against immediate and actual loss, but not against remote injuries.⁷

What Liability Imported by Bond. — The liability imported by an injunction bond would seem to depend upon the purpose of the injunction proceedings in

novation, or some other legal manner; (4) that time has been granted to him for paying the debt, although this circumstance be not mentioned in the contract; (5) that the act containing the privilege or mortgage is forged; (6) that it was obtained by fraud, violence, fear, or some other unlawful means; (7) that he has a liquidated account to plead in compensation of the debt claimed; (8) finally, that the action for the recovery of the debt is barred by prescription. *Hodgson v. Roth*, 33 La. Ann. 941.

1. Injunction Inoperative Without Bond. — *Elliott v. Osborne*, 1 Cal. 396; *Carter v. Mulrein*, 82 Cal. 167, 16 Am. St. Rep. 99; *Van Fleet v. Stout*, 44 Kan. 523; *State v. Kearny County*, 42 Kan. 739; *Pell v. Lander*, 8 B. Mon. (Ky.) 554; *Davis v. Hoopes*, 33 Miss. 173; *Davis v. Dixon*, 1 How. (Miss.) 64, 26 Am. Dec. 695; *State v. Greene*, 48 Neb. 327; *Marlatt v. Perrine*, 17 N. J. Eq. 49; *Clarke v. Hoomes*, 2 Hen. & M. (Va.) 23; *Chesapeake, etc., R. Co. v. Patton*, 5 W. Va. 234.

Indorsement that Operation Is Suspended until Bond Given. — Upon issuing an injunction against proceedings at law, the clerk must indorse on the writ that its operation is suspended until bond is given, and unless bond is given by all the parties applying for it the injunction will be inoperative. *Davis v. Dixon*, 1 How. (Miss.) 64, 26 Am. Dec. 695; *Boswell v. Wheat*, 37 Miss. 610.

2. Injunction Issued Before Bond Irregular Only. — *Chesapeake, etc., R. Co. v. Patton*, 5 W. Va. 234.

3. Jones v. Ewing, 56 Ala. 360; *Lewis v. Rowland*, 131 Ind. 103; *Manley v. Leggett*, 62 Hun (N. Y.) 562; *McKay v. Chapin*, 120 N. Car. 159; *Young v. Rollins*, 90 N. Car. 125; *Sledge v. Blum*, 63 N. Car. 374; *Watson v. Citizens' Sav. Bank*, 5 S. Car. 159. See also *Richards v. Baurman*, 65 N. Car. 162. See, however, *Lawton v. Richardson*, 115 Mich.

12, in which case it was held that an injunction issued without the bond required by statute is a nullity. *Pell v. Lander*, 8 B. Mon. (Ky.) 554; *Miller v. Parker*, 73 N. Car. 58. But it should be observed that in this last case the order was vacated upon the peremptory demands of the statute, because no such bond had been given.

4. Reasonable Time for Execution of Bond Allowed. — *Jones v. Ewing*, 56 Ala. 360; *Chesapeake, etc., R. Co. v. Patton*, 5 W. Va. 234.

Petition by Defendant for Order Requiring Bond. — In general, where an injunction issues without bond the defendants may petition for an order of court requiring that bond be given or on default that the injunction be dissolved. *Alexander v. Ghiselin*, 5 Gill (Md.) 138.

Filing of Bond and Issuance of Writ on Same Day. — The filing of an injunction bond and the consequent issue of the writ on the same day are regarded as concurrent acts, and a recital in the bond that the obligors "have obtained" such writ will be interpreted in the present tense, and held to refer to the writ actually issued. *Wallis v. Dilley*, 7 Md. 237.

5. Waiver of Irregularity. — *Howze v. Green*, Phil. Eq. (62 N. Car.) 250.

6. Object of Bond. — *Fox v. Hudson*, 20 Kan. 246; *Smith v. Kuhl*, 26 N. J. Eq. 97. See also *Hibbard v. McKindley*, 28 Ill. 245; *Brown v. Gorton*, 31 Ill. 416; *Napier v. Gidiere*, 7 Rich. Eq. (S. Car.) 254.

"It is to protect where the injunction suspends the prosecution of some work, or keeps the party enjoined out of the possession or restrains him from the enjoyment of property to which he is entitled, and the temporary deprivation of which might cause him some actual loss or injury." *Edwards v. Bodine*, 4 Edw. (N. Y.) 292.

7. Hibbard v. McKindley, 28 Ill. 240; *Brown v. Gorton*, 31 Ill. 416. See also *infra*, this section, *Measure of Damages*.

which it was given; thus where the bond is given to secure an injunction of a judgment, the obligor will be liable for the amount of the judgment.¹ Where, however, a bond is given by a stranger to a judgment to secure an injunction against the sale of a particular article of property, such bond, whatever may be its conditions, would seem to operate in equity only as a security to the party enjoined, for any injury that may accrue, and not for the amount of the debt.²

c. BY WHAT STATUTES CONSTRUED. — An injunction bond must be construed according to the statute in force at the time of its execution.³

d. EXECUTION, SIGNATURE, AND APPROVAL OF BOND — *By Whom Executed.* — Although under the statutes of one state it has been held that the party applying for the injunction must give or execute the bond,⁴ yet as a general rule it would seem that the statutory requirement of a bond will be satisfied if the party obtaining the injunction gives or furnishes the bond, and that he need not himself execute it.⁵

Time of Execution. — As the execution of an injunction bond, where such bond is required, is requisite to the effectiveness of the order granting an injunction, the bond is always to be executed before the execution of the writ.⁶

Place of Execution and Signature. — The proper place for the execution and signature of an injunction bond is a matter controlled entirely by statutory provisions, differing in the various states.⁷

1. Bond to Secure Injunction of Judgment. — *Hunt v. Scobie*, 6 B. Mon. (Ky.) 460.

Undertaking Applies to all Defendants though Part Only Restrained. — In *Tucker v. New Brunswick Trading Co.*, 44 Ch. D. 249, Cotton, L. J., said: "As a general rule, I think that when an injunction is granted the undertaking as to damages ought not to be confined to the persons restrained. In *Pemberton on Decrees* (4th ed.) 435, it is said: 'The undertaking applies to all the defendants, although one or more only may be restrained.' Mr. *Pemberton* does not refer to any authority for this; but I consider it to be a correct statement of the practice."

2. Bond Given by Stranger to Judgment. — *Hanley v. Wallace*, 3 B. Mon. (Ky.) 184.

3. By What Statutes Governed. — *Mix v. Vail*, 86 Ill. 40; *Alwood v. Mansfield*, 81 Ill. 314; *Krug v. Bishop*, 44 Ohio St. 221.

A Statute Passed Before the Execution of an injunction bond, but which does not take effect until afterwards, is as to such undertaking no statute, and can have no effect on the bond. *Mix v. Vail*, 86 Ill. 40.

4. Execution by Party Applying for Injunction. — *Com. v. Franklin Canal Co.*, 21 Pa. St. 117.

5. Plaintiff Need Not Execute Bond. — *Pence v. Durbin*, 1 Idaho 550; *State v. Eggleston*, 34 Kan. 714; *Teasdale v. Jones*, 40 Mo. App. 243.

Execution by Competent Persons Furnished by Plaintiff or Attorney. — In *Leffingwell v. Chave*, 5 Bosw. (N. Y.) 703, it was held that under Code Pro. *New York*, § 222, which required an undertaking "on the part of the plaintiff, with or without sureties," an undertaking executed by any persons of competent ability furnished by the plaintiff or his attorney was sufficient. The plaintiff need not execute it.

In *Louisiana* the defendant has the right to require bond from the plaintiff, or some one duly authorized to execute it for him. *State Bank v. Wilson*, 19 La. Ann. 3.

In *Florida* it was held that a statute prohibiting attorneys from signing bonds as sureties does not protect them from signing bonds as principals or in behalf of the parties. *Cunningham v. Tucker*, 14 Fla. 251.

Signature by Principal. — In those jurisdictions where an injunction bond may be executed by others than the principal, upon the dissolution of an injunction, the damages sustained thereby may be assessed against the plaintiff though he did not sign the bond. *Teasdale v. Jones*, 40 Mo. App. 243.

Injunction in Name of City — Bond Signed by City Officers. — In *Hawthorne v. McArthur*, 8 Ky. L. Rep. 526, it was held that where city officers have sued out an injunction in the name of the city, and have signed their names to the bond, they cannot escape liability thereon because the city did not sign the bond.

6. Execution of Bond Before Issuance of Injunction. — *Adams v. Olive*, 57 Ala. 249.

Bond Need Not Be Tendered with Bill. — In *Negro Charles v. Sheriff*, 12 Md. 274, it was held that it was no objection to the bill for an injunction that no injunction bond was tendered, since no such bond could be tendered until the court had fixed the amount of the bond.

7. In Kentucky an injunction bond must be executed in the office of the clerk of the court whose judgment is enjoined, and it would seem that one which is not executed there is on that account invalid, and the defendant may, on motion, have the injunction discharged on that ground. If, however, no such motion for discharge is made, it will furnish no defense to a suit on the bond that it was not executed in the clerk's office. *Cobb v. Curtis*, 4 Litt. (Ky.) 235.

In *Virginia* the statute (now Code Va., § 3442) does not require that the bond upon an injunction to a judgment shall be executed in the presence of the court, but it must be

Approval of Bond. — So also the approval of an injunction bond and the designation of the proper officer by whom it is to be approved are matters regulated solely by statute. Thus in some jurisdictions it is expressly provided by statute that in all cases in which bonds are required as a condition precedent to the issuing of a writ of injunction the surety shall be approved by the court, judge, or master granting or ordering the injunction.¹

Power Not to Be Delegated. — And where this is the case the power to approve cannot be delegated to the clerk.²

Approved by Clerk. — In other jurisdictions, however, the duty of approving and accepting injunction bonds where the injunction bond is granted out of court is expressly imposed upon the clerk.³

e. TO WHOM PAYABLE. — Usually, it is apprehended, the statutes require that the bond shall be made payable to the adverse party,⁴ but a substantial compliance with this requirement will be sufficient.⁵

f. CONSIDERATION FOR BOND. — In the case of an injunction against a judgment, the suspension and delay of execution to be produced by the

executed before the clerk of the court in which the judgment was. That it was given before the court will not, however, vitiate such bond. *Harman v. Howe*, 27 Gratt. (Va.) 676.

In Louisiana it is unnecessary that an injunction bond should be signed by the surety in the presence of the clerk of the court where the genuineness of such signature and the sufficiency of the surety are satisfactorily proved. *Catalogne v. Bauries*, 4 La. Ann. 567.

See also the various local statutes.

Effect of Obligor's Signature in Blank. — It would seem that an obligor who leaves his signature in blank to an injunction bond with the clerk of the court will be bound thereby when such bond is filled up. *Breedlove v. Johnston*, 2 Mart. N. S. (La.) 517.

1. Acceptance and Approval Not Imported by Delivery to Clerk. — The mere delivery to the clerk of an injunction bond does not import its acceptance and approval by the court. *Burgess v. Lloyd*, 7 Md. 178.

Indorsement of Court's Approval. — It is proper but not absolutely essential that the approval of the court or judge should be indorsed upon the bond. *Griffin v. Wallace*, 66 Ind. 410.

Evidence of Approval. — "In *Patterson v. Stair*, 26 Ind. 137, the court say: 'We must also consider the fact that the undertaking was read to the court, and thereupon the restraining order was continued, as conclusive evidence that the court approved the bond.'" *Griffin v. Wallace*, 66 Ind. 410.

2. Power Cannot Be Delegated to Clerk. — *Rutan v. Lagonda Nat. Bank*, 72 Ill. App. 35. But a bond so approved may be good as a common-law obligation. *Bochner v. Automatic Time Stamp Co.*, 80 Ill. App. 27.

As to the nature of the office of clerk of court, the clerk's powers, duties, and liabilities, see the title *CLERKS OF COURT*, vol. 6, p. 132.

3. Approval by Clerk. — *Greathouse v. Hord*, 1 Dana (Ky.) 105.

Presumption as to Approval. — In *Catalogne v. Bauries*, 4 La. Ann. 567, it was held that approval by the clerk will be presumed from the fact that he issued the injunction. See also *Burgess v. Lloyd*, 7 Md. 178, holding that where the bond is tendered and remains in the

clerk's office and is acted under by the authorities the presumption of acceptance and approval by the proper authorities will arise.

Clerk May Take Other Surety than That Designated. — The security in an injunction bond, the injunction being granted out of court, is to be approved by the clerk, and so much of the order granting an injunction as designates the surety to be taken on the bond is a nullity. The injunction is valid though the clerk take a different surety from the one designated in the order. (*Acts of Kentucky*, Sess. 1826, 127.) *Greathouse v. Hord*, 1 Dana (Ky.) 105.

4. Bonds Payable to Adverse Party. — *Scott v. Fowler*, 7 Ark. 299; *Cay v. Galliot*, 4 Strobb. L. (S. Car.) 282; *Parker v. Boyd*, (Tex. Civ. App. 1897) 42 S. W. Rep. 1031.

5. Bonds Held Sufficient. — In *Scott v. Fowler*, 7 Ark. 299, it was held that an injunction bond executed to Harrell and Scott, upon suing out a writ of injunction against a judgment at law rendered in favor of Harrell for the use of Scott, is a bond to the "adverse party," within the statute, and suit may be maintained thereon for breach of its condition.

Under the *South Carolina* statute of 1784, the bond of one applying for a stay of execution by injunction must be taken in the name of the plaintiff. In *Cay v. Galliot*, 4 Strobb. L. (S. Car.) 282, the master, on granting the injunction, took a bond payable to himself and his successors in office and then assigned it to the plaintiff. It was held that the bond was good, and that the assignees could sue thereon.

In *Parker v. Boyd*, (Tex. Civ. App. 1897) 42 S. W. Rep. 1031, under a statute requiring that the bond should be payable to the adverse party, the bond in a suit to enjoin an execution, where the sheriff and his deputy and the judgment creditor were codefendants, was made payable to the judgment creditor "et al." It was held not reversible error to refuse to quash such bond.

In *Thompson v. Hall*, 67 Ga. 627, where the bond was made payable to "Hull & Long," instead of to "Hall & Long," it was held that the mistake was one which was relievable either in equity or at law, and that the discrepancy was not available in an action on the bond.

injunction have been held to be, *prima facie* at least, a sufficient consideration for the execution of the bond.¹

g. TO WHOSE BENEFIT BOND INURES. — An injunction bond (at least where the injunction is granted before service of process) is for the benefit of all the defendants who are enjoined, whether served or not served; and if a defendant, without any service of the summons or injunction upon him, obeys the injunction, he is entitled to damages upon the dissolution of the injunction.²

h. FORM AND CONDITIONS OF BOND — (1) *When Prescribed by Statute* — Generally. — In many of the states the statutes requiring a bond as a condition precedent to an order of injunction prescribe, at least in general terms, the conditions of such bond.³

Statutory Provisions Must Be Complied With. — Where the conditions of an injunction bond are thus prescribed the bond must conform in terms or substantially to the statutory requirements.⁴ While it has been held that where the injunction bond is defective in not securing the damages according to the conditions prescribed in the statute this will be ground for dissolving the injunction, though not for dismissing the petition,⁵ it is well settled that the statute need not be literally and strictly followed, and that a bond in substantial compliance with the statute is valid.⁶

1. Consideration for Execution of Bond. — *Mahan v. Tydings*, 10 B. Mon. (Ky.) 351, in which case it was held that an injunction bond executed by an executor to enjoin a judgment against him as such is *prima facie* upon good consideration, and a plea averring only that it was without consideration is bad.

2. To Whose Benefit Bond Inures. — *Cumberland Coal, etc., Co. v. Hoffman Steam Coal Co.*, 39 Barb. (N. Y.) 16.

3. Conditions Prescribed by Statute. — See *Stirlen v. Neustadt*, 50 Ill. App. 378; *Alexander v. Gish*, 88 Ky. 13; *Barrett v. Bowers*, 87 Me. 185; *Menken v. Frank*, 57 Miss. 732; *Boswell v. Wheat*, 37 Miss. 610; *Teasdale v. Jones*, 40 Mo. App. 243; *Palmer v. Foley*, 71 N. Y. 106; *Hubbard v. Fravell*, 12 Lea (Tenn.) 304; *Pillow v. Thompson*, 20 Tex. 206; *Harman v. Howe*, 27 Gratt. (Va.) 676.

Representative Statutes. — According to *Neal v. Taylor*, 56 Ark. 521, it would seem that the statute no longer requires the condition that the sureties will abide the decision of the suit for injunction and pay all sums of money adjudged against their principal therein. See *Hunt v. Burton*, 18 Ark. 188; *Blakeney v. Ferguson*, 18 Ark. 347.

In *Illinois*, *Starr & Curt. Annot. Stat.* (1896), c. 69, par. 8, requires that before an injunction shall issue to enjoin a judgment, the complainant shall give a bond with surety, "conditioned for the payment of all moneys and costs due to the plaintiff in the judgment, and such damages as may be awarded against the complainant in case the injunction is dissolved." The bond so required is for payment of the judgment, *i. e.*, "all moneys and costs due to the plaintiff in the judgment," as well as for all damages which may be awarded in case of a dissolution of the injunction." *Stirlen v. Neustadt*, 50 Ill. App. 378.

In *Missouri* it is provided by *Rev. Stat.* 1889, § 5493, that a bond shall be required "in such sum as the court or judge shall deem sufficient to secure the amount or other matter to be enjoined, and all damages that may be occasioned by such injunction to the parties

enjoined or to any party interested in the subject-matter of the controversy, conditioned that the plaintiff will abide the decision which shall be made thereon, and pay all sums of money, damages, and costs that shall be adjudged against him if the injunction shall be dissolved." *Teasdale v. Jones*, 40 Mo. App. 243.

Kentucky. — In *Alexander v. Gish*, 88 Ky. 13, the court said: "Section 278, Civil Code, provides that the court, judge, or officer granting an injunction, shall, in the order granting it, fix the amount of the bond to be given, and may prescribe its terms. If the terms be not prescribed, it shall be to the effect that the party giving it will pay to the party enjoined such damages as he may sustain if it be finally decided that the injunction ought not to have been granted. The terms prescribed in the bond in question are substantially the same as are required in section 278."

4. Substantial Compliance with Statute Necessary. — *Bein v. Heath*, 12 How. (U. S.) 168; *Stirlen v. Neustadt*, 50 Ill. App. 378; *Palmer v. Foley*, 71 N. Y. 106; *Pillow v. Thompson*, 20 Tex. 206.

Omission of Statutory Condition Ground for Reversal. — *Stirlen v. Neustadt*, 50 Ill. App. 378.

5. Bond Defective in Not Securing Damages According to Statutory Provisions. — *Pillow v. Thompson*, 20 Tex. 206.

6. Substantial Compliance Sufficient. — *Alexander v. Gish*, 88 Ky. 13; *Barrett v. Bowers*, 87 Me. 185; *Palmer v. Foley*, 71 N. Y. 106; *Episcopal Church v. Varian*, 28 Barb. (N. Y.) 644; *Cay v. Galliot*, 4 Sirobb. L. (S. Car.) 282; *James v. Reynolds*, 2 Tex. 250; *White v. Clay*, 7 Leigh (Va.) 68; *Cooper v. Tappan*, 4 Wis. 362.

Obligors Bound Where Bond Contains Material Part of Condition. — In *Holliday v. Myers*, 11 W. Va. 276, it was held that although the conditions of an injunction bond are not so extensive as the statute requires, yet if it contains a material part of the condition required, the bond is not void, but binds the obligors to the extent of such condition or conditions.

(2) *Terms Discretionary with Court in Absence of Statute.* — In the absence of statutory provisions prescribing the conditions of an injunction bond, the matter is within the discretion of the chancellor.¹

(3) *Necessity for Direction in Order.* — Where the law furnishes a pattern for an injunction bond, and prescribes its conditions, an order to take such bond "as the law directs" is sufficient. When, however, the chancellor grants an injunction in cases where the law furnishes no model, the order itself ought to direct what kind of a bond should be taken.²

Clerk May Not Insert Conditions Unless Authorized. — It is essential, however, that the conditions of the bond be fixed either by statute or in the exercise of the court's discretion, and the clerk of a court has no power to insert in such bond conditions not prescribed by law or the fiat of a judge.³

(4) *Insertion of Unnecessary Conditions Surplusage.* — The insertion in an injunction bond of conditions not required by law, but not against law, will not vitiate those that are required by law,⁴ and the conditions not required will, it seems, be regarded merely as surplusage.⁵

i. AMOUNT OF BOND — In General. — Although in some cases the amount of an injunction bond is fixed by statute,⁶ yet as a general rule it would seem

Defeasance Clause Improperly Worded. — An injunction bond should, of course, contain a defeasance clause, but the fact that such clause is so worded as to leave the obligors bound notwithstanding they may pay all damages that the plaintiff may sustain has been held not to avoid the bond. *Washington v. Timberlake*, 74 Ala. 259.

When Strict Conformity Necessary. — "To render a bond void for want of conformity to a statute it must be made so by express enactment, or must be intended as a fraud on the obligors by color of law by an evasion of the statute." *Janes v. Reynolds*, 2 Tex. 250.

1. Discretion of Court as to Conditions. — *Walker v. Pritchard*, 135 Ill. 109; *Newell v. Partee*, 10 Humph. (Tenn.) 325; *Hubbard v. Fravell*, 12 Lea (Tenn.) 304; *Black v. Caruthers*, 6 Humph. (Tenn.) 87; *Ranning v. Reeves*, 2 Tenn. Ch. 263. See also *Russell v. Farley*, 105 U. S. 433.

In *Walker v. Pritchard*, 135 Ill. 103, the court said: "We have held that where the collection of a note is enjoined the statute prescribes no rule in regard to the conditions to be inserted in the injunction bond, and that the chancellor may, in the exercise of a reasonable discretion, require the complainant to give security for the payment of the debt in case he fails to maintain his suit." See also *Billings v. Sprague*, 49 Ill. 509; *Barnes v. Brookman*, 107 Ill. 317.

Court May Not Prescribe Unreasonable Conditions. — In cases not provided for by the statutes, the court should prescribe the conditions of the bond; and if unreasonable ones are prescribed, the bond is not obligatory in equity to the extent that it is unreasonable, being without consideration. *Hanley v. Wallace*, 3 B. Mon. (Ky.) 192. See also *Moore v. Hallum*, 1 Lea (Tenn.) 511.

2. Stevenson v. Miller, 2 Litt. (Ky.) 306, 13 Am. Dec. 271.

Effect of Order Granting Injunction "On Usual Terms." — In *Harman v. Howe*, 27 Gratt. (Va.) 676, the judge, in granting an injunction to a judgment for money, indorsed on the bill, "Injunction granted on the usual terms," without stating on what terms it was to become opera-

tive. The bond given was in a penalty about double the amount of the judgment, and was in other respects as prescribed by the statute. It was held that this order would seem to be a compliance with the law directing that the judge should prescribe the amount of the penalty, but that however this might be, the obligors to the bond were estopped from denying that the penalty of the bond conformed to the direction of the judge who awarded the injunction.

3. Hubbard v. Fravell, 12 Lea (Tenn.) 304, citing *Coltart v. Ham*, 2 Tenn. Ch. 356, and *Enochs v. Wilson*, 11 Lea (Tenn.) 228. As to the nature of the office of clerk of a court, the clerk's powers, etc., see the title *CLERKS OF COURTS*, vol. 6, p. 132.

4. Unnecessary Conditions — Effect. — *Johnson v. Vaughan*, 9 B. Mon. (Ky.) 217; *Hopkins v. Morgan*, 7 T. B. Mon. (Ky.) 1; *Menken v. Frank*, 57 Miss. 732; *Rubelman Hardware Co. v. Greve*, 18 Mo. App. 6; *Holliday v. Myers*, 11 W. Va. 276. See also *Miller v. Montague*, 1 Disney (Ohio) 167.

5. Conditions Not Required — Surplusage. — *Johnson v. Vaughan*, 9 B. Mon. (Ky.) 217; *Greathouse v. Hord*, 1 Dana (Ky.) 105; *Holliday v. Myers*, 11 W. Va. 276.

Rejection of Insensible Words. — In *Gully v. Gully*, 1 Hawks (8 N. Car.) 20, it was held that the condition of a bond will be so construed, by rejecting insensible words, as to fulfil the intent of the parties. Hence, if a bond given upon obtaining an injunction be conditioned, "If the said R. [the complainant] should dissolve the injunction, and pay" the sum recovered at law and interest, the words "should dissolve the injunction, and" will be rejected as insensible.

6. Injunction to Restrain Collection of Judgment. — In *Hardin v. White*, 63 Iowa 633, it was held under Code Iowa (1873), §§ 3396, 3397 (Code 1897 §§ 4365, 4366), that where it is sought to restrain the collection of a judgment, the injunction bond must be for double the amount of the judgment; but this rule does not apply where it is sought only to restrain the sale of certain specific property under the execution issued upon the judgment.

that in the matter of ordinary preliminary injunctions the function of fixing the amount of the bond required rests in the sound discretion of the court.¹

Probable Injury from Injunction to Be Considered. — In fixing the amount of the bond the court should exercise a reasonable discretion and should take care in all cases that the bond is sufficient to cover the probable amount of damages which the defendant may sustain by reason of the injunction,² so as to insure with all practicable certainty that he may sustain no ultimate loss in case the injunction should be dissolved.³

j. INSERTION OF NAMES OF SURETIES. — According to the decisions, it would seem to be immaterial that the name of the surety should appear in the body of the injunction bond.⁴

k. MISRECITALS IN BOND — **Effect of Misrecital of Order of Injunction.** — A misrecital in an injunction bond of the order of injunction will not subject the surety to the payment of a judgment at law when it appears from the injunction itself that the collection of the judgment was not enjoined.⁵

Correction of Misrecital in Bond. — A misrecital in the condition of the bond as to the amount of the judgment enjoined may be corrected by the bill where the bond contains a plain reference to it, upon the principle that that is certain which can be made certain.⁶

l. FILING — **Necessity for.** — An injunction bond should be filed with the clerk after being approved.⁷

1. Amount Usually Discretionary with Court. — *Bell v. Riggs*, 37 La. Ann. 813; *Green v. Huey*, 23 La. Ann. 704; *Billingslea v. Gilbert*, 1 Bland (Md.) 566; *Pratt v. Underwood*, (Supm. Ct. Gen. T.) 4 Civ. Pro. (N. Y.) 167; *Gulick v. Heermans*, 6 Luz. Leg. Reg. (Pa.) 227.

Discretion Legal and Not Arbitrary. — *Bell v. Riggs*, 37 La. Ann. 813.

Presumption that Judge Fixed Amount of Bond. — Where the probate judge of a county allows a temporary injunction, but does not expressly state in his written order the amount of the undertaking to be given, but the undertaking which is given and accepted on the day of the allowance of the order recites upon its face that the injunction was granted on condition that the plaintiff give a bond to the defendant in the sum of five hundred dollars, it must be assumed, in the absence of any other showing, that the probate judge fixed the amount of the undertaking and that the bond was given and approved in pursuance of his order. *State v. Eggleston*, 34 Kan. 715.

When Order Fixing Penalty Unnecessary. — In *Hurman v. Howe*, 27 Gratt. (Va.) 676, it was held that where the injunction bond is executed in the presence of the court it is immaterial that the order for the injunction did not fix the penalty of the bond.

2. Probable Amount of Damages. — *Loveland v. Burnham*, 1 Barb. Ch. (N. Y.) 65.

Plaintiff's Demand Not the Criterion. — Under the *Pennsylvania* Act of May 6, 1844 (P. L. 564), the amount of security to be given on the granting of an interlocutory injunction rests in the sound discretion of the court; the plaintiff's demand is not the criterion. *Gulick v. Heermans*, 6 Luz. Leg. Reg. (Pa.) 227.

3. Drake v. Phillips, 40 Ill. 388; *Lomax v. Picot*, 2 Rand. (Va.) 247. See also *Billingslea v. Gilbert*, 1 Bland (Md.) 566.

Effect of Error in Fixing Penalty. — In *Drake v. Phillips*, 40 Ill. 388, the court after stating the rule as above set out, held that where the writ has been properly granted, the fact that

the penalty in the bond is too small does not injure the party against whom the writ is allowed, and the decree will not be reversed for that reason.

Bond Not Void for Failure to Specify Amount — *North Carolina*. — *North Carolina Gold Amalgamating Co. v. North Carolina Ore Dressing Co.*, 79 N. Car. 48.

4. Necessity for Inserting Names of Sureties. — *Griffin v. Wallace*, 66 Ind. 410, citing *Potter v. State*, 23 Ind. 550. In *Hyatt v. Washington*, 20 Ind. App. 148, the court said: "The names of the sureties do not appear in the body of the bond, but that is not material, as the court approved the bond when the restraining order was issued."

5. Misrecital of Order for Injunction. — *Hord v. Trimble*, 1 Litt. (Ky.) 414.

6. Correction of Misrecital. — *Williamson v. Hall*, 1 Ohio St. 190.

7. Filing of Bond. — *Sheldon v. Allerton*, 1 Sandf. (N. Y.) 700; *O'Donnell v. McMurn*, (Supm. Ct. Spec. T.) 3 Abb. Pr. (N. Y.) 391. See also *Lothrop v. Southworth*, 5 Mich. 436.

Effect of Failure to File. — Where, on application for an injunction, an undertaking was presented to the judge and approved by him, and, after the granting of the injunction, was given by the plaintiff's attorney to his clerk to be filed, but the filing was omitted, it was held that the plaintiff should pay costs of a motion to vacate the injunction; and it might have been vacated, had the omission been designed. *O'Donnell v. McMurn*, (Supm. Ct. Spec. T.) 3 Abb. Pr. (N. Y.) 391.

In *Maryland* it was held, in *Burgess v. Lloyd*, 7 Md. 178, that though the statute did not prescribe what should be done with the bond, it should be kept in the clerk's office, but need not be recorded.

In *New Jersey* it is the practice for the chancellor to direct that the bond, instead of being delivered to the defendant, shall be filed in the clerk's office, and it is considered as an escrow to be used by the clerk for the purpose of in-

Bond Operative from Time of Filing. — The bond is a perfect obligation as soon as filed.¹

Necessity for Proof of Execution. — According to some decisions, it is irregular for the plaintiff to file an injunction bond unless its execution has been duly proved or acknowledged.²

m. ORDER FOR DELIVERY OF BOND FOR PROSECUTION — **Necessity for.** — As has been stated, an injunction bond is a perfect obligation as soon as filed, and its delivery to the party entitled to the benefit thereof is dependent upon its breach,³ when it seems that an order is necessary directing the delivery of the bond to the proper party, in order that he may prosecute his action thereon.⁴

Rescission of Order. — Where an order has been made for the delivery of the bond to the obligees for prosecution it should be obeyed, and if this has been done and a suit has been instituted on the bond it would seem that such order, even though made without regard to the equities of the case, cannot be rescinded except for equities shown, and on equitable terms.⁵

n. SURETIES — (1) **Necessity for.** — The matter of injunction bonds being, as has been seen, entirely regulated by statute, the question as to the necessity of sureties on such bonds is to be determined by the wording of the statutes of the different states, which should be consulted.⁶

(2) **Justification by Sureties.** — The subject of justification by sureties, the necessity therefor, and the manner thereof, will be treated at length in a subsequent volume of this work.⁷

demnifying those who may be damaged by the issuance of the injunction. *Brown v. Easton*, 30 N. J. Eq. 725.

1. **Bond Operative from Time of Filing.** — *Lothrop v. Southworth*, 5 Mich. 436.

2. **Proof of Execution.** — *Harrington v. American L. Ins., etc., Co.*, 1 Barb. (N. Y.) 244. See also *Loveland v. Burnham*, 1 Barb. Ch. (N. Y.) 65.

3. **Necessity for Order.** — *Lothrop v. Southworth*, 5 Mich. 436; *Carpenter v. Acby, Hoffm.* (N. Y.) 311. See *supra* this section, *Filing*.

4. *Lothrop v. Southworth*, 5 Mich. 436; *Brown v. Easton*, 30 N. J. Eq. 725; *Carpenter v. Acby, Hoffm.* (N. Y.) 311. See also *Easton v. New York, etc., R. Co.*, 26 N. J. Eq. 359.

5. **Rescission of Order.** — *Brown v. Easton*, 30 N. J. Eq. 725.

6. **New York — Principal's Undertaking Sufficient.** — Under a rule of court it has been held that the officer granting an injunction may, under certain circumstances, dispense with sureties and allow the complainant to give his own bond, where, in the opinion of such officer, the personal responsibility of the complainant will afford ample protection to the defendant. *Carroll v. Sand*, 10 Paige (N. Y.) 298; *Leavitt v. Dabney*, 2 Sweeny (N. Y.) 613. See also *New York, etc., R. Co. v. Dennis*, 40 N. J. L. 345. In the case first cited it was said: "But where the officer allowing the injunction * * * is not satisfied with the sufficiency of the complainant's own bond, and thinks that one or more sureties should join in the same, he should require such sureties to justify in double the amount of the penalty of the bond which he may think necessary to cover the damage the defendant may sustain by reason of the injunction."

Requisites of Justification by Plaintiff. — It has been held that the plaintiff's own undertaking will not be received unless he will justify as being a freeholder or householder,

and with double the sum specified over and above all his debts and liabilities. *Leavitt v. Dabney*, 2 Sweeny (N. Y.) 613; *Sheldon v. Allerton*, 1 Sandf. (N. Y.) 700, note.

7. See the title SURETYSHIP.

Necessity Where Sureties Are to Be Approved by Judge. — In one state it has been held that sureties who are to be approved by a judge must justify in all cases. *Leavitt v. Dabney*, 2 Sweeny (N. Y.) 613; *Loveland v. Burnham*, 1 Barb. Ch. (N. Y.) 65; *Sheldon v. Allerton*, 1 Sandf. (N. Y.) 700; *Carroll v. Sand*, 10 Paige (N. Y.) 298. See also *Dangel v. Levy*, 1 Idaho 722.

What Justification Required. — In *New York* it has been held that a surety, when required, must justify in the same manner as the plaintiff when the latter's own undertaking is received, *i. e.*, that he is a householder or freeholder, and worth double the sum specified, over and above all his debts and liabilities. *Sheldon v. Allerton*, 1 Sandf. (N. Y.) 700; *Loveland v. Burnham*, 1 Barb. Ch. (N. Y.) 65.

Sureties Cannot Justify in Less Sum than the Penalty. — In *Dangel v. Levy*, 1 Idaho 722, it was held that under the *Idaho* statute a surety in a bond or undertaking for an injunction for two thousand dollars or less cannot justify in a sum less than that named as a penalty in the bond or undertaking.

Justification in Twenty Days. — In *Carroll v. Sand*, 10 Paige (N. Y.) 298, the court, in holding that the sureties to the bond must justify, said: "The provisions of the 172d rule are general, and apply to all cases in which an officer of the court is required to decide upon the sufficiency of sureties, either under a special order of the court, or by virtue of any of its general rules. The whole of this injunction must be set aside for irregularity, therefore, unless the sureties named in the bond in this case justify before the vice-chancellor within twenty days, or a new bond is filed

(3) *Liability of Sureties* — (a) *When Attaches in Case of Signature in Blank.* — Where a surety signs in blank an injunction bond which is afterwards properly filled up, his liability will attach from the time of his signature.¹

(b) *Liability to Be Strictly Construed* — *aa. GENERAL RULE.* — In the case of a surety on an injunction bond, the well-established principles of law as to the construction of the contracts of sureties generally apply, and such a bond is to be construed with the utmost strictness.²

bb. LIABILITY LIMITED BY EXPRESS TERMS OF BOND. — The surety on such bond cannot be held liable beyond the express terms of his undertaking.³

cc. MAY NOT BE VARIED BY STIPULATION OF PARTIES TO SUIT. — The liability of the sureties cannot be varied or extended by any stipulation of the parties to the injunction suit,⁴ as, for instance, by agreement of such parties that damages may be assessed for the first time in a suit upon the bond.⁵

with sureties who shall thus justify. And in case of such justification the injunction is still to be modified as before directed."

Undertaking Not Invalidated by Want of Affidavit. — In *Lee v. Watson*, 15 Mont. 228, it was held that the *Montana* Code of Civil Procedure imposes a duty upon the person who takes an injunction bond to require the sureties to accompany it with an affidavit of solvency, but if this duty is not performed and the affidavit is not secured, the undertaking is not therefore invalidated, but still holds, and the sureties are still liable, at least until the lack of verification is brought to the attention of the court or judge and action is taken thereon.

Justification Necessary When Sufficiency Excepted To. — Still another provision as to the justification of sureties is to the effect that when the sufficiency of sureties is excepted to, the plaintiff's sureties, upon notice to the defendant, must justify in the same manner as upon bail on arrest, and that upon failure to justify at the time and place appointed the order granting an injunction shall be dissolved. *McSherry v. Pennsylvania Consol. Gold Min. Co.*, 97 Cal. 637.

1. *When Liability Attaches.* — *Eyssallenne v. Citizens' Bank*, 3 La. Ann. 663.

2. *Bond Strictly Construed.* — *U. S. v. Boyd*, 15 Pet. (U. S.) 208; *Waters v. Simpson*, 7 Ill. 570; *Sharp v. Bedell*, 10 Ill. 88; *Ovington v. Smith*, 78 Ill. 250.

3. *Surety Not Liable Beyond Terms of Bond* — *England.* — *Arlington v. Merricke*, 2 Saund. 403; *Liverpool Water Works Co. v. Atkinson*, 6 East 507; *St. Saviour v. Bostock*, 2 B. & P. N. R. 175.

United States. — *U. S. v. Boyd*, 15 Pet. (U. S.) 208; *Miller v. Stewart*, 9 Wheat. (U. S.) 702.

California. — *Carter v. Mulrein*, 82 Cal. 167, 16 Am. St. Rep. 99.

Illinois. — *Ovington v. Smith*, 78 Ill. 250; *Rees v. Peltzer*, 1 Ill. App. 315.

Iowa. — *Grove v. Bush*, 86 Iowa 94; *Spencer v. Sherwin*, 86 Iowa 117.

Kentucky. — *Ashby v. Tureman*, 3 Litt. (Ky.) 6; *Hughes v. Wickliffe*, 11 B. Mon. (Ky.) 209.

Maryland. — *Morgan v. Blackiston*, 5 Har. & J. (Md.) 61.

Mississippi. — *Anderson v. Falconer*, 34 Miss. 257.

Missouri. — *Loehner v. Hill*, 19 Mo. App. 142.

New York. — *Dobbin v. Bralley*, 17 Wend. (N. Y.) 422; *Hunt v. Smith*, 17 Wend. (N. Y.) 180, 31 Am. Dec. 296; *Pacific Mail Steamship Co. v. Toel*, 9 Daly (N. Y.) 301; *Lawton v. Green*, 64 N. Y. 326; *Hovey v. Rubber Tip Pencil Co.*, 38 N. Y. Super. Ct. 428.

North Carolina. — *Nansemond Timber Co. v. Rountree*, 122 N. Car. 45.

Ohio. — *Hall v. Williamson*, 9 Ohio St. 17. *Tennessee.* — *Rhea v. McCorkle*, 11 Heisk. (Tenn.) 415.

Illustration. — Although the law requires that an injunction bond, where a judgment at law is enjoined, should be conditioned for the payment of the judgment, as well as the damages and costs, yet if a bond is in fact taken, securing damages and costs only, the securities are not bound for the judgment. *Ashby v. Tureman*, 3 Litt. (Ky.) 6.

The Surety Is Entitled to Stand on the Precise Terms of His Contract. — and there is no way of extending his liability beyond the stipulation to which he has chosen to bind himself. *Tarpey v. Shillenberger*, 10 Cal. 391; *Webber v. Wilcox*, 45 Cal. 301. See also *Dunn v. Davis*, 37 Ala. 95.

Not to Be Extended by Implication. — The liability of a surety is not to extend, by implication, beyond the terms of his contract. This understanding is to receive a strict interpretation, not to extend beyond the fair scope of its terms. *U. S. v. Boyd*, 15 Pet. (U. S.) 187.

Allowance over Sum Specified Error. — The limit of liability upon such an undertaking is the amount specified therein, and the court has no power to make any allowance beyond that amount for disbursements; an allowance for disbursements and reference fees over and above the sum specified in the undertaking is error. *Lawton v. Green*, 64 N. Y. 326.

4. *Liability Not Varied by Agreement.* — *Mix v. Vail*, 86 Ill. 40. See also *Brackebush v. Dorsett*, 138 Ill. 167.

Sureties Not Released by Stipulation Modifying Injunction. — The sureties on an injunction bond, in a suit to restrain a sheriff from paying over the proceeds of a sale of property on execution, are not released by a stipulation between the principal obligor and the execution creditors that the sheriff might retain the money until the determination of a motion in the case for the appointment of a receiver. *Keith v. Henkleman*, 173 Ill. 137.

5. In *Mix v. Vail*, 86 Ill. 40, where an injunction was dissolved in vacation and the bill

dd. PAROL EVIDENCE INADMISSIBLE TO CONTRADICT OR VARY TERMS. — Parol evidence is inadmissible to add to, contradict, or vary the contract of a surety, as to any of its terms.¹

(c) **No Liability Beyond Statutory Requirements.** — Where the conditions of an injunction bond are prescribed by statute² the surety thereon will not be liable beyond the statutory requirements,³ although the conditions may be broader and express.⁴

(d) **Extent of Liability for Damages and Costs — Damages Limited to Those Caused by Injunction.** — There is no liability on the part of the obligors in the bond for other damages and costs than those caused by the injunction.⁵

Liability as Dependent upon Award. — In some jurisdictions the rule is established that even within the limits above stated, the liabilities of the obligors upon a statutory injunction bond extend to such damages only as the court shall award against them upon the dissolution of the injunction.⁶ The nonpayment of the amount adjudged forms the breach of the bond, so far as damages are concerned,⁷ and until there has been an adjudication of damages no cause of action can be maintained on the bond.⁸

Liability for Counsel Fees. — The surety may be held liable for counsel fees as part of the damages, but the recovery in such cases is limited to the fees for services rendered in procuring the dissolution of the injunction, and does not extend to all the services rendered in the suit in which the injunction was sued out.⁹

(e) **Sureties' Liability After Death of Principal — Liability for Satisfaction of Decree Against Principal.** — The sureties in an injunction bond, in the usual form, are not only bound for the performance of any final decree that may be rendered against their principal, but where he dies before final hearing, and the case is revived in the name of his administrator, they are bound for the satisfaction of the decree rendered against him.¹⁰

Liability for Costs Occurring After Death of Complainant. — The sureties are liable

was dismissed under a stipulation that the dismissal and an appeal which was taken should in nowise affect the right of the defendants to have their damages assessed for wrongfully suing out the injunction, in case of affirmance, and the final decree gave to the defendants leave to file a suggestion of damages within ten days, it was held that this did not dispense with the necessity of having the damages assessed in the chancery suit, and authorized them to be assessed in a suit upon the injunction bond.

1. **Parol Evidence Inadmissible to Vary Liability.** — *Williamson v. Hall*, 1 Ohio St. 190.

2. See *supra*, this section, *When Prescribed by Statute*.

3. **Not Liable Beyond Statutory Requirements.** — *Lambert v. Haskell*, 80 Cal. 611; *Hubbard v. Fravell*, 12 Lea (Tenn.) 304; *Horton v. Cope*, 6 Lea (Tenn.) 155.

4. *Horton v. Cope*, 6 Lea (Tenn.) 155; *Hubbard v. Fravell*, 12 Lea (Tenn.) 304.

5. **Damages and Costs Caused by Injunction.** — *Loehner v. Hill*, 17 Mo. App. 32; *Lewis v. Leahey*, 14 Mo. App. 567.

6. *Loehner v. Hill*, 17 Mo. App. 32; *Dorriss v. Carter*, 67 Mo. 545. See generally as to assessment of damages by the court, *infra*, this section, *Damages*.

7. *Blakeney v. Ferguson*, 18 Ark. 347; *Kennedy v. Hammond*, 16 Mo. 341; *Dorriss v. Carter*, 67 Mo. 544; *Corder v. Martin*, 17 Mo. 41. See also *Lothrop v. Southworth*, 5 Mich. 436.

8. **Adjudication of Damages.** — *Dorriss v. Car-*

ter, 67 Mo. 544. See also *Blakeney v. Ferguson*, 18 Ark. 347; *Brownfield v. Brownfield*, 58 Ill. 152; *McWilliams v. Morgan*, 70 Ill. 551.

In *Brownfield v. Brownfield*, 58 Ill. 152, the condition of the bond provided for the payment of "all such costs and damages as shall be awarded against the complainants in case this injunction be dissolved." It was held that there could be no recovery upon the bond except for such damages as may have been awarded by the chancellor on the dissolution of the injunction.

In *Ashby v. Chambers*, 3 Dana (Ky.) 437, the condition of the bond was that the complainant should prosecute with effect or "pay such costs and damages as shall be awarded." In an action on the bond, the declaration averred that the suit was tried, the bill dismissed, and the plaintiff enjoined from taking possession of his land, which defendant had ever since enjoyed, and received the issues and profits thereof. It was held that this declaration showed no cause of action, as the defendant undertook to pay such damages only as should be awarded, and it did not appear that the damages had been in any way awarded.

9. **Fees Incurred in Dissolving Injunction.** — *Bolling v. Tate*, 65 Ala. 417, 39 Am. Rep. 5. As to the assessment of counsel fees as a part of the damages upon the dissolution of an injunction, see *infra*, this section, *Recovery of Counsel Fees on Dissolution of Injunction*.

10. **Liability as Affected by Death of Principal.** — *Fowler v. Scott*, 11 Ark. 675.

for costs accruing in the injunction suit after the death of their principal, as well as before.¹

(f) **Liability for Damages Accruing After Injunction Made Permanent.** — Since as a general rule no undertaking can be required upon a final decree,² and the function of the preliminary injunction ceases when the final decree is made,³ it would seem that damages accruing after the temporary injunction is made permanent cannot be recovered from the sureties if the final decree be reversed on appeal.⁴

(g) **Liability for Damages Pending Appeal After Dissolution.** — It has been held that a bond conditioned to pay damages accruing by reason of the wrongful suing out of the injunction can be held to cover the damages only up to the dissolution of the injunction, and cannot be held to cover any damages which accrue by reason of wrongfully continuing the injunction in force by means of an appeal bond.⁵ In case of such an appeal and continuance of the injunction, resort must be had to the appeal bond for the recovery of such damages.⁶ In *Maryland*, however, it has been held that the injunction bond is liable for the damages accruing to the defendant in the injunction proceedings by reason of the delay and obstruction of his rights during the pendency of the appeal, and the appeal bond is held to be only cumulative security except as to the costs on the appeal, for which it alone is answerable.⁷

(h) **Operation of Bond as Estoppel on Sureties — General Rule.** — The usual rule is that a surety is estopped to deny the recitals of an injunction bond to the terms of which he has agreed.⁸

Estoppel to Deny Pendency of Suit. — In an action on a bond given to restrain the further prosecution of a suit at law the defendants are estopped from denying that there was such a suit pending as that described in the bond.⁹

Estoppel to Deny Issuance of Injunction. — The sureties are estopped from denying that the injunction recited in the bond was granted and ordered.¹⁰

Estoppel to Deny Existence of Judgment Recited. — In an action on a bond to stay proceedings on a judgment, the obligors are estopped to deny that there was such a judgment as that which the bond recites had been enjoined.¹¹

Estoppel to Deny that Order Required Bond. — When the bond recites that the issu-

1. Costs Occurring After Death of Principal. — *Fowler v. Scott*, 11 Ark. 675.

2. See *supra*, this section, *When Unnecessary*.

3. *Lambert v. Haskell*, 80 Cal. 611.

4. Damages Accruing After Injunction Made Permanent. — *Lambert v. Haskell*, 80 Cal. 611.

Undertaking Coextensive in Point of Time with Order. — If the plaintiff in an action to obtain a perpetual injunction restraining the commission of trespasses obtains a preliminary injunction at the time of commencing suit, and on the trial it is made perpetual, and the judgment is afterwards reversed and the action dismissed, the sureties are not liable for any damages accruing after the entry of the decree making the injunction perpetual. *Webber v. Wilcox*, 45 Cal. 301.

5. Damages Pending Appeal from Decree of Dissolution. — *Rees v. Peltzer*, 1 Ill. App. 315. See also *Woodson v. Johns*, 3 Munf. (Va.) 230, holding that the security in a bond for the prosecution of an injunction is not liable for the costs and damages which may accrue on an appeal to a superior court.

6. Resorting to Appeal Bond for Damages. — *Rees v. Peltzer*, 1 Ill. App. 315.

7. Appeal Bond Cumulative Security. — *Hamilton v. State*, 32 Md. 348, the court saying: "It was not until the order of dissolution was affirmed by the Court of Appeals that the liability of the injunction bond became fixed; and though the appeal bond was continued to

prosecute the appeal with effect, and by breach of which the appellee became entitled to recover for damages sustained by reason of the appeal, it is but cumulative security to the injunction bond, except as to the costs on the appeal, to which the appeal bond alone is chargeable."

8. Surety Estopped to Deny Recitals of Bond. — *Person v. Thornton*, 86 Ala. 308; *Fowler v. Scott*, 11 Ark. 675; *Hardey v. Coe*, 5 Gill (Md.) 189; *Le Strange v. State*, 58 Md. 26; *Burgess v. Lloyd*, 7 Md. 198; *Hamilton v. State*, 32 Md. 348; *Northwestern Bank v. Fleshman*, 22 W. Va. 317. See generally the title SURETYSHIP.

9. Estoppel to Deny Pendency of Suit. — *Person v. Thornton*, 86 Ala. 308; *Le Strange v. State*, 58 Md. 26.

10. Estoppel to Deny Issuance of Injunction. — *Fowler v. Scott*, 11 Ark. 675; *Le Strange v. State*, 58 Md. 26; *Northwestern Bank v. Fleshman*, 22 W. Va. 317.

11. Estoppel to Deny Existence of Judgment. *Northwestern Bank v. Fleshman*, 22 W. Va. 317. In this case the court, after laying down the rule as to estoppel by recitals in a bond, said: "So parties are estopped from denying that there was such an injunction awarded or judgment or decree rendered as their bonds recite." See *Allen v. Luckett*, 3 J. J. Marsh. (Ky.) 165; *Kellar v. Beeler*, 4 J. J. Marsh. (Ky.) 655; *Stockton v. Turner*, 7 J. J. Marsh. (Ky.) 192. See also *Hardey v. Coe*, 5 Gill (Md.) 189.

ance of the injunction was ordered "on the complainant's filing, etc., a bond executed by himself and a surety or sureties," etc., the surety, in an action against himself on the bond, is estopped from denying that the order granting the injunction required a bond.¹

Estoppel to Plead that Order Was Broader than Application. — The parties to the bond are estopped from asserting as a defense in a suit on the bond that the order was broader than the application therefor.²

(4) *Sureties Bound by Decree in Injunction Suit.* — It May Be Stated as a General Rule that the sureties cannot go behind the decree in the case in which their bond was given.³

Cannot Assail Agreement on Which Decree Founded. — Thus in an action on the bond for damages they cannot go behind a decree dissolving the injunction, and assail the validity of the agreement upon which the decree was founded.⁴

(5) *Right of Surety to Appeal from Judgment in Injunction Suit.* — In the absence of statute it may be laid down as a general rule that the sureties in the bond are not parties to the judgment in the original suit, and therefore have no right to appeal from such judgment.⁵

o. ACTION ON BOND — (1) *Right of Action* — (a) **Merger of Common-law Remedy.** — According to the weight of authority it would seem that the common-law remedy in the nature of an action on the case for injuries arising from an injunction is not merged in the statutory remedy on the injunction bond,⁶ but the defendant may resort to an action on the case for malicious prosecution wherever there is malice or want of probable cause, since in such case the party abusing the process is considered as a co-trespasser.⁷ If, however, no abuse of the process through malice and without probable cause appears, the only remedy of the injured party is an action upon the injunction bond.⁸

1. Estoppel to Deny that Order Required Bond. — *Hamilton v. State*, 32 Md. 348. See also *Lloyd v. Burgess*, 4 Gill (Md.) 187.

2. Estoppel to Deny Terms of Order. — *Gibson v. Reed*, 54 Neb. 309.

3. Sureties Bound by Decree in Injunction Suit. — *Oelrichs v. Spain*, 15 Wall. (U. S.) 211; *Shenandoah Nat. Bank v. Read*, 86 Iowa 136; *Towle v. Towle*, 46 N. H. 434.

4. Agreement on Which Decree Founded. — *White v. Brooke*, 11 Wash. 99.

5. Right of Appeal. — *St. Louis Zinc Co. v. Hesselmeier*, 50 Mo. 180.

Sureties Become Parties in Case of Proceedings to Assess Damages. — If a proceeding be had upon the injunction bond, by motion or otherwise, against the sureties to assess damages, then they become parties and may appeal from such judgment. But until this occurs they have no such interest as to authorize them to carry on the original suit by appeal or otherwise. *St. Louis Zinc Co. v. Hesselmeier*, 50 Mo. 180. See also *Nolan v. Johns*, 108 Mo. 431.

Right to Appeal from Order Confirming Referee's Report. — In *New York*, where an order directing a reference to ascertain the damages sustained by the defendant in consequence of the issuing of an injunction requires that five days' notice of the hearing be given to the sureties upon the undertaking (which in the case at bar was not signed by the plaintiff), and the sureties appear before the referee and oppose the confirmation of the report at special term, they are entitled to maintain an appeal to the general term from the order confirming the report of the referee, although they are not parties to the action. *Hotchkiss v. Platt*, 7 Hun (N. Y.) 56. See also *Methodist Churches v. Barker*, 18 N. Y. 463.

6. Common-law Remedy Not Merged in Statutory Remedy. — *Cox v. Taylor*, 10 B. Mon. (Ky.) 17; *Keber v. Mercantile Bank*, 4 Mo. App. 195; *Ruble v. Coyote Gold, etc.*, Min. Co., 10 Oregon 39; *Gowan v. Graves*, 10 Heisk. (Tenn.) 579.

7. When Action for Malicious Prosecution Lies — *United States*. — *Meyers v. Block*, 120 U. S. 206; *Russell v. Farley*, 105 U. S. 433; *Tobey Furniture Co. v. Colby*, 35 Fed. Rep. 592.

Georgia. — *Mitchell v. Southwestern R. Co.*, 75 Ga. 398.

Indiana. — *Harless v. Consumers' Gas Trust Co.*, 14 Ind. App. 545.

Kentucky. — *Cox v. Taylor*, 10 B. Mon. (Ky.) 17; *Lexington, etc., R. Co. v. Applegate*, 8 Dana (Ky.) 289, 33 Am. Dec. 497; *Pettit v. Mercer*, 8 B. Mon. (Ky.) 51.

Mississippi. — *Manlove v. Vick*, 55 Miss. 567.

Missouri. — *Keber v. Mercantile Bank*, 4 Mo. App. 195; *St. Louis v. St. Louis Gaslight Co.*, 82 Mo. 349; *Teasdale v. Jones*, 40 Mo. App. 243.

New York. — *Lawton v. Green*, 5 Hun (N. Y.) 157; *Cayuga Bridge Co. v. Magee*, 2 Paige (N. Y.) 116; *Mark v. Hyatt*, 61 Hun (N. Y.) 325; *Palmer v. Foley*, 71 N. Y. 106.

Oregon. — *Ruble v. Coyote Gold, etc.*, Min. Co., 10 Oregon 39.

Contra. — *Gorton v. Brown*, 27 Ill. 489, 81 Am. Dec. 245.

8. Where Restricted to Action on Bond. — *Meyers v. Block*, 120 U. S. 206; *Asevado v. Orr*, 100 Cal. 293; *Robinson v. Kellum*, 6 Cal. 399; *Harless v. Consumers Gas Trust Co.*, 14 Ind. App. 545; *Hayden v. Keith*, 32 Minn. 277; *Campbell v. Carroll*, 35 Mo. App. 640; *Keber v. Mercantile Bank*, 4 Mo. App. 195; *Iron Mountain Bank v. Mercantile Bank*, 4 Mo.

(b) **Necessity for Actual Issuance of Injunction — No Cause of Action Where No Writ Issues.** — Until the writ is obtained and the party is actually restrained by it, the bond is held to be inoperative, and there can be no breach of the condition and therefore no right of action on the bond.¹

Agreement in Place of Writ. — Thus, where an order is passed directing an injunction to restrain further proceedings, but no writ issues, but by agreement of parties the suit is entered "enjoined," and regarded and treated as if the writ had issued, the proper remedy for the obligee for any damages sustained by him by reason of the restraint is on the agreement, and not on the injunction bond.²

Recovery by Defendant Who Has Obeyed Injunction though Not Served. — It has been held that a defendant who obeys an injunction though never served therewith is entitled after judgment in his favor to claim the damages provided for in the undertaking to procure such injunction.³

(c) **Necessity for Final Decree — aa. GENERAL RULE — Must Be Final Decree in Suit.** — As to the time when the right of action accrues on an injunction bond, the weight of authority is clearly to the effect that no action can be maintained upon a bond as ordinarily conditioned until there has been a final decree in the suit in which the injunction was obtained and the bond executed;⁴ and that such right of action does not accrue immediately upon the dissolution of

App. 505; *Ruble v. Coyote Gold, etc.*, Min. Co., 10 Oregon 39.

Voluntary Dismissal Does Not Admit Want of Probable Cause. — *Asevado v. Orr*, 100 Cal. 293.

1. **No Cause of Action Before Issuance of Writ.** — *Dubberly v. Black*, 38 Ala. 193; *Shorter v. Mims*, 18 Ala. 655; *Carter v. Mulrein*, 82 Cal. 167, 16 Am. St. Rep. 99; *Harlan v. Wingate*, 2 J. J. Marsh. (Ky.) 138; *Eakle v. Smith*, 27 Md. 467; *Baxter v. Washburn*, 8 Lea (Tenn.) 1. See also *Byam v. Cashman*, 78 Cal. 525; *Ridgley v. Minneapolis Threshing Mach. Co.*, 61 Ill. App. 173; *Garner v. Strode*, 5 Litt. (Ky.) 314. See, however, the dissenting opinion of Cooper, J., in *Baxter v. Washburn*, 8 Lea (Tenn.) 21.

Record Must Show that Injunction Was Ordered or Issued. — Where the record fails to show that an injunction was ordered or issued a judgment for damages on its dissolution cannot be sustained. *Ridgley v. Minneapolis Threshing Mach. Co.*, 61 Ill. App. 173.

Effect of Prior Issuance of Writ. — In *Carter v. Mulrein*, 82 Cal. 167, 16 Am. St. Rep. 99, it was held that when a bond is given in pursuance of an order that an injunction issue upon the filing of the bond, the sureties are not liable for damages arising to the defendant from his obedience to a writ of injunction issued several days prior to the date of the bond, no writ having issued after the filing of the undertaking.

Effect of Order Preventing Enforcement. — In *Hyde v. Teal*, 46 La. Ann. 645, it was held that the defendant was not entitled to reconventional damages where immediately after the order of injunction was granted an order was issued to prevent its enforcement.

Obedience to Ambiguous Writ. — A person who has secured an injunction which is ambiguous in its terms cannot object to its obedience on the part of the defendants, or to their claim for recompense for the damage they have sustained thereby. His acquiescence in their obedience must be accepted as his own construction of the manner in which he in-

tended it to be obeyed, and his bondsmen are liable upon their bond for the damages consequent thereon. *Asevado v. Orr*, 100 Cal. 293.

2. **Agreement to Enter Suit as Enjoined.** — *Eakle v. Smith*, 27 Md. 467. See also *Freeman v. Adams*, 9 Johns. (N. Y.) 115.

Injunction Ordered but Not Complied With. — In *M'Coun v. Delany*, 2 Bibb (Ky.) 440, it was held that where an injunction was ordered upon a condition which was not complied with, the injunction was not effectual to delay the party, and it was erroneous to decree damages upon a dissolution of the injunction.

3. **Obedience to Injunction Not Served — Effect.** — *Cumberland Coal, etc., Co. v. Hoffman Steam Coal Co.*, (Supm. Ct. Gen. T.) 15 Abb. Pr. (N. Y.) 78.

4. **Necessity of Final Decree — Alabama.** — *May v. Walter*, 85 Ala. 438.

Arkansas. — *Scott v. Fowler*, 14 Ark. 427.
California. — *Dowling v. Polack*, 18 Cal. 625; *Bennett v. Pardini*, 63 Cal. 154; *Clark v. Clayton*, 61 Cal. 634; *Dougherty v. Dore*, 63 Cal. 170.

Iowa. — *Monroe Bank v. Gifford*, 65 Iowa 648.

Kansas. — *Jones v. Ross*, 48 Kan. 474; *Brown v. Galena Min., etc., Co.*, 32 Kan. 528; *Fox v. Hudson*, 20 Kan. 246.

Kentucky. — *Cates v. Wooldridge*, 1 J. J. Marsh. (Ky.) 268; *Pugh v. White*, 78 Ky. 210.

Maryland. — *Gray v. Veirs*, 33 Md. 159.

Mississippi. — *Yates v. Mead*, 69 Miss. 473; *Penny v. Holberg*, 53 Miss. 567; *Goodbar v. Dunn*, 61 Miss. 624.

Missouri. — *Dorriss v. Carter*, 67 Mo. 544.

Nebraska. — *Bemis v. Gannett*, 8 Neb. 236; *Browne v. Edwards, etc., Lumber Co.*, 44 Neb. 361.

New York. — *Harter v. Westcott*, (Brooklyn City Ct. Gen. T.) 11 Misc. (N. Y.) 180; *Shearman v. New York Cent. Mills*, (Supm. Ct. Spec. T.) 11 How. Pr. (N. Y.) 269; *Leavitt v. Dabney*, (N. Y. Super. Ct. Gen. T.) 40 How. Pr. (N. Y.) 277; *Roberts v. White*, 73 N. Y. 375; *Lawton v. Green*, 64 N. Y. 326; *Vanderbilt v.*

the injunction, but accrues only after the final determination of the action in which the injunction was obtained.¹

Right of Action on Bare Dissolution. — Although the well-settled rule is as stated, cases which apparently hold that an action may be maintained upon the bare dissolution of the injunction and without awaiting a final decree are not wanting, though the decisions seem to have been based upon the peculiar wording of the bonds in such cases.²

Schreyer, 28 Hun (N. Y.) 61; Palmer v. Foley, 71 N. Y. 106.

Tennessee. — Pickett v. Boyd, 11 Lea (Tenn.) 498.

"Section 1919 of the [Mississippi] Code of 1880 does not change the rule announced in Penny v. Holberg, 53 Miss. 567, that an action cannot be maintained on an injunction bond until the final determination of the case." Goodbar v. Dunn, 61 Miss. 624.

Signature and Filing of Formal Decree Unnecessary. — In Thurston v. Haskell, 81 Me. 303, it was held that an action may be maintained on the bond after an entry has been made in a docket dismissing the bill on its merits, without awaiting the signing and filing of a formal decree.

1. Right Does Not Accrue on Dissolution — United States. — Bentley v. Joslin, Hempst. (U. S.) 218.

Alabama. — May v. Walter, 85 Ala. 438.

California. — Dougherty v. Dore, 63 Cal. 170; Dowling v. Polack, 18 Cal. 625; Clark v. Clayton, 61 Cal. 634; Fowler v. Frisbie, 37 Cal. 34.

Colorado. — Kilpatrick v. Haley, 6 Colo. App. 407.

Illinois. — Terry v. Hamilton Primary School, 72 Ill. 476; Beauchamp v. Kankakee County, 45 Ill. 274; Woerishoffer v. Lake Erie, etc., R. Co., 25 Ill. App. 84; Post-Boynton Strong Co. v. Williams, 57 Ill. App. 434.

Iowa. — Monroe Bank v. Gifford, 65 Iowa 648.

Kansas. — Brown v. Galena Min., etc., Co., 32 Kan. 528; Jones v. Ross, 48 Kan. 474.

Kentucky. — Newport v. McArthur, 4 Ky. L. Rep. 632; Cavanaugh v. Davis, 7 J. J. Marsh. (Ky.) 371.

Louisiana. — Butchers' Union, etc., Co. v. Howell, 37 La. Ann. 280.

Maryland. — Gray v. Veirs, 33 Md. 159.

Massachusetts. — Foster v. Goodrich, 127 Mass. 176.

Mississippi. — Penny v. Holberg, 53 Miss. 567; Goodbar v. Dunn, 61 Miss. 624; Adams v. Ball, (Miss. 1888) 5 So. Rep. 109.

Missouri. — Cohn v. Lehman, 93 Mo. 574.

Montana. — Stewart v. Miller, 1 Mont. 301.

Nebraska. — Browne v. Edwards, etc., Lumber Co., 44 Neb. 361; Bemis v. Gannett, 8 Neb. 236; Smith v. Gregg, 9 Neb. 212.

New York. — Dunkin v. Lawrence, 1 Barb. (N. Y.) 447; New York Security, etc., Co. v. Lipman, 83 Hun (N. Y.) 569; Kelley v. McMahon, 32 Hun (N. Y.) 347; Granger v. Smyth, 70 Hun (N. Y.) 9; Shearman v. New York Cent. Mills, (Supm. Ct. Spec. T.) 11 How. Pr. (N. Y.) 269; Leggett v. Dubois, 1 Paige (N. Y.) 574; Wynkoop v. Van Beuren, 63 Hun (N. Y.) 500; Foley v. Schiedemantel, (Supm. Ct. Gen. T.) 44 N. Y. St. Rep. 279; Apollinaris Co. v. Venable, 136 N. Y. 46; Hall v. Sexton, (N. Y.

Super. Ct. Spec. T.) 3 N. Y. Supp. 549; Ninth Ave. R. Co. v. New York El. R. Co., (C. Pl. Spec. T.) 3 Abb. N. Cas. (N. Y.) 22; Pacific Mail Steamship Co. v. Leuling, (C. Pl. Spec. T.) 7 Abb. Pr. N. S. (N. Y.) 37; Carpenter v. Wright, 4 Bosw. (N. Y.) 655; New York City Suburban Water Co. v. Bissell, 78 Hun (N. Y.) 176; Manning v. Cassidy, 80 Hun (N. Y.) 127; Cassell v. Fisk, 16 N. Y. Wkly. Dig. 112; Lawton v. Green, 64 N. Y. 326; Pacific Mail Steamship Co. v. Toel, 85 N. Y. 646; Methodist Churches v. Barker, 18 N. Y. 463; Leavitt v. Dabney, (N. Y. Super. Ct. Gen. T.) 9 Abb. Pr. N. S. (N. Y.) 373; Benedict v. Benedict, 76 N. Y. 600, affirming 15 Hun (N. Y.) 305; Neugent v. Swan, (Supm. Ct. Spec. T.) 61 How. Pr. (N. Y.) 40; Weeks v. Southwick, (Supm. Ct. Spec. T.) 12 How. Pr. (N. Y.) 170; Mills v. Hoag, 7 Paige (N. Y.) 18, 31 Am. Dec. 271.

North Carolina. — Thompson v. McNair, 64 N. Car. 448; Falls v. McAfee, 2 Ired. L. (24 N. Car.) 236; Western North Carolina R. Co. v. Georgia, etc., R. Co., 88 N. Car. 79; Crawford v. Pearson, 116 N. Car. 718; Raleigh, etc., R. Co. v. Glendon, etc., Min., etc., Co., 117 N. Car. 191.

Washington. — Donahue v. Johnson, 9 Wash. 187.

Wisconsin. — Independent Order of Foresters v. United Order of Foresters, 94 Wis. 234; Avery v. Ryan, 74 Wis. 591.

Leave to Plaintiff to Discontinue Not Final Decision. — Palmer v. Foley, 71 N. Y. 106, followed in Benedict v. Dixon, 47 N. Y. Super. Ct. 480, explained in Johnson v. Elwood, 82 N. Y. 362.

Dissolution for Want of Bond Insufficient. — The dissolution of an existing injunction for want of a proper bond, followed by an immediate order for a new injunction upon the filing of a new bond, and such bond being filed, is not such a dissolution as is contemplated by the statute in regard to damages. Beauchamp v. Kankakee County, 45 Ill. 274.

Void Order of Dissolution Gives No Cause of Action. — Alexander v. Gish, (Ky. 1891) 17 S. W. Rep. 287.

No Right of Action Where Injunction Reinstated. — Bentley v. Joslin, Hempst. (U. S.) 218.

When Statute of Limitations Begins to Run Against Surety's Administrator. — In Pickett v. Boyd, 11 Lea (Tenn.) 498, it was held that the statute of limitations did not begin to run in favor of an administrator of a surety until the injunction was dissolved and the action in which it was granted was determined, since the right of action did not accrue until that time.

2. Right of Action on Dissolution Dependent on Wording of Bond. — Sizer v. Anthony, 22 Ark. 465; Tallahassee R. Co. v. Hayward, 4 Fla. 411; Boden v. Dill, 58 Ind. 273; Harrison v. Balfour, 5 Smed. & M. (Miss.) 301; Somerville

bb. ACCRUAL OF RIGHT ON DISCONTINUANCE OR DISMISSAL — Order of Discontinuance Final Determination. — An order discontinuing an action in which an injunction has been issued, upon the motion of the plaintiff, which motion was opposed by the defendant, is equivalent to a final determination that the plaintiff was not entitled to the injunction¹ for the purposes of the relief founded upon the undertaking given when the injunction was procured.²

Accrual of Right on Dismissal of Suit — In General. — The dismissal of a suit in which an injunction has been issued amounts to a determination that the injunction has been improperly granted, and a right of action immediately accrues to the defendant.³ A dismissal for want of prosecution operates as a final adjudication and gives a right of action on the bond;⁴ and the same is

v. Mayes, 54 Miss. 31. See also *Stone v. Cason*, 1 Oregon 100.

Where a bond to secure an injunction provides for the payment "of all damages and costs" sustained by the obligee by reason of such injunction "should the same be wrongful," it contains but one condition, namely, that the injunction shall be wrongful, and such undertaking becomes absolute when the injunction is shown to be wrongful and is dissolved. *Boden v. Dill*, 58 Ind. 273.

1. Right of Action Accrues on Discontinuance. — *Manning v. Cassidy*, 80 Hun (N. Y.) 127; *New York Cent., etc., R. Co. v. Hastings-on-Hudson*, 9 N. Y. App. Div. 256; *Pacific Mail Steamship Co. v. Toel*, 85 N. Y. 646; *Waterbury v. Bouker*, 10 Hun (N. Y.) 262; *Amberg v. Kramer*, (Supm. Ct. Gen. T.) 29 N. Y. St. Rep. 958; *Wynkoop v. Van Beuren*, 63 Hun (N. Y.) 500; *New York City Suburban Water Co. v. Bissell*, 78 Hun (N. Y.) 176.

2. New York Cent., etc., R. Co. v. Hastings-on-Hudson, 9 N. Y. App. Div. 256; *Manning v. Cassidy*, 80 Hun (N. Y.) 127.

Discontinuance or Dismissal by Stipulation Insufficient. — The discontinuance of the action by an amicable and voluntary agreement of the parties, unlike a voluntary dismissal by the plaintiff of his own motion in consequence or in view of an adverse interlocutory decision of the court, is not such a final decision adverse to the plaintiff as to fix liability on the injunction bond. *Palmer v. Foley*, 71 N. Y. 106, which case was cited in *Manufacturers, etc., Bank v. C. W. F. Dare Co.*, 67 Hun (N. Y.) 44, and distinguished in *Amberg v. Kramer*, (Supm. Ct. Gen. T.) 8 N. Y. Supp. 821. See also *Large v. Steer*, 121 Pa. St. 30, in which case the court said that as a general rule the dismissal of a bill by the agreement of the parties is not the equivalent of a decision upon the merits, citing *New York, etc., R. Co. v. Omerod*, 29 Hun (N. Y.) 274; *Palmer v. Foley*, 71 N. Y. 106; *Towle v. Leacox*, 59 Iowa 42; *Neugent v. Swan*, (Supm. Ct. Spec. T.) 61 How. Pr. (N. Y.) 40. The court continued: "That this must be the rule as regards the sureties in an injunction bond can hardly be doubted. Were it otherwise, their liability could be fixed by the agreement of the parties, without their assent, or even their knowledge, instead of by the judgment or decree of the court, as contemplated and tacitly understood when they signed the bond."

3. Right of Action Accrues on Dismissal — Alabama. — *Zeigler v. David*, 23 Ala. 127.

California. — *Dowling v. Polack*, 18 Cal.

627; *Asevado v. Orr*, 100 Cal. 293; *Clark v. Clayton*, 61 Cal. 634.

Illinois. — *Cummings v. Mugge*, 94 Ill. 186.

Iowa. — *Shenandoah Nat. Bank v. Read*, 86 Iowa 136.

Kansas. — *Mitchell v. Sullivan*, 30 Kan. 231.

Kentucky. — *Pugh v. White*, 78 Ky. 210.

Louisiana. — *Carondelet Canal, etc., Co. v. Touche*, 38 La. Ann. 388.

Maine. — *Thurston v. Haskell*, 81 Me. 303.

Missouri. — *Sharpe v. Harding*, 65 Mo. App. 28, 2 Mo. App. Rep. 1145.

Nebraska. — *Smith v. Gregg*, 9 Neb. 212; *Bemis v. Gannett*, 8 Neb. 236.

New Jersey. — *New York, etc., R. Co. v. Dennis*, 40 N. J. L. 340.

New York. — *Loomis v. Brown*, 16 Barb. (N. Y.) 325; *Williams v. Montgomery*, 148 N. Y. 519; *Granger v. Smyth*, 70 Hun (N. Y.) 9; *Jordan v. Donnelly*, (Supm. Ct. Gen. T.) 19 Civ. Pro. (N. Y.) 413; *Musgrave v. Sherwood*, 76 N. Y. 194; *Palmer v. Foley*, 71 N. Y. 106; *Lawton v. Green*, 64 N. Y. 326; *Coates v. Coates*, 1 Duer (N. Y.) 664; *Shearman v. New York Cent. Mills*, (Supm. Ct. Spec. T.) 11 How. Pr. (N. Y.) 269; *Methodist Churches v. Barker*, 18 N. Y. 463; *Jacobs v. Miller*, 11 Hun (N. Y.) 441; *Waterbury v. Bouker*, 10 Hun (N. Y.) 262; *Vanderbilt v. Schreyer*, 28 Hun (N. Y.) 61; *Manufacturers, etc., Bank v. C. W. F. Dare Co.*, 67 Hun (N. Y.) 44; *Mutual Safety Ins. Co. v. Roberts*, 4 Sandf. Ch. (N. Y.) 592.

North Carolina. — *Raleigh, etc., R. Co. v. Glendon, etc., Min., etc., Co.*, 117 N. Car. 191; *Jones v. Hill*, 2 Murph. (6 N. Car.) 131.

Wisconsin. — *Kane v. Casgrain*, 69 Wis. 430.

No Defense that Injunction Was Obtained in Subsequent Suit. — In an action on the bond, brought upon the dismissal of an action for injunction, it is no defense that in a subsequent action seeking the same relief the defendant obtained a decree perpetually enjoining the defendant. *Swan v. Timmons*, 81 Ind. 243. See also *Weaver v. Poyer*, 73 Ill. 489.

Referee's Report Not Final Decision. — Where a referee makes a report dismissing the complaint with costs, until a judgment has been entered upon such report so that the decision of the referee becomes the judgment of the court there is no final decision that the plaintiff was not entitled to the injunction, and the defendant is not entitled to a reference to ascertain the damages. *Weeks v. Southwick*, (Supm. Ct. Spec. T.) 12 How. Pr. (N. Y.) 170, citing *Dunkin v. Lawrence*, 1 Barb. (N. Y.) 447.

4. Failure to Prosecute. — *Zeigler v. David*,

the case when the dismissal is based on the failure of the complaint to state a cause of action.¹ So the voluntary dismissal by the plaintiff of the action in which the injunction was issued will have the same effect as a decision of the court that he was not entitled to the injunction.²

(d) **Accrual of Right on Partial Dissolution.** — The partial dissolution of an injunction by a final decree is such a breach of the obligation of the bond as to give to the obligee a right of action thereon.³ The justice of this rule is especially apparent in the case of injunctions against judgments, since otherwise the obligee might often be left without security for the greater part of his debt which both equity and law have adjudged to be justly due to him.⁴

(e) **Right of Action on Dissolution of Injunction Against Judgment — Right to Sue on Bond Without Enforcing Judgment.** — Where a bond given to secure an injunction against a judgment is conditioned to pay all money and costs due or to become due to the plaintiff in the action at law, and also all such costs and damages as may be awarded in case the injunction is dissolved, the dissolution of the injunction is the contingency on the happening of which the bond is forfeited, and the right of action is then complete;⁵ and the obligee in such case need not, before resorting to his remedy on the bond, pursue his remedy at law by the issuance of an execution upon the judgment.⁶

23 Ala. 127; *Dowling v. Polack*, 18 Cal. 626 [overruling *Gelston v. Whitesides*, 3 Cal. 309]; *Manufacturers, etc., Bank v. C. W. F. Dare Co.*, 67 Hun (N. Y.) 44. See also *Apollinaris Co. v. Venable*, 136 N. Y. 46.

1. **Failure to State Cause of Action.** — *Williams v. Montgomery*, 148 N. Y. 519.

2. **Voluntary Dismissal by Plaintiff—California.** — *Asevado v. Orr*, 100 Cal. 293.

Georgia. — *Richardson v. Allen*, 74 Ga. 719. *Indiana.* — *Swan v. Timmons*, 81 Ind. 243.

Kansas. — *Mitchell v. Sullivan*, 30 Kan. 232;

Brown v. Galena Min., etc., Co., 32 Kan. 528.

Kentucky. — *Pugh v. White*, 73 Ky. 210.

Missouri. — *Sharpe v. Harding*, 65 Mo. App. 28, 2 Mo. App. Rep. 1145.

Nebraska. — *Bemis v. Gannett*, 8 Neb. 236.

New York. — *Apollinaris Co. v. Venable*,

136 N. Y. 46; *Mutual Safety Ins. Co. v. Roberts*, 4 Sandf. Ch. (N. Y.) 592; *Pacific Mail*

Steamship Co. v. Toel, 85 N. Y. 646; *Amberg*

v. Kramer, (Supm. Ct. Gen. T.) 8 N. Y. Supp.

821; *Carpenter v. Wright*, 4 Bosw. (N. Y.) 655;

New York City Suburban Water Co. v. Bissell,

78 Hun (N. Y.) 176.

Virginia. — *Roach v. Gardner*, 9 Gratt.

(Va.) 89.

Dismissal Without Prejudice to Future Action.

— Where a plaintiff, on commencing a suit and

obtaining a temporary injunction, gives an

undertaking to secure to the party injured the

damages which he may sustain if it be finally

decided that the injunction ought not to have

been granted, and subsequently appears in

court and dismisses the action without preju-

dice to a future action, and the court enters

judgment dismissing the action, such judg-

ment is equivalent to a final decision by the

court that the plaintiff was not entitled to

the temporary order of injunction, and after

the judgment an action lies upon the under-

taking. *Mitchell v. Sullivan*, 30 Kan. 231;

Yale v. Baum, 70 Miss. 225.

3. **Partial Dissolution on Final Decree.** — *Smith*

v. Mutual L. & T. Co., 102 Ala. 282; *Rice v.*

Cook, 92 Cal. 144; *Willits v. Slocumb*, 24 Ill.

App. 484; *Walker v. Pritchard*, 135 Ill. 103;

Combs v. Boswell, 1 Dana (Ky.) 476; *Penny v. Holberg*, 53 Miss. 567; *Wabash R. Co. v. McCabe*, 47 Mo. App. 346; *Pierson v. Ells*, 46 Hun (N. Y.) 336; *White v. Clay*, 7 Leigh (Va.) 68. See also *Combs v. Boswell*, 1 Dana (Ky.) 476; *Harter v. Westcott*, 155 N. Y. 211. *Contra*, *Pointer v. Roth*, 19 La. Ann. 78; *Raiford v. Thorn*, 15 La. Ann. 81.

"If the Injunction Was Wrongfully Issued as to Any Part of Plaintiff's Demand, and it is partially dissolved to that extent, he will be entitled to such damages within the limit of the penalty of the bond as he may have sustained by reason of the issuing of the injunction." *Rice v. Cook*, 92 Cal. 144.

Effect of Order of Court on Stipulation for Modification. — Where, after the execution of the bond and the issuance of the injunction, the parties to the suit stipulate that the injunction shall be modified, and thereafter the injunction, as modified, is dissolved, a right of action accrues upon the bond, and the modification of the injunction by stipulation does not have the effect to relieve the sureties from their liability. *Brackebush v. Dorsett*, 37 Ill. App. 581, citing *Boynton v. Phelps*, 52 Ill. 210, and *Towle v. Towle*, 46 N. H. 431.

4. **Reason for Rule.** — See the opinion of *Brooke, J.*, in *White v. Clay*, 7 Leigh (Va.) 68.

5. **Suit on Bond Without Enforcing Judgment.**

— *Harrison v. Balfour*, 5 Smed. & M. (Miss.)

301; *Somerville v. Mayes*, 54 Miss. 31. See

also *Hunt v. Scobie*, 6 B. Mon. (Ky.) 469.

6. **Issuance of Execution Unnecessary.** — *Harrison v. Balfour*, 5 Smed. & M. (Miss.) 301.

Effect of Issuance of Execution, and Execution and Forfeiture of Forthcoming Bond. — In *Harrison v. Balfour*, 5 Smed. & M. (Miss.) 301, it was held that after the dissolution of an injunction against a judgment at law, and action brought on the injunction bond, the issuance of an execution and the execution and forfeiture of a forthcoming bond will not bar the action on the injunction bond.

Right Barred by Taking Debtor's Body in Execution. — See *Porteous v. Snipes*, 1 Bay (S. Car.) 215.

(2) *Defenses to Action on Bond* — (a) **General Rule as to Merits of Injunction Suit — Merits May Not Be Inquired Into.** — It may be laid down as a universally accepted rule that the grounds of an injunction may not be inquired into in an action upon the injunction bond. It is for the court to determine whether the injunction was properly or improperly issued, and the defendants in the action on the bond are concluded by the determination of the court on this point.¹

(b) **Solvency of Principal.** — In an action on the bond against the sureties therein it is no defense that the principal is solvent and able to pay his own debts.²

(c) **Want of Jurisdiction.** — The fact that the court issuing the injunction had no jurisdiction is no defense to an action on the bond.³

Reason for Rule. — The rule is a proper application of the doctrine of estoppel and is based upon the theory that it does not lie in the mouth of one who has affirmed the jurisdiction of a court in a particular matter, to accomplish a purpose, afterwards to deny such jurisdiction to escape a penalty.⁴

(d) **Disobedience to Writ.** — It may be laid down as a general rule that while by disobedience to a writ of injunction the party enjoined becomes amenable to the action of the court as for contempt,⁵ such disobedience does not deprive him of his right of action for a breach of the conditions of the injunction bond, and is no defense to such an action.⁶

(e) **Issuance of Second Injunction.** — It has been held that in a suit on a bond given to secure the injunction of a judgment it is no defense to show that immediately after the dissolution of the injunction in respect to which the bond was given another injunction was obtained against the collection of the same judgment, and that such injunction is still in force and not dissolved.⁷ It seems, however, that in such a case where the judgment was unjust and wrongful equity will give relief and restrain the exercise of the obligor's strictly legal right.⁸

1. **Decree of Court Conclusive — California.** — *Dowling v. Polack*, 18 Cal. 625.

Indiana. — *Sipe v. Holliday*, 62 Ind. 4.

Kentucky. — *Offut v. Bradford*, 4 Bush (Ky.) 413; *Hughes v. Wickliffe*, 11 B. Mon. (Ky.) 202; *Hunt v. Scobie*, 6 B. Mon. (Ky.) 469.

Maryland. — *Hopkins v. State*, 53 Md. 502. See also *Lloyd v. Burgess*, 4 Gill (Md.) 187.

Mississippi. — *Yale v. Baum*, 70 Miss. 225; *Smith v. Wells*, 46 Miss. 64.

Nebraska. — *Bemis v. Gannett*, 8 Neb. 236.

New Jersey. — *Easton v. New York, etc., R. Co.*, 26 N. J. Eq. 359; *Smith v. Kuhl*, 26 N. J. Eq. 97.

New York. — *Harter v. Westcott*, (Brooklyn City Ct. Gen. T.) 11 Misc. (N. Y.) 180; *Pacific Mail Steamship Co. v. Toel*, 85 N. Y. 646; *Andrews v. Glenville Woolen Co.*, 50 N. Y. 282.

North Carolina. — *Nansemond Timber Co. v. Rountree*, 122 N. Car. 45.

Virginia. — *Arthur v. Crenshaw*, 4 Leigh (Va.) 394.

Washington. — *White v. Brooke*, 11 Wash. 99.

Evidence in Mitigation of Damages — Dissolution Prima Facie Evidence of Improper Issuance. — In *Stewart v. Miller*, 1 Mont. 301, it was held that "where the dissolution of an injunction is not consequent upon a final determination or adjudication upon the merits of the action, the obligors in the bond may, according to the weight of authority and principle, show the facts and circumstances entitling them to the injunction, if not in full defense, at least in mitigation of damages in an action upon the bond, the order of dissolution being in such cases only *prima facie* evidence that the injunction was improperly issued."

2. **Solvency of Principal No Defense.** — *Hunt v. Burton*, 18 Ark. 188. See also *Dangel v. Levy*, 1 Idaho 722.

In *Riggan v. Crain*, 86 Ky. 249, which was an action on a bond given to secure the injunction of an execution, it was held that it is immaterial whether the property released from levy was subject to the execution, or whether the plaintiff has lost his debt by reason of the injunction. Where there is no question as to the execution of the bond, the only inquiry is Did the chancellor dissolve the injunction?

3. **Want of Jurisdiction Not a Defense.** — *Stevenson v. Miller*, 2 Litt. (Ky.) 306, 13 Am. Dec. 271; *Hanna v. McKenzie*, 5 B. Mon. (Ky.) 314, 43 Am. Dec. 122; *Kimm v. Sicketee*, 44 Mich. 527; *Cumberland Coal, etc., Co. v. Hoffman Steam Coal Co.*, 39 Barb. (N. Y.) 16. See also *Walton v. Develing*, 61 Ill. 201; *Robertson v. Smith*, 129 Ind. 427.

4. **Reason for Rule.** — *Per Miller, J.*, in *Robertson v. Smith*, 129 Ind. 422. See also *Cumberland Coal, etc., Co. v. Hoffman Steam Coal Co.*, 39 Barb. (N. Y.) 16.

5. **Disobedience to Writ.** — See the title *CONTEMPT*, vol. 7, p. 54. See also *supra*, this title, *Violation of Injunction*.

6. *Colcord v. Sylvester*, 66 Ill. 540; *Van Hoozer v. Van Hoozer*, 18 Mo. App. 19. As to the contemnor's disabilities generally, see the title *CONTEMPT*, vol. 7, p. 69.

7. **Second Injunction Against Same Judgment.** — *Weaver v. Poyer*, 73 Ill. 489. See also *Weaver v. Poyer*, 79 Ill. 417.

8. *Weaver v. Poyer*, 79 Ill. 417, in which case, where a party sued out an injunction to restrain the collection of a void and unjust judgment, which was dissolved, and imme-

(f) **Reversal of Judgment Enjoined.** — Where a bond has been given to secure an injunction against the collection of a judgment, conditioned for the payment of the judgment in case of the dissolution of the injunction, it would seem that the reversal of the judgment at law before the suit on the bond has been brought will be a good defense to such action.¹

(3) **Evidence in Action on Bond — Extracts from Record.** — In an action on an injunction bond it seems that extracts from the decrees and orders in the injunction cause are competent and sufficient evidence of the dissolution of the injunction, and it is unnecessary to produce the entire record.²

Agreement to Offer Original Papers — Admission of Petition for Taking of Proof. — Where by agreement of counsel in an action on the bond the original papers in the injunction case are to be offered, subject to exception, in place of the exemplification of the record of that case, all the original papers in the injunction suit are clearly admissible as constituting the record,³ and it is no error to admit in evidence a petition filed in the injunction case for the taking of proof, since such petition constitutes part of the record.⁴

Evidence that Injunction Prevented Collecting Judgment by Execution. — In an action on a bond to secure an injunction against a judgment where the plaintiff contends that he could have made the money on his judgment by execution on certain lands which were mortgaged pending the injunction, evidence of such fact is admissible.⁵

2. Damages — a. MANNER OF ASSESSING — (1) At Common Law — Prevailing Rule. — As regards the assessment and award of damages on the dissolution of an injunction, the decisions are not entirely uniform. According to the weight of authority, the rights and liabilities of the parties under the bond are cognizable only in courts of law. The principal obligor and his sureties are entitled to have these rights determined under and according to the rules of practice of courts of law, and, aside from express statutory authorization, a court of equity, on dissolving the injunction, cannot assess and award damages except by the consent of the obligors expressed in the bond, or in some other appropriate mode.⁶ And it seems that where the plaintiff and his sureties undertake to abide by such order respecting damages as the court may make, the question of their liability may be submitted to the judgment of the common-law courts.⁷

On the Other Hand, it has been held at circuit, the court relying on a dictum of the United States Supreme Court, that a court of chancery has inherent power to assess damages upon the dissolution of an injunction, and that where the injunction has been dissolved, the sounder and safer rule is for the court to go on and assess the damages sustained by the party against whom the injunction issued.⁸ And in one of the state courts it was held that where a court

diately filed a second bill for the same purpose, which was held sufficient, and in the meantime judgment was recovered on the injunction bond for the amount of such void judgment, it was held that, as it was inequitable to allow the collection of the void judgment, it was equally so to allow the plaintiff to enforce payment of the judgment on the bond, and collection thereof should be enjoined.

1. Reversal of Judgment. — *Fahs v. Darling*, 82 Ill. 142. But compare *Somerville v. Mayes*, 54 Miss 31.

2. Extracts from Record of Injunction Cause. — *White v. Clay*, 7 Leigh (Va.) 68.

3. Agreement to Offer Original Papers. — *Hopkins v. State*, 53 Md. 502.

4. Petition to Take Proof. — *Hopkins v. State*, 53 Md. 502.

5. Hopkins v. State, 53 Md. 502.

6. View that Court of Equity Cannot Assess

Damages — United States. — *Merryfield v. Jones*, 2 Curt. (U. S.) 306; *Bein v. Heath*, 12 How. (U. S.) 168.

Illinois. — *Phelps v. Foster*, 18 Ill. 309.

Iowa. — *Spencer v. Sherwin*, 86 Iowa 117; *Grove v. Bush*, 86 Iowa 94; *Shenandoah Nat. Bank v. Read*, 86 Iowa 136; *Fountain v. West*, 68 Iowa 380; *Taylor v. Brownfield*, 41 Iowa 264.

New Jersey. — *Easton v. New York, etc., R. Co.*, 26 N. J. Eq. 359.

New York. — *Garcie v. Sheldon*, 3 Barb. (N. Y.) 232.

Texas. — *Avery v. Stewart*, 60 Tex. 154.

7. Effect of Agreement Conferring Jurisdiction. — *Novello v. James*, 31 Eng. L. & Eq. 280; *Easton v. New York, etc., R. Co.*, 26 N. J. Eq. 361.

8. View that Court of Equity May Assess Damages. — *Lea v. Deakin*, 11 Biss. (U. S.) 40, rely-

Volume XVI.

of chancery granting an injunction has made an order requiring the party asking the injunction to pay such damages as the party enjoined shall suffer by reason of the injunction, in case of its dissolution, or if a bond to secure such damages has been required and furnished, it is within the power of the chancery court, independently of the statutes or chancery rules, to ascertain the damages upon the dissolution of the injunction and to decree their payment by the party obtaining the injunction. It was said, however, that so far as the sureties were concerned the court could have no jurisdiction, and that to enforce the bond proceedings must be instituted at law upon the bond itself.¹

(2) *Under Statutes* — *Right of Court to Assess on Dissolution*. — In many of the states it is expressly provided by statute that after it has been adjudged that the party obtaining the injunction was not entitled thereto, the court may proceed to ascertain the damages² by reference or otherwise as it may see fit to direct;³ and in others there are provisions not quite so broad, but which authorize the assessment of damages upon the dissolution of an injunction against proceedings on a judgment or final order.⁴ In all other cases the

ing on a dictum in *Russell v. Farley*, 105 U. S. 433.

1. *Sturgis v. Knapp*, 33 Vt. 486.

2. *Power of Court to Assess on Dissolution* — *Illinois*. — *Alwood v. Mansfield*, 81 Ill. 314; *Mix v. Vail*, 86 Ill. 40; *Misner v. Bullard*, 43 Ill. 470; *Albright v. Smith*, 68 Ill. 181; *Darst v. Gale*, 83 Ill. 136; *Holmes v. Stateler*, 57 Ill. 209; *Russell v. Rogers*, 56 Ill. 176; *McWilliams v. Morgan*, 70 Ill. 551; *Forth v. Xenia*, 54 Ill. 210; *Wing v. Dodge*, 80 Ill. 565; *Smith v. Powell*, 50 Ill. 21.

Michigan. — *Lothrop v. Southworth*, 5 Mich. 436.

Minnesota. — *Hayden v. Keith*, 32 Minn. 277.

Missouri. — *Nolan v. Johns*, 108 Mo. 431.

New York. — *Leavitt v. Dabney*, (N. Y. Super. Ct. Gen. T.) 40 How. Pr. (N. Y.) 277; *Lawton v. Green*, 64 N. Y. 326; *Methodist Churches v. Barker*, 18 N. Y. 463; *Jordan v. Volkenning*, 72 N. Y. 300; *Musgrave v. Sherwood*, 76 N. Y. 194; *Loomis v. Brown*, 16 Barb. (N. Y.) 325; *Waterbury v. Bouker*, 10 Hun (N. Y.) 262; *Roberts v. White*, 73 N. Y. 375; *Jacobs v. Miller*, 11 Hun (N. Y.) 441.

North Carolina. — *North Carolina Gold Amalgamating Co. v. North Carolina Ore Dressing Co.*, 79 N. Car. 48; *Crawford v. Pearson*, 116 N. Car. 718; *Nansemond Timber Co. v. Rountree*, 122 N. Car. 45.

South Carolina. — *Hill v. Thomas*, 19 S. Car. 235.

Tennessee. — *Ragan v. Aiken*, 9 Lea (Tenn.) 623, 42 Am. Rep. 684; *White v. Bowman*, 10 Lea (Tenn.) 55; *Hubbard v. Fravell*, 12 Lea (Tenn.) 304.

Texas. — *Howard v. Randolph*, 73 Tex. 454.

Wisconsin. — *Parish v. Reeve*, 63 Wis. 315.

Illinois — *Suggestion of Damages*. — It is necessary that a suggestion of damages be filed. *Albright v. Smith*, 68 Ill. 183; *Misner v. Bulard*, 43 Ill. 470. Evidence cannot be heard and damages assessed upon the dissolution of an injunction where no suggestion in writing has been filed. *Driggers v. Bell*, 8 Ill. App. 254; *Steele v. Boone*, 75 Ill. 457; *Palmer v. Gardiner*, 77 Ill. 143; *Spring v. Olney*, 78 Ill. 101; *Wilson v. Haecker*, 85 Ill. 349; *Hamilton v. Stewart*, 59 Ill. 330; *Albright v. Smith*, 68 Ill. 181; *Forth v. Xenia*, 54 Ill. 210.

After the dissolution of an injunction the

defendant may file his suggestions and claim damages at any time before the decree is signed and filed, and the court may dispose of the suggestion even after the decree is filed. It is error to refuse leave to file them before the decree is filed. *Wing v. Dodge*, 80 Ill. 566; *Albright v. Smith*, 68 Ill. 181; *Wilson v. Haecker*, 85 Ill. 349; *Hamilton v. Stewart*, 59 Ill. 330; *Forth v. Xenia*, 54 Ill. 210.

A suggestion of damages at a succeeding term comes too late, and the court has no authority to assess damages on such suggestion. *Albright v. Smith*, 68 Ill. 181.

In *Texas* one seeking damages to the amount of an injunction bond can bring an original action on the bond, or, in the pending suit wherein it was given, plead in reconviction, setting up the grounds of his claim for damages. *Avery v. Stewart*, 60 Tex. 154.

3. *Reference to Ascertain Damages*. — *Lawton v. Green*, 64 N. Y. 326; *Roberts v. White*, 73 N. Y. 378; *Crawford v. Pearson*, 116 N. Car. 718; *North Carolina Gold Amalgamating Co. v. North Carolina Ore Dressing Co.*, 79 N. Car. 48; *Hill v. Thomas*, 19 S. Car. 235; *Parish v. Reeve*, 63 Wis. 315.

"A reference after the final determination against the right of the plaintiff to the injunction is very much a matter of course, for the purpose of ascertaining the defendant's damages." *Waterbury v. Bouker*, 10 Hun (N. Y.) 262 [citing *Dunkin v. Lawrence*, 1 Barb. (N. Y.) 447; *Coates v. Coates*, 1 Duer (N. Y.) 664; *Park v. Musgrave*, 6 Hun (N. Y.) 223].

In *Tennessee*, by Code 1896, § 6259, "the damages may be ascertained by the court in which the cause is heard and injunction dissolved, upon reference to the clerk and master, and proof, or upon an issue of fact to be made up and tried as in other cases of issues of fact." See *Ragan v. Aiken*, 9 Lea (Tenn.) 623, 42 Am. Rep. 684.

4. *Injunctions Against Judgments* — *Arkansas*. — *Stanley v. Bonham*, 52 Ark. 354; *Fowler v. Williams*, 20 Ark. 641; *Greer v. Stewart*, 48 Ark. 21; *Marshall v. Green*, 24 Ark. 410; *Johnson v. Walker*, 25 Ark. 106.

Kentucky. — *Logsdon v. Willis*, 14 Bush (Ky.) 183; *Rankin v. Estes*, 13 Bush (Ky.) 428; *Alexander v. Gish*, 88 Ky. 13; *Hayden v. Phillips*, 89 Ky. 1; *Eastern Kentucky R. Co.*

damages can be ascertained only in an action on the injunction bond.¹

Evidence of Damages on Assessment — Necessity for. — Where damages are assessed by the court upon the dissolution of an injunction there must be evidence supporting such assessment.²

Record Must Show Evidence. — The record must show the evidence upon which the court assessed the damages,³ especially where there is no such finding of facts in the decree as will dispense with the necessity of preserving the evidence.⁴ There is no presumption in such cases to aid the omission of the evidence from the record.⁵

b. ASSESSMENT AS PREREQUISITE TO ACTION ON BOND — In Absence of Statute. — Where there is no statute authorizing the court to assess damages on the dissolution of an injunction, no assessment is necessary in order that the defendant may maintain an action on the bond for the damages sustained by him.⁶

Under Statute Authorizing Assessment. — In those states where the statutes provide for the assessment of damages upon the dissolution of the injunction the authorities are not uniform as to the necessity of such assessment. Thus it has been held that it is imperative that the damages should be so assessed,⁷ and some decisions expressly hold that where the obligation in a statutory bond is to pay such damages as the court shall upon the dissolution of the injunction adjudge against the plaintiff no action can be maintained on the bond without such assessment, since the nonpayment of the amount adjudged forms the breach of the bond so far as damages are concerned.⁸ Other deci-

v. Brown, 99 Ky. 540; *Crawford v. Woodworth*, 9 Bush (Ky.) 745.

Louisiana. — *Green v. Reagan*, 32 La. Ann. 974; *Verges v. Gonzales*, 33 La. Ann. 410; *King v. Labranche*, 35 La. Ann. 305; *Boyer v. Joffrion*, 40 La. Ann. 657; *Morris v. Bienvenu*, 30 La. Ann. 878; *Willis v. Elam*, 28 La. Ann. 859; *D'Meza v. Generes*, 22 La. Ann. 286; *Sheen v. Stothart*, 29 La. Ann. 630; *Crescent City Live Stock Landing, etc., Co. v. Larrieux*, 30 La. Ann. 742; *Elder v. New Orleans*, 31 La. Ann. 500.

No Application to Injunctions Against Sale of Particular Property. — The terms of Mansf. Dig. Stat. Ark., §§ 3763-3765 (Sand. & H. Dig. Stat. Ark. 1894, §§ 3810-3812), providing for the assessment of damages on the dissolution of an injunction to stay proceedings upon a judgment, apply only to cases where the enforcement of the judgment is enjoined. An injunction to prevent the sale of particular property is not within the meaning of the statute, and it is error to award damages on dissolving it. *Stanley v. Bonham*, 52 Ark. 354.

No Application in Case of Injunctions Restraining Trespass. — Upon the dissolution of an injunction to restrain the commission of a trespass, the court has no right to assess the damages accruing from the injunction. They must be recovered in another action if at all. *Greer v. Stewart*, 48 Ark. 21.

1. *Stanley v. Bonham*, 52 Ark. 354; *Logsdon v. Willis*, 14 Bush (Ky.) 183; *Willis v. Elam*, 28 La. Ann. 859.

In *Louisiana* damages can be allowed by the decree dissolving an injunction only when the judgment which has been enjoined is for money. *Sheen v. Stothart*, 29 La. Ann. 630; *Crescent City Live Stock Landing, etc., Co. v. Larrieux Landing, etc., Co.*, 30 La. Ann. 740.

2. **Evidence in Support of Assessment Necessary.**

— *Lengfelder v. Smith*, 69 Ill. App. 238; *Forth v. Xenia*, 54 Ill. 210. See also *Packer v. Nevin*, 67 N. Y. 550.

3. **Record Must Show Evidence.** — *Mitchell v. Northwestern Mfg., etc., Co.*, 26 Ill. App. 295; *Forth v. Xenia*, 54 Ill. 210; *Hamilton v. Stewart*, 59 Ill. 330; *Wilson v. Weber*, 3 Ill. App. 125.

4. *Mitchell v. Northwestern Mfg., etc., Co.*, 26 Ill. App. 295.

5. **No Presumption to Aid Omission of Evidence.** — *Forth v. Xenia*, 54 Ill. 210, the court saying: "We are not aware of any rule of law or equity requiring this court to presume that the Circuit Court heard evidence on rendering a decree. The rule has been often stated by this court that the facts on which a decree in equity is based must appear somewhere in the record." *Citing Wilhite v. Pearce*, 47 Ill. 413; *Pankey v. Raum*, 51 Ill. 88.

6. **When Assessment Not Prerequisite to Action on Bond.** — *Rees v. Peltzer*, 1 Ill. App. 315. See *Eastern Kentucky R. Co. v. Brown*, 99 Ky. 540; *Rankin v. Estes*, 13 Bush (Ky.) 428.

In *Claytor v. Anthony*, 15 Gratt. (Va.) 518, it was held that though the condition of the bond provides for the payment of such damages as may be awarded by the court, and the court simply dissolves the injunction and dismisses the bill, yet the order of dissolution necessarily imports that the damages are to be paid, unless they are expressly remitted by the terms of the order.

7. *Kentucky.* — *Hayden v. Phillips*, 89 Ky. 1; *Crawford v. Woodworth*, 9 Bush (Ky.) 745; *Logsdon v. Willis*, 14 Bush (Ky.) 183.

8. **Action Held Not Maintainable Without Assessment.** — *Ashby v. Chambers*, 3 Dana (Ky.) 437; *Dorriss v. Carter*, 67 Mo. 544. See also *Carson Min. Co. v. Hill*, 7 Colo. App. 141; *Kennedy v. Hammond*, 16 Mo. 341; *Corder v. Martin*, 17 Mo. 41.

sions, however, hold that although it is provided that the court may assess the damages on dissolution of an injunction, this fact will not prevent the defendant from recovering damages on the bond without such assessment.¹

c. EFFECT OF ASSESSMENT. — Where the court assesses the amount of damages upon the dissolution of an injunction this is conclusive upon both the party and his sureties.²

d. RIGHT OF COURT DISSOLVING INJUNCTION TO ENFORCE PAYMENT —

(1) *Rendition of Judgment Against Principal.* — As to whether the power of the court upon the dissolution of an injunction ends with the mere ascertainment of the amount of damages to be allowed to the defendant, the practice differs in the various states. Thus in some states it is provided that judgment shall be rendered against the party who obtained the injunction for the damages assessed, and such assessment shall be conclusive against the surety of such party,³ though the court has no jurisdiction to render judgment for damages against the sureties in the injunction bond.⁴

(2) *Rendition of Judgment Against Principal and Sureties.* — In other jurisdictions, however, it is held that the sureties on an injunction bond are so far parties that judgment may be rendered against them together with the principal to pay the amount adjudged against the latter;⁵ and in one jurisdiction the decisions hold that the payment of damages ascertained by reference may be enforced by order of court and by execution against all the obligors, pro-

1. *Illinois* — Prior to the Act of 1861 it was held that the conditions of an injunction bond, in reference to damages, authorized a recovery thereon whether the damages were awarded on the dissolution of the injunction or afterwards, in a suit on the bond. *Hibbard v. McKindley*, 28 Ill. 240.

Under the Act of 1861, authorizing the chancellor on the dissolution of an injunction to assess damages upon the filing of suggestions in writing, it was held that where a bond has been given conditioned to pay such damages as may be awarded to the plaintiff, the condition is intended to refer to the awarding of damages by the chancellor, and that where damages have not been awarded no suit can be maintained on the bond. *Russell v. Rogers*, 56 Ill. 176, in which case the court pointed out that *Hibbard v. McKindley*, 28 Ill. 240, was decided before the enactment of the statute. See also *McWilliams v. Morgan*, 70 Ill. 551; *Brownfield v. Brownfield*, 58 Ill. 152; *Mix v. Vail*, 86 Ill. 40.

Rev. Stat. 1874, p. 580, § 12 (Starr & Curt. Annot. Stat. 1896, c. 69, par. 12), contains a proviso that the failure of the court to assess damages shall not operate as a bar to an action upon the injunction bond; but this statute has been held not to affect the right to maintain an action on a bond which was executed before the statute became operative. *Mix v. Vail*, 86 Ill. 40. See also *Marthaler v. Druiding*, 58 Ill. App. 336; *Linington v. Strong*, 8 Ill. App. 388.

2. *Assessment Conclusive on Party and Sureties.* — *Bailey v. Gibson*, 29 Ark. 472; *McAllister v. Clark*, 86 Ill. 236; *Hayden v. Phillips*, 89 Ky. 1; *Lothrop v. Southworth*, 5 Mich. 436; *Lawton v. Green*, 64 N. Y. 326; *Leavitt v. Dabney*, (N. Y. Super. Ct. Gen. T.) 40 How. Pr. (N. Y.) 277.

Reference and Report Conclusive on Sureties when Confirmed by Court. — A reference and report upon the damages sustained by reason of the injunction, and a confirmation by the court,

are conclusive in an action against the sureties, although they were not parties to the reference, and not notified of the proceedings. *Methodist Churches v. Barker*, 18 N. Y. 463.

Surety May Not Show Payments Prior to Assessment. — *McAllister v. Clark*, 86 Ill. 236.

3. *Rendition of Judgment Against Principal Obligor.* — *Bailey v. Gibson*, 29 Ark. 472; *Greer v. Stewart*, 48 Ark. 21; *Stanley v. Bonham*, 52 Ark. 354; *Lawson v. Barton*, (Ark. 1888) 7 S. W. Rep. 387; *Hayden v. Phillips*, 89 Ky. 1; *Crawford v. Woodworth*, 9 Bush (Ky.) 745; *Logsdon v. Willis*, 14 Bush (Ky.) 183. See also *Lothrop v. Southworth*, 5 Mich. 436.

4. *Bailey v. Gibson*, 29 Ark. 472; *Clayton v. Martin*, 31 Ark. 217; *Daniel v. Daniel*, 39 Ark. 266. See also Kentucky decisions cited in the preceding note.

No Reversal for Such Error on Appeal of Principal Alone. — In *Daniel v. Daniel*, 39 Ark. 266, it was held that while it is error, upon the dissolution of an injunction, to render judgment against the sureties in the injunction bond, the judgment will not be reversed upon the appeal of the principal alone. See also *Mann v. State*, 37 Ark. 405.

5. *Judgment Against Sureties.* — *Howell v. Cronan*, 31 La. Ann. 247; *Garcia v. Avery*, 22 La. Ann. 417; *Nolan v. Johns*, 108 Mo. 431; *St. Louis Zinc Co. v. Hesselmeyer*, 50 Mo. 180. See also *Sharp v. Schmidt*, 62 Tex. 263.

Surety a Party Only Where Execution of Judgments Enjoined. — In *Scott v. Sheriff*, 30 La. Ann. 580, it was said: "It is only in those cases in which the execution of a judgment is enjoined that, on the trial of the injunction, the sureties on the bond are by law considered as parties to the suit. In all others the successful defendant is left to his action on the bond."

Against One or Both. — In *Nansemond Timber Co. v. Rountree*, 122 N. Car. 45, it was held that the damages must be assessed against the plaintiff and its sureties, or either one of them. See also *Crawford v. Pearson*, 116 N. Car. 718.

vided all have been notified of the reference, and thus made parties to the proceedings.¹

e. **ENFORCEMENT BY ACTION ON BOND.** — In the absence of statutes such as have just been considered, the order of the court upon dissolving an injunction should be confined to fixing the amount of damages, the payment of which can be enforced only by action on the undertaking.²

f. **MEASURE OF DAMAGES** — (1) *Only Proximate Damages Recoverable* — (a) **General Rule.** — It may be laid down as a general rule that upon the dissolution of an injunction nothing can be included in the damages which is not the actual natural and proximate result of the injunction.³

Loss of Property or Diminution of Profits. — Any loss of property or diminution of profits occurring in consequence of the change in the custody and control of the defendant's goods or stoppage of his business is held to be such proximate result of the injunction as may be recovered as damages.⁴

Remote or Speculative Damages Not Recoverable. — The defendant cannot recover damages which are remote, consequential, or speculative.⁵

1. *Hill v. Thomas*, 19 S. Car. 235.

2. **Enforcement by Action on Bond.** — *Lawton v. Green*, 64 N. Y. 326; *Leavitt v. Dabney*, (N. Y. Super. Ct. Gen. T.) 40 How. Pr. (N. Y.) 277; *Methodist Churches v. Barker*, 18 N. Y. 463; *Randall v. Carpenter*, 47 N. Y. Super. Ct. 205; *Fitzpatrick v. Flagg*, (C. Pl. Gen. T.) 12 Abb. Pr. (N. Y.) 189; *Patterson v. Bloomer*, (Supm. Ct. Spec. T.) 37 How. Pr. (N. Y.) 450. See also *Hayden v. Keith*, 32 Minn. 277.

3. **Damages Must Be Proximate Result of Injunction** — *California*. — *Rice v. Cook*, 92 Cal. 144; *Lambert v. Haskell*, 80 Cal. 611; *Dougherty v. Dore*, 63 Cal. 170.

Colorado. — *Streeter v. Marshall Silver Min. Co.*, 4 Colo. 535; *Belmont Min., etc., Co. v. Costigan*, 21 Colo. 465.

District of Columbia. — *Kerngood v. Gusdorf*, 5 Mackey (D. C.) 161.

Illinois. — *Collins v. Sinclair*, 51 Ill. 328; *Cummings v. Burleson*, 78 Ill. 281; *Edwards v. Pope*, 4 Ill. 465; *Rosenthal v. Boas*, 27 Ill. App. 430.

Iowa. — *Hibbs v. Western Land Co.*, 81 Iowa 285; *Reece v. Northway*, 58 Iowa 187.

Kentucky. — *Cummins v. Miller*, 7 Ky. L. Rep. 670; *Burgen v. Sharer*, 14 B. Mon. (Ky.) 399.

Louisiana. — *Lallande v. Trezevant*, 39 La. Ann. 830; *Carondelet Canal, etc., Co. v. Touche*, 38 La. Ann. 388; *Riggs v. Bell*, 42 La. Ann. 666.

Maryland. — *Lange v. Wagner*, 52 Md. 310, 36 Am. Rep. 380; *Banks v. State*, 62 Md. 88.

Missouri. — *Kennedy v. Hammond*, 16 Mo. 341; *Alliance Trust Co. v. Stewart*, 115 Mo. 236; *Holloway v. Holloway*, 103 Mo. 284; *Wabash R. Co. v. McCabe*, 118 Mo. 640; *Teasdale v. Jones*, 40 Mo. App. 243.

Nevada. — *Brown v. Jones*, 5 Nev. 374.

New Hampshire. — *State v. Concord R. Corp.*, 62 N. H. 375.

New York. — *Hotchkiss v. Platt*, 8 Hun (N. Y.) 46; *Roberts v. White*, 73 N. Y. 375; *Whiteside v. Noyac Cottage Assoc.*, 84 Hun (N. Y.) 555; *Harrison v. Harrison*, 75 Hun (N. Y.) 191; *Hovey v. Rubber-Tip Pencil Co.*, 50 N. Y. 335; *McDonald v. James*, 38 N. Y. Super. Ct. 76; *Bray v. Poillon*, 4 Thomp. & C. (N. Y.) 663.

Ohio. — *Tyler v. Ryan*, 4 Am. L. Rec. 670, 5 Ohio Dec. (Reprint) 336; *Bishop v. Bascoc*, 7 Cinc. L. Bul. 342, 8 Ohio Dec. (Reprint) 423.

South Dakota. — *Edmison v. Sioux Falls Water Co.*, 10 S. Dak. 440.

Tennessee. — *Hubbard v. Fravell*, 12 Lea (Tenn.) 304; *Moore v. Hallum*, 1 Lea (Tenn.) 511; *Hammond v. St. John*, 4 Yerg. (Tenn.) 107; *Terrell v. Ingersoll*, 10 Lea (Tenn.) 77; *Downs v. Allen*, 10 Lea (Tenn.) 670; *White v. Bowman*, 10 Lea (Tenn.) 55; *Ragan v. Aiken*, 9 Lea (Tenn.) 623, 42 Am. Rep. 684.

Texas. — *Galveston City R. Co. v. Miller*, (Tex. Civ. App. 1897) 38 S. W. Rep. 1132; *Pipher v. Bissonet*, (Tex. Civ. App. 1896) 36 S. W. Rep. 770.

Vermont. — *Center v. Hoag*, 52 Vt. 401; *Lillie v. Lillie*, 55 Vt. 470.

Washington. — *Donahue v. Johnson*, 9 Wash. 187.

See also *Allen v. Jones*, 79 Fed. Rep. 698.

See generally the title **DAMAGES**, vol. 8, p. 537.

Sureties Not Liable for Tortious Taking and Conversion by Complainant. — The sureties in an injunction bond are not liable for wrongs suffered by the defendant during the time when the injunction was in force, by unlawful acts of the complainant, other than the improvident act of suing out the writ. They are not liable for the tortious acts of the complainant in taking and converting the property during the pendency of the injunction. *Cummings v. Mugge*, 94 Ill. 186.

4. **Loss of Property or Diminution of Profits.** — *Hotchkiss v. Platt*, 8 Hun (N. Y.) 46.

5. **Remote or Speculative Damages** — *California*. — *Rice v. Cook*, 92 Cal. 144.

Illinois. — *Chicago City R. Co. v. Howison*, 86 Ill. 215; *Densch v. Scott*, 58 Ill. App. 33.

Maryland. — *Lange v. Wagner*, 52 Md. 310, 36 Am. Rep. 380; *Wood v. State*, 66 Md. 61; *Steuart v. State*, 20 Md. 97.

Missouri. — *McKinzie v. Mathews*, 59 Mo. 99; *Teasdale v. Jones*, 40 Mo. App. 243.

New York. — *Hotchkiss v. Platt*, 8 Hun (N. Y.) 46; *Manufacturers, etc., Bank v. C. W. F. Dare Co.*, (Supm. Ct. Gen. T.) 16 N. Y. Supp. 67.

Pennsylvania. — *Sensenig v. Parry*, 113 Pa. St. 115; *Morgan v. Negley*, 53 Pa. St. 153.

South Dakota. — *Edmison v. Sioux Falls Water Co.*, 10 S. Dak. 440.

Vermont. — *Foster v. Stafford Nat. Bank*, 58 Vt. 658.

(b) **Necessity for Exercise of Care and Prudence by Defendant.** — According to some decisions damages recoverable for injuries occasioned from an injunction obtained in good faith are such only as result from injuries received while the defendant is exercising ordinary care and prudence.¹

(c) **Recovery of Damages on Partial Dissolution.** — If an injunction is wrongfully issued as to any part of the plaintiff's demand, and is partially dissolved to that extent, the party enjoined will be entitled to such damages within the limit of the penalty of the bond as he may have sustained by reason of the issuing of the injunction.²

(d) **Recovery of Exemplary Damages.** — It would seem according to some decisions that exemplary damages are not recoverable even where an injunction has been maliciously sued out.³ According to decisions in other jurisdictions, however, the court may mulct in exemplary damages those who abuse the equitable remedy of injunction.⁴

(2) **Amount of Recovery Limited by Bond.** — Where an injunction bond is required and given, and there is no evidence of the character and extent of the order as to securing the damages outside the terms of the bond, it has been held that the court of chancery cannot, upon dissolution of the injunction, award damages in excess of the penalty of the bond.⁵ Other decisions,

Wisconsin. — *Gear v. Shaw*, 1 Pin. (Wis.) 608.

See generally the title DAMAGES, vol. 8, p. 537.

Loss of Possible Profits. — A horse-railway company was enjoined from extending its track to a certain point; the injunction being dissolved, the company claimed damages from a loss of profits that might have been realized from increase of business after the extension. It appeared that the company had another line, parallel with the extension and near it, and that no accounts were kept of the profits as to the extension, the fare being five cents for any distance. It was held that no damages could be assessed for such profits, they being speculative and too remote and uncertain. *Chicago City R. Co. v. Howison*, 86 Ill. 215. See also, as to loss of possible profits being too speculative to allow of recovery therefor, *Lehman v. McQuown*, 31 Fed. Rep. 138; *Manufacturers, etc., Bank v. C. W. F. Dare Co.*, 67 Hun (N. Y.) 44.

Damages Arising from Acts of Receiver. — When an injunction is ended by the appointment of a receiver, damages arising from the act of the receiver in selling at a sacrifice the property the sale of which was enjoined are not recoverable in an action on the injunction bond. *Kerngood v. Gusdorf*, 5 Mackey (D. C.) 161.

1. Injuries Sustained While Exercising Ordinary Care. — *Center v. Hoag*, 52 Vt. 401. See also to the same effect *Edwards v. Edwards*, 31 Ill. 474; *Alliance Trust Co. v. Stewart*, 115 Mo. 236; *Douglass v. Stephens*, 18 Mo. 366; *Meyersburg v. Schlieper*, 46 Mo. 209; *Kulp v. Bowen*, 122 Pa. St. 78; *Sturgis v. Knapp*, 33 Vt. 486.

Want of Diligence in Securing Other Employment. — In *Muller v. Fern*, 35 Iowa 420, it was held that in an action on an injunction bond the plaintiffs are entitled to recover, at the usual rate of wages, for the loss of time occasioned by the injunction, provided they used diligence to secure other employment during such period. In the absence of all evidence that the plaintiffs used such diligence a judgment in their favor should be reversed.

Negligence in Protecting Property from Injury.

— The defendant having a lot of unburned brick which were damaged by rain while an injunction was in force, restraining him from carrying on the manufacture of such brick on the premises, it was held that the writ of injunction as issued did not prevent him from taking steps to protect the brick from the rain, and if he was negligent in that respect he could not recover for damages sustained thereby. *Behrens v. McKenzie*, 23 Iowa 333, 92 Am. Dec. 428.

Entitled to Loss from Obedience to Injunction as Reasonably Understood. — A defendant who has been wrongfully enjoined may recover as damages whatever loss he has sustained by reason of obeying the injunction as he reasonably understood it. *Webb v. Laird*, 62 Vt. 448, 22 Am. St. Rep. 121.

2. Damages Recoverable on Partial Dissolution. — *Rice v. Cook*, 92 Cal. 144.

3. View that Exemplary Damages Are Not Recoverable. — See *Galveston, etc., R. Co. v. Ware*, 74 Tex. 47. See also *Shackelford County v. Hounsfield*, (Tex. Civ. App. 1893) 24 S. W. Rep. 358.

4. View that Exemplary Damages May Be Recoverable. — *Walker v. Villavaso*, 23 La. Ann. 800; *Pendleton v. Eaton*, 23 La. Ann. 435. In the latter case it was held that an act of sale of personal property, consisting of goods, wares, and merchandise in a store, in block, without fixing a price and without delivery, is null as against a seizing creditor, and a third party who claims to have purchased such goods before the seizure, and who resorts to the equitable remedy of injunction to stay the sale thereof on the ground of ownership in himself under his purchase, will be condemned to pay the highest rate of exemplary damages for his abuse of the equitable remedies which are given by the law to enable parties to protect themselves against unjust attacks.

5. Limit of Recovery. — *Sturgis v. Knapp*, 33 Vt. 486. See also *Rhea v. McCorkle*, 11 Heisk. (Tenn.) 415.

Limiting Recovery to Penalty Named in Bond. — In *Selectmen v. McGaffey*, 56 Vt. 294, it was

however, hold that the recovery against a principal and surety in a bond for the payment of money is not limited to the penalty, but may exceed it so far as necessary to include interest from the time of the breach.¹

(3) *Discretion of Court as to Amount.* — Where by statute discretionary power to award damages not to exceed a certain per cent. is given to a court, if it awards a much less sum than the maximum authorized such exercise of discretion will not be controlled by the Supreme Court.²

(4) *Damages on Dissolution of Injunction Against Judgments.* — Upon the dissolution of an injunction on a judgment, the damages for retarding execution by the injunction should be computed on the aggregate of principal, interest, and costs appearing due on the judgment at the time when the injunction took effect;³ and the defendant is entitled to damages on so much of his judgment only as remains due, and the collection of which has been delayed by the injunction.⁴

Assessment of Percentage of Judgment Enjoined — In General. — Statutory provisions exist in some of the states to the effect that where an injunction to stay the collection of a money judgment is dissolved wholly or in part, damages at a certain percentage shall be assessed on the amount of such judgment.⁵ Such provisions apply not only where the judgment debtor arrests the proceedings,

held that on the dissolution of an injunction granted on condition that a bond of a specified amount be filed, the bond having been filed, with no other order as to payment of damages which might result from granting the injunction, the defendant can recover no greater amount than the penalty of the bond. If the injunction had issued conditioned that the orators pay all the damages sustained, the case might merit a different conclusion.

1. *Allowance of Interest.* — Perry v. Horn, 22 W. Va. 381. See also McAllister v. Clark, 86 Ill. 236; Washington v. Parks, 6 Leigh (Va.) 581.

Award of Interest in Excess of Penalty of Bond. — As to the power to award interest beyond the penalty of the bond, see the title INTEREST.

2. *Discretion of Court as to Amount.* — Moore v. Granger, 30 Ark. 574. See also Combs v. Bentley, (Ky. 1897) 41 S. W. Rep. 8.

3. *On What Amount Computed.* — Washington v. Parks, 6 Leigh (Va.) 581.

4. *Southerland v. Crawford*, 2 J. J. Marsh. (Ky.) 369.

On Partial Dissolution. — Where the execution of a judgment has been enjoined, and upon the admission of the defendant of a partial payment the injunction is perpetuated for the amount paid and dissolved for the remainder still due, the plaintiff and his surety on the injunction bond are bound to the defendant for damages only on the amount for which the injunction is dissolved. Perry v. Kearney, 14 La. Ann. 401.

5. **Assessing Percentage on Judgment Enjoined.** — Mason v. Muncaster, 3 Cranch (C. C.) 403; Roberts v. Fahs, 36 Ill. 268; Camp v. Bryan, 84 Ill. 250; Stirlen v. Neustadt, 50 Ill. App. 378; Fawcett v. Pendleton, 5 Litt. (Ky.) 136; McIlvoy v. McIlvoy, 4 Dana (Ky.) 289; Johnson v. Blackford, Litt. Sel. Cas. (Ky.) 187; Head v. Perry, 1 T. B. Mon. (Ky.) 257; Martin v. Wade, 5 T. B. Mon. (Ky.) 77; Crawford v. Woodworth, 9 Bush (Ky.) 745; Moss v. Rowland, 3 Bush (Ky.) 507; Claytor v. Anthony, 15 Gratt. (Va.) 518.

Assessment of Ten Per Cent. — The usual provision is to the effect that damages may be assessed on the dissolution of an injunction staying the collection of a money judgment to an amount not exceeding ten per cent. on the sum improperly enjoined. Roberts v. Fahs, 36 Ill. 268; Claytor v. Anthony, 15 Gratt. (Va.) 518.

Assessment of Percentage of Amount Released. — According to the provisions of the statutes in some states, if money shall have been enjoined, the damages thereon shall not exceed ten per cent. on the amount released by the dissolution, exclusive of legal interest and costs. Kennedy v. Hammond, 16 Mo. 341; St. Louis v. Alexander, 23 Mo. 483; Wabash R. Co. v. McCabe, 47 Mo. App. 346; Alliance Trust Co. v. Stewart, 115 Mo. 236. See also Rio Grande R. Co. v. Scanlan, 44 Tex. 649.

On What Amount Given. — On the dissolution of an injunction, the ten per cent. damages should be given on the amount enjoined at the time of granting the injunction, not on the amount enjoined at the time of the dissolution. Bartlett v. Blanton, 4 J. J. Marsh. (Ky.) 432. See also Veech v. Pennebaker, 2 Bibb (Ky.) 327; McCallister v. Dugan, 4 J. J. Marsh. (Ky.) 572.

Erroneous to Include Amount of Judgment Enjoined. — In Roberts v. Fahs, 36 Ill. 268, it was held erroneous for the court upon the dissolution of an injunction staying a money judgment, in assessing damages, to include the amount of the judgment enjoined. The proper measure of damages in such case cannot exceed ten per cent. of the judgment enjoined. See also Joslyn v. Dickerson, 71 Ill. 25; Stirlen v. Neustadt, 50 Ill. App. 378; Fernandez v. Casey, 77 Tex. 452.

Error to Allow Damages in Excess of Prescribed Per Cent. — In Camp v. Bryan, 84 Ill. 250, it was held that it is error to allow damages, upon the dissolution of an injunction enjoining the collection of a judgment at law, in excess of ten per cent. upon the amount of the judgment. See also Moss v. Rowland, 3 Bush (Ky.) 507.

but also where a person not a party to the judgment enjoins them.¹

(5) *Damages on Dissolution of Injunction Restraining Acts of Ownership* — Where a party is restrained, by an injunction wrongfully sued out, from exercising acts of ownership over land, he will be entitled to such damages as are the necessary and proximate result of that deprivation. In determining their extent the court proceeds upon equitable principles, and is not governed by arbitrary or technical rules.²

(6) *Damages on Dissolution of Injunction Restraining Sale or Disposal of Goods*. — Where an injunction was prayed for the purpose of restraining the defendant from selling, disposing of, or intermeddling with certain goods, the amount properly recoverable in an action on the injunction bond is the loss in value of the goods during the operation of the injunction, not exceeding the penalty of the bond, with interest thereon from the time of the institution of the suit.³

(7) *Damages for Enjoining Sale of Property under Deed of Trust*. — Under the *Missouri* statute upon the dissolution of an injunction restraining the sale of property under a deed of trust, the damages assessed should be commensurate with the actual injury sustained, and it is error for the court to assess without proof the damages at a certain percentage of the amount released by the dissolution, as in the case of a proceeding to restrain the collection of money.⁴

3. Costs and Expenses — *a. IN GENERAL*. — It may be stated as a general rule that where an injunction is finally dissolved, necessary costs and expenses incurred in procuring its dissolution are recoverable.⁵ Where, however, the

1. Injunction of Judgment by Person Not Party. — *Clayton v. Anthony*, 15 Gratt. (Va.) 518.

Not Applicable to Injunctions Against Decrees. — The statute giving ten per cent. damages on the dissolution of injunctions against judgments does not apply to injunctions against decrees in chancery; therefore no damages can be given on the dissolution of such injunctions. *Head v. Perry*, 1 T. B. Mon. (Ky.) 253. See also *McIlvoy v. McIlvoy*, 4 Dana (Ky.) 289.

Statute Applies Only Where Money Actually Stayed. — The provisions of the *Missouri* statute that if money or any proceeding for the collection of money shall have been enjoined the damages shall not exceed ten per cent. of the amount released by the dissolution, exclusive of interest and costs, apply only to cases where the collection of money has been actually stayed by the injunction; in other cases the defendant may recover the damages actually sustained. *Hale v. Meegan*, 39 Mo. 272. See also *Wabash R. Co. v. McCabe*, 118 Mo. 640; *Kennedy v. Hammond*, 16 Mo. 341; *St. Louis v. Alexander*, 23 Mo. 493.

Assessment on Dissolution of Injunction Restraining Collection of Tax. — In *Rio Grande R. Co. v. Scanlan*, 44 Tex. 649, it was held that it is proper to render judgment for ten per cent. damages on the dissolution of an injunction restraining the collection of a tax.

2. Injunction Restraining Act of Ownership. — *Rice v. Cook*, 92 Cal. 144; *Mack v. Jackson*, 9 Colo. 536; *Alexander v. Colcord*, 85 Ill. 323; *Edwards v. Edwards*, 31 Ill. 474; *Winship v. Clendenning*, 24 Ind. 439; *Wood v. State*, 66 Md. 61; *Smith v. Wells*, 46 Miss. 64; *Campbell v. Metcalf*, 1 Mont. 378; *Aldrich v. Reynolds*, 1 Barb. Ch. (N. Y.) 613; *Barton v. Fisk*, 30 N. Y. 166; *White v. Bowman*, 10 Lea (Tenn.) 55; *Ragan v. Aiken*, 9 Lea (Tenn.) 623, 42 Am.

Rep. 684; *Newell v. Partee*, 10 Humph. (Tenn.) 325.

Damages for Injunction Restraining Disposition for Nonpayment of Rent. — In *Bray v. Poillon*, 4 Thomp. & C. (N. Y.) 663, it was held that the injunction was to prevent the disposition of the plaintiff for nonpayment of rent, and that the amount of rent at the rate reserved in the lease while the plaintiff kept possession was a fair measure of damages. See also *McDonald v. James*, 38 N. Y. Super. Ct. 76.

3. Sale or Disposal of Goods. — *Levy v. Taylor*, 24 Md. 282.

4. St. Louis v. Alexander, 23 Mo. 483; *Kennedy v. Hammond*, 16 Mo. 341.

5. Necessary Costs and Expenses Generally Recoverable. — *Bullard v. Harkness*, 83 Iowa 373; *Derry Bank v. Heath*, 45 N. H. 524; *Fitzpatrick v. Flagg*, (C. Pl. Gen. T.) 12 Abb. Pr. (N. Y.) 189; *Wilde v. Joel*, (N. Y. Super. Ct. Gen. T.) 15 How. Pr. (N. Y.) 320; *Noble v. Arnold*, 23 Ohio St. 264.

Costs, Including Counsel Fees, may be allowed as damages on the dissolution of an injunction. *Misner v. Bullard*, 43 Ill. 470; *Ryan v. Anderson*, 25 Ill. 372; *Brown v. Jones*, 5 Nev. 374.

Expenses Incurred on Reference. — In a proceeding by reference to ascertain the damages sustained by a party in consequence of an injunction restraining him in the exercise of some legal right, it is proper to allow, as a part of the damages, the expenses incurred upon the reference. *Holcomb v. Rice*, 119 N. Y. 598; *Aldrich v. Reynolds*, 1 Barb. Ch. (N. Y.) 613; *Lawton v. Green*, 64 N. Y. 326; *Edwards v. Bodine*, 11 Paige (N. Y.) 223.

Time for Which Costs Recoverable. — In a suit upon an injunction bond, the recovery for

injunction is merely auxiliary, expenses incurred in defending the action generally are not recoverable.¹

Where Injunction Perpetuated in Part. — When a complainant shows good cause for the interposition of the chancellor, and an injunction granted is perpetuated in part, it is error to decree costs against him.²

b. RECOVERY OF COUNSEL FEES ON DISSOLUTION OF INJUNCTION — (1) In Federal Courts. — In the United States courts it seems that counsel fees cannot be allowed on the injunction bond upon the dissolution of an injunction.³

(2) In State Courts — (a) General Rule — Counsel Fees Recoverable as Damages. — In the state courts a few decisions, following the federal practice, hold that upon the dissolution of an injunction the defendant's counsel fees are not to be allowed as part of his damages,⁴ and are not covered by the injunction bond.⁵ It may be set down as a general rule, however, that where reasonable attorneys' fees and expenses are necessarily incurred alone in procuring the dissolution of an injunction, either when it is the sole relief sought by the action or is merely ancillary thereto, and it is finally decided that the injunction should not have been granted, such fees and expenses may be recovered in an action on the undertaking;⁶ but where the injunction is only auxiliary to the

costs and expenses is confined to those which accrued between the time of issuing the injunction and the affirmation of the order dissolving it. *Wallis v. Dilley*, 7 Md. 237.

1. Costs Not Recoverable Where Injunction Merely Auxiliary. — *Bullard v. Harkness*, 83 Iowa 373; *Carroll County v. Iowa R. Land Co.*, 53 Iowa 685.

2. Injunction Perpetuated in Part. — *Hoofman v. Marshall*, 1 J. J. Marsh. (Ky.) 64. See also *Ross v. Gordon*, 2 Munf. (Va.) 289.

3. Counsel Fees — Federal Courts. — *Oelrichs v. Spain*, 15 Wall. (U. S.) 211.

4. State Courts — View that Counsel Fees Not Recoverable. — *Oliphint v. Mansfield*, 36 Ark. 101; *Thurston v. Haskell*, 81 Me. 36; *Barratt v. Bowers*, 87 Me. 185; *Sensenig v. Parry*, 113 Pa. St. 115; *Crowley v. Robinson*, (Tenn. Ch. 1898) 46 S. W. Rep. 461; *Davis v. Rosedale St. R. Co.*, 75 Tex. 381.

5. Counsel Fees Not Recoverable. — *Richards v. Green*, (Ariz. 1890) 32 Pac. Rep. 266; *Wood v. State*, 66 Md. 61; *Wallis v. Dilley*, 7 Md. 237; *Sensenig v. Parry*, 113 Pa. St. 115; *Jones v. Rosedale St. R. Co.*, 75 Tex. 382; *Galveston, etc., R. Co. v. Ware*, 74 Tex. 50.

Attorneys' Fees on Dissolution of Restraining Order. — Attorneys' fees ordinarily are not recoverable in *Nebraska* for services rendered in an attempt to dissolve a temporary restraining order pending the hearing of a motion to allow a temporary injunction. *Carnes v. Heimrod*, 45 Neb. 364.

Action in State Court on Bond Given in Federal Court. — In an action in a state court upon an injunction bond given in a federal court, attorneys' fees for which the plaintiff has become liable may be recovered as damages, though not so recoverable in the federal courts. *Wash v. Lackland*, 8 Mo. App. 122, the court saying: "It is settled in *Missouri* that attorneys' fees paid in defense of an injunction suit may be recovered as damages in an action on the injunction bond; and this, although the bond was given and the injunction obtained in a federal court. * * * The rule is the same as to attorneys' fees not actually

paid, but for which the plaintiff has become liable." *Citing Barnes v. Webster*, 16 Mo. 263; *State v. Beldsmeier*, 56 Mo. 226; *Uhrig v. St. Louis*, 47 Mo. 528; *Hannibal, etc., R. Co. v. Shepley*, 1 Mo. App. 254; *Leisse v. St. Louis, etc., R. Co.*, 2 Mo. App. 105. See also *Mitchell v. Hawley*, 79 Cal. 301.

6. View that Counsel Fees Are Recoverable — Alabama. — *Garrett v. Logan*, 19 Ala. 344; *Ferguson v. Baber*, 24 Ala. 402; *Bullock v. Ferguson*, 30 Ala. 227; *Bolling v. Tate*, 65 Ala. 417, 39 Am. Rep. 5.

California. — *Ah Thaie v. Quan Wan*, 3 Cal. 216; *Prader v. Grim*, 13 Cal. 585; *Bustamente v. Stewart*, 55 Cal. 115; *Porter v. Hopkins*, 63 Cal. 53.

Colorado. — *Belmont Min., etc., Co. v. Costigan*, 21 Colo. 465.

Florida. — *Wittich v. O'Neal*, 22 Fla. 592.

Illinois. — *Ryan v. Anderson*, 25 Ill. 372; *Collins v. Sinclair*, 51 Ill. 328; *Joslyn v. Dickerson*, 71 Ill. 25; *Cummings v. Burleson*, 78 Ill. 281; *Walker v. Pritchard*, 135 Ill. 103; *Wilson v. Weber*, 3 Ill. App. 125; *Panton v. Collar*, 12 Ill. App. 160.

Indiana. — *Morris v. Price*, 2 Blackf. (Ind.) 457; *Raupman v. Evansville*, 44 Ind. 392; *Beeson v. Beeson*, 59 Ind. 97; *Swan v. Timmons*, 81 Ind. 243.

Iowa. — *Campbell v. Chamberlain*, 10 Iowa 337; *Behrens v. McKenzie*, 23 Iowa 333, 92 Am. Dec. 428; *Langworthy v. McKelvey*, 25 Iowa 48; *Wallace v. York*, 45 Iowa 81; *Carroll County v. Iowa R. Land Co.*, 53 Iowa 685; *Ford v. Loomis*, 62 Iowa 586; *Fountain v. West*, 68 Iowa 380; *Colby v. Meservey*, 85 Iowa 558.

Kansas. — *Underhill v. Spencer*, 25 Kan. 71; *Nimocks v. Welles*, 42 Kan. 39.

Louisiana. — *McRae v. Brown*, 12 La. Ann. 281; *Meaux v. Pittman*, 35 La. Ann. 360; *Aiken v. Leathers*, 40 La. Ann. 23; *Gray v. Lowe*, 11 La. Ann. 391; *Williams v. Close*, 14 La. Ann. 746; *Smith v. Bradford*, 17 La. 263; *Hill v. Noe*, 4 La. Ann. 304; *Flynn v. Rhodes*, 12 La. Ann. 239; *Pargoud v. Morgan*, 2 La. 102; *Ricard v. Hiriart*, 5 La. 246; *Hereford v.*

object of the action, and the liability is incurred in defending the action, and the dissolution of the injunction is only incidental to the result, no recovery can be had on the undertaking for the attorneys' fees and expenses occasioned thereby,¹ since in such case these items could not be regarded as damages sustained "by reason of the injunction."²

Recoverable for Services on Appeal. — According to some decisions, in an action on an injunction bond counsel fees are recoverable as a part of the damages for services rendered in the Supreme Court on appeal, as well as in the court below.³

Allowance of Counsel Fees on Final Hearing. — In at least one state it has been held that where a motion to dissolve the injunction was made, which motion the court refused, deeming it more advisable to defer inquiry into the merits until final hearing, the counsel fees on final hearing as well as those incurred in making the unsuccessful motion were recoverable where on such final hearing the injunction was dissolved.⁴

Babin, 14 La. Ann. 333; Taylor v. Simpson, 12 La. Ann. 537; Levisones v. Brady, 11 La. Ann. 696; Aiken v. Leathers, 37 La. Ann. 482; Stafford v. Renshaw, 33 La. Ann. 443.

Mississippi. — Valentine v. McGrath, 52 Miss. 112; Strong v. Harrison, 62 Miss. 61.

Missouri. — Hannibal, etc., R. Co. v. Shepley, 1 Mo. App. 254; Buford v. Keokuk Northern Line Packet Co., 3 Mo. App. 159; Bohan v. Casey, 5 Mo. App. 101; Wash v. Lackland, 8 Mo. App. 122; Uhrig v. St. Louis, 47 Mo. 528; Holloway v. Holloway, 103 Mo. 274.

Montana. — Miles v. Edwards, 6 Mont. 180; Allport v. Kelley, 2 Mont. 343; Parker v. Bond, 5 Mont. 1; Campbell v. Metcalf, 1 Mont. 378; Creek v. McManus, 13 Mont. 152; Helena v. Brule, 15 Mont. 429.

Nevada. — Brown v. Jones, 5 Nev. 374.

New Hampshire. — Hoitt v. Holcomb, 32 N. H. 186; Derry Bank v. Heath, 45 N. H. 524; Solomon v. Chesley, 59 N. H. 24.

New Jersey. — Cook v. Chapman, 41 N. J. Eq. 152.

New York. — Coates v. Coates, 1 Duer (N. Y.) 664; Westervelt v. Smith, 2 Duer (N. Y.) 449; Aldrich v. Reynolds, 1 Barb. Ch. (N. Y.) 613; Edwards v. Bodine, 11 Paige (N. Y.) 224; Park v. Musgrave, 6 Hun (N. Y.) 223; Baylis v. Scudder, 6 Hun (N. Y.) 300; Lyon v. Hersey, 32 Hun (N. Y.) 253; Crouse v. Syracuse, etc., R. Co., 32 Hun (N. Y.) 497; Corcoran v. Judson, 24 N. Y. 106; Andrews v. Glenville Woolen Co., 50 N. Y. 282; Hovey v. Rubber-Tip Pencil Co., 50 N. Y. 335; Rose v. Post, 56 N. Y. 603; Newton v. Russell, 87 N. Y. 527; Randall v. Carpenter, 88 N. Y. 293; Fitzpatrick v. Flagg, (C. Pl. Gen. T.) 12 Abb. Pr. (N. Y.) 189; Phoenix Bridge Co. v. Keystone Bridge Co., 10 N. Y. App. Div. 176; Boswell v. Ward, 17 N. Y. Wkly. Dig. 300.

Ohio. — Noble v. Arnold, 23 Ohio St. 264; Riddle v. Cheadle, 25 Ohio St. 278.

South Carolina. — Livingston v. Exum, 19 S. Car. 223.

Washington. — Steel v. Gordon, 14 Wash. 521.

1. Carroll County v. Iowa R. Land Co., 53 Iowa 685; Langworthy v. McKelvey, 25 Iowa 48; Cook v. Chapman, 41 N. J. Eq. 152; Hovey v. Rubber-Tip Pencil Co., 50 N. Y. 335; Noble v. Arnold, 23 Ohio St. 264; Riddle v. Cheadle, 25 Ohio St. 278.

Injunction Must Render Trial More Difficult or Increase Costs of Defense. — In Allen v. Brown, 5 Lans. (N. Y.) 511, it was held that costs or counsel fees, or other expenses of defending an action in which a preliminary injunction has been granted, where there is nothing to show that the injunction rendered the trial of the action more difficult, or that the injunction increased the costs or expense of the defense, are not damages sustained "by reason of the injunction." See also Hotchkiss v. Platt, 8 Hun (N. Y.) 46.

Suits to Determine Title. — In Allport v. Kelley, 2 Mont. 343, affirming and applying Campbell v. Metcalf, 1 Mont. 381, it was held that in a suit on an undertaking to procure a temporary injunction, the merits of which were never tried, no recovery could be had for attorneys' fees expended in the main suit to determine the title to certain waters in dispute, and evidence offered for such purpose was properly excluded. See also Disbrow v. Garcia, 52 N. Y. 654, distinguishing Andrews v. Glenville Woolen Co., 50 N. Y. 282.

2. **Reason for Rule.** — Noble v. Arnold, 23 Ohio St. 264; Riddle v. Cheadle, 25 Ohio St. 278. But compare Olds v. Cary, 13 Oregon 362.

3. **Services on Appeal.** — Bolling v. Tate, 65 Ala. 417, 39 Am. Rep. 5 [overruling Ferguson v. Baber, 24 Ala. 402; Bullock v. Ferguson, 30 Ala. 227]; Porter v. Hopkins, 63 Cal. 53; Lambert v. Haskell, 80 Cal. 611.

Counsel Fees on Appeal from an Order Refusing to Dissolve an Injunction, taken before the final decree is made, are recoverable if the evidence segregates the amount of such counsel fees from those paid generally in the cause. Lambert v. Haskell, 80 Cal. 611.

4. **Allowance on Final Hearing.** — Andrews v. Glenville Woolen Co., 50 N. Y. 282. See also Bolling v. Tate, 65 Ala. 417, 39 Am. Rep. 5; Wallace v. York, 45 Iowa 81; Cook v. Chapman, 41 N. J. Eq. 152; Lyon v. Hersey, 32 Hun (N. Y.) 253; Hovey v. Rubber-Tip Pencil Co., 50 N. Y. 336; Disbrow v. Garcia, 52 N. Y. 655.

See, however, Allen v. Brown, 5 Lans. (N. Y.) 511, in which case the court held that the expenses of an unsuccessful motion to set aside an injunction could not be recovered upon an undertaking under Code Pro. N. Y.,

(b) **Limitation of Recovery — Confined to Services Rendered in Procuring Dissolution.** — The recovery of counsel fees as a part of the damages upon the dissolution of an injunction is limited to fees for services rendered either below or on appeal in procuring the dissolution of the injunction, and does not extend to all the services rendered in the suit in which the injunction was sued out;⁴ and it will be a serious objection to evidence in support of a suggestion of damages of this character that it makes no discrimination between services rendered in the case generally and services which were strictly necessary to procure a dissolution of the injunction.²

No Recovery Where Injunction Defeated on Merits Without Motion for Dissolution. — Attorneys' fees are not recoverable in an action on an injunction bond where no motion for the dissolution of the injunction is made and it is allowed to stand until defeated by a trial upon its merits.³

Fees Should Be Reasonable. — Counsel fees which it is sought to recover should be reasonable,⁴ and the defendant will not be permitted to lay the foundation for large damages against the complainant by employing an unnecessary number of counsel.⁵

(c) **Whether Actual Payment of Counsel Fees Necessary.** — The general rule is that counsel fees incurred in procuring the dissolution of an injunction may be recovered though they may not have been actually paid; if their payment is contracted for this will be sufficient, provided it was necessary to incur them.⁶

§ 222, even though the court afterward decided that the defendant was not entitled to the injunction.

1. **Limited to Fees Paid in Securing Dissolution** — *Alabama*. — *Bolling v. Tate*, 65 Ala. 417, 39 Am. Rep. 5.

California. — *Bustamente v. Stewart*, 55 Cal. 115; *Porter v. Hopkins*, 63 Cal. 53.

Illinois. — *Alexander v. Colcord*, 85 Ill. 323; *Elder v. Sabin*, 66 Ill. 126; *Lambert v. Alcorn*, 144 Ill. 313; *Field v. Medenwald*, 26 Ill. App. 642; *Gerard v. Gateau*, 15 Ill. App. 520.

Indiana. — *Swan v. Timmons*, 81 Ind. 243.

Iowa. — *Colby v. Meserve*, 85 Iowa 555; *Thomas v. McDanel*, 77 Iowa 299; *Leonard v. Capital Ins. Co.*, 101 Iowa 482; *Behrens v. McKenzie*, 23 Iowa 333, 92 Am. Dec. 428; *Langworthy v. McKelvey*, 25 Iowa 48.

Kentucky. — *Trapnall v. McAfee*, 3 Met. (Ky.) 34, 77 Am. Dec. 152; *Pettit v. Mercer*, 8 B. Mon. (Ky.) 51; *Burgen v. Sharer*, 14 B. Mon. (Ky.) 399.

Louisiana. — *Phelps v. Coggeshall*, 13 La. Ann. 440; *Transit Co. v. McCerren*, 13 La. Ann. 214; *Aiken v. Leathers*, 40 La. Ann. 23.

Minnesota. — *Lamb v. Shaw*, 43 Minn. 507.

Montana. — *Campbell v. Metcalf*, 1 Mont. 378; *Parker v. Bond*, 5 Mont. 1; *Miles v. Edwards*, 6 Mont. 180; *Allport v. Kelley*, 2 Mont. 343.

Nevada. — *Brown v. Jones*, 5 Nev. 374.

New Hampshire. — *Derry Bank v. Heath*, 45 N. H. 524.

New York. — *Andrews v. Glenville Woolen Co.*, 50 N. Y. 282; *Hovey v. Rubber-Tip Co.*, (N. Y. Super. Ct. Gen. T.) 12 Abb. Pr. N. S. (N. Y.) 360; *McDonald v. James*, 38 N. Y. Super. Ct. 76; *Newton v. Russell*, 87 N. Y. 527; *Allen v. Brown*, 5 Lans. (N. Y.) 511; *Hovey v. Rubber-Tip Pencil Co.*, 50 N. Y. 335.

Washington. — *Donahue v. Johnson*, 9 Wash. 187.

See also *Bennett v. Lambert*, 100 Ky. 737; *Hyman v. Devereux*, 65 N. Car. 588.

Allowance though Other Matters Involved. — In a suit upon an injunction bond, where it is shown that the suit in which the bond was filed asked relief other than an injunction, it is proper to allow attorneys' fees, and like expenses, in so far as they relate to services rendered in resisting the making of the injunction or in procuring its dissolution, although other matters may be involved in the litigation. *Robertson v. Smith*, 129 Ind. 422.

Counsel Fees on Cross-bill. — When the defendant to an injunction bill files a cross-bill and succeeds in the litigation, it is error for the court to decree payment of his attorneys' fees on the cross-bill. *Valentine v. McGrath*, 52 Miss. 112. See to the same effect *Jevne v. Osgood*, 57 Ill. 340; *Wilson v. Haecker*, 85 Ill. 349.

2. **Discrimination as to Different Kinds of Services.** — *Alexander v. Colcord*, 85 Ill. 323; *Lambert v. Alcorn*, 144 Ill. 313; *Creek v. McManus*, 17 Mont. 445.

3. **Injunction Defeated on Merits Without Motion to Dissolve.** — *Donahue v. Johnson*, 9 Wash. 187.

4. **Fees Should Be Reasonable.** — See the cases cited in the preceding notes to this subdivision.

5. **Unnecessary Number of Counsel.** — *Collins v. Sinclair*, 51 Ill. 328, cited and approved in *Hotchkiss v. Platt*, 8 Hun (N. Y.) 46.

6. **Actual Payment of Counsel Fees Unnecessary** — *Alabama*. — *Garrett v. Logan*, 19 Ala. 344; *Miller v. Garrett*, 35 Ala. 96.

Illinois. — *Steele v. Thatcher*, 56 Ill. 257; *Lambert v. Alcorn*, 144 Ill. 313.

Kansas. — *Underhill v. Spencer*, 25 Kan. 72; *Loofborow v. Shaffer*, 29 Kan. 416.

Kentucky. — *Shultz v. Morrison*, 3 Met. (Ky.) 98.

Louisiana. — *Meaux v. Pittman*, 35 La. Ann. 360; *McRae v. Brown*, 12 La. Ann. 181. But see *Brashear v. Wilkins*, 9 Rob. (La.) 56; *Rhodes v. Skolfield*, 10 Rob. (La.) 131; *Mills v. Jones*, 9 La. Ann. 11.

(d) **Evidence as to Rendition and Value of Services.** — It seems necessary, however, that there should be evidence as to the actual rendition of services by counsel, and also as to the value of such services.¹

(e) **Amount Question for Jury.** — It has been held that the amount of counsel fees to be allowed in an action on an injunction bond for services in dissolving the injunction, being a question of fact, is to be ascertained by a jury and not by the court.²

(f) **Amount as Affected by Interests Involved.** — It would seem that in measuring the compensation of counsel in dissolving an injunction, not only the time during which counsel were engaged should be considered, but also the magnitude of the case in respect of the property involved.³

INJURIA. (See also the title *DAMNUM ABSQUE INJURIA*, vol. 8, p. 694.) — *Injuria* means a tortious act, whether wilful, malicious, or accidental.⁴

Missouri. — *Wash v. Lackland*, 8 Mo. App. 122; *Leisse v. St. Louis, etc., R. Co.*, 2 Mo. App. 105; *Holthaus v. Hart*, 9 Mo. App. 1.

Nevada. — *Brown v. Jones*, 5 Nev. 374.

New York. — *Crounse v. Syracuse, etc., R. Co.*, 32 Hun (N. Y.) 497. See also *Andrews v. Glenville Woolen Co.*, 50 N. Y. 282; *Hovey v. Rubber-Tip Pencil Co.*, 50 N. Y. 335; *Packer v. Nevin*, 67 N. Y. 550; *Wilde v. Joel*, (N. Y. Super. Ct. Gen. T.) 15 How. Pr. (N. Y.) 320; *National Bank v. Bigler*, 83 N. Y. 51.

Ohio. — *Noble v. Arnold*, 23 Ohio St. 264.

Contra. — *Willson v. McEvoy*, 25 Cal. 170. See also *Prader v. Grimm*, 28 Cal. 11.

1. **Evidence of Rendition of Services.** — *Delahanty v. Warner*, 75 Ill. 185, 20 Am. Rep. 237. See also *Albright v. Smith*, 68 Ill. 181; *Campbell v. Metcalf*, 1 Mont. 378; *Packer v. Nevin*, 67 N. Y. 550.

Retainer of Attorney Inferred from Facts. — See *School Directors v. School Trustees*, 66 Ill. 247; *Cook v. Greenough*, 14 Mont. 352.

Contract for Contingent Fee Held Insufficient as Basis of Assessment. — *Hedges v. Meyers*, 5 Ill. App. 347.

Municipal Officers May Not Recover for Fees Paid by Municipality. — *Fitzpatrick v. Flagg*, (C. Pl. Gen. T.) 12 Abb. Pr. (N. Y.) 189.

2. **Amount — Question for Jury.** — *Steel v. Gordon*, 14 Wash. 521.

3. **As Affected by Interests Involved.** — See *Matthews v. Murchison*, (Supm. Ct. Gen. T.) 14 Abb. N. Cas. (N. Y.) 512, note.

Cannot Exceed Amount Claimed by Defendant. — Counsel fees allowed as special damages cannot exceed the amount claimed by the defendant himself. *Woodward v. Lurty*, 11 La. Ann. 280.

4. *Hutcheson v. Peck*, 5 Johns. (N. Y.) 205; *Wright v. Chicago, etc., R. Co.*, 7 Ill. App. 446.

In *Winsmore v. Greenbank*, Willes 581, it was said that by *injuria* is meant a tortious act. It need not be wilful and malicious, for an action will lie though it be accidental, if it be tortious.

But in *Addington v. Allen*, 11 Wend. (N. Y.) 408, it was said: "The technical word *injuria* means not simply a wrong act, but a wrong act with a wrong intent."

INJURIES TO ANIMALS BY RAILROADS.

BY LOMAX PITTMAN.

- I. INTRODUCTORY, 472.**
- II. NECESSITY OF NEGLIGENCE ON PART OF RAILROAD COMPANY, 472.**
 - 1. *No Presumption of Negligence at Common Law, 472.*
 - 2. *Statutes Creating Presumption of Negligence, 472.*
- III. STATUTES CREATING ABSOLUTE LIABILITY IRRESPECTIVE OF NEGLIGENCE OR DUTY TO FENCE, 474.**
- IV. STATUTES AWARDING ATTORNEY'S FEES TO PERSONS RECOVERING JUDGMENT, 474.**
- V. CONTRIBUTORY NEGLIGENCE ON FENCED ROADS OR INDEPENDENT OF DUTY TO FENCE, 475.**
 - 1. *Scope of Section, 476.*
 - 2. *Right of Recovery Barred by Contributory Negligence, 476.*
 - 3. *Whether Contributory Negligence to Allow Animals to Run at Large, 478.*
 - a. *In Absence of Special Statute Making It Unlawful, 478.*
 - b. *Contributory Negligence Where Animals Unlawfully at Large, 479.*
 - 4. *Plaintiff's Negligence Must Proximately Contribute to Injury, 480.*
 - 5. *Defendant's Negligence After Discovering Animals on Track, 480.*
 - 6. *Where Doctrine of Comparative Negligence Prevails, 481.*
- VI. LIABILITY UNDER STATUTES RELATING TO ERECTION AND MAINTENANCE OF FENCES, 481.**
 - 1. *General Character of These Statutes, 481.*
 - 2. *Amount of Recovery under These Statutes, 482.*
 - 3. *Kind and Character of Debarments Required, 484.*
 - a. *Kind and Nature of Animals to Be Excluded, 484.*
 - b. *Sufficiency of Debarments to Answer Intended Purpose, 485.*
 - (1) *What Is Sufficient Fence, 485.*
 - (2) *What are Sufficient Cattle Guards, 486.*
 - 4. *Whether Actual Contact Between Train and Animal Essential to Liability, 486.*
 - 5. *Liability as Between Owners and Operators, 487.*
 - a. *In General, 487.*
 - b. *Who Are Agents of Corporation, 487.*
 - c. *Lessors and Lessees, 487.*
 - d. *Tracks Used by Both Owner and Another, 489.*
 - e. *Road Operated by Receiver, 489.*
 - 6. *Place of Entrance Rather than of Injury Governs Liability, 489.*
 - 7. *Contributory Negligence under These Statutes, 490.*
 - a. *Effect Regulated by Statute, 490.*
 - b. *Where Statutes Are Silent as to Effect of Contributory Negligence, 490.*
 - c. *Wilful Act of Owner Contributing to Injury a Defense, 491.*
 - 8. *Obligation to Fence Begins as Soon as Road Is Used, 492.*
 - 9. *Company's Notice of Defect as Affecting Its Liability, 493.*
 - 10. *Duty to Maintain Debarments at Particular Points, 494.*
 - 11. *Company's Liability as Affected by Right of Cattle to Be at Large, 494.*
 - 12. *Constitutionality of Such Statutes, 496.*
- VII. NECESSITY OF STATUTE TO MAKE RAILROADS LIABLE MERELY BECAUSE OF NONEXISTENCE OF FENCES, 498.**

CROSS-REFERENCES.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the titles *AGISTMENT*, vol. 2, p. 3; *ANIMALS*, vol. 2, p. 341, and references there given; *CARRIERS OF LIVE STOCK*, vol. 5, p. 427; *CONTRIBUTORY NEGLIGENCE*, vol. 7, p. 368; *FENCES*, vol. 12, p. 1035; *IMPOUNDING*, ante, p. 4; *NEGLIGENCE*; *RAILROADS*; *STREET RAILROADS*.

I. INTRODUCTORY. — In litigation between railroad companies and the owners of live stock for the killing or injuring of the stock by trains, the liability of the railroad company generally depends either on its negligence in the operation of the train or on its negligence in having failed to erect debarments demanded by statute that animals may not gain access to its tracks. Where negligence in the operation of the road is charged, many cases turn on the contributory negligence of the owner of the animal in permitting it to be at the place of injury; but the authorities are conflicting as to whether the contributory negligence of the owner can be relied upon by the railroad company to defeat an action for damages sustained through its failure to comply with or its violation of a statute requiring it to erect fences.¹

II. NECESSITY OF NEGLIGENCE ON PART OF RAILROAD COMPANY — 1. No Presumption of Negligence at Common Law. — At common law there can, of course, be no recovery against a railroad company for injuring or killing animals on its track unless there is proof of negligence; and the mere killing or injuring affords no presumption of negligence.² But under statutes a presumption of negligence may arise from the fact of injury.³

2. Statutes Creating Presumption of Negligence. — In very many states (chief among which are those where there is no statutory requirement that the railroad companies maintain fences and respond in damages for injuries to animals

1. See the following sections of this title, *passim*.

2. **Necessity of Negligence at Common Law to Authorize Recovery** — *United States*. — Eddy *v.* Lafayette, 4 U. S. App. 243, 49 Fed. Rep. 798.

Colorado. — Denver, etc., R. Co. *v.* Henderson, 10 Colo. 1, 31 Am. & Eng. R. Cas. 559.

Florida. — Savannah, etc., R. Co. *v.* Geiger, 21 Fla. 669, 58 Am. Rep. 697, 29 Am. & Eng. R. Cas. 274.

Georgia. — Georgia R., etc., Co. *v.* Anderson, 33 Ga. 110.

Illinois. — Illinois Cent. R. Co. *v.* Reedy, 17 Ill. 580; Chicago, etc., R. Co. *v.* Barrie, 55 Ill. 226, 2 Am. R. Rep. 451; Great Western R. Co. *v.* Morthland, 30 Ill. 451; Toledo, etc., R. Co. *v.* Barlow, 71 Ill. 640.

Indiana. — Indianapolis, etc., R. Co. *v.* Means, 14 Ind. 30; Wright *v.* Indianapolis, etc., R. Co., 18 Ind. 168; Indianapolis, etc., R. Co. *v.* Warner, 35 Ind. 515.

Iowa. — Schneur *v.* Chicago, etc., R. Co., 40 Iowa 337; Comstock *v.* Des Moines Valley R. Co., 32 Iowa 376, 10 Am. R. Rep. 23; Plaster *v.* Illinois Cent. R. Co., 35 Iowa 449, 5 Am. R. Rep. 528.

Kentucky. — Kentucky Cent. R. Co. *v.* Lebus, 14 Bush (Ky.) 518.

Louisiana. — Day *v.* New Orleans Pac. R. Co., 36 La. Ann. 244.

Maine. — Waldron *v.* Portland, etc., R. Co., 35 Me. 422.

Maryland. — Keech *v.* Baltimore, etc., R. Co., 17 Md. 32.

Minnesota. — Johnson *v.* Minneapolis, etc., R. Co., 43 Minn. 207.

Mississippi. — Mobile, etc., R. Co. *v.* Hudson, 50 Miss. 572; New Orleans, etc., R. Co. *v.* Enochs, 42 Miss. 603; Memphis, etc., R. Co. *v.* Blakeney, 43 Miss. 218; Louisville, etc., R. Co. *v.* Smith, 67 Miss. 15; Chicago, etc., R. Co. *v.* Packwood, 59 Miss. 280, 7 Am. & Eng. R. Cas. 584.

Missouri. — Calvert *v.* Hannibal, etc., R. Co., 34 Mo. 242; Turner *v.* St. Louis, etc., R. Co., 76 Mo. 261; Brown *v.* Hannibal, etc., R. Co., 33 Mo. 309; Robinson *v.* St. Louis, etc., R. Co., 21 Mo. App. 141; Burger *v.* St. Louis, etc., R. Co., 52 Mo. App. 119.

Nevada. — Walsh *v.* Virginia, etc., R. Co., 8 Nev. 112.

New Mexico. — Atchison, etc., R. Co. *v.* Walton, 3 N. Mex. 319.

Ohio. — Pittsburgh, etc., R. Co. *v.* Heiskell, 38 Ohio St. 666, 13 Am. & Eng. R. Cas. 555; Cleveland, etc., R. Co. *v.* Elliott, 4 Ohio St. 474; Pittsburgh, etc., R. Co. *v.* McMillan, 37 Ohio St. 554, 7 Am. & Eng. R. Cas. 588.

South Carolina. — Joyner *v.* South Carolina R. Co., 26 S. Car. 49, 29 Am. & Eng. R. Cas. 258; Jones *v.* Columbia, etc., R. Co., 20 S. Car. 249, 19 Am. & Eng. R. Cas. 459; Walker *v.* Columbia, etc., R. Co., 25 S. Car. 141.

Texas. — Bethje *v.* Houston, etc., R. Co., 26 Tex. 604; Missouri Pac. R. Co. *v.* Lawler, 3 Tex. App. Civ. Cas., § 19.

Vermont. — Lyndsay *v.* Connecticut, etc., R. Co., 27 Vt. 643.

Wisconsin. — Galpin *v.* Chicago, etc., R. Co., 19 Wis. 604.

3. See *infra*, this section, *Statutes Creating Presumption of Negligence*.

resulting from their failure to do so),¹ where it is shown that the animal is run against and killed or injured by the cars of the railroad, a *prima facie* statutory presumption that the defendant was guilty of negligence is indulged.² This presumption of negligence applies only when the facts are not known, or when from the testimony they are uncertain or ambiguous. In the latter cases the

1. See *infra*, this title, *Liability under Statutes Relating to Erection and Maintenance of Fences*.

2. **Statutory Presumption of Negligence — Alabama.** — Mobile, etc., R. Co. v. Williams, 53 Ala. 595; East Tennessee, etc., R. Co. v. Bayliss, 74 Ala. 150, 19 Am. & Eng. R. Cas. 480; Alabama G. S. R. Co. v. McAlpine, 75 Ala. 113, 22 Am. & Eng. R. Cas. 602; Nashville, etc., R. Co. v. Hembree, 85 Ala. 481, 38 Am. & Eng. R. Cas. 300; Mobile, etc., R. Co. v. Caldwell, 83 Ala. 190; Birmingham Mineral R. Co. v. Harris, 98 Ala. 326; Louisville, etc., R. Co. v. Kelsey, 89 Ala. 287, 42 Am. & Eng. R. Cas. 584; Louisville, etc., R. Co. v. Barker, 96 Ala. 435; South, etc., Alabama R. Co. v. Bees, 82 Ala. 340; Louisville, etc., R. Co. v. Posey, 96 Ala. 262; South, etc., Alabama R. Co. v. Williams, 65 Ala. 74; Central R., etc., Co. v. Lee, 96 Ala. 444.

Arkansas. — Little Rock, etc., R. Co. v. Payne, 33 Ark. 816; Little Rock, etc., R. Co. v. Finley, 37 Ark. 562, 11 Am. & Eng. R. Cas. 469; Little Rock, etc., R. Co. v. Jones, 41 Ark. 157, 19 Am. & Eng. R. Cas. 443; St. Louis, etc., R. Co. v. Hagan, 42 Ark. 122, 19 Am. & Eng. R. Cas. 446; St. Louis, etc., R. Co. v. Taylor, 57 Ark. 136; Little Rock, etc., R. Co. v. Dick, 52 Ark. 402, 42 Am. & Eng. R. Cas. 591; Little Rock, etc., R. Co. v. Henson, 39 Ark. 413, 19 Am. & Eng. R. Cas. 440; St. Louis, etc., R. Co. v. Vincent, 36 Ark. 451; Kansas City, etc., R. Co. v. Summers, 45 Ark. 295; Memphis, etc., R. Co. v. Jones, 36 Ark. 87; St. Louis, etc., R. Co. v. Chambliss, 54 Ark. 214; Little Rock, etc., R. Co. v. Christcoe, 57 Ark. 192.

Florida. — Jacksonville, etc., R. Co. v. Garrison, 30 Fla. 567.

Georgia. — Georgia R., etc., Co. v. Monroe, 49 Ga. 373; Georgia R., etc., Co. v. Willis, 28 Ga. 317; Woolfolk v. Macon, etc., R. Co., 56 Ga. 457; Georgia R. Co. v. Fisk, 65 Ga. 714; Georgia R. Co. v. Bird, 76 Ga. 13; Atlantic, etc., R. Co. v. Griffin, 61 Ga. 11; East Tennessee, etc., R. Co. v. Culler, 75 Ga. 704.

Iowa. — Brentner v. Chicago, etc., R. Co., 68 Iowa 530, 19 Am. & Eng. R. Cas. 448.

Kentucky. — Louisville, etc., R. Co. v. Simmons, 85 Ky. 151; Louisville, etc., R. Co. v. Brown, 13 Bush (Ky.) 475; Grundy v. Louisville, etc., R. Co., (Ky. 1887) 2 S. W. Rep. 899; Louisville, etc., R. Co. v. Marriott, (Ky. 1884) 19 Am. & Eng. R. Cas. 509.

Louisiana. — Lapine v. New Orleans, etc., R. Co., 20 La. Ann. 158.

Maryland. — Western Maryland R. Co. v. Carter, 59 Md. 306, 13 Am. & Eng. R. Cas. 573; Keech v. Baltimore, etc., R. Co., 17 Md. 32; Northern Cent. R. Co. v. Ward, 63 Md. 362.

Mississippi. — Kansas City, etc., R. Co. v. Doggett, 67 Miss. 250; Vicksburg, etc., R. Co. v. Hamilton, 62 Miss. 503; Mobile, etc., R. Co. v. Dale, 61 Miss. 206; Louisville, etc., R. Co. v. Smith, 67 Miss. 15.

New Hampshire. — White v. Concord R. Co., 30 N. H. 188; Smith v. Eastern R. Co., 35 N. H. 356.

North Carolina. — Randall v. Richmond, etc., R. Co., 107 N. Car. 748, 45 Am. & Eng. R. Cas. 507; Wilson v. Norfolk, etc., R. Co., 90 N. Car. 69, 19 Am. & Eng. R. Cas. 453; Roberts v. Richmond, etc., R. Co., 88 N. Car. 560, 20 Am. & Eng. R. Cas. 473; Bethea v. Raleigh, etc., R. Co., 106 N. Car. 279; Battle v. Wilmington, etc., R. Co., 66 N. Car. 343; Jones v. North Carolina R. Co., 67 N. Car. 122; Randall v. Richmond, etc., R. Co., 104 N. Car. 410, 42 Am. & Eng. R. Cas. 603; Clark v. Western North Carolina R. Co., 1 Winst. L. (60 N. Car.) 109.

South Dakota. — Keilbach v. Chicago, etc., R. Co., 11 S. Dak. 468; Schimke v. Chicago, etc., R. Co., 11 S. Dak. 471.

South Carolina. — Jones v. Columbia, etc., R. Co., 20 S. Car. 249, 19 Am. & Eng. R. Cas. 459; Danner v. South Carolina R. Co., 4 Rich. L. (S. Car.) 329, 55 Am. Dec. 678; Joyner v. South Carolina R. Co., 26 S. Car. 49, 29 Am. & Eng. R. Cas. 258; Roof v. Charlotte, etc., R. Co., 4 S. Car. 61; Murray v. South Carolina R. Co., 10 Rich. L. (S. Car.) 227, 70 Am. Dec. 219.

Tennessee. — Nashville, etc., R. Co. v. Fugett, 3 Coldw. (Tenn.) 402.

Texas. — Texas Cent. R. Co. v. Childress, 64 Tex. 346.

There Must Be Proof that the Injury Was Done by the Train, to raise the presumption, and the mere fact that the animal was found wounded near a railroad is not enough. St. Louis, etc., R. Co. v. Hagan, 42 Ark. 122, 19 Am. & Eng. R. Cas. 446.

But this proof may be circumstantial. Chicago, etc., R. Co. v. Packwood, 59 Miss. 280, 7 Am. & Eng. R. Cas. 584.

The Presumption Arises When the Animal Injured Was Hitched to a Cart as well as when it was running at large. Randall v. Richmond, etc., R. Co., 107 N. Car. 748, 45 Am. & Eng. R. Cas. 507. See also St. Louis, etc., R. Co. v. Taylor, 57 Ark. 136.

Proof that the Animal Was in Charge of a Person When Injured does not rebut the statutory presumption of negligence. Randall v. Richmond, etc., R. Co., 104 N. Car. 410, 42 Am. & Eng. R. Cas. 603.

Imperfect Light Caused by a Fog at the Time of the Killing may be shown, and the consideration of such fact by the jury is proper in determining the existence of negligence. St. Louis, etc., R. Co. v. Vincent, 36 Ark. 451.

The Burden Is on the Railroad Company to show that the precautions required of it by the Alabama statute (Code Ala. 1876, §§ 1699, 1700; Civ. Code 1896, §§ 3440, 3443) were taken. South, etc., Alabama R. Co. v. Williams, 65 Ala. 74; Central R., etc., Co. v. Lee, 96 Ala. 444.

statutes turn the scales and fix the responsibility, yet when the testimony affirmatively shows that there was no negligence on the part of the railroad company, there can be no recovery.¹

To Rebut the Presumption of Negligence it is not sufficient to prove the exercise of care in certain matters, when such care is not inconsistent with the existence, in other particulars, of negligence rendering the railroad company liable for the injury.² But the presumption is overcome by proof of facts showing that there was no negligence.³

III. STATUTES CREATING ABSOLUTE LIABILITY IRRESPECTIVE OF NEGLIGENCE OR DUTY TO FENCE.—Statutes in some states have provided for the absolute liability of the railroad company under certain circumstances for all live stock and cattle killed or injured by it, without any regard to the actual negligence of the road in running over such animals, or without regard to the company's performance of a statutory duty to fence, but these statutes have uniformly been declared unconstitutional as seeking to deprive the railroad company of its property without due process of law.⁴

IV. STATUTES AWARDED ATTORNEY'S FEES TO PERSONS RECOVERING JUDGMENT.—The statutes, both of some of those states in which there is a specific statutory obligation to fence⁵ and of other states where there is no such specific statutory obligation, provide that the plaintiff may, in some cases, where it is necessary for him to bring suit against a railroad for injury to animals, recover as additional damage a designated attorney's fee, or one to be fixed by the court before which suit is brought and recovery had.⁶

1. **Statutory Presumption Not Applicable When Facts Are Known.**—See *Durham v. Wilmington*, etc., R. Co., 83 N. Car. 352, and the cases cited in the preceding note.

2. *Little Rock*, etc., R. Co. v. *Chriscoe*, 57 Ark. 192. See also *Georgia R. Co. v. Fisk*, 65 Ga. 714; *Mobile*, etc., R. Co. v. *Dale*, 61 Miss. 206.

Showing that Stock Was Unlawfully at Large Will Not Suffice to rebut the statutory presumption of negligence. *Roberts v. Richmond*, etc., R. Co., 88 N. Car. 560, 20 Am. & Eng. R. Cas. 473.

3. *Alabama G. S. R. Co. v. McAlpine*, 75 Ala. 113, 22 Am. & Eng. R. Cas. 602; *Nashville*, etc., R. Co. v. *Hembree*, 85 Ala. 481, 38 Am. & Eng. R. Cas. 300; *Georgia Southern*, etc., R. Co. v. *Bowman*, 108 Ga. 798; *Louisville*, etc., R. Co. v. *Smith*, 67 Miss. 15; *Bethea v. Raleigh*, etc., R. Co., 106 N. Car. 279; *Keilbach v. Chicago*, etc., R. Co., 11 S. Dak. 468. See also *Mobile*, etc., R. Co. v. *Caldwell*, 83 Ala. 196.

Something beyond a showing that there was probably no negligence is required. *Battle v. Wilmington*, etc., R. Co., 66 N. Car. 343.

Facts Showing the Exercise of Care Must Be Proved, and mere opinions that everything was done to avoid the accident do not rebut the presumption. *Kansas City*, etc., R. Co. v. *Summers*, 45 Ark. 295. See also *St. Louis*, etc., R. Co. v. *Chambliss*, 54 Ark. 214; *Clark v. Western North Carolina R. Co.*, 1 Winst. L. (60 N. Car.) 109.

4. **Statutes Creating Absolute Liability Unconstitutional**—*Alabama*.—*Zeigler v. South*, etc., Alabama R. Co., 58 Ala. 594 (opinion quoted under the title DUE PROCESS OF LAW, vol. 10, p. 301, note).

Colorado.—*Denver*, etc., R. Co. v. *Outcalt*, 2 Colo. App. 395; *Denver*, etc., R. Co. v. *Davidson*, 2 Colo. App. 443; *Rio Grande Western*

R. Co. v. Vaughn, 3 Colo. App. 465; *Wadsworth v. Union Pac. R. Co.*, 18 Colo. 600, 36 Am. St. Rep. 309; *Rio Grande Western R. Co. v. Chamberlin*, 4 Colo. App. 149; *Union Pac. R. Co. v. Bullis*, 6 Colo. App. 64.

Florida.—See *Savannah*, etc., R. Co. v. *Geiger*, 21 Fla. 669, 58 Am. Rep. 697, 29 Am. & Eng. R. Cas. 274.

Idaho.—*Cateril v. Union Pac. R. Co.*, 2 Idaho 540.

Montana.—*Bielenberg v. Montana Union R. Co.*, 8 Mont. 271, 38 Am. & Eng. R. Cas. 275.

Nebraska.—*Atchison*, etc., R. Co. v. *Baty*, 6 Neb. 37, 29 Am. Rep. 356.

Utah.—*Jensen v. Union Pac. R. Co.*, 6 Utah 253 (opinion quoted in part under the title DUE PROCESS OF LAW, vol. 10, p. 301, note).

See generally the title DUE PROCESS OF LAW, vol. 10, p. 287.

The constitutional provision referred to renders void statutes imposing on railroads an absolute liability for the actual loss sustained (see the *Alabama*, *Florida*, *Montana*, and *Utah* cases cited above in this note) as well as statutes which impose an absolute liability for double the value of the property injured. See the *Colorado* and *Nebraska* cases.

A statute imposing an absolute liability in the nature of a penalty for an injury occurring through the company's neglect to erect and maintain fences as required by law is not unconstitutional. See the titles EXEMPLARY DAMAGES, vol. 12, p. 31; FENCES, vol. 12, pp. 1065, 1066. Also *infra*, this title, *Liability under Statutes Relating to Erection and Maintenance of Fences*.

5. See *infra*, this title, *Liability under Statutes Relating to Erection and Maintenance of Fences*—*Constitutionality of Such Statutes*.

6. **Statutes Allowing Attorney's Fees Against Railroads Injuring Animals**—*Illinois*.—*Toledo*, etc., R. Co. v. *Franklin*, 53 Ill. App. 632.

The Constitutionality of Statutes Allowing the Plaintiff to Recover Attorney's Fees against the railroad company has frequently been called in question, and the decisions are by no means harmonious. Two recent decisions of the United States Supreme Court deal with this matter, but unfortunately they do not reach all aspects of the question. They may be considered, however, as settling that if the statutes of the state require the railroad company to maintain fences along its right of way, the recovery of attorney's fees by the owner of cattle for injury sustained by them through the failure to maintain fences as required is a penalty which it is in the power of the legislature to impose for the non-performance of a statutory duty in the nature of a police regulation;¹ but that if the imposition of attorney's fees on the railroad company is merely a means of securing the payment of a debt, it is arbitrary class legislation, obnoxious to the equality clause of the Fourteenth Amendment.² It would appear, however, that if a statute of this character is limited in its operation to imposing a reasonable attorney's fee on a railroad company which, by negligence in the operation of its road, has injured the plaintiff's live stock, it is to be regarded as valid as a police regulation, though no law requiring the company to fence exists.³ In the state courts the constitutionality of such statutes has generally been upheld,⁴ but in several states these acts have been condemned as unconstitutional.⁵

V. CONTRIBUTORY NEGLIGENCE ON FENCED ROADS OR INDEPENDENT OF DUTY TO FENCE — 1. *Scope of Section.* — Under another section of this title the contributory negligence of the owner or of the person in charge of the animal, as affecting the liability of a railroad company upon which rests a statutory duty

Kansas. — St. Louis, etc., R. Co. v. Byron, 24 Kan. 350; Kansas Pac. R. Co. v. Wood, 24 Kan. 619; St. Louis, etc., R. Co. v. Armstrong, 25 Kan. 561; Missouri Pac. R. Co. v. Abney, 30 Kan. 41; Union Pac. R. Co. v. Shelley, 49 Kan. 667; Wichita, etc., R. Co. v. Hart, 7 Kan. App. 554.

Tennessee. — Illinois Cent. R. Co. v. Crider, 91 Tenn. 489 (attorney's fees recoverable only when the plaintiff proceeds after appraisalment).

See further the following notes.

1. See the remarks of Brewer, J., delivering the opinion in Gulf, etc., R. Co. v. Ellis, 165 U. S. 150, 158, 6 Am. & Eng. R. Cas. N. S. 752, and in Atchison, etc., R. Co. v. Matthews, 174 U. S. 96. See also Missouri Pac. R. Co. v. Humes, 115 U. S. 512.

2. Gulf, etc., R. Co. v. Ellis, 165 U. S. 150, 6 Am. & Eng. R. Cas. N. S. 752. Chief Justice Fuller and Judges Gray and White dissented in this case, considering that costs are the creatures of statutes, and that, presuming lawful motives on the part of the state legislature, no ground existed for holding that the statute was founded upon such an arbitrary classification as to render it void under the Fourteenth Amendment.

3. In Atchison, etc., R. Co. v. Matthews, 174 U. S. 96, the court (Justices Harlan, Brown, Peckham, and McKenna dissenting) upheld a statute declaring that in action against a railroad company to recover damages resulting from fire caused by the operation of its road, "if the plaintiff shall recover, there shall be allowed him by the court a reasonable attorney's fee, which shall become a part of the judgment." The Ellis case cited in the last note *supra* was distinguished, and stress was laid upon the fact that in that case was pre-

sented for consideration the constitutionality as a whole of a statute which imposed the payment of attorney's fees on the railroad company in various classes of small debts, some of which had no natural connection with the peculiar hazards or duties of a railroad company as such.

4. *Statutes Allowing Reasonable Attorney's Fee Against Railroads Held Constitutional* — *Florida.* — Jacksonville, etc., R. Co. v. Prior, 34 Fla. 271.

Illinois. — Peoria, etc., R. Co. v. Duggan, 109 Ill. 537, 50 Am. Rep. 619, 20 Am. & Eng. R. Cas. 489; Wabash, etc., R. Co. v. Lavieux, 14 Ill. App. 469.

Kansas. — Kansas Pac. R. Co. v. Mower, 16 Kan. 573; Atchison, etc., R. Co. v. Harper, 19 Kan. 529; Missouri River, etc., R. Co. v. Shirley, 20 Kan. 660; St. Louis, etc., R. Co. v. Miller, 18 Kan. 212.

Missouri. — Briggs v. St. Louis, etc., R. Co., 111 Mo. 168; Perkins v. St. Louis, etc., R. Co., 103 Mo. 52.

Tennessee. — Illinois Cent. R. Co. v. Crider, 91 Tenn. 489, 56 Am. & Eng. R. Cas. 157.

Texas. — Gulf, etc., R. Co. v. Ellis, (Tex. 1892) 18 S. W. Rep. 723, 49 Am. & Eng. R. Cas. 509, reversed 165 U. S. 150.

5. *Statutes Allowing Attorney's Fee Unconstitutional* — *Alabama.* — South, etc., Alabama R. Co. v. Morris, 65 Ala. 193.

Arkansas. — St. Louis, etc., R. Co. v. Williams, 49 Ark. 492.

Michigan. — Wilder v. Chicago, etc., R. Co., 70 Mich. 382; Schut v. Chicago, etc., R. Co., 70 Mich. 433; Lafferty v. Chicago, etc., R. Co., 71 Mich. 35.

Washington. — Jolliffe v. Brown, 14 Wash. 155, 53 Am. St. Rep. 868.

See also Denver, etc., R. Co. v. Outcalt, 2 Volume XVI.

to fence for injuries done to animals on unfenced railroad tracks, will be found exhaustively treated.¹ In this section, therefore, the contributory negligence of the owner or person in charge of animals is examined in those cases where the rules governing the liability are independent of a duty to fence — *i. e.*, where the roads were either properly fenced or where there was no statutory duty to fence at the point where the animal entered the track.

2. Right of Recovery Barred by Contributory Negligence. — For injuries by railroad trains to animals in such cases all of the usual rules for ascertaining the existence of contributory negligence apply,² and where the facts are such that its existence is shown there can be no recovery.³ There are, of course,

Colo. App. 395; Denver, etc., R. Co. v. Davidson, 2 Colo. App. 443; Rio Grande Western R. Co. v. Vaughn, 3 Colo. App. 465.

1. See *infra*, this title, *Liability under Statutes Relating to Erection and Maintenance of Fences* — *Contributory Negligence under These Statutes*.

2. **Standard as to Contributory Negligence.** — "Negligence in managing and restraining domestic animals is the absence of such methods and means of care as would be employed by men of ordinary prudence," and by this standard the question whether the plaintiff was guilty of contributory negligence is to be determined. Chicago, etc., R. Co. v. Fenn, 3 Ind. App. 253. And see generally the title CONTRIBUTORY NEGLIGENCE, vol. 7, p. 368.

The Owner Is Chargeable with the Negligence of a Servant having charge of the animal. Louisville, etc., R. Co. v. Stommel, 126 Ind. 35. See generally the title CONTRIBUTORY NEGLIGENCE, vol. 7, p. 445.

When the Plaintiff's Negligence Is Not the Proximate Cause of the Injury, it cannot preclude a recovery therefor. Louisville, etc., R. Co. v. Kelsey, 89 Ala. 287, 42 Am. & Eng. R. Cas. 584. See the title CONTRIBUTORY NEGLIGENCE, vol. 7, p. 382 *et seq.*

Where the Railroad Company Erects and Maintains Proper Fences and Cattle Guards, and cattle escape from an inclosure adjoining the road and stray upon the track, they are trespassers, and the law charges the owner with negligence, though he may be free from actual carelessness. Fisher v. Farmers' L. & T. Co., 21 Wis. 73.

Facts Held to Show Contributory Negligence — *Riding Unbridled Horse on Railroad Track.* — Wabash, etc., R. Co. v. Krough, 13 Ill. App. 431.

Ordering Horse to Be Led Across Track with Knowledge that Train Is Approaching. — Toledo, etc., R. Co. v. Head, 62 Ill. 233.

Leaving Horse Unhitched Near Station. — Edwards v. Philadelphia, etc., R. Co., 148 Pa. St. 531.

Rushing Stock Across Track Ahead of Moving Train. — Ohio, etc., R. Co. v. Eaves, 42 Ill. 288.

Driving Stock Along Right of Way. — Davidson v. Central Iowa R. Co., 75 Iowa 22, 35 Am. & Eng. R. Cas. 158.

The driving of an unbroken, easily frightened horse along a public road paralleling the railroad track has been held contributory negligence. Philadelphia, etc., R. Co. v. Stinger, 78 Pa. St. 219.

If a Block and Chain Attached to a Cow Contributed to Prevent Her Escape from the track,

the owner who fastened the incumbrance on her cannot recover. Guess v. South Carolina R. Co., 30 S. Car. 163.

Facts Held Not to Amount to Contributory Negligence — *Keeping Stock in Pasture through Which Railroad Passes.* — Birmingham Mineral R. Co. v. Harris, 98 Ala. 326.

Turning Animals into Unfenced Field. — McCoy v. California Pac. R. Co., 40 Cal. 532, 6 Am. Rep. 623.

Trying to Extricate Team at Crossing Instead of Going to Look for Approaching Trains. — Chicago, etc., R. Co. v. Hogarth, 38 Ill. 370.

The Fact that a Horse Escapes from a Securely Fenced Inclosure does not fix his owner with negligence unless the horse was one that ordinary fences would not confine. Dennis v. Louisville, etc., R. Co., 116 Ind. 42, 35 Am. & Eng. R. Cas. 141.

3. Right to Recovery Barred by Contributory Negligence — *Colorado.* — Denver, etc., R. Co. v. Stewart, 1 Colo. App. 227.

Illinois. — Chicago Board of Underwriters v. Chicago, etc., R. Co., 44 Ill. App. 253; Chicago, etc., R. Co. v. Dannel, 48 Ill. App. 251; Central Military Tract R. Co. v. Rockafellow, 17 Ill. 541; Chicago, etc., R. Co. v. Cauffman, 28 Ill. 513; Cleveland, etc., R. Co. v. Ducharme, 49 Ill. App. 520.

Indiana. — Bond v. Evansville, etc., R. Co., 100 Ind. 301, 23 Am. & Eng. R. Cas. 200; Indianapolis, etc., R. Co. v. Shimer, 17 Ind. 295; Indianapolis, etc., R. Co. v. Brownburg, 32 Ind. 199; Indianapolis, etc., R. Co. v. Wright, 13 Ind. 213; Koutz v. Toledo, etc., R. Co., 54 Ind. 515; Wabash, etc., R. Co. v. Nice, 99 Ind. 152, 23 Am. & Eng. R. Cas. 168; Cincinnati, etc., R. Co. v. Street, 50 Ind. 225; Indianapolis, etc., R. Co. v. Harter, 38 Ind. 557; Louisville, etc., R. Co. v. Schmidt, 81 Ind. 264, 8 Am. & Eng. R. Cas. 248; Louisville, etc., R. Co. v. Eves, 1 Ind. App. 224; Cincinnati, etc., R. Co. v. Hiltzhauser, 99 Ind. 486; Ft. Wayne, etc., R. Co. v. O'Keefe, 4 Ind. App. 249; Chicago, etc., R. Co. v. Nash, 1 Ind. App. 298; Lyons v. Terre Haute, etc., R. Co., 101 Ind. 419; Chicago, etc., R. Co. v. Fenn, 3 Ind. App. 250; Welty v. Indianapolis, etc., R. Co., 105 Ind. 55, 24 Am. & Eng. R. Cas. 371.

Iowa. — Connors v. Sioux City, etc., R. Co., 78 Iowa 410; Wooster v. Chicago, etc., R. Co., 74 Iowa 593, 35 Am. & Eng. R. Cas. 152.

Kansas. — Kansas City, etc., R. Co. v. McHenry, 24 Kan. 501; Kansas Pac. R. Co. v. Landis, 24 Kan. 406.

Kentucky. — Louisville, etc., R. Co. v. Milton, 14 B. Mon. (Ky.) 61; Schmittenhelm v. Louisville, etc., R. Co., (Ky. 1883) 19 Am. & Eng. R. Cas. 111.

many cases where the evidence is such that it results in a failure of the defendant to sustain such defense.¹

Maryland. — Baltimore, etc., R. Co. v. Lam-born, 12 Md. 257.

Massachusetts. — Amstein v. Gardner, 134 Mass. 4, 16 Am. & Eng. R. Cas. 585.

Michigan. — Robinson v. Flint, etc., R. Co., 79 Mich. 323, 19 Am. St. Rep. 174, 45 Am. & Eng. R. Cas. 496; Niemann v. Michigan Cent. R. Co., 80 Mich. 197.

Minnesota. — Locke v. First Div. St. Paul, etc., R. Co., 30 Minn. 350.

New Hampshire. — Hook v. Worcester, etc., R. Co., 58 N. H. 251.

New York. — Clark v. Syracuse, etc., R. Co., 11 Barb. (N. Y.) 112; Halloran v. New York, etc., R. Co., 2 E. D. Smith (N. Y.) 257; Bowman v. Troy, etc., R. Co., 37 Barb. (N. Y.) 516; Cornell v. Skaneateles R. Co., 61 Hun (N. Y.) 618, 15 N. Y. Supp. 581; Diamond Brick Co. v. New York Cent., etc., R. Co., 58 Hun (N. Y.) 396; Good v. New York, etc., R. Co., 50 Hun (N. Y.) 601, 2 N. Y. Supp. 419; Fitch v. Buffalo, etc., R. Co., 13 Hun (N. Y.) 668; Hance v. Cayuga, etc., R. Co., 26 N. Y. 428.

North Carolina. — Doggett v. Richmond, etc., R. Co., 81 N. Car. 459.

Ohio. — Cranston v. Cincinnati, etc., R. Co., 1 Handy (Ohio) 193.

Pennsylvania. — Horricks v. Philadelphia, etc., R. Co., 1 Phila. (Pa.) 28, 7 Leg. Int. (Pa.) 19; New York, etc., R. Co. v. Skinner, 19 Pa. St. 298, 57 Am. Dec. 654.

Rhode Island. — Tower v. Providence, etc., R. Co., 2 R. I. 404.

Texas. — Hargis v. St. Louis, etc., R. Co., 75 Tex. 19.

Wisconsin. — Carey v. Chicago, etc., R. Co., 61 Wis. 71, 20 Am. & Eng. R. Cas. 469; Richardson v. Chicago, etc., R. Co., 56 Wis. 347; McCandless v. Chicago, etc., R. Co., 45 Wis. 365, 19 Am. R. Rep. 374; Fisher v. Farmers' L. & T. Co., 21 Wis. 73.

Canada. — Ferris v. Grand Trunk R. Co., 16 U. C. Q. B. 474; Boggs v. Great Western R. Co., 23 U. C. C. P. 573.

1. Where Contributory Negligence Not Sustained

— *Alabama.* — Alabama G. S. R. Co. v. McAlpine, 71 Ala. 545, 15 Am. & Eng. R. Cas. 544; Alabama G. S. R. Co. v. Jones, 71 Ala. 487, 15 Am. & Eng. R. Cas. 549; Louisville, etc., R. Co. v. Kelsey, 89 Ala. 287, 42 Am. & Eng. R. Cas. 584; South, etc., Alabama R. Co. v. Williams, 65 Ala. 74.

California. — Waters v. Moss, 12 Cal. 535, 73 Am. Dec. 561; Richmond v. Sacramento Valley R. Co., 18 Cal. 351; Needham v. San Francisco, etc., R. Co., 37 Cal. 409; Orcutt v. Pacific Coast R. Co., 85 Cal. 291; McCov v. Southern Pac. R. Co., (Cal. 1891) 26 Pac. Rep. 629.

Connecticut. — Isbell v. New York, etc., R. Co., 27 Conn. 393, 71 Am. Dec. 78.

Florida. — Savannah, etc., R. Co. v. Geiger, 21 Fla. 669, 58 Am. Rep. 697, 29 Am. & Eng. R. Cas. 274.

Georgia. — Chattanooga, etc., R. Co. v. Palmer, 89 Ga. 161; Central R., etc., Co. v. Davis, 19 Ga. 437.

Illinois. — Chicago, etc., R. Co. v. Cauffman, 38 Ill. 424; Rockford, etc., R. Co. v.

Rafferty, 73 Ill. 58; Chicago, etc., R. Co. v. Engle, 84 Ill. 397; Toledo, etc., R. Co. v. Johnston, 74 Ill. 83.

Indiana. — Toledo, etc., R. Co. v. Milligan, 52 Ind. 505; Toledo, etc., R. Co. v. Jackson, 5 Ind. App. 547.

Iowa. — Story v. Chicago, etc., R. Co., 79 Iowa 402; Searles v. Milwaukee, etc., R. Co., 35 Iowa 490, 5 Am. R. Rep. 524; Kuhn v. Chicago, etc., R. Co., 42 Iowa 420; Whitbeck v. Dubuque, etc., R. Co., 21 Iowa 103; Miller v. Chicago, etc., R. Co., 59 Iowa 707; Wooster v. Chicago, etc., R. Co., 74 Iowa 593, 35 Am. & Eng. R. Cas. 152; Doran v. Chicago, etc., R. Co., 73 Iowa 115; Pearson v. Milwaukee, etc., R. Co., 45 Iowa 497.

Kansas. — Pacific R. Co. v. Brown, 14 Kan. 469; Missouri Pac. R. Co. v. Wilson, 28 Kan. 637, 11 Am. & Eng. R. Cas. 447; Atchison, etc., R. Co. v. Gabbert, 34 Kan. 132, 22 Am. & Eng. R. Cas. 621.

Maine. — Gilman v. European, etc., R. Co., 6 Me. 235.

Maryland. — Western Maryland R. Co. v. Carter, 59 Md. 306, 13 Am. & Eng. R. Cas. 573.

Massachusetts. — Southworth v. Old Colony, etc., R. Co., 105 Mass. 342, 7 Am. Rep. 528.

Michigan. — Parker v. Lake Shore, etc., R. Co., 93 Mich. 607.

Minnesota. — Watier v. Chicago, etc., R. Co., 31 Minn. 91, 13 Am. & Eng. R. Cas. 582.

Mississippi. — Chicago, etc., R. Co. v. Jones, 59 Miss. 465, 11 Am. & Eng. R. Cas. 450.

Missouri. — Pinnell v. St. Louis, etc., R. Co., 49 Mo. App. 170; Williams v. Missouri Pac. R. Co., 74 Mo. 453; Brown v. Hannibal, etc., R. Co., 27 Mo. App. 394; Nolon v. Chicago, etc., R. Co., 23 Mo. App. 353; Hannibal, etc., R. Co. v. Kenney, 41 Mo. 271; Tarwater v. Hannibal, etc., R. Co., 42 Mo. 193; Burger v. St. Louis, etc., R. Co., 52 Mo. App. 119; Windsor v. Hannibal, etc., R. Co., 45 Mo. App. 123.

Montana. — McMaster v. Montana Union R. Co., 12 Mont. 163, 56 Am. & Eng. R. Cas. 195.

New York. — Spinner v. New York Cent., etc., R. Co., 67 N. Y. 153.

North Carolina. — Horner v. Williams, 100 N. Car. 230, 35 Am. & Eng. R. Cas. 155; Bethea v. Raleigh, etc., R. Co., 106 N. Car. 279; Farmer v. Wilmington, etc., R. Co., 88 N. Car. 564, 20 Am. & Eng. R. Cas. 481.

Ohio. — Marietta, etc., R. Co. v. Stephenson, 24 Ohio St. 48; Cleveland, etc., R. Co. v. Elliott, 4 Ohio St. 474; Kerwhacker v. Cleveland, etc., R. Co., 3 Ohio St. 172.

Oregon. — Moses v. Southern Pac. R. Co., 18 Oregon 385, 42 Am. & Eng. R. Cas. 555; Keeney v. Oregon R., etc., Co., 19 Oregon 291, 42 Am. & Eng. R. Cas. 619.

Pennsylvania. — Reeves v. Delaware, etc., R. Co., 30 Pa. St. 454, 72 Am. Dec. 713.

South Carolina. — Harmon v. Columbia, etc., R. Co., 32 S. Car. 127; Murray v. South Carolina R. Co., 10 Rich. L. (S. Car.) 227, 70 Am. Dec. 219; Rowe v. Greenville, etc., R. Co., 7 S. Car. 167.

Tennessee. — Memphis, etc., R. Co. v. Smith, 9 Heisk. (Tenn.) 860.

3. Whether Contributory Negligence to Allow Animals to Run at Large — *a*. IN ABSENCE OF SPECIAL STATUTE MAKING IT UNLAWFUL. — Where the question of the railroad company's liability for injuries to animals is not dependent upon a failure on its part to comply with a statute as to erecting debarments,¹ and where it is not dependent upon the question whether the owner of the animal was forbidden by statute to allow it to be at the place of injury,² it frequently becomes necessary to determine whether it is contributory negligence on the part of the owner to allow animals to become trespassers on the right of way of the railroad company.

Jurisdictions Where Contributory Negligence. — Where the common-law rule by which every man was bound to keep his cattle upon his own land is in force,³ it is held that if the owner of cattle suffers them to escape and go upon the right of way and track of the railroad company, they are trespassers; and generally an owner's permitting them to go at large is the proximate cause of their collision with its trains and is contributory negligence which defeats a recovery for their injury.⁴

Jurisdictions Where Not Contributory Negligence. — On the other hand, in many jurisdictions,⁵ in fact in the great majority of the states of the Union, the own-

Texas. — *Texas, etc., R. Co. v. Cockrell*, 2 Tex. App. Civ. Cas. § 717.

Washington. — *Timm v. Northern Pac. R. Co.*, 3 Wash. Ter. 299.

West Virginia. — *Washington v. Baltimore, etc., R. Co.*, 17 W. Va. 190, 10 Am. & Eng. R. Cas. 749.

Wisconsin. — *Chicago, etc., R. Co. v. Goss*, 17 Wis. 428, 84 Am. Dec. 755; *Sika v. Chicago, etc., R. Co.*, 21 Wis. 370.

1. See *infra*, this title, *Liability under Statutes Relating to Erection and Maintenance of Fences — Contributory Negligence under These Statutes*, where this question is treated in relation to railroad companies' statutory negligence.

2. See *infra*, this section, *Contributory Negligence Where Animals Unlawfully at Large*.

3. See the titles ANIMALS, vol. 2, p. 354; FENCES, vol. 12, p. 1040.

4. **Jurisdictions Where Contributory Negligence to Allow Stock to Run at Large — *Indiana.*** — *Chicago, etc., R. Co. v. Nash*, 1 Ind. App. 298; *Ft. Wayne, etc., R. Co. v. O'Keefe*, 4 Ind. App. 249; *Hanna v. Terre Haute, etc., R. Co.*, 119 Ind. 316; *Indianapolis, etc., R. Co. v. Harter*, 38 Ind. 557; *Cincinnati, etc., R. Co. v. Hiltzhauer*, 99 Ind. 486; *Wabash, etc., R. Co. v. Nice*, 99 Ind. 152, 23 Am. & Eng. R. Cas. 168; *Cincinnati, etc., R. Co. v. Street*, 50 Ind. 225; *Lyons v. Terre Haute, etc., R. Co.*, 101 Ind. 419.

Maryland. — *Baltimore, etc., R. Co. v. Lam-born*, 12 Md. 257.

Michigan. — *Robinson v. Flint, etc., R. Co.*, 79 Mich. 323, 19 Am. St. Rep. 174, 45 Am. & Eng. R. Cas. 496; *Niemann v. Michigan Cent. R. Co.*, 80 Mich. 197.

Minnesota. — *Locke v. First Div. St. Paul, etc., R. Co.*, 15 Minn. 350; *Moser v. St. Paul, etc., R. Co.*, 42 Minn. 480.

New Jersey. — *Price v. New Jersey R., etc., Co.*, 32 N. J. L. 19; *Vandegrift v. Rediker*, 22 N. J. L. 185, 51 Am. Dec. 262.

New York. — *Mentges v. New York, etc., R. Co.*, 1 Hilt. (N. Y.) 425; *Fitch v. Buffalo, etc., R. Co.*, 13 Hun (N. Y.) 668; *Clark v. Syracuse, etc., R. Co.*, 11 Barb. (N. Y.) 112; *Halloran v. New York, etc., R. Co.*, 2 E. D. Smith (N. Y.) 257; *Munger v. Tonawanda R. Co.*, 4 N. Y. 349; *Bowman v. Troy, etc., R. Co.*, 37 Barb.

(N. Y.) 516; *Hance v. Cayuga, etc., R. Co.*, 26 N. Y. 428.

Pennsylvania. — *Horricks v. Philadelphia, etc., R. Co.*, 1 Phila. (Pa.) 28, 7 Leg. Int. (Pa.) 19; *New York, etc., R. Co. v. Skinner*, 19 Pa. St. 298, 57 Am. Dec. 654.

Rhode Island. — *Tower v. Providence, etc., R. Co.*, 2 R. I. 404.

Vermont. — *Trow v. Vermont Cent. R. Co.*, 24 Vt. 487, 58 Am. Dec. 191.

Wisconsin. — *McCandless v. Chicago, etc., R. Co.*, 45 Wis. 365, 19 Am. R. Rep. 374.

Though There Is Evidence that the Engineer Might Have Avoided Injury, recovery has been held to be barred. *Price v. New Jersey R., etc., Co.*, 32 N. J. L. 19.

Where There Is No Statute Requiring Fences, the same rule as to contributory negligence applies as at exceptional places in states having such statutes. Thus, where a person permitted his cow to pass upon the railroad track, he was precluded by contributory negligence from recovering damages for its loss. *Tower v. Providence, etc., R. Co.*, 2 R. I. 404. See to the same effect *McCandless v. Chicago, etc., R. Co.*, 45 Wis. 365, 19 Am. R. Rep. 374.

Where Cattle Wilfully Killed. — The rule is of course otherwise where the cattle are wilfully killed. The fact that they were unlawfully at large does not bar a recovery for their killing. *Jeffersonville, etc., R. Co. v. Underhill*, 48 Ind. 389; *Jeffersonville, etc., R. Co. v. Adams*, 43 Ind. 402; *Ft. Wayne, etc., R. Co. v. O'Keefe*, 4 Ind. App. 249; *Chicago, etc., R. Co. v. Nash*, 1 Ind. App. 298.

When Animals Are Let Out of a Securely Fenced Pasture by a Trespasser and stray on a railroad and are injured, the owner is not guilty of contributory negligence. *Toledo, etc., R. Co. v. Milligan*, 52 Ind. 505.

Contributory Negligence Question of Fact. — In *Sinkling v. Illinois Cent. R. Co.*, 10 S. Dak. 560, it was held that where the plaintiff turned his horse loose on his premises, which were in unobstructed proximity to a railroad track, shortly before the time when a train was accustomed to pass, the question of contributory negligence was one for the jury.

5. See the titles ANIMALS, vol. 2, p. 356; FENCES, vol. 12, p. 1041.

ers of animals are not guilty of contributory negligence in allowing them to go at large so as to defeat a recovery for the negligent injury of such animals by a railroad company.¹

b. CONTRIBUTORY NEGLIGENCE WHERE ANIMALS UNLAWFULLY AT LARGE.—The authorities are almost unanimous² in holding that when the owner of animals allows them to run at large in a town or elsewhere when there is a statutory prohibition against his doing so, such breach of the law is contributory negligence on his part which will preclude his recovery from the railroad company for their injury on its track.³

1. Jurisdictions Where Not Contributory Negligence to Allow Stock to Run at Large—*Alabama*.—*Alabama G. S. R. Co. v. McAlpine*, 71 Ala. 545, 15 Am. & Eng. R. Cas. 544; *Alabama G. S. R. Co. v. Jones*, 71 Ala. 487, 15 Am. & Eng. R. Cas. 549; *Mobile, etc., R. Co. v. Williams*, 53 Ala. 595; *South, etc., Alabama R. Co. v. Williams*, 65 Ala. 74.

California.—*Waters v. Moss*, 12 Cal. 535, 73 Am. Dec. 561; *Richmond v. Sacramento Valley R. Co.*, 18 Cal. 351.

Florida.—*Savannah, etc., R. Co. v. Geiger*, 21 Fla. 669, 58 Am. Rep. 697, 29 Am. & Eng. R. Cas. 274.

Illinois.—*Chicago, etc., R. Co. v. Cauffman*, 38 Ill. 424; *Rockford, etc., R. Co. v. Rafferty*, 73 Ill. 58; *Chicago, etc., R. Co. v. Engle*, 84 Ill. 397. But see *Central Military Tract R. Co. v. Rockafellow*, 17 Ill. 541, *overruled* in *Illinois Cent. R. Co. v. Middlesworth*, 46 Ill. 498.

Iowa.—*Searles v. Milwaukee, etc., R. Co.*, 35 Iowa 490; *Whitbeck v. Dubuque, etc., R. Co.*, 21 Iowa 103; *Kuhn v. Chicago, etc., R. Co.*, 42 Iowa 420; *Pearson v. Milwaukee, etc., R. Co.*, 45 Iowa 497; *Miller v. Chicago, etc., R. Co.*, 59 Iowa 707; *Alger v. Mississippi, etc., R. Co.*, 10 Iowa 268.

Kansas.—*Missouri Pac. R. Co. v. Wilson*, 28 Kan. 637, 11 Am. & Eng. R. Cas. 447 (not contributory negligence to allow cattle to run at large in absence of restraining order of county commissioners under Laws 1872, c. 193).

Mississippi.—*Chicago, etc., R. Co. v. Jones*, 59 Miss. 465, 11 Am. & Eng. R. Cas. 450.

Missouri.—*Burger v. St. Louis, etc., R. Co.*, 52 Mo. App. 119; *Brown v. Hannibal, etc., R. Co.*, 27 Mo. App. 394; *Nolon v. Chicago, etc., R. Co.*, 23 Mo. App. 353; *Hannibal, etc., R. Co. v. Kenney*, 41 Mo. 271; *Turner v. Kansas City, etc., R. Co.*, 78 Mo. 578, 19 Am. & Eng. R. Cas. 506; *Tarwater v. Hannibal, etc., R. Co.*, 42 Mo. 193.

Montana.—*McMaster v. Montana Union R. Co.*, 12 Mont. 163, 56 Am. & Eng. R. Cas. 195.

North Carolina.—*Bethea v. Raleigh, etc., R. Co.*, 106 N. Car. 279.

Ohio.—*Kerwhacker v. Cleveland, etc., R. Co.*, 3 Ohio St. 172; *Cranston v. Cincinnati, etc., R. Co.*, 1 Handy (Ohio) 193.

Oregon.—*Moses v. Southern Pac. R. Co.*, 18 Oregon 385, 42 Am. & Eng. R. Cas. 555; *Keehey v. Oregon R., etc., Co.*, 19 Oregon 291, 42 Am. & Eng. R. Cas. 619. But see *Hindman v. Oregon R., etc., Co.*, 17 Oregon 614, 38 Am. & Eng. R. Cas. 310; and the title *FENCES*, vol. 12, p. 1012, note.

South Carolina.—*Murray v. South Carolina R. Co.*, 10 Rich. L. (S. Car.) 227, 70 Am. Dec. 219; *Rowe v. Greenville, etc., R. Co.*, 7 S. Car. 167.

Tennessee.—*Memphis, etc., R. Co. v. Smith*, 9 Heisk. (Tenn.) 860, 20 Am. R. Rep. 60.

Texas.—*Texas, etc., R. Co. v. Cockrell*, 2 Tex. App. Civ. Cas., § 717.

Washington.—*Timm v. Northern Pac. R. Co.*, 3 Wash. Ter. 299.

Not Contributory Negligence unless Prohibited by Law.—In *Illinois* it is not negligence for the owner of animals to permit them to run at large in a town through which a railroad passes if such running at large is not prohibited by law. *Chicago, etc., R. Co. v. Engle*, 84 Ill. 397.

Pasturing Stock on Commons of Incorporated Towns.—An owner of animals has the right to pasture them on the commons of incorporated towns, in the absence of local regulations to the contrary; and such conduct, though dangerous and reprehensible, does not constitute contributory negligence on his part nor diminish his right to compensation from a railroad company causing injuries to them. *Chicago, etc., R. Co. v. Jones*, 59 Miss. 465, 11 Am. & Eng. R. Cas. 450.

Animals at Large Where Salt Exposed Near Railroad Track.—The owner of an animal may allow it to run at large notwithstanding he knows that salt has been left exposed near the railroad track, and such knowledge will therefore not constitute contributory negligence. *Burger v. St. Louis, etc., R. Co.*, 52 Mo. App. 119; *Brown v. Hannibal, etc., R. Co.*, 27 Mo. App. 394.

2. Permitting Cattle at Large Where Prohibited Not Contributory Negligence—Proximate Cause.

—It has been held that, even in a locality where by statute it is unlawful for stock to run at large, an owner permitting his cattle to be at large is not guilty of contributory negligence so as to prevent a recovery for their injury by a railroad company, his act not being a proximate cause of such injury. *Alabama G. S. R. Co. v. McAlpine*, 71 Ala. 545, 15 Am. & Eng. R. Cas. 544; *Orcutt v. Pacific Coast R. Co.*, 85 Cal. 291.

3. Contributory Negligence When Animal Unlawfully at Large—*Colorado*.—*Denver, etc., R. Co. v. Stewart*, 1 Colo. App. 227.

Illinois.—*Chicago, etc., R. Co. v. Engle*, 84 Ill. 397.

Iowa.—*Vanhorn v. Burlington, etc., R. Co.*, 63 Iowa 67; *Van Horn v. Burlington, etc., R. Co.*, 59 Iowa 33, 7 Am. & Eng. R. Cas. 591.

Kansas.—*Central Branch R. Co. v. Lea*, 20 Kan. 353; *Kansas City, etc., R. Co. v. McHenry*, 24 Kan. 501; *Kansas Pac. R. Co. v. Landis*, 24 Kan. 406.

Ohio.—*Baltimore, etc., R. Co. v. Wood*, 47 Ohio St. 431, 45 Am. & Eng. R. Cas. 464; *Pittsburgh, etc., R. Co. v. Methven*, 21 Ohio St. 586.

When at Large Not by Fault of Owner. — This rule, however, has no application where the statute has been unintentionally violated without fault on the part of the owner; the fact that the stock was at large at the time of the injury done does not render him guilty of contributory negligence.¹

4. Plaintiff's Negligence Must Proximately Contribute to Injury. — To establish contributory negligence barring a recovery by the plaintiff, his negligent act or omission relied on as a defense must proximately contribute to the injury.²

5. Defendant's Negligence After Discovering Animals on Track. — In the majority of jurisdictions, even though it appears that the plaintiff has negligently exposed his animals to injury by a railroad train, yet if the railroad company, after discovering the exposed situation, runs its train upon them, through a failure to exercise ordinary care, the plaintiff may recover damages.³ It has been held by many courts that where cattle are negligently permitted to run at large near an unfenced railroad track, and are run over and killed by a passing train, their owner may recover damages if the railroad company or its employees were negligent and could have avoided the injury.⁴ In other jurisdictions, however, it is held that the owner of cattle is guilty of contribu-

Canada. — *McGee v. Great Western R. Co.*, 23 U. C. Q. B. 293; *Ferris v. Grand Trunk R. Co.*, 16 U. C. Q. B. 474; *Thompson v. Grand Trunk R. Co.*, 18 U. C. Q. B. 92; *Cooley v. Grand Trunk R. Co.*, 18 U. C. Q. B. 96.

Where an animal running at large, contrary to statute, was killed by collision with a railroad train, it was held that there could be no recovery by the owner of the animal in the absence of wilful or gross negligence on the part of the railroad company. *Denver, etc., R. Co. v. Stewart*, 1 Colo. App. 227.

Contributory Negligence to Allow Animal to Go at Large in Violation of City Ordinance. — *Vanhorn v. Burlington, etc., R. Co.*, 63 Iowa 67, 69 Iowa 239.

1. Statute Unintentionally Violated When Owner Not at Fault. — *Toledo, etc., R. Co. v. Johnston*, 74 Ill. 83 (stock escaping from pasture); *Doran v. Chicago, etc., R. Co.*, 73 Iowa 115 (mules escaping from stables); *Story v. Chicago, etc., R. Co.*, 79 Iowa 402 (stock confined within sufficient inclosure, escaping through fence getting out of repair).

2. To Establish Defense Plaintiff's Negligence Must Proximately Contribute to Injury. — *Alabama.* — *Louisville, etc., R. Co. v. Kelsey*, 89 Ala. 287, 42 Am. & Eng. R. Cas. 584; *Alabama G. S. R. Co. v. McAlpine*, 71 Ala. 545, 15 Am. & Eng. R. Cas. 544.

California. — *Needham v. San Francisco, etc., R. Co.*, 37 Cal. 409; *Orcutt v. Pacific Coast R. Co.*, 85 Cal. 291.

Indiana. — *Louisville, etc., R. Co. v. Hart*, 2 Ind. App. 130.

Maine. — *Gilman v. European, etc., R. Co.*, 60 Me. 235.

Maryland. — *Western Maryland R. Co. v. Carter*, 59 Md. 306, 13 Am. & Eng. R. Cas. 573.

Minnesota. — *Watier v. Chicago, etc., R. Co.*, 31 Minn. 91, 13 Am. & Eng. R. Cas. 582.

Missouri. — *Pinnell v. St. Louis, etc., R. Co.*, 49 Mo. App. 170.

Ohio. — *Cleveland, etc., R. Co. v. Elliott*, 4 Ohio St. 474.

Oregon. — *Moses v. Southern Pac. R. Co.*, 18 Oregon 385, 42 Am. & Eng. R. Cas. 555.

Wisconsin. — *Sika v. Chicago, etc., R. Co.*, 21 Wis. 370.

See generally the title CONTRIBUTORY NEGLIGENCE, vol. 7, p. 381 *et seq.*

Negligence of Plaintiff and Railroad Company Must Not Be Disconnected. — Contributory negligence exists where the negligence of the plaintiff contributed proximately to the injury of the animal, and it does not contribute proximately where the injury sued for and that resulting from the fault of the plaintiff are disconnected. *Pinnell v. St. Louis, etc., R. Co.*, 49 Mo. App. 170; *Sika v. Chicago, etc., R. Co.*, 21 Wis. 370.

Illustrations of Acts or Omissions Held to Be Proximate Cause. — Where a horse escapes from its owner and goes on the railroad track and runs thereon between five hundred and six hundred feet before it is injured, the jury is authorized in finding that the injury was the proximate, principal, and natural result of the owner's negligence in permitting the horse to escape. *Amstein v. Gardner*, 134 Mass. 4, 16 Am. & Eng. R. Cas. 585.

Where a herder in charge of animals voluntarily drives them and leaves them uncared for in a place of danger along the railroad track where injury is likely to happen to them, and they are killed, such act is the proximate cause of the injury and will bar a recovery. *Keeney v. Oregon R., etc., Co.*, 19 Oregon 291, 42 Am. & Eng. R. Cas. 619.

Allowing Animals to Run at Large has been held not to be the proximate cause of their injury by a railroad train. *Needham v. San Francisco, etc., R. Co.*, 37 Cal. 409; *Western Maryland R. Co. v. Carter*, 59 Md. 306, 13 Am. & Eng. R. Cas. 573; *Cleveland, etc., R. Co. v. Elliott*, 4 Ohio St. 474. And this rule has been applied even where it was unlawful for the animals to be at large. *Alabama G. S. R. Co. v. McAlpine*, 71 Ala. 545, 15 Am. & Eng. R. Cas. 544; *Orcutt v. Pacific Coast R. Co.*, 85 Cal. 291. See generally *supra*, this section, *Whether Contributory Negligence to Allow Animals to Run at Large*.

3. See the title CONTRIBUTORY NEGLIGENCE, vol. 7, p. 382, note 5.

4. Where Care Would Have Avoided Injury to Animal on Track. — *California.* — *Richmond v. Sacramento Valley R. Co.*, 18 Cal. 351.

tory negligence in permitting them to go astray where they are likely to get upon the track, and cannot recover against the railroad company, irrespective of its negligence in thereafter running over them.¹

6. Where Doctrine of Comparative Negligence Prevails. — Where the doctrine of comparative negligence prevails, it is applied, of course, in determining the effect of the plaintiff's negligence on his right to recover damages for injury to his stock by a railroad company.²

VI. LIABILITY UNDER STATUTES RELATING TO ERECTION AND MAINTENANCE OF FENCES — **1. General Character of These Statutes.** — In *England, Canada*, and in most of the *United States* there are statutes dealing with the duty of railroad companies to fence or with their liability for injuries to cattle caused by the absence of fences. Many of these statutes make it the duty of railroads to maintain suitable fences, cattle guards, and gates along the line of their rights of way, except at certain places,³ for the safety of passengers traveling on their trains as well as for the protection from injury⁴ of animals which may stray upon their tracks,⁵ and provide that the failure of the railroad company to observe certain statutory requirements shall be conclusive evidence of negligence rendering it liable to the owner of cattle killed, either for the actual loss sustained by him or for a sum designated in excess thereof.⁶ Other statutes, although they do not specifically make it the duty of railroads to main-

Connecticut. — *Isbell v. New York, etc., R. Co.*, 27 Conn. 393, 71 Am. Dec. 78.

Indiana. — *New Albany, etc., R. Co. v. Maiden*, 12 Ind. 10.

Iowa. — *Wooster v. Chicago, etc., R. Co.*, 74 Iowa 593, 35 Am. & Eng. R. Cas. 152.

Minnesota. — *Locke v. First Div. St. Paul, etc., R. Co.*, 15 Minn. 350.

Ohio. — *Cleveland, etc., R. Co. v. Elliott*, 4 Ohio St. 474; *Kerwhacker v. Cleveland, etc., R. Co.*, 3 Ohio St. 172.

Vermont. — *Trow v. Vermont Cent. R. Co.*, 24 Vt. 487, 58 Am. Dec. 191.

1. New York. — *Munger v. Tonawanda R. Co.*, 4 N. Y. 349; *Terry v. New York Cent. R. Co.*, 22 Barb. (N. Y.) 574; *Halloran v. New York, etc., R. Co.*, 2 E. D. Smith (N. Y.) 257; *Mentges v. New York, etc., R. Co.*, 1 Hilt. (N. Y.) 425.

Pennsylvania. — *Horricks v. Philadelphia, etc., R. Co.*, 1 Phila. (Pa.) 28, 7 Leg. Int. (Pa.) 19.

2. Comparative Negligence — *Georgia.* — Where a railroad company is not required to fence stock from its track, and where the owner of stock is not required to fence in his stock, the rights of each on uninclosed lands are the same; if stock be injured on such lands by passing trains, the diligence of both the owner and the railroad company is material. *Georgia R., etc., Co. v. Neely*, 56 Ga. 540.

Slight contributory negligence goes in mitigation of damages. *Georgia R., etc., Co. v. Neely*, 56 Ga. 540; *Central R., etc., Co. v. Davis*, 19 Ga. 437. For the present status of the doctrine in Georgia, see the title *COMPARATIVE NEGLIGENCE*, vol. 6, p. 366.

Illinois. — *Rockford, etc., R. Co. v. Irish* 72 Ill. 404; *Toledo, etc., R. Co. v. McGinnis*, 7 Ill. 346.

The doctrine of comparative negligence no longer prevails in Illinois. See the title *COMPARATIVE NEGLIGENCE*, vol. 6, p. 365.

3. See infra, this section, *Duty to Maintain Debarments at Particular Points*.

4. Purpose of These Enactments. — See gener-

ally the title *FENCES*, vol. 12, p. 1066. See also *Nolan v. New York, etc., R. Co.*, 53 Conn. 461; *Cincinnati, etc., R. Co. v. Hildreth*, 77 Ind. 504; *Kansas City, etc., R. Co. v. Spencer*, 72 Miss. 491; *Humes v. Missouri Pac. R. Co.*, 9 Mo. App. 588; *Wait v. Bennington, etc., R. Co.*, 61 Vt. 268. As to the protection of infants, see the title *FENCES*, vol. 12, p. 1084.

5. See infra, this section, *Kind and Character of Debarments Required* — *Kind and Nature of Animals to Be Excluded*.

6. Where Both Duty to Fence Imposed and Recovery for Neglect Thereof Authorized by Statute — *United States.* — *Missouri Pac. R. Co. v. Humes*, 115 U. S. 512; *Minneapolis, etc., R. Co. v. Beckwith*, 129 U. S. 26; *Minneapolis, etc., R. Co. v. Emmons*, 149 U. S. 364; *Minneapolis, etc., R. Co. v. Nelson*, 149 U. S. 368.

Florida. — *Jacksonville, etc., R. Co. v. Harris*, 33 Fla. 217, 39 Am. St. Rep. 127; *Jacksonville, etc., R. Co. v. Prior*, 34 Fla. 271.

Illinois. — *Cairo, etc., R. Co. v. Peoples*, 92 Ill. 97, 34 Am. Rep. 112; *Cairo, etc., R. Co. v. Warrington*, 92 Ill. 157; *Toledo, etc., R. Co. v. Franklin*, 159 Ill. 99.

Indiana. — *New Albany, etc., R. Co. v. Tilton*, 12 Ind. 3, 74 Am. Dec. 195; *Indianapolis, etc., R. Co. v. Kercheval*, 16 Ind. 84.

Kentucky. — *Louisville, etc., R. Co. v. Belcher*, 89 Ky. 193.

Michigan. — *Gardner v. Smith*, 7 Mich. 410, 74 Am. Dec. 722.

Nebraska. — *Fremont, etc., R. Co. v. Lamb*, 11 Neb. 592; *Union Pac. R. Co. v. High*, 14 Neb. 14; *Burlington, etc., R. Co. v. Brinkman*, 14 Neb. 70; *Burlington, etc., R. Co. v. Franzen*, 15 Neb. 365.

New Jersey. — *Vanduzer v. Lehigh, etc., R. Co.*, 58 N. J. L. 8.

Ohio. — *Gill v. Atlantic, etc., R. Co.*, 27 Ohio St. 240.

Pennsylvania. — *Dunkirk, etc., R. Co. v. Mead*, 90 Pa. St. 454, 1 Am. & Eng. R. Cas. 166.

Utah. — *Stimpson v. Union Pac. R. Co.*, 9 Utah 123.

tain such debarments, yet provide for their liability in damages when animals are killed by their trains because of the absence of fences.¹ Other enactments, again, provide for the maintenance of such barriers without in terms making the road liable for injuries caused by the absence thereof. Where statutes of the latter class exist, the negligence of the road in having failed to comply with the statutory requirement makes it absolutely liable to the owner of animals injured by its trains thereby.²

2. Amount of Recovery under These Statutes — Recovery of Actual Damages Sustained.

— In the majority of jurisdictions where these statutes exist, a recovery under them is limited in all cases to the value of the animal killed or injured;³ but in a few jurisdictions (for instance in *Illinois*, *Iowa*, *Missouri*, and *Montana*),

Vermont. — *Hurd v. Rutland*, etc., R. Co., 25 Vt. 116; *Nelson v. Vermont*, etc., R. Co., 26 Vt. 717, 62 Am. Dec. 614.

Virginia. — *Norfolk*, etc., R. Co. v. *McGavock*, 90 Va. 507; *Kimball v. Carter*, 95 Va. 77.

Wisconsin. — *Cole v. Duluth*, etc., R. Co., (Wis. 1899) 80 N. W. Rep. 736.

Canada. — *St. John*, etc., R. Co. v. *Montgomery*, 21 N. Bruns. 441; *Pontiac Pac. Junction R. Co. v. Brady*, 4 Montreal Q. B. 346.

1. **Statutes Not Imposing Duty to Fence, but Authorizing Recovery in Absence of Fences** — *Kansas*. — *Kansas Pac. R. Co. v. Mower*, 16 Kan. 573.

Michigan. — *Flint*, etc., R. Co. v. *Lull*, 28 Mich. 510; *Grand Rapids*, etc., R. Co. v. *Southwick*, 30 Mich. 444.

Montana. — *Beckstead v. Montana Union R. Co.*, 19 Mont. 147; *Snook v. Clark*, 20 Mont. 230; *Menard v. Montana Cent. R. Co.*, 22 Mont. 340.

Oregon. — *Sullivan v. Oregon R.*, etc., Co., 19 Oregon 319; *Eaton v. Oregon R.*, etc., Co., 19 Oregon 391; *Hindman v. Oregon R.*, etc., Co., 17 Oregon 614.

Tennessee. — *Illinois Cent. R. Co. v. Crider*, 91 Tenn. 489, 56 Am. & Eng. R. Cas. 157; *Cincinnati*, etc., R. Co. v. *Russell*, 92 Tenn. 108.

Texas. — *Texas*, etc., R. Co. v. *Mitchell*, 2 Tex. App. Civ. Cas., § 373; *Galveston*, etc., R. Co. v. *Wessendorf*, (Tex. Civ. App. 1896) 39 S. W. Rep. 132.

Washington. — *Oregon R.*, etc., Co. v. *Dacres*, 1 Wash. 195.

Wisconsin. — *McCall v. Chamberlain*, 13 Wis. 637; *Anderson v. Stewart*, 76 Wis. 43; *McDonough v. Milwaukee*, etc., R. Co., 73 Wis. 223; *Martin v. Stewart*, 73 Wis. 553.

2. **Where Only Duty to Fence Imposed by Statute, Recovery May Be Had for Neglect Thereof** — *England*. — *Bessant v. Great Western R. Co.*, 8 C. B. N. S. 368, 98 E. C. L. 368; *Dawson v. Midland R. Co.*, L. R. 8 Exch. 8; *Fawcett v. York*, etc., R. Co., 15 Jur. 173.

Canada. — *New Brunswick R. Co. v. Armstrong*, 23 N. Bruns. 193.

California. — *Baker v. Southern California R. Co.*, 114 Cal. 501; *McCoy v. Southern Pac. R. Co.*, (Cal. 1891) 26 Pac. Rep. 629; *Fontaine v. Southern Pac. R. Co.*, 54 Cal. 645.

Connecticut. — *Bulkley v. New York*, etc., R. Co., 27 Conn. 479.

Maine. — *Norris v. Androscoggin R. Co.*, 39 Me. 273, 63 Am. Dec. 621; *Wilder v. Maine Cent. R. Co.*, 65 Me. 332, 20 Am. Rep. 698.

Massachusetts. — *Sawyer v. Vermont*, etc., R. Co., 105 Mass. 196; *Keliher v. Connecticut*

River R. Co., 107 Mass. 411; *Taft v. New York*, etc., R. Co., 157 Mass. 297.

Minnesota. — *Gillam v. Sioux City*, etc., R. Co., 26 Minn. 268; *Cox v. Minneapolis*, etc., R. Co., 41 Minn. 101; *Alexander v. Chicago*, etc., R. Co., 41 Minn. 515; *Moser v. St. Paul*, etc., R. Co., 42 Minn. 480; *La Paul v. Truesdale*, 44 Minn. 275; *Vinson v. Chicago*, etc., R. Co., 47 Minn. 265.

New Hampshire. — *Cornwall v. Sullivan R. Co.*, 28 N. H. 161; *Smith v. Eastern R. Co.*, 35 N. H. 356; *Horn v. Atlantic*, etc., R. Co., 35 N. H. 169.

New York. — *Corwin v. New York*, etc., R. Co., 13 N. Y. 42; *Shepard v. Buffalo*, etc., R. Co., 35 N. Y. 641; *Tracy v. Troy*, etc., R. Co., 38 N. Y. 433, 98 Am. Dec. 54; *Crawford v. New York Cent.*, etc., R. Co., 18 Hun (N. Y.) 108.

Ohio. — *Cleveland*, etc., R. Co. v. *McConnell*, 26 Ohio St. 57; *Pittsburgh*, etc., R. Co. v. *Smith*, 38 Ohio St. 410; *Baltimore*, etc., R. Co. v. *Schultz*, 43 Ohio St. 270; *Cincinnati*, etc., R. Co. v. *Hoffhines*, 46 Ohio St. 643.

3. **Actual Damages Recovered for Injuries Due to Defective Fences or Cattle Guards** — *England*. — *Dickinson v. London*, etc., R. Co., 1 H. & R. 399; *Bessant v. Great Western R. Co.*, 8 C. B. N. S. 368, 98 E. C. L. 368.

Canada. — *New Brunswick R. Co. v. Armstrong*, 23 N. Bruns. 193; *St. John*, etc., R. Co. v. *Montgomery*, 21 N. Bruns. 441; *Dunsford v. Michigan Cent. R. Co.*, 20 Ont. App. 577; *Davis v. Canadian Pac. R. Co.*, 12 Ont. App. 724; *Landry v. La Cie du Chemin*, etc., 9 Montreal Leg. N. 5; *Vernon v. Grand Trunk R. Co.*, 2 Montreal Super. Ct. 181, 9 Montreal Leg. N. 203.

California. — *Fontaine v. Southern Pac. R. Co.*, 54 Cal. 645, 1 Am. & Eng. R. Cas. 159; *McCoy v. Southern Pac. R. Co.*, (Cal. 1891) 26 Pac. Rep. 629; *McCoy v. California Pac. R. Co.*, 40 Cal. 532, 6 Am. Rep. 623.

Connecticut. — *Bulkley v. New York*, etc., R. Co., 27 Conn. 479.

Florida. — *Jacksonville*, etc., R. Co. v. *Harris*, 33 Fla. 217, 39 Am. St. Rep. 127; *Jacksonville*, etc., R. Co. v. *Prior*, 34 Fla. 271.

Idaho. — *Pattie v. Oregon Short Line R. Co.*, (Idaho 1899) 56 Pac. Rep. 82.

Indiana. — *Madison*, etc., R. Co. v. *Whiteneck*, 8 Ind. 217; *Wabash R. Co. v. Forshee*, 77 Ind. 158; *Jeffersonville*, etc., R. Co. v. *Dunlap*, 112 Ind. 93.

Kansas. — *Hopkins v. Kansas Pac. R. Co.*, 18 Kan. 462, 16 Am. R. Rep. 41; *Kansas Pac. R. Co. v. Mower*, 16 Kan. 573; *Wichita*, etc., R. Co. v. *Gibbs*, 47 Kan. 274.

whether there may be a recovery of more than actual damages depends upon whether the suit is under the particular statute and whether the party seeking to recover has taken certain steps which were requisite to entitle him to recover more than actual damages. Where he has not done so, he sues only for the actual damages sustained, and those alone are recoverable.¹

Recovery of Amount in Excess of Actual Damages. — There is also a class of statutes which not only make the injury to the animal conclusive evidence of negligence on the part of the railroad company for its failure to maintain fences, but also increase the amount of damages which the owner may recover to double ²

Kentucky. — Louisville, etc., R. Co. v. Belcher, 89 Ky. 193, 40 Am. & Eng. R. Cas. 228.

Maine. — Wilder v. Maine Cent. R. Co., 65 Me. 332, 20 Am. Rep. 698; Wyman v. Penobscot, etc., R. Co., 46 Me. 162; Norris v. Androscoggin R. Co., 39 Me. 273, 63 Am. Dec. 621.

Massachusetts. — Taft v. New York, etc., R. Co., 157 Mass. 297; Sawyer v. Vermont, etc., R. Co., 105 Mass. 196; Keliher v. Connecticut River R. Co., 107 Mass. 411.

Michigan. — Coleman v. Flint, etc., R. Co., 64 Mich. 160; Lafferty v. Chicago, etc., R. Co., 71 Mich. 35; Talbot v. Minneapolis, etc., R. Co., 82 Mich. 66.

Minnesota. — Schubert v. Minneapolis, etc., R. Co., 27 Minn. 360; Cox v. Minneapolis, etc., R. Co., 41 Minn. 101; Alexander v. Chicago, etc., R. Co., 41 Minn. 515; Chisholm v. Northern Pac. R. Co., 53 Minn. 122; Gould v. Great Northern R. Co., 63 Minn. 37, 56 Am. St. Rep. 453.

Montana. — Snook v. Clark, 20 Mont. 230; Menard v. Montana Cent. R. Co., 22 Mont. 340.

Nebraska. — Burlington, etc., R. Co. v. Franzen, 15 Neb. 365, 15 Am. & Eng. R. Cas. 530; Chicago, etc., R. Co. v. Cox, 51 Neb. 479; Fremont, etc., R. Co. v. Lamb, 11 Neb. 592, 5 Am. & Eng. R. Cas. 367.

New Hampshire. — Cornwall v. Sullivan R. Co., 28 N. H. 161; Cressey v. Northern R. Co., 59 N. H. 564, 47 Am. Rep. 227; Smith v. Eastern R. Co., 35 N. H. 356; Horn v. Atlantic, etc., R. Co., 35 N. H. 169.

New Jersey. — Vanduzer v. Lehigh, etc., R. Co., 58 N. J. L. 8.

New York. — Corwin v. New York, etc., R. Co., 13 N. Y. 42; Kelter v. New York, etc., R. Co., 126 N. Y. 365, 49 Am. & Eng. R. Cas. 551; Hodge v. New York Cent., etc., R. Co., 27 Hun (N. Y.) 394; Dayton v. New York, etc., R. Co., 81 Hun (N. Y.) 284.

Ohio. — Pittsburgh, etc., R. Co. v. Smith, 38 Ohio St. 410, 13 Am. & Eng. R. Cas. 579; Baltimore, etc., R. Co. v. Schultz, 43 Ohio St. 270, 54 Am. Rep. 805, 22 Am. & Eng. R. Cas. 579.

Oregon. — Hindman v. Oregon R., etc., Co., 17 Oregon 614, 38 Am. & Eng. R. Cas. 310; Eaton v. Oregon R., etc. Co. 19 Oregon 391, 43 Am. & Eng. R. Cas. 57.

Pennsylvania. — Dunkirk, etc., R. Co. v. Mead, 90 Pa. St. 454, 1 Am. & Eng. R. Cas. 166.

Tennessee. — Cincinnati, etc., R. Co. v. Stonecipher, 95 Tenn. 311; Illinois Cent. R. Co. v. Crider, 91 Tenn. 489, 56 Am. & Eng. R. Cas. 157; Cincinnati, etc., R. Co. v. Russell, 92 Tenn. 108.

Texas. — Gulf, etc., R. Co. v. Keith, 74 Tex.

287; Gulf, etc., R. Co. v. Ellis, (Tex. 1892) 18 S. W. Rep. 723, 49 Am. & Eng. R. Cas. 509; Texas, etc., R. Co. v. Mitchell, 2 Tex. App. Civ. Cas., § 373.

Utah. — Stimpson v. Union Pac. R. Co., 9 Utah 123.

Vermont. — Harwood v. Bennington, etc., R. Co., 67 Vt. 664; Congdon v. Central Vermont R. Co., 56 Vt. 390, 48 Am. Rep. 793; Hurd v. Rutland, etc., R. Co., 25 Vt. 116.

Virginia. — Norfolk, etc., R. Co. v. Johnson, 91 Va. 661; Norfolk, etc., R. Co. v. McGavock, 90 Va. 507.

Washington. — Jolliffe v. Brown, 14 Wash. 155, 53 Am. St. Rep. 868; Oregon R., etc., Co. v. Dacres, 1 Wash. 195.

Wisconsin. — Lawrence v. Milwaukee, etc., R. Co., 42 Wis. 322; Anderson v. Stewart, 76 Wis. 43; Heller v. Abbot, 79 Wis. 409.

1. *Illinois.* — Toledo, etc., R. Co. v. Pence, 68 Ill. 524; Toledo, etc., R. Co. v. Franklin, 159 Ill. 99; Peoria, etc., R. Co. v. Duggan, 109 Ill. 537, 50 Am. Rep. 619, 20 Am. & Eng. R. Cas. 489.

Iowa. — Coyle v. Chicago, etc., R. Co., 62 Iowa 518; Swift v. North Missouri R. Co., 29 Iowa 243; Robinson v. Chicago, etc., R. Co., 79 Iowa 495; Giger v. Chicago, etc., R. Co., 80 Iowa 492.

Missouri. — Bigelow v. North Missouri R. Co., 48 Mo. 510; Vanderworker v. Missouri Pac. R. Co., 51 Mo. App. 166; Perkins v. St. Louis, etc., R. Co., 103 Mo. 52; Cobb v. Kansas City, etc., R. Co., 43 Mo. App. 313.

Montana. — Beckstead v. Montana Union R. Co., 19 Mont. 147.

2. **Double Damages Authorized** — *Illinois.* — Cairo, etc., R. Co. v. Peoples, 92 Ill. 97, 34 Am. Rep. 112; Cairo, etc., R. Co. v. Warrington, 92 Ill. 157. The statute under which these two actions were brought was so amended by the Act of May 23, 1877 (Laws 1877, p. 164), that such corporations shall be liable only for "all damages" in such cases. Therefore the present law of this state is the same as it was before the enactment of Rev. Stat. 1874, c. 114, p. 807, under which those suits were brought. See the cases arising in this state prior to the enactment and after the repeal of this statute, cited in the notes to the foregoing subdivision.

Iowa. — Jones v. Galena, etc., R. Co., 16 Iowa 6; Tredway v. Sioux City, etc., R. Co., 43 Iowa 527, 14 Am. R. Rep. 475; Welsh v. Chicago, etc., R. Co., 53 Iowa 632, 21 Am. R. Rep. 181; Morrison v. Burlington, etc., R. Co., 84 Iowa 663. See also Minneapolis, etc., R. Co. v. Beckwith, 129 U. S. 26.

Missouri. — Cummings v. St. Louis, etc., R. Co., 70 Mo. 570; Barnett v. Atlantic, etc., R. Co., 68 Mo. 56, 30 Am. Rep. 773; Humes v.

or treble¹ the value of any animals injured by such default; and some statutes provide that the owner may in some cases recover, in addition to the damages provided by statute, a designated attorney's fee or one to be fixed by the court before which suit is brought and recovery had.²

Penal Character of Double-damage Statutes. — The construction given to these acts by some courts is that the double damages of which recovery is authorized are not in the nature of a fine or penalty, but are simply the measure of damages fixed by the statute for private wrongs.³ On the other hand, some courts, in construing particular statutes, have held that although they provide a compensation to the owner, they also inflict a penalty upon the company for neglect of duty, though the owner recovers the penalty.⁴ The nature of such acts, however, becomes important only as relating to their constitutionality, and reference is here made to that part of this article where that question is treated at length.⁵

3. Kind and Character of Debarments Required — *a. KIND AND NATURE OF ANIMALS TO BE EXCLUDED* — *In General.* — Though some of these statutes provide that railroads must erect and maintain debarments sufficient to prevent certain specified classes of domestic animals from getting on their roads,⁶ yet the vast majority of them fail to specify the kind of domestic animals which the debarments required by such statute shall be sufficient to exclude. In the absence of specifications in the statute, it may be said that the fences or cattle guards must be sufficient to exclude or turn all ordinary live stock, and not merely cattle and horses.⁷

Sheep and Swine. — Though statutes sometimes provide that a fence must be sufficient to exclude sheep and swine,⁸ yet where such a clause is wanting, if a fence is insufficient for this purpose the railroad is liable for an injury either to the one⁹ or the other.¹⁰

Missouri Pac. R. Co., 82 Mo. 221, 52 Am. Rep. 369. See also Missouri Pac. R. Co. v. Humes, 115 U. S. 512.

Montana. — Beckstead v. Montana Union R. Co., 19 Mont. 147.

Washington. — Jolliffe v. Brown, 14 Wash. 155, 53 Am. St. Rep. 863.

1. Treble Damages are recoverable in *Minnesota* in certain circumstances. *Minneapolis, etc., R. Co. v. Emmons*, 149 U. S. 364; *Minneapolis, etc., R. Co. v. Nelson*, 149 U. S. 368.

2. Recovery of Attorney's Fee in Action Against Unfenced Road for Injury to Animals. — A few of the statutes do not limit the recovery of an attorney's fees in an action against railroads for injury to animals by unfenced railroads, but authorize a recovery in certain cases where the injury is due to some other negligent default or act of the road. See *supra*, this title, *Statutes Awarding Attorney's Fees to Persons Recovering Judgment*.

3. Not in Nature of Fine or Penalty. — *Koons v. Chicago, etc., R. Co.*, 23 Iowa 493; *Mackie v. Central R. Co.*, 54 Iowa 540. But see *Minneapolis, etc., R. Co. v. Beckwith*, 129 U. S. 26.

4. In Nature of Penalty. — *Missouri Pac. R. Co. v. Humes*, 115 U. S. 512, 22 Am. & Eng. R. Cas. 557; *Minneapolis, etc., R. Co. v. Beckwith*, 129 U. S. 26, 38 Am. & Eng. R. Cas. 267; *Cairo, etc., R. Co. v. Peoples*, 92 Ill. 97, 34 Am. Rep. 112. See also the title *EXEMPLARY DAMAGES*, vol. 12, p. 31.

The *Colorado* Act of 1887 providing that a railroad company shall be liable for twice the full value of each animal killed by it in case it fails to comply with the statute by recording a description of the animal and marking its

hide is a penal statute. *Atchison, etc., R. Co. v. Tanner*, 19 Colo. 559.

5. See *infra*, this section, *Constitutionality of Such Statutes*.

6. A Statute Which Provides for Fences Against "Cattle and Horses" Includes Mules. — *Toledo, etc., R. Co. v. Beals*, 50 Ill. 150. And see *CATTLE*, vol. 5, p. 771.

7. Debarments Must Be Sufficient to Exclude All Ordinary Live Stock. — *Ohio, etc., R. Co. v. Brubaker*, 47 Ill. 462; *Fritz v. Milwaukee, etc., R. Co.*, 34 Iowa 337; *Missouri Pac. R. Co. v. Bradshaw*, 33 Kan. 533; *Missouri Pac. R. Co. v. Roads*, 33 Kan. 640; *Halverson v. Minneapolis, etc., R. Co.*, 32 Minn. 88. And see the title *FENCES*, vol. 12, p. 1080.

8. Statute Providing that Fences Must Be Sufficient to Exclude Sheep and Swine. — *Ohio, etc., R. Co. v. Brubaker*, 47 Ill. 462; *Peoria, etc., R. Co. v. Aten*, 43 Ill. App. 68; *Chicago, etc., R. Co. v. James*, 26 Neb. 188, 194.

9. Liability of Railroad Where Fence Insufficient to Exclude Sheep. — *Bessant v. Great Western R. Co.*, 8 C. B. N. S. 368, 98 E. C. L. 368; *Indianapolis, etc., R. Co. v. Marshall*, 27 Ind. 300.

10. Liability of Railroad Where Fence Insufficient to Exclude Swine. — *Cleveland, etc., R. Co. v. Swift*, 42 Ind. 119; *Lee v. Minneapolis, etc., R. Co.*, 66 Iowa 131, 20 Am. & Eng. R. Cas. 476; *Fritz v. Milwaukee, etc., R. Co.*, 34 Iowa 337; *Missouri Pac. R. Co. v. Roads*, 33 Kan. 640; *Missouri Pac. R. Co. v. Bradshaw*, 33 Kan. 533.

Where a statute requires a "good and lawful fence" against all animals, the railroad company is liable for injury to hogs getting upon its track, unless it shows that the partic-

When Forbidden by Statute to Run at Large. — In *Iowa*, where sheep and swine are forbidden by statute to run at large, that fact is no defense to an action for an injury to them by reason of an insufficient fence to exclude them.¹ In *Kansas* the contrary doctrine prevails. There, under such circumstances, there can be no recovery.²

Dogs. — Dogs not being stock within the meaning of such statutes, railroad companies are not liable for injuries to these animals occurring by reason of insufficient fences.³

b. SUFFICIENCY OF DEBARMENTS TO ANSWER INTENDED PURPOSE —

(1) *What Is Sufficient Fence.* — It may be laid down as a general rule that in the absence of statutory provision as to the height or the material of which the fences shall be constructed,⁴ a railroad company, in actions for stock killing under these statutes, is held to have performed its duty as to fencing when it erects and maintains a fence which is reasonably sufficient to prevent live stock from coming upon its track.⁵ Whether the particular fence through

ular hog injured was of a character against which a lawful fence would be no protection, and the burden of establishing this rests on the railroad. *Missouri Pac. R. Co. v. Roads*, 33 Kan. 640; *Missouri Pac. R. Co. v. Bradshaw*, 33 Kan. 533. See *Atchison, etc., R. Co. v. Yates*, 21 Kan. 613; *Kansas City, etc., R. Co. v. McHenry*, 24 Kan. 501, where damages were not recoverable because the hogs were not such as to be kept out by a "good and lawful fence."

Regard Had to Size but Not to Species of Animals. — In *Halverson v. Minneapolis, etc., R. Co.*, 32 Minn. 88, the evidence showed that the hog for whose killing the suit was brought was young and only about fifteen inches high. The court held that generally, in the case of sheep or swine that get through the fence of a railroad company, the question of the sufficiency of the fence is one of fact, depending on the size of the animal rather than on its species.

1. That Sheep and Swine Forbidden to Run at Large No Defense. — *Fritz v. Milwaukee, etc., R. Co.*, 34 Iowa 337.

2. Contra — Kansas. — *Atchison, etc., R. Co. v. Yates*, 21 Kan. 613; *Henning v. Wilkinson*, 21 Kan. 747; *Atchison, etc., R. Co. v. Hegwir*, 21 Kan. 623; *Leebrick v. Republican Valley, etc., R. Co.*, 41 Kan. 756.

3. Fence Law Does Not Apply to Dogs. — *Texas, etc., R. Co. v. Scott*, (Tex. App. 1891) 17 S. W. Rep. 1116, construing the *Texas* statute (Rev. Stat. 1895, art. 4528) requiring railroads to fence against "stock." See also *Wilson v. Wilmington, etc., R. Co.*, 10 Rich. L. (S. Car.) 52.

4. Statutory Specifications are to be followed. *Davidson v. Michigan Cent. R. Co.*, 49 Mich. 428. See also the title *FENCES*, vol. 12, p. 1038.

5. Fences Must Be Sufficient to Exclude Ordinary Stock. — *McKenly v. Chicago, etc., R. Co.*, 43 Iowa 641; *Lemmon v. Chicago, etc., R. Co.*, 32 Iowa 151; *Jones v. Chicago, etc., R. Co.*, 59 Mo. App. 137; *Green v. Hornellsville, etc., R. Co.*, 24 N. Y. App. Div. 434; *Welch v. Abbot*, 72 Wis. 512. See also the title *FENCES*, vol. 12, pp. 1038, 1080.

A Legal Fence under the General Fence Law has been held sufficient, where there is no special requirement as to railroad fences. *Enright v. San Francisco, etc., R. Co.*, 33 Cal. 230, *Toledo, etc., R. Co. v. Thomas*, 18 Ind. 215; *Corwin*

v. New York, etc., R. Co., 13 N. Y. 42. See also the title *FENCES*, vol. 12, p. 1080 *et seq.*

Hedges, Ditches, etc., as Fences. — See the title *FENCES*, vol. 12, p. 1037. As to an embankment as a fence under the *Wisconsin* statute, see the same title, vol. 12, p. 1076, note.

Gates and Gate Fastenings are a part of the fence which it is the duty of the railroad company to maintain. *Morrison v. Burlington, etc., R. Co.*, 84 Iowa 663; *Manwell v. Burlington, etc., R. Co.*, 89 Iowa 708; *Chisholm v. Northern Pac. R. Co.*, 53 Minn. 122; *Galveston, etc., R. Co. v. Wessendorf*, (Tex. Civ. App. 1896) 39 S. W. Rep. 132. See further the title *FENCES*, vol. 12, p. 1081 *et seq.*

That the duty of keeping gates closed rests upon the railroad company, see *Galveston, etc., R. Co. v. Wessendorf*, (Tex. Civ. App. 1896) 39 S. W. Rep. 132; *Missouri, etc., R. Co. v. Bellows*, (Tex. Civ. App. 1897) 39 S. W. Rep. 1000. But compare *Megrue v. Lennox*, 59 Ohio St. 479, and see generally the title *FENCES*, vol. 12, p. 1082.

Where the plaintiff makes a gap in the railroad fence for convenience in delivering goods to the railroad company, and through such gap his team gets on the track and is injured, he cannot recover from the railroad. *Clark v. Chicago, etc., R. Co.*, 62 Mich. 358.

For cases wherein the facts were held not to disclose negligence on the part of the railroad company in construction and maintenance of gates, see *Mears v. Chicago, etc., R. Co.*, 103 Iowa 203; *Harding v. Chicago, etc., R. Co.*, 100 Iowa 677.

The Duty of Erecting and Maintaining Cattle Guards is included in the duty of fencing, and the company is liable for injuries to cattle due to a failure to fulfil this duty. *Chicago, etc., R. Co. v. Reid*, 24 Ill. 144; *Indiana, etc., R. Co. v. Drum*, 21 Ill. App. 331; *Chicago, etc., R. Co. v. Farrelly*, 3 Ill. App. 60; *Pittsburgh, etc., R. Co. v. Ehrhart*, 36 Ind. 118; *Banister v. Pennsylvania R. Co.*, 98 Ind. 220; *Evansville, etc., R. Co. v. Barbee*, 74 Ind. 160; *Heskett v. Wabash, etc., R. Co.*, 61 Iowa 467; *Gorman v. Pacific R. Co.*, 26 Mo. 441, 72 Am. Dec. 220; *White v. Concord R. Co.*, 30 N. H. 188; *Crawford v. New York Cent., etc., R. Co.*, 18 Hun (N. Y.) 108; *Brace v. New York Cent. R. Co.*, 27 N. Y. 269; *Dunnigan v. Chicago, etc., R. Co.*, 18 Wis. 28, 86 Am. Dec. 741; *Pontiac Pac. Junction R. Co. v. Brady*, 4

which the animal entered was or was not sufficient to restrain ordinary animals is generally a question of fact.¹

(2) *What Are Sufficient Cattle Guards.* — The railroad's liability for insufficient erection or maintenance of cattle guards by reason of which stock is injured is measured by the same standard as is its duty to maintain fences. Thus it has performed its duty when it maintains cattle guards which are ordinarily sufficient to prevent stock from crossing the track, without reference to the question whether such guards will prevent all animals from crossing the track at all times;² but where, judged by this test, the erection³ or the maintenance of the cattle guards⁴ is ordinarily insufficient to serve the purpose for which the law requires guards, the railroad is liable for stock injured thereby.⁵

4. *Whether Actual Contact Between Train and Animal Essential to Liability.* — Though the statutes in some jurisdictions require in express terms that there be an actual collision between the animal injured and the cars or engines of the railroad company to render it liable for a failure to maintain debarments, the vast majority of the statutes are silent upon that subject. In some states it is held that actual contact is a prerequisite to the liability of the railroad company;⁶ in others that no such prerequisite exists where a failure to com-

Montreal Q. B. 346; *Huist v. Buffalo, etc., R. Co.*, 16 U. C. Q. B. 299. See further the titles CROSSINGS, vol. 8, p. 367; FENCES, vol. 12, p. 1082.

The Duty to Maintain a Sufficient Fence as well as the duty to construct such a fence rests on the railroad company. *Cleveland, etc., R. Co. v. Swift*, 42 Ind. 119; *Bennett v. Wabash, etc., R. Co.*, 61 Iowa 355; *Leyden v. New York Cent., etc., R. Co.*, 55 Hun (N. Y.) 114. See also the title FENCES, vol. 12, p. 1074.

Whether It Is Contributory Negligence to Turn Breachy Cattle into a Lot Adjoining a Railroad is for the jury. *Jones v. Sheboygan, etc., R. Co.*, 42 Wis. 306. See *infra*, this section, *Contributory Negligence under These Statutes*.

1. **Question of Sufficiency of Fence Is for Jury.** — *Butler v. Chicago, etc., R. Co.*, 71 Iowa 206; *Welch v. Abbot*, 72 Wis. 512.

Sufficient Construction and Maintenance of Gate Question for Jury. — *Hammond v. Chicago, etc., R. Co.*, 43 Iowa 168, 14 Am. R. Rep. 412; *McKenly v. Chicago, etc., R. Co.*, 43 Iowa 641, 14 Am. R. Rep. 495.

Sufficiency of Fences Not Subject of Expert Testimony. — *Enright v. San Francisco, etc., R. Co.*, 33 Cal. 230; *Green v. Hornellsville, etc., R. Co.*, 24 N. Y. App. Div. 434.

2. **Cattle Guards Must Suffice to Turn Ordinary Stock.** — *Smead v. Lake Shore, etc., R. Co.*, 58 Mich. 200; *Wait v. Bennington, etc., R. Co.*, 61 Vt. 268. See further the title FENCES, vol. 12, p. 1083.

3. **Where Cattle Guards Erected Insufficient.** — *Louisville, etc., R. Co. v. Porter*, 97 Ind. 267, 20 Am. & Eng. R. Cas. 446; *Downing v. Chicago, etc., R. Co.*, 43 Iowa 96; *Parker v. Lake Shore, etc., R. Co.*, 93 Mich. 607.

A cattle guard across the railroad track with a wing or frame extending eight feet on either side and not crossing the right of way does not meet the requirements of the statute. *Kansas City, etc., R. Co. v. Spencer*, 72 Miss. 491.

A railroad bridge forty feet long and six feet above the water, with a top consisting of ties six inches apart and seven inches wide, over a stream of water at a railway crossing, is not such a cattle guard as will satisfy the require-

ments of the *New York* statute. *Ham v. Newburgh, etc., R. Co.*, 69 Hun (N. Y.) 137.

Where Cattle Guards Are Located at the Wrong Place, the railroad has not discharged its duty. *Louisville, etc., R. Co. v. Porter*, 97 Ind. 267, 20 Am. & Eng. R. Cas. 446; *Parker v. Lake Shore, etc., R. Co.*, 93 Mich. 607. See also the title CROSSINGS, vol. 8, p. 367.

Evidence that the Cattle Guard Was the Same as That Used by Other Roads is admissible. *Chicago, etc., R. Co. v. Bryant*, 29 Ill. App. 17.

Evidence that Cattle Guards of Like Kind Have Proven Sufficient elsewhere is inadmissible. *Downing v. Chicago, etc., R. Co.*, 43 Iowa 96.

Defective Guards Do Not Render Road Liable Where Cattle Unlawfully at Large. — *Whitman v. Windsor, etc., R. Co.*, 18 Nova Scotia 271.

The rule on this subject differs in different jurisdictions. See *infra*, this section, *Company's Liability as Affected by Right of Cattle to Be at Large*.

4. **Failure to Keep Cattle Guard in Repair.** — *Chicago, etc., R. Co. v. Reid*, 24 Ill. 144; *Pittsburgh, etc., R. Co. v. Eby*, 55 Ind. 567, 16 Am. R. Rep. 244; *Wait v. Bennington, etc., R. Co.*, 61 Vt. 268.

5. **Where There Is Conflicting Evidence** as to the insufficiency of the cattle guard the question should go to the jury. *Jones v. Chicago, etc., R. Co.*, 59 Mo. App. 137. See also *Parker v. Lake Shore, etc., R. Co.*, 93 Mich. 607.

Permitting Cattle Guards to Remain Filled with Ice and Snow renders the railroad company liable for resulting injuries. *Wait v. Bennington, etc., R. Co.*, 61 Vt. 268; *Dunnigan v. Chicago, etc., R. Co.*, 18 Wis. 28, 86 Am. Dec. 741. See further the title FENCES, vol. 12, p. 1084, note.

6. **Actual Contact Held Necessary** — *Illinois*. — *Schertz v. Indianapolis, etc., R. Co.*, 107 Ill. 577, 15 Am. & Eng. R. Cas. 523, *affirming* 12 Ill. App. 304.

Indiana. — *Louisville, etc., R. Co. v. Thomas*, 106 Ind. 10; *Childers v. Louisville, etc., R. Co.*, 12 Ind. App. 686.

New York. — *Knight v. New York, etc., R. Co.*, 99 N. Y. 25, *reversing* 30 Hun (N. Y.) 415. *Tennessee*. — *Nashville, etc., R. Co. v. Sadler*, 91 Tenn. 508, 30 Am. St. Rep. 896.

ply with the statute is the proximate cause of the injury.¹

5. Liability as Between Owners and Operators—*a. IN GENERAL.*—Where a corporation is at once the owner and the operator of a railroad, no doubt can exist as to its liability for injuries due to a failure to perform its statutory duty to fence. The joint liability of other parties may, however, be involved, and where the owner and the operator are different corporations the question which of these is liable, and whether the liability rests on both, may arise. These questions depend largely upon the construction of particular statutes.

b. WHO ARE AGENTS OF CORPORATION.—Where the Corporation "and Its Agents" are by statute liable for injuries so inflicted, the term "agent" has been held to embrace not only lessees or others operating the road in the place of the company,² but also the servants of the operating company, such as engineers³ and firemen⁴ as well as contractors.⁵

c. LESSORS AND LESSEES—*Liability of Lessor or Owner.*—Where a statute specifically provides that the lessor or both the lessor and the lessee shall be liable,⁶ and generally when there is no provision in the statute fixing the liability as between these parties,⁷ the owner or lessor company is responsible

Texas.—*International, etc., R. Co. v. Hughes*, 68 Tex. 290.

See further the title *FENCES*, vol. 12, p. 1074, note, the paragraph *Animals Injured by Fright*.

The *Tennessee* Act of 1891 imposing an absolute liability upon railroads for injuries to stock on unfenced railroad tracks can have no application to stock killed by falling down an unfenced embankment on the track, since at common law the company would not have to maintain fences, and hence generally is not liable for injury to stock in such cases. *Sinard v. Southern R. Co.*, 101 Tenn. 473.

1. Actual Contact Held Not Necessary—*Iowa.*—*Kraus v. Burlington, etc., R. Co.*, 55 Iowa 338; *Young v. St. Louis, etc., R. Co.*, 44 Iowa 172; *Van Slyke v. Chicago, etc., R. Co.*, 80 Iowa 620; *Liston v. Central Iowa R. Co.*, 70 Iowa 714.

Kansas.—*Atchison, etc., R. Co. v. Jones*, 20 Kan. 527, 20 Am. R. Rep. 308.

Maine.—*Gould v. Bangor, etc., R. Co.*, 82 Me. 122.

Minnesota.—*Nelson v. Chicago, etc., R. Co.*, 30 Minn. 74.

Missouri.—*Perkins v. St. Louis, etc., R. Co.*, 103 Mo. 52, *overruling* previous cases *contra*.

Nebraska.—*Fremont, etc., R. Co. v. Pounder*, 36 Neb. 247; *Chicago, etc., R. Co. v. Cox*, 51 Neb. 479, *overruling* *Burlington, etc., R. Co. v. Shoemaker*, 18 Neb. 369.

See also the title *FENCES*, as in the last note *supra*.

Whether Failure to Fence Proximate Cause Question for Jury.—*Kraus v. Burlington, etc., R. Co.*, 55 Iowa 338.

No Liability for Animals Suffering Ill Health by Fright.—A railroad company is not liable by reason of its failure to fence its track for the loss of flesh of cattle caused by their becoming frightened by passing trains while they are upon the railroad's right of way. *Dooley v. Missouri Pac. R. Co.*, 36 Mo. App. 381.

2. Meaning of Agents.—*Lessees* are agents. *Clement v. Canfield*, 28 Vt. 302.

So a company operating a road under a contract with its owner is an agent. *Bay City, etc., R. Co. v. Austin*, 21 Mich. 390.

Company Which Has Leased Entire Property of

Another Road Not Its Agent.—Under section 32 of the *New York* Railroad Law as amended in 1892, it has been held that where the railroad company has leased its entire property, except its right to exist as a corporation, to another company, the lessee company cannot be considered as the "agent" of the lessor so as to render the latter liable for cattle injured by the trains of the lessee. "The word agents in the statute," said the court, "has reference only to the agents of the corporation or person operating the road." *Throne v. Lehigh Valley R. Co.*, 88 Hun (N. Y.) 141.

3. Engineers.—*Suydam v. Moore*, 8 Barb. (N. Y.) 358; *St. Johnsbury, etc., R. Co. v. Hunt*, 59 Vt. 294.

4. Firemen.—*Suydam v. Moore*, 8 Barb. (N. Y.) 358.

5. Contractors.—*Gardner v. Smith*, 7 Mich. 410, 74 Am. Dec. 722. See the title *FENCES*, vol. 12, p. 1069, note.

6. Lessor or Owner Liable by Special Statute.—The *Indiana* statute provides expressly for the liability of the owner or lessor. *Cincinnati, etc., R. Co. v. McDougall*, 108 Ind. 179; *Cincinnati, etc., R. Co. v. Leviston*, 97 Ind. 488; *Wabash R. Co. v. Williamson*, 3 Ind. App. 190. For cases under an earlier statute see *Indianapolis, etc., R. Co. v. Solomon*, 23 Ind. 534; *Ft. Wayne, etc., R. Co. v. Hinebaugh*, 43 Ind. 354; *Pittsburgh, etc., R. Co. v. Bolner*, 57 Ind. 572. The lessor's liability is not affected by the fact that the lessee operates the road in its own name. *Indianapolis, etc., R. Co. v. Solomon*, 23 Ind. 534; *Cincinnati, etc., R. Co. v. Bunnell*, 61 Ind. 183.

This seems to be the effect of the statutes in *Maine*. *Whitney v. Atlantic, etc., R. Co.*, 44 Me. 362, 69 Am. Dec. 103. See *Rev. Stat. Me.* (1883), c. 51, § 36.

Where a Contractor Is Operating Trains on an Unfinished Railroad under the control of the railroad company, the latter remains liable for injuries caused to cattle by such trains by reason of the want of fences. *Wyman v. Penobscot, etc., R. Co.*, 46 Me. 162.

7. Lessor's Liability for Injury to Animals on Unfenced Railroad.—*Fontaine v. Southern Pac. R. Co.*, 54 Cal. 645, 1 Am. & Eng. R. Cas. 159; *Illinois Cent. R. Co. v. Kanouse*, 39 Ill. 272, 89

for animals injured on an unfenced portion of its road by the trains of a lessee corporation operating such part of the road. But it has been held that after a lease of the whole property of a railroad company, the lessor is not liable.¹

Liability of Lessee.—Of course where the particular statute makes the lessee liable for all injuries to animals occasioned by its cars while operating on an unfenced railroad track, there can be no question as to its liability.² In the absence of such a provision the prevailing rule is that the negligence of the lessor company in failing to maintain debarments is to be imputed to the lessee company running the trains so as to render the latter liable.³

Am. Dec. 307; *East St. Louis, etc., R. Co. v. Gerber*, 82 Ill. 632; *Eaton v. Oregon R., etc., Co.*, 19 Oregon 391, 43 Am. & Eng. R. Cas. 57; *Nelson v. Vermont, etc., R. Co.*, 26 Vt. 717, 62 Am. Dec. 614; *Oregon R., etc., Co. v. Dacres*, 1 Wash. 195. See *Houston, etc., R. Co. v. Meador*, 50 Tex. 77. See also the title FENCES, vol. 12, p. 1068.

In *Texas* a company leasing its road without the permission of the state remains liable. *International, etc., R. Co. v. Dunham*, 68 Tex. 231, 2 Am. St. Rep. 484.

Lease or Contract Must Be Shown.—It has been held that to charge the lessor for injury caused by the lessee's rolling stock, the lease must be shown, for the owner of the tract would not be liable for an unauthorized use of its track. *Cincinnati, etc., R. Co. v. Paskins*, 36 Ind. 380; *Cincinnati, etc., R. Co. v. Townsend*, 39 Ind. 38.

1. *Throne v. Lehigh Valley R. Co.*, 88 Hun (N. Y.) 141.

But it seems that where one railroad company merely allows to another the limited use of its tracks under a traffic agreement, the former company continues liable for injuries to cattle by the trains of the latter, since the latter is not a "lessee" or "other person in possession of" the road within the statute. *Edwards v. Buffalo, etc., R. Co.*, 5 N. Y. App. Div. 390. See also *Dolan v. Newburgh, etc., R. Co.*, 120 N. Y. 571.

2. **Lessee's Liability under Special Statute.**—In *Indiana*, under Rev. Stat., §§ 4001, 4025, lessees, assignees, and other persons and corporations operating any railroad or running trains thereover are liable for injuring cattle by failure to fence. *Cincinnati, etc., R. Co. v. Leviston*, 97 Ind. 488; *Cincinnati, etc., R. Co. v. McDougall*, 108 Ind. 179; *Wabash R. Co. v. Williamson*, 3 Ind. App. 190. Under an earlier statute the lessee, assignee, etc., could be held liable when operating the road in the name of the lessor or owner, but incurred no liability in operating it in its own name. *Cincinnati, etc., R. Co. v. Norris*, 61 Ind. 285; *Cincinnati, etc., R. Co. v. Bonnell*, 61 Ind. 183; *Pittsburgh, etc., R. Co. v. Hannon*, 60 Ind. 417; *Pittsburgh, etc., R. Co. v. Bolner*, 57 Ind. 572; *Jeffersonville, etc., R. Co. v. Downey*, 61 Ind. 287.

Contractor Operating Road.—Under the earlier statute the railroad company was liable for an injury inflicted by a contractor operating trains under the name of the company. *Huey v. Indianapolis, etc., R. Co.*, 45 Ind. 320.

The *Iowa* statute specifically declares the liability of lessee companies for stock injured by their trains. *Stephens v. Davenport, etc., R. Co.*, 36 Iowa 327. In this case the court intimated that this clause was added to the

law in view of a decision in *Liddle v. Keokuk, etc., R. Co.*, 23 Iowa 378, that the previous law, rendering liable any company running or operating a railroad, did not apply to a person who was not "individually the lessee and in the possession of and running said road." The earlier statute was held to apply to a railroad company which was a lessee and in possession of and running a railroad owned by another company. *Stewart v. Chicago, etc., R. Co.*, 27 Iowa 282.

Under the *New York* statute (General Railroad Law, § 32, as amended in 1892), "any lessee or other person in possession of" the road is declared liable for injury to animals occurring by reason of the failure to maintain sufficient fences. *Edwards v. Buffalo, etc., R. Co.*, 8 N. Y. App. Div. 390.

The *Oregon* statute renders liable any corporation "or lessee or agent thereof owning or operating any railroad." *Hill's Annot. Laws Oregon* (1892), § 4044. The purpose of this statute is to make the company owning the road and the company operating the road liable, so that either may be sued, as the plaintiff may elect. *Eaton v. Oregon R., etc., Co.*, 19 Oregon 391.

The *Washington* statute provides for the liability of corporations "owning or operating steam railways." *Ball. Annot. Codes & Stat. Wash.* (1897), § 4332; *Oregon R., etc., Co. v. Dacres*, 1 Wash. 195.

A statute of this kind seems sufficient to impose a liability upon the lessee, for it has been held that the lessee is essentially the owner and operator of the road. *Tracy v. Troy, etc., R. Co.*, 38 N. Y. 433, 98 Am. Dec. 54, *affirming* 55 Barb. (N. Y.) 529.

3. **Lessee Liable in Absence of Statute.**—*Illinois Cent. R. Co. v. Kanouse*, 39 Ill. 272, 89 Am. Dec. 307; *East St. Louis, etc., R. Co. v. Gerber*, 82 Ill. 632; *Bay City, etc., R. Co. v. Austin*, 21 Mich. 390; *Tracy v. Troy, etc., R. Co.*, 38 N. Y. 435, 98 Am. Dec. 54, *affirming* 55 Barb. (N. Y.) 529; *McCall v. Chamberlain*, 13 Wis. 637; *Cook v. Milwaukee, etc., R. Co.*, 36 Wis. 45. And see the title FENCES, vol. 12, p. 1068, note.

The lessee may be liable as the actual operator of the road. *International, etc., R. Co. v. Dunham*, 68 Tex. 231, 2 Am. St. Rep. 484. And see the title FENCES, vol. 12, p. 1067.

Lessee Cannot Be Held Liable for Stock Killed Before Execution of Lease.—*Pittsburgh, etc., R. Co. v. Kain*, 35 Ind. 291, 5 Am. R. Rep. 574.

Company Operating Road Merely by Permission Not Lessee.—*Kansas City, etc., R. Co. v. Ewing*, 23 Kan. 273.

In *Canada* a Lessee Has Been Held Not Liable for neglect to maintain fences, which resulted in the killing of the plaintiff's cattle, there being no other negligence charged or proved.

Either Lessor or Lessee Liable. — In many states, liability for injuries to cattle under such circumstances may be enforced against either the lessor or the lessee,¹ but it has been held that only the company whose trains actually caused the injury may be held liable.²

d. TRACKS USED BY BOTH OWNER AND ANOTHER. — Where a railroad track is used by both the owner and another company, under an agreement for the use of the track, and an injury to cattle is caused by the rolling stock of the latter company, the owner has been held liable as such,³ and the other company has been held to incur liability as actual operator.⁴ In some states either company is liable,⁵ but in *Iowa*, where the trains of two companies thus use the same track, only that company whose rolling stock actually caused the injury can be held liable.⁶

e. ROAD OPERATED BY RECEIVER. — The statutes of some states make railroad companies liable for animals injured on their unfenced railroad tracks, although at the time of the injury the road may be operated by a receiver.⁷ In the absence of a statute, however, specifically making the road liable in such a case, the receiver⁸ and not the railroad company⁹ would be liable, unless the failure to fence occurred when the railroad itself was the operator and existed when the receiver assumed charge; in such cases the railroad company has been held liable.¹⁰

6. Place of Entrance Rather than of Injury Governs Liability. — In order to recover under these statutes a failure to maintain proper debarments must of course be the cause of the injury for which compensation is sought. Hence, the liability of the railroad company depends on the question whether the animal entered upon the track at a point where the company should have maintained debarments but failed to do so, rather than upon the question of the existence of debarments at the place of injury.¹¹ Thus, though it may not have been the duty of the railroad to maintain debarments at the place of injury, yet if

Bennett v. Covert, 24 U. C. Q. B. 38. But see Brown v. Grand Trunk R. Co., 24 U. C. Q. B. 350.

1. Joint or Several Liability of Lessor or Lessee. — Illinois Cent. R. Co. v. Kanouse, 39 Ill. 272, 89 Am. Dec. 307; Cincinnati, etc., R. Co. v. McDougall, 103 Ind. 179; Jeffersonville, etc., R. Co. v. Dunlap, 112 Ind. 93; Bay City, etc., R. Co. v. Austin, 21 Mich. 390; Edwards v. Buffalo, etc., R. Co., 8 N. Y. App. Div. 390; Eaton v. Oregon R., etc., Co., 19 Oregon 391, 43 Am. & Eng. R. Cas. 57; Oregon R., etc., Co. v. Dacres, 1 Wash. 195. See also International, etc., R. Co. v. Dunham, 68 Tex. 231, 2 Am. St. Rep. 484.

2. Stephens v. Davenport, etc., R. Co., 36 Iowa 327.

3. Liability of Owner. — East St. Louis, etc., R. Co. v. Gerber, 82 Ill. 632; Toledo, etc., R. Co. v. Rumbold, 40 Ill. 143.

4. Company Having Permission to Operate Trains Liable. — Toledo, etc., R. Co. v. Rumbold, 40 Ill. 143; East St. Louis, etc., R. Co. v. Gerber, 82 Ill. 632; Clary v. Iowa Midland R. Co., 37 Iowa 344; Stephens v. Davenport, etc., R. Co., 36 Iowa 327; Farley v. St. Louis, etc., R. Co., 72 Mo. 338.

5. Either Company Liable in Illinois. — East St. Louis, etc., R. Co. v. Gerber, 82 Ill. 632; Toledo, etc., R. Co. v. Rumbold, 40 Ill. 143. See also the last text paragraph *supra*, *Either Lessor or Lessee Liable*.

6. Iowa — Company Whose Cars Inflict Injury Alone Liable. — Clary v. Iowa Midland R. Co., 37 Iowa 344; Stephens v. Davenport, etc., R. Co., 36 Iowa 327.

7. Statutes Making Company Liable Though in Hands of Receiver. — Indianapolis, etc., R. Co. v. Ray, 51 Ind. 269; Ohio, etc., R. Co. v. Fitch, 20 Ind. 498; McKinney v. Ohio, etc., R. Co., 22 Ind. 99; Louisville, etc., R. Co. v. Couble, 46 Ind. 277.

8. Receiver's Liability in Absence of Statute. — Brockert v. Central Iowa R. Co., 82 Iowa 369.

9. Schurr v. Omaha, etc., R. Co., 98 Iowa 418; Brockert v. Central Iowa R. Co., 82 Iowa 369.

10. Railroad Liable for Failure to Fence Before Receiver Appointed. — Kansas Pac. R. Co. v. Wood, 24 Kan. 619.

11. Place of Entry Rather than That of Injury Governs Liability — Illinois. — Chicago, etc., R. Co. v. Farrelly, 3 Ill. App. 60; Wabash R. Co. v. Brown, 2 Ill. App. 516.

Indiana. — Indiana, etc., R. Co. v. Quick, 109 Ind. 295; Jeffersonville, etc., R. Co. v. Lyon, 72 Ind. 107; Toledo, etc., R. Co. v. Stevens, 63 Ind. 337; Wabash, etc., R. Co. v. Tretts, 96 Ind. 450, 19 Am. & Eng. R. Cas. 601; Louisville, etc., R. Co. v. Goodbar, 102 Ind. 596; Louisville, etc., R. Co. v. Thomas, 106 Ind. 10; Pennsylvania R. Co. v. Lindley, 2 Ind. App. 111; Louisville, etc., R. Co. v. Porter, 97 Ind. 267; Jeffersonville, etc., R. Co. v. Avery, 31 Ind. 277.

Kansas. — Kansas City, etc., R. Co. v. Burge, 40 Kan. 736, 40 Am. & Eng. R. Cas. 181.

Minnesota. — Cox v. Minneapolis, etc., R. Co., 41 Minn. 101, 38 Am. & Eng. R. Cas. 287.

Missouri. — Miller v. Wabash R. Co., 47 Mo. App. 630; Ehret v. Kansas City, etc., R. Co., 20 Mo. App. 251; Nance v. St. Louis, etc., R.

the animal entered its track where such duty was owing it is liable.¹ On the other hand, if the animal entered the track at a place where it was not the duty of the company to maintain debarments, it is not liable irrespective of the condition of the debarments at the place of injury and irrespective of the question whether it was the duty of the road to maintain debarments at such place.²

Presumption as to Place of Entry. — In some jurisdictions it is held that where the track is unfenced or defectively fenced at the point where the animal is injured, it will be presumed that the animal entered upon the track at that place.³ In *Wisconsin* it has been held that no such presumption will be indulged.⁴

7. Contributory Negligence under These Statutes — *a. EFFECT REGULATED BY STATUTE.* — The statutes of two states expressly provide that in actions for injuries to animals grounded on laws requiring railroads to fence, the plaintiff's contributory negligence bars a recovery.⁵ In *Iowa* it is expressly declared that contributory negligence is no defense.⁶

b. WHERE STATUTES ARE SILENT AS TO EFFECT OF CONTRIBUTORY NEGLIGENCE. — In the absence of a special provision in the statutes there is much conflict of authority. In a number of jurisdictions contributory negligence on the part of the owner of the animal injured bars his recovery against the railroad under the railroad fencing laws.⁷ In about an equal number of

Co., 79 Mo. 196, 19 Am. & Eng. R. Cas. 594; *Clardy v. St. Louis, etc.*, R. Co., 73 Mo. 576, 7 Am. & Eng. R. Cas. 555; *Brassfield v. Patton*, 32 Mo. App. 572; *Mayfield v. St. Louis, etc.*, R. Co., 91 Mo. 296; *Adams v. Quincy, etc.*, R. Co., 52 Mo. App. 590.

Oregon. — *Sullivan v. Oregon R., etc., Co.*, 19 Oregon 319, 42 Am. & Eng. R. Cas. 625.

Texas. — *Missouri, etc., R. Co. v. Willis*, 17 Tex. Civ. App. 228.

Wisconsin. — *Bennett v. Chicago, etc., R. Co.*, 19 Wis. 145; *Bremmer v. Green Bay, etc., R. Co.*, 61 Wis. 114, 19 Am. & Eng. R. Cas. 575.

Where Line of Fence Generally Insecure. — Where it appears that live stock went upon the track over a fence which was generally insecure, not such as good farmers usually keep, it is not necessary to show that the fence was insecure at the particular place where the stock went over. *Louisville, etc., R. Co. v. Spain*, 61 Ind. 460.

Failure to Allege Defective Fence at Place of Entry Is Cured by Verdict. — *Louisville, etc., R. Co. v. Goodbar*, 102 Ind. 596; *Toledo, etc., R. Co. v. Stevens*, 63 Ind. 337.

1. Company Liable though Fences Not Required at Place of Injury. — *Alsop v. Ohio, etc., R. Co.*, 19 Ill. App. 292; *Duggan v. Peoria, etc., R. Co.*, 42 Ill. App. 536; *Toledo, etc., R. Co. v. Howell*, 38 Ind. 447; *Wabash R. Co. v. Forshee*, 77 Ind. 158; *Louisville, etc., R. Co. v. Eizler*, 3 Ind. App. 562; *Snider v. St. Louis, etc., R. Co.*, 73 Mo. 465.

2. Where Immaterial that Track Unfenced at Place of Injury. — *Chicago, etc., R. Co. v. Blair*, 75 Ill. App. 659; *Illinois Cent. R. Co. v. Finney*, 42 Ill. App. 390; *Great Western R. Co. v. Morthland*, 30 Ill. 451; *Duggan v. Peoria, etc., R. Co.*, 42 Ill. App. 536; *Missouri Pac. R. Co. v. Leggett*, 27 Kan. 323; *Foster v. St. Louis, etc., R. Co.*, 90 Mo. 116; *Ward v. St. Louis, etc., R. Co.*, 91 Mo. 168; *Moore v. Wabash, etc., R. Co.*, 81 Mo. 499; *Eaton v. McNeill*, 31 Oregon 128.

3. Presumption as to Place of Entry. — *Johnson*

v. Chicago, etc., R. Co., 27 Mo. App. 379; *McGuire v. Missouri Pac. R. Co.*, 23 Mo. App. 325; *Lepp v. St. Louis, etc., R. Co.*, 87 Mo. 139, 29 Am. & Eng. R. Cas. 242; *Kinion v. Kansas City, etc., R. Co.*, 39 Mo. App. 574; *Ehret v. Kansas City, etc., R. Co.*, 20 Mo. App. 251; *Gee v. St. Louis, etc., R. Co.*, 80 Mo. 283; *Jantzen v. Wabash, etc., R. Co.*, 83 Mo. 171; *Eaton v. Oregon R., etc., Co.*, 19 Oregon 371; *Mobile, etc., R. Co. v. Tiernan*, 102 Tenn. 704.

Presumption Not Conclusive. — *Ehret v. Kansas City, etc., R. Co.*, 20 Mo. App. 251.

4. No Presumption as to Place of Entry Indulged. — *Bremmer v. Green Bay, etc., R. Co.*, 61 Wis. 114, 19 Am. & Eng. R. Cas. 575.

5. Contributory Negligence a Statutory Defense — *California.* — Civ. Code Cal., § 485. See *McCoy v. Southern Pac. Co.*, 94 Cal. 570.

Oregon. — See *Hindman v. Oregon R., etc., Co.*, 17 Oregon 614; *Sullivan v. Oregon R., etc., Co.*, 19 Oregon 319, 42 Am. & Eng. R. Cas. 625.

6. Contributory Negligence No Defense — *Iowa Statute.* — *Lee v. Minneapolis, etc., R. Co.*, 66 Iowa 131, 20 Am. & Eng. R. Cas. 476; *Hindman v. Chicago, etc., R. Co.*, 28 Iowa 491; *Welsh v. Chicago, etc., R. Co.*, 53 Iowa 632, 21 Am. R. Rep. 181; *Inman v. Chicago, etc., R. Co.*, 60 Iowa 459; *Krebs v. Minneapolis, etc., R. Co.*, 64 Iowa 670, 20 Am. & Eng. R. Cas. 478; *Smith v. Kansas City, etc., R. Co.*, 58 Iowa 622; *Kuhn v. Chicago, etc., R. Co.*, 42 Iowa 420; *Anderson v. Chicago, etc., R. Co.*, 93 Iowa 561.

7. Jurisdictions Where Contributory Negligence Defense — *Illinois.* — *Ewing v. Chicago, etc., R. Co.*, 72 Ill. 25; *Chicago, etc., R. Co. v. Seirer*, 60 Ill. 295; *Chicago, etc., R. Co. v. Buck*, 14 Ill. App. 394; *Rockford, etc., R. Co. v. Irish*, 72 Ill. 404; *Peoria, etc., R. Co. v. Champ*, 75 Ill. 577; *Cairo, etc., R. Co. v. Murray*, 82 Ill. 76; *Cairo, etc., R. Co. v. Woosley*, 85 Ill. 370; *Cincinnati, etc., R. Co. v. Ducharme*, 4 Ill. App. 178; *Ohio, etc., R. Co. v. Clutter*, 82 Ill. 123.

states, however, it is held that the owner's contributory negligence cannot avail the railroad company as a defense.¹

c. **WILFUL ACT OF OWNER CONTRIBUTING TO INJURY A DEFENSE.** — There is a class of cases where the owner or the agent of the owner of an

Maine. — *Wilder v. Maine Cent. R. Co.*, 65 Me. 332, 20 Am. Rep. 698.

Massachusetts. — *Eames v. Salem, etc., R. Co.*, 98 Mass. 560, 96 Am. Dec. 676; *McDonnell v. Pittsfield, etc., R. Corp.*, 115 Mass. 504; *Maynard v. Boston, etc., R. Co.*, 115 Mass. 458, 15 Am. Rep. 119. But see *Rogers v. Newburyport R. Co.*, 1 Allen (Mass.) 16.

Minnesota. — *Johnson v. Chicago, etc., R. Co.*, 29 Minn. 425; *Evans v. St. Paul, etc., R. Co.*, 30 Minn. 489; *Watier v. Chicago, etc., R. Co.*, 31 Minn. 91; *Ericson v. Duluth, etc., R. Co.*, 57 Minn. 26; *Whittier v. Chicago, etc., R. Co.*, 24 Minn. 394, 15 Am. R. Rep. 450; *Vinson v. Chicago, etc., R. Co.*, 47 Minn. 265; *Green v. St. Paul, etc., R. Co.*, 55 Minn. 192.

Missouri. — *Donovan v. Hannibal, etc., R. Co.*, 89 Mo. 147, 26 Am. & Eng. R. Cas. 588; *Boyle v. Missouri Pac. R. Co.*, 21 Mo. App. 416; *Patton v. West End Narrow Gauge R. Co.*, 14 Mo. App. 589.

New Hampshire. — *Giles v. Boston, etc., R. Co.*, 55 N. H. 552; *Chapin v. Sullivan R. Co.*, 39 N. H. 564, 75 Am. Dec. 237; *Towns v. Cheshire R. Co.*, 21 N. H. 364; *Woolson v. Northern R. Co.*, 19 N. H. 267; *Mayberry v. Concord R. Co.*, 47 N. H. 391, all of which cases held that turning animals on unfenced railroad tracks in violation of law is such contributory negligence as bars recovery.

Texas. — *International, etc., R. Co. v. Cocke*, 64 Tex. 151, 23 Am. & Eng. R. Cas. 226.

Vermont. — The rule stated in the text formerly prevailed in this state. *Trow v. Vermont Cent. R. Co.*, 24 Vt. 488, 58 Am. Dec. 191. The contrary doctrine has since been announced. See the following subdivision.

Wisconsin. — *Martin v. Stewart*, 73 Wis. 553, 38 Am. & Eng. R. Cas. 316; *Peterson v. Northern Pac. R. Co.*, 86 Wis. 206; *Carey v. Chicago, etc., R. Co.*, 61 Wis. 71, 20 Am. & Eng. R. Cas. 469; *Curry v. Chicago, etc., R. Co.*, 43 Wis. 665; *Pitzner v. Shinnick*, 39 Wis. 129; *Jones v. Sheboygan, etc., R. Co.*, 42 Wis. 306; *Laude v. Chicago, etc., R. Co.*, 33 Wis. 640; *McCandless v. Chicago, etc., R. Co.*, 45 Wis. 365, 19 Am. R. Rep. 374; *McCann v. Chicago, etc., R. Co.*, 96 Wis. 664.

Defense Only When Improper Maintenance Involved. — In *Wisconsin* contributory negligence is a defense if the injury resulted from improper maintenance, but not if it resulted from a failure to erect. See the succeeding subdivision.

Turning Animals into Pasture with Knowledge of Defective Fence. — Where a railroad company is required to fence its track, it has been held that the plaintiff was not guilty of contributory negligence in turning his cattle into his field with knowledge that the fence between it and the railroad was down or was defective. *Wilder v. Maine Cent. R. Co.*, 65 Me. 332, 20 Am. Rep. 698; *Donovan v. Hannibal, etc., R. Co.*, 89 Mo. 147, 26 Am. & Eng. R. Cas. 588; *Cressey v. Northern R. Co.*, 59 N. H. 564, 47 Am. Rep. 227, 15 Am. & Eng. R. Cas. 540; *Shepard v. Buffalo, etc., R. Co.*,

35 N. Y. 641; *Gulf, etc., R. Co. v. Cash*, 8 Tex. Civ. App. 569. *Contra* in *Wisconsin*, *Martin v. Stewart*, 73 Wis. 553; *McCann v. Chicago, etc., R. Co.*, 96 Wis. 664. See also *Carey v. Chicago, etc., R. Co.*, 61 Wis. 71.

In *Illinois* it has been held that where a plaintiff turned his cattle into a pasture with the knowledge that the fence between it and the railroad was defective, and failed to notify the company of this fact, he was guilty of contributory negligence. *Chicago, etc., R. Co. v. Seirer*, 60 Ill. 295.

1. Jurisdictions Where Contributory Negligence

No Defense. — *Indiana.* — *Louisville, etc., R. Co. v. Whitesell*, 68 Ind. 297; *Indianapolis, etc., R. Co. v. McKinney*, 24 Ind. 283; *Louisville, etc., R. Co. v. Cahill*, 63 Ind. 340; *Wely v. Indianapolis, etc., R. Co.*, 105 Ind. 55, 24 Am. & Eng. R. Cas. 371; *Terre Haute, etc., R. Co. v. Schaefer*, 5 Ind. App. 86; *Jeffersonville, etc., R. Co. v. Dunlap*, 29 Ind. 426; *Bellefontaine R. Co. v. Reed*, 33 Ind. 476; *Jeffersonville, etc., R. Co. v. Ross*, 37 Ind. 545, 5 Am. R. Rep. 560; *Toledo, etc., R. Co. v. Cory*, 39 Ind. 218; *Indianapolis, etc., R. Co. v. Wolf*, 47 Ind. 250; *Chicago, etc., R. Co. v. Brannegan*, 5 Ind. App. 540; *Toledo, etc., R. Co. v. Cary*, 37 Ind. 172, 5 Am. R. Rep. 557; *Jeffersonville, etc., R. Co. v. Lyon*, 55 Ind. 477; *Jeffersonville, etc., R. Co. v. Nichols*, 30 Ind. 321.

Kansas. — *Atchison, etc., R. Co. v. Shaft*, 33 Kan. 521; *Missouri Pac. R. Co. v. Bradshaw*, 33 Kan. 533; *Hopkins v. Kansas Pac. R. Co.*, 18 Kan. 462; *Atchison, etc., R. Co. v. Gabbert*, 34 Kan. 132.

Michigan. — *Flynt, etc., R. Co. v. Lull*, 28 Mich. 510; *Grand Rapids, etc., R. Co. v. Cameron*, 45 Mich. 451; *Gardner v. Smith*, 7 Mich. 410, 74 Am. Dec. 722; *McDonald v. Chicago, etc., R. Co.*, 51 Mich. 628.

Nebraska. — *Burlington, etc., R. Co. v. Franzen*, 15 Neb. 365, 15 Am. & Eng. R. Cas. 530; *Burlington, etc., R. Co. v. Webb*, 18 Neb. 215, 53 Am. Rep. 809; *Burlington, etc., R. Co. v. Brinkman*, 14 Neb. 70, 11 Am. & Eng. R. Cas. 438.

New York. — The simple negligence of the owner of animals in permitting them to run at large in the highway or to trespass upon his neighbor's premises is no defense to the railroad. *Cowin v. New York, etc., R. Co.*, 13 N. Y. 42; *Shepard v. Buffalo, etc., R. Co.*, 35 N. Y. 641; *Brady v. Rensselaer, etc., R. Co.*, 1 Hun (N. Y.) 378; *Rhodes v. Utica, etc., R. Co.*, 5 Hun (N. Y.) 344; *Munch v. New York Cent. R. Co.*, 29 Barb. (N. Y.) 647. *Contra*, *Halloran v. New York, etc., R. Co.*, 2 E. D. Smith (N. Y.) 257; *Marsh v. New York, etc., R. Co.*, 14 Barb. (N. Y.) 364.

Ohio. — *Cleveland, etc., R. Co. v. Scudder*, 40 Ohio St. 173, 13 Am. & Eng. R. Cas. 561; *Pittsburgh, etc., R. Co. v. Smith*, 38 Ohio St. 410.

Vermont. — *Harwood v. Bennington, etc., R. Co.*, 67 Vt. 664; *Mead v. Burlington, etc., R. Co.*, 52 Vt. 278, 7 Am. & Eng. R. Cas. 550; *Eddy v. Kinney*, 60 Vt. 554.

animal is guilty of such negligence (if, indeed, it may be called such)¹ contributing to the collision between the train and the animal as to amount to a willingness to suffer the injury. Thus, where a person actually drives his animal on an unfenced railroad track,² or does some other positive act³ or is guilty of some default which under the circumstances evinces an intention to abandon the animal to injury,⁴ such act or default will relieve the railroad of liability in those jurisdictions where ordinary contributory negligence is no defense.⁵

8. Obligation to Fence Begins as Soon as Road Is Used. — The statutory obligation to fence begins as soon as cars are run over the road.⁶

Wisconsin. — *Martin v. Stewart*, 73 Wis. 553; *Heller v. Abbot*, 79 Wis. 409. In this state contributory negligence is no defense if the injury resulted from a failure to erect debarments, though it is when the injury results from improper maintenance. *Martin v. Stewart*, 73 Wis. 553. See the last note *supra*.

In *New York* it has been held that a foreign corporation using the track of a domestic railroad company under an agreement between the roads cannot set up contributory negligence as against the owner of cattle injured through defective fences. *Labussiere v. New York, etc., R. Co.*, (C. Pl. Gen. T.) 10 Abb. Pr. (N. Y.) 393, note. *Contra*, *Shauchan v. New York, etc., R. Co.*, (County Ct.) 10 Abb. Pr. (N. Y.) 393.

Contributory Negligence Defense Where Statute Imposes Duty on Both Parties to Maintain Fence. — *Sandusky, etc., R. Co. v. Sloan*, 27 Ohio St. 341, 11 Am. R. Rep. 264; *Dayton, etc., R. Co. v. Miami County Infirmary*, 32 Ohio St. 566.

Contributory Negligence Defense if Animals Entered at Point Where No Fence Required. — *Hanna v. Terre Haute, etc., R. Co.*, 119 Ind. 313. See *supra*, this section, *Place of Entrance Rather than of Injury Governs Liability*.

Railroad Cannot Plead as Counterclaim Damage Done by Animal Permitted to Stray upon Track. — *Chesapeake, etc., R. Co. v. Roe*, (Ky. 1899) 54 S. W. Rep. 1.

Contributory Negligence Not Defense to Action under Such Statute for Other Damage than Stock Killing. — *St. Louis, etc., R. Co. v. Blackwell*, (Tex. Civ. App. 1897) 40 S. W. Rep. 860.

1. A Wilful Act Is Not Properly Negligence. *Corwin v. New York, etc., R. Co.*, 13 N. Y. 49. See also the title CONTRIBUTORY NEGLIGENCE, vol. 7, p. 443.

2. Driving Animals on Unfenced Railroad Track. — *Indianapolis, etc., R. Co. v. Townsend*, 10 Ind. 38; *Missouri Pac. R. Co. v. Roads*, 33 Kan. 640, 23 Am. & Eng. R. Cas. 165; *Dolan v. Newburgh, etc., R. Co.*, 120 N. Y. 571; *Brady v. Rensselaer, etc., R. Co.*, 1 Hun (N. Y.) 378, 3 Thomp. & C. (N. Y.) 537; *Heller v. Abbot*, 79 Wis. 409.

3. Acts of Owner Defeating Liability of Railroad. — The only exceptions to the rule making railroad companies liable for injuries to animals through negligence by them in maintaining fences at places where the statute requires them are in cases where it appears that the owners wilfully drove their animals on the road, or voluntarily permitted them to stray upon the track, or did some positive act increasing the danger. *Brady v. Rensselaer, etc., R. Co.*, 1 Hun (N. Y.) 378, 3 Thomp. & C. (N. Y.) 537.

Turning Out a Blind Horse on an Unfenced Common through which a railroad ran was held to be conduct amounting to a willingness to suffer an injury to the animal, which relieved the railroad of all liability for killing it. *Knight v. Toledo, etc., R. Co.*, 24 Ind. 402.

A Licensee Stands in the Shoes of the Occupier of Land as to the Latter's Positive Act, so that if the occupier has voluntarily removed part of the railroad fence bounding land upon which he permits another to pasture animals, the latter cannot recover for animals which stray through this opening and are injured. *McCoy v. Southern Pac. Co.*, 94 Cal. 568.

In Iowa, by Statute, "the Wilful Act of the Owner" occasioning the injury constitutes a defense. *Krebs v. Minneapolis, etc., R. Co.*, 64 Iowa 670; *Moody v. Minneapolis, etc., R. Co.*, 77 Iowa 29, 38 Am. & Eng. R. Cas. 319.

The fact that the owner of hogs allows them, in violation of law, to run at large on his own premises near a railroad track will not constitute such a "wilful act of the owner" as will exonerate the railroad company from liability for killing them. *Lee v. Minneapolis, etc., R. Co.*, 66 Iowa 131, 20 Am. & Eng. R. Cas. 476.

Turning a colt upon the highway for the purpose of taking it across a railroad track to the pasture is not a wilful act of the owner defeating a recovery under the statute. *Smith v. Kansas City, etc., R. Co.*, 58 Iowa 622.

4. Abandonment of Animals on Unfenced Railroad Track. — *Welty v. Indianapolis, etc., R. Co.*, 105 Ind. 55, 24 Am. & Eng. R. Cas. 371; *Ft. Wayne, etc., R. Co. v. Woodward*, 112 Ind. 118, 31 Am. & Eng. R. Cas. 546; *Jeffersonville, etc., R. Co. v. Dunlap*, 29 Ind. 426; *Knight v. Toledo, etc., R. Co.*, 24 Ind. 402; *Brady v. Rensselaer, etc., R. Co.*, 1 Hun (N. Y.) 378, 3 Thomp. & C. (N. Y.) 537. See also *Indianapolis, etc., R. Co. v. Wright*, 13 Ind. 213.

The Owner Is Bound by the Act of the Borrower of an animal, and if the borrower becomes intoxicated and rides a borrowed horse to a railroad crossing, where, in consequence of the absence of cattle guards, the horse turns upon the track and is injured, the circumstances show an abandonment, and there can be no recovery under the statute requiring railroad companies to fence. *Welty v. Indianapolis, etc., R. Co.*, 105 Ind. 55, 24 Am. & Eng. R. Cas. 371.

5. The Wilful Act of the Owner Is No Defense When the Railroad Company Is Guilty of Reckless Mismanagement. — *McDonald v. Chicago, etc., R. Co.*, 51 Mich. 628.

6. When Obligation to Fence Begins. — See Volume XVI.

9. Company's Notice of Defect as Affecting Its Liability. — In order to charge a railroad company with liability under these statutes for failure to maintain fences, the company must be fixed with notice, either direct or implied from circumstances, of the defect by reason of which the injury occurred.¹ It must use ordinary diligence to make repairs within a reasonable time after it has discovered a defect in its fences or has received notice thereof.² But it is its duty to keep informed, and it is conclusively charged with notice of defects which have existed for an unreasonable length of time.³

this matter fully treated under the title FENCES, vol. 12, p. 1070.

1. Necessity of Notice of Defect by Company — Illinois. — Chicago, etc., R. Co. v. Seirer, 60 Ill. 295, 12 Am. R. Rep. 315; Indianapolis, etc., R. Co. v. Hall, 88 Ill. 368; Illinois Cent. R. Co. v. Swearingen, 47 Ill. 206.

Indiana. — Indianapolis, etc., R. Co. v. Truitt, 24 Ind. 162.

Iowa. — Davis v. Chicago, etc., R. Co., 40 Iowa 292; Hilliard v. Chicago, etc., R. Co., 37 Iowa 442; Brenner v. Chicago, etc., R. Co., 58 Iowa 625, 7 Am. & Eng. R. Cas. 574.

Missouri. — Haston v. Wabash, etc., R. Co., 18 Mo. App. 403; Foster v. St. Louis, etc., R. Co., 44 Mo. App. 11; Laney v. Kansas City, etc., R. Co., 83 Mo. 466; Clardy v. St. Louis, etc., R. Co., 73 Mo. 576, 7 Am. & Eng. R. Cas. 555; Townsley v. Missouri Pac. R. Co., 89 Mo. 31.

New York. — Hodge v. New York Cent., etc., R. Co., 27 Hun (N. Y.) 394; Wheeler v. Erie R. Co., 2 Thomp. & C. (N. Y.) 634.

Where the Circumstances Show Due Diligence on the Part of the Company, and the injury happened by reason of a breach due to a sudden fire, or other such cause, of which the company was ignorant, it is not liable. Toledo, etc., R. Co. v. Eder, 45 Mich. 329; Chicago, etc., R. Co. v. Saunders, 85 Ill. 288.

The Plaintiff Must Show the Company's Knowledge of the defective condition of the debarment, either by direct or circumstantial evidence or by proof that the defect had existed for such a length of time that the company was chargeable with knowledge. Aylesworth v. Chicago, etc., R. Co., 30 Iowa 459; Dewey v. Chicago, etc., R. Co., 31 Iowa 373; Dunn v. Chicago, etc., R. Co., 58 Iowa 674, 7 Am. & Eng. R. Cas. 573.

Defect in Erection. — Where cattle escape through a fence which is not shown ever to have been a lawful fence, it appears that the question of the company's notice of its condition is immaterial. Gulf, etc., R. Co. v. Rowland, (Tex. Civ. App. 1893) 23 S. W. Rep. 421.

The Fact that the Plaintiff Has Not Notified the Company of a defect of which he knew does not bar his recovery, for notice derived from any source would bind the defendant. Dunn v. Chicago, etc., R. Co., 58 Iowa 674, 7 Am. & Eng. R. Cas. 573.

2. Must Repair or Rebuild Within Reasonable Time After Discovery — Illinois. — Chicago, etc., R. Co. v. Reid, 24 Ill. 144.

Indiana. — Jeffersonville, etc., R. Co. v. Sullivan, 38 Ind. 262, 10 Am. R. Rep. 279; Cleveland, etc., R. Co. v. Brown, 45 Ind. 90; Pittsburgh, etc., R. Co. v. Eby, 55 Ind. 567.

Iowa. — Robinson v. Chicago, etc., R. Co., 79 Iowa 495.

Missouri. — Chubbuck v. Hannibal, etc., R. Co., 77 Mo. 591; Vinyard v. St. Louis, etc., R. Co., 80 Mo. 92.

New York. — McDowell v. New York Cent. R. Co., 37 Barb. (N. Y.) 195.

Ohio. — Baltimore, etc., R. Co. v. Schultz, 43 Ohio St. 270.

Vermont. — Wait v. Bennington, etc., R. Co., 61 Vt. 268.

See also the cases cited in the last preceding note.

In *Missouri* it has been held that if a fence is defective, the fact that sufficient time has not elapsed since it got out of repair to enable the railroad company to repair it is matter of defense which the company must show. Busby v. St. Louis, etc., R. Co., 81 Mo. 43.

Reasonable Care and Diligence is all that is required of a railroad company in maintaining its fences. It is not an insurer. Grand Rapids, etc., R. Co. v. Monroe, 47 Mich. 152; Varco v. Chicago, etc., R. Co., 30 Minn. 18, 11 Am. & Eng. R. Cas. 419; Carey v. Chicago, etc., R. Co., 61 Wis. 71.

Circumstances Showing Due Diligence. — Where an inspection made on Saturday afternoon at four o'clock showed the fence in good condition, and the road was inspected again on Monday morning, when it was found that the fence had been recently broken, and that cattle had gotten on the road and been injured, it was held that the company had shown reasonable diligence in keeping the fence in repair, and was not liable for the cattle injured. Illinois Cent. R. Co. v. Swearingen, 47 Ill. 206.

Negligence of Railroad Company in Failing to Discover Defects Is Usually a Question for the Jury. — Grahlman v. Chicago, etc., R. Co., 78 Iowa 564; Robinson v. Chicago, etc., R. Co., 79 Iowa 495; Peet v. Chicago, etc., R. Co., 88 Iowa 520. See also Graves v. Chicago, etc., R. Co., 47 Minn. 429.

3. Notice of Defect Presumed from Lapse of Time. — Ohio, etc., R. Co. v. Clutter, 82 Ill. 123; Laney v. Kansas City, etc., R. Co., 83 Mo. 466; Townsley v. Missouri Pac. R. Co., 89 Mo. 31; Vinyard v. St. Louis, etc., R. Co., 80 Mo. 92; Clardy v. St. Louis, etc., R. Co., 73 Mo. 576, 7 Am. & Eng. R. Cas. 555; Mayfield v. St. Louis, etc., R. Co., 91 Mo. 296; Heaston v. Wabash, etc., R. Co., 18 Mo. App. 403; McDowell v. New York Cent. R. Co., 37 Barb. (N. Y.) 195; Laude v. Chicago, etc., R. Co., 33 Wis. 640.

Circumstances under Which Notice Presumed — After One Day Where Fence in Close Proximity to Station. — Foster v. St. Louis, etc., R. Co., 44 Mo. App. 11.

After Three Days, During Which Two Inspections Should Have Been Had. — Toledo, etc., R. Co. v. Cohen, 44 Ind. 444.

One Week's Failure to Repair Burned Fence

Volume XVI.

10. Duty to Maintain Debarments at Particular Points. — The particular places at which railroads are required to maintain fences under these statutes have been considered elsewhere.¹

11. Company's Liability as Affected by Right of Cattle to Be at Large. — At the common law and in several of the United States the owner of cattle is bound to keep them fenced in; in other states this duty does not rest on the owner of cattle so that they are trespassers when found on the uninclosed lands of another, but animals may wander at large and are not trespassers unless they get upon lands inclosed by a proper fence.² These different rules of law have an important bearing on the liability of railroad companies under statutes requiring railroads to fence and rendering them liable for injuries to stock when they fail in this duty. Such statutes unquestionably protect persons whose lands adjoin the railroad, and their cattle entering on the railroad through a defective fence do not become trespassers so as to affect the owner's right to recover for their injury.³ But in jurisdictions where the common-law duty of keeping up cattle is recognized, if the cattle of a nonadjoining owner wander on the land of an adjoining owner, the animals are trespassers thereon, and unless the railroad fencing acts avail such nonadjoining owner, such animals wandering further upon the railroad are trespassers, and the railroad company is not liable for injuring them in the absence of actual negligence.

Statutes Held to Avail Those Only Whose Cattle Rightfully on Adjoining Lands. — In several jurisdictions these fencing acts are regarded as being for the benefit of adjoining owners only, and, the common-law rule as to inclosing cattle prevailing, it is held, in accordance with the view just indicated, that the owner of cattle cannot recover by force of the statute for their injury if they were trespassers at the point where they entered upon the lands of the railroad.⁴

Unreasonable. — *Cleveland, etc., R. Co. v. Brown*, 45 Ind. 90.

After Two Weeks, notice of a patent defect will be presumed. *Varco v. Chicago, etc., R. Co.*, 30 Minn. 18, 11 Am. & Eng. R. Cas. 419; *Baltimore, etc., R. Co. v. Schultz*, 43 Ohio St. 270, 54 Am. Rep. 805, 22 Am. & Eng. R. Cas. 579.

Where Bars Have Remained Down for Three Months notice will be presumed. *Illinois Cent. R. Co. v. Arnold*, 47 Ill. 173.

Fifteen Hours Has Been Held Insufficient time to charge a railroad company with notice of the defective condition of a fence along the track one mile from the station. *Goodrich v. Kansas City, etc., R. Co.*, 152 Mo. 222.

1. See the title FENCES, vol. 12, p. 1075 *et seq.*

2. See the titles ANIMALS, vol. 2, p. 354; FENCES, vol. 12, p. 1039 *et seq.*

3. *Animal Entering from Owner's Land Not Trespasser* — *Kansas*. — *Atchison, etc., R. Co. v. Riggs*, 31 Kan. 622, 15 Am. & Eng. R. Cas. 531; *Missouri Pac. R. Co. v. Bradshaw*, 33 Kan. 533.

Maine. — *Wilder v. Maine Cent. R. Co.*, 65 Me. 333, 20 Am. Rep. 608.

Missouri. — *Holland v. West End Narrow Gauge R. Co.*, 16 Mo. App. 172.

New York. — *Shepard v. Buffalo, etc., R. Co.*, 35 N. Y. 641.

Vermont. — *Congdon v. Central Vermont R. Co.*, 56 Vt. 390, 48 Am. Rep. 793.

4. *Not Liable if Trespasser* — *England.* — *Manchester, etc., R. Co. v. Wallis*, 14 C. B. 213, 78 E. C. L. 213; *Ricketts v. East, etc., India Docks, etc., R. Co.*, 12 C. B. 160, 74 E. C. L. 160.

Canada. — *Wilson v. Northern R. Co.*, 28 U. C. Q. B. 274; *Gillis v. Great Western R. Co.*, 12 U. C. Q. B. 427; *Dolrey v. Ontario, etc., R. Union Co.*, 11 U. C. Q. B. 600; *Daniels v. Grand Trunk R. Co.*, 11 Ont. App. 471, 22 Am. & Eng. R. Cas. 609; *Duncan v. Canadian Pac. R. Co.*, 21 Ont. 355; *McLennan v. Grand Trunk R. Co.*, 8 U. C. C. P. 411; *Douglass v. Grand Trunk R. Co.*, 5 Ont. App. 585; *McIntosh v. Grand Trunk R. Co.*, 30 U. C. Q. B. 601; *Conway v. Canadian Pac. R. Co.*, 12 Ont. App. 708, *affirming* 7 Ont. 673, 19 Am. & Eng. R. Cas. 650.

Maine. — *Allen v. Boston, etc., R. Co.*, 87 Me. 326; *Perkins v. Eastern R. Co.*, 29 Me. 307, 50 Am. Dec. 589.

Massachusetts. — *Maynard v. Boston, etc., R. Co.*, 115 Mass. 458, 15 Am. Rep. 119; *McDonnell v. Pittsfield, etc., R. Corp.*, 115 Mass. 564, 7 Am. R. Rep. 465; *Darling v. Boston, etc., R. Co.*, 121 Mass. 118; *Sawyer v. Vermont, etc., R. Co.*, 105 Mass. 196; *Towne v. Nashau, etc., R. Co.*, 124 Mass. 101; *Eames v. Salem, etc., R. Co.*, 98 Mass. 560, 96 Am. Dec. 676, *distinguishing* *Browne v. Providence, etc., R. Co.*, 12 Gray (Mass.) 55, 71 Am. Dec. 736, which was decided under a *Connecticut* statute. See also *Taft v. New York, etc., R. Co.*, 157 Mass. 297.

Nevada. — *Walsh v. Virginia, etc., R. Co.*, 8 Nev. 110.

New Hampshire. — *Giles v. Boston, etc., R. Co.*, 55 N. H. 552; *Cornwall v. Sullivan R. Co.*, 28 N. H. 161; *Woolson v. Northern R. Co.*, 19 N. H. 268; *Hill v. Concord, etc., R. Co.*, 67 N. H. 449; *Chapin v. Sullivan R. Co.*, 39 N. H. 53, 75 Am. Dec. 207.

Vermont. — *Morse v. Rutland, etc., R. Co.*,

Volume XVI.

Cattle on Adjoining Land with Consent of Owner. — Where the owner of adjoining land contracts with or grants permission to another to keep the latter's animals upon this land, the railroad company is liable for their injury to the same extent as if the animals were the property of the adjoining owner.¹

Statutes Avail All Whose Cattle Are Injured through Company's Failure to Fence. — In the majority of jurisdictions in the United States, the railroad company is held liable to the owner for injuries to animals which, because of a defect in or the absence of statutory debarments, stray upon the track from an adjoining close, or from a point where they were at large, whether such animals were lawfully or unlawfully at large, or lawfully or unlawfully on the land from which they strayed.²

Effect of Special Statute Prohibiting Animals at Large. — In most jurisdictions in the

27 Vt. 49; *Jackson v. Rutland, etc.*, R. Co., 25 Vt. 150, 60 Am. Dec. 246; *Bemis v. Connecticut, etc.*, R. Co., 42 Vt. 375, 1 Am. Rep. 339.

In *Missouri* it appears that if an animal belonging to a nonadjoining owner comes upon the railroad from an adjoining owner's land into which it had gotten in spite of such land being inclosed with a lawful fence, and upon which it was therefore a trespasser, the railroad is not liable for its injury. *Berry v. St. Louis, etc.*, R. Co., 65 Mo. 172; *Harrington v. Chicago, etc.*, R. Co., 71 Mo. 384; *Johnson v. Missouri Pac. R. Co.*, 80 Mo. 620; *Peddicord v. Missouri Pac. R. Co.*, 85 Mo. 160; *Carpenter v. St. Louis, etc.*, R. Co., 25 Mo. App. 110; *Ferris v. St. Louis, etc.*, R. Co., 30 Mo. App. 122; *Hendrix v. St. Joseph, etc.*, R. Co., 38 Mo. App. 520; *Geiser v. St. Louis, etc.*, R. Co., 61 Mo. App. 459. The rule is otherwise, however, if the nonadjoining owner shows that his animals were upon the adjoining land rightfully, as by contract with or license from the owner thereof. *Summers v. Hannibal, etc.*, R. Co., 29 Mo. App. 41; *Smith v. St. Louis, etc.*, R. Co., 25 Mo. App. 113. But this doctrine has no application where the animal comes upon the railroad from uninclosed lands, *Kaes v. Missouri Pac. R. Co.*, 6 Mo. App. 397; *Duke v. Kansas City, etc.*, R. Co., 39 Mo. App. 105; *Kinion v. Kansas City, etc.*, R. Co., 39 Mo. App. 382; *Board v. St. Louis, etc.*, R. Co., 36 Mo. App. 151; *Jackson v. St. Louis, etc.*, R. Co., 43 Mo. App. 324; *Dean v. Omaha, etc.*, R. Co., 54 Mo. App. 647; or from lands of an adjoining proprietor which are defectively fenced, *Carpenter v. St. Louis, etc.*, R. Co., 25 Mo. App. 110; *Peddicord v. Missouri Pac. R. Co.*, 85 Mo. 160; *Harrington v. Chicago, etc.*, R. Co., 71 Mo. 384; or from a street in a town, in the absence of evidence that the animal was in the street in violation of a town ordinance, *Brandenburg v. St. Louis, etc.*, R. Co., 44 Mo. App. 224.

Cattle Are Not Presumed as Rightfully Going at Large; there must be proof that the county or town in which an animal was injured permitted it to do so. Hence, if cattle are injured by a train through a failure of the railroad company to comply with the statutory requirements as to fences upon common land, the railroad company is not liable. *Perkins v. Eastern R. Co.*, 29 Me. 307, 50 Am. Dec. 589.

1. **Rightfully on Adjoining Lands** — *Kansas*. — *St. Louis, etc.*, R. Co. v. *Dudgeon*, 28 Kan. 283.

Massachusetts. — *Sawyer v. Vermont, etc.*, R. Co., 105 Mass. 196.

Missouri. — *Brandenburg v. St. Louis, etc.*, R. Co., 44 Mo. App. 224.

New York. — *French v. Western New York, etc.*, R. Co., 72 Hun (N. Y.) 469.

Vermont. — *Smith v. Barre R. Co.*, 64 Vt. 21.

Wisconsin. — *Veerhusen v. Chicago, etc.*, R. Co., 53 Wis. 689.

Canada. — *McAlpine v. Grand Trunk R. Co.*, 38 U. C. Q. B. 446.

Rightful Use of Adjoining Lands Not Acquired by Prescription. — In *McIntosh v. Grand Trunk R. Co.*, 30 U. C. Q. B. 601, it was held that no recovery could be had where the plaintiff's cow was killed on a railroad track to which she had gained access from an unfenced common whereon the residents of the town had for thirty or forty years been accustomed to pasture their stock, though without express permission from the corporation owning the common.

2. **Liability Irrespective of Right of Cattle to Be at Place of Entrance** — *Illinois*. — *Chicago, etc.*, R. Co. v. *Harris*, 54 Ill. 528; *Toledo, etc.*, R. Co. v. *Delehanty*, 71 Ill. 615.

Indiana. — *New Albany, etc.*, R. Co. v. *Ash-ton*, 13 Ind. 545; *New Albany, etc.*, R. Co. v. *Bishop*, 13 Ind. 566; *Indianapolis, etc.*, R. Co. v. *McKinney*, 24 Ind. 285; *Indianapolis, etc.*, R. Co. v. *Townsend*, 10 Ind. 38; *Jeffersonville R. Co. v. Applegate*, 10 Ind. 49; *Indianapolis, etc.*, R. Co. v. *Meek*, 10 Ind. 502; *Hart v. Indianapolis, etc.*, R. Co., 12 Ind. 478; *Indianapolis, etc.*, R. Co. v. *Paramore*, 12 Ind. 407; *New Albany, etc.*, R. Co. v. *Fix*, 12 Ind. 485; *New Albany, etc.*, R. Co. v. *Beeler*, 12 Ind. 560; *Bellefontaine R. Co. v. Reed*, 33 Ind. 476; *Jeffersonville, etc.*, R. Co. v. *Ross*, 37 Ind. 545; *Louisville, etc.*, R. Co. v. *Cahill*, 63 Ind. 340.

Kansas. — *Missouri Pac. R. Co. v. Roads*, 33 Kan. 640, 23 Am. & Eng. R. Cas. 165.

Minnesota. — *Gillam v. Sioux City, etc.*, R. Co., 26 Minn. 268; *Nelson v. Great Northern R. Co.*, 52 Minn. 276.

Nebraska. — *Union Pac. R. Co. v. High*, 14 Neb. 14.

New York. — *Duffy v. New York, etc.*, R. Co., 2 Hill. (N. Y.) 496; *Purdy v. New York, etc.*, R. Co., 61 N. Y. 353; *Corwin v. New York, etc.*, R. Co., 13 N. Y. 42; *Rhodes v. Utica, etc.*, R. Co., 5 Hun (N. Y.) 344; *Waldron v. Rensselaer, etc.*, R. Co., 8 Barb. (N. Y.) 390; *Dayton v. New York, etc.*, R. Co., 81 Hun (N. Y.) 284; *Bradley v. Buffalo, etc.*, R. Co., 34 N. Y. 432.

Ohio. — *Pittsburgh, etc.*, R. Co. v. *Howard*, 40 Ohio St. 6, 11 Am. & Eng. R. Cas. 488; *Pittsburgh, etc.*, R. Co. v. *Allen*, 40 Ohio St.

United States the fact that there is a special statute against or a special law applying to a particular county, making it unlawful for such animals to be at large at the time and place of injury, does not affect the liability of the railroad company,¹ unless perchance through the fault of the owner, in those jurisdictions where contributory negligence is a defense to actions under these statutes.²

Such Statutes Held to Relieve Railroad Company of Liability. — In a few jurisdictions, however, it is held that a statute or by-law forbidding animals to run at large is a complete defense to an injury to such animal resulting from the fact that the railway track was unfenced.³

12. Constitutionality of Such Statutes. — The constitutionality of statutes which impose the duty of fencing upon railroad companies and render them liable for injuries to cattle if they fail in this duty has almost uniformly been upheld.⁴

206, 19 Am. & Eng. R. Cas. 657; *Marietta, etc., R. Co. v. Stephenson*, 24 Ohio St. 48.

Pennsylvania. — *Dunkirk, etc., R. Co. v. Mead*, 90 Pa. St. 454, 1 Am. & Eng. R. Cas. 166.

Wisconsin. — *McCall v. Chamberlain*, 13 Wis. 637; *Curry v. Chicago, etc., R. Co.*, 43 Wis. 665. See also *Veerhusen v. Chicago, etc., R. Co.*, 53 Wis. 689.

1. Liability of Railway Even where Special Law Against Animal Running at Large — *Indiana.* — *Louisville, etc., R. Co. v. Cahill*, 63 Ind. 340.

Iowa. — *Krebs v. Minneapolis, etc., R. Co.*, 64 Iowa 670, 20 Am. & Eng. R. Cas. 478; *Fritz v. Milwaukee, etc., R. Co.*, 34 Iowa 337; *Stewart v. Chicago, etc., R. Co.*, 27 Iowa 282; *Spence v. Chicago, etc., R. Co.*, 25 Iowa 139.

Kansas. — *Missouri Pac. R. Co. v. Bradshaw*, 33 Kan. 533; *Atchison, etc., R. Co. v. Riggs*, 31 Kan. 622, 15 Am. & Eng. R. Cas. 531; *Kansas Pac. R. Co. v. Wiggins*, 24 Kan. 588; *Missouri Pac. R. Co. v. Johnston*, 35 Kan. 58. *Minnesota.* — *Watier v. Chicago, etc., R. Co.*, 31 Minn. 91.

Nebraska. — *Chicago, etc., R. Co. v. Sims*, 17 Neb. 691; *Burlington, etc., R. Co. v. Brinkman*, 14 Neb. 70, 11 Am. & Eng. R. Cas. 438.

That, although there is no duty to fence, a railroad company cannot set up as a defense in an action for injury to cattle a statute forbidding stock being at large, see *Roberts v. Richmond, etc., R. Co.*, 88 N. Car. 560, 20 Am. & Eng. R. Cas. 473.

2. See supra, this section, Contributory Negligence under These Statutes.

Permitting animals to run at large in violation of a special law prohibiting it in certain towns, and making their owners liable for trespasses by them, constitutes no exemption from liability in the case of estrays or merely trespassing animals unless the fault or negligence of the owner under the circumstances of the particular case contributed to the injury. *Watier v. Chicago, etc., R. Co.*, 31 Minn. 91.

3. Nonliability of Railroad Where Special Law Against Animals Running at Large. — *Peoria, etc., R. Co. v. Champ*, 75 Ill. 577; *Pittsburgh, etc., R. Co. v. Methven*, 21 Ohio St. 586. See also *Duncan v. Canadian Pac. R. Co.*, 21 Ont. 355.

4. Statutes Held Constitutional — *United States.* — *Missouri Pac. R. Co. v. Humes*, 115 U. S. 512, 22 Am. & Eng. R. Cas. 557 (*Missouri* statute); *Minneapolis, etc., R. Co. v. Beckwith*, 129 U. S. 26, 38 Am. & Eng. R. Cas. 267; (*Iowa* statute); *Minneapolis, etc., R. Co. v. Emmons*, 149 U. S. 364 (*Minnesota* statute).

Illinois. — *Cairo, etc., R. Co. v. Warrington*, 92 Ill. 157; *Cairo, etc., R. Co. v. Peoples*, 92 Ill. 97, 34 Am. Rep. 112, Ohio, etc., R. Co. v. McClelland, 25 Ill. 140; *Galena, etc., R. Co. v. Crawford*, 25 Ill. 529.

Indiana. — *Lafayette, etc., R. Co. v. Martin*, 8 Ind. 251; *Indianapolis, etc., R. Co. v. Parker*, 29 Ind. 471; *Indianapolis, etc., R. Co. v. Kercheval*, 16 Ind. 84; *Madison, etc., R. Co. v. Burnett*, 8 Ind. 277; *Madison, etc., R. Co. v. Whiteneck*, 8 Ind. 217; *Toledo, etc., R. Co. v. Brown*, 17 Ind. 353; *New Albany, etc., R. Co. v. Tilton*, 12 Ind. 3, 74 Am. Dec. 195; *Indianapolis, etc., R. Co. v. Marshall*, 27 Ind. 300; *Toledo, etc., R. Co. v. Nordyke*, 27 Ind. 95.

Kansas. — *Atchison, etc., R. Co. v. Harper*, 19 Kan. 529.

Kentucky. — *Louisville, etc., R. Co. v. Belcher*, 89 Ky. 193, 40 Am. & Eng. R. Cas. 228.

Maine. — *Wilder v. Maine Cent. R. Co.*, 65 Me. 332, 20 Am. Rep. 698.

Minnesota. — *Johnson v. Chicago, etc., R. Co.*, 29 Minn. 425; *Schimmele v. Chicago, etc., R. Co.*, 34 Minn. 216.

Missouri. — *Trice v. Hannibal, etc., R. Co.*, 49 Mo. 438; *Hines v. Missouri Pac. R. Co.*, 86 Mo. 629; *Speelman v. Missouri Pac. R. Co.*, 71 Mo. 434; *Kaes v. Missouri Pac. R. Co.*, 6 Mo. App. 397; *Phillips v. Missouri Pac. R. Co.*, 86 Mo. 540; *Humes v. Missouri Pac. R. Co.*, 82 Mo. 221, 52 Am. Rep. 369; *Barnett v. Atlantic R. Co.*, 68 Mo. 56, 30 Am. Rep. 773; *Cummings v. St. Louis, etc., R. Co.*, 70 Mo. 570; *Gorman v. Pacific R. Co.*, 26 Mo. 441, 72 Am. Dec. 220; *Hamilton v. Missouri Pac. R. Co.*, 87 Mo. 85.

Montana. — *Snook v. Clark*, 20 Mont. 230.

New York. — *Staats v. Hudson River R. Co.*, 3 Keyes (N. Y.) 196; *Waldron v. Rensselaer, etc., R. Co.*, 8 Barb. (N. Y.) 390; *Suydam v. Moore*, 8 Barb. (N. Y.) 358.

Tennessee. — *Illinois Cent. R. Co. v. Crider*, 91 Tenn. 489, 56 Am. & Eng. R. Cas. 157.

Utah. — *Stimpson v. Union Pac. R. Co.*, 9 Utah 123.

Vermont. — *Thorpe v. Rutland, etc., R. Co.*, 27 Vt. 140, 62 Am. Dec. 625; *Nelson v. Vermont, etc., R. Co.*, 26 Vt. 717, 62 Am. Dec. 614.

Wisconsin. — *Quackenbush v. Wisconsin, etc., R. Co.*, 62 Wis. 411, 71 Wis. 472; *Blair v. Milwaukee, etc., R. Co.*, 20 Wis. 254.

Railroad's Liability for Fires. — Compare the discussion of the constitutionality of statutes rendering railroad companies liable for fires, under the title FIRES, vol. 13, p. 427 *et seq.*

These statutes impose a special duty upon railroad corporations by reason of the business in which they are engaged, and in the valid exercise of the police power of the state provide for the enforcement of the duty thus created by allowing the recovery of compensatory or double damages¹ in case of nonperformance, without regard to the existence of other negligence on the company's part.²

Not Class Legislation. — Statutes of this character do not deprive railroad companies of the equal protection of the law or deny to them due process of law within the meaning of the Fourteenth Amendment to the United States Constitution, or within the meaning of similar provisions in state constitutions.³

The Fact that the Statute May Expressly Exclude the Defense of Contributory Negligence does not affect its constitutionality.⁴

Not Ex Post Facto as Applied to Existing Railroads. — Such statutes are not unconstitutional on the ground that such enactments are *ex post facto* as applied to roads operating under existing charters at the time of the enactment.⁵

1. Allowance of Double Damages Unconstitutional. — The allowance of double damages, being strictly punitive, has been held unconstitutional in *Nebraska*, where the recovery of damages as a punishment is not allowed. *Grand Island, etc., R. Co. v. Swinbank*, 51 Neb. 521; *Atchison, etc., R. Co. v. Baty*, 6 Neb. 37, 29 Am. Rep. 356. See also the title EXEMPLARY DAMAGES, vol. 12, p. 9, note. But see the cases cited in the next note to this section, *infra*.

2. Such Legislation an Exercise of Police Power. — *Missouri Pac. R. Co. v. Humes*, 115 U. S. 512 (*Missouri* statute); *Minneapolis, etc., R. Co. v. Beckwith*, 129 U. S. 26 (*Iowa* statute); *Minneapolis, etc., R. Co. v. Emmons*, 149 U. S. 364 (*Minnesota* statute); *Kansas Pac. R. Co. v. Mower*, 16 Kan. 573. See also *Gulf, etc., R. Co. v. Ellis*, 165 U. S. 150; *Atchison, etc., R. Co. v. Matthews*, 174 U. S. 96.

Where These Acts Are Regarded as of a Penal Character, as is usually the case, they have been held valid as against the objection that they violated a constitutional provision requiring that fines and penalties be paid to a particular fund. *Barnett v. Atlantic, etc., R. Co.*, 68 Mo. 56, 30 Am. Rep. 773; *Spealman v. Missouri Pac. R. Co.*, 71 Mo. 434; *Graham v. Kibble*, 9 Neb. 183, *overruling Atchison, etc., R. Co. v. Baty*, 6 Neb. 37, 29 Am. Rep. 356. But see *Grand Island, etc., R. Co. v. Swinbank*, 51 Neb. 521.

On the other hand, these acts have been declared not to create punitive or penal actions. *Koons v. Chicago, etc., R. Co.*, 23 Iowa 493; *Mackie v. Central R. Co.*, 54 Iowa 540.

The damages given by a statute allowing double damages "are not exclusively penalty, but are to be regarded as compensation as well as penalty." *Cairo, etc., R. Co. v. Peoples*, 92 Ill. 97, 34 Am. Rep. 112.

Statutes Authorizing Recovery of Attorney's Fees in Cases of Litigation Are Constitutional. — *Peoria, etc., R. Co. v. Duggan*, 109 Ill. 537, 50 Am. Rep. 619; *Wabash, etc., R. Co. v. Lavieus*, 14 Ill. App. 469; *Kansas Pac. R. Co. v. Mower*, 16 Kan. 573; *Briggs v. St. Louis, etc., R. Co.*, 111 Mo. 168; *Illinois Cent. R. Co. v. Crider*, 91 Tenn. 489, 56 Am. & Eng. R. Cas. 157.

A Statute Authorizing the Recovery of Double or Triple Costs in Case of Litigation Is Constitutional. — *Johnson v. Chicago, etc., R. Co.*, 29 Minn.

425; *Schimmele v. Chicago, etc., R. Co.*, 34 Minn. 216.

A Statute Authorizing Double Damages Where the Railroad Fails to Post Notice of Stock Killed Is Constitutional. — *Little Rock, etc., R. Co. v. Payne*, 33 Ark. 816; *Memphis, etc., R. Co. v. Horsfall*, 36 Ark. 651; *St. Louis, etc., R. Co. v. Wright*, 57 Ark. 327.

3. Not in Conflict with Fourteenth Amendment to United States Constitution. — *Missouri Pac. R. Co. v. Humes*, 115 U. S. 512, 22 Am. & Eng. R. Cas. 557; *Minneapolis, etc., R. Co. v. Beckwith*, 129 U. S. 26, 38 Am. & Eng. R. Cas. 267; *Cairo, etc., R. Co. v. Peoples*, 92 Ill. 97, 34 Am. Rep. 112; *Cairo, etc., R. Co. v. Warrington*, 92 Ill. 157; *Treadway v. Sioux City, etc., R. Co.*, 43 Iowa 527, 14 Am. R. Rep. 475; *Jones v. Galena, etc., R. Co.*, 16 Iowa 6; *Mackie v. Central R. Co.*, 54 Iowa 540; *Spealman v. Missouri Pac. R. Co.*, 71 Mo. 434; *Sullivan v. Oregon R., etc., Co.*, 19 Oregon 319; *Quackenbush v. Wisconsin, etc., R. Co.*, 62 Wis. 411.

Where the Statutes Impose the Same Liability on All Railroad Companies operating in the jurisdiction for injuries to animals on their unfenced railroad tracks, such laws, of course, are not special because the duty to erect and maintain fences and the statutory liability for the failure to do so are not also imposed upon other classes of corporations and persons. *Louisville, etc., R. Co. v. Belcher*, 89 Ky. 193, 40 Am. & Eng. R. Cas. 228.

4. Statute Constitutional though Defense of Contributory Negligence Excluded. — *Quackenbush v. Wisconsin, etc., R. Co.*, 71 Wis. 472, 62 Wis. 411.

5. Not Ex Post Facto as Applied to Existing Railroads. — *Ohio, etc., R. Co. v. McClelland*, 25 Ill. 140; *Galena, etc., R. Co. v. Crawford*, 25 Ill. 529; *New Albany, etc., R. Co. v. Tilton*, 12 Ind. 3, 74 Am. Dec. 195; *Gorman v. Pacific R. Co.*, 26 Mo. 441, 72 Am. Dec. 220; *Suydam v. Moore*, 8 Barb. (N. Y.) 358; *Waldron v. Rensselaer, etc., R. Co.*, 8 Barb. (N. Y.) 390; *Nelson v. Vermont, etc., R. Co.*, 26 Vt. 717, 62 Am. Dec. 614; *Thorpe v. Rutland, etc., R. Co.*, 27 Vt. 140, 62 Am. Dec. 625.

A Statute Requiring Fences on Railroads Thereafter to Be Constructed does not apply to a railroad already partially constructed. *Stearns v. Old Colony, etc., R. Corp.*, 1 Allen (Mass.) 493.

Statutes Not Creating Duty but Declaring Liability. — Statutes which merely impose a liability on railroad companies for cattle killed or injured in the absence of fences have been almost uniformly upheld in state courts as against constitutional objections.¹ But such legislation has been held unconstitutional in *Washington* as imposing a penalty without creating a corresponding duty — a taking of property without due process of law.² It has been justly observed that the creation of a liability for injuries occasioned by a failure to fence is equivalent to creating a duty to fence.³

VII. NECESSITY OF STATUTE TO MAKE RAILROADS LIABLE MERELY BECAUSE OF NONEXISTENCE OF FENCES. — Since the obligation to fence or the obligation to pay for stock killed because of a failure to fence exists only by statute, the liability of a railroad company for injury to stock, where there is no statute on the subject, must be determined upon the principles of the common law as it exists in the several states. Only actual negligence on the part of the railroad company will render it liable.⁴ If such

1. Constitutionality of Statutes Making Road Liable where Track Unfenced. — *Tredway v. Sioux City, etc.*, R. Co., 43 Iowa 527, 14 Am. R. Rep. 475; *Mackie v. Central R. Co.*, 54 Iowa 540; *Jones v. Galena, etc.*, R. Co., 16 Iowa 6; *Welsh v. Chicago, etc.*, R. Co., 53 Iowa 632, 21 Am. R. Rep. 181; *Kansas Pac. R. Co. v. Mower*, 16 Kan. 573; *Beckstead v. Montana Union R. Co.*, 19 Mont. 147; *Sullivan v. Oregon R., etc.*, Co., 19 Oregon 319; *Texas Cent. R. Co. v. Childress*, 64 Tex. 346.

2. Oregon R., etc., Co. v. Smalley, 1 Wash. 206, 22 Am. St. Rep. 143; *Jolliffe v. Brown*, 14 Wash. 155, 53 Am. St. Rep. 868; *Dickey v. Northern Pac. R. Co.*, 19 Wash. 350.

If an inclination to uphold the view of these *Washington* cases might be deduced from the case of *Gulf, etc., R. Co. v. Ellis*, 165 U. S. 160, it is reasonably certain from the reasoning in *Atchison, etc., R. Co. v. Matthews*, 174 U. S. 96, where the *Ellis* case is distinguished, that a statute of the kind indicated in the text would be regarded as a valid exercise of the police power of the state. See also *Kansas Pac. R. Co. v. Mower*, 16 Kan. 573.

3. Sullivan v. Oregon R., etc., Co., 19 Oregon 319.

4. No Obligation to Fence in Absence of Statute — Negligence in Operation Rendering Railroad Liable — United States. — *Cowan v. Union Pac. R. Co.*, 35 Fed. Rep. 43.

California. — *Richmond v. Sacramento Valley R. Co.*, 18 Cal. 351.

Connecticut. — *Campbell v. New York, etc., R. Co.*, 50 Conn. 128.

Georgia. — *Collier v. Georgia R. Co.*, 76 Ga. 611; *Rossignoll v. Northeastern R. Co.*, 75 Ga. 354; *Georgia, etc., R. Co. v. Neely*, 56 Ga. 540.

Illinois. — *Chicago, etc., R. Co. v. Patchin*, 16 Ill. 198; *Headen v. Rust*, 39 Ill. 186.

Indiana. — *Lafayette, etc., R. Co. v. Shriner*, 6 Ind. 141; *Indianapolis, etc., R. Co. v. Harter*, 38 Ind. 557, 10 Am. R. Rep. 247; *Williams v. New-Albany, etc., R. Co.*, 5 Ind. 111.

Iowa. — *Alger v. Mississippi, etc., R. Co.*, 10 Iowa 268.

Kansas. — *Union Pac. R. Co. v. Rollins*, 5 Kan. 167.

Kentucky. — *Louisville, etc., R. Co. v. Ballard*, 2 Met. (Ky.) 177; *Louisville, etc., R. Co. v. Milton*, 14 B. Mon. (Ky.) 61; *O'Bannon v. Louisville, etc., R. Co.*, 8 Bush (Ky.) 348.

Maine. — *Perkins v. Eastern R. Co.*, 29 Me. 307, 50 Am. Dec. 589.

Maryland. — *Baltimore, etc., R. Co. v. Lam-born*, 12 Md. 257; *Baltimore, etc., R. Co. v. Mulligan*, 45 Md. 486; *Western Maryland R. Co. v. Carter*, 59 Md. 306.

Massachusetts. — *Stearns v. Old Colony, etc., R. Corp.*, 1 Allen (Mass.) 493.

Michigan. — *Williams v. Michigan Cent. R. Co.*, 2 Mich. 259, 55 Am. Dec. 59.

Minnesota. — *Locke v. First Div. St. Paul, etc., R. Co.*, 15 Minn. 350.

Missouri. — *Robinson v. St. Louis, etc., R. Co.*, 21 Mo. App. 141; *Gorman v. Pacific R. Co.*, 26 Mo. 441, 72 Am. Dec. 220; *Davis v. Wabash R. Co.*, 46 Mo. App. 477.

New Hampshire. — *Mayberry v. Concord R. Co.*, 47 N. H. 391; *Cornwall v. Sullivan R. Co.*, 28 N. H. 161; *Towns v. Cheshire R. Co.*, 21 N. H. 363; *Dean v. Sullivan R. Co.*, 22 N. H. 316.

New Jersey. — *Vandegrift v. Rediker*, 22 N. J. L. 185, 51 Am. Dec. 262.

New York. — *Langlois v. Buffalo, etc., R. Co.*, 19 Barb. (N. Y.) 364; *Tonawanda R. Co. v. Munger*, 5 Den. (N. Y.) 255.

North Carolina. — *Jones v. Western North Carolina R. Co.*, 95 N. Car. 328.

Ohio. — *Cleveland, etc., R. Co. v. Elliott*, 4 Ohio St. 474; *Kerwhacker v. Cleveland, etc., R. Co.*, 3 Ohio St. 172.

Pennsylvania. — *New York, etc., R. Co. v. Skinner*, 19 Pa. St. 298, 57 Am. Dec. 654; *North Pennsylvania R. Co. v. Rehman*, 49 Pa. St. 101, 88 Am. Dec. 491.

Tennessee. — *Sinard v. Southern R. Co.*, 101 Tenn. 473.

Texas. — *Gulf, etc., R. Co. v. Ellidge*, (Tex. Civ. App. 1894) 28 S. W. Rep. 912.

Vermont. — *Hurd v. Rutland, etc., R. Co.*, 25 Vt. 116.

West Virginia. — *Blaine v. Chesapeake, etc., R. Co.*, 9 W. Va. 252; *Layne v. Ohio River R. Co.*, 35 W. Va. 438.

Wisconsin. — *Stucke v. Milwaukee, etc., R. Co.*, 9 Wis. 202.

Canada. — *Bennett v. Covert*, 24 U. C. Q. B. 38; *McMillan v. Manitoba, etc., R. Co.*, 4 Manitoba 220.

In Absence of Statute, Plaintiff Must Show Defendants' Negligence. — *Gulf, etc., R. Co. v. Ellidge*, (Tex. Civ. App. 1894) 28 S. W. Rep. 912.

actual negligence does not exist there can be no recovery.¹

INJURY, INJURE, ETC. (See also the titles DAMAGES, vol. 8, p. 537; DAMNUM ABSQUE INJURIA, vol. 8, p. 694; MALICIOUS MISCHIEF; TORTS; and see WRONG.)—An injury is a wrong for which the law provides a remedy.² To injure means to do wrong or harm to; to cause loss or detriment to; to impair soundness, as of health; to damage and lessen the value of; to make worse.³

Statute Construed Not to Require Maintenance of Fences in Absence of Order from Railroad Commissioners.—Campbell v. New York, etc., R. Co., 50 Conn. 128.

Contract Imposing Same Duty as Statute.—A contract by a railroad company to fence its track through certain land imposes on it the same duties and liabilities with respect to the killing of stock as would be imposed by a statute requiring it to fence. Gulf, etc., R. Co. v. Washington, 49 Fed. Rep. 347.

Where a railway company contracted with a landowner to fence its track, and by reason of its neglect in so doing the landowner's cattle get upon the track and are killed, the killing is negligence, irrespective of any negligence in the management and operation of the engines and trains. Gulf, etc., R. Co. v. Washington, 4 U. S. App. 121.

1. Railroad Not Liable when Not Guilty of Negligence.—Mobile, etc., R. Co. v. Williams, 53 Ala. 595; Macon, etc., R. Co. v. Vaughn, 48 Ga. 464; Chicago, etc., R. Co. v. Engle, 84 Ill. 397; Kuhn v. Chicago, etc., R. Co., 42 Iowa 420; Kaes v. Missouri Pac. R. Co., 6 Mo. App. 397; McPheeters v. Hannibal, etc., R. Co., 45 Mo. 22; Marietta, etc., R. Co. v. Stephenson, 24 Ohio St. 48; Coyle v. Baltimore, etc., R. Co., 11 W. Va. 94.

2. Injury.—"An *injury*, legally speaking, consists of a wrong done to a person, or, in other words, a violation of his right. * * * As an *injury* * * * necessarily imports damage, there can be no such thing as an *injury* without damage. An *injury* is a wrong, and for the redress of every wrong there is a remedy." Parker v. Griswold, 17 Conn. 302.

"We understand the word *injury* (or injured), as used in the constitution, to mean such a legal wrong as would be the subject of an action for damages at common law." Pennsylvania R. Co. v. Marchant, 119 Pa. St. 561, 21 W. N. C. (Pa.) 300. See also Pennsylvania Schuylkill Valley R. Co. v. Walsh, 124 Pa. St. 558.

Injury means in general any wrong or damage done to a man's person, rights, reputation, or goods. Jordan v. State, 142 Ind. 427, citing 11 AM. AND ENG. ENCYC. OF LAW (1st ed.) 1.

Deprivation of Legal Right.—In Brittle Silver Co. v. Rust, 10 Colo. App. 470, it was said: "The case cannot be included within the scope of the * * * word *injury*, which can only be taken to mean the deprivation of some legal right."

Injury means in general "any wrong or damage done to a man's person, rights, reputation, or goods." Northern R. Co. v. Carpentier, (Supm. Ct. Spec. T.) 13 How. Pr. (N. Y.) 222, 3 Abb. Pr. (N. Y.) 250, citing Webster's Dict.

Whether the Term "Injury" Includes Injury Resulting in Death.—A statute provided that

whoever intentionally and without malice pointed or aimed any firearm at or towards any person, and by the discharge of such firearm maimed or injured the person, should be fined, etc. In construing this statute the court said: "It is urged with force that the word *injures* is broad enough to, and does in fact, include the death of the person *injured*—that the loss of the life is the greatest *injury* a person can suffer. But we think this claim is not well founded. The definition of the verb 'to *injure*,' as given in the lexicons, is 'to do harm; to hurt; to damage; to hurt or wound the person.' And we think it is certainly the usage to attach to the word the meaning of hurting or wounding which does not result fatally. We speak of persons killed and *injured*, thus making a wide distinction between the two." Williamson v. State, 1 Ohio Cir. Dec. 492, 2 Ohio Cir. Ct. 292.

3. Injure.—Job v. Harlan, 13 Ohio St. 494, in which case it was held that an injury to sheep by dogs, by chasing and worrying them, was within the Ohio statute for the protection of sheep.

The term *injure* in a statute against inflicting any punishment or bodily injury upon another has been held to import a trespass. State v. Porter, 25 W. Va. 689.

Injure and Destroy Distinguished.—See Com. v. Sullivan, 107 Mass. 218.

Injuriously Affecting.—As to what *injuriously* affects property within statutes allowing compensation for property *injuriously* affected by the exercise of the right of eminent domain, see the title EMINENT DOMAIN, vol. 10, pp. 1103, 1109.

Unlawful Act Implied.—In Woodruff v. North Bloomfield Gravel Min. Co., 18 Fed. Rep. 781, it was said: "It [a statute] nowhere said that these acts were lawful, but it expressly calls them by the proper legal name, *injuries*, which *ex vi termini* imports that they are unlawful, or otherwise they would only be *damnum absque injuria*. An *injury* is a 'wrong or tort.'"

Injury and Damage.—In Smith v. Brown, L. R. 6 Q. B. 732, it was said: "We speak, indeed, of damages as compensation for *injury* done to the person; but the term 'damage' is not employed interchangeably with the term *injury*, with reference to mischief wrongfully occasioned to the person."

In North Vernon v. Voegler, 103 Ind. 318, it was said: "There is a material distinction between damages and *injury*. *Injury* is the wrongful act or tort which causes loss or harm to another. Damages are allowed as an indemnity to the person who suffers loss or harm from the *injury*. The word *injury* denotes the illegal act, the term 'damages' means the sum recoverable as amends for the wrong.

INJURY TO CHILDREN. — See the titles CROSSINGS, vol. 8, p. 335; CONTRIBUTORY NEGLIGENCE, vol. 7, p. 4457; INFANTS, *ante*, p. 255; PARENT AND CHILD; STREET RAILWAYS; STREETS AND SIDEWALKS; TURNTABLES.

The words are sometimes used as synonymous terms, but they are, in strictness, words of widely different meaning. There is more than a mere verbal difference in their meaning, for they describe essentially different things. The law has always recognized a difference between the things described, for it is often declared that no action will lie because the act is *damnum absque injuria*. Citing Broom's Legal Maxims 195; Weeks on Damnum Absque Injuria 7; Broom's Com. (4th ed.) 75, 621.

For the use of *injury* in the sense of damage, see *Bellows v. Allen*, 22 Vt. 113.

Same — Civil Damage Act. (See also the title CIVIL DAMAGE ACTS, vol. 6, p. 36.) — A civil damage act provided that any bond taken pursuant to it might be sued upon for the use of any person who might be *injured* by the selling or giving away of any intoxicating liquors. In construing this statute the court said: "We think the word *injured* here is synonymous with the word 'damaged,' and the true reading and meaning of the part of the section referred to is 'any person who may be *injured*' — in other words, may suffer damage." *Gran v. Houston*, 45 Neb. 823.

In *Smith v. Wilcox*, 47 Vt. 537, it was held that the word *injury* in a civil damage act was used in the sense of unlawful damage or hurt, and that anything done in self-defense would not be actionable under the statute.

Under the *Illinois* statute giving a remedy for *injuries* occasioned by the sale of intoxicating liquors, the family of the inebriate may be *injured* in their means of support although not deprived of the bare necessities of life; and "whatever lessens or impairs" the ability of the husband and father "to supply the suitable comforts which might reasonably be expected from one in his occupation and with his capacity for earning money may be regarded as lessening or impairing their means of support." *Herring v. Ervin*, 48 Ill. App. 369.

Applies Equally to Property or Persons. — The charter of a municipal corporation provided that no action for an *injury* caused by defective streets should be maintained unless notice was given to the corporation within thirty days after the *injury*. It was held that this included *injury* to persons as well as property. The court said: "As to the first of these objections, the phrase 'on account of any injuries received by means of any defect,' etc., includes as well injuries to property as to persons; and to hold the subsequent phrase 'and that the person so *injured*' (perfectly correct language to use in respect to one *injured* in his property) as qualifying the former phrase would be a strained construction." *Nichols v. Minneapolis*, 30 Minn. 545. See generally the title MUNICIPAL CORPORATIONS.

Injury to Cattle. — In *Allday v. Great Western R. Co.*, 5 B. & S. 903, 117 E. C. L. 903, it was held that an *injury* to cattle, within an English Carriers Act, was caused where a loss of condition resulted from their having been kept on the train for several hours without food or water, owing to their having been

carried beyond their destination. See also *Sheridan v. Midland Great Western R. Co.*, 24 L. R. Ir. 146.

Notice of Injury. — The words "person *injured*," used in a proviso to the *Vermont* statute requiring that notice be given to the selectmen in case of *injury* on the highway, refer to the person *injured* in the accident, and not to a person *injured* pecuniarily. *Eames v. Brattleboro*, 54 Vt. 471. See also the title HIGHWAYS, vol. 15, p. 483.

Intent to Injure. — In *Mogul Steamship Co. v. McGregor*, 23 Q. B. D. 612, Bowen, L. J., said: "We were invited by the plaintiffs' counsel to accept the position from which their argument started, that an action will lie if a man maliciously and wrongfully conducts himself so as to injure another in that other's trade. Obscurity resides in the language used to state this proposition. The terms 'maliciously,' 'wrongfully,' and *injure* are words all of which have accurate meanings, well known to the law, but which also have a popular and less precise signification, into which it is necessary to see that the argument does not imperceptibly slide. An intent to *injure* in strictness means more than an intent to harm. It connotes an attempt to do wrongful harm. 'Maliciously,' in like manner, means and implies an intention to do an act which is wrongful, to the detriment of another. The term 'wrongful' imports in its turn the infringement of some right." See also *Allen v. Flood*, (1898) A. C. 93.

In *State v. Hair*, 37 Minn. 351, it was held that in a prosecution for maiming under the *Minnesota* Code the *injury* must be wilfully inflicted with intent to *injure*, disfigure, or disable, and that the words "intent * * * to *injure*" refer to *injuries* of the same class specified in the statute or such as might reasonably be expected to be dangerous or to result in serious bodily harm. See also the title MAYHEM.

An intent to *injure* is a general guilty intent. *U. S. v. Taintor*, 11 Blatchf. (U. S.) 374; *U. S. v. Harper*, 33 Fed. Rep. 481; *People v. Carmichael*, 5 Mich. 10; *People v. Edwards*, 5 Mich. 22.

Injure Trade. — In *U. S. v. Debs*, 64 Fed. Rep. 748, it was said: "A distinction has been suggested between the phrase 'in restraint of trade' and the phrases 'to *injure* trade' and 'to restrain trade.' Though perceptible, the distinction does not seem to me so significant that the use of one expression rather than the other should vary the interpretation of this statute. Any contract, combination, or conspiracy, to be in restraint of trade, must involve the use of means of which the effect is to *injure* or to restrain trade. A contract, combination, or conspiracy in restraint of trade is therefore a contract, combination, or conspiracy to restrain or to *injure* trade." See the titles RESTRAINT OF TRADE; TRADE COMBINATIONS AND CORPORATE TRUSTS.

Popular Sense. — Four spars were hired for an indefinite period, to aid in raising a steam-

INJURY TO THE INHERITANCE.—See the titles EMINENT DOMAIN, vol. 10, p. 1194; REMAINDERS AND EXECUTORY INTERESTS; WIFE.

boat that was sunk. For the use of each the owner of the boat was to pay one dollar a day, and if they were lost or *injured* he was to pay at the rate of twenty-five dollars each for three of them, and ten for the fourth. It was held that the terms "lost or *injured*" were to be understood in a popular sense, and although the spars were not actually lost or *injured*, the owner of the boat might, if he retained them, upon paying eighty-five dollars, the price agreed, avoid the payment of hire for the use of spars. The court said: "The terms 'lost or *injured*' are not to be construed in their strictest sense, and as excluding every other cause which may have prevented their return, but they are to be understood as having been used to express the idea of a failure to return the spars, without reference to any particular cause therefor." Pope v. Murray, 6 Ala. 491.

Injure and Defraud Distinguished.—A statute provided that it should be an indictable offense for the cashier of a bank to embezzle, abstract, or wilfully misapply the moneys or funds of the bank with intent to *injure* or defraud the bank. In construing this provision the court said: "Nor can such effect be given these words without treating the word *injure* as synonymous with 'defraud,' and as referring to a misapplication for the benefit of the doer. But, if the signification of the word 'defraud' be limited to a malicious dealing with property for the personal advantage of the doer—and it is not always to be so limited—the word *injure* is not of such limited application, and was doubtless inserted to cover cases of misapplication causing injury to the association without benefit to the offender." U. S. v. Taintor, 11 Blatchf. (U. S.) 378. See also U. S. v. Harper, 33 Fed. Rep. 471. And see the title EMBEZZLEMENT, vol. 10, p. 1013.

Injurious and Wrongfully.—In State v. Vermont Cent. R. Co., 27 Vt. 103, it was held that the word "unlawfully" was not indispensable in an indictment against a railroad company for erecting a nuisance. The court said: "We do not think the word 'unlawfully' indispensable to the sufficiency of the second, third, and fourth counts. Any other words, as '*injurious* and *wrongfully*,' which are found in the bill, are equally available and sufficient."

Injuries to Persons. (See also PERSONAL INJURIES.)—A statute conferred upon justices of the peace jurisdiction in actions for *injuries* to persons where the damages claimed did not exceed a certain amount. It was held that the words "*injuries* to persons" included *injuries* to the relative rights of persons as well as *injuries* to their absolute rights. The court said: "Actions for seducing wives, daughters, or servants, or for enticing away or harboring apprentices or servants, are said to be for *injuries* to the relative rights of persons; and we are inclined to think a justice has jurisdiction to try such actions where the damages claimed do not exceed two hundred dollars." Wightman v. Devere, 33 Wis. 575, distinguishing Gibbs v. Larrabee, 23 Wis. 495; Wagner v. Lathers, 26 Wis. 336.

Same—Injury to Reputation.—In Johnson v. Bradstreet Co., 87 Ga. 81, it was held that *in-*

jury to reputation was *injury* to the person. The court said: "Under the head of 'security in person' Cooley includes the right to life, immunity from attacks and injuries, and to reputation. Cooley on Torts (2d ed.) 23, 24. See also Pollock on the Law of Torts 7. Bouvier classes among absolute injuries to the person batteries, injuries to health, slander, libel, and malicious prosecutions."

Same—Wife as Witness Against Husband. (See also the title WITNESSES.)—A statute provided that either the husband or the wife should be a competent witness against the other, where he or she should be "the party *injured* by the offense committed." In construing this statute the court said: "The word *injured* as employed must be construed in its plain, ordinary, and usual sense. Rev. Stat. 1894, § 240. It is not to be limited to personal or physical injuries, but in its plain, ordinary, and usual sense it signifies the privation of a legal right." Jordan v. State, 142 Ind. 422.

In an act providing that the party *injured* shall be a competent witness in criminal actions, "by *injured* party is meant the person who is the immediate and direct sufferer from the offense committed." People v. Howard, 17 Cal. 63.

Injurious to Health.—In Local Board of Health v. Malton Farmers' Manure, etc., Co., 4 Ex. D. 302, it was held that the case of an offensive trade causing effluvia was within the English Public Health Act, if the effluvia, though not *injurious* to persons in sound health, caused sick persons to become sicker. Kelly, C. B., said: "The effluvia is the gravamen of the grievance complained of, and that has caused sick persons to become worse. It is clear that this comes within the strict words of the Act as an *injury* to health." See generally the title NUISANCES.

Serious Bodily Injury.—See SERIOUS.

Public Officers. (See also the title PUBLIC OFFICERS.)—In Talcott v. Buffalo, 125 N. Y. 286, it was said: "The terms 'waste' and *injury*, used in this statute [giving a right of action to a taxpayer as against municipal officers], comprehended only illegal, wrongful, or dishonest official acts, and were not intended to subject the official action of boards, officers, or municipal bodies acting within the limits of their jurisdiction and discretion * * * to the supervision of the judicial tribunals." See also dissenting opinion of Gray, J., in Chittenden v. Wurster, 152 N. Y. 367.

Injury to Property.—An *injury* to property has been defined by the New York Code to be an actionable act whereby the estate of another is lessened, other than a personal *injury* or the breach of a contract. Whitney v. Hirsch, 39 Hun (N. Y.) 327; Maxson v. Delaware, etc., R. Co., 112 N. Y. 563; Stevens v. Cheney, 36 Hun (N. Y.) 3.

"The defendants did nothing to lessen the estate of the plaintiffs, which remains as before, and it was not affected, except as to value, a thing controlled entirely by the fluctuations of the market, which at times rises and falls. The word *injury* as used in the code is not so elastic as to yield to such a changeable

INLAND BILL. (See also the title **BILLS OF EXCHANGE AND PROMISSORY NOTES**, vol. 4, p. 78.) — An inland bill is a bill of exchange drawn upon a person residing in the same state or country as the drawer.¹

INLAND NAVIGATION — INLAND WATERS. (See also the titles **NAVIGABLE WATERS**; **NAVIGATION**.) — Inland waters are canals, lakes, streams, rivers, watercourses, inlets, bays, etc., and arms of the sea between projections of land.²

construction." *Roome v. Jennings*, 61 N. Y. Super. Ct. 361.

In *Campion Card, etc., Co. v. Searing*, 47 Hun (N. Y.) 237, it was held that fraudulent representations constituted an *injury* to property. See also *Wittner v. Von Minden*, 27 Hun (N. Y.) 234; *Weiller v. Schreiber*, (Supm. Ct. Spec. T.) 11 Abb. N. Cas. (N. Y.) 175.

Same — Costs. — By an English rule of court, costs were allowed on the "higher scale" in actions for special injunctions to restrain the commission or continuance of waste, nuisances, breach of covenants, *injury* to property, etc. It was held that an *injury* to property must be a substantial, physical *injury*, and did not include trespass on the land without *injury* to the soil, though of a permanent character and committed in the assertion of title. *Goodhand v. Ayscough*, 10 Q. B. D. 71. See also *Chapman v. Midland R. Co.*, 5 Q. B. D. 167.

Same — Extortion. (See also the title **EXTORTION**, vol. 12, p. 576.) — In *People v. Hughes*, (Supm. Ct. Gen. T.) 8 N. Y. Crim. 448, *affirmed* 137 N. Y. 29, it was held that an *injury* to business was an *injury* to property within the *New York* statute defining extortion as procuring property by means of fear induced by threats to injure property. See also *People v. Barondess*, (N. Y. 1892) 31 N. E. Rep. 240.

Injury to Real Property. — In *Cox v. St. Louis, etc., R. Co.*, 55 Ark. 454, it was held that a suit to restrain the defendant from removing earth from the plaintiff's land was an action for *injury* to real property. The court said: "The term *injury* is used in section 4994 [of Mansf. Dig. Ark.] in a technical sense and as meaning every wrong which in legal contemplation is an *injury* to real property. This embraces not only injuries committed directly and forcibly, for which an action of trespass was the appropriate remedy under the former practice, but such also as nuisances, the obstruction of light or air, diverting watercourses, and other similar wrongs for which the remedy at common law was an action on the case. Of the latter class was permissive waste, which, being a failure to repair, was a mere nonfeasance; and yet it was classed as an *injury* to real property, and the venue was local. 1 Chitty 144, 268. That an act which is only threatened may be an *injury* to real property is shown by the statutory provisions affording a remedy in many cases to prevent it."

Wilful Injury. — See **WILFUL**.

1. **Inland Bill.** — *Lonsdale v. Brown*, 4 Wash. (U. S.) 153; *U. S. Bank v. Daniel*, 12 Pet. (U. S.) 32; *Strawbridge v. Robinson*, 10 Ill. 472, 50 Am. Dec. 420.

"Sir William Blackstone, in his Commentaries, distinguishes foreign from *inland* bills by defining the former as bills drawn by a merchant residing abroad upon his corre-

spondent in England, or *vice versa*; and the latter as those drawn by one person on another when both drawer and drawee reside within the same kingdom. Chitty, p. 16, and the other writers on bills of exchange are to the same effect." *Buckner v. Finley*, 2 Pet. (U. S.) 590.

A bill of exchange drawn by one resident of a state upon another resident has been held to be an *inland* bill of exchange. *Kaskaskia Bridge Co. v. Shannon*, 6 Ill. 15.

2. *Cogswell v. Chubb*, 1 N. Y. App. Div. 94. See also *People v. Duxtater*, 75 Hun (N. Y.) 472.

Sounds. — Ordinarily, navigation upon a sound of limited area is *inland navigation*. *Woodhouse v. Cain*, 95 N. Car. 114. But Long Island Sound is not an *inland* water. *Providence, etc., Steamship Co. v. Hill Mfg. Co.*, 109 U. S. 578.

Twelve Miles Out to Sea. — A stipulation contained in a policy of marine insurance in the words, "warranted to navigate only the *inland* waters of the United States and Canada, and not below the Thousand Islands," was held to be broken where the vessel insured passed out of New York bay and sailed upon the open ocean for a distance of twelve miles from Sandy Hook lighthouse. *Cogswell v. Chubb*, 1 N. Y. App. Div. 93. See also the title **MARINE INSURANCE**.

Great Lakes. — In *American Transp. Co. v. Moore*, 5 Mich. 368, 24 How. (U. S.) 1, it was held that the navigation of the great American lakes and their connecting waters was not *inland navigation*, within the meaning of the Act of Congress of March 3, 1851, entitled "an act to limit the liability of shipowners and for other purposes."

River. — The *War Eagle* was a steamer of more than twenty tons burden, duly enrolled and licensed for the coasting trade, and plying on the Mississippi river between the ports of Dubuque, Iowa, and St. Paul, Minnesota, touching at intermediate points. While making one of her regular trips she was burned with her cargo. It was held that she was a vessel engaged in *inland navigation*, within the meaning of the act above referred to. *The War Eagle*, 6 Biss. (U. S.) 364. See also *Waiker v. Western Transp. Co.*, 3 Wall. (U. S.) 150.

Prize. — A United States statute provided that no property seized or taken upon any of the *inland* waters of the United States, by the naval forces thereof, should be regarded as maritime prize. In construing this statute, in *Porter v. U. S.*, 106 U. S. 612, the court said: "The term *inland* as here used was evidently intended to apply to all waters of the United States upon which a naval force could go, other than bays and harbors on the seacoast. In most instances property of the enemy on them

INLET. — See note 1.

INMATE. — See note 2.

INNOCENCE. — As to the presumption of innocence, see the title PRESUMPTIONS.

INNOCENT. — See note 3.

INNOCENT AGENT. — An innocent agent is one who does the forbidden thing, moved thereto by another person, yet incurs no legal guilt, because he is either not endowed with sufficient mental capacity or not acquainted with the necessary facts.⁴

INNOCENT CONVEYANCES. — A technical term used to signify those conveyances made by a tenant of his leasehold which do not occasion a forfeiture;

could be taken, if at all, by an armed force without the aid of vessels of war. These were seldom required on such waters, except when batteries or fortified places near them were to be attacked in conjunction with the army. As observed by the court in *The Cotton Plant* [10 Wall. (U. S.) 577], Congress probably anticipated, in view of the state of the war when the act was passed, that most of the captures on the rivers would be made by the army."

1. **Inlet.** — A statute provided that a corporation should have power to build bridges over navigable streams and *inlets*, and that every such bridge should contain a draw of sufficient width to admit the passage of vessels. In construing this statute the court said: "The word *inlet* seems to be used by the statute to denote the indentation in the shore at the mouth or outlet of a navigable stream falling into the Hudson river, and the word 'bay' to describe an indentation or curve where there is no such stream." *Tillotson v. Hudson River R. Co.*, 9 N. Y. 579.

2. **Inmate.** — By an English statute it was provided that "no *inmate*, or more families than one, shall dwell in any cottage, on pain that the owner of such cottage placing or suffering such *inmate*, etc., shall forfeit to the lord of the feef 10s. *per mensem*. * * * A man is accounted an *inmate* who, not having sufficient to live of himself by his land, art, or trade, dwells in part of another's house. As if common breakers of hedges, or other idle or suspicious persons, dwell in an house with another. Or if a poor laborer dwells with another, and both go by the same door into the high street. Or if a man, not of ability, take certain rooms in an house. But if a man demise parcel of the house where he dwells, and severs it from the other part, and makes separate doors to the high street, the lessee is not an *inmate*; for they are two houses. Or if a man take another *ad mensam*, or to sojourn with him, and he has certain rooms, he is not an *inmate*. Or if a man take his married daughter with her husband, according to agreement, and suffer them to have certain rooms in his house. Or if he suffer a gentleman to have certain rooms in his house who does not table with him, but goes to a victualler's for his sustenance. Kit. 45 *b.*" Com. Dig., tit. Justices of Peace, B 85.

By the English Public Health Act, 1848, § 69, if any street, not being a highway, be not *sewered*, leveled, paved, etc., to the satisfaction of the local board of health, such board may, by notice in writing to the respective

owners or occupiers of the premises fronting such parts as may require to be *sewered*, etc., require them to *sewer*, etc., the same within a time to be specified in such notice; and if such notice be not complied with, the local board may execute the works, and the expenses shall be paid by the owners in default. By section 150 it is provided that in all cases in which any notice to the owner or occupier of any premises is required, the notice shall be served either personally or by delivering it to some *inmate* of the owner's or occupier's "place of abode." It seems that a place of business is a "place of abode," and a clerk an *inmate*, within the meaning of the 150th section. *Mason v. Bibby*, 2 H. & C. 881.

3. **Innocent Woman.** — The term "*innocent woman*" employed by Code N. Car., § 1113, making it a misdemeanor to attempt to destroy the reputation of an *innocent woman* by false declarations in respect to her chastity, means a woman who at the time of the alleged slanderous charge and at the time of the trial thereof was chaste and virtuous. *State v. Grigg*, 104 N. Car. 882.

In *State v. Brown*, 100 N. Car. 525, it was said: "Of the instructions asked and refused as well as those given it is only necessary to refer to the cases of *State v. Davis*, 92 N. Car. 764, and *State v. Moody*, 98 N. Car. 671, in the first of which it is decided that an '*innocent woman*' is one who has never had unlawful sexual commerce with any man, and in the other, that incontinency has the same meaning. These cases cover the whole charge and sustain it fully."

In *State v. Hinson*, 103 N. Car. 374, it was held that a woman was *innocent* unless actual coition took place, even though discovered in the arms of the man and interrupted before consummation of the intercourse. And in that case it was held that in an indictment for slandering an *innocent woman*, under Code N. Car., § 1113, the defendant cannot show, on the plea of not guilty, a prevalent report of sexual intimacy between the prosecutrix and a certain man, the making of a charge of such intimacy being the defamatory matter specified in the indictment, to disprove its wanton and malicious utterance, though he might make such proof, after verdict of guilty, to the court, in extenuation, etc. See generally the title LIBEL AND SLANDER.

4. **Bouv. L. Dict.**; *Smith v. State*, 21 Tex. App. 107. See also the titles ACCESSORY, vol. 1, p. 257; ACCOMPLICES, vol. 1, p. 389; CONSPIRACY, vol. 6, p. 830; MASTER AND SERVANT.

these are conveyances by lease and release, bargain and sale, and a covenant to stand seized by a tenant for life.¹

INNOCENT PURCHASER. (See also the titles **BILLS OF EXCHANGE AND PROMISSORY NOTES**, vol. 4, p. 299; **FRAUDULENT SALES AND CONVEYANCES**, vol. 14, p. 283; **RECORDING ACTS**.)— See note 2.

1. Bouv. L. Dict.

2. Innocent Purchaser—Usury. (See also the title **USURY**.)—A statute provided for the protection of an *innocent purchaser* to whom the holder of a usurious note sold it. It was held that the term *innocent purchaser* as used in the statute meant a *bona fide* indorsee or bearer of the note within the law merchant. *Robinson v. Smith*, 62 Minn. 64. In that case the court said: "Assuming, then, that the notes were usurious, as between the original parties to them, we reach the vital question in this case, viz., did Morgan take the notes freed from the vice of usury? and, if so, did the plaintiff, by his purchase of them, acquire all of the rights and equities of Morgan in and to the notes, notwithstanding he himself was not a *bona fide* purchaser of the notes before maturity? The answer depends on the construction to be given to the proviso to G. S. 1894, § 2214, declaring all usurious notes, contracts, and securities void, which reads as follows: 'Nothing herein shall be construed to prevent the purchase of negotiable mercantile paper, usurious or otherwise, for a valuable consideration, by an innocent purchaser, free from all equities, at any price before the maturity of the same, when there has been no intent to evade the provisions of this act, or where said purchase has not been a part of the original usurious transaction. In any case, however, where the original holder of an usurious note sells the same to an *innocent purchaser*, the maker of said note, or his representatives, shall have the right to recover back from the said original holder the amount of principal and interest paid by him on said note.' Manifestly, this proviso was enacted in view of the fact that negotiable paper enters into the channels of commerce, and constitutes a large addition to the medium of exchange in the business world, and that its free circulation as such medium ought not to be hampered. The statute, therefore, makes no attempt to repeal the law merchant, as to usurious negotiable paper, but expressly provides that after the paper has passed into the hands of an *innocent*

purchaser for value, before maturity, it is freed from the vice of usury. The maker has no longer any defense, as against the purchaser; but the law, in such cases, gives him a right to recover from the original holder, who transferred the paper, the amount of the usurious paper he is required to pay. An *innocent purchaser*, as the term is used in this statute, means a *bona fide* indorsee or bearer, within the law merchant. *Fredin v. Richards*, 61 Minn. 490; *Rochester First Nat. Bank v. Bentley*, 27 Minn. 87. This last case holds that the proviso we are considering intends that the defense of usury may be interposed in an action on negotiable paper only where any other defense, if it exist, might be interposed. Now, it is clear that the defendants in this action could not interpose any other defense against these notes in the hands of the plaintiff. Therefore, they cannot interpose the defense of usury. This conclusion follows from the rule of the law merchant, that one who acquires negotiable paper from a *bona fide* indorsee or bearer who purchased it for value, before maturity, obtains the title and rights of such indorsee or bearer. Therefore, he will not be affected by the fact that he purchased after maturity of the paper, and with notice of fraud or other vice in the origin of the paper. It would be inconsistent that the law should recognize a perfect title to the paper in an *innocent purchaser*, yet limit his right to dispose of it. If he cannot transfer the paper, with all the privileges and immunities attaching to it in his hands, to any one he pleases, his title is imperfect; he is deprived of a free market for it. The statute gives the right to an *innocent purchaser* to acquire negotiable paper, usurious or otherwise, free from all equities; and by his purchase he obtains this immunity, which becomes his property, and he may transfer it to whom he pleases. *Bedell v. Herring*, 77 Cal. 572, and 11 Am. St. Rep. 322, note; 1 Daniel Neg. Inst., § 803. The question must be answered in the affirmative. The plaintiff, by his purchase from Morgan, acquired the notes free from the defense of usury."

INNS AND INNKEEPERS.

BY CHARLES PORTERFIELD,

I. WHO ARE INNKEEPERS, 507.

1. *Definitions and Explanation of Terms*, 507.
2. *Essential Characteristics*, 508.
 - a. *Accommodations for Guests*, 508.
 - b. *Accommodations for Horses*, 509.
 - c. *Must Be Regular Business*, 509.
 - d. *Necessity of License*, 509.
 - e. *Necessity of Sign*, 510.
 - f. *Sale of Intoxicating Liquors*, 510.
3. *Distinctions*, 510.
 - a. *Keepers of Boarding Houses and Lodging Houses*, 510.
 - b. *Keepers of Hotels at Summer Resorts or Watering Places*, 511.
 - c. *Keepers of Restaurants and Cafés*, 512.
 - d. *Sleeping Car and Steamboat Companies*, 512.
4. *Evidence*, 513.
5. *Who May Keep an Inn*, 513.

II. STATUTORY REGULATION, 514.

1. *In General*, 514.
2. *License*, 514.
3. *Fire Escapes*, 515.
4. *Provisions for Lodging Guests*, 515.
5. *Official Inspection*, 516.

III. WHO ARE GUESTS, 516.

1. *Definition*, 516.
2. *Who May Become a Guest*, 516.
3. *What Constitutes the Relation*, 517.
 - a. *In General*, 517.
 - b. *Necessity of Personal Presence*, 518.
 - (1) *Property Taken to Inn by Owner's Servant or Member of Family*, 518.
 - (2) *Property Taken to Inn by Bailee of Owner*, 518.
 - (3) *Inanimate Chattels Left at Inn by Owner*, 518.
 - (4) *Leaving Horses at Inn*, 518.
 - c. *Nature of Accommodations Furnished*, 519.
 - d. *Duration of Relation*, 520.
 - (1) *Commencement*, 520.
 - (2) *Termination*, 521.
 - (a) *By Guest*, 521.
 - aa. *Departure from Inn*, 521.
 - bb. *Abandonment of Transient Character*, 522.
 - (b) *By Innkeeper*, 522.
 - e. *Distinction between Guests and Boarders*, 522.
 - (1) *Definition of Boarder*, 522.
 - (2) *Permanent or Transient Character of Stay*, 522.
 - (3) *Contract Creating Relation*, 523.

IV. DUTIES, RIGHTS, AND LIABILITIES, 524.

1. *Receiving and Entertaining Guests*, 524.
 - a. *Extent of Duty*, 524.
 - b. *Grounds for Refusing Entertainment*, 524.

INNS AND INNKEEPERS.

- c. Liabilities for Improper Refusal, 525.*
 - (1) *Action by Party Injured, 525.*
 - (2) *Indictment, 526.*
 - (3) *Compelling Performance of Duty, 526.*
 - 2. Excluding or Ejecting Persons Not Coming as Guests, 526.*
 - 3. Liability in Respect to Effects of Guests, 527.*
 - a. Rule Stated, 527.*
 - b. Reason of Rule, 527.*
 - c. Exceptions to Rule, 528.*
 - (1) *Act of God or Public Enemy, 528.*
 - (2) *Operation of Vis Major, 528.*
 - (3) *Negligence of Guest, 528.*
 - (a) *Statement of Rule, 528.*
 - (b) *What Constitutes Negligence, 528.*
 - (c) *Degree of Negligence, 530.*
 - (4) *Acts of Servants or Companions of Guests, 530.*
 - (5) *Losses Resulting from Inherent Causes, 530.*
 - d. Requisites of Liability, 530.*
 - (1) *Existence of Relation of Innkeeper and Guest, 530.*
 - (2) *Custody of Innkeeper, 533.*
 - (3) *Default of Innkeeper, 535.*
 - e. Nature and Extent of Liability, 535.*
 - (1) *Rule of Liability as Insurer, 535.*
 - (2) *Rule of Prima Facie Liability, 536.*
 - (3) *Conflict of Rules Considered, 537.*
 - f. To What Property Liability Attaches, 538.*
 - g. Limiting Liability, 540.*
 - (1) *By Contract, 540.*
 - (2) *By Statute, 541.*
 - (a) *In General, 541.*
 - (b) *Mode of Effecting Limitation, 541.*
 - (c) *Extent of Limitation, 542.*
 - aa. *In General, 542.*
 - bb. *To Whom Statutes Apply, 543.*
 - cc. *Property Contemplated by Statutes, 543.*
 - h. Form of Action, 544.*
 - i. Measure of Damages, 544.*
 - j. Evidence, 545.*
- 4. Liability for Personal Injuries to Guests, 545.*
 - a. In General, 545.*
 - b. Assault and Battery, 546.*
 - (1) *By Innkeeper, 546.*
 - (2) *By Servant of Innkeeper, 546.*
 - (3) *By Other Guests and Strangers, 546.*
 - c. Defective or Unsanitary Condition of Inn, 547.*
 - d. Unwholesome Food, 547.*
 - e. Injuries Caused by Fire, 547.*
- 5. Securing and Enforcing Right to Compensation, 548.*
 - a. Lien on Goods of Guests, 548.*
 - (1) *The Right in General, 548.*
 - (a) *Innkeepers Proper, 548.*
 - (b) *Boarding-house and Lodging-house Keepers, 549.*
 - (2) *To What Lien Attaches, 550.*
 - (a) *Property Belonging to Guests, 550.*
 - (b) *Property of Third Persons in Possession of Guests, 550.*
 - (c) *Person of Guest, 552.*
 - (3) *To What Charges Lien Extends, 552.*
 - (4) *Loss or Waiver of Lien, 552.*
 - (5) *Care of Property Held under Lien, 553.*
 - (6) *Enforcement of Lien, 553.*

- b. Action for Price of Entertainment, 554.*
 6. *Keeping Disorderly House, 555.*
 7. *Criminal Liability of Guests, 555.*

CROSS-REFERENCES.

For matters of *PROCEDURE*, see the *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*, title *INNS AND INNKEEPERS*, vol. 10, p. 1130.

For other matters of *SUBSTANTIVE LAW and EVIDENCE* related to this subject, see the following titles in this work: *AGISTMENT*, vol. 2, p. 3; *ANIMALS*, vol. 2, p. 341; *BAGGAGE*, vol. 3, p. 528; *BAILMENTS*, vol. 3, p. 732; *FIRE ESCAPES*, vol. 13, p. 82; *IMPRISONMENT FOR DEBT AND IN CIVIL ACTIONS*, p. 12, *ante*; *INTOXICATING LIQUORS*; *LIENS*; *LIVERY STABLE KEEPERS*; *NUISANCES*.

I. WHO ARE INNKEEPERS — 1. Definitions and Explanation of Terms. — An Inn is a house which is held out to the public as a place where all transient persons who come will be received and entertained as guests for compensation.¹

An Innkeeper is defined by some authorities to be a person who makes it his business to entertain travelers and passengers, and provide lodging and necessities for them and their horses and attendants.² But perhaps it is more accurate to say that an innkeeper is one who holds out that he will receive all travelers and sojourners who are willing to pay a price adequate to the sort of accommodation provided, and who come in a situation in which they are fit to be received.³ The chief difference between these two definitions lies in

1. **Inn Defined.** — *Fay v. Pacific Imp. Co.*, 93 Cal. 253, 27 Am. St. Rep. 198; *Pinkerton v. Woodward*, 33 Cal. 557, 91 Am. Dec. 657; *Bunn v. Johnson*, 77 Mo. App. 596; *Meacham v. Galloway*, 102 Tenn. 415, *citing* 11 AM. AND ENG. ENCYC. OF LAW (1st ed.) 7.

"A public house of entertainment for all who choose to visit it, is the true definition of an inn." *Walling v. Potter*, 35 Conn. 183; *Wintermute v. Clark*, 5 Sandf. (N. Y.) 242.

Best, J., in *Thompson v. Lacy*, 3 B. & Ald. 283, 5 E. C. L. 285, defines an inn as "a house, the owner of which holds out that he will receive all travelers and sojourners who are willing to pay a price adequate to the sort of accommodation provided, and who come in a situation in which they are fit to be received." And Bayley, J., in the same case, defines it as "a house where the traveler is furnished with everything which he has occasion for whilst upon his way."

See also Civil Rights Bill, 1 Hughes (U. S.) 541; *Dickerson v. Rogers*, 4 Humph. (Tenn.) 179, 40 Am. Dec. 642.

For other definitions see *Krohn v. Sweeney*, 2 Daly (N. Y.) 200; *Bernstein v. Sweeney*, 33 N. Y. Super. Ct. 271; *People v. Jones*, 54 Barb. (N. Y.) 311; *Taylor v. Monnot*, 4 Duer (N. Y.) 116; *Dunn v. Beau*, 11 Quebec Super. Ct. 538.

2. **Innkeeper Defined.** — The definition given in the text is supported by the following authorities: Civil Rights Bill, 1 Hughes (U. S.) 541; *Kisten v. Hildebrand*, 9 B. Mon. (Ky.) 73, 48 Am. Dec. 416; *St. Louis v. Siegrist*, 46 Mo. 593; *Story on Bailments*, § 475; *Bac. Abr.*, tit. Inns and Innkeepers (B).

An Innkeeper is distinguished from other Trad-
 ers in that he cannot, as such, be a bankrupt, for, though he buys provisions to be spent in his house, yet he does not properly sell them, but serves them at such rates as he thinks

reasonable; and the attendance of his servants, the furniture of his house, etc., are to be considered. The contracts with innkeepers are not for any commodities *in specie*, but they are contracts for house room, trouble, attendance, lodging, and necessities, and therefore cannot come within the design of the words of the statutes of bankruptcy, since there is no trade carried on of buying and bartering commodities. *Newton v. Trigg*, 3 Mod. 327, Comb. 181, Carth. 149; *Harman v. Clarkson*, 22 U. C. C. Pl. 291.

Compare *Meggott v. Mills*, 12 Mod. 159, 1 Ld. Raym. 286; *Buscall v. Hogg*, 3 Wils. C. Pl. 146; *Patman v. Vaughan*, 1 T. R. 572. And see the title *INSOLVENCY AND BANKRUPTCY*, *post*.

3. **Proffered Definition.** — *Thompson v. Lacy*, 3 B. & Ald. 283, 5 E. C. L. 285.

Other Definitions. — *Wintermute v. Clark*, 5 Sandf. (N. Y.) 242; *Taylor v. Monnot*, 4 Duer (N. Y.) 116, 1 Abb. Pr. (N. Y.) 325.

Keeping a house openly for the entertainment and accommodation of travelers and others, for a reward, is keeping an inn, whether licensed or not, and whether or not liquors or wines are sold there. *State v. Stone*, 6 Vt. 295.

Estoppel to Deny Character. — Where a person, by the means usually employed in the business of innkeeping, holds himself out to the world as an innkeeper, and in that capacity is accustomed to receive travelers as his guests, and solicits a continuance of their patronage, and a traveler relying on such representations goes to the house to receive such entertainment as he has occasion for, the relation of innkeeper and guest is created, and the innkeeper cannot be heard to say that his professions were false, and that he was not in fact an innkeeper. *Pinkerton v. Woodward*, 33 Cal. 597, 91 Am. Dec. 657.

the omission from the one last given of the element concerning the accommodation of horses. If it was ever necessary to constitute an innkeeper that he should have accommodations for the horses of his guests, it is certainly not the case under the changed conditions of travel in modern times.¹

Explanation of Terms. — *The Words "Inn" and "Innkeeper"* have a perfectly definite meaning in law, as has already been seen.²

"*Tavern*," according to the *English* nomenclature, signifies a place where food and drink, without lodgings, may be obtained, and therefore it does not include the idea of an inn.³ In the *United States*, however, the distinction found in England is not generally observed, but the words "tavern" and "inn" are ordinarily used synonymously.⁴

"*Hotel*" is a comparatively modern word, signifying the same as the word "inn," which in recent times has fallen into disuse.⁵

2. Essential Characteristics — *a. ACCOMMODATIONS FOR GUESTS.* — To constitute an inn, there must be some provision for the essential needs of a traveler on his journey, viz., lodging, as well as food. These two elements of an inn may doubtless be present in very disproportionate degrees, as the needs of the situation may require; but both must in some degree be present to constitute an inn.⁶

Duty to Receive All Comers. — The business of an innkeeper is viewed by the law as a public employment,⁷ and accordingly, one of the distinguishing characteristics of that business is the obligation to receive and entertain, as guests, all who choose to visit the house.⁸ In this lies the distinction between an inn-

1. Accommodations for Horses. — See *infra*, this section, *Essential Characteristics*.

2. See *supra*, this section, *Definitions and Explanation of Terms*.

3. Tavern — Meaning of Term in England. — Reg. v. Kymmer, 2 Q. B. D. 136; Smith v. Scott, 2 Moo. & S. 35; Schouler on Bailments and Carriers, (2d ed.), § 277.

"A tavern is a place where wine is sold and drinkers are entertained." Johnson's Dict., quoted in State v. Chamblyss, Cheves L. (S. Car.) 220, 34 Am. Dec. 593.

4. "Tavern" and "Inn" Considered Synonymous in United States. — Foster v. State, 84 Ala. 451; Bonner v. Wilborn, 7 Ga. 296; Com. v. Shortridge, 3 J. J. Marsh. (Ky.) 640; St. Louis v. Siegrist, 46 Mo. 593; Overseers of Poor v. Warner, 3 Hill (N. Y.) 150; People v. Jones, 54 Barb. (N. Y.) 311; State v. Chamblyss, Cheves L. (S. Car.) 220, 34 Am. Dec. 593.

The Term "Tavern Keeper" in Kentucky has a technical meaning and special application, and the peculiar privilege of retaining the goods of the guests until their charges for lodging, etc., are paid is confined to the keeper of a tavern or inn. Southwood v. Myers, 3 Bush (N. Y.) 682.

The Terms "Inn, Tavern, or Hotel," employed in an act respecting the granting of licenses to sell intoxicating liquors, are considered to be "used synonymously to designate what is ordinarily and popularly known as an inn or tavern, or place for the entertainment of travelers, and where all their wants can be supplied." People v. Jones, 54 Barb. (N. Y.) 311.

The Century Dictionary defines a tavern as "a public house where wines and other liquors are sold, and where food is provided for travelers and other guests; a public house where both food and drink are supplied; an inn." See also Webster's Dictionary, Worcester's Dictionary, and the various law dictionaries.

5. "Hotel" and "Inn" Synonymous. — Fay v. Pacific Imp. Co., 93 Cal. 253, 27 Am. St. Rep. 198; St. Louis v. Siegrist, 46 Mo. 593; Taylor v. Monnot, 4 Duer (N. Y.) 116; People v. Jones, 54 Barb. (N. Y.) 311.

Origin and History of Term "Hotel." — In Cromwell v. Stephens, 2 Daly (N. Y.) 15, it is said that the word "hotel" is of French origin, being derived from *hostel*, which in turn came from the Latin *hostis*, and was introduced into England about the year 1760, and came into use in the United States about 1797. In this case Judge Daly, in a learned and scholarly opinion, traces the history and etymology of the word from the earliest times to its introduction and use in English and American law.

6. Accommodations for Guests — Provision Must Be Made for Lodgings. — Lewis v. Hitchcock, 10 Fed. Rep. 4.

The proposition stated in the text is also sustained by the definitions of the words "inn" and "innkeeper," given above.

A Hotel Conducted on the European Plan, that is, where the charge per day includes only lodging and service, and the guests take their meals *à la carte*, at the attached restaurant, or wherever they please, and pay for them separately, is an inn within the legal meaning of the word. Bullock v. Adair, 63 Ill. App. 30; Krohn v. Sweeney, 2 Daly (N. Y.) 200; Bernstein v. Sweeny, 33 N. Y. Super. Ct. 271.

7. Business of Innkeeper Considered a Public Employment. — Hall v. State, 4 Harr. (Del.) 132. See also *infra*, this title, *Statutory Regulation*.

8. Innkeeper Bound to Receive All Persons Seeking Accommodations. — Parker v. Flint, 12 Mod. 254; Beall v. Beck, 3 Cranch (C. C.) 666; Fay v. Pacific Imp. Co., 93 Cal. 253, 27 Am. St. Rep. 198; Pinkerton v. Woodward, 33 Cal. 557, 91 Am. Dec. 657; People v. Jones, 54 Barb. (N. Y.) 311.

keeper and the keeper of a boarding house.¹

b. ACCOMMODATIONS FOR HORSES.—Whatever may have been the rule in early times, it is now well settled that a man may be an innkeeper, and liable as such, though he has no provision for the accommodation of horses;² but if he assumes to furnish stabling, it must be safe, and he is liable for the loss of or injury to the horses of his guests to the same extent that he is liable for other effects brought to the inn by guests.³

c. MUST BE REGULAR BUSINESS.—One of the essential characteristics of keeping an inn is that it shall be the regular business of the person so engaged, and it is not sufficient that he sometimes furnishes travelers with the accommodations of an inn;⁴ but it is not necessary that innkeeping should be his exclusive occupation,⁵ nor does the fact that he is engaged in another kind of business, which he conducts in connection with his inn for the convenience or pleasure of his guests, impose on him the liabilities of an innkeeper with reference to such other business.⁶

d. NECESSITY OF LICENSE.—The right to keep an inn is not a franchise, and therefore, in the absence of any statute on the subject, any person may keep such a house without obtaining a license to do so;⁷ but he cannot

1. Distinction between Innkeeper and Keeper of Boarding House.—See *infra*, this section, *Distinctions*.

2. Accommodations for Horses Not Necessary.—*Thompson v. Lacy*, 3 B. & Ald. 283, 5 E. C. L. 285; *Kisten v. Hildebrand*, 9 B. Mon. (Ky.) 74, 48 Am. Dec. 416; *Com. v. Wetherbee*, 101 Mass. 214.

3. Stabling When Furnished Must Be Safe.—*Dickerson v. Rogers*, 4 Humph. (Tenn.) 179, 40 Am. Dec. 642. See also *infra*, this title, *Liability in Respect to Effects of Guests*.

4. Innkeeper Must Be Regularly Engaged in Business of Keeping an Inn.—*Kisten v. Hildebrand*, 9 B. Mon. (Ky.) 74, 48 Am. Dec. 416; *Lyon v. Smith*, 1 Morr. (Iowa) 184; *State v. Mathews*, 2 Dev. & B. L. (19 N. Car.) 424.

Thus, Farmers Who Occasionally Entertain Travelers are not liable as innkeepers; but where a man had a house on the highroad much visited by travelers, who were uniformly entertained and charged, and these facts were notorious and relied on by travelers, while on the other hand he often declared that he did not keep an inn, refused to take boarders, and often entertained his friends and countrymen free of charge, it was held that, though he lived in a sparsely settled country, the jury, on this evidence, might find him an innkeeper. *Howth v. Franklin*, 20 Tex. 798, 73 Am. Dec. 218.

And the Occasional Entertainment of Travelers by a Boarding-house Keeper does not constitute him an innkeeper. *Kisten v. Hildebrand*, 9 B. Mon. (Ky.) 75, 48 Am. Dec. 416.

Proprietary Interest Required.—The salaried manager of a hotel belonging to a company is not an innkeeper so as to be by law responsible for the goods and property of the guests, although the usual license under 1 Geo. IV., c. 61, has been granted to him personally. *Dixon v. Birch*, 42 L. J. Exch. 135, L. R. 8 Exch. 135, 28 L. T. N. S. 360, 21 W. R. 443.

5. Exclusive Occupation as Innkeeper Not Required.—A man may be an innkeeper though he keeps an inn imperfectly, or combines that employment with others. If he is prepared and holds himself out to the public as ready to entertain travelers, strangers, and transient

guests, with their teams and carriages, after the manner usual with innkeepers, he is an innkeeper, though he may sometimes make special bargains with his customers, may not keep his house open in the night, and may not keep the stable at which he puts up the horses of those who stop with him at his house. *Com. v. Wetherbee*, 101 Mass. 214.

6. Business Conducted in Connection with Inn.—*Minor v. Staples*, 71 Me. 316, 36 Am. Dec. 318.

7. Right to Keep an Inn Not a Franchise.—*Overseers of Poor v. Warner*, 3 Hill (N. Y.) 150.

License Not Necessary unless Required by Statute.—*Foster v. State*, 84 Ala. 451; *Lyon v. Smith*, 1 Morr. (Iowa) 184; *Norcross v. Norcross*, 53 Me. 163; *Overseers of Poor v. Warner*, 3 Hill (N. Y.) 150; *People v. Murphy*, (Supm. Ct. Gen. T.) 5 Park. Crim. (N. Y.) 130; *Dickerson v. Rogers*, 4 Humph. (Tenn.) 179, 40 Am. Dec. 642.

The possession of a license does not make a person an innholder, nor the want of it prevent him from being one, at common law. *Norcross v. Norcross*, 53 Me. 163.

Any person has a right at common law to keep an inn, and to put up a sign indicating his business; he only requires a license to authorize the sale of liquors, and if his sign does not indicate that he keeps a licensed tavern, he is not thereby subjected to the penalty therefor. *Overseers of Poor v. Warner*, 3 Hill (N. Y.) 150.

License Required by Statute.—In some jurisdictions no person can keep an inn or house of entertainment unless he is duly licensed by the proper authorities. *Bostick v. State*, 47 Ark. 126; *Braswell v. Com.*, 5 Bush (Ky.) 545; *Randall v. Tuell*, 89 Me. 443; *State v. Wynne*, 1 Hawks (8 N. Car.) 451; *State v. Stone*, 6 Vt. 295.

An early statute in *Tennessee* required a license to conduct an inn, but this was repealed by the Acts of 1837-38. *Dickerson v. Rogers*, 4 Humph. (Tenn.) 179, 40 Am. Dec. 642.

In *North Carolina* a license was required by an Act passed in 1798. *State v. Wynne*, 1 Hawks (8 N. Car.) 451.

furnish his guests with intoxicating liquors as a part of their entertainment, without first obtaining a liquor license in compliance with the excise laws.¹ Even where the law requires an innkeeper to obtain a license, his failure to do so will not protect him from the responsibilities of the occupation, if in fact he exercises it, though he would probably be denied the corresponding rights and privileges.²

e. **NECESSITY OF SIGN.** — In order to constitute a person an innkeeper, it is not necessary that he should exhibit a sign indicating his occupation as such.³ It is sufficient if he, by words, acts, or otherwise, holds himself out to the public as a common innkeeper.⁴

f. **SALE OF INTOXICATING LIQUORS.** — The retailing of intoxicating liquors in a building will not constitute it an inn if it does not otherwise possess the requisite characteristics,⁵ though a bar is an almost invariable incident to the business;⁶ nor is it necessary to constitute an inn that liquors should be supplied to the guests, though this is usually done.⁷ Neither will serving a free lunch at the bar, or the occasional bringing of victuals from a neighboring restaurant, transform a drinking saloon into a hotel.⁸

3. Distinctions — a. KEEPERS OF BOARDING HOUSES AND LODGING HOUSES. — Though the keeper of a boarding house may furnish both food

See also the titles **LICENSE; OCCUPATION, BUSINESS, AND PRIVILEGE TAXES;** and the various local codes and statutes in the *United States*.

1. License Necessary if Intoxicating Liquors Are Sold. — *Braswell v. Com.*, 5 Bush (Ky.) 545; *Mason v. Lancaster*, 4 Bush (Ky.) 406; *Com. v. Shortridge*, 3 J. J. Marsh. (Ky.) 638.

The privilege of selling spirituous liquors is not implied or embraced in a license to keep a tavern. *Hoglan v. Com.*, 3 Bush (Ky.) 147; *Com. v. Jordan*, 18 Pick. (Mass.) 228.

The *New York* statute of 1857 absolutely prohibits the granting of a license to any person to sell strong and spirituous liquors to be drunk on his premises, "unless such person proposes to keep an inn, tavern, or hotel, and unless the commissioners are satisfied that the applicant is of good moral character; that he has sufficient ability to keep an inn, tavern, or hotel, and the necessary accommodations to entertain travelers at the place where such applicant resides or proposes to keep the same."

* * * The terms 'inn, tavern, or hotel,' mentioned in the statute, are used synonymously, to designate what is ordinarily and popularly known as an inn or tavern, or place for the entertainment of travelers, and where all their wants can be supplied. The words 'inn or tavern' were so used in the prior corresponding enactments." *People v. Jones*, 54 Barb. (N. Y.) 311; *Kelly v. Excise Com'rs*, (C. Pl. Spec. T.) 54 How. Pr. (N. Y.) 327.

Formerly a tavern license in *Kentucky* included the right to sell intoxicating liquors. *Louisville v. Kean*, 18 B. Mon. (Ky.) 14; *Com. v. Kamp*, 14 B. Mon. (Ky.) 309. And the rule was the same in *South Carolina*. *State v. Chambliss*, Cheves L. (S. Car.) 220, 34 Am. Dec. 593.

2. Failure to Obtain License When Required by Law — Liabilities Not Affected. — See *State v. Wynne*, 1 Hawks (8 N. Car.) 451; *Dickerson v. Rogers*, 4 Humph. (Tenn.) 179, 40 Am. Dec. 642.

Remedies Not Available without License. — If a tavern keeper fails to take out a license as re-

quired by law he cannot sue for damage done him as a tavern keeper. *Bonner v. Welborn*, 7 Ga. 296. See also *Randall v. Tuell*, 89 Me. 443.

3. Sign Not Necessary. — Civil Rights Bill, 1 Hughes (U. S.) 541; *Lyon v. Smith*, 1 Morr. (Iowa) 184; *Kisten v. Hildebrand*, 9 B. Mon. (Ky.) 74, 48 Am. Dec. 416; *Dickerson v. Rogers*, 4 Humph. (Tenn.) 179, 40 Am. Dec. 642.

4. Holding Out as Innkeeper Is Sufficient. — *Pinkerton v. Woodward*, 33 Cal. 557, 91 Am. Dec. 657; *Kisten v. Hildebrand*, 9 B. Mon. (Ky.) 74, 48 Am. Dec. 416; *Dickerson v. Rogers*, 4 Humph. (Tenn.) 179, 40 Am. Dec. 642; *Howth v. Franklin*, 20 Tex. 798, 73 Am. Dec. 218.

5. Retailing Intoxicating Liquors Does Not Constitute a Place an Inn. — *Rafferty v. New Brunswick F. Ins. Co.*, 18 N. J. L. 480, 38 Am. Dec. 525.

A Refreshment Bar Attached to a Hotel, but entered from the street by a separate door, is not an inn. *Reg. v. Rymer*, 2 Q. B. D. 136, 46 L. J. M. C. 108, 13 Cox C. C. 378, 35 L. T. N. S. 774, 25 W. R. 415.

6. As to the right to sell intoxicating liquors, see *supra*, this section, *Necessity of License*.

Bar-room in Separate Building. — A tavern keeper, duly licensed to sell intoxicating liquors, may have his bar-room in an apartment which is not connected by any doorway with his main building, but separated from it, and may there retail spirituous liquors by himself or partner, without a violation of law, provided this separate bar-room constitutes, in good faith, a part of the tavern, and the license is not used as a fraudulent shield for a drinking room such as is commonly called a grocery. *Gray v. Com.*, 9 Dana (Ky.) 300, 25 Am. Dec. 136.

7. Sale of Liquors Not Essential Characteristic of Inn. — *Pinkerton v. Woodward*, 33 Cal. 557, 91 Am. Dec. 657; *St. Louis v. Siegrist*, 46 Mo. 593.

8. Free Lunch in Liquor Saloon. — *Kelly v. Excise Com'rs*, (C. Pl. Spec. T.) 54 How. Pr. (N. Y.) 332.

and lodgings for his boarders, he is not an innkeeper,¹ nor is he fixed with that character by the fact that he occasionally entertains travelers.² The two classes of persons are clearly distinguishable.³ There is nothing inconsistent or unusual, however, in a house of public entertainment having a double character, being simultaneously a boarding house and an inn. With respect to those who occupy rooms and are entertained on a special contract, it may be a boarding house; and in respect to transient persons, who without a stipulated contract remain from day to day, it is an inn.⁴ Neither does the fact that a house is not immediately on a highway, and that the grounds on which it stands are inclosed and the gates closed at night, render it any less an inn, or convert it into a boarding house.⁵

b. KEEPERS OF HOTELS AT SUMMER RESORTS OR WATERING PLACES.—The keeper of a hotel at a summer resort or watering place, for the board, lodging, and entertainment of the visitors, is not an innkeeper, because there is wanting the essential characteristic that innkeepers entertain from day to day on an implied contract, while the keeper of a hotel of the sort mentioned above receives his guests under an express contract for a certain time and at a certain rate.⁶

1. Keeper of Boarding House Not an Innkeeper.—*Dansy v. Richardson*, 3 El. & Bl. 144, 77 E. C. L. 144; *Blum v. Southern Pullman Palace Car Co.*, 1 Flipp. (U. S.) 500; *Southwood v. Myers*, 3 Bush (Ky.) 682; *Cromwell v. Stephens*, 2 Daly (N. Y.) 15, 3 Abb. Pr. N. S. (N. Y.) 26; *Swann v. Smith*, 14 Daly (N. Y.) 114.

One who lets out rooms to lodgers, not supplying them with meals, and leases the basement to another person, who keeps a restaurant as an independent establishment, from which access may be had to the lodging rooms, is not an innkeeper, and has no lien as such upon the property of his lodgers. *Cochrane v. Schryver*, 12 Daly (N. Y.) 174, 17 N. Y. Wkly. Dig. 442.

2. Occasional Entertainment of Travelers by Boarding-house Keeper.—*Kisten v. Hildebrand*, 9 B. Mon. (Ky.) 75, 48 Am. Dec. 416.

3. The Distinction as to the Nature of the Occupation, between an innkeeper and the keeper of a private boarding house or lodging house, lies in this, that the latter is at liberty to choose his guests, while an innkeeper is pledged to entertain all travelers of good conduct and means of payment, and furnish them everything which they have occasion for as such travelers on their way. *Parker v. Flint*, 12 Mod. 254; *Beall v. Beck*, 3 Cranch (C. C.) 666; *Pinkerton v. Woodward*, 33 Cal. 557, 91 Am. Dec. 657.

"The fact that the house is open for the public, that those who patronize it come to it upon the invitation which is extended to the general public, and without any previous agreement for accommodation or agreement as to the duration of their stay, marks the important distinction between a hotel or inn and a boarding house." *Fay v. Pacific Imp. Co.*, 93 Cal. 253, 27 Am. St. Rep. 198.

In *Willard v. Reinhardt*, 2 E. D. Smith (N. Y.) 148, it was said that the distinction between a boarding house and an inn is that in the former the guest is under an express contract for a certain time at a certain rate; in the latter the guest is entertained from day to day upon an implied contract.

See also *Bostick v. State*, 47 Ark. 126, in

which it is said that a boarding house is a house "where the boarder is selected and received into the house upon an express contract for a certain period of time."

In Regard to Liabilities there is an important distinction between the two classes of persons, in that an innkeeper is held to a very rigorous rule of liability for the goods of his guests, while a boarding-house keeper is liable, in that regard, only as an ordinary bailee. See *infra*, this title, subdiv. *Liability in Respect to Effects of Guests*—*Requisites of Liability*—*Existence of Relation of Innkeeper and Guest*.

Lien on Effects of Guests.—Another distinguishing feature is that an innkeeper has, at common law, a lien for his charges on all the effects of his guests within the inn, while a boarding-house keeper has such remedy only when it is given by statute. See *infra*, this title, subdiv. *Securing and Enforcing Right to Compensation*.

4. Innkeeper May Also Be Boarding-house Keeper.—*Foster v. State*, 84 Ala. 451; *Haff v. Adams*, (Ariz. 1899) 59 Pac. Rep. 111; *Bullock v. Adair*, 63 Ill. App. 30, citing 11 AM. AND ENG. ENCYC. OF LAW (1st ed.) 18; *Lusk v. Belote*, 22 Minn. 468; *Cromwell v. Stephens*, 2 Daly (N. Y.) 15; *Lawrence v. Howard*, 1 Utah 143.

5. Inn Need Not Be Situated on Highway.—*Fay v. Pacific Imp. Co.*, 93 Cal. 253, 27 Am. St. Rep. 198.

6. Keeper of Hotel at Summer Resort, etc., Held Not to Be an Innkeeper.—*Parker v. Flint*, 12 Mod. 254; *Blum v. Southern Pullman Palace Car Co.*, 1 Flipp. (U. S.) 500; *Bonner v. Welborn*, 7 Ga. 296; *Southwood v. Myers*, 3 Bush (Ky.) 681.

In *Parker v. Flint*, 12 Mod. 254, it appeared that the plaintiff let lodgings at Epsom, during the season for drinking the waters, to such as went thither for that purpose, or for the air, or for their pleasure, and did dress victuals for them, and did sell them ale and beer, and entertain their horses at eight pence *per diem*, but sold no victuals, drink, etc., to any but the lodgers. It was held that his house was not an inn, because he was not compellable to entertain anybody, and none could come there without a previous contract; he was not bound

c. **KEEPERS OF RESTAURANTS AND CAFES.** — The keeper of a restaurant or cafe, so far as those terms are used to designate a mere eating house, where no provision is made for lodging the guest, is not an innkeeper,¹ though his obligations as regards the effects of guests are somewhat similar.² But a restaurant keeper may also be an innkeeper, and he may establish the last-named character by his own acts and declarations so that he cannot afterwards deny it.³

d. **SLEEPING CAR AND STEAMBOAT COMPANIES.** — While the analogy between an inn and a sleeping car or a steamboat is a strong one, and the rigid responsibility which was imposed on innkeepers at an early period when passengers traveled by coach or on horseback, making frequent stops at houses of public entertainment, whose proprietors often colluded with thieves and highwaymen to plunder their guests, is still enforced against that class of persons, the tendency of modern legislation and judicial opinion has been to limit it strictly to them. It is accordingly held, almost without exception, that sleeping car companies and the proprietors of steamboats are not innkeepers, and therefore are not subject to the same measure of responsibility in regard to their passengers' effects.⁴

to sell at reasonable rates, or to protect his guest. To the same effect is *Parkhurst v. Foster*, 1 *Ld. Raym.* 479, *Carth.* 417, 1 *Salk.* 388.

1. Keeper of Restaurant Not an Innkeeper. — *Blum v. Southern Pullman Palace Car Co.*, 1 *Flipp.* (U. S.) 500; *Sheffer v. Willoughby*, 61 *Ill. App.* 263, *affirmed* 163 *Ill.* 518, 54 *Am. St. Rep.* 483; *Carpenter v. Taylor*, 1 *Hilt.* (N. Y.) 193; *People v. Jones*, 54 *Barb.* (N. Y.) 311; *Montgomery v. Ladjing*, (*Supm. Ct. App. T.*) 61 *N. Y. Supp.* 840; *Kelly v. Excise Com'rs*, (*C. Pl. Spec. T.*) 54 *How. Pr.* (N. Y.) 329.

The term "restaurant" has no definite legal meaning. As currently understood it doubtless means only or chiefly an eating-house. But not infrequently a bar forms a part of it; sometimes lodging in addition. And it is also just as currently understood that in numerous resorts termed "restaurants" some lodgings for travelers are provided, or alleged to be provided, so as to obtain the license for the sale of liquors allowed under the excise law to hotels, taverns, or inns only. A restaurant may be an inn or it may not be, according to its real character. The name by which it goes is of little or no account, and the court cannot say judicially that a place described in a complaint as "a certain inn, to wit, a restaurant at No. 9 Chatham street," may not be an inn. *Lewis v. Hitchcock*, 10 *Fed. Rep.* 4.

A Mere Coffee-house is not an inn. *Doe v. Laming*, 4 *Campb.* 77.

Obligations of Restaurant Keeper Similar to Those of Innkeeper. — *Dunn v. Beau*, 11 *Quebec Super. Ct.* 538.

In *Ultzen v. Nicols*, 63 *L. J. Q. B.* 289, (1894) 1 *Q. B.* 92, 10 *Reports* 13, 70 *L. T. N. S.* 140, 42 *W. R.* 58, 58 *J. P.* 103, the plaintiff went into the defendant's restaurant for the purpose of dining. His overcoat was received by the waiter at the table, and, without any directions, hung up on a peg in the room. The coat was stolen. It was held that the jury was justified in finding that there was a bailment and such negligence as rendered the defendant liable.

3. Character as Innkeeper Established by Acts and Declarations. — In *Kopper v. Willis*, 9 *Daly*

(N. Y.) 460, the defendant was engaged in keeping a restaurant on the lower floor of a building occupied by him. Only a half of one floor was prepared for lodgers. The defendant's entire business was carried on under a liquor license obtained by him on an affidavit that he kept an inn, and that an inn was necessary to the accommodation of travelers in the place where he kept it. It was held that the defendant, by his own act and declaration, had established the fact that he kept an inn, and hence his liability to a person who lost property in the inn, while there in the character of a guest, attached, no matter how slight the entertainment might be, nor how temporarily the use made of it, and that the character of the party as a guest was not affected by the fact that his entertainment was paid for by a friend who invited him to go to the place. See also *Korn v. Schedler*, 11 *Daly* (N. Y.) 234, 15 *N. Y. Wkly. Dig.* 468.

4. Sleeping-car Companies Not Liable as Innkeepers. — *United States.* — *Blum v. Southern Pullman Palace Car Co.*, 1 *Flipp.* (U. S.) 504.

Alabama. — *Pullman Palace Car Co. v. Adams*, (*Ala.* 1898) 24 *So. Rep.* 921.

Illinois. — *Pullman Palace Car Co. v. Smith*, 73 *Ill.* 360, 24 *Am. Rep.* 258.

Indiana. — *Woodruff Sleeping, etc., Coach Co. v. Diehl*, 84 *Ind.* 474, 43 *Am. Rep.* 102.

Kentucky. — *Pullman Palace Car Co. v. Gaylord*, 6 *Ky. L. Rep.* 279, 23 *Am. L. Reg. N. S.* 788.

Massachusetts. — *Lewis v. New York Sleeping Car Co.*, 143 *Mass.* 267, 58 *Am. Rep.* 135.

Mississippi. — *Illinois Cent. R. Co. v. Handy*, 63 *Miss.* 609, 56 *Am. Rep.* 846.

Missouri. — *Scaling v. Pullman's Palace Car Co.*, 24 *Mo. App.* 29; *Bevis v. Baltimore, etc., R. Co.*, 26 *Mo. App.* 19.

New York. — *Tracy v. Pullman Palace Car Co.*, (*N. Y. City Ct.*) 67 *How. Pr.* (N. Y.) 154; *Welch v. Pullman Palace Car Co.*, (*Buffalo Super. Ct. Gen. T.*) 16 *Abb. Pr. N. S.* (N. Y.) 352.

Ohio. — *Falls River, etc., Co. v. Pullman Palace Car Co.*, 6 *Ohio Dec.* 85, 4 *Ohio N. P.* 26.

Pennsylvania. — *Pullman Palace Car Co. v. Gardner*, 3 *Penny.* (Pa.) 78.

4. Evidence. — A sign displayed on a building, indicating that it is a common inn, is obviously evidence that the building is such in fact and that the proprietor is an innkeeper, but a sign is not necessary to prove that fact.¹ It may also be shown by the acts or declarations of the party,² or by any other facts or circumstances indicating that he is engaged in such business.³

5. Who May Keep an Inn. — It has already been observed that the right to keep an inn is not a franchise, and therefore requires no license or grant of authority at common law, but that it is an occupation in which any person may engage, in the absence of statutory regulations.⁴ At the present day, however,

Texas. — Pullman Palace Car Co. v. Pollock, 69 Tex. 120, 5 Am. St. Rep. 31; Pullman Palace Car Co. v. Matthews, 74 Tex. 654, 15 Am. St. Rep. 873.

See also Hutchinson on Carriers (2d ed.), § 617d; 2 Rorer on Railroads 987; 3 Wood's Railway Law 1450.

But see *contra*, Pullman Palace Car Co. v. Lowe, 28 Neb. 239, 26 Am. St. Rep. 325, in which the court said: "The engagement of the sleeping car company, so far as it goes, is exactly the same as the duties assumed by an innkeeper. A passenger on entering a sleeping car as a guest — because that is what he is in fact — necessarily must take his ordinary wearing apparel with him, and some articles for convenience, comfort, or necessity. The articles, when placed in the care of the company's employees, are *infra hospitium*, and are at the company's risk."

Proprietor of Steamboat Not an Innkeeper. — Steamboat Crystal Palace v. Vanderpool, 16 B. Mon. (Ky.) 302; Clark v. Burns, 118 Mass. 275, 19 Am. Rep. 456; Adams v. New Jersey Steamboat Co., 151 N. Y. 163, 56 Am. St. Rep. 616. And see McKee v. Owen, 15 Mich. 115, in which the court was divided.

For a Full Discussion as to the liabilities of sleeping car and steamboat companies, see the titles BAGGAGE, vol. 3, p. 528; CARRIERS OF PASSENGERS vol. 5, p. 474; SLEEPING CAR COMPANIES.

1. Sign as Evidence that One Is an Innkeeper. — Bostick v. State, 47 Ark. 126; Howth v. Franklin, 20 Tex. 798, 73 Am. Dec. 218.

Sign Not Necessary to Prove that One Is an Innkeeper. — Civil Rights Bill, 1 Hughes (U. S.) 541; Lyon v. Smith, 1 Morr. (Iowa) 184; Kisten v. Hildebrand, 9 B. Mon. (Ky.) 74, 48 Am. Dec. 416; Dickerson v. Rogers, 4 Humph. (Tenn.) 179, 40 Am. Dec. 642.

2. Acts and Declarations of Party. — Howth v. Franklin, 20 Tex. 798, 73 Am. Dec. 218.

3. Facts and Circumstances Indicating Occupation. — In Bostick v. State, 47 Ark. 126, the defendant's house was advertised by a sign attached to it bearing the inscription "Webb House," and also in the newspapers by a card announcing its location and stating that the house was open for the accommodation of the public on very reasonable terms. It was held that the evidence tended to prove that the house was a public house, intended for the reception and entertainment of all comers, and was not a mere boarding house.

In Stringer v. Davis, 35 Cal. 25, it was held, on the trial of the issue whether a certain house was a hotel, that the publication by the proprietors of an advertisement of the house, as such, in the newspapers of the neighbor-

hood, was competent evidence to show such character.

In Fay v. Pacific Imp. Co., 93 Cal. 253, 27 Am. St. Rep. 198, the defendant's house was called the "Hotel del Monte." The evidence showed that it was open to all persons having a right to demand entertainment at a public house; that it solicited public patronage by advertising, and in the distribution of its business cards, and kept a public register in which its guests entered their names on their arrival and before they were assigned rooms; that the hotel, at its own expense, ran a coach to the railroad station for the purpose of conveying its patrons to and from the hotel; and that it had a manager, clerks, waiters, and in its interior management all the ordinary arrangements and appearances of a hotel, and the prices charged were for board and lodging. It was held that these facts were sufficient to justify a finding that the defendant was an innkeeper.

In Wintermute v. Clark, 5 Sandf. (N. Y.) 242, it was said that in order to charge the defendant as an innkeeper, it was not necessary to prove that it was only for the reception of travelers that his house was kept open, but that it was sufficient to prove that all who came were received as guests, without any previous agreement as to the duration of their stay or the terms of their entertainment.

4. Right to Keep an Inn Not a Franchise. — See *supra*, this section, *Essential Characteristics — Necessity of License*.

Any Person has a right, at common law, to keep an inn. Overseers of Poor v. Warner, 3 Hill (N. Y.) 150, 2 Hawks P. C. 452.

"It seems to be agreed at this day that any person may set up a new inn, unless it be inconvenient to the public, in respect of its situation, or to its increasing the number of inns, not only to the prejudice of the public, but also to the hindrance and prejudice of other ancient and well-governed inns; for the keeping of an inn is no franchise, but a lawful trade, open to every subject, and therefore there is no need of any license from the king for that purpose." Bac. Abr., tit. Inns and Innkeepers (A).

A Corporation having engaged in that occupation and assumed the liability of an innkeeper towards a guest, and received from him the consideration for such liability, cannot, in an action against it to recover damages for personal property destroyed by fire, plead that its acts as an innkeeper are *ultra vires* because under its corporate powers it was not authorized to engage in such occupation. Magee v. Pacific Imp. Co., 98 Cal. 678, 35 Am. St. Rep. 199.

the matter is generally subject to statutory regulation, and licenses are required in both England and the United States.¹

II. STATUTORY REGULATION — 1. In General. — The occupation of an innkeeper is of a public character to the extent that he is obliged to receive and entertain all persons who may come as guests in a proper manner and at suitable times, so long as he has the means of accommodation for them.² This being the nature of the business, it is not within the general rule that the individual may deal with some persons at his option, and refuse to deal with others. The matter is therefore subject to regulation by statute, as being within the police power of the state.³

2. License. — In *England* and generally in the *United States* a license is required by statute to carry on the business of keeping an inn.⁴ The statutes prescribe by whom such licenses shall be granted, and these are usually the local county authorities;⁵ and provision is generally made for keeping the

1. See *infra*, this title, *Statutory Regulation*. See also *supra*, this section, *Necessity of License*.

2. **Public Character of Innkeeper's Occupation.** — *Beale v. Posey*, 72 Ala. 323; *Hall v. State*, 4 Harr. (Del.) 132; *Bowlin v. Lyon*, 67 Iowa 538, 56 Am. Rep. 355; *Markham v. Brown*, 8 N. H. 523, 31 Am. Dec. 209. See also *infra*, this title, *Duties, Rights, and Liabilities — Receiving and Entertaining Guests*.

3. **Regulation of Inns Regarded as Matter of Police Power.** — *Bostick v. State*, 47 Ark. 126; *Com. v. Muir*, 38 W. N. C. (Pa.) 328.

The Constitutionality of the Statutes requiring an innkeeper to obtain a license to do business has often been sustained. *Bostick v. State*, 47 Ark. 126; *Henry v. State*, 26 Ark. 523; *State v. Adams*, 16 Ark. 497; *State v. Tibbetts*, 36 Me. 553. See also *Berry v. Cramer*, 58 N. J. L. 278.

Rates of Charges. — In some jurisdictions statutes have been enacted fixing the rates which may be charged by innkeepers. *Banks v. Oden*, 1 A. K. Marsh. (Ky.) 548; *South v. Grant*, 7 N. J. L. 26.

4. **License Required by Statute — England.** — *Dixon v. Birch*, L. R. 8 Exch. 135; *Atkinson v. Sellers*, 5 C. B. N. S. 442, 94 E. C. L. 442; *R. v. Price*, Cald. Sett. Cas. 305. The English statutes go back to an early day and are quite numerous. The principal ones of them are 5 & 6 Edw. VI., c. 25; 2 Geo. II., c. 28; 24 Geo. II., c. 40; 26 Geo. II., c. 31; 29 Geo. II., c. 59; 5 Geo. III., c. 46; 33 Geo. III., c. 55; 35 Geo. III., c. 103; 48 Geo. III., c. 143; 53 Geo. III., c. 103.

Alabama. — *Beale v. Posey*, 72 Ala. 323.

Arkansas. — *State v. Adams*, 16 Ark. 497; *Bostick v. State*, 47 Ark. 126.

Delaware. — *Russell v. Fagan*, 7 Houst. (Del.) 389.

Georgia. — *Bonner v. Welborn*, 7 Ga. 296.

Kentucky. — *Plummer v. Com.*, 1 Bush (Ky.) 26; *Hoglan v. Com.*, 3 Bush (Ky.) 147; *Braswell v. Com.*, 5 Bush (Ky.) 545; *Mason v. Lancaster*, 4 Bush (Ky.) 406; *Pierce v. Com.*, 10 Bush (Ky.) 7; *Barnes v. Com.*, 2 Dana (Ky.) 388; *Reeks v. Com.*, 8 Ky. L. Rep. 873.

Maine. — *Crosby v. Snow*, 16 Me. 121; *Lord v. Jones*, 24 Me. 439, 41 Am. Dec. 391; *State v. Lamos*, 26 Me. 258; *State v. Tibbetts*, 36 Me. 553.

Massachusetts. — *Com. v. Wetherbee*, 101 Mass. 214.

Missouri. — *St. Louis v. Siegrist*, 46 Mo. 593.

New Hampshire. — *State v. Fletcher*, 5 N. H. 257.

New Jersey. — *Dilkes v. Pancoast*, 53 N. J. L. 553; *Hinchman v. Stoepel*, 54 N. J. L. 486; *McNeal v. Ryan*, 56 N. J. L. 443; *Winants v. Bayonne*, 44 N. J. L. 114; *State v. Fay*, 44 N. J. L. 474; *Barnegat City Beach Assoc. v. Busby*, 44 N. J. L. 627; *Dufford v. Nolan*, 46 N. J. L. 87; *Batchelder v. Erb*, 47 N. J. L. 92. *New York.* — *People v. Woodman*, 15 Daly (N. Y.) 20.

North Carolina. — *State v. Wynne*, 1 Hawks (8 N. Car.) 451; *Civil Rights Bill*, 1 Hughes (U. S.) 541, referring to statutory provisions in North Carolina.

Pennsylvania. — *Com. v. Naylor*, 34 Pa. St. 86; *Com. v. Muir*, 38 W. N. C. (Pa.) 328.

South Carolina. — *State v. Chambliss*, Cheves L. (S. Car.) 220, 34 Am. Dec. 593.

Vermont. — *State v. Stone*, 6 Vt. 295; *Stat. Vt. 1894*, § 4719 *et seq.*

See also the various local codes and statutes in the *United States*.

The Power to Regulate Hotels, given to municipal corporations by the *Arkansas* statute of March 9, 1875, includes the power to license as a means of regulating them. *Russellville v. White*, 41 Ark. 485. This statute is not exclusive, or inconsistent with the statute requiring all persons keeping public taverns to procure license from the County Court. *State v. Sumpter*, 53 Ark. 342.

Designation of House. — A tavern license should designate the house where the tavern is to be kept, and will not serve for any other house. *Barnes v. Com.*, 2 Dana (Ky.) 388.

The applicant need not, at the time of the application, be an inhabitant of the house in which the inn is proposed to be kept. *Amerman v. Hill*, 52 N. J. L. 326.

More than One Person May Be Licensed to keep an inn under the *New Jersey* statute. *Amerman v. Hill*, 52 N. J. L. 326.

A Tavern License Confers a Personal Privilege on the person to whom it is granted. It is not transferable, and does not pass with a lease of the house in which the tavern is kept. *Com. v. Bryan*, 9 Dana (Ky.) 310; *Com. v. Brannan*, 8 B. Mon. (Ky.) 374. But there is nothing illegal in an agreement to transfer a license to keep an inn, though the license after its transfer will be inoperative. *Hoagland v. Hall*, 38 N. J. L. 350.

5. **Who Authorized to Grant Licenses.** — The

business out of improper hands, by committing the matter to the discretion of the licensing authorities,¹ and by providing for the revocation of licenses for cause;² but no restraints can be imposed on the persons licensed except such as are authorized by the statute.³

The Enforcement of the License Laws is usually effected by means of pecuniary penalties, or by making the failure to obtain a license a misdemeanor;⁴ and, even in the absence of such statutory pains and penalties, a person who assumes to be an innkeeper without a license, when one is required by law, is not entitled to an innkeeper's rights and privileges, though he becomes subject to all the liabilities.⁵

A Bond is also required in some jurisdictions to secure compliance with the law.⁶

3. Fire Escapes. — Recent statutes in many jurisdictions provide that hotels shall be furnished with fire escapes, in order to protect the guests from the risk of injury or loss of life, in case the ordinary modes of exit are cut off by fire.⁷ The constitutionality of these enactments, so wise and salutary, in view of the great height of modern hotel buildings, and the disasters which have frequently occurred, has often been sustained.⁸

4. Provisions for Lodging Guests. — In some jurisdictions the statutes pro-

authorities to whom is committed the power to grant licenses must be ascertained in each jurisdiction by reference to the local statutes.

1. Discretionary Power as to Granting Licenses. — *Nepp v. Com.*, 2 Dav. (Ky.) 546; *Pierce v. Com.*, 10 Bush (Ky.) 7; *Dufford v. Nolan*, 46 N. J. L. 87.

The discretionary power to refuse a license must not be exercised in an arbitrary manner. *Louisville v. Kean*, 18 B. Mon. (Ky.) 11; *Hoglan v. Com.*, 3 Bush (Ky.) 147. And it does not include the right to refuse altogether to license any taverns. *Louisville v. Kean*, 18 B. Mon. (Ky.) 11.

Mandamus will lie to review the action of the commissioners in refusing to grant a license under the *New York* statute. *People v. Woodman*, 15 Daly (N. Y.) 20.

Remonstrances Against Granting License. — Remonstrances against granting licenses to keep inns and taverns, under the *New Jersey* statute, may present special facts affecting the jurisdiction of the city council under the charter, and, if refused a hearing at a time and place within the discretion of the council, such facts may be shown on certiorari to defeat licenses granted. *Austin v. Atlantic City*, 48 N. J. L. 118. See also *Ferguson v. Atlantic City*, (N. J. 1899) 42 Atl. Rep. 747.

2. Revocation of Licenses. — *Com. v. Graves*, 18 B. Mon. (Ky.) 34; *State v. Lamos*, 26 Me. 258; *Lantz v. Highstown*, 46 N. J. L. 102.

Revocation of License Must Be by a Direct Proceeding. — *Com. v. Graves*, 18 B. Mon. (Ky.) 34.

The Jurisdiction of the licensing board, in revoking a license under the statute, must appear affirmatively, and cannot be presumed or inferred. *State v. Lamos*, 26 Me. 258.

Suspension of License. — A license may be suspended for violation of the law, but a suspension is a nullity, unless the alleged offender has been summoned to appear at a time and place designated to show cause. *Plummer v. Com.*, 1 Bush (Ky.) 26.

3. May Impose No Restraints Not Authorized by Statute. — *Crosby v. Snow*, 16 Me. 121.

4. Failure to Obtain License Made Misdemeanor by Statute. — *Bostick v. State*, 47 Ark. 126; *State v. Sumpter*, 53 Ark. 342; *State v. Fletcher*, 5 N. H. 257. See also *Overseers of Poor v. Warner*, 3 Hill (N. Y.) 150.

The statutory provisions on this subject vary in the different jurisdictions, but are usually so explicit in terms as to leave little or nothing for judicial interpretation, and reference must be had to the local statutes in each jurisdiction.

5. Failure to Obtain License — Effect in Absence of Statutory Penalties. — See *supra*, this title, *Essential Characteristics — Necessity of License*.

6. The North Carolina Statute provides that every person wishing to keep a common inn, tavern, or ordinary, for the entertainment of travelers and others, shall apply to the board of county commissioners for a license to do so, "and the applicant must give bond in the sum of one thousand dollars, payable to the state of North Carolina," and conditioned for finding and providing good and wholesome diet and lodgings for his guests, and stable and provender for their horses; and also to safely keep for his guests all such articles and property as may come to his care and charge as an innkeeper; and on breach of any condition thereof, any person injured may put the same in suit. *Civil Rights Bill*, 1 Hughes (U. S.) 541.

Judgment on Bond — Effect as to Surety. — Where a licensed tavern keeper has been fined for breach of his bond, his surety, not being a party to the proceeding, is not concluded by the judgment. *Margoley v. Com.*, 3 Met. (Ky.) 405.

7. Fire Escapes Required by Statute. — Department of Buildings v. Field, 12 N. Y. App. Div. 258; *People v. Pierson*, 59 Hun (N. Y.) 450. See also the various local codes and statutes in the *United States*.

The Principal English Statutes on the subject are 38 & 39 Vict., c. 55; 41 & 42 Vict., c. 32; 53 & 54 Vict., c. 59; 56 & 57 Vict., cc. 15, 221; 58 & 59 Vict., c. 28.

8. Constitutionality of Fire Escape Laws. — See the title FIRE ESCAPES, vol. 13, p. 82.

vide that every inn shall contain not less than a designated number of beds, etc., for the accommodation of guests.¹

5. Official Inspection. — There are also statutes which require lodging houses to be inspected by official authority before any lodgers may be received thereat.²

III. WHO ARE GUESTS — 1. Definition. — The word "guest" has frequently been defined by various judges and text writers with more or less completeness.³ The sum of all these definitions seems to be that a guest is a transient person who resorts to, and is received at, an inn for the purpose of obtaining the accommodations which it purports to afford.⁴

2. Who May Become a Guest. — It has often been laid down, especially in the older cases, that in order to constitute a person a guest he must be a traveler or wayfarer;⁵ but it is doubtful whether it was ever intended to lay any stress on the term.⁶ However that may be, the more recent cases do not take such a restricted view as to what constitutes a guest at an inn. On the contrary, they expressly hold that a guest is a person who uses the inn either for a temporary or a more permanent stay, in order to take what the inn can give, regardless of whether he comes from a distance or lives in the immediate vicinity.⁷

1. Minimum Limit of Accommodations Prescribed by Statute. — *Overseers of Poor v. Warner*, 3 Hill (N. Y.) 150. See also the statutes in other jurisdictions.

2. The English Statute provides that "a person shall not keep a common lodging-house or receive a lodger therein until the house has been inspected and approved for that purpose by some officer appointed in that behalf by the local authority, and has been registered." But it is held that this statute does not apply to a house which is maintained as a charitable institution and not for the purposes of gain. *Booth v. Ferrett*, 25 Q. B. D. 87.

3. Guest Defined. — "A guest is one who patronizes an inn as such." *Walling v. Potter*, 35 Conn. 183.

A guest is a wayfarer who stops at an inn and is accepted. *Manning v. Wells*, 9 Humph. (Tenn.) 746, 51 Am. Dec. 688.

"Any one away from home, receiving accommodations at an inn as a traveler, is a guest." *Pullman Palace Car Co. v. Lowe*, 28 Neb. 239, 26 Am. St. Rep. 325.

The Guest Comes Without Any Bargain for time, remains without one, and may go when he pleases, paying only for the actual entertainment received; and the rule is not changed by the fact that the person remains a long time in the inn in this way. *Shoecraft v. Bailey*, 25 Iowa 553, quoted in *Metzger v. Schnabel*, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 698; 2 Parsons on Contracts 151.

The Massachusetts Statute (Pub. Stat. Mass. 1882, c. 100, § 9, cl. 2) limits the word "guest" to persons who resort to the house for food or lodging. *Com. v. Hagan*, 140 Mass. 239.

4. See the several definitions given in the next preceding note. See also the two next succeeding divisions of this section.

5. Use of Terms "Traveler" and "Wayfarer" — *England*. — *Burgess v. Clements*, 4 M. & S. 306; *Dawson v. Chamney*, 5 Q. B. 164, 48 E. C. L. 164; *Calye's Case*, 8 Coke 32 (in which it was said that inns were instituted for "passengers and wayfaring men"); *Thompson v. Lacy*, 3 B. & Ald. 283, 5 E. C. L. 285 (defining an inn as a house where the "traveler" is furnished all he has occasion for while on the

way); *Beedle v. Morris*, Cro. Jac. 224 (holding that the custom of the realm respecting the liability of innkeepers "is only for travelers").

Delaware. — *Russell v. Fagan*, 7 Houst. (Del.) 389.

Nebraska. — *Pullman Palace Car Co. v. Lowe*, 28 Neb. 239, 26 Am. St. Rep. 325.

Tennessee. — *Manning v. Wells*, 9 Humph. (Tenn.) 746, 51 Am. Dec. 688.

See also *Bouvier's Law Dictionary*, defining an innkeeper as "the keeper of a common inn for the lodging and entertainment of travelers and passengers."

The words "travelers," "wayfarers," and "passengers" are also used in this connection by the following authorities: *Bac. Abr.*, tit. Inns and Innkeepers, (B), (C); *Wharton on Innkeepers* 75, 76; *Edwards on Bailments*, § 450. *Willcock on Inns* 47.

6. Special Significance of Term "Traveler" Doubted. — In *Walling v. Potter*, 35 Conn. 183, *Carpenter, J.*, referring to the definition of an inn given in *Thompson v. Lacy*, 3 B. & Ald. 283, 5 E. C. L. 285, said that he did "not suppose that the court intended, in the definition above quoted, to lay stress upon the word 'traveler.'"

7. Persons Not Travelers May Become Guests. — *Orchard v. Bush*, (1898) 2 Q. B. 284, 67 L. J. Q. B. 650, 78 L. T. N. S. 557, 46 W. R. 527.

In *Walling v. Potter*, 35 Conn. 183, 9 Am. L. Reg. N. S. 618, the defendant kept an inn in the town of Kent. The plaintiff resided in the same town, about half a mile from the defendant's inn. One evening the plaintiff came to the inn, stayed over night and took breakfast there, paying the defendant his usual charge for a night's lodging and breakfast. On these facts it was held that the plaintiff was a guest, and that the defendant was liable to him as an innkeeper for money stolen during the night. In a note to the report of this case in 9 Am. L. Reg. N. S. 618, it is said that "where one lives in the same town, he cannot compel the innkeeper to receive him as a guest;" but there does not seem to be any authority to the statement unless the definition given in *Calye's Case*, 8 Coke 32, that "it [the inn] ought to

But It Is Essential that a Party Should Be a Transient, that is, that he should come to the inn for a more or less temporary stay.¹ And if he is a transient, he may become a guest, in the legal sense of the word, notwithstanding an express contract between him and the innkeeper fixing the amount to be paid,² though it has been laid down as one of the distinctive features of the relation, that a guest is received under an implied contract.³

3. What Constitutes the Relation — a. IN GENERAL. — To a certain extent, the definition of a guest already given is descriptive of the circumstances which will operate to constitute the relation of innkeeper and guest, for the purpose of conferring the rights or imposing the liabilities which the law

be a common inn," for "passengers" and not for "neighbors."

"It is not wayfarers alone, or travelers from a distance, that at the present day give character to an inn, the point being rather that people resort to the house habitually, no matter whence coming or whither going, as for transient lodging and entertainment." Schouler on Bailments (2d ed.), § 276.

See also *Arcade Hotel Co. v. Wiatt*, 44 Ohio St. 32, where the question whether a person who is a resident and householder in a city, and not in any sense a traveler, is capable of becoming a guest at a hotel in that city, so as to charge the proprietor with the safekeeping of his property, was raised but not decided.

1. Only Transients May Be Guests — England. — *Burgess v. Clements*, 4 M. & S. 306; *Parkhurst v. Foster*, 1 Salk. 388.

Alabama. — *Beale v. Posey*, 72 Ala. 323.

California. — *Fay v. Pacific Imp. Co.*, 93 Cal. 253, 27 Am. St. Rep. 198.

Delaware. — *Russell v. Fagan*, 7 Houst. (Del.) 389.

Illinois. — *Bullock v. Adair*, 63 Ill. App. 30.

New Mexico. — *Horner v. Harvey*, 3 N. Mex. 197.

New York. — *Taylor v. Monnot*, 4 Duer (N. Y.) 116; *Clute v. Wiggins*, 14 Johns. (N. Y.) 175, 7 Am. Dec. 448.

North Carolina. — *Neal v. Wilcox*, 4 Jones L. (49 N. Car.) 136, 67 Am. Dec. 266.

Tennessee. — *Meacham v. Galloway*, 102 Tenn. 415, citing 11 AM. AND ENG. ENCYC. LAW (1st ed.) 13; *Manning v. Wells*, 9 Humph. (Tenn.) 746, 51 Am. Dec. 688.

Wisconsin. — *Curtis v. Murphy*, 63 Wis. 4, 53 Am. Rep. 242; *Jalie v. Cardinal*, 35 Wis. 118.

See also *infra*, this section, *Distinction Between Guests and Boarders*.

A Person Who Furnishes a Room in a Hotel and Lives There During Two Months cannot be considered a "traveler," and therefore the innkeeper has no action for intoxicating liquors furnished to him. *Ferguson v. Riendeau*, 2 Montreal Super. Ct. 136.

Persons Belonging to the Army or Navy, who have no permanent residence they can call home, are to be regarded as travelers when stopping at public inns. *Hancock v. Rand*, 94 N. Y. 1, 46 Am. Rep. 112, affirming 17 Hun (N. Y.) 279. See also *Metzger v. Schnabel*, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 698, in which it was held that a foreign army officer, temporarily in the United States, was a guest at the defendant's hotel, where he had a room, though he rented the room by the week at a stipulated price.

Railroad Conductors. — In *Horner v. Harvey*, 3 N. Mex. 197, the plaintiff was a railroad conductor. At one end of his route he rented a room at a hotel, by the month, for his use when at that end. It was held that he was not a transient, and therefore did not occupy the relation of guest to the proprietor of the hotel.

The Prominent Idea is that a guest must be a traveler, wayfarer, or transient coming to an inn for lodging and entertainment. It is not now deemed essential that a person should have come from a distance to constitute a guest. Distance is not material; a townsman or neighbor may be a traveler, and therefore a guest at an inn, as well as he who comes from a distance or from a foreign country. *Curtis v. Murphy*, 63 Wis. 4, 53 Am. Rep. 242. See also *Meacham v. Galloway*, 102 Tenn. 415, citing 11 AM. AND ENG. ENCYC. LAW (1st ed.) 13.

2. Guests May Make Express Contracts with Innkeepers for Price — *Alabama*. — *Beale v. Posey*, 72 Ala. 323.

California. — *Pinkerton v. Woodward*, 33 Cal. 557, 91 Am. Dec. 657; *Fay v. Pacific Imp. Co.*, 93 Cal. 253, 27 Am. St. Rep. 198; *Magee v. Pacific Imp. Co.*, 98 Cal. 678, 35 Am. St. Rep. 199.

Massachusetts. — *Berkshire Woollen Co. v. Proctor*, 7 Cush. (Mass.) 417.

Minnesota. — *Lusk v. Belote*, 22 Minn. 468; *Ross v. Mellin*, 36 Minn. 421.

New York. — *Hancock v. Rand*, 94 N. Y. 1, 46 Am. Rep. 112, affirming 17 Hun (N. Y.) 279; *Lima v. Dwinelle*, 7 Alb. L. J. 44; *Metzger v. Schnabel*, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 698, citing 11 AM. AND ENG. ENCYC. LAW (1st ed.) 12, 15.

Hancock v. Rand, 94 N. Y. 1, 46 Am. Rep. 112, affirming 17 Hun (N. Y.) 279, probably carries the doctrine under discussion further than any other case. Here the plaintiff went to the defendant's hotel, pursuant to an agreement made by her husband, General Hancock, of the United States Army, for the board of himself and family, including the plaintiff, at a certain price per month, from November until the following spring or summer, if everything should be satisfactory, unless he should be sooner ordered away on military duty. It was contended that under this agreement the defendants did not receive the plaintiff into their hotel as a guest, but as a permanent boarder. The court, however, held to the contrary.

3. See *supra*, this title, *Who Are Innkeepers — Definitions and Explanation of Terms*. See also *infra*, this section, *Distinction Between Guests and Boarders*.

attaches to that relation. But this definition is very general in its terms, and a further consideration of the subject is necessary to ascertain precisely what constitutes the relation.¹

It is Considered a Question of Fact to be determined on all the evidence, whether, in any case, the relation of innkeeper and guest exists,² or, speaking more precisely, a mixed question of law and fact, because, if the facts are definitely ascertainable from the undisputed evidence, the question then becomes one for the determination of the court.³

b. NECESSITY OF PERSONAL PRESENCE — (1) *Property Taken to Inn by Owner's Servant or Member of Family*. — It has several times been held that one may become entitled to the remedies of a guest against an innkeeper, though he did not himself stop or receive any entertainment at the inn, if his property is taken there in charge of his servant or a member of his family, in such a way that the law will imply it, while there, to have been in his own possession.⁴

(2) *Property Taken to Inn by Bailee of Owner*. — If property in the possession of a third person, as bailee of the owner, is taken to an inn by such third person, the owner does not in consequence thereof occupy the relation of guest, because the law cannot imply, in such a case, that the property was in the owner's possession.⁵

(3) *Inanimate Chattels Left at Inn by Owner*. — It is also a well-established rule that where the owner of inanimate chattels leaves them at an inn, without receiving any personal entertainment, or allows them to remain after his entertainment has ceased, the innkeeper is merely an ordinary bailee in respect to such chattels, because he has no profit from them, and the owner does not then occupy the relation of a guest.⁶

(4) *Leaving Horses at Inn*. — It has been held, in both *England* and *America*, that one who leaves his horse at an inn to be cared for thereby

1. See *supra*, this section, *Who Are Guests* — *Definition*.

2. *Question of Fact*. — *Lamond v. Richard*, (1897) 1 Q. B. 541; *Magee v. Pacific Imp. Co.*, 98 Cal. 678, 35 Am. St. Rep. 199; *Hall v. Pike*, 100 Mass. 495; *Bunn v. Johnson*, 77 Mo. App. 596; *Jalie v. Cardinal*, 35 Wis. 118.

3. *Determination by Court on Undisputed Facts*. — *Arcade Hotel Co. v. Wiatt*, 41 Ohio St. 32.

4. *Personal Presence Not Indispensable*. — *Towson v. Hayre-de-Grace Bank*, 6 Har. & J. (Md.) 47, 14 Am. Dec. 254; *Coykendall v. Eaton*, (Supm. Ct. Gen. T.) 37 How. Pr. (N. Y.) 438, 55 Barb. (N. Y.) 183; *Bac. Abr.*, tit. *Inns and Innkeepers* (C) 5. See also *Coykendall v. Eaton*, (Supm. Ct. Gen. T.) 40 How. Pr. (N. Y.) 266, 42 How. Pr. (N. Y.) 378.

Owner's Servants. — *Beedle v. Morris*, Cro. Jac. 224, was an action against the defendant as an innkeeper for money stolen from the plaintiff's servant while lodging at the defendant's inn. It was objected that the custom of the realm was only for travelers, and that the plaintiff himself was not a traveler, but it was adjudged that he might maintain the action. See also *Bennett v. Mellor*, 5 T. R. 273; *Seymour v. Cook*, 53 Barb. (N. Y.) 451.

In the Case of a Corporation whose agent, while traveling on the business of the corporation, with its property in his possession, stops at an inn, the justice and propriety of the rule stated in the text are obvious, and the innkeeper cannot escape liability for the theft of such goods while so at his inn, on the ground that a corporation could not, in the nature of

things, be a guest. *Berkshire Woollen Co. v. Proctor*, 7 Cush. (Mass.) 417.

5. *Property Taken to Inn by Bailee of Owner*. — *Coykendall v. Eaton*, (Supm. Ct. Gen. T.) 37 How. Pr. (N. Y.) 438, 55 Barb. (N. Y.) 188. In this case the plaintiff's son, twenty-five years of age, went to the defendant's inn to attend a ball. While he was at the inn a buggy robe which he had borrowed from the plaintiff was lost. It was held that the defendant was not liable to the plaintiff as an innkeeper, but only as an ordinary bailee, because the plaintiff's son went to the inn on his own business and not as the agent or servant of the plaintiff, and no claim was made that he was a member of the plaintiff's family. Compare *Mason v. Thompson*, 9 Pick. (Mass.) 280, 20 Am. Dec. 471. In this case one Lydia Giles, who had hired a horse of the plaintiff, drove it to Boston to the house of one Abrams, where she remained as a visitor, sending the horse to the stable of the defendant, an innkeeper, to be kept during her visit. At the end of four days, when Lydia Giles sent for the horse, the harness could not be found, and was supposed to have been stolen, and it was held, on the authority of *Yorke v. Grenaugh*, 2 Ld. Raym. 866, that the plaintiff was entitled to recover.

6. *Owner Leaving Inanimate Chattels at Inn Not a Guest*. — *Strauss v. County Hotel, etc., Co.*, 12 Q. B. D. 27, 53 L. J. Q. B. 25, 49 L. T. N. S. 601, 32 W. R. 170, 48 J. P. 69; *Palin v. Reid*, 10 Ont. App. 63; *Toub v. Schmidt*, 60 Hun (N. Y.) 409; *McDaniels v. Robinson*, 28

becomes a guest, *quoad* the property so committed to the innkeeper's care,¹ because the innkeeper has profit from its keep.² There are, however, several *dicta* opposed to this rule,³ and in some recent cases the contrary has been squarely decided.⁴

c. NATURE OF ACCOMMODATIONS FURNISHED. — While those persons only can be regarded as guests who resort to an inn for the purpose of obtaining such accommodations as inns usually afford,⁵ it is not necessary that they should require all that an inn can furnish, but it is sufficient if they take lodgings only,⁶ or food without lodgings;⁷ and it has even been held that one

Vt. 387, 67 Am. Dec. 720. See also the *dicta* in the cases cited in the next following note.

1. **Leaving Horse at Inn Held to Constitute Owner a Guest.** — *Gelley v. Clerk*, Cro. Jac. 188; *York v. Grindstone*, 1 Salk. 388, 2 Ld. Raym. 866; *Walker v. Sharpe*, 31 U. C. Q. B. 340; *Russell v. Fagan*, 7 Houst. (Del.) 389; *Mason v. Thompson*, 9 Pick. (Mass.) 280, 20 Am. Dec. 471; *McDaniels v. Robinson*, 26 Vt. 316, 62 Am. Dec. 574.

In the case of *Mason v. Thompson*, 9 Pick. (Mass.) 280, 20 Am. Dec. 471, the traveler never went to the inn, but stopped as a visitor with a friend, and sent her horse and carriage to the inn. After four days she sent for the property, and found that a part of it had been stolen; but still the innkeeper was held liable.

The Accommodation and Convenience of Travelers seem to be an important element of the rule stated in the text. See *Russell v. Fagan*, 7 Houst. (Del.) 389.

In *Grinnell v. Cook*, 3 Hill (N. Y.) 485, 38 Am. Dec. 663, the owner of several horses placed them at an inn in the village where he resided, and they were cared for by the innkeeper for several weeks. The question arose as to whether the relation of innkeeper and guest existed, and it was argued that it did not, because the owner of the horses was not a traveler or a transient person. The court held, on the facts involved, that the relation did not exist. It would seem, therefore, that the precise point decided was that, where a person who is not a traveler or transient person, but the neighbor of an innkeeper, puts his horses at the inn to be kept, he does not thereby become a guest so as to give rise to the mutual rights and liabilities of an innkeeper in respect to the horses; though it was said by Bronson, J., delivering the opinion, that even if the owner of the horses had been a traveler, it would not make him a guest to leave his horse at the inn, if he did not stop there himself. But see *Walker v. Sharpe*, 31 U. C. Q. B. 340. In this case the plaintiff's horse was left at the defendant's inn, not by the plaintiff, or by his servant or any member of his family, but by one S., to whom the plaintiff had lent or hired the horse. It was strangled while so in the defendant's stable, owing, as the jury found, to negligence of the defendant's servant in tying it up in the stall, and it was held that the defendant was liable to the plaintiff as innkeeper.

2. **Reason for Decisions — Profit from Keep of Horse.** — *York v. Grindstone*, 1 Salk. 388, 2 Ld. Raym. 866; *Russell v. Fagan*, 7 Houst. (Del.) 389.

3. **Opposing Dicta.** — In *York v. Grindstone*, 1 Salk. 388, 2 Ld. Raym. 866, Lord Holt

doubted whether a traveler who did not go to the inn himself, but only left his horse there, which the innkeeper was not obliged to receive, thereby became a guest. In *Grinnell v. Cook*, 3 Hill (N. Y.) 485, 38 Am. Dec. 663, Bronson, J., expressed the same opinion, and referring to *York v. Grindstone*, 1 Salk. 388, 2 Ld. Raym. 866, said that as to the point for which it is usually cited as an authority, it rests on the dictum of Powell, Powys, and Gould, JJ., because that point did not actually arise; but that the decision turned on the construction of the avowry and the proper mode of pleading, and that the judges gave as the authority for their dictum the case of *Robinson v. Water*, Popham 127, in which the point decided was that the innkeeper had a lien on the plaintiff's horse, though the animal was brought to the inn by one who took him wrongfully.

4. **Cases Holding that Leaving Horse at Inn Does Not Constitute Owner a Guest.** — *Healey v. Gray*, 68 Me. 489, 28 Am. Rep. 80; *Ingalsbee v. Wood*, 36 Barb. (N. Y.) 455, affirmed 33 N. Y. 577.

5. See *supra*, this section. *Who Are Guests — Definition.*

6. **Taking Lodgings Without Food.** — *Pinkerton v. Woodward*, 33 Cal. 557, 91 Am. Dec. 657; *Bullock v. Adair*, 63 Ill. App. 30; *Krohn v. Sweeney*, 2 Daly (N. Y.) 200; *Bernstein v. Sweeny*, 33 N. Y. Super. Ct. 271; *Metzger v. Schnabel*, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 698.

In *Lynar v. Mossop*, 36 U. C. Q. B. 230, the plaintiff went from the train on which he had been traveling to the defendant's hotel, taking with him a portmanteau and other luggage. He applied to the clerk of the hotel for a room, and one was assigned to him. He said that he wanted the room only to change his dress before going to a friend. His luggage was taken to the room, and hot water was brought at his request, for the purpose of shaving. He occupied the room for about an hour and then went to the house of his friend. He left his luggage in the room, but said nothing about returning to it. It was held that he was a guest during the time that he was using the room for the purpose of dressing.

A European Hotel, which may furnish lodgings without food, has been held within the principle of the cases cited *supra*, this note, to be an inn. *Bullock v. Adair*, 63 Ill. App. 30; *Krohn v. Sweeney*, 2 Daly (N. Y.) 200; *Bernstein v. Sweeny*, 33 N. Y. Super. Ct. 271.

7. **Taking Food Without Lodgings.** — *Read v. Amidon*, 41 Vt. 15, 98 Am. Dec. 560; *Orchard v. Bush*, (1898) 2 Q. B. 284, 67 L. J. Q. B. 650, 78 L. T. N. S. 557, 46 W. R. 527.

who visits an inn merely for the purpose of obtaining liquor thereby becomes a guest.¹ Furthermore, a person is none the less a guest because he comes to the inn, not on his own business or pleasure, but in the company and at the expense of another, if he comes as a traveler or transient to receive entertainment in that character.² On the other hand, one does not become a guest by obtaining a room at an inn solely for the accomplishment of some unlawful or improper purpose,³ or in any case where he visits the house, not as a traveler or transient and with the view of receiving the usual accommodations desired by persons in that character.⁴

d. DURATION OF RELATION — (1) Commencement. — It is often important to ascertain when the relation of innkeeper and guest commences, in cases involving liability for the loss of or injury to the guest's effects. This is a question of fact, the solution of which generally depends on the facts of each case.⁵ It is obvious that when a person goes to an inn as a traveler or wayfarer, and the innkeeper receives him as such, the relation of landlord and guest attaches at once.⁶ The intention, however, to avail himself of the entertainment offered, that is, to obtain refreshments or lodging, or both, is material, and if the party should engage and pay for a room merely to secure a safe place for the deposit of his valuables, and without any intention of occupying it, he would not be a guest.⁷ Under some circumstances, too, the

1. Purchasing Liquor at Inn Held Sufficient to Constitute Party a Guest. — *McDonald v. Edgerton*, 5 Barb. (N. Y.) 560. See also *Bennett v. Mellor*, 5 T. R. 273.

Massachusetts Statute. — The idea that a person who resorts to an inn for the purpose of procuring and drinking intoxicating liquors is a guest is expressly excluded by the Massachusetts statute (Pub. Stat. Mass. 1882, c. 100, § 9, cl. 2), which forbids the sale of liquor on Sunday, "except that if the licensee is also licensed as an innholder he may supply such liquor to guests who have resorted to his house for food or lodging." *Conn. v. Hagan*, 140 Mass. 289.

2. Going to Inn in Company and at Expense of Another. — *Read v. Amidon*, 41 Vt. 15, 98 Am. Dec. 560.

A Distinction is to be noted, however, between a case like the one stated in the text, and one where a person goes to an inn to visit a guest and to be there entertained by the guest. In the latter case, the visitor does not become the guest of the innkeeper. See *Gastenhof v. Clair*, 10 Daly (N. Y.) 265.

3. Taking Room for Unlawful or Improper Purpose. — In *Curtis v. Murphy*, 63 Wis. 4, 53 Am. Rep. 242, it was held that a man did not become a guest, within the legal significance of the word, where he went to a hotel near his residence and took a room for the night, merely for the purpose of having illicit intercourse with a woman whom he brought with him. The court said that the considerations of public policy on which the extraordinary liabilities of innkeepers are founded have no application to such a case, and that a guest is only one who, as a traveler or transient person, put up at an inn for a lawful purpose, to receive its customary entertainment. Compare *Lucia v. Omel*, 46 N. Y. App. Div. 200.

4. Person Attending Balls, Banquets, etc., at Inn Not a Guest. — *Carter v. Hobbs*, 12 Mich. 52, 83 Am. Dec. 762; *Amey v. Winchester*, 68 N. H. 447, *citing* 11 AM. AND ENG. ENCYC. OF LAW (1st ed.) 20, 21; *Fitch v. Casler*, 17 Hun

(N. Y.) 126. But see *contra*, *Bourgouin v. Hogan*, 15 L. C. Rep. 424, in which a hotel keeper was held liable for the value of an overcoat, given in charge by the owner to a servant of the hotel while the owner attended a ball there, for which he received a check, and which afterwards could not be found.

Person Going to Hotel in Order to Deposit Valuables Not a Guest. — *Arcade Hotel Co. v. Wiatt*, 44 Ohio St. 32.

Person Dining with Guest at Inn Not Himself a Guest. — *Gastenhof v. Clair*, 10 Daly (N. Y.) 265.

Accommodations for Stallion and Keeper. — *Mowers v. Fethers*, 61 N. Y. 34, 19 Am. Rep. 244, *reversing* 6 Lans. (N. Y.) 112, and *distinguishing* *Washburn v. Jones*, 14 Barb. (N. Y.) 193, was an action to recover the value of a stallion which was destroyed by fire while at the defendant's inn. It appeared that the plaintiffs, having appointed an itinerary for their horse for the season of 1865, one station of which was the defendant's inn, made a special agreement with the defendant, before the season commenced, by which the defendant was to give the plaintiffs the exclusive use of a designated box stall in his barn, in which to keep the horse for two days of each week, and to furnish oats for the horse and meals for the man in charge at prices less than the ordinary rates for travelers. The agreement also provided that the plaintiffs should feed, care for, and groom the horse. It was held that the plaintiffs were not entitled to recover, because the sojourn of the man and the horse at the inn was not that of an ordinary traveler within the strict rule of common-law liability for the preservation of the property of guests.

5. Commencement of Relation Dependent on Circumstances. — *Sasseen v. Clark*, 37 Ga. 242.

6. Reception of Persons Resorting to Inn. — *Norcross v. Norcross*, 53 Me. 163; *Ross v. Melin*, 36 Minn. 421.

7. Intention to Become Guest — England. — *Strauss v. County Hotel, etc., Co.*, 12 Q. B. D. 27.

relation may commence before the party actually reaches the inn,¹ or where he does not go in person at all.²

(2) *Termination* — (a) *By Guest* — *aa. DEPARTURE FROM INN.* — The guest generally comes without any bargain, remains without one, and may go when he pleases, paying only for the actual entertainment received.³ Accordingly he ceases to be a guest when he pays his bill and departs,⁴ even though he intends to return,⁵ unless by mutual understanding or agreement the relation is continued during his absence.⁶ And where he departed without removing his effects, it has been held that the relation will continue for such reasonable time as will afford him an opportunity of removing them.⁷ But as long as the guest is actually on the premises the liability of the innkeeper continues though the guest has paid his bill and is in the act of departing.⁸

Leaving the Inn Temporarily, however, as where the guest merely goes out to view the town or to witness some spectacle there, intending to return again, has been held not to terminate the relation.⁹

Leaving Baggage or Effects at Inn. — When a departing guest leaves his baggage or effects at the inn, that fact does not operate to continue the relation, but the innkeeper becomes merely an ordinary bailee of such property.¹⁰ It has been held, however, that where a departing guest leaves his luggage at the

Michigan. — Carter v. Hobbs, 12 Mich. 52, 83 Am. Dec. 762.

Missouri. — Bunn v. Johnson, 77 Mo. App. 596.

Ohio. — Arcade Hotel Co. v. Wiatt, 44 Ohio St. 32.

Vermont. — McDaniels v. Robinson, 26 Vt. 316, 62 Am. Dec. 574.

Wisconsin. — Curtis v. Murphy, 63 Wis. 4, 53 Am. Rep. 242.

Intention Is a Question of Fact, and hence all of the authorities say that whether the relation of landlord and guest exists is always a question of fact for the jury. The evidence, however, may be of such a character in a given case as to leave no room for dispute as to the party's intention. Thus, if he engage a room at a hotel and occupy it in the usual way, there can be no question that he intended to become a guest. Bunn v. Johnson, 77 Mo. App. 596.

1. *Commencement of Relation Before Arrival of Guest* — *Delivery of Baggage to Porter.* — See Sasseen v. Clark, 37 Ga. 242.

Want of Authority in the Porter to receive baggage, checks for baggage, or guests, at the depot, his duty being simply to advertise the hotel and suggest it to strangers, will not relieve the innkeeper from liability, where it is not shown that the traveler knew of any such limitation of authority, but simply knew such porter was in fact the porter of the hotel. Coskery v. Nagle, 83 Ga. 696, 20 Am. St. Rep. 333. See also Richards v. London, etc., R. Co., 7 C. B. 839, 62 E. C. L. 839; Dickinson v. Winchester, 4 Cush. (Mass.) 114, 50 Am. Dec. 760.

Baggage Sent on Ahead. — When baggage is delivered to an innkeeper with the intention on the part of the owner of becoming a guest, and he soon afterwards does become a guest, the innkeeper's liability begins at the time the baggage was received. Eden v. Drey, 75 Ill. App. 102.

2. See *supra*, this section, *Necessity of Personal Presence.*

3. *Relation Determinable at Will of Guest.* — Shoecraft v. Bailey, 25 Iowa 553.

4. *Payment of Bill and Departure from Inn* — *England.* — Gelley v. Clerk, Cro. Jac. 189.

Canada. — Lynar v. Mossop, 36 U. C. Q. B. 230; Palin v. Reid, 10 Ont. App. 63.

Alabama. — Glenn v. Jackson, 93 Ala. 342.

Arkansas. — Wear v. Gleason, 52 Ark. 364, 20 Am. St. Rep. 186.

Colorado. — Murray v. Marshall, 9 Colo. 482, 59 Am. Rep. 152.

Florida. — O'Brien v. Vaill, 22 Fla. 627, 1 Am. St. Rep. 219.

Iowa. — Hays v. Turner, 23 Iowa 214.

New York. — Wintermute v. Clark, 5 Sandf. (N. Y.) 242.

"Where He [the Guest] Leaves Goods to Keep, whereof the defendant is not to have any benefit, and goeth from thence for two or three days, although he saith he will return, yet he is at his liberty, and therefore is not any guest during that time." Gelley v. Clerk, Cro. Jac. 189.

5. *Leaving Inn with Intention of Returning.* — Miller v. Peeples, 60 Miss. 819, 45 Am. Rep. 423; Lynar v. Mossop, 36 U. C. Q. B. 230.

6. *Mutual Agreement or Understanding.* — Allen v. Smith, 12 C. B. N. S. 638, 104 E. C. L. 638, 31 L. J. C. Pl. 306, 9 Jur. N. S. 230, 6 L. T. N. S. 459, 10 W. R. 646, affirmed 9 Jur. N. S. 1284, 11 W. R. 440; Day v. Bathur, 2 H. & C. 14, 9 Jur. N. S. 444, 32 L. J. Exch. 171, 8 L. T. N. S. 205, 11 W. R. 575; Brown Hotel Co. v. Burckhardt, 13 Colo. App. 59.

7. *Continuation of Relation for Removal of Baggage.* — Maxwell v. Gerard, 84 Hun (N. Y.) 537. See also *infra*, this title, *Liability in Respect to Effects of Guests* — *Requisites of Liability* — *Existence of Relation of Innkeeper and Guest.*

8. *Relation Not Terminated until Actual Departure.* — Seymour v. Cook, 53 Barb. (N. Y.) 451.

9. *Leaving Inn Temporarily.* — Gelley v. Clerk, Cro. Jac. 188; McDonald v. Edgerton, 5 Barb. (N. Y.) 560. See also Brown Hotel Co. v. Burckhardt, 13 Colo. App. 59; Grinnell v. Cook, 3 Hill (N. Y.) 485, 38 Am. Dec. 663; McDaniels v. Robinson, 26 Vt. 316, 62 Am. Dec. 574.

10. *Leaving Baggage, etc., at Inn.* — See the

inn with the innkeeper's consent, the innkeeper remains liable for it as such for a reasonable time, to be estimated according to the circumstances of the case, though he gets no additional compensation for taking care of it;¹ but this proposition has been criticised as not sound in principle, and as failing to observe the distinction between live chattels, for the keep of which the innkeeper has compensation, and inanimate things, from which he derives no profit.²

bb. ABANDONMENT OF TRANSIENT CHARACTER. — A guest at an inn may terminate the existing relation by abandoning his transient character, and this may be effected merely by forming an intention to remain indefinitely or permanently, without any present purpose of going on to any other place.³

A Special Contract with an Innkeeper, made by one who has been received as a guest, does not operate to convert the relation to that of a boarder if the party retains his character as a transient.⁴

The Presumption always is that one who comes as a guest remains in that capacity until a change of relation is shown.⁵

(b) **By Innkeeper.** — An innkeeper has the right to terminate the relation and require a guest to depart, if the guest conducts himself in an improper or disorderly manner,⁶ or is in default in the payment of the innkeeper's proper charges.⁷ Also, if the guest loses his status as a transient, the innkeeper may require him to leave, because innkeepers are required by law to entertain transients.⁸

c. DISTINCTION BETWEEN GUESTS AND BOARDERS — (1) *Definition of Boarder.* — A boarder has been defined as one who makes a special contract with another person for food, with or without lodging.⁹

(2) *Permanent or Transient Character of Stay.* — The essential difference between a mere boarder and a guest at an inn lies in the character in which the party comes, that is, whether he is a transient person or not; and accordingly one who stops at an inn or a hotel as a transient is a guest, with all the rights, privileges, and liabilities incident to that relation.¹⁰ On the other

cases cited *supra*, this division of this section, note, *Payment of Bill and Departure from Inn.*

1. **Luggage Left at Inn with Innkeeper's Consent.** — *Adams v. Clem*, 41 Ga. 65, 5 Am. Rep. 524; *McDonald v. Edgerton*, 5 Barb. (N. Y.) 560; *Giles v. Fauntleroy*, 13 Md. 126.

2. **Distinction Between Animate and Inanimate Property.** — *Grinnell v. Cook*, 3 Hill (N. Y.) 485, 38 Am. Dec. 663. See also *O'Brien v. Vaill*, 22 Fla. 627, 1 Am. St. Rep. 219, criticising the cases of *Adams v. Clem*, 41 Ga. 65, 5 Am. Rep. 524, and *McDonald v. Edgerton*, 5 Barb. (N. Y.) 560, cited in the next preceding note. The distinction is also referred to in *Glenn v. Jackson*, 93 Ala. 342.

3. **Abandonment of Transient Character — Change of Intention.** — *Lamond v. Richard*, (1897) 1 Q. B. 541, 66 L. J. Q. B. 315, 76 L. T. N. S. 141, 45 W. R. 289, 61 J. P. 260. See also *Whiting v. Mills*, 7 U. C. Q. B. 450.

4. **Relation Not Changed by Special Contract.** — *Pinkerton v. Woodward*, 33 Cal. 557, 91 Am. Dec. 657; *Berkshire Woollen Co. v. Proctor*, 7 Cush. (Mass.) 417; *Lusk v. Belote*, 22 Minn. 468; *Ross v. Mellin*, 36 Minn. 421; *Lima v. Dwinelle*, 7 Alb. L. J. 44. See also *infra*, this section, *Distinction between Guests and Boarders — Contract Creating Relation.*

5. **Presumption of Continuance.** — *Norcross v. Norcross*, 53 Me. 163; *Lusk v. Belote*, 22 Minn. 468; *Ross v. Mellin*, 36 Minn. 421; *Whiting v. Mills*, 7 U. C. Q. B. 450.

6. **Termination of Relation by Innkeeper — Mis-**

conduct of Guest. — *Howell v. Jackson*, 6 C. & P. 723, 25 E. C. L. 617; *Moriarty v. Brooks*, 6 C. & P. 684, 25 E. C. L. 597; *State v. Whitby*, 5 Harr. (Del.) 494; *Com. v. Mitchel*, 2 Pars. Eq. Cas. (Pa.) 431.

7. **Default of Guest in Payment of Charges.** — *Doyle v. Walker*, 26 U. C. Q. B. 502; *Lawrence v. Howard*, 1 Utah 142.

8. **Guest Losing Status as Transient.** — A traveler who goes to a common inn is not necessarily entitled to accommodation therein as long as he chooses to remain on payment of the inn charges and conducting himself properly, and if he forms an intention of staying in the inn and has no intention of going on to any other place, he ceases to be a traveler, and the innkeeper is entitled to terminate the relation of host and guest by reasonable notice. The question whether a traveler staying in a common inn has ceased to be a traveler is a question of fact, in determining which the length of his stay in point of time must be taken into consideration, but is not of itself conclusive. *Lamond v. Richard*, (1897) 1 Q. B. 541, 66 L. J. Q. B. 315, 76 L. T. N. S. 141, 45 W. R. 289, 61 J. P. 260. See also *Whiting v. Mills*, 7 U. C. Q. B. 450.

9. **Boarder Defined.** — *Bouvier's Law Dict.*, tit. Boarder. See also the term BOARD defined, vol. 4, p. 589.

10. **Transient Character of Party Determinative of Relation.** — See *supra*, this section, *Who May Become a Guest.*

hand, one who seeks accommodations, with such a view to permanency as to make the place his home for the time being, is not a guest, but a boarder.¹ The length of his stay, however, is not of itself ordinarily decisive, for he will continue to be a guest as long as he remains in the transitory condition of that relation;² but still one may cease to be a guest and become a boarder, and the length of his stay is a fact which may be considered in determining this question.³

(3) *Contract Creating Relation.* — It has also been said that there is a difference between a boarder and a guest in regard to the contract by which the relation is created in the respective instances; a boarder being under an express contract at a certain rate, for a certain time,⁴ while a guest at an inn is ordinarily entertained from day to day, according to his business, on an implied contract.⁵ But this difference seems to rest more on the practice usually followed in the dealings between innkeepers and their guests; for it has frequently been held that, where a transient goes to an inn for entertainment as

1. Permanency as Determinative of Character of Boarder — *Arizona.* — *Haff v. Adams*, (Ariz. 1899) 59 Pac. Rep. 111.

Kentucky. — *Vance v. Throckmorton*, 5 Bush (Ky.) 43, 96 Am. Dec. 327; *Kisten v. Hildebrand*, 9 B. Mon. (Ky.) 72, 48 Am. Dec. 416.

Minnesota. — See *Singer Mfg. Co. v. Miller*, 52 Minn. 516, 38 Am. St. Rep. 568.

Nebraska. — *Pullman Palace Car Co. v. Lowe*, 28 Neb. 239, 26 Am. St. Rep. 325.

Tennessee. — *Manning v. Wells*, 9 Humph. (Tenn.) 746, 51 Am. Dec. 688.

Canada. — *Whiting v. Mills*, 7 U. C. Q. B. 450.

Intention to Remain at Inn Indefinitely. — In *Moore v. Long Beach Development Co.*, 87 Cal. 483, 22 Am. St. Rep. 265, the plaintiff went with his family to the defendant's hotel, with the intention of remaining there indefinitely in case his wife's health should be benefited, but with a view, if her health did not improve, to leave at any time. He had previously made an arrangement with the defendant for terms of entertainment at a great deal less than those for a transient traveler, and by the month, and during his stay at the hotel he had no other place of residence. It was held that the plaintiff and his family were boarders and not guests.

A Regular Boarder at a Hotel, by the month, at a fixed price, is in no sense a guest so as to hold the proprietors liable as innkeepers. *Lawrence v. Howard*, 1 Utah 142.

Presumption as to Relation. — Where a person goes to an inn, the presumption is that he goes as a guest, unless there is evidence showing that he goes as a boarder. *Fay v. Pacific Imp. Co.*, 93 Cal. 253, 27 Am. St. Rep. 198; *Hall v. Pike*, 100 Mass. 495.

Some Members of a Family stopping at a hotel may be boarders, while others are guests. Thus, where a man placed his wife and children at a hotel to board indefinitely, and made them occasional visits, two or three times a year, it was held that the wife and children were boarders, and that the man, when present on a visit, was a guest, and that in case of theft of their property the hotelkeeper was liable as an innkeeper only for such articles as belonged personally to the man and were brought with him on the visit during which the theft occurred. As respects jewelry and wearing apparel of the wife and children, the inn-

keeper's liability was held to be governed by the status of the members of the family to whom such articles belonged. *Lusk v. Belote*, 22 Minn. 468.

2. Length of Stay Not Controlling — *England.* — *Parkhurst v. Foster*, 1 Salk. 388.

Canada. — *Whiting v. Mills*, 7 U. C. Q. B. 450.

California. — *Moore v. Long Beach Development Co.*, 87 Cal. 483, 22 Am. St. Rep. 265.

Illinois. — *Bullock v. Adair*, 63 Ill. App. 30.

Iowa. — *Pollock v. Landis*, 36 Iowa 651.

Kentucky. — *Kisten v. Hildebrand*, 9 B. Mon. (Ky.) 75, 48 Am. Dec. 416.

New Mexico. — *Horne v. Harvey*, 3 N. Mex. 197.

Wisconsin. — *Jalie v. Cardinal*, 35 Wis. 118.

Length of Stay as Evidence. — *Lamond v. Richard*, (1897) 1 Q. B. 541, 66 L. J. Q. B. 315, 76 L. T. N. S. 141, 45 W. R. 289, 61 J. P. 260.

3. Change of Relation — Length of Stay as Evidence. — See *supra*, this section, *Duration of Relation*.

4. Boarders — Express Contract as to Time and Rate of Entertainment — *England.* — *Parkhurst v. Foster*, 1 Salk. 388.

Arizona. — *Haff v. Adams*, (Ariz. 1899) 59 Pac. Rep. 111.

California. — *Moore v. Long Beach Development Co.*, 87 Cal. 483, 22 Am. St. Rep. 265.

Kentucky. — *Vance v. Throckmorton*, 5 Bush (Ky.) 43, 96 Am. Dec. 327; *Kisten v. Hildebrand*, 9 B. Mon. (Ky.) 72, 48 Am. Dec. 416.

New York. — *Willard v. Reinhardt*, 2 E. D. Smith (N. Y.) 148.

Tennessee. — *Meacham v. Galloway*, 102 Tenn. 415, citing 11 AM. AND ENG. ENCYC. LAW 7; *Manning v. Wells*, 9 Humph. (Tenn.) 746, 51 Am. Dec. 688.

Utah. — *Lawrence v. Howard*, 1 Utah 142.

In *Shoecraft v. Bailey*, 25 Iowa 553, Beck, J., said: "The distinction between a guest and a boarder seems to be this: 'The guest comes without any bargain for time, remains without one, and may go when he pleases, paying only for the actual entertainment which he receives; and it is not enough to make [one] a boarder, and not a guest, that he has stayed a long time in the inn in this way.'"

5. Guests Received under Implied Contract. — *Shoecraft v. Bailey*, 25 Iowa 553; *Willard v. Reinhardt*, 2 E. D. Smith (N. Y.) 148.

such, he becomes a guest, with all a guest's rights and liabilities, though he makes a special contract with the innkeeper, either as to the price of the entertainment or the duration of his stay at the inn, or both.¹

Effect of Special Contract as Evidence of Relation. — Though a special contract between an innkeeper and a transient is not determinative of the question whether such transient is a boarder, it is evidence thereof to be considered with the other evidence in the case.²

IV. DUTIES, RIGHTS, AND LIABILITIES — 1. Receiving and Entertaining Guests — a. EXTENT OF DUTY. — It is a well-settled rule, which has been in force from the earliest times, that every one who keeps a common inn is under a legal obligation to afford proper entertainment to all persons offering themselves as guests, unless he has a reason, good and sufficient in law, for not doing so.³

It Is Only a Reasonable Accommodation, in respect to those things usually furnished at an inn, that the guest is entitled to demand, and therefore he has no right to select any particular apartment,⁴ and no right to any apartment except for the purpose of lodging and refreshment;⁵ nor can he require the innkeeper to furnish him with post horses, though the innkeeper is licensed to let them and has horses at liberty at the time the guest calls for them.⁶

b. GROUNDS FOR REFUSING ENTERTAINMENT. — There are several grounds on which an innkeeper may refuse to receive a proposed guest. Thus he is not bound to receive any who are not travelers or transients;⁷ or persons not

1. Special Contract Between Guest and Innkeeper Held Not to Affect Relation — *Alabama*. — *Beale v. Posey*, 72 Ala. 323.

California. — *Magee v. Pacific Imp. Co.*, 98 Cal. 678, 35 Am. St. Rep. 199; *Fay v. Pacific Imp. Co.*, 93 Cal. 253, 27 Am. St. Rep. 198; *Pinkerton v. Woodward*, 33 Cal. 557, 91 Am. Dec. 657.

Illinois. — *Bullock v. Adair*, 63 Ill. App. 30. *Massachusetts*. — *Berkshire Woollen Co. v. Proctor*, 7 Cush. (Mass.) 417.

Minnesota. — *Ross v. Mellin*, 36 Minn. 421; *Lusk v. Belote*, 22 Minn. 468. *Compare Singer Mfg. Co. v. Miller*, 52 Minn. 516, 38 Am. St. Rep. 568.

New York. — *Hancock v. Rand*, 94 N. Y. 1, 46 Am. Rep. 112, *affirming* 17 Hun (N. Y.) 279; *Metzger v. Schnabel*, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 698; *Lima v. Dwinelle*, 7 Alb. L. J. 44.

2. Special Contract as Evidence of Relation. — *Magee v. Pacific Imp. Co.*, 98 Cal. 678, 35 Am. St. Rep. 199.

3. Duty to Receive All Who Offer as Guests — *England*. — *Gordon v. Silber*, 25 Q. B. D. 491; *Hawthorn v. Hammond*, 1 C. & K. 404, 47 E. C. L. 404; *Thompson v. Lacy*, 3 B. & Ald. 283, 5 E. C. L. 285.

Alabama. — *Beale v. Posey*, 72 Ala. 323. *California*. — *Willis v. McMahan*, 89 Cal. 156; *Pinkerton v. Woodward*, 35 Cal. 557, 91 Am. Dec. 657.

Delaware. — *Hall v. State*, 4 Harr. (Del.) 132; *Russell v. Fagan*, 7 Houst. (Del.) 389.

Indiana. — *Fruchey v. Eagleson*, 15 Ind. App. 88.

Kentucky. — *Watson v. Cross*, 2 Duv. (Ky.) 148; *Kisten v. Hildebrand*, 9 B. Mon. (Ky.) 73, 48 Am. Dec. 416.

New Hampshire. — *Markham v. Brown*, 8 N. H. 523, 31 Am. Dec. 209.

Extent of Duty. — An agreement to board and lodge another implies an engagement to pay the usual and reasonable attentions to his

health and comfort, and the paying such attentions furnishes no ground for additional charge. *Kennard v. Whitson*, 1 Houst. (Del.) 36.

4. Guest Not Entitled to Select Any Particular Apartment. — *Fell v. Knight*, 8 M. & W. 269; *Scrivenor v. Reed*, 6 W. R. 603.

Removing Guest from One Room to Another. — An innkeeper has the sole right to select the apartment for a guest, and, if he finds it expedient, to change it and assign him another. He cannot be treated as a trespasser for entering to make the change. *Doyle v. Walker*, 26 U. C. Q. B. 502.

Right to Candle-light in Bedroom. — Where the guest expresses a desire to sit up all night, the landlord is not bound to supply him with candle-light in a bedroom, providing he offers him another proper room for the purpose. *Fell v. Knight*, 8 M. & W. 269.

5. Guest Not Entitled to Apartments Except for Lodgings and Refreshment. — *Burgess v. Clements*, 4 M. & S. 306, *Holt N. P.* 211, note, 3 E. C. L. 90, note, 1 Stark 251, note, 2 E. C. L. 101, note, 16 Rev. Rep. 473.

A Boarder does not, by his contract for board, acquire the right to carry on his business in the house. *Ambler v. Skinner*, 7 Robt. (N. Y.) 561.

6. Innkeeper Not Bound to Furnish Post-horses. — *Dicas v. Hides*, 1 Stark. 247, 2 E. C. L. 99.

7. Innkeepers Bound to Receive Only Travelers or Transients. — *Rex v. Luellin*, 12 Mod. 445; *Reg. v. Rymer*, 2 Q. B. D. 136, 13 Cox C. C. 378, 46 L. J. M. C. 108, 35 L. T. N. S. 774, 25 W. R. 415.

The statement that an innkeeper is not bound to receive any persons as guests except such as are travelers or transients, is only another way of saying that only persons of that condition may become guests, which matter has been considered in another place. See *supra*, this title, *Who Are Guests — Who May Become a Guest*.

in a fit condition to come to the inn,¹ as where they are drunk, disorderly, or otherwise obnoxious,² or are not able to pay the price of their entertainment.³ Neither is an innkeeper bound to entertain an agent of a rival inn who seeks to entice away his customers.⁴

On the Other Hand, it has been held to be no excuse for failing to provide a traveler with entertainment, that the innkeeper did not have sufficient food,⁵ or that the person seeking entertainment was traveling on Sunday,⁶ or at an hour of the night after the innkeeper's family had gone to bed,⁷ or that he was an infant,⁸ or that he refused to tell his name and abode.⁹

c. LIABILITIES FOR IMPROPER REFUSAL — (1) *Action by Party Injured.* — If an innkeeper improperly refuses to receive and entertain any person coming to the inn as a guest, he is liable, in consequence of such unlawful act, to an action by the injured party for damages.¹⁰

1. **Persons Not in Fit Condition.** — *Hall v. State*, 4 Harr. (Del.) 132; *Russell v. Fagan*, 7 Houst. (Del.) 389.

One Whose Filthy Condition Would Annoy Other Guests may properly be excluded from an inn by the proprietor. *Per Parker, J.*, in *Markham v. Brown*, 8 N. H. 523, 31 Am. Dec. 209.

2. **Drunk or Disorderly Persons.** — *Hawthorn v. Hammond*, 1 C. & K. 404, 47 E. C. L. 404; *Howell v. Jackson*, 6 C. & P. 723, 25 E. C. L. 617; *Rex v. Ivens*, 7 C. & P. 213, 32 E. C. L. 493; *Hutchins v. Durham*, 118 N. Car. 457; *McHugh v. Schlosser*, 159 Pa. St. 480, 39 Am. St. Rep. 699, 34 W. N. C. (Pa.) 33; *Com. v. Mitchel*, 2 Pars. Eq. Cas. (Pa.) 431, 1 Phila. (Pa.) 63, 7 Leg. Int. (Pa.) 59.

Disorderly Conduct is also mentioned as a reason for refusing to receive a guest, in *Beale v. Posey*, 72 Ala. 323.

Mere Apprehension of Insult Not Sufficient Reason for Refusal. — *Atwater v. Sawyer*, 76 Me. 539, 49 Am. Rep. 634.

Conduct Offensive to Other Guests. — In *Reg. v. Rymer*, 2 Q. B. D. 136, 13 Cox C. C. 378, 46 L. J. M. C. 103, 35 L. T. N. S. 774, 25 W. R. 415, it was held that an innkeeper had reasonable ground for refusing entertainment where the guest, who had been in the habit of coming to the inn with several large dogs which had been found an annoyance to other guests, persisted in bringing his dogs notwithstanding the objections of the innkeeper.

Illness of a Guest, in consequence of which he causes a disturbance and annoys other guests, will not justify the innkeeper in removing him, except in a manner suited to his condition. *McHugh v. Schlosser*, 159 Pa. St. 480, 39 Am. St. Rep. 699, 34 W. N. C. (Pa.) 33.

Where a Guest Is Taken Ill with a Contagious Disease, the proprietor, after notice, has the right to remove him, in a careful and becoming manner and at an appropriate hour, to some hospital or other place of safety, provided the life of the guest be not imperiled thereby. *Levy v. Corey*, (N. Y. City Ct. Tr. T.) 1 City Ct. (N. Y.) Supp. 57.

3. **Persons Not Able to Pay for Entertainment.** — *Markham v. Brown*, 8 N. H. 523, 31 Am. Dec. 209.

Means of Payment is mentioned as one of the qualifications without which the innkeeper need not receive a guest, in *Beale v. Posey*, 72 Ala. 323.

Tender of Compensation. — In *Rex v. Ivens*, 7 C. & P. 213, 32 E. C. L. 493, it was held that a

tender of compensation by a guest was not necessary to support an indictment for the refusal of the innkeeper to furnish entertainment.

In a later case, however, it was held that in order to recover against an innkeeper for refusal to receive a guest, the declaration must allege a tender of the amount to which the innkeeper would reasonably be entitled, unless a tender cannot be made, as where the innkeeper refuses to open his door. *Fell v. Knight*, 8 M. & W. 269, in which the court refuses to follow the case of *Rex v. Ivens*, 7 C. & P. 213, 32 E. C. L. 493. See also 1 Hawk. P. C. 452.

4. **Rival Enticing Away Customers.** — *Jencks v. Coleman*, 2 Sumn. (U. S.) 221 (dictum of Story, J.).

5. **Lack of Food No Excuse for Failure to Provide Entertainment.** — *Atwater v. Sawyer*, 76 Me. 539, 49 Am. Rep. 634. This case was decided under a statute which provides that "every innholder shall at all times be furnished with suitable provisions and lodging for strangers and travelers, * * * and he shall grant such reasonable accommodations as occasion requires to strangers, travelers, and others."

6. **Guest Traveling on Sunday.** — *Rex v. Ivens*, 7 C. & P. 213, 32 E. C. L. 493.

Though a guest coming on Sunday may not be refused for that reason, the local excise laws may forbid the innkeeper to furnish him with intoxicating liquors. *Hall v. State*, 4 Harr. (Del.) 132; *Com. v. Naylor*, 34 Pa. St. 86.

7. **Guest Coming After Innkeeper's Family Had Gone to Bed.** — *Rex v. Ivens*, 7 C. & P. 213, 32 E. C. L. 493.

8. **Infancy Not a Ground for Refusing Entertainment.** — *Watson v. Cross*, 2 Duv. (Ky.) 148.

9. **Refusal of Proposed Guest to Tell His Name and Abode.** — *Rex v. Ivens*, 7 C. & P. 213, 32 E. C. L. 493.

10. **Innkeeper Suable for Refusing Entertainment** — *England.* — *Hawthorn v. Hammond*, 1 C. & K. 404, 47 E. C. L. 404.

United States. — Civil Rights Bill, 1 Hughes (U. S.) 541.

California. — *Willis v. McMahan*, 89 Cal. 156.

Indiana. — *Fruchey v. Eagleson*, 15 Ind. App. 88.

Kentucky. — *Watson v. Cross*, 2 Duv. (Ky.) 148; *Kisten v. Hildebrand*, 9 B. Mon. (Ky.) 72, 48 Am. Dec. 416.

Penalties Are Also Prescribed by Statute in some jurisdictions for the refusal of an innkeeper to receive any person as a guest on account of such person's race or color. These statutes are usually known as the Civil Rights Acts, and are designed to prevent discrimination against persons of the negro race.¹

Measure of Damages. — Since the action sounds in tort,² it is governed by the general rule applicable to that class of actions, namely, that the measure of damages is based on the theory of compensation for the wrong and injury;³ and exemplary damages may be allowed when there are aggravating circumstances.⁴

(2) *Indictment.* — Not only is it a civil wrong at common law for an innkeeper to refuse, without a good reason, to entertain a traveler, but it is also a public offense for which the innkeeper may be indicted and fined.⁵

(3) *Compelling Performance of Duty.* — It has also been said that an innkeeper may be compelled by a constable of the town to receive and entertain as his guest a person who is lawfully entitled to entertainment.⁶

2. Excluding or Ejecting Persons Not Coming as Guests. — An innkeeper, by virtue of his proprietorship, has an undoubted right to exclude or eject from his premises any and all persons whose presence may be objectionable to him. This principle is recognized by all the cases involving the liability of an innkeeper for refusing to receive a guest, or compelling a guest to leave.⁷ As to persons not coming as guests, the rule is laid down as necessary for the protection of both the proprietor and his guests, that, if a man has entered a public inn and his presence is disagreeable to the proprietor or his guests, the proprietor may request him to depart, and if he refuses, may lay hands gently on him and lead him out, or use all the force necessary to put him out, if he resists.⁸ In case any one should call to see a guest, it would seem that the innkeeper ought to communicate the fact to him and admit the visitor, if the guest should wish it; but this is probably more a matter of courtesy than of right, and the innkeeper may refuse to allow the visitor to enter, or may eject him if he has already entered.⁹ This principle, however, goes merely to the innkeeper's exclusive dominion over his own premises, and does not involve a denial of any duty on his part to admit visitors on proper occasions. On the contrary, it has been said that the innkeeper would be liable to both the

Maine. — *Atwater v. Sawyer*, 76 Me. 539, 49 Am. Rep. 634.

Remedy Restricted to Action for Damages. — Guests at a hotel cannot maintain ejectment if evicted, but can only sue for damages if wrongfully turned out. *Hutchins v. Durham*, 118 N. Car. 457.

1. Statutory Penalties — Civil Rights Acts. — *Fruchey v. Eagleson*, 15 Ind. App. 88. See also the title CIVIL RIGHTS, vol. 6, p. 68, and the various local codes and statutes in the United States.

A Federal Statute of the same tenor was passed in 1875, but it was declared unconstitutional, as legislation not within the authority of Congress. *Civil Rights Cases*, 109 U. S. 3.

2. Action Sounds in Tort. — *McCarthy v. Niskern*, 22 Minn. 90.

3. Measure of Damages — Compensation for Injury. — In *Willis v. McMahan*, 89 Cal. 156, it was held that, in an action for refusal of an innkeeper to receive the plaintiff as a guest, the plaintiff may show that his purpose of stopping at the inn was to drink mineral waters to be had there, and that preventing him from using the water had an injurious effect on his health.

For a Full Discussion of the principles governing the measure of damages in actions sound-

ing in tort, see the title DAMAGES, vol. 8, p. 640.

4. Exemplary Damages were allowed in a case where the guest had engaged and paid for a night's lodging, and the innkeeper refused to let him have it, and then turned him out of the inn with abusive and insulting language. *McCarthy v. Niskern*, 22 Minn. 90.

5. Innkeeper Indictable for Refusal to Entertain Guests. — *Rex v. Ivens*, 7 C. & P. 213, 32 E. C. L. 493; *Rex v. Luellin*, 12 Mod. 445, *Civil Rights Bill*, 1 *Hughes* (U. S.) 541; *Kisten v. Hildebrand*, 9 B. Mon. (Ky.) 74, 48 Am. Dec. 416; *Watson v. Cross*, 2 Duv. (Ky.) 148; 1 *Hawk. P. C.* 452.

6. Compelling Performance of Duty to Receive Guests. — *Newton v. Trigg*, 1 *Show.* 268 (dictum of Eyres, J.); *Bac. Abr.*, tit. *Inns and Innkeepers* (C) 3.

7. See *supra*, this section, *Receiving and Entertaining Guests — Grounds for Refusing Entertainment.*

8. Right to Exclude or Eject Persons Not Coming as Guests. — *Com. v. Mitchel*, 2 *Pars. Eq. Cas.* (Pa.) 431.

9. Right of Innkeeper to Exclude Visitors. — *Com. v. Mitchel*, 2 *Pars. Eq. Cas.* (Pa.) 431. Compare *Markham v. Brown*, 8 N. H. 523, 31 Am. Dec. 209.

visitor and the guest for any injury suffered by them respectively.¹

3. Liability in Respect to Effects of Guests — *a. RULE STATED.* — It is the duty of an innkeeper to keep the goods of his guests safely night and day, so that no loss shall happen through his default or that of his servants, or others for whose presence in the inn the innkeeper is responsible, and if he is guilty of any breach of this duty he is liable to the party injured for the loss sustained.² This is the general rule, but there are some exceptions to it which will be considered presently.³

What Law Governs. — In an action against an innkeeper to enforce such liability, resort must be had to the law of the country where the inn is kept to determine the liability of the defendant, the legality of the plaintiff's claim, and the amount to which he is legally entitled.⁴

b. REASON OF RULE. — The rule making innkeepers liable for the loss of their guests' goods is founded on considerations of public policy for the protection of travelers against the negligence and dishonest practices of innkeepers and their servants.⁵ It had its origin at an early period when highways were infested with thieves and highwaymen, with whom the innkeepers frequently colluded, and was the only means under such conditions by which protection could be afforded to travelers who had no means of knowing the neighborhood or the character of those whom they might meet at an inn.⁶

1. Liability for Excluding or Ejecting Visitors. — *Com. v. Mitchel*, 2 Pars. Eq. Cas. (Pa.) 431.

2. Innkeeper Liable for Safekeeping of Guest's Effects — *England.* — *Calye's Case*, 8 Coke 32.

Alabama. — *Chamberlain v. Masterson*, 26 Ala. 371; *Lanier v. Youngblood*, 73 Ala. 587.

California. — *Pinkerton v. Woodward*, 33 Cal. 557, 91 Am. Dec. 657.

Georgia. — *Sasseen v. Clark*, 37 Ga. 242; *Rockwell v. Proctor*, 39 Ga. 105.

Illinois. — *Metcalfe v. Hess*, 14 Ill. 129; *Johnson v. Richardson*, 17 Ill. 302, 63 Am. Dec. 369; *Kelsey v. Berry*, 42 Ill. 469; *Hulbert v. Hartman*, 79 Ill. App. 289.

Indiana. — *Huntington v. Drake*, 24 Ind. 347.

Missouri. — *Batterson v. Vogel*, 10 Mo. App. 235.

New Hampshire. — *Sibley v. Aldrich*, 33 N. H. 553, 66 Am. Dec. 745.

Pennsylvania. — *Duncan v. Barr*, 21 Pittsb. Leg. J. (Pa.) 102.

This rule is recognized by all the cases cited in this section relating to the liability of innkeepers in respect to the effects of their guests.

Absence or Sickness of the Innkeeper is no excuse for him in case of a loss by theft, because he is bound in such cases to provide honest and faithful servants according to the confidence reposed in him by the public. *Cross v. Andrews*, Cro. Eliz. 622; *Borradaile v. Hunter*, 5 M. & G. 639, 44 E. C. L. 335; *Houser v. Tully*, 62 Pa. St. 96, 1 Am. Rep. 390; 2 Pars. Cont. 147.

The Criterion of Liability is the right of the innkeeper to charge the guest for his entertainment. *Calye's Case*, 8 Coke 32; *Miller v. Peeples*, 60 Miss. 819, 45 Am. Rep. 423; *Wilkins v. Earle*, 44 N. Y. 172, 4 Am. Rep. 655. See also *supra*, this title, *Who Are Guests* — *What Constitutes the Relation*; and *infra*, this section, *Requisites of Liability* — *Existence of Relation of Innkeeper and Guest*.

Acts of Other Guests. — If the goods of a guest are stolen by another guest, the innkeeper is liable therefor, unless the sufferer was responsible for the presence of the thief. *Calye's*

Case, 8 Coke 32; *Olson v. Crossman*, 31 Minn. 222; *Jacobi v. Haynes*, (C. Pl. Gen. T.) 14 Misc. (N. Y.) 15; *Walsh v. Porterfield*, 87 Pa. St. 376. See also *infra*, this section, *Rule of Liability as Insurer*.

As to the rule where a loss occurs by the act of the servant or companion of the guest, see *infra*, this section, *Exceptions to Rule*.

3. See *infra*, this section, *Exceptions to Rule*.

4. Liability Determined by Law of Situs of Inn. — *Holland v. Pack*, Peck (Tenn.) 151.

5. Reason of Rule — Public Policy — England. — *Holder v. Soulby*, 8 C. B. N. S. 254, 98 E. C. L. 254.

California. — *Pinkerton v. Woodward*, 33 Cal. 557, 91 Am. Dec. 657.

Delaware. — *Russell v. Fagan*, 7 Houst. (Del.) 389.

Illinois. — *Johnson v. Richardson*, 17 Ill. 302, 63 Am. Dec. 369.

Indiana. — *Laird v. Eichold*, 10 Ind. 212, 71 Am. Dec. 323.

Massachusetts. — *Mason v. Thompson*, 9 Pick. (Mass.) 280, 20 Am. Dec. 471.

New York. — *Piper v. Manny*, 21 Wend. (N. Y.) 282; *Hulett v. Swift*, 33 N. Y. 571, 88 Am. Dec. 405, affirming 42 Barb. (N. Y.) 230.

North Carolina. — *Neal v. Wilcox*, 4 Jones L. (49 N. Car.) 146, 67 Am. Dec. 266.

Ohio. — *Fuller v. Coats*, 18 Ohio St. 343.

Pennsylvania. — *Sneider v. Geiss*, 1 Yeates (Pa.) 34.

6. Origin of Rule — Early Conditions of Travel. — *Holder v. Soulby*, 8 C. B. N. S. 254, 98 E. C. L. 254; *Blum v. Southern Pullman Palace Car Co.*, 1 Flipp. (U. S.) 500, in which Brown, J., says that while the ancient rule is still enforced against the classes of persons to whom it was originally applied, the tendency of modern legislation and judicial opinion has been to limit it strictly to them.

Adoption from Roman Law. — The rule as to the liability of innkeepers for their guests' goods was adopted from the Roman law contained in the edict providing that if innkeepers and certain other classes of persons should not

c. EXCEPTIONS TO RULE—(1) *Act of God or Public Enemy*. — In many of the cases which discuss the liability of innkeepers for the loss of their guests' effects, losses resulting from the act of God or a public enemy are mentioned as an exception to the general rule, though there does not seem to be any case actually deciding that point. But the authorities holding that innkeepers are insurers usually declare that their liability is precisely the same as that of common carriers of goods, whose exemption from liability for losses caused by an act of God or a public enemy is established by numerous decisions.¹

(2) *Operation of Vis Major*. — In some jurisdictions innkeepers are not held liable for losses which result from inevitable accident or irresistible force, though the accident may not amount to what the law denominates the act of God, and the force may not be the power of a public enemy.²

(3) *Negligence of Guest* — (a) *Statement of Rule*. — It is well settled that an innkeeper is not liable for any loss which was caused by the negligence of the guest himself, and it is immaterial, so far as this principle is concerned, whether the innkeeper is regarded as an insurer or not, because, in any event, the liability is only *pro defectu hospitatorum*.³

(b) *What Constitutes Negligence*. — What constitutes negligence in any case is a question of fact, to be determined on a consideration of all the circumstances of the particular case, and an act or omission which is negligence in one case may not be so regarded in another.⁴ Thus it has been held that it is not negligence on the part of a guest to keep his money and valuables about his person, instead of depositing them with the innkeeper, in the absence of any statutory regulation or other limitation of liability;⁵ or to fail to give notice of the value of his luggage at the time of its delivery to the innkeeper's porter to be carried to the inn;⁶ or to allow several days to pass after the innkeeper received the baggage without inquiring as to its safety;⁷ or to permit the innkeeper to place in the room with him another guest, by whom a

restore what they had received to keep safe, judgment would be given against them. 2 Kent Com. 92; Jones Bailm. 98.

1. *Innkeeper Not Liable for Loss by Act of God or Public Enemy*. — See the cases cited *infra*, this section, *Rule of Liability as Insurer*.

As to the Rule Regarding Common Carriers, see the titles ACT OF GOD, vol. I, p. 592; CARRIERS OF GOODS, vol. 5, p. 234.

2. *Operation of Vis Major*. — See *infra*, this section, *Nature and Extent of Liability—Rule of Prima Facie Liability*.

3. *Negligence of Guest—Innkeeper Not Liable* — *England*. — Calve's Case, 8 Coke 32; Armistead v. Wilde, 17 Q. B. 261, 79 E. C. L. 261, 20 L. J. Q. B. 524, 15 Jur. 1010; Burgess v. Clements, 4 M. & S. 306, 101 N. P. 211, note, 3 E. C. L. 90, note, 1 Stark. 251, note, 2 E. C. L. 101, 16 Rev. Rep. 473; Cashill v. Wright, 6 El. & Bl. 891, 88 E. C. L. 891, 2 Jur. 1072, 4 W. R. 709; Filipowski v. Merryweather, 2 F. & F. 285.

United States. — Elcox v. Hill, 98 U. S. 218.

Alabama. — Chamberlain v. Masterson, 26 Ala. 371; Lanier v. Youngblood, 73 Ala. 587.

Georgia. — Bohler v. Owens, 60 Ga. 185; Coskery v. Nagle, 83 Ga. 696, 20 Am. St. Rep. 333.

Illinois. — Metcalf v. Hess, 14 Ill. 129; Kelsey v. Berry, 42 Ill. 469.

Indiana. — Bowell v. De Wald, 2 Ind. App. 303, 50 Am. St. Rep. 240.

Iowa. — See Shoecraft v. Bailey, 25 Iowa 553.

Kentucky. — Kisten v. Hildebrand, 9 B. Mon. (Ky.) 73, 48 Am. Dec. 416.

New York. — Purvis v. Coleman, 21 N. Y. 111; Cook v. Champlain Transp. Co., 1 Den. (N. Y.) 91; Fowler v. Dorlon, 24 Barb. (N. Y.) 384; Van Wyck v. Howard, (C. Pl. Spec. T.) 12 How. Pr. (N. Y.) 147.

Ohio. — Fuller v. Coats, 18 Ohio St. 343.

Texas. — Hadley v. Upshaw, 27 Tex. 547, 86 Am. Dec. 654.

Vermont. — Read v. Amidon, 41 Vt. 15, 98 Am. Dec. 560.

4. *Negligence a Question of Fact*. — Bohler v. Owens, 60 Ga. 185; Batterson v. Vogel, 10 Mo. App. 235; Hadley v. Upshaw, 27 Tex. 547, 86 Am. Dec. 654; Read v. Amidon, 41 Vt. 15, 98 Am. Dec. 560.

5. *Failure to Deposit Money, etc., with Innkeeper*. — Morgan v. Ravey, 6 H. & N. 265, 30 L. J. Exch. 131, 3 L. T. N. S. 784, 9 W. R. 376; Johnson v. Richardson, 17 Ill. 302, 63 Am. Dec. 369; McClay v. Nash, 6 Ky. L. Rep. 298. See also *infra*, this section, *Limiting Liability*.

6. *Failure to Give Notice of Value*. — Coskery v. Nagle, 83 Ga. 696, 20 Am. St. Rep. 333.

In Shoecraft v. Bailey, 25 Iowa 553, it was held that the fact that a guest, when giving his pocketbook into the innkeeper's care for safekeeping, did not state that there was money in it, was not sufficient to show negligence on the guest's part. See also Fowler v. Dorlon, 24 Barb. (N. Y.) 384; Quinton v. Courtney, 1 Hayw. (2 N. Car.) 40; Rubenstein v. Cruikshanks, 54 Mich. 199, 52 Am. Rep. 806.

7. *Failure to Ask for Baggage or to Inquire as to Its Safety*. — Eden v. Drey, 75 Ill. App. 102.

Volume XVI.

theft is committed;¹ or to deliver goods to a servant employed by the innkeeper to receive and keep the property of guests, instead of placing them in a check-room provided by the innkeeper;² or to remain out of his room all night.³ On the other hand, it has been held that it is such negligence as will defeat the remedy of the guest against the innkeeper, if he recklessly exposes money or other property of a character likely to tempt dishonest persons,⁴ or if he permits a third person to exercise acts of ownership over his baggage without informing the innkeeper that he (the guest) is the owner.⁵

Failure to Lock Door. — It is held that there is no obligation on the part of a guest to lock or fasten the door of his room, and therefore his omission to do so will not, as a matter of law, discharge the innkeeper from his liability to answer for the goods of the guest stolen from such room,⁶ unless, perhaps, the room was taken for some purpose not connected with his entertainment, as where a guest takes a separate room in which he may keep and exhibit his goods to prospective purchasers.⁷ It cannot be said, however, that the failure of a guest to lock his door is not evidence of negligence. On the contrary, such omission on his part may be considered in connection with other facts and circumstances in the case in determining whether or not he was negligent.⁸ But even in a case where the failure of a guest to lock his door would be negligence, the innkeeper may, by his own wrongful or improper conduct, preclude himself from showing it as a defense.⁹

Noncompliance with Regulations of Inn. — It is a well-established principle that innkeepers may limit their liability by making reasonable rules and regulations, and giving notice thereof to their guests.¹⁰ And this right, in some

1. **Consenting to Sleep in Room with Stranger Held Not Negligence.** — *Olson v. Crossman*, 31 Minn. 222.

2. **Delivering Goods to Servant Instead of Placing Them in Checkroom.** — *Labold v. Southern Hotel Co.*, 54 Mo. App. 567.

3. **Absence from Room All Night Not Negligence as Matter of Law.** — *Turner v. Whitaker*, 9 Pa. Super. Ct. 83, 43 W. N. C. (Pa.) 375.

4. **Reckless Exposure of Money, etc.** — *Armistead v. Wilde*, 17 Q. B. 261, 79 E. C. L. 261, 20 L. J. Q. B. 524, 15 Jur. 1010; *Oppenheim v. White Lion Hotel Co.*, L. R. 6 C. P. 515, 40 L. J. C. Pl. 231, 25 L. T. N. S. 93.

See also *Herbert v. Markwell*, 45 L. T. N. S. 649, 46 J. P. 358, *affirmed* in C. A. W. N. 1882, 112, holding that there was sufficient evidence of negligence to go to the jury in an action by a guest to recover the value of jewelry stolen from his room at the defendant's inn, where the plaintiff's wife had been wearing valuable jewelry in the inn during the evening of the night on which the theft occurred, and the plaintiff, when he retired, failed to fasten the door.

5. **Acts of Ownership by Third Persons.** — *Kel-sev v. Berry*, 42 Ill. 469.

6. **Failure to Lock Room Door Not Negligence.** — *Calye's Case*, 8 Coke 32; *Filipowski v. Merryweather*, 2 F. & F. 285; *Morgan v. Ravey*, 6 H. & N. 265, 30 L. J. Exch. 131, 3 L. T. N. S. 734, 9 W. R. 376, at nisi prius 2 F. & F. 283; *Mitchell v. Woods*, 16 L. T. N. S. 676; *Batterson v. Vogel*, 10 Mo. App. 235; *Budden-burg v. Benner*, 1 Hilt. (N. Y.) 84; *Classen v. Leopold*, 2 Sweeny (N. Y.) 705. See also *Huntington v. Drake*, 24 Ind. 347. Compare *Profflet v. Hall*, 14 La. Ann. 530.

In the absence of notice of a rule of the inn requiring a guest occupying a room to lock and bolt the door, a failure to do so does not

amount to legal negligence at common law. *Murchison v. Sergeant*, 69 Ga. 207, 47 Am. Rep. 754.

7. **Goods Stolen from Room Not Used Causa Hospitalandi.** — In *Burgess v. Clements*, Holt N. P. 211, note, 3 E. C. L. 90, 16 Rev. Rep. 473, the plaintiff, a factor, obtained a private room at the defendant's inn, for the purpose of exhibiting his goods to customers. The defendant gave him a key to the room and told him that he might lock the door, which, however, the plaintiff neglected to do and some of the goods were stolen. It was held that the defendant was not liable, because the care of such goods could not be considered as falling within the limits of the defendant's duty as an innkeeper. See also *Farnsworth v. Packwood*, 1 Stark. 249, 2 E. C. L. 100.

8. **Failure to Lock Door as Evidence of Negligence.** — In *Herbert v. Markwell*, 45 L. T. N. S. 649, 46 J. P. 358, *affirmed* in C. A. W. N. 1882, 112, it was said that it could not be laid down as a proposition of law that leaving the door unlocked was not evidence of negligence, but that each case must depend on its own circumstances. See also *Oppenheim v. White Lion Hotel Co.*, 40 L. J. C. Pl. 231, L. R. 6 C. P. 515, 25 L. T. N. S. 93.

9. **Defense of Negligence Precluded by Innkeeper's Conduct.** — *Medawar v. Grand Hotel Co.*, (1891) 2 Q. B. 11, 60 L. J. Q. B. 209, 64 L. T. N. S. 851, 55 J. P. 614.

10. **Right of Innkeeper to Make Regulations.** — See *infra*, this section, *Limiting Liability*.

Notice of Regulations. — In *Spring v. Hager*, 145 Mass. 186, 1 Am. St. Rep. 451, the plaintiff, whose goods were stolen while he was a guest at the defendant's inn, locked the door of his room on retiring at night, but did not bolt it, though there was a bolt on the door near the top. The plaintiff testified that he

jurisdictions, has been expressly declared by statute.¹ But in case of a loss where the guest failed to comply with the regulations of the inn, that fact does not relieve the innkeeper, if there is no evidence that it was the cause of the loss.²

Intoxication of Guest. — It has been held that the intoxication of a guest whose goods are stolen from the inn while he is in such condition does not relieve the innkeeper from liability for the loss so sustained.³ But if the intoxication of the guest contributed to the loss, he is chargeable with negligence and the innkeeper is not liable.⁴ And in *Louisiana*, where a guest is considered as in part the custodian, with the innkeeper, of all property brought by him to the inn and not deposited with the innkeeper, except such articles as are necessary for his comfort, it is held that intoxication, in consequence of which he acts so carelessly that he is robbed, is contributory negligence which will relieve the innkeeper from liability.⁵

(c) **Degree of Negligence.** — It is not every slight negligence on the part of a guest that will be held to relieve the innkeeper of liability for the loss of the guest's goods. The rule laid down by the authorities is that the want of ordinary care on the part of the guest, that is, such care as a prudent man may reasonably be expected to exercise under like circumstances, is sufficient to defeat a recovery against the innkeeper, where it appears that the guest's negligence proximately contributed to the loss, and that the loss would not otherwise have happened.⁶ This rule is also sustained by the analogies of the law in other cases.⁷

(4) **Acts of Servants or Companions of Guests.** — Another exception to the rule of liability is where the loss was caused by the acts of the servants or companions of the guest.⁸

(5) **Losses Resulting from Inherent Causes.** — An innkeeper is not liable where the loss was due to causes inherent in the property itself; as where a horse dies of disease or in consequence of its own viciousness, or where perishable property becomes worthless in the natural order of things.⁹

d. REQUISITES OF LIABILITY — (1) **Existence of Relation of Innkeeper and Guest.** — The first requisite of the extraordinary liability now under consideration is that the relation of innkeeper and guest should have existed between the parties at the time the loss or injury occurred; and such liability cannot be imposed in any case where the relation never in fact existed,¹⁰ or

did not know the bolt was there when he went to bed. It did not appear that there were any regulations of the inn posted in the room, or anywhere else, which in any manner brought the bolt to the notice of the plaintiff, and it was conceded that the plaintiff's attention was not called to it by the defendants or by anyone else. The court held that the plaintiff's loss was not attributable to his noncompliance with the regulations of the inn.

1. **Statutes Authorizing Regulations.** — *Burbank v. Chapin*, 140 Mass. 123.

2. **Loss Not Caused by Noncompliance with Regulations.** — *Burbank v. Chapin*, 140 Mass. 123.

3. **Intoxication of Guests.** — *Rubenstein v. Cruikshanks*, 54 Mich. 199, 52 Am. Rep. 806; *Cunningham v. Bucky*, 42 W. Va. 671.

4. **Intoxication of Guest Contributing to Loss.** — *Walsh v. Porterfield*, 87 Pa. St. 376; *Shultz v. Wall*, 134 Pa. St. 262, 19 Am. St. Rep. 686, 26 W. N. C. (Pa.) 51; *Jalie v. Cardinal*, 35 Wis. 118. See also *Becker v. Warner*, 90 Hun (N. Y.) 187.

5. **Rule as to Intoxication in Louisiana.** — *Profflet v. Hall*, 14 La. Ann. 530.

6. **Degree of Negligence — Want of Ordinary Care.** — *Cashill v. Wright*, 6 El. & Bl. 891, 85

E. C. L. 891, 2 Jur. N. S. 1072, 4 W. R. 709; *Lanier v. Youngblood*, 73 Ala. 587; *Chamberlain v. Masterson*, 26 Ala. 371.

7. **Rule Sustained by Analogies.** — See the title CONTRIBUTORY NEGLIGENCE, vol. 7, p. 375.

8. **Acts of Servants or Companions of Guest — England.** — *Calye's Case*, 8 Coke 32.

Florida. — *O'Brien v. Vaill*, 22 Fla. 627, 1 Am. St. Rep. 219.

Illinois. — *Johnson v. Richardson*, 17 Ill. 302, 63 Am. Dec. 369.

Kentucky. — *Kisten v. Hildebrand*, 9 B. Mon. (Ky.) 74, 48 Am. Dec. 416.

North Carolina. — *Quinton v. Courtney*, 1 Hayw. (2 N. Car.) 40.

Pennsylvania. — *Walsh v. Porterfield*, 87 Pa. St. 376; *Shultz v. Wall*, 134 Pa. St. 262, 19 Am. St. Rep. 686, 26 W. N. C. (Pa.) 51.

9. **Loss Resulting from Inherent Causes — Innkeeper Not Liable.** — *Metcalf v. Hess*, 14 Ill. 129; *Howe Mach. Co. v. Pease*, 49 Vt. 484.

10. **Existence of Relation of Innkeeper Essential to Liability — England.** — *Beedle v. Morris*, Cro. Jac. 224; *Strauss v. County Hotel, etc.*, Co., 12 Q. B. D. 27.

Canada. — *Lynar v. Mossop*, 36 U. C. Q. B. 230.

where it had been terminated by the departure of the guest before the loss occurred.¹ Under such circumstances the innkeeper is a gratuitous bailee, and therefore he is liable only in case loss occurs in consequence of gross negligence on his part,² unless the guest on his departure left his baggage with the innkeeper, with the consent of the latter, in which event the innkeeper still remains liable, as such, for a reasonable length of time, to be estimated according to the circumstances of the case.³ The requirement that the

Arizona. — *Haff v. Adams*, (Ariz. 1899) 59 Pac. Rep. 111.

California. — *Pinkerton v. Woodward*, 33 Cal. 557, 91 Am. Dec. 657.

Delaware. — *Russell v. Fagan*, 7 Houst. (Del.) 389.

Illinois. — *Bullock v. Adair*, 63 Ill. App. 30. *Indiana*. — *Thickstun v. Howard*, 8 Blackf. (Ind.) 535.

Iowa. — *Lyon v. Smith*, 1 Morr. (Iowa) 184.

Maine. — *Healey v. Gray*, 68 Me. 489, 28 Am. Rep. 80.

Maryland. — *Towson v. Havre-de-Grace Bank*, 6 Har. & J. (Md.) 47, 14 Am. Dec. 254.

Michigan. — *Carter v. Hobbs*, 12 Mich. 52, 83 Am. Dec. 762.

Missouri. — *Bunn v. Johnson*, 77 Mo. App. 596; *Wiser v. Chesley*, 53 Mo. 547.

New Hampshire. — *Aincy v. Winchester*, 68 N. H. 447, citing 11 AM. AND ENG. ENCYC. OF LAW (1st ed.) 20, 21.

New York. — *Fitch v. Casler*, 17 Hun (N. Y.) 126; *Ingallsbee v. Wood*, 33 N. Y. 577, 88 Am. Dec. 409, 36 Barb. (N. Y.) 452; *Toub v. Schmidt*, 60 Hun (N. Y.) 409; *Coykendall v. Eaton*, (Supm. Ct. Gen. T.) 37 How. Pr. (N. Y.) 438, 55 Barb. (N. Y.) 188; *Gasenhofer v. Clair*, 10 Daly (N. Y.) 265; *Centlivre v. Ryder*, 1 Edm. Sel. Cas. (N. Y.) 273.

North Carolina. — *Neal v. Wilcox*, 4 Jones L. (19 N. Car.) 146, 67 Am. Dec. 266.

Ohio. — *Arcade Hotel Co. v. Wiatt*, 44 Ohio St. 32.

Tennessee. — *Meacham v. Galloway*, 102 Tenn. 415, citing 11 AM. AND ENG. ENCYC. OF LAW (1st ed.) 7.

Vermont. — *McDaniels v. Robinson*, 28 Vt. 387, 67 Am. Dec. 720.

Wisconsin. — *Curtis v. Murphy*, 63 Wis. 4, 53 Am. Rep. 242. See also the cases cited *supra*, this title. *Who Are Guests*.

1. Departure of Guest Terminates Extraordinary Liability — *England*. — *Gelley v. Clerk*, Cro. Jac. 189.

Canada. — *Lynar v. Mossop*, 36 U. C. Q. B. 230; *Holmes v. Moore*, 17 L. C. Rep. 143.

Alabama. — *Glenn v. Jackson*, 93 Ala. 342.

Arkansas. — *Wear v. Gleason*, 52 Ark. 364, 20 Am. St. Rep. 186.

Colorado. — *Murray v. Marshall*, 9 Colo. 482, 59 Am. Rep. 152.

Florida. — *O'Brien v. Vaill*, 22 Fla. 627, 1 Am. St. Rep. 219.

Georgia. — *Adams v. Clem*, 41 Ga. 65, 5 Am. Rep. 524.

Iowa. — *Hays v. Turner*, 23 Iowa 214.

New York. — *Wintermute v. Clark*, 5 Sandf. (N. Y.) 242.

Vermont. — *McDaniels v. Robinson*, 28 Vt. 387, 67 Am. Dec. 720.

As to when and how the relation is terminated see *supra*, this title, *Who Are Guests* — *Duration of Relation*.

"An innkeeper's liability for the baggage of his guest is not terminated the instant the guest pays his bill and leaves the hotel, but continues for such a reasonable time thereafter as may be necessary for him to secure its removal; or, if the innkeeper, in the ordinary course of his business, undertakes its removal to a railroad or to some other common carrier, until he has made performance." *Maxwell v. Gerard*, 84 Hun (N. Y.) 538.

Baggage Left Without Notice to Innkeeper. — In *Stewart v. Heard*, 70 Ga. 449, a departing guest left his valise in the office of the hotel, without calling attention to it, and the clerk, without knowing who the owner was, took it into a room where baggage was kept. It was held that the landlord was a naked depositary, and was therefore liable only for gross neglect.

2. Innkeeper Liable as Gratuitous Bailee of Goods Left by Departing Guest — *Arizona*. — *Haff v. Adams*, (Ariz. 1899) 59 Pac. Rep. 111.

Arkansas. — *Wear v. Gleason*, 52 Ark. 364, 20 Am. St. Rep. 186.

Colorado. — *Murray v. Marshall*, 9 Colo. 482, 59 Am. Rep. 152; *Brown Hotel Co. v. Burckhardt*, 13 Colo. App. 59.

Tennessee. — *Whitemore v. Haroldson*, 2 Lea (Tenn.) 312.

Utah. — *Lawrence v. Howard*, 1 Utah 142.

Gross Negligence must be shown to charge an innkeeper for the loss of baggage left at the inn by a departing guest. *O'Brien v. Vaill*, 22 Fla. 627, 1 Am. St. Rep. 219; *Lawrence v. Howard*, 1 Utah 142.

Delivery of Baggage to Wrong Person. — Where baggage left by a departing guest is delivered by the innkeeper to a stranger without making inquiry as to his right to it, the innkeeper is guilty of such gross negligence as will render him liable to the owner. *Wear v. Gleason*, 52 Ark. 364, 20 Am. St. Rep. 186. See also *George v. Depierris*, (Supm. Ct. App. T.) 17 Misc. (N. Y.) 400.

Ordinary Care in Keeping Goods of Departing Guest. — A guest, intending to be absent a few days, left his baggage without paying his bill, and it was held that whether it was to be regarded as an ordinary bailment, or as property in the defendants' hands which they had a right to detain until the lien upon it was discharged, the defendants were bound to the exercise of ordinary care and diligence. If they could not produce it when required, it was for them to show how it had been lost; and if they could not explain the manner of its loss, the presumption would be that it was lost through their negligence, unless they proved that they had exercised all the care and diligence that could be expected from them under the circumstances. *Murray v. Clarke*, 2 Daly (N. Y.) 102.

3. Effects Left by Departing Guest with Consent of Innkeeper. — *Murray v. Marshall*, 9 Colo.

relation of innkeeper and guest must have existed at the time of the loss, in order to render the innkeeper subject to the extraordinary liability, does not mean that the actual owner of the property lost must have been a guest. If it is taken to the inn by the agent or servant of the owner, and such agent or servant is the guest of the innkeeper, the owner may enforce the innkeeper's liability.¹ Neither is it implied that the guest must have actually been in the inn at the time of the loss or injury. If he was a guest at the time, though temporarily absent, the innkeeper is liable.²

Keepers of Boarding Houses and Lodging Houses. — Within the principle that the extraordinary liability under discussion exists only where there is the relation of innkeeper and guest, it is maintained by the preponderance of authority that such rule of liability does not apply to the keepers of boarding houses and lodging houses.³ On the contrary, it has been held that they are under no obligation to take care of the goods of their boarders or lodgers,⁴ because, it is said, there is neither a contract to that effect, nor a bailment of the goods,⁵ though there have been some decisions and many expressions of opinion to the effect that boarding-house keepers and lodging-house keepers are required to take as much care of the goods of their boarders or lodgers as a reasonably prudent man would take of his own, and are liable for any loss thereof occurring through the negligence of themselves or their servants.⁶

But if a Boarder Deposits Goods for safekeeping with the person with whom he boards, there is a naked deposit without reward, and the liability of the boarding-house keeper is governed by the principles applicable to that species of bailment.⁷

482, 59 Am. Rep. 152; *Adams v. Clem*, 41 Ga. 65, 5 Am. Rep. 524; *Giles v. Fauntleroy*, 13 Md. 138.

1. Goods Taken to Inn by Agent or Servant of Owner. — *Towson v. Havre-de-Grace Bank*, 6 Har. & J. (Md.) 47, 14 Am. Dec. 254; *Berkshire Woollen Co. v. Proctor*, 7 Cush. (Mass.) 417; *Epps v. Hinds*, 27 Miss. 657, 61 Am. Dec. 528; *Washburn v. Jones*, 14 Barb. (N. Y.) 193; *Needles v. Howard*, 1 E. D. Smith (N. Y.) 54; *Piler v. Manny*, 21 Wend. (N. Y.) 282. See also *supra*, this title, *Who Are Guests — What Constitutes the Relation — Necessity of Personal Presence*.

2. Temporary Absence of Guest. — *McDonald v. Edgerton*, 5 Barb. (N. Y.) 560. See also *supra*, this title, *Who Are Guests — Duration of Relation*.

3. Keepers of Boarding Houses and Lodging Houses Not Liable as Innkeepers — England. — *Calye's Case*, 8 Coke 32; *Dansey v. Richardson*, 3 El. & Bl. 144, 77 E. C. L. 144; *Holder v. Soulby*, 8 C. B. N. S. 254, 98 E. C. L. 254.

Alabama. — *Chamberlain v. Masterson*, 26 Ala. 371.

California. — *Moore v. Long Beach Development Co.*, 87 Cal. 483, 22 Am. St. Rep. 265.

Kansas. — *Johnson v. Reynolds*, 3 Kan. 251.

Kentucky. — *Vance v. Throckmorton*, 5 Bush (Ky.) 43, 96 Am. Dec. 327.

Pennsylvania. — *Jeffords v. Crump*, 12 Phila. (Pa.) 500, 35 Leg. Int. (Pa.) 36.

Tennessee. — *Manning v. Wells*, 9 Humph. (Tenn.) 746, 51 Am. Dec. 688.

4. No Obligation to Take Care of Goods of Boarders or Lodgers. — *Dansey v. Richardson*, 3 El. & Bl. 144, 77 E. C. L. 144, decided by a divided court, on a motion for a new trial; *Holder v. Soulby*, 8 C. B. N. S. 254, 98 E. C. L. 254. In the case last cited, however, Erle,

C. J., intimates in his opinion that where the loss has resulted from gross negligence on the part of the lodging-house keeper he will be liable.

5. Boarding-house Keeper, etc., Not a Bailee. — *Dansey v. Richardson*, 3 El. & Bl. 144, 77 E. C. L. 144; *Holder v. Soulby*, 8 C. B. N. S. 254, 98 E. C. L. 254.

Contract Not Implied. — *Holder v. Soulby*, 8 C. B. N. S. 254, 98 E. C. L. 254.

6. Duty of Boarding-house Keepers to Care for Goods Asserted. — See the opinions of Lord Campbell, C. J., and Coleridge, J., in *Dansey v. Richardson*, 3 El. & Bl. 155, 77 E. C. L. 155.

This view, says the learned author of *Parsons on Contracts*, is "more consistent with reason, and with the authorities so far as they bear upon the question." 2 *Parsons on Contracts*, 153. See also *Chamberlain v. Masterson*, 26 Ala. 371, in which it was said that if the goods lost belong to a boarder, in order to charge the innkeeper he would be required to show that the loss was owing to the failure on his part to discharge the duties which his situation as boarding-house keeper or the special contract with the other party imposed on him; and these duties must be measured by the analogies of the law applicable to other species of bailments.

Boarding-house Keeper Held Liable for Negligence of Servants in Care of Boarder's Property. — *Smith v. Read*, 6 Daly (N. Y.) 33.

"It Is Probable that This Is the Limit of the Rule, viz., that boarding-house keepers are liable, as bailees for mutual benefit, for the preservation of goods brought upon the premises by boarders." *Taylor v. Downey*, 104 Mich. 532, 53 Am. St. Rep. 472.

7. Goods Deposited with Boarding-house Keepers. — *Johnson v. Reynolds*, 3 Kan. 251; *Taylor*

(2) *Custody of Innkeeper*. — The second requisite of the absolute liability of an innkeeper for the effects of his guest is that the effects, at the time of the loss or injury, must have been *infra hospitium*, that is, in the custody of the innkeeper as such,¹ but not necessarily within the building strictly denominated the inn.² Neither is it necessary at common law that the property of the guest should be in the special keeping of the innkeeper. It is generally sufficient that it is in the inn under his implied care.³ But in some jurisdictions this principle has been altered by statutes designed to protect innkeepers against fraudulent practices.⁴

The Custody of the Innkeeper Commences as soon as the goods are brought into the inn, though there is no actual delivery of the goods, nor any notice given him concerning them;⁵ unless the guest gives directions in regard to their keep-

v. Downey, 104 Mich. 532, 53 Am. St. Rep. 472.

Liabilities of Bailees Without Reward. — See the title *BAILMENTS*, vol. 3, p. 745.

1. Innkeeper Liable Only for Effects *Infra Hospitium*. — *Calye's Case*, 8 Coke 32; *Candy v. Spencer*, 3 F. & F. 306; *Piper v. Manny*, 21 Wend. (N. Y.) 282; *Neal v. Wilcox*, 4 Jones L. (49 N. Car.) 146, 67 Am. Dec. 266; *Bac. Abr.*, tit. *Inns and Innkeepers* (C) 1.

If an Innkeeper Receive Goods as a Bailee, and not in the character of an innkeeper, as where they are deposited in his house for the purpose of being forwarded by a carrier, the extraordinary liability is not incurred. *Williams v. Gesse*, 3 Bing. N. Cas. 849, 32 E. C. L. 353.

Distinction Between Goods Received as Ordinary Bailee and as Innkeeper. — In *Bennett v. Mellor*, 5 T. R. 273, the distinction is drawn between a case where goods are left with an innkeeper as an ordinary bailee, and a case where they are received by him in the character of innkeeper. The facts were as follows: The plaintiff's servant took goods of the plaintiff to market at Manchester, and, not being able to dispose of them, went to the defendant's inn and asked the defendant's wife if he could leave them there till the week following, meaning the next market day. She said she could not tell, for they were very full of parcels. The plaintiff's servant then sat down in the inn and had some liquor, putting the goods on the floor immediately behind him. When he got up, after sitting there a little while, the goods were missing. A verdict was found for the plaintiff, and on motion for a new trial, Buller, J., observed that he was of opinion that if the defendant's wife had accepted the charge of the goods upon a special request made to her, he should have considered her as a special bailee, and not answerable in this case, having been guilty of no actual negligence; but that not being the case, he considered this to be the common case of goods brought into an inn by a guest, and stolen from thence; in which case the innkeeper was liable to make good the loss.

2. Goods May Be *Infra Hospitium* Though Not in Inn Building Proper. — *Mason v. Thompson*, 9 Pick. (Mass.) 280, 20 Am. Dec. 471; *Piper v. Manny*, 21 Wend. (N. Y.) 282; *Clute v. Wiggins*, 14 Johns. (N. Y.) 175, 7 Am. Dec. 448.

Baggage Delivered on Platform Provided for that Purpose. — In *Maloney v. Bacon*, 33 Mo. App. 501, it was held that if an innkeeper has customarily received the baggage of his guests at

a platform in front of the inn, a guest's trunk delivered on such platform in the usual and customary way, as practiced between the innkeeper and baggage-transfer men, is *infra hospitium*, and the innkeeper becomes liable for its safety.

3. Property of Guest Need Not Be in Innkeeper's Special Keeping. — *Packard v. Northcraft*, 2 Met. (Ky.) 442; *Burrows v. Trieber*, 21 Md. 320, 83 Am. Dec. 590; *Clute v. Wiggins*, 14 Johns. (N. Y.) 175, 7 Am. Dec. 448; *Kopper v. Willis*, 9 Daly (N. Y.) 460; *Jalie v. Cardinal*, 35 Wis. 118. See also the cases cited in the next preceding note but one.

Hanging Up a Coat in the Place Allotted for that purpose is placing it *infra hospitium*, though it is done in the absence of the landlord and his servants. *Norcross v. Norcross*, 53 Me. 163.

Custody of Innkeeper's Servants. — An innkeeper is responsible for money deposited by a guest, with one acting as barkeeper, in his absence, with his implied authority. *Houser v. Tully*, 62 Pa. St. 92, 1 Am. Rep. 390. See also *Curtis v. Murphy*, 63 Wis. 4, 53 Am. Rep. 242.

It is obvious that, in the nature of things, the delivery by a guest of his effects must often be to a servant instead of the innkeeper personally, and this is generally recognized by the statutes relating to the liability of innkeepers. See the New York statute recited in the next following note.

4. Statutes Requiring Special Delivery to Innkeeper. — The New York statute provides that no hotel keeper shall be liable to any guest in any sum for the loss of any article of wearing apparel, cane, umbrella, satchel, valise, box, bags, bundles, or other chattels belonging to such guest and not within a room assigned to him, unless the same shall be specially entrusted to the care and custody of such hotel keeper or his servants. Under this statute it is held that there is a sufficient delivery to the innkeeper where a guest, in the presence of the person apparently in charge of the office, hangs his overcoat on one of the row of hooks placed in the office behind the desk and used by the guests for that purpose. *Bradner v. Mollen*, (County Ct.) 27 Mis. (N. Y.) 479.

5. Goods Brought to Inn Considered in Custody of Innkeeper — *England*. — *Calye's Case*, 8 Coke 32.

Maine. — *Norcross v. Norcross*, 53 Me. 163.

Maryland. — *Burrows v. Trieber*, 21 Md. 320, 83 Am. Dec. 590.

ing, which make it necessary for the innkeeper to put them out of the inn.¹

Goods Constructively *Infra Hospitium*. — The goods and effects of a guest may be *infra hospitium* constructively, as well as in point of fact. Thus the custody of the innkeeper may attach before such goods and effects have actually been brought to the inn;² and so, too, a place outside the inn premises may be adopted as a part thereof by the innkeeper, as where the stable or inclosure for keeping the horses or other animals of guests is not physically connected with the inn,³ or even where the property of a guest is left on the highway without his knowledge or consent.⁴

Exclusive Custody of Guest. — Applying the principle just laid down, that an innkeeper can be held liable for the loss of the goods of a guest only when the goods were actually or constructively in the custody and under the care of the innkeeper, it is uniformly held that no such liability is incurred where the guest chooses to have his goods exclusively in his own possession and under his own care.⁵ This condition exists where a commercial traveler, or a person similarly occupied, comes with goods for sale, or to be used as samples in making sales, and keeps such goods in his bedroom, or in a separate room taken by him for the purpose, in order that he may exhibit them to his

Missouri. — *Maloney v. Bacon*, 33 Mo. App. 501.

New York. — *Van Wyck v. Howard*, (C. Pl. Spec. T.) 12 How. Pr. (N. Y.) 147. See also *Story Bailm.*, § 478; 2 Kent Com. 503.

The Ancient Rule was, that so soon as the goods of the guest were brought within the precincts of the inn, *infra hospitium*, the responsibility of the innkeeper for their safekeeping began. *Williams v. Moore*, 69 Ill. App. 619.

It Is Not Necessary to Show Actual Delivery to the innkeeper. Depositing the goods in a public room set apart for such articles is a delivery to him. *Rockwell v. Proctor*, 29 Ga. 107.

A Parcel Placed in the Lobby or Hall of the Inn is in the custody of the innkeeper, and he is responsible for its safety. *Candy v. Spencer*, 3 F. & F. 306.

Baggage Sent Before Arrival of Guest. — In *Eden v. Drey*, 75 Ill. App. 102, it was held that where baggage is delivered to the innkeeper with the intention on the part of the owner of becoming a guest and he afterwards does become a guest, the innkeeper's liability for the safekeeping of the baggage begins at the time it was received.

1. Directions of Guest as to Mode of Keeping. — Where the horse of a guest is, at his request, put to pasture by the innkeeper, it is not *infra hospitium*, and for this reason the innkeeper is not bound by law to answer for such horse if it be stolen out of the pasture. But it is otherwise if the horse is put to pasture without any request from the guest. *Calye's Case*, 8 Coke 32.

But if a horse, placed at pasture by direction of the guest, strays or is stolen in consequence of the negligence of the innkeeper, he is liable. *Bac. Abr.*, tit. Inns and Innkeepers (C) 1. See also *Hawley v. Smith*, 25 Wend. (N. Y.) 642, where sheep put to pasture by direction of the guest were injured by eating poisonous plants.

2. Delivery of Baggage Check to Hotel Porter at Railroad Station. — *Sassee v. Clark*, 37 Ga. 242; *Dickinson v. Winchester*, 4 Cush. (Mass.) 114. 50 Am. Dec. 760.

A Private Arrangement between an Innkeeper

and a Carrier for the transportation of persons and baggage to the inn does not affect travelers. They have the right to assume, without any knowledge to the contrary, that such carrier is in fact authorized by the proprietor of the inn to transport safely and securely themselves and their baggage; and when loss occurs by the negligence of such carrier, the proprietor of the inn is liable. *Coskery v. Nagle*, 83 Ga. 696, 20 Am. St. Rep. 333.

Delivery of Baggage Check to Hotel Clerk. — Where a person, at the time of engaging accommodations at a hotel, delivers his baggage check to the clerk, who thereupon undertakes to have the baggage brought to the hotel, and it is lost by the carrier employed for that purpose, the hotel keeper is liable. *Williams v. Moore*, 69 Ill. App. 618.

3. Stable or Inclosure Not Physically Connected with Inn. — See *Cohen v. Manuel*, 91 Me. 274, where it was held that a vehicle which was placed, by the innkeeper's direction, at his stable situated some distance from the inn, was *infra hospitium*.

Cattle Kept Over Night. — An innholder receiving cattle to keep over night is responsible as such for the safety of the place provided for them. *Hilton v. Adams*, 71 Me. 19.

4. Leaving Vehicle in Street. — *Jones v. Tyler*, 1 Ad. & El. 522, 28 E. C. L. 138, 3 N. & M. 576, 3 L. J. K. B. 166. To the same effect are *Albin v. Presby*, 8 N. H. 408, 29 Am. Dec. 679; *Piper v. Manny*, 21 Wend. (N. Y.) 282; *Clute v. Wiggins*, 14 Johns. (N. Y.) 175, 7 Am. Dec. 448.

Putting Horse at Pasture. — In *Calye's Case*, 8 Coke 32, it was said that if an innkeeper, at his own instance and without any request of his guest, put the guest's horse at pasture, whence it was stolen, the innkeeper would be liable therefor.

5. Goods in Exclusive Custody of Guests. — *Richmond v. Smith*, 8 B. & C. 9, 15 E. C. L. 144; *Packard v. Northcraft*, 2 Met. (Ky.) 442; *Weisenger v. Taylor*, 1 Bush (Ky.) 276, 89 Am. Dec. 626; *Vance v. Throckmorton*, 5 Bush (Ky.) 43, 96 Am. Dec. 327; *Fuller v. Coats*, 18 Ohio St. 343.

customers,¹ though the innkeeper is not thereby relieved of all responsibility.² But a guest, by retaining the custody of his personal effects, such as his trunk and its contents, and those things which travelers usually carry about their persons, does not assume the exclusive care thereof, so as to relieve the innkeeper of his common-law liability.³

(3) *Default of Innkeeper.* — The extraordinary liability of an innkeeper for the loss of his guests' effects exists only where he is legally in default. Many and weighty authorities hold that he is in default, within the meaning of this principle, in any case of loss or injury from whatever cause, unless it happened by the act of God or a public enemy, or resulted from the negligence of the guest himself. Other authorities are to the effect that the word "default," in this connection, means "negligent" in the ordinary sense of the word, and that, while an innkeeper is *prima facie* liable for any loss, he may excuse himself by proving that the cause was *vis major*; and some go even to the length of permitting him to show that the loss was not due to any negligence on his part.⁴

c. NATURE AND EXTENT OF LIABILITY — (1) *Rule of Liability as Insurer.* — The rule that has generally been laid down is that an innkeeper is absolutely liable for any loss of, or injury to, the goods of his guest, not arising from the act of God or a public enemy or the negligence of the guest himself; in other words, that an innkeeper is an insurer of the goods of his guest.⁵

1. *Exhibiting Goods for Sale.* — *Burgess v. Clements*, 4 M. & S. 306; *Farnworth v. Packwood*, 1 Stark. 249, 2 E. C. L. 100, Holt N. P. 209, 3 E. C. L. 89; *Fisher v. Kelsey*, 121 U. S. 383, *affirming* 16 Fed. Rep. 71; *Myers v. Cottrill*, 5 Biss. (U. S.) 465.

In *Missouri* the liability of an innkeeper for goods exhibited as samples or for sale by a commercial traveler is governed by a statute which allows the traveler to give the innkeeper written notice that he has such merchandise in his possession in the hotel, leaving the innkeeper, on such notice, to elect whether he will permit the traveler to remain in the hotel with such merchandise for sale or sample. *Fisher v. Kelsey*, 121 U. S. 383.

2. *If an Innkeeper Knows that His Guest Has Valuable Goods* which he is exhibiting in his room, the innkeeper must use reasonable diligence to protect them. *Myers v. Cottrill*, 5 Biss. (U. S.) 465. And if, in consequence of his neglect to exercise such reasonable care, the goods are injured, he is liable. *Scheffer v. Corson*, 5 S. Dak. 233.

3. *Retaining Possession of Personal Effects.* — *Fay v. Pacific Imp. Co.*, 93 Cal. 253, 27 Am. St. Rep. 198.

The Pocket Money and Watch of a guest are within the rule stated in the text. *Weisenger v. Taylor*, 1 Bush (Ky.) 275, 89 Am. Dec. 626.

4. *Default of Innkeeper.* — See the next following subdivision of this section, *Nature and Extent of Liability.*

5. *Cases Declaring Innkeepers Liable as Insurers* — *England.* — *Morgan v. Ravey*, 6 H. & N. 265, 30 L. J. Exch. 131, 3 L. T. N. S. 784, 9 W. R. 376, at nisi prius 2 F. & F. 283; *Farnworth v. Packwood*, 1 Stark. 249, 2 E. C. L. 100; *Kent v. Shuckard*, 2 B. & Ad. 803, 22 E. C. L. 186; *Armistead v. Wilde*, 17 Q. B. 261, 79 E. C. L. 261, 15 Jur. 1010; *Richmond v. Smith*, 2 M. & R. 235, 8 B. & C. 9, 15 E. C. L. 144, 6 L. J. K. B. 279, (in which Lord Tenterden says that the situation of an innkeeper in respect to the

goods of his guest is "precisely analogous to that of a carrier"). But see *Dawson v. Chamney*, 5 Q. B. 164, 48 E. C. L. 164, Dav. & M. 348, 7 Jur. 1037, 13 L. J. Q. B. 33, and the dictum of Bayley, J., in *Richmond v. Smith*, 2 M. & R. 235, 8 B. & C. 9, 15 E. C. L. 144, 6 L. J. K. B. 279, that an innkeeper "is *prima facie* liable for any loss not occasioned by the act of God or the king's enemies."

Canada. — See *Geriken v. Grannis*, 21 L. C. Jur. 265.

California. — *Mateer v. Brown*, 1 Cal. 221, 52 Am. Dec. 303; *Pinkerton v. Woodward*, 33 Cal. 557, 91 Am. Dec. 657.

Delaware. — *Russell v. Fagan*, 7 Houst. (Del.) 389.

Florida. — *O'Brien v. Vaill*, 22 Fla. 627, 1 Am. St. Rep. 219.

Georgia. — *Rockwell v. Proctor*, 39 Ga. 107.

Maine. — *Shaw v. Berry*, 31 Me. 478, 52 Am. Dec. 628; *Norcross v. Norcross*, 53 Me. 163.

Massachusetts. — *Mason v. Thompson*, 9 Pick. (Mass.) 280, 20 Am. Dec. 471.

Minnesota. — *Lusk v. Belote*, 22 Minn. 468.

Missouri. — *Batterson v. Vogel*, 10 Mo. App. 235.

New Hampshire. — *Sibley v. Aldrich*, 33 N. H. 553, 66 Am. Dec. 745.

New York. — *Piper v. Manny*, 21 Wend. (N. Y.) 282; *Washburn v. Jones*, 14 Barb. (N. Y.) 193; *Hulett v. Swift*, 33 N. Y. 571, 88 Am. Dec. 405, *affirming* 42 Barb. (N. Y.) 230; *Hancock v. Rand*, 17 Hun (N. Y.) 279; *Lucia v. Omel*, 46 N. Y. App. Div. 200; *Wies v. Hoffman House*, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 225; *Metzger v. Schnabel*, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 698, *citing* 11 AM. AND ENG. ENCYC. OF LAW (1st ed.) pp. 51, 53; *Cheesebrough v. Taylor*, (C. Pl. Gen. T.) 12 Abb. Pr. (N. Y.) 227; *Grinnell v. Cook*, 3 Hill (N. Y.) 485, 38 Am. Dec. 663.

North Carolina. — *Neal v. Wilcox*, 4 Jones L. (49 N. Car.) 146, 67 Am. Dec. 266.

Loss by External Causes. — The logical consequence of the rule holding innkeepers absolutely liable as insurers is that no distinction is to be made between losses happening from internal causes, such as thefts by other guests or by servants, and those which result from external causes, such as burglary and robbery,¹ or accidental fire.²

(2) **Rule of Prima Facie Liability.** — The rule of liability adopted in some of the *United States*, and by recent decisions in *England* also, is that an innkeeper is *prima facie* liable for the loss of goods in his charge, but may discharge himself by showing that it happened by irresistible force, though not the act of God or a public enemy, or by inevitable accident, or otherwise without fault or negligence on his part.³

Pennsylvania. — *Houser v. Tully*, 62 Pa. St. 92, 1 Am. Rep. 390; *Walsh v. Porterfield*, 87 Pa. St. 376; *Shultz v. Wall*, 134 Pa. St. 262, 19 Am. St. Rep. 686, 26 W. N. C. (Pa.) 51.

Tennessee. — *Manning v. Wells*, 9 Humph. (Tenn.) 746, 51 Am. Dec. 688; *Meacham v. Galloway*, 102 Tenn. 415, citing 11 AM. AND ENG. ENCYC. OF LAW (1st ed.) 7.

West Virginia. — *Cunningham v. Bucky*, 42 W. Va. 671, citing 11 AM. AND ENG. ENCYC. OF LAW (1st ed.).

Losses by Act of God. — As to what occurrences are considered the acts of God, and for a full explanation of the meaning of the phrase, see the title ACT OF GOD, vol. I, p. 584.

The Words "Irresistible Superhuman Cause," used in the *California* statute, are equivalent in meaning to the phrase "act of God," and refer to those natural causes the effect of which cannot be prevented by the exercise of prudence, diligence, and care, and the use of those appliances which the situation of the party renders it reasonable that he should employ. *Fay v. Pacific Imp. Co.*, 93 Cal. 253, 27 Am. St. Rep. 198.

Theft, etc., by Persons at Inn. — The rule stated in the text applies with special force in cases of thefts, etc., committed by other guests not introduced by the owner of the property stolen, or by servants of the innkeeper, because an innkeeper insures against the acts of all persons whom he admits to the inn. *Weisenger v. Taylor*, 1 Bush (Ky.) 276, 89 Am. Dec. 626; *Woodward v. Birch*, 4 Bush (Ky.) 514. See also the cases cited *supra*, this note. And in such cases it is admitted even in those jurisdictions where the doctrine of absolute liability is not recognized. *Cutler v. Bonney*, 30 Mich. 250, 18 Am. Rep. 127.

The Georgia Statute declares that an innkeeper is a depository for hire, but that from the peculiar nature of his business his liability is governed by more stringent rules than is that of other depositories for hire; that he is bound to use extraordinary diligence in preserving the property of his guests, and that in case of loss there is a presumption of want of proper diligence on his part. *Murchison v. Sergeant*, 69 Ga. 206, 47 Am. Rep. 754; *Adams v. Clem*, 41 Ga. 67, 5 Am. Rep. 524.

1. Innkeeper Held Liable for Losses by Burglary or Robbery. — *Mateer v. Brown*, 1 Cal. 230, 52 Am. Dec. 303; 1 Chitty Pl. 430, note 22.

Chancellor Kent, in his Commentaries, says, at one place, that innkeepers are held responsible to as strict and severe an extent as common carriers, while in another place he limits their responsibility to losses occasioned

otherwise than by inevitable casualty, but by superior force, as robbery. 2 Kent Com. 591, 593.

In Jurisdictions Where Innkeepers Are Not Held as Insurers they are not liable for losses by burglary or robbery. See *infra*, this division of this section, *Rule of Prima Facie Liability*.

2. Innkeeper Held Liable for Losses by Accidental Fire. — *Fay v. Pacific Imp. Co.*, 93 Cal. 253, 27 Am. St. Rep. 198; *Magee v. Pacific Imp. Co.*, 98 Cal. 678, 35 Am. St. Rep. 199; *Hulett v. Swift*, 33 N. Y. 571, 88 Am. Dec. 405, affirming 42 Barb. (N. Y.) 230.

Accidental Fire Not Act of God. — In *Fay v. Pacific Imp. Co.*, 93 Cal. 262, 27 Am. St. Rep. 198, it was held that a loss arising from an accidental fire was not caused by the act of God, unless the fire was started by lightning or some superhuman agency.

Rule Changed by Statute in New York. — In New York a statute was passed after the decision in *Hulett v. Swift*, 33 N. Y. 571, 88 Am. Dec. 405, cited *supra*, this note, by which innkeepers were expressly exempted from liability for losses caused by accidental fires. *Faucett v. Nichols*, 64 N. Y. 377.

The Rule as to Accidental Fires Is Different, in jurisdictions where innkeepers are not held liable as insurers, from that laid down by the foregoing cases. See *infra*, this division of this section, *Rule of Prima Facie Liability*.

3. Rule of Prima Facie Liability — England. — *Dawson v. Chamney*, 5 Q. B. 164, 48 E. C. L. 164, Dav. & M. 348, 7 Jur. 1037, 13 L. J. Q. B. 33. The force of this case, as supporting the proposition that an innkeeper is not liable as an insurer for the loss of his guest's goods, is questioned by Sir F. Pollock in *Morgan v. Ravey*, 6 H. & N. 265, 30 L. J. Exch. 131, 3 L. T. N. S. 784, 9 W. R. 376. He calls attention to the fact that, according to the report of the Dawson case, in 7 Jur. 1037, "there was no evidence of the manner in which the horse received the injury for which the action was brought;" and "this," he says, "may be the explanation of that case, for though damage happening to the horse from what occurred in the stable might be evidence of defectus or neglect, still, if it was not shown how the damage arose, it was not even shown that it arose from what occurred in the stable. This would reconcile that case to the general current of authorities." In a note, however, to *Morgan v. Ravey*, 6 H. & N. 265, it is said that the report of Dawson v. Cholmeley, in 7 Jur. 1037, is evidently incorrect because the judgment which was written recites that the injury was caused by the kick of another horse. For Eng-

(3) *Conflict of Rules Considered.* — It has been observed as somewhat singular that on a practical question which must be as old as the rudiments of the law, there should be found at the present day such diversity of opinion and decision as obtains in regard to the question under consideration.¹ But it is even more singular that the same early case should be cited as authority for both of the conflicting rules.² The cases, however, are in irreconcilable

lish cases supporting the opposite view, see *supra*, this section, *Rule of Liability as Insurer.*

Illinois. — Metcalf v. Hess, 14 Ill. 129; Johnson v. Richardson, 17 Ill. 302, 63 Am. Dec. 369; Hulbert v. Hartman, 79 Ill. App. 289.

Indiana. — Laird v. Eichold, 10 Ind. 212, 71 Am. Dec. 323; Baker v. Dessauer, 49 Ind. 28; Hill v. Owen, 5 Blackf. (Ind.) 323, 35 Am. Dec. 124; Thickstun v. Howard, 8 Blackf. (Ind.) 535; Bowell v. De Wald, 2 Ind. App. 303, 50 Am. St. Rep. 240.

Kentucky. — Kisten v. Hildebrand, 9 B. Mon. (Ky.) 72, 48 Am. Dec. 416; Vance v. Throckmorton, 5 Bush (Ky.) 41, 96 Am. Dec. 327.

Louisiana. — Simon v. Miller, 7 La. Ann. 360; Woodworth v. Morse, 18 La. Ann. 156.

Michigan. — Cutler v. Bonney, 30 Mich. 259, 18 Am. Rep. 127.

Nebraska. — Dunbier v. Day, 12 Neb. 506, 41 Am. Rep. 772.

Ohio. — Gast v. Gooding, 7 West. L. J. 234, 1 Ohio Dec. (Reprint) 315.

Vermont. — Merritt v. Claghorn, 23 Vt. 177; McDaniels v. Robinson, 26 Vt. 316, 62 Am. Dec. 574; Howe Mach. Co. v. Pease, 49 Vt. 477.

The rule of liability laid down in *South Carolina* is that innkeepers are liable for all losses which might have been prevented by ordinary care. *Newson v. Axon*, 1 McCord L. (S. Car.) 509, 10 Am. Dec. 685.

The rule laid down in *Texas* is that an innkeeper is liable for any loss of property committed to his keeping which any care, vigilance, or diligence on his part could have prevented. *Howth v. Franklin*, 20 Tex. 798, 73 Am. Dec. 218.

Innkeepers Held Not Liable for Losses by Robbery. — *Kisten v. Hildetrand*, 9 B. Mon. (Ky.) 74, 48 Am. Dec. 416.

But in *Case of Burglary* he may be liable. Under the *prima facie* rule of liability nothing excuses but acts of God, of public enemies, of an armed mob, or forcible robbery. *Gast v. Gooding*, 7 West. L. J. 234, 1 Ohio Dec. (Reprint) 315. Compare *McDaniels v. Robinson*, 26 Vt. 316, 62 Am. Dec. 574, in which it was said that, though an innkeeper may, under peculiar circumstances, be excused for the loss of the goods of his guest, when stolen "by a burglarious entry from without," yet this can be only by proof of some of the circumstances ordinarily attending the breaking of a house securely fastened, and by showing that it was without any fault or negligence on his part.

Accidental Fires, not caused by the innkeeper's fault, are within the rule stated in the text. *Vance v. Throckmorton*, 5 Bush (Ky.) 41, 96 Am. Dec. 327; *Merritt v. Claghorn*, 23 Vt. 177.

Statutory Provisions as to Accidental Fires. — In some jurisdictions it is expressly provided by statute that an innkeeper shall not be liable

for the loss of any baggage or other property of a guest caused by fire not intentionally produced by the innkeeper or his servants. *Fisher v. Kelsey*, 121 U. S. 383, (reciting the statute of *Missouri*); *Faucett v. Nichols*, 64 N. Y. 377; *Burnham v. Young*, 72 Me. 273.

1. Conflict of Rules Considered. — *Sibley v. Aldrich*, 33 N. H. 553, 66 Am. Dec. 745.

2. Common Authority for Conflicting Rules. — The leading case on the subject is *Calve's Case*, 8 Coke 32, in which the word *defectus* contained in the ancient writ against innkeepers, is rendered "default" by Lord Coke. One line of decisions construes this to mean, not negligence in the ordinary sense, but neglect of the duty which the law imposes on innkeepers to keep safely the goods committed to their care, and that there is a "default" in respect to this duty, if the goods are lost or damaged in any way, regardless of the question of want of actual care on the part of the innkeeper, unless the loss or damage was caused by the act of God or a public enemy, or by the fault of the guest himself. This is the position taken in *Sibley v. Aldrich*, 33 N. H. 553, 66 Am. Dec. 745. So, too, in *Mateer v. Brown*, 1 Cal. 221, 52 Am. Dec. 303, the court say: "It strikes us forcibly that the uncertainty and confusion which have been thrown over this branch of the law have arisen from confounding the word *defectus* in the writ, and the word 'default' used by Lord Coke as its translation, with the term 'negligence,' an error into which Judge Story himself seems to have fallen. (Story on Bailments, § 470.) The question of negligence does not, according to the language of the writ in the Register Brevium or the Commentary of Coke, constitute a subject for discussion in ascertaining the responsibility of innkeepers, any more than it does in ascertaining that of common carriers. The law requires of the former to keep the goods safely, as it does of the latter to carry them safely, and in case either fails, from any cause, to comply with this legal obligation, the law pronounces him in default, unless the loss be occasioned through the fault of the owner of the goods, or by the act of God, or by the public enemies. It seems, therefore, that the dictum of Mr. Justice Bayley in *Richmond v. Smith*, 8 B. & C. 9, 15 E. C. L. 144, is a concise and accurate summary of the doctrine of *Calve's Case*. 'It appears to me,' he says, 'that the innkeeper's liability very closely resembles that of a carrier. He is *prima facie* liable for any loss not occasioned by the act of God or the king's enemies; although he may be exonerated where the guest chooses to have his goods under his own care.' And although that dictum has been overturned in England by the subsequent decision in *Dawson v. Chamney*, 5 Q. B. 164, 48 E. C. L. 163, we think the dictum right, and the decision wrong." See also the cases cited

conflict,¹ though in some of the decisions which lay down the rule that the liability is not absolute, but only *prima facie*, attention is called to the fact that the cases supporting the doctrine of absolute liability relate, with but few exceptions, either to unexplained thefts or losses, or else do not properly involve the question as to the extent of the liability.²

f. TO WHAT PROPERTY LIABILITY ATTACHES. — The general rule is that an innkeeper is liable for all the movable goods, chattels, and moneys of his guests placed within the inn; and his responsibility is not necessarily limited to such baggage as is carried for convenience of travel. This rule was laid down by an early case, and has since been acquiesced in by an almost unbroken line of decisions, *English* and *American*.³ But, notwithstanding

supra, this division of this section, *Rule of Liability as Insurer*.

Text Writers Criticised.—In *Mateer v. Brown*, 1 Cal. 221, 52 Am. Dec. 303, the court, after reciting the rule laid down by Chancellor Kent, Mr. Justice Story, and Sir William Jones, respectively, says that while Judge Story leaves the point under consideration at loose ends, the other two distinguished commentators are still more uncertain, as neither apparently agrees with himself, and that it is difficult to determine to which side of the question they intend to adhere.

Opposed to This View is *Dawson v. Chamney*, Dav. & M. 343, 5 Q. B. 164, 48 E. C. L. 164, 7 Jur. 1037, 13 L. J. Q. B. 33, in which Lord Denman, citing Story Bailm., construes the word *defectus* as used in Calye's Case, 8 Coke 32, to mean negligence in the ordinary sense. See also the cases cited *supra*, this division of this section, *Rule of Prima Facie Liability*.

1. **Conflict of Authority Noticed.**—See *Lanier v. Youngblood*, 73 Ala. 587.

2. **Cases Imposing Liability as Insurer Criticised.**—See *Cutler v. Bonney*, 30 Mich. 259, 18 Am. Rep. 127.

3. **Liability Held to Extend to Personalty of All Kinds**—*England*.—Calye's Case, 8 Coke 32; *Kent v. Shuckard*, 2 B. & Ad. 803, 22 E. C. L. 186; *Richmond v. Smith*, 8 B. & C. 9, 15 E. C. L. 144.

Alabama.—*Lanier v. Youngblood*, 73 Ala. 591.

Illinois.—*Johnson v. Richardson*, 17 Ill. 302, 63 Am. Dec. 369; *Metcalf v. Hess*, 14 Ill. 129.

Maine.—*Hilton v. Adams*, 71 Me. 19; *Cohen v. Manuel*, 91 Me. 274.

Massachusetts.—*Berkshire Woollen Co. v. Proctor*, 7 Cush. (Mass.) 417.

Minnesota.—*Smith v. Wilson*, 36 Minn. 334, 1 Am. St. Rep. 669.

Nebraska.—*Dunbier v. Day*, 12 Neb. 596, 41 Am. Rep. 772.

New York.—*Wilkins v. Earle*, 44 N. Y. 179, 4 Am. Rep. 655; *Piper v. Manny*, 21 Wend. (N. Y.) 282; *Needles v. Howard*, 1 E. D. Smith (N. Y.) 54; *Clute v. Wiggins*, 14 Johns. (N. Y.) 175, 7 Am. Dec. 448; *Hulett v. Swift*, 33 N. Y. 571, 88 Am. Dec. 405; *Taylor v. Monnot*, 4 Duer (N. Y.) 116, 1 Abb. Pr. (N. Y.) 325; *Van Wyck v. Howard*, (C. Pl. Spec. T.) 12 How. Pr. (N. Y.) 147.

North Carolina.—*Quinton v. Courtney*, 1 Hayw. (2 N. Car.) 40.

Pennsylvania.—*Sneider v. Geiss*, 1 Yeates (Pa.) 34; *Houser v. Tully*, 62 Pa. St. 92, 1 Am. Rep. 390.

Wisconsin.—*Jalie v. Cardinal*, 35 Wis. 118.

The Leading Case on the subject is *Calye's Case*, 8 Coke 32, decided in 1584, in which it was said: "If one brings a bag or chest, etc., of evidences into the inn, or obligations, deeds, or other specialties, and by default of the innkeeper they are taken away, the innkeeper shall answer for them, and the writ shall be *bona et catalla* generally, and the declaration shall be special. These words, *bona et catalla*, restrain the latter words to extend only to movables. And these words aforesaid, *absque subtractione seu amissione*, extend to all movable goods."

"It may be considered as the fair result of all the cases, that this liability covers all the personal property of every kind, *infra hospitium*, which the traveler or guest finds it convenient to carry about him, including money, jewelry, or other valuables devoted to use or ornament." *Lanier v. Youngblood*, 73 Ala. 591.

Horses of Guests Within the Rule.—*Dickerson v. Rogers*, 4 Humph. (Tenn.) 179, 40 Am. Dec. 642.

Merchandise Carried by Guest Held Within the Rule.—Calye's Case, 8 Coke 32; *Eden v. Drey*, 75 Ill. App. 102. See, however, the cases cited in the text following note.

In *Missouri* an innkeeper is not liable for the loss of any merchandise for sale or sample belonging to a guest, unless the guest shall have given written notice of having such merchandise for sale or sample in his possession after entering the inn, nor shall the innkeeper be compelled to receive such guest with merchandise for sale or sample. *Fisher v. Kelsey*, 121 U. S. 383, *affirming* 16 Fed. Rep. 71.

A Peddler's Stock of Goods is within the rule of liability. *Cohen v. Manuel*, 91 Me. 274; *Rubenstein v. Cruikshanks*, 54 Mich. 199, 52 Am. Rep. 806.

Merchandise Exhibited for Sale by a guest, either in his bedroom or in a separate room taken for the purpose, is not within the general rule stated in the text, but this is because the guest retains exclusive possession of the goods, and not because of their character. See *supra*, this section, *Requisites of Liability—Custody of Innkeeper*.

Money.—There is no distinction between money and goods of a guest in regard to the innkeeper's liability. *Kent v. Shuckard*, 2 B. & Ad. 803, 22 E. C. L. 186, 1 L. J. K. B. 1; *Woodward v. Birch*, 4 Bush (Ky.) 511; *Epps v. Hinds*, 27 Miss. 657, 61 Am. Dec. 528; *Kellogg v. Sweeney*, 46 N. Y. 291, 7 Am. Rep. 333, 1 Lans. (N. Y.) 397; *Quinton v. Courtney*, 1 Hayw. (2 N. Car.) 40.

the uniformity of the cases on the subject, it has been directly held, in at least one of the United States, and intimated in others, that the liability of an innkeeper, in the respect under consideration, extends only to the baggage of his guests, and that the term "baggage" includes only articles for the personal convenience and use of the traveler.¹ These cases, however, entirely disregard the long-established doctrine stated above, and rest solely on the authority of cases relating to the extent of a carrier's liability in respect to the baggage of passengers.² In some jurisdictions the property to which the

The responsibility of an innkeeper in respect to the money of his guest is not limited to such an amount as is necessary for the guest's traveling expenses. *Armistead v. Wilde*, 17 Q. B. 261, 79 E. C. L. 261, 15 Jur. 1010, 20 L. J. Q. B. 524; *Berkshire Woollen Co. v. Proctor*, 7 Cush. (Mass.) 417; *Smith v. Wilson*, 36 Minn. 334, 1 Am. St. Rep. 669; *Wilkins v. Earle*, 44 N. Y. 172, 4 Am. Rep. 655.

In Louisiana the innkeeper's responsibility depends on the circumstances of each particular case; and, when money is stolen from a traveler, should be restricted to the sum which, from the circumstances of the journey, it may be presumed, formed part of his effects, but which care should be taken not to rate too low. *Simon v. Miller*, 7 La. Ann. 360.

Estoppel to Object to Character and Quantity of Property. — In *Pinkerton v. Woodward*, 33 Cal. 557, 91 Am. Dec. 657, it was held that where an innkeeper gave notice to his guests to deposit their money and valuables, without any limit specified, for safekeeping, and that he would not otherwise be responsible therefor, and accordingly a guest deposited a large amount of money and gold-dust, which was received without objection by the innkeeper and put by him in the usual place of deposit for such things, he could not afterwards, when the property had been stolen, object as to the kind or amount thereof for the purpose of defeating or reducing a recovery for its value. *Pinkerton v. Woodward*, 33 Cal. 557, 91 Am. Dec. 657.

1. Decisions Holding Innkeeper Liable Only for Baggage. — *Pettigrew v. Barnum*, 11 Md. 434, 69 Am. Dec. 212. See also *Giles v. Fountleroy*, 13 Md. 126; *Maltby v. Chapman*, 25 Md. 310; *Treiber v. Burrows*, 27 Md. 130. In *Sasseen v. Clark*, 37 Ga. 242, this question was mooted but was not decided; the court saying (p. 249) that "there seems to be a disposition to limit the liability of an innkeeper as such for such of the goods of his guests only as is usually denominated baggage, that is, to such articles of necessity or personal convenience as are usually carried by passengers for their personal use." This limitation, the court said further, "probably originated from the somewhat analogous case of common carriers, where there is a liability as common carriers for baggage without other compensation than the fare for passengers." See also *Vance v. Throckmorton*, 5 Bush (Ky.) 43, 96 Am. Dec. 327, in which it was said that *prima facie* the law would not impose upon the landlord responsibility for silverware, bedclothing, books, etc.

In *Treiber v. Burrows*, 27 Md. 130, it was held that money in the trunk of a guest at an inn may constitute part of the baggage for which the innkeeper is responsible, but that it

is such an amount only as may be convenient to meet personal traveling expenses; and to arrive at this, the condition of the guest, his mode of life, habits, tastes, and the character of his journey, must be taken into account.

2. Rule in Maryland Not Supported by Authority. — The Court of Appeals of Maryland, in reaching the decision in *Pettigrew v. Barnum*, 11 Md. 434, 69 Am. Dec. 212, did not refer to any of the cases in which the liability of innkeepers had been adjudicated, but *cited*, in support of its conclusions, the following authorities: *Dibble v. Brown*, 12 Ga. 224, 56 Am. Dec. 460; *Hawkins v. Hoffman*, 6 Hill (N. Y.) 586, 41 Am. Dec. 767; *Orange County Bank v. Brown*, 9 Wend. (N. Y.) 85, 24 Am. Dec. 129; *Pardee v. Drew*, 25 Wend. (N. Y.) 459; *Clark v. Spence*, 10 Watts (Pa.) 335; *Johnson v. Stone*, 11 Humph. (Tenn.) 419; *Story Bailm.*, § 499. None of these authorities involve any question in regard to innkeepers, but they all relate to the liability of carriers for the baggage of passengers, with one exception, *Clark v. Spence*, 10 Watts (Pa.) 336, which was the case of a warehouseman.

Treiber v. Burrows, 27 Md. 130, refers to this doctrine as a departure from the established rule.

Moreover, the doctrine laid down in *Pettigrew v. Barnum*, 11 Md. 434, 69 Am. Dec. 212, seems to be at variance with the rule impliedly recognized by the Maryland statute. This statute, enacted soon after the litigation in the case just cited began, provides that any innkeeper in a city or town of more than five hundred inhabitants, who shall provide an iron safe or other secure depository for keeping the money, jewelry, and plate belonging to his guests, and who shall take charge for safekeeping of such money, etc., shall be liable for the full value of the same if lost or stolen while thus in his charge; and that if he shall post notices reciting the purport of the statute and requesting guests to deposit their money, etc., with him or his agent, then he shall not be responsible for loss by robbery or otherwise. Pub. Gen. Law Md. 1860, art. 70, §§ 5, 6; Pub. Gen. Law Md. 1888, art. 71, §§ 5, 6.

What Constitutes Baggage. — In *Pettigrew v. Barnum*, 11 Md. 434, 69 Am. Dec. 212, the question what constitutes the baggage of a traveler was considered, and it was said that this depends so much upon circumstances, such as the traveler's position, habits, tastes of living, and mode of traveling, that it is easier to say in a given instance whether an article is embraced than to lay down a general rule that will apply to all cases; and it was held that the term did not embrace merchandise or other valuables not designed for use or personal convenience on the journey, such as silver knives, forks, spoons, etc.

extraordinary liability shall extend is expressly designated by statute.¹

Property of Third Persons. — Actual ownership on the part of a guest, of property brought by him to the inn and lost while *infra hospitium*, is not essential. If the goods lost were in the possession of the guest as the agent or servant of the actual owner, then the owner may maintain an action therefor against the innkeeper; and if the guest had a qualified property in the goods as bailee, etc., the right of action is in him.²

g. LIMITING LIABILITY — (1) *By Contract.* — Both the authorities and the analogies of the law in other cases support the view that an innkeeper may, either expressly or impliedly, contract with his guests for a limited liability in regard to the guest's effects; and, on principle, no good reason can be perceived why this should not be so. The transaction concerns the parties only; it involves simply rights of property, and the public can have no interest in requiring the responsibility of insurance to accompany the accommodation of the guests, in the face of an agreement for its relinquishment. By such an agreement the innkeeper becomes, with reference to the particular transaction, an ordinary bailee.³

Notice to a Guest, given by an innkeeper, to the effect that he will be liable for the guest's effects only to a certain extent, or on certain conditions, is sufficient,⁴ but an innkeeper cannot limit his liability, in the absence of statutory authority, by a general notice.⁵

1. Statutory Provisions. — The *Louisiana Code* makes innkeepers liable for the loss of a traveler's baggage, and such sum as is necessary for his expenses according to his condition in life and the journey undertaken; but not for other kinds of property, unless the guest deposits it with the innkeeper, or gives notice that he has it in his possession. *Profiel v. Hall*, 14 La. Ann. 530; *Pope v. Hall*, 14 La. Ann. 324. But see *Woodworth v. Morse*, 18 La. Ann. 156.

The statutes of *Massachusetts* exempt innholders from liability for the loss of goods which are not personal baggage and effects, unless such goods shall be delivered by the traveler to the innholder for safekeeping. *Becker v. Haynes*, 29 Fed. Rep. 441.

Compare the statutes in other jurisdictions.

2. Property of Third Persons in Possession of Guests. — *Towson v. Havre-de-Grace Bank*, 6 Har. & J. (Md.) 47, 14 Am. Dec. 254; *Quinton v. Courtney*, 1 Hayw. (2 N. Car.) 40; *Jordan v. Boone*, 5 Rich. L. (S. Car.) 528. See also *supra*, this title, *Who Are Guests — What Constitutes the Relation — Necessity of Personal Presence*.

3. Right to Limit Liability Recognized by Authorities. — *Sanders v. Spencer*, 3 Dyer 2666; *Richmond v. Smith*, 8 B. & C. 9, 15 E. C. L. 144, in which Alexander, C. B., said that an innkeeper could not get rid of his common-law liability, unless by giving an express notice; *Van Wyck v. Howard*, (C. Pl. Spec. T.) 12 How. Pr. (N. Y.) 147; *Fuller v. Coats*, 18 Ohio St. 343; *McDaniels v. Robinson*, 26 Vt. 316, 62 Am. Dec. 574.

In 2 Kent Com. 594, it is said that "an innkeeper, like a common carrier, * * * can only limit his liability by express agreement or notice." See also *Schouler Bailm.*, § 309; *Pinkerton v. Woodward*, 33 Cal. 557, 91 Am. Dec. 657.

Custom and Usage. — In *Berkshire Woollen Co. v. Proctor*, 7 Cush. (Mass.) 417, an innkeeper, who was sued for money abstracted

from a guest's trunk at the inn, attempted to show a general and uniform custom of the local hotels and their guests to deposit the money of guests in safes kept for that purpose, but the court held that such evidence was not admissible because it was not shown that the custom, if any, was general and uniform, thus impliedly recognizing the principle that the matter might be regulated by custom.

An Analogy in support of the proposition stated in the text is found in the case of common carriers. For reasons of public policy it is held that they are liable as insurers of the goods committed to their charge for transportation, but it is well settled that they have the right to limit their liability. See the title *CARRIERS OF GOODS*, vol. 5, p. 288.

4. Limitation of Liability by Notice to Guest. — *Richmond v. Smith*, 8 B. & C. 9, 15 E. C. L. 144; *Van Wyck v. Howard*, (C. Pl. Spec. T.) 12 How. Pr. (N. Y.) 147; 2 Kent Com. 594.

Where a guest is notified that he must deposit his baggage in a particular place for safekeeping, and he neglects to do so, the innkeeper is not responsible in case of loss. *Wilson v. Halpin*, 1 Daly (N. Y.) 496, 30 How. Pr. (N. Y.) 124.

In *Mateer v. Brown*, 1 Cal. 221, 52 Am. Dec. 303, the question whether an innkeeper can limit his responsibility by notice was referred to but not decided.

Terms of Notice. — Unless the innkeeper has given his guest notice that he will not be responsible, if goods be left in the public room, his liability still continues, even though he may have said to his guest that he had better take them to his room. *Packard v. Northcraft*, 2 Met. (Kv.) 442.

5. General Notice Not Sufficient. — *Stanton v. Leland*, 4 E. D. Smith (N. Y.) 88.

Notice Must Be Brought Home to the Guest, and the mere fact that a notice limiting the innkeeper's liability, unless certain requirements should be observed, was posted on the door of the guest's room, is not sufficient to raise a

(2) *By Statute* — (a) *In General*. — Statutes have been enacted both in *England* and in the *United States* modifying the rigorous rule of the common law in respect to the liability of innkeepers, by permitting them to provide a place of safe deposit, and to require guests to place there money and other articles of a nature calculated to tempt dishonest persons, and easy to remove without detection. These statutes more nearly adapt the state of the law to modern conditions by giving innkeepers the right to make their liability as insurers conditional on actual custody in certain cases.¹

(b) *Mode of Effecting Limitation*. — In some jurisdictions the statutes limit the liability of innkeepers by declaring that they shall not be liable for losses sustained by their guests, unless the guests deliver or offer to deliver their goods to them for safe custody, thus creating an absolute limitation of liability without requiring any act to be done by the innkeepers.² But it is usually pro-

presumption that he had knowledge thereof. *Bodwell v. Bragg*, 20 Iowa 232.

Notice Posted in Room. — In *Huntly v. Bedford Hotel Co.*, 56 J. P. 53, it was held that a notice in a guest's room that "articles of value, if not kept under lock, shall be deposited with the manager, who will give a responsible receipt for the same," did not constitute a special bargain with the guest that the innkeeper would be responsible if such articles were kept under lock.

Notice Printed on Hotel Register. — The signing of a register under a printed heading containing an agreement that the innkeeper shall not be responsible for the loss of valuables unless deposited in the safe, is not the contract of the guest in the absence of any proof that it was seen or assented to by him. *Bernstein v. Sweeny*, 33 N. Y. Super. Ct. 271.

The Georgia Statute provides that an innkeeper cannot limit his liability by public notice, but that he may adopt reasonable regulations for his own protection, and that the publication of such to his guests binds them to comply therewith. Code Ga. 1895, § 2938.

1. **The English Statute** enacted in 1863 provides that no innkeeper shall be liable for any loss of or injury to property, other than live animals, brought to his inn, to a greater amount than thirty pounds, except (1) where such property shall have been stolen, lost, or injured through the wilful act, default, or neglect of such innkeeper or any servant in his employ, and (2) where such property shall have been deposited expressly for safe custody with such innkeeper; provided always that in the case of such deposit it shall be lawful for such innkeeper, if he thinks fit, to require as a condition of his liability that the property shall be deposited in a box or other receptacle fastened and sealed by the person depositing it. The statute further provides that the innkeeper shall exhibit a copy thereof in a conspicuous part of the hall or entrance to his inn. Stat. 26 & 27 Vict., c. 41; *Spice v. Bacon*, 2 Ex. D. 463, 46 L. J. Exch. 713, 36 L. T. N. S. 896, 25 W. R. 840.

The Word "Wilful" in section 1 of this statute applies only to the following word "act," and not to the succeeding words "default or neglect." *Squire v. Wheeler*, 16 L. T. N. S. 93.

The notice required by the statute, in order to be effectual, must state correctly the provisions of the act, and the omission of any material portion thereof will render a notice

ineffectual to protect the innkeeper. Thus, where the copy of the statute exhibited by the innkeeper, in reciting the first exception, referred to property stolen, lost, or injured through "the wilful default or neglect" of the innkeeper, instead of "the wilful act, default, or neglect," it was held that the omission was material and rendered the notice insufficient. *Spice v. Bacon*, 46 L. J. Exch. 713, 2 Ex. D. 463, 36 L. T. N. S. 896, 25 W. R. 840.

Statutes in United States. — See 1 Stim. Am. Stat. Law, § 4392. See also the various local codes and statutes in the United States.

In *Bowell v. De Wald*, 2 Ind. App. 303, 50 Am. St. Rep. 240, it was held that in *Indiana* there is no statute regulating the liability of innkeepers for loss of personal property sustained by their guests, and their liability is therefore governed by the common law.

2. **Limitation Effectuated by Terms of Statute.** — The *Maine* statute (Laws 1874, c. 174, § 1; Rev. Stat. Me. 1883, tit. 2, c. 27, § 7) declares that innholders are not liable for losses sustained by their guests, except for wearing apparel or articles worn or carried upon the person to a reasonable amount, personal baggage, and money necessary for traveling expenses and personal use, unless upon delivery, or offer of delivery, by such guests of their money, jewelry, or other property, to the innholder, his agent or servants, for safe custody. *Noble v. Milliken*, 74 Me. 225, 43 Am. Rep. 581.

The *Massachusetts* statute is to the same effect. *Becker v. Haynes*, 29 Fed. Rep. 441.

The self-executing terms of the statutes are sometimes restricted in respect to the character of the property. Thus the *Missouri* statute provides that an innkeeper shall not be liable "for the loss of any merchandise for sale or sample belonging to a guest, unless the guest shall have given written notice of having such merchandise for sale or sample in his possession after entering the inn, nor shall the innkeeper be compelled to receive such guest with merchandise for sale or sample." *Fisher v. Kelsey*, 121 U. S. 383, affirming 16 Fed. Rep. 71. Compare the statutes in other jurisdictions.

What Constitutes Delivery to Innkeeper. — There is a delivery of goods to the innkeeper for safe custody where the guest, arriving at the inn with a cart containing his goods, is directed by the innkeeper to take the cart to a stable at some distance from the inn, but owned by the innkeeper and used by him in

vided that, in order to effect a limitation of liability, the innkeeper shall provide a secure place of deposit for valuables, and post notices to the guests to leave their effects with him for safe keeping.¹ These statutes, being in derogation of the common law, are strictly construed,² and a literal compliance therewith is generally held necessary to effect the limitation.³

(c) **Extent of Limitation** — *aa. IN GENERAL.* — An innkeeper by complying with the statute on the subject does not relieve himself from all liability for the safety of the goods of his guests, if they fail to place them in his actual custody. He still remains liable for any loss caused by the act or default of himself or his servants, but his liability is no longer that of an absolute insurer; and proof of the mere fact of the loss no longer raises a presumption against him. In order to charge the innkeeper under these circumstances the guest must establish the default.⁴ The innkeeper, however, cannot claim that the degree of his responsibility is thus reduced, if the loss would have happened whether the valuables of the guest had been deposited with him or not.⁵

connection with it, and the guest does take his cart there and deliver it to the innkeeper's hostler. *Cohen v. Manuel*, 91 Me. 274.

Noncompliance with such statutes does not relieve an innkeeper for losses caused by the acts or defaults of himself or his servants. *Becker v. Haynes*, 29 Fed. Rep. 441.

1. Mode of Effecting Limitation — **Posting Notices.** — See the various codes and statutes relating to the subject.

Notice on Hotel Register Held Not Sufficient. — Under a statute requiring the "posting," it was held not sufficient that there was on the register, on which a guest wrote his name, a notice that "all moneys, jewels, coats, valises, and other valuables must be left at the office, and checks received for them, otherwise the proprietor will not be responsible for any loss." *Murchison v. Sergeant*, 69 Ga. 206, 47 Am. Rep. 754. See also *Olson v. Crossman*, 31 Minn. 222.

2. Statutes Strictly Construed. — *Lanier v. Youngblood*, 73 Ala. 587; *Ramaley v. Leland*, 43 N. Y. 539, 3 Am. Rep. 728.

3. Literal Compliance with Statute Required. — *Myers v. Cottrill*, 5 Biss. (U. S.) 465; *Chamberlain v. West*, 37 Minn. 54.

Actual Notice to a guest, that a safe has been provided for keeping the effects of guests and that the innkeeper will not be responsible for their loss unless deposited therein, is equivalent to the statutory notice by posting. *Purvis v. Coleman*, 21 N. Y. 111, 1 Bosw. (N. Y.) 321; *Classen v. Leopold*, 2 Sweeny (N. Y.) 705; *Shultz v. Wall*, 134 Pa. St. 262, 19 Am. St. Rep. 686, 26 W. N. C. (Pa.) 51. But see *Lanier v. Youngblood*, 73 Ala. 587, in which it was suggested that actual notice probably would not be sufficient to relieve the innkeeper from liability, if he failed to post the notice as required by law.

Posting Copies of Statute — **Verbal Errors.** — A mere verbal error in a copy of the statute, exhibited as required by its terms for the purpose of limiting the innkeeper's liability, will not vitiate the notice so as to make it ineffectual, if the provisions of the act are correctly stated; but the omission of a material portion of the statute will render the notice ineffectual to protect the innkeeper. *Spice v. Bacon*, 46 L. J. Exch. 713, 2 Ex. D. 463, 36 L. T. N. S. 896, 25 W. R. 840.

Where the statute requires notices to be

posted on the doors of the inn, such notices must be posted on the doors of all rooms occupied by guests, and a guest is not affected with the notice unless it was posted on the door of his room. *Lanier v. Youngblood*, 73 Ala. 587.

A Notice Printed in Small Type, instead of large type as required by the *Missouri* statute, is not sufficient to relieve the innkeeper of liability. *Porter v. Gilkey*, 57 Mo. 235.

Printing a Copy of the Statute on the Hotel Register is not sufficient, where it is provided that a copy shall be posted in each sleeping room. *Batterson v. Vogel*, 8 Mo. App. 24.

Deposit Expressly for Safe Custody. — By the terms of the English statute, a guest who deposits an article with an innkeeper cannot, in the absence of default or neglect, hold the innkeeper responsible to a greater amount than thirty pounds for its loss, unless, when making the deposit, he informs the innkeeper, in a reasonable and intelligible manner, that the deposit is for the safe custody of the article. *O'Connor v. Grand International Hotel Co.*, (1898) 2 Ir. R. 92.

4. Under the English Statutes of 26 & 27 Vict., c. 47, the absolute liability of the innkeeper is limited to the sum of thirty pounds where he has complied with the statute, and the guest fails to deposit his goods accordingly. *Spice v. Bacon*, 46 L. J. Exch. 713, 2 Ex. D. 463, 36 L. T. N. S. 896, 25 W. R. 840.

Innkeeper Not Relieved Against Defaults of Himself or Servants. — *Spice v. Bacon*, 2 Ex. D. 463, 46 L. J. Exch. 713, 36 L. T. N. S. 896, 25 W. R. 840; *Elcox v. Hill*, 98 U. S. 218; *Treiber v. Burrows*, 27 Md. 130. See also the various local codes and statutes, many of which expressly declare that an innkeeper cannot limit his liability for the direct acts or omissions of himself or his servants.

Effect of Complying with Statute — **Guest Must Prove Default.** — *Spice v. Bacon*, 2 Ex. D. 463, 46 L. J. Exch. 713, 36 L. T. N. S. 896, 25 W. R. 840; *Lanier v. Youngblood*, 73 Ala. 587; *Elcox v. Hill*, 98 U. S. 218.

5. Liability Not Affected by Failure to Deposit. — An illustration of the exception stated in the text is where the property of a guest is stolen after it has been packed preparatory to the departure of the guest. In such a case it is obvious that the loss could not have been prevented by depositing the property with the

As Regards Property Which Has Been Placed in His Custody by a guest pursuant to the statute and notice thereof, the liability of the innkeeper is in no way affected, but remains the same as at common law.¹

Limitation as to Amount. — In some jurisdictions the statutes limit the amount to which an innkeeper shall be liable, whether the property of the guest be committed to his special keeping or not.²

bb. TO WHOM STATUTES APPLY. — The statutes are usually made applicable to all innkeepers, but in some instances they are not so comprehensive.³

cc. PROPERTY CONTEMPLATED BY STATUTE. — The statutes usually contemplate property which is of such a kind or character as to be peculiarly subject to loss by theft or otherwise, and as a general rule they specify it with more or less particularity,⁴ though sometimes property of all kinds, with certain exceptions, is declared to be within the statute,⁵ and when the statute specifically names the kinds of property with respect to which the innkeeper may limit his liability, the court cannot, in any case, extend it to other articles, because the statutes, being in derogation of the common law, are to be strictly construed.⁶

Rule as to Articles Carried for Personal Use. — It is held that a reasonable amount of money for traveling expenses, and articles of personal use and convenience, though within the terms of the statute, are not within its spirit, and that a guest by retaining such articles in his own possession, instead of depositing them with the innkeeper, does not absolve the innkeeper from his common-

innkeeper. *Bendetson v. French*, 46 N. Y. 266, reversing 44 Barb. (N. Y.) 31; *Stanton v. Leland*, 4 E. D. Smith (N. Y.) 88.

1. No Modification of Liability as to Goods Placed in Innkeeper's Custody. — *Wilkins v. Earle*, 44 N. Y. 172, 4 Am. Rep. 655.

2. Limitation as to Amount. — The *New York* statute limits the amount for which an innkeeper shall be liable in any case to the sum of five hundred dollars. *Briggs v. Todd*, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 208; *Bradner v. Mullen*, (County Ct.) 27 Misc. (N. Y.) 479.

3. To Whom Statutes Apply. — See the various local codes and statutes.

The *Alabama* statute, by its terms, is limited to the keepers of inns or hotels in a city, and cannot be extended to towns or villages, or to inns or hotels situated in the country. *Beale v. Posey*, 72 Ala. 323; *Lanier v. Youngblood*, 73 Ala. 587; Code Ala. 1896, § 2541.

4. The Alabama and Georgia statutes designate "valuable articles." *Beale v. Posey*, 72 Ala. 323; *Lanier v. Youngblood*, 73 Ala. 587; Code Ala. 1896, § 2541; *Murchison v. Sergeant*, 69 Ga. 207, 47 Am. Rep. 754; Code Ga. 1895, § 2937.

The articles in respect to which an innkeeper may limit his liability under the *Illinois* statute are "money, jewelry, or other valuables of gold, silver, or rare precious stones." *Elcox v. Hill*, 98 U. S. 218; *Starr & Curt. Ann. Stat. Ill.*, c. 71, par. 2.

The *Maryland* statute designates "money, jewelry, and plate." *Maltby v. Chapman*, 25 Md. 310.

The *New York* statute designates "the money, jewels, or ornaments." *Ramaley v. Leland*, 43 N. Y. 539, 3 Am. Rep. 728.

Compare the statutes in other jurisdictions.

5. The English Statute protects the innkeeper with respect to property of every kind, except

horses or other live animals. *Spice v. Bacon*, 2 Ex. D. 463, 46 L. J. Exch. 713, 36 L. T. N. S. 896, 25 W. R. 840; Stat. 26 & 27 Vict., c. 41.

6. Limitation Applicable only to Kinds of Property Named. — *Maltby v. Chapman*, 25 Md. 310; *Ramaley v. Leland*, 43 N. Y. 539, 3 Am. Rep. 728.

Watches. — Within the rule stated in the text, it is held that the *New York* statute designating "money, jewels, or ornaments," does not include a watch of a reasonable value owned by a guest. *Ramaley v. Leland*, 43 N. Y. 539, 3 Am. Rep. 728, 6 Robt. (N. Y.) 358; *Becker v. Warner*, 90 Hun (N. Y.) 187. And this holds good, though the case of the watch is engraved with a coat of arms, and has a picture of the owner's mother inside the cover, or has been laid aside in the owner's trunk temporarily. *Briggs v. Todd*, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 208.

In *Kösenplaenter v. Roessle*, 54 N. Y. 262, there is an expression by Earl, C., to the effect that a watch is within the *New York* statute, but it will be observed that no watch was involved in the litigation.

The *Ohio* statute which specifies "money, banknotes, jewelry, articles of gold and silver manufacture, precious stones, and bullion," includes a watch and chain. *Lang v. Arcade Hotel Co.*, 12 Cinc. L. Bul. 253, 9 Ohio Dec. (Reprint) 372.

The provision of the *Wisconsin* statute relating to "money, jewelry, and articles of gold and silver manufacture," includes gold and silver watches and watch chains usually worn by guests about their persons. *Stewart v. Parsons*, 24 Wis. 241.

Table Silver. — It is also held that articles of table silver, such as forks and spoons, are not included in the designation "money, jewels, or ornaments." *Briggs v. Todd*, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 208.

law liability.¹ And in some instances the statutes expressly except such reasonable amount of money and articles of personal use.²

h. FORM OF ACTION. — It has been said that an action against an innkeeper for the loss of or an injury to a guest's goods while within the inn is founded on the implied contract of the innkeeper to keep safely the goods of his guests.³ On the other hand, it has been declared that the action sounds in tort, being founded on a breach of duty devolved by the law on the innkeeper by reason of his calling, and that this duty is imposed from considerations of public policy, without regard to any implied contract of bailment;⁴ and this view seems to be the one generally adopted.⁵

i. MEASURE OF DAMAGES. — Where the property of a guest is lost or stolen under such circumstances as, within the principles stated above, will render the innkeeper liable, the proper measure of damages is the market value of the property, that is, its value in the market open to the guest, at the time of the loss.⁶

In Case the Property Has No Market Value, then, of course, it is the actual value that is recoverable, and it would seem that such value is not merely what the property might have sold for in money at public or private sale, but its pecuniary value to the owner.⁷ This is the rule that has been laid down in other cases of bailment, and no reason is perceived why it should not apply equally to innkeepers.⁸

The Cost of the property lost or stolen, though not the measure of the guest's recovery,⁹ is still evidence which may be considered in connection

1. Articles of Personal Use or Convenience. — A guest is not bound to deposit with the innkeeper, for safekeeping, a watch or a sum of money amounting to ninety dollars. *Maltby v. Chapman*, 25 Md. 310.

Under the *Georgia* statute which specifies "valuable articles," it is held that a guest cannot be required to deposit a watch of reasonable value worn by him, or a reasonable sum had by him for the purpose of paying his traveling expenses. *Murchison v. Sergeant*, 60 Ga. 207, 47 Am. Rep. 754.

It Is a Question of Fact whether a sum of money stolen from a guest was reasonably necessary for traveling expenses. *Maltby v. Chapman*, 25 Md. 310. See also the next following note, *Limitation Expressly Restricted by Statute*.

On the Contrary, it has been held that the statutes apply to all property of the kind designated, and that there is no restriction as to such amounts or articles as may be in excess of what a guest may require for his traveling expenses or personal convenience. *Hyatt v. Taylor*, 42 N. Y. 258, *affirming* 51 Barb. (N. Y.) 632; *Ramaley v. Leland*, 43 N. Y. 539, 3 Am. Rep. 728, *modifying* 6 Robt. (N. Y.) 358; *Rosenplaenter v. Roessle*, 54 N. Y. 262, *overruling* *Gile v. Libby*, 36 Barb. (N. Y.) 70.

2. Limitation Expressly Restricted by Statute. — *Noble v. Miliken*, 74 Me. 225, 43 Am. Rep. 581; *Turner v. Whitaker*, 9 Pa. Super. Ct. 83, 43 W. N. C. (Pa.) 375. And see the statutes in other jurisdictions.

3. Action for Goods Lost Said to Be Ex Contractu. — *Rockwell v. Proctor*, 39 Ga. 105; *Dickinson v. Winchester*, 4 Cush. (Mass.) 114, 50 Am. Dec. 760.

4. Action for Loss of Guest's Goods Held to Sound in Tort. — *Johnson v. Richardson*, 17 Ill. 302, 63 Am. Dec. 369; *People v. Willett*, (Supm.

Ct. Spec. T.) 15 How. Pr. (N. Y.) 210, 6 Abb. Pr. (N. Y.) 37.

5. In *Morgan v. Ravey*, 6 H. & N. 265, it was said by counsel, on the argument, that "there is no instance of an action against an innkeeper upon a promise to keep the goods of his guest safely. The form of action has always been case upon the custom of the realm." And from an examination of the cases cited in the foregoing notes, relative to the liability of innkeepers in respect to their guests' goods, it appears that the action is generally in the form of an action of trespass.

6. Measure of Damages — Market Value. — *Kellogg v. Sweeny*, 46 N. Y. 291, 7 Am. Rep. 333, dissenting opinion of Allen, J.; *Needles v. Howard*, 1 E. D. Smith (N. Y.) 54; *Wies v. Hoffman House*, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 225.

For a Full Discussion as to what is the market value of any commodity, see the title MARKET VALUE.

7. Pecuniary Value to Owner Recoverable in Absence of Market Value. — In *Wies v. Hoffman House*, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 225, the principle stated in the text seems to have been applied. In that case the plaintiff sued for certain articles of wearing apparel, and a toilet set and bag, which were stolen from his room while he was a guest at the defendant's inn, and his recovery was based on evidence as to the original cost of the several articles, the extent to which they had been used, and their condition at the time they were stolen. See also *Needles v. Howard*, 1 E. D. Smith (N. Y.) 54.

8. Analogous Cases. — See the titles BAGGAGE, vol. 3, p. 584; CARRIERS OF GOODS, vol. 5, p. 390.

9. Cost of Property Not Measure of Damage. — *Needles v. Howard*, 1 E. D. Smith (N. Y.) 54.

with other facts in determining the actual value.¹

Interest. — It has been held that, in an action against an innkeeper for the loss of goods committed to his charge, the jury may give interest on the amount of the goods lost, by way of damages, but they are not obliged to do so.² This does not seem, however, to be in accordance with the trend of modern opinion, because the same rule which was laid down by some earlier cases as applicable to carriers of goods has been generally abandoned by later decisions, and it may now be considered as well settled that where a carrier is liable for the loss of goods, the owner is entitled to interest on the value thereof from the time when they should have been delivered.³

j. EVIDENCE — Presumption Arising from Loss. — Whether innkeepers are held liable as insurers of the goods of their guests, or only for such losses as may happen without any fault or neglect on their part, the mere fact that goods of a guest are lost is presumptive evidence of such negligence in an action against an innkeeper, and the *onus* then rests on him to bring the case within one of the exceptions recognized by law.⁴

Admissions of Servants. — According to the well-known rule of evidence that the admissions of an agent are not binding on the principal, unless the agent was acting within the scope of his authority at the time, and the admission related to some transaction then depending, an admission of a servant of an innkeeper that he had stolen the property of a guest is not admissible against the innkeeper.⁵ Neither can a statement by a servant as to the contents of a package delivered to him by a guest for safekeeping be admitted against the innkeeper, where the servant was not acting within the scope of his employment at the time.⁶

Plaintiff as Witness in His Own Behalf. — In an action by a guest against an innkeeper for the loss of goods *infra hospitium* the plaintiff is not within the common-law rule that a party is not competent as a witness in his own behalf, and therefore he may testify as to the fact of loss and the value of the goods. This is one of the exceptions to the general rule, *in odium spoliatoris*.⁷ But the exception is of comparatively little importance now, because of the modern statutes removing the disqualification of parties as witnesses.⁸

4. Liability for Personal Injuries to Guests — a. IN GENERAL. — In the leading case on the subject it was said that innkeepers are liable for injuries in respect to the goods only of their guests, and not for injuries to the person.⁹ But that case was decided a long time ago (in the year 1584), and did not

1. **Cost as Evidence of Value.** — *Wies v. Hoffman House*, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 225.

2. **Interest Held Discretionary with Jury.** — *Sparr v. Wellman*, 11 Mo. 230.

3. See the title CARRIERS OF GOODS, vol. 5, p. 378. See also the title INTEREST.

4. **Negligence Presumed from Fact of Loss.** — *Sasseen v. Clark*, 37 Ga. 242; *Eden v. Drey*, 75 Ill. App. 102; *Norcross v. Norcross*, 53 Me. 163; *Faucett v. Nichols*, 64 N. Y. 377, *reversing* 2 Hun (N. Y.) 521. See also *supra*, this section, *Nature and Extent of Liability*.

5. **Admission by Servant as to Theft of Guest's Property.** — *Elcox v. Hill*, 98 U. S. 218; *Beale v. Posey*, 72 Ala. 323. See the title ADMISSIONS, vol. 1, p. 670.

6. **Statement as to Contents of Package.** — *Matteer v. Brown*, 1 Cal. 221, 52 Am. Dec. 303.

7. **Plaintiff as Witness — Exception to Common-law Rule.** — *Pettigrew v. Barnum*, 11 Md. 434, 69 Am. Dec. 212; *Sparr v. Wellman*, 11 Mo. 230; *Taylor v. Monnot*, (N. Y. Super. Ct. Gen. T.) 1 Abb. Pr. (N. Y.) 325; *Johnson v. Stone*, 11 Humph. (Tenn.) 419.

In Kentucky, it was provided by a former statute (Civ. Code, § 670) that "persons interested in an issue in behalf of themselves, and parties to an issue in behalf of themselves, or those united with them in the issue," should be incompetent to testify; and it was held that under this provision the exception to the common-law rule stated in the text did not obtain, because the statute was absolute in its terms and did not authorize the court to make any exceptions. *Packard v. Northcraft*, 2 Met. (Ky.) 439.

The present statute is materially different, and provides that "no person shall testify for himself in chief in an ordinary action, after introducing other testimony for himself in chief; nor in an equitable action after taking other testimony for himself in chief." Code Ky. 1895, § 606, subd. 4.

8. See the title WITNESSES, and the various local codes and statutes relating to the subject.

9. In *Calye's Case*, 8 Coke 32, it was said: "If the guest be beaten in the inn, the innkeeper shall not answer for it; for the injury ought to be done to his movables which be

actually involve any question of liability for personal injuries; and it may well be doubted whether it would not be accepted as authority for the proposition that it lays down. Indeed, though the reported cases involving this question are very few, they all look the other way.¹

b. ASSAULT AND BATTERY — (1) *By Innkeeper.* — It is obvious that since an innkeeper may, for certain causes, refuse to receive persons offering themselves as guests, and may eject them after they have been received, he cannot be held liable as for an assault and battery in effecting such ejection, if he used no more force than was necessary for that purpose.² It is equally obvious that in case of an ordinary personal encounter between an innkeeper and his guest, or of violence inflicted by the one on the other, which is not in pursuance of any purpose of ejecting the guest, the innkeeper's liability would be governed by the general principles applicable to assaults and batteries.³

(2) *By Servant of Innkeeper.* — **It Is a General Rule** that a master is liable for the tortious acts of his servant, committed while the servant was engaged in the execution of some matter which was within the real or apparent scope of the duties intrusted to him, even though he acted wantonly or maliciously.⁴

In the Case of Carriers of Passengers this rule is carried still further by some late authorities, and a distinct doctrine is laid down as applicable to that class of persons. This doctrine is that the carrier is liable for the wilful and malicious acts of its servants resulting in injuries to passengers, whether done in the line of their employment or not, if done in the course of the discharge of their duty relating to passengers. And the ground on which the doctrine rests is that the carrier, as a part of the contract of carriage, is bound to protect the passenger from all tortious acts of its servants.⁵

As to Innkeepers, it would seem, on principle, that at least the general rule governing the liability of a master for the torts of his servant would be applicable, but a dictum in the leading *English* case already referred to states a radically different rule, namely, that "if the guest be beaten in the inn, the innkeeper shall not answer for it."⁶ The question of an innkeeper's liability for the assault and battery of a guest by a servant seems to have received little attention since the dictum above mentioned was uttered, but the tenor of modern authority is that an innkeeper is liable for assaults committed by his servants on guests, according to the general principles governing the ordinary relation of master and servant, at least;⁷ and there are some intimations that the rule in regard to carriers of passengers should be applied.⁸

(3) *By Other Guests and Strangers.* — If the early doctrine of nonliability on the part of innkeepers for personal violence to their guests were accepted, it would follow that no liability could be predicated on an assault and battery by another guest or by a stranger;⁹ but the contrary of this was long ago

brings with him; and by the words of the writ, the innholder ought to keep the goods and chattels of his guest, and not his person."

1. See the following subdivisions of this section.

2. See *supra*, this section, *Receiving and Entertaining Guests*.

3. As to assaults and batteries generally, see the title ASSAULT AND BATTERY, vol. 2, p. 952.

4. See the title *MASTERS AND SERVANTS*, vol. 1, p. 1151; *MASTER AND SERVANT*.

5. See the title *CARRIERS OF PASSENGERS*, vol. 5, p. 542.

6. *Innkeeper Declared Not Liable for Assault and Battery of Guest.* — *Calye's Case*, 8 Coke 32.

7. *Modern Rule — Innkeeper Liable for Assaults by Servants.* — See *Wade v. Thayer*, 40 Cal. 578.

8. *Applicability of Rule Governing Carriers of Passengers.* — In *Wade v. Thayer*, 40 Cal. 578, cited in the next preceding note, and holding

that an innkeeper is liable for an assault and battery on a guest committed by servants of the innkeeper in the performance of their duties as such, the court referred to the case of *Turner v. North Beach, etc.*, R. Co., 34 Cal. 594, which was an action against a carrier of passengers for an alleged violent and unlawful ejection of a passenger from a car, and said that the question "was fully discussed and the authorities cited" in that case, "and need not be further noticed."

And in *Rommel v. Schambacher*, 120 Pa. St. 579, 6 Am. St. Rep. 732, a carrier case, the case of *Pittsburgh, etc.*, R. Co. v. *Pillow*, 76 Pa. St. 510, 18 Am. Rep. 424, is relied on as an analogous authority for the proposition that it is the duty of an innkeeper to protect his guests from violence.

9. *Early Rule — Nonliability for Assaults by Other Guests and Strangers.* — In *Calye's Case*,

intimated,¹ and has recently been decided.²

c. DEFECTIVE OR UNSANITARY CONDITION OF INN. — Whatever may have been the innkeeper's liability for personal injuries sustained by a guest, it is now well settled that in case of an injury occurring in consequence of the dangerous or defective condition of the inn premises, the innkeeper is liable on the same principles as are applicable in other cases where persons coming on premises at the invitation of the owner or occupant thereof, or by his license, are injured in consequence of the dangerous condition of such premises.³ But his liability extends no further than this; he is not an insurer of the personal safety of his guests.⁴

d. UNWHOLESOME FOOD. — It is the duty of an innkeeper to provide his guests with wholesome food, and if he is negligent in the performance of this duty, in consequence of which negligence a guest is injured, the innkeeper is liable in damages; but a case of negligence must be made against him, because he is not held, as respects the guest's person, to the same degree of responsibility as the law imposes in respect to the guest's goods.⁵

e. INJURIES CAUSED BY FIRE. — The statutory duty of innkeepers to provide fire escapes has already been considered.⁶ In the absence of such a statutory requirement no duty to provide fire escapes is imposed by law, and therefore liability for personal injuries caused by fire can be predicated only

8 Coke 32, no distinction was made between assaults made by the servants of the innkeeper and those made by other guests or strangers, but the court stated broadly that "if the guest be beaten in the inn, the innkeeper shall not answer for it."

1. Later Rule. — The first case arising after the decision in *Calye's Case*, 8 Coke 32, cited in the next preceding note, was *Newton v. Trigg*, 1 Show. 268, in which Eyres, J., in enumerating the duties of an innkeeper, says that he is "compellable to keep the assize, and to prevent tippling."

2. Modern Rule — Innkeeper Held Liable for Assaults by Other Guests. — *Rommel v. Schambacher*, 120 Pa. St. 579, 6 Am. St. Rep. 732.

3. Innkeeper Bound to Maintain Premises in Safe Condition. — *Ten Broeck v. Wells*, 47 Fed. Rep. 690; *West v. Thomas*, 97 Ala. 622, citing 16 AM. AND ENG. ENCYC. OF LAW (1st ed.) 414; *Stanley v. Bircher*, 78 Mo. 245.

One who keeps a public house (*i. e.*, an inn or hotel) extends an implied invitation to all to come on his premises, and is therefore liable for injuries sustained in consequence of the bad condition of such premises. *Oxford v. Prior*, 14 W. R. 611.

Duty Cannot Be Delegated. — *Stott v. Churchill*, (C. Pl. Gen. T.) 15 Misc. (N. Y.) 80, affirmed 157 N. Y. 692.

Guest Injured by Fall of Ceiling. — In *Sandys v. Florence*, 47 L. J. C. Pl. 598, it was held that a guest who was injured by the fall of a ceiling in the inn was entitled to recover against the innkeeper, if the accident was due to the innkeeper's negligence.

Places Where Guests Are Not Reasonably Expected to Go. — The general duty of an innkeeper to take proper care for the safety of his guests does not extend to every room in his house at all hours of the night or day, but must be limited to those places into which guests may be reasonably supposed to be likely to go, in a reasonable belief that they are entitled or invited to do so. *Walker v.*

Midland R. Co., 55 L. T. N. S. 489, 51 J. P. 116.

Communication of Infectious Disease. — Where an innkeeper, with knowledge of the prevalence of smallpox in his hotel, kept it open for business, and permitted a person to become a guest without informing her of the presence of the disease, it was held that the innkeeper would be liable to the guest if she contracted the disease while in the house, and was herself guilty of no negligence contributing to the injury. *Gilbert v. Hoffman*, 66 Iowa 205, 55 Am. Rep. 263.

Defective Elevator. — In *Stott v. Churchill*, (C. Pl. Gen. T.) 15 Misc. (N. Y.) 80, affirmed 157 N. Y. 692, it was held that a guest at a hotel was entitled to recover for injuries caused by the fall of a passenger elevator in the hotel, if the hotel keeper was chargeable with negligence in allowing the elevator to become unsafe. See the title ELEVATORS, vol. 10, p. 944.

Waiver of Defects. — Where a person had been a guest of a hotel for such time that he knew, or had an opportunity to know, all about the alleged defective construction which, it was claimed, was the cause of his injury, and he yet voluntarily elected to occupy the room, it was held that he must be considered as having elected to take the chances. *Glass v. Colman*, 14 Wash. 635.

4. Limits of Liability. — *Sneed v. Moorehead*, 70 Miss. 690.

The General Rule of Law governing the liability of an innkeeper is, that he is not an insurer of the person of his guest against injury, but his obligation is merely to exercise reasonable care that his guests may not be injured by anything happening through the innkeeper's negligence. *Weeks v. McNulty*, 101 Tenn. 495, citing 11 AM. AND ENG. ENCYC. OF LAW (1st ed.) 32.

5. Liability for Furnishing Unwholesome Food. — *Sheffer v. Willoughby*, 163 Ill. 518, 54 Am. St. Rep. 483, affirming 61 Ill. App. 263.

6. See *supra*, this title, *Statutory Regulation — Fire Escapes.*

on negligence in the occurrence of the fire and the attendant circumstances.¹ But when the duty is imposed by statute, a failure in that respect renders the innkeeper liable to any guest who may be injured in consequence,² unless such guest had waived the provisions of the statute.³

5. Securing and Enforcing Right to Compensation — a. LIEN ON GOODS OF GUESTS — (1) *The Right in General* — (a) *Innkeepers Proper*. — Corresponding to the extraordinary liabilities which the law imposes on innkeepers, is the extraordinary privilege of a lien on the effects of guests for the amount of the reasonable charges for the guests' entertainment,⁴ and in many jurisdictions the right to such lien is expressly declared by statute.⁵ It is essential to the existence of the lien that the goods on which it is claimed should have been brought to the inn by a person coming in the character of a guest,⁶ but it is

1. Duty to Provide Fire Escapes Purely Statutory. — See the title FIRE ESCAPES, vol. 13, p. 82.

There Is No Presumption that a fire by which an inn was burned was due to negligence of the innkeeper. *Weeks v. McNulty*, 101 Tenn. 495.

2. Effect of Failure to Comply with Statute. — See the title FIRE ESCAPES, vol. 13, p. 85. See also the title FIRES, vol. 13, p. 404.

Injury Not Resulting from Want of Fire Escape. — If the injury did not occur in consequence of the want of a fire escape, the innkeeper cannot be held liable. *Weeks v. McNulty*, 101 Tenn. 495, citing 11 AM. AND ENG. ENCYC. OF LAW (1st ed.) 32.

3. Statutory Provision Waived by Guest. — *Armando v. Ferguson*, 37 N. Y. App. Div. 160.

4. Right to Lien on Effects of Guests — England. — *Thompson v. Lacy*, 3 B. & Ald. 283, 5 E. C. L. 285; *Sunbolf v. Alford*, 3 M. & W. 248, 1 H. & H. 13, 2 Jur. 110, 7 L. J. Exch. 60. *Alabama*. — *Hickman v. Thomas*, 16 Ala. 666.

Georgia. — *Domestic Sewing Mach. Co. v. Watters*, 50 Ga. 573.

Iowa. — *Swan v. Bournes*, 47 Iowa 501, 29 Am. Rep. 492; *Brown Shoe Co. v. Hunt*, 103 Iowa 586.

Kentucky. — *Black v. Brennan*, 5 Dana (Ky.) 311; *Reed v. Teneyck*, (Ky. 1898) 44 S. W. Rep. 356.

Maine. — *Stanwood v. Woodward*, 38 Me. 192; *Danforth v. Pratt*, 42 Me. 50.

Michigan. — *People v. Husband*, 36 Mich. 306.

Missouri. — *Case v. Fogg*, 46 Mo. 44.

South Carolina. — *Dunlap v. Thorne*, 1 Rich. L. (S. Car.) 213. But see *contra*, *Carlisle v. Quattlebaum*, 2 Bailey L. (S. Car.) 452.

Though the Guest Is an Infant, his baggage is nevertheless subject to the innkeeper's lien for the price of his entertainment, if furnished in good faith without the knowledge that the infant was acting improperly and contrary to the wishes of his guardian. *Watson v. Cross*, 2 Duv. (Ky.) 147.

Married Women. — It has been held that where a husband and wife stop at an inn, and the wife has effects with her which are her separate property, the innkeeper is entitled to a lien thereon for their entertainment. *Gordon v. Silber*, 25 Q. B. D. 491.

In a *New York* case there is a dictum to the effect that an innkeeper has no lien on the property of a married woman for a debt contracted by her husband for their entertainment at the inn. *McIlvaine v. Hilton*, 7 Hun (N.

Y.) 594. But in another case it was held that the landlord was entitled to a lien, where the married woman was the head of the family, the one to whom credit was given, and she had money while her husband had none. *Birney v. Wheaton*, (N. Y. City Ct. Gen. T.) 2 How. Pr. N. S. (N. Y.) 519. See also *infra*, this division of this section, *Boarding-house and Lodging-house Keepers*, note *Married Women*.

5. Lien Authorized by Statute. — *Brown Shoe Co. v. Hunt*, 103 Iowa 589; *Wyckoff v. Southern Hotel Co.*, 24 Mo. App. 382; *Rischert v. Kunz*, 9 Mo. App. 283; *Hodo v. Benecke*, 11 Mo. App. 393. See also the various local codes and statutes in the United States.

6. Only Goods Brought by Guest Subject to Lien — England. — *Binns v. Pigot*, 9 C. & P. 208, 38 E. C. L. 82.

Canada. — *Reg. v. Askin*, 20 U. C. Q. B. 626; *Neale v. Croker*, 8 U. C. C. P. 224.

Alabama. — *Hickman v. Thomas*, 16 Ala. 666.

Colorado. — *Wall v. Garrison*, 11 Colo. 515.

Iowa. — *Pollock v. Landis*, 36 Iowa 651.

Maine. — *Stanwood v. Woodward*, 38 Me. 192.

Michigan. — *Elliott v. Martin*, 105 Mich. 506, 55 Am. St. Rep. 461.

Missouri. — *Hursh v. Byers*, 29 Mo. 469.

New York. — *Grinnell v. Cook*, 3 Hill (N. Y.) 485, 38 Am. Dec. 663; *Fox v. McGregor*, 11 Barb. (N. Y.) 41.

South Carolina. — *Ewart v. Stark*, 8 Rich. L. (S. Car.) 423.

Where an Innkeeper Receives Horses and a Carriage to Stand at a Livery, the circumstance of the owner, at a subsequent period, taking occasional refreshment at the inn, or sending a friend to be lodged there at his charge, will not entitle the innkeeper to a lien in respect of any part of his demand. *Smith v. Dearlove*, 6 C. B. 132, 60 E. C. L. 132, 17 L. J. C. Pl. 219, 12 Jur. 377. See also *Dixon v. Dalby*, 11 U. C. Q. B. 79.

Horses Left at Inn for Treatment. — Whether an innkeeper with whom a horse was left to be kept and cured has a lien on him for his keep, where neither the owner of the horse, nor the person having him in charge, was entertained at the inn when the horse was left there, has been doubted. *Lord v. Jones*, 24 Me. 439, 41 Am. Dec. 391; *Miller v. Marston*, 35 Me. 153, 56 Am. Dec. 694. See also *Allen v. Ham*, 63 Me. 532.

No Lien as Against Boarder. — An innkeeper has a lien on the goods of a guest, but not on those of a boarder. *Pollock v. Landis*, 36

not essential that the guest should in all cases be the owner of the goods.¹

(b) **Boarding-house and Lodging-house Keepers.** — The keepers of boarding-houses, lodging-houses, and like establishments, not being subject, at common law, to the extraordinary liabilities imposed on innkeepers, were not entitled to the corresponding privilege of a lien on the effects of their boarders or lodgers;² but the tendency of recent legislation has been to extend this privilege, and a lien is now given by statute in many jurisdictions to the keepers of such houses,³ and in some jurisdictions they are given a lien on the wages of their

Iowa 651; *Reed v. Teneyck*, (Ky. 1898) 44 S. W. Rep. 356; *Singer Mfg. Co. v. Miller*, 52 Minn. 516, 38 Am. St. Rep. 568; *Hursh v. Byers*, 29 Mo. 469.

Special Contract for Lien. — Though an innkeeper is not entitled to a lien as such on the property of a person not coming to the inn as a guest, still such lien may be created by special agreement of the parties. *Crabtree v. Griffith*, 22 U. C. Q. B. 573.

An Intimation Contrary to the Rule Stated in the Text seems to be contained in the case of *Peet v. McGraw*, 25 Wend. (N. Y.) 653. But in *Grinnell v. Cook*, 3 Hill (N. Y.) 485, 38 Am. Dec. 663, the court comments on this case as follows: "We are referred to the case of *Peet v. McGraw*, 25 Wend. (N. Y.) 653, to prove that it is not necessary to the lien, or the liability of the innkeeper, that the owner should be a guest. The case decides no such thing. It turned on the construction of the plea, and we thought the words of the plea equivalent to an averment that the owner was a guest. A single expression of the chief justice, which was not necessary to the decision of the cause, is separated from the context, and pressed into the plaintiff's service. But neither the chief justice nor any other member of the court intended to say, that either the lien or the liability could exist where the owner of the goods was not either actually or constructively the guest of the innkeeper. There must be such a relation."

1. Ownership of Guest Not Always Essential. — See the next following subdivision of this section, *To What Lien Attaches*.

2. Boarding-house and Lodging-house Keepers Not Entitled to Lien at Common Law — *Kentucky*. — *Southwood v. Myers*, 3 Bush (Ky.) 682.

New York. — *Cochrane v. Schryver*, 12 Daly (N. Y.) 174.

South Carolina. — *Ewart v. Stark*, 8 Rich. L. (S. Car.) 423.

Canada. — *Reg. v. Askin*, 20 U. C. Q. B. 626; *Huffman v. Walterhouse*, 19 Ont. 186; *Cooper v. Downes*, 13 L. C. Rep. 358; *Light v. Abel*, 11 N. Bruns. 400.

3. Statutory Lien of Boarding-house and Lodging-house Keepers — *Colorado*. — *Hanlin v. Walters*, 3 Colo. App. 519; *Mills Ann. Stat. Colo.* 1891, § 2854.

Connecticut. — *Brooks v. Harrison*, 41 Conn. 184.

Massachusetts. — *Bayley v. Merrill*, 10 Allen (Mass.) 360.

Missouri. — *Hodo v. Benecke*, 11 Mo. App. 393; *Clark v. Haydock*, 44 Mo. App. 367; *Coates v. Acheson*, 23 Mo. App. 255.

New Hampshire. — *Cross v. Wilkins*, 43 N. H. 332.

New Jersey. — *Baker v. Stratton*, 52 N. J. L. 277.

New York. — *Corbett v. Cushing*, 15 Daly (N. Y.) 170; *Smith v. Read*, (C. Pl. Gen. T.) 52 How. Pr. (N. Y.) 14; *Shafer v. Guest*, 6 Robt. (N. Y.) 264, 35 How. Pr. (N. Y.) 184; *Stewart v. McCready*, (C. Pl. Gen. T.) 24 How. Pr. (N. Y.) 62; *Jones v. Morrill*, 42 Barb. (N. Y.) 623.

Canada. — *Huffman v. Walterhouse*, 19 Ont. 186; *Dunn v. Beau*, 11 Quebec Super. Ct. 538; *Lalonde v. McGlinn*, 3 Montreal Leg. N. 94; *Downie v. Barrie*, 9 Rev. Lég. 513.

Whether the Boarder Is Transient or Permanent is immaterial under the *New York Act of 1860*. The keeper of a boarding-house has a lien in either case. *Stewart v. McCready*, (C. Pl. Gen. T.) 24 How. Pr. (N. Y.) 62.

So, too, the statute gives the right to a lien in the case of special contracts for board at a fixed rate by the week or month, though an innkeeper under such circumstances would have no lien. *Misch v. O'Hara*, 9 Daly (N. Y.) 361.

Persons Not Engaged in Business of Taking Boarders. — In *New York* it has been held that a housekeeper who receives a person into his family for an indefinite time as a boarder, but who is not accustomed to take persons to board, is not entitled to the lien given by the Act of 1860. *Cady v. McDowell*, 1 Lans. (N. Y.) 484.

Married Women. — A boarding-house keeper has no lien on the effects of a wife, for a debt contracted by her husband for their board. *Mellvaine v. Hilton*, 7 Hun (N. Y.) 594. Or even where the board was furnished the woman and her husband under a joint contract to charge both with board. *Birney v. Wheaton*, (N. Y. City Ct. Gen. T.) 8 N. Y. St. Rep. 347. See also *supra*, this division of this section, *Innkeepers Proper*, note *Married Women*.

In *Baker v. Stratton*, 52 N. J. L. 277, it was held that a boarding-house keeper has no lien on the separate property of a married woman boarding at the house, but living apart from her husband, where the husband has engaged, and by express agreement promised to pay, her board.

Property Exempt from Execution by Statute is nevertheless subject to a boarding-house keeper's lien, when such a lien is given by statute. *Thorn v. Whitbeck*, (County Ct.) 11 Misc. (N. Y.) 171, citing 11 AM. AND ENG. ENCYC. OF LAW (1st ed.) 39. See also *infra*, this division of this section, *To What Lien Attaches*, paragraph *Property Exempt from Execution*.

Extent of Boarding-house Keeper's Lien. — The *New Hampshire* statute giving boarding-house keepers a lien on the effects of their boarders is limited by its terms to the fare and board, and does not cover the cost of keeping

boarders or lodgers for the price of the entertainment furnished.¹

(2) *To What Lien Attaches* — (a) *Property Belonging to Guests*. — Obviously, in the absence of statutory restrictions, all the property belonging to a guest and brought with him to the inn is subject to the innkeeper's lien. This proposition is embraced in the general rule stated above, as to the existence of the right to a lien.²

Property Exempt from Execution is nevertheless subject to the innkeeper's lien, at least in case the exemption is statutory.³

But Wearing Apparel on the Person of a Guest cannot be taken from him and held by the innkeeper.⁴

Wages of Guests. — In some jurisdictions the innkeeper's lien is extended by statute to the wages of guests.⁵

Horses Employed in the Transportation of the United States Mail cannot be detained by an innkeeper for his charges for the entertainment of the owner while stopping with such horses at the inn.⁶

(b) *Property of Third Persons in Possession of Guests*. — It is well settled that the lien of an innkeeper will attach to goods brought to the inn by a guest, though they are not really the guest's property, if they were received by the innkeeper on the faith of the innkeeping relation,⁷ and though they are not ordinary

the boarder's property. *Cross v. Wilkins*, 43 N. H. 332.

Under the *New York* statute of 1860, the lien of the keeper of a boarding house is co-extensive with that of an innkeeper at common law, extending to all goods brought on the premises by a boarder though in fact the property of a stranger. *Jones v. Morrill*, 42 Barb. (N. Y.) 623.

But the lien is restricted to the amount which may be due for board, and cannot be extended to any other indebtedness, nor to any demand not due at the time of the detention. *Shafer v. Guest*, 6 Robt. (N. Y.) 264, 35 How. Pr. (N. Y.) 184.

The *Quebec* statute (39 Vict., c. 23), giving a lien on the effects of a boarder for the amount due from him for board, applies to the price of the board only, and does not extend to charges for the custody of effects left behind by the boarder. *Ferguson v. Riendeau*, 2 Montreal Super. Ct. 136, 9 Montreal Leg. N. 135. Compare, in this respect, the statutes in other jurisdictions.

1. *Lien on Wages Given by Statute*. — *Hodo v. Benecke*, 11 Mo. App. 393; *Walker v. Kennedy*, 20 Pa. Co. Ct. 433, 7 Pa. Dist. 516; *Hawk v. Rock*, 14 Pa. Co. Ct. 490; *Thomas v. Glasgow*, 13 Pa. Co. Ct. 167. See also the statutes in other jurisdictions, and *infra*, this division of this section, *To What Lien Attaches*, paragraph *Wages of Guests*.

2. See *supra*, this division of this section, *The Right in General*.

Within the principle that the lien of an innkeeper is general and extends to all goods and chattels belonging to his guest, a chattel, though deposited with the innkeeper and placed by him apart from the personal goods of the guest, may be detained by him on account of money owing to him for the lodging, food, and entertainment of the guest. *Mulliner v. Florence*, 47 L. J. Q. B. 700, 3 Q. B. D. 434, 38 L. T. N. S. 167, 26 W. R. 385.

The *Missouri* statute confines the lien to the "baggage and other valuables of the guest," and does not cover the goods of third persons

taken to the inn by the guest. *Wyckoff v. Southern Hotel Co.*, 24 Mo. App. 382.

Only the *Property of the Defaulting Guest* is subject to the lien, and the innkeeper has no right to detain the baggage of any other, though in the same company. *Kennedy v. Muller*, 1 W. N. C. (Pa.) 445. See also *Clayton v. Butterfield*, 10 Rich. L. (S. Car.) 300.

3. *Innkeeper's Lien Not Affected by Statutory Exemption from Execution*. — *Swan v. Bournes*, 47 Iowa 501, 29 Am. Rep. 492. See also *supra*, this division of this section, *Boarding-house and Lodging-house Keepers*, note *Property Exempt from Execution by Statute*.

4. *Wearing Apparel on Person of Guest*. — *Sunbolt v. Alford*, 3 M. & W. 248, 1 H. & H. 13, 7 L. J. Exch. 60, 2 Jur. 110.

5. *Innkeeper's Lien Extended by Statute to Wages of Guests*. — *Clark v. Haydock*, 44 Mo. App. 367; *Smith v. Dingus*, 12 Pa. Co. Ct. 299; *Weisman v. Weisman*, 133 Pa. St. 89; *McCarty v. Dougherty*, 16 Pa. Co. Ct. 86; *Dillon v. Trivett*, 16 Pa. Co. Ct. 89; *Thomas v. Glasgow*, 13 Pa. Co. Ct. 167. See also *supra*, this division of this section, *Boarding-house and Lodging-house Keepers*.

6. *Horses Used in Carrying United States Mail*. — *U. S. v. Barney*, 2 Wheel. Crim. (N. Y.) 513. See also *Hickman v. Thomas*, 16 Ala. 666. But see *Young v. Kimball*, 23 Pa. St. 193.

7. *Property of Third Persons in Possession of Guests* — *England*. — *Robinson v. Walter*, 3 Bulst. 269, Popham 127, 1 Rolle 449; *Stiirt v. Drungold*, 3 Bulst. 289; *Johnson v. Hill*, 3 Stark. 172, 14 E. C. L. 176 a; *Turrill v. Crawley*, 13 Q. B. 197, 66 E. C. L. 197, 18 L. J. Q. B. 155, 13 Jur. 878; *Snead v. Watkins*, 1 C. B. N. S. 267, 87 E. C. L. 267, 26 L. J. C. Pl. 57; *Robins v. Gray*, (1895) 2 Q. B. 501.

Canada. — *Fogarty v. Dion*, 6 Quebec 163.

Kentucky. — *Pool v. Adkisson*, 1 Cana (Ky.) 110.

Minnesota. — *Singer Mfg. Co. v. Miller*, 52 Minn. 516, 38 Am. St. Rep. 568.

New York. — *Grinnell v. Cook*, 3 Hill (N. Y.) 485, 38 Am. Dec. 663.

traveler's luggage if the fact as to the ownership was not known to the innkeeper.¹ In some jurisdictions this principle has been affirmed by statute,² while the statutes in other jurisdictions either abrogate it entirely or modify it.³ And in some cases it has been questioned whether the rule of the common law, which extends the innkeeper's lien to the goods of a third person brought to the inn by a guest does not conflict with the constitutional guaranties against depriving the citizen of his property without due process of law.⁴

Even Stolen Property taken to an inn by a guest is subject to the innkeeper's lien.⁵

Horses Owned by United States and Employed in Carrying Mails. — An innkeeper who

North Carolina. — *Covington v. Newberger*, 99 N. Car. 523.

Oregon. — *Cook v. Kane*, 13 Oregon 482, 57 Am. Rep. 28.

Pennsylvania. — *Singer Mfg. Co. v. Flennigan*, 7 Pa. Co. Ct. 45.

Wisconsin. — *Manning v. Hollenbeck*, 27 Wis. 202.

Husband's Property in Possession of Wife. — Under the *Massachusetts* statute giving boarding-house keepers a lien on the baggage and effects brought to their houses belonging to their guests or boarders, for all proper charges due for fare and board, it has been held that where, by a husband's neglect and cruelty towards his wife and child, they were driven from his house, and in his absence the wife took her child and certain goods belonging to the husband, and went to a boarding house, no lien was created on the husband's goods, though the wife left her husband under such circumstances that she carried his credit with her, and he was liable for the board of herself and child. *Mills v. Shirley*, 110 Mass. 159.

Credit Given to Husband — Separate Property of Wife. — The defendants, husband and wife, stayed at the plaintiffs' hotel. The wife had with her a quantity of luggage, which was her separate property. Credit was given to the husband, who made payments on account. The balance of the plaintiffs' bill not being paid, the plaintiffs detained the wife's luggage in the alleged exercise of their right of lien. It was held that the plaintiffs were entitled to a lien on the goods, notwithstanding that they were the separate property of the wife. *Gordon v. Silber*, 59 L. J. Q. B. 507, 25 Q. B. D. 491, 63 L. T. N. S. 283, 39 W. R. 111, 55 J. P. 134.

Property Held under Color of Legal Proceeding. — An innkeeper has a lien on a horse for his keep, though the guest had wrongfully seized the horse under color of a legal proceeding against the owner, unless the innkeeper knew that the party making the seizure was a wrongdoer at the time it was made, and such knowledge is a question for the jury. *Johnson v. Hill*, 3 Stark. 172, 14 E. C. L. 176 *n.*, 23 Rev. Rep. 764.

Goods Brought to Inn by Commercial Traveler. — In *Robins v. Gray*, (1895) 2 Q. B. 501, 14 Reports 671, affirming (1895) 2 Q. B. 78, a commercial traveler, employed by the firm which dealt in sewing machines, went to stay at an inn, and while there machines were sent to him by the firm in the ordinary course of business, for the purpose of selling them to customers in the neighborhood. Before the goods were sent the innkeeper had express notice

that they were the property of the firm, but he received them as the baggage of the traveler, who afterwards left the inn without paying his bill for board and lodging. It was held that the innkeeper had a lien on the machines for the amount of his bill. See also *Fugarty v. Dion*, 6 Quebec 163; *Brown Shoe Co. v. Hunt*, 103 Iowa 586; *Manning v. Hollenbeck*, 27 Wis. 202. But see *contra*, *Torrey v. McClellan*, 17 Tex. Civ. App. 371, decided under the *Texas* statute.

1. Goods Not Ordinary Traveler's Luggage. — The innkeeper's lien extends to articles brought with him by the guest as his own, but which (as for instance a piano) are not ordinary traveler's luggage. *Threfall v. Borwick*, L. R. 7 Q. B. 711, affirmed L. R. 10 Q. B. 210, 44 L. J. Exch. 87.

In *Cook v. Kane*, 13 Oregon 482, 57 Am. Rep. 28, also, a lien was claimed and allowed on a piano brought to the inn by a guest, though it was the property of a third person, the innkeeper not being aware of that fact.

2. Brown Shoe Co. v. Hunt, 103 Iowa 589. Compare the statutes in other jurisdictions.

3. Statutory Provisions. — The *New Hampshire* statute, which gives a lien on animals "entrusted" to any person to be pastured or boarded, refers to animals entrusted by the owner or some person having authority to pledge them for such a purpose. *Sargent v. Usher*, 55 N. H. 287, 20 Am. Rep. 208.

Under the *South Dakota* statute it is held that the rule of the common law is changed, and that the innkeeper is not entitled to a lien on the property of third persons in possession of a guest. *McClain v. Williams*, 11 S. Dak. 227.

Under the *Texas* statute an innkeeper has no lien on the trunks and samples of a commercial traveler, for the cost of the traveler's entertainment, where the innkeeper knew that they were not the property of the traveler. *Torrey v. McClellan*, 17 Tex. Civ. App. 371.

Under the *Georgia* statute, if the guest is not the real owner of the article on which the innkeeper claims a lien, or if there be a prior legal incumbrance on it, the innkeeper's lien is only good against the true owner or prior incumbrancer for the expense of feeding or taking care of that particular article. *Domestic Sewing Mach. Co. v. Watters*, 40 Ga. 573.

4. Existence of Common-law Rule under American Constitutions Questioned. — *Wyckoff v. Southern Hotel Co.*, 24 Mo. App. 382; *McClain v. Williams*, 11 S. Dak. 227.

5. Stolen Property Subject to Lien. — *Black v. Brennan*, 5 Dana (Ky.) 311. See also the dictum of *Lopes*, L. J., in *Gordon v. Silber*, 25 Q. B. D. 491.

furnishes entertainment to a mail carrier who stops at his inn with horses owned by the United States and employed in the mail service is not entitled to a lien on such horses.¹

The Fact that the Innkeeper Knew that the Guest Was Not the Owner does not affect the right to a lien, however, if the goods are such as a traveler might ordinarily carry with him.² If, on the other hand, goods, not being of such kind or character, are brought to the inn with the innkeeper's knowledge that they are the property of a third person, no lien attaches;³ and the rule is the same if the guest was illegally in possession of the property, and the innkeeper knew that fact.⁴

(c) *Person of Guest.* — There is a dictum in an early case to the effect that an innkeeper may detain the persons of his guests until payment of the charges for their entertainment,⁵ but it has since been decided that no such right exists.⁶

(3) *To What Charges Lien Extends.* — The innkeeper's lien extends to the entire charge for the guest's entertainment, and is not limited, where the rights of third persons intervene, to what would have been a reasonable expenditure by the guest;⁷ nor can it be limited to the charge of keeping the property on which the lien is claimed, where such a charge can be made, as in the case of a guest's horse.⁸

Money Loaned to Guest. — It has also been held that an innkeeper has a lien for money loaned to his guest, if it was agreed between them at the time of the loans that the guest's goods should be security for the loans.⁹

(4) *Loss or Waiver of Lien — Loss of Lien.* — If an innkeeper, who holds the goods of a guest by virtue of his innkeeper's lien, suffers them to be taken

1. *Horses Owned by United States and Employed in Carrying Mail.* — *U. S. v. Barney*, 2 Wheel. Crim. (N. Y.) 513.

2. *Knowledge on the Part of the Innkeeper that the goods brought by or sent to the guest are not the guest's property is material only where the goods are of a description which the innkeeper is not bound to receive.* Wills, J., in *Robins v. Gray*, (1895) 2 Q. B. 78. See also *Brown Shoe Co. v. Hunt*, 103 Iowa 536.

3. *Goods Not Brought by Guest as His Own.* — In *Broadwood v. Granara*, 10 Exch. 417, 24 L. J. Exch. 1, 1 Jur. N. S. 19, 3 W. R. 25, 3 C. L. R. 177, the owner of a piano loaned it to a professional pianist who was, at the time, staying as a guest at the defendant's inn, and the defendant knew the fact as to the ownership of the piano. It was held that the defendant had no lien on the piano for a bill due from the guest.

4. *Goods Illegally in Possession of Guest.* — *Johnson v. Hill*, 3 Stark. 172, 14 E. C. L. 176 a, 23 Rev. Rep. 764.

5. *Lien on Person of Guest Asserted.* — *Newton v. Trigg*, 1 Show. 238, *per* Eyres, J.; Bac. Abr., tit. Inns and Innkeepers (D), where it is said that "innkeepers may detain the person of the guest who eats." See also *Carlisle v. Quattlebaum*, 2 Bailey L. (S. Car.) 452, *citing* Bac. Abr., tit. Inns and Innkeepers (D). The only other case that seems ever to have been cited in support of this proposition is *Ward v. Clarke*, an unreported case referred to in 9 *Wentworth's Pleader* 362.

As to these cases, Lord Abinger says that the utterance of Eyres, J., in *Newton v. Trigg*, 1 Show. 368, "was not only an *obiter dictum*, but a very wide divaricating dictum;" and he disposes of the case of *Ward v. Clarke* by saying that "Wentworth's Pleader is a book of no

authority; it is a collection of very vicious precedents." *Sunbolf v. Alford*, 3 M. & W. 248, 1 H. & H. 13, 2 Jur. 110, 7 L. J. Exch. 60.

6. *Innkeeper Held Not Entitled to Lien on Person of Guest.* — *Sunbolf v. Alford*, 3 M. & W. 248, 1 H. & H. 13, 2 Jur. 110, 7 L. J. Exch. 60. See also *Grinnell v. Cook*, 3 Hill (N. Y.) 485, 38 Am. Dec. 603, in which it is said that "it was once held that he might detain the person of the guest, but that doctrine is now exploded, and the lien is confined to the goods."

7. *Lien Extends to Entire Charge for Entertainment.* — *Black v. Brennan*, 5 Dana (Ky.) 311. Compare *McManigle v. Crouse*, 1 Walk. (Pa.) 43, 34 Leg. Int. (Pa.) 384.

8. *Amount of Lien as Against Execution Creditor of Guest.* — In *Proctor v. Nicholson*, 7 C. & P. 67, 32 E. C. L. 440, it was held that an innkeeper had a lien on the goods of a guest for board and lodging, and wine supplied to such guest's order, whatever might be the amount, provided the guest was possessed of his reason, and was not an infant; and therefore the sheriff, under a *fi. fa.* against the guest, could only take the guest's goods, subject to the lien of the landlord for such amount regardless of whether the quantity of wines, etc., was reasonable.

9. *Lien Extends to Entertainment of Guest as Well as Keep of Property.* — *Mulliner v. Florence*, 3 Q. B. D. 484, 26 W. R. 385, 47 L. J. Q. B. 700, 38 L. T. N. S. 167.

10. *Lien for Money Loaned to Guest.* — *Proctor v. Nicholson*, 7 C. & P. 67, 32 E. C. L. 440.

11. *Money Loaned to Infant Guest.* — Where an innkeeper furnishes money to an infant guest, and it is expended for necessaries, the innkeeper is entitled to a lien for the amount thereof. *Watson v. Cross*, 2 Duv. (Ky.) 147.

away, and no fraud has been practised on him, the lien is lost, and it is not reinstated by the fact that the guest again comes to the inn bringing the goods with him.¹

The Lien Is Waived, if the innkeeper sells the goods in order to reimburse himself.² But it is not waived by accepting security from the guest for the payment of the charges against him, unless there is something in the nature of the security, or in the circumstances under which it was taken, which is inconsistent with the existence or continuance of the lien and therefore destructive of it.³ It has also been held that the lien is not waived by a failure to assert it on refusing to deliver the goods to a chattel mortgagee when possession was demanded under the mortgage,⁴ nor by a verbal promise to send home the subject of the lien, made in consideration of the verbal promise of a third person to pay the amount necessary to discharge the lien.⁵

(5) *Care of Property Held under Lien.* — An innkeeper retaining the goods of his guest by virtue of his lien thereon for his charges is not bound to use greater care in keeping them than he exercises in regard to his own goods of a similar description.⁶

(6) *Enforcement of Lien.* — At Common Law the innkeeper's remedy by way of a lien on his guests' effects extended no further than to give him the right to detain said effects until payment of his charges. He could not sell the effects detained,⁷ except in *London* and *Exeter*, by virtue of local customs.⁸ There is nothing, however, to prevent an innkeeper from obtaining a judgment at law for the amount due him, and enforcing such judgment by execution against the goods held by him under his lien.⁹

Equity Has Jurisdiction, according to some authorities, to entertain a suit for the enforcement of a common-law lien, such as the lien of an innkeeper,¹⁰ but the rule laid down in these cases seems to be opposed to the weight of authority.¹¹

1. **Lien Terminated by Voluntarily Parting with Goods if Not Induced by Fraud.** — *Hickman v. Thomas*, 16 Ala. 666; *Manning v. Hollenbeck*, 27 Wis. 202. This is a general principle of the law of bailments. See the title BAILMENTS, vol. 3, p. 760. Compare *Huffman v. Walterhouse*, 19 Ont. 186.

A Sale made in good faith, of property held under a boarding-house keeper's lien, does not terminate the lien, where the sale was made without the knowledge of the boarding-house keeper; but the lien remains valid and effectual for board furnished after the sale, under the original contract for board, until notice of the sale is given or the property is removed. *Bayley v. Merrill*, 10 Allen (Mass.) 360.

2. **Sale of Goods Held a Waiver of Lien.** — *Mulliner v. Florence*, 47 L. J. Q. B. 700, 3 Q. B. D. 484, 38 L. T. N. S. 167, 26 W. R. 385.

As to the rule that the right of lien does not, in the absence of statute, include the right to sell the goods, see *infra*, this section, *Enforcement of Lien*.

3. **Taking Security for Charges Not Ordinarily a Waiver of the Lien.** — *Angus v. McLachlan*, 23 Ch. D. 330, 52 L. J. Ch. 587, 48 L. T. N. S. 863, 31 W. R. 641.

4. **Failure to Assert Lien.** — *Corbett v. Cushing*, 15 Daly (N. Y.) 170.

5. **Promise to Return Property.** — *Danforth v. Pratt*, 42 Me. 50.

6. **Care of Property Held under Lien.** — *Angus v. McLachlan*, 23 Ch. D. 330, 52 L. J. Ch. 587, 48 L. T. N. S. 863, 31 W. R. 641; *Frank v. Berryman*, 3 British Columbia 506. See also the title BAILMENTS, vol. 3, p. 732.

7. **Sale to Enforce Lien Not Authorized at Common Law.** — *Mulliner v. Florence*, 3 Q. B. D. 484; *People v. Husband*, 36 Mich. 306; *Case v. Fogg*, 46 Mo. 44; *Fox v. McGregor*, 11 Barb. (N. Y.) 41. But see the dictum of Popham, C. J., to the contrary in *Hostler's Case*, Yelv. 66.

8. "By the Custom of London and Exeter, if a man commit a horse to a hostler [innkeeper], and he eat out the price of his head, the hostler [innkeeper] may take him as his own, upon the reasonable appraisement of four of his neighbors; which was, it seems, a custom arising from the abundance of traffic with strangers, that could not be known, to charge them with the action; but the innkeeper hath no power to sell the horse by the general custom of the whole kingdom." *Bac. Abr.*, tit. Inns and Innkeepers (D). See also *Jones v. Pearle*, 1 Stra. 556; *Jones v. Thurloe*, 8 Mod. 172; *Pohtonier v. Dawson*, Holt N. P. 383, 3 E. C. L. 154; *Waldbroke v. Griffin*, 2 Rol. Abr. 85.

9. See the next following subdivision of this section, *Action for Price of Entertainment*.

10. **Innkeeper's Lien Held Enforceable by Bill in Equity.** — *Black v. Brennan*, 5 Dana (Ky.) 310; *Fox v. McGregor*, 11 Barb. (N. Y.) 41. See also 2 Kent Com. 642.

11. **Jurisdiction of Equity to Enforce Common-law Liens Denied.** — The author of *Jones on Liens* says: "Generally a court of equity has no jurisdiction to enforce a common-law lien by sale merely because there is no remedy at law, or because the retaining of possession under a passive lien involves expense or incon-

Statutory Power of Sale. — The ineffectiveness of the innkeeper's lien for the purpose of enforcing his charges against delinquent guests has been remedied, both in *England* and in the *United States*, by modern statutes authorizing the sale of goods held under such a lien,¹ and where a lien on the wages of guests is given by statute, a remedy for its enforcement has been given also, viz., by garnishment or attachment proceedings against the employers of the guests.²

Statutory Lien of Boarding-house Keepers, etc. — In those jurisdictions where a lien is given, by statute, to boarding-house keepers, etc., and a mode of enforcing it is prescribed, such mode of enforcement is exclusive of all others, the rule being that where a statute creates a right which did not exist before, and provides a remedy for the enforcement of it, such remedy must be pursued.³

b. ACTION FOR PRICE OF ENTERTAINMENT. — Since an innkeeper receives and entertains his guests under a contract, sometimes express, though usually implied, that the guests will pay the amount of the innkeeper's charges, it is perfectly obvious that the relation of debtor and creditor is created, and that an action in the proper form will lie for the enforcement of the debt, as in any other case where that relation exists,⁴ unless the innkeeper was doing business as such without a license in a jurisdiction where the statute requires a license.⁵

Satisfaction of Judgment. — When a judgment has been recovered by an innkeeper for the price of entertainment furnished a guest, it is plain that it may be enforced by execution, like any other judgment; and though at common law an innkeeper's lien was not enforceable by a sale of the guest's goods, no reason is perceived why the execution may not be levied on such goods, and a sale had thereunder.⁶

Where a Party of Several Persons Resort to an Inn, they are said to be jointly liable

venience. Generally a lien at law, or by statute, can be enforced only under express statutory provisions. An equitable form of procedure may be expressly provided; but in the absence of such provision a lien cannot be enforced in equity unless jurisdiction is acquired under well-established rules." Jones on Liens, § 1038.

For a Full Discussion of this question, see the title LIENS.

1. Statutory Power to Sell under Lien — *Connecticut*. — Brooks v. Harrison, 41 Conn. 184.

New York. — Gildea v. Earle, (N. Y. City Ct. Tr. T.) 2 City Ct. (N. Y.) 122.

Pennsylvania. — Smith v. Dingus, 12 Pa. Co. Ct. 299; Hawk v. Rock, 14 Pa. Co. Ct. 490; Gump v. Showalter, 43 Pa. St. 507.

Canada. — Huffman v. Walterhouse, 19 Ont. 186.

See also 1 Stim. Am. Stat. Law, § 4354, and the various local codes and statutes in the United States.

Stolen Property brought to an inn by a guest, though sometimes subject to the innkeeper's lien (see *supra*, this section, *To What Lien Attaches*), is not within the provision of the *Pennsylvania* statute giving innkeepers power to sell under their lien, and therefore such a sale does not divest the title of the real owner. Gump v. Showalter, 43 Pa. St. 507.

2. Garnishment or Attachment of Guests' Wages. — Clark v. Haydock, 44 Mo. App. 367; Weisman v. Weisman, 133 Pa. St. 89; Smith v. Dingus, 12 Pa. Co. Ct. 299; Hawk v. Rock, 14 Pa. Co. Ct. 490; Carden v. Scott, 1 Kulp (Pa.) 196; McGinley v. McDonough, 3 Lanc. L. Rev. (Pa.) 202; Thatcher v. Beam, 14 Pa. Co. Ct. 109; McCarty v. Dougherty, 16 Pa. Co. Ct. 86;

Dillon v. Treverton, 16 Pa. Co. Ct. 89; Thomas v. Glasgow, 13 Pa. Co. Ct. 167.

An Attachment as Original Process cannot be issued under the *Pennsylvania* statute, according to the preponderance of authority, to collect a debt for boarding. Carden v. Scott, 1 Kulp (Pa.) 196; McGinley v. McDonough, 3 Lanc. L. Rev. (Pa.) 202; Thatcher v. Beam, 14 Pa. Co. Ct. 109; Dillon v. Treverton, 16 Pa. Co. Ct. 89. There are, however, cases to the contrary. Smith v. Dingus, 12 Pa. Co. Ct. 299; Thomas v. Glasgow, 13 Pa. Co. Ct. 167.

3. Statutory Lien of Boarding-house Keepers, etc. — Coates v. Acheson, 23 Mo. App. 255.

4. Action for the Price of Entertainment. — The following cases were actions to recover sums due for the entertainment of guests:

Illinois. — Mitchell v. Hughes, 24 Ill. App. 308.

Kentucky. — Banks v. Oden, 1 A. K. Marsh. (Ky.) 548; Southwood v. Myers, 3 Bush (Ky.) 681.

Maine. — Randall v. Tuell, 89 Me. 443.

Missouri. — Hodo v. Benecke, 11 Mo. App. 393.

New York. — Bowers v. Smith, 19 N. Y. St. Rep. 926 (Supm. Ct. Gen. T.) 8 N. Y. Supp. 226.

5. License Essential to Maintenance of Action. — Randall v. Tuell, 89 Me. 443. See also *supra*, this title, *Statutory Regulation* — *License*.

6. For a Full Discussion as to what property of a debtor is subject to levy and sale under execution, see the title EXECUTIONS, vol. 11, p. 604.

And see Southwood v. Myers, 3 Bush (Ky.) 681, in which a guest's goods held by the innkeeper by virtue of his lien were attached in an action on the debt due.

for the cost of the entertainment of the whole party, and not merely each for his own share;¹ but if some member or members of the party came on the invitation of the other or others, and the innkeeper knew that fact, the invited members are not liable to the innkeeper.²

6. Keeping Disorderly House. — The keeper of an inn who conducts himself in such a manner, either in the entertainment of travelers or other persons, as to violate public order and decorum, or shock the religious sense and feelings of the neighborhood, is guilty of a nuisance at common law, and may be indicted, fined, and imprisoned, and his house suppressed.³ He is also criminally liable for violations of the statutes regulating the sale of intoxicating liquors,⁴ or those designed for the suppression of gambling;⁵ and various statutes have been enacted regulating the business of innkeeping, and prescribing penalties for noncompliance therewith.⁶

7. Criminal Liability of Guests. — In many jurisdictions statutes have been enacted for the protection of innkeepers against fraudulent practices by which they are deprived of their compensation for entertainment furnished. These statutes, while varying somewhat in terms, are uniform in design, and generally declare guilty of a misdemeanor any person who obtains food or accommodation at an inn without paying therefor, with the intent to defraud the innkeeper, or who obtains credit by the use of any false pretenses, or who, after obtaining credit, absconds without paying the charges against him.⁷

1. Joint Liability of Guests. — *Forster v. Taylor*, 3 Campb. 49, 13 Rev. R.p. 748.

2. Persons Invited to Inn by Guests. — *Rol. Abr.*, tit. Action sur Case 24, 15.

3. Indictment for Keeping Disorderly House. — *Hall v. State*, 4 Harr. (Del.) 132; *State v. Mathews*, 2 Dev. & B. L. (10 N. Car.) 424; *Baldwin v. State*, 6 Ohio 15. See also the title DISORDERLY HOUSES, vol. 9, p. 503.

Suspension of License. — *Plummer v. Com.*, 1 Bush (Ky.) 26.

4. Sale of Intoxicating Liquors by Innkeeper. — *Barnes v. Com.*, 2 Dana (Ky.) 390; *Seeley v. Norris*, 3 N. J. L. 206; *Fleming v. New Brunswick*, 47 N. J. L. 231; *Com. v. Naylor*, 34 Pa. St. 86; *Com. v. Baker*, 4 Haz. Reg. (Pa.) 217. And see generally the title INTOXICATING LIQUORS.

5. Gambling at Inns. — *State v. Records*, 4 Harr. (Del.) 554; *Com. v. Shortridge*, 3 J. J. Marsh. (Ky.) 640; *Com. v. Bolkom*, 3 Pick. (Mass.) 281. See *Gen. Stat.*, c. 88; *Com. v. Arnold*, 4 Pick. (Mass.) 251. See also the titles GAMING, vol. 14, p. 664; GAMING HOUSES, vol. 14, p. 692.

Room Used for Gambling Without Knowledge of Innkeeper. — An innkeeper who rents a room in his house, in good faith, to be used as a bedroom, and who has no control over it, is not responsible if it be used without his knowledge, by a lessee of his tenant, to set up a faro bank. *Com. v. Watson*, 2 Duv. (Ky.) 409.

Keeping a Billiard Table is a breach of a tavern keeper's bond against keeping a "gambling table of any description." *People v. Harrison*, (Supm. Ct. Spec. T.) 28 How. Pr. (N. Y.) 247.

6. Statutory Regulation of Inns. — *Jackson v. Com.*, 7 Bush (Ky.) 99; *State v. Fletcher*, 5 N. H. 257; *State v. Barrett*, 20 R. 1 313.

7. Criminal Liability of Guests for Fraudulent Practices — *California*. — *Ex p. Williams*, 121 Cal. 328; *Pen. Code Cal.*, § 537.

Illinois. — *Sundmacher v. Block*, 39 Ill. App. 553; *Hutchinson v. Davis*, 58 Ill. App. 353.

Rev. Stat. Ill. 1889, c. 38 §§ 155a, 155b; 3 *Starr & C. Stat. Ill.*, p. 357, § 2.

Minnesota. — *State v. Benson*, 28 Minn. 424.

Missouri. — *State v. Kingsley*, 108 Mo. 135.

New York. — *People v. Nicholson*, (County Ct.) 25 Misc. (N. Y.) 266.

Pennsylvania. — *Com. v. Gough*, 3 Kulp (Pa.) 148.

See also the title FALSE PRETENSES AND CHEATS, vol. 12, p. 792.

Strict Construction of Statute Required. — A statute providing for the punishment of frauds perpetrated by guests on innkeepers must be strictly construed in accordance with the rule relating to penal statutes; and where it provides for imprisonment, regard must also be had to the constitutional provision prohibiting imprisonment for debt. *Hutchinson v. Davis*, 58 Ill. App. 358.

But it has been held that such a statute is not unconstitutional as an attempt to imprison for debt. *State v. Benson*, 28 Minn. 424. See the title IMPRISONMENT FOR DEBT AND IN CIVIL ACTIONS, p. 12, *ante*.

What Constitutes False Pretense. — A false pretense, in order to come within the Missouri statute punishing any person who shall obtain board or lodging at a hotel by false pretenses must relate to an existing or past fact, and not to the future; and therefore a person is not punishable for making a false promise, when about to leave a hotel, as to payment for board, most of which he had obtained before that time. *State v. Tull*, 42 Mo. App. 324. See also *State v. Kingsley*, 108 Mo. 135. And see generally the title FALSE PRETENSES AND CHEATS, vol. 12, p. 792.

A Surreptitious Removal of Baggage by a guest within the meaning of the *Illinois* statute is not established merely by evidence that he went away and took his baggage, and that neither the innkeeper nor any of his agents knew he was going nor that he was taking his baggage. *Hutchinson v. Davis*, 58 Ill. App. 358.

INNUENDO. (See also the title LIBEL AND SLANDER.) — The office of an innuendo in pleading is to explain, not to enlarge, and is the same in effect as "that is to say." It is used almost exclusively in practice in actions for defamation.¹

INOFFICIOUS WILL. (See generally the titles UNDUE INFLUENCE; WILLS.) — An inofficious will is a will not in accordance with the testator's natural affection or moral duties.²

INOPORTUNE. — Inopportune means unseasonable in time, or at the wrong time.³

INQUEST. — As to coroners' inquests, see the title CORONERS, vol. 7, p. 598; CORONERS' INQUESTS, 5 ENCYC. OF PL. AND PR. 38. As to inquests in general, see the title INQUESTS AND INQUIRIES, 10 ENCYC. OF PL. AND PR. 1134.

INQUEST OF OFFICE. (See also the title ESCHEAT, vol. 11, p. 315, and 8 ENCYC. OF PL. AND PR. 1.) — An inquest of office is sometimes simply termed office, as in the phrase "office found." In English practice it is an inquiry made by the king's officer, his sheriff, coroner, or escheator, either *virtute officii* or by writ sent to him for that purpose, or by commissioners specially appointed, concerning any matter that entitles the king to the possession of lands or tenements, goods or chattels.⁴

Meals Not Actually Obtained. — Under the Illinois statute declaring a person guilty of a misdemeanor who obtains food or accommodation at an inn without paying therefor, such food or accommodation must be actually obtained in order to bring a person within the statute. Thus, where a guest, who had received supper and a night's lodging, pays therefor and departs after breakfast has been served, he cannot be considered as having obtained breakfast within the meaning of the statute, though under the known rules of the hotel a departing guest is required to pay for a meal which is in readiness at the time of his departure. *Sundmacher v. Block*, 39 Ill. App. 553.

1. In *Van Vechten v. Hopkins*, 5 Johns. (N. Y.) 220, it was said: "An *innuendo* is explanatory of the subject-matter sufficiently expressed before, and it is explanatory of such matter only; for it cannot extend the sense of the words beyond their own meaning, unless something is put upon the record for it to explain." See also *Barham's Case*, 4 Coke 20; *Post Pub. Co. v. Hallam*, 16 U. S. App. 651; *Beardsley v. Tappan*, 1 Blatchf. (U. S.) 588, 591; *Weir v. Hoss*, 6 Ala. 881; *Buthrick v. Detroit Post, etc., Co.*, 50 Mich. 629; *Bourresseau v. Detroit Evening Journal Co.*, 63 Mich. 425; *Bartow v. Brands*, 15 N. J. L. 249; *McCuen v. Ludlum*, 17 N. J. L. 15; *Brittain v. Allen*, 2 Dev. L. (13 N. Car.) 123; *Collins v. Dispatch Pub. Co.*, 152 Pa. St. 187; *Price v. Conway*, 134 Pa. St. 342; *Dickson v. State*, 34 Tex. Crim. 1; *Hansbrough v. Stinnett*, 25 Gratt. (Va.) 499; *Buckstaff v. Viall*, 84 Wis. 129.

2. 1 *Williams on Executors* (7th Am. ed.) 44. See also *Banks v. Goodfellow*, 39 L. J. Q. B. 237; *Smith v. Smith*, 48 N. J. Eq. 590; *Sanderson v. Sanderson*, 52 N. J. Eq. 252.

Inofficious Donation. — In *Laurange v. Barre*, 11 Rob. (La.) 311, it was said that "an *inofficious* or excessive donation means the disposition which fathers and mothers, or other ascendants, make of their property to the

prejudice of their descendants, beyond the proportion reserved to them by law (Civil Code, art. 3522, § 21); that such donations retain all their effect during the life of the donor (Civil Code, art. 1490); and that the action to have them reduced only belongs to the forced heirs of the donor, to be exercised, after his death, against the donee or his heirs. Civil Code, arts. 1489, 1491, 1504. See also *Vazeille*, Prescription, page 224, nos. 545, 546 *et seq.*"

3. **Inopportune.** — *Pennsylvania Co. v. Sloan*, 125 Ill. 73. This case was an action against a railway company to recover for a personal injury charged to have resulted from the carelessness and negligence of its flagman at a street crossing, in signaling the plaintiff to cross its track at a time of danger and peril. The use of the words in an instruction, that if the jury should believe, from the evidence, that the defendant's flagman "improperly and inopportune" signaled the plaintiff's team, etc., instead of using the words "carelessly and negligently," was urged as error. It was held that while the use of the latter words would have been technically more correct, yet the use of the former words was not sufficiently inaccurate to mislead the jury, those words imputing negligence under the circumstances of the case.

4. **Inquest of Office.** — "As, to inquire whether the king's tenant for life died seized, whereby the reversion accrues to the king; whether A, who held immediately of the crown, died without heir, in which case the lands belong to the king by escheat; whether B be attainted of treason, whereby his estate is forfeited to the crown; whether C, who has purchased land, be an alien, which is another cause of forfeiture. * * * These *inquests of office* were more frequently in practice during the continuance of the military tenures than at present; and were devised by law as an authentic means to give the king his right by solemn matter of record." *Burrill L. Dict.*, citing 3 Black Com. 258.

"Blackstone defines an *inquest of office* as

INQUIRY—INQUISITION. (See also 10 ENCYC. OF PL. AND PR. 1134, 1169.)—See note 1.

INSANE ASYLUMS.—See the titles HABEAS CORPUS, vol. 15, p. 125; HOSPITALS AND ASYLUMS, vol. 15, p. 757; INSANITY, *post*.

'an inquiry made by the king's officer, his sheriff, coroner, or escheator, *virtute officii*, or by writ to them sent for that purpose, or by commissioners specially appointed, concerning any matter that entitles the king to the possession of lands or tenements, goods or chattels. This is done by a jury of no determinate number, being either twelve, or less, or more.

* * * These *inquests of office* were devised by law as an authentic means to give the king his right by solemn matter of record, without which he, in general, can neither take nor part from anything.' 3 Black. Com. 258, 259." Atlantic, etc., R. Co. v. Mingus, 165 U. S. 413.

1. **Inquisition.**—An *inquisition* as known to our law is a finding of facts by a jury. Bouv. L. Dict., cited in *Newton v. Mutual Ben. L. Ins. Co.*, 15 Hun (N. Y.) 597, *affirmed* 76 N. Y. 426.

Inquiry—Requisition. (See also REQUISITION.)—The condition of an auction sale provided that it should form no objection to the title that the indenture under which the vendor held was an underlease, and no requisition or *inquiry* should be made respecting the title of the lessor or his superior landlord, or his right to grant such underlease. In construing this provision, Quain, J., said: "The word *inquiry* there is not used for the purpose of precluding all *inquiry aliunde*, but is used as a convertible expression with the word 'requisition,' and does not extend beyond the word 'requisition;' and I find in the seventh condition, where the word *inquiry* is again used, that it is used in that sense; because it says, 'and all *inquiries* and evidences, if any, which may be required by the purchaser for the purpose of verifying the abstract, shall be made at his expense.' The word *inquiry*, in the sixth condition, has not so wide a meaning as that word had in the condition in *Hume v. Bentley*, 5 De G. & Sm. 520, 21 L. J. Ch. 760, because the words there were, 'the lessor's title will not be shown and shall not be *inquired* into,' evidently pointing, therefore, to *inquiries* from all quarters and in all ways; whereas I think, in the present case, the stipulation points to *inquiries* and requisitions between the vendor and purchaser." *Waddell v. Wolfe*, L. R. 9 Q. B. 521.

Inquiry.—The Penal Code of New York provided that no act or omission begun after the beginning of the day on which the code took effect should be deemed criminal or pun-

ishable, except as prescribed or authorized by the code, but any act or omission begun prior to that day might be inquired of. In construing this provision in *People v. Beckwith*, 108 N. Y. 67, the court said: "Does the latter clause include the provision of section 181? An 'act' criminal in its nature 'may be *inquired* of' by various courts upon whom jurisdiction is conferred 'to *inquire*,' through the intervention of a grand jury, concerning it, or such *inquiry* may be made in certain cases though an examination before a magistrate, but in either case the *inquiry* relates to a proceeding before indictment found or trial had; prosecution relates to the warrant, the arrest, the indictment, and other proceedings following the *inquiry* and before punishment, and the manner of so doing is regulated by the Code of Criminal Procedure (Penal Code, § 8)."

Inquiry of Damages.—In *Gridley v. Brigs*, 2 How. (Miss.) 831, it was said: "The whole matter resolves itself into this: What is an *inquiry* of damages? The term is technical, and means the legal ascertainment of damages, and may be in various ways. The section does not speak of a 'writ of *inquiry* of damages,' but merely of an '*inquiry* of damages.' By Rev. Code 120, § 67, a method is expressly pointed out for ascertaining the amount due, where the action is founded on any instrument of writing for a sum certain, without the intervention of a jury. That this process is an *inquiry* of damages is certain from the fact that on a declaration containing but a single count upon such instrument, the judgment cannot be final until the ascertainment of damages according to this section. The clerk is authorized to make *inquiry* of damages, not to execute a writ of *inquiry*, but to ascertain and *inquire* of damages."

Inquiry and Report.—A statute provided for a reference for *inquiry* and report. In construing this provision, *Esher, M. R.*, in *Wenlock v. River Dee Co.*, 19 Q. B. D. 158, said: "It does not appear to me that the word *inquiry* only includes an *inquiry* which the referee is to make with his own eyes. The word *inquiry*, in my opinion, signifies an *inquiry* in which he is to take evidence and hold a judicial *inquiry* in the usual way in which such *inquiries* are held. The word *inquiry* is used because it is not meant to have the same result as a trial." See also ENCYC. OF PL. AND PR., title REFERENCES, vol. 17, p. 978.

INSANITY.

By W. H. MICHAEL.

I. DEFINITIONS, 562.

1. *Insanity Generally*, 562.
2. *Idiocy*, 562.
3. *Lunacy*, 562.
4. *Persons Non Compotes Mentis*, 563.
5. *Delusions and Hallucinations*, 563.
6. *Imbecility*, 563.
7. *Senile Dementia*, 563.
8. *Delirium Tremens*, 563.
9. *Moral Insanity — Irresistible Impulse — Emotional Insanity*, 563.
10. *Monomania*, 564.
11. *Homicidal Mania*, 564.
12. *Kleptomania*, 564.
13. *Pyromania*, 564.
14. *Dipsomania*, 565.
15. *Somnambulism*, 565.
16. *Delirium*, 565.
17. *Craziness*, 565.
18. *Lucid Intervals*, 565.

II. JURISDICTION IN LUNACY, 565.

III. THE INQUISITION, 566.

1. *General Statement*, 566.
2. *Who May Make Application*, 566.
3. *Issuance of Commission Matter of Discretion*, 567.
4. *Notice to and Attendance of Lunatic*, 567.
5. *Powers and Duties of Commissioners — The Furors*, 569.
6. *Personal Examination of Lunatic — Exclusion of Spectators*, 570.

IV. COSTS AND DISBURSEMENTS, 571.

1. *In General*, 571.
2. *Imposed upon Prosecutor*, 571.
3. *Imposed upon Lunatic's Estate*, 571.
4. *Where Inquisition Fails or Is Set Aside*, 572.
5. *By What Court Allowed*, 573.

V. APPOINTMENT OF GUARDIAN, 573.

1. *Character of Trust — Guardianship of Infants Distinguished*, 573.
2. *Prior Adjudication of Insanity Requisite*, 574.
3. *Same Person as Committee of Person and Estate*, 574.
4. *On Whose Nomination Appointment to Be Made*, 574.
5. *Consideration Given to Lunatic's Wishes*, 575.
6. *Who May Be Appointed*, 575.
 - a. *Heir at Law — Next of Kin — Relatives Generally*, 575.
 - b. *Husband*, 575.
 - c. *When Woman Should Be Appointed*, 576.
 - d. *Residence of Committee*, 576.
 - e. *Corporations*, 576.
 - f. *Officers of Court*, 576.
 - g. *Strangers*, 577.
7. *Appointment of Receiver*, 577.
8. *Whether Security Required*, 577.
9. *For Nonresident Lunatics*, 577.

INSANITY.

VI. MANAGEMENT OF ESTATE — GUARDIANS' RIGHTS, DUTIES, AND LIABILITIES,

- 578.
1. *In General*, 578.
 2. *Control of Court*, 578.
 3. *Employment of Agents*, 579.
 4. *Expenditures for Lunatic*, 579.
 - a. *His Comfort First Consideration*, 579.
 - b. *Where Expenditures Exceed Income*, 579.
 - c. *Property Within Jurisdiction — Primary Fund*, 580.
 - d. *Traveling Expenses*, 580.
 - e. *Ward's Charitable Enterprises*, 580.
 5. *Support and Maintenance of Lunatic's Family and Relatives*, 580.
 - a. *Lunatic's Wife and Children*, 580.
 - b. *Lunatic's Stepchildren*, 581.
 - c. *Lunatic's Adopted Children*, 581.
 - d. *Lunatic's Illegitimate Children*, 581.
 - e. *Lunatic's Collateral Kindred*, 582.
 - f. *Lunatic's Brother's Illegitimate Children*, 582.
 - g. *Lunatic's Personal Servants*, 582.
 6. *Sales, Transfers, and Incumbrances*, 582.
 - a. *General Rules*, 582.
 - b. *Of Personal Property*, 583.
 - (1) *In General*, 583.
 - (2) *For Payment of Debts*, 583.
 - c. *Of Real Estate*, 583.
 - (1) *Power to Sell*, 583.
 - (a) *General Rules*, 583.
 - (b) *For Support and Maintenance*, 585.
 - (c) *For Better Investment*, 585.
 - (d) *For Payment of Taxes*, 585.
 - (e) *Real Estate of Insane Married Women*, 585.
 - (2) *Subject to Existing Liens — Guardian's Covenants*, 586.
 - (3) *Under Existing Mortgage or Trust Deed*, 586.
 - (4) *Partition Sales*, 586.
 - (5) *Leases*, 586.
 - (a) *Inherent Power of Court*, 586.
 - (b) *Statutory Authority*, 586.
 - (c) *Renewal of Leases*, 587.
 - (6) *Mortgages*, 587.
 - (7) *Extinguishment of Dower*, 587.
 - d. *Effect upon Character of Property*, 588.
 - (1) *General Rule*, 588.
 - (a) *In Sales of Realty*, 588.
 - (b) *Upon Investment of Personalty*, 588.
 - (c) *Timber Severed from Soil*, 588.
 - (2) *Exceptions for Benefit of Lunatic*, 589.
 7. *Relative Powers and Duties of Committee and Prior Trustee*, 589.
 8. *Accounting*, 589.
 - a. *Annual Accounts*, 589.
 - (1) *Duty to Make*, 589.
 - (2) *Not Conclusive Evidence*, 590.
 - (3) *Creditor May Compel*, 590.
 - b. *Final Accounting*, 590.
 - (1) *For Property Received*, 590.
 - (2) *For Profits of Ward's Labor*, 591.
 - (3) *For Interest*, 591.
 - c. *Responsibility for Safety of Investments*, 591.
 - d. *Allowance of Items*, 591.
 - (1) *For Support of Ward*, 591.

INSANITY.

- (2) *For Improvements to Estate*, 592.
- (3) *For Counsel Fees*, 592.
- (4) *For Costs*, 592.
- (5) *For Payment of Ward's Past Debts*, 592.
- (6) *For Damage to Guardian's Property by Ward*, 593.
- (7) *For Ward's Individual Debt to Guardian*, 593.
- (8) *Acting Without Authority—Void Appointment*, 593.
9. *Compensation of Guardian*, 593.
 - a. *In England*, 593.
 - b. *In United States*, 594.

VII. TERMINATION OF GUARDIANSHIP, 594.

1. *Death of Ward*, 594.
2. *Recovery of Lunatic*, 595.
3. *Resignation of Committee*, 595.
4. *Removal of Committee*, 595.

VIII. HUSBAND'S LIABILITY FOR MAINTENANCE OF INSANE WIFE, 596.

IX. RESTRAINT OF INSANE PERSONS, 596.

1. *Without Warrant*, 596.
2. *False Imprisonment*, 597.
3. *Incarceration in Madhouse*, 597.
4. *Right to Writ of Habeas Corpus*, 598.
 - a. *In General*, 598.
 - b. *Those Charged with Crime*, 598.
5. *Inquiry by Commission in Lunacy*, 598.
6. *Right to Notice and Hearing*, 599.
7. *Right to Institute Proceedings for Release*, 599.
8. *Right to Jury Trial*, 599.
9. *Detention After Acquittal upon Criminal Charge*, 600.

X. ACTIONS BY AND AGAINST LUNATICS AND THEIR GUARDIANS, 600.

1. *Lunatic's Right to Sue*, 600.
 - a. *Before Inquisition*, 600.
 - b. *After Inquisition*, 601.
2. *Lunatic's Liability to Be Sued*, 601.
 - a. *Actions Against Lunatic Himself*, 601.
 - (1) *In General*, 601.
 - (2) *After Inquisition*, 602.
 - (a) *Action at Law*, 602.
 - (b) *Suit in Equity*, 602.
 - b. *Actions Against Guardian*, 602.
3. *Lunatic's Right to Allege His Own Insanity*, 602.

XI. QUESTIONS OF LAW AND FACT, 603.

XII. PRESUMPTIONS, 604.

1. *Of Sanity*, 604.
2. *Of Continuance of Insanity*, 604.
 - a. *Of Permanent Nature*, 604.
 - b. *Of Temporary Nature*, 606.

XIII. EVIDENCE OF INSANITY, 606.

1. *Record of Inquisition*, 606.
 - a. *In General*, 606.
 - b. *Transactions Overreached by Finding*, 607.
 - c. *Commitment to Asylum*, 607.
2. *Nature of Act under Consideration*, 608.
 - a. *Criminal Acts*, 608.
 - b. *Civil Acts*, 608.
 - c. *Suicide*, 608.
3. *Absence of Motive*, 609.
4. *Declarations and Admissions*, 609.
 - a. *Verbal Statements*, 609.

INSANITY.

- b. *Letters and Diaries*, 610.
- c. *Recitals in Written Instrument*, 610.
5. *Particular Facts and Circumstances Tending to Show Mental Aberration*, 610.
 - a. *General Conduct and Appearance*, 610.
 - b. *Irrational Acts and Beliefs*, 610.
 - c. *Irritability*, 611.
 - d. *Depravity*, 611.
 - e. *Improvident Bargains and Habits*, 611.
 - f. *Religious Beliefs*, 611.
 - g. *Belief in Spiritualism*, 611.
6. *Expert and Opinion Evidence*, 611.
7. *Books of Science*, 611.
8. *General Reputation and Family Tradition*, 612.
 - a. *To Prove Hereditary Taint*, 612.
 - b. *To Prove Insanity of Party*, 612.
9. *Proof of Hereditary Taint*, 613.
 - a. *Insanity of Ancestors*, 613.
 - b. *Insanity of Collateral Kindred*, 613.
 - c. *As to Nature of Malady*, 613.
 - d. *Admitted as Cumulative Evidence*, 614.
10. *Competency of Evidence in regard to Time*, 614.
 - a. *Condition of Time of Act Is Point for Decision*, 614.
 - b. *Evidence of Condition Before and After Act Admissible*, 614.
 - (1) *To Prove Insanity at Time of Act*, 614.
 - (2) *In Rebuttal*, 615.
11. *Requisite Degree of Proof in Criminal Cases*, 615.
 - a. *In General — Three Views*, 615.
 - b. *View that Accused Must Prove Insanity Beyond Reasonable Doubt*, 615.
 - c. *View that Issue Should Be Decided According to Preponderance of Evidence*, 616.
 - d. *View that Prosecution Must Prove Sanity Beyond Reasonable Doubt*, 617.

XIV. LIABILITY FOR CRIMES, 618.

1. *In General*, 618.
2. *Right and Wrong Test*, 619.
3. *Rule in McNaghten's Case*, 619.
4. *American Modification of Rule*, 620.
5. *Compared with Civil Responsibility*, 621.
6. *Instruction as to Merits of Defense*, 621.
7. *Irresponsibility Acquits—No Reduction of Degree of Crime*, 621.
8. *Insanity At or After Trial*, 621.
 - a. *Prisoner Cannot Be Tried or Punished*, 621.
 - b. *Separate Trial of Issue by Jury Discretionary*, 622.

XV. LIABILITY FOR TORTS, 622.

1. *In General*, 622.
2. *Tortious Negligence*, 623.
3. *Inevitable Accident*, 623.
4. *Liability for Compensatory Damages Only*, 623.
5. *Slander — Exception to Rule*, 623.

XVI. LIABILITY ON CONTRACTS, 623.

1. *In General*, 623.
2. *Bona Fide Executed Contracts*, 625.
3. *Contracts for Necessaries*, 625.
 - a. *For Lunatic*, 625.
 - b. *For Lunatic's Family*, 626.
 - c. *After Inquisition*, 626.
4. *After Adjudication of Insanity*, 626.

5. *Equitable Relief*, 627.

6. *Who May Avoid Lunatic's Contract*, 629.

CROSS-REFERENCES.

For matters of *PROCEDURE*, see *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*, title *INSANE PERSONS*, vol. 10, p. 1169, and references there given.

For other matters of *SUBSTANTIVE LAW AND EVIDENCE* related to this subject, see the following titles in this work: *ACCIDENT INSURANCE*, vol. 1, p. 284; *ADMISSIONS*, vol. 1, p. 670; *AGENCY*, vol. 1, p. 930; *ALIMONY*, vol. 2, p. 105; *ARBITRATION AND AWARD*, vol. 2, p. 630; *ARREST*, vol. 2, p. 893; *ASSIGNMENTS*, vol. 2, p. 1012; *ASSIGNMENTS FOR THE BENEFIT OF CREDITORS*, vol. 3, pp. 22, 132; *ATTEMPTS TO COMMIT CRIME*, vol. 3, p. 263; *ATTORNEY AND CLIENT*, vol. 3, p. 329; *BENEFICIARIES (IN INSURANCE)*, vol. 3, p. 1021; *BENEVOLENT OR BENEFICIAL ASSOCIATIONS*, vol. 3, p. 1074; *BILLS OF EXCHANGE AND PROMISSORY NOTES*, vol. 4, p. 163; *BONDS*, vol. 4, pp. 627, 642; *BREACH OF PROMISE OF MARRIAGE*, vol. 4, p. 894; *BURDEN OF PROOF*, vol. 5, p. 38; *CARRIERS OF PASSENGERS*, vol. 5, p. 554; *COMMUNITY PROPERTY*, vol. 6, p. 333; *CONSTITUTIONAL LAW*, vol. 6, p. 982; *CONTRIBUTORY NEGLIGENCE*, vol. 7, p. 410; *CONVERSION AND RECONVERSION*, vol. 7, p. 463; *DEAF AND DUMB PERSONS*, vol. 8, p. 842; *DEATH BY WRONGFUL ACT*, vol. 8, p. 906; *DEEDS*, vol. 9, p. 119; *DISFRANCHISEMENT*, vol. 9, p. 494; *DIVORCE*, vol. 9, p. 723; *DOWER*, vol. 10, p. 215; *DYING DECLARATIONS*, vol. 10, p. 375; *EJECTMENT*, vol. 10, p. 524; *ELECTIONS*, vol. 10, p. 608; *EQUITABLE ELECTION*, vol. 11, p. 79; *EXECUTION AND PROOF OF DOCUMENTS*, vol. 11, p. 597; *EXECUTORS AND ADMINISTRATORS*, vol. 11, p. 825; *EXEMPLARY DAMAGES*, vol. 12, p. 23; *EXPERT AND OPINION EVIDENCE*, vol. 12, p. 452; *FALSE IMPRISONMENT*, vol. 12, p. 750; *FIRE INSURANCE*, vol. 13, p. 131; *FORECLOSURE OF MORTGAGES*, vol. 13, p. 817; *FRAUD AND DECEIT*, vol. 14, p. 20; *GIFTS*, vol. 14, p. 1010; *GUARDIAN AD LITEM*, vol. 15, p. 2; *HABITUAL DRUNKARDS*, vol. 15, p. 221; *HEARSAY EVIDENCE*, vol. 15, p. 314; *HOMESTEAD*, vol. 15, p. 672; *HOSPITALS AND ASYLUMS*, vol. 15, p. 757; *HUSBAND AND WIFE*, vol. 15, p. 811; *INTOXICATION*; *JUDGMENTS AND DECREES*; *LIFE INSURANCE*; *LIMITATIONS OF ACTIONS*; *MEDICAL JURISPRUDENCE*; *POOR AND POOR LAWS*; *RESCISSION*; *SPECIFIC PERFORMANCE*; *SUICIDE*; *TESTAMENTARY CAPACITY*; *UNDUE INFLUENCE*; *VENDOR AND PURCHASER*; *WITNESSES*.

I. DEFINITIONS — 1. Insanity Generally. — The word "insane" is a general term, and is not confined in its application to persons who are wholly without understanding. It is applicable to every person who is *non compos mentis* or of unsound or deranged mind.¹

2. Idiocy. — An idiot is one who has been without understanding from his nativity — one who has been in a continuous state of fatuity from his birth.²

3. Lunacy. — A lunatic is a person who has possessed reason, but through disease, grief, or other cause has lost it. The term is especially applicable to

1. *Insanity Generally.* — *Burnham v. Mitchell*, 34 Wis. 117.

A Person Who until Nine Years of Age Was a Bright Child, but who afterwards came into such a state of mind as to be denominated, in ordinary parlance, an idiot, is an "insane" person within the meaning of the statutes providing for the care of the insane. *Speedling v. Worth County*, 68 Iowa 152.

2. *Idiocy.* — 1 Black. Com. 302; 1 Russ. on

Crimes (9th Am. ed.) 11; *Owings's Case*, 1 Bland (Md.) 370, 17 Am. Dec. 311; *Beverley's Case*, 4 Coke 124.

Complete Idiocy has been defined as "total fatuity from birth." Sir John Nicholl in *Browning v. Reane*, 2 Phil. Ecc. 69.

Deaf and Dumb Persons were at one time presumed to be idiots, but no such presumption exists now. See the title *DEAF AND DUMB PERSONS*, vol. 8, p. 842.

one who has lucid intervals, and may yet, in contemplation of the law, recover his reason.¹

4. Persons Non Compotes Mentis. — The words *non compos mentis* have, from an early period, been used as a generic term to include all persons mentally deranged, without regard to the cause or duration of their malady.²

5. Delusions and Hallucinations. — Delusions and hallucinations constitute that species of mental unsoundness which is marked by persistent and incorrigible beliefs that things which exist only in the imagination of the patient are real.³

6. Imbecility. — Mental imbecility is a weakness of the mind due to defective development or loss of the faculties.⁴ Whether it will incapacitate the subject for the ordinary duties of life depends upon the seriousness of the infirmity in the particular case.⁵

7. Senile Dementia. — Senile dementia is that form of insanity in the aged, marked by slowness and weakness, which indicates the breaking down of the mental powers in advance of bodily decay.⁶

8. Delirium Tremens. — Delirium tremens, or *mania a potu*, is a disorder of the brain arising from the inordinate and protracted use of ardent spirits. The delirium is a constant symptom, but the tremor is not always conspicuously present. It is properly a disease of the nervous system, and is one of the legally recognized forms of insanity.⁷

9. Moral Insanity — Irresistible Impulse — Emotional Insanity. — **Moral Insanity**, or a morbid perversion of the moral feelings, has been the subject of considerable discussion by both laymen and members of the profession; but however the subject may be viewed from a metaphysical standpoint, it may be laid down as a general proposition of law that the mere perversion of the moral feelings, unaccompanied by mental delusion, is of itself insufficient to invalidate a civil act⁸ or to excuse a criminal act.⁹

1. Lunacy. — Cent. Dict.; 1 Min. Inst. (3d ed.) 99; 1 Black. Com. 304; *Ex p. Barnsley*, 3 Atk. 168; *Beverley's Case*, 4 Coke 124. See also *Owings's Case*, 1 Bland (Md.) 370, 17 Am. Dec. 311.

2. Persons Non Compotes Mentis. — Co. Litt. 246 b, 247 a; 1 Russ. on Crimes (9th Am. ed.) 11; *Beverley's Case*, 4 Coke 124; *Rochford v. Ely*, Ridg. P. C. 528; *Matter of Beaumont*, 1 Whart. (Pa.) 52, 29 Am. Dec. 33.

3. Delusions. — *Mudway v. Croft*, 3 Curt. 671; *State v. Lewis*, 20 Nev. 333. See also *Greenwood v. Greenwood*, cited in Atty.-Gen. v. Parnter, 3 Bro. C. C. 444; *Jenkins v. Morris*, 14 Ch. D. 674; *Smee v. Smee*, 5 P. D. 84; *Banks v. Goodfellow*, L. R. 5 Q. B. 549; *Matter of Blakely*, 48 Wis. 294. And see DELUSION, vol. 9, p. 195.

For singular instances of inveterate delusions see Lord Erskine's speech in Hadfield's Case, 27 How. St. Tr. 1307, 3 Add. Ecc. 79, note; *Hope v. Campbell*, (1899) A. C. 1; *Com. v. Meredith*, 14 W. N. C. (Pa.) 188; *Norton's Case*, 45 Leg. Int. (Pa.) 434; *Barbo v. Rider*, 67 Wis. 598.

4. Imbecility. — Century Dict. And see IMBECILE — IMBECILITY, vol. 15, p. 1019.

5. Imbecility and weakness of mind may exist in different degrees between the limits of absolute idiocy on the one hand and perfect capacity on the other. Sir John Nicholl in *Ingram v. Wyatt*, 1 Hag. Ecc. 384.

6. Senile Dementia. — *Hiatt v. Shull*, 36 W. Va. 563.

7. Delirium Tremens. — See Cent. Dict.; Reg. v. Davis, 14 Cox C. C. 563; Reg. v. Leigh, 4

F. & F. 915. See also DELIRIUM TREMENS, vol. 9, p. 194, and the title INTOXICATION.

8. Moral Insanity — As to Civil Acts. — *Frere v. Peacocke*, 1 Rob. Ecc. 442; *Mullins v. Cottrell*, 41 Miss. 291; *Boardman v. Woodman*, 47 N. H. 120; *Matter of Forman*, 54 Barb. (N. Y.) 274; *Mayo v. Jones*, 78 N. Car. 402. See also *St. Louis Mut. L. Ins. Co., v. Graves*, 6 Bush (Ky.) 268.

No degree of moral obliquity is sufficient to avoid the legal consequence of one's acts, in the absence of insane delusion. *White v. Wilson*, 13 Ves. Jr. 88; *Florey v. Florey*, 24 Ala. 241; *Lucas v. Parsons*, 24 Ga. 640, 71 Am. Dec. 147; *Stanton v. Wetherwax*, 16 Barb. (N. Y.) 259; *Jenckes v. Probate Ct.*, 2 R. I. 255.

9. Moral Insanity No Excuse for Crime — England. — Reg. v. Burton, 3 F. & F. 772; Reg. v. Dixon, 11 Cox C. C. 341; Reg. v. Layton, 4 Cox C. C. 149; *Rex v. Offord*, 5 C. & P. 168, 24 E. C. L. 259; Reg. v. Oxford, 9 C. & P. 525, 38 E. C. L. 208; Reg. v. Leigh, 4 F. & F. 915; Reg. v. Haynes, 1 F. & F. 666; Reg. v. Townlev, 3 F. & F. 839; Reg. v. Higginson, 1 C. & K. 129, 47 E. C. L. 129; Reg. v. Davies, 1 F. & F. 69.

Alabama. — *Boswell v. State*, 63 Ala. 321, 35 Am. Rep. 20; *Ford v. State*, 71 Ala. 385; *Parsons v. State*, 81 Ala. 594; *Walker v. State*, 91 Ala. 81.

California. — *People v. McCarthy*, 115 Cal. 255.

Georgia. — *Choice v. State*, 31 Ga. 424; *Humphreys v. State*, 45 Ga. 190.

Indiana. — Mere mental depravity is not insanity. *Goodwin v. State*, 96 Ind. 550.

Irresistible Impulse is not to be confounded with passionate propensity. No matter how hot the passion, or how fierce the frenzy, it is not insanity; and the question comes at last to this — was there a disease of the brain?¹

Emotional Insanity is a derangement of the emotional powers, or inability to control one's impulses.² It is closely allied to irresistible impulse, but lacks the essential element of intellectual insanity. Consequently, while the emotive part of human nature may be the common and perhaps the only source of mental disease, emotional insanity, of itself, cannot be accepted as an excuse from criminal responsibility.³

10. Monomania. — Monomania is insanity in which there is a more or less complete limitation of the perverted mental action to a particular field, as a special delusion or an impulse to do some particular thing, though the other mental functions may show some signs of degeneration.⁴

11. Homicidal Mania. — Much has been written by alienists and metaphysicians on the subject of homicidal mania.⁵ Nevertheless it has failed to obtain a standing in court as an excuse for crime. One who kills another under circumstances which would otherwise amount to murder cannot escape punishment on the ground of insanity, unless it be shown that at the time his reason was dethroned or that he was laboring under an insane delusion which deprived him of his reason in regard to the act charged.⁶

"**Transitory Homicidal Mania**" is a term invented by ingenious lawyers to afford to the jury a safe bridge upon which to pass from a disagreeable technical duty to the accomplishment of their desire where the accused has killed some one who, according to the consensus of opinion, ought to have been killed.⁷

12. Kleptomania. — Kleptomania is a morbid propensity to steal without regard to the value or utility of the article stolen;⁸ and it is now considered a sufficient defense to a prosecution for the larceny of the articles stolen by a person afflicted with such malady.⁹

13. Pyromania. — Pyromania may be defined as a morbid propensity to incendiarism. The plea has been admitted in some cases where there was strong reason to suspect mental aberration, but in such cases only.¹⁰

New Jersey. — State v. Spencer, 21 N. J. L. 207.

North Carolina. — See State v. Brandon, 8 Jones L. (53 N. Car.) 463.

1. See *infra*, this title, *Liability for Crimes*.

2. Cent. Dict., *sub nom.* Insanity.

3. See a paper read before the Medico-Legal Society of New York, April 24, 1873, by Mr. David Dudley Field, 7 Alb. L. J. 273.

4. Monomania. — Cent. Dict.

Furor Uterinus was regarded by Lord Thurlow as a form of insanity sufficiently serious to avoid a disposition of the sufferer's property in favor of her husband. Atty.-Gen. v. Parnter, 3 Bro. C. C. 445.

5. **Homicidal Mania.** — See 1 Whart. & S. Med. Jur. (4th ed.) 578 *et seq.*; Guiteau's Case, 10 Fed. Rep. 189, note.

6. **Guiteau's Case**, 10 Fed. Rep. 161, did much in the way of clearing the legal atmosphere of fruitless speculation on this subject. In the note to this case, 10 Fed. Rep. 189, the editor expresses the opinion that one of the incidental benefits arising from the trial has been the development of the fact that the theory of moral insanity has no longer any professional medical opinion in its favor. This statement seems to be amply sustained by the editor's quotation from the London Lancet of Dec. 12, 1881, and the opinions of eminent alienists quoted from the North American Review of January, 1882.

7. See 8 Crim. L. Mag. 233, for an account of a number of cases where this defense was interposed.

8. **A Mania for Pilfering** is a supposed species of moral insanity, exhibiting itself in an irresistible propensity to steal. Cent. Dict., *sub nom.* Cleptomania. See 1 Whart. & S. Med. Jur. (4th ed.), § 590 *et seq.*, where the medical authorities on the subject are reviewed.

9. **Looney v. State**, 10 Tex. App. 524, 38 Am. Rep. 646. In this case the court reversed the judgment because the trial court did not charge the jury specially on this particular symptom as it relates to the general subject of insanity. See also **Harris v. State**, 18 Tex. App. 287.

In **Com. v. Fritch**, 9 Pa. Co. Ct. 164, this defense was set up, but it failed because the prosecution succeeded in showing a motive for the crime consistent with the sanity of the defendants.

10. **Pyromania.** — Reg. v. White. Wilts. Summer Ass. 1846, cited in 1 Whart. & S. Med. Jur. (4th ed.), § 606. See also the case of James Gibson, tried before the High Court of Justiciary in Edinburgh, cited in Taylor's Med. Jur. 595, and reported in full in Cormack's Edinburgh Journal, Feb. 1845, p. 141.

Another example is the case of Jonathan Martin, who believed himself to be deputed of God to burn down the cathedral of York, to do away with the heresies practiced there.

14. Dipsomania. — Dipsomania is a periodic recurrence of a violent thirst for intoxicating liquor, a thirst which is not quenched until the patient has drunk continuously for a period of greater or less duration, depending upon the constitution of the individual, when the passion subsides and he remains sober until another attack of the disease comes on.¹ It seems that such a thirst, produced by the habit of drinking, is no excuse, legal or moral, for the consequences resulting from the indulgence of the appetite;² though it has been held that whether there is such a mental disease as dipsomania, whether the defendant had that disease, and whether his act was the product of such disease are all questions of fact for the jury to decide upon the evidence in the case.³

15. Somnambulism. — Alienists have written much of somnambulism, or, as the etymology of the word indicates, the habit of walking about in one's sleep, or at least in a state intermediate between sleep and wakefulness.⁴ Such writings contain accounts of many well-authenticated cases in which acts of great atrocity have been committed while the perpetrator was either asleep or just being aroused from sleep; and this has recently found its way into court as a defense to a prosecution for homicide, on the ground that the accused was, at the time of the killing, incapable of entertaining a criminal intent.⁵

16. Delirium. — Delirium is a disordered state of the mental faculties, more or less temporary, and occurring during illness, especially in febrile conditions.⁶

17. Craziness. — The word "crazy" in its popular sense imports a broken, shattered, or deranged mind, rather than one enfeebled by age or disease.⁷

18. Lucid Intervals. — By "lucid interval" is meant, not merely a cessation of the violent symptoms of the disorder,⁸ but a temporary restoration of reason such as to create responsibility for acts done during its continuance.⁹ Still, restoration of the mental faculties to their original condition is not necessary; it is sufficient if there be such restoration that the person is able, beyond doubt, to comprehend and to do the act with such reason, memory, and judgment as to make it a legal act.¹⁰

II. JURISDICTION IN LUNACY. — In England the custody of idiots and lunatics and the management of their property have from a very early period been vested in the crown,¹¹ but this control was exercised by delegated authority and not by the sovereign in person. While the lord chancellor, except during the existence of the Court of Wards,¹² has generally exercised this jurisdiction, it should be observed that he has not done so by virtue of his judicial office, but as the direct delegate and representative of the crown, deriving his authority from the royal warrant under the sign manual of the sovereign delivered to

See Taylor's Med. Jur. 595, 1 Whart. & S. Med. Jur. (4th ed.), § 606.

For a review of the medical authorities on the subject, see 1 Whart. & S. Med. Jur. (4th ed.), § 604 *et seq.*

1. **Dipsomania.** — 1 Whart. & S. Med. Jur. (4th ed.), § 639 *et seq.*

2. *Choice v. State*, 31 Ga. 424.

3. *State v. Pike*, 49 N. H. 399, 6 Am. Rep. 533.

4. **Somnambulism.** — See 1 Whart. & S. Med. Jur. (4th ed.), § 492 *et seq.*

5. *Fain v. Com.*, 78 Ky. 183, 39 Am. Rep. 203.

6. **Delirium.** — Cent. Dict. See Owings's Case, 1 Bland (M.J.) 370, 17 Am. Dec. 311.

7. **Craziness.** — *Shaver v. McCarthy*, 110 Pa. St. 345.

8. **Lucid Interval.** — *Hall v. Warren*, 9 Ves. Jr. 605.

9. See *Towart v. Sellers*, 5 Dow. 231; *Hall v. Warren*, 9 Ves. Jr. 605; *Waring v. Waring*,

6 Moo. P. C. 341; *In re Gangwere's Estate*, 14 Pa. St. 417.

10. *Frazer v. Frazer*, 2 Del. Ch. 263; *Ex p. Holyland*, 11 Ves. Jr. 10.

11. **Jurisdiction—In England.**—See the statute *De Prerogativa Regis*, 17 Edw. II., cc. 9, 10, confirming an earlier statute in the reign of Edw. I., which appears to have been lost.

It has been said that the original ground for the custody of idiots and lunatics is more a matter of curiosity than of use, and that it certainly existed before the statute *De Prerogativa Regis*. *Ex p. Grimstone*, Amb. 706. See also *Oxenden v. Compton*, 2 Ves. Jr. 71; *Matter of Fitzgerald*, 2 Sch. & Lef. 435; *Hume v. Burton*, 1 Ridg. P. C. 213.

12. First, perhaps, in point of time by the lord chancellor and afterwards by the Court of Wards, which was created by the statute 32 Hen. VIII., c. 46, and again by the lord chancellor after the Court of Wards was abolished by statute 12 Car. II., c. 24.

him upon his coming into office, it being the theory of the law that the royal authority was thus delegated once for all to prevent repeated applications to the sovereign in person.¹

In the United States there has been considerable discussion as to whether those courts which have general equity jurisdiction possess by virtue thereof inherent jurisdiction in lunacy. Many cases hold that in the absence of legislation on the subject courts of general equity jurisdiction, representing the state in its character of *parens patriæ*, may rightfully exercise the same powers and control over the persons and property of lunatics and idiots as were exercised in England by the lord chancellor under the authority of the royal warrant,² though there are decisions to the contrary.³

The Discussion Is, However, of Little Practical Importance at the present time, inasmuch as the question of jurisdiction and the procedure in lunacy are now regulated by statute, both in England⁴ and the United States. In a number of the states the probate courts have jurisdiction,⁵ in others the county courts,⁶ in still others the courts of record having general original jurisdiction,⁷ while in a few states this jurisdiction still remains with the court of chancery.⁸

III. THE INQUISITION — 1. General Statement. — Most of the questions that have arisen in this connection relate to the proper procedure, and are beyond the scope of this work.⁹ There are, however, certain matters of substantive law which will be here discussed.

2. Who May Make Application — General Rule — Relative or Friend. — As a rule the application should be presented by a relative or friend of the alleged lunatic;¹⁰ and it has been held that a mere stranger will not be permitted to

1. *Eyre v. Shaftsbury*, 2 P. Wms. 118; *Burford v. Lenthall*, 2 Atk. 553; *Bonner v. Thwaites*, Tothill 130; *Murray v. Frank*, 2 Dick. 555.

2. **Jurisdiction in United States.** — *Dodge v. Cole*, 97 Ill. 333, 37 Am. Rep. 111; *McCord v. Achiltree*, 8 Blackf. (Ind.) 15; *Nailor v. Nailor*, 4 Dana (Ky.) 339; *Corrie's Case*, 2 Bland (Md.) 492; *Matter of Colah*, 3 Daly (N. Y.) 529; *Latham v. Wiswall*, 2 Ired. Eq. (37 N. Car.) 294; *Ashley v. Holman*, 15 S. Car. 97; *Ex p. Richards*, 2 Brev. (S. Car.) 375. See also *Matter of Colvin*, 3 Md. Ch. 278; *Tomlinson v. Devore*, 1 Gill (Md.) 345; *Walker v. Russell*, 10 S. Car. 82.

3. *In re Eckstein*, 1 Pa. L. J. Rep. 224, 2 Pa. L. J. 126; *Kennedy v. Johnston*, 65 Pa. St. 451, 3 Am. Rep. 650. See also *Lance v. McCoy*, 34 W. Va. 418.

In *Fentress v. Fentress*, 7 Heisk. (Tenn.) 425, it was held that chancery acquired its jurisdiction of the subject solely from statute; following *Oakley v. Long*, 10 Humph. (Tenn.) 251, wherein the court said: "We cannot assent to the reasoning of the Court of Appeals of Kentucky in the case of *Nailor v. Nailor*, 4 Dana (Ky.) 341."

4. **England.** — The Lunacy Regulation Act, 16 & 17 Vict., c. 70, as amended by 18 Vict., c. 13, 25 & 26 Vict., c. 86, and the Lunacy Act of 1890.

5. **Probate Courts — Alabama.** — *Campbell v. Campbell*, 30 Ala. 312; *Modawell v. Holmes*, 40 Ala. 391; *Craft v. Simon*, 118 Ala. 625.

Indiana. — *Martin v. Moisinger*, 130 Ind. 555.

Kansas. — *Matter of Latta*, 43 Kan. 533.

Maine. — *Hovey v. Harmon*, 49 Me. 269.

Minnesota. — *State v. Wilcox*, 24 Minn. 143.

Missouri. — *Cox v. Osage County*, 103 Mo. 385.

New Hampshire. — *H — v. S —*, 4 N. H. 60.

Ohio. — *Wheeler v. State*, 34 Ohio St. 394, 32 Am. Rep. 372; *Heckman v. Adams*, 50 Ohio St. 305.

And see the various state statutes.

6. **County Courts.** — See the local statutes.

7. **Court of General Jurisdiction — Kentucky.** — *Taylor v. Barker*, (Ky. 1898) 47 S. W. Rep. 217.

New York. — A court of record of the city or county has jurisdiction, or a justice of the Supreme Court of the district in which the alleged insane person resides or may be. *Laws N. Y.* 1896, c. 545, § 60, p. 491.

Formerly the care and custody of lunatics and habitual drunkards were confined to the Court of Chancery without restriction or limitation. *Matter of Tracy*, 1 Paige (N. Y.) 582; *Matter of Mason*, 1 Barb. (N. Y.) 436; *L'Amoureux v. Crosby*, 2 Paige (N. Y.) 422, 22 Am. Dec. 655; *Brasher v. Van Cortlandt*, 2 Johns. Ch. (N. Y.) 246.

Pennsylvania. — *Guthrie's Appeal*, 16 Pa. St. 321; *Kennedy v. Johnston*, 65 Pa. St. 451, 3 Am. Rep. 650.

Virginia. — The Circuit Courts have concurrent jurisdiction with the County and the Corporation Courts in the appointment of committees, Code Va. (1857), § 1700, but have no jurisdiction to try questions of insanity. *Harrison v. Garnett*, 86 Va. 763.

And see the local statutes.

8. **Delaware.** — *Rev. Stat. Del.* (1893), p. 381, c. 49, § 1; *In re Harris*, 7 Del. Ch. 42.

New Jersey. — *Gen. Stat. N. J.* (1895), p. 1696, par. 1; *In re Devausney*, 52 N. J. Eq. 502. As appears by the case of *Cooper v. Wallace*, 55 N. J. Eq. 192, the Orphans' Court has power also to appoint a guardian for a lunatic.

9. See the title *INSANE PERSONS*, 10 ENCYC. OF PL. AND PR. 1169.

10. **Application by Friend or Relative.** — *Ex p.*

sue out a commission or make himself a party to the proceedings.¹

Municipal Authorities. — In some jurisdictions the application may be made by the selectmen of the town or overseers of the poor,² and it has been held that where the alleged lunatic is wasting his property and is liable to become a charge upon the town, the application may be made by any inhabitant of the town, and need not be signed by the overseers of the poor, though in such case the person signing the petition is liable for costs in case of an appeal.³

Where Confinement the Object. — Where the object of the proceedings is to confine the lunatic in an asylum, it is not an unusual provision that the application may be made by any person having knowledge of the lunacy.⁴

3. Issuance of Commission Matter of Discretion. — The issuance of a commission is a matter within the sound discretion of the court in each particular case,⁵ the controlling consideration being the welfare of the lunatic. Where the propriety of issuing the commission is doubtful, the chancellor may instruct physicians to make private examinations of the party for the enlightenment of the court.⁶ In several early *English* cases, a commission was refused because the person was not shown to be insane, within the technical meaning of that term, although of weak understanding and imbecile mind.⁷ But according to more recent cases it is not necessary upon a commission in the nature of a writ *de lunatico inquirendo* to establish idiocy or lunacy.⁸ It is sufficient, if, as said by Lord Eldon, "it is made out that the party is unable to act with any proper and provident management; liable to be robbed by any one; under that imbecility of mind, not strictly insanity, but as to the mischief calling for as much protection as actual insanity."⁹

4. Notice to and Attendance of Lunatic — Notice to Alleged Lunatic — General Rule. — Where, as in *England*, a traverse of the inquisition is deemed a matter of right,¹⁰ it seems that a failure to serve notice on the alleged lunatic does not invalidate the proceedings.¹¹ But in the *United States* it is generally held that a person against whom a commission of lunacy is issued is entitled to reasonable notice of the time and place of the inquisition, and has the right to be present and contest the proceedings.¹² In some cases it has been held that

Tomlinson, 1 Ves. & B. 57; Matter of Webb, 2 Phil. 10; Matter of Nesbitt, 2 Phil. 245; *In re* Whittaker, 4 Myl. & C. 441; Craft v. Simon, 118 Ala. 625; Hayden v. Smith, 49 Conn. 83; Shaw v. Dixon, 6 Bush (Ky.) 644; Insane Hospital v. Belgrade, 35 Me. 497; Cleveland v. Hopkins, 2 Aik. (Vt.) 394.

The Surviving Husband of a Deceased Cousin is not a relative by marriage such as may make application for a commission of lunacy. Com. v. Metz, 17 Pa. Co. Ct. 541.

1. Covenhoven's Case, 1 N. J. Eq. 19. See also Hayden v. Smith, 49 Conn. 83.

2. **Town Authorities.** — Hayden v. Smith, 49 Conn. 83; Lord v. Walker, 61 N. H. 261.

3. Baker v. Searle, 2 R. I. 115.

4. Territory v. Gallatin County, 6 Mont. 297; Shenango Tp. v. Wayne Tp., 34 Pa. St. 184.

In *Indiana* it seems that any person may file a petition to have a person declared of unsound mind and to have a guardian of his person and property appointed. Jessup v. Jessup, 7 Ind. App. 573.

5. **Discretion in Issuing Commission.** — Matter of J. B., 1 Myl. & C. 538; *Ex p.* Tomlinson, 1 Ves. & B. 57; Sherwood v. Sanderson, 19 Ves. Jr. 280; *Ex p.* Persse, 1 Molloy 219; Owings's Case, 1 Bland (Md.) 290; Morgan's Case, 3 Bland (Md.) 332; Matter of Colvin, 3 Md. Ch. 278; Matter of Chatin, 16 N. J. Eq. 496.

In *Michigan*, where the statute provides that the citation shall issue upon presentation of

the petition, it is held that the issuing thereof is a mere formal order and does not involve the exercise of judicial discretion. Matter of Leonard, 95 Mich. 300; McFarlane v. Clark, 39 Mich. 44, 33 Am. Rep. 346.

6. *Ex p.* Persse, 1 Molloy 219.

7. *Ex p.* Barnsley, 3 Atk. 168; Donegal's Case, 2 Ves. 407 (both by Lord Hardwicke).

8. Ridgeway v. Darwin, 8 Ves. Jr. 65; *Ex p.* Cranmer, 12 Ves. Jr. 445; Sherwood v. Sanderson, 19 Ves. Jr. 285; Gibson v. Jeyes, 6 Ves. Jr. 267; *In re* Monaghan, 9 Ir. Eq. 253; Matter of Perrine, 41 N. J. Eq. 411; Matter of Conover, 28 N. J. Eq. 330; Matter of Lawrence, 28 N. J. Eq. 331; Dickenson v. Blisset, 1 Dick. 268; Matter of Barker, 2 Johns. Ch. (N. Y.) 232; Brower v. Fisher, 4 Johns. Ch. (N. Y.) 441.

9. Ridgway v. Darwin, 8 Ves. Jr. 66.

10. **Notice to Alleged Lunatic.** — *Ex p.* Ferne, 5 Ves. Jr. 450, 832; Sherwood v. Sanderson, 19 Ves. Jr. 280. See also *Ex p.* Hall, 7 Ves. Jr. 261.

11. Medlock v. Cogburn, 1 Rich. Eq. (S. Car.) 477.

12. *Maine.* — Coolidge v. Allen, 82 Me. 25; Halman v. Hohman, 80 Me. 139.

New Jersey. — Matter of Whitenack, 3 N. J. Eq. 252; Matter of Vanauken, 10 N. J. Eq. 186.

New York. — Matter of Russell, 1 Barb. Ch. (N. Y.) 38; Matter of Tracy, 1 Paige (N. Y.) 580; Matter of Petit, 2 Paige (N. Y.) 174.

Pennsylvania. — *In re* Rust, 177 Pa. St. 340;

such proceedings without notice to the alleged lunatic are absolutely void,¹ while in others they are held to be merely voidable and not subject to attack in collateral proceedings.²

In New York It Is Not Necessary to Give Notice of the Application for the commission; it is sufficient to give notice of the time and place of the execution thereof.³

Appearance — Effect as Waiver. — There are authorities to the effect that the appearance of the party either in person or by counsel and proceeding to trial will be considered as a waiver of a want or defect of notice;⁴ but there are authorities to the contrary.⁵

Notice to Next of Kin. — In addition to personal notice to the lunatic himself,⁶ some of the statutes provide that his next of kin shall have notice of the proceedings;⁷ but their interests are wholly secondary to those of the alleged lunatic.⁸

Ex p. Hinchman, Bright. (Pa.) 181; *Ex p. Isaacs*, 1 Leg. Gaz. (Pa.) 17; *May's Case*, 10 Pa. Co. Ct. 283; *Com. v. Groh*, 10 Pa. Co. Ct. 557.

Tennessee. — *Ex p. Dozier*, 4 Baxt. (Tenn.) 81.
West Virginia. — *Lancee v. McCoy*, 34 W. Va. 416.

Service of a writ of arrest has been held to be sufficient notice. *Fore v. Fore*, 44 Ala. 478.

Even when the statute under which the proceedings are taken does not provide for notice, it will be presumed that reasonable notice was intended to be given. *May's Case*, 10 Pa. Co. Ct. 283.

1. Effect of Lack of Notice. — *McCurry v. Hooper*, 12 Ala. 823, 46 Am. Dec. 280; *Eslava v. Lepretre*, 21 Ala. 504; *Molton v. Henderson*, 62 Ala. 426; *Arrington v. Arrington*, 32 Ark. 674; *Matter of Wellman*, 3 Kan. App. 100; *Stafford v. Stafford*, 1 Mart. N. S. (La.) 551; *North v. Joslin*, 59 Mich. 624. See also *Eddy v. People*, 15 Ill. 386; *Matter of Whitenack*, 3 N. J. Eq. 252.

2. *Kimball v. Fisk*, 39 N. H. 110, 75 Am. Dec. 213.

An inquisition of lunacy cannot be avoided collaterally for want of notice of the holding of the inquest. *Arrington v. Short*, 3 Hawks (10 N. Car.) 71; *Rogers v. Walker*, 6 Pa. St. 371, 47 Am. Dec. 470; *Willis v. Willis*, 12 Pa. St. 159. See also *Southern Tier Masonic Relief Assoc. v. Laudenschach*, (Supm. Ct. Spec. T.) 5 N. Y. Supp. 901; *In re Cook*, (Supm. Ct. Gen. T.) 6 N. Y. Supp. 720; *Matter of Demelt*, 27 Hun (N. Y.) 480.

3. *Gridley v. St. Francis Xavier College*, 137 N. Y. 330.

4. Appearance as Waiver. — *Matter of Wellman*, 3 Kan. App. 100; *Matter of Lindsley*, 46 N. J. Eq. 358; *Matter of Vanauken*, 10 N. J. Eq. 186; *Matter of Rogers*, 9 Abb. N. Cas. (N. Y. Supm. Ct.) 141. See also *Nyce v. Hamilton*, 90 Ind. 417; *Martin v. Motsinger*, 130 Ind. 555; *Jessup v. Jessup*, 7 Ind. App. 573; *McAfee v. Com.*, 3 B. Mon. (Ky.) 305; *Lackey v. Lackey*, 8 B. Mon. (Ky.) 107.

5. See *Morton v. Sims*, 64 Ga. 298; *Matter of Whitenack*, 3 N. J. Eq. 252.

6. Personal Notice to Lunatic. — *Smith v. Burlingame*, 4 Mason (U. S.) 121; *Morton v. Sims*, 64 Ga. 298; *Segur v. Pellerin*, 16 La. 63; *Chase v. Hathaway*, 14 Mass. 222; *Matter of Petit*, 2 Paige (N. Y.) 174; *Matter of Blewitt*, 131 N. Y. 541; *Ex p. Dozier*, 4 Baxt. (Tenn.) 81.

7. Notice to Relatives. — *Matter of Nesbitt*, 2 Phil. 245.

In *In re Hinchman*, 4 Pa. L. J. Rep. 184, 7 Pa. L. J. 268, it was held that such relatives and friends as counsel a finding against the alleged lunatic are excluded from the list of persons competent to receive notice of the execution of the commission.

In *Matter of Rogers*, (Supm. Ct. Spec. T.) 9 Abb. N. Cas. (N. Y.) 141, it was held that failure to give notice of an application for a commission to one of the heirs of the lunatic is at most only an irregularity, as he has no absolute right to notice. See also *In re Scarlett*, L. R. 8 Ch. 739; *Matter of Brown*, 1 Macn. & G. 201, *In re Clements*, 2 Coop. 166.

In *Morton v. Sims*, 64 Ga. 298, it was held that if the nearest adult relatives of the alleged imbecile are themselves the petitioners, the ten days' notice provided for in the *Georgia Code* should be given to three of the next nearest, or if there be no adult relatives within the state except the petitioners, then the ordinary should either require ten days' notice to the alleged imbecile himself, or else designate by order a guardian *ad litem* to receive the notice for him.

Under the *Michigan* statute (How. Annot. Stat. 1882, § 6,314; Comp. Laws 1897, § 8,709), it was held that where all the next of kin residing in the state were notified, the finding of lunacy is not void because nonresident heirs were not notified. *Munger v. Kaiaamazoo County*, 86 Mich. 363.

The Jurisdiction of the Court does not depend on notice being given to all of the next of kin of the alleged lunatic. *In re Cook*, (Supm. Ct. Gen. T.) 6 N. Y. Supp. 720; *Matter of Demelt*, 27 Hun (N. Y.) 480.

The Brother of an Alleged Incompetent Person, who is also the mortgagee in a mortgage executed for his use and benefit, is entitled to notice of proceedings looking towards the appointment of a guardian for such brother, instituted on the petition of his wife. *Partello v. Holton*, 79 Mich. 373.

Where Application Made by Husband or Wife. — Notice of an application for the appointment of a committee need not be given to a relative of the alleged incompetent person where the application is made by the husband or wife of such person. *Matter of Parke*, (Supm. Ct. Spec. T.) 15 Misc. (N. Y.) 662. See also *Matter of Beach*, 23 N. Y. App. Div. 413.

8. The interests of the heirs and next of kin must, in the trial of an inquisition, be wholly secondary to the interests of the lunatic, with respect to both his person and his estate.

Lunatic's Right to Be Present. — The person whose sanity is undergoing investigation has a right to be present at the execution of the commission, and it is fatal to the proceedings if this right is denied;¹ and where the inquisition assumes the form of a trial before the judge and a jury, it is frequently provided by statute that the supposed lunatic shall, if practicable, be produced in open court, that he may not be deprived of his liberty and the control of his property without an opportunity to be heard in his own behalf.²

When Notice or Presence of Lunatic May Be Dispensed With. — If it is made to appear that the alleged lunatic is a dangerous madman or cannot be controlled, notice may be dispensed with, and the proceedings may be had in his absence.³ And in some instances it has been held that if he cannot be produced in court without injury to his health, the court may dispense with his personal appearance.⁴

5. Powers and Duties of Commissioners — The Jurors — Improper Interference by Commissioners. — In a *New York* case it was held to be the duty of the sheriff to select and summon the jurors, and that for the commissioners to dictate to him what jurors should be summoned was an irregularity for which the proceedings should be set aside.⁵ And in *New Jersey* it was considered a fatal irregularity for the commissioners to remain in the jury room in the absence of the alleged lunatic and his counsel, and to charge the jurors and inform them of the issue, and to answer questions and make suggestions as to the mode of ascertaining their sentiments on that subject in the use of the ballot.⁶

Improper Interference by Sheriff. — When the sheriff improperly interferes with the deliberations of the jury, as where he converses with them on the matter under consideration, the inquisition will be set aside.⁷

Compelling Attendance of Witnesses. — In *Pennsylvania* it is held that the com-

In re Cook, (Supm. Ct. Gen. T.) 6 N. Y. Supp. 720.

1. Right of Lunatic to Be Present. — *Ex p. Cranmer*, 12 Ves. Jr. 455; *Matter of Dickie*, (Supm. Ct. Spec. T.) 7 Abb. N. Cas. (N. Y.) 417; *Bethea v. McLennon*, 1 Ired. L. (23 N. Car.) 523; *In re Lincoln*, 1 Brews. (Pa.) 392.

An inquisition of lunacy which appeared to have been taken by the coroner and twelve freeholders, and returned to the County Court, and by it confirmed, and from which it did not appear that the lunatic was present, was offered in evidence to support the plea of *non compos mentis*. It was held that since the writing had been received by the County Court as an inquest, and a guardian had been appointed under it, it was too late to question it as an inquest. *Arrington v. Short*, 3 Hawks (10 N. Car.) 71.

2. See the various statutes, and also the notes following.

In Montana the statute provides that the alleged lunatic shall be brought before the judge and a jury of three, one of whom shall be a licensed practicing physician, for personal examination. *State v. Third Judicial Dist. Ct.*, 17 Mont. 411; *Territory v. Gallatin County*, 6 Mont. 297.

Nonresidence or Temporary Absence. — It is not absolutely necessary that the alleged lunatic should be before the jury. A commission may issue where he is a nonresident or temporarily absent from the state, and where it is impossible for the jury to see him. *Matter of Child*, 16 N. J. Eq. 498.

3. When Notice Dispensed With. — *Matter of Vanauken*, 10 N. J. Eq. 186; *Bethea v. Mc-*

Lennon, 1 Ired. L. (23 N. Car.) 523; *Re Newman*, 2 Ch. Chamb. (Ont.) 390; *In re Mein*, 2 Ch. Chamb. (Ont.) 429.

4. When Personal Attendance Dispensed With. — *Hutts v. Hutts*, 62 Ind. 214; *Martin v. Motsinger*, 130 Ind. 557; *Fiscus v. Turner*, 125 Ind. 49; *Jessup v. Jessup*, 7 Ind. App. 573; *McAfee v. Com.*, 3 B. Mon. (Ky.) 305. See also *Chavannes v. Priestly*, 80 Iowa 316.

The alleged lunatic should be present at the place of trial, if consistent with his health and safety. *Craft v. Simon*, 118 Ala. 625. But if this would be attended with great inconvenience and injury to the afflicted person, his actual presence may be dispensed with. *Campbell's Case*, 2 Bland (Md.) 209, 20 Am. Dec. 360.

False Representation. — A judgment that a person is of unsound mind and incapable of managing his estate will be set aside as fraudulent where it is shown that such judgment was procured by falsely representing that the person alleged to be insane was confined in a hospital, and could not be produced in court without injury to his health. *Asbury v. Frisz*, 148 Ind. 513.

5. Commissioners Dictating to Sheriff as to Jurors. — In *Matter of Wager*, 6 Paige (N. Y.) 11, the chancellor decided that the commissioners were only authorized to pass upon the validity of challenges to the jurors selected by the sheriff. For the irregularity referred to in the text the issuance of a new commission was directed.

6. Commissioners Interfering with Jury's Deliberations. — *In re Kennedy*, 55 N. J. Eq. 636.

7. Sheriff's Improper Conduct. — *Matter of Arn-*

missioners have full power to issue subpoenas for witnesses and to compel attendance, and their refusal to do so on the application of the alleged lunatic is fatal to the proceedings.¹

Decision of Questions of Law. — The commissioners are also authorized to decide on the validity of challenges to the jurors selected,² and after the testimony is closed they should submit the question to the jury in the form of a charge, stating the law applicable to the case and recapitulating the facts if necessary, but without arguments of counsel on either side; and in relation to every legal question arising in the execution of the commission, a majority of the commissioners must decide.³ They are, however, subject to the direction of the court as to the manner in which they shall proceed.⁴

Trial Before Court. — In some jurisdictions no commissioners are appointed. The trial of the inquisition is had before the judge of the court having jurisdiction of the matter, by a jury summoned and sworn for that purpose.⁵

Number of Jurors. — The statutes ordinarily specify the number of which the jury is to consist. As a rule the jury must be not less than twelve nor more than twenty-three in number.⁶

Bias of Juror. — A juror should not sit who confesses that he has formed an opinion, and that it would require "some little evidence to overcome it."⁷ And the party is entitled to a new trial if it appears that any such bias or opinion previously formed operated against him.⁸

6. Personal Examination of Lunatic — Exclusion of Spectators. — The commissioners and jury have a right to make a personal examination of the alleged lunatic, that they may be assisted by their own observations of his appearance and conduct;⁹ and if they think proper, they may require those having him in custody to produce him before them, and to this end may have the assistance of the court in enforcing their requirement.¹⁰ Though such personal examination is usually made, and should be made in every case of doubt, when practicable,¹¹ it is nevertheless within the discretion of the commissioners whether

1. **Compelling Attendance of Witnesses.** — *Matter of Plank*, 5 Pa. L. J. Rep. 35. See also a dictum of Lord Eldon in *Ex p. Lund*, 6 Ves. Jr. 781.

2. **Decision of Questions of Law.** — *Matter of Wager*, 6 Paige (N. Y.) 11.

3. *Matter of Arnhout*, 1 Paige (N. Y.) 497.

4. *Matter of Baird*, (Supm. Ct. Spec. T.) 8 N. Y. St. Rep. 493; *Matter of Mason*, 1 Barb. (N. Y.) 436.

5. *Laughinghouse v. Laughinghouse*, 38 Ala. 257. See also the statutes of other states.

The inquisition should be taken in court unless it appears that the alleged lunatic cannot be controlled or is too ill to attend. *McAfee v. Com.*, 3 B. Mon. (Ky.) 305.

6. **Number of Jurors.** — In *Ex p. Wragg*, 5 Ves. Jr. 450, the jury before whom the inquisition was taken consisted of seventeen.

In *Matter of Dey*, 9 N. J. Eq. 181, twenty-three jurors, and in *Matter of Vanauken*, 10 N. J. Eq. 186, twenty-one jurors, were sworn.

In *De Hart v. Condit*, 51 N. J. Eq. 613, 40 Am. St. Rep. 545, it was said that in practice any number not less than twelve nor more than twenty-three has been considered adequate.

In *Alabama* the statute provides that the inquisition shall be taken before a jury of "twelve disinterested persons of the neighborhood." *Craft v. Simon*, 118 Ala. 625.

7. **A Statute Limiting the Number of jurors to twelve is constitutional.** *De Hart v. Condit*, 51 N. J. Eq. 611, 40 Am. St. Rep. 545.

8. **A Unanimous Verdict of Twelve Jurors is suf-**

ficient, though only twelve be summoned. *Matter of Lindsley*, 46 N. J. Eq. 358.

9. **If More Jurors Are Sworn than Are Necessary**, and the proceeding is commenced before all, it must continue before all; it is irregular to discharge a part of them. *Tebout's Case*, (Supm. Ct.) 9 Abb. Pr. (N. Y.) 211.

10. **Report Made by Greater Number than Required.** — In *Field v. Lucas*, 21 Ga. 447, 68 Am. Dec. 465, it was held that it was not fatal to the proceeding that the report was made by thirteen men instead of twelve.

11. **A Jury of Less than Twelve** is provided for in some states. Thus in *Montana* the jury consists of three citizens of the county, one of whom must be a licensed practicing physician. *Territory v. Gallatin*, 6 Mont. 297; *State v. Third Judicial Dist. Ct.*, 17 Mont. 411.

7. **Bias of Juror.** — *Matter of Klock*, 49 Hun (N. Y.) 450.

8. **Prior Service of Juror.** — In *Matter of Lindsley*, 46 N. J. Eq. 358, under the circumstances of the case, the court refused to set aside the inquisition because of the previous service of a juror touching the lunacy of the same person.

9. *Tebout's Case*, 9 Abb. Pr. (N. Y. Supm. Ct.) 211.

10. **Personal Examination of Party.** — *Wenman's Case*, 1 P. Wms. 701; *Ex p. Southcot*, 2 Ves. 404; *Covenhoven's Case*, 1 N. J. Eq. 19.

11. *Ex p. Southcot*, 2 Ves. 405; *Wenman's Case*, 1 P. Wms. 701; *Matter of Childs*, 16 N. J. Eq. 498.

11. *Matter of Russell*, 1 Barb. Ch. (N. Y.) 38.

they will make it or omit it,¹ and where it is made it is not required that the jurors attend as a body or that they all see and examine the lunatic.²

Exclusion of Spectators. — At a personal examination of an alleged lunatic by the commissioners and jurors, all other persons, including counsel, may be excluded in order that the commissioners and jurors may have an opportunity without interruption to make their own observations.³

IV. COSTS AND DISBURSEMENTS — 1. In General. — In the absence of express statutory provision to the contrary, the allowance of costs in lunacy proceedings is discretionary with the court having jurisdiction of the proceedings, and depends upon the character of the application and the conduct of the party — that is, upon the fairness of intention and motives, and the reasonableness of the proceedings.⁴

2. Imposed upon Prosecutor. — Costs are not, as a matter of course, granted against a person who institutes the proceedings and fails in them. In such circumstances he should not be condemned in costs if the prosecution was made from proper motives and in good faith.⁵

Want of Probable Cause. — But if the proceedings were instituted in bad faith, or if it appears by the certificate of the commissioners, or otherwise, that there was not probable cause for the application, the court, in the exercise of its discretion, will usually impose the costs of the proceeding upon the petitioner.⁶

3. Imposed upon Lunatic's Estate. — Where, as the result of the inquisition, the supposed lunatic is found to be insane, the costs of the proceeding are ordinarily taxed against his estate.⁷

Attorney's Fees for Opposing Commission. — It is important that every reasonable

See also *In the Matter of J. B.*, 1 Myl. & C. 542; *H— v. S—*, 4 N. H. 60; *In re Lincoln*, 1 Bres. (Pa.) 394.

1. *Jones v. Van Gundy*, 16 Ind. 490; *Matter of O'Brien*, 1 Ashm. (Pa.) 82; *In re Lincoln*, 1 Brews. (Pa.) 392.

2. *Ex p. Smith*, 1 Swanst. 4.

The fact that only a part of the jurors visited the alleged lunatic for personal examination of him is not sufficient ground for setting aside the inquisition. *De Hart v. Condit*, 51 N. J. Eq. 611, 40 Am. St. Rep. 545.

3. **Right to Exclude Spectators.** — *Matter of Lindsley*, 46 N. J. Eq. 358.

The commissioners and jury may lawfully examine the alleged lunatic privately and apart from his counsel. *Matter of Kennedy*, 55 N. J. Eq. 638.

4. **Costs — General Rule.** — *Matter of Van Cott*, 1 Paige (N. Y.) 489; *Matter of Root*, 8 Paige (N. Y.) 625; *Matter of Beckwith*, 3 Hun (N. Y.) 443; *Ebling's Estate*, 134 Pa. St. 227; *Clark's Case*, 22 Pa. St. 466; *Hassenplug's Appeal*, 106 Pa. St. 527; *In re Johns*, 5 Pa. Dist. 775.

5. **Good Faith.** — *Matter of White*, 17 N. J. Eq. 274; *Matter of Beckwith*, 3 Hun (N. Y.) 448; *Matter of Arnhout*, 1 Paige (N. Y.) 497; *Matter of Giles*, 11 Paige (N. Y.) 638; *Brower v. Fisher*, 4 Johns. Ch. (N. Y.) 441; *Carter v. Beckwith*, 128 N. Y. 312.

Where the Case is a Proper One for Inquiry, the petitioner should not be ordered to pay the costs of the inquisition, though the supposed lunatic was found to be of sound mind. *In re E. S—*, 4 Ch. D. 301.

Extra Allowances. — In *Matter of McAdams*, 19 Hun (N. Y.) 292, the court said: "Assuming the proceedings *de lunatico inquirendo* to be special proceedings, within the meaning of

chapter 270, Laws of 1854, the court had no power to grant extra allowances to the alleged lunatic, upon inquisition being found in her favor."

Setting Aside Finding of Lunacy for Insufficiency of Evidence. — The Court of Common Pleas has no power to set aside an inquisition finding the fact of lunacy in proceedings *de lunatico inquirendo* upon the ground that the evidence is insufficient to sustain the finding, and where this is done it is also error to impose the costs of the proceedings upon the petitioner. *In re Weaver*, 116 Pa. St. 225.

6. **Prosecution Without Probable Cause.** — *Matter of White*, 17 N. J. Eq. 274; *Ex p. Birth*, 1 Kulp (Pa.) 101.

In Indiana, upon the Dismissal of Proceedings to obtain a judicial declaration that a person is of unsound mind and for the appointment of a guardian of such person, the court may award costs against the person who instituted the inquiry. *Ruhlman v. Ruhlman*, 110 Ind. 314. See also *Galbreath v. Black*, 80 Ind. 300.

7. **When Lunatic's Estate Chargeable.** — *Hassenplug's Appeal*, 106 Pa. St. 527; *Malone's Appeal*, 79 Pa. St. 481.

The Commissioners Are Entitled to Compensation out of the lunatic's estate. *Matter of Lofthouse*, 3 N. Y. App. Div. 139; *Sargent's Case*, 22 Pa. Co. Ct. 140.

Where the wife of a lunatic petitioned for the removal of the committee upon the ground of fraud and mismanagement in the execution of his trust, and upon the hearing it appeared that the committee had faithfully discharged his duty, and no probable cause for the application was shown, costs out of the estate were denied to the wife, but the costs of the committee were allowed. *Matter of Lytle*, 3 Paige (N. Y.) 251.

opportunity to defend himself in the proceeding instituted to have him adjudged insane should be afforded to the alleged lunatic. If he is ultimately found to be insane, the court has the power to award such sum as seems reasonable and right under the circumstances, payable out of his property, to the persons who render service in defending him. In this way it is possible to prevent fraud and mistake.¹

So, Also, the Disbursements of the Petitioner for costs and counsel fees are a proper charge against the estate of one who has been found a lunatic.²

4. Where Inquisition Fails or Is Set Aside. — In England, until the powers of the chancellor were enlarged by statute,³ in proceedings upon a commission in the nature of a writ *de lunatico inquirendo*, where the alleged lunatic was found to be of sound mind, or where the commission was superseded before a committee was appointed, or where the inquisition was successfully traversed, costs and expenses could not be allowed to the prosecutor, because, as the court had not obtained control of the lunatic's property, there was no fund out of which their payment could be directed.⁴ If, however, the lunatic had a fund already in court, it was within the discretion of the chancellor to order that the costs of the proceedings in lunacy be paid out of that fund, where such proceedings were evidently for the benefit and protection of the lunatic.⁵

In the United States no uniform rule exists. In one jurisdiction at least the old English rule is in vogue,⁶ and in others the courts appear to have ample discretion in the matter; but generally the rules for the imposition of costs in such proceedings are to be found in the statutes.⁷

1. Counsel Fees. — Matter of Hardy, 26 N. Y. App. Div. 166; Carter v. Beckwith, 128 N. Y. 319.

The court may in its discretion allow costs for opposing the commission although unsuccessful, where the fact of the lunacy is so much in doubt that the chancellor would have sanctioned and directed such opposition if the application had been made to him in the first instance. Matter of Conklin, 8 Paige (N. Y.) 450.

2. Matter of Lofthouse, 3 N. Y. App. Div. 139. See also Matter of Root, 8 Paige (N. Y.) 625.

Counsel to Committee. — A proper compensation of counsel representing the petitioner and the lunatic may be allowed, but no allowance for counsel to the committee of the person will be made in advance; the necessity for such allowance must be passed on after the occasion arises. *In re Heft*, 8 Pa. Dist. 351.

Costs Assessed Against Guardian. — Under the Indiana Act of May 29, 1852, § 5 (Horner's Stat. Ind. 1896, § 2548), the guardian of a lunatic may be required to pay an attorney employed by the lunatic's children for services in prosecuting the proceeding in which the party was adjudged insane and the guardian was appointed. *Brownlee v. Switzer*, 49 Ind. 221; *State v. Newlin*, 69 Ind. 108.

3. When Party Found Sane. — Lunacy Regulation Act, 1862, 25 & 26 Vict., c. 86, § 11. By this act the matter of costs is placed entirely within the discretion of the lord chancellor.

Under this statute, when the inquiry as to lunacy was based on the report of the lunacy commissioners, and the jury found in favor of sanity, it is proper for the court to order the payment of the costs in both proceedings out of the lunatic's estate. *In re C.*, L. R. 10 Ch. 75. See also *In re F.*, 33 L. J. Ch. 333. Compare *In re E. S.*, 4 Ch. D. 301, where, under

the circumstances, the court refused to award costs either for or against the petitioner. The party was found sound of mind, but the case was one calling for inquiry.

4. *Ex p. Ferne*, 5 Ves. Jr. 832; *Sherwood v. Sanderson*, 19 Ves. Jr. 280; *Ex p. Glover*, 1 Meriv. 269; *In re Pinks*, 12 L. J. Ch. 57; *Ex p. Loveday*, 1 De G. M. & G. 275; *Anonymous*, 4 De G. & J. 103.

5. *Sherwood v. Sanderson*, 19 Ves. Jr. 280; *Taylor v. Taylor*, 3 Macn. & G. 426; *Williams v. Wentworth*, 5 Beav. 325; *Matter of Bridge*, Cr. & Ph. 338.

6. New Jersey. — Matter of Farrell, 51 N. J. Eq. 353, holding further that the fees of jurors and commissioners cannot be allowed as a charge upon the estate of an alleged lunatic if he is found to be of sound mind.

7. Under the Pennsylvania Statute the Court of Common Pleas has full power to decree that either party shall pay all the costs, or that the several parties interested shall pay the costs in such proportion as the justice of the case may require. *Hassenplug's Appeal*, 106 Pa. St. 527; *In re Weaver*, 116 Pa. St. 225; *Clark's Case*, 22 Pa. St. 466.

Where the Return Was Defective and would not support the commission, but found the alleged lunatic to be feeble-minded and unfit to manage her affairs, it was held to be the exercise of a proper discretion to divide the costs between the petitioner and the lunatic. *Com. v. Reeves*, 140 Pa. St. 258. See also *In re Graybill*, 2 York (Pa.) 109.

Certificate of Probable Cause. — It has been held that, even after a finding that the party was not a lunatic, the court would order him to pay the costs of the inquisition unless the commissioner certified that there was not probable cause for the application. *In re Hogg*, 17 Pa. Co. Ct. 509.

Payment Before Proceedings Concluded — *Re-*
Volume XVI.

Costs upon Traverse. — Where the inquisition is sustained upon the trial of a traverse it is proper to charge the costs to the traverser.¹

5. By What Court Allowed. — The costs should be taxed and allowed in the court having jurisdiction of the proceedings in lunacy. If this is not done while the lunatic is living, a court of probate cannot allow the bill of costs as a valid claim against his estate after his death.²

Actions Against Committee. — The committee of a lunatic ought not to be subject to action for any of the expenses of the process by which the lunatic and his estate are put into the custody of the law. All these expenses ought to be carefully supervised by the court; and, considering the helpless condition of the lunatic, none ought to be allowed except such as are manifestly just and moderate. If the committee is liable to action, he may be sued anywhere, and thus put to very unjust inconvenience and expense, under the forms of law. The court that has the final settlement of the committee's account ought to have the control of the committee's expenditures.³

Extent of Court's Authority. — But the court having jurisdiction of the lunacy proceedings has no authority to allow a claim against the estate of the lunatic which is not a part of the expense incurred in such proceedings. All claims which are not a part of such expense stand on the footing of ordinary debts.⁴

V. APPOINTMENT OF GUARDIAN — 1. Character of Trust — Guardianship of Infants Distinguished — Mere Curator. — The powers which inhere in the office of committee, under both the English and the American jurisprudence, are confined within very narrow limits. In the former the committee is a mere bailiff or receiver appointed by the chancellor for the crown;⁵ and in the latter he is usually a mere curator, without title to the property of the lunatic, and as such possesses only the power to preserve, repair, and improve such property, unless his authority is enlarged by statute.⁶

Guardians for Infants and for Insane Distinguished. — To some extent, the respective duties of guardians for minors and for insane persons are similar; but the modes of ascertaining the necessity of guardianship in the two cases are quite dissimilar.⁷ The office of a guardian appointed because of infancy ceases

imbursement. — Or the court may order the alleged lunatic to pay costs before the proceeding is determined; but in such case the court may order reimbursement on the determination of the case. *Clark's Case*, 22 Pa. St. 466.

Under the Missouri Statute a judgment for costs against an alleged lunatic who was not found to be such is unauthorized, and the execution and all proceedings thereunder are void. *State v. Duestrow*, 70 Mo. App. 311.

In Illinois such costs are purely a matter of statutory regulation, and the courts have no power to adjudge them as against any one on mere equitable or moral grounds. *Union County v. Axley*, 53 Ill. App. 670.

1. Where Inquisition Traversed. — *Matter of Van Cott*, 1 Paige (N. Y.) 489. See also *Matter of M'Clean*, 6 Johns. Ch. (N. Y.) 440; *Carter v. Beckwith*, 128 N. Y. 312.

In Minnesota the probate court has power to order payment out of the estate of an insane person of the attorneys' fees and witness fees incurred on the hearing of a petition to have his restoration judicially determined. *Kelly v. Kelly*, 72 Minn. 19.

The Grantee of a Lunatic for whose benefit an issue was awarded was directed to pay the costs to which the committee had been subjected thereby. *Matter of Folger*, 4 Johns. Ch. (N. Y.) 160.

2. By What Court Costs Allowed. — *Gulick v. Conover*, 15 N. J. L. 420. See also *Com. v.*

Quinter, 2 Woodw. (Pa.) 377; *Freeman's Appeal*, 22 W. N. C. (Pa.) 173; *Ebling's Estate*, 9 Pa. Co. Ct. 138, 134 Pa. St. 227.

Character as Debt. — Until the costs of such proceedings are adjusted and fixed by the court, they are not debts against the estate in such a sense that they can be collected in the ordinary manner in which debts of a decedent may be collected. *Matter of Lofthouse*, 3 N. Y. App. Div. 139.

3. *Wier v. Myers*, 34 Pa. St. 377.

4. *Rogers's Appeal*, 119 Pa. St. 182.

5. General Nature of Committee's Office. — *Matter of Fitzgerald*, 2 Sch. & Lef. 432; *Beverley's Case*, 4 Coke 123 b, 16 Eng. Rul. Cas. 702. See *Cooper v. Wallace*, 55 N. J. Eq. 192, where *Reed, V. C.*, traced the development of the powers of a committee of a lunatic under the English statutes.

6. *Cooper v. Wallace*, 55 N. J. Eq. 192; *Van Horn v. Hann*, 39 N. J. L. 207. See also *Bolling v. Turner*, 6 Rand. (Va.) 584. See *infra*, this title, *Management of Estate — Guardian's Rights, Duties, and Liabilities — In General*.

7. See the title *GUARDIAN AND WARD*, vol. 15, p. 16; and the preceding sections of this title. See also *Stumph v. Pfeiffer*, 53 Ind. 472.

The probate court appoints a guardian for an infant solely because of the infancy, and no inquiry is made as to sanity. *Fleming v. Johnson*, 26 Ark. 438.

when minority ceases,¹ and he cannot after that event continue under such appointment by reason of the insanity of the ward.²

2. Prior Adjudication of Insanity Requisite. — A committee cannot be appointed until after the lunatic has been adjudged insane.³

Notice to Lunatic. — And it has been held that even then the court has no power to appoint a committee without notice to the lunatic,⁴ though in some cases it seems to be conceded that where the status of lunacy is once fixed by a proper inquisition the court has the power to appoint a committee or guardian without further notice.⁵

Collateral Attack. — The action of the court in appointing a guardian is not, however, open to collateral attack where the record discloses no want of jurisdiction.⁶

3. Same Person as Committee of Person and Estate. — Though it is usual to appoint the same party committee of the person and the estate, yet not unfrequently the practice is different, and from peculiar circumstances it is sometimes eminently proper to intrust the person of the lunatic to one committee and his estate to another.⁷

4. On Whose Nomination Appointment to Be Made. — Though the committee is usually appointed on the nomination of the person who sues out the commission of lunacy, yet a caveat may be entered against the appointment, and when this is done the recommendations of the parties interested will be considered, and proof may be taken to aid the court in making the selection.⁸

1. The force of the order of appointment may be extended when necessary for the purpose of the settlement of the trust. See generally the title *GUARDIAN AND WARD*, vol. 15, pp. 45 *et seq.*, 73.

2. *Cook v. Cook*, 6 Ind. 268.

If, after arrival at full age, the ward is, upon proper inquest, found to be insane, another guardian may be appointed, but the two guardianships are entirely distinct. See *Fleming v. Johnson*, 26 Ark. 438.

3. **Finding of Insanity Requisite.** — *Craft v. Simon*, 118 Ala. 625; *Coolidge v. Allen*, 82 Me. 23; *Hamilton v. Traber*, 78 Md. 26, 44 Am. St. Rep. 258; *Matter of Bassett*, 68 Mich. 348. See also *Munger v. Probate Judge*, 86 Mich. 364.

But if the Record Shows the Appointment of a Guardian, an adjudication of lunacy will be presumed in the absence of evidence to the contrary. *Guthrie v. Guthrie*, 84 Iowa 372.

Where There Is a Commission in Force, the court will not entertain an application to appoint a certain person as committee until the return of the commission is brought before the court. *Matter of Parke*, (Supm. Ct. Spec. T.) 15 Misc. (N. Y.) 662.

A Devise of the Custody of a Lunatic who is more than twenty-one years of age is void. *Ex p. Ludlow*, 2 P. Wms. 635.

4. **Notice of Appointment to Lunatic.** — *Evans v. Johnson*, 39 W. Va. 299, 45 Am. St. Rep. 912; *Lance v. McCoy*, 34 W. Va. 416; *South Penn. Oil Co. v. McIntire*, 44 W. Va. 296.

Death of Guardian — Second Appointment. — An appointment of a guardian of an insane person whose former guardian has died cannot be made without notice to the ward. *Allis v. Morton*, 4 Gray (Mass.) 63.

5. *Heckman v. Adams*, 50 Ohio St. 305.

Where a Person Without Property Has Been Adjudged Insane and committed to an asylum, the court may, without notice, appoint a commit-

tee to receive property afterwards inherited by him. *Swope v. Frazier*, (Ky. 1896) 37 S. W. Rep. 495.

6. **Collateral Attack.** — *Isaacs v. Jones*, 121 Cal. 257; *Willwerth v. Leonard*, 156 Mass. 277; *Sims v. Sims*, 121 N. Car. 297, 61 Am. St. Rep. 665; *Heckman v. Adams*, 50 Ohio St. 305; *Shroyer v. Richmond*, 16 Ohio St. 455; *Wheeler v. State*, 34 Ohio St. 394, 32 Am. Rep. 372; *Knapp v. Thomas*, 39 Ohio St. 387.

7. **Custody of Person and Estate in Different Committees.** — *Matter of Colvin*, 3 Md. Ch. 278.

A guardian for the estate of a lunatic may be appointed without appointing a guardian of the person. *Heckman v. Adams*, 50 Ohio St. 305. See also *Easley v. Bone*, 39 Mo. App. 388.

But under the *Michigan* statute it is held that an order appointing a guardian must include both the person and the estate of the lunatic. *Matter of Bassett*, 68 Mich. 348.

8. **Who May Nominate.** — *Matter of Colvin*, 3 Md. Ch. 278.

Course Where Next of Kin Have Not Assented to or United in Petition. — In *Matter of Lamoree*, (Supm. Ct. Gen. T.) 11 Abb. Pr. (N. Y.) 277, 32 Barb. (N. Y.) 122, the court said: "If the next of kin unite in a petition, and name a proper person as committee, or give their consent in writing to the appointment of a particular person, it is usual to select such person. But if the next of kin have not assented, or united in the petition, there should be an order of reference, and then the next of kin are entitled to notice of the proceedings upon the reference, and to propose themselves as the committee."

If the Person Recommended Is Embarrassed by Pecuniary Difficulties, and there is any reasonable ground for apprehending that he would be likely to employ in his own affairs the money which may come to his hands as committee, this will operate with powerful force

5. **Consideration Given to Lunatic's Wishes.** — The court, in selecting a committee of the person, will, as far as practicable under the circumstances, follow the wishes of the lunatic himself.¹

6. **Who May Be Appointed** — *a.* **HEIR AT LAW — NEXT OF KIN — RELATIVES GENERALLY** — **Early Rule Excluding Heir.** — In the early *English* cases it was held that the heir of a lunatic could not have the custody of his person, though he might be appointed committee of his estate.²

Next of Kin. — It was said to be no objection, however, that the committee of the lunatic's person was his next of kin and would come in for a share by the statute of distributions.³

Modern Rule. — This rule was, however, long ago abandoned in *England*,⁴ and the relatives and next of kin are now preferred in the appointment of a committee, unless there is some specific objection to their appointment.⁵ As the reason which lay at the foundation of the rule has never existed in the *United States*, the rule itself has found no support in the courts of the latter country.⁶

No Absolute Preference of Relatives. — While there is no rule of law excluding the heirs or next of kin,⁷ on the other hand there is no rule of absolute preference of relatives;⁸ the court selecting the committee with a view to the best interests of the lunatic, keeping in view always the possibility of his recovery.⁹

b. **HUSBAND.** — The husband, if a suitable person, should be intrusted with the guardianship of his insane wife, in preference to a third person;¹⁰ but he

against his appointment. *Matter of Colvin*, 3 Md. Ch. 278.

1. *In re Leacocke*, Ll. & G. 498.

2. **Early Rule — Heir Excluded.** — *Ex p.* Ludlow, 2 P. Wms. 635; *Dormer's Case*, 2 P. Wms. 262.

3. **Next of Kin.** — *Neal's Case*, 2 P. Wms. 544; *Ex p.* Ludlow, 2 P. Wms. 635.

The Reason Assigned for This Distinction was that the heir at law would have an interest in the death of the lunatic, whereas the next of kin, because of the probability of increase of the personalty by the continuance of the lunatic's life, would be interested in the preservation thereof. See the cases just cited.

This Distinction Is Not Satisfactory; for immediate gain would be a stronger temptation than the hope of future advantage to those upon whom suspicion, which was the foundation of the rule, could attach. See *Ex p.* Cockayne, 7 Ves. Jr. 591, note.

The Rule Had Relation in Its Origin to Socage Tenure, and the principle of law upon which it rested was that no one who had a temptation to put the ward out of the way could have the custody of his person. The next of blood to whom the inheritance could not descend was therefore entitled to the guardianship in socage. *Ex p.* Richards, 2 Brev. (S. Car.) 376. See also the title **GUARDIAN AND WARD**, vol. 15, p. 21.

4. **Early Rule Abandoned.** — *Ex p.* Cockayne, 7 Ves. Jr. 591; *Cope's Case*, 2 Ch. Cas. 239; *In re Bangor*, 2 Molloy 518.

5. *Ex p.* Le Heup, 18 Ves. Jr. 221; *In re Perse*, 1 Molloy 439; *In re Hussey*, 1 Molloy 226.

In *Matter of Webb*, 2 Phil. 10, 116, the natural daughter of a lunatic, who was named as residuary legatee in a will which he had made while he was sane, was allowed to bring in proposals for committees of both his person and his estate.

6. **Early English Rule Never Obtained in United States.** — *Matter of Colvin*, 3 Md. Ch. 278; *Matter of Livingston*, 1 Johns. Ch. (N. Y.) 436; *Ex p.* Richards, 2 Brev. (S. Car.) 375.

7. **Relatives.** — *Matter of Page*, 7 Daly (N. Y.) 155.

8. *Matter of Taylor*, 9 Paige (N. Y.) 611; *Matter of Page*, 7 Daly (N. Y.) 155.

9. See the cases cited in the two notes preceding.

Where the Father of a Lunatic Is Living and Has the Custody of the Lunatic's Estate, he should be the committee, on giving bond, if he is willing to accept. *Coleman v. Lunatic Asylum*, 6 B. Mon. (Ky.) 239.

In *Georgia*, Among Collateral Relatives applying for the guardianship, the nearest of kin by blood, if otherwise unobjectionable, is preferred, males being preferred to females. The ordinary, however, in every case may exercise his discretion according to the circumstances, and if necessary may grant the guardianship to a stranger in blood. *Armor v. Moore*, 104 Ga. 579; *Johnson v. Kelly*, 44 Ga. 485.

Where No Statute Gives to the Next of Kin the Right to be appointed guardian, it is within the discretion of the court to appoint him or another. *Muse v. Muse*, 76 Miss. 372.

Where the Son and Heir at Law of a Lunatic Would Not Give Security, Lord Eldon refused to appoint him one of the committee of his father's estate, unless the master reported that no one who would give security could be found to act as committee. *In re Frank*, 2 Russ. 450.

10. **Husband as Guardian.** — *Drew's Appeal*, 57 N. H. 181.

In *Coleman's Case*, 4 Hen. & M. (Va.) 506, where the insane wife was put under the care of a committee by the County Court, it was ordered that she be restored to her husband upon his giving bond and security according to law.

has no absolute right to the trust, and if his friendliness to her is doubtful, and his motives are those of self-interest, he should not be appointed.¹

c. **WHEN WOMAN SHOULD BE APPOINTED.** — If the lunatic is an unmarried female, it is proper for obvious reasons that the committee of her person should be a woman;² and so in other cases it has been sometimes held that the comfort of the unfortunate individual would be best promoted by having his person placed under the care of a woman committee, as by appointing the wife to be the committee of her insane husband.³

d. **RESIDENCE OF COMMITTEE.** — As has heretofore been stated, the comfort and well-being of the lunatic are the primary considerations. Accordingly, one who is so situated as to admit of his frequently visiting the lunatic and inspecting the management of his concerns should be preferred as committee if in other respects suitable.⁴ And as the committee should at all times be under the supervision and control of the court, no one who is a nonresident of the jurisdiction should be appointed to that office.⁵

e. **CORPORATIONS.** — Under statutory authority a corporation may be appointed guardian of the estate of a lunatic; and to such appointment, under a well-guarded statute, there can be no objection either on constitutional grounds or on considerations of public policy.⁶

f. **OFFICERS OF COURT.** — It has been held that a committee of the person and estate of a lunatic may be appointed without liability to account for profits, upon condition that he will maintain the lunatic and make and return an inventory of his property.⁷ In *England*, however, a committee cannot be appointed under such conditions, but the chancellor may make what allowance he pleases for the maintenance of the lunatic,⁸ and, as the committee of the lunatic's estate is in all cases required to account for profits, an officer of the court who may be called on to pass the accounts cannot be appointed as such committee.⁹

1. *In re Davy*, (1892) 3 Ch. 38; *Fegan's Estate*, Myr. Prob. (Cal.) 10.

2. **Female Committee.** — *Ex p.* Ludlow, 2 P. Wms. 638; *Gibson's Case*, 1 Bland (Md.) 142, 17 Am. Dec. 257.

Daughter Committee of Insane Mother. — Chancellor Kent considered the daughter of an insane woman the most fit person to perform the duties of a committee. *Matter of Livingston*, 1 Johns. Ch. (N. Y.) 436.

3. **Wife as Committee.** — See *Gibson's Case*, 1 Bland (Md.) 142, 17 Am. Dec. 257, and the MS. opinions there referred to.

The wife of a lunatic may be appointed his committee jointly with some relative by blood. *Ex p.* Le Heup, 18 Ves. Jr. 221.

A wife may be appointed curatrix of her interdicted husband without being bound to furnish security, but she can be thus appointed only on the recommendation of a family meeting duly convened and held. *Interdiction of Bothick*, 43 La. Ann. 547.

4. *Ex p.* Fermor, Jac. 404.

Distant Residence as Ground for Discharge. — The circumstance that the committee of a lunatic's estate resides at a distance from the property is not a ground *per se* for discharging him, although it may raise a case for inquiry as to the propriety of his discharge. *Matter of Brown*, 1 Macn. & G. 201.

5. **Nonresident.** — *Boarman's Case*, 2 Bland (Md.) 89; *Morgan's Case*, 3 Bland (Md.) 332.

Allowance for Expenses Discontinued. — The committee of a lunatic ought to be resident within the jurisdiction of the court, and therefore an allowance made to him for expenses in

visiting the lunatic ought to be discontinued on his going to live out of the jurisdiction. *Ex p.* Ord, Jac. 94.

6. **Corporation as Committee.** — *Minnesota L. & T. Co. v. Beebe*, 40 Minn. 7.

Power Presumed from General Grant to "Execute Trusts of Every Description." — In *Equitable Trust Co. v. Garis*, 190 Pa. St. 544, it was said by Mr. Justice Mitchell: "In the absence of specific restriction in its charter, which nowhere appears, the Equitable Trust Company, by virtue of its general powers under the Act of May 9, 1889, P. L. 159, to 'execute trusts of every description,' must be presumed to have corporate capacity to act as committee of the lunatic." See also the title **CORPORATIONS (PRIVATE)**, vol. 7, pp. 733, 734.

7. *Boarman's Case*, 2 Bland (Md.) 89. See *infra*, this title, *Management of Estate — Guardian's Rights, Duties, and Liabilities — Accounting*.

8. *Sheldon v. Aland*, 3 P. Wms. 110; *Lysaght v. Royse*, 2 Sch. & Lef. 153; *Matter of Fitzgerald*, 2 Sch. & Lef. 436.

9. **Court Officer as Committee.** — *Ex p.* Fletcher, 6 Ves. Jr. 427. See also *In re Hussey*, 1 Molloy 226. In the case first cited Lord Eldon said: "It is a satisfaction that it has occurred to me to say, I cannot appoint a master to be a committee, in the instance of a gentleman than whom there is no man I would rather trust with the management of my own property."

In *Ex p.* Pincke, 2 Meriv. 452, upon the petition of the committee of the person of a lunatic, the court refused to appoint the solicitor to the commission as receiver of the

g. STRANGERS. — It has been said that, "considering the close and intimate relations which the committee must maintain with the family and relatives of the lunatic, * * * a rule of practice or of positive legislation which would justify the appointment of a stranger to exercise the trust of committee without the assent and against the will of his family or other relatives, and without any sufficient or adequate cause, would be oppressive and intolerable."¹

7. **Appointment of Receiver.** — If, before the return of the commission, it is made to appear that the estate of the lunatic is suffering from neglect or reckless management, the court may appoint a receiver *ad interim* to act until a committee of the estate can be regularly appointed.² So in *England*, where the committee of a lunatic's estate was required to serve without compensation, it was customary, where no one could be found who would act gratuitously, to appoint a receiver with a salary, who performed the same functions as a committee of the estate would have performed.³

8. **Whether Security Required.** — As a rule the committee ought to be required to give security for the faithful performance of his duties;⁴ but in the absence of a positive statutory requirement, it is within the discretion of the court to appoint a committee without requiring security where the estate of the lunatic is small and no one who is willing to give security can be found to act as committee.⁵ In *England* the bond is taken to the use of the crown, and the crown is entitled to treat it as a matter of record and have a scire facias issued thereon for a breach of its conditions.⁶ After the recovery of the lunatic and a supersedeas of the commission, the security given by the committee will be discharged, if a fair and satisfactory account is given.⁷

9. **For Nonresident Lunatics.** — There is no doubt that a commission of lunacy may issue against a person resident abroad if he owns property in the jurisdiction.⁸ But the guardian of an insane person appointed in a foreign juris-

lunatic's estate, saying that the court was very jealous of appointing to be a receiver any person whose duty it was to call the receiver to an account.

In a *New York* case where the lunacy proceedings were instituted by the mother, upon her consent the clerk of the court was appointed committee of the person and estate of her insane daughter. *Matter of Owens*, 5 Daly (N. Y.) 288.

1. **Strangers.** — *Lamoree's Case*, (Supm. Ct. Gen. T.) 11 Abb. Pr. (N. Y.) 277, 32 Barb. (N. Y.) 122. But compare *Matter of Owens*, 5 Daly (N. Y.) 288. See the preceding subdivisions of this section.

2. **Receiver.** — *Matter of Kenton*, 5 Binn. (Pa.) 613. See also *Beall v. Smith*, L. R. 9 Ch. 85; *McGinnis v. Com.*, 74 Pa. St. 248.

Where the lunacy of a person is in question, the court may make a provisional order as to his property until the point of lunacy is determined. *Matter of Heli*, 3 Atk. 635; *Marr's Case*, cited in *Ex p. Annandale*, Amb. 82; *In re Holmes*, 4 Russ. 182.

In *Michigan* the appointment of a special guardian is merely ancillary to the proceedings for the appointment of a general guardian, and if the latter appointment falls the former falls with it. *Matter of Bassett*, 68 Mich. 348.

3. *Ex p. Radcliffe*, 1 Jac. & W. 619; *Ex p. Warren*, to Ves. Jr. 622.

The solicitor under the commission of lunacy was not eligible to appointment as such receiver. *Ex p. Pincke*, 2 Meriv. 452.

4. **Security.** — *In re Frank*, 2 Russ. 451. See 16 C. of L.—37

generally the title GUARDIAN AND WARD, vol. 15, p. 116.

A guardian should qualify by giving the bond as required by the statute before he can lawfully intermeddle with the ward's estate by bringing suit or otherwise. *Ormiston v. Trumbo*, 77 Mo. App. 310.

The husband, when appointed curator of his interdicted wife's estate, is bound to give security for the faithful administration of her estate confided to his care. *Woodward v. Woodward*, 15 La. Ann. 162.

The penalty of the bond should be equal to the active debts and the value of the lunatic's movable property as stated in the inventory, together with such additional sum as the judge shall deem sufficient to cover any loss or damage which the curator may occasion to the lunatic's estate by maladministration. *Matter of Rochon*, 15 La. Ann. 6.

In respect to the oath, inventory, and security the law on the subject of the guardianship of minors is applicable to that of lunatics. *Matter of Rochon*, 15 La. Ann. 6.

5. *Ex p. Farrow*, 1 Russ. & M. 112; *In re Burroughs*, 1 Con. & Law. 309, 2 Dr. & War. 207.

6. Such bonds may be treated as a matter of record by virtue of the statute 33 Hen. VIII., c. 39, § 50. *Reg. v. Chambers*, 11 M. & W. 776; *In re Bell*, 2 Coop. t. Cot. 163; *Rex v. Lambe*, M'Clel. 402.

7. *Ex p. Bampton*, Mosely 78.

8. **Nonresident Owning Property in Jurisdiction.** — *Ex p. Southcote*, Amb. 109; *In re Devansney*, 52 N. J. Eq. 502; *Matter of Perkins*,

Volume XVI.

diction is merely the guardian of his person and of his estate within that jurisdiction. His appointment has no extraterritorial force and gives to him no power over the lunatic's property in other jurisdictions.¹

VI. MANAGEMENT OF ESTATE — GUARDIAN'S RIGHTS, DUTIES, AND LIABILITIES

— 1. **In General** — As has been before stated,² the power which inheres in the committee of a lunatic, except as his authority has been enlarged by statute, is confined within very narrow bounds. Under the *English* jurisprudence he was the mere bailiff or curator of the lunatic's property, appointed by the chancellor for the crown, for the purpose of preserving the estate of the ward.³ And in the *United States*, where proceedings in lunacy are had in courts of general equity jurisdiction, the committee or guardian is considered a mere curator of the court, appointed to manage and preserve the lunatic's estate, but without title to his property, real or personal.⁴ In some of the states where such proceedings are had in courts of probate jurisdiction, the guardian of a lunatic is clothed with the same powers and required to perform the same duties as the guardian of an infant, so far as these are applicable.⁵

2. **Control of Court.** — In the discharge of his duties, the committee acts

2 Johns. Ch. (N. Y.) 124; *Matter of Neally*, (Supm. Ct. Spec. T.) 26 How. Pr. (N. Y.) 402; *Matter of Petit*, 2 Paige (N. Y.) 174; *Matter of Ganse*, 9 Paige (N. Y.) 416.

But the Petition Must Show that the alleged lunatic is the owner of property within the jurisdiction. *Matter of Fowler*, 2 Barb. Ch. (N. Y.) 305.

A Person Found a Lunatic by a Competent Jurisdiction Abroad may be considered a lunatic in the local forum. *Ex p. Gillam*, 2 Ves. Jr. 587; *Ex p. Lewis*, 1 Ves. 298; *Burke v. Wheaton*, 3 Cranch (C. C.) 341. See also *Matter of Perkins*, 2 Johns. Ch. (N. Y.) 124; *Matter of Neally*, (Supm. Ct. Spec. T.) 26 How. Pr. (N. Y.) 402.

Alleged Lunatic Without Property and Incarcerated under Sentence of Death. — A commission of lunacy will not be issued where the alleged lunatic has no property and is in prison under sentence of death. *Baughn v. Wiley*, 98 Ga. 364; *In re Clifford*, 57 N. J. Eq. 14.

1. **Appointment Has No Extraterritorial Force.** — *Rogers v. McLean*, 31 Barb. (N. Y.) 304; *Matter of Neally*, (Supm. Ct. Spec. T.) 26 How. Pr. (N. Y.) 402; *Matter of Petit*, 2 Paige (N. Y.) 174; *Weller v. Suggett*, 3 Redf. (N. Y.) 249. See also *Matter of Houstoun*, 1 Russ. 312.

The Jurisdiction in Lunacy Is Strictly Territorial, and a court of equity in *North Carolina* can neither charge the lunatic's land in another state nor its proceeds in the hands of his heir in the former state for his support. *Allison v. Campbell*, 1 Dev. & B. Eq. (21 N. Car.) 152.

Under the Act 1 Wm. IV., c. 65, § 34, the lord chancellor has no jurisdiction to deal with the property of one declared a lunatic in a foreign jurisdiction except in conformity with the laws of the country where the lunacy has been declared. *Newton v. Manning*, 1 Macn. & G. 362. See also *Matter of Graydon*, 1 Macn. & G. 655.

Conveyance of Lands. — An inquisition in a foreign jurisdiction is not sufficient to warrant the conveyance of a lunatic's land. There must be an inquisition and a finding in the jurisdiction where the land is situated. *Matter of Chandois*, 1 Sch. & Lef. 301; *Matter of Perkins*, 2 Johns. Ch. (N. Y.) 124; *Allison v. Campbell*, 1 Dev. & B. Eq. (21 N. Car.) 152.

Personalty. — In *Matter of Neally*, (Supm. Ct. Spec. T.) 26 How. Pr. (N. Y.) 402, the court refused to recognize a committee appointed in proceedings had in the state of *Iowa*, where both the committee and the lunatic resided, on an application by the committee for moneys to which the lunatic had become entitled under the will of his father, who died in the state of New York, where also the administrator was appointed and resided.

2. See *supra*, this title, *Appointment of Guardian — Character of Trust — Guardianship of Infants Distinguished*.

3. *Beverley's Case*, 4 Coke 123b, 16 Eng. Rul. Cas. 702.

More Authority Without Interest. — The grant of the custody of a lunatic's estate is a mere authority without an interest, and does not survive. *Ex p. Lyne*, Cas. t. Talb. 143.

Statement of Committee's Duties. — Lord Truro considered it to be "the duty of the committee to attend to the management of that [the lunatic's] estate and to keep the court informed of all that materially relates to it, and not to allow it to be administered without taking care that the court is fully apprised of what are the charges affecting it." *Matter of Skingley*, 3 Macn. & G. 230.

Authority to Committee to Act under Advice of Master. — The court would not, except in a very special case supported by affidavits, make a general order authorizing the committee of a lunatic's estate to act under the opinion and advice of the master in the management of the estate. *Matter of Cooper*, 1 Myl. & C. 33.

4. *Johnson's Appeal*, 71 Conn. 590; *Cooper v. Wallace*, 55 N. J. Eq. 192; *Van Horn v. Hann*, 39 N. J. L. 207. See also *Bolling v. Turner*, 6 Rand. (Va.) 584.

He cannot enter into contracts by which the funds or estate in his custody shall be charged except pursuant to the direction of the court. *Kent v. West*, 33 N. Y. App. Div. 112; *Pharis v. Gere*, 110 N. Y. 336; *Matter of Board of St. Opening, etc.*, 89 Hun (N. Y.) 528; *Matter of Otis*, 101 N. Y. 581.

5. *Stumph v. Pfeiffer*, 58 Ind. 472; *Tiffany v. Worthington*, 96 Iowa 560; *Interdiction of Onorato*, 46 La. Ann. 73. See generally the title **GUARDIAN AND WARD**, vol. 15, p. 50.

under the control and direction of the court which appointed him; ¹ and where his duty is a matter of doubt, it is his right to ask and receive the aid and direction of the court in the execution of his trust. ² So also where his power to act clearly exists, but is discretionary, he may ask the court for instructions as to the wisdom of exercising it in a particular manner. ³ If any part of the estate of a lunatic is liable to forfeiture or is held upon condition, it is the duty of his committee, if possible, to protect it from the forfeiture, to satisfy the condition, and when necessary to apply to the chancellor or court for directions. ⁴ The committee of an insane widow has no authority without the sanction of the court to elect for her whether she will take under the will of her deceased husband or against it; ⁵ but the court which appointed a committee of her estate has the power and right to make such election for her or to direct her committee to make it, under the instructions of the court. ⁶

3. Employment of Agents. — If the interest of the estate requires the employment of an agent or clerk, the court, upon the application of the committee, will authorize the employment, and the payment of a reasonable compensation for the services out of the income of the estate. ⁷

4. Expenditures for Lunatic — *a.* **HIS COMFORT FIRST CONSIDERATION.** — The lunatic should have every comfort of which his situation and fortune will admit, without any regard to the interests of those who may inherit his estate at his death. ⁸ It is no part of the committee's duty to diminish the reasonable comforts of his ward or to prevent him from enjoying such luxuries or indulging such tastes as would be allowable and proper in the case of a man similarly situated in other respects, but in the full possession of his faculties. ⁹ Where the estate of the lunatic is ample to maintain him and his household in the manner he had chosen for himself before his lunacy, and such maintenance is best adapted for his comfort and ease after his lunacy, the court should authorize the committee to expend a sufficient amount of his estate for that purpose. ¹⁰

b. **WHERE EXPENDITURES EXCEED INCOME.** — The annual allowances for the maintenance of the lunatic may exceed the income of his estate. ¹¹ But

1. Control of Court. — *State v. Jones*, 89 Mo. 470; *In re Heft*, 8 Pa. Dist. 351.

The Superintendence of the Conduct of the Committee Originated in the authority of the court itself, as being the court from which the commission issued, into which the inquisition was returned, and which made the grant founded thereon. *Matter of Fitzgerald*, 2 Sch. & Lef. 432.

2. Right to Seek Aid of Court. — *Cooper v. Wallace*, 55 N. J. Eq. 192; *Kearney v. Macomb*, 16 N. J. Eq. 180.

3. *Cooper v. Wallace*, 55 N. J. Eq. 192.

4. Estates upon Condition — Forfeiture. — *In re Hylton*, (1898) 2 Ch. 384. See also *Matter of Skingley*, 3 Macn. & G. 221.

5. Election to Take Under or Against Will. — *Kennedy v. Johnston*, 65 Pa. St. 451, 3 Am. Rep. 650.

6. *State v. Ueland*, 30 Minn. 277.

7. Employment of Agents. — *Matter of Brown*, 1 Macn. & G. 201; *Kent v. West*, 33 N. Y. App. Div. 118; *Matter of Livingston*, 9 Paige (N. Y.) 440.

The Foreign Guardian of a foreign lunatic may have an agent to receive money due to his ward, and payment to such agent will discharge the debtor *pro tanto*. *Ferneau v. Whitford*, 39 Mo. App. 311.

8. Lunatic's Comfort Prime Consideration. — *Ex p. Chumley*, 1 Ves. Jr. 296; *Brodie v. Barry*, 2 Ves. & B. 36; *Ex p. Whitbread*, 2

Meriv. 101; *Rudland v. Crozier*, 2 De G. & J. 143; *Dormer's Case*, 2 P. Wms. 262; *Ex p. Baker*, 6 Ves. Jr. 8; *Matter of Colah*, 3 Daly (N. Y.) 529; *Matter of Reed* (County Ct.) 18 Misc. (N. Y.) 285.

9. *Ames, J.*, in *May v. May*, 109 Mass. 256. To the same general effect are *Oxenden v. Compton*, 2 Ves. Jr. 69; *Ex p. Baker*, 6 Ves. Jr. 8; *Dormer's Case*, 2 P. Wms. 262; *Ex p. Whitbread*, 2 *Meriv.* 99; *In re Persse*, 3 Molloy 94; *Weid v. Tew*, Beatty 266; *Kendall v. May*, 10 Allen (Mass.) 59; *Matter of Salisbury*, 3 Johns. Ch. (N. Y.) 347; *Matter of Livingston*, 1 Johns. Ch. (N. Y.) 436; *Matter of Taylor*, 9 Paige (N. Y.) 611; *Matter of Willoughby*, 11 Paige (N. Y.) 259; *Matter of Heeney*, 2 Barb. Ch. (N. Y.) 326.

10. *Matter of Heeney*, 2 Barb. Ch. (N. Y.) 329; *Hambleton's Appeal*, 102 Pa. St. 50; *In re Heft*, 8 Pa. Dist. 351.

The jurisdiction of the Orphans' Court is the creature of statute, and such court has no authority to decide in advance what amount of the lunatic's personal property or of the profits of his realty shall be expended for his support by his guardian. *Potter v. Berry*, 56 N. J. L. 454.

11. Annual Allowances for Maintenance. — *In re Persse*, 3 Molloy 94; *Ex p. Stenard*, 18 Ves. Jr. 285; *Brown's Estate*, 1 W. N. C. (Pa.) 134.

The Estate of a Lunatic Being Exhausted, his committee may demand and enforce payment

as the guardian of a lunatic cannot sell the land of his ward without an order of the court, it follows that he cannot, without the permission of the court, exceed the annual income of the estate in such expenditures.¹ Consequently, when a guardian finds that the income of the ward's estate is not sufficient for his maintenance, it is his duty to submit the whole matter to the consideration of the court, and to act under its directions; if he proceeds otherwise, he acts upon his own responsibility and at his peril.²

c. PROPERTY WITHIN JURISDICTION — PRIMARY FUND. — Where a lunatic has property in the hands of his committee appointed in the jurisdiction of his residence, that property is the primary fund for his support, and should be first applied for that purpose by the committee who has the control of his person, before resorting to his property in another jurisdiction.³ But the committee of the estate of a lunatic who resides in a foreign jurisdiction may be authorized to make such further provision for his support as he may think necessary or proper, when he is satisfied that the estate of the lunatic in the hands of his committee in the jurisdiction of his residence has been exhausted.⁴

d. TRAVELING EXPENSES. — If the ward's health requires it and his estate can bear the expense, he may be permitted to travel, even beyond the jurisdiction of the court.⁵

e. WARD'S CHARITABLE ENTERPRISES. — The committee may be authorized by the court to place at the lunatic's disposal, so long as he is competent to judge of the claims of applicants, small sums of money for purposes of charity; and the committee may also be authorized to pay for the support of the institutions of religion in the church where the lunatic and his family were accustomed to worship at the time when his mental faculties became impaired, such sums as the lunatic may from time to time desire him to pay, not exceeding an annual sum named by the court as that which the lunatic had been accustomed to pay for such purposes while he was in possession of his mental faculties. But the court cannot authorize the committee to be the almoner of the general charities of the lunatic.⁶

5. Support and Maintenance of Lunatic's Family and Relatives — *a. LUNATIC'S WIFE AND CHILDREN.* — The lunatic is chargeable with the maintenance of his own family; accordingly, after his own needs are provided for, persons for whom he is legally bound to provide are entitled to be cared for out of the income of his estate.⁷

of a sum necessary for the lunatic's support from the executors and legatees of a testator who imposed this charge on such a contingency. *Ashley v. Holman*, 44 S. Car. 145.

1. Permission of Court to Exceed Annual Income. — *Patton v. Thompson*, 2 Jones Eq. (55 N. Car.) 412; *Kennedy v. Johnston*, 65 Pa. St. 451, 3 Am. Rep. 650.

2. *Patton v. Thompson*, 2 Jones Eq. (55 N. Car.) 413; *Kennedy v. Johnston*, 65 Pa. St. 455, 3 Am. Rep. 650.

3. Property Within Jurisdiction Primary Fund. — *Matter of Taylor*, 9 Paige (N. Y.) 611.

4. *Matter of Taylor*, 9 Paige (N. Y.) 619.

The Court Cannot Send the Estate of an Insane Person Out of Its Jurisdiction, but where the lunatic resides in another state and has a guardian in such other state, the court may make an annual allowance for his maintenance to be paid to the guardian abroad. *McNeely v. Jamison*, 2 Jones Eq. (55 N. Car.) 186.

Where a Lunatic Has Been Supported at State Expense, the court, on petition or bill by the attorney for the commonwealth, may decree in behalf of the commonwealth, out of the profits of the lunatic's estate, against the person hav-

ing his estate, the past expenses of keeping such lunatic, though residing in a different county from that in which the inquisition is taken, process being served on the lunatic in the county where suit is brought. *Coleman v. Lunatic Asylum*, 6 B. Mon. (Ky.) 241.

5. Traveling Expenses — Going Beyond Jurisdiction. — *Matter of Colah*, 3 Daly (N. Y.) 540.

In *In re Halkett*, 3 Ir. Ch. 375, the lunatic was transferred from Ireland to England. It was beyond the jurisdiction of the chancellor having custody of his person, but the jurisdiction of each chancellor was a part of the prerogative of the same sovereign. See also *Matter of Houston*, 1 Russ. 312; *Matter of Jones*, 1 Phil. 461.

6. Charitable Enterprises. — *Matter of Heeney*, 2 Barb. Ch. (N. Y.) 326. See also *In re Strickland*, L. R. 6 Ch. 226.

7. Support of Lunatic's Family. — *Bird v. Leffevre*, 4 Bio. C. C. 100; *Conduit v. Soane*, 5 Myl. & C. 111; *Nettleship v. Nettleship*, 10 Sim. 236; *Edwards v. Abrey*, 2 Phil. 37; *Jones v. Bruce*, 11 Sim. 221; *Matter of Latham*, 4 Ired. Eq. (39 N. Car.) 235; *Brooks v. Brooks*, 3 Ired. L. (25 N. Car.) 389.

Support and Care of Wife. — The husband is liable for the support of his wife, and his insanity does not relieve him from that obligation. His committee should therefore provide for her support out of his estate.¹ She is entitled to medical attention when ill, and the physician who renders it upon the request of the committee of the insane husband is entitled to compensation out of his estate in the hands of his committee;² and in case of her death the committee of her husband is justified in paying her funeral expenses though she had a separate estate and left a will providing for the payment of her debts and funeral expenses.³

Children. — Allowances should likewise be made for the maintenance and support of the lunatic's children.⁴

Marriage Portion. — An allowance may be made out of the estate of a lunatic as a marriage portion for his daughter and to pay for her outfit on her marriage;⁵ but it seems that such allowance should not be made unless the daughter makes a settlement of her property to be approved by the court.⁶

b. LUNATIC'S STEPCHILDREN. — Chancellor Walworth considered it competent for a court of chancery to direct an allowance for the support of the lunatic's stepdaughter, provided the income of the estate was more than enough for the wants of the lunatic and of those who had a legal claim upon him, and it being made to appear to the satisfaction of the court that the lunatic himself would have made provision for her were he legally competent to do so.⁷

c. LUNATIC'S ADOPTED CHILDREN. — The court may make an allowance out of the income of a lunatic's estate for the education of persons whom he had adopted as children while he was in a sound state of mind.⁸

d. LUNATIC'S ILLEGITIMATE CHILDREN. — An allowance may be made out of a lunatic's estate for his illegitimate children, but not for their mother.⁹

1. Support of Wife. — *In re Stewart*, (N. J. 1891) 22 Atl. Rep. 122; *Matter of Taylor*, 9 Paige (N. Y.) 619. See also *Exeter v. Ward*, 2 Myl. & K. 54; *Steed v. Calley*, 2 Myl. & K. 52; *Hallett v. Hallett*, 8 Ind. App. 305.

A husband is liable for necessities supplied to his wife during the period of his lunacy. *Read v. Legard*, 6 Exch. 636; *Matter of Wood*, 1 De G. J. & S. 465.

Where the Wife of a Lunatic Has Sued for a Divorce from him, the dismissal of her suit and the disallowance of alimony will not deprive her and her family of the right to support from his estate. *Tiffany v. Worthington*, 96 Iowa 560.

In North Carolina, under sections 2273, 2274, and 2278 of the Code, a wife who lives in the mansion house of her insane husband has the right to remain there and to use such supplies as may have been provided for his family, or a sufficient quantity of them to maintain her and her family according to their condition in life, as determined by the situation and resources of the husband. *In re Hybart*, 119 N. Car. 359.

2. Medical Attendance. — *Booth v. Cottingham*, 126 Ind. 433.

3. Wife's Funeral Expenses. — *In re Stewart*, (N. J. 1891) 22 Atl. Rep. 122.

4. Children. — *Foster v. Marchant*, 1 Vern. 262.

Chancellor Walworth said the court would, when the estate would warrant it, make allowances "almost as a matter of course in reference to the children of the lunatic or other descendants who are presumptively entitled to his estate in case of his death, and where

there is but little or no hope of his recovery." *Matter of Willoughby*, 11 Paige Ch. (N. Y.) 257.

Adult Children — Hotchpot. — Continuing, the same learned judge said: "My present recollection is that in all those cases I required the adult children, who were competent to support themselves, to give a stipulation that the amounts advanced to them respectively should be brought into hotchpot upon the death of the lunatic, if any part of his personal estate should come to them under the statute of distributions. This principle, of considering the allowance as an advance, to be brought into hotchpot in distribution, has not, however, been extended to children of the lunatic who were sickly or decrepit so as to give them a special claim upon the estate of the lunatic for a support."

5. Daughter's Marriage Portion. — *Matter of Drummend*, 1 Myl. & C. 627. In a note to this case it was said: "Orders of a similar kind, on the marriage of the daughters of lunatics, have been made in several recent cases." *Citing Matter of Baker*, March 25, 1830; *Matter of Craver*, April 8, 1830; *Matter of Goldsmid*, March 12, 1835.

6. Ex p. Fowler, 6 Jur. 431; *Matter of Drummend*, 1 Myl. & C. 627.

7. Stepchildren. — *Matter of Willoughby*, 11 Paige (N. Y.) 257.

8. Adopted Children. — *Matter of Heeney*, 2 Barb. Ch. (N. Y.) 326.

9. Illegitimate Children and Their Mother. — *Ex p. Haycock*, 5 Russ. 154.

In re Jodrell, Shelf. on Lunacy 161, Lord Lyndhurst made an allowance out of the estate for the education of a natural child of a lunatic.

e. LUNATIC'S COLLATERAL KINDRED — **Power to Order Allowance.** — The court of chancery has the power to provide out of the surplus income of the estate of a lunatic for the support of one who is not his next of kin, and whom the lunatic is under no legal obligation to support, where the chancellor is satisfied beyond all reasonable doubt that the lunatic himself would have provided for the support of such person if he had remained of sound mind so as to be legally competent to do so.¹

But Great Caution Should Be Exercised in respect to making allowances to the relatives of a lunatic for whom he is not legally bound to provide;² and in several cases it has been said that the practice ought rather to be narrowed than extended.³

The Amount and Proportions of such allowances, when made, are entirely within the discretion of the court.⁴

Principle Upon Which Court Acts. — In all such cases the court should see what the lunatic would himself do if he were sane, and act accordingly.⁵

f. LUNATIC'S BROTHER'S ILLEGITIMATE CHILDREN. — The court refused to make an allowance for the illegitimate children of a deceased brother of a lunatic, to whose support he would probably have contributed if he had remained sane.⁶

g. LUNATIC'S PERSONAL SERVANTS. — In one instance an annuity was allowed as a retiring pension to an old personal servant of the lunatic who was, by reason of the infirmities of old age, compelled to retire from his service.⁷

6. Sales, Transfers, and Incumbrances — *a.* GENERAL RULES. — In cases of lunacy the first care of the court, as has been already stated, is the maintenance of the lunatic; and after that, it is a rule not to vary or charge the prop-

1. Rule as to Collateral Kindred. — Walworth, C., in *Matter of Heeney*, 2 Barb. Ch. (N. Y.) 328. See also *In re Creagh*, 1 Dr. & Wal. 323.

Brothers and Sisters. — In *Ex p. Whitbread*, 2 Meriv. 102, Lord Eldon said: "Where a large property devolves upon an elder son, who is a lunatic, as heir at law, and his brothers and sisters are slenderly or not at all provided for, the court will make an allowance to the latter for the sake of the former; upon the principle that it would naturally be more agreeable to the lunatic, and more for his advantage, that they should receive an education and maintenance suitable to his condition, than that they should be sent into the world to disgrace him as beggars."

Nephews. — In *Matter of Blair*, 1 Myl. & C. 300, the court, with considerable reluctance, made an allowance out of the income of a female lunatic for the better maintenance of her nephews. For a case where an allowance was made to a nephew who was tenant in tail in remainder of estates of which his insane uncle was tenant for life, upon the terms of the estate being charged with the repayment of the amounts received, see *In re Sparrow*, 20 Ch. D. 320.

Cousins. — In *In re Croft*, 32 L. J. Ch. 481, the court made an allowance for the first cousin of a lunatic, the other next of kin consenting.

An allowance was refused to an aged clergyman, a first cousin and one of the next of kin of the lunatic, who was reduced to indigence by unavoidable misfortune, it not being shown that the lunatic had ever known of his existence, or done anything for him, or expressed an intention in his favor. *In re Evans*, 21 Ch. D. 297.

In one instance weekly allowances were

directed in favor of six needy cousins who were supposed to be the next of kin of the lunatic, it appearing that they were very poor, that the lunatic had expressed an intention in their favor, and that the income of the estate far exceeded the wants of the lunatic. *In re Frost*, L. R. 5 Ch. 699. See also *In re MacKenzie*, 43 L. T. N. S. 681.

A first cousin who was partially and voluntarily supported by a person when in his right mind is not dependent upon him within the meaning of section 2274 of the *North Carolina Code* so as to be entitled to support from his estate when declared a lunatic. *In re Hybart*, 119 N. Car. 359.

2. Such Allowances to Be Made with Caution. — *Matter of Blair*, 1 Myl. & C. 303; *Ex p. Whitbread*, 2 Meriv. 99; *In re Clarke*, 2 Phil. 282.

3. See especially *In re Evans*, 21 Ch. D. 297; *In re Clark*, 2 Phil. 282.

4. Amount and Proportions Discretionary with Court. — *Ex p. Whitbread*, 2 Meriv. 99; *In re Creagh*, 1 Dr. & Wal. 323.

5. Principle of Court's Action. — *Ex p. Whitbread*, 2 Meriv. 99; *In re Feak, Shelf*, on Lunacy 160; *In re Jodrell, Shelf*, on Lunacy 161; *Matter of Blair*, 1 Myl. & C. 300; *Matter of Carysfort, Cr. & Ph.* 76; *Matter of Willoughby*, 11 Paige (N. Y.) 259; *Matter of Heeney*, 2 Barb. Ch. (N. Y.) 328.

6. Brother's Illegitimate Children. — *In re Grove*, 13 L. J. Ch. 202.

7. Servants. — *Matter of Carysfort, Cr. & Ph.* 76. Lord Cottenham considered the case a worthy one, and the committees "were satisfied that the allowance was one which the lunatic, if he should ever recover, would approve." It was conceded, however, that there was no precedent for it.

erty of the lunatic so as to effect any alteration as to the succession to it.¹

b. OF PERSONAL PROPERTY—(1) In General.—In the absence of any statutory restraint in that regard it seems that the committee of a lunatic may sell and transfer the personal property of his ward without license from any judicial tribunal when in his judgment such sale will be advantageous to the lunatic;² but it is the safer and perhaps the usual course to make application to the court having jurisdiction of the lunacy proceedings for an order authorizing such sales; and this of course must be done where the statute requires it.³

(2) For Payment of Debts.—The court will not make an order for the payment of the lunatic's debts out of funds not within the reach of his creditors, except for his accommodation where it clearly appears that he will have a sufficient maintenance left;⁴ and according to the early *English* cases the court would make no provision for the payment of his debts out of any fund, if the result would be to leave him destitute.⁵ Still, the court will not refuse to assist creditors when assistance can be given without prejudice to the lunatic.⁶

c. OF REAL ESTATE—(1) Power to Sell—(a) General Rules.—In England the power of the committee to sell the land of his ward, even for the payment of his debts, by direction of the chancellor, did not exist until conferred by statute in the year 1803.⁷ Under a recent statute the judge may direct that any property of the lunatic, whether present or future, be sold, charged, mortgaged, dealt with, or disposed of as he thinks most expedient for the purpose of raising or securing, or repaying with or without interest, money which is to

1. Succession Should Not Be Altered.—Rules in lunacy derived from the statute 17 Edw. II. See *Weld v. Tew*, Beatty 268; *Sergeson v. Sealey*, 2 Atk. 413; *Ex p. Annandale*, Ambl. 81; *Ex p. Grimstone*, Ambl. 707.

Stop Order on Estate.—The court refused to make an order in the nature of a stop order on the lunatic's estate in favor of an assignee of his next of kin. *In re Wilkinson*, L. R. 10 Ch. 73, *overruling* *Matter of Pigott*, 3 Macn. & G. 263.

Specific Legacy.—Where it appeared that the lunatic when sane, had bequeathed certain furniture to a particular individual, the court refused to defeat the intention thus manifested by ordering the sale of the furniture notwithstanding the committee had reported that the sale would be beneficial to the estate. *Ex p. Haycock*, 5 Russ. 154. Compare *Jones v. Green*, L. R. 5 Eq. 555.

2. May Sell Personality.—*Holden v. Scudder*, 58 Fed. Rep. 932; *Ellis v. Essex Merrimack Bridge*, 2 Pick. (Mass.) 243; *Strong v. Strauss*, 40 Ohio St. 87.

3. In re Freer, 22 Ch. D. 622; *Matter of Weaver*, 2 Myl. & C. 441; *McLean v. Breese*, 109 N. Car. 566; *Adams v. Thomas*, 81 N. Car. 296, 83 N. Car. 521.

4. Payment of Lunatic's Debts.—*Ex p. Hastings*, 14 Ves. Jr. 182; *Tally v. Tally*, 2 Dev. & B. Eq. (22 N. Car.) 385, 34 Am. Dec. 407; *Matter of Latham*, 4 Ired. Eq. (39 N. Car.) 231; *McLean v. Breese*, 109 N. Car. 566; *Adams v. Thomas*, 81 N. Car. 296, 83 N. Car. 521.

By order of the court the guardian may rightfully sell the personal property of the lunatic for the payment of his debts, provided there is no fraud in the proceeding. *Howard v. Thompson*, 8 Ired. L. (30 N. Car.) 367.

In *North Carolina* the court of probate has no power to sell property for, or to order the payment of, debts contracted prior to the

lunacy, or to entertain a suit at the instance of such creditors. Such jurisdiction remains in the superior courts, where it was always lodged, on the equity side at least. *Blake v. Respess*, 77 N. Car. 193; *Smith v. Pipkin*, 79 N. Car. 569.

Community Property.—The wife of an insane person cannot authorize the sale of community property to pay antecedent debts of her husband. *Cason v. Laney*, (Tex. Civ. App. 1894) 27 S. W. Rep. 420; *Heidenheimer v. Thomas*, 63 Tex. 289.

5. Ex p. Dikes, 8 Ves. Jr. 79; *Ex p. Smith*, 5 Ves. Jr. 556; *Ex p. Hastings*, 14 Ves. Jr. 182.

6. In re Shaw, 14 Grant Ch. (U. C.) 524.

7. Power to Sell Lands—In England.—Stat. 43 Geo. III., c. 75, § 4.

To Prevent Bill by Creditors.—The lord chancellor could not, upon a petition in lunacy, order that part of the lunatic's real estate be sold for payment of his debts, in order to prevent a bill by his creditors. *Ex p. Smith*, 5 Ves. Jr. 556; *Ex p. Dikes*, 8 Ves. Jr. 79.

Title to Leasehold.—Neither could the chancellor, by an order in lunacy, make an absolute title to the lunatic's leasehold estate. *Ex p. Dikes*, 8 Ves. Jr. 79.

Sales of Copyhold Estates of lunatics were not authorized by the statute 43 Geo. III., c. 75. *Ex p. Birch*, 3 Swanst. 98.

But the statute 59 Geo. III., c. 80, § 2, extends the power of sale to estates held by ancient demesne or copy of court roll. See 3 Swanst. 98, note.

Where a Lunatic Took as Devisee an estate charged by the will with the payment of the testator's debts, the court had power to order a sale of the land to pay such debts in case there was not sufficient personal property to pay them. *Williams v. Whinyates*, 2 Bro. C. C. 399.

be or which has been applied to the payment of the lunatic's debts or engagements; the discharge of any incumbrance on his property; the payment of any debt or expenditure incurred for the lunatic's maintenance or otherwise for his benefit; or the payment of or provision for the expenses of his future maintenance; and the judge may, by order, authorize and direct the committee of the estate of a lunatic, *inter alia*, to sell any property belonging to the lunatic.¹

In the United States it has been held that it is competent for the chancery court, under its general powers over the estates of lunatics, to order the sale of a lunatic's land for his support and maintenance, or for the reimbursement of the committee for moneys expended by him in supporting the lunatic.² It is now very generally provided by statute that when necessity or the prudent management of the estate requires the sale of a lunatic's land, it may be sold with the sanction of the court in the manner provided in such statutes.³ But a court of equity has no jurisdiction to decree a sale of the estate of a

1. Recent English Statutes. — Lunacy Act 1890, §§ 117, 120; *In re Ware*, (1892) 1 Ch. 344.

The Court May Sanction a Sale of a Lunatic's Real Estate in Consideration of a Perpetual Rent Charge. *In re Ware*, (1892) 1 Ch. 344.

Exchange of Lands. — Under the Lunacy Regulation Act of 1853, 16 & 17 Vict., c. 70, § 124, it was held that the court had power to make an exchange of the land of a lunatic without the mines and minerals under it. It appeared that a conveyance of the minerals would cause great inconvenience, and that the proposed exchange was quite in accordance with the custom of the country. *In re Dicconson*, 15 Ch. D. 316.

Reconveyance. — Under the statute 1 Wm. IV., c. 60, § 3, the committee *ad interim* could not be empowered to reconvey land of which the lunatic was found to be mortgagee. *Matter of Poulton*, 1 Macn. & G. 100.

Committee Empowered to Concur in Deeds of Partnership Property. — In one case the court empowered the committee of an insane partner, with the sanction of the master in lunacy, to concur in all deeds of the partnership property which should have been executed by the other partners. *Lawrie v. Lees*, 14 Ch. D. 249.

Tenant in Tail in Remainder of Stock Authorized to Dispose Thereof. — Under the statute 3 & 4 Wm. IV., c. 74, the lord chancellor, as protector under the act for the abolition of fines and recoveries, made an order to enable a *quasi* tenant in tail in remainder of a sum of stock, of which the tenant for life was a lunatic, to dispose of the fund. *Grant v. Yea*, 3 Myl. & K. 245. But Lord Cottenham refused to make such an order where the object was to give a benefit to the husband of one member of the lunatic's family at the expense of another member. *Matter of Newman*, 2 Myl. & C. 112.

Where the Tenant in Tail in Possession Is a Lunatic, the lord chancellor has authority under the statute 3 & 4 Wm. IV., c. 74, to permit the first tenant in tail in remainder to bar the subsequent limitations, on a proper case being made out for the exercise of such authority. *Matter of Blewitt*, 6 De G. M. & G. 187, *overruling In re Wood*, 3 Myl. & C. 266, and *Matter of Blewitt*, 3 Myl. & K. 250. See also *In re Pares*, 12 Ch. D. 333.

2. Power of Sale — In United States. — *Dodge v. Cole*, 97 Ill. 338, 37 Am. Rep. 111.

3. Statutes. — See *Matter of Leary*, 50 N. J.

Eq. 383; *Matter of Dunn*, 64 Hun (N. Y.) 18, 22 Civ. Pro. (N. Y.) 118; *Fitzwilliams v. Davie*, 18 Tex. Civ. App. 81. See also the statutes of the various states, and see the cases cited in this section of this title.

For the manner of proceeding to sale, see to ENCYC. OF PL. AND PR., title INSANE PERSONS, p. 1233 *et seq.*

Effect of Supersedeas of Commission. — Under the Kentucky statute, the court has ample power to entertain the suit of a committee of a lunatic for the sale of his estate for the payment of his debts. And where the court has rightfully acquired jurisdiction in such proceedings, a subsequent supersedeas of the commission and a restitution of the lunatic to the control of his estate will not deprive the court of its authority to sell his property to pay his debts. *Salter v. Salter*, 6 Bush (Ky.) 624.

When Persons of Unsound Mind Are Seized of Lands in Trust, the guardian or committee may convey under orders of a court of chancery. *Boyce v. Prichett*, 6 Dana (Ky.) 231.

Married Women. — The Illinois statutes of 1845 and 1853 were held applicable to insane married women, notwithstanding the common law governing the rights of married women obtained in this state at the time of their enactment. *Gardner v. Maroney*, 95 Ill. 552.

Nonresidents. — The Illinois Act of 1853 has no reference whatever to nonresident owners. It applies only to cases where the insane person and his conservator reside in the state. Sales by nonresident conservators are authorized by the Act of 1865. *Wing v. Dodge*, 80 Ill. 564.

Public Sale — Notice. — In Pennsylvania the Court of Common Pleas may authorize the committee of a lunatic to sell at public sale, or mortgage, his real estate for the payment of his debts, the maintenance of his family, and the education of his minor children; but it has no power to decree a private sale for any purpose, and no jurisdiction to entertain a petition therefor. And it is requisite to the court's jurisdiction that it appear upon the face of the petition that notice to the wife, if any, and the next of kin of the lunatic had been given as required by statute. *Bennett v. Hayden*, 145 Pa. St. 586.

In Maryland the court has power under the statute (now Pub. Gen. Laws 1888, art. 16,

lunatic for his maintenance and support, or to effect a change of investment, until his lunacy has been established by the inquisition of a jury, and a guardian, committee, or trustee to take charge of his person and estate has been appointed according to law; and the application for such sale must be made by the guardian, committee, or trustee of the lunatic.¹

(b) **For Support and Maintenance.** — The personal property of a lunatic is the primary fund for his support and that of his family, and the general rule is that his real estate cannot be sold for that purpose until his personal estate is exhausted.²

(c) **For Better Investment.** — A court of equity has no inherent jurisdiction to decree the sale of a lunatic's lands for the purpose of better investment.³

(d) **For Payment of Taxes.** — Where there are no funds in the hands of the committee to pay taxes on the lunatic's real property the court may order it or a portion of it to be sold to pay the taxes.⁴

(e) **Real Estate of Insane Married Women.** — The real estate of an insane married woman during her coverture and insanity can be charged with indebtedness only to the same extent as if she were not insane, and neither her committee nor a court of equity can subject the *corpus* of such real estate to debts or claims with which it would not be chargeable if she were sane.⁵ But in *Illinois* it cannot be objected to a conveyance by her conservator that there could

§ 103) to decree the sale of the real property to pay necessary expenses incurred by the committee for the support and maintenance of the lunatic, without exposing him to the expense and delay incident to a regular chancery proceeding. *Matter of Dorney*, 59 Md. 68. See *Willis v. Hodson*, 79 Md. 330, set out *infra*, in the subdivision *For Better Investment*.

Death of Lunatic Pending Distribution of Proceeds. — Where the real estate of a lunatic is sold under the provisions of the *Pennsylvania* Act of June 13, 1836, § 22, P. L. 597, and the lunatic dies pending the distribution by an auditor of the fund arising therefrom, the proceeding is not stayed or the course of distribution altered by the lunatic's death. *Wheatland's Appeal*, 125 Pa. St. 38.

Proceeds Trust Fund for Purposes for Which Sale Ordered. — The committee is but the receiver of the court as to the proceeds of the real estate sold, and the fund, when it comes into his hands, is a trust fund applicable in the first instance to the specific purpose for which it was raised. *Wheatland's Appeal*, 125 Pa. St. 38.

Estates for Life May Not Be Sold under Statute Authorizing Sale of Fee Simple. — A statute authorizing the sale of land of which a lunatic is seized in fee simple does not apply to estates of which he is tenant for life. *In re Corbett*, L. R. 1 Ch. 516.

The Committee Has No Power to Change the Manner of Payment of the purchase price prescribed in the order of sale without first obtaining permission of the court. *Walrath v. Abbott*, 75 Hun (N. Y.) 445.

Accepting Worthless Security. — If the committee, in violation of an order of the court, accepts a worthless security in payment of the purchase price of the property of the lunatic, the latter's heirs at law will, after his death, have an equitable lien on the property sold, which they may enforce by foreclosure and sale. *Walrath v. Abbott*, 75 Hun (N. Y.) 445.

Oil and Natural Gas are a part of the realty in which they exist, and if they belong to a luna-

tic his committee can sell or lease them only by decree of court, as in other sales of his realty. *South Penn Oil Co. v. McIntire*, 44 W. Va. 296.

1. Previous Finding of Lunacy Requisite. — *Hamilton v. Traber*, 78 Md. 26, 44 Am. St. Rep. 258.

Under the Settled Land Act of 1882, the court has no power to dispose of the life estate of a lunatic until he is so found by inquisition and a committee of his estate is appointed. *In re Baggs*, (1894) 2 Ch. 416, note.

But under the Lunacy Act of 1890, section 120, the *quasi* committee appointed to manage the estate of a person who through mental infirmity is incapable of managing his own affairs may be authorized to sell a settled life estate of such person. *In re X*, (1894) 2 Ch. 415.

2. Personality the Primary Fund for Support. — *Matter of Pettit*, 2 Paige (N. Y.) 596; *Matter of Hoag*, 7 Paige (N. Y.) 312; *Matter of Heller*, 3 Paige (N. Y.) 203. See the preceding subdivision.

Direction of Court Necessary. — *Patton v. Thompson*, 2 Jones Eq. (55 N. Car.) 412; *Kennedy v. Johnston*, 65 Pa. St. 451, 3 Am. Rep. 650.

3. Sale for Better Investment. — *Clark v. Mathewson*, 7 App. Cas. (D. C.) 382; *Matter of Pettit*, 2 Paige (N. Y.) 596.

Statutes. — In *Maryland* the power of the court to sell for better investment is derived from sections 98, 100, and 124, art. 16, of the Code. And to give jurisdiction to the court there must be a summons and a return of the summons "as served," in the case of a resident of the state, or in the case of a nonresident there must be "proof of due publication of the order of publication." *Willis v. Hodson*, 79 Md. 327. See *Matter of Dorney*, 59 Md. 68, set out *supra*, in the subdivision *General Rules*.

4. Payment of Taxes. — *Matter of Dorney*, 59 Md. 67; *Willis v. Hodson*, 79 Md. 327. See generally the title **TAXATION**.

5. Dickel v. Smith, 38 W. Va. 635. See the title **SEPARATE PROPERTY OF MARRIED WOMEN**.

be no conveyance by her, even of her separate estate, without joining with her husband, for the statutes in reference to conveyances by married women have no relation whatever to conveyances by conservators. The latter are governed entirely by the statute in relation to idiots and lunatics.¹

(2) *Subject to Existing Liens—Guardian's Covenants.*—The committee must sell the lunatic's real estate subject to all outstanding liens and incumbrances thereon; and a bond executed by him conditioned to remove such liens will not bind the lunatic's estate.²

Covenants.—Neither has he any power to bind the estate of his ward by covenants in his deed; such covenants, if valid at all, bind the committee personally and not the estate which he represents.³

(3) *Under Existing Mortgage or Trust Deed.*—If the owner of real property makes a valid mortgage or trust deed and afterwards becomes insane, his insanity will not affect a subsequent sale of the land under the power of sale in such instrument.⁴

Real Estate Held by Lunatic in Trust.—But equity has no power to order the guardian of a lunatic, on a bill by the guardian to which his ward is not a party, to transfer real estate which the lunatic held in trust, to the beneficiaries or their nominees.⁵

(4) *Partition Sales.*—The estate of a lunatic may be transferred to another by means of proceedings in partition, for it could not be endured that the insanity of one cotenant should prevent the rest, for an indefinite time, from having their estate in severalty.⁶

(5) *Leases*—(a) **Inherent Power of Court.**—The committee of a lunatic cannot make leases or in any way encumber the lunatic's estate without special order of the court, where the profits are not sufficient to maintain the lunatic;⁷ and unless empowered by statute the court cannot make or authorize a lease of a lunatic's land to extend beyond the period of lunacy, for the tenant may be ejected by the lunatic if he recovers.⁸

(b) **Statutory Authority.**—This matter is now quite generally regulated by statutes which provide that the committee may, when such course appears to be for the lunatic's interest, apply to the court for leave to lease the whole or

1. *Gardner v. Maroney*, 95 Ill. 552.

2. **Liens.**—*Person v. Merrick*, 5 Wis. 231.

3. *Person v. Merrick*, 5 Wis. 231. See generally the title COVENANTS, vol. 8, p. 43.

4. **Mortgage or Trust Deed.**—*Lundberg v. Davidson*, 72 Minn. 49; *Vanmeter v. Darrah*, 115 Mo. 153; *Meyer v. Kuechler*, 10 Mo. App. 371.

Mortgage in Pursuance of Agreement Made Prior to Insanity.—So it may be immaterial that a mortgagee was not sane at the date of the execution of a mortgage executed in strict pursuance of a valid written agreement made by him when he was sane. *Bevin v. Powell*, 83 Mo. 365.

5. *Cooper v. Wallace*, 55 N. J. Eq. 192.

6. **Partition.**—*In re Barker*, 17 Ch. D. 241; *Snowden v. Dunlavey*, 11 Pa. St. 525.

Conveyance of Lunatic's Undivided Share.—See *Matter of Bloomer*, 2 De G. & J. 88, where, under the Trustee Act 1850, and the Lunacy Regulation Act 1853, the lords justices considered themselves authorized to direct the committee to convey the lunatic's undivided share according to the partition.

But the Lunatic Must Be Brought Before the Court in some proper form, and any irregularity in bringing him in may be cured by a subsequent amendment. *Rogers v. McLean*, 34 N. Y. 536.

Proceeds Subject to Same Uses as Estate Before

Sale.—Where partition was ordered the court directed that the proceeds of the sale should be subject to the same uses as the lunatic's estate was subject to before the sale. *In re Pares*, 12 Ch. D. 333.

7. **Leases.**—*Foster v. Marchant*, 1 Vern. 262; *Drury v. Fitch*, Hutt. 16; *Blewitt's Case*, Ley 47; *Beverley's Case*, 4 Coke 127; *Knipe v. Palmer*, 2 Wils. C. Pl. 130.

A *South Carolina* case contains a dictum that "the only restraint imposed upon the committee operates to prevent their binding the lunatic after his restoration, and that letting out the land from year to year is no violation of the rule." *De Treville v. Ellis*, Bailey Eq. (S. Car.) 35, 21 Am. Dec. 518.

Agreement by Committee to Lease.—The committee's agent agreed with C. to loan to the latter a part of the ward's estate. No formal agreement was signed, nor was the sanction of the master in lunacy applied for, but C. entered into possession with the knowledge of the committee and expended a considerable sum in improvements. The court ordered the committee to grant a lease in accordance with the terms settled between C. and the agent, saying that the court would do on behalf of a lunatic what a just and reasonable owner would do. *In re Wynne*, L. R. 7 Ch. 229.

8. **Period of Lease.**—*Ex p. Dikes*, 8 Ves. Jr. 80; *Matter of Starkie*, 2 Russ. 197.

such part of his estate as may, under the circumstances, be deemed most advantageous to him.¹

(c) **Renewal of Leases — Where Lunatic Is Lessee — Form of Lease.** — Where a lease was renewed for the benefit of the lunatic's estate Lord Eldon said that if the lease was at the time of the lunacy made to some other person in trust for the lunatic, he should continue it so, as in that case he should not change the estate; but if the lease was in the lunatic himself, and only taken out of him by the act of the court, the new lease ought to be made to the lunatic himself, and not to his committee.²

Old Tenants to Be Preferred. — In an early case it was said that the court possesses the discretion of a landlord in the management of the real estate of lunatics and infants, and should exercise it in making lettings, to give a preference to the old tenants.³

(6) **Mortgages.** — Under the rule restraining the committee of a lunatic from encumbering his ward's estate, the committee had no power to mortgage any part of the lunatic's real estate;⁴ but modern statutes usually provide that such real estate may be mortgaged by order of the court when it appears to be necessary or expedient in the prudent management of the estate.⁵

(7) **Extinguishment of Dower.** — An Insane Wife cannot release her dower rights.⁶

Nor Has Her Committee the power to execute any instrument which would

1. Statutory Authority as to Leases — England. — A person appointed under section 116 of the Lunacy Act 1890, to act as committee of the estate of a person lawfully detained as a lunatic, though not so found by inquisition, may by leave of a judge exercise the power of leasing vested in the lunatic as tenant for life under the Settled Land Act of 1882. *In re Salt*, (1896) 1 Ch. 117. See also *In re Ray*, 25 Ch. D. 464.

Connecticut. — The conservator of an idiot is not empowered by virtue of his office to make a lease of his ward's real estate where the statute has given such power to the court exclusively. *Treat v. Peck*, 5 Conn. 280.

If, under such circumstances, the committee leases his ward's land without the sanction of the court, his lessee is merely a tenant at will; and if he commits waste he becomes a trespasser *ab initio*, and the lunatic, being the general owner of the land, may maintain trespass *quare clausum fregit* against him. *Treat v. Peck*, 5 Conn. 280.

But now in that state, under Laws 1885, c. 110, §§ 81, 84, conservators of lunatics have power to make leases for a reasonable time of the real estate of their wards. *Palmer v. Cheseboro*, 55 Conn. 114.

New York. — In this state, if a lease is necessary to accomplish specified results, the court is expressly authorized to order it. Laws 1874, c. 446, p. 571; Code Civ. Pro., § 2338 *et seq.* But neither at common law nor under this statute has the committee any authority to lease his ward's estate without an order of the court. *Pharis v. Gere*, 110 N. Y. 336; *Agricultural Ins. Co. v. Barnard*, 96 N. Y. 525.

Pennsylvania. — If, in the judgment of the committee, the interest of the lunatic and his family will best be promoted by leasing the whole or a part of the homestead and providing for his wife and family elsewhere, he should represent the facts to the court and ask for instructions. *Shaffer v. List*, 114 Pa. St. 486.

2. Ex p. Jermyn, 3 Swanst. 131.

3. In re Ball, 1 Molloy 141.

Abatement of Rent. — It is within the discretion of the court to direct an abatement in the rent paid by the tenant of a lunatic's estate, even without a reference, where the application is made by the committee. *In re Fitch*, 1 Russ. & M. 354; Anonymous, 2 Molloy 343.

But in *Ex p. Town*, T. & R. 137, the court refused to direct a reference to the master as to the reduction of rent upon the petition of a tenant of the lunatic's estate.

4. Mortgages. — *Foster v. Marchant*, 1 Vern. 262.

To Pay Costs in Partition Suit. — It was held that the court had no jurisdiction to authorize the committee to mortgage the land of a lunatic for the purpose of raising money to pay his costs in a partition suit. *Matter of Bloomar*, 2 De G. F. & J. 154.

5. To Raise Money for Lunatic's Support. — *Kent v. Morrison*, 153 Mass. 137, 25 Am. St. Rep. 616; *In re Eckstein*, 1 Pa. L. J. Rep. 224, 2 Pa. L. J. 126.

To Raise Money to Pay Debts. — *Agricultural Ins. Co. v. Barnard*, 96 N. Y. 525; *In re Eckstein*, 1 Pa. L. J. Rep. 224, 2 Pa. L. J. 126.

Sale under Authority to Mortgage — Innocent Purchaser. — Where the committee sells the lunatic's real estate under an order giving him leave to mortgage it, such sale is void, though he obtains an affirmation thereof by the court. But an innocent purchaser may be entitled to an equitable lien on the property for the amount of the purchase money paid. *Reals v. Weston*, (Supm. Ct. Tr. T.) 28 Misc. (N. Y.) 67.

Releasing Portion of Lands from Lien of Mortgage. — Where the committee had invested money of the lunatic in a real-estate mortgage, it was held that he might release a portion of the premises from the lien thereof without applying to the court for permission to do so. *Pickersgill v. Read*, 5 Hun (N. Y.) 170.

6. Insane Wife May Not Release Dower. — *Ex p. McElwain*, 29 Ill. 442.

operate to extinguish or release her inchoate right of dower.¹

And the Husband of an Insane Wife cannot, by proceedings on an *ex parte* petition, deprive his wife of her contingent right of dower in real estate which he is about to sell. The wife must be made a party to the proceeding, and after notice must have an opportunity to be heard.²

The Wife of a Lunatic does not relinquish her right of dower in the land of her husband, sold by his guardian, by joining with her husband in signing a deed thereto. She is not bound unless the deed of her husband is valid, and he is incapacitated to execute a deed even with the assent of his guardian.³

d. EFFECT UPON CHARACTER OF PROPERTY — (1) General Rule — (a) In Sales of Realty. — Where the real estate of a lunatic has been sold, the proceeds of the sale are, as between the real and personal representatives of the lunatic, to be treated as realty for the purpose of transmission.⁴

Money Recovered as Damages to the Fee for operating an elevated railroad in the street in front of a lunatic's real property retains its character of real estate, and upon his death his heirs at law are entitled to receive it.⁵ But money so realized is considered personalty after it reaches the hands of the heir.⁶

Heir Dying Without Making Election. — Where money has been raised by sale or mortgage of a lunatic's land, and his heir has died also a lunatic without having elected to take the surplus money as personalty, it descends in the character of realty.⁷

Fund Claimed as Personalty. — Where the interest in lands of a monomaniac who had never been declared a lunatic was sold in partition, and the proceeds were paid into court, and he had recognized and claimed them as personalty, they, together with the accrued interest, were adjudged to be of that character.⁸

(b) Upon Investment of Personalty. — If the committee of a lunatic invests a portion of his personal estate in the purchase of land, it will remain personal property in the hands of the committee, and in case of the lunatic's death will go to his personal representative.⁹ So if the committee uses money of the lunatic to pay off a mortgage on his real estate, the amount ought to be raised out of the real estate and paid to his personal representative at his death.¹⁰ The ordinary and necessary repairs upon a lunatic's real estate should be borne by the personal estate; but an extraordinary outlay of the personal estate, such as the purchase of land, or the building of houses, should retain its character of personalty.¹¹

(c) Timber Severed from Soil. — Timber felled on the lunatic's estate by his committee by order of the court becomes personal property, and upon the lunatic's death such timber or the unexpended proceeds thereof will go to his personal representative.¹²

1. **Committee May Not Release Dower.** — *Eslava v. Lepretre*, 21 Ala. 529, 56 Am. Dec. 266; *Matter of Dunn*, 64 Hun (N. Y.) 18.

2. **Husband — Ex Parte Proceedings.** — *Hess v. Gale*, 93 Va. 467.

3. **Wife of Lunatic Joining in Deed.** — *Rannells v. Gerner*, 80 Mo. 474, reversing 9 Mo. App. 506.

4. **Proceeds of Realty Regarded as Realty.** — *In re Smith*, L. R. 10 Ch. 79; *In re Trevelyhan*, 31 L. J. Ch. 560, 10 W. R. 828; *In re Barker*, 17 Ch. D. 241; *Campbell v. Campbell*, 19 Grant Ch. (U. C.) 255. Compare *Clarke v. Ruttan*, 11 Grant Ch. (U. C.) 416. See also the title CONVERSION AND RECONVERSION, vol. 7, p. 474.

In *New York* this is so by express statute. *Ford v. Livingston*, 140 N. Y. 167; *Walrath v. Abbott*, 75 Hun (N. Y.) 445; *Matter of Board of St. Opening, etc.*, 89 Hun (N. Y.) 525.

5. **Damages Recovered for Injury to Realty.** — *Ford v. Livingston*, 140 N. Y. 162.

6. *In re Wheeler*, 8 Jur. N. S. 785, 6 L. T.

N. S. 846; *In re Trevelyhan*, 31 L. J. Ch. 560, 10 W. R. 828; *In re Smith*, L. R. 10 Ch. 79.

7. *Matter of Wharton*, 5 De G. M. & G. 33.

As to election generally, by insane persons, see the title EQUITABLE ELECTION, vol. 11, p. 79.

8. *Smith v. Bayright*, 34 N. J. Eq. 424. See also *Matter of Cross*, 1 Sim. N. S. 260.

9. **Personalty Invested in Realty.** — *Awdley v. Awdley*, 2 Vern. 192.

10. **Mortgage Discharged from Personal Estate.** — *Matter of Leming*, 3 De G. F. & J. 43; *Ex p. Annandale*, Ambl. 80. See also *Ex p. Digby*, 1 Jac. & W. 620; *Ex p. Hinde*, Ambl. 706, note.

11. **Repairs to Realty.** — *In re Badcock*, 4 Myl. & C. 440; *In re Gist*, 5 Ch. D. 881; *In re Harris, Shelf. on Lunacy* 203.

12. **Timber Severed from Soil.** — *Oxenden v. Compton*, 2 Ves. Jr. 69, 4 Bro. C. C. 231; *Ex p. Bromfield*, 1 Ves. Jr. 453; *Ex p. Phillips*, 19 Ves. Jr. 118; *Ex p. Chumley*, 1 Ves. Jr. 156; *Matter of Salisbury*, 3 Johns. Ch. (N. Y.) 347.

The committee has the same power in cut-

(2) *Exceptions for Benefit of Lunatic — General Principles.* — But the governing principle in the management of the estate is the lunatic's interest, not that of those who may have eventual rights of succession. Upon this principle it is settled that the property of a lunatic may be converted from realty into personalty or from personalty into realty whenever it shall appear to be for the interest of the lunatic to make such change, without regard to the contingent interests of his real and personal representatives.¹

For Improvements. — If it is clearly for the lunatic's advantage that the nature of one part of his estate should be altered for the improvement of the other, such alteration will be directed.² And where such alteration has been made there is no equity between the real and personal representatives at the lunatic's death to have the nature of the property restored.³

7. Relative Powers and Duties of Committee and Prior Trustee. — The appointment of a committee does not *ipso facto* divest the authority of a testamentary trustee holding funds for the benefit of the lunatic. The committee takes the estate subject to the execution of the trust and the rights of the remote beneficiaries of the funds.⁴ But, though the trustee may lawfully hold the *corpus* of the estate, the committee is entitled to the annual income, interest, and profits thereof, in order to appropriate them to the support and maintenance of the lunatic as well as for medical services in the endeavor to restore his reason.⁵

8. Accounting — *a. ANNUAL ACCOUNTS* — (1) *Duty to Make.* — Since the committee of the estate of a lunatic acts as the bailiff or officer of the court in the management of the lunatic's affairs, he will not ordinarily be appointed without liability to render an annual account of his doings.⁶ But where the property of the lunatic is very small, a committee may be appointed without liability to annual account, in order to avoid the expense of such accounting.⁷ And in *Maryland* it has been held that a committee may be appointed without liability to account, in consideration that he will provide suitable maintenance for the lunatic and make and return an inventory of his property.⁸ So the court may permit the committee to use as his own the real and personal prop-

erty timber for repairs as the absolute owner. *Ex p. Ludlow*, 2 Atk. 407. But he has not, by virtue of his office, any right or authority to sell and dispose of timber and firewood growing on the land of his ward. *Treat v. Peck*, 5 Conn. 280.

1. Exceptions to General Rule. — *Ex p. Johnson*, 1 Molloy 128; *In re Ashley*, 1 Russ. & M. 371; *In re Brewer*, 1 Ch. D. 409; *Matter of Salisbury*, 3 Johns. Ch. (N. Y.) 347; *King v. Strong*, 9 Paige (N. Y.) 94.

Upon the principle stated in the text, a mortgage on a lunatic's estate was paid off and it was ordered that the mortgage term be assigned to attend the inheritance, and not in trust for the next of kin. *Ex p. Grimstone*, Ambl. 706. The authority of this case was doubted in *Weld v. Tew*, Beatty 266, but it was afterwards followed in *Newcombe v. Newcombe*, 3 Ir. Eq. 414, Drury 358.

2. Improvements. — *Ex p. Phillips*, 19 Ves. Jr. 123; *Ex p. Bromfield*, 3 Bro. C. C. 510, 1 Ves. Jr. 453; *In re Gist*, 5 Ch. D. 881; *Dormer's Case*, 2 P. Wms. 263; *Sergeson v. Sealey*, 2 Atk. 412; *Ex p. Tabbert*, 6 Ves. Jr. 428; *Plymouth's Case*, Freem. Ch. 114; *Ex p. Ellice*, Jac. 234; *Matter of Livingston*, 9 Paige (N. Y.) 440, affirmed 2 Den. (N. Y.) 575.

3. Oxenden v. Compton, 2 Ves. Jr. 69, 4 Bro. C. C. 231; *Compton v. Oxenden*, 2 Ves. Jr. 261; *Ex p. Degge*, 4 Bro. C. C. 235, note *a*;

Batteste v. Maunsell, Ir. R. 10 Eq. 97, 314; *Ex p. Clayton*, 1 Russ. & M. 369.

4. Prior Trustees Not Displaced by Committee. — *Canaday v. Hopkins*, 7 Bush (Ky.) 108; *In re Wilson*, 2 Pa. St. 325. In this latter case the court said: "The testator had a right to appoint his own trustee; and if the office were vacant, the proper course would be to fill it by appointment, for which the lunatic's committee, whose business it is to call the trustee to account, would be the most improper person that could be selected."

5. Committee Entitled to Income of Estate. — *In re Earp*, 2 Pars. Eq. Cas. (Pa.) 178, explaining and distinguishing the *Pennsylvania* case cited in the preceding note.

Naked Authority in Executors to Restrain Alienation by Lunatic. — In *Royer v. Meixel*, 19 Pa. St. 240, real estate was devised to a lunatic, the executors having only a naked authority to restrain alienation by the devisee, and it was held that the committee of the lunatic's person and estate was entitled to receive the income. *Distinguishing In re Wilson*, 2 Pa. St. 325.

6. Committee's Duty to Account. — *Sheldon v. Aland*, 3 P. Wms. 110, Lysaght v. Royce, 2 Sch. & Lef. 153; *Matter of Fitzgerald* 2 Sch. & Lef. 436.

7. Ex p. Pickard, 3 Ves. & B. 127.

8. Boarman's Case, 2 Bland (Md.) 89.

erty of the lunatic, without accounting for the profits until further order, upon his undertaking to account and deliver when called on by order of the chancellor or in any other legal manner.¹ In such cases, however, he should have the previous sanction of the court for not passing his accounts annually.²

(2) *Not Conclusive Evidence*. — These annual or periodical accounts of the committee are filed for the information of the court and of those interested in the welfare of the lunatic and the preservation of his estate. They are only *prima facie* evidence of the matters therein contained, and consequently may be reopened and impeached upon the adjudication of the final account of the committee.³

(3) *Creditor May Compel*. — A creditor may compel the guardian to adjust his accounts, and if thereafter it is found that there is a balance in his hands, his refusal to pay a judgment recovered against his ward will be a breach of the condition of his bond, and the creditor's remedy is by an action on the guardianship bond.⁴

b. FINAL ACCOUNTING — (1) For Property Received — General Rule. — The committee, at the termination of his office, is bound to account for all the estate, income, and effects of the lunatic which came into his possession or under his care and direction.⁵ He is also chargeable with all that should have come into his possession by the exercise of due care and diligence.⁶

And if He Fails or Refuses to Account the court will, upon proper application, compel him or his personal representative to do so⁷ unless the parties interested

1. Moore v. White, 4 Har. & J. (Md.) 546.

2. Anonymous, 1 Russ. & M. 113.

The Lord Chancellor Refused Costs to a Committee who had passed his accounts irregularly, taking the accounts of several years together. *Ex p. Clarke*, 1 Ves. Jr. 296.

Interest. — Where a committee has not passed his accounts for several years, and balances have remained in his hands, he should be charged with interest thereon unless he can show circumstances to excuse his neglect. *Ex p. Hall*, Jac. 160; *Ex p. Catton*, 1 Ves. Jr. 156; *Ex p. Chumley*, 1 Ves. Jr. 156.

The Committee May Forfeit His Commissions by not passing his accounts regularly. *Crigler v. Alexander*, 33 Gratt. (Va.) 674.

The Committee Stands in the Relation of a Quasi Trustee for the lunatic, and as such is amenable to the court to which his accounts are rendered. *Wright v. Chard*, 1 De G. F. & J. 567; *Sheldon v. Aland*, 3 P. Wms. 104.

3. *Prima Facie Evidence Only*. — The annual settlements of a guardian of an insane person have not the effect of a final judgment and are only *prima facie* evidence of their correctness. *Wilcox v. Parker*, 23 Ill. App. 429; *State v. Jones*, 89 Mo. 470. See also *Vinson v. Vinson*, 1 Del. Ch. 120; *Curatorship of Beecroft*, 28 La. Ann. 824; *Moran's Estate*, 8 Pa. St. 315; *Clark v. Crout*, 34 S. Car. 417. But the burden of proving their inaccuracy is upon the person seeking to impeach them. *Warfield v. Warfield*, 74 Iowa 184.

4. *Rights of Creditors — Liability on Official Bond*. — *Davis v. Drew*, 6 N. H. 399, 25 Am. Dec. 467; *Pendexter v. Cole*, 66 N. H. 556. See also *Conant v. Kendall*, 21 Pick. (Mass.) 36. And if the guardian's accounts have been adjusted, and a balance is found in his hands, he may be adjudged trustee of his ward in foreign attachment. *Davis v. Drew*, 6 N. H. 399, 25 Am. Dec. 467.

5. *Final Accounting — For Property Received*. — *Devilbiss v. Bennett*, 70 Md. 560.

The Rule Laid Down to Govern the Accounting by Successive Committees of a lunatic's estate is to charge them with the *corpus* and interest, and to credit them with commissions and the yearly sum allowed by the court for the support of the lunatic. *Ashley v. Holman*, 44 S. Car. 145.

Committee's Own Notes. — It is the duty of the committee to turn over to the administrator his own notes found among the lunatic's papers, although they appear to have been outlawed at the time of his appointment. *In re Blossom*, (Supm. Ct. Gen. T.) 7 N. Y. Supp. 360.

Where Lunatic Indebted to Committee. — A curator of an interdicted person cannot keep the funds of the interdict without accounting for them to the probate court, under a claim that the interdict is indebted to him. He must account for the money received, and the indebtedness of the interdict, if it exists, must be settled and adjudicated under the supervision of the court. Nor can such curator, without proper judicial sanction, transfer his claim to another person and authorize such person to collect the money of the interdict and retain it in satisfaction of the debt so transferred. *McKenzie v. Bacon*, 40 La. Ann. 157.

A Trust for the Support of a Lunatic is in exoneration of the private property of the lunatic. *Matter of Weaver*, 21 Ch. D. 615; *Matter of Reed*, 22 N. Y. App. Div. 328, *affirmed* 100 N. Y. 702. In this latter case the trust was for the testator's insane wife, and the provision was held to be in exoneration of the wife's separate estate.

6. See *Ashley v. Holman*, 44 S. Car. 145; *De Treville v. Ellis*, *Bailey Eq.* (S. Car.) 35, 21 Am. Dec. 578; *Matter of Hathaway*, 80 Hun (N. Y.) 186.

7. *Compelling Committee to Account*. — *Tiffany v. Worthington*, 96 Iowa 560; *Potter v. Berry*, 56 N. J. L. 454. See also *Ex p. Cottingham*, 124 Ind. 250.

have slept on their rights until such a course would work a manifest hardship and injustice.¹

If a Guardian Becomes Non Compos Mentis without having settled his accounts, the court may compel or allow a settlement of such accounts by his guardian.²

(2) *For Profits of Ward's Labor.* — If a lunatic, bereft of his reason so far as to be unable to assent to a contract, is yet able to labor and does labor to the profit of another (in this case the committee), the law will imply an obligation on the part of the latter to pay therefor as fully as it does in cases where the parties are sane.³

(3) *For Interest.* — Generally the committee is to be charged only simple interest upon the balances found against him on a settlement of his account, compound interest not being chargeable except under very peculiar circumstances.⁴ But where it is made the duty of the guardian to lend out any balance in his hands upon bond with surety and to account for the interest annually, it follows that he is chargeable with compound interest on such balance.⁵ The committee is not, however, chargeable with interest on moneys kept in his hands pending the determination of conflicting claims of the lunatic's creditors.⁶

c. RESPONSIBILITY FOR SAFETY OF INVESTMENTS. — This topic will be fully discussed elsewhere in this work.⁷

d. ALLOWANCE OF ITEMS — (1) *For Support of Ward.* — If the estate of a lunatic is sufficient to permit it, he should be maintained in that degree of comfort which he had deemed fitting when he was sane;⁸ and thought he committee may not have been as economical of his expenditures in the care of a lunatic as he might have been, his account should be approved if it is clear that he was upright in the discharge of his trust, and that whatever unnecessary expenditures he made were in the interest of the personal comfort of his unfortunate ward.⁹

Liability of Sureties. — The general rule is that sureties on a bond are not liable for past defaults unless made so by the terms of the bond. And this rule applies when different bonds are given during the same appointment or term of office as well as where they are given under successive appointments. *State v. Jones*, 89 Mo. 470.

1. *Laches.* — *Com. v. Stewart*, 183 Pa. St. 269; *Willingham v. Chick*, 14 S. Car. 93.

2. **Where Committee Becomes Insane.** — In such circumstances the proceedings are conducted in the name of the *non compos* guardian by his guardian, and the decree for any balance found against him is rendered against him individually, to be levied of his goods and chattels in the hands of his guardian. *Moda-well v. Holmes*, 40 Ala. 391.

3. **Profits of Lunatic's Labor.** — *Ashley v. Holman*, 15 S. Car. 97.

An order of the court of equity appointing a committee of a lunatic and authorizing the committee to retain the entire annual interest of the lunatic's estate for his support and maintenance is no bar to an action to require the committee to account for profit subsequently made to himself by the labor of his ward. *Ashley v. Holman*, 15 S. Car. 97.

Payment of Idiot's Debts. — Where it appeared that the idiot was without property or estate, but was possessed of musical ability, and that the committee had utilized his services in concerts given at the committee's own expense, it was held questionable whether the court would direct the application of any moneys thus realized to the payment of the

debts of the incompetent person. *Ackerman v. Bethune*, (Supm. Ct. Spec. T.) 3 Misc. (N. Y.) 126.

4. **Interest.** — *Crigler v. Alexander*, 33 Gratt. (Va.) 674. See also such titles as EXECUTORS AND ADMINISTRATORS, vol. 11, p. 1211 *et seq.*; GUARDIAN AND WARD, vol. 15, p. 95 *et seq.*; TRUSTS AND TRUSTEES.

5. *Spack v. Long*, 1 Ired. Eq. (36 N. Car.) 426.

6. *Bulows v. O'Neal*, 4 Desaus. (S. Car.) 394.

7. See the title INVESTMENTS.

8. **Manner of Lunatic's Maintenance.** — *In re Heft*, 8 Pa. Dist. 351. See also *supra*, this title, *Management of Estate — Guardian's Rights, Duties, and Liabilities.*

Question for Court. — Where the guardian of a person of unsound mind makes a contract with another for boarding, clothing, and caring for his ward, compensation for such services is a proper charge against the ward's estate, and the reasonableness of such a claim is a question for the court, after hearing and considering the evidence. *Miller v. Hart*, 135 Ind. 201.

9. *Hain's Estate*, 157 Pa. St. 61.

Sums expended for the purpose of rendering the lunatic and his wife comfortable in their declining years should be allowed to the committee. *Deming v. Paynter*, (Ky. 1897) 42 S. W. Rep. 1112.

If any item in the guardian's account is contested, evidence of the regularity and necessity of the expenditure should be required, and the facts found in relation thereto. *McLean v. Breese*, 109 N. Car. 564.

(2) *For Improvements to Estate.* — The committee may not, without the sanction of the court, expend large sums of money in making permanent improvements, even though he acts in good faith and such improvements are beneficial to his ward's estate;¹ and if he does so, the cost of the improvements should not be allowed in the settlement of his accounts.²

(3) *For Counsel Fees.* — The committee should receive credit for a reasonable fee paid to his counsel on final settlement;³ and so of counsel fees paid by him in the management of the estate.⁴ But to entitle him to an allowance for counsel fees on final settlement, he must show that he has already paid them.⁵

(4) *For Costs.* — The costs of a suit necessarily prosecuted or defended by the committee for the protection of his ward's estate should be allowed;⁶ but if he has gone recklessly into litigation or appears to have been actuated by malice his costs should not be allowed.⁷

(5) *For Payment of Ward's Past Debts.* — Although the committee has no right to deprive the lunatic or his family of comfortable support by paying his past debts,⁸ yet where he has in good faith paid such just debts without inconvenience to his ward or those dependent on his estate for support, the sums so paid may be allowed in the settlement of his accounts;⁹ and in one case at least credit has been given to the committee for making payment, after the death of his ward, of a just debt which he had incurred for him while he was living.¹⁰

1. Improvements — Dismissal of Committee. — Where the committee of a lunatic's estate had expended large sums in draining and other improvements, and had contracted with a railroad company for the sale of part of the estate, but in all this had acted in good faith and under the sanction of the master in lunacy, it was held that such acts were beyond the scope of his authority, but as they were manifestly beneficial to the estate they formed no grounds for his dismissal from office. *Matter of Brown*, 1 Macn. & G. 201.

2. *Ex p.* Marton, 11 Ves. Jr. 397; *Ex p.* Hilbert, 11 Ves. Jr. 397; *Foster v. Marchant*, 1 Vern. 262.

Exceeding Authorization of Court. — Where the committee had been authorized by the court to expend a certain sum in rebuilding a farmhouse, but expended half as much again in building one of larger size on a different site, the excess was not allowed, although what the committee had done appeared to be beneficial to the estate. *Matter of Langham*, 2 Phil. 299.

Disallowance of Cost of Building — Allowance of Rental. — In *Murphy v. Walker*, 131 Mass. 341, the court refused to allow the cost of a building erected by the committee because deemed necessary in the business of the ward, which he was conducting advantageously, with either the request or the concurrence of all the parties interested in the lunatic's estate; but a reasonable rental was allowed.

3. Counsel Fees. — *Devilbiss v. Bennett*, 70 Md. 554; *In re Blossom*, (Supm. Ct. Gen. T.) 7 N. Y. Supp. 360.

Defending His Reports Against Charge of Fraud. — An allowance made to the guardian of an insane ward for an attorney's fee in defending his reports when assailed as being fraudulent and unjust is proper and should be approved. *Warfield v. Warfield*, 74 Iowa 184.

4. Matter of Colvin, 4 Md. Ch. 126; *Bulows v. O'Neal*, 4 Desaus. (S. Car.) 394.

5. Modawell v. Holmes, 40 Ala. 391.

6. Allowance of Costs. — *Bulows v. O'Neal*, 4 Desaus. (S. Car.) 394.

A guardian who has been compelled to pay costs in a suit prosecuted by him for the recovery of his ward's property may be reimbursed if the expenditure was made properly and in good faith. *Green v. Burgess*, 117 N. Car. 495; *McNeill v. Hodges*, 83 N. Car. 504.

Expenses in Resisting Application for Revocation of Guardianship. — Expenses incurred by the guardian in resisting the application of the ward for a revocation of the guardianship on the ground of restoration to sanity will be allowed in the settlement of the guardian's accounts, when they are reasonable and incurred in good faith and under a reasonable doubt whether the ward was so far restored as to render the continuance of the guardianship unnecessary. *Palmer v. Palmer*, 38 N. H. 418.

7. *In re Montgomery*, 1 Molloy 419. See also *Ashley v. Holman*, 44 S. Car. 145.

8. Past Debts of Ward. — The ultimate benefit of a lunatic is of so great consideration that Lord Eldon said he could not order the payment of a lunatic's past debts and leave him destitute, but must reserve a sufficient maintenance for him, although in consequence his creditors might put him in jail and the court would have to support him there. *Ex p.* Hastings, 14 Ves. Jr. 182.

9. Although the courts will not order the payment of a lunatic's debts contracted anterior to his lunacy, if it will deprive him or his family of maintenance, yet the disbursements will be allowed where, in the settlement of the guardian's account, the lunatic being dead and his only child of age, it appears that the guardian in good faith paid such debts without prejudice to the estate. *McLean v. Breece*, 113 N. Car. 390, 109 N. Car. 564; *Adams v. Thomas*, 83 N. Car. 521; *Smith v. Pipkin*, 79 N. Car. 569.

10. Interdiction of Onorato, 46 La. Ann. 73.

(6) *For Damage to Guardian's Property by Ward.* — The guardian of a lunatic cannot receive allowance in his probate account for the amount of damages occasioned to his own property by his ward's want of care.¹

(7) *For Ward's Individual Debt to Guardian.* — Neither can the guardian set off his ward's individual debt to him. He must account for the property in his hands, and then pursue another remedy to collect his own claim;² though it has been held that where the committee, prior to his appointment, has advanced money to the lunatic or paid claims against him, the sums thus expended should be allowed upon his accounting as committee.³

(8) *Acting Without Authority — Void Appointment.* — Where the appointment of the committee proves to be void, he nevertheless acts under color of authority, and he has an equitable right to be reimbursed for such expenditures as would have been reasonable and proper had his appointment been valid.⁴ And in *Alabama* it was held that when the appointment made by the probate court was void for want of jurisdiction, the committee might be charged as trustee *in invitum* and compelled to account in equity.⁵

9. Compensation of Guardian — a. IN ENGLAND — As a Rule No Compensation Allowed. — In England the court would not, as a rule, allow to the committee of a lunatic any compensation for his care and trouble.⁶

Where Extraordinary Care and Expense Involved. — In rare cases, however, where the care of the estate and the collection and remittance of the rents were attended with more than ordinary trouble and expense, the court would make a small allowance to the committee of the estate to meet such expense.⁷

Receiver with Salary. — And where no one could be found who was willing to serve as committee without compensation, the court would sometimes appoint a receiver with a reasonable salary;⁸ but in such cases the allowance was made not for the sake of the committee or receiver, but for the benefit of the lunatic's estate.⁹

Employment of Agent at Fixed Salary. — Again, in some cases where the lunatic's property was of such a character as to require constant personal attention, the court gave permission to the committee to employ an agent at a fixed salary to superintend the details of the management of the estate.¹⁰

Annual Sum for Maintenance — Accounting. — And where an annual sum of money

1. Torts by Ward Against Guardian. — A claim for unliquidated damages, as for assault and battery, or action on the case for negligence, by a guardian against his ward, cannot be made part of his account. It is not a matter arising from the trust. It is a question for a court of common law, to be tried at its bar and under its rules. *Brown v. Howe*, 9 Gray (Mass.) 85, 69 Am. Dec. 276.

2. Ward's Debts to Guardian. — *McKenzie v. Bacon*, 40 La. Ann. 157. See also *Tally v. Tally*, 2 Dev. & B. Eq. (22 N. Car.) 385, 34 Am. Dec. 407.

3. Matter of Forkel, 8 N. Y. App. Div. 397.

4. Where Appointment Void. — *Jessup v. Jessup*, 17 Ind. App. 177. See also *Coolidge v. Allen*, 82 Me. 23.

5. Trustee in Invitum. — *Moody v. Bibb*, 50 Ala. 245. And here it was further held that under such circumstances the committee could not protect himself from thus accounting in equity by pleading a former settlement in the probate court which was void for lack of jurisdiction. See also *Lockwood v. Mitchell*, 7 Ohio St. 387, 70 Am. Dec. 78.

Where the brother of a lunatic was duly appointed his committee, but had managed the estate for nine years before the commission, during which time there was considerable sav-

ings, Lord Thurlow compelled him to pay interest on the savings in his hands, although he claimed that he had made no use of the money. *Ex p. Chumley*, 1 Ves. Jr. 156.

In *Shepherd v. Newkirk*, 21 N. J. L. 302, the defendant, having acted as guardian and accounted in such character, was held estopped, in an action of assumpsit by his former ward whose commission had been superseded, to deny his lawful appointment.

6. Rule in England — No Compensation. — *Matter of Annesley*, Amb. 78; *Anonymous*, 10 Ves. Jr. 103.

7. Exceptions. — *Re Walker*, 2 Phil. 630; *Re Westbrooke*, 2 Phil. 631; *Ex p. Fermor*, Jac. 404; *Ex p. Ord*, Jac. 94.

8. Ex p. Warren, 10 Ves. Jr. 622; *Ex p. Radcliffe*, 1 Jac. & W. 619; *Ex p. Billingham*, Amb. 104. See also *Bcall v. Smith*, L. R. 9 Ch. 85.

9. Re Walker, 2 Phil. 630; *Re Westbrooke*, 2 Phil. 631; *In re Lanesboro*, Beatty 638.

10. Matter of Brown, 1 Macn. & G. 201.

In *Matter of Errington*, 2 Russ. 567, Lord Eldon made an order, without a reference to the master, that the committee of a lunatic should be at liberty to employ a particular person for inspecting the lunatic's property, at a fixed salary to be paid out of the rents.

was ordered to be paid to the committee of the person for the maintenance of the lunatic, the committee was not bound to keep accounts, and as a general rule would not be ordered to account for any surplus remaining in his hands after supplying the lunatic's wants;¹ but where the lunatic was not properly maintained or the sum allowed had clearly not been expended in good faith, he might be ordered to account.²

b. IN UNITED STATES — Compensation Allowed. — In the *United States*, as early as the year 1817, Chancellor Kent decided that the committee of a lunatic was entitled to an allowance by way of compensation for his services in receiving and paying out moneys, within the equity of the statute authorizing the court to make a reasonable allowance to guardians, executors, and administrators for their services;³ and in the absence of express statutory provision for the compensation of such officers, this rule has been followed in other cases.⁴ In such cases the court makes the allowance according to some fixed rule, as two and one-half per cent. for receiving and two and one-half per cent. for disbursing all moneys that pass through the hands of the committee in the management of the lunatic's estate;⁵ but where the committee has had extraordinary trouble in the discharge of his duty compensation therefor may be allowed in addition to his commissions for collections and disbursements,⁶ though he is entitled to no extra compensation for ordinary services,⁷ such as are incidental to the trust and the prudent management of the property.⁸

VII. TERMINATION OF GUARDIANSHIP — 1. Death of Ward — Effect upon Court's Jurisdiction. — Upon the death of a lunatic under guardianship, the court has no further jurisdiction except to pass upon the accounts of his committee and deliver itself of the lunatic's property to the persons entitled to receive it.⁹

1. *In re French*, L. R. 3 Ch. 317; *In re Ponsonby*, 3 Dr. & War. 27; *Grosvenor v. Drax*, 2 Knapp 82.

2. *In re French*, L. R. 3 Ch. 317. See also *Latouche v. Danvers*, Ll. & G. 503.

In the case of Sir William Dormer, a lunatic, the court allowed the entire profits of his estate to the committee for the maintenance of his person. After his death, his administrator brought a bill against the committee for an account of these profits, but the court refused the relief in the absence of a showing of gross fraud on the part of the committee. *Sheldon v. Aland*, 3 P. Wms. 104.

In his opinion in *In re French*, L. R. 3 Ch. 317, Lord Cairns alluded to two unreported cases in which an inquiry was directed as to the manner in which the committee had expended the money allowed for the lunatic's support. One was *In re Rosoman*, decided in 1822 by Lord Eldon, and the other *In re Wood*, before Lord Cottenham in 1839.

3. Rule in United States — Compensation Allowed. — *Matter of Roberts*, 3 Johns. Ch. (N. Y.) 43. See the titles EXECUTORS AND ADMINISTRATORS, vol. 11, p. 1277 *et seq.*; GUARDIAN AND WARD, vol. 15, pp. 109, 110; TRUSTS AND TRUSTEES.

4. *Matter of Livingston*, 9 Paige (N. Y.) 440, affirmed 2 Den. (N. Y.) 575; *Ex p. Lyde*, Rich. Eq. Cas. (S. Car.) 3. See also *Devilbiss v. Bennett*, 70 Md. 554.

Government Bonds. — The committee is not entitled to a commission on the face value of a registered government bond belonging to his ward, but he is entitled to a commission of five per cent. on the interest accrued thereon and received by him. *Gregory v. Parker*, 87 Va. 451.

A Guardian Who Makes Up His Accounts Monthly may charge his ward's estate each month with his commissions on the amounts collected in that month, and with a month's interest on a balance from the preceding month in his own favor, and may carry the balance to the next month. *May v. May*, 109 Mass. 252.

5. *Matter of Livingston*, 9 Paige (N. Y.) 442, affirmed 2 Den. (N. Y.) 575; *Ex p. Lyde*, Rich. Eq. Cas. (S. Car.) 4. See also *Matter of Roberts*, 3 Johns. Ch. (N. Y.) 43.

The committee is entitled to commissions on the aggregate amount of the lunatic's personality, for receiving and paying out the money, whether it is disbursed as expenses in the administration of the trust or turned over to the lunatic's personal representative after his death. *In re Blossom*, (Supm. Ct. Gen. T.) 7 N. Y. Supp. 360.

Five per cent. of rents collected from prompt-paying tenants is a reasonable compensation to the committee, where most of the tenants were in possession when he took charge. *Gregory v. Parker*, 87 Va. 451.

6. *Ex p. Lyde*, Rich. Eq. Cas. (S. Car.) 3. See also *May v. May*, 109 Mass. 252.

7. *Bulows v. O'Neal*, 4 Desaus. (S. Car.) 394.

8. *Moore v. White*, 4 Har. & J. (Md.) 548.

9. Effect of Ward's Death upon Jurisdiction. — *Matter of Way*, 3 De G. F. & J. 175; *Wigg v. Tiler*, 2 Dick. 552; *In re Barry*, 1 Molloy 414; *Scammell v. Light*, 4 Giff. 127; *Grosvenor v. Drax*, 2 Knapp 82; *Matter of Colvin*, 3 Md. Ch. 278.

Guardian Clothed with Powers of Administrator. — In some states guardians of deceased lunatics are by statute vested with all the powers of administrators on estates and are controlled

The question of heirship¹ and the conflicting claims of creditors² will not be considered and determined as a part of the lunacy proceedings. Under some circumstances an order made in the lunacy proceedings before the lunatic's death may be carried into effect after his demise.³

Effect upon Committee's Authority. — So the death of a lunatic terminates the authority of his committee, whose duty it then becomes to settle his accounts and deliver such property as remains in his hands to the deceased lunatic's personal representatives or other persons entitled to receive it.⁴ And if it is not clear who is entitled to the possession of the property, the court may appoint a receiver to take charge of it until that question can be determined;⁵ otherwise it is the duty of the committee to take care of it until he is ordered by the court to give it up to those who have succeeded to the inheritance.⁶

2. Recovery of Lunatic. — Upon the recovery of a lunatic and a supersedeas of the commission, the committee and his bondsmen should, after a satisfactory accounting, be discharged from further responsibility.⁷

3. Resignation of Committee. — Independently of statutory permission, the committee of a lunatic cannot resign at his pleasure.⁸ In one case, however, the court seems to have allowed the committee to resign without questioning his right to do so.⁹

4. Removal of Committee. — The committee of a lunatic is at all times subject to the supervision and control of the court appointing him, and the court may revoke and annul his powers whenever from any cause it appears proper to do so.¹⁰

by the laws in relation to administrators. See *Jefferson v. Bowers*, 33 Ga. 452.

1. Question of Heirship. — *Ex p.* Gilbert, 1 Ball. & B. 297.

But possession may be given, in a disputed case, to the persons reported by the master to be the heirs at law. *Ex p.* Clarke, Jac. 589.

2. Conflicting Claims of Creditors. — *Boorman's Case*, 2 Bland (Md.) 89; *Matter of Colvin*, 3 Md. Ch. 278.

The property remaining at the lunatic's death, or its proceeds, must be delivered over to his representatives, and of course will then be subject to the claims of the creditors, as in other cases of individual debtors. *Ex p.* Latham, 6 Ired. Eq. (41 N. Car.) 406.

3. In re Kingston, 2 Ir. Eq. 169.

4. Effect of Ward's Death upon Committee's Authority. — *Stumph v. Pfeiffer*, 58 Ind. 472; *Cain v. Warford*, 3 Md. 454; *Butler v. Jarvis*, (N. Y. 1886) 2 Cent. Rep. 377; *Matter of Grout*, 83 Hun (N. Y.) 25; *Dean's Appeal*, 90 Pa. St. 106.

Where No Executor or Administrator of the Lunatic's Estate Has Been Appointed the committee may properly apply to the court for his discharge on giving notice of such application to all the heirs at law and next of kin of the deceased. *Matter of Forkel*, 8 N. Y. App. Div. 398.

Where the Land of the Lunatic Has Been Leased his committee cannot enter and distrain for rent after the death of the lunatic. *Persse v. Persse*, Alc. & Nap. 35.

Discontinuance of Suits. — Upon the death of a lunatic, the committee has no power even to discontinue a suit in which he is plaintiff as such committee. *Stobert v. Smith*, 184 Pa. St. 34.

5. Matter of Colvin, 3 Md. Ch. 279.

6. The committee may not, upon the death of the lunatic, abandon the estate; and he acts at his peril if he gives it up without being

ordered by the court to do so. *Guerard v. Gaillard*, 15 Rich. L. (S. Car.) 22.

7. Recovery of Lunatic — Discharge of Committee and Bondsmen. — *Ex p.* Bampton, Mosely 78; *Ex p.* Ferrars, Mosely 332; *Matter of Brugh*, 61 Hun (N. Y.) 193; *In re Lowe*, (Supm. Ct. Gen. T.) 19 N. Y. Supp. 245; *Ex p.* Drayton, 1 Desaus. (S. Car.) 144.

After Approval of the Committee's Report, and the surrender of the estate to his former ward, and discharge by the court, the committee will not be liable to an action on his bond by a creditor of such person for not paying the debt owing to such creditor. *Morgan v. Hoyt*, 69 Ill. 489.

Court Compelling Retransfer of Property. — After the discharge of the committee, the court cannot compel a retransfer of property by persons to whom such former incompetent person had transferred it subsequent to the committee's discharge. *Matter of Dowd*, (Supm. Ct. Spec. T.) 19 Misc. (N. Y.) 688.

8. Resignation of Committee. — *Evans v. Johnson*, 39 W. Va. 299, 45 Am. St. Rep. 912.

In *Matter of Lytle*, 3 Paige (N. Y.) 251, Chancellor Walworth refused to allow the committee of a lunatic to resign although his situation was rendered very unpleasant in consequence of controversies existing among the members of the lunatic's family.

The Code of West Virginia, c. 118, § 1, allows a committee and fiduciary to resign on filing a petition and proceeding as therein directed. See *Evans v. Johnson*, 39 W. Va. 299, 45 Am. St. Rep. 912.

9. Morgan's Case, 3 Bland (Md.) 332.

In *Ex p.* Ord, Jac. 94, Lord Eldon said that it was the duty of a committee who had removed beyond the territorial jurisdiction of the court to give up his office.

10. Removal of Committee. — *Matter of Fitzgerald*, 2 Sch. & Lef. 438; *Lance v. McCoy*, 34 W. Va. 420.

Removal Ex Parte. — But an order removing the guardian of a lunatic, made upon *ex parte* proceedings, without notice to such guardian, is void.¹

Failure to Pass Accounts or Make Report and File Inventory. — The committee may be discharged for not passing his accounts as required by law;² and so if he fails to make a report and file an inventory when ordered by the court to do so.³

A Committee Who Refuses to Defend an Action brought against his ward may be removed and a new committee appointed in his stead.⁴

And the Commitment of the Committee for Contempt of Court in the publication of a libelous pamphlet is sufficient ground for his removal from office.⁵

Residence at Distance. — The circumstance that the committee of the estate resides at a distance from the property is not *per se* a ground for discharging him, although it may raise a case for an inquiry as to the propriety of his discharge.⁶

The Effect of Insolvency or Bankruptcy of the committee is discussed elsewhere in this work.⁷

VIII. HUSBAND'S LIABILITY FOR MAINTENANCE OF INSANE WIFE. — It is the husband's primary duty to support his insane wife, and it is only when he is unable to do so that resort can be had for her maintenance to her separate estate.⁸ And in the case of an insane married woman, a trust fund provided for the purpose is to be applied to her maintenance in exoneration of her separate estate.⁹ If, however, her husband is unable to support her and provide proper medical treatment for her malady, resort may be had to her estate *in presenti* or expectancy in order to prevent her becoming a public charge or being left without assistance.¹⁰

IX. RESTRAINT OF INSANE PERSONS — 1. Without Warrant. — A Private Person may, without warrant or authority, confine a person disordered in his mind who seems disposed to do mischief to himself or another person, the restraint being necessary both for the safety of the lunatic and for the preservation of

The removal of a guardian by a decree of the Supreme Judicial Court terminates the guardianship, and sending the case back to the probate court for further proceedings does not qualify the terminating effect of the removal. *Willwerth v. Leonard*, 156 Mass. 277.

In *Louisiana* under article 398 of the Civil Code in force in 1866, it was held that the court could not rescind the appointment of an administrator *pro tempore* without good legal cause. *State v. Judge*, 18 La. Ann. 523.

The general rule, however, is that this is a matter of discretion with the court, and from an order of removal no appeal lies. *Matter of Griffin*, (Supm. Ct. Gen. T.) 5 Abb. Pr. N. S. (N. Y.) 96; *Black's Case*, 18 Pa. St. 434. See also *Dean's Appeal*, 90 Pa. St. 106.

1. **Removal Ex Parte Void.** — *Sims v. Sims*, 121 N. Car. 297, 61 Am. St. Rep. 665.

2. **Failure to Pass Accounts.** — *Matter of Lockey*, 1 Phil. 509.

3. **Failure to File Inventory.** — *Ex p. Cottingham*, 124 Ind. 250; *Tiffany v. Worthington*, 96 Iowa 560.

A guardian who fails to make a report and file an inventory in obedience to an order of court is not entitled to notice that an order of removal will be made in case of such failure. *Ex p. Cottingham*, 124 Ind. 250.

4. **Refusal to Defend Action.** — *Lloyd v. —*, 2 Dick. 460.

5. **Committee in Contempt.** — *Ex p. Jones*, 13 Ves. Jr. 237.

6. **Remoteness of Residence.** — *Matter of Brown*, 1 Macn. & G. 201.

7. See the title **INSOLVENCY AND BANKRUPTCY**, *post*.

8. **Liability of Husband for Support of Insane Wife.** — *Brodie v. Barry*, 2 Ves. & B. 36; *Meyer's Estate*, Myr. Prob. (Cal.) 178; *Senft v. Carpenter*, 18 R. I. 545. See generally the titles **HUSBAND AND WIFE**, vol. 15, p. 814; **SEPARATE PROPERTY OF MARRIED WOMEN**.

Statutes. — In *California*, "if indigent insane persons have kindred of degree of husband or wife, father, mother, or children, living within this state, of sufficient ability, who are otherwise liable, said kindred shall support such indigent insane person [while confined in a lunatic asylum] to the extent prescribed for paying patients." *Watt v. Smith*, 89 Cal. 602.

In *Indiana*, all insane persons having a legal residence in the state are entitled to be maintained at the expense of the state while confined in the lunatic asylum, and the husband is not liable for the support of his insane wife while she is confined in such institution. *Marshall County v. Burkey*, 1 Ind. App. 565.

But the homestead of the husband is exempt from claims for the support of his insane wife. *Central Kentucky Lunatic Asylum v. Craven*, 98 Ky. 105, 56 Am. St. Rep. 323.

For other cases of this kind, see the title **HOSPITALS AND ASYLUMS**, vol. 15, p. 761.

9. **Trust in Exoneration of Separate Estate.** — *Rudland v. Crozier*, 2 De G. & J. 143; *Matter of Reed*, 22 N. Y. App. Div. 328, *affirmed* 160 N. Y. 702.

10. *Matter of Renz*, 79 Mich. 216.

the public peace.¹ But such restraint is unauthorized unless it is necessary to prevent some immediate injury by the lunatic to himself or others.²

Actual Insanity. — Nothing but actual insanity will authorize the seclusion of one who makes known his objections to restraint.³

Breach of Peace in Presence of Magistrate. — It is as much the right and duty of a magistrate to order the arrest of an insane person who is committing a breach of the peace in his presence as of a sane person under similar circumstances.⁴

2. False Imprisonment. — All persons who unite in the procurement of an illegal commitment for insanity are liable as for false imprisonment.⁵

3. Incarceration in Madhouse. — No person can legally be committed to an insane hospital unless it appears that the welfare of the patient or the safety of others requires such restraint.⁶

Where a Person Has Been Released temporarily from an asylum, and completely recovers his reason before returning, mandamus will lie to compel the superin-

1. Arrest by Private Person Without Warrant. — *Fletcher v. Fletcher*, 28 L. J. Q. B. 134; *Anderdon v. Burrows*, 4 C. & P. 210, 19 E. C. L. 348; *Brookshaw v. Hopkins*, Loft. 240; *Look v. Dean*, 108 Mass. 116, 11 Am. Rep. 323; *Colby v. Jackson*, 12 N. H. 529; *Davis v. Merrill*, 47 N. H. 208; *Keleher v. Putnam*, 60 N. H. 30, 49 Am. Rep. 304; *Emmerich v. Thorley*, 35 N. Y. App. Div. 452.

Period of Detention. — But such detention or confinement is warranted only for such a time as is necessary to institute the proper proceedings for the determination of the question of the person's sanity. *Colby v. Jackson*, 12 N. H. 526.

2. Danger of Immediate Injury. — *Anderdon v. Burrows*, 4 C. & P. 210, 19 E. C. L. 348; *Fletcher v. Fletcher*, 28 L. J. Q. B. 134; *Scott v. Wakem*, 3 F. & F. 328; *Brookshaw v. Hopkins*, Loft. 240; *Look v. Dean*, 108 Mass. 116, 11 Am. Rep. 323; *Keleher v. Putnam*, 60 N. H. 30, 49 Am. Rep. 304.

A person alleged to be insane, but against whom there has been no inquisition and finding of lunacy, should not be deprived of his liberty save in extreme cases, where the public peace or morals or the interest of the patient requires it. *Com. v. Kirkbride*, 2 Brews. (Pa.) 400.

3. Actual Insanity. — *Rex v. Coote*, Loft. 73; *Brookshaw v. Hopkins*, Loft. 240; *Scott v. Wakem*, 3 F. & F. 328; *Symm v. Fraser*, 3 F. & F. 859; *Hall v. Semple*, 3 F. & F. 337; *Reg. v. Pinder*, 24 L. J. Q. B. 148; *Matter of Shuttleworth*, 9 Q. B. 651, 58 E. C. L. 651; *Fletcher v. Fletcher*, 1 El. & El. 420, 102 E. C. L. 420.

4. Breach of Peace in Presence of Magistrate. — *Lott v. Sweet*, 33 Mich. 308. See also *Porter v. Ritch*, 70 Conn. 235.

5. False Imprisonment. — *Bacon v. Bacon*, 76 Miss. 458; *Higenbotam v. Green*, 25 Hun (N. Y.) 214. And see the preceding subdivisions.

The Superintendent of an Insane Asylum is liable to an action for false imprisonment if the order under which a lunatic is detained is void. *Palmer v. Buck*, 83 Mich. 528.

In *Van Deusen v. Newcomer*, 40 Mich. 90, the question whether the superintendent of an asylum is liable for detaining a sane person whom in good faith he considers to be insane was left undecided; *Campbell, C. J.*, and *Cooley, J.*, holding the affirmative, and *Graves and Marston, JJ.*, holding the negative.

Making and Filing a False Certificate as to the mental state of an alleged lunatic is not alone sufficient to render the physicians who did it liable for the subsequent wrongful arrest of such person. It must be shown that they caused his arrest. *Force v. Probasco*, 43 N. J. L. 539.

Malicious Prosecution. — One who maliciously and without probable cause institutes or procures to be instituted against another an inquisition of lunacy is liable to the latter on his discharge, in an action for malicious prosecution, for all damages suffered by him in excess of the taxable costs of such proceeding. *Lockenour v. Sides*, 57 Ind. 360, 26 Am. Rep. 58; *Dobbyn v. Decow*, 25 U. C. C. P. 18.

Insane Paupers. — See the title POOR AND POOR LAWS.

6. Confinement in Asylum. — *Matter of Ross*, 38 La. Ann. 524; *Com. v. Western Pennsylvania Hospital*, 3 Pittsb. (Pa.) 299; *Com. v. Kirkbride*, 2 Brews. (Pa.) 400.

When a Person Has Been Indicted and His Counsel Suggests His Insanity Before Trial, and a commission is appointed to inquire into his mental condition and reports him to be insane, and the jury returns a verdict accordingly, and the judge of the Criminal District Court remands him to the parish prison, without a commitment to the insane asylum, the judge of the Civil District Court has authority, under Rev. Stat. of Louisiana, § 1768, to inquire into the facts and circumstances of the case, and if in his opinion such person is dangerous to the citizens and the peace of the state, to commit him to the insane asylum of the state. *State v. Uniacke*, 48 La. Ann. 1230. See *infra*, this section, *Those Charged with Crime*.

In *Rhode Island* it is provided that a person adjudged to be insane shall be committed to a hospital for the insane unless a recognizance satisfactory to the court be then given that such person shall not be permitted to go at large until restored to soundness of mind. *Senf v. Carpenter*, 18 R. I. 545; *Sherman's Petition*, 17 R. I. 356.

A Person Who Has Been Discharged from the Insane Asylum by the supervisors of the insane cannot be recommitted under a revocation of that discharge by a single supervisor, although it was a condition of his original release that one supervisor might revoke the order of discharge. *In re Thorpe*, 64 Vt. 398.

tendent of the asylum to grant to him a certificate of discharge.¹

At Common Law it was an indictable offense forcibly to incarcerate one in a private madhouse, an institution unknown to the law and not under the supervision of any responsible authority.²

In England, in order to prevent a system of illegal restraint without the knowledge of the commissioners of lunacy, it has been made a misdemeanor for any person to receive two or more lunatics into any house, unless such house is an asylum or a hospital registered under the act, or a house for the time being duly licensed according to law.³

4. Right to Writ of Habeas Corpus — *a. IN GENERAL.* — Any one who is unlawfully restrained of his liberty as an insane person is entitled to a writ of habeas corpus upon a proper application made by him or by some friend in his behalf.⁴

Authority of Applicant. — Upon an application for the writ of habeas corpus in such cases, the party applying must make it appear that he has been duly authorized to do so by the alleged lunatic himself, unless the latter is so coerced as to be incapable of giving such authority.⁵

Upon the Return of Such Writ the fact of the party's insanity should be inquired into and determined, and if it appears that he is wrongfully detained, he should be set at liberty;⁶ but if it is revealed at the hearing that he is in fact insane, and the court is satisfied that restraint and medical treatment would be beneficial to him, he should not be discharged.⁷

b. THOSE CHARGED WITH CRIME. — Where one charged with crime is found to be insane and is for that reason held in custody, it seems that he is not entitled to a writ of habeas corpus for the purpose of obtaining his release,⁸ though it has been held that where the guilt of a party charged with a capital offense depended upon the issue of his sanity at the time of the commission of the imputed crime, he might have a writ of habeas corpus to determine whether or not he was entitled to be released on bail.⁹

5. Inquiry by Commission in Lunacy. — In *New York*, when the state commission in lunacy has reason to believe that any person adjudged insane is wrongfully deprived of his liberty or is improperly cared for, it may ascertain the facts or may order an investigation of the facts by one of its members, and the commission or the commissioner conducting the proceeding may issue compulsory process for the attendance of witnesses and the production of papers, and exercise the powers conferred upon a referee of the Supreme Court.¹⁰

1. **Temporary Release — Recovery of Patient.** — *Statham v. Blackford*, 89 Va. 771.

2. **Common-law Rule.** — *Rex v. Coate*, Loft. 73; *Rex v. Turlington*, 2 Burr. 1115.

3. Under this statute (§ 9 Vict., c. 100, § 44) it is no defense that a person who receives two or more lunatics into his house for medical care and treatment is ignorant of the fact that they are lunatics, since it is the object of the act, when restraint is desirable, to place all such unfortunate persons under a competent authority. *Reg. v. Bishop*, 5 Q. B. D. 259.

4. **Habeas Corpus.** — *Rex v. Wright*, 2 Stra. 915; *Reg. v. Pinder*, 24 L. J. Q. B. 148; *Rex v. Turlington*, 2 Burr. 1115; *Rex v. Coate*, Loft. 73; *Rex v. Clarke*, 3 Burr. 1362; *Palmer v. Buck*, 83 Mich. 528; *State v. Billings*, 55 Minn. 473, 43 Am. St. Rep. 525; *State v. Kilbourne*, 68 Minn. 320; *Lance v. McCoy*, 34 W. Va. 416. See generally the title HABEAS CORPUS, vol. 15, p. 160 *et seq.*

5. *Ex p. Child*, 15 C. B. 238, 80 E. C. L. 238.

6. *Rex v. Turlington*, 2 Burr. 1115; *Gresho's*

Case, 12 Pa. Co. Ct. 295. See also *King v. McLean Asylum*, 21 U. S. App. 407; *Devilbiss v. Bennett*, 70 Md. 554. And see the title HABEAS CORPUS, vol. 15, p. 198.

7. **When the Person Restrained Is an Imbecile** and is unable to take care of himself, the court will not discharge him on habeas corpus. *Com. v. Kirkbride*, 3 Brews. (Pa.) 586.

In Massachusetts, so far as the Declaration of Rights is concerned, it has been determined that a person who is in fact insane is not entitled to be discharged from the hospital on habeas corpus provided the court is satisfied that the restraint and treatment there will be beneficial to him. *In re Oakes*, (Mass. 1845) 8 Law Rep. 122; *Denny v. Tyler*, 3 Allen (Mass.) 225; *Dowdell*, Petitioner, 169 Mass. 387, 61 Am. St. Rep. 290.

8. **When Crime Is Charged.** — *Matter of Underwood*, 30 Mich. 502; *In re Maguire*, 114 Mich. 80.

9. *Zembrod v. State*, 25 Tex. 519.

10. **New York Statute — Commission in Lunacy.** — *N. Y. Laws 1896*, c. 545, § 72. See *Ayer's*

6. Right to Notice and Hearing — Statute Conferring Arbitrary Powers upon Judge. — A statute which expressly and unequivocally leaves it to the judge to say whether the alleged insane person shall have notice of the proceedings being taken against him before or during the examination on which he is found insane, and to say whether he shall or shall not be heard at all in his own behalf, is in conflict with the Fourteenth Amendment of the Federal Constitution and similar provisions in the state constitutions, forbidding that any person shall be deprived of his life, liberty, or property without due process of law.¹

An Act Which Purports to Confer upon Overseers of the Poor or any other officers the arbitrary and dangerous power of taking and confining in any place of their own choosing the body of any person in the county whom they in their judgment may deem insane, without any trial or other legal proceeding by which the fact can be judicially ascertained, is in derogation of the rights of civil liberty guaranteed by the constitution.²

7. Right to Institute Proceedings for Release. — A statute which provides that an insane person may be committed to an asylum by others and there held and detained without the right to initiate proceedings for his own release is unconstitutional and void because it violates the Fourteenth Amendment of the Constitution of the United States, which directs that no state shall "deprive any person of life, liberty, or property without due process of law."³ But it is otherwise if he is entitled as a matter of right to institute judicial proceedings under the statute to determine the necessity and propriety of his confinement.⁴

8. Right to Jury Trial. — It has been held that no man can be deprived of his liberty without the judgment of his peers, and that it matters not whether the alleged cause of detention is insanity or crime.⁵ But on the other hand it has been held that an inquisition of lunacy is not within the purview of the constitutional guaranty of the right of trial by jury.⁶

Public Office — Insanity of Incumbent. — Where the statute provided for an inquiry into cases of alleged lunacy by jury trial, the action of the court in declaring a public office vacant because of the insanity of the officer, where this mode was not followed, was held to be unwarranted.⁷

Case, 3 Abb. N. Cas. (N. Y.) 218; Matter of Kings County Insane Asylum, (Supm. Ct. Spec. T.) 7 Abb. N. Cas. (N. Y.) 425. See also People v. Osborn, 57 Barb. (N. Y.) 663.

1. Constitutional Guaranty — Due Process — Unconstitutional Statute. — State v. Billings, 55 Minn. 473, 43 Am. St. Rep. 525.

A Statute Which Provides that the Court Shall, if Necessary, Issue a Warrant to apprehend an alleged insane person, is not in conflict with the constitution as authorizing the court to dispense with notice to the alleged lunatic and an opportunity to be heard in his own behalf, because it may not be necessary to arrest him in order to secure his constitutional rights. State v. Kilbourne, 68 Minn. 320.

Statute Not Requiring Notice or Appearance. — The constitutional provision that "no person shall be deprived of life, liberty, or property without due process of law," does not invalidate a statute which fails to require notice to a person or his appearance before he can lawfully be adjudged insane and restrained accordingly. Chavannes v. Priestley, 80 Iowa 316.

It should be observed, however, that this statute contemplates the presence in court of the person whose sanity is in question, in all cases except where upon inquiry it is made to appear that such presence would probably be

injurious to him or dangerous to others. See the case last above cited, and see Black Hawk County v. Springer, 58 Iowa 417.

2. Overseers of Poor. — Smith v. People, 65 Ill. 375. See the title POOR AND POOR LAWS.

3. Institution of Proceedings for Release. — Doyle's Petition, 16 R. I. 537, 27 Am. St. Rep. 759.

4. Le Donne, Petitioner, 173 Mass. 550; Dowdell, Petitioner, 169 Mass. 387, 61 Am. St. Rep. 290.

5. Jury Trial. — Com. v. Kirkbride, 2 Brews. (Pa.) 419. See also Bryce v. Graham, 2 Wils. & Sh. 481, 517; In re Crompe, L. R. 4 Ch. 653; Matter of Dey, 9 N. J. Eq. 181. See generally the title JURY AND JURY TRIAL.

6. Inquisition Not Within Constitutional Provision. — Matter of Ross, 38 La. Ann. 523; Gaston v. Babcock, 6 Wis. 503.

The constitutional provision guaranteeing the right of trial by jury applies only to criminal prosecutions or accusations for offenses against the criminal law where it is sought to punish the offender by fine or imprisonment. The inquest of lunacy is not a criminal proceeding, and is therefore not within such constitutional provision. Black Hawk County v. Springer, 58 Iowa 417; Matter of Bresee, 82 Iowa 573.

7. Missouri Statute — Public Office. — State v. Volume XVI.

9. Detention After Acquittal upon Criminal Charge. — In England it is provided by statute that if the jury acquits a person on trial for treason, murder, or felony, but finds specifically that he was insane at the time of doing the acts which would have been criminal had he been of sound mind, the court may order his detention in safe custody at the pleasure of the crown.¹ This statute, it seems, is applicable also in cases of misdemeanors of a grave character,² and at common law the crown had the power of detaining an insane defendant on a criminal charge until an inquest might be sworn to try the fact of his insanity.³

But in the United States it has been held that a statute which authorizes the confinement in a lunatic asylum of a person acquitted of crime on the ground of insanity, without giving to him the right to institute proceedings to secure his discharge, is unconstitutional and void.⁴

X. ACTIONS BY AND AGAINST LUNATICS AND THEIR GUARDIANS — 1. Lunatic's Right to Sue — *a.* BEFORE INQUISITION — **Early Rule.** — It is said that there was a time when idiots, madmen, and such as were deaf and dumb naturally were disabled to sue, because they wanted reason and understanding;⁵ but Coke says that in his time they might all sue, though the suit should be in their name, but "followed by others,"⁶ and he adds that when an idiot sued or defended, he should not appear by guardian or *prochein ami*, or attorney, but "must be ever in person,"⁷ the meaning of which seems to be that he must first appear in proper person, after which some competent person was admitted as his next friend to prosecute or defend for him.⁸

Modern Rule — **By Next Friend.** — A lunatic or person *non compos mentis*, not having been adjudged so by inquisition, and having no legal committee or guardian, may sue in his own name by some competent person as his next friend.⁹

Baird, 47 Mo. 301 (quo warranto proceedings); Kiehne v. Wessell, 53 Mo. App. 667.

1. Acquittal upon Criminal Charge. — Stat. 39 & 40 Geo. III., c. 94, § 2; Rex v. Pritchard, 7 C. & P. 303, 32 E. C. L. 517; Rex v. Dyson, 7 C. & P. 305, 32 E. C. L. 518; Reg. v. Oxford, 9 C. & P. 525, 38 E. C. L. 208; Reg. v. Goode, 7 Ad. & El. 536, 34 E. C. L. 150; Reg. v. Hodges, 8 C. & P. 195, 34 E. C. L. 350.

2. Rex v. Little, R. & R. C. C. 430; Rex v. Goode, 7 Ad. & El. 536, 34 E. C. L. 150.

3. Rex v. Frith, 22 How. St. Tr. 311; Kinloch's Case, 18 How. St. Tr. 411.

4. Underwood v. People, 32 Mich. 1, 20 Am. Rep. 633.

5. Early Rule as to Suits by Insane. — Co. Litt. 135*b*.

6. Co. Litt. 135*b*; Fitz. N. B. 27 H.

7. Co. Litt. 135*b*; Bac. Abr., tit. Idiots and Lunatics, G.

8. Dennis v. Dennis, 2 Saund. 328; Dennis v. Phrasier, 2 Keb. 691.

"An idiot in an action brought against him shall appear in proper person, and he who pleadeth best for him shall be admitted, as appeareth in 33 H. VI., 18." Beverley's Case, 4 Coke 124*b*.

9. Modern Rule — Suits by Next Friend — *England.* — Nelson v. Duncombe, 9 Beav. 231; Light v. Light, 25 Beav. 248; Scott v. Bentley, 1 Kay & J. 281; Jones v. Lloyd, 43 L. J. Ch. 826.

United States. — Dudgeon v. Watson, 23 Fed. Rep. 161.

Alabama. — Whetstone v. Whetstone, 75 Ala. 495.

Arkansas. — Jetton v. Smead, 29 Ark. 372.

Delaware. — Penington v. Thompson, 5 Del. Ch. 328.

Georgia. — Reese v. Reese, 89 Ga. 645.

Illinois. — Speck v. Pullman Palace Car Co., 121 Ill. 50; Chicago, etc., R. Co. v. Munger, 73 Ill. 301; Leonard v. The Times, 51 Ill. App. 429; Ryder v. Topping, 15 Ill. App. 216.

Kentucky. — Newcomb v. Newcomb, 13 Bush (Ky.) 544, 26 Am. Rep. 222.

Massachusetts. — Taylor v. Lovering, 171 Mass. 303.

Minnesota. — Plympton v. Hall, 55 Minn. 22.

Mississippi. — Gillespie v. Hauenstein, 72 Miss. 838.

Nebraska. — Wager v. Wagoner, 53 Neb. 511.

North Carolina. — Smith v. Smith, 108 N. Car. 365; Abbott v. Hancock, 123 N. Car. 99; Smith v. Smith, 106 N. Car. 499.

Tennessee. — Rankin v. Warner, 2 Lea (Tenn.) 302.

Texas. — Holzheiser v. Gulf, etc., R. Co., 11 Tex. Civ. App. 677; Pelham v. Moore, 21 Tex. 755; Abrahams v. Vollbaum, 54 Tex. 226.

Wisconsin. — Menz v. Beebe, 95 Wis. 383, 60 Am. St. Rep. 120.

Substitution of Guardian ad Litem. — Where proceedings are instituted in behalf of a lunatic by his next friend, the court has power to appoint a guardian *ad litem* to supersede the next friend. King v. McLean Asylum, 21 U. S. App. 481. See the title GUARDIAN AD LITEM, vol. 15, p. 3.

In Iowa it has been held that without statutory authority no one can maintain an action as the next friend of an insane person. Tiffany v. Worthington, 96 Iowa 560.

In a Lucid Interval an appeal may be taken

Judgment in Favor of Insane Plaintiff. — And it is well settled that a judgment at law is neither void nor voidable merely because the plaintiff is a lunatic.¹

b. AFTER INQUISITION — By Committee or Guardian. — A lunatic under guardianship must, as a rule, sue by his committee or guardian, and not by next friend,² unless the interests of the committee are at variance with those of the lunatic in respect to the matter to be litigated.³

2. Lunatic's Liability to Be Sued — a. ACTIONS AGAINST LUNATIC HIMSELF — (1) In General. — Courts of common law have jurisdiction in cases involving the rights of lunatics, unless they have been ousted of their jurisdiction by statute.⁴ That an insane person may be sued, and jurisdiction over him may be acquired by the like process as if he were sane, is abundantly established by the authorities.⁵ An action at law will lie against a lunatic personally for

by a lunatic not so found. *Formby v. Wood*, 19 Ga. 581.

1. Judgment for Insane Plaintiff Valid — Alabama. — *Waller v. Clay*, 21 Ala. 797.

California. — *Sacramento Sav. Bank v. Spencer*, 53 Cal. 737.

Georgia. — *Foster v. Jones*, 23 Ga. 168.

Illinois. — *Speck v. Pullman Palace Car Co.*, 121 Ill. 51; *Leonard v. The Times*, 51 Ill. App. 427.

Maryland. — *Stigers v. Brent*, 50 Md. 214, 33 Am. Rep. 317.

New Hampshire. — *Lamprey v. Nudd*, 29 N. H. 299.

New York. — *Robertson v. Lain*, 19 Wend. (N. Y.) 650; *Clarke v. Dunham*, 4 Den. (N. Y.) 262; *Sternbergh v. Schoolcraft*, 2 Barb. (N. Y.) 153.

Ohio. — *Johnson v. Pomeroy*, 31 Ohio St. 247.

Pennsylvania. — *Wood v. Bayard*, 63 Pa. St. 320.

Wisconsin. — *Menz v. Beebe*, 95 Wis. 383, 60 Am. St. Rep. 120.

2. After Inquisition — Suit to Be Brought by Guardian — England. — *Hartley v. Gilbert*, 13 Sim. 506.

Illinois. — *Covington v. Neftzger*, 140 Ill. 608, 33 Am. St. Rep. 261; *McClum v. McClum*, 176 Ill. 376.

Iowa. — *Chavannes v. Priestley*, 80 Iowa 316.

Massachusetts. — *Lombard v. Morse*, 155 Mass. 136.

North Carolina. — *Sims v. Sims*, 121 N. Car. 297, 61 Am. St. Rep. 665.

Ohio. — *Row v. Row*, 53 Ohio St. 249.

Vermont. — *Lincoln v. Thrall*, 34 Vt. 110; *Holden v. Scanlin*, 30 Vt. 177.

That the Plaintiff Was, at the Commencement of the Action, Insane and under guardianship, is sufficient ground for a plea in abatement. *Collard v. Crane*, Brayt. (Vt.) 18; *Holden v. Scanlin*, 30 Vt. 177.

Distinction Between Law and Equity. — The original distinction between law and equity in this regard does not seem now to be much observed; yet there are some recent cases which hold that although idiots and lunatics may sue at law by next friend, they must sue in equity by the committees or guardians of their estates, duly appointed in lunacy, for the care and management of their property. *Covington v. Neftzger*, 140 Ill. 608, 33 Am. St. Rep. 261; *Dorsheimer v. Roorback*, 18 N. J. Eq. 438; *Norcom v. Rogers*, 16 N. J. Eq. 484; *Demarest v. Vandenberg*, 39 N. J. Eq. 132; *McCreight v. Aiken*, Rice L. (S. Car.) 56.

And it is said that the rule is a wise one, for it should never be permitted that any volunteer should, by styling himself the next friend of an idiot or lunatic, bring suit for him and lose or jeopard his rights. *Covington v. Neftzger*, 140 Ill. 608, 33 Am. St. Rep. 261; *Dorsheimer v. Roorback*, 18 N. J. Eq. 439.

3. Where Committee's Interests Adverse to Lunatic's. — *Norcom v. Rogers*, 16 N. J. Eq. 484; *Bird v. Bird*, 21 Gratt. (Va.) 712.

Suit by Officer of State. — Sometimes in such circumstances suit may be brought by the attorney-general or other state officer. See the title *INSANE PERSONS*, 10 ENCYC. OF PL. AND PR. 1225.

Removal of Guardian. — A lunatic may file by his next friend a petition for the removal of his guardian. *Gray v. Parke*, 155 Mass. 433.

Form of Action. — As to the name in which the action should be brought, see the titles *GUARDIANS*, 9 ENCYC. OF PL. AND PR. 886; *INSANE PERSONS*, 10 ENCYC. OF PL. AND PR. 1225.

4. Actions Against Lunatics. — *Tomlinson v. Devore*, 1 Gill (Md.) 345; *Stigers v. Brent*, 50 Md. 214, 33 Am. Rep. 317.

England. — *Thorn v. Coward*, 2 Sid. 124; *Tyrell v. Jenner*, 3 M. & P. 648; *Anonymous*, 13 Ves. Jr. 590.

Alabama. — *Ex p. Northington*, 37 Ala. 496, 79 Am. Dec. 67.

California. — *Sacramento Sav. Bank v. Spencer*, 53 Cal. 737.

Illinois. — *Noel v. Modern Woodmen of America*, 61 Ill. App. 597; *Maloney v. Dewey*, 127 Ill. 395, 11 Am. St. Rep. 131.

Kentucky. — *German Nat. Bank v. Engeln*, 14 Bush (Ky.) 708.

Louisiana. — *Rau v. Katz*, 26 La. Ann. 463.

Maine. — *King v. Robinson*, 33 Me. 114, 54 Am. Dec. 614.

Maryland. — *Stigers v. Brent*, 50 Md. 214, 33 Am. Rep. 317; *Tomlinson v. Devore*, 1 Gill (Md.) 345.

Michigan. — *Ingersoll v. Harrison*, 48 Mich. 234.

Mississippi. — *Hines v. Potts*, 56 Miss. 347.

New Jersey. — *Van Horn v. Hann*, 39 N. J. L. 207.

New York. — *Robertson v. Lain*, 19 Wend. (N. Y.) 649; *Runberg v. Johnson*, (Brooklyn City Ct. Gen. T.) 11 Civ. Pro. (N. Y.) 283.

Ohio. — *Johnson v. Pomeroy*, 31 Ohio St. 247.

Rhode Island. — *Atwood v. Lester*, 20 R. I. 660.

Texas. — *Denni v. Elliott*, 60 Tex. 337.

Attachment. — The estate of a lunatic may

necessaries furnished to him before or during the period of his derangement.¹

(2) *After Inquisition* — (a) *Action at Law*. — The facts that a person has been adjudged insane and that a committee of his person and estate has been appointed do not place him beyond the jurisdiction of a court of law.² And the appointment of a committee or guardian for an insane person does not prevent the creditors of such person from commencing suits against him to recover their debts.³

(b) *Suit in Equity*. — But a suit in equity cannot be maintained against a lunatic under guardianship to recover a debt overreached by the finding in lunacy. The creditor should bring an action at law, and the sum found due may be paid out of the funds belonging to the lunatic.⁴

b. *ACTIONS AGAINST GUARDIAN* — *In General*. — An action will not lie against the committee or guardian on a cause of action against the lunatic which accrued prior to the commencement of the guardianship.⁵ And generally where the committee or guardian is regarded as a mere curator without title to the property of the lunatic, his immunity from liability to an action is recognized by the courts, and the lunatic himself is the proper party to be sued.⁶

By Leave of Court. — In some jurisdictions, as for instance *New York*, the committee is considered an officer of the court, and no action is maintainable against him without leave of court first granted.⁷ But leave to sue the committee may be granted when the petitioner shows a cause upon which a court of equity would grant relief if the claim should be established in a court of law.⁸

3. *Lunatic's Right to Allege His Own Insanity* — *Ancient Rule*. — According to an early rule at common law, a person of full age who had been *non compos*

be proceeded against by attachment, and he need not appear and defend by his next friend. *Weber v. Weitling*, 18 N. J. Eq. 441.

1. *Action for Necessaries*. — *Bagster v. Portsmouth*, 7 Dowl. & R. 614; *Van Horn v. Hann*, 39 N. J. L. 207.

And such action will lie against his personal representative after his death. *Van Horn v. Hann*, 39 N. J. L. 207.

2. *Actions at Law After Inquisition*. — *Sternbergh v. Schoolcraft*, 2 Barb. (N. Y.) 153; *Aldrich v. Williams*, 12 Vt. 413.

It is not irregular at law to sue and recover a judgment against one who has been found by inquisition to be a lunatic. *Dennis v. Dennis*, 2 Saund. 328; *Tyrrell v. Jenner*, 3 M. & P. 648; *Thorn v. Coward*, 2 Sid. 124; *Clarke v. Dunham*, 4 Den. (N. Y.) 262.

A commission of lunacy will not protect the lunatic against an action; and a commission of bankruptcy is a species of action against which the lunacy is no defense. *Anonymous*, 13 Ves. Jr. 590.

It is no ground for setting aside proceedings at law that the defendant at the beginning of the action was incompetent to manage his affairs or has become so since. *Cameron v. Portinger*, 3 Bibb (Ky.) 11; *Robertson v. Lain*, 19 Wend. (N. Y.) 649.

3. *Aldrich v. Williams*, 12 Vt. 413.

4. *In Equity*. — *Ex p. M'Dougal*, 12 Ves. Jr. 384.

5. *Against Committee*. — *Coombs v. Janvier*, 31 N. J. L. 240.

An action will not lie against the committee for necessaries furnished to the lunatic before and during the period of his lunacy. *Van Horn v. Hann*, 39 N. J. L. 207.

An action at law cannot be maintained

against a person in the character of committee or guardian of a lunatic without joining the lunatic as a party defendant. *Rodgers v. Ellison*, Meigs (Tenn.) 88.

6. *Thacher v. Dinsmore*, 5 Mass. 301, 4 Am. Dec. 61; *Van Horn v. Hann*, 39 N. J. L. 211; *Coombs v. Janvier*, 31 N. J. L. 240; *Bolling v. Turner*, 6 Rand. (Va.) 84.

In *Illinois* the conservator may be sued as the representative of the person for whom he is appointed, and upon judgment and execution against him all the property of the lunatic may be sold to pay his just debts that might be sold in other cases. *Morgan v. Hoyt*, 69 Ill. 489.

7. *Leave of Court*. — *Smith v. Keteltas*, 27 N. Y. App. Div. 279; *Soverhill v. Dickinson*, (Supm. Ct. Spec. T.) 5 How. Pr. (N. Y.) 109; *L'Amoureux v. Crosby*, 2 Paige (N. Y.) 422, 22 Am. Dec. 655; *Matter of Heller*, 3 Paige (N. Y.) 199; *Matter of Hopper*, 5 Paige (N. Y.) 489; *Williams v. Cameron*, 26 Barb. (N. Y.) 172. See also *In re Eckstein*, 2 Pa. L. J. 126, 1 Pa. L. J. Rep. 224; *Wier v. Myers*, 34 Pa. St. 377; *Wright's Appeal*, 8 Pa. St. 57; *Guthrie's Appeal*, 16 Pa. St. 321.

Effect of Leave Granted. — Permission to sue is not a determination that the petitioner has a good cause of action against the committee. *Kent v. West*, 33 N. Y. App. Div. 113.

8. *Matter of Wing*, 2 Han (N. Y.) 671.

The Jurisdiction to Determine the Necessity or Propriety of Charges and Expenses Incurred in the preservation or protection of a lunatic's interest or estate is of an equitable character and is to be based upon equitable principles, and such charges cannot be enforced by a common-law action against the committee. *Kent v. West*, 33 N. Y. App. Div. 113.

mentis would not be allowed to stultify himself and disable his own person by insisting on his insanity in avoidance of any act done by him while he was insane.¹ But though a deed, feoffment, or grant made by a man *non compos mentis* could not be avoided by himself, it could be avoided by his privies in blood or in representation.²

Modern Rule. — This rule, which was long criticised as mischievous and contrary to the dictates of natural justice,³ has been pretty thoroughly exploded, and the modern rule is that a contract made by a person who is so insane as to be incapable of understanding its effect is voidable at that person's option, unless the other contracting party did not know and had no means of knowing that he was of unsound mind;⁴ and under this rule it has been held that the lunacy of the defendant may be proved under a plea of *non est factum*.⁵ Though there are American cases in which the existence of the early English rule is clearly recognized, no case has been found in which that rule has been followed to the extent of depriving a party of the right to allege his own disability.⁶ The American courts have uniformly recognized the right of the party himself to rely upon and prove his own insanity as a means of avoiding any contract made by him during his insanity, as well at law as in equity.⁷

XI. QUESTIONS OF LAW AND FACT. — The General Rule is that the existence of insanity in a particular case is a question of fact to be decided by the jury.⁸

1. Ancient Rule as to Plea of Insanity by Lunatic. — Co. Litt. 246b; *Beverley's Case*, 4 Coke 123b; *Thompson v. Leach*, 1 Ld. Raym. 313; *Stroud v. Marshall*, Cro. Eliz. 398; Atty.-Gen. v. *Parkhurst*, 1 Ch. Cas. 113; Atty.-Gen. v. *Woolrich*, 1 Ch. Cas. 153; *Bagster v. Portsmouth*, 7 Dowl. & R. 614, 16 E. C. L. 304; *Brown v. Jodrell*, 3 C. & P. 30, 14 E. C. L. 196; Anonymous, Jenk. 40.

2. Rule as to Lunatic's Heirs. — *Beverley's Case*, 4 Coke 123b; *Thompson v. Leach*, 1 Ld. Raym. 315; *Tourson's Case*, 8 Coke 170; Anonymous, Jenk. 40.

The English authorities went no further than to estop a person from stultifying himself. The rule was never extended to the heirs, executors, or administrators. *Woodbridge, C. J.*, in *Lazell v. Pinnick*, 1 Tyler (Vt.) 247, 4 Am. Dec. 722.

3. Fitzherbert, Indeed, Says It Was Not a Rule of the Common Law, and that the notion first made its appearance in the opinions of two of the judges in a case decided in the 35th year of the reign of Edw. III. Fitz. N. B. 202. See also *Ridler v. Ridler*, 1 Eq. Cas. Abr. 279, par. 5; *Baxter v. Portsmouth*, 2 C. & P. 178, 12 E. C. L. 79.

4. Modern Rule. — *Gore v. Gibson*, 13 M. & W. 623; *Ball v. Mannin*, 3 Bligh N. S. 1; *Sentance v. Poole*, 3 C. & P. 1, 14 E. C. L. 179; *Molton v. Camroux*, 2 Exch. 487.

5. Yates v. Boen, 2 Stra. 1104; *Thompson v. Leach*, 2 Vent. 198; *Cole v. Robins*, Buller N. P. 172.

6. Jenkins v. Jenkins, 3 T. B. Mon. (Ky.) 327; *Breckenridge v. Ormsby*, 1 J. J. Marsh. (Ky.) 236, 19 Am. Dec. 71; *Stewart v. Spedden*, 5 Md. 446; *Owings's Case*, 1 Bland (Md.) 376, 17 Am. Dec. 311; *Mitchell v. Kingman*, 5 Pick. (Mass.) 431; *M'Creight v. Aiken*, Rice L. (S. Car.) 56; *Lazell v. Pinnick*, 1 Tyler (Vt.) 247, 4 Am. Dec. 722.

7. Connecticut. — *Webster v. Woodford*, 3 Day (Conn.) 90; *Grant v. Thompson*, 4 Conn. 203, 10 Am. Dec. 119.

Illinois. — *Mead v. Stegall*, 77 Ill. App. 679;

McCormick v. Littler, 85 Ill. 62, 28 Am. Rep. 610; *Burnham v. Kidwell*, 113 Ill. 425.

Kentucky. — *Taylor v. Dudley*, 5 Dana (Ky.) 308.

Maine. — *Hovey v. Hobson*, 53 Me. 454, 89 Am. Dec. 705; *Thornton v. Appleton*, 29 Me. 298.

Maryland. — *Owings's Case*, 1 Bland (Md.) 377, 17 Am. Dec. 311; *Chew v. Baltimore Bank*, 14 Md. 318.

Massachusetts. — *Seaver v. Phelps*, 11 Pick. (Mass.) 304, 22 Am. Dec. 372; *Allis v. Billings*, 6 Met. (Mass.) 415, 39 Am. Dec. 744; *Gibson v. Soper*, 6 Gray (Mass.) 279, 66 Am. Dec. 414; *Mitchell v. Kingman*, 5 Pick. (Mass.) 431; *Hix v. Whittemore*, 4 Met. (Mass.) 545; *Atwell v. Jenkins*, 163 Mass. 363, 47 Am. St. Rep. 463.

Missouri. — *Tolson v. Garner*, 15 Mo. 494; *Halley v. Troester*, 72 Mo. 73.

New Hampshire. — *Lang v. Whidden*, 2 N. H. 435.

New Jersey. — *Dem v. Moore*, 5 N. J. L. 540.

New York. — *Rice v. Peet*, 15 Johns. (N. Y.) 503.

North Carolina. — *Morris v. Clay*, 8 Jones L. (53 N. Car.) 216.

Pennsylvania. — *Crawford v. Scovell*, 94 Pa. St. 48, 39 Am. Rep. 766; *Bensell v. Chancellor*, 5 Whart. (Pa.) 371, 34 Am. Dec. 561.

South Carolina. — *M'Creight v. Aiken*, Rice L. (S. Car.) 56.

As to the pleading necessary to admit the defense of insanity, see 10 ENCYC. OF PL. AND PR., title INSANE PERSONS, p. 1214 *et seq.*

8. Existence of Insanity Question of Fact — *Alabama.* — *Walker v. Walker*, 34 Ala. 469; *Parsons v. State*, 81 Ala. 577, 60 Am. Rep. 193.

California. — *People v. Best*, 39 Cal. 690.

Georgia. — *Gardner v. Lamback*, 47 Ga. 133.

Kansas. — See *State v. Newman*, 57 Kan. 705.

Maryland. — *Townshend v. Townshend*, 7 Gill (Md.) 10.

Michigan. — *Kempsey v. McGinniss*, 21 Mich. 123; *Roberts v. People*, 19 Mich. 401;

Volume XVI,

but that the legal effect of insanity, admitted or proved, is a question of law.¹

Contrary View. — There are cases, however, in which it is held that it is for the jury, under suitable instructions of the court, to find the existence of insanity and to determine its effects on the party's acts.²

Where Evidence Clearly Insufficient. — In civil cases the court should not submit the question of a party's sanity to the jury upon clearly insufficient evidence such as will not sustain a verdict.³

But Where There Is Conflicting Evidence on the subject, the jury must settle the question as one of fact.⁴

And in Courts of Chancery the question of a party's sanity may be submitted to a jury in like manner as other questions of fact.⁵

XII. PRESUMPTIONS — 1. Of Sanity. — Except in a few jurisdictions where the statutes have cast upon the proponent of a will the burden of showing testamentary capacity,⁶ the uniform rule, in both civil and criminal cases, is that all persons who have reached the age of discretion are presumed to be sane until the contrary is shown, and that the burden of proving insanity rests upon him who first alleges it, to the extent, at least, of rebutting such presumption.⁷

2. Of Continuance of Insanity — a. OF PERMANENT NATURE. — When habitual insanity in the mind of the person whose act is in question is once

People v. Finley, 38 Mich. 482; *People v. Beverly*, 108 Mich. 509.

Pennsylvania. — *Nonnemacher v. Nonnemacher*, 159 Pa. St. 634.

Tennessee. — *Gass v. Gass*, 3 Humph. (Tenn.) 278.

And see generally the title **QUESTIONS OF LAW AND FACT**.

Where the defense of insanity is interposed, a verdict of guilty is conclusive on that issue, unless it is clearly against the weight of evidence or was influenced by some mistake, error, or prejudice. *People v. Hoch*, 150 N. Y. 291; *People v. Schuyler*, 106 N. Y. 298; *People v. Loppy*, 128 N. Y. 629, 40 N. Y. St. Rep. 410; *People v. Taylor*, 138 N. Y. 398. See also *Meyer v. People*, 156 Ill. 126.

And in civil cases a finding of the jury on a question of sanity will not be disturbed on the ground that it is against the weight of evidence. *Jones v. Roberts*, 96 Wis. 427.

1. Legal Effect of Insanity Question of Law. — *Gardner v. Lamback*, 47 Ga. 133; *Townshend v. Townshend*, 7 Gill (Md.) 10; *Kempsey v. McGinniss*, 21 Mich. 123; *Gass v. Gass*, 3 Humph. (Tenn.) 278.

Capacity to make a will is not a simple question of fact. It is a conclusion which the law draws from certain facts as premises. *Walker v. Walker*, 34 Ala. 473.

2. Indiana. — *Stevens v. State*, 31 Ind. 485, 99 Am. Dec. 634; *Bradley v. State*, 31 Ind. 492. See *Blake v. State*, 121 Ind. 435, 16 Am. St. Rep. 408; *Guettig v. State*, 63 Ind. 278; *Grubb v. State*, 117 Ind. 277.

Maine. — *Robinson v. Adams*, 62 Me. 369, 16 Am. Rep. 473; *Ware v. Ware*, 8 Me. 42; *Hill v. Nash*, 41 Me. 585, 66 Am. Dec. 266.

New Hampshire. — *Young v. Stevens*, 48 N. H. 133, 97 Am. Dec. 592; *State v. Pike*, 49 N. H. 399, 6 Am. Rep. 533 [overruling *Boardman v. Woodman*, 47 N. H. 120]; *State v. Jones*, 50 N. H. 369, 9 Am. Rep. 242.

3. Civil Cases — Insufficiency of Evidence. — *John Hancock Mut. L. Ins. Co. v. Moore*, 34 Mich. 41; *Cauffman v. Long*, 82 Pa. St. 72;

Boorman v. Northwestern Mut. Relief Assoc., 90 Wis. 144.

4. Where Evidence Conflicting — United States. — *Charter Oak L. Ins. Co. v. Rodel*, 95 U. S. 232.

Arkansas. — *McDaniel v. Crosby*, 19 Ark. 533; *Rogers v. Diamond*, 13 Ark. 479; *Matter of Cornelius*, 14 Ark. 675; *Abraham v. Wilkins*, 17 Ark. 292; *Jenkins v. Tobin*, 31 Ark. 306.

Georgia. — *Gainesville v. Caldwell*, 81 Ga. 76.

Maine. — *Hill v. Nash*, 41 Me. 585, 66 Am. Dec. 266.

Massachusetts. — *Wright v. Wright*, 139 Mass. 177.

Mississippi. — *Kelly v. Miller*, 39 Miss. 17.

New York. — *White v. Davis*, 62 Hun (N. Y.) 622, 17 N. Y. Supp. 548.

Pennsylvania. — *Starrett v. Douglass*, 2 Yeates (Pa.) 46.

Texas. — *Texas, etc., R. Co. v. Bailey*, (Tex. Civ. App. 1894) 27 S. W. Rep. 302.

5. In Courts of Chancery — United States. — *Harding v. Handy*, 11 Wheat. (U. S.) 103.

Alabama. — *Atwood v. Smith*, 11 Ala. 894;

Alexander v. Alexander, 5 Ala. 517.

Florida. — *Whitlock v. Smith*, 13 Fla. 385.

Illinois. — *Myatt v. Walker*, 44 Ill. 485;

Pankey v. Raum, 51 Ill. 88; *Titcomb v. Vantyle*, 84 Ill. 371; *Guild v. Hull*, 127 Ill. 523.

Kentucky. — *Howard v. Howard*, 87 Ky. 616.

New York. — *Doe v. Roe*, 1 Edm. Sel. Cas. (N. Y.) 344.

North Carolina. — *Smith v. Smith*, 106 N. Car. 502.

Ohio. — *Wallace v. Bevard*, *Wright* (Ohio) 114.

Tennessee. — *Yourie v. Nelson*, 1 Tenn. Ch. 275.

Virginia. — *Fishburne v. Ferguson*, 84 Va. 87.

West Virginia. — *Anderson v. Cranmer*, 11 W. Va. 582.

6. General Rule — All Persons Presumed Sane. — See the title **TESTAMENTARY CAPACITY**.

7. This is the rule given by all the text-writers, and it will be found stated in some

established, then the party who would take advantage of the fact of restoration to a sane condition or of an interval of reason must prove it, for insanity of that character is presumed to continue until the contrary is shown.¹

Need Not Show Complete Restoration. — But it is not necessary to show that the person has been restored to the full possession of his former mental vigor. The test of his capacity is the same as if he had never been insane, and a comparison of his present with his former mental strength can answer no useful purpose.²

form in nearly all the cases where the question has been at issue.

1. Habitual Insanity — Presumption of Continuance — *England*. — Atty.-Gen. *v.* Parnter, 3 Bro. C. C. 441; Osmond *v.* Fitzroy, 3 P. Wms. 129; Clarke *v.* Cartwright, 1 Phill. Ecc. 90; White *v.* Driver, 1 Phill. Ecc. 84; Smea *v.* Smea, 5 P. D. 84; White *v.* Wilson, 13 Ves. Jr. 87; Waring *v.* Waring, 6 Moo. P. C. 341; Harris *v.* Berrall, 1 Sw. & Tr. 153; Sprigge *v.* Sprigge, L. R. 1 P. & D. 608; Groom *v.* Thomas, 2 Hagg. Ecc. 433; Faulder *v.* Silk, 3 Campb. 126; Dane *v.* Kirkwall, 8 C. & P. 683, 34 E. C. L. 582; Frank *v.* Frank, 2 M. & Rob. 314; Bannatyne *v.* Bannatyne, 2 Rob. Ecc. 472; Hume *v.* Burton, 1 Ridg. P. C. 204; Prinsep *v.* Dyce Sombre, 10 Moo. P. C. 232; Smith *v.* Tebbitt, L. R. 1 P. & D. 398; Nichols *v.* Binns, 1 Sw. & Tr. 239; Reg. *v.* Layton, 4 Cox C. C. 149; Reg. *v.* Stokes, 3 C. & K. 185; Sergeson *v.* Sealey, 2 Atk. 412.

United States. — Stevens *v.* Vancleve, 4 Wash. (U. S.) 262; Hoge *v.* Fisher, Pet. (C. C.) 163.

Alabama. — Pike *v.* Pike, 104 Ala. 642; Saxon *v.* Whitaker, 30 Ala. 237; State *v.* Brinyea, 5 Ala. 244; Johnson *v.* Armstrong, 97 Ala. 731.

Arkansas. — McDaniel *v.* Crosby, 19 Ark. 545.

California. — People *v.* Francis, 38 Cal. 183; People *v.* Smith, 57 Cal. 130.

Delaware. — Duffield *v.* Robeson, 2 Harr. (Del.) 375.

Florida. — Armstrong *v.* State, 30 Fla. 170.

Georgia. — Terry *v.* Buftington, 11 Ga. 337, 56 Am. Dec. 423; Griffin *v.* Griffin, R. M. Charl. (Ga.) 217.

Illinois. — Emery *v.* Hoyt, 46 Ill. 258; Langdon *v.* People, 133 Ill. 382.

Indiana. — Achey *v.* Stephens, 8 Ind. 411; Rush *v.* Megee, 36 Ind. 69; Wade *v.* State, 37 Ind. 180; Kenworthy *v.* Williams, 5 Ind. 375; Grubb *v.* State, 117 Ind. 286; Crouse *v.* Holman, 19 Ind. 30; Musselman *v.* Cravens, 47 Ind. 1; Physio-Medical College *v.* Wilkinson, 108 Ind. 314; Sheets *v.* Bray, 125 Ind. 33.

Iowa. — Corbit *v.* Smith, 7 Iowa 60, 71 Am. Dec. 431.

Kansas. — State *v.* Reddick, 7 Kan. 143.

Louisiana. — Chandler *v.* Barrett, 21 La. Ann. 58, 99 Am. Dec. 701.

Maine. — Weston *v.* Higgins, 40 Me. 102; Thornton *v.* Appleton, 29 Me. 298; Staples *v.* Wellington, 58 Me. 453; Halley *v.* Webster, 21 Me. 461.

Maryland. — Townshend *v.* Townshend, 7 Gill (Md.) 10; Taylor *v.* Creswell, 45 Md. 422.

Massachusetts. — Hix *v.* Whittemore, 4 Met. (Mass.) 545; Breed *v.* Pratt, 18 Pick. (Mass.) 115.

Mississippi. — Mullins *v.* Cottrell, 41 Miss.

291; Ford *v.* State, 73 Miss. 734; Ricketts *v.* Jolliff, 62 Miss. 448.

Missouri. — State *v.* Lowe, 93 Mo. 547.

New Hampshire. — Pettes *v.* Bingham, 10 N. H. 514.

New Jersey. — Goble *v.* Grant, 3 N. J. Eq. 629; State *v.* Spencer, 21 N. J. L. 196; White-nack *v.* Stryker, 2 N. J. Eq. 8; Hill *v.* Day, 34 N. J. Eq. 150; Elkinton *v.* Brick, 44 N. J. Eq. 154.

New York. — Stewart *v.* Lispenard, 26 Wend. (N. Y.) 313; Jackson *v.* Van Dusen, 5 Johns. (N. Y.) 144 4 Am. Dec. 330; Goodell *v.* Harrington, 3 Thomp. & C. (N. Y.) 345; Matter of Hoag, 7 Paige (N. Y.) 312; Clark *v.* Fisher, 1 Paige (N. Y.) 171, 19 Am. Dec. 402; Hicks *v.* Marshall, 8 Hun (N. Y.) 327; Hart *v.* Deamer, 6 Wend. (N. Y.) 497; Hoyt *v.* Adee, 3 Lans. (N. Y.) 173.

North Carolina. — Ballew *v.* Clark, 2 Ired. L. (24 N. Car.) 23.

Pennsylvania. — Dornick *v.* Reichenback, 10 S. & R. (Pa.) 84; Grabill *v.* Barr, 5 Pa. St. 441, 47 Am. Dec. 418; Boyd *v.* Eby, 8 Watts (Pa.) 66; Harden *v.* Hays, 9 Pa. St. 151; Titlow *v.* Titlow, 54 Pa. St. 216, 93 Am. Dec. 691; Rogers *v.* Walker, 6 Pa. St. 371, 47 Am. Dec. 470; *In re* Gangwere, 14 Pa. St. 417, 53 Am. Dec. 554; Miskey's Appeal, 107 Pa. St. 611; Willis *v.* Willis, 12 Pa. St. 159; Noel *v.* Karper, 53 Pa. St. 97; Klohs *v.* Klohs, 61 Pa. St. 245; Hutchinson *v.* Sandt, 4 Rawle (Pa.) 234, 26 Am. Dec. 127; McGinnis *v.* Com., 74 Pa. St. 245; Lancaster County Nat. Bank *v.* Moore, 78 Pa. St. 407, 21 Am. Rep. 24.

Rhode Island. — Jenckes *v.* Probate Ct., 2 R. I. 255; Hamilton *v.* Hamilton, 10 R. I. 538.

South Carolina. — Kinloch *v.* Palmer, 1 Mill (S. Car.) 216.

Texas. — Leache *v.* State, 22 Tex. App. 279, 58 Am. Rep. 638; Smith *v.* State, 22 Tex. App. 316.

West Virginia. — Anderson *v.* Cranmer, 11 W. Va. 562; Jarrett *v.* Jarrett, 11 W. Va. 584.

Wisconsin. — Ripley *v.* Babcock, 13 Wis. 425; State *v.* Wilner, 40 Wis. 304.

2. Restoration to Former Mental Vigor Need Not Be Shown — *England*. — Hall *v.* Warren, 9 Ves. Jr. 605; *Ex p.* Holyland, 11 Ves. Jr. 10; White *v.* Wilson, 13 Ves. Jr. 88; White *v.* Driver, 1 Phill. Ecc. 88; Clarke *v.* Cartwright, 1 Phill. Ecc. 90; Creagh *v.* Blood, 2 J. & La. T. 509.

New York. — People *v.* Montgomery, (Oyer & T. Ct.) 13 Abb. Pr. N. S. (N. Y.) 207.

Pennsylvania. — McMasters *v.* Blair, 29 Pa. St. 298; Boyd *v.* Eby, 8 Watts (Pa.) 66.

Lord Thurlow, however, once expressed the opinion that when lunacy is once established by clear evidence, the party ought to be restored to as perfect a state of mind as he had before, and that this should be proved by evi-

b. OF TEMPORARY NATURE. — The rule above stated, that insanity once proved is presumed to continue, obtains only in cases of a chronic or permanent nature. If the malady is occasional or intermittent in its nature the presumption does not arise, and he who relies on insanity proved at another time must prove its existence also at the time alleged.¹

XIII. EVIDENCE OF INSANITY — 1. **Record of Inquisition** — a. **IN GENERAL.** — In collateral proceedings a finding of lunacy upon an inquisition which has not been superseded is presumptive but not conclusive evidence of insanity.²

dence as clear and satisfactory. Atty.-Gen. v. Parnter, 3 Bro. C. C. 441.

1. **In Cases of Temporary Insanity — England.** — Brogden v. Brown, 2 Add. Ecc. 441; Legeyt v. O'Brien, Milward 325; Blake v. Johnson, Milward 162; White v. Wilson, 13 Ves. Jr. 87; Hall v. Warren, 9 Ves. Jr. 605.

United States. — Hall v. Unger, 4 Sawy. (U. S.) 672; U. S. v. McGlue, 1 Curt. (U. S.) 1; Lewis v. Baird, 3 McLean (U. S.) 56.

Alabama. — Ford v. State, 71 Ala. 385; Johnson v. Armstrong, 97 Ala. 731.

California. — People v. Francis, 38 Cal. 183.

Delaware. — Duffield v. Robeson, 2 Harr. (Del.) 375.

Florida. — Armstrong v. State, 30 Fla. 170.

Illinois. — Brown v. Riffin, 94 Ill. 560; Trish v. Newell, 62 Ill. 196, 14 Am. Rep. 79; Langdon v. People, 133 Ill. 382.

Indiana. — Castor v. Davis, 120 Ind. 231.

Kansas. — State v. Reddick, 7 Kan. 143.

Kentucky. — Carpenter v. Carpenter, 8 Bush (Ky.) 283.

Maine. — Halley v. Webster, 21 Me. 461; Staples v. Wellington, 58 Me. 453.

Maryland. — Turner v. Rusk, 53 Md. 65; Townshend v. Townshend, 7 Gill (Md.) 10.

Massachusetts. — Hix v. Whittemore, 4 Met. (Mass.) 545.

Mississippi. — Ford v. State, 73 Miss. 734; Ricketts v. Jolliff, 62 Miss. 448.

Missouri. — State v. Lowe, 93 Mo. 547.

New York. — Clarke v. Sawyer, 3 Sandf. Ch. (N. Y.) 351; Gardner v. Gardner, 22 Wend. (N. Y.) 526, 34 Am. Dec. 340.

North Carolina. — State v. Sewell, 3 Jones L. (48 N. Car.) 245.

Pennsylvania. — McMasters v. Blair, 29 Pa. St. 298.

Tennessee. — Puryear v. Reese, 6 Coldw. (Tenn.) 21.

Texas. — Leach v. State, 22 Tex. App. 279, 38 Am. Rep. 638.

Vermont. — Manley v. Staples, 65 Vt. 370.

Virginia. — Burton v. Scott, 3 Rand. (Va.) 399; Cropp v. Cropp, 88 Va. 753.

Wisconsin. — State v. Wilner, 40 Wis. 304.

To establish the basis of a presumption that insanity once shown to have existed continues to exist, it must appear to have been of such duration and character as to indicate the probability of its continuance, and not simply the possibility, or even probability, of its recurrence, as in case of temporary insanity. People v. Schmitt, 106 Cal. 49; New York Mutual L. Ins. Co. v. Wiswell, 56 Kan. 765.

In Averall v. State, 15 Lea (Tenn.) 672, it was held that where the evidence is that the accused was subject to occasional attacks of insanity, and was visited by such an attack shortly before the offense, and is not shown to have recovered sanity at the time of such

offense, the presumption is that the insane condition continues as last established.

2. **Record of Inquisition Presumptive Evidence — England.** — Cooke v. Turner, 15 Sim. 611; Faulder v. Silk, 3 Campb. 126; Sergeson v. Sealey, 2 Atk. 412; Dane v. Kirkwall, 8 C. & P. 683, 34 E. C. L. 582; Bannatyne v. Bannatyne, 16 Jur. 864; Hassard v. Smith, Ir. R. 6 Eq. 429; Frank v. Frank, 2 M. & Rob. 314; Hume v. Burton, 1 Ridg. P. C. 204.

United States. — Thomas v. Hatch, 3 Sumn. (U. S.) 170.

Georgia. — Lucas v. Parsons, 23 Ga. 267.

Kentucky. — Hawkins v. Grimes, 13 B. Mon. (Ky.) 257; Hopson v. Boyd, 6 B. Mon. (Ky.) 296.

Massachusetts. — White v. Palmer, 4 Mass. 147; Stone v. Damon, 12 Mass. 488; Breed v. Pratt, 18 Pick. (Mass.) 115. See also Edson v. Munsell, 10 Allen (Mass.) 557.

New Jersey. — Hunt v. Hunt, 13 N. J. Eq. 161; Hill v. Day, 34 N. J. Eq. 150; Mott v. Mott, 49 N. J. Eq. 192; Den v. Clark, 10 N. J. L. 217, 18 Am. Dec. 417; Yauger v. Skinner, 14 N. J. Eq. 389.

New York. — Hughes v. Jones, 116 N. Y. 67, 15 Am. St. Rep. 386; Osterhout v. Shoemaker, 3 Hill (N. Y.) 516; Goodell v. Harrington, 3 Thomp. & C. (N. Y.) 345; Lewis v. Jones, 50 Barb. (N. Y.) 645; Matter of Taylor, 1 Edm. Sel. Cas. (N. Y.) 375; Cook v. Cook, 53 Barb. (N. Y.) 180; Hart v. Deamer, 6 Wend. (N. Y.) 497; Hicks v. Marshall, 8 Hun (N. Y.) 327.

North Carolina. — Christmas v. Mitchell, 3 Ired. Eq. (38 N. Car.) 535; Rippey v. Gant, 4 Ired. Eq. (39 N. Car.) 443; Armstrong v. Short, 1 Hawkes (8 N. Car.) 11. See also Arrington v. Short, 3 Hawks (10 N. Car.) 71.

Pennsylvania. — Noel v. Karper, 53 Pa. St. 97; Miskey's Appeal, 107 Pa. St. 611; Leckey v. Cunningham, 56 Pa. St. 370; Klohs v. Klohs, 61 Pa. St. 245; McGinnis v. Com., 74 Pa. St. 245; Willis v. Willis, 12 Pa. St. 159; *In re* Gangwere, 14 Pa. St. 417, 53 Am. Dec. 554; Rogers v. Walker, 6 Pa. St. 371, 47 Am. Dec. 470; Hutchinson v. Sandt, 4 Rawle (Pa.) 234, 26 Am. Dec. 127; Lancaster County Nat. Bank v. Moore, 78 Pa. St. 407, 21 Am. Rep. 24.

Rhode Island. — Hamilton v. Hamilton, 10 R. I. 538; Jenckes v. Probate Ct., 2 R. I. 255.

South Carolina. — See M'Creight v. Aiken, Rice L. (S. Car.) 56.

Texas. — Herndon v. Vick, 18 Tex. Civ. App. 583.

Vermont. — Shumway v. Shumway, 2 Vt. 339; Blaisdell v. Holmes, 48 Vt. 492; Williams v. Robinson, 39 Vt. 267.

Pending an Appeal from a finding of lunacy, it is only *prima facie* evidence of insanity. Grimes v. Shaw, 2 Tex. Civ. App. 20.

An inquest of lunacy, although conclusive evidence of the condition of the party at the

And when the record of an inquisition is offered in evidence in another proceeding, its validity is not open to collateral attack.¹

b. TRANSACTIONS OVERREACHED BY FINDING. — So also where a transaction is overreached by the finding of the jury in lunacy proceedings, the inquisition is presumptive but not conclusive evidence of insanity at the time of such transaction.²

c. COMMITMENT TO ASYLUM. — It seems, however, that an order made on *ex parte* proceedings committing a person to a lunatic asylum is not admissible to prove such person's insanity where his contractual capacity is in issue.³ If, however, he was sent to an asylum after a regular trial of the question of his sanity, the record of that trial is competent evidence on the subject in a subsequent prosecution for crime.⁴

Records of Hospital. — And the official records of the hospital are competent evidence of the mental condition of a patient who has been confined in such institution.⁵

date of the inquest, is only *prima facie* evidence of his condition at any subsequent period; being a mere presumption, it may be repelled by oral testimony. *Clark v. Trail*, 1 Met. (Ky.) 35.

1. *Gates v. Carpenter*, 43 Iowa 152; *Gillespie v. Hauenstein*, 72 Miss. 838; *Crow v. Meyer-sieck*, 88 Mo. 411; *Cook v. Cook*, 53 Barb. (N. Y.) 180.

Advantage of want of notice cannot be taken in collateral proceedings. *Warner v. Wilson*, 4 Cal. 310; *Dutcher v. Hill*, 29 Mo. 271; *Rogers v. Walker*, 6 Pa. St. 371, 47 Am. Dec. 470; *Willis v. Willis*, 12 Pa. St. 159. Nor may the validity of the committee's appointment be so questioned. *Dodge v. Cole*, 97 Ill. 338, 37 Am. Rep. 111; *Wing v. Dodge*, 80 Ill. 564 (foreign committee).

2. *Overreached Transactions — England.* — *Portsmouth v. Portsmouth*, 1 Hag. Ecc. 355; *Prinsep v. Dyre Sombre*, 10 Moo. P. C. 232; *Sergeson v. Sealey*, 2 Atk. 412; *Niell v. Morley*, 9 Ves. Jr. 478; *Frank v. Mainwaring*, 2 Beav. 115; *Jacobs v. Richards*, 18 Beav. 300; *Rodd v. Lewis*, 2 Lee Ecc. 176; *Snook v. Watts*, 11 Beav. 105; *Bannatyne v. Bannatyne*, 16 Jur. 864.

Illinois. — *Titcomb v. Vantyle*, 84 Ill. 371.

Kentucky. — *Wall v. Hill*, 1 B. Mon. (Ky.) 290, 36 Am. Dec. 578; *Hopson v. Boyd*, 6 B. Mon. (Ky.) 296.

Massachusetts. — *Breed v. Pratt*, 18 Pick. (Mass.) 115.

New York. — *L'Amoureux v. Crosby*, 2 Paige (N. Y.) 422, 22 Am. Dec. 655; *Hart v. Deamer*, 6 Wend. (N. Y.) 497; *Griswold v. Miller*, 15 Barb. (N. Y.) 520; *Van Deusen v. Sweet*, 51 N. Y. 386; *Banker v. Banker*, 63 N. Y. 413; *Hughes v. Jones*, 116 N. Y. 73, 15 Am. St. Rep. 386; *Osterhout v. Shoemaker*, 3 Hill (N. Y.) 513; *Reals v. Weston*, (Supm. Ct. Tr. T.) 28 Misc. (N. Y.) 67; *Hoyt v. Adeo*, 3 Lans. (N. Y.) 173; *Hicks v. Marshall*, 8 Hun (N. Y.) 329; *Hirsch v. Trainer*, (Supm. Ct. Spec. T.) 3 Abb. N. Cas. (N. Y.) 274; *Searles v. Harvey*, 6 Hun (N. Y.) 658; *Rider v. Miller*, 86 N. Y. 507; *Goodell v. Harrington*, 3 Thomp. & C. (N. Y.) 345.

North Carolina. — *Johnson v. Kincade*, 2 Ired. Eq. (37 N. Car.) 470; *Parker v. Davis*, 8 Jones L. (53 N. Car.) 460; *Arrington v. Short*, 3 Hawks (10 N. Car.) 71; *Christmas v. Mitchell*, 3 Ired. Eq. (38 N. Car.) 535; *Rippy v. Gant*, 4 Ired. Eq. (39 N. Car.) 443.

Pennsylvania. — *Noel v. Karper*, 53 Pa. St. 97. *South Carolina.* — *Knox v. Knox*, 30 S. Car.

377.

Virginia. — *Hughes v. Hughes*, 2 Munf. (Va.) 209.

In *Addison v. Dawson*, 2 Vern. 678, a sale of land which was overreached by the finding of the lunacy of the vendor was set aside, but the conveyance was allowed to stand as security for what was really paid.

As to acts done by a lunatic before the issuing of the commission and which are overreached by the retrospective finding of the jury, the inquisition is only presumptive but not conclusive evidence of incapacity. *L'Amoureux v. Crosby*, 2 Paige (N. Y.) 427, 22 Am. Dec. 655; *Wheeler v. State*, 34 Ohio St. 396, 32 Am. Rep. 372; *Lancaster County Nat. Bank v. Moore*, 78 Pa. St. 407, 21 Am. Rep. 24.

3. *Order of Commitment to Asylum.* — In a writ of entry by a woman to recover land from one to whom she and her husband had given a deed of it, on the ground that her husband was insane, an order of the judge of probate committing the husband to the lunatic asylum is not admissible to prove his insanity, for the double reason that the issue before the judge of probate was not the same as that before the jury and that the parties were different. *Leggare v. Clark*, 111 Mass. 308.

The Fact that the Grantor Had Been Discharged from a Lunatic Asylum shortly before the execution of the deed is not of itself sufficient evidence of incapacity to avoid his conveyance. *Knox v. Haug*, 48 Minn. 58; *Cropp v. Cropp*, 88 Va. 753.

In *Topeka Water-Supply Co. v. Root*, 56 Kan. 187, the deed of a person who had been discharged from an asylum as cured was upheld, though she had been adjudged insane before being sent to the asylum and there had been no adjudication that she had been restored to reason before the execution of the deed.

4. *On the Trial of an Indictment for Crime* a record of a court finding a defendant insane and committing him to an asylum four years before the commission of the offense is admissible as evidence as tending to prove his insanity. *Wheeler v. State*, 34 Ohio St. 394, 32 Am. Rep. 372.

5. *Hospital Records.* — *Townsend v. Pepperell*, 99 Mass. 40.

And the fact that one charged with crime

2. Nature of Act under Consideration — *a. CRIMINAL ACTS.* — When the act undergoing judicial investigation involves the criminality of the actor, the terrible and atrocious nature of the act cannot stand as the proof itself or as an element of the proof of the perpetrator's insanity.¹

b. CIVIL ACTS. — Where the act is of a civil nature purely, it is competent to consider it in connection with the circumstances surrounding its commission and the other evidence in the case as tending to prove the sanity or insanity of the actor.²

c. SUICIDE. — It has often been contended that self-destruction can result only from a deranged mind, but it seems now to be settled that suicide is not *per se* even *prima facie* evidence of insanity.³ But the act itself should be taken into consideration in connection with the previous conduct of the *felo de se* in order to determine whether he was or was not in possession of his faculties.⁴ Suicide, it is said, is admissible evidence to show the absence of a sound and disposing mind in a testator.⁵ It has been held that on a trial for murder it is not permissible to prove that the mind of the deceased was unbalanced;⁶ and it has also been held that upon such a trial it is not permissible to prove that the deceased had threatened to commit suicide, unless such threat can be

had, previous to the act, been committed to a lunatic asylum is admissible in evidence as tending to prove his insanity at the time of the act. *Pflueger v. State*, 46 Neb. 493.

1. Nature of Criminal Act as Evidence. — *Guiteau's Case*, 10 Fed. Rep. 108; *State v. Spencer*, 21 N. J. L. 207; *Laros v. Com.*, 84 Pa. St. 200; *Com. v. Mosler*, 4 Pa. St. 264; *State v. Stark*, 1 Strobh. L. (S. Car.) 479.

In one case it was suggested that when other proof of insanity has been introduced the atrocity of the act might add weight to such proof. *Laros v. Com.*, 84 Pa. St. 200. Compare *McLeod v. State*, 31 Tex. Crim. 331.

2. Rule in Civil Cases — *England.* — *Wheeler v. Alderson*, 3 Hag. Ecc. 574; *Fulleck v. Allinson*, 3 Hag. Ecc. 527; *Clarke v. Cartwright*, 1 Phill. Ecc. 90; *Nichols v. Binns*, 1 Sw. & Tr. 239; *Bannatyne v. Bannatyne*, 16 Jur. 864.

Canada. — *Campbell v. Hill*, 22 U. C. C. P. 526, 23 U. C. C. P. 473.

United States. — *Hall v. Unger*, 4 Sawy. (U. S.) 672.

Alabama. — *Stubbs v. Houston*, 33 Ala. 555; *Fountain v. Brown*, 38 Ala. 72; *Couch v. Couch*, 7 Ala. 519, 42 Am. Dec. 602; *Pike v. Pike*, 104 Ala. 642.

Arkansas. — *Beller v. Jones*, 22 Ark. 92.

Delaware. — *Duffield v. Robeson*, 2 Harr. (Del.) 375; *Chandler v. Ferris*, 1 Harr. (Del.) 454.

Illinois. — *Snow v. Benton*, 28 Ill. 306.

Indiana. — *Addington v. Wilson*, 5 Ind. 137, 61 Am. Dec. 81.

Iowa. — *Corbit v. Smith*, 7 Iowa 60, 71 Am. Dec. 431.

Kentucky. — *Weir's Will*, 9 Dana (Ky.) 440; *Overton v. Overton*, 18 B. Mon. (Ky.) 61.

Maryland. — *Higgins v. Carlton*, 28 Md. 115, 92 Am. Dec. 666.

Mississippi. — *Mullins v. Cottrell*, 41 Miss. 291; *Brock v. Lockett*, 4 How. (Miss.) 459.

New York. — *Clark v. Fisher*, 1 Paige (N. Y.) 171, 19 Am. Dec. 402; *La Bau v. Vanderbilt*, 3 Redf. (N. Y.) 384; *Stewart v. Lispenard*, 26 Wend. (N. Y.) 255.

Pennsylvania. — *Bitner v. Bitner*, 65 Pa. St. 347; *Spence v. Spence*, 4 Watts (Pa.) 165.

South Carolina. — *Means v. Means*, 5 Strobh. L. (S. Car.) 167.

Texas. — *Denson v. Beazley*, 34 Tex. 191.

3. Suicide. — *Reg. v. Barton*, 3 Cox C. C. 275; *M'Adam v. Walker*, 1 Dow 148; *Rex v. Coroner de —*, Comb. 2; *Rex v. Saloway*, 3 Mod. 100; *Burrows v. Burrows*, 1 Hag. Ecc. 109; *Terry v. Life Ins. Co.*, 1 Dill. (U. S.) 403; *Duffield v. Robeson*, 2 Harr. (Del.) 375; *Merritt v. Cotton States L. Ins. Co.*, 55 Ga. 103; *McElwee v. Ferguson*, 43 Md. 479; *Weed v. Mutual Ben. L. Ins. Co.*, 70 N. Y. 561; *Van Zandt v. Mutual Ben. L. Ins. Co.*, 55 N. Y. 169; *McClure v. Mutual L. Ins. Co.*, 55 N. Y. 651.

4. Borradaile v. Hunter, 5 M. & G. 647, 44 E. C. L. 339; *Clift v. Schwabe*, 3 C. B. 448, 54 E. C. L. 448; *Terry v. Imperial F. Ins. Co.*, 3 Dill. (U. S.) 408; *Duffield v. Robeson*, 2 Harr. (Del.) 375; *Jones v. Gorham*, 90 Ky. 622, 29 Am. St. Rep. 423; *McElwee v. Ferguson*, 43 Md. 479; *Brooks v. Barrett*, 7 Pick. (Mass.) 94; *Karow v. Continental Ins. Co.*, 57 Wis. 56, 46 Am. Rep. 17.

Fact of Suicide Said to Remove Presumption of Sanity. — In *Coffey v. Home L. Ins. Co.*, 35 N. Y. Super. Ct. 314, it was said that the law does not presume that a person who has taken his own life was insane at the time; but that inasmuch as many, perhaps most, persons who destroy their own lives are insane at the time, the fact of suicide removes the presumption of sanity.

Where Insane Man Found Dead — Presumption. — And again it has been said that "the presumption of law that a sane man found dead has not committed suicide does not apply to the case of an insane man so found. * * * The presumption in the case of a sane man is based upon his sanity, and the fact of insanity being shown, the ground of the presumption is gone." *Germain v. Brooklyn L. Ins. Co.*, 26 Hun (N. Y.) 604.

5. Suicide as Bearing on Testamentary Capacity. — *M'Adam v. Walker*, 1 Dow 148; *Brooks v. Barrett*, 7 Pick. (Mass.) 94; *Pettitt v. Pettitt*, 4 Humph. (Tenn.) 191.

6. Unbalanced Mental Condition — Homicide. — *State v. Punshon*, 133 Mo. 44.

considered a dying declaration or a part of the *res gestæ*.¹ But in a recent case in *Massachusetts*, where there was nothing in evidence inconsistent with the theory of suicide, the court, after careful consideration of the question on both principle and authority, set aside a verdict against the defendant because the trial court excluded evidence that the deceased, on the day preceding her death, had expressed a determination to put an end to her life.²

3. Absence of Motive. — In criminal cases the absence of any apparent motive for the commission of the offense is a circumstance to be considered in connection with other evidence of insanity, but it does not of itself prove insanity.³

4. Declarations and Admissions — a. VERBAL STATEMENTS. — Declarations of a party expressing an intention to make a disposition of his property other than that which he did make are not admissible in evidence for the general purpose of avoiding his deed or will.⁴ But declarations of the party, whether made before or after the act in question, may be received in evidence if they throw any light on his mental condition at the time of the act, though they cannot be considered as proof of any other matter.⁵

1. Threats to Suicide — Homicide. — Siebert v. People, 143 Ill. 571; State v. Fitzgerald, 130 Mo. 407; State v. Punshon, 133 Mo. 44.

2. Com. v. Trefethen, 157 Mass. 180. See also Reg. v. Jessop, 16 Cox C. C. 204.

3. Motive. — Reg. v. Layton, 4 Cox C. C. 149; State v. Spencer, 21 N. J. L. 196; Com. v. Mosler, 4 Pa. St. 264; McLeod v. State, 31 Tex. Crim. 331.

There are many recorded cases where atrocious crimes were committed in sheer recklessness, neither the hope of gain nor the gratification of any passion prompting the act. Goodwin v. State, 96 Ind. 566.

Where, upon a trial for murder, the defense is that the defendant was an epileptic and that the homicide was the unconscious and uncontrollable result of epileptic mania, the absence of motive is important as bearing upon the issue so presented. People v. Barber, 115 N. Y. 475.

4. Verbal Declarations as Evidence — In Avoidance of Deed — England. — Provis v. Reed, 5 Bing. 435, 15 E. C. L. 490.

United States. — Stevens v. Vancleve, 4 Wash. (U. S.) 262; Smith v. Fenner, 1 Gall. (U. S.) 170.

Connecticut. — Comstock v. Hadlyme Ecclesiastical Soc., 8 Conn. 254, 20 Am. Dec. 100.

Illinois. — Rutherford v. Morris, 77 Ill. 397; Dickie v. Carter, 42 Ill. 376.

Indiana. — Hayes v. West, 37 Ind. 21.

Iowa. — Gay v. Gay, 60 Iowa 415, 46 Am. Rep. 78.

Kansas. — Caeman v. Van Harke, 33 Kan. 333.

Kentucky. — Quisenberry v. Quisenberry, 14 B. Mon. (Ky.) 386.

Maryland. — Stewart v. Redditt, 3 Md. 67.

Michigan. — Fraser v. Jennison, 42 Mich. 206.

Missouri. — Gibson v. Gibson, 24 Mo. 227.

New Hampshire. — Hoitt v. Hoitt, 63 N. H. 475, 56 Am. Rep. 530.

New York. — Dan v. Brown, 4 Cow. (N. Y.) 483, 15 Am. Dec. 395.

Pennsylvania. — Chess v. Chess, 1 P. & W. (Pa.) 32, 21 Am. Dec. 350; Moritz v. Brough, 16 S. & R. (Pa.) 403.

Wisconsin. — Ladd's Will, 60 Wis. 187, 50 Am. Rep. 355.

See generally the title HEARSAY EVIDENCE, vol. 15, p. 309.

5. As Evidence of Mental State — England. — Sutton v. Sadler, 3 C. B. N. S. 87, 91 E. C. L. 87.

Connecticut. — Comstock v. Hadlyme Ecclesiastical Soc., 8 Conn. 254, 20 Am. Dec. 100.

Georgia. — Taylor v. State, 83 Ga. 647.

Illinois. — Reynolds v. Adams, 90 Ill. 134, 32 Am. Rep. 15.

Iowa. — Bates v. Bates, 27 Iowa 110; Parsons v. Parsons, 66 Iowa 754.

Kansas. — Mooney v. Olsen, 22 Kan. 69.

Massachusetts. — Howe v. Howe, 99 Mass. 88; Potter v. Baldwin, 133 Mass. 427; Lane v. Moore, 151 Mass. 87, 21 Am. St. Rep. 430.

Michigan. — Harring v. Allen, 25 Mich. 505.

Nevada. — State v. Lewis, 20 Nev. 333.

New York. — Waterman v. Whitney, 11 N. Y. 157, 62 Am. Dec. 71.

North Carolina. — Norwood v. Marrow, 4 Dev. & B. L. (20 N. Car.) 442.

Pennsylvania. — Chess v. Chess, 1 P. & W. (Pa.) 32, 21 Am. Dec. 350; Wilkinson v. Pearson, 23 Pa. St. 117; Moritz v. Brough, 16 S. & R. (Pa.) 403; McTaggart v. Thompson, 14 Pa. St. 149; Rambler v. Tryon, 7 S. & R. (Pa.) 94, 10 Am. Dec. 444; Norris v. Sheppard, 20 Pa. St. 475.

See also the title RES GESTÆ.

In Stewart v. Redditt, 3 Md. 67, declarations of the grantor made after the execution of the deed were excluded though offered to prove insanity, on the ground that they might as well have been the fruits of well-conceived deceit as of a vacant mind.

Upon a Criminal Trial, where the defense is insanity, it is not competent to prove declarations made by the defendant to his physician as to his condition at a time prior to the declarations, nor are any such declarations the proper basis of a scientific opinion as to his mental condition at that time. People v. Hawkins, 109 N. Y. 408; People v. Strait, 148 N. Y. 566.

But this rule does not apply to a case where it is asserted that the defendant was continuously insane from a period several months before the commission of the crime up to and at the time of the trial. People v. Nino, 149 N. Y. 326.

It is held that declarations of a prisoner are not admissible to prove his insanity unless they form a part of the *res gestæ* or are a part of some conversation which is admitted in evi-

b. LETTERS AND DIARIES. — Letters written¹ or diaries kept² by one whose sanity is questioned may be received in evidence if they throw any light on the condition of his intellect at or near the time of the act which is undergoing investigation. But letters of third persons addressed to such a person are not of themselves any evidence of his mental condition, and are not admissible for that purpose unless connected by evidence with some act of the party done with reference to them and which the contents of the letters are admissible to explain.³

c. RECITALS IN WRITTEN INSTRUMENT. — A former deed or will executed by the party may be received in evidence to show the condition of his mind at or near the time of the transaction in question, but not for the purpose of proving its contents, or showing a different disposition of the property embraced.⁴ But a person whose sanity is in question cannot himself be compelled to disclose the contents of a will he has made.⁵

5. Particular Facts and Circumstances Tending to Show Mental Aberration —

a. GENERAL CONDUCT AND APPEARANCE. — The language, conduct, appearance, and general health of a person whose sanity is in question may be considered in connection with other circumstances in the case.⁶

b. IRRATIONAL ACTS AND BELIEFS. — In determining the mental capacity of a person, his substantial business transactions are of greater weight than his foolish sayings and doings unconnected with business;⁷ but his irrational acts and beliefs may be shown as circumstances to be considered and weighed by the jury in connection with the other evidence in the case.⁸ The defend-

dence. *State v. Scott*, 1 Hawks (8 N. Car.) 24; *State v. Vann*, 82 N. Car. 631. See *contra*, *McLean v. State*, 16 Ala. 672.

Declarations of Agent. — Declarations of an agent that his principal was insane about the time when he executed the power of attorney under which the agent acted cannot be received in evidence. *Bensell v. Chancellor*, 5 Whart. (Pa.) 376, 34 Am. Dec. 561. See also the title *ADMISSIONS*, vol. 1, p. 670.

1. Letters Written by Party. — *State v. Kring*, 64 Mo. 591; *Marx v. McGlynn*, 88 N. Y. 358; *Sayres v. Com.*, 88 Pa. St. 291.

2. Diary and Journal Kept by Party. — *U. S. v. Sharp*, 1 Pet. (C. C.) 118; *Marx v. McGlynn*, 88 N. Y. 358. See also *Irish v. Smith*, 8 S. & R. (Pa.) 573.

3. Letters of Third Persons Addressed to Party. — *Wright v. Doe*, 7 Ad. & El. 313, 34 E. C. L. 95; *Waters v. Waters*, 35, Md. 531. In the case first cited this question was discussed with great ability, first in the King's Bench and afterwards in the Exchequer Chamber, and in the same case on appeal in the House of Lords, reported in 5 Cl. & F. 670.

4. Recitals in Deed or Will. — *Mynn v. Robinson*, 2 Hag. Ecc. 109; *Dodge v. Meech*, 1 Hag. Ecc. 612; *Marsh v. Tyrrell*, 2 Hag. Ecc. 84; *Hughes v. Hughes*, 31 Ala. 519 [*overruling* *Roberts v. Trawick*, 13 Ala. 68]; *Tobin v. Jenkins*, 29 Ark. 151; *Ross v. McQuiston*, 45 Iowa 145; *Rankin v. Rankin*, 61 Mo. 295; *Wood v. Sawyer*, Phil. L. (61 N. Car.) 251; *Love v. Johnston*, 12 Ired. L. (34 N. Car.) 355; *Titlow v. Titlow*, 54 Pa. St. 216, 93 Am. Dec. 691; *Irish v. Smith*, 8 S. & R. (Pa.) 573, 11 Am. Dec. 648.

Prior Conveyance of Property Attempted to Be Devised. — "The fact that before the will was made the testator had conveyed to third persons some of the property disposed of in the will, was competent evidence for the contestants, as it tended to show the failure of the

testator's memory, and thus bore on the question of his intellectual condition and capacity." *Walker, J.*, in *Fountain v. Brown*, 38 Ala. 72.

5. Alvord v. Alvord, (Iowa 1899) 80 N. W. Rep. 306.

6. General Conduct and Appearance. — *Clinton v. Estes*, 20 Ark. 216; *Halley v. Webster*, 21 Me. 461; *Doud v. Hall*, 8 Allen (Mass.) 410; *John Hancock Mut. L. Ins. Co. v. Moore*, 34 Mich. 41; *Com. v. Buccieri*, 153 Pa. St. 535; *Irish v. Smith*, 8 S. & R. (Pa.) 573, 11 Am. Dec. 648; *McLeod v. State*, 31 Tex. Crim. 331; *Adams v. State*, 34 Tex. Crim. 470.

That a Person Acted Strangely or in a Childish Manner is a fact to which any witness, though not an expert, may testify. *Parsons v. Parsons*, 66 Iowa 754. See also *State v. Duestrow*, 137 Mo. 44. And see the title *EXPERT AND OPINION EVIDENCE*, vol. 12, pp. 490, 492.

The Fact that a Client Appeared Too Imbecile to Make Statements to His Counsel is admissible in evidence. Such statements, when made, are privileged, but the inability to make them is not. *Daniel v. Daniel*, 39 Pa. St. 191.

The Want of Recollection of Names is one of the earliest symptoms of the decay of the memory; but this failure may exist to a very great degree and yet the solid power of the understanding may remain. *In re Yorke*, 185 Pa. St. 63; *Wilson v. Mitchell*, 101 Pa. St. 495.

7. Irrational Acts and Beliefs. — *Turner v. Hand*, 3 Wall. Jr. (C. C.) 88.

A Growing Neglect of One's Property is admissible as evidence of failing capacity. *Hamilton v. Hamilton*, 10 R. I. 538.

Nominating Notoriously Unfit Person as Executor. — That a testator, with knowledge of the fact, named a person of notoriously bad reputation as his executor, is admissible evidence to show want of capacity. *McGinnis v. Kempsey*, 27 Mich. 303.

8. The fact that a man "took a homely woman not quite right to church, and after-

ant may prove not only irrational acts and conduct, but facts which may account for them and reveal an adequate cause for mental aberration.¹ But proof that a cause existed which might tend to produce insanity is not of itself sufficient.²

c. IRRITABILITY. — If a mild, quiet, amiable, and modest man should suddenly become irritable, harsh, suspicious, obscene, and profane, evidence of such a revolution of temperament and character would be admissible as tending to show mental derangement.³ But mere irritability of temper and excitability of disposition, without more, do not constitute insanity, nor are such peculiarities of themselves evidence of insanity.⁴

d. DEPRAVITY. — Depravity of character and abandoned habits are not of themselves evidence of insanity.⁵

e. IMPROVIDENT BARGAINS AND HABITS. — That a person makes an improvident bargain, or many improvident bargains, or that he is generally unthrifty in his business, or unsuccessful in one or many enterprises, does not, *per se*, prove him to be *non compos mentis*. These may coexist with a mind perfectly and legally sound. But such testimony is certainly admissible in connection with other facts and circumstances tending to show mental aberration. Shrewdness in trade and general success in business would go far to rebut inconclusive testimony of mental unsoundness. So improvidence and recklessness in trade would render much more satisfactory and convincing circumstantial evidence which tended to prove mental aberration.⁶

f. RELIGIOUS BELIEFS. — Evidence as to one's religious beliefs or opinions regarding the existence of rewards and punishments in a future state is not admissible to prove his insanity.⁷

g. BELIEF IN SPIRITUALISM. — A general belief in spiritualism is not evidence of a want of mental capacity.⁸ But an insane delusion that one's acts are directed by the spirit of some departed friend is quite another matter, and may be sufficient to avoid acts done under its influence.⁹

6. Expert and Opinion Evidence. — This phase of the subject has already received full treatment in this work.¹⁰

7. Books of Science. — There are cases in which counsel for the prisoner have

ward said he would leave because she threatened him with a breach of promise suit," is a circumstance to be considered, but is not, in itself, sufficient to warrant the deduction of his insanity. *Smith's Case*, 22 Pa. Co. Ct. 489.

That a white man believes himself to be the father of a child with woolly hair and the color and features of a mulatto, and whose mother is also white, is admissible evidence to show mental delusion on that subject, though he was lawfully married to the mother three years before the child was born. *Florey v. Florey*, 24 Ala. 247.

1. *People v. Wood*, 126 N. Y. 249; *French v. State*, 93 Wis. 325.

Where the defense is insanity it is competent to prove illicit relations between the deceased and the defendant's wife and that the defendant had knowledge of such relations. *People v. Osmond*, 138 N. Y. 80; *People v. Wood*, 126 N. Y. 249.

2. *Sawyer v. State*, 35 Ind. 80.

3. *Irritability—Excitability.* — *Conely v. McDonald*, 40 Mich. 150; *Bitner v. Bitner*, 65 Pa. St. 347.

4. *Willis v. People*, 32 N. Y. 715.

Insomnia and Nervous Restlessness, though inconclusive, may be proved as circumstances to be weighed by the jury. *Boswell v. State*, 63 Ala. 307, 35 Am. Rep. 20.

Extreme Hostility to One's Kindred which is without cause or is the result of delusion is admissible as evidence of testamentary incapacity. *Brown v. Ward*, 53 Md. 376, 36 Am. Rep. 422.

5. *Depravity.* — *Hill v. Hill*, 27 N. J. Eq. 214. In this case the court said: "That she became lost to shame, and in her lewdness disregarded her duty to her husband and her family, is not proof of an unsound mind, but of vicious tastes and inclinations too powerful to be controlled by the demands of duty or the restraints of society."

6. *Improvident Habits.* — 1 Beck's Med. Jur. 745; *In re Carmichael*, 36 Ala. 514; *Henry v. Fine*, 23 Ark. 417; *Kenworthy v. Williams*, 5 Ind. 375; *Hall v. Hall*, 17 Pick. (Mass.) 373; *Noel v. Karper*, 53 Pa. St. 97.

7. *Religious Beliefs.* — *Gass v. Gass*, 3 Humph. (Tenn.) 284; *Bonard's Will*, 16 Abb. Pr. N. S. (N. Y.) 128.

8. *Spiritualism.* — *Turner v. Hand*, 3 Wall. Jr. (C. C.) 88; *Brown v. Ward*, 53 Md. 376, 36 Am. Rep. 422; *Matter of Beach*, 23 N. Y. App. Div. 411.

9. *Robinson v. Adams*, 62 Me. 369, 16 Am. Rep. 473; *Matter of Beach*, 23 N. Y. App. Div. 411.

10. See the title **EXPERT AND OPINION EVIDENCE**, vol. 12, p. 414.

been allowed to read to the jury passages from standard works on medical jurisprudence in support of their theory of the mental condition of the accused;¹ but the better opinion is that excerpts from such works cannot be read to the jury as evidence or in the course of argument by counsel.² No evidence in the nature of parol testimony can properly pass to the jury, except under the sanction of an oath; and upon this ground books of science are excluded, notwithstanding the opinion of scientific men that they are books of authority and valuable as treatises. Scientific men are permitted to give their opinions as experts because they are given under oath, but the books which they write containing such opinions are, for the want of such oath, excluded.³

8. General Reputation and Family Tradition — *a.* TO PROVE HEREDITARY TAIN. — When it is desirable to prove the insanity of remote ancestors of the person whose sanity is directly in issue, it is sometimes difficult or impossible to find living witnesses who have personal knowledge of the fact. In one such case the court admitted evidence of family tradition to show the hereditary taint, on the principle that such evidence is admissible, when it is the best obtainable, to prove births, deaths, genealogies, etc.⁴ But this is open to the double objection of admitting hearsay evidence to prove a collateral fact, and it appears to be the better rule that such evidence is not admissible.⁵

b. TO PROVE INSANITY OF PARTY. — And there is certainly no authority or principle of the law of evidence which will admit proof, by mere reputation in the family, of insanity or other disease of the person whose mental condition is directly in issue.⁶ Neither is general reputation competent evidence of such person's mental condition.⁷

1. Books of Science. — *State v. Hoyt*, 46 Conn. 330; *State v. West*, Houst. Crim. Cas. (Del.) 371.

In *Connecticut* this rule is said to be confined exclusively to cases where the plea of insanity is interposed in behalf of one indicted or informed against for a criminal offense. In all other cases the rule laid down in *Baldwin's Appeal*, 44 Conn. 37, fully applies. See *Richmond's Appeal*, 59 Conn. 244.

In *Reg. v. Crouch*, 1 Cox C. C. 94, counsel for the prisoner, in his address to the jury, attempted to quote from a medical work the author's opinion on the subject of insanity, insisting that it was certainly done in *M'Naghten's Case*, 10 Cl. & F. 200; but *Alderson, B.*, refused to permit it, saying: "But for the noninterposition of the judge in that case, you would not probably have thought it necessary to make this struggle now."

2. England. — *Reg. v. Crouch*, 1 Cox C. C. 94; *Reg. v. Taylor*, 13 Cox C. C. 77; *Collier v. Simpson*, 5 C. & P. 73, 24 E. C. L. 219; *Cocks v. Purday*, 2 C. & K. 270, 61 E. C. L. 270.

California. — *People v. Wheeler*, 60 Cal. 581, 44 Am. Rep. 70.

Maryland. — *Davis v. State*, 38 Md. 15.

Massachusetts. — *Com. v. Brown*, 121 Mass. 81; *Com. v. Sturivant*, 117 Mass. 122, 19 Am. Rep. 401.

Michigan. — *Fraser v. Jennison*, 42 Mich. 206.

Texas. — *Burt v. State*, 38 Tex. Crim. 397.

Wisconsin. — *Boyle v. State*, 57 Wis. 472, 46 Am. Rep. 41.

In the trial of a criminal case, where the defense relied on is the insanity of the defendant, neither books of established reputation on the subject of insanity, whether written by medical men or lawyers, nor statistics of the increase of insanity as stated by the court or

counsel on the trial of another case, can be read to the jury. *Com. v. Wilson*, 1 Gray (Mass.) 337.

3. People v. Wheeler, 60 Cal. 587, 44 Am. Rep. 70; *State v. O'Brien*, 7 R. I. 338.

4. General Reputation and Family Tradition. — *State v. Windsor*, 5 Harr. (Del.) 512.

5. In *State v. Hoyt*, 47 Conn. 518, 36 Am. Rep. 89, evidence offered by the defendant to prove that his father was reported in the neighborhood to be at times insane was held inadmissible on the ground that insanity is a fact that cannot be proved by reputation.

In *Walker v. State*, 102 Ind. 507, the defendant offered to prove hereditary insanity in his family by family tradition, and it was held that the evidence was not admissible and was properly excluded by the trial court.

6. People v. Koerner, 154 N. Y. 355.

Family and neighborhood reputation is not admissible to prove that the prisoner was permanently injured in his mind by reason of a physical injury which he had received. *Choice v. State*, 31 Ga. 424.

7. Georgia. — *Brinkley v. State*, 58 Ga. 296; *Stewart v. State*, 58 Ga. 577.

Massachusetts. — *Townsend v. Pepperell*, 99 Mass. 40.

Missouri. — *Brinkman v. Rueggessick*, 71 Mo. 553.

Pennsylvania. — *Pidcock v. Potter*, 68 Pa. St. 342, 8 Am. Rep. 181.

See also *Territory v. Padilla*, 8 N. Mex. 510.

Rumors in the neighborhood of the party alleged to be insane respecting his mental condition are not admissible in evidence. *Ashcraft v. De Armond*, 44 Iowa 229; *Lancaster County Nat. Bank v. Moore*, 78 Pa. St. 407, 21 Am. Rep. 24. See also *People v. Schmitt*, 106 Cal. 48. Neither are the letters and unsworn statements of his friends and relatives admis-

9. Proof of Hereditary Taint — a. INSANITY OF ANCESTORS. — Though it was once ruled that proof that other members of the same family have been decidedly insane is not admissible either in civil or criminal cases,¹ it is now allowable to prove the insanity of either parent, or even of a more remote ancestor, since it seems well established that insanity sometimes disappears in one generation and reappears in the next.²

b. INSANITY OF COLLATERAL KINDRED. — So the insanity of a brother or sister of the accused may be shown, and the jury may consider it in connection with other evidence bearing on the subject of the defendant's mental condition;³ and the same is true of the insanity of more remote collateral relatives of the person whose sanity is directly in question,⁴ though in such cases it should be made to appear that they are descended from a common stock which bears the hereditary taint.⁵

c. AS TO NATURE OF MALADY. — And it seems also that the insanity alleged should appear to be of a kind that may in its nature be hereditary.⁶

sible. *Wright v. Doe*, 1 Ad. & El. 3, 28 E. C. L. 11.

In *Foster v. Brooks*, 6 Ga. 292, the court said: "If reputation of insanity is competent, then reputation of sanity must be also. By this kind of evidence a fool may be proved a wise man and a philosopher a fool. Public opinion declared Copernicus a fool when he promulgated the planetary system, and Columbus a fool when he announced the sublime idea of a new world. Hazardous in the extreme would it be to the rights of parties under the law if they were allowed to depend upon the opinion of a neighborhood of the sanity of individuals."

1. Insanity of Ancestors. — Shelf, on Lunacy 59; *M'Adam v. Walker*, 1 Dow. 148, 174; *Cooley, C. J.*, in *People v. Garbutt*, 17 Mich. 17, 97 Am. Dec. 162.

2. 1 Whart. & St. Med. Jur., § 362 *et seq.*; *Esquirol on Mental Maladies* (translated by Hunt) 49; *1 Beck's Med. Jur.* (10th ed.) 725; *Taylor's Med. Jur.* (Eng. ed.) 629; *Ray's Med. Jur.*, § 72; *Combe on Mental Derangement* (Am. ed.) 96.

Connecticut. — *State v. Hoyt*, 47 Conn. 518, 36 Am. Rep. 89.

Delaware. — *State v. Windsor*, 5 Harr. (Del.) 512.

District of Columbia. — *Coughlin v. Poulson*, 2 MacArthur (D. C.) 308.

Georgia. — *Taylor v. State*, 105 Ga. 746.

Massachusetts. — *Baxter v. Abbott*, 17 Gray (Mass.) 71.

Michigan. — *People v. Garbutt*, 17 Mich. 17, 97 Am. Dec. 162.

Missouri. — *State v. Simms*, 68 Mo. 305.

New York. — *People v. Montgomery*, (Oyer & T. Ct.) 13 Abb. Pr. N. S. (N. Y.) 207; *People v. Sprague*, (Oyer & T. Ct.) 2 Park. Crim. (N. Y.) 43; *People v. Pine*, 2 Barb. (N. Y.) 566.

North Carolina. — *State v. Cunningham*, 72 N. Car. 469.

Pennsylvania. — *Com. v. Haskell*, 2 Brews. (Pa.) 491; *Smith v. Krame*, 1 Am. L. Reg. 353.

Texas. — *Lovegrove v. State*, 31 Tex. Crim. 491.

3. Insanity of Collateral Kin. — *Shaeffer v. State*, 61 Ark. 241; *People v. Garbutt*, 17 Mich. 9, 97 Am. Dec. 162; *Fraser v. Jennison*, 42 Mich. 228; *State v. Simms*, 68 Mo. 305.

In a trial for murder in *Tennessee*, in which the defense was insanity, and there was some evidence tending to show the defendant's insanity at the time of the killing, it was held reversible error to reject evidence of the mental condition of the prisoner's brother. *Hagan v. State*, 5 Baxt. (Tenn.) 615.

4. Reg. v. Tucket, 1 Cox C. C. 103.

The insanity of an uncle or aunt of the person whose sanity is in issue is admissible in evidence. *Baxter v. Abbott*, 7 Gray (Mass.) 71; *State v. Simms*, 68 Mo. 305.

In a case in *Massachusetts* in 1868 the court admitted evidence of the insanity of collateral relatives of the defendant descended from a common ancestor three generations back. *Trial of Andrews*, pamphlet, p. 135, cited in 1 Whart. & St. Med. Jur., § 375.

5. In Missouri it is held that evidence of the insanity of a person's collateral kindred is not admissible unless it is shown that he is descended from that blood which bore the taint of insanity. *State v. Soper*, 148 Mo. 217.

6. Nature of Malady as Hereditary. — *Reg. v. Tucket*, 1 Cox C. C. 103; *State v. Hoyt*, 47 Conn. 518, 36 Am. Rep. 89; *Mecker v. Mecker*, 75 Ill. 260.

In *Reg. v. Oxford*, 9 C. & P. 525, 38 E. C. L. 208, evidence was introduced tending to prove the insanity of the prisoner's grandfather; and Lord Denman instructed the jury that two points were to be considered; first, whether the grandfather was or was not insane, and second, whether his insanity, if it existed, was hereditary.

View that Insanity of Ancestors and That of Party Must Be of Same Kind. — In *State v. Christmas*, 6 Jones L. (51 N. Car.) 471, it was held that where hereditary insanity in the prisoner's family is offered in evidence for the defense, it must, in order to be admissible, be of the same character as that alleged to exist in the prisoner, and that the instances to be proved must have been notorious, so as to be capable of being established by general reputation.

This Case Seems to Be Supported by No Other Authority, and Mr. Wharton says that it cannot be sustained, as insanity rarely descends in the same common type, but varies in individuals. 1 Whart. Crim. Law, § 65; 1 Whart. & St. Med. Jur., § 376.

d. ADMITTED AS CUMULATIVE EVIDENCE. — Proof of hereditary insanity is admitted as cumulative evidence only, and the insanity of ancestors is of itself no defense.¹ Consequently proof of hereditary insanity in the prisoner's family is admissible after laying a foundation for its reception by the introduction of some evidence of the defendant's own insanity.² But it is not admissible until such foundation has been laid by an offer of some direct proof of insanity in the person whose mental condition is in issue.³

10. Competency of Evidence in Regard to Time — *a. CONDITION AT TIME OF ACT IS POINT FOR DECISION.* — In both civil and criminal cases the question for the jury to decide has reference to the mental condition of the person whose sanity is in issue at the very time of doing the act which is the subject of judicial investigation.⁴

b. EVIDENCE OF CONDITION BEFORE AND AFTER ACT ADMISSIBLE — (1) *To Prove Insanity at Time of Act.* — But in order to ascertain a person's mental condition at the time of the act in question, it is permissible to receive evidence of the condition of his mind for a reasonable period both before and after that time, especially where it is claimed that his disorder is of a continuing or permanent character, and this evidence should be considered by the jury in connection with the other facts and circumstances of the case.⁵

1. Merely Cumulative Evidence — No Defense. — 1 Whart. & St. Med. Jur., § 377; Shaeffer v. State, 61 Ark. 244; State v. Van Tassel, 103 Iowa 11.

Where the question of insanity is at issue, evidence of hereditary taint is competent to corroborate direct proof. Smith v. Kramer, 1 Am. L. Reg. 353.

It cannot be presumed against proof that a person was insane, merely because his mother had been insane. Snow v. Benton, 28 Ill. 306

2. Green v. State, 64 Ark. 530; People v. Garbutt, 17 Mich. 9, 97 Am. Dec. 162. See also People v. Smith, 31 Cal. 466; Bradley v. State, 31 Ind. 492.

3. England. — Doe v. Whitefoot, 8 C. & P. 270, 34 E. C. L. 386.

Arkansas. — Green v. State, 64 Ark. 530.

Indiana. — Bradley v. State, 31 Ind. 492; Sawyer v. State, 35 Ind. 80.

Iowa. — State v. Van Tassel, 103 Iowa 11.

Pennsylvania. — Laros v. Com., 84 Pa. St. 200.

See also State v. Cunningham, 72 N. Car. 469.

4. Mental Condition at Time of Act — England. — Hadfield's Case, 27 How. St. Tr. 1281; Reg. v. Renshaw, 11 Jur. 615.

Alabama. — Jones v. State, 13 Ala. 153.

California. — People v. Schmitt, 106 Cal. 48.

Massachusetts. — Com. v. Rogers, 7 Met. (Mass.) 500, 41 Am. Dec. 458.

Missouri. — State v. Huting, 21 Mo. 464.

Nevada. — State v. Lewis, 20 Nev. 333.

New Jersey. — State v. Spencer, 21 N. J. L. 196.

New York. — People v. Pine, 2 Barb. (N. Y.) 566.

North Carolina. — State v. Vann, 82 N. Car. 631.

Pennsylvania. — Nonnemacher v. Nonnemacher, 159 Pa. St. 634; Com. v. Buccieri, 153 Pa. St. 535.

South Carolina. — State v. Stark, 1 Strobh. L. (S. Car.) 479.

Texas. — Shultz v. State, 13 Tex. 401; Clark v. State, 8 Tex. App. 350; Carter v. State, 12

Tex. 500, 62 Am. Dec. 539; Webb v. State, 5 Tex. App. 596; Williams v. State, 7 Tex. App. 163; Leache v. State, 22 Tex. App. 308; Giebel v. State, 28 Tex. App. 171; Erwin v. State, 10 Tex. App. 700; Thomas v. State, 40 Tex. 60.

The Fact that the Insanity of the Defendant Has Become Fully Developed Since the Trial, assuming it to be true, does not authorize the appellate court to act upon evidence furnished by his present demented condition, and upon that ground reverse a judgment otherwise legal, when it may be true that, notwithstanding his present condition, the mental disease may not have so far progressed at the time of the homicide as to relieve the defendant from responsibility for his acts. People v. Schmitt, 106 Cal. 49.

5. Evidence of Mental Condition Before and After Act — England. — Beavan v. M'Donnell, 10 Exch. 184.

United States. — Stevens v. Vancleve, 4 Wash. (U. S.) 262; U. S. v. Holmes, 1 Cliff. (U. S.) 98.

Alabama. — Jones v. State, 13 Ala. 153; McLean v. State, 16 Ala. 672; McAllister v. State, 17 Ala. 434, 52 Am. Dec. 180; Watson v. Anderson, 11 Ala. 43; Walker v. Clay, 21 Ala. 797.

Arkansas. — Clinton v. Estes, 20 Ark. 216.

California. — People v. March, 6 Cal. 543; Toomes's Estate, 54 Cal. 509, 35 Am. Rep. 83.

Connecticut. — Grant v. Thompson, 4 Conn. 203, 10 Am. Dec. 119.

Georgia. — Gray v. Obear, 59 Ga. 675; Choice v. State, 31 Ga. 424; Terry v. Buffington, 11 Ga. 337, 56 Am. Dec. 423; Carr v. State, 96 Ga. 284.

Indiana. — Koile v. Ellis, 16 Ind. 301; Nichol v. Thomas, 53 Ind. 42.

Iowa. — Ross v. McQuiston, 45 Iowa 145; Ashcraft v. De Armond, 44 Iowa 229.

Kansas. — State v. Newman, 57 Kan. 705.

Kentucky. — Montgomery v. Com., 38 Ky. 509; Moore v. Com., 92 Ky. 630.

Maine. — Robinson v. Adams, 62 Me. 369, 16 Am. Rep. 473.

Maryland. — Davis v. Calvert, 5 Gill & J.

Volume XVI.

(2) *In Rebuttal*. — And where a party has put in issue his sanity at a particular time, the other party may, in rebuttal, inquire into his condition before and after that time.¹

11. Requisite Degree of Proof in Criminal Cases — *a. IN GENERAL* — **THREE VIEWS.** — On this subject three distinct theories are held by courts and text-writers of the highest character, viz.: (1) The prisoner must prove his insanity beyond a reasonable doubt. (2) He must establish it by a preponderance of evidence. (3) He must raise a reasonable doubt as to his sanity.²

b. VIEW THAT ACCUSED MUST PROVE INSANITY BEYOND REASONABLE DOUBT. — The rule as laid down by the English adjudications and textbooks is that when the prisoner seeks to excuse himself upon the plea of insanity, it is for him to make it clear that he was insane at the time of committing the offense charged.³ And there has been some disposition on the part of American courts, in cases where the commission of the act was admitted or clearly proved, to regard the plea of insanity as in the nature of confession and avoidance and to require that it be proved beyond a reasonable doubt.⁴

(Md.) 269, 25 Am. Dec. 282; *Negro Jerry v. Townshend*, 9 Md. 145.

Massachusetts. — *Lane v. Moore*, 151 Mass. 87, 21 Am. St. Rep. 430; *Peaslee v. Robbins*, 3 Met. (Mass.) 164; *Com. v. Pomeroy*, 117 Mass. 143; *Shailer v. Bumstead*, 99 Mass. 112. *Michigan*. — *Conely v. McDonald*, 40 Mich. 150.

Minnesota. — *Matter of Pinney*, 27 Minn. 280. *Mississippi*. — *Russell v. State*, 53 Miss. 367. *Missouri*. — *State v. Kring*, 64 Mo. 591.

Nevada. — *State v. Lewis*, 20 Nev. 333. *New Hampshire*. — *State v. Kelley*, 57 N. H. 549.

New Jersey. — *Whitenack v. Stryker*, 2 N. J. Eq. 9; *Turner v. Cheesman*, 15 N. J. Eq. 243; *Boylan v. Meeker*, 28 N. J. L. 274.

New York. — *Freeman v. People*, 4 Den. (N. Y.) 9, 47 Am. Dec. 216; *People v. Hoch*, 150 N. Y. 291.

North Carolina. — *Berry v. Hall*, 105 N. Car. 154.

Ohio. — *Wheeler v. State*, 34 Ohio St. 394, 32 Am. Rep. 372.

Oregon. — *State v. Hansen*, 25 Oregon 391.

Pennsylvania. — *Nonnemacher v. Nonnemacher*, 159 Pa. St. 634; *Com. v. Wireback*, 190 Pa. St. 138; *Laros v. Com.*, 84 Pa. St. 200; *Sayres v. Com.*, 88 Pa. St. 291.

Rhode Island. — *Thayer v. Thayer*, 9 R. I. 377.

Tennessee. — *Overall v. State*, 15 Lea (Tenn.) 672; *Green v. State*, 88 Tenn. 614; *Bryant v. Jackson*, 6 Humph. (Tenn.) 199.

Texas. — *Williams v. State*, 37 Tex. Crim. 348; *Giebee v. State*, 28 Tex. App. 151.

Vermont. — *Fairchild v. Bascomb*, 35 Vt. 398. *Virginia*. — See *Vance v. Com.*, 2 Va. Cas. 132.

Wisconsin. — *French v. State*, 93 Wis. 325.

1. In Rebuttal. — *U. S. v. Holmes*, 1 Cliff. (U. S.) 98; *Walker v. Clay*, 21 Ala. 797; *Gardner v. State*, 96 Ala. 12; *Robinson v. Adams*, 62 Me. 369, 16 Am. Rep. 473; *State v. Kring*, 64 Mo. 591; *Sayres v. Com.*, 88 Pa. St. 291.

On the **Issue of Insanity in a Murder Trial**, the prosecution may elicit from a competent witness evidence as to the mental condition of the defendant at the time of the trial, as bearing upon his condition at the time of the homicide. *People v. Hoch*, 150 N. Y. 292.

On a trial for murder, where the evidence to establish the defense of insanity is confined to a period not exceeding ten years before the killing, it is not admissible in rebuttal to prove that the defendant was sane at a period twenty years prior to the killing, if such evidence throws no light upon the crime. *Green v. State*, 59 Ark. 246.

Where the defense has introduced evidence tending to show insanity of long standing, the prosecution may in rebuttal ask a witness who is a neighbor of the defendant if he had ever heard of the defendant's insanity until after the homicide. *Merritt v. State*, 39 Tex. Crim. 70. **2. Cunningham v. State**, 56 Miss. 272, 31 Am. Rep. 360.

3. English View as to Degree of Proof. — *Beltingham's Case*, Coll. on Lunacy 630, 671; *Rex v. Offord*, 5 C. & P. 168, 24 E. C. L. 259, and note; *Reg. v. Stokes*, 3 C. & K. 185. See also *Reg. v. Layton*, 4 Cox C. C. 149.

4. In State v. Spencer, 21 N. J. L. 201, Chief Justice Hornblower instructed the jury that where it is admitted or clearly proved that the prisoner committed the act, but it is insisted that he was insane at the time, and the evidence leaves the question of insanity in doubt, "there the jury ought to find against him. For there the other presumption arises, namely, that every man is presumed sane until the contrary is clearly proved." *Compare Com. v. Rogers*, 7 Met. (Mass.) 500, 41 Am. Dec. 458.

In Delaware it has been held that if the proof of insanity does not arise out of the evidence offered by the state, the prisoner must prove it to the satisfaction of the jury beyond a reasonable doubt; otherwise the presumption of sanity or soundness of mind will remain un rebutted and in full force. *State v. Pratt*, *Houst. Crim. Cas. (Del.)* 249; *State v. Danby*, *Houst. Crim. Cas. (Del.)* 166; *State v. West*, *Houst. Crim. Cas. (Del.)* 371.

In *State v. Thomas*, *Houst. Crim. Cas. (Del.)* 511, however, it was held that if, upon a calm view and consideration of all the testimony, and regarding it alone, the jury has a reasonable doubt of the prisoner's capacity to know that he was doing wrong, he should be acquitted.

In Oregon the rule is statutory that when the

Volume XVI.

c. VIEW THAT ISSUE SHOULD BE DECIDED ACCORDING TO PREPONDERANCE OF EVIDENCE. — Another rule supported by a long array of respectable authority is that the legal presumption that all men are of sane mind sustains the burden of proof, on the part of the prosecution, unless it is rebutted and overcome by satisfactory evidence to the contrary; and that in order to overcome this presumption of law and shield the defendant from legal responsibility, the burden is on him to prove to the satisfaction of the jury, by a fair preponderance of the evidence in the whole case, that at the time of committing the act complained of he was not of sane mind.¹ Under this rule it is not

commission of the act charged as a crime is proved and the defense sought to be established is the insanity of the defendant, the insanity must be proved beyond a reasonable doubt. *State v. Murray*, 11 Oregon 413; *State v. Hansen*, 25 Oregon 391; *State v. Zorn*, 22 Oregon 591.

In Alabama this rule formerly obtained, *State v. Brinyea*, 5 Ala. 241. But that case was overruled in *Boswell v. State*, 63 Ala. 307, 35 Am. Rep. 20. See *infra*, the next note.

1. *Preponderance of Evidence* — *Alabama*. — *Boswell v. State*, 63 Ala. 307, 35 Am. Rep. 20; *Parsons v. State*, 81 Ala. 577, 60 Am. Rep. 193; *Gunter v. State*, 83 Ala. 96; *Maxwell v. State*, 89 Ala. 150.

Arkansas. — *Williams v. State*, 50 Ark. 511; *McKenzie v. State*, 26 Ark. 334; *Coates v. State*, 50 Ark. 330; *Casat v. State*, 40 Ark. 523; *Bolling v. State*, 54 Ark. 588.

California. — *People v. Allender*, 117 Cal. 81. *Georgia*. — *Carr v. State*, 96 Ga. 285; *Carter v. State*, 56 Ga. 463; *Ryder v. State*, 100 Ga. 528; *Danforth v. State*, 75 Ga. 614, 58 Am. Rep. 480; *Fogarty v. State*, 80 Ga. 450; *Keener v. State*, 97 Ga. 388.

Iowa. — *State v. Van Tassel*, 103 Iowa 11; *State v. Felter*, 32 Iowa 49; *State v. Jones*, 64 Iowa 349; *State v. Trout*, 74 Iowa 545, 7 Am. St. Rep. 499; *State v. Bruce*, 48 Iowa 530, 30 Am. Rep. 403; *State v. Geddis*, 42 Iowa 264.

Kentucky. — *Graham v. Com.*, 16 B. Mon. (Ky.) 587; *Brown v. Com.*, 14 Bush (Ky.) 398; *Portwood v. Com.*, (Ky. 1898) 47 S. W. Rep. 339; *Farris v. Com.*, (Ky. 1886) 1 S. W. Rep. 729; *Kriel v. Com.*, 5 Bush (Ky.) 362; *Phelps v. Com.*, (Ky. 1895) 32 S. W. Rep. 470; *Moore v. Com.*, 92 Ky. 630; *Smith v. Com.*, (Ky. 1891) 17 S. W. Rep. 868.

Louisiana. — *State v. Coleman*, 27 La. Ann. 691; *State v. Burns*, 25 La. Ann. 302; *State v. Scott*, 49 La. Ann. 253; *State v. De Rance*, 34 La. Ann. 186, 44 Am. Rep. 426; *State v. Clements*, 47 La. Ann. 1088.

Maine. — *State v. Lawrence*, 57 Me. 574.

Massachusetts. — *Com. v. Rogers*, 7 Met. (Mass.) 500, 41 Am. Dec. 458; *Com. v. Eddy*, 7 Gray (Mass.) 583 [the text is from the opinion of Metcalf, J., in this case]; *Com. v. York*, 9 Met. (Mass.) 93, 43 Am. Dec. 373. Compare *Com. v. Heath*, 11 Gray (Mass.) 303; *Com. v. Pomeroy*, (Mass.), reported in Wharton on Homicide (2d ed.) 753, Appendix, and referred to by Mr. Justice Harlan in *Davis v. U. S.*, 160 U. S. 483.

Minnesota. — *Bonfanti v. State*, 2 Minn. 123; *State v. Brown*, 12 Minn. 538; *State v. Gut, 13 Minn.* 341; *State v. Hanley*, 34 Minn. 433.

Missouri. — *State v. McCoy*, 34 Mo. 531, 86 Am. Dec. 121; *State v. Redemeier*, 71 Mo. 173,

36 Am. Rep. 462; *State v. Pagels*, 92 Mo. 300; *State v. Shaefer*, 116 Mo. 96; *State v. Duestrow*, 137 Mo. 44; *State v. Klinger*, 43 Mo. 127; *State v. Hundley*, 46 Mo. 414; *State v. Wright*, 134 Mo. 404; *State v. Smith*, 53 Mo. 267; *State v. Bell*, 136 Mo. 120; *State v. Erb*, 74 Mo. 199; *State v. Dreher*, 137 Mo. 11.

Nevada. — *State v. Lewis*, 20 Nev. 333; *State v. Hartley*, 22 Nev. 342.

New Jersey. — *Graves v. State*, 45 N. J. L. 203.

North Carolina. — *State v. Starling*, 6 Jones L. (51 N. Car.) 366; *State v. Vann*, 82 N. Car. 631; *State v. Davis*, 109 N. Car. 780; *State v. Rippey*, 104 N. Car. 752.

Ohio. — *Loeffner v. State*, 10 Ohio St. 598; *Bond v. State*, 23 Ohio St. 349; *Kelch v. State*, 55 Ohio St. 146, 60 Am. St. Rep. 680; *Cottell v. State*, 55 Ohio St. 666.

Pennsylvania. — *Com. v. Wireback*, 190 Pa. St. 138; *Coyle v. Com.*, 100 Pa. St. 578, 45 Am. Rep. 397; *Com. v. Gerade*, 145 Pa. St. 289, 27 Am. St. Rep. 689; *Com. v. Woodley*, 166 Pa. St. 463; *Nevling v. Com.*, 98 Pa. St. 322; *Com. v. Mosler*, 4 Pa. St. 264; *Ortwein v. Com.*, 76 Pa. St. 414, 18 Am. Rep. 420; *Pannell v. Com.*, 86 Pa. St. 260; *Lynch v. Com.*, 77 Pa. St. 205; *Meyers v. Com.*, 83 Pa. St. 131; *Sayres v. Com.*, 88 Pa. St. 291.

South Carolina. — *State v. Paulk*, 18 S. Car. 514; *State v. Bundy*, 24 S. Car. 439, 58 Am. Rep. 262; *State v. Alexander*, 30 S. Car. 74, 14 Am. St. Rep. 879.

Texas. — *Burt v. State*, 38 Tex. Crim. 397; *Wheatly v. State*, (Tex. Crim. 1897) 39 S. W. Rep. 672; *Lovegrove v. State*, 31 Tex. Crim. 491; *Webb v. State*, 9 Tex. App. 490; *Leache v. State*, 22 Tex. App. 279, 58 Am. Rep. 638; *King v. State*, 9 Tex. App. 515; *Johnson v. State*, 10 Tex. App. 571; *Riley v. State*, (Tex. Crim. 1898) 44 S. W. Rep. 498; *Williams v. State*, 37 Tex. Crim. 348; *Smith v. State*, 31 Tex. Crim. 14; *Fisher v. State*, 30 Tex. Crim. 502.

Utah. — *People v. Dillon*, 8 Utah 92; *People v. Calton*, 5 Utah 451.

Virginia. — *Baccigalupo v. Com.*, 33 Gratt. (Va.) 807, 36 Am. Rep. 795; *Boswell v. Com.*, 20 Gratt. (Va.) 860; *Dejarnette v. Com.*, 75 Va. 867; *Honey v. Com.*, 81 Va. 283.

West Virginia. — *State v. Strauder*, 11 W. Va. 747, 27 Am. Rep. 606.

In Alabama the rule was not definitely settled until the decision of *Boswell v. State*, 63 Ala. 307, 35 Am. Rep. 20. See *State v. Marler*, 2 Ala. 43, 36 Am. Dec. 398; *State v. Brinyea*, 5 Ala. 241; *McAllister v. State*, 17 Ala. 434, 52 Am. Dec. 180.

Either the jury remains convinced of the prisoner's sanity by the legal presumption

incumbent on the prosecution to prove the prisoner's sanity beyond all reasonable doubt, and a reasonable doubt arising from a consideration of all the evidence, either as to the fact of insanity or as to the causal connection between it and the criminal act, does not authorize an acquittal.¹

d. VIEW THAT PROSECUTION MUST PROVE SANITY BEYOND REASONABLE DOUBT. — The rule, however, which seems to be best supported by reason and perhaps by authority, and which is certainly growing in favor, is that the presumption that all men are sane until evidence of the contrary appears has fulfilled its mission when it has relieved the prosecution of the necessity of proving the prisoner's sanity in the first instance;² and if, in the progress of the trial, proof is adduced by either side tending to show the insanity of the accused, it then devolves on the prosecution to prove beyond a reasonable doubt every element of the crime, including the sanity of the prisoner, because the legal presumption of his innocence ought to shield him from punishment unless it is clearly shown that he possessed sufficient reason to form a guilty intent.³

against him, or it is convinced of his insanity by the preponderance of evidence in his favor; there is no middle ground which the law recognizes. *Com. v. Wireback*, 190 Pa. St. 138.

1. *Alabama*. — *Parsons v. State*, 81 Ala. 577. 60 Am. Rep. 193; *Gunter v. State*, 83 Ala. 96; *Maxwell v. State*, 89 Ala. 150; *Ford v. State*, 71 Ala. 392; *Fonville v. State*, 91 Ala. 44.

California. — *People v. Barthleman*, 120 Cal. 11; *People v. Ward*, 105 Cal. 343; *People v. McNulty*, 93 Cal. 427; *People v. Travers*, 88 Cal. 233; *People v. Eubanks*, 86 Cal. 295; *People v. Kernaghan*, 72 Cal. 609; *People v. Messersmith*, 61 Cal. 246; *People v. Wilson*, 49 Cal. 13; *People v. McDonnell*, 47 Cal. 134; *People v. Coffman*, 24 Cal. 231; *People v. Myers*, 20 Cal. 518; *People v. McCarthy*, 115 Cal. 255; *People v. Pico*, 62 Cal. 50; *People v. Bawden*, 90 Cal. 195; *People v. Bemmerly*, 93 Cal. 299.

The law requires the defendant to prove his insanity, not beyond a reasonable doubt, but to the reasonable satisfaction of the jury. *State v. Duestrow*, 137 Mo. 44; *State v. Rede-meier*, 71 Mo. 173, 36 Am. Rep. 462; *State v. Wright*, 134 Mo. 404. See also *State v. Larkins*, (Idaho 1897) 47 Pac. Rep. 945.

Neither it is incumbent on the prosecution to satisfy the jury of the prisoner's sanity beyond a reasonable doubt. *Graves v. State*, 45 N. J. L. 203; *Dejarnette v. Com.*, 75 Va. 867; *Boswell v. Com.*, 20 Gratt. (Va.) 860; *Baccigalupo v. Com.*, 33 Gratt. (Va.) 807, 36 Am. Rep. 795.

2. **Sanity Is Presumed to Be the Normal State of the Human Mind**, and it is never incumbent upon the prosecution in the first instance to give affirmative evidence that such a state exists in a particular case. *Walter v. People*, 32 N. Y. 147; *Ferris v. People*, 35 N. Y. 125; *Brotherton v. People*, 75 N. Y. 162; *Walker v. People*, 26 Hun (N. Y.) 70, affirmed 88 N. Y. 81.

3. **Sanity to Be Proved Beyond Reasonable Doubt** — *United States*. — *Davis v. U. S.*, 160 U. S. 469; *Guiteau's Case*, 10 Fed. Rep. 161; *U. S. v. Ridgeway*, 31 Fed. Rep. 144; *U. S. v. Faulkner*, 35 Fed. Rep. 730; *U. S. v. McClare*, 17 Law Rep. 439; *U. S. v. Lancaster*, 7 Biss. (U. S.) 440.

Connecticut. — *State v. Johnson*, 40 Conn. 136.

Delaware. — *State v. Reidell*, 9 Houst. (Del.) 470.

Florida. — *Brown v. State*, 40 Fla. 459; *Hodge v. State*, 26 Fla. 11; *Armstrong v. State*, 27 Fla. 366, 26 Am. St. Rep. 72, 30 Fla. 170.

Illinois. — *Hopps v. People*, 31 Ill. 385, 83 Am. Dec. 231; *Dacey v. People*, 116 Ill. 555; *Chase v. People*, 40 Ill. 352; *Jamison v. People*, 145 Ill. 357; *Dunn v. People*, 109 Ill. 635; *Langdon v. People*, 133 Ill. 382.

Indiana. — *Polk v. State*, 19 Ind. 170, 81 Am. Dec. 382; *Hall v. State*, 8 Ind. 439; *Guetig v. State*, 66 Ind. 94, 32 Am. Rep. 99; *French v. State*, 12 Ind. 670, 74 Am. Dec. 229; *Stevens v. State*, 31 Ind. 485, 99 Am. Dec. 634; *Bradley v. State*, 31 Ind. 492; *McDougal v. State*, 88 Ind. 24; *Plake v. State*, 121 Ind. 433, 16 Am. St. Rep. 408; *Aszman v. State*, 123 Ind. 347; *Grubb v. State*, 117 Ind. 277; *Plummer v. State*, 135 Ind. 321.

Kansas. — *State v. Crawford*, 11 Kan. 32; *State v. Nixon*, 32 Kan. 205; *State v. Mahn*, 25 Kan. 182.

Michigan. — *People v. Garbutt*, 17 Mich. 9, 97 Am. Dec. 162; *Underwood v. People*, 32 Mich. 1, 20 Am. Rep. 633.

Mississippi. — *Cunningham v. State*, 56 Miss. 276, 31 Am. Rep. 360; *Pollard v. State*, 53 Miss. 410, 24 Am. Rep. 703; *Ford v. State*, 73 Miss. 734.

Nebraska. — *Wright v. People*, 4 Neb. 407; *Knights v. State*, (Neb. 1899) 78 N. W. Rep. 508; *Smith v. State*, 4 Neb. 277; *Snider v. State*, 56 Neb. 309.

New Hampshire. — *State v. Bartlett*, 43 N. H. 224, 80 Am. Dec. 154; *State v. Pike*, 49 N. H. 399, 6 Am. Rep. 533; *State v. Jones*, 50 N. H. 369, 9 Am. Rep. 242.

New Mexico. — *Faulkner v. Territory*, 6 N. Mex. 464.

New York. — *Brotherton v. People*, 75 N. Y. 159; *People v. McCann*, 16 N. Y. 58, 69 Am. Dec. 642; *O'Connell v. People*, 87 N. Y. 377, 41 Am. Rep. 379; *Walker v. People*, 88 N. Y. 81; *Moett v. People*, 85 N. Y. 373. See also *People v. Nim*, 149 N. Y. 317.

Tennessee. — *Dove v. State*, 3 Heisk. (Tenn.) 348; *King v. State*, 91 Tenn. 617; *Stuart v. State*, 1 Baxt. (Tenn.) 178.

Wisconsin. — *Revolv v. State*, 82 Wis. 295.

In a recent case in *Illinois* it was held that a reasonable doubt which will authorize an acquittal is one as to the guilt of the accused on the whole evidence, and not as to any particu-

XIV. LIABILITY FOR CRIMES — 1. In General. — From the earliest period of the common law, no criminal responsibility could attach where the accused was so utterly deprived of reason as to be incapable of forming a guilty or criminal intent.¹ Thus far there is no difficulty. The discussion has been as to what degree of mental infirmity marks the dividing line between responsibility and irresponsibility where the party is not wholly insane.²

Delusions and Hallucinations. — When a person is under an insane delusion or hallucination, but is rational on other subjects, the rule is that he is not responsible criminally for acts committed under the influence of such delusion or hallucination, where the fact or state of facts existing in his imagination would, if actually existing, justify or excuse the act.³ But where the imaginary facts, if real, are not such as would justify or excuse the act, it is no defense that it was committed under an insane delusion.⁴ A mere belief on his part that his act is justified is not sufficient.⁵

Moral Insanity. — The same rule, in general, governs moral insanity as a defense in criminal cases; that is, if the defendant had sufficient mental capacity fully to comprehend the nature and consequences of an act and sufficient will power to overcome the impulse to commit crime, he is criminally responsible.⁶

An Irresistible or Uncontrollable Impulse may be a defense to an act committed under its influence, where it was the result of mental disease existing to so high a degree that for the time it overwhelmed reason, judgment, and conscience;⁷ but such defense cannot be sustained if the defendant knew the

lar fact, such as his sanity. *Hornish v. People*, 142 Ill. 620.

1. General Rule as to Criminal Responsibility. — 1 *Hawk. P. C.* 1; 1 *Hale P. C.*, c. 4; *Bac. Abr.*, tit. Idiots and Lunatics, E; *Co. Litt.* 247a; 4 *Black. Com.* 24; *Reg. v. Goode*, 7 Ad. & El. 536, 34 E. C. L. 150; *Com. v. Rogers*, 7 Met. (Mass.) 501, 41 Am. Dec. 458.

2. Insane Persons and Children Compared. — The rule laid down by Lord Hale was that, since children under fourteen years of age are *prima facie* incapable of crime, imbeciles ought not to be held responsible criminally unless of capacity equal to ordinary children of that age. 1 *Hale P. C.* 30.

In *State v. Richards*, 39 Conn. 591, Seymour, J., recommended Lord Hale's rule to the jury, with the explanation that the child to be taken as the standard "ought not to be one who has had superior advantages of education, but should rather be one in humble life, with only ordinary training."

3. Delusions and Hallucinations — General Rule — *England*. — *M'Naghten's Case*, 10 Cl. & F. 200.

Alabama. — *Boswell v. State*, 63 Ala. 308; *Parsons v. State*, 81 Ala. 577.

Arkansas. — *Bolling v. State*, 54 Ark. 588; *Smith v. State*, 55 Ark. 259; *Green v. State*, 64 Ark. 523.

California. — *People v. Hubert*, 119 Cal. 216.

Georgia. — *Roberts v. State*, 3 Ga. 310; *Carr v. State*, 96 Ga. 284; *Graham v. State*, 102 Ga. 654; *Flanagan v. State*, (Ga. 1898) 30 S. E. Rep. 550, 103 Ga. 625; *Taylor v. State*, 195 Ga. 775.

Massachusetts. — *Com. v. Rogers*, 7 Met. (Mass.) 503.

Mississippi. — *Cunningham v. State*, 56 Miss. 269; *Grissom v. State*, 62 Miss. 169; *Ford v. State*, 73 Miss. 740.

Nebraska. — *Thurman v. State*, 32 Neb. 226.

Nevada. — *State v. Lewis*, 20 Nev. 333.

New Hampshire. — *State v. Jones*, 50 N. H. 369.

New Jersey. — *State v. Spencer*, 21 N. J. L. 204.

New York. — *People v. Taylor*, 138 N. Y. 398.

Pennsylvania. — *Com. v. Wireback*, 190 Pa. St. 138; *Com. v. Mosler*, 4 Pa. St. 264.

Texas. — *Riley v. State*, (Tex. Crim. App. 1898) 44 S. W. Rep. 498.

4. Imaginary Facts Not Constituting Defense if True. — *People v. Hubert*, 119 Cal. 216, holding that an insane delusion on the part of the defendant that his wife had put poison in his food, in consequence of which he killed her, was not a defense; *People v. Taylor*, 138 N. Y. 398, holding that a delusion in the mind of the defendant, a convict confined in the state prison, that the deceased was acting as a spy on him and had betrayed a plan of escape, did not affect the criminal nature of the act; *Merritt v. State*, 39 Tex. Crim. 70; in which case, where it was shown that the defendant, charged with murder, had an insane delusion that a mob was after him to kill him, it was held error to exclude evidence that he regarded the deceased as the leader of the mob.

5. Mere Belief that Act Is Justifiable. — *Com. v. Wireback*, 190 Pa. St. 138.

6. Moral Insanity — General Rule — Indiana. — *Goodwin v. State*, 96 Ind. 576.

Iowa. — *State v. Mewherter*, 46 Iowa 88.

Massachusetts. — *Com. v. Rogers*, 7 Met. (Mass.) 500.

Mississippi. — *Bovard v. State*, 30 Miss. 600.

Missouri. — *State v. Erb*, 74 Mo. 199.

New Jersey. — *Genz v. State*, 59 N. J. L. 488; *Mackin v. State*, 59 N. J. L. 495.

Virginia. — *Dejarnette v. Com.*, 75 Va. 867.

7. Irresistible Impulse Resulting from Disease. — *England*. — *Reg. v. Oxford*, 9 C. & P. 525, 38 E. C. L. 208.

Alabama. — *Parsons v. State*, 81 Ala. 577.

difference between right and wrong, and that his act was morally a crime, though he was impelled to its commission by overmastering anger, revenge, or other inordinate passion.¹

2. Right and Wrong Test. — According to the former statement of the rule, a prisoner, to be entitled to acquittal on the ground of insanity, must, at the time of committing the offense, have been so insane that he did not know right from wrong.²

3. Rule in M'Naghten's Case. — But in 1843, in response to questions propounded by the House of Lords, the rule was restated by Lord Chief Justice Tindal as follows: "The jurors ought to be told in all cases that every man is to be presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defense on the ground of insanity it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong."³ This rule has been fol-

California. — *People v. Hoin*, 62 Cal. 120.

Connecticut. — *State v. Johnson*, 40 Conn. 136.

Illinois. — *Hopps v. People*, 31 Ill. 385;

Chase v. People, 40 Ill. 353; *Dunn v. People*,

109 Ill. 643; *Dacy v. People*, 116 Ill. 571;

Meyer v. People, 156 Ill. 129.

Indiana. — *Bradley v. State*, 31 Ind. 492;

Stevens v. State, 31 Ind. 485; *Goodwin v.*

State, 96 Ind. 550; *Conway v. State*, 118 Ind.

482; *Plake v. State*, 121 Ind. 435.

Iowa. — *State v. Felter*, 25 Iowa 67; *State v.*

Geddis, 42 Iowa 264.

Kentucky. — *Scott v. Com.*, 4 Met. (Ky.) 227;

Smith v. Com., 1 Duv. (Ky.) 224; *Kriel v.*

Com., 5 Bush (Ky.) 362.

Massachusetts. — *Com. v. Rogers*, 7 Met.

(Mass.) 500.

Michigan. — *People v. Darfee*, 62 Mich. 494.

Mississippi. — *Ford v. State*, 73 Miss. 734;

Cunningham v. State, 56 Miss. 269.

Nebraska. — *Burgo v. State*, 26 Neb. 643.

New York. — *People v. Sprague*, 2 Park. (N. Y.) 43.

Pennsylvania. — *Com. v. Eckerd*, 174 Pa. St. 137.

Where a young woman, suffering from puerperal fever, in a violent impulse threw her child overboard, Judge Story very strongly intimated to the jury that there was no ground for conviction; and the jurors, without leaving their seats, rendered a verdict of not guilty. *U. S. v. Hewson*, Brun. Col. Cas. (U. S.) 532, 26 Fed. Cas. No. 15,360.

In *Indiana* the rule is broadly stated that a person may have sufficient mental capacity to know right from wrong, and to be able to comprehend the nature and consequences of his acts, and yet be not criminally responsible for his acts. For if the will power is so impaired that he cannot resist the impulse to commit a crime, he is not of sound mind. *Goodwin v. State*, 96 Ind. 550; *Conway v. State*, 118 Ind. 482; *Plake v. State*, 121 Ind. 435.

1. Irresistible Impulse of Passion, etc. — *Arkansas.* — *Williams v. State*, 50 Ark. 511; *Balling v. State*, 54 Ark. 588; *Smith v. State*, 55 Ark. 250; *Green v. State*, 64 Ark. 523.

California. — *People v. Barthleiman*, 120 Cal. 11; *People v. McCarthy*, 111 Cal. 255.

Georgia. — *Roberts v. State*, 3 Ga. 310.

Indiana. — *Guetig v. State*, 66 Ind. 94.

Iowa. — *State v. Sickley*, 41 Iowa 232.

Michigan. — *People v. Slack*, 90 Mich. 448 (voluntary intoxication).

North Carolina. — *State v. Brandon*, 8 Jones (N. Car.) 463.

Pennsylvania. — *Com. v. Mosler*, 4 Pa. St.

264; *Coyle v. Com.*, 100 Pa. St. 573; *Lynch v.*

Com., 77 Pa. St. 205.

South Carolina. — *State v. Alexander*, 30 S. Car. 74.

In *Missouri* the court does not indorse the doctrine of "insane or uncontrollable impulse," under the influence of which a person committing homicide may be sane the instant before he strikes the fatal blow and sane the instant afterwards, but entirely *non compos mentis* at the instant of doing the act. *State v. Soper*, 148 Mo. 217; *State v. Pagels*, 92 Mo. 317; *State v. Miller*, 111 Mo. 542. Compare *State v. Levelle*, 34 S. Car. 131.

Statutory Provisions. — In some jurisdictions the rule is statutory that an uncontrollable and insane impulse to commit crime, in the mind of one who is conscious of the nature and quality of the act or that it is wrong, is not allowed as a defense. *State v. Scott*, 41 Minn. 365; *People v. Taylor*, 138 N. Y. 398.

2. Knowledge of Right and Wrong. — *Reg. v. Higginson*, 1 C. & K. 129, 47 E. C. L. 129; *Reg. v. Burton*, 3 Cox C. C. 275; *Reg. v. Davies*, 1 F. & F. 69; *Reg. v. Richards*, 1 F. & F. 87; *Reg. v. Townley*, 3 F. & F. 839; *Rex v. Offord*, 5 C. & P. 168, 24 E. C. L. 259; *Reg. v. Oxford*, 9 C. & P. 525, 38 E. C. L. 208; *Arnold's Case*, 16 How. St. Tr. 764; *Ferrers's Case*, 10 How. St. Tr. 947; *Bellingham's Case*, Coll. on Lunacy 636; *Parker's Case*, Coll. on Lunacy 477; *Bowler's Case*, Coll. on Lunacy 673 note; *Hadfield's Case*, Coll. on Lunacy 480.

3. M'Naghten's Case. 10 Cl. & F. 200, 1 C. & K. 130, note, 47 E. C. L. 130, note. In this case M'Naghten, the defendant, was tried for killing Mr. Drummond, the private secretary of Sir Robert Peel, mistaking him for the premier himself. He was acquitted on the ground of insanity, and his acquittal caused so much excitement that the House of Lords propounded questions to all the judges, which drew forth the response stated in the text.

lowed in later English cases,¹ and is accepted in many American jurisdictions as laying down the correct test of the criminal responsibility of the accused.²

4. American Modification of Rule. — But in other jurisdictions the answer of the English judges has not been deemed entirely satisfactory, and the courts have settled down upon the question of knowledge of right and wrong as to the particular act charged, or rather of the capacity to know it, as the test of responsibility;³ or, as the rule is sometimes stated, the test of responsibility for criminal acts, where insanity is asserted, is the capacity of the accused to distinguish between right and wrong at the time of and with respect to the

1. Rule in M'Naghten's Case Followed in English Cases. — Reg. v. Vaughan, 1 Cox C. C. 80; Reg. v. Stokes, 3 C. & K. 185; Reg. v. Barton, 3 Cox C. C. 275; Reg. v. Burton, 3 F. & F. 772; Reg. v. Townley, 3 F. & F. 839; Reg. v. Haynes, 1 F. & F. 666; Reg. v. Brough, 2 F. & F. 838, note; Reg. v. Layton, 4 Cox C. C. 149; Reg. v. Law, 2 F. & F. 836; Reg. v. Leigh, 4 F. & F. 915; Reg. v. Shaw, L. R. 1 C. C. 145, 11 Cox C. C. 109; Reg. v. Bishop, 14 Cox C. C. 404.

2. American Cases Following Rule in M'Naghten's Case — United States. — U. S. v. Shults, 6 McLean (U. S.) 121; U. S. v. Clarke, 2 Cranch (C. C.) 158.

California. — People v. Coffman, 24 Cal. 230; People v. Harris, 62 Cal. 120, 45 Am. Rep. 651; People v. Ferris, 55 Cal. 588; People v. M'Donell, 47 Cal. 134; People v. Ward, 105 Cal. 343.

Delaware. — State v. Windsor, 5 Harr. (Del.) 512; State v. Brown, Houst. Crim. Cas. (Del.) 539.

Maine. — State v. Lawrence, 57 Me. 574.

Nebraska. — Wright v. People, 4 Neb. 407; Hawe v. State, 11 Neb. 537, 38 Am. Rep. 375; Hart v. State, 14 Neb. 572; Thurman v. State, 32 Neb. 224; Knights v. State, (Neb. 1899) 78 N. W. Rep. 508; Anderson v. State, 25 Neb. 550.

Texas. — Giebel v. State, 28 Tex. App. 151; Clark v. State, 8 Tex. App. 350; Webb v. State, 5 Tex. App. 596; Pettigrew v. State, 12 Tex. App. 225; Carter v. State, 12 Tex. 500, 62 Am. Dec. 539; Williams v. State, 7 Tex. App. 163; Thomas v. State, 40 Tex. 60.

But if a person commits a crime, though he is affected by insane delusion on subjects with which the act is connected, he is criminally responsible if he was capable of the perception or consciousness of right and wrong as applied to the act, and had the ability, through that consciousness, to choose by an effort of the will whether he would or would not do the act. State v. Windsor, 5 Harr. (Del.) 512.

3. Cases Modifying Rule in M'Naghten's Case — United States. — Guiteau's Case, 10 Fed. Rep. 182; U. S. v. Ridgeway, 31 Fed. Rep. 144; U. S. v. Faulkner, 35 Fed. Rep. 730; U. S. v. McGlue, 1 Curt. (U. S.) 9; U. S. v. Holmes, 1 Cliff. (U. S.) 98.

Arkansas. — Williams v. State, 50 Ark. 511.

Connecticut. — State v. Swift, 57 Conn. 496.

Georgia. — Roberts v. State, 3 Ga. 310; Anderson v. State, 42 Ga. 9; Stewart v. State, 58 Ga. 577; Brinkley v. State, 53 Ga. 296; Carr v. State, 96 Ga. 284.

Idaho. — State v. Larkins, (Idaho 1897) 47 Pac. Rep. 945.

Illinois. — Dunn v. People, 109 Ill. 635;

Hopps v. People, 31 Ill. 385, 83 Am. Dec. 231; Hornish v. People, 142 Ill. 620.

Iowa. — State v. Felter, 25 Iowa 67; State v. Mewherter, 46 Iowa 88.

Kansas. — State v. Nixon, 32 Kan. 205; State v. Mowry, 37 Kan. 369.

Kentucky. — Hays v. Com., (Ky. 1896) 33 S. W. Rep. 1104; Shannahan v. Com., 8 Bush (Ky.) 463, 8 Am. Rep. 465.

Massachusetts. — Com. v. Rogers, 7 Met. (Mass.) 500, 41 Am. Dec. 458; Com. v. Heath, 11 Gray (Mass.) 303.

Minnesota. — State v. Shippey, 10 Minn. 229; State v. Gut, 13 Minn. 358.

Mississippi. — Grissom v. State, 62 Miss. 169; Ford v. State, 73 Miss. 740; Cunningham v. State, 56 Miss. 276, 31 Am. Rep. 360; Bovard v. State, 30 Miss. 600; Kearney v. State, 68 Miss. 233.

Missouri. — State v. Huting, 21 Mo. 464; State v. Erb, 74 Mo. 199; State v. Kotovsky, 74 Mo. 247; Baldwin v. State, 12 Mo. 223; State v. Redemeier, 71 Mo. 175, 36 Am. Rep. 462; State v. Duestrow, 137 Mo. 69; State v. Miller, 111 Mo. 550; State v. Pagel, 92 Mo. 317; State v. Turlington, 102 Mo. 654; State v. Wright, 134 Mo. 404.

Nevada. — State v. Lewis, 20 Nev. 333.

New Jersey. — State v. Spencer, 21 N. J. L. 196; Grave v. State, 45 N. J. L. 208; Genz v. State, 59 N. J. L. 488, 59 Am. St. Rep. 619; Mackin v. State, 59 N. J. L. 497.

New York. — Walker v. People, 26 Hun (N. Y.) 67, affirmed 88 N. Y. 81; Flanagan v. People, 52 N. Y. 467, 11 Am. Rep. 731; Willis v. People, 32 N. Y. 715; Freeman v. People, 4 Den. (N. Y.) 9, 47 Am. Dec. 216; People v. Sprague, (Oyer & T. Ct.) 2 Park. Crim. (N. Y.) 43; People v. O'Connell, (Supm. Ct. Gen. T.) 62 How. Pr. (N. Y.) 436, affirmed 87 N. Y. 377; People v. Kleim, 1 Edm. Sel. Cas. (N. Y.) 13; People v. Divine, 1 Edm. Sel. Cas. (N. Y.) 594; People v. Carnel, 2 Edm. Sel. Cas. (N. Y.) 200.

North Carolina. — State v. Brandon, 8 Jones L. (53 N. Car.) 463.

Ohio. — Lochner v. State, 10 Ohio St. 598; Blackburn v. State, 23 Ohio St. 146.

Oregon. — State v. Zorn, 22 Oregon 591.

Pennsylvania. — Brown v. Com., 78 Pa. St. 122; Oriwein v. Com., 76 Pa. St. 414, 18 Am. Rep. 420; Com. v. Mosler, 4 Pa. St. 266; Sayres v. Com., 88 Pa. St. 291; Com. v. Wireback, 190 Pa. St. 138.

South Carolina. — State v. McIntosh, 39 S. Car. 97.

Tennessee. — Stuart v. State, 1 Baxt. (Tenn.) 178; Dove v. State, 3 Heisk. (Tenn.) 348.

Virginia. — Dejarrette v. Com., 75 Va. 867.

West Virginia. — State v. Harrison, 36 W. Va. 729; State v. Maier, 36 W. Va. 757.

act which is the subject of inquiry.¹ And the question whether the accused knew the difference between right and wrong is no longer to be put generally, but in reference to the very act with which he is charged.²

5. Compared with Civil Responsibility. — It has been said that a greater degree of insanity is required to warrant the acquittal of one accused of crime than would suffice to invalidate a civil act or contract of the party;³ but on the other hand it has been held that the same test of capacity is applicable in both cases.⁴

6. Instruction as to Merits of Defense. — While the defense of insanity when satisfactorily proved is a good one, and should appeal to the humanity of an enlightened jury, yet it is sometimes resorted to where no other way of escaping punishment seems open to the accused, and it is not error for the trial court to admonish the jury that the evidence should be carefully considered lest an ingenious counterfeit of mental disorder should furnish immunity for guilt.⁵ But the court should not make any statements to the jury which are designed to cast discredit or suspicion on such defense made apparently in good faith.⁶

7. Irresponsibility Acquits — No Reduction of Degree of Crime. — Evidence of insanity sufficient to cause irresponsibility requires an acquittal and cannot have the effect of reducing the degree of murder.⁷

8. Insanity At or After Trial — a. PRISONER CANNOT BE TRIED OR PUNISHED. — A person indicted for crime cannot validly plead or be tried, sentenced, or executed while in a state of insanity,⁸ though in *England* he

1. Capacity at Time of and with Respect to Act under Inquiry. — *Flanagan v. People*, 52 N. Y. 407, 11 Am. Rep. 731; *People v. Sprague*, (Oyer & T. Ct.) 2 Park. Crim. (N. Y.) 43; *Freeman v. People*, 4 Den. (N. Y.) 9, 47 Am. Dec. 216; *Willis v. People*, 32 N. Y. 717; *Wagner v. People*, 4 Abb. App. Dec. (N. Y.) 511; *People v. O'Connell*, (Supm. Ct. Gen. T.) 62 How. Pr. (N. Y.) 436, affirmed 87 N. Y. 377; *Moett v. People*, 85 N. Y. 373; *Flanigan v. People*, 86 N. Y. 559, 40 Am. Rep. 556; *Walker v. People*, 88 N. Y. 87; *People v. Wood*, 126 N. Y. 268; *People v. Carpenter*, 102 N. Y. 250.

In a recent case in New York it has been held reversible error for the judge to give to the jury as its instruction the rule in *McNaghten's* case, on the ground that it is calculated to mislead the jury in two very important points, namely, the amount of proof necessary to be given by the defendant to place the prosecution under the burden of proving sanity as an issue tendered by the indictment, and the effect of a reasonable doubt created in the minds of the jury by the evidence as to the insanity of the defendant. *People v. Nino*, 149 N. Y. 317.

2. People v. Kleim, 1 Edm. Sel. Cas. (N. Y.) 26; *Freeman v. People*, 4 Den. (N. Y.) 9, 47 Am. Dec. 216; *People v. Montgomery*, (Oyer & T. Ct.) 13 Abb. Pr. N. S. (N. Y.) 207; *Looney v. State*, 10 Tex. App. 520, 38 Am. Rep. 646; *Erwin v. State*, 10 Tex. App. 700.

3. Compared with Civil Liability. — *Hadfield's Case*, 27 How. St. Tr. 1281; *State v. Spencer*, 21 N. J. L. 196; *McTaggart v. Thompson*, 14 Pa. St. 149; *Com. v. Mosler*, 4 Pa. St. 266. See *infra*, this title, *Liability on Contracts*.

4. State v. Geddis, 42 Iowa 264; *State v. Gardiner*, Wright (Ohio) 392.

5. Instruction as to Merit of the Defense. — *People v. Allender*, 117 Cal. 81; *People v.*

Dennis, 39 Cal. 637; *People v. Bumberger*, 45 Cal. 650; *People v. Pico*, 62 Cal. 51; *Aszman v. State*, 123 Ind. 359; *Sawyer v. State*, 35 Ind. 80; *Sanders v. State*, 94 Ind. 147; *Butler v. State*, 97 Ind. 378; *Com. v. Eckerd*, 174 Pa. St. 137.

6. Aszman v. State, 123 Ind. 347.
7. Irresponsibility Acquits, but Does Not Reduce Degree of Crime. — *Com. v. Hollinger*, 190 Pa. St. 155; *Com. v. Wireback*, 190 Pa. St. 138.

8. May Not Be Tried or Punished — England. — 1 Hawk. P. C., bk. 1, c. 1, § 3; 4 Black. Com. 24; *Reg. v. Southey*, 4 F. & F. 804; *Reg. v. Turton*, 6 Cox C. C. 385; *Rex v. Dyson*, 7 C. & P. 305, 32 E. C. L. 518; *Reg. v. Goode*, 7 Ad. & El. 536, 34 E. C. L. 150; *Rex v. Pritchard*, 7 C. & P. 303, 32 E. C. L. 517; *Reg. v. Berry*, 1 Q. B. D. 447; *Reg. v. Derryhouse*, 2 Cox C. C. 446; *Reg. v. Cobus*, 1 Cox C. C. 207; *Reg. v. Blackwell*, 7 Cox C. C. 353; *Frith's Case*, 22 How. St. Tr. 808; *Reg. v. Davis*, 3 C. & K. 328, 6 Cox C. C. 326; *Rex v. Little*, R. & R. C. C. 430; *Rex v. Ley*, 1 Lewin C. C. 239; *Reg. v. Whitfield*, 3 C. & K. 121; *Reg. v. Israel*, 2 Cox C. C. 263; *Thompson's Case*, 2 Lewin C. C. 137.

United States. — *U. S. v. Haskell*, 4 Wash. (U. S.) 409; *U. S. v. Lancaster*, 7 Biss. (U. S.) 440.

Alabama. — *Jones v. State*, 13 Ala. 153; *State v. Brinyea*, 5 Ala. 241.

Arkansas. — *Taffe v. State*, 23 Ark. 34.

California. — *People v. Ah Ying*, 42 Cal. 18; *People v. Moice*, 15 Cal. 330; *People v. Lee Fook*, 85 Cal. 300; *People v. Pico*, 62 Cal. 50; *People v. Farrell*, 31 Cal. 576.

Georgia. — *Spann v. State*, 47 Ga. 553; *Long v. State*, 38 Ga. 491; *Anderson v. State*, 42 Ga. 9.

Iowa. — *State v. Arnold*, 12 Iowa 479.

Louisiana. — *State v. Reed*, 41 La. Ann. 581; *State v. Judge*, 48 La. Ann. 503; *State v. Pat-*

might be detained in custody during the pleasure of the crown.¹

b. SEPARATE TRIAL OF ISSUE BY JURY DISCRETIONARY. — At common law a suggestion of insanity made after verdict and sentence did not give rise to an absolute right on the part of a convict to have such issue tried before the court and a jury, but addressed itself to the discretion of the judge.² So if, after a regular conviction and sentence, a suggestion of then existing insanity is made, it is not necessary, in order to constitute due process of law under the constitutional guaranty, that the question so presented shall be tried by a jury.³ And a defendant who alleges his insanity at the time of his arraignment is not entitled as a matter of legal right to have a separate, independent, and preliminary trial of that question by a jury specially impaneled for that purpose. If there is no apparent reason to suppose him insane, but on the contrary he appears to be quite capable of pleading to the indictment, there is no necessity for a preliminary trial, because every right to set up insanity, either when the offense was committed or at the time of the trial, still remains and can be thoroughly tried by the jury which is to try the indictment.⁴

XV. LIABILITY FOR TORTS — 1. In General. — A lunatic is not responsible

ton, 12 La. Ann. 288; *State ex rel. Chandler*, 45 La. Ann. 696.

Massachusetts. — *Com. v. Braley*, 1 Mass. 103; *Com. v. Hathaway*, 13 Mass. 299.

Missouri. — *State v. Klinger*, 46 Mo. 224.

New Jersey. — *State v. Peacock*, 50 N. J. L. 34.

New York. — *Freeman v. People*, 4 Den. (N. Y.) 9, 47 Am. Dec. 216; *People v. Kleim*, 1 Edm. Sel. Cas. (N. Y.) 13; *People v. McElvaine*, 125 N. Y. 596; *People v. Rhinelander*, (N. Y. Gen. Sess.) 2 N. Y. Crim. 335; *People v. Connor*, 65 Hun (N. Y.) 392.

North Carolina. — *State v. Lane*, 4 Ired. L. (26 N. Car.) 113; *State v. Hinson*, 82 N. Car. 540; *State v. Vann*, 84 N. Car. 722; *State v. Harris*, 8 Jones L. (53 N. Car.) 136, 78 Am. Dec. 272; *State v. Pritchett*, 106 N. Car. 667.

Ohio. — *Inskeep v. State*, 35 Ohio St. 482, 36 Ohio St. 145.

Pennsylvania. — *Laros v. Com.*, 84 Pa. St. 200; *Webber v. Com.*, 119 Pa. St. 223, 4 Am. St. Rep. 634; *Com. v. Schmous*, 162 Pa. St. 326; *Com. v. Buccieri*, 153 Pa. St. 535.

Tennessee. — *Bonds v. State, Mart. & Y. (Tenn.)* 143, 17 Am. Dec. 795.

Texas. — *Guagando v. State*, 41 Tex. 626; *Shultz v. State*, 13 Tex. 401; *Zembrod v. State*, 25 Tex. 519.

Virginia. — *Stover v. Com.*, 92 Va. 780.

West Virginia. — *Gruber v. State*, 3 W. Va. 699; *State v. Harrison*, 36 W. Va. 729.

Wisconsin. — *French v. State*, 85 Wis. 400, 33 Am. St. Rep. 855.

For the proceedings for the purpose of determining the question of the prisoner's sanity, see the title *INSANE PERSONS*, 10 ENCYC. OF PL. AND PR. 1218 *et seq.*

When a person whose insanity is alleged is called upon to plead, the question is whether at that moment he understands that he is charged with the offense alleged; the fact that he has been insane at another time is not material for this purpose. *Reg. v. Keary*, 13 Cox C. C. 143.

It is well settled that if one who has committed a capital offense becomes *non compos*

mentis after conviction, he shall not be executed, but the burden is on the defense to allege and show that the insanity developed and became evident after the trial. *State v. Paine*, 49 La. Ann. 1092; *State v. Patton*, 12 La. Ann. 288.

Under the *California Penal Code*, a person, though adjudged to punishment, cannot be punished for a public offense while insane, and his conviction of the offense does not exclude him from the state insane asylum. *People v. Schmitt*, 106 Cal. 49.

In *Georgia* it is provided by statute that if the prisoner becomes insane after conviction and sentence to death, the sheriff of the county, with the concurrence and assistance of the ordinary thereof, shall summon a jury of twelve men to inquire under oath into such insanity; and it is held that this provision is sufficient to protect the prisoner's constitutional rights as to due process of law. *Nobles v. Georgia*, 168 U. S. 398; *Baughn v. State*, 100 Ga. 554.

1. See *supra*, this title, *Restraint of Insane Persons*.

2. *Separate Trial of Issue of Insanity After Conviction.* — 1 Chitty's Crim. L. 761; 1 Hale P. C. 33-35; 1 Hawk. P. C., bk. 1, c. 1, § 4; 4 Black. Com. 395, 396; *Nobles v. Georgia*, 168 U. S. 409; *State v. Judge*, 48 La. Ann. 503; *State v. Reed*, 41 La. Ann. 581; *Laros v. Com.*, 84 Pa. St. 200.

3. *Nobles v. Georgia*, 168 U. S. 398; *Baughn v. State*, 100 Ga. 554.

4. *Separate Trial of Issue of Insanity Before Trial on Criminal Charge — Alabama.* — *Jones v. State*, 13 Ala. 157.

California. — *People v. Geiger*, 116 Cal. 440; *People v. Ah Ying*, 42 Cal. 18.

Iowa. — *State v. Arnold*, 12 Iowa 483.

New Jersey. — *State v. Peacock*, 50 N. J. L. 34.

New York. — *Freeman v. People*, 4 Den. (N. Y.) 9, 47 Am. Dec. 216; *People v. McElvaine*, 125 N. Y. 596.

Pennsylvania. — *Webber v. Com.*, 119 Pa. St. 223, 4 Am. St. Rep. 634; *Laros v. Com.*, 84 Pa. St. 200.

for crime, because he is not a free agent, capable of intelligent voluntary action, and therefore is incapable of a guilty intent; but in a civil action for an injury done to the person or property of another, the intent is generally immaterial, and the rule is that an insane person is liable for his torts the same as a sane person, except for those torts in which malice, and therefore intention, is a necessary ingredient.¹

2. Tortious Negligence. — In respect to this liability there is no distinction between torts of nonfeasance and of misfeasance, and consequently an insane person is liable for injuries caused by his tortious negligence.² Insane persons are held to this liability on the principle that where a loss must be borne by one of two innocent persons it shall be borne by him who occasioned it.³

3. Inevitable Accident. — The law, however, imposes no obligation on an insane person to perform impossible things, and therefore he is not liable for the consequences of an inevitable accident which no amount of prudence and care could have avoided.⁴

4. Liability for Compensatory Damages Only. — In such cases an insane person will be liable for actual damages resulting from the injury, but punitive or vindictive damages cannot be recovered.⁵

5. Slander — Exception to Rule. — Inasmuch as malice, actual or implied, is an element of slander, a person is not liable in damages therefor if at the time of speaking the defamatory words he was totally deranged,⁶ or was the victim of insane delusions on the subject to which the words related;⁷ and where the defendant was not totally deranged at the time of uttering the words complained of, he may nevertheless prove the unsound condition of his mind in mitigation of damages.⁸

XVI. LIABILITY ON CONTRACTS — 1. In General — Early Rule. — It was at one time considered that a person whose mind was unsound was not capable

1. Torts of Lunatics — England. — *Cross v. Andrews*, Cro. Eliz. 622; *Weaver v. Ward*, Hob. 134; *Haycraft v. Creasy*, 2 East 92.

Canada. — *Taggard v. Innes*, 12 U. C. C. P. 77.

United States. — *Avery v. Wilson*, 20 Fed. Rep. 856.

Alabama. — *White v. Farley*, 81 Ala. 563.

Illinois. — *McIntyre v. Sholty*, 121 Ill. 660, 2 Am. St. Rep. 140.

Indiana. — *Tucker v. Hyatt*, 151 Ind. 332; *Woods v. Brown*, 93 Ind. 167, 47 Am. Rep. 369.

Iowa. — *Behrens v. McKenzie*, 23 Iowa 333.

Maryland. — *Cross v. Kent*, 32 Md. 581.

Massachusetts. — *Morain v. Devlin*, 132 Mass. 87, 42 Am. Rep. 423.

New Hampshire. — *Jewell v. Colby*, 66 N. H. 399.

New York. — *Krom v. Schoonmaker*, 3 Barb. (N. Y.) 647; *Matter of Heller*, 3 Paige (N. Y.) 199; *Williams v. Hays*, 143 N. Y. 442, 42 Am. St. Rep. 743; *Williams v. Cameron*, 26 Barb. (N. Y.) 172; *Bullock v. Babcock*, 3 Wend. (N. Y.) 391.

Pennsylvania. — *Lancaster County Nat. Bank v. Moore*, 78 Pa. St. 407, 21 Am. Rep. 24.

Tennessee. — *Ward v. Conatser*, 4 Baxt. (Tenn.) 66; *Tally v. Ayres*, 3 Sneed (Tenn.) 680.

Vermont. — *Morse v. Crawford*, 17 Vt. 499, 44 Am. Dec. 349.

2. Tortious Negligence. — *Morain v. Devlin*, 132 Mass. 87, 42 Am. Rep. 423; *Brown v. Howe*, 9 Gray (Mass.) 84, 69 Am. Dec. 276; *Williams v. Hays*, 143 N. Y. 442, 42 Am. St. Rep. 743.

3. Williams v. Hays, 143 N. Y. 450, 42 Am. St. Rep. 743; *Beals v. See*, 10 Pa. St. 56, 49 Am. Dec. 573.

4. Inevitable Accident. — Thus, in a very recent and well-considered case in *New York* it was held that the master of a vessel who became physically exhausted and was driven temporarily insane by his efforts to save his ship from the perils of a terrible storm was not liable for the consequences of negligence resulting from such insanity. *Williams v. Hays*, 157 N. Y. 541 (Bartlett, J., dissenting), reversing 2 N. Y. App. Div. 183. See also *Jewell v. Colby*, 66 N. H. 399; *Brown v. Collins*, 53 N. H. 442, 16 Am. Rep. 372.

5. Measure of Damages. — *Jewell v. Colby*, 66 N. H. 399; *Krom v. Schoonmaker*, 3 Barb. (N. Y.) 647; *Ward v. Conatser*, 4 Baxt. (Tenn.) 64. See also *Cross v. Kent*, 32 Md. 581.

6. Slander. — *Yeates v. Reed*, 4 Blackf. (Ind.) 463, 32 Am. Dec. 43; *Dickinson v. Barber*, 9 Mass. 225, 6 Am. Dec. 58; *Bryant v. Jackson*, 6 Humph. (Tenn.) 199; *Horner v. Marshall*, 5 Munf. (Va.) 466. See generally the title LIBEL AND SLANDER.

7. Yeates v. Reed, 4 Blackf. (Ind.) 463, 32 Am. Dec. 43; *Horner v. Marshall*, 5 Munf. (Va.) 466.

8. Yeates v. Reed, 4 Blackf. (Ind.) 463, 32 Am. Dec. 43; *McDougald v. Coward*, 95 N. Car. 368.

In *Withrow v. Smithson*, 37 W. Va. 757, the court upheld a judgment for slander uttered by the defendant's wife, though it was claimed that the defendant was insane when the trial took place and when the judgment was rendered.

during the period of his insanity of performing any valid civil act requiring volition. And though he were afflicted only with insane delusion, or insanity on some particular subject, it was not deemed necessary to trace the act in question to the immediate influence of such delusion.¹ These cases proceeded on the assumption that insane delusions, as such, were to be proved by insanity, not insanity by delusions.²

Present Rule. — As a result of medical research on this subject it is now well understood that a man may be thoroughly insane on one subject and at the same time be quite capable of transacting business on all others, and in the light of this knowledge the law now recognizes the fact that there may be partial derangement and yet capacity to act on many subjects; and to avoid a man's act on the ground of insane delusion, it is necessary to show that the act under judicial consideration was the direct result of such delusion.³

The Test of Mental Capacity is whether the person possesses sufficient mind to understand, in a reasonable manner, the nature and effect of the act in which he is engaged;⁴ and in order to avoid a contract it must appear not only that

1. **Former Rule as to Civil Acts.** — *Groom v. Thomas*, 2 Hagg. Ecc. 433; *Waring v. Waring*, 6 Moo. P. C. 341; *Hancock v. Peaty*, L. R. 1 P. & D. 335; *Smith v. Tebbitt*, L. R. 1 P. & D. 398.

The reasoning of these cases seems to have reached the opposite extreme from the still earlier rule which forbade a man to stultify himself by alleging his own insanity and allowed his deed to be avoided only by his privies in blood or in representation. See *Beverley's Case*, 4 Coke 123*b*.

2. 1 Whart. & St. Med. Jur., § 34.

3. **Present Rule — England.** — *Banks v. Goodfellow*, L. R. 5 Q. B. 549; *Smee v. Smee*, 5 P. D. 84; *Jenkins v. Morris*, 14 Ch. D. 674; *Boughton v. Knight*, L. R. 3 P. & D. 64; *Dew v. Clark*, 3 Add. Ecc. 79. See also *Fullek v. Alleson*, 3 Hagg. Ecc. 527.

United States. — *Hall v. Unger*, 4 Sawy. (U. S.) 672.

Alabama. — *Ex p. Northington*, 37 Ala. 496, 79 Am. Dec. 67.

Georgia. — *Wetter v. Habersham*, 60 Ga. 194; *Lemon v. Jenkins*, 48 Ga. 313.

Illinois. — *Emery v. Hoyt*, 46 Ill. 258.

Iowa. — *Pelamourges v. Clark*, 9 Iowa 1; *Burgess v. Pollock*, 53 Iowa 273, 36 Am. Rep. 218.

Louisiana. — *Kingsbury v. Whitaker*, 32 La. Ann. 1055, 36 Am. Rep. 278; *Calderon v. Martin*, 50 La. Ann. 1153.

Maine. — *Hovey v. Hobson*, 55 Me. 256.

Massachusetts. — *Townsend v. Pepperell*, 99 Mass. 40; *Holyoke v. Haskins*, 5 Pick. (Mass.) 20, 16 Am. Dec. 372.

Missouri. — *Benoist v. Murrin*, 58 Mo. 307.

New Hampshire. — *Concord v. Rumney*, 45 N. H. 423; *Dennett v. Dennett*, 44 N. H. 531, 84 Am. Dec. 97.

New Jersey. — *Lozeau v. Shields*, 23 N. J. Eq. 509; *Eaton v. Eaton*, 37 N. J. L. 113, 18 Am. Rep. 716; *Hill v. Day*, 34 N. J. Eq. 150; *Wilkinson v. Sherman*, 45 N. J. Eq. 413. See also *Kern v. Kern*, 51 N. J. Eq. 577.

New York. — *Odell v. Buck*, 21 Wend. (N. Y.) 142; *Bell v. Smith*, 83 Hun (N. Y.) 438.

North Carolina. — *Moffitt v. Witherspoon*, 10 Ired. L. (32 N. Car.) 185.

Pennsylvania. — *Taylor v. Trich*, 165 Pa. St. 586, 44 Am. St. Rep. 679; *Leech v. Leech*, 5

Pa. L. J. Rep. 86; *Pidcock v. Potter*, 68 Pa. St. 348, 8 Am. Rep. 181; *Ekin v. McCracken*, 11 Phila. (Pa.) 534, 32 Leg. Int. (Pa.) 405. See also *Boyd v. Eby*, 8 Watts (Pa.) 66.

Tennessee. — *Mays v. Prewett*, 98 Tenn. 474. **Virginia.** — *Boyce v. Smith*, 9 Gratt. (Va.) 704, 60 Am. Dec. 313.

West Virginia. — *Buckey v. Buckey*, 38 W. Va. 168; *Hiett v. Shull*, 36 W. Va. 563.

Wisconsin. — *Cole's Will*, 49 Wis. 179.

"In no case at the present day is it a mere question whether a party is insane. The point to be established is whether the party is so insane as to be incapable of doing the particular act with understanding and reason." *Concord v. Rumney*, 45 N. H. 428.

4. **The Test — England.** — *Osmond v. Fitzroy*, 3 P. Wms. 129; *Bennett v. Vade*, 2 Atk. 324; *Ball v. Mannin*, 1 Dow. N. S. 380.

Alabama. — *In re Carmichael*, 36 Ala. 514.

Arkansas. — *McDaniel v. Crosby*, 19 Ark. 547. See also *Abraham v. Wilkins*, 17 Ark. 292.

Georgia. — *Lemon v. Jenkins*, 48 Ga. 313.

Illinois. — *English v. Porter*, 109 Ill. 285.

Indiana. — *Somers v. Pumphrey*, 24 Ind. 246; *Darnell v. Rowland*, 30 Ind. 342; *Raymond v. Wathen*, 142 Ind. 374; *Teegarden v. Lewis*, 145 Ind. 101.

Massachusetts. — *Bond v. Bond*, 7 Allen (Mass.) 1.

New Hampshire. — *Dennett v. Dennett*, 44 N. H. 531.

New Jersey. — *Wilkinson v. Sherman*, 45 N. J. Eq. 413; *Earle v. Norfolk*, etc., *Hosiery Co.*, 36 N. J. Eq. 188, 37 N. J. Eq. 315.

New York. — *Aldrich v. Bailey*, 132 N. Y. 85.

North Carolina. — *Moffitt v. Witherspoon*, 10 Ired. (N. Car.) 185.

West Virginia. — *Buckey v. Buckey*, 38 W. Va. 168.

Wisconsin. — *Wright v. Jackson*, 59 Wis. 569.

See also *Greenwade v. Greenwade*, 43 Md. 315; *Mullins v. Cottrell*, 41 Miss. 291; *Jencks v. Smithfield*, 2 R. I. 255.

The law fixes no particular standard of intelligence necessary to be possessed by parties in making a contract. *In re Carmichael*, 36 Ala. 514; *Hovey v. Chase*, 52 Me. 304; *Ball v. Mannin*, 3 Bligh N. S. 20.

And the rule of judging is the same at law and in equity. *Bennett v. Vade*, 2 Atk. 327, 9

the party was of unsound mind or insane when it was made, but that this unsoundness or insanity was of such a character that he had no reasonable perception or understanding of the nature and terms of the contract.¹

Cross-References. — The powers, rights, and liabilities of lunatics in reference to such matters as agency, assignments, bills of exchange and promissory notes, deeds, domicile, elections, gifts, bankruptcy, marriage, partnership, settlement, wills, etc., are discussed fully elsewhere in this work.²

2. Bona Fide Executed Contracts. — Where there has been no inquisition or adjudication of lunacy, a contract entered into upon an adequate consideration of which the lunatic has had the benefit, and made by the other contracting party in good faith, without fraud or undue influence, and without knowledge of the insanity or reason to suspect it, will be upheld against the lunatic where the parties cannot be put *in statu quo*.³ The liability of the lunatic in such cases is upheld, it has been said, not on the ground of the contract, but on the fact that the lunatic has received and enjoyed an actual benefit from the contract, for which he ought in equity and justice to pay.⁴

3. Contracts for Necessaries — *a.* **FOR LUNATIC.** — An exception to the general rule that persons of unsound mind are not bound by their contracts is to be found in contracts for necessities for the lunatic himself.⁵

Mod. 312; Osborne v. Fitzroy, 3 P. Wms. 129, 1 Fonbl. 57; Webster v. Woodford, 3 Day (Conn.) 93.

A man may not have sufficient intelligence to manage his affairs in a proper and prudent manner, and yet may not be *non compos mentis*. *In re Carmichael*, 36 Ala. 514; Hovey v. Chase, 52 Me. 304.

1. *Idaho*. — Kelly v. Perrault, (Idaho 1897) 48 Pac. Rep. 45.

Iowa. — Elwood v. O'Brien, 105 Iowa 239.

Massachusetts. — Farnam v. Brooks, 9 Pick. (Mass.) 212.

Missouri. — Cutler v. Zollinger, 117 Mo. 92; Richardson v. Smart, 65 Mo. App. 14.

New York. — Aldrich v. Bailey, 132 N. Y. 85.

North Carolina. — Ducker v. Whitson, 112 N. Car. 44.

West Virginia. — Buckey v. Buckey, 38 W. Va. 168.

Wisconsin. — Brothers v. Kaukauna Bank, 84 Wis. 381, 36 Am. St. Rep. 932.

2. See the titles AGENCY, vol. 1, p. 930; ASSIGNMENTS, vol. 2, p. 1007; BILLS OF EXCHANGE AND PROMISSORY NOTES, vol. 4, p. 65; DEEDS, vol. 9, p. 87; DOMICIL, vol. 10, p. 6; ELECTIONS, vol. 10, p. 552; GIFTS, vol. 14, p. 1006; INSOLVENCY AND BANKRUPTCY, *post*; MARRIAGE; PARTNERSHIP; POOR AND POOR LAWS; WILLS.

3. Bona Fide Executed Contracts — *England*. — Elliot v. Ince, 7 De G. M. & G. 475; Molton v. Camroux, 2 Exch. 487, 4 Exch. 17; Campbell v. Hooper, 3 Smale & G. 153, 24 L. J. Ch. 644; Beavan v. M'Donnell, 9 Exch. 309; Hassard v. Smith, 6 Ir. R. Eq. 429; Dane v. Kirkwall, 8 C. & P. 679, 34 E. C. L. 581; Brown v. Jodrell, M. & M. 105; Baxter v. Portsmouth 5 B. & C. 170, 11 E. C. L. 190.

Illinois. — Burnham v. Kidwell, 113 Ill. 425; Scanlan v. Cobb, 85 Ill. 295.

Indiana. — Wilder v. Weakley, 34 Ind. 181; Physio-Medical College v. Wilkinson, 108 Ind. 320; Copenrath v. Kienby, 83 Ind. 18; McMillan v. Deering, 139 Ind. 71; Hull v. Louth, 109 Ind. 315, 58 Am. Rep. 405.

Iowa. — Alexander v. Haskins, 68 Iowa 73; Behrens v. McKenzie, 23 Iowa 333; Ashcraft

v. De Armond, 44 Iowa 234; Abbott v. Creal, 56 Iowa 175.

Kansas. — Myers v. Knabe, 51 Kan. 720; Gribben v. Maxwell, 34 Kan. 8, 55 Am. Rep. 233.

Louisiana. — Schmidt v. Ittman, 46 La. Ann. 888; Vanosdel v. Hyce, 46 La. Ann. 387.

Minnesota. — Morris v. Great Northern R. Co., 67 Minn. 74; Schaps v. Lehner, 54 Minn. 208; Knox v. Haug, 48 Minn. 58.

Missouri. — Rhoades v. Fuller, 139 Mo. 179.

New Hampshire. — Young v. Stevens, 48 N. H. 133, 2 Am. Rep. 202.

New Jersey. — Matthiessen, etc., Refining Co. v. McMahon, 38 N. J. L. 536; Yauger v. Skinner, 14 N. J. Eq. 389; Eaton v. Eaton, 37 N. J. L. 108, 18 Am. Rep. 716.

New York. — Mutual L. Ins. Co. v. Hunt, 79 N. Y. 541; Haines v. Scott, 35 N. Y. App. Div. 518; Loomis v. Spencer, 2 Paige (N. Y.) 158; Riggs v. American Tract Soc., 84 N. Y. 335; Carter v. Beckwith, 128 N. Y. 321; Baldwin v. Golde, 88 Hun (N. Y.) 115.

North Carolina. — Riggan v. Green, 80 N. Car. 236, 30 Am. Rep. 77.

Ohio. — Hosler v. Beard, 54 Ohio St. 405, 56 Am. St. Rep. 720.

Pennsylvania. — Beals v. See, 10 Pa. St. 56, 49 Am. Dec. 573; Lancaster County Nat. Bank v. Moore, 78 Pa. St. 407, 21 Am. Rep. 24.

Tennessee. — Hadley v. Latimer, 3 Yerg. (Tenn.) 537; Coffee v. Ruffin, 4 Coldw. (Tenn.) 514; Seat v. McWhirter, 93 Tenn. 569; Mays v. Prewett, 98 Tenn. 478; Memphis Nat. Bank v. Sneed, 97 Tenn. 124, 56 Am. St. Rep. 788.

Vermont. — Lincoln v. Buckmaster, 32 Vt. 652.

4. Gore v. Gibson, 13 M. & W. 626; Matthiessen, etc., Refining Co. v. McMahon, 38 N. J. L. 544; Lincoln v. Buckmaster, 32 Vt. 658.

If in such cases he elects to disaffirm the contract, he must do so within a reasonable time after regaining his reason, and then he must return the consideration which he has received. Morris v. Great Northern R. Co., 67 Minn. 74.

5. **Contracts for Necessaries for Lunatic** — *Eng-*

land. — Baxter v. Portsmouth, 5 B. & C. 170, 11 E. C. L. 190; Wentworth v. Tubbs, 1 Y. &

b. FOR LUNATIC'S FAMILY. — And the exception extends to necessities supplied to the lunatic's family.¹

c. AFTER INQUISITION. — An insane person, whether under guardianship or not, may be bound by his contract for necessities if it was made in good faith by the other party and under circumstances which justified the contract.² Whenever necessities are supplied to a person who by reason of disability cannot himself make a contract, the law implies an obligation on the part of such person to pay for such necessities out of his own property; and the rule applies to a lunatic, whether so found or not, when the necessities supplied are suitable to his position in life. But to justify the court in implying such obligation, the necessities must be supplied with the intention on the part of the person making the provision to be paid for them and to look to the lunatic's estate for his pay.³

4. After Adjudication of Insanity — Contracts Void. — After inquisition and adjudication of insanity and the appointment of a committee or guardian to an insane person, all his contracts, except for necessities, made while such adjudication and appointment remain in force, are void.⁴

C. Ch. 171; Howard *v.* Digby, 2 Cl. & F. 634; Nelson *v.* Duncombe, 9 Beav. 211; Williams *v.* Wentworth, 5 Beav. 325; Selby *v.* Jackson, 6 Beav. 192; *In re Persse*, 3 Molloy 94.

Alabama. — *Ex p.* Northington, 37 Ala. 496, 79 Am. Dec. 67.

Arkansas. — Henry *v.* Fine, 23 Ark. 417.

Louisiana. — Breaux *v.* Francke, 30 La. Ann. 336.

Maine. — Leach *v.* Marsh, 47 Me. 548, 74 Am. Dec. 503; Sawyer *v.* Lufkin, 56 Me. 308.

Massachusetts. — Kendall *v.* May, 10 Allen (Mass.) 59; Hallett *v.* Oakes, 1 Cush. (Mass.) 299.

Missouri. — Reando *v.* Misplay, 90 Mo. 251, 59 Am. Rep. 13.

New Jersey. — Van Horn *v.* Hann, 39 N. J. L. 207.

New York. — Wallis *v.* Manhattan Co., 2 Hall (N. Y.) 495.

North Carolina. — Tally *v.* Tally, 2 Dev. & B. Eq. (22 N. Car.) 385, 34 Am. Dec. 407; Richardson *v.* Strong, 13 Ired. L. (35 N. Car.) 106, 55 Am. Dec. 430.

Pennsylvania. — La Rue *v.* Gilkyson, 4 Pa. St. 375, 45 Am. Dec. 700; Lancaster County Nat. Bank *v.* Moore, 78 Pa. St. 407, 21 Am. Rep. 24; Kneedler's Appeal, 92 Pa. St. 428; Clark's Case, 22 Pa. St. 466; Wier *v.* Myers, 34 Pa. St. 377.

South Carolina. — Johnson *v.* Ballard, 11 Rich. L. (S. Car.) 178.

Vermont. — Blaisdell *v.* Holmes, 48 Vt. 492.

A person of unsound mind, under guardianship, is personally liable for necessities furnished to him before he became insane, and his guardian cannot be held personally liable therefor. Baker *v.* Groves, 1 Ind. App. 522; Woods *v.* Brown, 93 Ind. 164, 47 Am. Rep. 369; Fay *v.* Burditt, 81 Ind. 433, 42 Am. Rep. 142; Wilder *v.* Weakley, 34 Ind. 181; *Ex p.* Leighton, 14 Mass. 207; Richardson *v.* Strong, 13 Ired. L. (35 N. Car.) 106, 55 Am. Dec. 430.

1. Necessaries for Lunatic's Family. — Matter of Wood, 1 De G. J. & S. 465; Read *v.* Legard, 6 Exch. 636; Drew *v.* Nunn, 4 Q. B. D. 661; *In re Gibson*, L. R. 7 Ch. 53; Harris *v.* Davis, 1 Ala. 259; Pearl *v.* M'Dowell, 3 J. J. Marsh. (Ky.) 658, 20 Am. Dec. 199; Bangor *v.* Wisconsin Casset, 71 Me. 535; Shaw *v.* Thompson, 16

Pick. (Mass.) 198, 26 Am. Dec. 655; Stuckey *v.* Mathes, 24 Hun (N. Y.) 461; Surles *v.* Pipkin, 69 N. Car. 513.

2. For Necessaries — After Inquisition. — Sawyer *v.* Lufkin, 56 Me. 308; Seaver *v.* Phelps, 11 Pick. (Mass.) 304, 22 Am. Dec. 372; McCrillis *v.* Bartlett, 8 N. H. 569; Shaper *v.* Wing, 2 Hun (N. Y.) 671; Lincoln *v.* Buckmaster, 32 Vt. 652.

An adjudication of insanity and the appointment of a committee or guardian are not conclusive against the ability of the ward to make a valid contract for necessities. Stannard *v.* Burns, 63 Vt. 244; Motley *v.* Head, 43 Vt. 633; Blaisdell *v.* Holmes, 48 Vt. 492.

Should the Guardian Be Derelict in Duty and fail to provide suitably for his ward, taking into account the means at his disposal, there is in law a clear remedy for such abuse, either by compelling the performance of the duty or by removing the unfaithful or incompetent trustee. And there is another remedy which the law furnishes *ex necessitate*. A neglected ward might be brought to want and suffering before judicial relief could be successfully invoked. In such case a stranger may supply pressing and present wants, and have his claim therefor made a charge against the trust fund in the hands of the guardian. But this principle finds neither justification nor field of operation unless the guardian neglects or refuses to supply the ward with necessities suitable to the latter's estate and condition. Creagh *v.* Tunstall, 98 Ala. 249.

3. Implied Contract to Pay. — *In re Rhodes*, 44 Ch. D. 94; Williams *v.* Wentworth, 5 Beav. 325; Howard *v.* Digby, 2 Cl. & F. 634; Wentworth *v.* Tubb, 1 Y. & C. Ch. 171; Nelson *v.* Duncombe, 9 Beav. 211; *In re Gibson*, L. R. 7 Ch. 52; Brockwell *v.* Bullock, 22 Q. B. D. 567; Creagh *v.* Tunstall, 98 Ala. 249.

Although one *non compos mentis* cannot assent to a contract, yet the law raises an obligation on the part of a person benefited by the services of a lunatic to pay for such services; and upon this obligation an action may be maintained in the courts. Ashley *v.* Holman, 15 S. Car. 97.

4. After Inquisition. — *Georgia.* — American Trust, etc., Co. *v.* Boone, 102 Ga. 202.

Adjudication in Foreign Jurisdiction. — And it has been held that the rule is the same though the adjudication of insanity was made in another jurisdiction and was unknown to the other contracting party.¹

5. Equitable Relief. — The subject of equitable interference generally in the matter of the contracts of lunatics is discussed elsewhere in this work.² This subdivision will discuss the degree of mental weakness that will warrant the interposition of equity.

When Finding of Lunacy Would Not Be Justified. — A degree of imbecility below what is sufficient to justify a finding of lunacy under a commission *de lunatico inquirendo* may be sufficient to enable a court of equity to interfere to set aside a deed or other contract if it appears that undue advantage has been taken of that weakness, such as it is, to obtain the execution of the contract.³

Illinois. — *Burnham v. Kidwell*, 113 Ill. 425; *Lilly v. Waggoner*, 27 Ill. 395; *McCormick v. Litler*, 85 Ill. 62, 28 Am. Rep. 610.

Kentucky. — *Pearl v. M'Dowell*, 3 J. J. Marsh. (Ky.) 658, 20 Am. Dec. 199.

Maine. — *Hovey v. Hobson*, 53 Me. 453, 89 Am. Dec. 705.

Massachusetts. — *Wait v. Maxwell*, 5 Pick. (Mass.) 217, 16 Am. Dec. 391; *Leonard v. Leonard*, 14 Pick. (Mass.) 280; *Lynch v. Dodge*, 130 Mass. 458.

New York. — *L'Amoureux v. Crosby*, 2 Paige (N. Y.) 422, 22 Am. Dec. 655; *Carter v. Beckwith*, 128 N. Y. 312; *Wadsworth v. Sharpsteen*, 8 N. Y. 388, 59 Am. Dec. 499; *Hughes v. Jones*, 116 N. Y. 67, 15 Am. St. Rep. 386.

West Virginia. — *Hanley v. National Loan, etc., Co.*, 44 W. Va. 450.

Contracts made by those who have been adjudged insane are void, and those made by persons of unsound mind who have not been so adjudged are voidable only. *Boyer v. Berryman*, 123 Ind. 451; *Copenrath v. Kienby*, 83 Ind. 18; *Crouse v. Holman*, 19 Ind. 30; *Fay v. Burditt*, 81 Ind. 433, 42 Am. Rep. 142; *McClain v. Davis*, 77 Ind. 419; *Freed v. Brown*, 55 Ind. 310; *Nichol v. Thomas*, 53 Ind. 42; *Hardenbrook v. Sherwood*, 72 Ind. 403; *Somers v. Pumphrey*, 24 Ind. 231; *Musselman v. Cravens*, 47 Ind. 1; *Redden v. Baker*, 86 Ind. 191; *Devin v. Scott*, 34 Ind. 67; *Wilder v. Weakley*, 34 Ind. 181; *Teegarden v. Lewis*, 145 Ind. 102; *Wray v. Chandler*, 64 Ind. 146.

The Presumption of the continuance of the lunacy is conclusive as to all dealings with the lunatic after the inquisition and until it has been superseded. *Carter v. Beckwith*, 128 N. Y. 312.

No Evidence of a Lucid Interval is admissible to controvert the insanity of a person after he has been placed in ward, and *non est factum* may be pleaded to his deed and the special matter given in evidence. *Rannells v. Gerner*, 80 Mo. 474.

Those Who Have Notice of the adjudication of lunacy cannot, even with the consent of the guardian, trade with the ward without limitation. *Coleman v. Farrar*, 112 Mo. 54.

The Assent of the Guardian of an insane person to the latter's deed confers upon that instrument no element of validity. *Rannells v. Gerner*, 80 Mo. 474.

Restoration — Effect in Absence of Decree. — The adjudication of lunacy renders subsequent contracts by the lunatic invalid, whether he has or has not a guardian; and while it stands

— that is, in the absence of a decree of restoration — it is conclusive, so that its effect on the contracts of the insane person cannot be overcome by proof that he has become capable of managing his own affairs. *Kiehne v. Wessell*, 53 Mo. App. 668.

When the Guardianship of an Insane Person Has Terminated, and a controversy has arisen between third parties, one of whom claims under a contract made with the ward after the termination of the guardianship, the reason ceases for regarding the decree of the Probate Court as conclusive on the question of the ward's sanity. *Willwerth v. Leonard*, 156 Mass. 277.

Commitment to Asylum. — But the fact that a person has been committed to a lunatic asylum under appropriate proceedings does not render his contracts void if there has been no inquisition and no committee of his person or estate has been appointed. *Wagner v. Harriott*, (N. Y. City Ct. Tr. T.) 20 Abb. N. Cas. (N. Y.) 283.

1. *American Trust, etc., Co v. Boone*, 102 Ga. 202.

2. See the titles **DEEDS**, vol. 9, p. 87; **FRAUD AND DECEIT**, vol. 14, p. 12; **RESCISSION**; **SPECIFIC PERFORMANCE**; **UNDUE INFLUENCE**; **VENDOR AND PURCHASER**. And see generally the title **EQUITY**, vol. 11, p. 145.

3. **Extent of Weakness Requisite to Justify Interference** — *England.* — *Blachford v. Christian*, 1 Knapp 73; *Wright v. Proud*, 13 Ves. Jr. 136; *Evans v. Blood*, 3 Bro. P. C. (Toml. ed.) 632; *Clerk v. Clerk*, 2 Vern. 412; *Addison v. Dawson*, 2 Vern. 678; *Clarkson v. Hanway*, 2 P. Wms. 203; *Bennet v. Wade*, 2 Atk. 324; *Hall v. Warren*, 9 Ves. Jr. 605; *Huguenin v. Baselle*, 14 Ves. Jr. 273; *Bridgman v. Green*, 2 Ves. 627; *Cooke v. Clayworth*, 18 Ves. Jr. 12; *Lightfoot v. Heron*, 3 Y. & C. Ch. 586; *Morley v. Loughman*, (1893) 1 Ch. 736.

United States. — *Selden v. Myers*, 20 How. (U. S.) 506; *Allore v. Jewell*, 94 U. S. 506; *Harding v. Handy*, 11 Wheat. (U. S.) 125; *Harding v. Wheaton*, 2 Mason (U. S.) 378; *Kerwin v. Hibernia Ins. Co.*, 25 Fed. Rep. 692.

Alabama. — *Pike v. Pike*, 104 Ala. 642.

Connecticut. — *Webster v. Woodford*, 3 Day (Conn.) 90.

Idaho. — *Kelly v. Perrault*, (Idaho 1897) 48 Pac. Rep. 45.

Indiana. — *Raymond v. Wathen*, 142 Ind. 367; *McCormick v. Malin*, 5 Blackf. (Ind.) 509; *Lange v. Dammier*, 119 Ind. 567.

Iowa. — *Alexander v. Haskins*, 68 Iowa 73.

Maryland. — *Cherbonnier v. Evitts*, 56 Md.

Where Consideration Grossly Inadequate. -- When it is shown that the mind of one of the contracting parties was enfeebled, and that he was suspiciously subjected to the influences of the other, to whom he transferred valuable rights or conveyed valuable property for a grossly inadequate consideration, the courts will require that it be made to appear affirmatively that the grantor understood the nature of his act and was not led to it by unfair influences.¹

When Party Cannot Be Adjudged Lunatic. -- When a person of weak mind has not been or cannot be adjudged a lunatic by the special tribunal provided by law for that purpose, and yet is so far incapacitated by disease, decrepitude, or other infirmity as to require the protection of a court of equity against the undue influence and fraud of others, a suit for that purpose may be brought by next friends in the name of such weak-minded person.²

Mere Weakness of Mind, or unsoundness to some degree, is not, however, sufficient to avoid a contract, in the absence of fraud, imposition, or undue influence.³

276; *Wampler v. Wolfinger*, 13 Md. 337; *Highberger v. Stiffler*, 21 Md. 352, 83 Am. Dec. 593; *Todd v. Grove*, 33 Md. 194; *Eagle v. Reynolds*, 54 Md. 305.

Missouri. -- *Kroenung v. Goehri*, 112 Mo. 641; *Bogges v. Bogges*, 127 Mo. 305.

Nebraska. -- *Loder v. Loder*, 34 Neb. 824; *Dewey v. Allgire*, 37 Neb. 6, 40 Am. St. Rep. 463.

New Hampshire. -- *Young v. Stevens*, 48 N. H. 133, 2 Am. Rep. 202.

New Jersey. -- *Crane v. Conklin*, 1 N. J. Eq. 346, 22 Am. Rep. 519; *Mott v. Mott*, 49 N. J. Eq. 192.

New York. -- *Rider v. Miller*, 86 N. Y. 507; *Brick v. Brick*, 66 N. Y. 144; *Smith v. Carll*, 5 Johns. Ch. (N. Y.) 119; *Goodyear v. Adams*, (Supm. Ct. Gen. T.) 5 N. Y. Supp. 275.

North Carolina. -- *Buffalow v. Buffalow*, 2 Dev. & B. Eq. (22 N. Car.) 241; *Rippy v. Gant*, 4 Ired. Eq. (39 N. Car.) 443; *Riggan v. Green*, 80 N. Car. 236, 30 Am. Rep. 77.

Ohio. -- *Tracey v. Sacket*, 1 Ohio St. 54, 59 Am. Dec. 610.

Pennsylvania. -- *Bensell v. Chancellor*, 5 Whart. (Pa.) 371, 34 Am. Dec. 561.

Tennessee. -- *Mays v. Prewett*, 98 Tenn. 474; *Gass v. Mason*, 4 Sneed (Tenn.) 506; *Cradock v. Cabiness*, 1 Swan (Tenn.) 481; *Parrott v. Parrott*, 1 Heisk. (Tenn.) 687; *Knox v. Haralson*, 2 Tenn. Ch. 236.

Texas. -- *Elston v. Jasper*, 45 Tex. 409; *Edwards v. Edwards*, 14 Tex. Civ. App. 87.

Virginia. -- *Whitehorn v. Hines*, 1 Munf. (Va.) 557; *Fishburne v. Ferguson*, 84 Va. 87.

See also the title *DEEDS*, vol. 9, p. 121.

Many cases may arise in which the mind and memory are so far impaired as to afford grounds for setting aside an improvident agreement made by a person in that situation, upon a bill filed for that purpose, when the court would not have power to deprive him of the right to the possession and control of his property on the supposition that he was a person of unsound mind. *Matter of Morgan*, 7 Paige (N. Y.) 237. See also *Gibson v. Jeyes*, 6 Ves. Jr. 267; *Ridgeway v. Darwin*, 8 Ves. Jr. 65; *Matter of Conover*, 28 N. J. Eq. 330; *Matter of Lawrence*, 28 N. J. Eq. 331.

1. *Wilkinson v. Sherman*, 45 N. J. Eq. 421; *Haydock v. Haydock*, 34 N. J. Eq. 570, 38 Am. Rep. 385. See also *Kennedy v. Marrast*, 46 Ala. 161; *Bowden v. Achor*, 95 Ga. 243; *Tit-*

comb v. Vantyle, 84 Ill. 371; *Davis v. Calvert*, (Ky. 1897) 38 S. W. Rep. 884; *Curtis v. Brownell*, 42 Mich. 165; *Peters v. Peters*, 101 Mich. 291.

2. *Jones v. Lloyd*, 43 L. J. Ch. 826; *Howard v. Howard*, 87 Ky. 616; *Owings's Case*, 1 Bland (Md.) 370, 17 Am. Dec. 311; *Edwards v. Edwards*, 14 Tex. Civ. App. 87; *Holzheiser v. Gulf, etc., R. Co.*, 11 Tex. Civ. App. 677.

3. **Mere Mental Weakness** -- **Absence of Fraud** -- *United States.* -- *Martinez v. Moll*, 46 Fed. Rep. 724.

California. -- *Soberanes v. Soberanes*, 106 Cal. 1.

Georgia. -- *Maddox v. Simmons*, 31 Ga. 512.

Illinois. -- *Guild v. Hull*, 127 Ill. 523; *Miller v. Craig*, 36 Ill. 109; *Scanlan v. Cobb*, 85 Ill. 296; *Guild v. Warne*, 149 Ill. 105.

Iowa. -- *Schneiter v. Carman*, 98 Iowa 276; *Campbell v. Campbell*, 51 Iowa 713; *Caldwell v. Finch*, 96 Iowa 698; *Burgess v. Pollock*, 53 Iowa 273, 36 Am. Rep. 218; *Elwood v. O'Brien*, 105 Iowa 239; *Corbit v. Smith*, 7 Iowa 60, 71 Am. Dec. 431.

Maine. -- *Darby v. Hayford*, 56 Me. 246.

Maryland. -- *Cain v. Warford*, 33 Md. 23.

Nebraska. -- *Dewey v. Allgire*, 37 Neb. 6, 40 Am. St. Rep. 465.

New Jersey. -- *Hopper v. Hopper*, (N. J. 1896) 35 Atl. Rep. 400.

New York. -- *Van Alst v. Hunter*, 5 Johns. Ch. (N. Y.) 160; *Odell v. Buck*, 21 Wend. (N. Y.) 142; *Petrie v. Shoemaker*, 24 Wend. (N. Y.) 85; *Person v. Warren*, 14 Barb. (N. Y.) 494.

North Carolina. -- *Ducker v. Whitson*, 112 N. Car. 44.

Pennsylvania. -- *Aiman v. Stout*, 42 Pa. St. 114; *Elcessor v. Elcessor*, 146 Pa. St. 359.

South Carolina. -- *Lee v. Lee*, 4 McCord L. (S. Car.) 194.

Texas. -- *Moore v. Cross*, 87 Tex. 557.

West Virginia. -- *Buckey v. Buckey*, 38 W. Va. 168.

See also *Duncan v. Mason*, (Ky. 1892) 20 S. W. Rep. 252.

Sanity Being the Normal Condition of the Human Mind, the onus of proving mental incapacity sufficient to avoid a contract is on the party who asserts it; and it is not sufficient to show mere weakness of intellect, not seriously impairing the reasoning faculties or the memory, nor indicating inability to understand the common business affairs of life. *White v. Farley*,

Old Age is not of itself sufficient evidence of incapacity to make a binding contract. It must be shown that the party at the time of the execution of the contract was afflicted with such a degree of mental weakness as rendered him incapable of understanding and protecting his own interests.¹

6. Who May Avoid Lunatic's Contract. — The insanity of one of the parties to a contract does not entitle the other to avoid the contract. The right to avoid is for the personal protection of the insane, and can be exercised only by the incompetent or his legal representative; the other party has no corresponding right.²

INSIST. — See note 3.

INSOLENT — INSOLENCIE. — Insolence is anything said or done rudely; to be insolent is to be rude, saucy, insulting, abusive, offensive.⁴

81 Ala. 563; *Boyer v. Berryman*, 123 Ind. 451; *Lewis v. Arbuckle*, 85 Iowa 335; *Hill v. Nash*, 41 Me. 585, 66 Am. Dec. 266; *Jackson v. King*, 4 Cow. (N. Y.) 207, 15 Am. Dec. 354; *Latner v. Long*, (Tenn. Ch. 1898) 47 S. W. Rep. 1111.

The Test of Competency is not one's ability to manage his particular estate, be it large or small, but his fitness to attend to the ordinary, common affairs of life. *Matter of Brugh*, 61 Hun (N. Y.) 193; *Matter of Mason*, 60 Hun (N. Y.) 54; *Matter of Williams*, 24 N. Y. App. Div. 247, affirmed 157 N. Y. 704; *In re Rush*, (Supm. Ct. Spec. T.) 53 N. Y. Supp. 581.

1. Old Age — Florida. — *Waterman v. Higgins*, 28 Fla. 660.

Illinois. — *Guild v. Warne*, 149 Ill. 105; *Kimball v. Cuddy*, 117 Ill. 218; *Rutherford v. Morris*, 77 Ill. 397; *Willemin v. Dunn*, 93 Ill. 511; *Argo v. Coffin*, 142 Ill. 368, 34 Am. St. Rep. 86; *Peabody v. Kendall*, 145 Ill. 519.

Michigan. — *Lynch v. Doran*, 95 Mich. 395.

Missouri. — *Pennington v. Stanton*, 125 Mo. 658; *Cutler v. Zollinger*, 117 Mo. 92.

Pennsylvania. — *Kraus v. Stein*, 173 Pa. St. 221.

West Virginia. — *Jarrett v. Jarrett*, 11 W. Va. 584; *Kerr v. Lunsford*, 31 W. Va. 661; *Buckey v. Buckey*, 38 W. Va. 173.

See also *Williams v. Haid*, 118 N. Car. 481.

2. Who May Question Competency of Party. — *Bunn v. Postell*, 107 Ga. 490; *Mead v. Stegall*, 77 Ill. App. 679; *Allen v. Berryhill*, 27 Iowa

534; *Atwell v. Jenkins*, 163 Mass. 362, 47 Am. St. Rep. 463. See also *Breckenridge v. Ormsby* 1 J. J. Marsh. (Ky.) 239, 19 Am. Dec. 71; *Key v. Davis*, 1 Md. 43.

The Administrator of the estate of an insane intestate may show his insanity in evidence in avoidance of his contract. *Lazell v. Pinnick*, 1 Tyler (Vt.) 247, 4 Am. Dec. 722.

A contract of an insane person in respect to his personal estate, not ratified by him during his life, may be rescinded by his personal representative after his death. *Bunn v. Postell*, 107 Ga. 490; *Probate Judge v. Stone*, 44 N. H. 593.

As to Who May Avoid a Deed of Conveyance made by a lunatic, see the title *DEEDS*, vol. 9, p. 119.

3. Insist. — A condition that the vendor shall be at liberty to rescind the contract if the purchaser should "show any objection, whether of title, conveyance, or otherwise," and should "insist thereon," was held not to authorize the vendor to rescind the contract without attempting to answer the requisitions, although some of them were untenable. It was held, also, that he was bound to answer them, and give to the purchaser an opportunity of either waiving or insisting upon them. *Greaves v. Wilson*, 25 Beav. 290. See also *Masson v. Fletcher*, L. R. 10 Eq. 212. In this latter case the word was "persist." See generally the title *VENDOR AND PURCHASER*.

4. State v. Hill, 13 Ired. L. (35 N. Car.) 377.

Volume XVI.

INSOLVENCY AND BANKRUPTCY.

BY CHARLES PORTERFIELD.

I. DEFINITIONS, 636.

II. CONSTITUTIONALITY OF INSOLVENCY AND BANKRUPTCY LAWS, 638.

1. *National Bankruptcy Laws*, 638.
 - a. *Power to Enact*, 638.
 - b. *Provision for Discharge in Voluntary Proceedings*, 638.
 - c. *Provision for Discharge of Existing Debts*, 638.
 - d. *Uniformity of Operation*, 639.
2. *State Insolvency Laws*, 639.
 - a. *Power of States to Enact Insolvency Laws*, 639.
 - b. *Constitutionality as to Existing Debts*, 640.
 - c. *Constitutionality as to Subsequent Debts*, 640.
 - d. *Constitutionality in Respect to Nonresidents*, 640.

III. OPERATION OF INSOLVENCY AND BANKRUPTCY LAWS, 641.

1. *Matters Occurring After Approval of Law but Before It Goes into Operation*, 641.
2. *Rules of Construction*, 641.
3. *Effect of Bankruptcy Law on State Insolvency Law*, 642.
 - a. *Power of State to Enact Insolvency Law*, 642.
 - b. *State Laws Suspended by Enactment of Federal Law*, 642.
 - c. *Pending Proceedings under State Laws*, 643.
4. *Territorial Operation*, 643.
5. *Repeal of Statutes*, 644.

IV. JURISDICTION, 644.

1. *In England*, 644.
2. *In United States*, 645.
 - a. *Under National Bankruptcy Laws*, 645.
 - b. *Under State Insolvency Laws*, 646.

V. WHO MAY APPLY FOR ADJUDICATION, 646.

1. *Voluntary Proceedings*, 646.
 - a. *Authority of Debtor to Make Application*, 646.
 - b. *Circumstances Affecting Right of Debtor to Institute Proceeding*, 646.
 - (1) *In General*, 646.
 - (2) *Character or Kind of Debts*, 647.
 - (3) *Character or Condition of Debtor*, 647.
2. *Involuntary Proceedings*, 648.
 - a. *In General*, 648.
 - b. *Character or Kind of Debts*, 648.
 - c. *Number of Creditors and Amount of Debts*, 649.

VI. INVENTORY AND SCHEDULE, 650.

1. *Necessity*, 650.
2. *Requisites*, 650.
 - a. *Statement of Assets*, 650.
 - b. *Statement of Liabilities*, 651.
 - c. *Verification*, 651.
3. *Omissions and Defects*, 651.

VII. HEARING AND DETERMINATION, 652.

1. *Defenses and Objections*, 652.
2. *Mode of Trial*, 653.

INSOLVENCY AND BANKRUPTCY.

3. *Evidence*, 653.
 - a. *In General*, 653.
 - b. *Burden of Proof*, 653.
 - c. *Examination of Debtor*, 654.
4. *Adjudication*, 654.

VIII. WHO MAY BE ADJUDGED BANKRUPTS OR INSOLVENTS, 655.

1. *In General*, 655.
2. *Condition of Debtor*, 657.
3. *Character of Debtor*, 657.
 - a. *Aliens*, 657.
 - b. *Married Women*, 657.
 - c. *Infants*, 657.
 - d. *Lunatics*, 658.
 - e. *Corporations*, 659.
 - f. *Partnerships, and Other Cases of Joint Liability*, 659.
 - g. *Executors Carrying On Testator's Business*, 660.
 - h. *Convicts*, 660.
 - i. *Wage Earners and Farmers*, 660.
 - j. *Persons Privileged from Arrest*, 660.
 - k. *Indians*, 660.

IX. ACTS OF BANKRUPTCY OR INSOLVENCY, 660.

1. *Fraudulent Conveyance or Transfer of Property*, 660.
2. *Preference of Creditors*, 661.
 - a. *Effect as Act of Bankruptcy or Insolvency*, 661.
 - b. *What Constitutes Preference*, 662.
 - (1) *Nature of Act*, 662.
 - (a) *In General*, 662.
 - (b) *Payment of Money to Creditor*, 662.
 - (c) *Transferring Property or Giving Security to Creditor*, 663.
 - aa. *General Rule*, 663.
 - bb. *Acts Done under Previous Agreement*, 664.
 - cc. *Doctrine of Pressure*, 665.
 - dd. *Exchange of Values*, 665.
 - (2) *Time as Affecting Consequences of Act*, 667.
 - (3) *Circumstances of Debtor*, 667.
 - (4) *Intent to Create Preferences*, 668.
 - (5) *Creditor's Knowledge as to Circumstances and Intent of Debtor*, 669.
3. *Assignment for Benefit of Creditors*, 669.
4. *Departure of Debtor or Concealment of Person*, 670.
5. *Removal or Concealment of Property*, 671.
6. *Arrest of Debtor*, 671.
7. *Seizure of Goods under Legal Process*, 671.
8. *Non-payment of Commercial Paper*, 672.
9. *Admitting Insolvency*, 673.

X. DEBTS AND CLAIMS AGAINST ESTATE, 673.

1. *Proof and Allowance*, 673.
 - a. *Necessity of Proof in General*, 673.
 - b. *Before Whom Provable*, 673.
 - c. *By Whom Provable*, 673.
 - d. *Amount Allowable*, 674.
 - (1) *In General*, 674.
 - (2) *Interest*, 675.
 - (3) *Set-off*, 676.
 - (4) *Secured Claims*, 676.
 - e. *Time of Filing Claims*, 678.
 - f. *Allowance of Claims*, 678.
 - g. *Contest of Claims*, 679.

INSOLVENCY AND BANKRUPTCY.

- h. Effect of Proving Claims, 679.*
 - (1) *In General, 679.*
 - (2) *Waiver of Lien or Security, 679.*
 - (3) *Right of Creditor to Sue, 679.*
 - (4) *Foreign Insolvency or Bankruptcy Proceeding, 680.*
- 2. *What Debts and Claims Are Provable, 680.*
 - a. In General, 680.*
 - b. Claims Accruing After Commencement of Proceedings, 683.*
 - c. Claims Barred by Statute of Limitations, 684.*
 - d. Contingent and Unliquidated Claims, 685.*
 - e. Joint and Several Debts, 687.*
 - f. Secured Claims, 688.*
 - g. Judgments, 690.*
 - h. Assigned Claims, 690.*
 - i. Preferred Claims, 690.*
 - j. Costs and Expenses, 691.*
 - (1) *Rule in England, 691.*
 - (2) *Rule in United States, 691.*
- 3. *Priorities, 692.*
 - a. In General, 692.*
 - b. Taxes and Debts Due the Government, 693.*
 - c. Costs and Expenses, 695.*
 - d. Wages or Salaries of Laborers, Clerks, etc., 695.*
 - e. Claims Given Priority by State Laws, 697.*

XI. OPERATION AND EFFECT OF INSOLVENCY AND BANKRUPTCY PROCEEDINGS, 697.

- 1. *Exemption of Debtor from Arrest on Civil Process, 697.*
- 2. *Control of Property, 698.*
 - a. In General, 698.*
 - b. Property Acquired Pending Bankruptcy Proceedings, 699.*
 - c. Surplus Remaining After Termination of Proceeding, 699.*
- 3. *Partnerships, 700.*
- 4. *Agency, 700.*
- 5. *Actions by Debtor, 701.*
 - a. Right of Action in General, 701.*
 - b. Prosecution of Pending Actions, 702.*
- 6. *Actions Against Debtor, 702.*
 - a. Actions Brought After Commencement of Proceeding, 702.*
 - b. Actions Pending at Commencement of Proceeding, 703.*
- 7. *Liens on Debtor's Property, 705.*
 - a. Liens Not Obtainable Pending Insolvency or Bankruptcy Proceedings, 705.*
 - b. Liens Existing at Commencement of Proceeding, 705.*
 - (1) *General Rule, 705.*
 - (2) *Existing Liens Dissolved by Proceeding, 705.*
 - (a) *Liens Created by Act of Parties, 705.*
 - (b) *Liens Created by Statute, 706.*
 - (c) *Liens Acquired by Legal Proceedings, 706.*
 - aa. Rule under English Bankruptcy Law, 706.*
 - bb. Rule under Bankruptcy Law of United States, 706.*
 - cc. Rule under State Insolvency Laws, 708.*
 - (3) *Circumstances Affecting Dissolution of Existing Liens, 709.*
 - (4) *Priority Between Creditors, 711.*

XII. ASSIGNEE OR TRUSTEE, 711.

- 1. *Appointment and Tenure, 711.*
 - a. How Selection Is Made, 711.*
 - (1) *Election by Creditors, 711.*
 - (a) *Statutory Provisions, 711.*

INSOLVENCY AND BANKRUPTCY.

- (b) *Meeting of Creditors*, 712.
 - aa. *How Convened*, 712.
 - bb. *Time of Meeting*, 712.
 - cc. *Place of Meeting*, 712.
 - dd. *Conduct of Meeting*, 712.
- (c) *Right to Vote*, 713.
 - aa. *In General*, 713.
 - bb. *Secured Creditors*, 714.
 - cc. *Preferred Creditors*, 714.
 - dd. *Power of Attorney*, 714.
 - ee. *Postponing Proof or Allowance of Claims*, 715.
- (d) *Votes Necessary to Elect*, 715.
- (e) *Confirmation of Election*, 716.
 - aa. *Necessity*, 716.
 - bb. *Grounds for Refusing*, 716.
 - cc. *Who May Oppose*, 717.
- (2) *Appointment by Court*, 717.
- (3) *Appointment by Debtor*, 718.
- b. *Who May Be Appointed*, 718.
- c. *Notice of Appointment*, 718.
- d. *Bond*, 718.
- e. *Termination of Office*, 719.
 - (1) *Discharge After Completion of Duties*, 719.
 - (2) *Removal*, 719.
 - (3) *Death of Debtor*, 721.
 - (4) *Death of Assignee or Trustee*, 721.
- f. *Additional Appointment*, 721.
- g. *Postponing Appointment*, 721.
- a. *What Passes to Assignee or Trustee*, 721.
 - a. *General Rule*, 721.
 - b. *Leases*, 723.
 - c. *Franchises and Licenses*, 723.
 - d. *Trade Marks and Trade Names*, 724.
 - e. *Powers of Appointment*, 724.
 - f. *Choses in Action*, 724.
 - (1) *In General*, 724.
 - (2) *Contracts to Purchase Land*, 726.
 - (3) *Shares or Memberships in Corporations and Exchanges*, 726.
 - (4) *Liabilities of Stockholders*, 726.
 - (5) *Insurance Policies*, 726.
 - (6) *Claims Against Government*, 727.
 - g. *Conditional, Contingent, and Defeasible Interests*, 727.
 - h. *Trusts and Equitable Interests*, 728.
 - (1) *Property Held in Trust by Debtor*, 728.
 - (2) *Property Held in Trust for Debtor*, 730.
 - (3) *Equities and Rights of Redemption*, 730.
 - i. *Undivided Interests*, 731.
 - (1) *Partnership Property*, 731.
 - (2) *Undivided Interests in Real Estate*, 731.
 - j. *Property Transferred by Debtor*, 731.
 - (1) *In General*, 731.
 - (2) *Fraudulent Conveyances*, 732.
 - (3) *Assignments for Benefit of Creditors*, 733.
 - (4) *Preferences*, 734.
 - k. *Property in Other Countries or States*, 737.
 - (1) *Rule in England*, 737.
 - (2) *Rule in United States*, 737.
 - l. *Property Acquired After Commencement of Proceedings*, 738.
 - m. *Exemptions and Allowances*, 739.

INSOLVENCY AND BANKRUPTCY.

3. *Title of Assignee or Trustee*, 740.
 - a. *Quantity of Title*, 740.
 - b. *When Title Vests*, 741.
 - c. *How Title Is Divested*, 741.
4. *Powers, Duties, and Liabilities*, 742.
 - a. *General Principles*, 742.
 - b. *Collection of Assets*, 743.
 - (1) *In General*, 743.
 - (2) *Property Claimed or Held Adversely*, 744.
 - (3) *Discovery of Assets*, 745.
 - c. *Abandonment of Property*, 745.
 - d. *Setting Aside Fraudulent or Preferential Transfers*, 746.
 - e. *Continuing Business*, 747.
 - f. *Sale of Property*, 747.
 - (1) *Authority to Sell*, 747.
 - (a) *In General*, 747.
 - (b) *Leave or Approval of Court*, 748.
 - (2) *Property Subject to Sale*, 749.
 - (3) *Manner and Terms of Sale*, 749.
 - (4) *Who May Purchase*, 750.
 - (5) *Title and Rights of Purchasers*, 751.
 - (6) *Setting Aside Sale*, 751.
 - (7) *Resale*, 751.
 - g. *Arbitration and Compromise*, 752.
 - h. *Actions*, 752.
 - (1) *Actions by Assignee or Trustee*, 752.
 - (a) *Right to Maintain*, 752.
 - (b) *Evidence of Official Character*, 752.
 - (2) *Actions Against Assignee or Trustee*, 752.
 - (3) *Intervention and Substitution in Pending Actions*, 752.
 - (a) *Actions Brought by Bankrupt*, 752.
 - (b) *Actions Brought Against Bankrupt*, 753.
 - (4) *Jurisdiction*, 753.
 - (a) *Under Former Statutes*, 753.
 - (b) *Jurisdiction under Act 1898*, 754.
 - aa. *District Courts of United States*, 754.
 - bb. *Circuit Courts of United States*, 755.
 - cc. *State Courts*, 755.
 - (5) *Limitation of Actions*, 755.
5. *Accounting*, 756.
 - a. *Duty to Account*, 756.
 - b. *Allowances to Assignee or Trustee*, 756.
 - (1) *Compensation*, 756.
 - (2) *Expenses*, 757.

XIII. ASSIGNMENT, 758.

XIV. COMPOSITIONS, 758.

1. *Authority to Make Compositions*, 758.
2. *Composition Meetings*, 759.
 - a. *Convening Creditors*, 759.
 - b. *Investigation of Debtor's Affairs*, 759.
 - c. *Right to Vote*, 759.
 - d. *Number and Amount of Consenting Creditors*, 760.
3. *Terms of Composition*, 760.
4. *Confirmation of Composition*, 760.
 - a. *Necessity*, 760.
 - b. *Grounds for Refusing Confirmation*, 760.
5. *Payment of Dividends*, 762.
 - a. *Mode of Payment*, 762.
 - b. *Time of Payment*, 762.

INSOLVENCY AND BANKRUPTCY.

- c. Claims Payable, 762.*
 - d. Default in Making Payments, 763.*
 - e. Security for Payment, 764.*
- 6. *Effect of Composition, 764.*
- 7. *Secret Agreements with and Preference of Creditors, 764.*
- 8. *Setting Aside Compositions, 765.*
 - a. The Power, 765.*
 - b. Who May Move, 765.*
 - c. Grounds for Setting Aside Composition, 765.*
 - d. Effect as to Prior Acts, 766.*

XV. DISCHARGE OF DEBTOR, 766.

- 1. *Right to Discharge, 766.*
 - a. In General, 766.*
 - b. Surrender of All Property, 766.*
 - c. Amount of Indebtedness, 767.*
 - d. Consent of Creditors, 767.*
 - e. Death of Debtor, 768.*
- 2. *Effect of Discharge, 768.*
 - a. Conclusiveness in General, 768.*
 - b. Effect as to Debtor, 769.*
 - (1) *Release from Debts, 769.*
 - (a) *In General, 769.*
 - (b) *Alimony and Maintenance of Children, 771.*
 - (c) *Judgments, 771.*
 - (d) *Lien Debts, 774.*
 - (e) *Contingent Liabilities, 775.*
 - (f) *Continuing Contracts, 776.*
 - (g) *Time of Accrual of Liabilities, 777.*
 - (h) *Taxes and Other Debts Due the Government, 778.*
 - (i) *Partnership Debts, 779.*
 - (j) *Fiduciary Debts, 779.*
 - aa. Statutory Provisions, 779.*
 - bb. What Constitutes Fiduciary Relation, 780.*
 - cc. Effect of Proving Debt, 782.*
 - (k) *Debts Contracted by Fraud, 782.*
 - (l) *Liabilities Arising Out of Torts, 783.*
 - (m) *Extraterritorial Effect of Discharge, 783.*
 - aa. In General, 783.*
 - bb. Discharge under State Insolvency Laws, 784.*
 - (2) *Exemption from Arrest and Imprisonment, 787.*
 - (3) *New Promise to Pay Debt Released, 789.*
 - (4) *Jurisdiction over Debtor, 792.*
 - c. Effect as to Persons Liable with Debtor, 792.*
 - d. Effect as to Assignee or Trustee, 794.*
- 3. *Opposition to Discharge, 794.*
 - a. Who May Oppose, 794.*
 - b. Evidence, 795.*
 - c. Agreements to Withdraw Opposition, 795.*
 - d. Grounds for Refusing Discharge, 795.*
 - (1) *In General, 795.*
 - (2) *Offenses Against Statute, 796.*
 - (3) *Fraud, 797.*
 - (4) *Concealment of or False Statements as to Debts and Assets, 797.*
 - (5) *Preferences, 798.*
 - (6) *Failure to Keep, Concealment, or Destruction of Books of Account, 799.*
 - (7) *Influencing Creditors, 801.*
 - (8) *Refusal to Submit to Examination, 802.*

- (9) *Existence of Debts Not Affected by Discharge*, 802.
- (10) *Previous Bankruptcy or Insolvency*, 802.
- 4. *Setting Aside or Impeaching Discharge*, 802.
 - a. *Direct Attack*, 802.
 - (1) *Authority to Set Aside or Annul Discharge*, 802.
 - (2) *Who May Make Application*, 803.
 - (3) *Grounds of Relief*, 803.
 - (4) *Time of Application*, 804.
 - b. *Collateral Attack*, 804.
 - (1) *Liability to Collateral Attack*, 804.
 - (a) *Rule under National Bankruptcy Law*, 804.
 - (b) *Rule under State Insolvency Laws*, 805.
 - (2) *Grounds of Attack*, 805.

XVI. OFFENSES AGAINST INSOLVENCY AND BANKRUPTCY LAWS, 806.

- 1. *Creation of Offenses*, 806.
- 2. *Constitutionality of Penal Provisions*, 806.
- 3. *Jurisdiction*, 806.
- 4. *Limitations*, 806.

XVII. INSOLVENT DECEDENTS' ESTATES, 806.

CROSS-REFERENCES.

For matters of *PROCEDURE*, see the *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*, titles *CREDITORS' BILLS*, vol. 5, p. 388; *INSOLVENCY*, vol. 11, p. 1; *POOR PERSONS*, vol. 16, p. 673; *UNITED STATES COURTS*.

For other matters of *SUBSTANTIVE LAW AND EVIDENCE* related to this subject, see the following titles of this work: *ASSIGNMENTS FOR THE BENEFIT OF CREDITORS*, vol. 3, p. 1; *COMPOSITION WITH CREDITORS*, vol. 6, p. 376; *FRAUDULENT SALES AND CONVEYANCES*, vol. 14, p. 210; *TRUST DEEDS AND POWER OF SALE MORTGAGES*.

I. DEFINITIONS. — The Term "Bankrupt" originally meant a trader who secreted himself or did certain other acts tending to defraud his creditors. It was distinguishable from "insolvent" in that a bankrupt must have been a trader, and the object of the proceedings against, not by, him. This distinction was preserved by the *English* bankruptcy acts until recent times, when it was practically abolished. In the *United States* the distinction is not generally regarded, and it seems to be settled that the word is used in the Constitution of the United States, not in the early English sense, but as commensurate with "insolvent." As used in the bankruptcy acts, "bankrupt" means a person who has done or suffered to be done some act which is by law declared to be an act of bankruptcy.¹

Insolvency. — As used in the insolvency and bankruptcy laws, especially when applied to traders or persons engaged in commercial pursuits, the term "insolvency" generally means the condition of a person who is unable to pay his debts as they become due in the ordinary course of business.² According

1. **Bankrupt Defined.** — 2 Bl. Com. 471; 2 Kent Com. 389; Bouv. Law Dict., "Bankrupt;" Burr. Law Dict., "Bankrupt;" *Sturges v. Crowninshield*, 4 Wheat. (U. S.) 122; *Sackett v. Andross*, 5 Hill (N. Y.) 327.

2. **Insolvency Defined — England.** — Bayly v. Schofield, 1 M. & S. 338; *Shone v. Lucas*, 3 Dowl. & R. 218, 16 E. C. L. 166.

United States. — *Cunningham v. Norton*, 125 U. S. 77; *Merchants' Nat. Bank v. Cook*, 95 U. S. 342, 16 Nat. Bankr. Reg. 391; *Dutcher v. Wright*, 94 U. S. 553, 16 Nat. Bankr. Reg. 331; *Wager v. Hall*, 16 Wall. (U. S.) 584, affirming 3 Biss. (U. S.) 28; *Buchanan v.*

Smith, 16 Wall. (U. S.) 277, 7 Nat. Bankr. Reg. 513; *Toof v. Martin*, 13 Wall. (U. S.) 40, affirming 1 Dill. (U. S.) 203, 6 Nat. Bankr. Reg. 49; *Driggs v. Moore*, 1 Abb. (U. S.) 440, 3 Nat. Bankr. Reg. 602, 7 Fed. Cas. No. 4,083; *Case v. Citizens Bank*, 2 Woods (U. S.) 23, 5 Fed. Cas. No. 2,489; *In re Ryan*, 2 Sawy. (U. S.) 411, 21 Fed. Cas. No. 12,183; *Matter of Black*, 2 Ben. (U. S.) 196, 1 Nat. Bankr. Reg. 353, 3 Fed. Cas. No. 1,457; *Graham v. Stark*, 3 Ben. (U. S.) 520, 3 Nat. Bankr. Reg. 357, 10 Fed. Cas. No. 5,676; *Scammon v. Cole*, 1 Hask. (U. S.) 214, 3 Nat. Bankr. Reg. 393, 21 Fed. Cas. No. 12,433, affirmed in 3 Cliff. (U.

to this definition, a person may be insolvent though he has assets exceeding in value the amount of all his liabilities;¹ and so it has been held that a partnership, as such, may be insolvent though one or more of the individuals composing it are solvent.²

In Its Popular and General Sense the term "insolvency" denotes the insufficiency of the entire property and assets of an individual to pay his debts.³

S.) 472, 5 Nat. Bankr. Reg. 257, 21 Fed. Cas. No. 12,432; *Wilson v. Brinkman*, 2 Nat. Bankr. Reg. 468, 30 Fed. Cas. No. 17,794; *Campbell v. Traders' Nat. Bank*, 2 Biss. (U. S.) 423, 3 Nat. Bankr. Reg. 408, 4 Fed. Cas. No. 2,370; *Jackson v. McCulloch*, 1 Woods (U. S.) 433, 13 Nat. Bankr. Reg. 283, 13 Fed. Cas. No. 7,140; *Sawyer v. Turpin*, 2 Lowell (U. S.) 29, 5 Nat. Bankr. Reg. 339, 21 Fed. Cas. No. 12,410, affirmed in 1 Holmes (U. S.) 226, 21 Fed. Cas. No. 12,409; *Stranahan v. Gregory*, 4 Nat. Bankr. Reg. 427, 23 Fed. Cas. No. 13,522; *Mayer v. Hermann*, 10 Blatchf. (U. S.) 256, 16 Fed. Cas. No. 9,344; *Warren v. New York Tenth Nat. Bank*, 10 Blatchf. (U. S.) 493, 7 Nat. Bankr. Reg. 481, 29 Fed. Cas. No. 17,202, reversing 5 Ben. (U. S.) 395, 5 Nat. Bankr. Reg. 479, 29 Fed. Cas. No. 17,200, reversed in 96 U. S. 539; *Webb v. Sachs*, 4 Sawy. (U. S.) 158, 15 Nat. Bankr. Reg. 168, 29 Fed. Cas. No. 17,325; *In re Hauck*, 17 Nat. Bankr. Reg. 158, 11 Fed. Cas. No. 6,219; *Anshutz v. Hoerr*, 1 Fed. Rep. 592; *May v. Le Claire*, 18 Fed. Rep. 164; *Matter of Diblee*, 3 Ben. (U. S.) 283, 2 Nat. Bankr. Reg. 617, 7 Fed. Cas. No. 3,884; *Graham v. Stark*, 3 Ben. (U. S.) 520, 3 Nat. Bankr. Reg. 357, 10 Fed. Cas. No. 5,676; *In re Randall*, Deady (U. S.) 557, 3 Nat. Bankr. Reg. 19, 20 Fed. Cas. No. 11,551; *In re Wells*, 3 Nat. Bankr. Reg. 371, 29 Fed. Cas. No. 17,388; *In re Holland*, 2 Hask. (U. S.) 90, 12 Fed. Cas. No. 6,603; *In re Bininger*, 7 Blatchf. (U. S.) 264; *Ex p. Hull*, 1 N. Y. Leg. Obs. 1, 12 Fed. Cas. No. 6,856.

California. — *Sacry v. Lobree*, 84 Cal. 41; *Bell v. Ellis*, 33 Cal. 620.

Illinois. — *Atwater v. American Exch. Nat. Bank*, 152 Ill. 605.

Maine. — *Morey v. Milliken*, 86 Me. 464; *Clay v. Towle*, 78 Me. 89.

Maryland. — *Castleberg v. Wheeler*, 68 Md. 266.

Massachusetts. — *Holbrook v. Jackson*, 7 Cush. (Mass.) 136; *Thompson v. Thompson*, 4 Cush. (Mass.) 127; *Lee v. Kilburn*, 3 Gray (Mass.) 594; *Vennard v. McConnell*, 11 Allen (Mass.) 562; *Barnard v. Crosby*, 6 Allen (Mass.) 331; *Hazelton v. Allen*, 3 Allen (Mass.) 114.

Michigan. — *Munson v. Ellis*, 58 Mich. 331.

Minnesota. — *Corliss v. Jewett*, 36 Minn. 364; *Daniels v. Palmer*, 35 Minn. 347; *Fishel v. Burt*, 69 Minn. 250.

Missouri. — *Moore v. Carr*, 65 Mo. App. 64, 2 Mo. App. Rep. 1244.

Montana. — *Teitig v. Boesman*, 12 Mont. 404, citing 11 AM. AND ENG. ENCYC. OF LAW (1st ed.) 168.

New Jersey. — *Sewell v. Cape May*, etc., R. Co., (N. J. 1887) 8 Cent. Rep. 577. See also *Tuckahoe*, etc., R. Co. v. *Baker*, 49 N. J. Eq. 581.

New York. — *Brown v. Montgomery*, 20 N. Y. 287; *Brouwer v. Harbeck*, 9 N. Y. 589;

Sterrett v. Buffalo Third Nat. Bank, 46 Hun (N. Y.) 22; *Ferry v. Central New York Bank*, (Supm. Ct. Spec. T.) 15 How. Pr. (N. Y.) 445. Compare *Livingston v. State Bank*, 26 Barb. (N. Y.) 304, 5 Abb. Pr. (N. Y.) 338; *Holbrook v. Basset*, 5 Bosw. (N. Y.) 147.

Pennsylvania. — *Levan's Appeal*, 112 Pa. St. 294.

Texas. — *Langham v. Lanier*, 7 Tex. Civ. App. 4; *Blum v. Welborne*, 58 Tex. 157.

The General Abstract Definition of "Insolvency," as "inability to pay one's debts in the ordinary course of business," has reference to the usages of the trade or business in which the person is engaged, and of the place in which he is carrying it on. *Daniels v. Palmer*, 35 Minn. 349.

An Endowment Association, which is merely unable, because of the general impracticability of its scheme, to carry out its plan, is not properly an "insolvent." *In re Youth's Temple of Honor*, 73 Minn. 319.

The Suspension of Business by a concern does not establish insolvency, where such suspension was the result of difficulties arising out of the commencement of an action against the concern. *American Water-Works Co. v. Verner*, (Supm. Ct. Gen. T.) 18 N. Y. Supp. 379.

1. Deficiency of Assets Not Necessary to Constitute Insolvency. — *Morgan v. Mastick*, 2 Nat. Bankr. Reg. 521, 17 Fed. Cas. No. 9,803; *In re Woods*, 7 Nat. Bankr. Reg. 126, 30 Fed. Cas. No. 17,090, 29 Leg. Int. (Pa.) 236; *In re Ramazzina*, 110 Cal. 488; *Munson v. Ellis*, 58 Mich. 331.

2. Insolvent Partnership. — *Ransom v. Wardlaw*, 99 Ga. 540.

By statute in *New Hampshire* the insolvency of a partnership renders each partner insolvent within the meaning of such statute. *Schmidt v. Ellis*, (N. H. 1897) 38 Atl. Rep. 382.

3. Popular Meaning of Insolvency — *United States*. — *Toof v. Martin*, 13 Wall. (U. S.) 40, 6 Nat. Bankr. Reg. 49; *In re Oregon Bulletin Printing*, etc., Co., 13 Nat. Bankr. Reg. 503, 18 Fed. Cas. No. 10,559, reversed on another point in 3 Sawy. (U. S.) 614, 14 Nat. Bankr. Reg. 405, 18 Fed. Cas. No. 10,561; *In re Wells*, 3 Nat. Bankr. Reg. 371, 29 Fed. Cas. No. 17,388.

California. — *Hunt v. His Creditors*, 9 Cal. 45.

Connecticut. — *Millard's Appeal*, 62 Conn. 184.

Indian Territory. — *Noble v. Worthy*, (Indian Ter. 1898) 45 S. W. Rep. 137.

Louisiana. — *Kock v. Bringier*, 19 La. Ann. 183; *Lea v. Bringier*, 19 La. Ann. 197.

New York. — *Paulding v. Chrome Steel Co.*, 94 N. Y. 334; *Dutcher v. Importers*, etc., Nat. Bank, 59 N. Y. 5; *Van Riper v. Poppenhausen*, 43 N. Y. 68; *Curtis v. Leavitt*, 15 N. Y. 9; *Herrick v. Borst*, 4 Hill (N. Y.) 650; *Walkenshaw v. Perzel*, 4 Robt. (N. Y.) 426, 32 How. Pr. (N. Y.) 233.

II. CONSTITUTIONALITY OF INSOLVENCY AND BANKRUPTCY LAWS — 1. National Bankruptcy Laws — a. POWER TO ENACT. — The Constitution of the United States gives Congress power "to establish * * * uniform laws on the subject of bankruptcies throughout the United States,"¹ and to make all laws which shall be necessary and proper for carrying such power into execution.² This power is plenary, and is not limited to laws similar in scope to those which were in force in England at the time the Constitution was adopted.³

b. PROVISION FOR DISCHARGE IN VOLUNTARY PROCEEDINGS. — The first bankruptcy law enacted by Congress, following the then existing English statutes, provided for involuntary proceedings only, and did not authorize the institution of the proceedings by the debtor.⁴ The next Act of Congress on the subject, passed in 1841, provided for the discharge of bankrupts on their own petition,⁵ and this feature appears in both of the succeeding bankruptcy laws of 1867 and 1898, respectively.⁶ The constitutionality of this provision of the Act of 1841 was questioned on the ground that the Constitution contemplated only a law which would permit creditors to compel a debtor to apply his property to the payment of his debts, but the courts refused to adopt that view, and declared the provision in question constitutional and valid.⁷

c. PROVISION FOR DISCHARGE OF EXISTING DEBTS. — It is well settled that the provision of the bankrupt law for the discharge of the debtor from his obligations to creditors is valid as to debts contracted before the passage of the law, as well as those contracted afterwards, because the Constitution of the United States does not forbid Congress to pass laws impairing the obligation of contracts.⁸ In this lies one of the chief differences between a bank-

South Carolina. — *Mitchell v. Mitchell*, 42 S. Car. 475; *Akers v. Rowan*, 33 S. Car. 470.

Tennessee. — *Churchill v. Wells*, 7 Coldw. (Tenn.) 364.

Virginia. — *McArthur v. Chase*, 13 Gratt. (Va.) 683.

West Virginia. — *Weigand v. Alliance Supply Co.*, 44 W. Va. 133; *Wolf v. McGugin*, 37 W. Va. 552.

As Applied to Persons Who Are Not Traders, the term "insolvency" is ordinarily held to have a less restricted meaning than when applied to bankers, traders, etc. *Williamson v. Hatch*, 55 Minn. 344. See also *Daniels v. Palmer*, 35 Minn. 350.

1. Constitutional Power to Enact Bankruptcy Laws. — *Mitchell v. Great Works Milling, etc., Co.*, 2 Story (U. S.) 648, 17 Fed. Cas. No. 9,662; *Const. U. S.*, art. I, § 8, par. 4.

2. Laws Necessary and Proper for Execution of Constitutional Powers. — *Const. U. S.*, art. I, § 8, par. 18.

A provision for the punishment of a debtor who conceals or disposes of any of his property in fraud of the bankrupt law is valid as a law "necessary and proper" for carrying the bankrupt law into effect. *U. S. v. Pusey*, 6 Nat. Bankr. Reg. 284, 27 Fed. Cas. No. 16,095.

3. Scope of Bankruptcy Laws Not Limited by Constitution. — *Silverman's Case*, 2 Abb. (U. S.) 243, 1 Sawy. (U. S.) 410, 4 Nat. Bankr. Reg. 522, 22 Fed. Cas. No. 12,855; *In re Reiman*, 11 Nat. Bankr. Reg. 21; *In re California Pac. R. Co.*, 3 Sawy. (U. S.) 240, 11 Nat. Bankr. Reg. 193, 4 Fed. Cas. No. 2,315.

The limitation of the bankruptcy laws in the English system to persons who are traders, or connected with matters of trade or commerce, is a mere matter of policy and does not enter

into the nature of such laws. *Story Const.*, § 1113.

Only in one case was the view taken that the Constitution of the United States contemplated laws similar in scope to the English bankruptcy statutes and in that case the decision of the district judge was reversed by the circuit court. *In re Klein*, 2 N. Y. Leg. Obs. 185, reversed 1 How. (U. S.) 277, note.

Corporations may be made subject to the bankruptcy laws, according to the principle stated in the text. *In re California Pac. R. Co.*, 3 Sawy. (U. S.) 240, 11 Nat. Bankr. Reg. 193, 4 Fed. Cas. No. 2,315.

4. Voluntary Proceedings Not Authorized by First Bankruptcy Law. — See Act April 4, 1800, (2 U. S. Stat. at L. 19).

5. Voluntary Bankruptcy Authorized. — Act Aug. 19, 1841 (5 U. S. Stat. at L. 440), § 1.

6. Act March 2, 1867 (14 U. S. Stat. at L. 517), § 11; Act July 1, 1898 (30 U. S. Stat. at L. 544), §§ 4, 59.

7. Provision for Voluntary Proceedings Held Constitutional — United States. — *Matter of Klein*, 1 How. (U. S.) 277, note, 14 Fed. Cas. No. 7,865, reversing 2 N. Y. Leg. Obs. 185, 14 Fed. Cas. No. 7,866.

Arkansas. — *State Bank v. Willborn*, 6 Ark. 35.

Illinois. — *Lalor v. Wattles*, 8 Ill. 225.

Maine. — *Loud v. Pierce*, 25 Me. 233.

Massachusetts. — *Thompson v. Alger*, 12

Met. (Mass.) 428.

New York. — *Kunzler v. Kohaus*, 5 Hill (N. Y.) 317; *Morse v. Hovey*, 1 Barb. Ch. (N. Y.) 404; *McCormick v. Pickering*, 4 N. Y. 276.

8. Provision for Discharge of Existing Debts Held Constitutional — United States. — *Matter of Klein*, 1 How. (U. S.) 277, note, 14 Fed. Cas. No. 7,865, 2 N. Y. Leg. Obs. 185, reversing 14 Fed. Cas. No. 7,866; *Ex p. Hull*, 1 N. Y. Leg. Obs. 1, 12 Fed. Cas. No. 6,856.

rupt law passed by Congress and a state insolvency law.¹

Discharge of Liens. — Since Congress has power to pass laws impairing the obligation of contracts, it follows that a bankruptcy law may annul any lien on the property of the bankrupt whether created by contract, judgment, or otherwise.²

d. UNIFORMITY OF OPERATION. — The provision of the Constitution of the United States giving the power to Congress to enact bankruptcy laws contains the requirement that such laws shall be uniform.³ By this it is meant that the law shall be general and uniform in its provisions; that is, that it shall not prescribe one law for one state or section, and a different law for another state or section.⁴ But the requirement of uniformity does not relate to the operation or working of the law in the different states or sections. This may, and often does, vary with the various circumstances and conditions existing in the different states.⁵

2. State Insolvency Laws — a. POWER OF STATES TO ENACT INSOLVENCY LAWS. — It was contended at one time that the clause of the Constitution, giving Congress power to establish uniform laws on the subject of bankruptcy throughout the United States, operated to exclude the right of the states to legislate on the same subject, and it has been so held;⁶ but the Supreme Court of the United States has decided that there is no such exclusion, except where the power has actually been exercised by Congress; and the right of the states in this respect is now well established.⁷ It has even been held that such a law, passed by a state while a federal bankruptcy law is in force, is not on that account void, but that its operation is suspended until the repeal of the bankruptcy law.⁸ Of course such a law may be unconstitutional for other reasons, as where it authorizes the taking of property without due process of law, etc.⁹

Arkansas. — *State Bank v. Wilborn*, 6 Ark. 35.

Maine. — *Loud v. Pierce*, 25 Me. 233.

New Hampshire. — *Cutter v. Folsom*, 17 N. H. 139.

New York. — *Kunzler v. Kohaus*, 5 Hill (N. Y.) 317; *Morse v. Hovey*, 1 Barb. Ch. (N. Y.) 404.

Voluntary Proceedings. — The provision for voluntary bankruptcy proceedings applies to debts created after the passage of the law as well as those created before it. *Loud v. Pierce*, 25 Me. 233; *Cutter v. Folsom*, 17 N. H. 139; *Kunzler v. Kohaus*, 5 Hill (N. Y.) 317.

1. See *infra*, this section, *State Insolvency Laws — Constitutionality as to Existing Debts*.

2. **Discharge of Liens by Bankruptcy Law.** — *In re Jordan*, 8 Nat. Bankr. Reg. 180, 13 Fed. Cas. No. 7,514, 10 Nat. Bankr. Reg. 427, 13 Fed. Cas. No. 7,515; *Columbia Bank v. Overstreet*, 10 Bush (Ky.) 148. See also *infra*, this title, *Operation and Effect of Insolvency and Bankruptcy Proceedings — Liens on Debtor's Property*.

3. **Uniformity Required.** — Const. U. S., art. I, § 8, par. 4.

4. **Uniformity Explained.** — *Darling v. Berry*, 13 Fed. Rep. 659; *Leidigh Carriage Co. v. Stengel*, 95 Fed. Rep. 637.

The bankruptcy law of 1898 is not wanting in uniformity because it discriminates between corporations and natural persons in respect to the right to take the benefit of the law. *Leidigh Carriage Co. v. Stengel*, 95 Fed. Rep. 637.

5. **Uniformity of Operation in Different States Not Required.** — An illustration of a law which may be uniform in its provisions, but operating differently in different states, is one which

allows the debtor all the exemptions given by the law of the state in which he resides. Under such a provision it is obvious that the amount of exemptions allowable to a bankrupt will vary in the different states; but it is held that want of uniformity in this respect relates merely to the operation of the law, and therefore does not impair its validity. *Darling v. Berry*, 13 Fed. Rep. 659; *In re Jordan*, 8 Nat. Bankr. Reg. 180, 13 Fed. Cas. No. 7,514. See also *In re Smith*, 8 Nat. Bankr. Reg. 401, 22 Fed. Cas. No. 12,986; *In re Jordan*, 10 Nat. Bankr. Reg. 427, 13 Fed. Cas. No. 7,515.

6. **Power of State to Pass Bankruptcy Law Denied.** — *Golden v. Prince*, 3 Wash. (U. S.) 313, 10 Fed. Cas. No. 5,509; *Olden v. Hallet*, 5 N. J. L. 535; *Vanuxem v. Hazlehurst*, 4 N. J. L. 218, 7 Am. Dec. 582. See also *Ballantine v. Haight*, 16 N. J. L. 196, adhering to the prior New Jersey decisions cited above, but making no reference to the decision of the supreme court of the United States in *Ogden v. Saunders*, 12 Wheat. (U. S.) 213, cited in the next following note.

7. **Power of States to Pass Bankruptcy Laws Declared.** — *Ogden v. Saunders*, 12 Wheat. (U. S.) 213; *Adams v. Storey*, 1 Paine (U. S.) 79, 1 Fed. Cas. No. 66; *Pettit v. Seaman*, 2 Root (Conn.) 178; *Pugh v. Bussell*, 2 Blackf. (Ind.) 394; *Fisk v. Montgomery*, 21 La. Ann. 446; *Blanchard v. Russell*, 13 Mass. 1, 7 Am. Dec. 106.

8. **State Insolvency Law Enacted While Federal Bankrupt Law Is in Force.** — *Palmer v. Hixon*, 74 Me. 447; *In re Damon*, 70 Me. 153.

9. See *Risser v. Hoyt*, 53 Mich. 185, holding the *Michigan Act No. 193 of 1883* unconstitutional on various grounds, and *O'Neil v.*

b. CONSTITUTIONALITY AS TO EXISTING DEBTS. — The Constitution of the United States provides that no state shall pass any law impairing the obligation of contracts.¹ Under this provision a state insolvency law which assumes to authorize the discharge of debtors without payment of their debts in full is void as to pre-existing contracts.² But the objection that the law is unconstitutional on this ground is waived if the creditor proves his claim in the insolvency proceeding and receives dividends on it, and he is estopped afterwards to raise such objection,³ and a discharge from a debt contracted before the enactment of the law is valid and operative, where such law supercedes a former law which was in force at the time the debt was contracted, and under which the debtor could have obtained a discharge.⁴

c. CONSTITUTIONALITY AS TO SUBSEQUENT DEBTS. — As to subsequent debts, that is, debts contracted after the passage of an insolvent law, it is clear that there is no impairment of the obligation of contracts, because every contract made in a state has relation to the existing law of the state which becomes a part of the contract.⁵

d. CONSTITUTIONALITY IN RESPECT TO NONRESIDENTS. — It is well settled that the insolvency laws of one state cannot be made applicable to

Glover, 5 Gray (Mass.) 144, holding that an insolvent law is void if it authorizes the debtor's whole estate to be seized without a jury trial on the facts alleged. Compare *Rider-Wallis Co. v. Fogo*, 102 Wis. 536, citing 10 AM. AND ENG. ENCYC. LAW (2d ed.) 305.

1. Const. U. S., art. 1, § 10, par. 1. See the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 15, p. 1030.

2. *Insolvency Laws Held Void as to Pre-existing Contracts — United States.* — *Sturges v. Crowninshield*, 4 Wheat. (U. S.) 122; *Farmers'*, etc., Bank *v. Smith*, 6 Wheat. (U. S.) 131; *M'Millan v. M'Neill*, 4 Wheat. (U. S.) 209; *Ogden v. Saunders*, 12 Wheat. (U. S.) 213; *Golden v. Prince*, 3 Wash. (U. S.) 313; *Hinkley v. Marean*, 3 Mason (U. S.) 88.

Connecticut. — *Smith v. Mead*, 3 Conn. 253, 8 Am. Dec. 183; *Hammett v. Anderson*, 3 Conn. 304; *Medbury v. Hopkins*, 3 Conn. 472; *Boardman v. De Forest*, 5 Conn. 1; *Hempstead v. Reed*, 6 Conn. 480.

Maine. — *Schwartz v. Drinkwater*, 70 Me. 409.

Massachusetts. — *Blanchard v. Russell*, 13 Mass. 1, 7 Am. Dec. 106; *Kimberly v. Ely*, 6 Pick. (Mass.) 440; *Agnew v. Platt*, 15 Pick. (Mass.) 417; *Betts v. Bagley*, 12 Pick. (Mass.) 572.

New York. — *Mather v. Bush*, 16 Johns. (N. Y.) 233, 8 Am. Dec. 313; *Roosevelt v. Cebra*, 17 Johns. (N. Y.) 108; *Matter of Wendell*, 19 Johns. (N. Y.) 153.

North Dakota. — *Elton v. O'Connor*, 6 N. Dak. 1.

Vermont. — *Conway v. Seamons*, 55 Vt. 8, 45 Am. Rep. 570.

A Discharge for a Period of Years impairs the obligation of the contract. U. S. Bank *v. Frederickson*, Ingr. Insolv. 277, 2 Fed. Cas. No. 945.

The Dissolution of an Attachment issued on an existing debt affects the remedy only and not the obligation of the contract. *Bigelow v. Pritchard*, 21 Pick. (Mass.) 169.

Discharge from Imprisonment. — State laws which merely authorize the discharge of the debtor from imprisonment do not impair the

obligation of contracts. They merely affect the remedy. *Beers v. Houghton*, 9 Pet. (U. S.) 329; *Sturges v. Crowninshield*, 4 Wheat. (U. S.) 122; *Mason v. Haile*, 12 Wheat. (U. S.) 370; *Woodhull v. Wagner*, Baldw. (U. S.) 296; *Lee v. Gamble*, 3 Cranch (C. C.) 374.

3. *Estoppel to Question Constitutionality of Law.* — *Fogler v. Clark*, 80 Me. 237; *Eustis v. Bolles*, 146 Mass. 413, 4 Am. St. Rep. 327.

4. *Debts Dischargeable under Prior Law.* — *Hundley v. Chaney*, 65 Cal. 363, was an action brought in 1881 on a judgment rendered in 1876. The defendants set up a discharge from the debt in an insolvency proceeding under the Act of April 16, 1880. By this Act the Insolvency Law of 1852 was repealed, except so far as it was not in conflict with the later Act. The Act of 1880 authorized a discharge only in case the debtor was indebted to the amount of \$300, while the Act of 1852 gave the right to any debtor, without regard to the amount of his indebtedness. It was held that the Act of 1880 was, in effect, a continuation of the Act of 1852, and that since the debtor had the right under the former law to be discharged from the debt, he also had such right under the later law, and that the discharge was valid. This case was afterwards followed in *Pomeroy v. Gregory*, 66 Cal. 574.

5. *Insolvency Laws Held Constitutional as to Subsequent Debts — United States.* — *Ogden v. Saunders*, 12 Wheat. (U. S.) 213; *Shaw v. Robbins*, 12 Wheat. (U. S.) 369, note; *Sturges v. Crowninshield*, 4 Wheat. (U. S.) 122; *Von Glahn v. Varrenne*, 1 Dill. (U. S.) 515.

Alabama. — *Wilson v. Matthews*, 32 Ala. 332.

Louisiana. — *Northern Bank v. Squires*, 8 La. Ann. 318, 58 Am. Dec. 682.

Massachusetts. — *Baker v. Wheaton*, 5 Mass. 509, 4 Am. Dec. 71; *Blanchard v. Russell*, 13 Mass. 16, 7 Am. Dec. 106; *Walsh v. Farrand*, 13 Mass. 19.

New York. — *Hicks v. Hotchkiss*, 7 Johns. Ch. (N. Y.) 207; *Mather v. Bush*, 16 Johns. (N. Y.) 233; *Jaques v. Marquand*, 6 Cow. (N. Y.) 497.

Ohio. — *Smith v. Parsons*, 1 Ohio 236.

residents of other states,¹ though the statutes of any state, in the case of non-resident debtors having property therein, may subject such property to the provisions of the insolvency law, in order to secure an equitable distribution of it.²

III. OPERATION OF INSOLVENCY AND BANKRUPTCY LAWS — 1. Matters Occurring After Approval of Law but Before It Goes into Operation. — Each of the bankruptcy laws passed by Congress contains a provision fixing a day in the future when proceedings may be commenced under it.³ In consequence of these provisions the question has frequently arisen whether the act, in respects other than the institution of proceedings under it, operates from the time of its approval. The statute may be so clear and explicit in this particular, as to leave no room for construction, as was the case with the law of 1800.⁴

A General Provision that the statute shall take effect from and after a certain day is held to suspend its operations for all purposes until such day.⁵

But a Specification of Certain Particulars, in respect to which the statute is not to operate until a future time, is held to limit a suspension of its operation to such particulars and to leave the statute operative in other respects from the time of its approval.⁶

2. Rules of Construction — English Precedents in Federal Courts. — In construing the bankruptcy law of 1800, it was held that English decisions in bankruptcy cases were applicable, because that statute was based on the English statutes.⁷

1. See *infra*, this title, *Operation of Insolvency and Bankruptcy Laws — Territorial Operation; and Discharge of Debtor — Effect of Discharge — Extra territorial Effect of Discharge.*

2. **Nonresident Debtors Having Property in the State.** — *Peabody v. Stetson*, 88 Me. 273; *Chipman v. Peabody*, 88 Me. 282.

3. **Operation of Law Postponed by Its Terms.** — Act April 4, 1800 (2 U. S. Stat. at L. 19), § 1; Act August 19, 1841 (5 U. S. Stat. at L. 440), § 17; Act March 2, 1867 (14 U. S. Stat. at L. 517), § 50; Act July 1, 1898 (30 U. S. Stat. at L. 544), § 70.

4. **Rule Under Bankruptcy Law of April 4, 1800.** — The bankruptcy law of April 4, 1800, provided that "from and after the first day of June, then next, if any merchant should with intent unlawfully to delay or defraud his creditors," do certain acts, he should be deemed and adjudged a bankrupt; and it was held that the statute expressly confined its operation to such acts committed after the first of June and did not include those committed between that day and the date of the approval of the law. *M'Menomy v. Murray*, 3 Johns. Ch. (N. Y.) 435; *M'Menomy v. Roosevelt*, 3 Johns. Ch. (N. Y.) 446.

5. **Suspension of Operation Generally.** — The bankruptcy law of August 19, 1841, § 17, provides that "this act shall take effect from and after the first day of February next," and under this provision it was held that the prohibition against preferential payments or transfers did not affect any such payment or transfer made before Feb. 1, 1842, though made in contemplation of bankruptcy and for the purpose of giving preferences. *In re Chadwick*, 5 Fed. Cas. No. 2,569; *In re Horton*, 12 Fed. Cas. No. 6,708; *Weiner v. Farnum*, 2 Pa. St. 146; *Reigart v. Small*, 2 Pa. St. 487. But see *contra*, *Hutchins v. Taylor*, 5 Law Rep. 289, 12 Fed. Cas. No. 6,953; *Anonymous*, 1 Pa. L. J. Rep. 121, 1 Pa. L. J. 326; *Cornwell's Appeal*, 7 W. & S. (Pa.) 305.

6. **Partial Suspension of Operation.** — The bankruptcy law of March 2, 1867, § 50, declares

that it "shall commence and take effect, as to the appointment of offices created thereby and the promulgation of rules and general orders, from and after the date of its approval; provided that no petition or other proceedings under this act shall be filed, received, or commenced before the first day of June, 1867." This clause was construed to mean that only the right to commence proceedings under it was suspended, and that in all other respects it went into operation at the date of its approval. *Traders' Bank v. Campbell*, 14 Wall. (U. S.) 87, 6 Nat. Bankr. Reg. 353; *In re Langley*, 1 Nat. Bankr. Reg. 559, 7 Am. L. Reg. N. S. 429, 19 Fed. Cas. No. 11,006; *In re Merchants' Ins. Co.*, 3 Biss. (U. S.) 162, 6 Nat. Bankr. Reg. 43, 17 Fed. Cas. No. 9,441; *Matter of Bunster*, 5 Ben. (U. S.) 242, 5 Nat. Bankr. Reg. 82, 4 Fed. Cas. No. 2,136; *In re Brinkman*, 7 Nat. Bankr. Reg. 421, 4 Fed. Cas. No. 1,884; *In re Wynne*, *Chase* (U. S.) 227, 4 Nat. Bankr. Reg. 23, 30 Fed. Cas. No. 18,117.

The Act of 1898 contains a provision in this respect similar to that of the Act of 1867. It is as follows: "This Act shall go into full force and effect upon its passage; provided, however, that no petition for voluntary bankruptcy shall be filed within one month of the passage thereof, and no petition for involuntary bankruptcy shall be filed within four months of the passage thereof." Act July 1, 1898 (30 U. S. Stat. at L. 544), § 70; *Leidigh Carriage Co. v. Stengel*, 95 Fed. Rep. 637; *Harbaugh v. Costello*, 184 Ill. 110, *affirming* 83 Ill. App. 29; *E. C. Wescott Co. v. Berry*, (N. H. 1899) 45 Atl. Rep. 352.

The act took effect on the first moment of the day of its approval (July 1, 1898). *Leidigh Carriage Co. v. Stengel*, 95 Fed. Rep. 637.

For a Full Discussion as to the time when statutes take effect, see the title **STATUTES**.

7. English Precedents in Federal Courts. — *Livermore v. Bagley*, 3 Mass. 487; *Lummas v. Fairfield*, 5 Mass. 248; *Roosevelt v. Mark*, 6 Johns. Ch. (N. Y.) 266.

Federal and State Decisions. — A federal court, having before it a federal bankruptcy law for interpretation, is not bound by decisions of state courts under state laws containing similar provisions,¹ but a state court is bound by the decisions of the federal courts on the construction of such bankruptcy law.²

Bankruptcy Laws Are Remedial in their nature, and must be construed accordingly.³

3. Effect of Bankruptcy Law on State Insolvency Law — a. POWER OF STATE TO ENACT INSOLVENCY LAW. — Since the power of Congress over the subject of bankruptcies is not exclusive, and the states have power to enact laws on the subject in the absence of the exercise of the power by Congress,⁴ it logically follows that a state may enact an insolvency law while a federal bankruptcy law is in force, but, of course, such state law will remain inoperative until the repeal of the federal law.⁵

b. STATE LAWS SUSPENDED BY ENACTMENT OF FEDERAL LAW. — The enactment of a bankruptcy law by Congress suspends the operation of all state laws on the same subject,⁶ from the time it takes effect,⁷ as far as cases within the purview of the federal statute are concerned,⁸ and subject to such

The Common Law must be resorted to in construing the terms used in a bankruptcy law, and not in the local law of the state where the bankrupt is domiciled. *Austill v. Crawford*, 7 Ala. 335.

1. Federal Courts Not Bound by Decisions of State Courts. — *In re Knight*, 2 Biss. (U. S.) 518, 8 Nat. Bankr. Reg. 436, 14 Fed. Cas. No. 7,880.

2. State Courts Bound by Decisions of Federal Courts. — *Russell v. Cheatham*, 8 Smed. & M. (Miss.) 703.

3. Bankruptcy Laws Remedial in Nature. — *In re Muller*, *Deady* (U. S.), 513, 3 Nat. Bankr. Reg. 329, 17 Fed. Cas. No. 9,912; *Blake v. Francis-Valentine Co.*, 89 Fed. Rep. 691; *Norcross v. Nathan*, 99 Fed. Rep. 414; *Mims v. Lockett*, 20 Ga. 474; *Taylor v. Hughes*, 27 Ga. 224; *Terrill v. Jennings*, 1 Met. (Ky.) 450.

As to the construction of remedial statutes, see generally the title **STATUTES**.

4. See supra, this title, *Constitutionality of Insolvency and Bankruptcy Laws — State Insolvency Laws — Power of States to Enact Insolvency Laws*.

5. State Law Enacted while Federal Law Is in Force. — *In re Damon*, 70 Me. 153; *Palmer v. Hixon*, 74 Me. 447; *Baldwin v. Buswell*, 52 Vt. 57.

6. Suspension of State Statutes — United States. — *Ex p. Eames*, 2 Story (U. S.) 322, 8 Fed. Cas. No. 4,237; *In re Reynolds*, 9 Nat. Bankr. Reg. 50, 20 Fed. Cas. No. 11,723; *Tua v. Carriere*, 117 U. S. 201; *Thornhill v. Louisiana Bank*, 1 Woods (U. S.) 1, 5 Nat. Bankr. Reg. 367, 23 Fed. Cas. No. 13,992, *affirming* 3 Nat. Bankr. Reg. 435, 23 Fed. Cas. No. 13,990; *Sturges v. Crowninshield*, 4 Wheat. (U. S.) 122; *Ogden v. Saunders*, 12 Wheat. (U. S.) 213; *In re Curtis*, 91 Fed. Rep. 737; *In re John A. Etheridge Furniture Co.*, 92 Fed. Rep. 329; *In re Smith*, 92 Fed. Rep. 135; *In re Richard*, 94 Fed. Rep. 633; *In re Gutwillig*, 90 Fed. Rep. 475; *In re Smith*, 2 Am. Bankr. Rep. 9.

California. — *Boedefeld v. Reed*, 55 Cal. 299; *Lewis v. Santa Clara County*, 55 Cal. 604.

Louisiana. — *Clarke v. Rosenda*, 5 Rob. (La.) 27; *Beach v. Miller*, 15 La. Ann. 601; *Meekins v. His Creditors*, 19 La. Ann. 497; *Fisk v. Montgomery*, 21 La. Ann. 446.

Maine. — *Palmer v. Hixon*, 74 Me. 447.

Maryland. — *Van Nostrand v. Carr*, 30 Md. 128.

Massachusetts. — *Day v. Bardwell*, 97 Mass. 248; *Judd v. Ives*, 4 Met. (Mass.) 401; *Griswold v. Pratt*, 9 Met. (Mass.) 16; *Lyman v. Bond*, 130 Mass. 291; *Parmenter Mfg. Co. v. Hamilton*, 172 Mass. 178.

Minnesota. — *Armour Packing Co. v. Brown*, (Minn. 1899) 79 N. W. Rep. 522; *Foley-Bean Lumber Co. v. Sawyer*, (Minn. 1899) 78 N. W. Rep. 1038.

New Hampshire. — *Chamberlain v. Perkins*, 51 N. H. 340; *Simpson v. City Sav. Bank*, 56 N. H. 466, 22 Am. Rep. 491; *Rowe v. Page*, 54 N. H. 190.

New York. — *Boese v. Locke*, (Supm. Ct. Spec. T.) 53 How. Pr. (N. Y.) 148; *Shears v. Solhinger*, (Supm. Ct. Spec. T.) 10 Abb. Pr. N. S. (N. Y.) 287; *French v. O'Brien*, (Supm. Ct.) 52 How. Pr. (N. Y.) 394; *Boese v. Locke*, 17 Hun (N. Y.) 270.

Pennsylvania. — *Com. v. O'Hara*, 6 Phila. (Pa.) 402, 24 Leg. Int. (Pa.) 284, 3 Pittsb. (Pa.) 70, 6 Am. L. Reg. N. S. 765; *Barber v. Rodgers*, 71 Pa. St. 362; *Tobin v. Trump*, 3 Brews. (Pa.) 288, 7 Phila. (Pa.) 123.

Rhode Island. — *Matter of Reynolds*, 8 R. I. 485, 5 Am. Rep. 615.

7. State Laws Suspended Only from Time Federal Law Takes Effect — Illinois. — *Harbaugh v. Costello*, 184 Ill. 110, *affirming* 83 Ill. App. 29.

Maryland. — *Larrabee v. Talbott*, 5 Gill (Md.) 426, 46 Am. Dec. 637.

Massachusetts. — *Day v. Bardwell*, 97 Mass. 246.

New Hampshire. — *Chamberlain v. Perkins*, 51 N. H. 336.

New York. — *Augsbury v. Crossman*, 10 Hun (N. Y.) 389.

The bankruptcy law of 1898 suspended the state laws from the date of its approval (July 1, 1898), notwithstanding the postponement of the right to commence proceedings under it. *In re Bruss-Ritter Co.*, 90 Fed. Rep. 651.

As to when bankruptcy laws take effect, see *supra*, this section, *Matters Occurring After Approval of Law but Before It Goes into Operation*.

8. Only Conflicting Statutes Suspended — United States. — *In re Sievers*, 91 Fed. Rep. 366; *State v. Superior Ct.*, 2 Am. Bankr. Rep. 92.

limitations as may be prescribed.¹ But it is only the operation of the state laws that is affected. The laws themselves continue to exist, and again go into operation on the repeal of the federal law, without being re-enacted,² and an act in contravention of the state law, though committed during such period of suspension, is sufficient to support a proceeding under the state law after the repeal of the national bankruptcy law.³ A state law so revived operates on an indebtedness contracted during the period of suspension, as well as an indebtedness contracted after the revival.⁴

c. PENDING PROCEEDINGS UNDER STATE LAWS. — Proceedings which are pending in a state court under a state law at the time a federal bankruptcy law goes into effect have been held under the former laws not to be affected thereby,⁵ and the present law expressly saves such proceedings.⁶

4. Territorial Operation. — The general rule that laws have no operation beyond the territorial limits of the sovereignty from which they emanate⁷ applies to bankruptcy and insolvency laws to the extent that they cannot

Connecticut. — *Geery's Appeal*, 43 Conn. 289, 21 Am. Rep. 653; *Maltbie v. Hotchkiss*, 38 Conn. 80, 9 Am. Rep. 264.

Indiana. — *Pugh v. Bussel*, 2 Blackf. (Ind.) 394.

Kentucky. — *Linthicum v. Fenley*, 11 Bush (Ky.) 131; *Ebersole v. Adams*, 10 Bush (Ky.) 83.

Louisiana. — *Fisk v. Montgomery*, 21 La. Ann. 446; *Gottschalk v. Meyer*, 28 La. Ann. 885; *Delaume v. Agar*, McGloin (La.) 97.

Maryland. — *Clarke v. Ray*, 1 Har. & J. (Md.) 318.

New Jersey. — *Steelman v. Mattix*, 36 N. J. L. 344.

New York. — *Berthelon v. Betts*, 4 Hill (N. Y.) 577; *Thrasher v. Bentley*, 2 Thomp. & C. (N. Y.) 309, *affirmed* (Ct. App.) 1 Abb. N. Cas. (N. Y.) 39; *Shears v. Solhinger*, (Supm. Ct. Spec. T.) 10 Abb. Pr. N. S. (N. Y.) 287.

Pennsylvania. — *Bates v. Rowley*, 33 Leg. Int. (Pa.) 202; *Gregg v. Hilsen*, 12 Phila. (Pa.) 343, 34 Leg. Int. (Pa.) 20; *Scully v. Kirkpatrick*, 79 Pa. St. 324, 21 Am. Rep. 62; *Peck v. Parker*, 65 Pa. St. 262.

Rhode Island. — *Jordan v. Hall*, 9 R. I. 218, 11 Am. Rep. 245.

South Carolina. — *Watson v. Citizens' Sav. Bank*, 5 S. Car. 159.

Insolvent Decedents' Estates. — A state law for the settlement of the estates of insolvent decedents is not affected by a federal bankruptcy law. *Hawkins v. Learned*, 54 N. H. 333.

Appointment of Receiver of Insolvent Corporation. — The power of a state court to appoint a receiver of an insolvent corporation under a state law is not suspended by the bankruptcy law of 1893, so long as proceedings are not instituted under it. *State v. Superior Ct.*, 20 Wash. 545.

Where the Bankrupt Act Expressly Excepts a Class of Cases Out of Its Operation, it will be presumed that Congress did not intend to interfere in such specified class with the laws of the several states. *Simpson v. City Sav. Bank*, 56 N. H. 466, 22 Am. Rep. 491.

More Insolvency Laws of a state, as distinguished from bankruptcy laws, that is, laws which protect the debtor from imprisonment but do not discharge him from his debts, were held not to be suspended by the bankrupt act of 1841. *Sullivan v. Hieskill*, Crabbe

(U. S.) 525, 23 Fed. Cas. No. 13,594; *Matter of Jacobs*, (C. Pl. Spec. T.) 12 Abb. Pr. N. S. (N. Y.) 273; *Jordan v. Hall*, 9 R. I. 220, 11 Am. Rep. 245.

1. **Extent of Suspension Subject to Limitation by Bankruptcy Law.** — *In re Bruss-Ritter Co.*, 90 Fed. Rep. 651.

2. **Revival of State Statutes.** — *Butler v. Goreley*, 146 U. S. 303, *affirming* 147 Mass. 8; *In re Rahrer*, 140 U. S. 545; *Tua v. Carriere*, 117 U. S. 201; *In re Wight*, 2 Am. Bankr. Rep. 592; *Palmer v. Hixon*, 74 Me. 447; *Fisher v. Currier*, 7 Met. (Mass.) 424; *Austin v. Caverly*, 10 Met. (Mass.) 332.

3. **Acts of Insolvency Committed During Period of Suspension.** — *Lothrop v. Highland Foundry Co.*, 128 Mass. 120.

4. **Debts Contracted During Suspension of State Law.** — *Boedefeld v. Reed*, 55 Cal. 299; *Lewis v. Santa Clara County*, 55 Cal. 604.

5. **Pending Proceedings Under State Laws — United States.** — *In re Holmes*, 1 N. Y. Leg. Obs. 211, 12 Fed. Cas. No. 6,633.

Iowa. — *Reed v. Taylor*, 32 Iowa 209, 7 Am. Rep. 180.

Louisiana. — *West v. His Creditors*, 5 Rob. (La.) 261, 8 Rob. (La.) 123; *Beach v. Miller*, 15 La. Ann. 601; *Meekins v. His Creditors*, 19 La. Ann. 497; *Longis v. His Creditors*, 20 La. Ann. 15.

Maryland. — *Lavender v. Gosnell*, 43 Md. 153.

Massachusetts. — *Judd v. Ives*, 4 Met. (Mass.) 401; *Minot v. Thacher*, 7 Met. (Mass.) 348, 41 Am. Dec. 444; *Fisher v. Currier*, 7 Met. (Mass.) 424.

6. **Pending Proceedings Saved by Bankruptcy Law of 1898.** — *In re Mussey*, 99 Fed. Rep. 71; *In re Bruss-Ritter Co.*, 90 Fed. Rep. 651; *Harbaugh v. Costello*, 184 Ill. 110, *affirming* 83 Ill. App. 29; *Parmenter Mfg. Co. v. Hamilton*, 172 Mass. 178; *Foley-Bean Lumber Co. v. Sawyer*, (Minn. 1899) 78 N. W. Rep. 1038; *E. C. Westcott Co. v. Berry*, (N. H. 1899) 45 Atl. Rep. 352.

An Assignment for the Benefit of Creditors, though an act of bankruptcy, is valid, unless bankruptcy proceedings are commenced within the time limited. *Armour Packing Co. v. Brown*, (Minn. 1899) 79 N. W. Rep. 522. See also *In re Romanow*, 92 Fed. Rep. 510.

7. See the title FOREIGN LAWS, vol. 13, p. 1054.

operate on property in a foreign jurisdiction, or on the claims of foreign creditors who did not in any way submit themselves to the jurisdiction of the court, and in this respect the insolvency laws of one of the United States are foreign as to the other states.¹ But proceedings had under such laws, so far as any matter of *status* is determined, are recognized as valid and binding everywhere.²

5. Repeal of Statutes. — The general rule as to the effect of the repeal of a remedial statute, without a saving clause in the repealing act, is that all pending proceedings fall within the statute.³ The acts of Congress repealing the bankruptcy laws contained saving clauses in favor of pending proceedings.⁴ Under the saving clause of the repealing act of Dec. 19, 1803, which related only to commissions of bankruptcy then pending, it was held that a criminal prosecution under the law repealed was barred.⁵ The saving clauses of the acts repealing the bankruptcy laws of 1841 and 1867 were more comprehensive, and included criminal prosecutions as well as bankruptcy proceedings.⁶

IV. JURISDICTION — 1. In England. — In England, the courts having jurisdiction in bankruptcy are the high court and the county courts, but it is provided that the Lord Chancellor may, from time to time, exclude any county

1. Insolvency and Bankruptcy Laws Not Operative Extraterritorially — United States. — Von Glahn *v.* Varrenne, 1 Dill. (U. S.) 515.

Connecticut. — Easterly *v.* Goodwin, 35 Conn. 279, 95 Am. Dec. 237; Mead *v.* Dayton, 28 Conn. 33.

Delaware. — Tabor *v.* Harwood, 5 Harr. (Del.) 42.

Idaho. — Security Sav., etc., Co. *v.* Rogers, (Idaho 1899) 57 Pac. Rep. 316.

Louisiana. — Scott *v.* Bogart, 14 La. Ann. 258.

Maine. — Pullen *v.* Hillman, 84 Me. 129, 30 Am. St. Rep. 340.

Maryland. — Larrabee *v.* Taibott, 5 Gill (Md.) 426, 46 Am. Dec. 637; Gardner *v.* Lewis, 7 Gill (Md.) 377; Jones *v.* Harsey, 4 Md. 306, 59 Am. Dec. 81.

Massachusetts. — Guernsey *v.* Wood, 130 Mass. 503; Regina Flour Mill Co. *v.* Holmes, 156 Mass. 11; Sawyer *v.* Levy, 162 Mass. 190.

Michigan. — Wood *v.* Parsons, 27 Mich. 159.

Minnesota. — Matter of Dalpay, 41 Minn. 532.

Mississippi. — Beer *v.* Hooper, 32 Miss. 246.

New Hampshire. — Whitney *v.* Whiting, 35 N. H. 457; Carbee *v.* Mason, 64 N. H. 10; Norris *v.* Atkinson, 64 N. H. 87; Smith *v.* Stanley, 67 N. H. 228; Schmidt *v.* Ellis, (N. H. 1897) 38 Atl. Rep. 382; Fish *v.* Hobart, (N. H. 1899) 45 Atl. Rep. 479.

New York. — Kelly *v.* Crapo, 45 N. Y. 86, 6 Am. Rep. 35; Donnelly *v.* Corbett, 7 N. Y. 500; Whittemore *v.* Adams, 2 Cow. (N. Y.) 626; Andrews *v.* Herriot, 4 Cow. (N. Y.) 508.

Pennsylvania. — James *v.* Allen, 1 Dall. (Pa.) 188.

Rhode Island. — Cross *v.* Brown, 19 R. I. 220.

Texas. — Beers *v.* Rhea, 5 Tex. 349.

Vermont. — Blackman *v.* Green, 24 Vt. 17;

Bedell *v.* Scruton, 54 Vt. 493; Roberts *v.* Ather-

ton, 60 Vt. 563, 6 Am. St. Rep. 133.

Waiver of Territorial Exemption. — Frankel *v.* Their Creditors, 20 Nev. 49. See also *infra*, this title, *Discharge of Debtor — Effect of Discharge — Effect as to Debtor — Release from Debts — Extraterritorial Effect of Discharge.*

Operation of Federal Bankruptcy Law in the

Territories. — The provision of the Ordinance of 1787 that no law ought ever to be made or have any force in the Northwest Territory that shall in any manner whatever interfere with or affect private contracts or engagements did not affect the operation of the bankruptcy laws in such territory. Stow *v.* Parks, 1 Chand. (Wis.) 60, 2 Pin. (Wis.) 122.

The English Bankruptcy Laws did not extend to the province of Maryland. Ward *v.* Morris, 4 Har. & M. (Md.) 330.

2. Status Determined under Foreign Law. — Davidson *v.* Smith, 1 Biss. (U. S.) 346; Manufacturers Nat. Bank *v.* Hall, 86 Me. 107; Pitkin *v.* Thompson, 13 Pick. (Mass.) 64; Matter of Coates, 3 Abb. App. Dec. (N. Y.) 231; Murphy *v.* Philbrook, 57 N. Y. Super. Ct. 204. See also the title FOREIGN LAWS, vol. 13, p. 1054; and, *infra*, this title, *Discharge of Debtor.*

3. See the title STATUTES.

4. See Act Dec. 19, 1803 (2 U. S. Stat. at L. 248); Act March 3, 1843 (5 U. S. Stat. at L. 614); Act June 7, 1878 (18 U. S. Stat. at L. 178).

5. Criminal Prosecution under Act April 4, 1800, Barred by Repeal. — Anonymous, 1 Wash. (U. S.) 84, 1 Fed. Cas. No. 475; U. S. *v.* Passmore, 4 Dall. (U. S.) 372, 27 Fed. Cas. No. 16,005.

6. Repeal of Bankruptcy Laws of 1841 and 1867.

— Carr *v.* Hilton, 1 Curt. (U. S.) 230, 5 Fed. Cas. No. 2,436; Hamlin *v.* Pettibone, 6 Biss. (U. S.) 167, 10 Nat. Bankr. Reg. 172, 11 Fed. Cas. No. 5,995; *In re Oregon Bulletin Printing, etc., Co.*, 8 Chicago Leg. N. 81, 13 Nat. Bankr. Reg. 199, 18 Fed. Cas. No. 10,558, 3 Sawy. (U. S.) 614, 14 Nat. Bankr. Reg. 405, 18 Fed. Cas. No. 10,561; Matter of King, 3 Fed. Rep. 839, 6 Fed. Rep. 869; *In re McKenna*, 9 Fed. Rep. 27; *In re Henderson*, 9 Fed. Rep. 196, affirmed 10 Fed. Rep. 385; Matter of Howes, 21 Vt. 619, 12 Fed. Cas. No. 6,788; Matter of Welman, 20 Vt. 653, 29 Fed. Cas. No. 17,407; Matter of Ankrim, 3 McLean (U. S.) 285, 1 Fed. Cas. No. 395; Matter of Richardson, 2 Story (U. S.) 571, 20 Fed. Cas. No. 11,777; Wells *v.* Brackett, 30 Me. 61; Rock *v.* Dennett, 155 Mass. 500; Chemung Canal Bank *v.* Judson, 8 N. Y. 254.

court from having any jurisdiction in bankruptcy, and for the purposes of bankruptcy jurisdiction may attach its district, or any part thereof, to the high court, or to any other county court or courts, and may, from time to time, revoke or vary any order so made; and the jurisdiction of the London bankruptcy court is transferred to the high court.¹

2. In United States—*a.* UNDER NATIONAL BANKRUPTCY LAWS.—The bankruptcy law of 1898 confers jurisdiction in bankruptcy on district courts of the United States in the several states, the supreme court of the District of Columbia, the district courts of the several territories, and the United States courts in the Indian Territory and the district of Alaska.² It has been held that Congress has no power to confer on state courts jurisdiction in bankruptcy matters.³

Locality as Affecting Jurisdiction.—The bankruptcy law of 1898 confers jurisdiction on the courts within whose territorial limits the debtor has had his principal place of business, or resided, or had his domicile, for the preceding six months or the greater part thereof. In the case of a debtor not residing, domiciled, or doing business in the United States, jurisdiction is conferred on the court within whose territorial limits the debtor has property.⁴ The prior acts of 1867 and 1841 were to the same effect in this particular, except that there was no provision in regard to nonresident debtors.⁵

1. English Bankruptcy Courts.—46 and 47 Vict., c. 52, § 92.

2. Bankruptcy Courts in United States.—Act July 1, 1898 (30 U. S. Stat. at L. 544), §§ 1, 2. And see generally *Watson v. Lemar*, Betts' Scr. Bk. 85, 29 Fed. Cas. No. 17,287; *Goodall v. Tuttle*, 3 Biss. (U. S.) 219, 7 Nat. Bankr. Reg. 193, 10 Fed. Cas. No. 5,533; *Pool v. McDonald*, 15 Nat. Bankr. Reg. 560, 19 Fed. Cas. No. 11,268; *In re Fendley*, 10 Nat. Bankr. Reg. 250, 8 Fed. Cas. No. 4,728; *In re Greenville*, etc., R. Co., 5 Chicago Leg. N. 124, 10 Fed. Cas. No. 5,787; *Norris's Case*, 1 Abb. (U. S.) 514, 4 Nat. Bankr. Reg. 35, 18 Fed. Cas. No. 10,304; *Mitchell v. Great Works Milling*, etc., Co., 2 Story (U. S.) 648, 17 Fed. Cas. No. 9,662; *Wright v. Watkins*, 2 Greene (Iowa) 547.

The Former Federal Bankruptcy Laws contained practically the same provision as the law of 1898 in regard to the courts having jurisdiction in bankruptcy. See Act April 4, 1800 (2 U. S. Stat. at L. 19); Act Aug. 19, 1841 (5 U. S. Stat. at L. 440); Act March 2, 1867 (14 U. S. Stat. at L. 517).

The Jurisdiction of the District Judges in bankruptcy is purely of statutory creation, and does not exist *virtute officiorum*. *Morris's Estate*, Crabbe (U. S.) 70, 17 Fed. Cas. No. 9,825; *Jobbins v. Montague*, 6 Nat. Bankr. Reg. 509, 13 Fed. Cas. No. 7,330.

Exclusive Jurisdiction.—The jurisdiction of the federal courts named in the statutes in bankruptcy matters is exclusive. *Watson v. Citizens' Sav. Bank*, 2 Hughes (U. S.) 200, 11 Nat. Bankr. Reg. 161, 29 Fed. Cas. No. 17,279; *In re Barrow*, 1 Nat. Bankr. Reg. 481, 2 Fed. Cas. No. 1,057; *In re Smith*, 2 Am. Bankr. Reg. 9; *Steele v. Moody*, 53 Ala. 418; *Markson v. Haney*, 47 Ind. 31; *Sherwood v. Burns*, 58 Ind. 502; *Newman v. Fisher*, 37 Md. 259; *Zeigler v. Shomo*, 78 Pa. St. 357.

3. Congress not Authorized to Confer Jurisdiction on State Courts.—*Mitchell v. Great Works Milling*, etc., Co., 2 Story (U. S.) 648, 17 Fed. Cas. No. 9,662.

4. Locality as Affecting Jurisdiction under Law

of 1898.—See Act July 1, 1898 (30 Stat. 544), § 2.

A debtor may be adjudged a bankrupt in the district in which his principal place of business is located even though he does not reside in that district. *In re Brice*, 93 Fed. Rep. 942, 2 Am. Bankr. Reg. 197; *In re Williams*, 99 Fed. Rep. 544.

If the Debtor Has Resided in Two Districts during the preceding six months, the proceeding may be brought in that district in which he has resided for the longest time during the six months. *In re Ray*, 2 Am. Bankr. Reg. 158.

The Burden of Proving an Alleged Change of Residence is on the party alleging it. *In re Wixelbaum*, 97 Fed. Rep. 562.

In the Case of a Corporation the jurisdiction is in the district in which the corporation had its principal place of business during the preceding six months. *In re Marine Mach.*, etc., Co., 91 Fed. Rep. 630.

In the Case of a Partnership the proceeding may be had in the district where either partner resides. *In re Murray*, 96 Fed. Rep. 600; *In re Blair*, 99 Fed. Rep. 76.

5. Locality as Affecting Jurisdiction under Act March 2, 1867.—*In re Palmer*, 1 Nat. Bankr. Reg. 213, 18 Fed. Cas. No. 10,680; *Fogarty v. Gerrity*, 1 Sawy. (U. S.) 233, 4 Nat. Bankr. Reg. 450, 9 Fed. Cas. No. 4,895; *Matter of Bailly*, 2 Ben. (U. S.) 437, 1 Nat. Bankr. Reg. 613, 2 Fed. Cas. No. 753; *Matter of Belcher*, 2 Ben. (U. S.) 468, 1 Nat. Bankr. Reg. 666, 13 Fed. Cas. No. 1,237; *Matter of Little*, 3 Ben. (U. S.) 25, 2 Nat. Bankr. Reg. 294, 15 Fed. Cas. No. 8,391; *Matter of Magic*, 2 Ben. (U. S.) 369, 1 Nat. Bankr. Reg. 522, 16 Fed. Cas. No. 8,951; *Re Walker*, 1 Lowell (U. S.) 237, 1 Nat. Bankr. Reg. 386, 29 Fed. Cas. No. 17,061; *In re Foster*, 3 Ben. (U. S.) 386, 3 Nat. Bankr. Reg. 236, 9 Fed. Cas. No. 4,962; *Matter of Leighton*, 3 Ben. (U. S.) 457, 5 Nat. Bankr. Reg. 95, 15 Fed. Cas. No. 8,221; *In re Watson*, 4 Nat. Bankr. Reg. 613, 29 Fed. Cas. No. 17,272; *In re Alabama*, etc., R. Co., 9 Blatchf. (U. S.) 390, 6 Nat. Bankr. Reg. 107, 1 Fed. Cas. No. 124; *Stiles v. Lay*, 9 Ala. 795.

b. UNDER STATE INSOLVENCY LAWS. — The insolvency laws of the several states give jurisdiction in proceedings thereunder to local courts.¹

V. WHO MAY APPLY FOR ADJUDICATION — 1. **Voluntary Proceedings** — *a.* **AUTHORITY OF DEBTOR TO MAKE APPLICATION.** — The English Bankruptcy Law now permits debtors to go into voluntary bankruptcy.²

The Bankruptcy Laws of the United States, with the exception of the first one of the four that have been enacted by Congress, authorize proceedings to be instituted by a debtor as well as by creditors.³

The State Insolvency Laws also provide for proceedings at the instance of the debtor.⁴

b. CIRCUMSTANCES AFFECTING RIGHT OF DEBTOR TO INSTITUTE PROCEEDING — (1) *In General.* — The right of a debtor to file a petition to be adjudged a bankrupt is not affected by the fact that involuntary proceedings have already been instituted against him;⁵ or that a discharge has once been

Locality as Affecting Jurisdiction under Act Aug. 19, 1841. — *Ex p.* Hall, 11 Fed. Cas. No. 5,919; *In re* Johnson, Betts' Scr. Bk. 62, 13 Fed. Cas. No. 7,368; *In re* Kinsman, 1 N. Y. Leg. Obs. 309, 14 Fed. Cas. No. 7,832; *Mitchell v. Great Works Milling, etc., Co.*, 2 Story (U. S.) 648, 17 Fed. Cas. No. 9,662.

Fugitives from Justice. — *Cobb v. Rice*, 130 Mass. 231.

Partners. — A member of a partnership may be adjudged a bankrupt either in the district where he resides, or where the partnership does business. *Ex p.* Hall, 11 Fed. Cas. No. 5,919; *Matter of Penn.*, 5 Ben. (U. S.) 89, 5 Nat. Bankr. Reg. 30, 19 Fed. Cas. No. 10,927; *Cameron v. Canieo*, 9 Nat. Bankr. Reg. 527, 4 Fed. Cas. No. 2,340; *Briswalter v. Long*, 14 Fed. Rep. 153; *In re* Smith, 16 Fed. Rep. 465. But see *Matter of Martin*, 6 Ben. (U. S.) 20, 16 Fed. Cas. No. 9,150; *Matter of Burton*, 9 Ben. (U. S.) 324, 17 Nat. Bankr. Reg. 212, 4 Fed. Cas. No. 2,214.

The Court which First Acquires Jurisdiction, in case the courts of different districts have concurrent jurisdiction, is exclusive of all others. *Ex p.* Hall, 11 Fed. Cas. No. 5,919; *Matter of Greenfield*, 5 Ben. (U. S.) 552, 10 Fed. Cas. No. 5,772; *In re* Boston, etc., R. Co., 9 Blatchf. (U. S.) 101, 6 Nat. Bankr. Reg. 209, 3 Fed. Cas. No. 1,677, reversing 5 Nat. Bankr. Reg. 232, 3 Fed. Cas. No. 1,679. And see *In re* Brown, 19 Nat. Bankr. Reg. 270, 4 Fed. Cas. No. 1,982; *Irving Nat. Bank v. Adams*, 90 N. Y. 682.

1. Jurisdiction Conferred on Local Courts by State Statutes — *California.* — *Creditors v. Consumer's Lumber Co.*, 98 Cal. 318; *Matter of Castle Dome Min., etc., Co.*, 79 Cal. 246.

Illinois. — *Farwell v. Crandall*, 120 Ill. 70.

Kentucky. — *Fishback v. Green*, 87 Ky. 107.

Louisiana. — *Mayewski v. His Creditors*, 40 La. Ann. 91.

Maine. — *Castner v. Twitchell-Champlin Co.*, 91 Me. 524.

Maryland. — *Paul v. Locust Point Co.*, 70 Md. 288; *Culbreth v. Banks*, 87 Md. 444.

Massachusetts. — *Denny v. Mattoon*, 2 Allen (Mass.) 361, 79 Am. Dec. 784; *Ryan v. Merriam*, 4 Allen (Mass.) 77; *Osgood v. Fernald*, 10 Gray (Mass.) 57; *Hassam v. Hodges*, 12 Gray (Mass.) 208; *Whiton v. Nichols*, 15 Gray (Mass.) 95; *Lee v. Wells*, 15 Gray (Mass.) 459; *McConnell v. Kelley*, 138 Mass. 372; *Chadwick v. Old Colony R. Co.*, 171 Mass. 239.

Minnesota. — *In re* Barnard, 30 Minn. 512.

Nevada. — *State v. Fifth Judicial Dist. Ct.*, 18 Nev. 286.

New Hampshire. — *Schmidt v. Ellis*, (N. H. 1897) 38 Atl. Rep. 382.

New York. — *Matter of Dimock*, 4 N. Y. App. Div. 301, affirming (County Ct.) 11 Misc. (N. Y.) 610, 24 Civ. Proc. (N. Y.) 312; *People v. Machado*, (Supm. Ct. Gen. T.) 16 Abb. Pr. (N. Y.) 460; *Matter of Wrigley*, 4 Wend. (N. Y.) 602, 8 Wend. (N. Y.) 134.

Ohio. — *Omwake v. Jackson*, 15 Ohio Cir. Ct. 615, 8 Ohio Cir. Dec. 235; *In re Schumacher*, 6 Ohio Dec. 125.

Rhode Island. — *Phillips v. Newton*, 12 R. I. 489.

Washington. — *Boston Nat. Bank v. Hammond*, (Wash. 1899) 57 Pac. Rep. 365.

And see the various local insolvency laws in the United States.

A Partnership may be proceeded against, under the *Massachusetts* statute, if one of the partners resided in the state within a year, though he has removed therefrom, and no one of the other partners is or ever has been a resident of the state. *McDaniel v. King*, 5 Cush. (Mass.) 469.

2. Voluntary Bankruptcy under English Statute. — *Ex p.* Bianconi, 10 L. T. N. S. 283; *Ex p.* Ensby, 35 L. J. Bankr. 23, 12 Jur. N. S. 579, 14 L. T. N. S. 692, 14 W. R. 849; *In re* Law, 5 L. T. N. S. 464; *In re* Hesketh, 5 L. T. N. S. 465; *In re* Baker, 6 L. T. N. S. 837; *Ex p.* Cabban, 6 L. T. N. S. 372; *In re* Savory, 7 L. T. N. S. 475, 11 L. T. N. S. 460; *Ex p.* Gashion, 8 L. T. N. S. 522, 11 W. R. 810; *In re* Drinkwater, 31 L. J. Bankr. 83, 8 Jur. N. S. 757, 6 L. T. N. S. 730; *Ex p.* Painter, 64 L. J. Q. B. 22, (1895) 1 Q. B. 85, 71 L. T. N. S. 581, 1 Manson 499; *In re* Bullen, 36 W. R. 836, 5 Mor. Bankr. Cas. 243; *Ex p.* Hudson, 52 L. J. Ch. 584, 22 Ch. D. 773, 47 L. T. N. S. 674, 31 W. R. 372; *Ex p.* Thomas, 40 L. T. N. S. 835; *Ex p.* Jones, 42 L. T. N. S. 157; 46 & 47 Vict., c. 52, §§ 4 (f), 8.

3. Voluntary Proceedings under Federal Bankruptcy Laws. — Act Aug. 19, 1841 (5 U. S. Stat. at L. 440); Act March 2, 1867 (14 U. S. Stat. at L. 517); Act July 1, 1898 (30 U. S. Stat. at L. 544).

4. Voluntary Proceedings under State Insolvency Laws. — See the insolvency laws of the several states.

5. Pendency of Involuntary Proceedings. — *In re* Canfield, 1 N. Y. Leg. Obs. 234, 5 Fed. Cas.

refused him, if, since such refusal, he has incurred new debts on which to base his petition;¹ or that he has made a fraudulent transfer of his property.²

(2) *Character or Kind of Debts.* — In order that a person may proceed to have himself adjudged a bankrupt, it is necessary that he should owe debts in the sense in which that word is used in the statutes.³

Fiduciary Debts. — Under the federal bankruptcy law of 1841, a debtor could not obtain an adjudication of bankruptcy on his own petition, if he owed any debts which were incurred while acting in a fiduciary capacity or as a public officer.⁴ By the Act of 1867 the fact that the debtor was indebted in a fiduciary or official capacity did not affect his right to obtain an adjudication of voluntary bankruptcy, but he was merely denied a discharge as to such debts,⁵ and this provision is contained in the existing bankruptcy law (Act July 1, 1898),⁶ and generally in the insolvency laws of the various states.⁷

(3) *Character or Condition of Debtor.* — Inasmuch as all insolvency and bankruptcy proceedings are wholly statutory, it is evident that no person has any right to the benefits thereof except those designated by the statutes.⁸

Partnerships, as such, are authorized by some of the statutes to make applications thereunder.⁹ The partners may, of course, apply separately, like any other individual debtors.¹⁰

Corporations are expressly excluded by the Act of 1898 from the right to become voluntary bankrupts.¹¹

Amount of Indebtedness. — Some of the statutes do not permit a debtor to become a voluntary bankrupt unless his indebtedness amounts to a certain sum.¹²

No. 2,380. See also *In re Flanagan*, 5 Sawy. (U. S.) 312, 18 Nat. Bankr. Reg. 439, 9 Fed. Cas. No. 4,850. Compare *In re Stewart*, 3 Nat. Bankr. Reg. 108, 23 Fed. Cas. No. 13,419.

1. **Effect of Prior Refusal of Discharge.** — *Re Drisko*, 2 Lowell (U. S.) 430, 13 Nat. Bankr. Reg. 112, 7 Fed. Cas. No. 4,090, affirmed 14 Nat. Bankr. Reg. 551, 7 Fed. Cas. No. 4,086.

2. **Fraudulent Transfer Not a Bar to Voluntary Proceedings.** — *In re Houghton*, 12 Fed. Cas. No. 6,727.

3. **What Constitute "Debts."** — Judgments for damages for seduction and for the maintenance of a bastard child are not debts so as to entitle the defendant to maintain a voluntary bankruptcy proceeding. *In re Cotton*, 2 N. Y. Leg. Obs. 370, 6 Fed. Cas. No. 3,269.

The North Carolina Statute, which uses the words "debtor" and "creditor" in reference to the persons who may be entitled to its provisions, is nevertheless construed to include persons who do not owe debts in a technical sense. Thus, one clause extends its benefits to every person taken or charged in execution of arrest for any debt or damages, and under this provision it is held that a defendant who is under arrest in an action for false imprisonment may apply for his discharge in insolvency. *Burgwyn v. Hall*, 108 N. Car. 489.

4. **Fiduciary Debts, etc., Act 1841.** — *In re Cease*, 5 Fed. Cas. No. 2,540; *In re Hardison*, 11 Fed. Cas. No. 6,053; *Johnson's Case*, Betts' Scr. Bk. 65, 13 Fed. Cas. No. 7,365a (money received by municipal officer). As to what are fiduciary debts, and the effect thereon of a discharge, see *infra*, this title, *Discharge of Debtor* — *Effect of Discharge* — *Release from Debts* — *Fiduciary Debts*.

5. **Fiduciary Debts, etc., Act 1867.** — Act March 2, 1867 (14 U. S. Stat. at L. 517), §§ 11, 33.

6. **Fiduciary Debts, etc., Act 1898.** — Act July 1, 1898 (30 U. S. Stat. at L.) 544, § 17.

7. See the various state insolvency laws.

8. The statutes vary as to the circumstances or conditions under which a debtor is allowed to petition himself into insolvency or bankruptcy, and on this question reference must be made to the statutes in each jurisdiction.

9. **Voluntary Proceedings by Partnership**—*England*. — 46 & 47 Vict., c. 52, § 148.

United States. — Act Cong. July 1, 1898 (30 U. S. Stat. at L. 544), § 5. And see the various state insolvency laws.

The Maryland Statute (Laws 1884, c. 295), extends the insolvency law of that state to partnerships, but one partner cannot procure the benefit of the law for the firm where the other partner has absconded. *Baltimore Second Nat. Bank v. Willing*, 66 Md. 314.

California Statute. — Neither the California insolvency act of May 4, 1852, nor the supplementary act of March 31, 1876, applied to partnerships. *In re Baker*, 55 Cal. 302.

10. **Application by Individual Partner.** — *In re Moore*, 5 Biss. (U. S.) 79, 17 Fed. Cas. No. 9,750; *In re Gorham*, 9 Biss. (U. S.) 23, 18 Nat. Bankr. Reg. 419, 10 Fed. Cas. No. 5,624; *Engel v. Bailey*, 82 Me. 118. And see the various insolvency and bankruptcy laws.

11. **Corporations.** — Act July 1, 1898 (30 U. S. Stat. at L. 544), § 4, par. a; *In re Bates Mach. Co.*, 91 Fed. Rep. 625.

12. **Amount of Indebtedness.** — The bankruptcy law of 1867 limited the right to voluntary bankruptcy to debtors who owed provable debts to the amount of three hundred dollars. Act March 2, 1867 (14 U. S. Stat. at L. 517), § 11.

But the existing bankruptcy law does not contain this limitation. It provides that "any person who owes debts, except a corporation, shall be entitled to the benefits of this act as a

2. Involuntary Proceedings — a. IN GENERAL. — The statutes generally give the right to any creditor to petition for an adjudication of insolvency or bankruptcy against his debtor.¹ This right is not affected by the fact that the creditor has brought an action at law for the recovery of his debt.² But if he has assented to a general assignment made by the debtor for the benefit of creditors and has voluntarily become a party to it, he is estopped thereafter to institute a bankruptcy proceeding against the debtor on the ground that the assignment was an act of bankruptcy.³ And a creditor who has obtained a preference cannot institute the proceeding against the debtor, where the statute limits the right to creditors having provable claims, and provides that no one who has obtained a preference shall prove his claim until he shall have surrendered to the assignee all the property received.⁴

b. CHARACTER OR KIND OF DEBTS. — The general rule is that any provable debt will support an application by a creditor to have a debtor adjudged a bankrupt,⁵ provided that the petitioner's debt accrued before the commission of the act of bankruptcy alleged.⁶ Accordingly a creditor may proceed

voluntary bankrupt." Act July 1, 1898 (30 U. S. Stat. at L. 544), § 4a.

The Vermont Statute does not allow a debtor to become a voluntary insolvent, unless he owes debts contracted while an inhabitant of the state exceeding three hundred dollars. *Moore v. McMillan*, 54 Vt. 27. See also the statutes in other jurisdictions.

1. Any Creditor Authorized to File Petition. — *Mechanics'*, etc., *Bank v. Versailles Woollen Co.*, 59 Conn. 347; *Taunton Nat. Bank v. Stetson*, 145 Mass. 366; *American Carpet Lining Co. v. Chipman*, 146 Mass. 385. And see the various insolvency and bankruptcy laws.

A Nonresident Creditor may file the petition. *Mechanics'*, etc., *Bank v. Versailles Woollen Co.*, 59 Conn. 347; *Brown v. Smart*, 69 Md. 320.

Filing Claims with the Trustee under a General Assignment does not estop the creditors to file a petition in insolvency against the debtor. *Castleberg v. Wheeler*, 68 Md. 266.

An Assignee in Bankruptcy may file a petition in bankruptcy against partnerships of which the bankrupt is a member. *In re Grady*, 3 Nat. Bankr. Reg. 227, 10 Fed. Cas. No. 5,654; *Matter of Robinson*, 8 Ben. (U. S.) 407.

A Partnership cannot file a petition in bankruptcy against one of its members. *Robinson v. Hinway*, 27 Pittsb. Leg. J. 21, 19 Nat. Bankr. Reg. 289, 20 Fed. Cas. No. 11,953.

2. Pendency of Action at Law. — *Everett v. Derby*, 5 Law Rep. 225, 8 Fed. Cas. No. 4,576; *In re Henderson*, 9 Fed. Rep. 196. See also *Ex p. Potts, Crabbe* (U. S.) 469, 19 Fed. Cas. No. 11,344.

3. Estoppel — Assent to General Assignment. — *In re Romanow*, 92 Fed. Rep. 510; *Simonson v. Sinsheimer*, 95 Fed. Rep. 948, reversing *In re Simonson*, 92 Fed. Rep. 904; *Leidigh Carriage Co. v. Stengel*, 95 Fed. Rep. 637, 2 Am. Bankr. Rep. 383. Compare *In re Curtis*, 94 Fed. Rep. 630, affirming 91 Fed. Rep. 737.

4. Effect of Obtaining Preferences. — *Ecker v. McAllister*, 45 Md. 290 (construing bankruptcy law of 1857). See also *Ecker v. McAllister*, 54 Md. 362.

5. Any Provable Debt Sufficient to Support Application by Creditor. — *Barton v. Tower*, 1 Pa. L. J. 209, 2 Fed. Cas. No. 1,085; *Ex p. Hull*, 1 N. Y. Leg. Obs. 1, 12 Fed. Cas. No. 6,856;

In re Oregon Bulletin Printing, etc., Co., 13 Nat. Bankr. Reg. 199, 18 Fed. Cas. No. 10,558, reversed on other points in (1876) 3 Sawy. (U. S.) 614, 18 Fed. Cas. No. 10,561. And see generally the various statutes on the subject.

Sale of Slaves. — A note given before the emancipation proclamation for the price of slaves is sufficient to support a petition in an involuntary proceeding. *Miller v. Keys*, 3 Nat. Bankr. Reg. 224, 17 Fed. Cas. No. 9,578.

When an Indorser's Liability Becomes Fixed it constitutes a debt due and payable from the indorser and may be made the foundation of involuntary proceedings against him. *In re Nickodemus*, 3 Nat. Bankr. Reg. 230, 18 Fed. Cas. No. 10,254.

A Preference Must Be Surrendered before the preferred debt can be made the foundation of a petition. *In re Hunt*, 5 Nat. Bankr. Reg. 433, 12 Fed. Cas. No. 6,882.

Where a Release by a creditor is induced by the fraudulent representations of another creditor in furtherance of a scheme to get all the debtor's property in his own hands, such creditor may disregard the release so given by him and file a petition to have the debtor adjudged a bankrupt. *Michaels v. Post*, 21 Wall. (U. S.) 398, 12 Nat. Bankr. Reg. 152.

A Debt Barred by the Statute of Limitations will not support a petition in involuntary bankruptcy. *In re Cornwall*, 9 Blatchf. (U. S.) 114, 6 Nat. Bankr. Reg. 305, 6 Fed. Cas. No. 3,250, affirming 4 Nat. Bankr. Reg. 400, 6 Fed. Cas. No. 3,251.

A Claim Which Is Not Supported by a Consideration cannot be made the basis of a petition. *In re Cornwall*, 4 Nat. Bankr. Reg. 400, 6 Fed. Cas. No. 3,251; *In re Oregon Bulletin Printing, etc., Co.*, 13 Nat. Bankr. Reg. 503, 18 Fed. Cas. No. 10,559, reversed on other points in 3 Sawy. (U. S.) 614, 14 Nat. Bankr. Reg. 405, 18 Fed. Cas. No. 10,561.

As to What Debts Are Provable, see *infra*, this title, *Debts and Claims Against Estate*.

6. Time of Accrual of Petitioner's Debt. — *Moss v. Smith*, 1 Campb. 489.

Thus a bill of exchange accepted before the act of bankruptcy, but not issued until after it, will not support a petition. *Ex p. Hayward*, L. R. 6 Ch. 546. See also *Ex p. Sadler*, 39 L. T. N. S. 361.

on a debt which is not yet payable,¹ a debt assigned to the petitioning creditor, though the assignment was made after the commission of the alleged acts of bankruptcy, and was for the purpose of enabling the assignee to petition,² a secured claim,³ or an equitable demand.⁴

A Partnership Creditor may proceed against one of the partners separately.⁵

c. NUMBER OF CREDITORS AND AMOUNT OF DEBTS. — In England a single creditor may file a petition in bankruptcy against his debtor, provided his debt amounts to fifty pounds, and if two or more creditors unite in the petition, their debts must aggregate that amount.⁶

In the United States, under the present federal bankruptcy law, the petition may be filed by three or more creditors who have provable claims amounting, in the aggregate, to five hundred dollars, or over; or, if all the creditors are less than twelve in number, then one of such creditors whose claim amounts to five hundred dollars may file the petition.⁷ The state laws vary somewhat

But the petitioning creditor need not have owned the debt at the date of the act of bankruptcy. *Ex p. Thomas*, 1 Atk. 73; *Glaister v. Hewer*, 7 T. R. 494.

1. Debts Not Payable at Time of Application. — *Barton v. Tower*, 1 Pa. L. J. 209, 2 Fed. Cas. No. 1,085; *In re King*, 1 N. Y. Leg. Obs. 276, 14 Fed. Cas. No. 7,785; *Phelps v. Clasen*, 1 Woolw. (U. S.) 204, 3 Nat. Bankr. Reg. 87, 19 Fed. Cas. No. 11,074; *In re Muller*, Deady (U. S.) 513, 3 Nat. Bankr. Reg. 329, 17 Fed. Cas. No. 9,912; *In re Alexander*, 1 Lowell (U. S.) 470, 4 Nat. Bankr. Reg. 178, 1 Fed. Cas. No. 161; *Linn v. Smith*, 4 Nat. Bankr. Reg. 46, 15 Fed. Cas. No. 8,375; *In re Ouimette*, 1 Sawy. (U. S.) 47, 3 Nat. Bankr. Reg. 566, 18 Fed. Cas. No. 10,622.

2. Assigned Claims. — *Glaister v. Hewer*, 7 T. R. 494; *Ex p. Lee*, 1 P. Wms. 782; *Ex p. Crisley*, 3 Bro. C. C. 237; *Ex p. Bloxham*, 6 Ves. Jr. 449; *In re Woodford*, 13 Nat. Bankr. Reg. 575, 30 Fed. Cas. No. 17,972; *Ex p. Shouse*, *Crabbe* (U. S.) 482, 22 Fed. Cas. No. 12,815; *American Carpet Lining Co. v. Chipman*, 146 Mass. 385.

3. Secured Claims. — *In re Bloss*, 4 Nat. Bankr. Reg. 147, 3 Fed. Cas. No. 1,562; *In re Stansell*, 6 Nat. Bankr. Reg. 183, 22 Fed. Cas. No. 13,293; *Rankin v. Florida*, etc., R. Co., 1 Nat. Bankr. Reg. 647, 20 Fed. Cas. No. 11,567; *In re Sheehan*, 8 Nat. Bankr. Reg. 345, 21 Fed. Cas. No. 12,737 (levy of execution); *Owen v. Potter*, 115 Mich. 556 (construing Act of 1898). But see *contra*, *In re High*, 3 Nat. Bankr. Reg. 191, 12 Fed. Cas. No. 6,473; *Re Hazens*, 4 Dill. (U. S.) 549, 11 Fed. Cas. No. 6,285. And compare *In re Alexander*, 1 Lowell (U. S.) 470, 4 Nat. Bankr. Reg. 178, 1 Fed. Cas. No. 161, holding that a secured creditor may petition, if his security is inadequate.

In England the rule formerly was that a secured creditor could file a petition against his debtor, without being required either to give up his security or to estimate and deduct its value. *Ex p. Jackson*, 5 Ves. Jr. 357; *Ex p. Topham*, 1 Madd. 38.

But the statute now requires the petitioning creditor, if he holds security, either to state in his petition that he is willing to give up his security for the benefit of the creditors in the event of the debtor being adjudged a bankrupt or to give an estimate of the value of his security, in which case he may be admitted as a petitioning creditor to the extent of the bal-

ance of the debt due him after deducting the value so estimated. 46 & 47 Vict., c. 52, § 6 (2). And see *In re Perkins*, 24 Q. B. D. 613; *Ex p. Taylor*, 13 Q. B. D. 128; *Moor v. Anglo-Italian Bank*, 10 Ch. D. 681; *Ex p. Vanderlinden*, 20 Ch. D. 289; *Cracknall v. Janson*, 6 Ch. D. 735.

4. Equitable Demands. — *Sigsby v. Willis*, 3 Ben. (U. S.) 371, 3 Nat. Bankr. Reg. 207, 22 Fed. Cas. No. 12,849.

5. Proceeding by Partnership Creditor Against a Partner Individually. — *In re Meicur*, 95 Fed. Rep. 634.

6. Number and Amount of Petitioning Creditors under English Statute. — Act 46 & 47 Vict., c. 52, § 6 (1).

7. Number and Amount of Petitioning Creditors under Federal Bankruptcy Law. — Act July 1, 1898 (30 U. S. Stat. at L. 544), § 59b.

The previous Act of 1867 permitted one or more creditors who held provable claims to the amount of two hundred and fifty dollars to file the petition. Act March 2, 1867 (14 U. S. Stat. at L. 517), § 39; *Michaels v. Post*, 21 Wall. (U. S.) 398, 12 Nat. Bankr. Reg. 152.

This section was afterwards amended so as to limit the right to one or more creditors, who shall constitute one-fourth at least in number, and the aggregate of whose debts provable under the act should amount to at least one-third of the debts so provable. *In re Angell*, 10 Nat. Bankr. Reg. 73, 1 Fed. Cas. No. 386; *Barnert v. Hightower*, 10 Nat. Bankr. Reg. 157, 2 Fed. Cas. No. 1,009; *In re Comstock*, 3 Sawy. (U. S.) 128, 10 Nat. Bankr. Reg. 451, 6 Fed. Cas. No. 3,077; Act July 22, 1874 (18 Stat. 178), § 12. And see *Matter of Hymes*, 7 Ben. (U. S.) 427, 10 Nat. Bankr. Reg. 433, 12 Fed. Cas. No. 6,986; *In re Broich*, 7 Biss. (U. S.) 303, 15 Nat. Bankr. Reg. 11, 4 Fed. Cas. No. 1,921; *In re McAdam*, 4 Sawy. (U. S.) 119, 15 Fed. Cas. No. 8,654; *In re Philadelphia Axle Works*, 1 W. N. C. Pa. 126, 10 Fed. Cas. No. 11,091; *In re Currier*, 2 Lowell (U. S.) 456, 13 Nat. Bankr. Reg. 68, 6 Fed. Cas. No. 3,492; *In re Bergeron*, 12 Nat. Bankr. Reg. 385, 3 Fed. Cas. No. 1,342; *In re Hadley*, 12 Nat. Bankr. Reg. 366, 11 Fed. Cas. No. 5,804; *In re Hall*, 15 Nat. Bankr. Reg. 31, 11 Fed. Cas. No. 5,923; *In re Woodford*, 13 Nat. Bankr. Reg. 575, 30 Fed. Cas. No. 17,972; *In re Lloyd*, 15 Nat. Bankr. Reg. 257, 15 Fed. Cas. No. 8,429, 25 Pittsb. Leg. J. (Pa.) 69, 15 Fed. Cas. No. 8,430; *In re Riker*, 18 Nat. Bankr. Reg. 393,

in their provisions as to the number and amount of creditors required to support a petition for involuntary bankruptcy or insolvency.¹

VI. INVENTORY AND SCHEDULE — 1. Necessity. — One of the usual requirements of bankruptcy and insolvency laws is that the debtor shall make and present to the court an inventory of his assets, if he has any, and a schedule of his debts.² If he fails to comply with this requirement of the law, his discharge may be refused.³

2. Requisites — a. STATEMENT OF ASSETS. — The inventory or schedule of the debtor's property must show the amount and kind thereof, its location, and its money value in detail.⁴

20 Fed. Cas. No. 11,833; *In re Blair*, 17 Nat. Bankr. Reg. 492, 3 Fed. Cas. No. 1,481.

Ascertainment of Amount. — The creditor or creditors instituting the proceeding must hold claims to the amount named in the statute over and above all set-offs and counterclaims. *In re Osage Valley, etc.*, R. Co., 9 Nat. Bankr. Reg. 281, 18 Fed. Cas. No. 10,592; *In re Bouton*, 5 Sawy. (U. S.) 427, 3 Fed. Cas. No. 1,706, and exclusive of all security; *In re Jewett*, 7 Biss. (U. S.) 242, 13 Fed. Cas. No. 7,305; *In re Scrafford*, 4 Dill. (U. S.) 376, 15 Nat. Bankr. Reg. 104, 21 Fed. Cas. No. 12,556; *Re Hazens*, 4 Dill. (U. S.) 549, 11 Fed. Cas. No. 6,285. See also *In re Frost*, 6 Biss. (U. S.) 213, 11 Nat. Bankr. Reg. 69, 9 Fed. Cas. No. 5,134; *In re Green Pond R. Co.*, 13 Nat. Bankr. Reg. 118, 10 Fed. Cas. No. 5,786; *In re Crosse*, 17 Nat. Bankr. Reg. 208, 6 Fed. Cas. No. 3,435; *In re Lloyd*, 15 Nat. Bankr. Reg. 257, 15 Fed. Cas. No. 8,429.

Compare In re Broich, 7 Biss. (U. S.) 303, 15 Nat. Bankr. Reg. 11, 4 Fed. Cas. No. 1,921.

Interest on the claims is to be included. *Shoan v. Lewis*, 22 Wall. (U. S.) 150, 12 Nat. Bankr. Reg. 173.

But Costs cannot be added to make up the jurisdictional amount. *In re Skelley*, 3 Biss. (U. S.) 260, 5 Nat. Bankr. Reg. 214, 22 Fed. Cas. No. 12,921; *In re Hatje*, 6 Biss. (U. S.) 436, 12 Nat. Bankr. Reg. 548, 11 Fed. Cas. No. 6,215.

Creditors Subsequently Joining in the Petition may be counted to make up the required number and amount. *In re Romanow*, 92 Fed. Rep. 510; *In re Bedingfield*, 96 Fed. Rep. 190.

Preferred Creditors could not petition for an adjudication in bankruptcy against their debtor under the Act of 1867. *In re Israel*, 3 Dill. (U. S.) 511, 12 Nat. Bankr. Reg. 204, 13 Fed. Cas. No. 7,111; *Re Currier*, 2 Lowell (U. S.) 436, 13 Nat. Bankr. Reg. 68, 6 Fed. Cas. No. 3,492; *Clinton v. Mayo*, 12 Nat. Bankr. Reg. 39, 5 Fed. Cas. No. 2,899. But see *Coxe v. Hale*, 10 Blatchf. (U. S.) 56, 8 Nat. Bankr. Reg. 562, 6 Fed. Cas. No. 3,310.

In a Proceeding Against a Corporation the rule as to the number and amount of creditors is the same as in the case of natural persons. *In re Leavenworth Sav. Bank*, 4 Dill. (U. S.) 363, 14 Nat. Bankr. Reg. 92, 15 Fed. Cas. No. 8,165, affirming 14 Nat. Bankr. Reg. 82, 15 Fed. Cas. No. 8,166; *In re Oregon Bulletin Printing, etc., Co.*, 3 Sawy. (U. S.) 614, 14 Nat. Bankr. Reg. 405, 18 Fed. Cas. No. 10,561, reversing 13 Nat. Bankr. Reg. 199, 18 Fed. Cas. No. 10,558.

1. See the insolvency laws of the several states.

2. Inventory and Schedule Required — United States. — Bankruptcy Act, 1898, § 7; *Warren Sav. Bank v. Palmer*, 10 Nat. Bankr. Reg. 239, 29 Fed. Cas. No. 17,207; *Clinton v. Mayo*, 12 Nat. Bankr. Reg. 39, 5 Fed. Cas. No. 2,899; *Ferguson v. Dent*, 24 Fed. Rep. 412.

California. — *Ex p. Clark*, 110 Cal. 405; *Matter of Green*, 96 Cal. 162.

Louisiana. — *Geilinger v. Philippi*, 133 U. S. 246 (reciting *Louisiana* statute).

Massachusetts. — *Shepard v. Abbott*, 137 Mass. 224; *Pub. Stat. Mass.*, c. 157, § 19.

New York. — *Wheeler v. Emmeluth*, 58 Hun (N. Y.) 369; *Page v. Waring*, 76 N. Y. 463; *Code Civ. Pro. N. Y.*, § 2162.

Pennsylvania. — *Widmier's Case*, 10 Phila. (Pa.) 81, 30 Leg. Int. (Pa.) 344.

See also the various state insolvency laws.

3. Refusal of Discharge for Failure to File Schedule. — *Phillips v. Her Creditors*, 36 La. Ann. 904; *Starr v. Patterson*, (Supm. Ct.) 27 Abb. N. Cas. (N. Y.) 19.

The Schedule Is Not a Condition Precedent to the jurisdiction in involuntary insolvency proceedings, under the *Massachusetts* statute. *Shepard v. Abbott*, 137 Mass. 224. See also *Dibble v. Morris*, 26 Conn. 416. *Compare Matter of Cohen*, (C. Pl. Spec. T.) 18 Civ. Pro. (N. Y.) 156, holding that a strict compliance with the statute is necessary, and that the court does not acquire jurisdiction if the schedules do not state where the creditors reside.

4. Requisites of Inventory and Schedule — Statement of Assets. — *Sellers v. Bell*, 94 Fed. Rep. 801, 2 Am. Bankr. Reg. 529; *Matter of Orne*, 1 Ben. (U. S.) 361, 1 Nat. Bankr. Reg. 57, 18 Fed. Cas. No. 10,581; *In re Brick*, 4 Fed. Rep. 804; *In re Brown*, 4 Fed. Cas. No. 1,978; *Act July 1, 1898* (33 U. S. Stat. at L. 544), § 7; *Lindsey v. Hunter*, 18 Ga. 50.

Exempt Property need not be scheduled as assets. *Sellers v. Bell*, 94 Fed. Rep. 801, 2 Am. Bankr. Reg. 529.

Description of Assets. — In *Pope v. Kirchner*, 77 Cal. 152, it was held that, while a statement of debts due the insolvent, as "debts due petitioner, \$274," was not an "accurate description" of the estate as required by the insolvency law, yet, the insolvency court having been satisfied with it, and having granted a discharge, the discharge would not be held void because of such inaccurate description. And see generally as to the description of property *In re Dodge*, *Betts' Scr. Bk.* 55, 7 Fed. Cas. No. 3,946a; *In re Frisbee*, 9 Fed. Cas. No. 5,130; *In re Malcom*, 4 Law Rep. 488, 16 Fed. Cas. No. 8,986; *Anonymous*, 1 Nat. Bankr. Reg. 122, 1 Fed. Cas. No. 457; *Matter of Hill*, 1 Ben. (U. S.) 321, 1 Nat. Bankr. Reg. 16, 12

b. STATEMENT OF LIABILITIES. — The statutes also require the debtor to give a list of his creditors, showing their residences, if known, the amounts due each of them, the consideration thereof, and matters respecting the nature and extent of the liabilities.¹

c. VERIFICATION. — The debtor must verify his schedules, and usually no distinction is made in this respect between voluntary and involuntary proceedings,² though instances may be found where the statute requires verification only when the proceeding is instituted by the debtor.³

3. Omissions and Defects. — If the debtor, with fraudulent intent, omits from his inventory or schedule any item of assets or indebtedness which he should properly have inserted therein, the court may refuse to grant him a discharge, or, if a discharge is granted, it may afterwards be avoided because of such omission.⁴ But a discharge is not vitiated in consequence of any such omission, where there was no fraudulent intent.⁵

If a Debtor Falsely Schedules Debts Which Do Not Exist, it is a fraud on his creditors for which a discharge may be refused, or for which the discharge, if granted, may be set aside.⁶

The Right of the Trustee or Assignee to take and dispose of the property for the benefit of creditors is not affected by any omission from the schedule, as it is not the inventory that invests him with his right or title.⁷

Fed. Cas. No. 6,481; *In re Sallee*, 2 Nat. Bankr. Reg. 228, 21 Fed. Cas. No. 12,256; *Phelps v. McDonald*, 2 MacArthur (D. C.) 375.

1. Statement of Liabilities — England. — *Everett v. Robertson*, 28 L. J. Q. B. 23; *Ex p. Topping*, 34 L. J. Bankr. 44; *Ex p. Revell*, 13 Q. B. D. 720; *Ex p. Edwards*, 14 Q. B. D. 415; 46 & 47 Vict., c. 52, § 16.

United States. — *In re Plimpton*, 4 Law Rep. 488, 19 Fed. Cas. No. 11,227; *Matter of Orne*, 1 Ben. (U. S.) 420, 1 Nat. Bankr. Reg. 79, 18 Fed. Cas. No. 10,582; *Matter of Hill*, 1 Ben. (U. S.) 321, 1 Nat. Bankr. Reg. 16, 12 Fed. Cas. No. 6,481; *Anonymous*, 2 Nat. Bankr. Reg. 141, 1 Fed. Cas. No. 462; *Sellers v. Bell*, 94 Fed. Rep. 801, 2 Am. Bankr. Rep. 520.

New York. — *People v. Behrman, Hill & D. Supp.* (N. Y.) 81; *Small v. Graves*, 7 Barb. (N. Y.) 576; *Hewlett v. Hewlett*, 4 Edw. (N. Y.) 7. See also the National Bankruptcy Act of 1898, § 7, and the several state insolvency laws.

A Full List of Creditors will not be required where the requisite number and amount of creditors have not petitioned. *In re California Pac. R. Co.*, 3 Sawy. (U. S.) 240, 11 Nat. Bankr. Reg. 193, 4 Fed. Cas. No. 2,315.

Residence of Creditors. — *Matter of Pulver*, 1 Ben. (U. S.) 381, 1 Nat. Bankr. Reg. 46, 20 Fed. Cas. No. 11,466.

Claims Purchased at a Discount still exist against the debtor for their full value in the hands of the purchaser, and may properly be stated in the schedule as of their full amount. *In re Houghton*, 12 Fed. Cas. No. 6,728.

2. Verification Required. — *In re Bailey*, 15 Nat. Bankr. Reg. 48, 2 Fed. Cas. No. 727; *Matter of Green*, 96 Cal. 162; *In re Abbott*, 74 Cal. 381. See also the National Bankruptcy Act of 1898, § 7, and the various state insolvency laws.

3. Verification Not Required in Involuntary Proceedings. — *Matter of Green*, 96 Cal. 162.

4. Fraudulent Omissions from Inventory or Schedules. — *Hinkel v. His Creditors*, 63 Cal. 328; *Dean v. Baker*, 64 Cal. 232; *Thaxter v. Johnson*, 79 Me. 348; *Starr v. Patterson*, (Supm. Ct.) 27 Abb. N. Cas. (N. Y.) 19.

5. "Not Every Omission or Error will make insolvency proceedings void. If honestly prosecuted, the inclination and duty of the court will be to disregard errors that have not caused injury." *Wheeler v. Emmeluth*, 58 Hun (N. Y.) 369, affirmed 125 N. Y. 750.

Omitting Assets from the Inventory Unintentionally, or under an honest conviction that the item was worthless, does not vitiate the discharge. *Demartin v. Demartin*, 85 Cal. 76; *Widmier's Case*, 10 Phila. (Pa.) 81, 30 Leg. Int. (Pa.) 344; *Oliver's Case*, 1 Ashm. (Pa.) 112.

The Omission of Names from the List of Creditors will not avoid the discharge, unless it was wilful and fraudulent, because the debtor apprehended opposition from the creditor or creditors omitted, or from some other motive. *Shepard v. Abbott*, 137 Mass. 224; *Williams v. Coggeshall*, 11 Cush. (Mass.) 442; *Burnside v. Brigham*, 8 Met. (Mass.) 75; *Platt v. Parker*, 4 Hun (N. Y.) 135, 6 Thomp. & C. (N. Y.) 377; *Thomas v. Jones*, 39 Wis. 124.

Giving the Name of a Deceased Creditor instead of the name of his administrator will not avoid the discharge where such creditor's death was recent and was not known to the debtor. *Wheeler v. Emmeluth*, 58 Hun (N. Y.) 369, affirmed 125 N. Y. 750.

Debts Barred by Limitation. — *In Pope v. Kirchner*, 77 Cal. 152, it was held that the omission from the inventory of debts barred by the statute of limitations did not vitiate the discharge.

Insufficient Statement of One Debt. — *In Devlin v. Cooper*, 20 Hun (N. Y.) 188, affirmed 84 N. Y. 410, it was held that an inventory was sufficient to give jurisdiction, though one of the debts was probably insufficiently stated.

6. False Schedule of Debts. — *In re Bregard*, 84 Cal. 322, 18 Am. St. Rep. 187.

Innocently Listing Debts Which Do Not Exist is not regarded as fraudulent conduct on the part of the debtor. *Romano v. Their Creditors*, 46 Ia. Ann. 1176.

7. Right of Trustee or Assignee Not Affected by Omissions. — *Geilinger v. Philippi*, 133 U. S.

VII. HEARING AND DETERMINATION — 1. Defenses and Objections — Fraud — Collusion — Requisite Number or Amount of Creditors Wanting — Estoppel. — An adjudication may be opposed on the ground that there was fraud or collusion between the debtor and the petitioning creditor,¹ or that creditors to the requisite number and amount did not join in the petition,² or any matter that will operate as an estoppel against the petitioner.³

Petitioner in Fact Solvent. — But where the statute makes it an act of bankruptcy for a debtor to file a petition to have himself adjudged a bankrupt, it is held that the proceeding cannot be resisted on the ground that the debtor is in fact solvent.⁴

Giving Preferences, Concealing Property, and the doing of other acts by the debtor which the law forbids, though grounds for refusing to grant a discharge, cannot be set up as a defense to an adjudication.⁵

Solicitation by Debtor — Rescission — Compromise — Withdrawal of Some of the Petitioning Creditors. — It is no defense that creditors were induced to sign a petition at the solicitation of the debtor,⁶ or that the transaction constituting the act of bankruptcy alleged was afterwards rescinded,⁷ or that the petitioning creditors agreed to compromise their claims, but the composition was not paid,⁸ or that one of the petitioning creditors has withdrawn, leaving less than the number of petitioning creditors originally required.⁹

A Payment or Tender to the Petitioning Creditor of the amount of his claim has been held not to defeat the proceeding.¹⁰

246; *Rued v. Cooper*, (Cal. 1893) 34 Pac. Rep. 98; *Pochlmann v. Kennedy*, 48 Cal. 201; *Prevost v. Walther*, 48 La. Ann. 227; *Andrus v. His Creditors*, 45 La. Ann. 1067; *McGraw v. Andrus*, 45 La. Ann. 1073; *Gumbel v. Andrus*, 45 La. Ann. 1081; *Chaffe v. Scheen*, 34 La. Ann. 657; *Davies v. New York Concert Co.*, (Supm. Ct. Gen. T.) 13 N. Y. Supp. 739.

1. Collusion Between Debtor and Petitioner. — *In re Mendelsohn*, 3 Sawy. (U. S.) 342, 12 Nat. Bankr. Reg. 533, 17 Fed. Cas. No. 9,420.

2. Insufficient Number of Petitioning Creditors. — *In re Hatje*, 6 Biss. (U. S.) 436, 12 Nat. Bankr. Reg. 548, 11 Fed. Cas. No. 6,215; *In re California Pac. R. Co.*, 3 Sawy. (U. S.) 240, 11 Nat. Bankr. Reg. 103, 4 Fed. Cas. No. 2,315; *Matter of Hymes*, 7 Ben. (U. S.) 427, 10 Nat. Bankr. Reg. 433, 12 Fed. Cas. No. 6,986; *In re Scammon*, 6 Biss. (U. S.) 130, 21 Fed. Cas. No. 12,427; *In re Sargent*, 1 N. Y. Wkly. Dig. 435, 13 Nat. Bankr. Reg. 144, 21 Fed. Cas. No. 12,361; *Matter of Duncan*, 8 Ben. (U. S.) 365, 14 Nat. Bankr. Reg. 18, 8 Fed. Cas. No. 4,131; *In re Lloyd*, 15 Nat. Bankr. Reg. 257, 15 Fed. Cas. No. 8,429.

If, however, the debtor refused to give his creditors proper information about his affairs, so that it could not be ascertained what number and amount of creditors were required to join, it is no defense that a sufficient number did not unite in the petition. *Perin*, etc., Mfg. Co. v. Peale, 17 Nat. Bankr. Reg. 377, 19 Fed. Cas. No. 10,981.

3. Estoppel. — *In re Massachusetts Brick Co.*, 2 Lowell (U. S.) 58, 5 Nat. Bankr. Reg. 408, 16 Fed. Cas. No. 9,259. And see *Perry v. Langley*, 1 Nat. Bankr. Reg. 559, 19 Fed. Cas. No. 11,006. Compare *Coxe v. Hale*, 10 Blatchf. (U. S.) 56, 8 Nat. Bankr. Reg. 562, 6 Fed. Cas. No. 3,310.

4. Solvency of Debtor Not a Defense in Voluntary Proceedings. — *In re Fowler*, 1 Lowell (U. S.) 161, 1 Nat. Bankr. Reg. 680, 9 Fed. Cas. No. 4,998.

5. Preferences, Concealment of Property, etc. — *Ex p. Paget*, 1 Pa. L. J. 307, 18 Fed. Cas. No. 10,670.

If the Petitioning Creditor Received a Preference, and this appears from the petition, but the creditor does not surrender the preference, the petition will be dismissed. *Matter of Rado*, 6 Ben. (U. S.) 230, 20 Fed. Cas. No. 11,522. And see *In re Williams*, 14 Nat. Bankr. Reg. 132, 29 Fed. Cas. No. 17,706.

6. Petition by Creditors at Solicitation of Debtor. — *In re Bouton*, 5 Sawy. (U. S.) 427, 3 Fed. Cas. No. 1,706.

7. Rescission of Transaction Constituting Act of Bankruptcy. — *In re Ryan*, 2 Sawy. (U. S.) 411, 21 Fed. Cas. No. 12,183.

8. Agreement by Petitioning Creditors to Compromise. — *Simonson v. Sinsheimer*, 95 Fed. Rep. 948, reversing 92 Fed. Rep. 904. See also *Spicer v. Ward*, 3 Nat. Bankr. Reg. 512, 22 Fed. Cas. No. 13,241.

A composition by which creditors were paid in different proportions has been held *prima facie* fraudulent and not a defense to a bankruptcy proceeding, unless it is shown that all the creditors consented to the discrimination. *Curran v. Munger*, 6 Nat. Bankr. Reg. 33, 6 Fed. Cas. No. 3,487, reversing *In re Munger*, 4 Nat. Bankr. Reg. 295, 17 Fed. Cas. No. 9,923.

9. Withdrawal of Petitioning Creditors. — *In re Rosenfield*, 11 Nat. Bankr. Reg. 86, 20 Fed. Cas. No. 12,061; *In re Heffron*, 6 Biss. (U. S.) 156, 10 Nat. Bankr. Reg. 213, 11 Fed. Cas. No. 6,321; *In re Philadelphia Axle Works*, 1 W. N. C. (Pa.) 126, 19 Fed. Cas. No. 11,001. And see *In re Vogel*, 9 Ben. (U. S.) 408, 28 Fed. Cas. No. 16,981; *In re Sargent*, 1 N. Y. Wkly. Dig. 435, 13 Nat. Bankr. Reg. 144, 21 Fed. Cas. No. 12,361.

10. Payment or Tender to Petitioning Creditor. — *Re Williams*, 1 Lowell (U. S.) 406, 3 Nat. Bankr. Reg. 286, 29 Fed. Cas. No. 17,703; *In re Omette*, 1 Sawy. (U. S.) 47, 3 Nat. Bankr. Reg.

Who May Oppose Adjudication. — Under the federal bankruptcy law of 1898 either the debtor or creditors may oppose the adjudication.¹

2. Mode of Trial. — Trial by jury is provided for in bankruptcy cases, both in *England*² and in the *United States*.³

3. Evidence — *a.* **IN GENERAL.** — The general rule that evidence must be limited to the facts alleged in the pleadings applies in bankruptcy and insolvency proceedings.⁴ So, too, all material allegations in the petition which are denied by answer must be proved.⁵

The Insolvency of the Debtor May Be Proved by his admissions,⁶ or by any evidence in general that tends to show such a financial condition.⁷

b. **BURDEN OF PROOF.** — The burden of proof as to the facts alleged in the petition may be imposed by the statute on either party, but in the absence

566, 18 Fed. Cas. No. 10,622. See also *In re Marcer*, 29 Leg. Int. (Pa.) 76, 6 Nat. Bankr. Reg. 351, 16 Fed. Cas. No. 9,060. Compare *In re Skelley*, 3 Biss. (U. S.) 260, 5 Nat. Bankr. Reg. 214, 22 Fed. Cas. No. 12,921.

1. Who May Oppose Adjudication. — Act July 1, 1898 (30 U. S. Stat. at L. 544), § 18.

Under the Act of 1867 the rule was the same in this respect as under the Act of 1898. *In re Boston*, etc., R. Co., 9 Blatchf. (U. S.) 101, 6 Nat. Bankr. Reg. 209, 3 Fed. Cas. No. 1,677; *Jack's Case*, 1 Woods (U. S.) 549, 13 Nat. Bankr. Reg. 206, 13 Fed. Cas. No. 7,119; *Clinton v. Mayo*, 12 Nat. Bankr. Reg. 39, 5 Fed. Cas. No. 2,899; *In re Scrafford*, 14 Nat. Bankr. Reg. 184, 21 Fed. Cas. No. 12,557; *Matter of Burton*, 9 Ben. (U. S.) 324, 17 Nat. Bankr. Reg. 212, 4 Fed. Cas. No. 2,214; *In re Williams*, 14 Nat. Bankr. Reg. 132, 29 Fed. Cas. No. 17,706; *In re Austin*, 16 Nat. Bankr. Reg. 518, 2 Fed. Cas. No. 662; *In re Jonas*, 16 Nat. Bankr. Reg. 452, 13 Fed. Cas. No. 7,442; *Anonymous*, 11 Chicago Leg. N. 190, 1 Fed. Cas. No. 441; *In re Hopkins*, 18 Nat. Bankr. Reg. 396, 12 Fed. Cas. No. 6,684; *Matter of Lawrence*, 10 Ben. (U. S.) 4, 18 Nat. Bankr. Reg. 416, 15 Fed. Cas. No. 8,133.

Under the Act of 1841 the debtor alone could oppose the proceeding. *Dutton v. Freeman*, 8 Fed. Cas. No. 4,210; *In re Tallmadge*, 23 Fed. Cas. No. 13,738. Compare *In re Heusted*, 12 Fed. Cas. No. 6,440.

2. Trial by Jury in England. — 46 & 47 Vict., c. 52 § 102, par. (3).

3. Trial by Jury in United States. — *Bray v. Cobb*, 91 Fed. Rep. 102; Act July 1, 1898 (30 U. S. Stat. at L. 544), § 19. And see the insolvency laws of the several states.

4. Evidence Confined to Acts Alleged. — *Ex p. Potts, Crabbe* (U. S.) 469, 19 Fed. Cas. No. 11,311; *Ex p. Shouse, Crabbe* (U. S.) 452, 22 Fed. Cas. No. 12,815; *In re Sykes*, 5 Biss. (U. S.) 113, 23 Fed. Cas. No. 13,708. See also *In re Skelley*, 3 Biss. (U. S.) 260, 5 Nat. Bankr. Reg. 214, 22 Fed. Cas. No. 12,921; *In re Safe Deposit*, etc., Inst., 7 Nat. Bankr. Reg. 392, 21 Fed. Cas. No. 12,211; *In re Drummond*, 1 Nat. Bankr. Reg. 231, 7 Fed. Cas. No. 4,093.

5. Proof of Controverted Matters. — *In re Scudder*, 1 N. Y. Leg. Obs. 325, 21 Fed. Cas. No. 12,563; *Brock v. Hoppock*, 2 Nat. Bankr. Reg. 7, 4 Fed. Cas. No. 1,912.

A denial that a confession of judgment was with intent to prefer, raises an immaterial issue, because a confession of judgment by an insolvent necessarily gave a preference to

the creditor. *In re Sutherland, Deady* (U. S.) 344, 1 Nat. Bankr. Reg. 531, 23 Fed. Cas. No. 13,638.

It is not necessary that the debt owing the petitioner be due, and therefore, if it is so alleged, it is not a fatal variance that it is proved not to be due. *Linn v. Smith*, 4 Nat. Bankr. Reg. 46, 15 Fed. Cas. No. 8,375.

6. Proof of Insolvency — Admissions of Debtor. — *In re Lange*, 97 Fed. Rep. 197; *Pacific Postal Tel. Cable Co. v. Fleischner*, 66 Fed. Rep. 899, 29 U. S. App. 227; *Clarke v. Mott*, (Cal. 1893) 33 Pac. Rep. 884.

A Tax List returned by the debtor shortly before insolvency proceedings were commenced is admissible to show what property was claimed by him at the time. *Towns v. Smith*, 115 Ind. 480.

Admissions by the Debtor are competent to contradict his testimony. *Copeland v. Taylor*, 99 Mass. 613.

7. Any Competent Witness May Be Examined. — *In re Cliffe*, 97 Fed. Rep. 540.

Admissions of Debtor. — *Guy v. McIlree*, 26 Pa. St. 92.

Inability to Pay Debts. — *Clarke v. Mott*, (Cal. 1893) 33 Pac. Rep. 884. See also *In re Bissell*, 57 Minn. 78; *Sterrett v. Buffalo Third Nat. Bank*, 46 Hun (N. Y.) 22; *Ottman v. Cooper*, 81 Hun (N. Y.) 530; *Buckley v. Archer*, 21 Barb. (N. Y.) 585.

Inability to Pay Debts Promptly as They Mature has been held not to show conclusively that the debtor was insolvent. *Mensing v. Atchison*, (Tex. Civ. App. 1894) 26 S. W. Rep. 509.

Failure to Pay a Single Debt when due does not show such inability as to establish insolvency. *Driggs v. Moore*, 1 Abb. (U. S.) 440, 3 Nat. Bankr. Reg. 149.

The Fact that an Attachment was sued out is no evidence of the defendant's insolvency. *Gustine v. Phillips*, 38 Mich. 674.

Return of Execution Nulla Bona does not prove insolvency, where it does not appear that the debtor ever resided or had property in the county to which the execution was issued. *Knox v. Bates*, 70 Ga. 425.

Confessing Judgment does not of itself prove insolvency. *Matter of Dibblee*, 3 Ben. (U. S.) 253, 2 Nat. Bankr. Reg. 617, 7 Fed. Cas. No. 3,884.

General Reputation as to insolvency has been held incompetent to prove the fact. *Stewart v. McMurray*, 82 Ala. 269. But see *Lawson v. Orear*, 7 Ala. 785; *Branch Bank v. Parker*, 5 Ala. 731; *Brooks v. Thomas*, 8 Md. 367; *Larkin v. Hapgood*, 56 Vt. 597.

of any provision in this respect, the matter is governed by the ordinary rules of evidence that the burden of proving any fact is on the party alleging it.¹

c. EXAMINATION OF DEBTOR. — The bankruptcy and insolvency laws provide for the examination of the debtor in regard to his affairs and his property.²

4. **Adjudication.** — An adjudication in bankruptcy or insolvency is governed by the same principles in general as other judgments in regard to the operation and effect thereof.³ The debtor and all other persons who were parties to the proceeding are therefore concluded and cannot afterwards attack the adjudication collaterally unless it is void.⁴ But the conclusiveness of the adjudication is not limited to the parties to the proceeding, because it is held that a bankruptcy proceeding is *in rem*, and is conclusive as to all the world

1. **Burden of Proof.** — The bankruptcy law of March 2, 1867 (14 U. S. Stat. at L. 517), § 41, imposed on the debtor the burden of disproving the facts set forth in the petition in an involuntary proceeding. *In re Price*, 8 Nat. Bankr. Reg. 514, 19 Fed. Cas. No. 11,411. See also *In re King*, 10 Nat. Bankr. Reg. 104, 14 Fed. Cas. No. 7,783; *In re Leonard*, 4 Nat. Bankr. Reg. 562, 15 Fed. Cas. No. 8,255. Compare *Miller v. Keys*, 3 Nat. Bankr. Reg. 224, 17 Fed. Cas. No. 9,578.

This provision was repealed by the Act of June 22, 1874 (18 U. S. Stat. at L. 182), § 14, and the burden then devolved on the petitioner to prove the facts alleged in the petition. *In re Oregon Bulletin Printing, etc.*, Co., 13 Nat. Bankr. Reg. 503, 18 Fed. Cas. No. 10,559.

Under the Wisconsin Statute the burden of proof is on the petitioner. *In re Callahan*, 102 Wis. 557.

2. **Examination of Debtor — England.** — *Ex p. Schofield*, 6 Ch. D. 230, 46 L. J. Bankr. 112, 37 L. T. N. S. 281, 26 W. R. 9; *In re Brünner*, 19 Q. B. D. 572, 56 L. J. Q. B. 606, 57 L. T. N. S. 418, 35 W. R. 719; *Bell v. Johnson*, 1 Johns. & H. 683, 4 L. T. N. S. 636, 9 W. R. 549; *In re a Solicitor*, 25 Q. B. D. 17; *New v. Hunting*, (1897) 1 Q. B. 607, (1897) 2 Q. B. 19; *Reg. v. Erdheim*, (1896) 2 Q. B. 260; *In re Cronmire*, (1894) 2 Q. B. 246; *Ex p. Milne*, 28 L. T. N. S. 175; *Ex p. Crawford*, 28 L. T. N. S. 244; *In re Lawrence*, 22 L. T. N. S. 246; *Ex p. Crump*, 1 Ch. D. 530; *Re Williams*, 1 Mor. Bankr. Cas. 16.

United States. — *Matter of Winship*, 7 Ben. (U. S.) 194, 30 Fed. Cas. No. 17,878; *Matter of Levy*, 1 Ben. (U. S.) 496, 1 Nat. Bankr. Reg. 136, 15 Fed. Cas. No. 8,296; *Re Noyes*, 2 Lowell (U. S.) 352, 11 Nat. Bankr. Reg. 111, 18 Fed. Cas. No. 10,370; *In re Tanner*, 1 Lowell (U. S.) 215, 1 Nat. Bankr. Reg. 316, 23 Fed. Cas. No. 13,745; *Matter of Richards*, 4 Ben. (U. S.) 303, 4 Nat. Bankr. Reg. 93, 20 Fed. Cas. No. 11,769; *Matter of Allen*, 13 Blatchf. (U. S.) 271, 1 Fed. Cas. No. 208; *In re Frisbie*, 13 Nat. Bankr. Reg. 349, 10 Fed. Cas. No. 5,131; *In re Dole*, 11 Blatchf. (U. S.) 499, 9 Nat. Bankr. Reg. 193, 7 Fed. Cas. No. 3,964; *Bray v. Cobb*, 91 Fed. Rep. 102.

Massachusetts. — *Clement v. Bullens*, 159 Mass. 193.

See also the various bankruptcy and insolvency laws.

3. **Adjudication — Operation and Effect in General** — *United States.* — *Shawhan v. Wheritt*, 7 How. (U. S.) 627; *Michaels v. Post*, 21 Wall.

(U. S.) 398, 12 Nat. Bankr. Reg. 152; *In re Banks*, 1 N. Y. Leg. Obs. 274, 2 Fed. Cas. No. 958; *In re Bear*, 2 Fed. Cas. No. 1,177; *Matter of Duncan*, 8 Ben. (U. S.) 365, 14 Nat. Bankr. Reg. 18, 8 Fed. Cas. No. 4,131; *Matter of Getchell*, 8 Ben. (U. S.) 256, 10 Fed. Cas. No. 5,371; *Matter of Dibblee*, 3 Ben. (U. S.) 283, 2 Nat. Bankr. Reg. 617, 7 Fed. Cas. No. 3,884; *Harmanson v. Bain*, 1 Hughes (U. S.) 168, 15 Nat. Bankr. Reg. 173, 11 Fed. Cas. No. 6,072; *Hobson v. Markson*, 1 Dill. (U. S.) 421, 12 Fed. Cas. No. 6,555; *In re Jewett*, 7 Biss. (U. S.) 473, 16 Nat. Bankr. Reg. 48, 13 Fed. Cas. No. 7,307, *affirming* 7 Biss. (U. S.) 328, 15 Nat. Bankr. Reg. 126, 13 Fed. Cas. No. 7,306; *In re Kerr*, 9 Nat. Bankr. Reg. 566, 14 Fed. Cas. No. 7,729; *In re Ordway*, 19 Nat. Bankr. Reg. 171, 18 Fed. Cas. No. 10,552; *Robinson v. Hall*, 8 Ben. (U. S.) 61, 20 Fed. Cas. No. 11,952; *Sutton v. Mandeville*, 1 Cranch (C. C.) 187, 23 Fed. Cas. No. 13,651; *In re Kindt*, 98 Fed. Rep. 403.

Connecticut. — *Barstow v. Adams*, 2 Day (Conn.) 70; *Bissell v. Post*, 4 Day (Conn.) 79.

Indiana. — *Roberts v. Shroyer*, 68 Ind. 64.

Missouri. — *State Sav. Assoc. v. Kellogg*, 52 Mo. 583.

New York. — *Smith v. Brinkerhoff*, 6 N. Y. 305.

North Carolina. — *Lewis v. Sloan*, 68 N. Car. 557.

Texas. — *Mims v. Swartz*, 37 Tex. 13, 10 Nat. Bankr. Reg. 305; *Taylor v. Bonnett*, 38 Tex. 521.

4. **Conclusiveness of Adjudication as to Parties**

— *United States.* — *Graham v. Boston, etc.*, R. Co., 118 U. S. 161; *In re Fallon*, 2 Nat. Bankr. Reg. 277, 8 Fed. Cas. No. 4,628; *Matter of Duncan*, 8 Ben. (U. S.) 365, 14 Nat. Bankr. Reg. 18, 8 Fed. Cas. No. 4,131; *In re Funkenstein*, 3 Sawy. (U. S.) 605, 14 Nat. Bankr. Reg. 213, 9 Fed. Cas. No. 5,158; *In re Gilbert*, 1 N. Y. Leg. Obs. 327, 10 Fed. Cas. No. 5,411; *In re Ives*, 5 Dill. (U. S.) 146, 19 Nat. Bankr. Reg. 97, 13 Fed. Cas. No. 7,115; *Matter of McKinley*, 7 Ben. (U. S.) 562, 16 Fed. Cas. No. 8,864.

California. — *Riego v. Foster*, 125 Cal. 178.

Maryland. — *Vogler v. Rosenthal*, 85 Md. 37, 60 Am. St. Rep. 298.

Massachusetts. — *Livermore v. Swasey*, 7 Mass. 213.

New Jersey. — *Mount v. Manhattan Co.*, 41 N. J. Eq. 211.

Compare *In re Dunkle*, 7 Nat. Bankr. Reg. 72, 8 Fed. Cas. No. 4,160.

that the debtor has committed an act of bankruptcy for which he has been duly decreed a bankrupt.¹

Annulling or Setting Aside Adjudication. — Provision is generally made by the statutes for annulling or setting aside adjudications on designated grounds.² If the adjudication is void, it is held that a proceeding to annul or set it aside will not be entertained, because in that event the adjudication is of no effect whatever and the proceeding is unnecessary.³

VIII. WHO MAY BE ADJUDGED BANKRUPTS OR INSOLVENTS — 1. In General. — Formerly the *English* bankruptcy laws applied only to traders,⁴ and their policy was at first pursued in the *United States*,⁵ but the existing statutes, both in *England* and in the *United States*, extend to practically all persons.⁶

Who Are Traders. — A trader, within the meaning of the bankruptcy laws, is a person engaged in any business requiring the purchase of articles to be sold again in the same or an improved shape, and also many persons who do not come within this definition.⁷ The meaning of the term is not of the same

1. Bankruptcy Proceedings Considered Proceedings in Rem. — *In re* Wallace, Deady (U. S.) 433, 2 Nat. Bankr. Reg. 134, 29 Fed. Cas. No. 17,094; *Morse v. Cohannet Bank*, 3 Story (U. S.) 391; *Shawhan v. Wheritt*, 7 How. (U. S.) 643.

This principle seems to be limited to the fixing of the status of the debtor as a bankrupt. A creditor who was not a party to the proceeding is not estopped to deny the acts of bankruptcy charged, so far as they affect him. *In re* Thomas, 11 Nat. Bankr. Reg. 330, 23 Fed. Cas. No. 13,891.

2. Annulling or Setting Aside Adjudication. — *In re* Bush, 6 Nat. Bankr. Reg. 179, 4 Fed. Cas. No. 2,222; *Matter of Derby*, 6 Ben. (U. S.) 232, 8 Nat. Bankr. Reg. 106, 7 Fed. Cas. No. 3,815; *In re* Magee, 1 W. N. C. (Pa.) 21, 16 Fed. Cas. No. 8,941; *In re* Bergeron, 12 Nat. Bankr. Reg. 385, 3 Fed. Cas. No. 1,342; *In re* Donnelly, 5 Fed. Rep. 783; *In re* Kindt, 98 Fed. Rep. 867. See also *Matter of Le Favour*, 8 Ben. (U. S.) 43, 15 Fed. Cas. No. 8,208; *In re* Thomas, 11 Nat. Bankr. Reg. 330, 23 Fed. Cas. No. 13,891; *Matter of Duncan*, 8 Ben. (U. S.) 365, 14 Nat. Bankr. Reg. 18, 8 Fed. Cas. No. 4,131; *In re* Matot, 5 N. Y. Wkly. Dig. 529, 16 Nat. Bankr. Reg. 485, 16 Fed. Cas. No. 9,282; *In re* Lalor, 19 Nat. Bankr. Reg. 253, 14 Fed. Cas. No. 8,001; *In re* Meade, 19 Nat. Bankr. Reg. 335, 16 Fed. Cas. No. 9,370.

Laches is a ground for refusing to set aside an adjudication. *In re* Republic Ins. Co., 8 Nat. Bankr. Reg. 317, 20 Fed. Cas. No. 11,706, *affirming* *Leiter v. Republic F. Ins. Co.*, 7 Biss. (U. S.) 26, 15 Fed. Cas. No. 8,227.

Mental Incapacity of Debtor. — An adjudication in an involuntary proceeding may be set aside at the instance of the debtor on the ground that he was *non compos mentis* at the time the alleged debts were contracted and the proceedings instituted. *In re* Murphy, 10 Nat. Bankr. Reg. 48, 17 Fed. Cas. No. 9,916.

The Fact that a Prior Petition Had Been Filed in Another District is not a ground for setting aside the adjudication. *Matter of Harris*, 6 Ben. (U. S.) 375, 11 Fed. Cas. No. 6,111.

3. Void Adjudication. — *Matter of Penn*, 4 Ben. (U. S.) 99, 3 Nat. Bankr. Reg. 582, 19 Fed. Cas. No. 10,926.

4. Former English Bankruptcy Laws Applicable Only to Traders. — 2 Bl. Com. 471 *et seq.*; *Matter*

of *Klein*, 1 How. (U. S.) 277 note, 14 Fed. Cas. No. 7,865.

5. The Bankruptcy Act of April 4, 1800 (2 U. S. Stat. at L. 19), the first one passed by Congress after the adoption of the Constitution, designated as the persons subject to its operation "any merchant * * * actually using the trade of merchandise, by buying or selling, in gross or by retail, or dealing in exchange, or as a banker, broker, factor, underwriter, or marine insurer."

The next Act passed August 19, 1841 (5 U. S. Stat. at L. 440), was limited to the same persons as those designated in the prior statute as to involuntary proceedings.

6. Modern Bankruptcy Laws Not Restricted to Traders — *England*, — 46 & 47 Vict. c. 52, § 4. *United States*. — Act July 1, 1898 (30 U. S. Stat. at L. 544), § 4.

And see the several state insolvency laws.

7. Trader Defined. — *Wakeman v. Hoyt*, 5 Law. Rep. 309, 28 Fed. Cas. No. 17,051.

Who Are Traders. — The following persons have been held to be traders within the bankruptcy laws:

Auctioneers. — *Ex p.* Moore, 3 Mont. & A. 130, 2 Deac. 287, 6 L. J. Bankr. 72, 1 Jur. 184.

Bill Brokers. — *Ex p.* Harvey, 1 Deac. 571, 2 Mont. & A. 593; *Richardson v. Bradshaw*, 1 Atk. 128. And see *Ex p.* Phipps, 2 Deac. 487, 6 L. J. Bankr. 93, 1 Jur. 529; *Hankey v. Jones*, 2 Cowp. 745.

Brickmakers. — *Ex p.* Gallimore, 2 Rose 424; *Sutton v. Wheelley*, 7 East 442, 3 Smith 445; *Ex p.* Burgess, 2 Glyn & J. 183; *Paul v. Dowling*, M. & M. 263, 3 C. & P. 500, 14 E. C. L. 412; *Heane v. Rogers*, 4 M. & R. 486, 9 B. & C. 577, 17 E. C. L. 449; *Ex p.* Harrison, 1 Bro. C. C. 173; *Parker v. Willis*, 1 Bro. P. C. (Toml. ed.) 545.

Brokers (of Goods). — *Doe v. Lawrence*, 2 C. & P. 134, 12 E. C. L. 58. Compare *Hernamann v. Barber*, 14 C. B. 583, 78 E. C. L. 583, 23 L. J. C. Pl. 145, 18 Jur. 790.

Builders. — *Ex p.* Neirinccks, 2 Mont. & A. 284, 1 Deac. 78; *Ex p.* Edwards, 4 Jur. 153; *Ex p.* Edwards, 1 Mont. D. & De G. 3; *Stuart v. Sloper*, 3 Exch. 700, 3 De G. & Sm. 557, 18 L. J. Exch. 321, 18 L. J. Bankr. 14, 13 Jur. 581; *Clark v. Wisdom*, 5 Esp. 147; *Williams v. Stevens*, 2 Campb. 300; *Re Fowler*, 1 Fonbl. 201.

importance as formerly, as it is in but few particulars that the law is applicable only to traders.¹

Butchers. — *Dally v. Smith*, 4 Burr. 2148.

Distillers. — *In re Eeles*, 1 N. Y. Leg. Obs. 84, 8 Fed. Cas. No. 4,302.

Horse Dealers and Livery Stable Keepers. — *Wright v. Bird*, 1 Price 20; *Cannan v. Denew*, 3 Moo. & S. 761, 10 Bing. 292, 25 E. C. L. 139; *Martin v. Nightingale*, 3 Bing. 421, 13 E. C. L. 33, 11 Moo. 305. See *contra*, Act 1841. *Hall v. Cooley*, 3 N. Y. Leg. Obs. 282, 11 Fed. Cas. No. 5,928. But buying dead horses for one's dogs and selling the skins and bones is not trading, though the sale of skins and bones may be at a profit. *Summersett v. Jarvis*, 6 Moo. 56, 3 Brod. & B. 2, 7 E. C. L. 322.

Market Gardeners. — *Ex p. Hammond*, De G. 93, 14 L. J. Bankr. 14, 9 Jur. 358.

Pawnbrokers. — *Rawlinson v. Pearson*, 5 B. & Ald. 124, 7 E. C. L. 46.

Publishers. — *Gillingham v. Laing*, 2 Marsh. 236, 6 Taunt. 532, 1 E. C. L. 476, 2 Rose 472.

Scriveners. — *Ex p. Gem*, 2 Mont. D. & De G. 99, 5 Jur. 683; *Ex p. Malkin*, 2 Rose 27, 2 Ves. & B. 31. As to who are scriveners, see *Ex p. Bath*, 1 Montagu 82; *Yeo v. Allen*, 3 Dougl. 214, 26 E. C. L. 82; *In re Lewis*, 2 Rose 59; *Hamson v. Harrison*, 2 Esp. 555; *Ex p. Malkin*, 2 Ves. & B. 175; *Adams v. Malkin*, 3 Campb. 534, 14 Rev. Rep. 837; *Hurd v. Brydges*, Holt N. P. 654, 3 E. C. L. 256; *Lott v. Melville*, 3 M. & G. 49, 42 E. C. L. 31, 3 Scott N. R. 346, 9 Dowl. 812, 5 Jur. 436; *Ex p. Dufaur*, 2 De G. M. & G. 246, 21 L. J. Bankr. 38; *Harman v. Johnson*, 2 El. & Bl. 61, 75 E. C. L. 61, 3 C. & K. 272, 22 L. J. Q. B. 297, 17 Jur. 1096; *Ex p. Spicer*, 3 De G. & Sm. 601, 14 Jur. 30; *Reg. v. Hughes*, 1 F. & F. 726; *Hutchinson v. Gascoigne*, Holt N. P. 507, 3 E. C. L. 201.

Shipbrokers. — *Pott v. Turner*, 6 Bing. 702, 19 E. C. L. 211, 4 M. & P. 551.

Stockbrokers. — Anonymous, Cullen Bankr. Laws 18. See *Colt v. Netterville*, 2 P. Wms. 308.

A **Clergyman** may become a trader by engaging in business. *Ex p. Meymot*, 1 Atk. 196.

Coach Proprietors. — It has been questioned whether a coach proprietor is a trader. *In re Walker*, 2 Mont. & A. 267.

Farmers, Graziers, etc. — A farmer, grazier, etc., as far as the ordinary operations of such occupations are concerned, does not become a trader by reason of buying and selling commodities. *Patten v. Browne*, 7 Taunt. 409, 2 E. C. L. 409; *Stewart v. Ball*, 2 B. & P. N. R. 78. But see *Bartholomew v. Sherwood*, 1 T. R. 573, note *a*; *Newland v. Bell*, Holt N. P. 221, 3 E. C. L. 94; *Ex p. Ridge*, 1 Ves. & B. 360; *Bell v. Young*, 15 C. B. 524, 80 E. C. L. 524, 24 L. J. Q. B. 66, 1 Jur. N. S. 167; *Ex p. Dering*, 1 De G. 308, 16 L. J. Bankr. 3, 11 Jur. 92; *Bolton v. Sowerby*, 11 East 274; *Mills v. Hughes*, Buller's N. P. 392; *Worth v. Budd*, 2 B. & Ald. 172, 22 E. C. L. 53, 1 Dowl. 328.

But if he buys and sells to an extent unauthorized by his character as such farmer, etc., he becomes a trader. *Ex p. Gibbs*, 2 Rose 38; *In re Newall*, 3 Deac. 33; *Bloxham v. Graham*, Peake Add. Cas. 3.

A **Fisherman** who makes it his business to buy fish of other boats at sea and sells them on

shore is a trader. *Heanny v. Birch*, 1 Rose 356, 2 Campb. 233.

But one who merely buys fish occasionally to make up a sufficient quantity for market is not a trader. *Ex p. Gallimore*, 2 Rose 424.

An **Innkeeper, Victualer, etc.**, merely as such, is not a trader. *Saunderson v. Rowles*, 4 Burr. 2064; *Willett v. Thomas*, 2 Chitt. 651, 18 E. C. L. 444; Anonymous, Loft 218. See also *Saunderson v. Rowles*, 4 Burr. 2064; *Gibson v. King*, C. & M. 458, 41 E. C. L. 251, 10 M. & W. 667, 12 L. J. Exch. 9, 6 Jur. 1044; *Ex p. Birch*, 2 Mont. D. & De G. 659; *Ex p. Daniell*, 7 Jur. 334; *King v. Simmonds*, 1 H. L. Cas. 754, 12 Jur. 903; *Smith v. Scott*, 9 Bing. 14, 23 E. C. L. 246, 2 Moo. & S. 35; *Ex p. Wilks*, 2 Mont. & A. 667, 2 Deac. 1, 5 L. J. Bankr. 39; *Ex p. Bowers*, 2 Deac. 99; *Ex p. Thorne*, 45 L. J. Bankr. 158, 3 Ch. D. 457, 35 L. T. N. S. 532, 25 W. R. 186; *Ex p. Nat. Deposit Bank*, 26 W. R. 624.

But if he sells goods, such as liquors, out of his house to all persons who apply, he becomes a trader. *Patman v. Vaughan*, 1 T. R. 572.

A **Landowner** who manufactures the produce of his land, and sells the manufactured products as a usual or necessary mode of enjoying the land, is not a trader though he buys some of the ingredients of his manufactures. *Wells v. Parker*, 1 T. R. 34, 1 Bro. P. C. (Toml. ed.) 545; *Holroyd v. Gwynne*, 2 Taunt. 176, 1 Rose 113; *Paul v. Dowling*, M. & M. 263, 3 C. & P. 500, 14 E. C. L. 412; *Hall v. Cooley*, 3 N. Y. Leg. Obs. 282, 11 Fed. Cas. No. 5,928.

The same rule is applicable to mine owners. *Turner v. Hardcastle*, 11 C. B. N. S. 683, 103 E. C. L. 683, 31 L. J. C. Pl. 193, 5 L. T. N. S. 748; *Ex p. Gallimore*, 2 Rose 424; *Port v. Turton*, 2 Wils. C. Pl. 169; *Ex p. Schomberg*, L. R. 10 Ch. 172, 31 L. J. N. S. 665, 23 L. R. 204; *Ex p. Atkinson*, 1 Mont. D. & De G. 300; *In re Cleland*, 36 L. J. Bankr. 33, L. R. 2 Ch. 466, 16 L. T. N. S. 403, 15 W. R. 681; *Ex p. Gardner*, 1 Rose 377, 1 Mont. & B. 45.

A **Medical Practitioner** who dispenses medicines to his patients, but charges for his visits, irrespective of the medicine furnished, is not a trader. *Hance v. Harding*, 20 Q. B. D. 732, 57 L. J. Q. B. 403, 59 L. T. N. S. 659, 36 W. R. 629.

But if he charges separately for medicines furnished he is a trader. *Ex p. Crabb*, 8 De G. M. & G. 277, 24 L. J. Bankr. 45, 2 Jur. N. S. 628, 4 W. R. 501; *Ex p. Daubenny*, 3 Mont. & A. 16, 2 Deac. 72.

A **Shipowner**, as such, is held not to be a trader. *Ex p. Bowes*, 4 Ves. Jr. 168.

An **Underwriter**, merely in that character, is held not to be a trader. *Ex p. Bell*, 15 Ves. Jr. 355.

A **Trader Who Has Withdrawn from Business** may be proceeded against on debts contracted while he was actually in trade. *Baldwin v. Rosseau*, 1 N. Y. Leg. Obs. 391, 2 Fed. Cas. No. 803; *Everett v. Derby*, 5 Law Rep. 225, 8 Fed. Cas. No. 4,576.

Provisions Peculiar to Traders. — One of the grounds on which a discharge may be refused is that the debtor, being a trader had failed

2. Condition of Debtor. — It is not necessary that the debtor should be insolvent before he may be adjudged a bankrupt. It is sufficient if he has committed an act of bankruptcy as defined by the statute.¹

Amount of Indebtedness. — The bankruptcy law of the United States permits an involuntary proceeding to be brought only in case the indebtedness amounts to one thousand dollars,² but there is not such limitation as to voluntary proceedings.³

3. Character of Debtor — a. ALIENS. — An alien may be adjudged a bankrupt.⁴

b. MARRIED WOMEN. — Inasmuch as traders only were subject to the earlier bankruptcy laws, a married woman could not be made a bankrupt, unless she were a trader.⁵ This condition could exist, at common law, under the custom of London,⁶ or where her husband was outlawed or convicted of felony, and not lawfully at large under any license.⁷ Recent legislation has made great changes in the law in this respect. In the first place, the bankruptcy laws are no longer limited to traders, but apply generally to all debtors; and in the second place the disabilities of married women have been removed by statute, so that in most jurisdictions they may carry on business separately and contract debts, and are subject to the bankruptcy laws, as if they were sole.⁸

c. INFANTS. — It has been considered doubtful whether an infant can be

to keep proper books of account. See *infra*, this title, *Discharge of Debtor — Opposition to Discharge — Failure to Keep, Concealment, or Destruction of Books of Account*.

1. Insolvency Not Prerequisite to Adjudication.

George M. West Co. v. Lea, 19 U. S. Sup. Ct. Rep. 836; Blake v. Sawin, 10 Allen (Mass.) 340; O'Neil v. Glover, 5 Gray (Mass.) 144.

The English Statute declares certain things acts of bankruptcy without regard to the debtor's actual financial condition. See 46 & 47 Vict., c. 52, § 4.

2. Amount of Indebtedness — Involuntary Bankruptcy. — *In re Tirre*, 95 Fed. Rep. 425.

3. Voluntary Proceedings—Amount Not Limited. — Act July 1, 1893 (30 U. S. Stat. at L. 544), § 4, par. a.

4. Aliens Subject to Bankruptcy. — *In re Goodfellow*, 1 Lowell (U. S.) 510, 3 Nat. Bankr. Reg. 452, 10 Fed. Cas. No. 5,536; *In re Boynton*, 10 Fed. Rep. 277; *Judd v. Lawrence*, 1 Cush. (Mass.) 531.

Residence at the Time of the Passage of the Bankruptcy Law is not necessary to bring a resident alien within its provisions. *Cutter v. Folsom*, 17 N. H. 139.

In England a nonresident alien may be adjudged a bankrupt, if he committed an act of bankruptcy in England, though he may have left the country before the petition for adjudication was presented. *Alexander v. Vaughan*, 1 Cowp. 393; *Doddsworth v. Anderson*, T. Raym. 375; *Ex p. Crispin*, L. R. 8 Ch. 374, 42 L. J. Bankr. 65, 28 L. T. N. S. 483, 21 W. R. 491; *Allen v. Cannon*, 4 B. & Ald. 418, 6 E. C. L. 542. See also *Ex p. Pascal*, 1 Ch. D. 509, 45 L. J. Bankr. 81, 34 L. T. N. S. 10, 24 W. R. 263.

But a foreigner who has never been in England is not subject to the bankruptcy law. *Ex p. Blain*, 12 Ch. D. 522, 41 L. T. N. S. 46, 28 W. R. 334.

In the United States an alien who was a nonresident at the time the petition was filed cannot be adjudged an involuntary bankrupt,

though he may have carried on business within the district for the required period. *Matter of Burton*, 9 Ben. (U. S.) 324, 17 Nat. Bankr. Reg. 212, 4 Fed. Cas. No. 2,214.

5. Married Women Not Subject to Bankruptcy Unless Sole Traders. — *In re Gardiner*, 20 Q. B. D. 249, 57 L. J. Q. B. 149, 58 L. T. N. S. 119, 36 W. R. 142; *Ex p. Mear*, 2 Bro. C. C. 266; *Ex p. Watson*, 16 Ves. Jr. 266; *Ex p. Harland*, 1 Deac. 75, 38 E. C. L. 379; *Reg. v. Robinson*, 14 Cox C. C. 467, L. R. 1 C. C. 80, 36 L. J. M. C. 78, 16 L. T. N. S. 605, 15 W. R. 906; *Ex p. Holland*, L. R. 9 Ch. 307, 43 L. J. Bankr. 85, 30 L. T. N. S. 106, 22 W. R. 425; *Ex p. Shepherd*, 10 Ch. D. 573, 48 L. J. Bankr. 35, 39 L. T. N. S. 652, 27 W. R. 310; *Ex p. Jones*, 12 Ch. D. 484; *Re Helsby*, 1 Manson 12; *In re Edwards*, 2 Manson 182.

6. Married Women Subject to Bankruptcy When Trading Separately under Custom of London. — *La Vie v. Philips*, 1 W. Bl. 570, 3 Burr. 1776; *Ex p. Carington*, 1 Atk. 206.

7. Husband Outlawed or Convicted of Felony. — *Ex p. Franks*, 7 Bing. 762, 20 E. C. L. 323, 1 Moo. & S. 1, 28 E. C. L. 249.

8. Disabilities of Married Women Removed by Statute. — See the title HUSBAND AND WIFE, vol. 15, p. 785.

Married Women Subject to Bankruptcy in England. — The English statute provides that every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a *feme sole*. 45 & 46 Vict., c. 75 (Married Women's Property Act 1882), § 1, subd. 5.

A married woman may be made bankrupt in respect of a debt incurred by her while carrying on a trade separately from her husband, though at the date of the act of bankruptcy on which the petition was founded she had ceased to trade. As long as any debts incurred by her while so trading remain unpaid she must be deemed to be still "carrying on a trade." *In re Dagnall*, (1896) 2 Q. B. 407, 65 L. J. Q.

made a bankrupt under any circumstances,¹ and there are many cases to the effect that he cannot.² It has been held, however, that an infant is subject to the bankruptcy laws in respect to such debts as he had the power to contract,³ or where he obtained credit and contracted debts by means of a false and fraudulent assertion that he was of age.⁴

d. LUNATICS. — While it has been held that a lunatic may be adjudged a bankrupt,⁵ there has always been more or less doubt about the matter,⁶ but it is well settled that a lunatic cannot commit an act of bankruptcy, at least, where an intent is involved, unless such act is committed during a lucid interval.⁷

B. 666, 3 Manson 218, 75 L. T. N. S. 142, 45 W. R. 79, *distinguishing Ex p. M'George*, 20 Ch. D. 607, 51 L. J. Ch. 909.

Married Women Subject to Bankruptcy in United States. — *In re Collins*, 3 Biss. (U. S.) 415, 10 Nat. Bankr. Reg. 335, 6 Fed. Cas. No. 3,006; *Taylor v. Moore*, 64 Ark. 23.

In *California* a married woman living separate and apart from her husband, being liable to be sued for her debts, may be adjudged a bankrupt. *Matter of Lyons*, 2 Sawy. (U. S.) 524, 15 Fed. Cas. No. 8,649.

In *Indiana* a married woman is not subject to bankruptcy, unless she has a separate estate. *In re Goodman*, 5 Biss. (U. S.) 401, 8 Nat. Bankr. Reg. 380, 10 Fed. Cas. No. 5,540.

Law of Domicil. — If a married woman is liable to suit on her contract in the state or county of her domicil, she may be adjudged a bankrupt. *Lavie v. Phillips*, 3 Burr. 1783; *Johnson v. Gallagher*, 3 De G. F. & J. 494; *In re Leeds Banking Co.*, L. R. 3 Eq. 781; *Picard v. Hine*, L. R. 5 Ch. 274; *McHenry v. Davies*, L. R. 10 Eq. 88; *In re Kinkead*, 3 Biss. (U. S.) 405, 7 Nat. Bankr. Reg. 439, 14 Fed. Cas. No. 7,824; *In re Collins*, 3 Biss. (U. S.) 415, 10 Nat. Bankr. Reg. 335, 6 Fed. Cas. No. 3,006; *Matter of Lyons*, 2 Sawy. (U. S.) 524, 15 Fed. Cas. No. 8,649; *In re O'Brien*, 1 Nat. Bankr. Reg. 176, 18 Fed. Cas. No. 10,397; *In re Goodman*, 5 Biss. (U. S.) 401, 8 Nat. Bankr. Reg. 380, 10 Fed. Cas. No. 5,540; *In re Slichter*, 2 Nat. Bankr. Reg. 336, 22 Fed. Cas. No. 12,943. See also *Lastrapes v. Blanc*, 3 Woods (U. S.) 134, 14 Fed. Cas. No. 8,100; *In re Howland*, 2 Nat. Bankr. Reg. 357, 12 Fed. Cas. No. 6,791; *Lawver v. Gladden*, (Pa. 1885) 1 Atl. Rep. 659.

1. **Liability of Infant to Bankruptcy Proceedings Doubted.** — *Ex p. Jones*, 18 Ch. D. 109, *overruling Ex p. Lynch*, 2 Ch. D. 227, and *following Ex p. Kibble*, L. R. 10 Ch. 373; *Reg. v. Wilson*, 5 Q. B. D. 28; *Lovell v. Beauchamp*, (1894) A. C. 607; *Miller v. Blankley*, 38 L. T. N. S. 527. See also *Farris v. Richardson*, 6 Allen (Mass.) 118; *Winchester v. Thayer*, 129 Mass. 129.

2. **Infants Held Not Subject to Bankruptcy Laws.** — *England.* — *O'Brien v. Currie*, 3 C. & P. 283, 14 E. C. L. 307; *Ex p. Adam*, 1 Ves. & B. 494, 12 Rev. Rep. 280; *Belton v. Hodges*, 9 Bing. 365, 23 E. C. L. 309, 2 Moo. & S. 496; *Matter of West*, 3 De G. M. & G. 198, 22 L. J. Bankr. 71, 1 W. R. 421; *Ex p. Behr*, 3 Deac. & C. 107; *Ex p. Watson*, 16 Ves. Jr. 265; *Stevens v. Jackson*, 4 Campb. 164, 1 Marsh 469, 6 Taunt. 106, 1 E. C. L. 325, 2 Rose 269; *Ex p. Sydebotham*, 1 Atk. 146; *Whitelock's Case*, Sel. Cas. Ch. 46. See also *Ex p. Henderson*, 4 Ves. Jr. 163; *Ex p. Layton*, 6 Ves. Jr. 440;

Ex p. Barwis, 6 Ves. Jr. 601; *Rex v. Cole*, 1 Ld. Raym. 443; *Ex p. Moule*, 14 Ves. Jr. 602; *Ex p. Henderson*, 4 Ves. Jr. 163; *Reg. v. Wilson*, 5 Q. B. D. 28; *Maclean v. Dummeu*, 22 L. T. N. S. 710; *Ex p. Jones*, 50 L. J. Ch. 673, 18 Ch. D. 109, 45 L. T. N. S. 193, 29 W. R. 747.

United States. — *Matter of Derby*, 6 Ben. (U. S.) 232, 8 Nat. Bankr. Reg. 106, 7 Fed. Cas. No. 3,815; *In re Dunnigan*, 95 Fed. Rep. 428; *In re Duguid*, 100 Fed. Rep. 274. But see *contra*, *In re Book*, 3 McLean (U. S.) 317, 3 Fed. Cas. No. 1,637.

Connecticut. — *In re Cotton*, 6 Law Rep. Conn. 546, 6 Fed. Cas. No. 3,269.

Massachusetts. — *Farris v. Richardson*, 6 Allen (Mass.) 118, 89 Am. Dec. 618; *Butler v. Breck*, 7 Met. (Mass.) 164.

The Fact that an Infant Is a Member of a Firm will not prevent the firm from being adjudged a bankrupt. *In re Duguid*, 100 Fed. Rep. 274.

3. **It Is Only in Respect to Debts for Necessaries** that an infant can be made a bankrupt, if at all. *In re Soltykoff*, (1891) 1 Q. B. 413; *Lovell v. Beauchamp*, (1894) A. C. 607. And see *Ex p. Kibble*, L. R. 10 Ch. 373; *Ex p. Unity Joint-Stock Mut. Banking Assoc.*, 3 De G. & J. 63.

If There Was Good Reason to Believe that an Infant Was of Age he cannot, under the *Iowa* statute, disaffirm his contracts made with persons who dealt with him under such belief, and therefore it is held that he may be adjudged a bankrupt as to debts or contracts. *In re Brice*, 93 Fed. Rep. 942.

4. **Fraudulent Assertion as to Full Age.** — *In re Smedley*, 10 L. T. N. S. 432.

5. **Lunatics Held Subject to Bankruptcy.** — *In re James*, 12 Q. B. D. 332, 53 L. J. Q. B. 575, 50 L. T. N. S. 471; *In re Lee*, 23 Ch. D. 216, 48 L. T. N. S. 193, 31 W. R. 802; *In re Weitzel*, 7 Biss. (U. S.) 289, 14 Nat. Bankr. Reg. 466, 29 Fed. Cas. No. 17,365. See also *Ex p. Layton*, 6 Ves. Jr. 434, *per* Ld. Eldon.

Insanity Occurring After Act of Bankruptcy. — A lunatic may be adjudged a bankrupt where he committed an act of bankruptcy before he became insane. *In re Pratt*, 2 Lowell (U. S.) 96, 6 Nat. Bankr. Reg. 276, 19 Fed. Cas. No. 11,371.

The English Bankruptcy Law of 1861 recognized the possibility of a lunatic being made a bankrupt. 24 & 25 Vict., c. 134, § 166. But no similar provision is contained in the act of 1883 (46 & 47 Vict., c. 52).

6. *In re Farnham*, (1895) 2 Ch. 799.

7. **Lunatic Not Capable of Act of Bankruptcy.** — *Crispe v. Perrit*, Willes 467; *Ex p. Stamp*, 1 De G. 345; *Ex p. Priddey*, Cook Bankr. L. 48; *Anonymous*, 13 Ves. Jr. 590; *In re Marvin*, 1

c. CORPORATIONS. — In England the bankruptcy law does not authorize proceedings against a corporation.¹

In the United States, by the existing statute, corporations are expressly excluded from its benefits as voluntary bankrupts, but it is provided that involuntary proceedings may be brought against "any corporation engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits."² The former bankruptcy laws of the United States, also, were applicable to corporations.³

f. PARTNERSHIPS, AND OTHER CASES OF JOINT LIABILITY. — A partnership, as such, may be declared a bankrupt,⁴ and an individual partner may

Dill. (U. S.) 178, 16 Fed. Cas. No. 9,178; *In re Weitzel*, 7 Biss. (U. S.) 289, 14 Nat. Bankr. Reg. 466, 29 Fed. Cas. No. 17,365.

1. Bankruptcy Proceedings Against Corporations Not Authorized by English Statute. — 46 & 47 Vict., c. 52, 123.

2. Provisions as to Corporations under Bankruptcy Law of United States. — Act July 1, 1898 (30 U. S. Stat. at L. 544), § 4.

An Incorporated Hospital doing business for profit is a mercantile corporation within the statute and may be adjudged a bankrupt as such. *In re San Gabriel Sanatorium Co.*, 95 Fed. Rep. 271.

A Water Supply Company is not within the statute. *In re New York, etc., Water Co.*, 98 Fed. Rep. 711.

An Insurance Company has been held not to be within the statute. *In re Cameron Town Mut. F., etc., Ins. Co.*, 2 Am. Bankr. Rep. 372.

Some of the State Insolvency Laws include corporations, *Platt v. New York, etc., R. Co.*, 26 Conn. 544; while others do not, *Jeffries v. Belleville Iron Works Co.*, 15 La. Ann. 19; *State v. State Bank* 6 Gill & J. (Md.) 205. See also the various local statutes.

3. Corporations Included in Former Statutes of United States. — *Rankin v. Florida, etc., R. Co.*, 1 Nat. Bankr. Reg. 647, 20 Fed. Cas. No. 11,567; *In re Lady Bryan Co.*, 1 Sawy. (U. S.) 349, 4 Nat. Bankr. Reg. 394, 14 Fed. Cas. No. 7,978; *Davis v. Alabama, etc., R. Co.*, 1 Woods (U. S.) 661, 13 Nat. Bankr. Reg. 258, 7 Fed. Cas. No. 3,648; *Freeman's Nat. Bank v. Smith*, 13 Blatchf. (U. S.) 220, 9 Fed. Cas. No. 5,089; *In re Jefferson Ins. Co.*, 2 Hughes (U. S.) 255, 11 Nat. Bankr. Reg. 287, 13 Fed. Cas. No. 7,253; *In re Collateral Loan, etc., Bank*, 5 Sawy. (U. S.) 331, 6 Fed. Cas. No. 2,997; *In re Detroit Car Works*, 14 Nat. Bankr. Reg. 243, 7 Fed. Cas. No. 3,853; *Jones v. Watkins*, 1 Stew. (Ala.) 81.

Railroad Companies Held Subject to Bankruptcy. — *Adams v. Boston, etc., R. Co.*, Holmes (U. S.) 30, 4 Nat. Bankr. Reg. 314, 1 Fed. Cas. No. 47; *Alabama, etc., R. Co. v. Jones*, 5 Nat. Bankr. Reg. 97, 1 Fed. Cas. No. 126; *Sweatt v. Boston, etc., R. Co.*, 3 Cliff. (U. S.) 339, 5 Nat. Bankr. Reg. 234, 23 Fed. Cas. No. 13,634; *In re Greenville, etc., R. Co.*, 5 Chicago Leg. N. 124, 10 Fed. Cas. No. 5,787; *Winter v. Iowa, etc., R. Co.*, 2 Dill. (U. S.) 487, 7 Nat. Bankr. Reg. 289, 30 Fed. Cas. No. 17,890; *In re California Pac. R. Co.*, 3 Sawy. (U. S.) 240, 11 Nat. Bankr. Reg. 193, 4 Fed. Cas. No. 2,315; *In re Southern Minnesota R. Co.*, 10 Nat. Bankr. Reg. 86, 22 Fed. Cas. No. 13,188. But see *In re Opelousa, etc., R. Co.*, 18 Fed. Cas. No. 10,547.

Insurance Companies Held Subject to Bankruptcy. — *In re Merchants' Ins. Co.*, 3 Biss. (U. S.) 162, 6 Nat. Bankr. Reg. 43, 17 Fed. Cas. No. 9,441; *Matter of Hercules Mut. L. Assur. Soc.*, 6 Ben. (U. S.) 35, 6 Nat. Bankr. Reg. 338, 12 Fed. Cas. No. 6,402; *In re Independent Ins. Co.*, Holmes (U. S.) 103, 6 Nat. Bankr. Reg. 260, 13 Fed. Cas. No. 7,017, affirming 2 Lowell (U. S.) 97, 6 Nat. Bankr. Reg. 169, 13 Fed. Cas. No. 7,018; *Matter of Atlantic Mut. L. Ins. Co.*, 9 Ben. (U. S.) 270, 16 Nat. Bankr. Reg. 541, 2 Fed. Cas. No. 628; *Knickerbocker Ins. Co. v. Comstock*, 16 Wall. (U. S.) 258, 8 Nat. Bankr. Reg. 145.

National Banks were not subject to bankruptcy proceedings under the Act of 1867. *In re Manufacturers' Nat. Bank*, 5 Biss. (U. S.) 499, 16 Fed. Cas. No. 9,051.

4. Partnerships Subject to Bankruptcy — England. — 46 & 47 Vict., c. 52, § 115. And see *Crawshaw v. Collins*, 15 Ves. Jr. 218; *In re Beauchamp*, (1894) 1 Q. B. 1; *Lovell v. Beauchamp*, (1894) A. C. 607.

United States. — *Hunt v. Pooke*, 5 Nat. Bankr. Reg. 161, 12 Fed. Cas. No. 6,896; *In re Moore*, 5 Biss. (U. S.) 79, 17 Fed. Cas. No. 9,750; *In re Gorham*, 9 Biss. (U. S.) 23, 18 Nat. Bankr. Reg. 419, 10 Fed. Cas. No. 5,624; *Medsker v. Bonebrake*, 108 U. S. 66; *Matter of Pitt*, 8 Ben. (U. S.) 389, 14 Nat. Bankr. Reg. 59, 19 Fed. Cas. No. 11,188; *Matter of Plumb*, 9 Ben. (U. S.) 279, 17 Nat. Bankr. Reg. 76, 19 Fed. Cas. No. 11,231; *In re Meyer*, 98 Fed. Rep. 976; *Mahoney v. Ward*, 100 Fed. Rep. 278.

Connecticut. — *Coggill v. Botsford*, 29 Conn. 439.

Massachusetts. — *Lancaster v. Choate*, 5 Allen (Mass.) 530.

The Dissolution of a Partnership, whether by the act of one or more of the partners, or by the death of a partner, does not affect the jurisdiction of the bankruptcy courts. *In re Temple*, 4 Sawy. (U. S.) 92, 17 Nat. Bankr. Reg. 345, 23 Fed. Cas. No. 13,825; *In re Stevens*, 1 Sawy. (U. S.) 397, 5 Nat. Bankr. Reg. 412, 23 Fed. Cas. No. 13,393; *In re Noonan*, 3 Biss. (U. S.) 491, 10 Nat. Bankr. Reg. 330, 18 Fed. Cas. No. 10,292; *In re Stowers*, 1 Lowell (U. S.) 528, 23 Fed. Cas. No. 13,516; *Matter of Crockett*, 2 Ben. (U. S.) 514, 2 Nat. Bankr. Reg. 208, 6 Fed. Cas. No. 3,402; *In re Dunnigan*, 95 Fed. Rep. 428.

A Partnership Consisting of Husband and Wife may be adjudicated bankrupt. *In re Kinkad*, 3 Biss. (U. S.) 405, 7 Nat. Bankr. Reg. 439, 14 Fed. Cas. No. 7,824.

A Partnership May Be Adjudged a Bankrupt, under the Act of 1898, after Dissolution and before final settlement of its affairs. *In re Levy*,

be made a bankrupt in respect of firm debts.¹

In Case of a Joint and Several Liability Other than a Partnership one of the persons so liable is not subject to bankruptcy proceedings because of an act of bankruptcy committed by the other.²

g. EXECUTORS CARRYING ON TESTATOR'S BUSINESS. — In *England* it is held that an executor who carries on the testator's business becomes a trader and may be adjudged a bankrupt as such,³ but the rule under the bankruptcy laws of the *United States* seems to be otherwise.⁴

h. CONVICTS. — A person under conviction of felony may be adjudged a bankrupt.⁵

i. WAGE EARNERS AND FARMERS. — The federal bankruptcy law of 1898 expressly provides that wage earners and persons engaged chiefly in farming or the tillage of the soil shall not be subject to involuntary bankruptcy proceedings.⁶

j. PERSONS PRIVILEGED FROM ARREST. — The privilege from arrest of members of Parliament and peers of the realm in *England* is not affected by the bankruptcy laws, and therefore it is held that such persons are not exempt from the operation of the bankruptcy laws.⁷

k. INDIANS. — Indians have been held to be entitled to the benefit of the bankruptcy law.⁸

IX. ACTS OF BANKRUPTCY OR INSOLVENCY — 1. Fraudulent Conveyance or Transfer of Property. — The bankruptcy and insolvency laws, probably without

95 Fed. Rep. 812. And there can be no final settlement as long as there are firm debtors unpaid. *In re Hirsch*, 97 Fed. Rep. 571.

Though Neither Partner Has Committed an Act of Bankruptcy on which an adjudication could be rendered against him separately, the firm may be adjudged bankrupt if it has committed an act of bankruptcy. *Chemical Nat. Bank v. Meyer*, 92 Fed. Rep. 896.

1. Bankruptcy of Individual Partners. — *Ex p. Wiswold*, *Montaga* 263; *Ex p. Wood*, 1 Mont. D. & De G. 92; *Ex p. Wyndham*, 1 Mont. D. & De G. 146; *Ex p. Brown*, 2 Mont. D. & De G. 718; *Ex p. Brundrett*, 3 Mont. & A. 51, 2 Deac. 219, 6 L. J. Bankr. 29; *Ex p. Brundrett*, 3 Mont. & A. 446; *Halgins v. Lane*, 2 Hughes (U. S.) 361, 11 Nat. Bankr. Reg. 462, 12 Fed. Cas. No. 6,827; *Matter of Little*, 2 Ben. (U. S.) 186, 1 Nat. Bankr. Reg. 341, 15 Fed. Cas. No. 8,390; *In re Noonan*, 3 Biss. (U. S.) 491, 10 Nat. Bankr. Reg. 330, 18 Fed. Cas. No. 10,232; *McNutt v. King*, 59 Ala. 597; *Halsey v. Norton*, 45 Miss. 703, 7 Am. Rep. 745; *Blackwell v. Claywell*, 75 N. Car. 213.

One Not Really a Partner, but who permits himself to be held out as such, may be made a bankrupt as a member of the firm, at the suit of creditors. *In re Krueger*, 2 Lowell (U. S.) 66, 5 Nat. Bankr. Reg. 439, 14 Fed. Cas. No. 7,941. Compare *In re Kenney*, 97 Fed. Rep. 554.

But a person not actually a partner cannot be adjudged bankrupt on petition of a pretended copartner. *In re Berryman*, 2 Hask. (U. S.) 293, 3 Fed. Cas. No. 1,360.

2. Joint Liability Other than Partnership. — *James v. Atlantic Delaine Co.*, 11 Nat. Bankr. Reg. 390, 13 Fed. Cas. No. 7,179.

3. Executors Subject to Bankruptcy in England. — *Viner v. Cadell*, 3 Esp. 82; *Ex p. Nutt*, 1 Atk. 102; *Longuet v. Hockley*, 5 L. J. Exch. 21.

4. Executors Not Subject to Bankruptcy in United States. — *Graves v. Winter*, 6 Chicago

Leg. N. 284, 9 Nat. Bankr. Reg. 357, 10 Fed. Cas. No. 5,710.

5. Convicts Held Subject to Bankruptcy. — *Ex p. Graves*, 51 L. J. Ch. 1, 19 Ch. D. 1, 45 L. T. N. S. 397, 30 W. R. 51, 46 J. P. 70, 14 Cox C. C. 629, 15 Cox C. C. 118.

6. Wage Earners and Farmers Not Subject to Involuntary Bankruptcy. — Act July 1, 1898 (30 U. S. Stat. at L. 544). § 46.

As to who are wage earners, see:

England. — *Gordon v. Jennings*, 9 Q. B. D. 45; *Riley v. Warden*, 2 Exch. 59.

United States. — *Louisville, etc., R. Co. v. Wilson*, 138 U. S. 505; *Campfield v. Lang*, 25 Fed. Rep. 128.

Alabama. — *South, etc., Alabama R. Co. v. Falkner*, 49 Ala. 118.

Iowa. — *Ford v. St. Louis, etc., R. Co.*, 54 Iowa 728.

New Hampshire. — *Weymouth v. Sanborn*, 43 N. H. 173, 80 Am. Dec. 144.

New York. — *Ryan v. Hook*, 34 Hun (N. Y.) 185; *People v. Remington*, 45 Hun (N. Y.) 338; *People v. Myers*, (Supm. Ct. Spec. T.) 25 Abb. N. Cas. (N. Y.) 368.

Pennsylvania. — *Pennsylvania, etc., R. Co. v. Leuffer*, 84 Pa. St. 108; *Com. v. Butler*, 99 Pa. St. 542.

Wisconsin. — *Lang v. Simmons*, 64 Wis. 525. See also the definition **WAGES**.

7. Members of Parliament Subject to Bankruptcy Laws. — *Read v. Phillips*, 16 Ves. Jr. 437; *Ex p. Griffiths*, 3 De G. M. & G. 174, 22 L. J. Bankr. 50; *Ex p. Pooley*, 41 L. J. Bankr. 67, L. R. 7 Ch. 519, 26 L. T. N. S. 813, 20 W. R. 735; *Ex p. Meymot*, 1 Atk. 200. See also *Ex p. Harcourt*, 2 Rose 203.

Peers of the Realm Subject to Bankruptcy Laws. — *Newcastle v. Morris*, L. R. 4 H. L. 661, 40 L. J. Bankr. 4, 23 L. T. N. S. 569, 19 W. R. 26, affirming L. R. 5 Ch. 172.

8. Indians. — *In re Rennie*, 2 Am. Bankr. Rep. 182.

exception, make it an act of bankruptcy or insolvency for a debtor to convey or transfer his property, or any part thereof, with the intent of hindering, delaying, or defrauding his creditors, by putting the property so conveyed or transferred beyond the reach of process against him.¹ A fraudulent intent, actual or implied, is necessary here, and a conveyance or transfer of property made by a debtor in good faith and for a lawful purpose is not an act of bankruptcy.²

2. Preference of Creditors — *a. EFFECT AS ACT OF BANKRUPTCY OR INSOLVENCY.* — Equality among creditors being one of the main purposes of all the modern statutes, it is declared an act of bankruptcy for a debtor who is insolvent, or in contemplation of insolvency, to give any creditor a preference over the others.³

1. Fraudulent Conveyance or Transfer by Debtor
an Act of Bankruptcy — *England.* — 46 & 47 Vict., c. 52, § 4 (b).

United States. — *Gassett v. Morse*, 21 Vt. 627, 10 Fed. Cas. No. 5,264; *In re Munn*, 3 Biss. (U. S.) 442, 7 Nat. Bankr. Reg. 468, 17 Fed. Cas. No. 9,925; *In re Alexander*, 1 Lowell (U. S.) 470, 4 Nat. Bankr. Reg. 178, 1 Fed. Cas. No. 161; *In re Williams*, 1 Lowell (U. S.) 406, 3 Nat. Bankr. Reg. 286, 29 Fed. Cas. No. 17,703; *In re Matot*, 5 N. Y. Wkly. Dig. 529, 16 Nat. Bankr. Reg. 485, 16 Fed. Cas. No. 9,282; *Rumsey, etc., Co. v. Novelty, etc., Mfg. Co.*, 99 Fed. Rep. 699; *In re Harper*, 100 Fed. Rep. 266.

Connecticut. — *Quinebaug Bank v. Brewster*, 30 Conn. 559.

Louisiana. — *Lawrence v. Young*, 1 La. Ann. 297; *Qiques v. Rivas*, 16 La. Ann. 402.

Maryland. — *Ecker v. Bohn*, 45 Md. 278; *Bowland v. Wilson*, 71 Md. 307; *Castleberg v. Wheeler*, 68 Md. 266.

Massachusetts. — *Ex p. Jordan*, 9 Met. (Mass.) 292.

Giving a Mortgage on either real or personal property, with intent to hinder, delay or defraud creditors, is an act of bankruptcy. *Baldwin v. Rosseau*, 1 N. Y. Leg. Obs. 391, 2 Fed. Cas. No. 803; *In re Cowles*, 1 Nat. Bankr. Reg. 280, 6 Fed. Cas. No. 3,297; *In re McKibben*, 12 Nat. Bankr. Reg. 97, 16 Fed. Cas. No. 8,859; *Lastrapes v. Blanc*, 3 Woods (U. S.) 134, 14 Fed. Cas. No. 8,100; *In re Ryan*, 2 Sawy. (U. S.) 411, 21 Fed. Cas. No. 12,183; *In re Foster*, 18 Nat. Bankr. Reg. 64, 9 Fed. Cas. No. 4,964.

Effect of Fraudulent Conveyance as to Judgment Creditor. — A fraudulent conveyance by a debtor of all his real property after the recovery of a judgment against him is not available to the judgment creditor as an act of bankruptcy. His remedy is to have the conveyance set aside in a court of equity. *Avery v. Johann*, 3 Nat. Bankr. Reg. 144, 2 Fed. Cas. No. 675.

A Gift by an insolvent debtor of all his property to his wife is an act of bankruptcy. *In re Alexander*, 1 Lowell (U. S.) 470, 4 Nat. Bankr. Reg. 178, 1 Fed. Cas. No. 161.

Mortgage Given by Infant. — It is not an act of bankruptcy for an infant to give a mortgage, because it is not absolute, being subject to disaffirmance by him when he comes of age. *Matter of Derby*, 6 Ben. (U. S.) 232, 8 Nat. Bankr. Reg. 106, 7 Fed. Cas. No. 3,815.

2. Existence of Fraudulent Intent. — *Davis v. Armstrong*, 3 Nat. Bankr. Reg. 33, 7 Fed. Cas.

No. 3,624; *Tiffany v. Lucas*, 15 Wall. (U. S.) 410, 8 Nat. Bankr. Reg. 49; *In re Valliquette*, 4 Nat. Bankr. Reg. 307, 28 Fed. Cas. No. 16,823; *In re Union Pac. R. Co.*, 10 Nat. Bankr. Reg. 178, 24 Fed. Cas. No. 14,376.

Debtor Continuing to Sell Stock of Goods — **Attempt to Compromise.** — It is not an act of bankruptcy for a debtor, without fraudulent intent, to continue to sell his stock at retail, and to attempt to compromise with his creditors. *In re Munger*, 4 Nat. Bankr. Reg. 205, 17 Fed. Cas. No. 9,923, *reversed* on other points, *Curran v. Munger*, 6 Nat. Bankr. Reg. 33, 6 Fed. Cas. No. 3,487.

Transfer to Protect Property from Attachment. — A debtor who transfers a bill of lading to a third person, to protect the property from attachment, and save it for the benefit of all the creditors, does not thereby commit an act of bankruptcy. *Ex p. Potts, Crabbe* (U. S.) 469, 19 Fed. Cas. No. 11,344.

A Sale of Partnership Property by one partner to whom the others, being insolvent, had transferred it for the purpose of settling the affairs of the partnership, is not an act of bankruptcy. *In re Weaver*, 9 Nat. Bankr. Reg. 132, 29 Fed. Cas. No. 17,307.

Sale for Purpose of Changing Business. — A sale by a debtor of his stock of goods for the sole purpose of changing his business is not an act of bankruptcy. *In re Valliquette*, 4 Nat. Bankr. Reg. 307, 28 Fed. Cas. No. 16,823.

3. Preference of Creditors an Act of Bankruptcy — *England.* — 46 & 47 Vict., c. 52, § 4 (c).

United States. — *Harrison v. Sterry*, 5 Cranch (U. S.) 289; *Matter of Craft*, 2 Ben. (U. S.) 214, 1 Nat. Bankr. Reg. 378, 6 Fed. Cas. No. 3,316; *Matter of Dibblee*, 3 Ben. (U. S.) 283, 2 Nat. Bankr. Reg. 617, 7 Fed. Cas. No. 3,884; *In re Merchants' Ins. Co.*, 3 Biss. (U. S.) 162, 6 Nat. Bankr. Reg. 43, 17 Fed. Cas. No. 9,441; *In re Broich*, 7 Biss. (U. S.) 303, 15 Nat. Bankr. Reg. 11, 4 Fed. Cas. No. 1,921; *Ex p. Shouse, Crabbe* (U. S.) 482, 22 Fed. Cas. No. 12,815; *In re Holland*, 2 Hask. (U. S.) 90, 12 Fed. Cas. No. 6,603; *In re Hapgood*, 2 Lowell (U. S.) 200, 11 Fed. Cas. No. 6,044; *In re Ryan*, 2 Sawy. (U. S.) 411, 21 Fed. Cas. No. 12,183; *In re Oregon Bulletin Printing, etc., Co.*, 3 Sawy. (U. S.) 614, 14 Nat. Bankr. Reg. 405, 18 Fed. Cas. No. 10,561; *Arnold v. Maynard*, 2 Story (U. S.) 349, 1 Fed. Cas. No. 561; *In re Kenyon*, 6 Nat. Bankr. Reg. 238; *Knower v. Haines*, 31 Fed. Rep. 515; *Moore v. American L. & T. Co.*, 80 Fed. Rep. 49; *Brock v. Terrell*, 2 Nat. Bankr. Reg. 643, 4 Fed. Cas. No. 1,914; *In re Drummond*, 1 Nat. Bankr. Reg. 231, 7 Fed.

b. WHAT CONSTITUTES PREFERENCE — (1) Nature of Act — (a) In General. — The statutory provisions in regard to preferences are very comprehensive, and include any and every device to which a debtor may resort, whether his conduct be active or passive, in order to put one or more of his creditors in a better position than the others.¹

(b) Payment of Money to Creditor. — It is a preference for an insolvent debtor, or one who is in contemplation of insolvency, to make a payment in money to a creditor, if the payment is made for the purpose of giving such creditor more than his *pro rata* share of the debtor's estate,² and the nature of the debt is

Cas. No. 4,093; *Farrin v. Crawford*, 2 Nat. Bankr. Reg. 602, 8 Fed. Cas. No. 4,686; *Jones v. Sleeper*, 2 N. Y. Leg. Obs. 131, 13 Fed. Cas. No. 7,496; *Knickerbocker Ins. Co. v. Comstock*, 9 Nat. Bankr. Reg. 484, 14 Fed. Cas. No. 7,879; *Payne v. Solomon*, 14 Nat. Bankr. Reg. 162, 19 Fed. Cas. No. 10,856; *In re Rogers*, 2 Nat. Bankr. Reg. 397, 20 Fed. Cas. No. 12,002; *Smith v. Teutonia Ins. Co.*, 22 Fed. Cas. No. 13,115; *Stewart v. Loomis*, 23 Fed. Cas. No. 13,433; *In re Kenyon*, 6 Nat. Bankr. Reg. 238, 30 Fed. Cas. No. 17,780, note.

Connecticut. — *Bloodgood v. Beecher*, 35 Conn. 469; *Quinebaug Bank v. Brewster*, 30 Conn. 559.

Georgia. — *Brown v. Lee*, 7 Ga. 267.

Maryland. — *Willison v. Frostburg First Nat. Bank*, 80 Md. 196; *Baker v. Kunkel*, 70 Md. 392; *Brown v. Smart*, 69 Md. 320, *affirmed* 145 U. S. 457.

Massachusetts. — *Forbes v. Howe*, 102 Mass. 427, 3 Am. Rep. 475; *Simpson v. Carleton*, 1 Allen (Mass.) 109, 79 Am. Dec. 707; *Locke v. Winning*, 3 Mass. 325.

Minnesota. — *Shay v. Security Bank*, 67 Minn. 287.

New York. — *Ogden v. Jackson*, 1 Johns. (N. Y.) 370.

Vermont. — *Larkin v. Hapgood*, 56 Vt. 597. See also the various insolvency and bankruptcy laws.

Under the Bankruptcy Law of April 4, 1800, a preference was not an act of bankruptcy. *Harrison v. Sterry*, 5 Cranch (U. S.) 289; *Locke v. Winning*, 3 Mass. 325; *Ogden v. Jackson*, 1 Johns. (N. Y.) 370.

1. Preference by Procuring Levy of Attachment or Execution. — *Matter of Craft*, 2 Ben. (U. S.) 214, 1 Nat. Bankr. Reg. 378, 6 Fed. Cas. No. 3,316; *In re Benton*, 16 Nat. Bankr. Reg. 75, 3 Fed. Cas. No. 1,333; *In re Woods*, 29 Leg. Int. (Pa.) 236, 7 Nat. Bankr. Reg. 126, 30 Fed. Cas. No. 17,999; *In re McGie*, 2 Biss. (U. S.) 163, 2 Nat. Bankr. Reg. 531, 9 Fed. Cas. No. 4,835; *In re Heller*, 3 Biss. (U. S.) 153, 11 Fed. Cas. No. 6,337; *Wright v. Filley*, 1 Dill. (U. S.) 171, 4 Nat. Bankr. Reg. 610, 30 Fed. Cas. No. 18,077; *Blake v. Francis-Valentine Co.*, 89 Fed. Rep. 691; *In re Cliffe*, 94 Fed. Rep. 354; *In re Ferguson*, 95 Fed. Rep. 429; *In re Pearson*, 95 Fed. Rep. 425; *In re Collins*, 2 Am. Bankr. Rep. 1; *Simmons Hardware Co. v. Whittaker*, (Ky. 1896) 34 S. W. Rep. 1086.

Preference by Confession or Otherwise Procuring Entry of Judgment — *United States.* — *Barnes v. Billington*, 1 Wash. (U. S.) 29, 2 Fed. Cas. No. 1,015; *Stewart v. Loomis*, 23 Fed. Cas. No. 13,433; *Matter of Dibblee*, 3 Ben. (U. S.) 283, 2 Nat. Bankr. Reg. 617, 7 Fed. Cas. No. 3,884; *Matter of Craft*, 2 Ben. (U. S.) 214, 1 Nat.

Bankr. Reg. 378, 6 Fed. Cas. No. 3,316. *Compare In re Leeds*, 1 Nat. Bankr. Reg. 521, 15 Fed. Cas. No. 8,205; *In re Nelson*, 98 Fed. Rep. 76.

California. — *Bernheim v. Christal*, 76 Cal. 569.

Massachusetts. — *Sartwell v. North*, 144 Mass. 188, 151 Mass. 142.

Minnesota. — *In re Graeff*, 30 Minn. 476; *Wright v. Fergus Falls Nat. Bank*, 48 Minn. 120; *Yanish v. Pioneer Fuel Co.*, 60 Minn. 321; *Fisher v. Utendorfer*, 68 Minn. 226.

Wisconsin. — *McCaul v. Thayer*, 70 Wis. 138; *Second Ward Sav. Bank v. Schranck*, 97 Wis. 250.

Exchanging Firm Note for Note of Individual Partners. — A creditor of an insolvent firm, one member of which had more than enough property to pay all his individual debts, procured the partners to give their individual note in place of the firm note which the creditor held. It was held that this constituted a preference, because the creditor, by proving his claim against the individual estates of the partners, would obtain a larger dividend than the other firm creditors. *Chadbourne v. Harding*, 80 Me. 580.

The Dissolution of a Partnership and the Transfer to One Partner of All the Firm Assets and Liabilities is not necessarily an act of bankruptcy by the partnership, but it may be so, if it was intended to prefer an individual creditor over partnership creditors, or to put him on an equality with them, which could not have been if the partnership had continued. *Ex p. Shouse, Crabbe* (U. S.) 482, 22 Fed. Cas. No. 12,815.

Deposit with Creditor Bank. — An insolvent debtor, who was indebted to a bank of which he was a depositor, in order to give the bank a preference over other creditors, made a general deposit to his credit, and the bank thereupon charged the amount of its claim against the deposit. There was evidence that the bank knew that the depositor was insolvent. It was held that this was a preference within the meaning of the insolvency law, and that the debtor's assignee in insolvency was entitled to recover from the bank the amount so appropriated by it. *Tripp v. Northwestern Nat. Bank*, 45 Minn. 383.

2. Preference by Payment of Money to Creditor. — *In re Oregon Bulletin Printing, etc. Co.*, 13 Nat. Bankr. Reg. 503, 18 Fed. Cas. No. 10,559, 3 Sawv. (U. S.) 614, 14 Nat. Bankr. Reg. 405, 18 Fed. Cas. No. 10,561; *In re Merchants' Ins. Co.*, 3 Biss. (U. S.) 162, 6 Nat. Bankr. Reg. 43, 17 Fed. Cas. No. 9,441; *Payne v. Solomon*, 14 Nat. Bankr. Reg. 162, 19 Fed. Cas. No. 10,856; *Knickerbocker Ins. Co. v.*

not ordinarily material;¹ but the payment of a percentage on some debts is not an act of bankruptcy, if the percentage to which the other creditors are entitled is not thereby diminished.²

Exception. — A payment of money to a creditor is expressly excepted by the statute of at least one state in declaring what acts of a debtor shall constitute a preference.³

(c) **Transferring Property or Giving Security to Debtor** — *aa. GENERAL RULE.* — A transfer of property made, or security given by the debtor to his creditor, either actively, as by means of a mortgage, pledge, etc., or passively, as by suffering the creditor to obtain a judicial lien, is a preference, if the debtor intended it for that purpose.⁴ But a mere executory agreement to transfer property to a

Comstock, 9 Nat. Bankr. Reg. 484, 14 Fed. Cas. No. 7,879; *Farrin v. Crawford*, 2 Nat. Bankr. Reg. 602, 8 Fed. Cas. No. 4,686; *Strobel, etc., Co. v. Knost*, 99 Fed. Rep. 409, *affirming* 96 Fed. Rep. 803; *In re Lange*, 97 Fed. Rep. 197; *In re Conhaim*, 97 Fed. Rep. 923; *Mather v. Coe*, 92 Fed. Rep. 333; *Blakey v. Boonville Nat. Bank*, 2 Am. Bankr. Rep. 459; *In re Knost*, 2 Am. Bankr. Rep. 471; *In re Mealy*, (Cal. 1899) 59 Pac. Rep. 313; *Willison v. Frostburg First Nat. Bank*, 80 Md. 196; *Stewart v. Union Bank*, 7 Gill (Md.) 439; *Larkin v. Hapgood*, 56 Vt. 597.

A Payment on Account of a Secured Debt may constitute an unlawful preference where the security is inadequate, but it cannot have such effect if the payment is made out of the proceeds of the security. *In re Pearson*, 2 Am. Bankr. Rep. 482; *Duluth Trust Co. v. Clark*, 69 Minn. 324; *Clarke v. National Citizens' Bank*, 74 Minn. 58.

1. Fiduciary Debts. — The effect of a payment as an act of bankruptcy is not avoided by the fact that it is on account of a fiduciary debt. *Matter of Dibblee*, 3 Ben. (U. S.) 283, 2 Nat. Bankr. Reg. 617, 7 Fed. Cas. No. 3,884.

Wages. — Under the bankruptcy law of 1867 the payment of wages to employees, if in contemplation of insolvency, was an act of bankruptcy, though made in the regular course of business. *In re Kenyon*, 6 Nat. Bankr. Reg. 238, 30 Fed. Cas. No. 17,780, note.

2. Payment of Percentage on Part of Debts. — *Re Hapgood*, 2 Lowell (U. S.) 200, 11 Fed. Cas. No. 6,044.

3. "Payment of a Just Debt in Money" not a Preference in Louisiana. — *State Nat. Bank v. Monroe Cotton Press Co.*, 39 La. Ann. 834. But it was held in this case that where an insolvent debtor transfers to a creditor notes and accounts for a part of the debt and pays the balance in money, such transfer and payment are parts of one transaction, and the payment though of "a just debt in money" must fall with the transfer of the notes and accounts.

4. Preference by Transfer of Property to Creditor — *England.* — *Siebert v. Spooner*, 1 M. & W. 714, 2 Gale 135, 5 L. J. Exch. 249; *Oriental Bank Corp. v. Coleman*, 3 Giff. 11, 30 L. J. Ch. 635, 4 L. T. N. S. 9, 9 W. R. 432; *In re Wood*, 41 L. J. Bankr. 21, L. R. 7 Ch. 302, 26 L. T. N. S. 113, 20 W. R. 403; *Cook v. Caldecot*, 4 C. & P. 315, 19 E. C. L. 403, M. & M. 522; *Cotton v. James*, M. & M. 273, 22 E. C. L. 305, 3 C. & P. 505, 14 E. C. L. 415; *Isitt v. Beeston*, 38 L. J. Exch. 89, L. R. 4 Exch. 159, 20 L. T. N. S. 371, 17 W. R. 620; *Young v. Fletcher*, 4 F. & F. 1081; *Goodricke v. Taylor*, 2 De G.

J. & S. 135, 10 Jur. N. S. 414, 10 L. T. N. S. 113, 12 W. R. 632, *affirming* 2 Hem. & M. 380; *Ex p. Foxley*, L. R. 3 Ch. 515, 18 L. T. N. S. 862, 16 W. R. 831; *Ex p. Wilson*, 29 L. T. N. S. 860, 22 W. R. 241; *Ex p. Lewis*, 31 L. J. Bankr. 11; *Jones v. Harber*, 40 L. J. Q. B. 59, L. R. 6 Q. B. 77, 23 L. T. N. S. 606, 19 W. R. 248; *Ex p. Smith*, 1 Ves. & B. 518; *Hassel v. Simpson*, 1 Bro. C. C. 99, 1 Dougl. 89, note; *Ex p. Hawker*, 41 L. J. Bankr. 34, L. R. 7 Ch. 214, 26 L. T. N. S. 54, 20 W. R. 322; *Ex p. Furber*, 6 Ch. D. 181, 36 L. T. N. S. 668; *Oswald v. Thompson*, 2 Exch. 215, 17 L. J. Exch. 234; *Ex p. Ellis*, 45 L. J. Bankr. 159, 2 Ch. D. 797, 34 L. T. N. S. 705; *Ex p. Cohen*, 41 L. J. Bankr. 17, L. R. 7 Ch. 20, 25 L. T. N. S. 473, 20 W. R. 69; *Ex p. Stevens*, 44 L. J. Bankr. 136, L. R. 20 Eq. 786, 33 L. T. N. S. 135, 23 W. R. 908; *Ex p. Payne*, 11 Ch. D. 539, 40 L. T. N. S. 206, 27 W. R. 368; *Topping v. Keysell*, 16 C. B. N. S. 258, 111 E. C. L. 258, 33 L. J. C. Pl. 225, 10 Jur. N. S. 774, 10 L. T. N. S. 526, 12 W. R. 756; *Graham v. Furber*, 14 C. B. 410, 78 E. C. L. 410, 2 C. L. R. 452, 23 L. J. C. Pl. 51, 18 Jur. 226, 2 W. R. 163; *Woodhouse v. Murray*, 8 B. & S. 464, 36 L. J. Q. B. 289, L. R. 2 Q. B. 634, 16 L. T. N. S. 559, 15 W. R. 1109, *affirmed* 9 B. & S. 720, 38 L. J. Q. B. 28, L. R. 4 Q. B. 27, 19 L. T. N. S. 570, 17 W. R. 206; *Ex p. Cooper*, 48 L. J. Bankr. 54, 10 Ch. D. 313, 39 W. R. 523, 27 W. R. 299; *Ex p. Trevor*, 45 L. J. Bankr. 27, 1 Ch. D. 297, 33 L. T. N. S. 756, 24 W. R. 301; *Ex p. Snowball*, 41 L. J. Bankr. 49, L. R. 7 Ch. 534, 26 L. T. N. S. 894, 20 W. R. 786; *Bowker v. Burdakin*, 11 M. & W. 128, 12 L. J. Exch. 329, *Ex p. Mayou*, 34 L. J. Bankr. 25, 11 Jur. N. S. 433, 12 L. T. N. S. 254, 13 W. R. 629; *Whitwell v. Thompson*, 1 Esp. 68; *Ex p. Bailey*, 3 De G. M. & G. 534, 22 L. J. Bankr. 45, 17 Jur. 475, 1 W. R. 343; *Dangerfield v. Thomas*, 9 Ad. & El. 292, 36 E. C. L. 143, 1 Per. & Dav. 287; *Ex p. Burton*, 13 Ch. D. 102, 41 L. T. N. S. 571, 28 W. R. 268; *Fraser v. Levy*, 6 H. & N. 16. See also *Philps v. Hornstedt*, 1 Ex. D. 62, *affirming* 42 L. J. Exch. 12, L. R. 8 Exch. 26, 21 W. R. 174; *Ex p. Cooper*, 48 L. J. Bankr. 40, 10 Ch. D. 313, 39 L. T. N. S. 521, 27 W. R. 298; *Colombine v. Penhall*, 1 Smale & G. 228; *Ex p. Mayor*, *Montagu* 292.

United States. — *Stewart v. Loomis*, 23 Fed. Cas. No. 13,433; *Jones v. Sleeper*, 2 N. Y. Leg. Obs. 131, 13 Fed. Cas. No. 7,466; *Brock v. Terrell*, 2 Nat. Bankr. Reg. 643, 4 Fed. Cas. No. 1,914; *Matter of Dibblee*, 3 Ben. (U. S.) 283, 2 Nat. Bankr. Reg. 617, 7 Fed. Cas. No. 3,884; *Goldman v. Smith*, 93 Fed. Rep. 182; *In re Baker-Ricketson Co.*, 97 Fed. Rep. 489;

creditor is not an act of bankruptcy.¹ And it has been held that the transfer, etc., must be effective as such, and that if for any reason it is inoperative as between the parties, it does not constitute an act of bankruptcy.²

bb. ACTS DONE UNDER PREVIOUS AGREEMENT. — According to some authorities, a transfer made, or security given, though within the limit of time preceding the insolvency or bankruptcy proceedings, does not violate the statute, if it was pursuant to an agreement entered into before that time, but is regarded as having been made at the time of the agreement.³ Other authorities hold that where a statute declares void all conveyances, transfers, etc., by an insolvent debtor to his creditor within a certain time before proceedings are commenced against him, no exception can be made on the ground that the prohibited act was done pursuant to a previous agreement,⁴ unless the previous agreement contemplated immediate action, so as to bring the matter within the rule that equity will consider a thing done at the time when it ought to have been done.⁵

Johnson v. Wald, 93 Fed. Rep. 640, 2 Am. Bankr. Rep. 84.

Kentucky. — *Corn v. Sims*, 3 Met. (Ky.) 391. *Louisiana.* — *Lefebvre v. De Montilly*, 1 La. Ann. 42; *Florance v. Nolan*, 4 La. Ann. 329.

Unless There Are Other Creditors holding provable claims, a transfer by an insolvent to a creditor is not an act of bankruptcy. *Bears v. Hanlin*, 99 Fed. Rep. 695.

Returning Goods to the Seller in satisfaction of the purchase money is not a preference, where the seller is secured for the purchase money. *In re Klingaman*, 2 Am. Bankr. Rep. 44; *In re Leeman*, 2 Am. Bankr. Rep. 52.

Preference by Giving Security to Creditor — *Unitel States.* — *Moore v. American L. & T. Co.*, 80 Fed. Rep. 49; *Knower v. Haines*, 31 Fed. Rep. 513; *Arnold v. Maynard*, 2 Story (U. S.) 349, 1 Fed. Cas. No. 561; *Ex p. Shouse*, *Crabbe* (U. S.) 482, 22 Fed. Cas. No. 12 815; *In re Holland*, 2 Hask. (U. S.) 90, 12 Fed. Cas. No. 6603; *In re Rogers*, 2 Nat. Bankr. Reg. 397, 20 Fed. Cas. No. 12,002; *In re Moyer*, 93 Fed. Rep. 188; *In re McLam*, 97 Fed. Rep. 922; *In re Wolf*, 98 Fed. Rep. 84; *In re Arnold*, 2 Am. Bankr. Rep. 180.

Connecticut. — *Bloodgood v. Beecher*, 35 Conn. 469; *Quinebaug Bank v. Brewster*, 30 Conn. 559.

Maryland. — *Baker v. Kunkel*, 70 Md. 392.

Massachusetts. — *Forbes v. Howe*, 102 Mass. 427, 3 Am. Rep. 475; *Simpson v. Carleton*, 1 Allen (Mass.) 109, 79 Am. Dec. 707.

Minnesota. — *Shay v. Security Bank*, 67 Minn. 287.

The Renewal of an Existing Security is not within the prohibition of the statute. *In re Little River Lumber Co.*, 92 Fed. Rep. 585.

1. Executory Agreement to Make Transfer Not an Act of Bankruptcy. — *Winter v. Iowa*, etc., R. Co., 2 Dill. (U. S.) 487, 7 Nat. Bankr. Reg. 289, 30 Fed. Cas. No. 17,890.

2. Void Assignment Not an Act of Bankruptcy. — *Matter of Dunham*, 2 Ben. (U. S.) 488, 2 Nat. Bankr. Reg. 17, 8 Fed. Cas. No. 4,143, it was held that an assignment not stamped according to the internal revenue law was void, and therefore was not an act of bankruptcy.

A Mortgage Given by an Infant was held not an act of bankruptcy, because not absolute in its effect, being subject to disaffirmance by the infant on the coming of age. *Matter of Derby*,

6 Ben. (U. S.) 232, 8 Nat. Bankr. Reg. 106, 7 Fed. Cas. No. 3,815.

3. Acts Done under Previous Agreement Held Valid — *England.* — *Ex p. Mackenzie*, 42 L. J. Bankr. 25; *Harris v. Rickett*, 4 H. & N. 1, 28 L. J. Exch. 197; *Ex p. King*, 45 L. J. Bankr. 109, 2 Ch. D. 256, 34 L. T. N. S. 466, 24 W. R. 559; *Ex p. Hodgkin*, 44 L. J. Bankr. 107, L. R. 20 Eq. 746, 33 L. T. N. S. 62, 24 W. R. 68; *Mercer v. Peterson*, 37 L. J. Exch. 54, L. R. 3 Exch. 104, 18 L. T. N. S. 30, 16 W. R. 486; *Ex p. Defries*, 35 L. T. N. S. 392; *Ex p. Mackay*, 42 L. J. Bankr. 68, L. R. 8 Ch. 643; *Ex p. Homan*, L. R. 12 Eq. 598, 19 W. R. 1078; *In re Gibson*, 8 Ch. D. 230, 38 L. T. N. S. 326, 26 W. R. 481; *Ex p. Izard*, 43 L. J. Bankr. 31, L. R. 9 Ch. 271, 30 L. T. N. S. 7, 22 W. R. 342; *Anonymous*, 3 L. T. N. S. 632, 9 W. R. 199; *Ex p. Burton*, 13 Ch. D. 102, 41 L. T. N. S. 571, 28 W. R. 268; *Ex p. Kilner*, 13 Ch. D. 245, 41 L. T. N. S. 520, 28 W. R. 269; *Morris v. Morris*, 64 L. J. P. C. 136, (1895) A. C. 625, 11 Reports 554, 72 L. T. N. S. 879, 44 W. R. 65; *Morris v. Venables*, 15 W. R. 2.

United States. — *Ex p. Potts, Crabbe* (U. S.) 469, 19 Fed. Cas. No. 11,344.

California. — *Broughton v. Vasquez*, 73 Cal. 325.

Connecticut. — *Marvin v. Bushnell*, 36 Conn. 353.

Louisiana. — *Baldwin v. McDonald*, 48 La. Ann. 1460.

Compare Elliott v. Harris, 9 Bush (Ky.) 237.

4. Transfers, etc., Pursuant to Previous Agreement Held Invalid — *United States.* — *Ex p. Ames*, 1 Lowell (U. S.) 561, 7 Nat. Bankr. Reg. 230; *In re Sheridan*, 98 Fed. Rep. 406.

Maine. — *Morey v. Milliken*, 86 Me. 464.

Massachusetts. — *Copeland v. Barnes*, 147 Mass. 388; *Holmes v. Winchester*, 135 Mass. 299; *Simpson v. Carleton*, 1 Allen (Mass.) 109, 79 Am. Dec. 707; *Blodgett v. Hildreth*, 11 Cush. (Mass.) 311.

Minnesota. — *Grant v. Minneapolis Brewing Co.*, 68 Minn. 86; *Chickering v. White*, 42 Minn. 457. *Compare Williams v. Clark*, 47 Minn. 53.

5. Agreement Contemplating Immediate Transfer. — *Bush v. Boutelle*, 156 Mass. 167, 32 Am. St. Rep. 442. See also *Payne v. Solomon*, 14 Nat. Bankr. Reg. 162, 19 Fed. Cas. No. 10,856.

In Sabin v. Camp, 98 Fed. Rep. 974, the

cc. DOCTRINE OF PRESSURE. — In England it was formerly held that, however desperate the circumstances of a debtor were, and though the creditor knew them to be desperate, the creditor was not debarred from pressing his debtor for payment, and if he did so press, and payment was made, such payment was not a fraudulent preference.¹ The tendency of some later decisions was to depart somewhat from this rule and disregard pressure unless the position of the debtor was such that the pressure might really influence him to make the payment,² and since fraudulent preferences have been defined by statute it has been held that in determining whether a transaction amounts to a fraudulent preference, the court ought to have regard merely to the statutory definition, and that, while the earlier decisions might be useful as a guide, the standards laid down in them should not be substituted for a statutory test.³

Canada. — The doctrine of pressure is recognized in *Canada*.⁴

In the United States it seems that the English doctrine of pressure has never obtained, and it is held not to change the nature or effect of a preference that it was given under the threats and coercion of a creditor.⁵

dd. EXCHANGE OF VALUES — **Not a Preference.** — An exchange of values between an insolvent debtor and one of his creditors does not constitute a preference, because in such case there is no diminution of the debtor's estate whereby creditors may be injured, and there is nothing, either in the language or the object of the law, which prevents a debtor from dealing with his property, selling or exchanging it at any time before bankruptcy proceedings are taken by or against him, provided that such dealing be conducted without any purpose to defraud or delay creditors, or to give a preference to any one.⁶

What Constitutes an Exchange. — Such an exchange of values occurs where the debtor substitutes for securities already in the hands of a creditor other securities of equal value;⁷ or where, at the time of obtaining loans or advances, or

transfer was made pursuant to an agreement, entered into at the time the creditor loaned the money to the debtor, that in default of payment the creditor should have the option of purchasing at a fixed price from which the amount of the loan should be deducted, and it was held that a transfer of the property within four months before the bankruptcy of the debtor was valid.

1. Doctrine of Pressure — Former Rule in England. — *Thompson v. Freeman*, 1 T. R. 155; *Edwards v. Glyn*, 2 El. & El. 29, 105 E. C. L. 29; *Harris v. Rickett*, 4 H. & N. 1; *Dixon v. Baldwin*, 5 East 175; *Ex p. Taylor*, 18 Q. B. D. 295; *Brown v. Kempton*, 19 L. J. C. Pl. 169. As to what circumstances constitute sufficient pressure to negative an intent to prefer, see *Ex p. London*, etc., *Banking Co.*, L. R. 16 Eq. 391; *Ex p. Topham*, L. R. 8 Ch. 614; *Ex p. Kevan*, L. R. 9 Ch. 752; *Ex p. Hodgkin*, L. R. 20 Eq. 746; *Smith v. Pilgrim*, 2 Ch. D. 127. As to circumstances held not to constitute sufficient pressure, see *Ex p. Halliday*, L. R. 8 Ch. 283; *Tomkins v. Saffery*, 3 App. Cas. 213; *Ex p. Hall*, 19 Ch. D. 580; *Ex p. Wheatley*, 45 L. T. N. S. 80.

2. Modification of English Doctrine. — *Ex p. Wheatley*, 45 L. T. N. S. 80; *Ex p. Hall*, 19 Ch. D. 580.

3. Later English Rule as to Doctrine of Pressure — *Ex p. Griffith*, 23 Ch. D. 60; *Ex p. Hill*, 23 Ch. D. 695. See also *New v. Hunting*, (1897) 1 Q. B. 607, (1897) 2 Q. B. 19. Compare *Butcher v. Stead*, L. R. 7 H. L. 839, in which Lord Cairns said that the statute appeared to have left the question of pressure as it stood under the old law. And see *Ex p. Topham*, L. R. 8 Ch. 614.

4. Doctrine of Pressure Recognized in Canada. — *Clemmow v. Converse*, 16 Grant Ch. (U. C.) 547; *McWhirter v. Royal Canadian Bank*, 17 Grant Ch. (U. C.) 480; *McPherson v. Reynolds*, 6 U. C. C. P. 491.

5. Doctrine of Pressure Not Admitted in United States. — *Campbell v. Traders' Nat. Bank*, 2 Biss. (U. S.) 423, 3 Nat. Bankr. Reg. 498, 4 Fed. Cas. No. 2,370; *Atkinson v. Farmers' Bank*, *Crabbe* (U. S.) 529, 2 Fed. Cas. No. 609; *Van Kleeck v. Thurber*, 1 Pa. L. J. 402, 28 Fed. Cas. No. 16,861.

6. Exchange of Values — England. — *Rose v. Haycock*, 3 N. & M. 645, 1 Ad. & El. 460; *Lee v. Hart*, 11 Exch. 880, 25 L. J. Exch. 135, 2 Jur. N. S. 308, 4 W. R. 289. See also *Baxter v. Pritchard*, 3 N. & M. 638, 1 Ad. & El. 456, 28 E. C. L. 124, 3 L. J. K. B. 185; *Bell v. Simpson*, 2 H. & N. 410, 26 L. J. Exch. 303, 5 W. R. 688; *Nixon v. Jenkins*, 2 H. Bl. 135; *Martin v. Pewtress*, 4 Burr. 2477.

United States. — *Cook v. Tullis*, 18 Wall. (U. S.) 332.

Indiana. — *Wilcoxon v. Annesley*, 23 Ind. 285.

Kentucky. — *H. B. Claflin Co. v. Levitch*, (Ky. 1895) 29 S. W. Rep. 452.

Maine. — *Morey v. Milliken*, 86 Me. 464.

Massachusetts. — *Stevens v. Blanchard*, 3 Cush. (Mass.) 169.

New York. — *Holbrook v. Basset*, 5 Bosw. (N. Y.) 147; *Nelson v. Wellington*, 5 Bosw. (N. Y.) 178; *Merchants' Bank v. McColl*, 6 Bosw. (N. Y.) 473.

7. Substitution of Securities. — *Sawyer v. Turpin*, 91 U. S. 114, 13 Nat. Bankr. Reg. 271; *Burnhisel v. Firman*, 22 Wall. (U. S.) 170, 11 Nat. Bankr. Reg. 505; *Clark v. Iselin*, 21

buying property, he gives a mortgage or other security to the lender or seller;¹ or where he pays cash on a purchase.²

Raising Funds to Defray Expenses of Bankruptcy Proceedings. — On the same principle it is now well settled that it is permissible for the debtor to mortgage or sell property in order to raise the money necessary to defray his expenses in the bankruptcy or insolvency proceeding, including the compensation of his attorney,³ though it has been said that the debtor has no right to mortgage his property for such purpose.⁴

In Cases of a Mixed Character, that is, where security for a past debt is coupled with a further advance, it has been held that the transaction is not necessarily condemned merely because both parties knew that the debtor was insolvent. Such an act, it is said, may be and in fact often is the wisest course that a trader can take to promote the interest of his creditors, and the question in each case is whether there was an intent to prefer, or whether the debtor expected to escape bankruptcy.⁵

Wall. (U. S.) 360, 11 Nat. Bankr. Reg. 337; Cook v. Tullis, 18 Wall. (U. S.) 332, 9 Nat. Bankr. Reg. 433; Stevens v. Blanchard, 3 Cush. (Mass.) 169.

In *St. Clair v. Cleveland*, 83 Me. 559, the insolvent at the time of borrowing money gave the lender a receipt therefor reciting that he gave certain personal property as security. Some months afterwards he gave the lender his note for the amount borrowed with a chattel mortgage on the property referred to in the receipt. It was held that the chattel mortgage was only a renewal of the former instrument, and was not given "to secure a prior existing creditor," within the prohibition of the *Utine* statute.

There Must Be an Actual Exchange of Securities. — The replacing of securities already lost is not an exchange. It is the giving of new and further security, thereby diminishing the insolvent's estate to the extent of the new security. *Morey v. Milliken*, 86 Me. 464.

If Larger Security Be Given in the Exchange, the excess may be attacked as a preference. *Hutchinson v. Murchie*, 74 Me. 187.

1. Security for Loans, Advances, etc. — *England*. — *Hutton v. Cruttwell*, 1 El. & Bl. 15, 72 E. C. L. 15; *Bittlestone v. Cook*, 6 El. & Bl. 296, 88 E. C. L. 296; *Harris v. Rickett*, 4 H. & N. 1.

United States. — *Tiffany v. Boatman's Sav. Inst.*, 18 Wall. (U. S.) 375, 9 Nat. Bankr. Reg. 245; *In re Sanford*, 7 Nat. Bankr. Reg. 351, 21 Fed. Cas. No. 12,310; *In re Pierson*, 10 Nat. Bankr. Reg. 107, 19 Fed. Cas. No. 11,153; *In re Wolf*, 98 Fed. Rep. 84. *Compare* *Volentine v. Hurl*, 21 Fed. Rep. 749.

Kentucky. — *Farmer v. Hawkins*, 79 Ky. 182. *Louisiana*. — *Brashear v. Alexandria Cooperage Co.*, 50 La. Ann. 587.

Maine. — *Hutchinson v. Murchie*, 74 Me. 187.

Maryland. — *Hinkleman v. Fey*, 79 Md. 112.

Massachusetts. — *Leighton v. Morrill*, 159 Mass. 271; *Bush v. Boutelle*, 156 Mass. 167, 32 Am. St. Rep. 442; *Clark v. Sawyer*, 151 Mass. 64.

Minnesota. — *Hanson v. White*, 75 Minn. 523.

A Mortgage Given to Secure a Bona Fide Loan made at the time is valid, though the proceeds were used in paying some creditors in preference to others, and the mortgagee was cognizant of the insolvency and of the intended preference. *George v. Grant*, 28 Hun (N. Y.) 69, *affirmed* 97 N. Y. 262.

A Confession of Judgment for a consideration passing at the time, is not an act of bankruptcy, though the judgment was not entered of record. *Clark v. Iselin*, 21 Wall. (U. S.) 360, 11 Nat. Bankr. Reg. 337; *Blabon v. Hunt*, 2 N. J. L. J. 179, 3 Fed. Cas. No. 1,455.

2. Paying Cash on the Purchase of goods is not a preference within the statute. *H. B. Claflin Co. v. Levitch*, (Ky. 1895) 29 S. W. Rep. 452. See also *Brooks v. Staton*, 79 Ky. 174.

3. Mortgage or Sale to Pay Attorney's Fees and Other Expenses. — *In re Rosenfeld*, 2 Nat. Bankr. Reg. 116; *In re Mallory*, 4 Nat. Bankr. Reg. 153; *In re Keefer*, 4 Nat. Bankr. Reg. 389; *Flournoy v. Newton*, 8 Ga. 306; *Parsons, Petitioner*, 150 Mass. 343; *Lyon v. Marshall*, 11 Barb. (N. Y.) 241; *Citizens' Sav. Bank, etc., Co. v. Graham*, 68 Vt. 306.

4. In re Evans, 3 Nat. Bankr. Reg. 261.

5. Security for Past Debt Coupled with Further Advance. — *Ex p. Ames*, 1 Lowell (U. S.) 561, 7 Nat. Bankr. Reg. 230. See *Johnson v. Wald*, 93 Fed. Rep. 640, 2 Am. Bankr. Rep. 84; *Whipple v. Bond*, 164 Mass. 183; *Peabody v. Knapp*, 153 Mass. 242; *Forbes v. Howe*, 102 Mass. 427, 3 Am. Rep. 475; *Denny v. Dana*, 2 Cush. (Mass.) 160, 48 Am. Dec. 655.

Intention of Debtor Governs. — If the debtor intended to give a preference, that fixes the character of the transaction, though he also obtained further advances; but if the transfer was made, or security given, without any intent to defraud, but for the sole purpose of obtaining such further advances, and in the hope of being thus enabled to continue business, the transaction will be upheld at least so far as further advances made at the time are concerned.

England. — *Allen v. Bonnett*, L. R. 5 Ch. 577, 23 L. T. N. S. 437, 18 W. R. 874; *Penson v. Moon*, 15 L. T. N. S. 444; *Graham v. Chapman*, 12 C. B. 85, 74 E. C. L. 85, 21 L. J. C. Pl. 173; *Ex p. Hauxwell*, 52 L. J. Ch. 737, 23 Ch. D. 626, 48 L. T. N. S. 742, 31 W. R. 711; *Lomax v. Buxton*, 40 L. J. C. Pl. 150, L. R. 6 C. P. 107, 24 L. T. N. S. 137, 19 W. R. 441; *Ex p. Fisher*, 41 L. J. Bankr. 62, L. R. 7 Ch. 636, 26 L. T. N. S. 931, 20 W. R. 849; *Whitmore v. Dowling*, 2 F. & F. 134; *Ex p. Reed*, L. R. 14 Eq. 586, 26 L. T. N. S. 558, 20 W. R. 622; *Newton v. Chantler*, 7 East 138, 3 Smith 137; *Butcher v. Easto*, 1 Dougl. 295; *Worseley v. Demattos*, 1 Burr. 467, 2 Ld. Ken. 218; *Wil-*

(2) *Time as Affecting Consequences of Act.* — While any transfer, payment, etc., to his creditor, by a debtor who is insolvent or in contemplation of insolvency, is declared a preference, still it is not available as an act of bankruptcy without regard to the time at which it was made; but, in order that it may have such effect, it is provided that it must have been made within a certain time, usually from two to six months before the commencement of proceedings by or against him.¹

(3) *Circumstances of Debtor.* — It is only where the debtor is insolvent or in contemplation of insolvency or bankruptcy that the statutes make it an act of bankruptcy for him to pay or secure one or more of his creditors without providing for the others; otherwise no debtor having several creditors could ever pay or give security to one or more, leaving others unpaid or unsecured, without rendering himself liable to bankruptcy or insolvency proceedings.²

son v. Day, 2 Burr. 827; Pulling v. Tucker, 4 B. & Ald. 382, 6 E. C. L. 527; Hartley v. Smith, Buck 368; Ex p. Royce, 14 L. T. N. S. 418; Ex p. Threlfall, 46 L. J. Bankr. 8, 35 L. T. N. S. 675, 25 W. R. 127; Ex p. Greener, 46 L. J. Bankr. 76, 36 L. T. N. S. 781; Ex p. Evans, 39 L. T. N. S. 364; Heath v. Cochrane, 46 L. J. Q. B. 727, 37 L. T. N. S. 280; Ex p. Clater, 48 L. T. N. S. 648; Wedge v. Newlyn, 4 B. & Ad. 831, 24 E. C. L. 173; Porter v. Walker, 1 M. & G. 686, 39 E. C. L. 603, 1 Scott N. R. 568, 9 L. J. C. Pl. 334; Stranger v. Wilkins, 19 Beav. 626; In re Lilburne, 12 L. T. N. S. 209; Bew v. Bill, 16 W. R. 760; The Thames, 63 L. T. N. S. 353, 6 Asp. M. Cas. 536; Ex p. Johnson, 53 L. J. Ch. 763, 26 Ch. D. 338, 50 L. T. N. S. 214, 32 W. R. 693; Kevan v. Mawson, 24 L. T. N. S. 395, 19 W. R. 1145; Ex p. Foxley, L. R. 3 Ch. 515, 18 L. T. N. S. 862, 16 W. R. 831; Allen v. Bonnett, L. R. 5 Ch. 577, 23 L. T. N. S. 437, 18 W. R. 874; Ex p. Hoare, 43 L. J. Bankr. 38; Ex p. Harris, 44 L. J. Bankr. 31, L. R. 19 Eq. 253, 31 L. T. N. S. 621, 23 W. R. 536; In re Jackson, 46 L. J. Bankr. 39, 4 Ch. D. 682, 35 L. T. N. S. 947, 25 W. R. 382; Ex p. Furber, 6 Ch. D. 181, 36 L. T. N. S. 668; Lacon v. Liffen, 4 Giff. 75, 32 L. J. Ch. 25, 9 Jur. N. S. 13, 7 L. T. N. S. 411, 11 W. R. 135, affirmed 32 L. J. Ch. 315, 9 Jur. N. S. 477, 7 L. T. N. S. 774, 11 W. R. 474; Topping v. Keysell, 16 C. B. N. S. 258, 111 E. C. L. 258, 33 L. J. C. Pl. 225, 10 Jur. N. S. 774, 10 L. T. N. S. 526, 12 W. R. 756; Ex p. Games, 12 Ch. D. 314, 40 L. T. N. S. 789, 27 W. R. 744; Ex p. Winder, 45 L. J. Bankr. 14, 1 Ch. D. 290, 33 L. T. N. S. 615, affirmed nom. Sheen; Ex p. Sheen, 45 L. J. Bankr. 89, 1 Ch. D. 560, 34 L. T. N. S. 48, 24 W. R. 685; Martin v. Williams, 20 L. T. N. S. 350; In re Dawson, 16 W. R. 424; Ex p. Dann, 51 L. J. Ch. 290, 17 Ch. D. 26, 44 L. T. N. S. 760, 29 W. R. 771; Ex p. Wilkinson, 52 L. J. Ch. 657, 22 Ch. D. 788, 48 L. T. N. S. 495, 31 W. R. 649; Ex p. King, 2 Ch. D. 256; Ex p. Ellis, 2 Ch. D. 797; Administrator-Gen. v. Lascelles, 63 L. J. P. C. 70, (1894) A. C. 135, 70 L. T. N. S. 179, 42 W. R. 416, 1 Manson 163, 6 Reports 445; Pennell v. Reynolds, 11 C. B. N. S. 709, 103 E. C. L. 709, 5 L. T. N. S. 286; In re Colemore, 35 L. J. Bankr. 8, L. R. 1 Ch. 128, 12 Jur. N. S. 38, 13 L. T. N. S. 621; Curties v. Jacobs, 16 L. T. N. S. 574; Harrison v. Cohen, 32 L. T. N. S. 717; Ex p. Jenkins, 33 W. R. 523, 2 Mor. Bankr. Cas. 71; Anonymous, 4 L. T. N. S. 809; Hutton v. Cruttwell,

1 El. & Bl. 15, 72 E. C. L. 15, 22 L. J. Q. B. 98, 17 Jur. 392; Whitmore v. Claridge, 33 L. J. Q. B. 87, 9 L. T. N. S. 451, 12 W. R. 214; Ex p. Jay, 45 L. T. N. S. 797; Leake v. Young, 5 El. & Bl. 955, 85 E. C. L. 955, 25 L. J. Q. B. 265, 2 Jur. N. S. 516, 4 W. R. 282; Ex p. Zwilchenbart, 3 Mont. D. & De G. 671, affirmed De G. 273, 13 L. J. Bankr. 19, 8 Jur. 1081; Ex p. Cooper, 48 L. J. Bankr. 40, 10 Ch. D. 313, 39 L. T. N. S. 521, 27 W. R. 298; Ex p. Payne, 11 Ch. D. 539, 40 L. T. N. S. 563, 27 W. R. 808.

Minnesota. — Penney v. Haugan, 61 Minn. 279; Corliss v. Jewett, 36 Minn. 364; Baumann v. Cunningham, 48 Minn. 292; Joseph Schlitz Brewing Co. v. Childs, 65 Minn. 409.

1. *Time as Affecting Consequences of Act.* — The English statute provides that a creditor shall not be entitled to present a petition in bankruptcy against the debtor, unless the act of bankruptcy on which the petition is grounded occurred within three months before the presentation of the petition. 46 & 47 Vict., c. 52, § 6.

The bankruptcy law of the United States requires the petition to be filed within four months after the commission of the act of bankruptcy, but provides that such time shall not expire until four months after the date of the recording or registering of the transfer or assignment, when the act consists of having made a transfer for the purpose of giving a preference, if by law such recording or registering is required or permitted, or if it is not from the date when the beneficiary takes notorious exclusive or continuous possession of the property, unless the petitioning creditors have received actual notice of such transfer. Act July 1, 1898 (30 U. S. Stat. at L. 544), § 3, par. b.

As to the rule in this particular under the state insolvency laws, see the various local statutes.

If a creditor enters judgment on a warrant of attorney within the time limited, and thereby obtains a preference, the statute applies, though the warrant was given before such time. In re Moyer, 93 Fed. Rep. 188.

The Time Is Computed from the commencement of the proceeding and not from the date of the appointment of the receiver or assignee. Beardslee v. Beaupre, 44 Minn. 1.

2. *Circumstances of Debtor* — *United States.* — In re Broich, 7 Biss. (U. S.) 303, 15 Nat. Bankr. Reg. 11, 4 Fed. Cas. No. 1,921; In re Bonnet, 1 N. Y. Leg. Obs. 310, 3 Fed. Cas. No. 1,632;

By the phrase "contemplation of bankruptcy" is meant having in view a state of bankruptcy or insolvency, or the commission of an act of bankruptcy or insolvency.¹ And the mere fact that a debtor, at the time of making a transfer as payment to a creditor, was unable to pay all his debts does not bring such act within the inhibition of the statute, if he does not afterwards become an insolvent within the time limited.² It has also been held that merely presenting a petition in bankruptcy or insolvency, without any intention of proceeding with it immediately, is not sufficient, if no action be taken thereon until the time limited has expired.³

(4) *Intent to Create Preferences.* — An intent on the part of the debtor to give a preference is generally necessary to constitute the act an act of bankruptcy.⁴

Atkinson v. Farmers' Bank, Crabbe (U. S.) 529, 2 Fed. Cas. No. 609; *Jones v. Sleeper*, 2 N. Y. Leg. Obs. 131, 13 Fed. Cas. No. 7,496; *Matter of Dunham*, 2 Ben. (U. S.) 488, 2 Nat. Bankr. Reg. 17, 8 Fed. Cas. No. 4,143; *Morgan v. Mastick*, 2 Nat. Bankr. Reg. 521, 17 Fed. Cas. No. 9,803.

California. — *Matthews v. Chaboya*, 116 Cal. 435; *In re Mealy*, (Cal. 1899) 59 Pac. Rep. 313.

Connecticut. — *Utley v. Smith*, 24 Conn. 290, 63 Am. Dec. 163; *Hayden v. Allyn*, 55 Conn. 280.

Kentucky. — *H. B. Claflin Co. v. Levitch*, (Ky. 1895) 29 S. W. Rep. 452; *Hampton v. Morris*, 2 Met. (Ky.) 336; *Shouse v. Utterbach*, 2 Met. (Ky.) 52; *Applegate v. Murrill*, 4 Met. (Ky.) 22; *Millett v. Pottinger*, 4 Met. (Ky.) 213; *Story v. Graham*, 4 Met. (Ky.) 319.

Vermont. — *Larkin v. Hapgood*, 56 Vt. 597.
If a Debtor Is Solvent, he may pay any or all of his debts, though proceedings in bankruptcy are pending against him. *In re Oregon Bulletin Printing, etc., Co.*, 13 Nat. Bankr. Reg. 303, 18 Fed. Cas. No. 10,559, 3 Sawy. (U. S.) 614, 14 Nat. Bankr. Reg. 405, 18 Fed. Cas. No. 10,561. See also *In re Bonnet*, 1 N. Y. Leg. Obs. 310, 3 Fed. Cas. No. 1,632.

Debtor's Knowledge of His Condition. — The debtor, besides intending to give a preference, must know that he is insolvent in order to constitute a transfer to a creditor a fraudulent preference. *Miller v. Keys*, 3 Nat. Bankr. Reg. 224, 17 Fed. Cas. No. 9,578.

And if he knows that he is insolvent, it does not avoid the effect of a preference given by him that he honestly believed that he would be able to go on in business. *Castleberg v. Wheeler*, 68 M. 1. 266.

A Mortgage Given by a Railroad Company, though it is technically insolvent or likely soon to become insolvent, to secure all its creditors equally out of its earnings, or to pay such as refuse the security their ratable proportion of the proceeds, is not an act of bankruptcy, where the mortgage was given in good faith to enable the company to continue its business. *In re Union Pac. R. Co.*, 10 Nat. Bankr. Reg. 178, 24 Fed. Cas. No. 14,376.

1. *Meaning of Phrase "Contemplation of Bankruptcy," etc.* — *Hutchins v. Taylor*, 5 Law Rep. 289, 12 Fed. Cas. No. 6,953; *Matter of Dibblee*, 3 Ben. (U. S.) 283, 2 Nat. Bankr. Reg. 617, 7 Fed. Cas. No. 3,884; *In re Craft*, 6 Blatchf. (U. S.) 177, 2 Nat. Bankr. Reg. 111, 6 Fed. Cas. No. 3,317. See also CONTEMPLATION defined, vol. 7, p. 23, note 2.

2. *Necessity of Insolvency or Bankruptcy Pro-*

ceedings Within Time Limited. — *Witters v. Sowles*, 32 Fed. Rep. 762, 33 Fed. Rep. 542. See also *Anstedt v. Bentley*, 61 Wis. 629; *Stevens v. Breen*, 75 Wis. 595.

A Stockholder's Bill for the appointment of a receiver in order to obtain better management of the corporation, and to arrange for the settlement of its liabilities, is not an insolvency proceeding within the meaning of a statute forbidding any preferential disposition of property within a certain time before the commencement of insolvency proceedings. *Illinois Steel Co. v. Putnam*, 68 Fed. Rep. 515.

3. *Filing Petition Without Intent to Proceed Immediately.* — *Witters v. Sowles*, 32 Fed. Rep. 758, 33 Fed. Rep. 540.

4. *Intention of Debtor to Give Preference — United States.* — *In re Broich*, 7 Biss. (U. S.) 303, 15 Nat. Bankr. Reg. 11, 4 Fed. Cas. No. 1,921; *Matter of Dunham*, 2 Ben. (U. S.) 488, 2 Nat. Bankr. Reg. 17, 8 Fed. Cas. No. 4,143; *Atkinson v. Farmers' Bank, Crabbe* (U. S.) 529, 2 Fed. Cas. No. 609; *Winter v. Iowa, etc., R. Co.*, 2 Dill. (U. S.) 487, 7 Nat. Bankr. Reg. 289, 30 Fed. Cas. No. 17,890; *Miller v. Keys*, 3 Nat. Bankr. Reg. 224, 17 Fed. Cas. No. 9,578; *Morgan v. Mastick*, 2 Nat. Bankr. Reg. 521, 17 Fed. Cas. No. 9,803; *Smith v. Teutonia Ins. Co.*, 4 Chicago Leg. N. 130, 22 Fed. Cas. No. 13,115; *Jones v. Sleeper*, 2 N. Y. Leg. Obs. 131, 13 Fed. Cas. No. 7,496; *Albany Exch. Bank v. Johnson*, 1 Fed. Cas. No. 133; *Doan v. Compton*, 2 Nat. Bankr. Reg. 607, 7 Fed. Cas. No. 3,940.

California. — *Matthews v. Chaboya*, 111 Cal. 435; *Hass v. Whittier*, 87 Cal. 613, 97 Cal. 411.

Connecticut. — *Utley v. Smith*, 24 Conn. 290, 63 Am. Dec. 163.

Delaware. — *Horse v. Stockley*, 4 Del. Ch. 536, affirmed 4 Houst. (Del.) 603.

Kentucky. — *H. B. Claflin Co. v. Levitch*, (Ky. 1895) 29 S. W. Rep. 452; *Hampton v. Morris*, 2 Met. (Ky.) 336; *Shouse v. Utterbach*, 2 Met. (Ky.) 52; *Applegate v. Murrill*, 4 Met. (Ky.) 22; *Millett v. Pottinger*, 4 Met. (Ky.) 213; *Story v. Graham*, 4 Met. (Ky.) 319.

Louisiana. — *Ellis v. Fisher*, 10 La. Ann. 479.

Maine. — *Randall v. Lunt*, 51 Me. 246.

Maryland. — *Glenn v. Baker*, 1 Md. Ch. 73.

Massachusetts. — *Mundo v. Shepard*, 166 Mass. 323; *Bridges v. Miles*, 152 Mass. 249; *Sartwell v. North*, 144 Mass. 188; *Rice v. Mills*, 117 Mass. 228.

Minnesota. — *Baumann v. Cunningham*, 48 Minn. 292; *Wright v. Fergus Falls Nat. Bank*, 48 Minn. 120; *Matter of Church, etc., Mfg. Co.*, 40 Minn. 39; *Fishel v. Burt*, 66 Minn. 250.

Evidence of Intent to Prefer. — Direct evidence of an intent to prefer is not necessary to prove that fact, but it may be inferred from the fact that a preference was given.¹ And it is generally provided by statute that any sale, transfer, etc., not in the usual course of business, shall be *prima evidence* of an intent to prefer.²

The Debtor May Testify as to what his intent was in making the transfer or payment.³

(5) *Creditor's Knowledge as to Circumstances and Intent of Debtor.* — In order that a preference may constitute an act of bankruptcy it is not necessary that the creditor should know that the debtor intended to give a preference or that he was insolvent or in contemplation of insolvency,⁴ though such knowledge is material as affecting the right of the assignee in bankruptcy or insolvency to recover from the creditor the property or money received by him.⁵

3. Assignment for Benefit of Creditors. — An assignment for the benefit of creditors is generally declared an act of bankruptcy or insolvency, even though without preferences,⁶ and without regard to the question of the assignor's

Vermont — *Larkin v. Hapgood*, 56 Vt. 597.

No Intent Is Necessary under the bankruptcy law of the United States, if the debtor has suffered or permitted a creditor to obtain a preference through legal proceedings. *In re Moyer*, 93 Fed. Rep. 188. Or if the act of bankruptcy alleged was a general assignment for the benefit of creditors. Act of July 1, 1898 (30 U. S. Stat. at L. 544), § 3, *par. a.* (4).

1. Intent Inferred from Fact of Preference. — *Peckham v. Barrows*, 3 Story (U. S.) 544, 19 Fed. Cas. No. 10,897; *Whipple v. Bond*, 164 Mass. 182; *Chipman v. McClellan*, 159 Mass. 304; *Sartwell v. North*, 144 Mass. 188; *Beals v. Clark*, 13 Gray (Mass.) 18; *Denny v. Dana*, 2 Cush. (Mass.) 160, 48 Am. Dec. 655; *Penney v. Haugan*, 61 Minn. 279; *Fisher v. Utendorfer*, 68 Minn. 226; *Moore v. American L. & T. Co.*, 80 Fed. Rep. 49, construing the *Minnesota* s. a. 112.

2. Sale, etc., Not In Usual Course of Business. — *Meserve v. Weld*, 75 Me. 453; *Stevens v. Pierce*, 147 Mass. 510; *Read v. Moody*, 60 Vt. 668.

Presumption from Natural and Necessary Consequences of Acts. — As every man must be presumed to know the natural and necessary consequences of his own acts, an intent to prefer may be inferred from the passive conduct of a debtor in permitting a creditor to obtain a judgment, where he is actually insolvent in the sense of an entire inadequacy of assets to pay all his debts. *Fisher v. Utendorfer*, 68 Minn. 226; *Penney v. Haugan*, 61 Minn. 279; *Thompson v. Johnson*, 55 Minn. 515; *Hastings Maltng Co. v. Heller*, 47 Minn. 71; *Tripp v. Northwestern Nat. Bank*, 45 Minn. 383.

3. Debtor May Testify as to Intent. — *Stearns v. Gosselin*, 58 Vt. 38.

4. Knowledge of Creditor Not Material. — *In re Oregon Bulletin Printing, etc., Co.*, 13 Nat. Bankr. Reg. 503, 18 Fed. Cas. No. 10,559, 3 Sawy. (U. S.) 614, 14 Nat. Bankr. Reg. 405, 18 Fed. Cas. No. 10,501; *Peckham v. Barrows*, 3 Story (U. S.) 544, 19 Fed. Cas. No. 10,897.

5. Knowledge of Creditor as Affecting Recovery by Assignee. — See *infra*, this title, *Assignee or Trustee — What Passes to Assignee or Trustee — Property Transferred by Debtor*.

6. Assignment for Benefit of Creditors an Act of Bankruptcy — England. — *Ex p. Bourne*, 16

Ves. Jr. 149; *Ex p. Smith*, 1 *Ves. & B.* 518, 2 *Rose* 63; *Stewart v. Moody*, 1 C. M. & R. 777, 5 *Tyrw.* 403; *Tappenden v. Burgess*, 4 *East* 230, 1 *Smith* 33; *Botcherby v. Lancaster*, 3 N. & M. 383, 1 *Ad. & El.* 77, 28 E. C. L. 45; *Doe v. Powell*, 8 *Dowl. & R.* 35, 5 B. & C. 308, 11 E. C. L. 241; *Carr v. Acraman*, 11 *Exch.* 566, 25 L. J. *Exch.* 90; *Ex p. Wensley*, 1 *De G. J. & Sm.* 273, 32 L. J. *Bankr.* 23, 9 *Jur. N. S.* 315, 7 L. T. N. S. 548, 11 *W. R.* 241; *Turner v. Hardcastle*, 11 C. B. N. S. 683, 103 E. C. L. 683, 31 L. J. C. Pl. 193, 5 L. T. N. S. 748; *Ex p. Morgan*, 1 *De G. J. & S.* 288; *Cattell v. Corral*, 4 Y. & C. *Exch.* 228; *Chase v. Goble*, 3 *Scott N. R.* 245, 2 M. & G. 930, 40 E. C. L. 698; *Ex p. Wilson*, 29 L. T. N. S. 860, 22 *W. R.* 241; *Ex p. Squire*, 38 L. J. *Bankr.* 13, L. R. 4 *Ch.* 47, 19 L. T. N. S. 272, 17 *W. R.* 40, *overruling Ex p. Potter*, 3 *De G. J. & S.* 240, 34 L. J. *Bankr.* 46, 11 *Jur. N. S.* 49, 11 L. T. N. S. 435, 13 *W. R.* 189; *Ex p. Heapy*, 58 L. J. Q. B. 297, 60 L. T. N. S. 273, 37 *W. R.* 415, 6 *Mor. Bankr. Cas.* 66; *Eckhardt v. Wilson*, 8 T. R. 140, 4 *Rev. Rep.* 618; *Ex p. M'Lean*, 24 L. T. N. S. 144; *In re Adamson*, 71 L. T. N. S. 579, 43 *W. R.* 192, 2 *Manson* 153, 15 *Reports* 248; *Ex p. Alsop*, 1 *De G. F. & J.* 289, 29 L. J. *Bankr.* 7, 6 *Jur. N. S.* 282, 1 L. T. N. S. 285, 8 *W. R.* 106; *In re Spackman*, 59 L. J. Q. B. 306, 24 Q. B. D. 728, 62 L. T. N. S. 849, 38 *W. R.* 497, 7 *Mor. Bankr. Cas.* 100, *reversing* 62 L. T. N. S. 266, 38 *W. R.* 368; *In re Hughes*, 62 L. J. Q. B. 358, (1893) 1 Q. B. 595, 68 L. T. N. S. 629, 41 *W. R.* 466, 10 *Mor. Bankr. Cas.* 91, 4 *Reports* 368; *Simpson v. Sikes*, 6 M. & S. 295; *Ex p. Mucklow*, 3 *Deac. & C.* 25; *Doe v. Powell*, 8 *Dowl. & R.* 35, 5 B. & C. 308, 11 E. C. L. 241, 2 Y. & J. 372, 4 L. J. K. B. 150, 29 *Rev. Rep.* 253; *Dutton v. Morrison*, 1 *Rose* 213, 17 *Ves. Jr.* 193, 11 *Rev. Rep.* 56; *Back v. Gooch*, 4 *Campb.* 232, *Holt N. P.* 13, 3 E. C. L. 16; *Ex p. Mayou*, 11 *Jur. N. S.* 433, 12 L. T. N. S. 254, 13 *W. R.* 620; *Lees v. Whiteley*, 35 L. J. Ch. 412, L. R. 2 *Eq.* 143, 14 L. T. N. S. 472, 14 *W. R.* 534; *Hardwick v. Wright*, 35 *Beav.* 133; 46 & 47 *Vict.*, c. 52, § 4 (d).

United States. — *In re Kraft*, 4 *Fed. Rep.* 523; *Jones v. Sleeper*, 2 N. Y. *Leg. Obs.* 131, 13 *Fed. Cas. No.* 7,496; *In re Randall*, *Deady* (U. S.) 557, 3 *Nat. Bankr. Reg.* 18, 20 *Fed. Cas. No.* 11,551; *In re Burt*, 1 *Dill.* (U. S.) 439, 4

solvency or insolvency.¹ But it has been held not to be an act of bankruptcy, if the instrument is wholly void and inoperative,² or if the assignment was made, not to defeat the law, but to protect the debtor's property for the benefit of all the creditors.³

Assent of Creditors. — A general assignment for the benefit of creditors cannot be relied on as an act of bankruptcy by any one who is a party or privy to it;⁴ but the assent of the creditor must be obtained without fraud or misrepresentation on the part of the debtor,⁵ and the assignment must not contain any preferences.⁶

4. Departure of Debtor or Concealment of Person. — The *English* bankruptcy law makes it an act of bankruptcy for a debtor, with intent to defeat or delay his creditors, to depart or remain out of the country, or in any way to absent himself, or to keep "housed."⁷ Substantially the same provision was con-

Fed. Cas. No. 2,210; *Spicer v. Ward*, 3 Nat. Bankr. Reg. 512, 22 Fed. Cas. No. 13,241; *Cragin v. Thompson*, 2 Dill. (U. S.) 513, 12 Nat. Bankr. Reg. 81, 6 Fed. Cas. No. 3,320; *In re Mendelsohn*, 3 Sawy. (U. S.) 342, 12 Nat. Bankr. Reg. 533, 17 Fed. Cas. No. 9,420; *Matter of Frisbee*, 14 Blatchf. (U. S.) 185, 15 Nat. Bankr. Reg. 522, 9 Fed. Cas. No. 5,129; *In re Croft*, 8 Biss. (U. S.) 188, 17 Nat. Bankr. Reg. 324, 6 Fed. Cas. No. 3,404; *Matter of Smith*, 4 Ben. (U. S.) 1, 3 Nat. Bankr. Reg. 377, 22 Fed. Cas. No. 12,974; *Perry v. Langley*, 1 Nat. Bankr. Reg. 559, 19 Fed. Cas. No. 11,006; *In re Chamberlain*, 3 Nat. Bankr. Reg. 710, 5 Fed. Cas. No. 2,574; *Wakeman v. Hoyt*, 5 Law Rep. 309, 28 Fed. Cas. No. 17,051; *Ex p. Breneman*, *Crabbe* (U. S.) 456, 4 Fed. Cas. No. 1,830; *Gassett v. Morse*, 21 Vt. 627, 10 Fed. Cas. No. 5,264; *Grow v. Ballard*, 2 Nat. Bankr. Reg. 194, 11 Fed. Cas. No. 5,848; *Davis v. Bohle*, 92 Fed. Rep. 325, *affirming* 91 Fed. Rep. 366; *In re Meyer*, 98 Fed. Rep. 976; *In re Empire Metallic Bedstead Co.*, 98 Fed. Rep. 981; Act July 1, 1898 (30 U. S. Stat. at L. 544), § 3.

Maryland. — *Pfaff v. Prag*, 79 Md. 369; *Riley v. Carter*, 76 Md. 581, 35 Am. St. Rep. 443.

Massachusetts. — *Cunningham v. Seavey*, 171 Mass. 341.

Rhode Island. — *Merrill v. Bowler*, 20 R. I. 226.

And see the several state insolvency laws.

Though the Assignee Received Nothing in Excess of the Debtor's Exemptions, a general assignment will still be held an act of bankruptcy. *Farrin v. Crawford*, 2 Nat. Bankr. Reg. 602, 8 Fed. Cas. No. 4,686.

Assignment by One Partner. — An insolvent partnership may be adjudged a bankrupt where the liquidating partner executes a general assignment of the partnership property for the benefit of its creditors, and no effort is made by the other partner to prevent it. *Chemical Nat. Bank v. Meyer*, 92 Fed. Rep. 896.

An Application by a Corporation for a Receiver to wind up its affairs is not equivalent to an assignment for the benefit of creditors. *In re Empire Metallic Bedstead Co.*, 95 Fed. Rep. 957. See also *In re Baker-Ricketson Co.*, 97 Fed. Rep. 489.

1. Insolvency Not Material. — *George M. West Co. v. Lea*, 19 U. S. Sup. Ct. Rep. 836; *Lea v. George M. West Co.*, 91 Fed. Rep. 237; *Bray v. Cobb*, 91 Fed. Rep. 102; *Leidigh Carriage Co. v. Stengel*, 95 Fed. Rep. 637.

2. Void Assignment. — An assignment which is not stamped as required by the internal revenue law is void, and therefore does not constitute an act of bankruptcy. *Matter of Dunham*, 2 Ben. (U. S.) 488, 2 Nat. Bankr. Reg. 17, 8 Fed. Cas. No. 4,143. Compare *Matter of Lawrence*, 10 Ben. (U. S.) 4, 18 Nat. Bankr. Reg. 516, 15 Fed. Cas. No. 8,133.

But if it can be used as a means of giving a preference, though not enforceable because of its defective execution, it is still an act of bankruptcy. *In re Mendelsohn*, 3 Sawy. (U. S.) 342, 12 Nat. Bankr. Reg. 533, 17 Fed. Cas. No. 9,420.

Want of a stamp is held not to avoid the deed in *England*. *Ex p. Heapy*, 6 Mor. Bankr. Cas. 66.

As to how far a deed, incomplete for the want of the assent of the trustee or for other reasons, can be an act of bankruptcy, in *England*, see *Ponsford v. Walton*, L. R. 3 C. P. 167; *Dutton v. Morrison*, 17 Ves. Jr. 193.

3. Assignment Made to Protect Creditors. — *Langley v. Perry*, 2 Nat. Bankr. Reg. 596, 14 Fed. Cas. No. 8,067.

4. Assignment Not Available to Assenting Creditors as Act of Bankruptcy. — *Ramford v. Baron*, 2 T. R. 594, note *a*; *Marshall v. Birkworth*, 4 B. & Ad. 508, 24 E. C. L. 108; *Jackson v. Irvin*, 2 Campb. 49; *In re Adamson*, 2 Manson 153; *In re Hawley*, 4 Manson 41; *In re Woodroff*, 4 Manson 46; *Ex p. Michael*, 8 Mor. Bankr. Cas. 305; *Ex p. Rooke*, 6 Mor. Bankr. Cas. 30; *Ex p. Stray*, L. R. 2 Ch. 374; *Ex p. Alsop*, 29 L. J. Bankr. 7; *Olliver v. King*, 25 L. J. Ch. 427.

5. Assent of Creditor Must Be Obtained Without Fraud. — *Ex p. Parrier*, 6 Mor. Bankr. Cas. 49.

6. Assignment Must Be Without Preferences. — *Ex p. Marshall*, 1 Mont. D. & De G. 575.

7. Departure or Concealment of Debtor — Rule in England. — *In re Wood*, L. R. 7 Ch. 302; *Ex p. Goater*, 30 L. T. N. S. 620; *Holroyd v. Whitehead*, 3 Campb. 530; *Ex p. Coates*, 5 Ch. D. 979; *Ex p. Fiddian*, 9 Mor. Bankr. Cas. 95; *Williams v. Nunn*, 1 Taunt. 270; *Fowler v. Padget*, 7 T. R. 509; *Rouch v. Great Western R. Co.*, 1 Q. B. 51, 41 E. C. L. 432; *Windham v. Paterson*, 1 Stark. 144, 2 E. C. L. 62; *Ex p. Crispin*, L. R. 8 Ch. 374; *Ex p. Gutierrez*, 11 Ch. D. 298; *Ex p. Osborne*, 2 Ves. & B. 17; *Ex p. Bunny*, 1 De G. & J. 309; *Ex p. Brandon*, 25 Ch. D. 501; *Bernasconi v. Farebrother*, 10 B. & C. 549, 21 E. C. L. 128; *Russell v. Bell*, 10 M. & W. 340; *Ex p. McKeand*, 6 Mor.

tained in the earlier bankruptcy laws of the *United States*,¹ but it was not carried into the present statute.²

5. Removal or Concealment of Property. — Some of the statutes make it an act of bankruptcy for a debtor to remove or conceal his property, or any part of it, with intent to defraud or delay creditors.³

6. Arrest of Debtor. — Under some statutes an act of bankruptcy is committed, if the debtor is arrested and imprisoned at the suit of a creditor. It was so provided by the former bankruptcy laws of the *United States*,⁴ but not by the present law.⁵ This provision is still found, however, in some of the state insolvency laws.⁶

7. Seizure of Goods under Legal Process. — Sometimes it is made a ground for proceeding against a debtor under the statute that an attachment or execution has been levied on his property, and he does not obtain a discharge thereof.⁷

Bankr. Cas. 240; *In re Alderson*, (1895) 1 Q. B. 183; *Ex p. Gardner*, 1 Ves. & B. 45; *Holroyd v. Gwynne*, 2 Taunt. 176; *Key v. Shaw*, 8 Bing. 320, 21 E. C. L. 305; *Dudley v. Vaughan*, 1 Campb. 271; *Fisher v. Boucher*, 10 B. & C. 705, 21 E. C. L. 152; *Richardson v. Pratt*, 52 L. T. N. S. 614.

More Failure to Keep an Appointment with a creditor is not an act of bankruptcy unless coupled with an intent to defeat or delay the creditor. *Ex p. Meyer*, L. R. 7 Ch. 188; *Ex p. Lopez*, L. R. 6 Ch. 894; *Ex p. Foster*, 4 Mor. Bankr. Cas. 258.

Actual Physical Absence is not necessary. Any concealment will be sufficient. *In re Alderson*, (1895) 1 Q. B. 183.

The Duration of Absence is not material, if there is an intent to hinder or delay creditors. *Bayly v. Schofield*, 1 M. & S. 338; *Chenoweth v. Hay*, 1 M. & S. 676; *Judine v. Da Cossen*, 1 B. & P. N. R. 234.

Refusing to See Creditors at unreasonable hours is not an act of bankruptcy. *Smith v. Currie*, 3 Campb. 349.

1. Provisions of Federal Statutes. — Act April 4, 1800 (2 U. S. Stat. at L. 19), § 1; Act Aug. 19, 1841 (5 U. S. Stat. at L. 440), § 1; Act March 2, 1867 (14 U. S. Stat. at L. 517), § 39.

Departure of Partner at Instance of Copartner Held Not an Act of Bankruptcy. — *In re Terry*, 5 Biss. (U. S.) 110, 23 Fed. Cas. No. 13,836.

Concealment by Debtor to Avoid Service of Process was an act of bankruptcy under the act of March 2, 1867. *Brock v. Hoppock*, 2 Nat. Bankr. Reg. 7, 4 Fed. Cas. No. 1,912.

Under the law of April 4, 1800, it was not an act of bankruptcy for a debtor to conceal himself from his creditors, unless service of process on him was thereby prevented. *Barnes v. Billington*, 1 Wash. (U. S.) 29, 2 Fed. Cas. No. 1,015.

As to the state laws on the subject see the various local insolvency laws.

And see *Pleasants v. Meng*, 1 Dall. (Pa.) 380; *Joy v. Cossart*, 1 Yeates (Pa.) 50, 2 Dall. (Pa.) 126, where it was questioned whether the flight of a resident of another state to his home was an act of bankruptcy.

2. Departure, etc., Not an Act of Bankruptcy under Law of 1898. — See Act July 1, 1898 (30 U. S. Stat. at L. 544), § 3, enumerating the acts of bankruptcy.

3. Removal or Concealment of Property. — Anonymous, 1 Pac. L. Rep. 173, 1 Fed. Cas. No. 466; *Fullings v. Fullings*, 3 N. J. L. J. 240,

9 Fed. Cas. No. 5,151a; *Livermore v. Bagley*, 3 Mass. 487; *Blake v. Sarvin*, 10 Allen (Mass.) 340. And see *Fox v. Eckstein*, 4 Nat. Bankr. Reg. 373, 9 Fed. Cas. No. 5,009.

The Bankruptcy Law of July 1, 1898, § 3, makes it an act of bankruptcy for a debtor to conceal or remove, or permit to be concealed or removed, any part of his property, with intent to hinder, delay or defraud his creditors, or any of them.

4. Arrest of Debtor — Rule under Former Bankruptcy Laws. — *In re Cohn*, 7 Nat. Bankr. Reg. 31, 6 Fed. Cas. No. 2,967; *Hunt v. Pooke*, 5 Nat. Bankr. Reg. 161, 12 Fed. Cas. No. 6,896; *Matter of Davis*, 3 Ben. (U. S.) 482, 3 Nat. Bankr. Reg. 339, 7 Fed. Cas. No. 3,615; *Van Kleeck v. Thurber*, 1 Pa. L. J. 402, 28 Fed. Cas. No. 16,861; *Wakeman v. Hoyt*, 5 Law Rep. 309, 28 Fed. Cas. No. 17,051; *Clarke v. Ray*, 1 Har. & J. (Md.) 318; *Nelms v. Pugh*, 1 Murph. (5 N. Car.) 149.

5. See Act July 1, 1898 (30 U. S. Stat. at L. 544), § 3, enumerating the acts of bankruptcy.

6. See the various state insolvency laws.

7. Seizure of Goods under Legal Process — England. — *Ex p. Pearson*, L. R. 8 Ch. 667; *Ex p. Brooke*, L. R. 9 Ch. 301; *Ex p. Villais*, L. R. 9 Ch. 432; *In re North*, (1895) 2 Q. B. 264; *Ex p. Caucasian Trading Corp.*, (1896) 1 Q. B. 368.

United States. — *In re Schick*, 2 Ben. (U. S.) 5, 1 Nat. Bankr. Reg. 177, 21 Fed. Cas. No. 12,455; *Fisher v. Currier*, 1 Pa. L. J. 270, 9 Fed. Cas. No. 4,818; *Jones v. Sleeper*, 2 N. Y. Leg. Obs. 131, 13 Fed. Cas. No. 7,496; *Rankin v. Florida, etc., R. Co.*, 1 Nat. Bankr. Reg. 647, 20 Fed. Cas. No. 11,567; *Wakeman v. Hoyt*, 5 Law Rep. 309, 28 Fed. Cas. No. 17,051; *In re Wells*, 3 Nat. Bankr. Reg. 371, 29 Fed. Cas. No. 17,388; *In re Reichman*, 91 Fed. Rep. 624; *In re Ferguson*, 95 Fed. Rep. 429; *Parmenter Mfg. Co. v. Stoever*, 97 Fed. Rep. 330; *In re Baker-Ricketson Co.*, 97 Fed. Rep. 489; *In re Chapman*, 99 Fed. Rep. 395.

Massachusetts. — *Kimball v. Morris*, 2 Met. (Mass.) 573; *Dennis v. Sayles*, 11 Met. (Mass.) 233; *Bates v. Chapin*, 8 Cush. (Mass.) 99; *Taunton Nat. Bank v. Stetson*, 145 Mass. 366.

Minnesota. — *Maxfield v. Edwards*, 38 Minn. 539.

See also the various statutes on the subject.

A Receiver Appointed by a State Court to take possession of the property of a debtor takes it under legal process. *In re Merchants Ins. Co.*, 3 Biss. (U. S.) 162, 6 Nat. Bankr. Reg. 43, 17 Fed. Cas. No. 9,441; *In re Bininger*, 7

8. Nonpayment of Commercial Paper. — The bankruptcy law of 1867, as amended by Act July 14, 1870, provided that any person who, being a banker, broker, merchant or trader, manufacturer or miner, had fraudulently stopped or suspended and not resumed payment of his commercial paper within a period of fourteen days, should be deemed to have committed an act of bankruptcy; ¹

Blatchf. (U. S.) 262, 3 Fed. Cas. No. 1,420. And see Matter of New Amsterdam F. Ins. Co., 6 Ben. (U. S.) 368, 18 Fed. Cas. No. 10,140.

1. Nonpayment of Commercial Paper. — *In re* Carter, 3 Biss. (U. S.) 195, 6 Nat. Bankr. Reg. 293, 5 Fed. Cas. No. 2,470; *McLean v. Brown*, 4 Nat. Bankr. Reg. 585, 16 Fed. Cas. No. 8,880; *In re* McNaughton, 8 Nat. Bankr. Reg. 44, 16 Fed. Cas. No. 8,912; *In re* Wilson, 5 Biss. (U. S.) 387, 8 Nat. Bankr. Reg. 396, 30 Fed. Cas. No. 17,780; *In re* Bininger, 7 Blatchf. (U. S.) 262, 3 Fed. Cas. No. 1,420; *In re* Chandler, 1 Lowell (U. S.) 478, 4 Nat. Bankr. Reg. 213, 5 Fed. Cas. No. 2,591; *In re* Wolf, 4 Sawy. (U. S.) 168, 17 Nat. Bankr. Reg. 423, 30 Fed. Cas. No. 17,923; *In re* Cowles, 1 Nat. Bankr. Reg. 280, 6 Fed. Cas. No. 3,297; *In re* Howland, 2 Nat. Bankr. Reg. 357, 12 Fed. Cas. No. 6,791; *Mendenhall v. Carter*, 7 Nat. Bankr. Reg. 320, 17 Fed. Cas. No. 9,426; *In re* Kenyon, 6 Nat. Bankr. Reg. 238, 30 Fed. Cas. No. 17,780, note; Matter of Kenyon, 1 Utah 47.

Rule Restricted to Persons Designated. — The weight of authority is to the effect that only a person in one of the classes enumerated in the statute (bankers, brokers, etc.) could commit an act of bankruptcy by suspending payment of commercial paper. *In re* Greenville, etc., R. Co., 5 Chicago Leg. N. 124, 10 Fed. Cas. No. 5,787; *Winter v. Iowa*, etc., R. Co., 2 Dill. (U. S.) 487, 7 Nat. Bankr. Reg. 289, 30 Fed. Cas. No. 17,890; *In re* Smith, 2 Lowell (U. S.) 69, 22 Fed. Cas. No. 12,981; *In re* Woods, 29 Leg. Int. (Pa.) 236, 7 Nat. Bankr. Reg. 126, 30 Fed. Cas. No. 17,990; *Alabama*, etc., R. Co. *v.* Jones, 5 Nat. Bankr. Reg. 97, 1 Fed. Cas. No. 126. But Judge Blatchford, after an elaborate discussion as to grammatical construction, reached the opposite conclusion. Matter of Hercules Mut. L. Assur. Soc., 6 Ben. (U. S.) 35, 6 Nat. Bankr. Reg. 338, 12 Fed. Cas. No. 6,402.

A Retired Trader, under the provision recited in the text, could commit an act of bankruptcy by suspending payment of paper given while a trader. *In re* Weikert, 3 Nat. Bankr. Reg. 27, 29 Fed. Cas. No. 17,361; *Davis v. Armstrong*, 3 Nat. Bankr. Reg. 33, 7 Fed. Cas. No. 3,624. But not if the paper was given after retiring, though for a debt incurred while trading. *Jack's Case*, 1 Woods (U. S.) 549, 13 Nat. Bankr. Reg. 296, 13 Fed. Cas. No. 7,119; *McKenney v. Baker*, 2 Hask. (U. S.) 130, 16 Fed. Cas. No. 8,853.

Character of Stoppage or Suspension. — It is not only when the stoppage is fraudulent that it constitutes an act of bankruptcy. The meaning of the statute is that the act occurs when the debtor fraudulently stops payment, or when, without fraud, he suspends payment and does not resume payment within fourteen days. *In re* Cowles, 1 Nat. Bankr. Reg. 280, 6 Fed. Cas. No. 3,297; *Dunn v. Compton*, 2 Nat. Bankr. Reg. 607, 7 Fed. Cas. No. 3,940; *In re* Sohoo, 3 Nat. Bankr. Reg. 215, 22 Fed. Cas. No. 13,162; *In re* Thompson, 2 Biss. (U.

S.) 166, 3 Nat. Bankr. Reg. 184, 23 Fed. Cas. No. 13,936; *In re* Weikert, 3 Nat. Bankr. Reg. 27, 29 Fed. Cas. No. 17,361; *In re* Hall, 1 Dill. (U. S.) 587, 11 Fed. Cas. No. 5,920; *In re* Wells, 1 Nat. Bankr. Reg. 171, 29 Fed. Cas. No. 17,387; *Baldwin v. Wilder*, 6 Nat. Bankr. Reg. 85, 2 Fed. Cas. No. 806. See also *In re* Hollis, 3 Nat. Bankr. Reg. 309, 12 Fed. Cas. No. 6,621; *In re* Laner, 9 Nat. Bankr. Reg. 494, 14 Fed. Cas. No. 8,055; *In re* Ballard, 2 Nat. Bankr. Reg. 250, 2 Fed. Cas. No. 816; *In re* Shea, 2 Biss. (U. S.) 156, 3 Nat. Bankr. Reg. 187, 21 Fed. Cas. No. 12,729; *In re* Raynor, 11 Blatchf. (U. S.) 43, 7 Nat. Bankr. Reg. 527, 20 Fed. Cas. No. 11,597; *In re* Massachusetts Brick Co., 2 Lowell (U. S.) 58, 5 Nat. Bankr. Reg. 408, 16 Fed. Cas. No. 9,259. But see Matter of Cone, 2 Ben. (U. S.) 502, 2 Nat. Bankr. Reg. 21, 6 Fed. Cas. No. 3,095; *In re* Jersey City Window Glass Co., 1 Nat. Bankr. Reg. 426, 13 Fed. Cas. No. 7,292; *In re* Leeds, 1 Nat. Bankr. Reg. 521, 15 Fed. Cas. No. 8,205; Matter of Davis, 3 Ben. (U. S.) 482, 3 Nat. Bankr. Reg. 339, 7 Fed. Cas. No. 3,615. But it is not such a stoppage or suspension of payment where the debtor refuses to pay his commercial paper on the ground that he has a legal defense. *In re* Thompson, 2 Biss. (U. S.) 166, 3 Nat. Bankr. Reg. 184, 23 Fed. Cas. No. 13,936; *In re* Sykes, 5 Biss. (U. S.) 113, 23 Fed. Cas. No. 13,708; *McLean v. Brown*, 4 Nat. Bankr. Reg. 585, 16 Fed. Cas. No. 8,880; Matter of Hercules Mut. L. Assur. Soc., 6 Ben. (U. S.) 35, 6 Nat. Bankr. Reg. 338, 12 Fed. Cas. No. 6,402; Matter of Mannheim, 6 Ben. (U. S.) 270, 7 Nat. Bankr. Reg. 342, 16 Fed. Cas. No. 9,038; Matter of Westcott, 6 Ben. (U. S.) 135, 7 Nat. Bankr. Reg. 285, 29 Fed. Cas. No. 17,430; *In re* Mann, 3 Biss. (U. S.) 442, 7 Nat. Bankr. Reg. 468, 17 Fed. Cas. No. 9,925. Or where he is enjoined from making any disposition or transfer of his property. Matter of Pratt, 6 Ben. (U. S.) 165, 9 Nat. Bankr. Reg. 47, 19 Fed. Cas. No. 11,360.

Who May Take Advantage of Suspension. — Any creditor may take advantage of the suspension, whether he held the paper as to which the debtor was in default or not. *In re* Hall, 1 Dill. (U. S.) 587, 11 Fed. Cas. No. 5,920.

Resumption of Payment after the expiration of the fourteen days does not cure the act of bankruptcy unless all the debts are paid. *In re* Ess, 3 Biss. (U. S.) 201, 7 Nat. Bankr. Reg. 133, 8 Fed. Cas. No. 4,530.

As to What Is "Commercial Paper" within the meaning of the statute, see the following cases: Matter of McDermott Patent Bolt Mfg. Co., 3 Ben. (U. S.) 369, 3 Nat. Bankr. Reg. 128, 16 Fed. Cas. No. 8,750; Matter of Westcott, 6 Ben. (U. S.) 135, 7 Nat. Bankr. Reg. 285, 29 Fed. Cas. No. 17,430; *In re* Sykes, 5 Biss. (U. S.) 113, 23 Fed. Cas. No. 13,708; *In re* Manning, 5 Biss. (U. S.) 497, 16 Fed. Cas. No. 9,040; *McKenney v. Baker*, 2 Hask. (U. S.) 130, 16 Fed. Cas. No. 8,853; *In re* Chandler, 1 Lowell (U. S.) 478, 4 Nat. Bankr. Reg. 213, 5 Fed.

but this provision is not contained in the present law.¹

9. Admitting Insolvency. — The *English* statute makes it an act of bankruptcy for the debtor to file in court a declaration of his inability to pay his debts or to present a petition in bankruptcy against himself.² In the *United States* it is an act of bankruptcy for a debtor to admit in writing his inability to pay his debts and his willingness to be adjudged bankrupt on that ground.³

X. DEBTS AND CLAIMS AGAINST ESTATE — 1. Proof and Allowance — a. NECESSITY OF PROOF IN GENERAL. — It is obviously necessary to require creditors to present and prove their debts before they will be allowed to participate in the distribution of the estate, and in this respect creditors holding security stand on the same footing as unsecured creditors.⁴

b. BEFORE WHOM PROVABLE. — Claims are to be proved before the court or some officer as may be provided by the statute. In *England* the proof is made before the trustee, if one has been appointed, otherwise before the official receiver.⁵ In the *United States* the court or the referee receives the proofs.⁶

c. BY WHOM PROVABLE. — The *English* statute provides that a debt may be proved by delivering or sending through the post, in a prepaid letter, to the official receiver, or, if a trustee has been appointed, to the trustee, an affidavit verifying the debt. This affidavit may be made by the creditor himself or by some person authorized by or on behalf of the creditor. If made by a person so authorized it shall state his authority and means of knowledge.⁷

Cas. No. 2,591; *Innes v. Carpenter*, 4 Nat. Bankr. Reg. 412, 13 Fed. Cas. No. 7,049; *In re Clemens*, 2 Dill. (U. S.) 533, 9 Nat. Bankr. Reg. 57, 5 Fed. Cas. No. 2,877, reversing 8 Nat. Bankr. Reg. 279, 5 Fed. Cas. No. 2,878; *In re Hollis*, 3 Nat. Bankr. Reg. 309, 12 Fed. Cas. No. 6,621; *In re Lanz*, 14 Nat. Bankr. Reg. 159, 14 Fed. Cas. No. 8,079; *Love v. Love*, 21 Pittsb. Leg. J. (Pa.) 101, 15 Fed. Cas. No. 8,549; *In re Lowenstein*, 2 Nat. Bankr. Reg. 306, 15 Fed. Cas. No. 8,574; *Mendenhall v. Carter*, 7 Nat. Bankr. Reg. 320, 17 Fed. Cas. No. 9,426; *In re Nickodemus*, 3 Nat. Bankr. Reg. 230, 18 Fed. Cas. No. 10,254; *In re Opelousa*, etc., R. Co., 3 Nat. Bankr. Reg. 31, 18 Fed. Cas. No. 10,547; *In re Weaver*, 9 Nat. Bankr. Reg. 132, 29 Fed. Cas. No. 17,307; *In re Kenyon*, 6 Nat. Bankr. Reg. 238, 30 Fed. Cas. No. 17,780, note.

As to Extensions of Time of payment by creditors, see *Doan v. Compton*, 2 Nat. Bankr. Reg. 607, 7 Fed. Cas. No. 3,940; *In re Sykes*, 5 Biss. (U. S.) 113, 23 Fed. Cas. No. 13,708; *Perin*, etc., Mfg. Co. v. Peale, 17 Nat. Bankr. Reg. 377, 19 Fed. Cas. No. 10,981.

¹ See Act July 1, 1898 (30 U. S. Stat. at L. 544), § 3, enumerating the acts of bankruptcy.

3. Admitting Insolvency — English Statute. — 46 & 47 Vict., c. 52, § 4(f); *Ransford v. Maule*, L. R. 8 C. P. 672; *Hill v. Cowdery*, 25 L. J. Exch. 285.

3. Bankruptcy Law of United States. — Act July 1, 1898 (30 U. S. Stat. at L.), § 3.

A Voluntary Application in insolvency under a state insolvency law was an act of bankruptcy under the law of 1867. *Van Nostrand v. Carr*, 30 Md. 128.

Admissions by Corporations. — *In re Baker-Ricketson Co.*, 97 Fed. Rep. 489; *In re Bates Mach. Co.*, 91 Fed. Rep. 625; *In re Marine Mach.*, etc., Co., 91 Fed. Rep. 630.

4. Necessity of Proof in General. — *Bromley v. Smith*, 2 Biss. (U. S.) 511, 5 Nat. Bankr. Reg. 152, 4 Fed. Cas. No. 1,922; *In re Davis*, 2 Nat.

Bankr. Reg. 391; *In re Cornwall*, 9 Blatch. (U. S.) 114, 6 Nat. Bankr. Reg. 305; *In re Scott*, 15 Nat. Bankr. Reg. 73, 21 Fed. Cas. No. 12,519; *Yeatman v. New Orleans Sav. Inst.*, 95 U. S. 764, 17 Nat. Bankr. Reg. 187; *In re Cleveland Ins. Co.*, 22 Fed. Rep. 200; *Proctor v. National Bank*, 152 Mass. 223.

The English Statute provides that "every creditor shall prove his debt as soon as may be after the making of a receiving order." 46 & 47 Vict., c. 52, 2d schedule, par. 1.

Necessity of Proof by Secured Creditors. — *In re Bowie*, 1 Nat. Bankr. Reg. 628, 3 Fed. Cas. No. 1,728; *Davis v. Anderson*, 6 Nat. Bankr. Reg. 145, 7 Fed. Cas. No. 3,623; *In re Davis*, 2 Nat. Bankr. Reg. 391, 7 Fed. Cas. No. 3,618; *Cole v. Duncan*, 58 Ill. 176; *Clarke v. Rosenda*, 5 Rob. (La.) 27; *Selfridge v. Gill*, 4 Mass. 95.

5. Before Whom Proof Is Made in England. — 46 & 47 Vict., c. 52, 2d schedule, par. 2.

6. Before Whom Proof Is Made in United States. — Act July 1, 1898 (30 U. S. Stat. at L. 544), § 57.

As to the practice under the former bankruptcy laws of the United States, see *In re Gaylor*, 10 Fed. Cas. No. 5,282a; *In re Haley*, 2 Nat. Bankr. Reg. 36, 11 Fed. Cas. No. 5,918; *In re Shephard*, 1 Nat. Bankr. Reg. 439, 21 Fed. Cas. No. 12,753; *In re Merrick*, 7 Nat. Bankr. Reg. 459, 17 Fed. Cas. No. 9,463; *In re Bakewell*, 4 Nat. Bankr. Reg. 619, 2 Fed. Cas. No. 788; *In re Lynch*, 16 Nat. Bankr. Reg. 38, 15 Fed. Cas. No. 8,635; *Ansonia Brass*, etc., Co. v. Babbitt, 8 Hun (N. Y.) 157; *In re Nebe*, 11 Nat. Bankr. Reg. 289, 17 Fed. Cas. No. 10,073; *Matter of Keyser*, 9 Ben. (U. S.) 224, 14 Fed. Cas. No. 7,748; *In re Strauss*, 2 Nat. Bankr. Reg. 48, 23 Fed. Cas. No. 13,532.

7. By Whom Proof May Be Made in England. — 46 & 47 Vict., c. 52, 2d schedule, par. 2, 3.

Proof Must Be Made by Creditor. — The debt must be due either at law or equity from the

The bankruptcy law of the *United States* provides that proof of claims shall consist of a statement under oath, in writing, signed by a creditor, setting forth the claim; the consideration therefor; what securities, if any, are held therefor; and what payments, if any, have been made thereon.¹

The Assignee of a Claim may prove it in a bankruptcy proceeding against the debtor, if the assignment was in good faith, though it was made after the proceeding was commenced.²

d. AMOUNT ALLOWABLE — (1) *In General*. — A creditor has the right to prove for the whole amount of the debt due him,³ and this amount must be determined in the mode prescribed by the statute.⁴ But it is only the debt which is due in equity that is provable.⁵

bankrupt to the person proving. *Malcolm v. Fullarton*, 2 T. R. 645. Thus the assignee of a debt assigned after the receiving order has been made could not prove, but merely had a right to call on the assignor to prove as trustee for him. *Ex p. Dickinson*, 2 Deac. & C. 520.

An Executor or Administrator is the proper person to prove in respect of debts due from the bankrupt to the testator or intestate. *Stammers v. Elliott*, L. R. 3 Ch. 195. See also *In re Watson*, (1896) 1 Ch. 925; *Ex p. Shaw*, 1 Glyn & J. 127; *Ex p. Moody*, 2 Rose 413; *Ex p. Colman*, 2 Deac. & C. 584; *Ex p. Wyatt*, 2 Deac. & C. 211.

1. By Whom Proof May Be Made in United States. — Act July 1, 1898 (30 U. S. Stat. at L. 544), § 57.

The Fact that a Surety Has Made a Part Payment of the debt does not affect the right of the creditor to prove for the entire amount. *In re Heyman*, 95 Fed. Rep. 800.

A County may prove a claim held by it against the bankrupt. *In re Wright*, 95 Fed. Rep. 807.

The Act of 1898 does not specify in what cases or how the proof shall be made by an agent or attorney, but the general orders and forms made by the Supreme Court of the United States, pursuant to the act, contained substantially the same requirements in this respect as the Act of 1867. See Rule 1 and Forms 35 and 36.

The Former Bankruptcy Law of the United States provided that any claim against the estate of a bankrupt must be verified by a deposition in writing on oath or solemn affirmation of the claimant testifying of his own knowledge, unless he was absent from the United States or prevented by some other good cause from testifying, in which case the demand might be verified by the attorney or authorized agent of the claimant testifying to the best of his knowledge, information and belief, and setting forth his means of knowledge. Act March 2, 1867 (14 U. S. Stat. at L. 517), § 22; *In re Barnes*, 1 Lowell (U. S.) 560, 2 Fed. Cas. No. 1,012; *In re Whyte*, 9 Nat. Bankr. Reg. 267, 29 Fed. Cas. No. 17,606; *South Boston Iron Co., Petitioners*, 4 Cliff. (U. S.) 343, 22 Fed. Cas. No. 13,183; *In re Watrous*, 14 Nat. Bankr. Reg. 258, 29 Fed. Cas. No. 17,270; *In re Portsmouth Sav. Fund Soc.*, 2 Hughes (U. S.) 238, 19 Fed. Cas. No. 11,297; *In re Jackson*, 7 Biss. (U. S.) 280 14 Nat. Bankr. Reg. 449, 13 Fed. Cas. No. 7,123; *Warner v. Spooner*, 3 Fed. Rep. 890.

As to the Rule under the State Insolvency Laws, see the several statutes on the subject.

Proof by Assignee of Claim Against Estate in

Bankruptcy or Insolvency. — *In re Mills*, 17 Nat. Bankr. Reg. 472, 17 Fed. Cas. No. 9,612; *In re Ford*, 18 Nat. Bankr. Reg. 426, 9 Fed. Cas. No. 4,932; *Matter of Van Buren*, 2 Fed. Rep. 645; *Todd v. Meding*, 56 N. J. Eq. 83.

A Corporation could prove its claim, under the Act of 1867, by the oath of its president, cashier, or treasurer. *Albany Exch. Bank v. Johnson*, 1 Fed. Cas. No. 133; *Matter of Morgan*, 8 Ben. (U. S.) 186, 17 Fed. Cas. No. 9,797; *Ex p. Norwood*, 3 Biss. (U. S.) 504, 18 Fed. Cas. No. 10,364; *In re Republic Ins. Co.*, 8 Nat. Bankr. Reg. 197, 20 Fed. Cas. No. 11,705.

A Stockholder may prove his claim against the company. *Pondville Co. v. Clark*, 25 Conn. 97.

A Wife may prove against her husband's estate. *Weeks, etc., Co. v. Elliott*, 93 Me. 286.

The Executor or Administrator of a deceased creditor must prove the claim. *Duer v. Hunt*, 41 N. Y. App. Div. 581. See also *In re Jordan*, 2 Fed. Rep. 319; *In re Mills*, 11 Nat. Bankr. Reg. 74, 17 Fed. Cas. No. 9,611.

2. Proof by Assignee of Claim. — *Re Murdock*, 1 Lowell (U. S.) 362, 3 Nat. Bankr. Reg. 146, 17 Fed. Cas. No. 9,939; *In re Pease*, 6 Nat. Bankr. Reg. 173, 19 Fed. Cas. No. 10,880; *In re Strachan*, 3 Biss. (U. S.) 181, 23 Fed. Cas. No. 13,519; *In re Burchell*, 4 Fed. Rep. 406. See also *In re Pease*, 29 Fed. Rep. 593.

As to claims purchased by and assigned to the debtor's agents, see *Matter of Lathrop*, 5 Ben. (U. S.) 199, 5 Nat. Bankr. Reg. 43, 14 Fed. Cas. No. 8,104; *In re State Ins. Co.*, 16 Fed. Rep. 756.

3. Whole Amount Provable. — *In re Hamilton*, 1 Fed. Rep. 800.

A Claim Purchased at a Discount may be proved by the purchaser at its face value. *Green v. Hood*, 42 Ill. App. 652. Compare *Emberson's Case*, (N. Y. Super. Ct.) 16 Abb. Pr. (N. Y.) 457.

A Note Held as Security for a debt due the holder from an indorser may be proved for the whole amount against the estate of the maker in bankruptcy. *Ex p. Farnsworth*, 1 Lowell (U. S.) 497, 8 Fed. Cas. No. 4,672.

4. In re Ford, 18 Nat. Bankr. Reg. 426, 9 Fed. Cas. No. 4,932.

5. Only Amount Equitably Due Is Provable. — *In re Newman*, 4 Ch. D. 724; *Ex p. Maclean*, 2 Mont. D. & De G. 564; *Ex p. Fidgeon*, 4 Deac. 217.

A Claim for Service Rendered may be proved only for the value thereof, if the amount is not fixed by contract. The fact that the claimant had previously been paid at a certain rate is

If a Debt Has Been Partly Paid by the principal debtor, so that the payment operates as an extinguishment of the debt, *pro tanto*, the creditor can prove only for the unpaid balance on the bankruptcy or insolvency either of such debtor or of one who is secondarily liable with him; ¹ but if the payment was made by one secondarily liable as indorser, surety, etc., the creditor may prove for the whole amount against the estate of the principal debtor, because the creditor in such a case is a trustee for the party who made the payment. ² If, however, the party secondarily liable, and by whom the payment was made, has released the principal debtor, the creditor can prove for only the unpaid balance of his claim. ³

Debts Payable in Futuro. — If a debt is not payable at the time the proceeding is commenced, it is not provable at its face value at that time, but is subject to a rebate of interest according to the time when it would have become payable. ⁴

Assigned Claims. — The assignee or pledgee of a claim against the debtor may prove for the full amount of the claim, though in the case of a pledgee he will be allowed dividends only to the extent of the debt for which he holds the security. ⁵

(2) **Interest.** — If the claim is one which draws interest, the creditor may prove for both principal and interest, ⁶ but if the debt is not interest-bearing

not conclusive. *In re* Grubbs-Wiley Grocery Co., 96 Fed. Rep. 183.

1. Part Payment by Principal Debtor. — *In re* Howard, 4 Nat. Bankr. Reg. 571, 12 Fed. Cas. No. 6,750; *Ex p.* Harris, 2 Lowell (U. S.) 568, 16 Nat. Bankr. Reg. 432, 11 Fed. Cas. No. 6,109; *In re* Pulsifer, 14 Fed. Rep. 247; *In re* Hamilton, 1 Fed. Rep. 800.

Where a Mortgagee Buys the Mortgaged Chattels at a Sale under Execution against the mortgagor, and afterwards sells such chattels and appropriates the proceeds to his own use, the amount realized on such sale does not fix the value of the chattels for which the mortgagor should be credited in bankruptcy proceedings against him, unless it was agreed that the mortgagee should make such sale and apply the proceeds to the mortgage debt. *In re* Wood, 5 Fed. Rep. 443.

A Transfer of Securities to the creditor by the debtor will not operate as a part payment, where the creditor did not accept the securities. *In re* Blumer, 11 Fed. Rep. 700.

2. Part Payment by One Secondarily Liable. — *Re* Souther, 2 Lowell (U. S.) 320, 9 Nat. Bankr. Reg. 502, 22 Fed. Cas. No. 13,184; *In re* Ellerhorst, 5 Nat. Bankr. Reg. 144, 8 Fed. Cas. No. 4,381; *Downing v. Traders' Bank*, 2 Dill. (U. S.) 136, 11 Nat. Bankr. Reg. 371, 7 Fed. Cas. No. 4,046.

3. Release of Principal Debtor by Surety or Indorser. — *In re* Baxter, 18 Nat. Bankr. Reg. 497, 2 Fed. Cas. No. 1,120.

4. Debts Payable at Future Time. — *In re* Browne, (1891) 2 Q. B. 574; *In re* Riker, 18 Nat. Bankr. Reg. 393, 20 Fed. Cas. No. 11,833.

5. Assigned Claims — Proof for Full Amount. — *Ex p.* Bloxham, 6 Ves. Jr. 449, 600; *Ex p.* Newton, 16 Ch. D. 330; *Ex p.* Kely, 1 Lowell (U. S.) 394, 14 Fed. Cas. No. 7,681; *Bailey v. Nichols*, 2 Nat. Bankr. Reg. 478, 2 Fed. Cas. No. 741; *Matter of Woods*, 52 Md. 520.

A Bill in the Hands of a Holder as Purchaser may be proved for the whole amount, just as the holder might sue the drawer or acceptor at law. *In re* Gomersall, 1 Ch. D. 137, on

appeal, *sub nom.* *Jones v. Gordon*, 2 App. Cas. 616.

An Agent of the Debtor, having purchased a claim for less than its face value cannot prove for the balance. *In re* Lathrop, 3 Ben. (U. S.) 490, 3 Nat. Bankr. Reg. 410, 14 Fed. Cas. No. 8,103. See also *Ex p.* Ames, 1 Lowell (U. S.) 561, 7 Nat. Bankr. Reg. 230, 1 Fed. Cas. No. 323; *In re* Shelbourne, 19 Nat. Bankr. Reg. 359, 21 Fed. Cas. No. 12,745.

6. Interest. — *England.* — *In re* London, etc., Hotel Co., (1892) 1 Ch. 639; *Ex p.* Bath, 22 Ch. D. 450, 27 Ch. D. 509; *Ex p.* Fewings, 25 Ch. D. 338; *In re* European Cent. R. Co., 4 Ch. D. 33; *In re* Savin, L. R. 7 Ch. 760; *Ex p.* Jones, 9 Mor. Bankr. Cas. 253; *Ex p.* Discount Banking Co., 10 Mor. Bankr. Cas. 295; *In re* Holland, 1 Manson 509; *In re* Evans, 4 Manson 114; *Ex p.* Lubbock, 4 De G. J. & S. 516.

United States. — *Matter of Haake*, 2 Sawy. (U. S.) 231, 7 Nat. Bankr. Reg. 61, 11 Fed. Cas. No. 5,883; *In re* Bugbee, 9 Nat. Bankr. Reg. 258, 4 Fed. Cas. No. 2,115; *Matter of Orne*, 1 Ben. (U. S.) 361, 1 Nat. Bankr. Reg. 57, 18 Fed. Cas. No. 10,581; *In re* Strachan, 3 Biss. (U. S.) 181, 23 Fed. Cas. No. 13,519; *Matter of Hagan*, 6 Ben. (U. S.) 407, 10 Nat. Bankr. Reg. 383, 11 Fed. Cas. No. 5,898; *In re* Town, 8 Nat. Bankr. Reg. 40, 24 Fed. Cas. No. 14,112; *In re* North Carolina Bank, 12 Nat. Bankr. Reg. 130, 1 N. Y. Wkly. Dig. 127, 2 Fed. Cas. No. 895, *reversing* 2 Hughes (U. S.) 369, 10 Nat. Bankr. Reg. 289, 2 Fed. Cas. No. 894; *In re* Bousfield, etc., Mfg. Co., 17 Nat. Bankr. Reg. 153, 3 Fed. Cas. No. 1,704; *In re* Reed, 6 Biss. (U. S.) 250, 11 Nat. Bankr. Reg. 94, 20 Fed. Cas. No. 11,635; *Matter of Berrian*, 6 Ben. (U. S.) 297, 3 Fed. Cas. No. 1,351.

New Jersey. — *Prichett v. Newbold*, 1 N. J. Eq. 571.

New York. — *Matter of Murray*, 6 Paige (N. Y.) 204.

Vermont. — *Clemons v. Clemons*, 69 Vt. 545.

Forfeiture of Interest for Usury will be enforced in the bankruptcy court, when the debt is

and is not payable at the time of the adjudication, it can be proved only for the amount of principal less interest from the time of adjudication to the time the debt becomes payable.¹

(3) *Set-off*. — Where there have been mutual credits, mutual debts, or other mutual dealings between the debtor and any other person proving or claiming to prove a debt against him, the sum due from the one shall be set off against any sum due from the other, and an allowance made for the balance.² The right of set-off here rests on a somewhat different principle from the right of set-off between solvent parties. In the latter case the object in view is to prevent cross actions, while in bankruptcy and insolvency cases the object is to do substantial justice between the parties. This subject will be fully discussed in another part of this work.³

(4) *Secured Claims*. — A creditor, in making proof of his claim, is required to state whether or not he holds any security.⁴ If he holds any security, he may surrender it for the general benefit of the creditors, and prove for his whole debt,⁵ or he may retain his security and prove for the balance remaining after deducting the value thereof;⁶ and he may be required to exhaust

offered for proof. *In re Prescott*, 5 Biss. (U. S.) 523, 9 Nat. Bankr. Reg. 385, 19 Fed. Cas. No. 11,389.

1. *Debt Payable in Future and Not Bearing Interest*. — *Matter of Orne*, 1 Ben. (U. S.) 361, 1 Nat. Bankr. Reg. 57, 18 Fed. Cas. No. 10,581.

2. *Set-off of Mutual Debts and Credits*. — *England*. — *Rose v. Hart* 8 Taunt. 499, 4 E. C. L. 185, 2 Smith Lead. Cas. 308; *Fair v. M'Iver*, 16 East 130; *Forster v. Wilson*, 12 M. & W. 191; *Ex p. Crosbie*, 7 Ch. D. 123; *Young v. Bengal Bank*, 1 Moo. P. C. 150; *Ex p. Prescott*, 1 Atk. 230; *Ex p. Ockenden*, 1 Atk. 235; *Easum v. Caio*, 5 B. & Ald. 861, 7 E. C. L. 282; *Naoroji v. Chartered Bank*, L. R. 3 C. P. 444; *Astley v. Gurney*, L. R. 4 C. P. 714; *Booth v. Hutchinson*, L. R. 15 Eq. 30; *In re Mid-Kent Fruit Factory*, (1896) 1 Ch. 567; *Peat v. Jones*, 8 Q. B. D. 147; *Mersey Steel, etc., Co. v. Naylor*, 9 App. Cas. 434; 46 & 47 Vict., c. 52, § 38.

United States. — *Hough v. Ft. Wayne First Nat. Bank*, 4 Biss. (U. S.) 349, 12 Fed. Cas. No. 6,721; *Ex p. Howard Nat. Bank*, 2 Lowell (U. S.) 487, 16 Nat. Bankr. Reg. 420, 12 Fed. Cas. No. 6,764; *Matter of Petrie*, 5 Ben. (U. S.) 110, 7 Nat. Bankr. Reg. 332, 19 Fed. Cas. No. 11,040; *In re Voetter*, 4 Fed. Rep. 632; *In re Purcell*, 18 Nat. Bankr. Reg. 447, 20 Fed. Cas. No. 11,470; *In re Ford*, 18 Nat. Bankr. Reg. 426, 9 Fed. Cas. No. 4,932; *Re Wheeler*, 2 Lowell (U. S.) 252, 29 Fed. Cas. No. 17,488; *Matter of Kaufman*, 8 Ben. (U. S.) 394, 14 Fed. Cas. No. 7,626; *In re Knox*, 98 Fed. Rep. 585; *In re Crystal Spring Bottling Co.*, 100 Fed. Rep. 205; *In re Myers*, 99 Fed. Rep. 601; Act July 1, 1898 (30 U. S. Stat. at L. 544), § 68.

California. — *Conroy v. Dunlap*, 104 Cal. 133; *Meherin v. Saunders*, 56 Pac. Rep. 1110.

Connecticut. — *Carroll v. Weaver*, 65 Conn. 76.

Iowa. — *Franzen v. Hutchinson*, (Iowa) 62 N. W. Rep. 698.

Louisiana. — *Martin v. Creditors*, 15 La. Ann. 165.

Massachusetts. — *Bartlett v. Bramhall*, 3 Gray (Mass.) 257; *Aldrich v. Campbell*, 4 Gray (Mass.) 284; *Stetson v. Exchange Bank*, 7 Gray (Mass.) 425; *Howe v. Snow*, 3 Allen (Mass.) 111; *Davis v. Newton*, 6 Met. (Mass.) 537; *Bemis v. Smith*, 10 Met. (Mass.) 194; *Demon v. Boylston Bank*, 5 Cush. (Mass.) 194.

Minnesota. — *Mercantile Nat. Bank v. Macfarlane*, 71 Minn. 497; *Northern Trust Co. v. Hiltgen*, 62 Minn. 361.

New York. — *Hughitt v. Hayes*, 136 N. Y. 163; *Matter of Hatch*, 155 N. Y. 401, reversing 22 N. Y. App. Div. 16; *People v. Canal St. Bank*, (N. Y. Super. Ct. Gen. T.) 6 Misc. (N. Y.) 319; *Matter of Arkell Pub. Co.*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 145.

And see the statutes in other jurisdictions.

3. See the title SET-OFF, RECOUPMENT, AND COUNTERCLAIM.

4. *Disclosure of Security* — *England*. — 46 & 47 Vict., c. 52, 2d schedule, par. 5.

United States. — Act July 1, 1898 (30 U. S. Stat. at L. 544), § 57. And see the several state insolvency laws. *Matter of Bolton*, 2 Ben. (U. S.) 189, 1 Nat. Bankr. Reg. 370, 3 Fed. Cas. No. 1,614.

A Lien Which Is Dissolved by Operation of Law need not be stated in proving such a lien debt. *In re Carrier*, 51 Fed. Rep. 900; *Duff v. Carrier*, 55 Fed. Rep. 433.

5. *Surrender of Security — Proof for Whole Debt*. — 46 & 47 Vict., c. 52, 2d schedule, par. 10.

6. *Proving for Balance after Deducting Value of Security* — *England*. — *In re London, etc., Hotel Co.*, (1892) 1 Ch. 639; *In re Bonacino*, 1 Manson 59. See also *In re Savin*, L. R. 7 Ch. 760; *Ex p. Lubbock*, 4 De G. J. & S. 516; 46 & 47 Vict., c. 52, 2d schedule, par. 11 *et seq.*

United States. — *In re Baldwin*, 19 Nat. Bankr. Reg. 52, 2 Fed. Cas. No. 796; *In re Grant*, 10 Fed. Cas. No. 5,690; *In re Winn*, 1 Nat. Bankr. Reg. 499, 30 Fed. Cas. No. 17,876; *Ex p. Dalby*, 1 Lowell (U. S.) 431, 6 Fed. Cas. No. 3,540; *Matter of Newland*, 6 Ben. (U. S.) 342, 7 Nat. Bankr. Reg. 477, 18 Fed. Cas. No. 10,170; *In re Shirley*, 9 Fed. Rep. 901; *In re Leitchworth*, 18 Fed. Rep. 822; *In re High*, 3 Nat. Bankr. Reg. 191, 12 Fed. Cas. No. 6,473; *Re Holbrook*, 2 Lowell (U. S.) 259, 12 Fed. Cas. No. 6,588; *In re Norris*, 2 Hask. (U. S.) 74, 18 Fed. Cas. No. 10,303.

Maryland. — *Watkins v. Worthington*, 2 Bland (Md.) 509.

New York. — *Plestoro v. Abraham*, 1 Paige (N. Y.) 236.

The rule that a secured creditor may prove only for the balance of his debt, after deduct-

his security before pursuing his remedies against the bankrupt's estate,¹ unless a liability over against the estate would thereby be created.²

If a Secured Creditor Does Not Disclose the Security in making his proof, he thereby waives it, so far as the debt proved is concerned;³ but this rule is in the interest of equality in the distribution of the estate by the court of bankruptcy, and therefore the failure of the creditor proving his claim to disclose the security that he may hold for it, does not affect the right of such creditor as against a creditor who has not proved his claim,⁴ nor does the rule apply in the case of a claim which is secured on property belonging to a third person,⁵

ing the value of his security, is not founded in equity. *Jervis v. Smith*, (Buffalo Super. Ct.) 7 Abb. Pr. N. S. (N. Y.) 217.

Release of Lien for Consideration.—If a creditor, secured by a lien on the property of a third person, releases the lien for a consideration, he will be allowed only the balance after deducting the amount so paid. *Seay v. Wilson*, 9 Fed. Rep. 589.

1. Creditor Required to Exhaust Security.—*In re Sauthoff*, 7 Biss. (U. S.) 167, 14 Nat. Bankr. Reg. 364, 21 Fed. Cas. No. 12,379; *Pierce v. Wilcox*, 40 Ind. 70. See also *Bucknam v. Dunn*, 2 Hask. (U. S.) 215, 16 Nat. Bankr. Reg. 470, 4 Fed. Cas. No. 2,096; *Société D'Epargnes v. McHenry*, 49 Cal. 351.

2. Liability Created by Enforcing Security.—A creditor to whom had been given a policy of insurance on the debtor's life, payable to his wife, was allowed to prove his whole claim, without first resorting to the policy, because the rights of the wife were superior to those of the assignee in bankruptcy. *In re Sauthoff*, 7 Biss. (U. S.) 167, 14 Nat. Bankr. Reg. 364, 21 Fed. Cas. No. 12,379. See also *Matter of Babcock*, 3 Story (U. S.) 393, 2 Fed. Cas. No. 696.

3. Waiver of Security—*United States*.—*Scott v. Ellery*, 142 U. S. 381; *In re Brand*, 2 Hughes (U. S.) 334, 3 Nat. Bankr. Reg. 324, 4 Fed. Cas. No. 1,809; *Briggs v. Stephens*, 4 Fed. Cas. No. 1,873; *In re Granger*, 8 Nat. Bankr. Reg. 30, 10 Fed. Cas. No. 5,684; *Ex p. Morris*, 2 Lowell (U. S.) 424, 16 Nat. Bankr. Reg. 572, 17 Fed. Cas. No. 9,823; *In re Bear*, 5 Fed. Rep. 53, *affirmed* 7 Fed. Rep. 583; *White v. Crawford*, 9 Fed. Rep. 371.

California.—*Levy v. Haake*, 53 Cal. 267.

Georgia.—*Heard v. Jones*, 56 Ga. 271.

Indiana.—*Hoadley v. Caywood*, 40 Ind. 239.

Louisiana.—*Camutz v. State Bank*, 26 La. Ann. 354; *Shorten v. Booth*, 32 La. Ann. 397.

Maine.—*Howe v. Handley*, 28 Me. 241; *Bowley v. Bowley*, 41 Me. 542.

New York.—*Haxtun v. Corse*, 4 Edw. (N. Y.) 585, 2 Barb. Ch. (N. Y.) 506; *Stewart v. Isidor*, (C. Pl. Spec. T.) 5 Abb. Pr. N. S. (N. Y.) 68. See also *Merchants' Nat. Bank v. Comstock*, 55 N. Y. 24, 14 Am. Rep. 168; *Wilder v. Keeler*, 3 Paige (N. Y.) 167, 23 Am. Dec. 781.

Pennsylvania.—*Bassett v. Baird*, 85 Pa. St. 384. See also *Beckler v. Hambrecht*, 2 W. N. C. 353.

Virginia.—*Spilman v. Johnson*, 27 Gratt. (Va.) 33.

Compare *Hiscock v. Jaycox*, 12 Nat. Bankr. Reg. 507, 12 Fed. Cas. No. 6,531; *In re Brand*, 2 Hughes (U. S.) 334, 3 Nat. Bankr. Reg. 324, 4 Fed. Cas. No. 1,809; *Mead v. Randall*, 68

Minn. 233; *McAlpin v. Lee*, 57 Ga. 281; *Drew v. McDaniel*, 60 N. H. 480; *Wallace v. Conrad*, 3 Brews. (Pa.) 329, 7 Phila. (Pa.) 114; *Johnson v. Worden*, 47 Vt. 457; *Merston v. Moors*, 76 Wis. 502.

The rule as to the waiver of security, by proving the claim without disclosing the security, is peculiar to insolvency and bankruptcy proceedings. In equity a secured creditor may prove his whole claim while holding his security. *People v. Remington*, 54 Hun (N. Y.) 505, *affirmed* 121 N. Y. 328.

Proof of Excess over Security.—*Farnum v. Boutelle*, 13 Met. (Mass.) 159; *Langton v. Wolcott*, 6 Met. (Mass.) 305.

A Creditor Who Has Both Secured and Unsecured Claims does not, by proving the unsecured claim, waive his security for the other. *Champion v. Buckingham*, 165 Mass. 76.

A Judgment Is Not Proved as Unsecured where the proof states the particulars of the judgment, and that no security has been received, though it omits to state the fact that the judgment is a lien on real estate. *Sedgwick v. Stewart*, 9 Ben. (U. S.) 433, 21 Fed. Cas. No. 12,625.

Appraisement of the Security at a Nominal Value is sufficient to prevent a waiver. *Streeper v. McKee*, 86 Pa. St. 188.

There Is No Waiver if the lien is asserted when the claim is filed. *Knapp v. McCaffrey*, 178 Ill. 107, *affirming* 74 Ill. App. 80.

4. Failure to Disclose Security Not Available to Creditor Not Proving Claim.—*Cook v. Farrington*, 104 Mass. 212.

5. Debt Secured on Property Belonging to Third Person—*England*.—*Ex p. Peacock*, 2 Glyn & J. 27; *Ex p. Bowden*, 1 Deac. & C. 135; *Ex p. Shepherd*, 2 Mont. D. & De G. 204; *Matter of Plummer*, 1 Phil. 56; *Ex p. West Riding Union Banking Co.*, 19 Ch. D. 105; *Ex p. English*, etc., Bank, L. R. 4 Ch. 49; *Baines v. Wright*, 16 Q. B. D. 330; *In re Hallett*, (1894) 2 Q. B. 256; *Ex p. Bloxham*, 6 Ves. Jr. 449; *Ex p. Parr*, 18 Ves. Jr. 65; *Ex p. Crossley*, 3 Bro. C. C. 237.

United States.—*In re Dunkeleson*, 4 Biss. (U. S.) 253, 12 Nat. Bankr. Reg. 413, 8 Fed. Cas. No. 4,157; *In re Kinne*, 5 Fed. Rep. 59; *In re Cram*, 1 Hask. (U. S.) 89, 1 Nat. Bankr. Reg. 504, 6 Fed. Cas. No. 3,343; *Matter of Babcock*, 3 Story (U. S.) 393.

See *Lloyd v. Western Nat. Bank*, 30 Cinc. L. Bul. 165, 11 Ohio Dec. (Reprint) 851; *McAden v. Keen*, 30 Gratt. (Va.) 400.

Partnership Debt Secured by One Partner.—Where one partner has given security for a partnership debt, the creditor may prove against the joint estate without surrendering, selling, or valuing his security. *Re Holbrook*,

or for which a third person is liable as guarantor, etc.¹ If the failure of a secured creditor to disclose his security occurs in ignorance of his rights and without any fraudulent intent, he may correct his mistake by amending his proof and setting up the security.²

e. TIME OF FILING CLAIMS. — The statutes provide that claims against the estate shall be filed within a certain time, generally computed from the appointment of the assignee or trustee,³ and if any creditor does not present his claim accordingly, he will not be permitted to participate in the distribution, until those creditors whose claims were duly filed and allowed have been paid in full.⁴

Extension of Time. — Where special circumstances exist, a creditor may be permitted to file his claim after the time limited.⁵

f. ALLOWANCE OF CLAIMS. — The *English* statute provides that the trustee shall examine every proof and the ground of the claim, and admit or reject it in whole or in part, or require further evidence in support of it,⁶ but in the *United States*, as a general rule, it is a matter of course to allow claims filed with the proofs as required by law, unless objection is made by some party in interest.⁷

2 Lowell (U. S.) 259, 12 Fed. Cas. No. 6,588; *In re Thomas*, 8 Biss. (U. S.) 139, 17 Nat. Bankr. Reg. 54, 23 Fed. Cas. No. 13,886.

1. **Debts Secured by Guaranty of Third Person.** — *In re Anderson*, 7 Biss. (U. S.) 233, 12 Nat. Bankr. Reg. 502, 1 Fed. Cas. No. 350. See also *Barnes v. Hekla F. Ins. Co.*, 56 Minn. 38, 45 Am. St. Rep. 438.

2. **Secured Creditor Acting in Good Faith in Ignorance of Rights.** — *Ex p. Harwood, Crabbe* (U. S.) 496, 11 Fed. Cas. No. 6,185; *Ex p. Lapsley*, 1 Pa. L. J. 245, 14 Fed. Cas. No. 8,083; *In re Clark*, 5 Nat. Bankr. Reg. 255, 5 Fed. Cas. No. 2,806; *In re Hope Min. Co.*, 1 Sawy. (U. S.) 710, 12 Fed. Cas. No. 6,681; *In re Jaycox*, 8 Nat. Bankr. Reg. 241, 13 Fed. Cas. No. 7,242; *In re McConnell*, 10 Phila. (Pa.) 287, 9 Nat. Bankr. Reg. 387, 15 Fed. Cas. No. 8,712; *In re Parkes*, 10 Nat. Bankr. Reg. 82, 18 Fed. Cas. No. 10,754. See also *In re Baxter*, 12 Fed. Rep. 72.

3. **Time of Filing Claims.** — The Bankruptcy Law of the *United States* requires claims to be presented within one year after the adjudication. *Bray v. Cobb*, 100 Fed. Rep. 270.

The *Illinois* statute limits the time to three months after publication of notice. *Suppiger v. Gruaz*, 137 Ill. 216, *affirmed* 36 Ill. App. 60.

The *New Hampshire* statute (Act 1889, c. 100, § 2), provides that "at any time before final decree of distribution any creditor who has not filed his claim within the time prescribed may file proof of his claim." *Nichols v. Cass*, 65 N. H. 212.

See also the various local statutes.

As to Extension of Time see *Rice v. Wallace*, 7 Met. (Mass.) 431; *McNeal Pipe, etc., Co. v. Waltman*, 114 N. Car. 178.

4. **Effect of Non-Presentation** — *Alabama*. — *Murdock v. Rousseau*, 32 Ala. 611.

Illinois. — *Rassier v. Jenkins*, 64 Ill. App. 336, *affirmed* 170 Ill. 503; *H. B. Claffin Co. v. Kelley*, 64 Ill. App. 525, *affirmed* 169 Ill. 20; *Suppiger v. Gruaz*, 36 Ill. App. 60, *affirmed* 137 Ill. 216.

Iowa. — *Matter of Holt*, 45 Iowa 301; *McKindley v. Nourse*, 67 Iowa 119; *Conlee Lumber Co. v. Meyer*, 74 Iowa 403; *Loomis v. Griffin*, 78 Iowa 482; *Smith v. Wheeler*, 58

Iowa 659; *Carter v. Lee*, 82 Iowa 26; *Budd v. King*, 83 Iowa 97; *Scott v. Thomas*, 94 Iowa 442.

Minnesota. — *Clark v. Squier*, 62 Minn. 364.

Nebraska. — *Clendenning v. Perrine*, 32 Neb.

155.

New Hampshire. — *Nichols v. Cass*, 65 N. H.

212.

Compare (Kennedy, J., *dissenting*) *People v. Remington*, 59 Hun (N. Y.) 282.

Existing Claims Only Are Affected by the rule stated in the text. If a claim accrues after the time limited by statute, it may nevertheless be filed and allowed. *Suppiger v. Gruaz*, 36 Ill. App. 60, *affirmed* 137 Ill. 216.

5. **Permitting Claim to Be Filed After Time Limited.** — *Richter v. Merchants Nat. Bank*, 65 Minn. 237; *Glenn v. Farmer's Bank*, 80 N. Car. 97, 84 N. Car. 631. See also *Eddy's Petition*, 15 R. I. 474; *Woodbury's Appeal*, 70 Conn. 455.

Fraud of Assignee. — The fact that a creditor is prevented, by the fraud of the assignee, from filing his claim in time will not excuse the omission. Such fact only renders the assignee personally liable. *H. B. Claffin Co. v. Kelley*, 64 Ill. App. 525, *affirmed* 169 Ill. 20.

An Insufficient Notice to Present Claims will not excuse nonpresentation in the time required, where the petition for the allowance of the claim is heard on a stipulation that notice was given as required by law. *Winona Paper Co. v. Kalamazoo First Nat. Bank*, 33 Ill. App. 630.

Claims in Litigation. — The filing of a claim in the time limited is not excused by the fact that it was in litigation. *H. B. Claffin Co. v. Kelley*, 64 Ill. App. 525, *affirmed* 169 Ill. 20.

Mistake as to the Law is no excuse for delay in filing a claim. *In re State Ins. Co.*, 15 Fed. Rep. 736.

6. **Allowance of Claims under English Statute.** — 46 & 47 Vict., c. 52, 2d schedule, par. 22.

7. **Allowance as Matter of Course** — *United States*. — Act July 1, 1898 (30 U. S. Stat. at L. 544), § 57, par. d.

Rhode Island. — *In re Knight*, (R. I. 1899) 43 Atl. Rep. 540.

And see the several state insolvency laws.

Volume XVI.

g. CONTEST OF CLAIMS. — The statutes generally authorize any party in interest to make objection to any claim, and leave it to the trustee or assignee to allow or reject the claim, with the right on the part of the objector or the claimant, as the case may be, to have the matter finally determined by the court.¹

h. EFFECT OF PROVING CLAIMS — (1) *In General.* — A creditor, by proving his claim in a bankruptcy or insolvency proceeding, submits to the jurisdiction of the court in which the proceeding is pending, and cannot pursue any remedy elsewhere.²

(2) *Waiver of Lien or Security.* — A secured creditor is held to waive his security, if he proves without disclosing it.³

(3) *Right of Creditor to Sue.* — A creditor, by proving his claim against the estate, waives his right to sue the debtor on the claim proved,⁴ but the waiver does not affect any debt not proved,⁵ or which would not be released by the discharge of the debtor,⁶ nor does it extend to any person other than the

1. *Contest of Claims* — *England.* — 46 & 47 Vict., c. 52, 2d schedule, par. 22, 25. See also *Ex p. Chatteris*, 26 L. T. N. S. 174, 20 W. R. 322; *In re Richardson*, 20 W. R. 968.

United States. — Act July 1, 1898 (30 U. S. Stat. at L. 544), § 57, par. d, f.

Louisiana. — *Johnson v. His Creditors*, 16 La. Ann. 177; *Byrne v. His Creditors*, 33 La. Ann. 198.

Maine. — *Tibbetts v. Trafton*, 80 Me. 264; *Robinson v. Chase*, 80 Me. 395.

Massachusetts. — *Freeland v. Mechanics' Bank*, 16 Gray (Mass.) 137.

Minnesota. — *Clark v. B. B. Richards Lumber Co.*, 72 Minn. 397.

Ohio. — *Meador v. Root*, 11 Ohio Cir. Ct. 81, 5 Ohio App. Dec. 61.

Rhode Island. — *Eddy's Petition*, 15 R. I. 474. And see the several state insolvency laws.

Improper Conduct on the Part of a Creditor after his claim has been allowed, as where he participates with the assignee in a transaction prejudicial to the rights of the creditors, is not a ground for expunging his claim, under the *Massachusetts* statute. *Northampton First Nat. Bank v. Crafts*, 145 Mass. 444.

In *Minnesota* the assignee, on the disallowance of a claim, is *functus officio* as to it, and cannot afterwards allow it. *Robitshek v. Swedish-American Nat. Bank*, 68 Minn. 206.

2. See the cases cited *infra*, this division of this section, *Right of Creditor to Sue*.

A Sale Cannot Be Rescinded for False Representations of the buyer after the seller has proved a promissory note taken for the price of the goods. *Seavey v. Potter*, 121 Mass. 297.

3. **Waiver of Lien or Security.** — See *supra*, this section, *Amount Allowable—Secured Claims*.

4. **Waiver of Right to Sue Debtor** — *England.* — *Ex p. Flower*, 11 Jur. 482, De G. 503, 16 L. J. Bankr. 9. See also *Ex p. Diack*, 2 Mont. & A. 675. Compare *Spencer v. Demett*, 4 H. & C. 127, L. R. 1 Exch. 123, 12 Jur. N. S. 104, 35 L. J. Exch. 73, 13 L. T. N. S. 677, 14 W. R. 310; *Elder v. Beaumont*, 8 El. & Bl. 353, 92 E. C. L. 353, 4 Jur. N. S. 23, 27 L. J. Q. B. 25, 6 W. R. 57; *Harley v. Greenwood*, 5 B. & Ald. 95, 7 E. C. L. 38.

United States. — *Matter of Meyers*, 2 Ben. (U. S.) 424, 1 Nat. Bankr. Reg. 581, 17 Fed. Cas. No. 9,518.

California. — *Wilson v. Capuro*, 41 Cal. 545.

Kentucky. — *Burns v. Buricke*, (Ky. 1886) 1 S. W. Rep. 821.

Massachusetts. — *Cook v. Coyle*, 113 Mass. 252; *Ormsby v. Dearborn*, 116 Mass. 386.

New Hampshire. — *Pray v. Torr*, 18 N. H. 188; *Rogers v. Wentworth*, 58 N. H. 318; *Batchelder v. Batchelder*, 66 N. H. 31.

New York. — *Durant v. Abendroth*, 44 N. Y. Super. Ct. 463; *Wood v. Hazen*, 10 Hun (N. Y.) 362.

Tennessee. — *Hambrick v. Bragg*, 4 Baxt. (Tenn.) 33.

But see *In re Davis*, 1 Sawy. (U. S.) 260; *Hoyt v. Freel*, 4 Nat. Bankr. Reg. 132; *Aubin v. Hunt*, 2 Pa. Co. Ct. 564; *Hill v. Phillips*, 14 R. I. 93; *Brandon Mfg. Co. v. Frazer*, 47 Vt. 88, 19 Am. Rep. 118.

See also *infra*, this title, *Operation and Effect of Insolvency and Bankruptcy Proceedings—Actions Against Debtor*.

Proof by a Resident Partner binds the firm, and the nonresident partner cannot afterwards sue in the jurisdiction of his domicile. *Matter of Schepeler*, 4 Ben. (U. S.) 68, 21 Fed. Cas. No. 12,453.

5. **Waiver Affects Only Debts Proved.** — *Ex p. Hardenburgh*, 1 Rose 204; *Harley v. Greenwood*, 5 B. & Ald. 95, 7 E. C. L. 38; *Watson v. Medex*, 1 B. & Ald. 121; *Ex p. Edwards*, 4 Mont. & M. 116; *Ex p. Crinsoz*, 1 Bro. C. C. 270; *Bridget v. Mills*, 12 Moo. 92, 4 Bing. 18, 13 E. C. L. 327; *Ex p. Schlesinger*, 2 Glyn & J. 392; *Ex p. Sly*, 2 Glyn & J. 163; *Howell v. Gollidge*, 5 Taunt. 175, 1 E. C. L. 64, 2 Rose 130; *Ex p. Newton*, 2 Mont. D. & De G. 422, 6 Jur. 68; *Ex p. —*, 1 Mont. D. & De G. 179; *Dally v. Wolfenston*, 3 Dowl. & R. 269, 16 E. C. L. 169, 1 L. J. K. B. 246.

6. **Debts Not Affected by Discharge.** — *Matter of Rosenberg*, 3 Ben. (U. S.) 14, 2 Nat. Bankr. Reg. 236, 20 Fed. Cas. No. 12,054; *Matter of Wright*, 2 Ben. (U. S.) 509, 2 Nat. Bankr. Reg. 142, 30 Fed. Cas. No. 18,065; *In re Robinson*, 6 Blatchf. (U. S.) 253, 20 Fed. Cas. No. 11,939; *In re Clews*, 19 Nat. Bankr. Reg. 109, 5 Fed. Cas. No. 2,891; *Laramore v. McKinzie*, 60 Ga. 532; *McBean v. Fox*, 1 Ill. App. 177. But see *Chapman v. Forsyth*, 2 How. (U. S.) 202.

Claims Against Corporations were not discharged under the bankruptcy law of 1867, and therefore proving such a claim did not affect the right of the creditor to sue the corporation.

bankrupt.¹

The Creditor's Right of Action Is Not Extinguished by proving his claim, but is only waived so far as it is inconsistent with the statutory remedy.²

And if a Discharge of the Debtor Is Not Granted, the creditor's right to enforce his claim by an action revives.³

(4) *Foreign Insolvency or Bankruptcy Proceeding.* — A creditor who appears in a bankruptcy or insolvency proceeding pending in a foreign jurisdiction and proves his claim, thereby waives his extraterritorial immunity, and is bound by the discharge of the debtor.⁴

2. What Debts and Claims Are Provable — *a. IN GENERAL* — **Debt Recoverable in Law or Equity.** — The general rule is that any debt which is recoverable either at law or in equity is provable,⁵ but there must be a debt in the sense in

New Lamp Chimney Co. v. Ansonia Brass, etc., Co., 91 U. S. 656, 13 Nat. Bankr. Reg. 385; *Chamberlin v. Huguenot Mfg. Co.*, 118 Mass. 532; *Athol Nat. Bank v. Hingham Mfg. Co.*, 121 Mass. 399; *Ansonia Brass, etc., Co. v. New Lamp-Chimney Co.*, 53 N. Y. 123, 13 Am. Rep. 476.

1. Waiver Affects Bankrupt Only — *England.* — *Young v. Hunter*, 16 East 252; *Heath v. Hall*, 4 Taunt. 326, 2 Rose 271, 13 Rev. Rep. 610; *Blannin v. Tayler, Gow* 199; *Ex p. Stanborough*, 5 Madd. 89; *Ex p. Hughes*, 5 B. & Ald. 482, 7 E. C. L. 167; *Mead v. Braham*, 3 M. & S. 91, 2 Rose 289; *Walker v. Pilbeam*, 4 C. B. 229, 56 E. C. L. 229; *Ex p. Hornby*, Buck 351; *Stammers v. Elliott*, 37 L. J. Ch. 353, L. R. 3 Ch. 195, 18 L. T. N. S. 1, 16 W. R. 489; *Armstrong v. Armstrong*, L. R. 12 Eq. 614, 25 L. T. N. S. 199, 19 W. R. 971; *Cherry v. Boultee*, 4 Myl. & C. 442; *In re Hodgson*, 48 L. J. Ch. 52, 9 Ch. D. 673, 27 W. R. 38; *In re Orpen*, 50 L. J. Ch. 25, 16 Ch. D. 202, 43 L. T. N. S. 728; *In re Watson*, 65 L. J. Ch. 553, (1896) 1 Ch. 925, 74 L. T. N. S. 453.

Massachusetts. — *New Bedford Five Cents Sav. Bank v. Union Mill Co.*, 128 Mass. 27.

Ohio. — *Ridenour v. Mayo*, 29 Ohio St. 138.

Pennsylvania. — *Cake v. Lewis*, 8 Pa. St. 493.

The Right to Sue Stockholders of a corporation was not waived by proving the debt against the corporation in bankruptcy. *Chamberlin v. Huguenot Mfg. Co.*, 118 Mass. 532; *Shellington v. Howland*, 53 N. Y. 371.

2. Right of Action Not Extinguished. — *Smith v. Soldiers' Business Messenger, etc., Co.*, 35 N. J. L. 60; *Hoyt v. Freel* (N. Y. Super. Ct. Spec. T.) 8 Abb. Pr. N. S. (N. Y.) 220.

3. Refusal of Discharge. — *Dingee v. Becker*, 9 Nat. Bankr. Reg. 508, 7 Fed. Cas. No. 3,919; *Valpey v. Rea*, 124 Mass. 99; *Morse v. Dayton*, 125 Mass. 47; *Miller v. O'Kain*, 5 Hun (N. Y.) 39; *Smith v. Krauskopf*, 13 Hun (N. Y.) 526; *Storrs v. Plumb*, 30 Hun (N. Y.) 319; *Haxtun v. Corse*, 2 Barb. Ch. (N. Y.) 506; *Hamlin v. Hamlin*, 3 Jones Eq. (56 N. Car.) 191; *McFadden v. Council*, 88 N. Car. 220.

4. Proving Claim in Foreign Proceedings — **Waiver of Extraterritorial Immunity.** — *Clay v. Smith*, 3 Pet. (U. S.) 411; *Phelps v. Borland*, 30 Hun (N. Y.) 366. See also *infra*, this title, *Discharge of Debtor* — *Extraterritorial Effect of Discharge*.

5. All Debts Provable in General. — *Ex p. Llynvi Coal, etc., Co.*, 41 L. J. Bankr. 5, L. R. 7 Ch. 28, 25 L. T. N. S. 609, 20 W. R. 105; *In re Jordan*, 2 Fed. Rep. 319; *Rankin v.*

Florida, etc., R. Co., 1 Nat. Bankr. Reg. 647, 20 Fed. Cas. No. 11,567; *Rea v. Jaffray*, 82 Iowa 231.

The question whether any particular debt is provable or not is one of law and not of fact. *Sigsby v. Willis*, 3 Ben. (U. S.) 371, 3 Nat. Bankr. Reg. 207, 22 Fed. Cas. No. 12,849. And depends on its status at the time of the filing of the petition. *In re Bingham*, 2 Am. Bankr. Rep. 223.

Whether the debt arises from a promise to pay, or whether it arises from a duty or obligation to pay, is not important. *Matter of Vetterlein*, 13 Blatchf. (U. S.) 44, 12 Nat. Bankr. Reg. 526, 28 Fed. Cas. No. 16,929.

Equitable Demands Provable in Bankruptcy. — *Ex p. Williamson*, 2 Ves. 252; *Ex p. Taylor*, 2 Rose 175; *Sigsby v. Willis*, 3 Ben. (U. S.) 371, 3 Nat. Bankr. Reg. 207, 22 Fed. Cas. No. 12,849; *In re Blandin*, 1 Lowell (U. S.) 543, 5 Nat. Bankr. Reg. 39, 3 Fed. Cas. No. 1,527; *In re Buckhause*, 2 Lowell (U. S.) 331, 10 Nat. Bankr. Reg. 206, 4 Fed. Cas. No. 2,086; *Warner v. Spooner*, 3 Fed. Rep. 890; *Murray v. Wood*, 144 Mass. 195; *Taylor v. Wilcox*, 167 Mass. 572.

It was considered doubtful whether such a debt could be proved under the former *Massachusetts* statute, because that statute was considered as referring only to legal debts. *Robb v. Mudge*, 14 Gray (Mass.) 540; *In re Blandin*, 1 Lowell (U. S.) 543, 5 Nat. Bankr. Reg. 39, 3 Fed. Cas. No. 1,527.

Fiduciary Debts may be proved equally with other debts, if the creditors to whom they are due so elect. *Morse v. Lowell*, 7 Met. (Mass.) 152.

As to the effect of proving fiduciary debts, see *infra*, this title, *Discharge of Debtor* — *Effect of Discharge*.

Claims Arising under Insurance Policies. — A policy holder, on the bankruptcy of the insurance company, may prove his claim under the policy for a loss, *In re Firemen's Ins. Co.*, 3 Biss. (U. S.) 462, 8 Nat. Bankr. Reg. 123, 9 Fed. Cas. No. 4,796; or for a rebate of premium due by the terms of the policy on its cancellation, *In re Independent Ins. Co.*, 2 Lowell (U. S.) 187, 13 Fed. Cas. No. 7,019. But he has no provable claim for the return of any part of the premiums paid for the part of the term which had not expired at the time of the bankruptcy of the company, or to any reductions on outstanding premium notes, *Matter of Western Ins. Co.*, 6 Ben. (U. S.) 159, 29 Fed. Cas. No. 17,435.

which the word is used in the bankruptcy or insolvency laws.¹

Adequate Consideration. — Therefore a claim against a bankrupt estate, in order to come within this rule must rest on a sufficient consideration, — a matter which a court of bankruptcy as a court of equity will always inquire into, even though the claim has been reduced to judgment, because the object of the bankruptcy laws is to procure the distribution of a debtor's property among his just creditors, which object could easily be defeated if the consideration of a judgment should not be open to investigation.²

Fraud — Illegality. — And on the same principle, a claim is not provable in bankruptcy, if it arose out of any fraudulent transaction on the part of the claimant, or rests on an illegal consideration.³

As to contingent claims under insurance policies, see *infra*, this division of this section, *Contingent and Unliquidated Claims*.

The Statute Liability of the Stockholders of a Corporation for its debts is not such a claim as can be proved in bankruptcy against them; it is not their debt within the meaning of the bankrupt law. *James v. Atlantic Delaine Co.*, 11 Nat. Bankr. Reg. 390, 13 Fed. Cas. No. 7,179; *Garrett v. Sayles*, 1 Fed. Rep. 377, affirmed 110 U. S. 288; *New York Fourth Nat. Bank v. Francklyn*, 120 U. S. 755; *Kelton v. Phillips*, 3 Met. (Mass.) 62; *Bangs v. Lincoln*, 10 Gray (Mass.) 600.

Liability to Calls on Stock is a provable debt. *In re Mercantile Mut. Marine Ins. Assoc.*, 25 Ch. D. 415; *In re Hallett*, 1 Manson 380; *Glenn v. Abell*, 39 Fed. Rep. 10. But see *Sayre v. Glenn*, 87 Ala. 631.

The Holder of Special Stock Illegally Issued by a corporation may prove against the estate of the corporation in insolvency the amount paid by him for the stock, deducting any dividends received, though he did not rescind the contract before the insolvency. *Reed v. Boston Mach. Co.*, 141 Mass. 454.

A Judgment for a Fine has been held a provable debt. *In re Alderson*, 98 Fed. Rep. 588.

A Debt Payable in Work is provable. *Barker v. Mann*, 4 Met. (Mass.) 302.

1. The General Rule is that those only are entitled to share in an insolvent estate who have a definite demand against it, or a cause of action capable of adjustment and liquidation on trial. *Reading Iron Works*, 150 Pa. St. 369.

Waiver of Right to Prove Claim. — The right of a creditor to prove his claim may be waived by him. *Clark v. Lindeke*, 44 Minn. 179.

Taxes are not debts, and therefore are not provable in bankruptcy. *In re Duryee*, 2 Fed. Rep. 68. And see *Foster v. Inglee*, 13 Nat. Bankr. Reg. 239, 9 Fed. Cas. No. 4,973.

2. Necessity of Consideration in General to Constitute Provable Debt. — *Ex p. Butterfill*, 1 Rose 192; *Ex p. Prescott*, 1 Mont. D. & De G. 199; *Ex p. Banner*, 17 Ch. D. 480; *Ex p. Mudie*, 6 Jur. 1093; *In re Hook*, 11 Nat. Bankr. Reg. 282, 12 Fed. Cas. No. 6,672; *In re Howard*, 6 Nat. Bankr. Reg. 372, 12 Fed. Cas. No. 6,751; *In re Schreyer*, 19 Fed. Rep. 732.

As to the necessity and sufficiency of a consideration in general, see the title *CONSIDERATION*, vol. 6, p. 673.

Even Where a Judgment Has Been Recovered, the court will inquire into the consideration of the claim on which the judgment is founded. *Ex p. Kibble*, L. R. 10 Ch. 373; *Ex p. Chat-*

teris, 26 L. T. N. S. 174; *Ex p. Revell*, 13 Q. B. D. 720; *Ex p. Bonham*, 14 Q. B. D. 604; *Ex p. Anderson*, 14 Q. B. D. 606; *Ex p. Lennox*, 16 Q. B. D. 315; *Ex p. Seaton*, 8 Mor. Bankr. Cas. 97. See also *Ex p. Bryant*, 1 Ves. & B. 211; *Ex p. Marson*, 3 Mont. & A. 155. But see *In re Kitzinger*, 19 Nat. Bankr. Reg. 152, 14 Fed. Cas. No. 7,861.

A Voluntary Bond, since it constitutes a gift from the obligor to the obligee, is a provable claim, unless made in fraud of creditors, though formerly, in *England*, payment was postponed until all other debts were satisfied. *Gardiner v. Shannon*, 2 Sch. & Lef. 228.

But under the present English statute voluntary bonds come in, *pari passu*, with other debts. *Ex p. Pottinger*, 8 Ch. D. 621; *Ex p. Scott*, 9 Mor. Bankr. Cas. 87.

3. Illegality or Fraud — England. — *Ex p. Randleson*, 1 Mont. & M. 86; *Ex p. Bolland*, 1 Mont. & A. 570; *Ex p. Bell*, 1 M. & S. 751; *Ex p. Chavasse*, 34 L. J. Bankr. 17; *Ex p. Moggridge*, Cook Bankr. L. 214; *Ex p. Ward*, cited in *Ex p. Mumford*, 15 Ves. Jr. 290; *Ex p. Mather*, 3 Ves. Jr. 373; *Ex p. Cavalierre*, 2 Glyn & J. 227; *Ex p. Schmalding*, Buck 93; *Matter of Morgan*, 2 De G. F. & J. 634, 30 L. J. Bankr. 1, 6 Jur. N. S. 1273, 3 L. T. N. S. 516, 9 W. R. 131. Compare *Ex p. Dyster*, 2 Rose 349, 1 Meriv. 155; *Ex p. King*, 2 Deac. 23, 2 Mont. & A. 676, 5 L. J. Bankr. 45; *Ex p. Pyke*, 47 L. J. Bankr. 100, 8 Ch. D. 754, 38 L. T. N. S. 923, 26 W. R. 806; *Ex p. Archer*, 2 Mont. D. & De G. 784.

United States. — *Bailey v. Milner*, 1 Abb. (U. S.) 261, 2 Fed. Cas. No. 740; *In re Whittaker*, 4 Nat. Bankr. Reg. 160, 29 Fed. Cas. No. 17,598; *Shaffer v. Fritchery*, 4 Nat. Bankr. Reg. 548, 21 Fed. Cas. No. 12,697; *In re Jaycox*, 12 Blatchf. (U. S.) 209, 13 Nat. Bankr. Reg. 122, 13 Fed. Cas. No. 7,237, 7 Nat. Bankr. Reg. 578, 13 Fed. Cas. No. 7,241, 13 Blatchf. (U. S.) 70, 13 Fed. Cas. No. 7,238; *In re Pittock*, 2 Sawy. (U. S.) 416, 8 Nat. Bankr. Reg. 78, 19 Fed. Cas. No. 11,189; *In re Chandler*, 9 Nat. Bankr. Reg. 514, 5 Fed. Cas. No. 2,590; *Ex p. Young*, 6 Biss. (U. S.) 53, 30 Fed. Cas. No. 18,145.

As to what claims in general are not enforceable, see the title *ILLEGAL CONTRACTS*, vol. 15, p. 927, and the references there given.

A Debt Founded in Felony cannot be proved in *England* until after a prosecution, except where a prosecution is hopeless. *Ex p. Jones*, 2 Mont. & A. 193, 3 Deac. & C. 525; *Ex p. Elliott*, 3 Mont. & A. 110, 123, 2 Deac. 172, *Ex p. Ball*, 48 L. J. Bankr. 57, 10 Ch. D. 667, 40 L. T. N. S. 141, 27 W. R. 563, 14 Cox C. C.

So, Too, Debts Contracted by an Infant cannot, on his becoming a bankrupt after attaining his majority, be proved except so far as they were contracted for necessities, or on the fraudulent representation of the infant that he was of age, or are liquidated damages for torts.¹

Debts Payable in Future. — If there is a valid and subsisting debt at the time of the bankruptcy, it is provable, though it is not payable until a future day.²

Sureties, Indorsers, etc., have no provable claim against the estate of the principal debtor until they have actually paid the debt,³ unless the creditor to whom they are liable fails to prove the debt, in which case the party so secondarily bound may make the proof.⁴

If a Husband Becomes Indebted to His Wife,⁵ she stands on the same footing as other creditors and may prove her claim against her husband's estate.⁶

237. Compare *Ex p. Bolland*, Mont. & M. 315; *Dudley*, etc., *Banking Co. v. Spittle*, 1 Johns. & H. 14, 2 L. T. N. S. 47, 8 W. R. 351; *Ex p. Turquand*, 9 Ch. D. 704; *Ex p. Leslie*, 51 L. J. Ch. 689, 20 Ch. D. 131, 46 L. T. N. S. 548, 30 W. R. 344, 15 Cox C. C. 125.

Money Lent to Pay a Lost Bet is not "money knowingly advanced for gaming or betting," within the English statute, and therefore the lender can prove his loan on the bankruptcy of the borrower. *Ex p. Pyke*, 8 Ch. D. 754.

The Burden of Proving that a note in the hands of an indorsee was founded on a gambling transaction is on the maker. *Hill v. Levy*, 98 Fed. Rep. 94.

Partial Legality. — If the consideration of a contract is partly legal and partly illegal, that part of the debt which rests on good consideration may be proved. *Ex p. Mather*, 3 Ves. Jr. 373; *Ex p. Bulmer*, 13 Ves. Jr. 313.

Sale of Intoxicating Liquors. — A claim arising out of a sale of intoxicating liquors in violation of a law of the state where the sale was made is not provable. *In re Paddock*, 6 Nat. Bankr. Reg. 132, 18 Fed. Cas. No. 10,657.

But it is otherwise if the sale was lawful in the state where it was made, though it was made to a citizen of another state who intended to sell the liquors in that state in violation of law. *In re Murray*, 1 Hask. (U. S.) 267, 3 Nat. Bankr. Reg. 765, 17 Fed. Cas. No. 9,954.

1. Debts Contracted During Infancy. — *Ex p. Unity Joint-Stock Mut. Banking Assoc.*, 3 De G. & J. 63; *Ex p. Jones*, 18 Ch. D. 109.

As to whether an infant may be proceeded against in bankruptcy, see *supra*, this title, *Who May Be Adjudged Bankrupts or Insolvents — Infants*.

2. Debts Payable in Future — England. — *In re Browne*, (1891) 2 Q. B. 574.

United States. — *In re Riker*, 18 Nat. Bankr. Reg. 393, 20 Fed. Cas. No. 11,833; *Ecfort v. Greely*, 6 Nat. Bankr. Reg. 433, 8 Fed. Cas. No. 4,260.

Minnesota. — *Citizens' Nat. Bank v. Minge*, 49 Minn. 454.

3. Right of Sureties, etc., to Indemnity Not a Provable Debt. — *Hester v. Baldwin*, 2 Woods (U. S.) 433, 12 Fed. Cas. No. 6,438; *Marks v. Barker*, 1 Wash. (U. S.) 178, 16 Fed. Cas. No. 9,096; *In re Sterling*, 1 Fed. Rep. 167; *Ecker v. Bohn*, 45 Md. 278; *Selfridge v. Gill*, 4 Mass. 95; *Roosevelt v. Mark*, 6 Johns. Ch. (N. Y.) 266; *Barclay v. Carson*, 2 Hayw. (3 N. Car.) 243. But see *contra*, *In re Paine*, (1897) 1 Q. B. 122; *Ex p. Delmar*, 7 Mor. Bankr. Cas. 129; *Wolmershausen v. Gullick*, (1893) 2 Ch.

514; *In re Gillespie*, 18 Q. B. D. 286; *Baker v. Vasse*, 1 Cranch (C. C.) 194, 2 Fed. Cas. No. 784.

Note of Surety Taken by Creditor in Payment. — If the individual note of a surety is taken by the creditor in payment of the principal debtor's liability, the surety may prove his claim against the estate of the principal debtor. *In re Morrill*, 2 Sawy. (U. S.) 356, 8 Nat. Bankr. Reg. 117, 17 Fed. Cas. No. 9,821.

If the Surety Pays the Debt, the principal debtor is then liable to him, and he may prove the claim against the principal debtor's estate. *In re Morse*, 11 Nat. Bankr. Reg. 482, 17 Fed. Cas. No. 9,853; *Tunno v. Bethune*, 2 Desaus. (S. Car.) 285.

In Massachusetts, if a surety pays the debt before the making of the first dividend, he may prove his claim therefor the same as if the payment had been made before the first publication. *Hussey v. Crawford*, 152 Mass. 596.

Proof by Surety Against Insolvent Cosurety. — A surety who pays the creditor in full may prove against the insolvent estate of his cosurety for a proportionate part of the debt only, though he would not receive more than such proportionate part if allowed to prove to the full amount. *New Bedford Sav. Inst. v. Hathaway*, 134 Mass. 69, 45 Am. Rep. 289.

4. Right of Surety, etc., on Failure of Debtor to Make Proof. — *In re Ellerhorst*, 5 Nat. Bankr. Reg. 144, 8 Fed. Cas. No. 4,381.

In England a surety may compel the creditor to prove. *Ex p. Rushforth*, 10 Ves. Jr. 409; *Gray v. Seckham*, L. R. 7 Ch. 680; *Ellis v. Emmanuel*, 1 Ex. D. 157, and cases cited.

5. How Husband May Become Indebted to Wife. — Notwithstanding the common-law doctrine of the legal unity of husband and wife, and the principle that a contract void at law is void in equity, a contract between husband and wife respecting her separate property is recognizable and enforceable in equity. By such a contract a wife may become the creditor of her husband. *Fenner v. Taylor*, 1 Sim. 169; *In re Blandin*, 1 Lowell (U. S.) 543, 5 Nat. Bankr. Reg. 39, 3 Fed. Cas. No. 1,527; *Riley v. Riley*, 25 Conn. 154; *Towers v. Hagner*, 3 Whart. (Pa.) 48. And see the title SEPARATE PROPERTY OF MARRIED WOMEN.

By Recent Statutes in some jurisdictions married women are given power to make contracts with their husbands, which may be enforced at law. See the title HUSBAND AND WIFE, vol. 15, p. 785.

6. Proof of Claims by Wife Against Husband. — *Ex p. Wells*, 2 Mont. D. & De G. 504; *Ex p.*

Ante-nuptial Debts of Wife Provable Against Husband. — A husband is liable at common law for the ante-nuptial debts of his wife, and therefore such debts may be proved against his estate in bankruptcy, like any other debts due from him.¹ This rule, notwithstanding the modern legislation in regard to the rights and liabilities of married women, still obtains in some jurisdictions.²

Alimony. — There is some uncertainty in the decisions as to whether a claim under a decree for alimony is provable in bankruptcy. The decisions in *England*, and also those in the *United States* before the enactment of the bankruptcy law of 1898, are uniform in holding that instalments which had not accrued at the date of the receiving order (adjudication) are not provable, because there is no debt within the meaning of the bankruptcy law, but only an order or decree for the performance of the duty of a husband to support his wife.³ It was also held that arrears of alimony were governed by the same principle as future instalments;⁴ but in the leading *English* case on the subject it was said that arrears accruing before the date of the receiving order would seem to be provable as a debt due in pursuance of an order or judgment, though they do not constitute a debt at law.⁵ In cases arising under the present bankruptcy law of the *United States* (1898) there have been several decisions holding that the language of that statute is broad enough to include decrees for alimony as provable debts,⁶ though there are some decisions which adhere to the former rule.⁷

b. CLAIMS ACCRUING AFTER COMMENCEMENT OF PROCEEDINGS. — The time of the accrual of claims, as affecting their provable character, is, of course, regulated by the statutes. The *English* statute declares provable all debts, etc., "to which the debtor is subject at the date of the receiving order."⁸ The bankruptcy law of the *United States* allows the proof of such claims only as are owing at the time of the filing of the petition.⁹

Thring, 1 Mont. & C. 75; *Fleitas v. Richardson*, 147 U. S. 550; *Matter of Bigelow*, 3 Ben. (U. S.) 198, 2 Nat. Bankr. Reg. 556, 3 Fed. Cas. No. 1,398; *In re Blandin*, 1 Lowell (U. S.) 543, 5 Nat. Bankr. Reg. 39, 3 Fed. Cas. No. 1,527; *Van Kleeck v. Miller*, 19 Nat. Bankr. Reg. 484, 28 Fed. Cas. No. 16,860; *Purdy v. Purdy*, 67 Vt. 50.

But see the *English* Married Women's Property Act, 1882 (45 & 46 Vict., c. 75), § 3, and the cases of *Ex p. Taylor*, 12 Ch. D. 366; *In re Genese*, 16 Q. B. D. 700.

1. Antenuptial Debts of Wife. — *Miles v. Williams*, 10 Mod. 160, 1 P. Wms. 249; *Vanderheyden v. Mallory*, 1 N. Y. 452, reversing 3 Barb. Ch. (N. Y.) 9.

2. Present Rule as to Husband's Liability for Wife's Debts. — See the title HUSBAND AND WIFE, vol. 15, p. 785.

3. Decree for Alimony Held Not Provable — *England*. — *Linton v. Linton*, 15 Q. B. D. 239; *In re Hawkins*, (1894) 1 Q. B. 25; *Kerr v. Kerr*, (1897) 2 Q. B. 439; *Ex p. Neal*, 14 Ch. D. 579; *Prescott v. Prescott*, 20 L. T. N. S. 331. See also *Ex p. Fryer*, 17 Q. B. D. 718; *Haddon v. Haddon*, 18 Q. B. D. 778; *In re Henderson*, 20 Q. B. D. 509.

United States. — *In re Lachemeyer*, 18 Nat. Bankr. Reg. 270, 14 Fed. Cas. No. 7,966; *In re Garrett*, 2 Hughes (U. S.) 235, 11 Nat. Bankr. Reg. 493, 10 Fed. Cas. No. 5,252. And see *Beach v. Beach*, 29 Hun (N. Y.) 181.

Vermont. — *Noyes v. Hubbard*, 64 Vt. 302, 33 Am. St. Rep. 928, decided under the insolvency law of Vermont. See also *Andrew v. Andrew*, 62 Vt. 495.

4. Decision that Arrears of Alimony Are Not

Provable. — *Kerr v. Kerr*, (1897) 2 Q. B. 439, per *Hawkins* and *Vaughan Williams*, JJ.; *Wright, J.*, dissenting; *In re Lachemeyer*, 18 Nat. Bankr. Reg. 270, 14 Fed. Cas. No. 7,966.

5. See opinions of *Bowen* and *Baggally, L. JJ.*, in *Linton v. Linton*, 15 Q. B. D. 239.

6. Alimony Held a Provable Debt under Act 1898. — *In re Houston*, 94 Fed. Rep. 119; *In re Van Orden*, 96 Fed. Rep. 86.

These decisions are based on the language of the statute specifying among the provable debts "a fixed liability, as evidenced by a judgment," this phrase being considered broad enough to include decrees for alimony.

7. Alimony Held Not Provable under Act 1898. — *In re Nowell*, 99 Fed. Rep. 931; *In re Shepard*, 97 Fed. Rep. 187; *In re Smith*, 3 Am. Bankr. Rep. 67, holding that neither arrears nor claims for future instalments are payable; *Barclay v. Barclay*, (Ill. 1900) 56 N. E. Rep. 636.

Arrears are sometimes held provable in consequence of local laws fixing their character as debts. This is the case in *Illinois*. *In re Challoner*, 98 Fed. Rep. 82. See also the concurring opinion of *Boggs, J.*, in *Barclay v. Barclay*, (Ill. 1900) 56 N. E. Rep. 636.

8. Debts Accruing after Receiving Order Not Payable under English Statute. — 46 & 47 Vict., c. 52, § 37, subd. 3.

9. Debts Accruing after Filing of Petition Not Provable under United States Statute. — Act July 1, 1898 (30 U. S. Stat. at L. 544), § 63.

The Act of 1867, though somewhat uncertain in its provisions, was, by the weight of authority, held to allow the proof of such claims only as accrued before the petition was filed.

Rent and Other Periodical Payments. — In some jurisdictions the statutes provide that when any rent or other payment falls due at stated periods, and the bankruptcy occurs at any time other than one of those periods, the person entitled to the rent or payment may prove for a proportionate part thereof, up to the date of the bankruptcy, as if the rent or payment grew due from day to day.¹ Apart from such a provision, rent accruing after bankruptcy is not provable.²

c. CLAIMS BARRED BY STATUTE OF LIMITATIONS. — If a claim is barred by the statute of limitations at the time as of which its provable character is to be determined, it cannot be proved,³ unless it had previously been

In re Crawford, 3 Nat. Bankr. Reg. 698, 6 Fed. Cas. No. 3,363; *In re* Ward, 12 Fed. Rep. 325; *In re* Merrell, 19 Fed. Rep. 874; *In re* Cook, 3 Biss. (U. S.) 116, 6 Fed. Cas. No. 3,151. See also U. S. v. The Rob Roy, 1 Woods (U. S.) 42, 13 Nat. Bankr. Reg. 235, 27 Fed. Cas. No. 16,170; *In re* Mansfield, 6 Nat. Bankr. Reg. 388, 16 Fed. Cas. No. 9,049; Matter of May, 7 Ben. (U. S.) 238, 9 Nat. Bankr. Reg. 419, 16 Fed. Cas. No. 9,325; *In re* Commercial Bulletin Co., 2 Woods (U. S.) 220, 6 Fed. Cas. No. 3,060; Matter of Lynch, 7 Ben. (U. S.) 26, 15 Fed. Cas. No. 8,634; Matter of Bruce, 6 Ben. (U. S.) 515, 4 Fed. Cas. No. 2,044; *Ex p.* Houghton, 1 Lowell (U. S.) 554, 12 Fed. Cas. No. 6,725; Matter of Croney, 8 Ben. (U. S.) 64, 6 Fed. Cas. No. 3,411; *In re* Hufnagel, 12 Nat. Bankr. Reg. 554, 12 Fed. Cas. No. 6,837; *In re* Clancy, 10 Nat. Bankr. Reg. 215, 5 Fed. Cas. No. 2,782; Matter of Leland, 8 Ben. (U. S.) 254, 15 Fed. Cas. No. 8,233; *In re* Ward, 12 Fed. Rep. 325; *In re* Orne, 12 Fed. Rep. 779; *In re* Letchworth, 19 Fed. Rep. 873; *Fowler v. Kendall*, 44 Me. 448; Matter of May, (U. S. Dist. Ct.) 47 How. Pr. (N. Y.) 37.

The Contrary, however, was held in Matter of Hennocksburgh, 6 Ben. (U. S.) 150, 7 Nat. Bankr. Reg. 37, 11 Fed. Cas. No. 6,367.

Where brokers who were carrying on a margin for the debtor stocks which at the time the petition in bankruptcy was filed could have been sold at a profit, continued to hold the stocks for an unreasonable time and then sold without notice at a loss, their claim for the amount of the loss is one accruing after the bankruptcy, and therefore is not provable. *In re* Daniels, 6 Biss. (U. S.) 405, 13 Nat. Bankr. Reg. 46, 6 Fed. Cas. No. 3,566.

New Note Given to Take Up Former Note. — A claim as indorser on a note made by the bankrupt cannot be proved where the note was given after the adjudication of bankruptcy to take up a former note. Matter of Montgomery, 3 Ben. (U. S.) 567, 3 Nat. Bankr. Reg. 426, 17 Fed. Cas. No. 9,730.

Under the Act of 1841, which differed essentially from the Act of 1867, it was held that debts accruing after the petition was filed, but before the final discharge, were provable. *Harrington v. McNaughton*, 20 Vt. 293; *Spalding v. Dixon*, 21 Vt. 45; *Downer v. Rowell*, 26 Vt. 397. Compare *Downer v. Brackett*, 21 Vt. 599, 7 Fed. Cas. No. 4,043.

Under the *Massachusetts* statute a claim arising after the first publication of the notice of filing the petition is not provable. *Spurr v. Dean*, 129 Mass. 84.

1. Periodical Payments — *England*. — 46 & 47

Vict., c. 52, 2d schedule, par. 19; *Ex p.* Dressler, 9 Ch. D. 252.

United States. — *Ex p.* Lake, 2 Lowell (U. S.) 544, 16 Nat. Bankr. Reg. 497, 14 Fed. Cas. No. 7,991. See also *In re* Jefferson, 93 Fed. Rep. 948; *In re* Gerson, 2 Am. Bankr. Rep. 170.

California. — Matter of Bell, 85 Cal. 119.

Minnesota. — *Wilder v. Peabody*, 37 Minn. 248.

As to the rule under the *Massachusetts* statute, in regard to rents accruing after insolvency, see *Bowditch v. Raymond*, 146 Mass. 109. See also *Treadwell v. Marden*, 123 Mass. 390, 25 Am. Rep. 108.

2. Rents Accruing After Bankruptcy — **Rule under United States Statute.** — *Bray v. Cobb*, 100 Fed. Rep. 270; *In re* Commercial Bulletin Co., 2 Woods (U. S.) 220, 6 Fed. Cas. No. 3,060.

Compare *Reading Iron Works*, 150 Pa. St. 369, holding that on the insolvency of a lessee there is a breach of the contract to pay rent according to the terms of the lease, the cause of action for which breach is provable against the insolvent estate of the lessee.

As to the rights of the landlord in general, see Matter of Breck, 8 Ben. (U. S.) 93, 12 Nat. Bankr. Reg. 215, 4 Fed. Cas. No. 1,822; *McLean v. Klein*, 3 Dill. (U. S.) 113, 16 Fed. Cas. No. 8,884; *Ex p.* Faxon, 1 Lowell (U. S.) 404, 8 Fed. Cas. No. 4,704.

3. Claims Barred by Statute of Limitations — *England*. — *Ex p.* Dewdney, 15 Ves. Jr. 479, 2 Rose 59, note; *Ex p.* Roffey, 19 Ves. Jr. 468; *Ex p.* Woodward, 3 Deac. 290; *Ex p.* Topping, 4 De G. J. & S. 551, 34 L. J. Bankr. 44, 12 L. T. N. S. 787, 13 W. R. 1025; *Ex p.* Kidd, 7 Jur. N. S. 613, 4 L. T. N. S. 334.

United States. — *In re* Reed, 6 Biss. (U. S.) 250, 11 Nat. Bankr. Reg. 94, 20 Fed. Cas. No. 11,635; *In re* Noesen, 6 Biss. (U. S.) 443, 12 Nat. Bankr. Reg. 422, 18 Fed. Cas. No. 10,288; *In re* Cornwall, 9 Blatchf. (U. S.) 114, 6 Nat. Bankr. Reg. 395, 6 Fed. Cas. No. 3,250; *In re* Hardin, 1 Hask. (U. S.) 163, 1 Nat. Bankr. Reg. 395, 11 Fed. Cas. No. 6,048; *In re* Kingsley, 1 Lowell (U. S.) 216, 1 Nat. Bankr. Reg. 329, 14 Fed. Cas. No. 7,819; *In re* Doty, 10 Nat. Bankr. Reg. 202, 7 Fed. Cas. No. 4,017; *In re* Graves, 9 Fed. Rep. 816.

Maryland. — Matter of Leiman, 32 Md. 225, 3 Am. Rep. 132, decided under the insolvency law of Maryland.

But see *contra*, *In re* Sheppard, 1 Nat. Bankr. Reg. 439, 21 Fed. Cas. No. 12,753.

Failure to Enforce a Judgment for Thirty Years is a ground for refusing to allow it on the bankruptcy of the judgment debtor, unless the proof shows sufficient reasons for the neg-

revived;¹ but the statute is suspended by the bankruptcy proceeding, and a claim not then barred is provable, though the period of limitation expired before proof was made.²

d. CONTINGENT AND UNLIQUIDATED CLAIMS. — In *England* all demands arising out of contract are provable, however unliquidated or uncertain the amount of the claim, including consequential damages and damages in cases where the amount has not and even cannot be ascertained by fixed rules, and this whether the breach has or has not or could not have occurred before the discharge of the debtor, the creditor being permitted to swear to a certain amount "and upwards."³ The former bankruptcy laws of the *United States* provided for the proof of contingent and unliquidated claims;⁴ but under these provisions it was held that a contract could not be proved as long as it remained uncertain whether it would ever give rise to an actual duty or liability, and the uncertainty could not be removed by any sort of calculation,⁵

lect to prosecute it. *Morris's Estate*, *Crabbe* (U. S.) 70, 17 Fed. Cas. No. 9,825.

What Statute of Limitations Governs. — According to some authorities, if a debt is barred by the statute of limitations in the jurisdiction where the debtor resides, it is sufficient to preclude proof in bankruptcy proceedings anywhere. *In re Hardin*, 1 Hask. (U. S.) 163, 1 Nat. Bankr. Reg. 395, 11 Fed. Cas. No. 6,048. See also *In re Kingsley*, 1 Lowell (U. S.) 216, 1 Nat. Bankr. Reg. 329, 14 Fed. Cas. No. 7,819; *In re Cornwall*, 9 Blatchf. (U. S.) 114, 6 Nat. Bankr. Reg. 305, 6 Fed. Cas. No. 3,250; *In re Reed*, 6 Biss. (U. S.) 250, 11 Nat. Bankr. Reg. 94, 20 Fed. Cas. No. 11,635; *In re Noesen*, 6 Biss. (U. S.) 443, 12 Nat. Bankr. Reg. 422, 18 Fed. Cas. No. 10,288; *In re Doty*, 16 Nat. Bankr. Reg. 202, 7 Fed. Cas. No. 4,017; *In re Graves*, 9 Fed. Rep. 816.

Other authorities hold that a debt, to be barred by the statute of limitations so as not to be provable, must be barred throughout the *United States*. *Matter of Ray*, 2 Ben. (U. S.) 53, 1 Nat. Bankr. Reg. 203, 20 Fed. Cas. No. 11,589; *In re Sheppard*, 1 Nat. Bankr. Reg. 439, 21 Fed. Cas. No. 12,753.

Debt Barred by Foreign Lex Fori. — It is held in *England* that a foreign debt which is barred by the law of the foreign country, may nevertheless be provable in *England*, because it is the remedy only which is in question, and that must be determined by the law of the country where the bankruptcy takes place. *Ex p. Melbourn*, L. R. 6 Ch. 64.

1. Proof After Revival. — *Roberts v. Morgan*, 2 Esp. 730; *Ex p. Wilson*, 1 Mont. D. & De G. 586; *Ex p. Bateson*, 1 Mont. D. & De G. 289; *Ex p. Woodward*, 3 Deac. 294.

Placing a Debt on the Schedule does not remove the bar of the statute of limitations. *In re Lipman*, 94 Fed. Rep. 353; *In re Resler*, 95 Fed. Rep. 804; *In re Doty*, 16 Nat. Bankr. Reg. 202, 7 Fed. Cas. No. 4,017; *Avery's Case*, 6 Abb. Pr. (N. Y.) 144.

As to Admissions by the debtor, see *In re Emmings*, 1 Fonbl. 34; *Ex p. Rorie*, 2 Mont. D. & De G. 631, 6 Jur. 897; *Pott v. Clegg*, 16 M. & W. 321, 16 L. J. Exch. 210, 11 Jur. 289; *Ex p. Foster*, 3 L. T. N. S. 896; *In re Haidin*, 1 Hask. (U. S.) 163, 1 Nat. Bankr. Reg. 395, 11 Fed. Cas. No. 6,048; *In re Kingsley*, 1 Lowell (U. S.) 216, 1 Nat. Bankr. Reg. 329, 14 Fed. Cas. No. 7,819; *In re Hertzog*, 18 Nat. Bankr. Reg. 526, 12 Fed. Cas. No. 6,433.

After Proof and Allowance the claim will be expunged, if it is shown that it was barred by limitation. *In re Lipman*, 94 Fed. Rep. 353.

As to How a Debt May Be Revived after the statute of limitations has run, see in general the title LIMITATION OF ACTIONS.

2. Statute of Limitations Suspended by Bankruptcy Proceeding — *England*. — *Ex p. Dewdney*, 15 Ves. Jr. 473; *Ex p. Ross*, 2 Glyn & J. 330; *Ex p. Seaber*, 1 Deac. 543, 2 Mont. & A. 588, 5 L. J. Bankr. 42.

United States. — *In re Eldridge*, 2 Hughes (U. S.) 256, 12 Nat. Bankr. Reg. 540, 8 Fed. Cas. No. 4,331; *In re Wright*, 6 Biss. (U. S.) 317, 2 Nat. Bankr. Reg. 142, 30 Fed. Cas. No. 18,068; *In re Maybin*, 15 Nat. Bankr. Reg. 468, 16 Fed. Cas. No. 9,337; *In re Graves*, 9 Fed. Rep. 816; *In re McKinney*, 15 Fed. Rep. 912.

New York. — *Von Sachs v. Kretz*, 72 N. Y. 548, affirming 10 Hun (N. Y.) 95.

But see *Nicholas v. Murray*, 5 Sawy. (U. S.) 320, 18 Nat. Bankr. Reg. 469, 18 Fed. Cas. No. 10,223; *Calloway v. Baldwin*, 1 Tex. App. Civ. Cas., § 592.

3. Rule as to Contingent and Unliquidated Claims in England. — *Ex p. Ruffie*, L. R. 8 Ch. 997; 46 & 47 Vict., c. 52, § 37. As to the former rule in *England*, see *Eden Bankr. Law* (1st ed.), p. 129.

4. Contingent Claims Provable under Bankruptcy Laws of United States. — Act August 19, 1841 (5 U. S. Stat. at L. 440), § 5; Act March 2, 1867 (14 U. S. Stat. at L. 517), § 19; Wolf v. Stix, 99 U. S. 1; *Ex p. Pollard*, 2 Lowell (U. S.) 411, 17 Nat. Bankr. Reg. 228, 19 Fed. Cas. No. 11,252; *In re Boston*, etc., Iron-Works, 29 Fed. Rep. 783, reversing 23 Fed. Rep. 880; *Abbott v. Rowan*, 33 Ark. 593; *McNeil v. Knott*, 11 Ga. 142. But see *Matter of Smith*, 6 Ben. (U. S.) 187, 22 Fed. Cas. No. 12,975; *In re Commercial Bulletin Co.*, 2 Woods (U. S.) 220, 14 Nat. Bankr. Reg. 286, 6 Fed. Cas. No. 3,060. And see *Orr v. Ward*, 73 Ill. 318.

An Insurance Policy is a "contingent liability," and a loss occurring after the bankruptcy of the insurance company but before the order for the final dividend is provable. *In re American Plate Glass*, etc., Ins. Co., 12 Nat. Bankr. Reg. 56, 1 Fed. Cas. No. 314.

5. Uncertainty as to Existence of Liability. — *In re Ellis*, 98 Fed. Rep. 967; *Ex p. Columbian Ins. Co.*, 2 Lowell (U. S.) 5, 6 Fed. Cas. No. 3,037; *Riggin v. Magwire*, 15 Wall. (U. S.)

or if there was no means of estimating the amount of the liability.¹ The present law provides for the proof and allowance of "unliquidated claims."² It does not, however, anywhere expressly mention "contingent" claims, but it would seem to have been intended that such claims should be provable, as under the former statutes.³

The State Insolvency Laws, in some instances, provide for the proof of contingent debts or liabilities, in accordance with the principles stated above,⁴ while others permit the proof of such debts only as are "absolutely due."⁵

Claims Arising Out of Torts. — An unliquidated claim for damages for a tort is not generally provable,⁶ though of course the statute may provide for the proof of such claims as well as others.⁷

Election Between Tort and Contract. — In cases where the claimant has, at law, an election of remedies between tort and contract, he may waive the tort and prove his claim as one for unliquidated damages for breach of contract,⁸ but if he elects to sue in tort he is bound by his election and cannot afterwards prove the claim in bankruptcy.⁹ The bankruptcy law of the *United States* of March 2, 1867, expressly provided that a claim for the conversion of personal

549, 8 Nat. Bankr. Reg. 484; *In re Mead*, 14 Fed. Rep. 287; *Ex p. Lake*, 2 Lowell (U. S.) 544, 16 Nat. Bankr. Reg. 497, 14 Fed. Cas. No. 7,991; *French v. Morse*, 2 Gray (Mass.) 111; *Kingman v. Fowle*, 5 Allen (Mass.) 133.

Proof of Claim under a Guaranty cannot be made against the estate of the bankrupt guarantor, where the principal debtor is solvent, and the debt is not payable. *Gay Mfg. Co. v. Gittings*, 53 Fed. Rep. 45, 8 U. S. App. 275.

The Liability of an Indorser Before Maturity has been held not to be provable, within this principle. *Stowell v. Richardson*, 3 Allen (Mass.) 64.

1. Amount Not Ascertainable. — *Steele v. Graves*, 68 Ala. 21, *overruling Jones v. Knox*, 46 Ala. 53, 7 Am. Rep. 583.

2. Act July 1, 1898 (30 U. S. Stat. at L. 544), § 63, par. b; *In re Heinsfurter*, 97 Fed. Rep. 198.

3. Contingent Claims Seemingly Contemplated by Act of 1898. — Section 63, paragraph a, clause (4), provides that claims founded on a contract, express or implied, may be proved, and this would seem broad enough to cover the contingent debts; and the Supreme Court, in the rules made pursuant to the statute (rule xxi, 4) seemed to have so understood it by providing for the proof of contingent claims.

4. Proof of Contingent Claims under State Insolvency Laws. — *Fernald v. Johnson*, 71 Me. 437; *Lothrop v. Reed*, 13 Allen (Mass.) 294; *Moseley v. Ames*, 5 Allen (Mass.) 163. And see *Matter of Bell*, 85 Cal. 119.

5. Proof Limited by State Laws to Debts "Absolutely Due." — *Savory v. Stocking*, 4 Cush. (Mass.) 607; *Brooks v. Brooks*, 11 Cush. (Mass.) 18; *Loring v. Kendall*, 1 Gray (Mass.) 305; *Treadwell v. Marden*, 123 Mass. 390, 25 Am. Rep. 108; *Deane v. Caldwell*, 127 Mass. 242; *McLane v. Curran*, 133 Mass. 531, 43 Am. Rep. 535; *Bowditch v. Raymond*, 146 Mass. 109; *Pub. Stat. Mass.*, c. 157, § 26; *Matter of Hevenor*, 70 Hun (N. Y.) 56, *affirmed* 144 N. Y. 271. Compare the statutes in other jurisdictions. *Bosler v. Kuhn*, 8 W. & S. (Pa.) 183; *Weinmann's Estate*, 164 Pa. St. 405.

6. Claims Arising out of Mere Torts Not Provable — England. — *In re Asphaltic Wood Pavement Co.*, 30 Ch. D. 216; *Buss v. Gilbert*, 2 M. & S. 70; *Ex p. Charles*, 16 Ves. Jr. 256; *Ex p.*

Seaward, 8 Mor. Bankr. Cas. 216; *Ex p. Mumford*, 15 Ves. Jr. 289; *Ex p. Muirhead*, 2 Ch. D. 22; *Ex p. Stone*, 6 Mor. Bankr. Cas. 158; *Ex p. Harding*, 23 L. J. Bankr. 22.

United States. — *In re Bailey*, 2 Woods (U. S.) 222, 2 Fed. Cas. No. 729; *Matter of Schuchardt*, 8 Ben. (U. S.) 585, 15 Nat. Bankr. Reg. 161, 21 Fed. Cas. No. 12,483; *Black v. McClelland*, 12 Nat. Bankr. Reg. 481, 3 Fed. Cas. No. 1,462; *In re Hennocksburgh*, 7 Nat. Bankr. Reg. 37; *Beers v. Hanlin*, 99 Fed. Rep. 695.

Massachusetts. — *Zimmer v. Schleeauf*, 115 Mass. 52.

New Hampshire. — *Gilman v. Cate*, 63 N. H. 278.

New York. — *Crouch v. Gridley*, 6 Hill (N. Y.) 250; *Kellogg v. Schuyler*, 2 Den. (N. Y.) 73.

A Claim for an Account of Profits Against an Infringer of a Patent Right has been held provable in bankruptcy, on the ground that it is not a claim for damages, but is more like an equitable claim for money had and received for the use of the patentee. *Watson v. Holliday*, 20 Ch. D. 780; *Re Blandin*, 1 Lowell (U. S.) 543, 5 Nat. Bankr. Reg. 39.

But this view has been disapproved by the Supreme Court of the United States, and it is now held that such a claim is founded on a tort and is not provable. *Root v. Lake Shore, etc.*, R. Co., 105 U. S. 189; *In re Boston, etc., Iron Works*, 23 Fed. Rep. 880, *reversing* 29 Fed. Rep. 783. See also *Child v. Boston, etc., Iron Works*, 137 Mass. 516, 50 Am. Rep. 328.

7. The Rhode Island Statute provides that claims against an insolvent "growing out of trover, replevin, or any tort," may be proved against his estate. *Brouillard, Petitioner*, 20 R. I. 617.

8. Election Between Tort and Contract. — *Johnson v. Spiller*, 1 Dougl. 168, note; *Parker v. Norton*, 6 T. R. 695; *Watson v. Holliday*, 20 Ch. D. 780.

A Claim Arising out of a Breach of Trust is provable within the rule stated in the text. *Ex p. Green*, 2 Deac. 113; *Ex p. Smith*, 2 Mont. D. & De G. 113; *Ex p. Westcott*, L. R. 9 Ch. 626; *Emma Silver Min. Co. v. Grant*, 17 Ch. D. 122.

9. Claimant Bound by Election. — *Ex p. Baum*, L. R. 9 Ch. 673. Compare *Elder v. Beaumont*, 8 El. & Bl. 353, 92 E. C. L. 353.

property should be provable,¹ but this provision is not contained in the Act of 1898.²

c. JOINT AND SEVERAL DEBTS. — In case several persons are liable for the same debt, and all of them are bankrupts, the creditor may prove his debt against the estate of each and receive dividends from all, until the debt is paid in full.³ If all the debtors are not bankrupts, the creditor may prove his debt against those who are bankrupts, and proceed at law against the other or others.⁴

In Case the Debtors Are Partners, and the firm is adjudged a bankrupt, partnership debts may, of course, be proved against the partnership estate.⁵ If the partners are individually adjudged bankrupts, such debts may be proved against their individual estates,⁶ and where one of the partners becomes individually liable for a debt of the firm, the creditor may prove against the estates of both the firm and the individual partner;⁷ but a claim against an individual partner is not provable against the partnership estate in bankruptcy, unless the statute provides for the settlement of such claims on the bankruptcy of the firm.⁸ So, too, a claim of a partnership against one of its members may

1. Claim for Conversion of Personality — Act March 2, 1867. — *Weaver v. Voils*, 68 Ind. 191.

2. See Act July 1, 1898 (30 U. S. Stat. at L. 544), § 63, enumerating the classes of debts provable in bankruptcy.

3. Proof of Claim Against Several Bankrupts. — *Matter of Babcock*, 3 Story (U. S.) 393, 2 Fed. Cas. No. 696; *Ex p. Farnsworth*, 1 Lowell (U. S.) 497, 8 Fed. Cas. No. 4,672; *In re Howard*, 4 Nat. Bankr. Reg. 571, 12 Fed. Cas. No. 6,750; *Downing v. Traders' Bank*, 2 Dill. (U. S.) 136, 11 Nat. Bankr. Reg. 371, 7 Fed. Cas. No. 4,046; *In re Kitzinger*, 19 Nat. Bankr. Reg. 152, 14 Fed. Cas. No. 7,861; *Weslon, Appellant*, 12 Met. (Mass.) 1.

Sureties, Indorsers, etc., are codebtors with the principal within the rule stated in the text. *Matter of Bruce*, 6 Ben. (U. S.) 515, 4 Fed. Cas. No. 2,044; *In re Hicks*, 19 Nat. Bankr. Reg. 299, 12 Fed. Cas. No. 6,456; *Downing v. Traders' Bank*, 2 Dill. (U. S.) 136, 11 Nat. Bankr. Reg. 371, 7 Fed. Cas. No. 4,046; *In re Duff*, 4 Fed. Rep. 519; *Ex p. Portland First Nat. Bank*, 70 Me. 369; *Ex p. Nason*, 70 Me. 363; *Loring v. Kendall*, 1 Gray (Mass.) 305; *Sohier v. Loring*, 6 Cush. (Mass.) 537.

Part Payment by the Surety does not deprive the creditor of his right to prove his full claim against the principal's estate. *In re Heyman*, 2 Am. Bankr. Reg. 651.

4. Proof of Claims Where Part Only of the Joint Debtors Are Bankrupts. — *Matter of Babcock*, 3 Story (U. S.) 393, 2 Fed. Cas. No. 696; *Ex p. Miller*, 1 N. Y. Leg. Obs. 38, 17 Fed. Cas. No. 9,550.

Where the Debtors Are Liable as the Maker and Indorser, respectively, of a note, the holder may prove it against the insolvent estate of the indorser, without first proceeding at law against the solvent maker. *Mercantile Nat. Bank v. Macfarlane*, 71 Minn. 497.

The Levy of an Execution on the property of one of two codebtors does not affect the right of the creditor to prove the claim against the other as unsecured. *In re Headley*, 97 Fed. Rep. 761.

5. Partnership Debts Provable Against Partnership Estate. — *Re Holbrook*, 2 Lowell (U. S.) 259, 12 Fed. Cas. No. 6,588; *In re Morse*, 11 Nat. Bankr. Reg. 482, 17 Fed. Cas. No. 9,853;

In re Roddin, 6 Biss. (U. S.) 377, 20 Fed. Cas. No. 11,989; *In re Herrick*, 13 Nat. Bankr. Reg. 312, 12 Fed. Cas. No. 6,420; *In re Norris*, 2 Hask. (U. S.) 19, 18 Fed. Cas. No. 10,302; *Gauss v. Schrader*, 48 Fed. Rep. 816; *Bush v. Crawford*, 7 Nat. Bankr. Reg. 299, 4 Fed. Cas. No. 2,224; *In re Baxter*, 18 Nat. Bankr. Reg. 62, 2 Fed. Cas. No. 1,119; *Daugherty v. Strauss*, 1 Tex. App. Civ. Cas., § 892.

6. Proof of Partnership Debts Against Individual Partners. — *Ex p. Elton*, 3 Ves. Jr. 238; *Ex p. Abell*, 4 Ves. Jr. 837; *Ex p. Clay*, 6 Ves. Jr. 813; *Ex p. Crisp*, 1 Atk. 133, Willes 467; *Tucker v. Oxley*, 5 Cranch (U. S.) 34; *In re Frear*, 2 Ben. (U. S.) 467, 1 Nat. Bankr. Reg. 660, 9 Fed. Cas. No. 5,074; *Matter of Bigelow*, 3 Ben. (U. S.) 146, 2 Nat. Bankr. Reg. 371, 3 Fed. Cas. No. 1,397; *In re Beers*, 5 Nat. Bankr. Reg. 211, 3 Fed. Cas. No. 1,229; *In re Bucyrus Mach. Co.*, 5 Nat. Bankr. Reg. 303, 4 Fed. Cas. No. 2,100; *In re Bates*, 100 Fed. Rep. 263; *Agawam Bank v. Morris*, 4 Cush. (Mass.) 99; *Roger Williams Nat. Bank v. Holl*, 160 Mass. 171; *Murray v. Murray*, 5 Johns. Ch. (N. Y.) 60.

If One Partner Only Becomes a Bankrupt, firm creditors may prove their claims against his estate. *In re Webb*, 4 Sawy. (U. S.) 326, 16 Nat. Bankr. Reg. 258, 29 Fed. Cas. No. 17,317; *Wilkins v. Davis*, 2 Lowell (U. S.) 511, 15 Nat. Bankr. Reg. 60, 29 Fed. Cas. No. 17,664.

7. Claims Against Both Firm and Individual Partner. — *In re Farnum*, 8 Fed. Cas. No. 4,674; *In re Bradley*, 2 Biss. (U. S.) 515, 3 Fed. Cas. No. 1,772; *Emery v. Canal Nat. Bank*, 3 Cliff. (U. S.) 507, 7 Nat. Bankr. Reg. 217, 8 Fed. Cas. No. 4,446; *Stephenson v. Jackson*, 2 Hughes (U. S.) 204, 9 Nat. Bankr. Reg. 255, 22 Fed. Cas. No. 13,374. See also *Mead v. National Bank*, 6 Blatchf. (U. S.) 180, 2 Nat. Bankr. Reg. 173, 16 Fed. Cas. No. 9,366; *In re Tesson*, 9 Nat. Bankr. Reg. 378, 23 Fed. Cas. No. 13,844.

8. Individual Claim Against Partner Not Provable Against Partnership Estate. — *Re Holbrook*, 2 Lowell (U. S.) 259, 12 Fed. Cas. No. 6,588; *In re Isaacs*, 3 Sawy. (U. S.) 35, 6 Nat. Bankr. Reg. 92, 13 Fed. Cas. No. 7,093; *In re Forbes*, 5 Biss. (U. S.) 510, 9 Fed. Cas. No. 4,922; *In re Dunkle*, 7 Nat. Bankr. Reg. 107, 8 Fed. Cas. No. 4,161; *In re Golder*, 2 Hask. (U. S.) 28, 10

be proved against his estate in bankruptcy.

f. SECURED CLAIMS. — A creditor does not, on the one hand, lose the right to prove his claim in bankruptcy because he holds security for it, nor, on the other hand, does the bankruptcy proceeding affect the security, if the creditor wishes to retain the benefit thereof. Several courses are open to him in regard to such a claim, viz., *first*, he may realize his security, and prove for the balance, or state, in his proofs, the particulars of the security, so that its value may be estimated and deducted from the amount of the claim;² *secondly*, he may surrender the security and prove for the whole debt;³ or,

Fed. Cas. No. 5,510; *In re Forsyth*, 7 Nat. Bankr. Reg. 174, 9 Fed. Cas. No. 4,948; *In re Frost*, 3 Nat. Bankr. Reg. 736, 9 Fed. Cas. No. 5,135; *Matter of Van Buren*, 2 Fed. Rep. 643. *Compare In re Norris*, 2 Hask. (U. S.) 19, 18 Fed. Cas. No. 10,302.

The Bankruptcy Law of 1898 provides that on the bankruptcy of a partnership, the bankruptcy court shall have the administration of the individual estates of the partners as well as the partnership estate. Act July 1, 1898 (30 U. S. Stat. at L. 544), § 5.

The Act of 1867 contained a similar provision. *In re Walton, Deady* (U. S.) 510, 29 Fed. Cas. No. 17,129.

1. Proof of Claim of Partnership Against Individual Partner. — *Brown v. Curtis*, 5 Mason (U. S.) 421, 4 Fed. Cas. No. 2,000; *In re McLean*, 15 Nat. Bankr. Reg. 333, 16 Fed. Cas. No. 8,879; *In re Hamilton*, 1 Fed. Rep. 800. See also *In re Dell*, 5 Sawy. (U. S.) 344, 7 Fed. Cas. No. 3,774. But see *In re McEwen*, 6 Biss. (U. S.) 294, 12 Nat. Bankr. Reg. 11, 16 Fed. Cas. No. 8,783. And compare *In re Lane*, 2 Lowell (U. S.) 333, 10 Nat. Bankr. Reg. 135, 14 Fed. Cas. No. 8,044; *In re May*, 19 Nat. Bankr. Reg. 101, 16 Fed. Cas. No. 9,328.

2. Deduction of Value of Security or Amount Realized Therefrom — *England*. — 46 & 47 Vict., c. 52, 2d schedule, par. 9, 11, 12-15; *In re Bonacino*, 1 Manson 59; *In re London, etc.*, Hotel Co., (1892) 1 Ch. 639; *White v. Simmons*, L. R. 6 Ch. 555.

Canada. — *Glanville v. Strachan*, 29 Ont. 373.

United States. — Act July 1, 1898 (30 U. S. Stat. at L. 544), § 57; *Matter of Bolton*, 2 Ben. (U. S.) 189, 1 Nat. Bankr. Reg. 370, 3 Fed. Cas. No. 1,614; *In re Shirley*, 9 Fed. Rep. 901; *In re Letchworth*, 18 Fed. Rep. 822; *In re Newland*, 6 Ben. (U. S.) 342, 7 Nat. Bankr. Reg. 477, 18 Fed. Cas. No. 10,170; *Ex p. Dalby*, 1 Lowell (U. S.) 431, 6 Fed. Cas. No. 3,540; *In re Baldwin*, 19 Nat. Bankr. Reg. 52, 2 Fed. Cas. No. 796; *In re Grant*, 10 Fed. Cas. No. 5,690; *In re Falls City Shirt Mfg. Co.*, 98 Fed. Rep. 592.

Connecticut. — *In re Greeley*, 70 Conn. 494.

Massachusetts. — *Miller's River Nat. Bank v. Jefferson*, 138 Mass. 111; *Franklin County Nat. Bank v. Greenfield First Nat. Bank*, 138 Mass. 515; *Washburn v. Tisdale*, 143 Mass. 376; *Lanckton v. Wolcott*, 6 Met. (Mass.) 305; *Hunnewell v. Goodrich*, 3 Cush. (Mass.) 469; *Day v. Lamb*, 6 Gray (Mass.) 523.

Minnesota. — *Swedish-American Nat. Bank v. Davis*, 69 Minn. 181.

Nebraska. — *State v. Nebraska Sav. Bank*, 40 Neb. 342.

New Jersey. — *Bell v. Fleming*, 12 N. J. Eq. 13, 490.

South Carolina. — *Wheat v. Dingle*, 32 S. Car. 473.

Vermont. — *International Trust Co. v. West Rutland Marble Co.*, 63 Vt. 326.

Washington. — *Matter of Frasch*, 5 Wash. 344.

Where a Firm Had Pledged Its Notes as Collateral for Its Acceptances, and afterwards failed and executed a deed of trust for creditors, it was held that the pledgees could sell the notes and credit the proceeds on the indebtedness, and then prove under the deed of trust for the balance of their claim; and also that the purchasers of the notes in good faith could prove for their full amount, though they bought them after maturity. *Matter of Woods*, 52 Md. 520.

It Is Only When Bankruptcy Proceedings Are Pending that the provision for estimating the value of the security applies. *In re Linforth*, 87 Fed. Rep. 386.

A Mortgage Creditor cannot prove the full amount of the mortgage debt while he still holds the mortgage. *Bristol County Sav. Bank v. Woodward*, 137 Mass. 412.

Leave of Bankruptcy Court to Foreclose Mortgages. — In some cases it was held, under the bankruptcy law of 1867, that, unless a mortgage creditor obtained leave of court to foreclose his mortgage, he could not prove for any deficiency that might result. *In re Miller*, 19 Nat. Bankr. Reg. 78, 17 Fed. Cas. No. 9,555; *In re Herrick*, 17 Nat. Bankr. Reg. 335, 12 Fed. Cas. No. 6,421. But see *Matter of Moller*, 14 Blatchf. (U. S.) 207, 17 Fed. Cas. No. 9,700, *affirming* 8 Ben. (U. S.) 526, 17 Fed. Cas. No. 9,699; *In re Stansfield*, 4 Sawy. (U. S.) 334, 16 Nat. Bankr. Reg. 268, 22 Fed. Cas. No. 13,294.

The *Massachusetts* statute requires a mortgagee to obtain leave of court to sell under his mortgage or pledge, and if he sells without first obtaining leave, he cannot prove the residue of his claim after applying the proceeds of the sale. *Smith v. Warner*, 133 Mass. 71.

A Mechanics' Lien Debt is not provable under the insolvency law of *California*. *Bradford v. Dorsey*, 63 Cal. 122.

Under the Kentucky Insolvency Law, a secured creditor may prove for his entire debt and receive dividends thereon without regard to the security. *Tod v. Kentucky Union Land Co.*, 57 Fed. Rep. 47.

3. Surrender of Security — *England*. — 46 & 47 Vict., c. 52, 2d schedule, par. 10; *Ex p. Morris*, 14 L. T. N. S. 606; *Cracknall v. Janson*, 6 Ch. D. 735; *Ex p. Good*, 14 Ch. D. 82.

United States. — *In re Bear*, 5 Fed. Rep. 53, *affirmed* 7 Fed. Rep. 583; *White v. Crawford*, 9 Fed. Rep. 371; *In re Brand*, 2 Hughes (U. S.) 334, 3 Nat. Bankr. Reg. 324, 4 Fed. Cas. No. 1,800.

California. — *Bradford v. Dorsey*, 63 Cal. Volume XVI.

thirdly, he may rely on his security and not prove.¹ The security here referred to is security on the property of the debtor. Security on the property of a third person does not affect the proof of the claim against the debtor.²

122; Act Cal. March 26, 1895 (Stat. 1895, p. 131), § 48.

Minnesota. — *Smith v. Brainerd*, 37 Minn. 479.

Execution Levied on Land. — A creditor who, before the insolvency of the debtor, levied an execution on land which was set off to him in satisfaction of the execution, cannot after the insolvency tender a release of the land to the assignee and claim the right to prove his demand on the theory that he holds the land as collateral security; and it makes no difference that the title to the land stood in the name of a third person at the time of the levy. *Wareham Sav. Bank v. Vaughan*, 133 Mass. 534.

Proving a Secured Claim Without Disclosing the Security operates as a waiver of the security. See *supra*, this section, *Amount Allowable — Secured Claims*, note *Waiver of Security*.

1. **Relying Exclusively on Security — England.** — *Tucker v. Wilson*, 1 P. Wms. 261; *Ex p. Reid*, 1 Deac. & C. 250; *Ex p. Belcher*, 2 Deac. & C. 587; *Ex p. Rolfe*, 3 Mont. & A. 305; *Ex p. Geller*, 2 Madd. 262; *White v. Simmons*, L. R. 6 Ch. 555; *In re Elmslie*, L. R. 9 Eq. 72.

Canada. — *Gordon v. Ross*, 11 Grant Ch. (U. C.) 124.

United States. — *Nugent v. Boyd*, 3 How. (U. S.) 426; *Jerome v. McCarter*, 94 U. S. 734, 15 Nat. Bankr. Reg. 546; *Yeatman v. New Orleans Sav. Inst.*, 95 U. S. 764, 17 Nat. Bankr. Reg. 187; *Cumming v. Clegg*, 14 Nat. Bankr. Reg. 49.

Georgia. — *Jones v. Lellyett*, 39 Ga. 64.

Kentucky. — *Louisville Second Nat. Bank v. New Jersey Nat. State Bank*, 10 Bush (Ky.) 367.

Louisiana. — *Levy v. Thompson*, 48 La. Ann. 410, 537. Compare *Phillipi v. Their Creditors*, 44 La. Ann. 675.

Massachusetts. — *Moody v. Webster*, 3 Pick. (Mass.) 424; *Davenport v. Tilton*, 10 Met. (Mass.) 320; *Bowditch Mut. F. Ins. Co. v. Jackson*, 12 Gray (Mass.) 114; *Bates v. Tappan*, 99 Mass. 376; *Bosworth v. Pomeroy*, 112 Mass. 293; *Stockwell v. Silloway*, 113 Mass. 382; *Johnson v. Collins*, 116 Mass. 392; *Hall v. Bliss*, 118 Mass. 554, 19 Am. Rep. 476.

Mississippi. — *Reed v. Bullington*, 49 Miss. 223; *Talbert v. Melton*, 9 Smed. & M. (Miss.) 9.

New Hampshire. — *Peck v. Jenness*, 16 N. H. 516, 43 Am. Dec. 573.

Vermont. — *Stoddard v. Locke*, 43 Vt. 574, 5 Am. Rep. 308; *Rogers v. Heath*, 62 Vt. 101.

Under the Bankruptcy Law of 1867 the practice in some districts was to require secured creditors to prove their claims in all cases, and leave of the bankruptcy court was essential to the right of the creditor to enforce his security. *Davis v. Anderson*, 6 Nat. Bankr. Reg. 145, 7 Fed. Cas. No. 3,623.

But it was afterwards held that the creditor might proceed to enforce his security without regard to the bankruptcy proceeding, unless the bankruptcy court should forbid him to do so. *Jerome v. McCarter*, 94 U. S. 734, 15 Nat. Bankr. Reg. 546; *Yeatman v. New Orleans Sav. Inst.*, 95 U. S. 764, 17 Nat. Bankr. Reg. 187.

The Present Bankruptcy Law of the United States provides that the value of securities held by secured creditors shall be determined by converting the same into money, according to the terms of the agreement under which they were delivered to the creditor or by such proceeding as the court may direct. Act July 1, 1898 (30 U. S. Stat. at L. 544), § 57.

The Failure of a Mortgagee to Prosecute His Foreclosure Suit after obtaining leave of court to foreclose does not preclude him from proving his claim, if he had a good reason for not prosecuting the foreclosure. *In re Linforth*, 87 Fed. Rep. 386.

Under the California Statute, if a secured creditor does not either surrender his security or deduct the value thereof from his claim, he will not be permitted to prove it. *In re Harvey*, (Cal. 1893) 32 Pac. Rep. 567. See also *Nichols v. Smith*, 143 Mass. 455. Compare the rule stated *supra*, this section, *Effect of Proving Claims — Waiver of Lien or Security*.

The Surplus After Satisfying the Secured Debt cannot be applied to an unsecured claim held by the same creditor. *Tallman v. New Bedford Five Cents Sav. Bank*, 138 Mass. 330.

2. **Proof Affected Only by Security on Property of Debtor — England.** — *Ex p. Peacock*, 2 Glyn & J. 27; *Ex p. Bowden*, 1 Deac. & C. 135; *Ex p. Shepherd*, 2 Mont. D. & De G. 204; *Matter of Plummer*, 1 Phil. 56; *Ex p. West Riding Union Banking Co.*, 19 Ch. D. 105; *Ex p. English*, etc., Bank, L. R. 4 Ch. 49; *Ex p. Parr*, 1 Rose 76; *Ex p. Goodman*, 3 Madd. 373; *Ex p. Hedderley*, 2 Mont. D. & De G. 487; *Ex p. Adams*, 3 Mont. & A. 157; *Baines v. Wright*, 16 Q. B. D. 330; *In re Hallett*, (1894) 2 Q. B. 256.

United States. — *In re Kinne*, 5 Fed. Rep. 59; *In re Dunkerson*, 4 Biss. (U. S.) 253, 12 Nat. Bankr. Reg. 413, 8 Fed. Cas. No. 4,157; *In re Cram*, 1 Hask. (U. S.) 89, 1 Nat. Bankr. Reg. 504, 6 Fed. Cas. No. 3,343; *Matter of Babcock*, 3 Story (U. S.) 393; *Re Alexander*, 1 Lowell (U. S.) 470; *Re Holbrook*, 2 Lowell (U. S.) 259; *In re Anderson*, 12 Nat. Bankr. Reg. 502; *In re Broich*, 15 Nat. Bankr. Reg. 11.

Arkansas. — *Taylor v. Moore*, 64 Ark. 23.

Massachusetts. — *Hale v. Leatherbee*, (Mass. 1900) 56 N. E. Rep. 562; *Viles v. Harris*, 130 Mass. 300; *Meed v. Nelson*, 9 Gray (Mass.) 55; *Cabot Bank v. Bodman*, 11 Gray (Mass.) 134.

New York. — *Elsworth v. Caldwell*, (Supm. Ct.) 18 Abb. Pr. (N. Y.) 20, 27 How. Pr. (N. Y.) 188.

Virginia. — *McAden v. Keen*, 30 Gratt. (Va.) 400.

Security on Property Transferred Before Insolvency. — The rule stated in the text applies where the property on which the debtor had given security was transferred by him before insolvency. Thus where the owner of land mortgaged it, subsequently conveyed his equity, and several years afterwards went into insolvency, the Massachusetts statute which provides for special proceedings where a creditor holds a mortgage of the debtor's estate, does not apply, and therefore the creditor may

g. **JUDGMENTS.** — A judgment entered in a civil proceeding is a provable debt, whether the recovery was on contract or tort,¹ but not a judgment in a criminal proceeding.² The creditor may, however, prove the original debt, notwithstanding the judgment.³

The fact that the judgment was rendered after commencement of the bankruptcy proceeding does not, according to the weight of authority, alter the case, if the recovery was for a debt which would have been provable without the judgment, because the judgment is not regarded as creating a new debt,⁴ though the contrary has been held.⁵ But a judgment for damages for a tort, rendered after the commencement of the bankruptcy proceeding, is not provable, though it was rendered on a verdict found previously.⁶

Interest and Costs may also be proved, where the judgment was rendered before the commencement of the bankruptcy proceeding.⁷

h. **ASSIGNED CLAIMS.** — A claim which has been assigned is provable in the hands of the assignee, whether the assignment was an absolute transfer, or was only intended as a pledge or collateral security for an indebtedness of the assignor to the assignee.⁸

i. **PREFERRED CLAIMS.** — In some jurisdictions a claim as to which the creditor has received a preference is not provable, at least until the creditor has surrendered his preference.⁹

sell the land under the power of sale, without obtaining any order of the insolvency court, and apply the proceeds in part satisfaction of his debt, and prove the balance of his claim against the estate of the insolvent. *Wilson v. Bryant*, 134 Mass. 291.

1. Judgments as Provable Debts — United States. — *Matter of Comstock*, 22 Vt. 642, 6 Fed. Cas. No. 3,073; *Matter of Leszynsky*, 3 Ben. (U. S.) 487, 15 Fed. Cas. No. 8,278; *In re Kitzinger*, 19 Nat. Bankr. Reg. 152, 14 Fed. Cas. No. 7,861.

Delaware. — *Randall v. Sutton*, 2 Houst. (Del.) 510.

Georgia. — *Loudon v. Blandford*, 56 Ga. 150.

Ohio — *Howland v. Carson*, 28 Ohio St. 625.

Vermont. — *Comstock v. Grout*, 17 Vt. 512.

The Pendency of a Writ of Error and Supersedeas does not affect the judgment, but it is still a provable debt in bankruptcy. *In re Sheehan*, 8 Nat. Bankr. Reg. 345, 21 Fed. Cas. No. 12,737.

2. Judgment in Criminal Proceeding Not Provable. — *In re Sutherland*, Deady (U. S.) 344, 1 Nat. Bankr. Reg. 531, 23 Fed. Cas. No. 13,638.

3. Debt Provable Notwithstanding Judgment. — *In re Vickery*, 3 Nat. Bankr. Reg. 696, 28 Fed. Cas. No. 16,930; *Matter of Stevens*, 4 Ben. (U. S.) 513, 4 Nat. Bankr. Reg. 367, 23 Fed. Cas. No. 13,391; *Bourne v. Maybin*, 3 Woods (U. S.) 724, 3 Fed. Cas. No. 1,700; *Matter of Vetterlein*, 13 Blatchf. (U. S.) 44, 12 Nat. Bankr. Reg. 526, 28 Fed. Cas. No. 16,929. And see *In re Van Buren*, 19 Nat. Bankr. Reg. 149, 28 Fed. Cas. No. 16,833, where the claimant sought to have a judgment which he had recovered set aside on account of fraud, whereby it was rendered for a smaller sum than was really due, and to recover what is still due under the contract on which the judgment was rendered.

Effect of Setting Aside Judgment. — One is not necessarily the less the creditor of an insolvent because a judgment entered in his favor has been set aside. *Davenport v. His Creditors*, 62 Cal. 29.

4. Judgment Rendered After Bankruptcy Held Provable. — *Matter of Brown*, 5 Ben. (U. S.) 1, 3 Nat. Bankr. Reg. 584, 4 Fed. Cas. No. 1,975; *In re Crawford*, 3 Nat. Bankr. Reg. 698, 6 Fed. Cas. No. 3,363; *In re Stansfield*, 4 Sawy. (U. S.) 334, 16 Nat. Bankr. Reg. 268, 22 Fed. Cas. No. 13,294; *Cothren's Appeal*, 59 Conn. 545.

5. Judgment Rendered After Bankruptcy Held Not Provable. — *In re Williams*, 2 Nat. Bankr. Reg. 229, 29 Fed. Cas. No. 17,705, in which it was said that a judgment extinguishes the debt on which it was founded, and constitutes a new debt. And see *In re Maybin*, 15 Nat. Bankr. Reg. 468, 16 Fed. Cas. No. 9,337; *Emery*, Appellant, 89 Me. 544, 56 Am. St. Rep. 440; *Sampson v. Clark*, 2 Cush. (Mass.) 173.

6. Judgment Rendered After Bankruptcy on Verdict Previously Found in Action for Tort. — *Black v. McClelland*, 12 Nat. Bankr. Reg. 481, 3 Fed. Cas. No. 1,462.

7. Interest and Costs on Judgment. — *Ex p. Ditton*, 13 Ch. D. 318; *Ex p. Ruffie*, L. R. 8 Ch. 997; *In re Newman*, 3 Ch. D. 494; *Vint v. Hudspeth*, 30 Ch. D. 24; *Ex p. O'Neill*, 1 Lowell (U. S.) 163, 1 Nat. Bankr. Reg. 677, 18 Fed. Cas. No. 10,527; *Swedish-American Nat. Bank v. Davis*, 69 Minn. 181.

8. Assigned Claims Provable in Hands of Assignee — England. — *Ex p. Newton*, 16 Ch. D. 330; *Ex p. Bloxham*, 6 Ves. Jr. 449, 600; *In re Gomersall*, 1 Ch. D. 137, on appeal, *sub nom.* *Jones v. Gordon*, 2 App. Cas. 616.

United States. — *Ex p. Kelty*, 1 Lowell (U. S.) 394, 14 Fed. Cas. No. 7,681; *Bailey v. Nichols*, 2 Nat. Bankr. Reg. 478, 2 Fed. Cas. No. 741; *In re Headley*, 97 Fed. Rep. 765. See also General Orders and Forms in Bankruptcy (1898), rule xxi., par. 3, 5.

Maryland. — *Matter of Woods*, 52 Md. 520.

9. Preferred Claims — Surrender of Preference. — Act July 1, 1898 (30 U. S. Stat. at L. 544), § 57, par. *g.*; *In re Richard*, 94 Fed. Rep. 633; *In re Heinsfurter*, 97 Fed. Rep. 198; *In re Conhaim*, 97 Fed. Rep. 923; *In re Ft. Wayne Electric Corp.*, 99 Fed. Rep. 400; *Strobel v.*

j. COSTS AND EXPENSES — (1) *Rule in England.* — In England, it is held that costs incurred by a bankrupt before the adjudication are included in the comprehensive phrase "all debts and liabilities," which the statute declares are provable in bankruptcy.¹

A Successful Plaintiff, whose cause of action was a provable debt, may prove his costs on the bankruptcy of the defendant as an addition to the original claim, if he (the plaintiff) obtained a verdict before the bankruptcy; but the rule is different, if the verdict was obtained after the bankruptcy.² If, however, the claim sued on was not a provable debt, the plaintiff is not entitled to prove his costs merely by reason of the fact that he had a verdict before the bankruptcy. The judgment must also have been signed.³

In the Case of a Successful Defendant, the right to prove costs on the bankruptcy of the plaintiff rests on the theory that a defendant's costs are not an incident to any other debt, but the liability therefor is created by the verdict or judgment, and therefore the defendant may prove his costs, if he obtained a verdict or judgment before the bankruptcy, though the costs had not been taxed or the judgment signed, and it is also immaterial whether the action was in contract or in tort.⁴

(2) *Rule in United States.* — When a judgment for costs has been perfected before bankruptcy proceedings are commenced, such costs are obviously provable as a debt or liability incurred before the bankruptcy.⁵ Express provision for costs is made by the bankruptcy law of 1898.⁶

Costs and Expenses of Attachments and Executions. — Where an attachment or execution was levied in good faith on the property of a debtor before his bankruptcy, the fees and disbursements of the officer making the levy may be proved;⁷ but they are not provable if the execution was issued after the

Knott, 99 Fed. Rep. 409; *In re Kahn*, 55 Minn. 509.

The *Massachusetts* statute forbids a creditor who has received a preference to prove the debt or claim on account of which the preference was given. Pub. Stat. Mass., c. 157, § 33. Compare the statutes in other jurisdictions.

Such prohibitions apply only to the debt preferred, and do not affect other debts due the same creditor. *Smith v. American Linen Co.*, 172 Mass. 227.

Nor do they apply to preferences which are not avoided by the statute, because not given within the time limited. *In re Folb*, 91 Fed. Rep. 107; *In re Little River Lumber Co.*, 92 Fed. Rep. 585.

1. Costs Held Provable Debts in England. — *Ex p. Peacock*, L. R. 8 Ch. 682; *Ex p. Edwards*, 3 Mor. Bankr. Cas. 179; *Ex p. Harding*, 23 L. J. Bankr. 22; *Jacobs v. Phillips*, 1 C. M. & R. 195.

A mere possibility of having to pay costs is not a debt provable in bankruptcy, though it may, in some cases, be a "contingent liability." *Vint v. Hudspeth*, 30 Ch. D. 24.

The costs of attempting to recover a provable debt are provable, though not ascertained at the time of the bankruptcy. *In re Gillespie*, 16 Q. B. D. 702; *In re General South American Co.*, 7 Ch. D. 637.

2. Rule as to Plaintiff's Costs in England. — *In re Newman*, 3 Ch. D. 494; *Ex p. Poucher*, 1 Glyn & J. 385; *Ex p. Helm*, Mont. & M. 70; *Aylett v. Harford*, 2 W. Bl. 1317; *Ex p. Cocks*, De G. 466; *Ex p. Ferris*, 2 Mont. D. & De G. 746; *Watts v. Hart*, 1 B. & P. 134; *Ex p. Simpson*, 3 Bro. C. C. 46; *Hurst v. Mead*, 5 T. R. 365.

3. Rule Where Cause of Action Is Not a Provable Debt. — *In re Newman*, 3 Ch. D. 494.

4. Rule as to Defendant's Costs in England. — *Ex p. Baum*, L. R. 9 Ch. 673; *In re Scarth*, L. R. 10 Ch. 234; *In re Newman*, 3 Ch. D. 494; *Ex p. Goodier*, 22 L. T. N. S. 426; *Ex p. Hill*, 11 Ves. Jr. 646; *Ex p. Eicke*, 1 Glyn & J. 261; *Ex p. Bluck*, 57 L. T. N. S. 419; *Ex p. Peacock*, L. R. 8 Ch. 682; *Holding v. Impey*, 7 Moo. 614.

5. Rule as to Costs in United States — Judgment Perfected Before Bankruptcy. — *Ex p. Foster*, 2 Story (U. S.) 131, 9 Fed. Cas. No. 4,960; *In re Preston*, 5 Nat. Bankr. Reg. 293, 19 Fed. Cas. No. 11,393; *Cothren's Appeal*, 59 Conn. 545. And see *supra*, this division of this section, *Judgments*.

The Stipulated Costs and Expenses of Foreclosing a Mortgage will not be allowed on the bankruptcy of the mortgagor before foreclosure of the mortgage. *In re Devore*, 16 Nat. Bankr. Reg. 56, 7 Fed. Cas. No. 3,847.

6. Costs under Bankruptcy Law of 1898. — Act July 1, 1898 (30 U. S. Stat. at L. 544), § 57.

7. Costs and Expenses of Attachments and Executions. — *Platt v. Stewart*, 11 Nat. Bankr. Reg. 191, 19 Fed. Cas. No. 11,221.

Levy under Invalid Judgment. — A sheriff who, in good faith, levied on the property of a judgment debtor, may, on the subsequent bankruptcy of the debtor, prove his claim for fees and expenses, though the judgment was invalid. *Matter of Welch*, 5 Ben. (U. S.) 278, 29 Fed. Cas. No. 17,367. See also *In re Williams*, 2 Nat. Bankr. Reg. 229, 29 Fed. Cas. No. 17,705.

Expenses Incurred in Keeping the Property After the Insolvency, and after the refusal of the

bankruptcy proceedings were commenced,¹ or if the attachment was vacated by the subsequent bankruptcy proceeding,² unless the estate has been benefited,³ or the statute authorizes the allowance of such costs.⁴

Compensation for Services Rendered for the Benefit of the Estate may be proved as a claim in bankruptcy, as in the case of the attorney for the receiver of an insolvent corporation.⁵

The Costs and Expenses of the Bankruptcy Proceeding are also claims which may be allowed against the estate.⁶

3. Priorities — *a. IN GENERAL.* — **The Principle of Equality** among creditors, on which the insolvency and bankruptcy laws proceed, relates to creditors who have acquired no specific lien on or interest in the property of the debtor, and does not affect any such superior rights as may have been acquired before the insolvency or bankruptcy occurred.⁷ In all other cases, except so far as

attaching officer to deliver up the property on demand by the assignee in insolvency, are not provable by the attaching creditor as a claim against the estate. *Russell Paper Co. v. Smith*, 135 Mass. 588.

1. Execution Issued After Bankruptcy. — *Platt v. Stewart*, 11 Nat. Bankr. Reg. 191, 19 Fed. Cas. No. 11,221.

2. Costs of Attachment Vacated by Bankruptcy Proceeding Not Provable. — *In re Davis*, 1 Hask. (U. S.) 232, 7 Fed. Cas. No. 3,616; *In re Arch-enbrow*, 8 Nat. Bankr. Reg. 429, 1 Fed. Cas. No. 503; *In re Irons*, 18 Nat. Bankr. Reg. 95, 13 Fed. Cas. No. 7,067; *In re Foye*, 2 Lowell (U. S.) 399, 9 Fed. Cas. No. 5,021. Compare *In re Preston*, 5 Nat. Bankr. Reg. 293, 19 Fed. Cas. No. 11,393.

Attachments, etc., Vacated by Bankruptcy Proceedings. See *infra*, this title, *Operation and Effect of Insolvency and Bankruptcy Proceedings* — *Lien on Debtor's Property*.

3. Benefit to Estate. — Expenses incurred by a sheriff or creditors in the care and custody of goods levied on under an attachment, which has been dissolved by the proceedings in bankruptcy, are provable if they have been beneficial to the estate. *In re Fortune*, 1 Lowell (U. S.) 306, 2 Nat. Bankr. Reg. 662, 9 Fed. Cas. No. 4,955; *Matter of Schwab*, 3 Ben. (U. S.) 231, 2 Nat. Bankr. Reg. 488, 21 Fed. Cas. No. 12,498; *Zeiber v. Hill*, 1 Sawy. (U. S.) 268, 8 Nat. Bankr. Reg. 239, 30 Fed. Cas. No. 18,206. See also *In re Baker*, 1 Hask. (U. S.) 593, 2 Fed. Cas. No. 762; *Ex p. Holmes*, 14 Nat. Bankr. Reg. 493, 12 Fed. Cas. No. 6,631; *In re Jenks*, 15 Nat. Bankr. Reg. 301, 13 Fed. Cas. No. 7,276.

If the Attachment Was Merely Auxiliary to the Bankruptcy Proceeding, the costs and expenses thereof may be proved. *In re Ward*, 9 Nat. Bankr. Reg. 349, 29 Fed. Cas. No. 17,145.

The Expense of Attempting to Arrest the Debtor cannot be proved against his estate in bankruptcy, where it does not appear that there was any necessity for the arrest, or that it resulted in any benefit to the estate. *In re Ward*, 9 Nat. Bankr. Reg. 349, 29 Fed. Cas. No. 17,145.

4. Costs of Pending Attachments Allowable. — The insolvency laws of some states expressly provide for the allowance of the costs of pending attachments which are dissolved by an insolvency proceeding. See the various state insolvency laws.

The Costs of a Wrongful Attachment, however,

are not contemplated by such provision. *In re Harvey*, (Cal. 1893) 32 Pac. Rep. 567.

5. Compensation for Services Rendered. — *Platt v. Archer*, 13 Blatchf. (U. S.) 351, 19 Fed. Cas. No. 11,214. And see *Kadish v. Chicago Co-operative Brewing Assoc.*, 35 Ill. App. 411; *Andrus v. His Creditors*, 46 La. Ann. 1351; *Dunbar v. His Creditors*, 39 La. Ann. 589; *Mullan v. His Creditors*, 39 La. Ann. 397; *Jaffray v. Steedman*, 38 S. Car. 557.

6. Costs and Expenses of Bankruptcy Proceeding. — Act July 1, 1898 (30 U. S. Stat. at L. 544), § 64; *In re Silverman*, 97 Fed. Rep. 325; *In re Matthews*, 97 Fed. Rep. 772; *State v. Simpson*, R. M. Charl. (Ga.) 122; *In re American Sav., etc., Assoc.*, (Minn. 1899) 81 N. W. Rep. 218.

Attorneys' Fees. — *In re Beck*, 92 Fed. Rep. 889; *In re Stotts*, 93 Fed. Rep. 438; *In re J. W. Harrison Mercantile Co.*, 95 Fed. Rep. 123; *In re Michel*, 95 Fed. Rep. 803; *In re Woodard*, 95 Fed. Rep. 955; *In re O'Connell*, 98 Fed. Rep. 83; *McIntosh v. Merchants' Co.*, 12 La. Ann. 533; *Kittredge v. Miller*, 12 Ohio Cir. Ct. 128, 5 Ohio Cir. Dec. 391. And see the various state insolvency laws.

The Costs of a Suit to Compel Distribution by a Voluntary Assignee are not provable where the suit was not beneficial to the creditors, and the estate was placed in the hands of an assignee in bankruptcy. *In re Dumahaut*, 19 Nat. Bankr. Reg. 394, 7 Fed. Cas. No. 4,126.

7. Preference of Lien Debts. — *Gardner v. Cook*, 7 Nat. Bankr. Reg. 346, 9 Fed. Cas. No. 5,226; *Swope v. Arnold*, 5 Nat. Bankr. Reg. 148, 23 Fed. Cas. No. 13,702; *In re Scott*, 1 Abb. (U. S.) 336, 3 Nat. Bankr. Reg. 742, 21 Fed. Cas. No. 12,517, affirmed in *The Ironsides*, 13 Fed. Cas. No. 7,070; *In re Hambright*, 2 Nat. Bankr. Reg. 498, 11 Fed. Cas. No. 5,973; *Reed v. Bullington*, 49 Miss. 223; *Hurlbutt v. Currier*, 68 N. H. 94; *In re McConnell*, 10 Phila. (Pa.) 287, 9 Nat. Bankr. Reg. 387, 15 Fed. Cas. No. 8,712; *In re Lowe*, 19 Fed. Rep. 589; *Tufts v. Casey*, 15 La. Ann. 258. See also *Dumont v. Fry*, 13 Fed. Rep. 423, 14 Fed. Rep. 293, explained in 18 Fed. Rep. 578, reversed in 130 U. S. 354.

Judgments Rendered After Insolvency. — A judgment creditor is not entitled to priority over other creditors, where his judgment was rendered after the insolvency proceeding was commenced; though the action was brought previous thereto. *Lubroline Oil Co. v. Athens Sav. Bank*, 104 Ga. 376; *Foster v. Rhodes*, 10 Nat. Bankr. Reg. 523, 9 Fed. Cas. No. 4,981,

priorities are created by the statutes, no discrimination is made between creditors of different classes.¹

In Cases of Trust, therefore, if the trust property or trust funds have been so mingled with the individual property or funds of the debtor as to be no longer traceable or capable of identification, the *cestuis que trustent* must come in *pari passu* with the other creditors;² but if they can trace or identify their funds or property, they are entitled to priority in accordance with the general principles applicable to following trust funds.³

b. TAXES AND DEBTS DUE THE GOVERNMENT. — Debts Due the Crown other than taxes are not given priority by the *English* statute,⁴ but priority is given

affirming 6 Ben. (U. S.) 268, 10 Nat. Bankr. Reg. 523, 9 Fed. Cas. No. 4,963.

Landlord's Lien. — A landlord who has a lien for rent on his tenant's goods is entitled to priority on the bankruptcy or insolvency of the tenant. *Longstreth v. Pennock*, 20 Wall. (U. S.) 575, 12 Nat. Bankr. Reg. 95; *In re Hoagland*, 18 Nat. Bankr. Reg. 530, 12 Fed. Cas. No. 6,545; *In re McConnell*, 10 Phila. (Pa.) 287, 9 Nat. Bankr. Reg. 387, 15 Fed. Cas. No. 8,712; *In re Lord*, etc., *Chemical Co.*, 7 Del. Ch. 248; *Searcy v. His Creditors*, 46 La. Ann. 376; *Wood v. McCardell*, etc., *Carriage Co.*, 49 N. J. Eq. 433. *Compare In re Robinson*, 1 Tex. L. J. 89, 20 Fed. Cas. No. 11,944.

As to what constitutes a lien see generally the title LIENS, and the cross-references there given.

Landlord's Lien. — *In re Gerson*, 2 Am. Bankr. Rep. 170. See also the title LANDLORD AND TENANT.

The Lien of a Judgment gives the judgment creditor priority, but the burden is on him to show compliance with all the requirements necessary to make the judgment operate as a lien. *In re Wood*, 95 Fed. Rep. 946.

As to judgment liens generally, see the title JUDGMENTS AND DECREES.

A General Usage Among Merchants to prefer accommodation loans made for a few days only, without security or interest, does not give a right of priority. *Thomson v. Albert*, 15 Md. 268.

1. **No Discrimination Between Different Classes of Creditors.** — *In re Merriman* 44 Conn. 587, 18 Nat. Bankr. Reg. 411, 17 Fed. Cas. No. 9,479. And see *Aiken v. Edrington*, 15 Nat. Bankr. Reg. 271, 1 Fed. Cas. No. 111; *In re Bousfield*, etc., *Mfg. Co.*, 17 Nat. Bankr. Reg. 153, 3 Fed. Cas. No. 1,704; *Re Pierce*, 2 Lowell (U. S.) 343, 19 Fed. Cas. No. 11,140; *In re Mutual Bldg. Fund Soc.*, 2 Hughes (U. S.) 374, 15 Nat. Bankr. Reg. 44, 17 Fed. Cas. No. 9,976; *Perkins v. Hanson*, 71 Minn. 487; *Desany v. Thorp*, 70 Vt. 31.

If a judgment creditor has no lien on the debtor's assets, he shares *pro rata* with the other creditors. *In re Erwin*, 3 Nat. Bankr. Reg. 580, 8 Fed. Cas. No. 4,524.

2. **Trust Property Mingled with Individual Property** — *United States*. — *Adams v. Meyers*, 1 Sawy. (U. S.) 306, 8 Nat. Bankr. Reg. 214, 1 Fed. Cas. No. 62; *In re Janeway*, 18 Pittsb. Leg. J. (Pa.) 67, 4 Nat. Bankr. Reg. 100, 13 Fed. Cas. No. 7,208; *In re Hosie*, 7 Nat. Bankr. Reg. 601, 12 Fed. Cas. No. 6,711; *White v. Jones*, 6 Nat. Bankr. Reg. 175, 29 Fed. Cas. No. 17,550; *In re Coan*, etc., *Carriage Mfg. Co.*, 6 Biss. (U. S.) 315, 12 Nat.

Bankr. Reg. 203, 5 Fed. Cas. No. 2,915; *Aiken v. Edrington*, 15 Nat. Bankr. Reg. 271, 1 Fed. Cas. No. 111; *Boone County Nat. Bank v. Latimer*, 67 Fed. Rep. 27; *Central Nat. Bank v. Connecticut Mut. L. Ins. Co.*, 104 U. S. 54; *H. B. Claffin Dry Goods Co. v. Eason*, 2 Am. Bankr. Rep. 263.

Illinois. — *Weir v. Mowe*, 81 Ill. App. 287, *affirmed* 182 Ill. 444; *Seiter v. Mowe*, 81 Ill. App. 346, *affirmed* 182 Ill. 351.

Maryland. — *Englar v. Offutt*, 70 Md. 78, 14 Am. St. Rep. 332.

Massachusetts. — *Little v. Chadwick*, 151 Mass. 110.

Michigan. — *Neely v. Rood*, 54 Mich. 134, 52 Am. Rep. 802; *Sherwood v. Central Michigan Sav. Bank*, 103 Mich. 109.

Mississippi. — *Winters v. Claitor*, 54 Miss. 341.

Nebraska. — *State v. Bank of Commerce*, 54 Neb. 725; *Morrison v. Lincoln Sav. Bank*, etc., Co., 57 Neb. 225.

New York. — *Cavin v. Gleason*, 105 N. Y. 256; *Holmes v. Gilman*, 138 N. Y. 369.

North Dakota. — *Northern Dakota Elevator Co. v. Clark*, 3 N. Dak. 26.

Pennsylvania. — *Thompson's Appeal*, 22 Pa. St. 16; *Freiberg v. Stoddard*, 161 Pa. St. 259.

Rhode Island. — *Slater v. Oriental Mills*, 18 R. I. 352.

Wisconsin. — *Nonotuck Silk Co. v. Flanders*, 87 Wis. 237; *Gianella v. Momen*, 90 Wis. 476.

But see *Independent Dist. v. King*, 80 Iowa 497; *Davenport Plow Co. v. Lamp*, 80 Iowa 722, 20 Am. St. Rep. 442; *Myers v. Board of Education*, 51 Kan. 87, 37 Am. St. Rep. 263; *McLeod v. Evans*, 66 Wis. 401; *Francis v. Evans*, 69 Wis. 115; *Bowers v. Evans*, 71 Wis. 133.

The three *Wisconsin* cases last mentioned, so far as they were opposed to the rule stated in the text, were overruled by the case of *Nonotuck Silk Co. v. Flanders*, 87 Wis. 237.

3. **Ability to Trace or Identify Trust Property.** — *Voight v. Lewis*, 14 Nat. Bankr. Reg. 543, 28 Fed. Cas. No. 16,989; *Dewey v. Kelton*, 18 Nat. Bankr. Reg. 217, 7 Fed. Cas. No. 3,850; *People v. Dansville Bank*, 39 Hun (N. Y.) 187.

To entitle the owner of trust property to a preference over the general creditors of an insolvent trustee, it must appear that his property or its proceeds went into, and became a part of, the fund or estate on which it is sought to impress a trust. *Morrison v. Lincoln Sav. Bank*, etc., Co., 57 Neb. 225.

As to the doctrine in regard to following trust funds, in general, see the title TRUSTS AND TRUSTEES.

4. **Rule as to Debts Due the Crown in England.** — The English bankruptcy law in the enumera-

to all parochial and other local rates due from the bankrupt, and all assessed taxes, land tax, property or income tax assessed on the bankrupt before the date of the receiving order, not exceeding in the whole one year's assessment.¹

Debts Due the United States have priority over all the other debts of the bankrupt.²

Debts Due a State are also given priority by the provision referred to above in connection with debts due the United States.³

tion of debts entitled to priority does not name debts due the crown, other than taxes, and it declares that the provisions relating to the priorities of debts shall bind the crown. 51 & 52 Vict., c. 62, § 1; 46 & 47 Vict., c. 52, § 150.

1. Rule as to Rates and Taxes in England. — 51 & 52 Vict., c. 62, § 1, par. (a).

2. Debts Due United States. — The bankruptcy law of the United States (Act July 1, 1893, § 64, par. a) provides that all taxes legally due and owing by the bankrupt to the United States shall be first paid, but no mention is made of other debts due the United States. This provision, however, is to be read in connection with paragraph b (5) of the same section, regulating the case of "debts owing to any person who, by the laws of the states of the United States, is entitled to priority," and an earlier statute (Rev. Stat. U. S., § 3466) which declares that whenever any person indebted to the United States is insolvent the debts due the United States shall be first satisfied. And see *In re Tilden*, 91 Fed. Rep. 500.

The Bankruptcy Law of 1867 provided that "whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor in the hands of the executors or administrators is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied." *Cook County Nat. Bank v. U. S.*, 107 U. S. 445; *U. S. v. Lewis*, 13 Nat. Bankr. Reg. 33, 26 Fed. Cas. No. 15,595, *affirmed* 92 U. S. 618; *In re Strassburger*, 4 Woods (U. S.) 557, 23 Fed. Cas. No. 13,526; *In re Bousfield*, etc., Mfg. Co., 17 Nat. Bankr. Reg. 153, 3 Fed. Cas. No. 1,704; *U. S. v. Griswold*, 8 Fed. Rep. 496; *U. S. v. Murphy*, 15 Fed. Rep. 589; *In re Huddell*, 47 Fed. Rep. 206.

And the Earlier Statutes were to the same effect. *U. S. v. Fisher*, 1 Wash (U. S.) 4, 25 Fed. Cas. No. 15,103; *Thelluson v. Smith*, Pet. (C. C.) 195; *U. S. v. Howland*, 4 Wheat. (U. S.) 108; *U. S. v. McLellan*, 3 Sumn. (U. S.) 345; *Prince v. Bartlett*, 8 Cranch (U. S.) 431; *U. S. v. Clark*, 1 Paine (U. S.) 629; *U. S. v. Mott*, 1 Paine (U. S.) 188; *U. S. v. Delaware Ins. Co.*, 4 Wash. (U. S.) 418; *Brent v. Washington Bank*, 10 Pet. (U. S.) 596; *U. S. v. North Carolina Bank*, 6 Pet. (U. S.) 29; *Howe v. Sheppard*, 2 Sumn. (U. S.) 133; *U. S. v. Shelton*, 1 Brock. (U. S.) 517; *Mott v. Maris*, 2 Wash. (U. S.) 196, 17 Fed. Cas. No. 9,880; *Kerr v. Hamilton*, 1 Cranch (C. C.) 546, 14 Fed. Cas. No. 7,731; *Pollock v. Pratt*, 2 Wash. (U. S.) 490, 19 Fed. Cas. No. 11,256; *Harrison v. Sterry*, 5 Cranch (U. S.) 289; *Beaston v. Farmers' Bank*, 12 Pet. (U. S.) 102; *U. S. v. Amory*, 5 Mason (U. S.) 455; *U. S. v. Munroe*, 5 Mason (U. S.) 572; *U. S. v. Evans*, *Crabbe* (U. S.) 60; *Marshall v. Barclay*, 1 Paige (N. Y.) 159; *U. S. v. Crookshank*, 1 Edw. (N. Y.) 233; *Willing*

v. Bleeker, 2 S. & R. (Pa.) 221; *Downing v. Kintzing*, 2 S. & R. (Pa.) 326.

What Are Debts Due United States. — The following have been held to be debts due the United States which are entitled to priority: A claim for a forfeiture because of undervaluation of goods entered at the custom-house (*In re Vetterlein*, 20 Fed. Rep. 109); money due for customs duties (*In re Kirkland*, 2 Hughes (U. S.) 208, 14 Nat. Bankr. Reg. 139, 157, 14 Fed. Cas. Nos. 7,843, 7,844; the liability of an indorser of a bill of exchange held by the United States (*U. S. v. Fisher*, 2 Cranch (U. S.) 358, 25 Fed. Cas. No. 14,720); penalties incurred by violating the internal revenue laws (*Matter of Rosey*, 6 Ben. (U. S.) 507, 8 Nat. Bankr. Reg. 509, 20 Fed. Cas. No. 12,066).

Equitable Debts, as well as those of a legal nature, due the United States are entitled to priority. *Howe v. Sheppard*, 2 Sumn. (U. S.) 135, 12 Fed. Cas. No. 6,772.

Priority Subject to Pre-existing Liens. — The right of priority given to debts due the United States does not partake of the nature of a lien, and, therefore, does not operate to prefer such debts to others secured by valid liens. *U. S. v. Hooe*, 3 Cranch (U. S.) 73; *Phillips v. The Ship Thomas Scattergood*, Gilp. (U. S.) 1, 19 Fed. Cas. No. 11,706; *U. S. v. Mechanics' Bank*, Gilp. (U. S.) 51, 26 Fed. Cas. No. 15,756.

Substitution to Priority of United States. — A purchaser of imported goods who is compelled to pay the customs duties, which the importer was to pay, is entitled to be substituted to the priority of the United States on the bankruptcy of the importer. *In re Kirkland*, 2 Hughes (U. S.) 208, 14 Nat. Bankr. Reg. 139, 157, 14 Fed. Cas. Nos. 7,843, 7,844.

And so, too, a revenue officer who pays to the government the amount of a dishonored check received by him from a government debtor will be subrogated to the rights of the government, because by accepting such check, he becomes a guarantor of its payment. *In re McBride*, 19 Nat. Bankr. Reg. 452, 15 Fed. Cas. No. 8,662.

But where a deputy collector of internal revenue deposits in bank money collected by him as such, and the bank afterwards goes into bankruptcy, the collector by whom such deputy was appointed is not entitled to priority as to such deposit. He is not the guarantor of a debt due from the bank to the government. *Wilkinson v. Babbitt*, 4 Dill. (U. S.) 207, 29 Fed. Cas. No. 17,668.

3. Debts Due a State. — *In re Southwestern Car Co.*, 9 Biss. (U. S.) 76, 19 Nat. Bankr. Reg. 404, 22 Fed. Cas. No. 13,192; *Matter of Chamberlin*, 9 Ben. (U. S.) 149, 17 Nat. Bankr. Reg. 49, 5 Fed. Cas. No. 2,580; *Matter of Mellor*, 10 Ben. (U. S.) 58, 17 Nat. Bankr. Reg. 402, 16 Fed. Cas. No. 9,401; *In re Dodge*, 4 Dill. (U. S.) 532, 7 Fed. Cas. No. 3,949; *Robinson v.*

Taxes Due to a State, County, District, or Municipality are named by the bankruptcy law in the clause giving priority to taxes due the United States,¹ and similar provisions are usually, if not invariably, contained in the insolvency laws of the states.²

c. COSTS AND EXPENSES. — The costs and expenses of the proceedings are also given priority by the statutes.³ These include the actual and necessary cost of preserving the estate after the filing of the petition,⁴ the filing fees paid by creditors in involuntary cases,⁵ and the cost of administration.⁶

Costs of Attachments pending at the time an insolvency or bankruptcy proceeding was commenced, and vacated by such proceeding because the writs of attachment were sued out within a limited time before the commencement of the proceeding, are given priority in some jurisdictions.⁷

d. WAGES OR SALARIES OF LABORERS, CLERKS, ETC. — **The English Statute** gives priority to all wages or salaries of any clerk or servant in respect of services rendered to the bankrupt during four months before the date of the receiving order, not exceeding fifty pounds; and all wages of any laborer or

Darien Bank, 18 Ga. 65; *Contee v. Chew*, 1 Har. & J. (Md.) 417; *Murray v. Ridley*, 3 Har. & M. (Md.) 171; *State v. State Bank*, 6 Gill & J. (Md.) 205, 26 Am. Dec. 561. See also the cases cited in the next preceding note. *Compare In re Corn Exch. Bank*, 7 Biss. (U. S.) 400, 15 Nat. Bankr. Reg. 431, 6 Fed. Cas. No. 3,242, reversing 15 Nat. Bankr. Reg. 216, 6 Fed. Cas. No. 3,243; *State v. Harris*, 2 Bailey L. (S. Car.) 598.

The "Mulot" Tax imposed by the Iowa statute on persons selling intoxicating liquors, though assessed and collected like other taxes, and appropriated for the same uses, is not a tax but a charge in the nature of a license, and is therefore not entitled to priority. *In re Ott*, 2 Am. Bankr. Rep. 637.

A Debt Due a Railroad Owned by the State has been held to be entitled to priority. *State v. Dickson*, 38 Ga. 171. But see *Tilford v. State Bank*, 2 Dana (Ky.) 114, holding that notes discounted by the bank of Kentucky are not entitled to a preference, in the administration of an insolvent estate.

1. Priority of Taxes Due State, County, District, or Municipality. — Act July 1, 1898 (30 U. S. Stat. at L. 544), § 64, par. a; *In re Brand*, 2 Hughes (U. S.) 334, 3 Nat. Bankr. Reg. 324, 4 Fed. Cas. No. 1,809; *Matter of Parker*, 6 Ben. (U. S.) 286, 18 Fed. Cas. No. 10,719; *Matter of Ambler*, 8 Ben. (U. S.) 176, 1 Fed. Cas. No. 271; *Matter of Moller*, 14 Blatchf. (U. S.) 207, 17 Fed. Cas. No. 9,700, affirming 8 Ben. (U. S.) 526, 17 Fed. Cas. No. 9,699.

2. Taxes Given Priority by State Insolvency Laws. — *Belfast v. Fogler*, 71 Me. 403; *Bent v. Hubbardston*, 138 Mass. 99. See also the statutes of the several states.

3. Costs and Expenses of Bankruptcy Proceeding — England. — 51 & 52 Vict., c. 62, § 1.

United States. — Act July 1, 1898 (30 U. S. Stat. at L. 544), § 64, par. b; *Meddaugh v. Wilson*, 151 U. S. 333; *Robinson v. Darien Bank*, 18 Ga. 65.

New York. — *Dayton v. Nichols*, 10 Johns. (N. Y.) 469.

4. Cost of Preserving Estate. — Act July, 1898 (30 U. S. Stat. at L. 544), § 64, par. b (1); *In re Grimes*, 2 Am. Bankr. Rep. 730.

Charges Incurred Before the Filing of the Petition caring for the property by the bankrupt is

not a preferred claim. *Gardner v. Cook*, 7 Nat. Bankr. Reg. 346, 9 Fed. Cas. No. 5,226.

The Expenses of Continuing the Insolvent's Business, if ordered by the court for the purpose of preserving will be allowed as a preferred claim. *St. James Hotel Co.'s Assignment*, 3 Ohio N. P. 42, 4 Ohio Dec. 209.

5. Fees of Bankruptcy Proceeding. — Act July 1, 1898 (30 U. S. Stat. at L. 544), § 64, par. b (2); *In re Collier*, 93 Fed. Rep. 191.

Money Advanced to Pay Costs and Fees. — Under the bankruptcy law of 1867 allowing priority to the fees, costs, and expenses of a bankruptcy proceeding, it was held that a person who advanced money to pay such fees had a preferred claim on the estate for its repayment. *Whiston v. Smith*, 2 Lowell (U. S.) 101, 29 Fed. Cas. No. 17,523.

6. Costs of Administration. — Act July 1, 1898 (30 U. S. Stat. at L. 544), § 64, par. b (3).

Compensation of Assignee in Bankruptcy. — The claim of an assignee for his compensation has no priority over a similar claim of his successor in office, where the funds are not sufficient to pay the charges of both. *In re Schneider*, 15 Fed. Rep. 913.

Attorney's Fees are expressly provided for by the present bankruptcy law. Act July 1, 1898 (30 U. S. Stat. at L. 544), § 64, par. b (3); *In re Duncan*, 2 Am. Bankr. Rep. 321; *In re Beck*, 92 Fed. Rep. 889; *In re Stotts*, 93 Fed. Rep. 438; *In re Burrus*, 97 Fed. Rep. 926.

Under the Act of 1867 attorneys who rendered services to the bankrupt prior to the adjudication, such as in defending suits, giving advice, and preparing petition and schedules, were not entitled to priority. *Matter of Hirschberg*, 2 Ben. (U. S.) 466, 1 Nat. Bankr. Reg. 642, 12 Fed. Cas. No. 6,530; *In re Jaycox*, 7 Nat. Bankr. Reg. 140, 13 Fed. Cas. No. 7,239; *In re Gies*, 7 Chicago Leg. N. 379, 12 Nat. Bankr. Reg. 179, 19 Fed. Cas. No. 5,407; *In re Handell*, 15 Nat. Bankr. Reg. 71, 11 Fed. Cas. No. 6,017.

Provision for attorneys' fees is also made by the state insolvency laws. *Dunbar v. His Creditors*, 39 La. Ann. 589. And see the statutes in other states.

7. Costs of Attachments Vacated by Commencement of Proceeding. — *Boughton v. Crosby*, 47 Conn. 577; *Emerson's Appeal*, 56 Conn. 98;

workman, not exceeding twenty-five pounds, in respect of services rendered to the bankrupt during two months before the date of the receiving order.¹

In Canada, also, priority is given to claims for wages.²

In the United States "wages due to workmen, clerks, or servants, which have been earned within three months before the date of the commencement of the proceedings, not to exceed three hundred dollars to each claimant," are given priority by the national bankruptcy law,³ and similar provisions are contained in the insolvency laws of the several states.⁴

Nature and Extent of Right. — In order that a claim may have priority under this provision of the statute, it must be a claim for "wages" or "salary" ⁵ accruing to some person who is within one of the classes enumerated by the statute.⁶ The right of priority is not limited, however, to claims in the hands

Cothren's Appeal, 59 Conn. 545; Hussey v. Crawford, 152 Mass. 596.

1. Priority of Claims for Wages, etc., in England. — 51 & 52 Vict., c. 62, §§ 1, 2; *In re Heywood*, (1897) 2 Ch. 593; *In re Albion Steel, etc.*, Co., 7 Ch. D. 547.

Formerly the servant or clerk had to be in the employment of the bankrupt at the date of the adjudication, but the present statute omits that requirement. *Ex p. Fox*, 17 Q. B. D. 4.

2. Priority of Claims for Wages in Canada. — *In re Cleghorn*, 2 U. C. L. J. N. S. 133.

3. Priority of Wages, etc., under Bankruptcy Law of United States. — Act July 1, 1898 (30 U. S. Stat. at L. 544), § 64, par. b; *In re Rouse*, 91 Fed. Rep. 514; *In re Kerby-Dennis Co.*, 95 Fed. Rep. 116, affirming 94 Fed. Rep. 818; *In re Byrne*, 97 Fed. Rep. 762. See also the following cases decided under the bankruptcy law of 1867: *In re Wells*, 4 Fed. Rep. 68; *In re Waties*, 39 Fed. Rep. 264.

4. Priority of Wages, etc., under State Insolvency Laws. — *Illinois.* — Heckman v. Tammien, 184 Ill. 144; Willard v. World's Fair Encampment Co., 59 Ill. App. 336.

Indiana. — McElwaine v. Hosey, 135 Ind. 481; Bass v. Doerman, 112 Ind. 390.

Iowa. — Reynolds v. Black, 91 Iowa 1.

Louisiana. — Smith v. W. J. Athens Lumber Co., 49 La. Ann. 663.

Maryland. — Lewis v. Fisher, 80 Md. 139, 45 Am. St. Rep. 327; Roberts v. Edie, 85 Md. 181.

Massachusetts. — Thayer v. Mann, 2 Cush. (Mass.) 371.

New Jersey. — Mingin v. Alva Glass Mfg. Co., 55 N. J. Eq. 463; *In re McConnell*, 10 Phila. (Pa.) 287, 9 Nat. Bankr. Reg. 387, 15 Fed. Cas. No. 8,712 (reciting the *New Jersey* statute).

New York. — Matter of Stryker, 73 Hun (N. Y.) 327.

Ohio. — Davis v. Greenlee, 13 Ohio Cir. Ct. 229, 7 Ohio Cir. Dec. 111; Davis v. Coe, 10 Ohio Cir. Dec. 264; Akron Iron Co. v. William N. Whitely Co., 25 Cinc. L. Bul. 203, 11 Ohio Dec. (Reprint) 192.

Pennsylvania. — Purefoy v. Brown, 13 Pa. Co. Ct. 281; Adamson's Appeal, 110 Pa. St. 459; Roberts's Appeal, 110 Pa. St. 325.

Utah. — Laws 1892, c. 30, p. 28.

And see the various local statutes.

5. Claim Must Be for Wages or Salary. — *Ex p. Hickin*, 19 L. J. Bankr. 8; *Ex p. Simmons*, 30 L. T. 311; Mulholland v. Wood, 166 Pa. St. 486, 36 W. N. C. (Pa.) 140.

The Mode of Determining the Amount to become

due, as where the wages are calculated by the result of the labor performed, does not deprive the claimant of his right to priority. *Ex p. Hollyoak*, 4 Mor. Bankr. Cas. 63; *Ex p. Allsop*, 32 L. T. N. S. 433.

Damages for Wrongful Discharge of Employees. — Where an employee is wrongfully discharged, his claim against his employer, though measured by the wages that he would have received, if he had not been discharged, is not a claim for wages, but a claim for damages for the breach of contract, and therefore is not entitled to priority. *In re Pevear*, 17 Nat. Bankr. Reg. 461, 19 Fed. Cas. No. 11,053.

6. An Overseer charged with the sole superintendence of the workmen, and having authority to hire and discharge workmen at his pleasure, is a laborer, within the meaning of the statute. *Pendergast v. Yandes*, 124 Ind. 159.

The General Manager of a Corporation is not a "workman" or a "servant" within the meaning of the statute. *In re Grubbs-Wiley Grocery Co.*, 96 Fed. Rep. 183.

Occasional Employment Held Not Sufficient to Constitute One a Clerk or Servant. — *Ex p. Walter*, L. R. 15 Eq. 412; *Ex p. Neale*, 1 Mont. & M. 194; *Ex p. Homborg*, 2 Mont. D. & De G. 642; *Ex p. Crawford*, 1 Montagu 270; *Ex p. Grellier*, 1 Montagu 264; *In re Dawson*, 1 Fonbl. 229; *Ex p. Collier*, 4 Deac. & C. 520; *Ex p. Harcourt*, 31 L. T. 188; *Ex p. Butler*, 28 L. T. 375; *Ex p. Oldham*, 32 L. T. 181; *Ex p. Chipchase*, 7 L. T. N. S. 290. But see *Ex p. Rockett*, 2 Lowell (U. S.) 522, 15 Nat. Bankr. Reg. 95, 20 Fed. Cas. No. 11,977, holding that a person employed for a temporary service, in adjusting the books and accounts of a bankrupt, within six months before the bankruptcy, has a privileged debt for services as clerk.

An Apprentice was held an "operative," within the bankruptcy law of 1841. *Ex p. Steiner*, 1 Pa. L. J. 368, 22 Fed. Cas. No. 13,354.

A Contractor who furnishes his own workmen is not an employee, operative or laborer, within the *New York* statute. *Charron v. Hale*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 34. See also *People v. Remington*, (Supm. Ct. Gen. T.) 6 N. Y. Supp. 796; *Hart's Appeal*, 96 Pa. St. 355.

A Traveling Agent or Salesman, with a monthly salary and a commission on all sales effected by him, is not a clerk within the meaning of the *Louisiana* statute in respect to the privilege for the payment of salaries. *Weems v. Delta Moss Co.*, 33 La. Ann. 973. See also *Mulholland v. Wood*, 166 Pa. St. 486, 36 W. N. C.

of the persons in whose favor they accrued. It is also accorded to their assignees,¹ or others acquiring their rights.²

c. CLAIMS GIVEN PRIORITY BY STATE LAWS. — The present bankruptcy law of the United States provides that among the debts entitled to priority under it shall be "debts owing to any person who by the laws of the states * * * shall be entitled to priority."³

XI. OPERATION AND EFFECT OF INSOLVENCY AND BANKRUPTCY PROCEEDINGS

— 1. **Exemption of Debtor from Arrest on Civil Process.** — The present bankruptcy law of the United States provides that a debtor shall be exempt from arrest on civil process, except (1) when issued from a court of bankruptcy for contempt or disobedience of its lawful order, or (2) when issued from a state court having jurisdiction, on a debt or claim from which a discharge in bankruptcy would not be a release. Substantially the same provision was also contained in the Act of 1867.⁴ It will be observed that this provision only

(Pa.) 140. Nor is he an 'operative' within the Ohio statute. Matter of Sloan, 60 Ohio St. 472; Davis v. Greenlee, 13 Ohio Cir. Ct. 229, 7 Ohio Cir. Dec. 111. Or a "workman," etc., within the bankruptcy law of the United States. *In re Greenwald*, 99 Fed. Rep. 705.

An Attorney at Law is not a clerk, servant, or employee within the Maryland statute. *Lewis v. Fisher*, 80 Md. 139, 45 Am. St. Rep. 327.

Typesetters and others employed in a printing establishment are "laborers." *Heckman v. Tammen*, 184 Ill. 144, affirming 84 Ill. App. 537.

A Piece Worker who receives materials from the shop of his employer and takes them to his own shop and there manufactures them, at certain prices, and delivers the manufactured product to the employer, is an "operative" within the Massachusetts statute. *Thayer v. Mann*, 2 Cush. (Mass.) 371.

A Loan to Pay the Wages of Employees does not give the lender a claim for wages, so as to entitle him to priority. *In re Paulson, Betts' Scr. Bk.* 75, 19 Fed. Cas. No. 10,849.

The Drawee of an Order for a Sum Due as Wages does not, on payment of the order to the employee, become the assignee of the employee's claim, or entitled to stand in his shoes by substitution. His claim accrues directly against the employer, and therefore is not entitled to priority. Matter of Erie Rolling Mill Co., 1 Fed. Rep. 585.

1. Assignee of Claim for Wages Held Entitled to Priority. — *In re Brown*, 4 Fed. Cas. No. 1,973a, 4 Ben. (U. S.) 142, 3 Nat. Bankr. Reg. 720, 4 Fed. Cas. No. 1,974. But see *contra*, under the Illinois statute, *Beifeld v. International Cement Co.*, 79 Ill. App. 318.

Under the bankruptcy law of 1898, giving priority of payment to "wages due to workmen," etc., and limiting the amount to three hundred dollars, it is held that an assignee of a claim for wages is not entitled to priority. *In re Westlund*, 99 Fed. Rep. 399.

2. The Father of an Infant has a preferred claim for the services of the infant. *In re Harthorn*, 4 Nat. Bankr. Reg. 103, 11 Fed. Cas. No. 6,162.

3. Priority under State Laws Preserved by Bankruptcy Law. — Act July 1, 1898 (30 U. S. Stat. at L. 544), § 64, par. b (5); *In re Tilden*, 91 Fed. Rep. 500; *In re Camp*, 91 Fed. Rep. 745; *In re Wright*, 95 Fed. Rep. 807; *In re Byrne*, 97 Fed.

Rep. 762; *In re Goldstein*, 2 Am. Bankr. Rep. 603; *In re Falls City Shirt Mfg. Co.*, 98 Fed. Rep. 592; *In re Lewis*, 99 Fed. Rep. 935.

The bankruptcy law of 1867 did not contain this provision. See Matter of Stuyvesant Bank, (U. S. Dist. Ct.) 49 How. Pr. (N. Y.) 133, 12 Blatchf. (U. S.) 179, 10 Nat. Bankr. Reg. 399, 22 Fed. Cas. No. 12,919.

4. Exemption of Bankrupt from Arrest on Civil Process. — Act July 1, 1898 (30 U. S. Stat. at L. 544), § 9, par. a; Act March 2, 1867 (14 U. S. Stat. at L. 517), § 26; *In re Borst*, 2 Nat. Bankr. Reg. 171, 3 Fed. Cas. No. 1,665; *Re Devoe*, 1 Lowell (U. S.) 251, 2 Nat. Bankr. Reg. 27, 7 Fed. Cas. No. 3,843; *Ex p. Taylor*, 1 Hughes (U. S.) 617, 16 Nat. Bankr. Reg. 40, 23 Fed. Cas. No. 13,773; Matter of Smith, 9 Ben. (U. S.) 494, 18 Nat. Bankr. Reg. 24, 22 Fed. Cas. No. 12,976; Matter of Goldstein, (U. S. Dist. Ct.) 52 How. Pr. (N. Y.) 426, 10 Fed. Cas. No. 5,523; *In re Lewensohn*, 99 Fed. Rep. 73.

A Judgment for a Tort is a debt in the sense in which that word is used in the statute. *In re Wiggers*, 2 Biss. (U. S.) 71, 29 Fed. Cas. No. 17,623.

No Exemption from Arrest for Debts Not Released by Discharge. — Matter of Patterson, 2 Ben. (U. S.) 155, 1 Nat. Bankr. Reg. 307, 18 Fed. Cas. No. 10,817; Matter of Kimball, 2 Ben. (U. S.) 554, 2 Nat. Bankr. Reg. 204, 14 Fed. Cas. No. 7,768, affirmed 6 Blatchf. (U. S.) 292, 2 Nat. Bankr. Reg. 354, 14 Fed. Cas. No. 7,769; *Re Devoe*, 1 Lowell (U. S.) 251, 2 Nat. Bankr. Reg. 27, 7 Fed. Cas. No. 3,843; Whitehouse, Petitioner, 1 Lowell (U. S.) 429, 4 Nat. Bankr. Reg. 63, 29 Fed. Cas. No. 17,564; *In re Pettis*, 2 Nat. Bankr. Reg. 44, 19 Fed. Cas. No. 11,046; *In re Pitts*, 19 Nat. Bankr. Reg. 63, 19 Fed. Cas. No. 11,190.

As to what debts are released by a discharge in bankruptcy, see *infra*, this title, *Discharge of Debtor — Effect of Discharge*.

Even though a Debt Is Provable in Bankruptcy, the debtor may be arrested, if a discharge in bankruptcy will not release the debt. Matter of Seymour, 1 Ben. (U. S.) 348, 1 Nat. Bankr. Reg. 29, 21 Fed. Cas. No. 12,684; Matter of Glaser, 2 Ben. (U. S.) 180, 1 Nat. Bankr. Reg. 336, 10 Fed. Cas. No. 5,474; *In re Alsberg*, 16 Nat. Bankr. Reg. 116, 1 Fed. Cas. No. 261.

As to the Rule under the Earlier Statutes, see (Act 1841) *In re Cheney*, 5 Law Rep. 19, 5 Fed. Cas. No. 2,636; *In re Comstock*, 22 Vt. 642, 5 Law Rep. 163, 6 Fed. Cas. No. 3,073;

relieves the debtor from liability to be arrested after the commencement of the bankruptcy proceeding, and does not affect any arrest made before that time,¹ and the rule is the same, in this respect, under some of the state insolvency laws.²

The Remedy of a debtor who is arrested in violation of his right of exemption is by an application to the district court of the United States for an order directing his discharge,³ or that court may bring him up on habeas corpus and discharge him.⁴

2. Control of Property — *a.* IN GENERAL. — A bankrupt, during the pendency of the proceeding, is said to be, in a sense, *civiliter mortuus*,⁵ and his property is not subject to seizure under process issued in an action against him,⁶ nor has he any right to dispose of any of his property after the filing of the petition, in voluntary proceedings, or after the adjudication, when the proceeding is involuntary;⁷ but it seems that such a transfer is merely void-

Ex p. Hoskins, Crabbe (U. S.) 466, 12 Fed. Cas. No. 6,712; Anonymous, 6 Hunt Mer. Mag. 355, 1 Fed. Cas. No. 450; *U. S. v. Dobbins*, 1 Pa. L. J. Rep. 5, 25 Fed. Cas. No. 14,971; *In re* Winthrop, 5 Law Rep. 24, 30 Fed. Cas. No. 17,900; *Ex p.* Rank, Crabbe (U. S.) 493, 20 Fed. Cas. No. 11,566; *Aldrich v. Aldrich*, 8 Met. (Mass.) 102, Merrimack River Locks, etc., *v.* Reed, 8 Met. (Mass.) 146; *State v. Rollins*, 13 Mo. 179; *Shulze v. Fleischer*, 1 Pa. L. J. Rep. 7, 1 Pa. L. J. 11; *Bishop v. Loewen*, 1 Pa. L. J. Rep. 368, 2 Pa. L. J. 364; *Gould v. Mathewson*, 18 Vt. 65. (*Act 1800*) *Foxall v. Levi*, 1 Cranch (C. C.) 139; *Jones v. Emerson*, 1 Cai. (N. Y.) 487; *Pesoa v. Passmore*, 4 Yeates (Pa.) 139.

1. Arrests Made Before Commencement of Bankruptcy Proceeding. — *Hazelton v. Valentine*, 11 Lowell (U. S.) 270, 2 Nat. Bankr. Reg. 31, 11 Fed. Cas. No. 6,287; *R. v. Walker*, 1 Lowell (U. S.) 222, 1 Nat. Bankr. Reg. 318, 29 Fed. Cas. No. 17,060; *Minon v. Van Nostrand*, 1 Holmes (U. S.) 251, 17 Fed. Cas. No. 9,641, *affirming* 1 Lowell (U. S.) 458, 4 Nat. Bankr. Reg. 108, 17 Fed. Cas. No. 9,642; *In re* O'Mara, 4 Biss. (U. S.) 506, 18 Fed. Cas. No. 10,509; *In re* Schwarz, 14 Fed. Rep. 787; *Brandon Nat. Bank v. Hatch*, 57 N. H. 460. And see *In re* Jacoby, 1 Nat. Bankr. Reg. 118, 13 Fed. Cas. No. 7,165; *In re* Migel, 2 Nat. Bankr. Reg. 48, 17 Fed. Cas. No. 9,538.

2. Existing Arrests Not Affected by State Insolvency Laws. — *Hussey v. Danforth*, 77 Me. 17; *Stockwell v. Silloway*, 100 Mass. 287. Compare the statutes in other jurisdictions.

3. Application for Order of Discharge. — *In re* Wiggers, 2 Biss. (U. S.) 71, 29 Fed. Cas. No. 17,623.

4. Habeas Corpus to Enforce Exemption from Arrest. — *Matter of Glaser*, 2 Ben. (U. S.) 180, 1 Nat. Bankr. Reg. 336, 10 Fed. Cas. No. 5,474; *In re* Houston, 94 Fed. Rep. 119, 2 Am. Bankr. Reg. 107.

Extent of Inquiry on Habeas Corpus. — On habeas corpus by a bankrupt who has been arrested on an order issued by a state court, the bankruptcy court can only inquire whether the papers on which the order of arrest was granted show on their face that the debt was one which would not be released by a discharge in bankruptcy. *Matter of Valk*, 3 Ben. (U. S.) 431, 3 Nat. Bankr. Reg. 278, 28 Fed. Cas. No. 16,814. Compare *In re* Alsberg, 16 Nat. Bankr. Reg. 116, 1 Fed. Cas. No. 261.

5. Bankrupt Considered Civiliter Mortuus. — *Herndon v. Howard*, 9 Wall. (U. S.) 664, 4 Nat. Bankr. Reg. 212; *Johnson v. Geisritter*, 26 Ark. 44; *Fisher v. Vose*, 3 Rob. (La.) 457, 38 Am. Dec. 243; *West v. His Creditors*, 4 Rob. (La.) 88; *Harrod v. Burgess*, 5 Rob. (La.) 440.

6. Property Not Subject to Seizure. — *In re* Schloerb, 97 Fed. Rep. 326.

7. No Right to Dispose of Property Pending Bankruptcy Proceedings. — *United States.* — *In re* Dillard, 2 Hughes (U. S.) 190, 9 Nat. Bankr. Reg. 8, 7 Fed. Cas. No. 3,912; *In re* Gregg, 3 Nat. Bankr. Reg. 529; *In re* Vogel, 2 Nat. Bankr. Reg. 427; *In re* Wynne, 4 Nat. Bankr. Reg. 23; *Taylor v. Robertson*, 21 Fed. Rep. 209; *Carter v. Hobbs*, 92 Fed. Rep. 594; *Blakey v. Boonville Nat. Bank*, 95 Fed. Rep. 267.

Arkansas. — *Johnson v. Geisritter*, 26 Ark. 44.

Kentucky. — *Harris v. England*, 1 Ky. L. Rep. 271.

Louisiana. — *West v. His Creditors*, 4 Rob. (La.) 88.

Maryland. — *Somerville v. Brown*, 5 Gill (Md.) 399; *Buckey v. Snouffer*, 10 Md. 149, 69 Am. Dec. 129.

New York. — *Page v. Waring*, 76 N. Y. 463.

Pennsylvania. — *Young v. Willing*, 2 Dall. (U. S.) 276.

Under the *Massachusetts* statute the insolvent's control over his property is terminated, not by the mere filing of the petition in a voluntary proceeding, but by the first publication of the notice of issuing the warrant. *King v. Cross*, 20 U. S. Sup. Ct. Rep. 131, *affirming* 19 R. I. 220.

Perishable Property. — A bankrupt has no right to sell even perishable property without leave of court, after he has filed his petition. *In re* Pryor, 4 Biss. (U. S.) 262, 20 Fed. Cas. No. 11,457.

Negotiable Notes. — The general rule as to the effect of transfers of negotiable paper to *bona fide* purchasers for value and without notice is not applicable where a bankrupt, after the adjudication, transfers bills or notes held by him, because all the world must take notice of the pending proceeding, and therefore the bankrupt's transferee cannot be said to be a purchaser without notice. *In re* Lake, 3 Biss. (U. S.) 204, 6 Nat. Bankr. Reg. 542, 14 Fed. Cas. No. 7,992. Compare *Galvin v. Boyd*, 25 Pittsb. Leg. J. 14, 9 Fed. Cas. No. 5,208.

An indorsee of a note before maturity, with notice of bankruptcy proceedings commenced

able, and the transferee's title is good, if no assignee is ever appointed and the bankruptcy proceeding is afterwards discontinued.¹

Possession Pending Appointment of Assignee. — A receiver may be appointed pending the appointment of the assignee or trustee, when it is necessary to protect the interests of the creditors.² Sometimes the bankrupt is permitted to retain possession of his property pending the appointment of an assignee, in which case he is a sort of a trustee of such property.³

Protection of Interests Pending Appointment of Assignee. — The bankrupt has the right, until an assignee or trustee is appointed, to pursue all proper legal measures for the protection of his interests.⁴

b. PROPERTY ACQUIRED PENDING BANKRUPTCY PROCEEDINGS. — Property acquired by a bankrupt after he has filed his petition in bankruptcy, or after an adjudication of bankruptcy in an involuntary proceeding, as the case may be, is not affected by the proceeding, and the bankrupt may, therefore, dispose of it at his pleasure,⁵ without liability for debts theretofore incurred.⁶

c. SURPLUS REMAINING AFTER TERMINATION OF PROCEEDING. — Where a surplus remains in the hands of the assignee or trustee, after the proceeding has terminated and the debts proved, if any, have all been paid, such surplus reverts to the bankrupt;⁷ but it has been held that a decree of

against his indorser, cannot maintain an action thereon. *Seaton v. Hinneman*, 50 Iowa 395.

Raising Money for Fees. — A sale to raise money for the payment of the fees in the bankruptcy proceeding is forbidden, equally with sales for other purposes, by the rule that a bankrupt, after filing his petition, has no right to sell any of his property. *In re Jessup*, 19 Fed. Rep. 94; *In re Thompson*, 13 Nat. Bankr. Reg. 300, 23 Fed. Cas. No. 13,938.

1. Transfer Voidable Only — Transferee's Title Good if No Assignee Is Ever Appointed. — *McDonnell v. Bauendahl*, 4 Hun (N. Y.) 265, affirmed 64 N. Y. 638; *Kline v. Bauendahl*, 6 Thomp. & C. (N. Y.) 546.

2. Appointment of Receiver — United States. — Act July 1, 1898 (30 U. S. Stat. at L. 544), § 2; *In re Rockwood*, 91 Fed. Rep. 363; *In re Kelly*, 91 Fed. Rep. 504; *In re Smith*, 92 Fed. Rep. 135; *Davis v. Bohle*, 92 Fed. Rep. 325, affirming 91 Fed. Rep. 366; *In re John A. Etheridge Furniture Co.*, 92 Fed. Rep. 329; *In re Schrom*, 97 Fed. Rep. 760; *In re Becker*, 98 Fed. Rep. 407; *Sedgwick v. Place*, 3 Ben. (U. S.) 360; *Lansing v. Manton*, 14 Nat. Bankr. Reg. 127, 3 N. Y. Wkly. Dig. 112, 14 Fed. Cas. No. 8,077; *Keenan v. Shannon*, 9 Nat. Bankr. Reg. 441, 10 Phila. (Pa.) 219, 31 Leg. Int. (Pa.) 85, 14 Fed. Cas. No. 7,640.

California. — *Tibbets v. Cohn*, 116 Cal. 365; *Taylor v. Hill*, 115 Cal. 143.

Louisiana. — *Block v. Jefferies*, 46 La. Ann. 1104; *Pitcher v. His Creditors*, 40 La. Ann. 782.

Massachusetts. — *Jordan v. Palmer*, 165 Mass. 317; Pub. Stat. Mass., c. 157, §§ 17, 113.

Washington. — *Ewing v. Van Wagenen*, 6 Wash. 30.

See also the various local statutes.

3. Bankrupt in Possession Regarded as Trustee. — Before the appointment of an assignee the bankrupt is himself regarded as a trustee in respect to his property for the benefit of his creditors, and he is bound to preserve it for delivery to the assignee when appointed. *In re Steadman*, 8 Nat. Bankr. Reg. 319.

According to this rule, a bankrupt has no right to buy of the marshal a stock of goods

ordered by the court to be sold, because it is likely to depreciate in value. If he does so purchase, the sale will be set aside without proof that the price was inadequate, or that there was any fraud in fact intended. *March v. Heaton*, 1 Lowell (U. S.) 278, 2 Nat. Bankr. Reg. 180, 16 Fed. Cas. No. 9,061.

So, too, the bankrupt, under such circumstances, is the proper person to be notified of dishonor of notes or bills on which he is indorser, and he may waive demand and notice. *Ex p. Tremont Nat. Bank*, 2 Lowell (U. S.) 409, 16 Nat. Bankr. Reg. 397, 24 Fed. Cas. No. 14,169.

4. Protection of Interests Pending Appointment of Assignee. — *Myers v. Callaghan*, 5 Fed. Rep. 726.

5. Property Acquired Pending Bankruptcy Proceedings. — *Matter of Grant*, 2 Story (U. S.) 312, 10 Fed. Cas. No. 5,693.

The rule stated in the text is subject to some qualification in *England*. See *infra*, this title, *Assignee or Trustee — What Passes to Assignee or Trustee — Property Acquired After Commencement of Proceeding*.

6. After-acquired Property Not Liable for Debts Previously Incurred. — *Mosby v. Steele*, 7 Ala. 299; *Bond v. Baldwin*, 9 Ga. 9; *McLendon v. Turner*, 65 Ga. 577; *Turner v. Gatewood*, 8 B. Mon. (Ky.) 613; *State Bank v. Franciscus*, 10 Mo. 27.

7. Surplus Reverts to Bankrupt — United States. — *In re Hoyt*, 3 Nat. Bankr. Reg. 55, 12 Fed. Cas. No. 6,806; *Ferguson v. Dent*, 24 Fed. Rep. 412.

Indiana. — *Boyd v. Olvey*, 82 Ind. 294.

Michigan. — *Steevens v. Earles*, 25 Mich. 40.

Minnesota. — *King v. Remington*, 36 Minn. 15.

New York. — Page v. Waring, 76 N. Y. 403.

Texas. — *Jones v. Pyron*, 57 Tex. 43; *Heindon v. Davenport*, 75 Tex. 462.

Since there can be no surplus until all the debts have been paid, a bankrupt cannot sue to set aside a sale of his lands made by a sheriff before the adjudication in bankruptcy. *Vanslyke v. Shryer*, 98 Ind. 126. And see *infra*, this section, *Actions by Debtor*.

the court is necessary to revest the title in the bankrupt.¹

3. Partnerships. — If a partner is adjudged a bankrupt or insolvent, the partnership is thereby immediately dissolved, because his interest in the partnership assets passes at once to his assignee.² The same result follows where an assignment for the benefit of creditors is made by a partner,³ or by the firm or all the partners.⁴

The Mere Fact of Insolvency, however, of a partner or of a firm, if there has been no adjudication of insolvency or bankruptcy, or any assignment, does not operate as a dissolution of the firm.⁵

4. Agency — Bankruptcy of Principal. — It is well settled that the bankruptcy of a principal revokes the agency, unless it is coupled with an interest, because the principal, by the adjudication, loses control of the subject-matter of the agency.⁶

Whether the Bankruptcy of the Agent revokes his authority is a question about which the authorities do not seem to be agreed. It was said in an English case that the agency is revoked.⁷ The proposition so laid down, however, is not logical, because the bankruptcy of an agent does not transfer the title to property held by him as such agent. In principle and reason it would seem

1. Decree of Court Necessary to Revest Title. — *Robinson v. Denny*, 57 Ala. 492; *Barnes v. Matteson*, 5 Barb. (N. Y.) 375. But see *Boyd v. Olvey*, 82 Ind. 294.

In *Bacon v. Abbott*, 137 Mass. 397, it was held that a bankrupt who has paid all his creditors in full and received his discharge is not prevented, by the mere technical and formal interest of the assignee, from redeeming a mortgage under a bill filed before the bankruptcy.

2. Dissolution of Partnerships — England. — *Morgan v. Marquis*, 9 Exch. 145; *Hague v. Rolleston*, 4 Burr. 2174; *Wilson v. Greenwood*, 1 Swanst. 471; *Fox v. Hanbury*, 2 Cowp. 445.

United States. — *Ex p. Norcross*, 1 N. Y. Leg. Obs. 100, 18 Fed. Cas. No. 10,293; *Forsaith v. Merritt*, 1 Lowell (U. S.) 336, 3 Nat. Bankr. Reg. 48, 9 Fed. Cas. No. 4,946; *Wilkins v. Davis*, 2 Lowell (U. S.) 511, 15 Nat. Bankr. Reg. 60, 29 Fed. Cas. No. 17,664.

Alabama. — *McNitt v. King*, 59 Ala. 597.

Illinois. — *Talcott v. Dudley*, 5 Ill. 427.

Mississippi. — *Halsey v. Norton*, 45 Miss. 703, 7 Am. Rep. 745; *Sims v. Ross*, 8 Smed. & M. (Miss.) 557.

New York. — *Marquand v. New York Mfg. Co.*, 17 Johns. (N. Y.) 525; *Ex p. Norcross*, 1 N. Y. Leg. Obs. 100; *King v. Leighton*, 100 N. Y. 386.

North Carolina. — *Blackwell v. Claywell*, 75 N. Car. 213.

Texas. — *Daugherty v. Strauss*, 1 Tex. App. Civ. Cas., § 892.

See also the title **PARTNERSHIP**.

The bankruptcy of a partner does not dissolve the partnership, if the adjudication was obtained for that purpose only and was not required for any other. *Amsinck v. Bean*, 22 Wall. (U. S.) 395, 11 Nat. Bankr. Reg. 495.

3. Assignment by Partner for Benefit of Creditors — Massachusetts. — *Dearborn v. Keith*, 5 Cush. (Mass.) 224; *Arnold v. Brown*, 24 Pick. (Mass.) 89, 35 Am. Dec. 296.

Minnesota. — *Moody v. Rathburn*, 7 Minn. 89.

New York. — *Ogden v. Arnot*, 29 Hun (N. Y.) 146; *Hubbard v. Gould*, 1 Duer (N. Y.) 662.

West Virginia. — *Conrad v. Buck*, 21 W. Va. 396.

4. Assignment by Firm for Benefit of Creditors — United States. — *Pearpont v. Graham*, 4 Wash. (U. S.) 232.

California. — *Wells v. Ellis*, 68 Cal. 243.

Illinois. — *Gordon v. Freeman*, 11 Ill. 14.

New York. — *Welles v. March*, 30 N. Y. 344; *Havens v. Hussey*, 5 Paige (N. Y.) 30.

Pennsylvania. — *McKelvy's Appeal*, 72 Pa. St. 409; *Brown v. Agnew*, 6 W. & S. (Pa.) 238; *Moddewell v. Keever*, 8 W. & S. (Pa.) 63; *Pleasants v. Meng*, 1 Dall. (Pa.) 380.

Rhode Island. — *Allen v. Woonsocket Co.*, 11 R. I. 288.

Vermont. — *Dana v. Lull*, 17 Vt. 391.

Canada. — *Cameron v. Stevenson*, 12 U. C. C. P. 389.

5. Mere Fact of Insolvency Not a Dissolution of Partnership. — *Boyce v. Burchard*, 21 Ga. 74; *Arnold v. Brown*, 24 Pick. (Mass.) 89, 35 Am. Dec. 296; *Mechanics Bank v. Hildreth*, 9 Cush. (Mass.) 356; *Siegel v. Chidsey*, 28 Pa. St. 279, 70 Am. Dec. 124.

6. Agency Revoked by Bankruptcy of Principal. — *Ex p. Snowball*, L. R. 7 Ch. 534; *Parker v. Smith*, 16 East 382; *In re Daniels*, 6 Biss. (U. S.) 405, 13 Nat. Bankr. Reg. 46; *Fuller v. Emerson*, 7 Cush. (Mass.) 203; *Dye v. Bertram*, 6 Am. L. Rec. 355, 5 Ohio Dec. (Reprint) 508. Compare *Ogden v. Gillingham*, *Baldw.* (U. S.) 38.

If the Act to Be Done by the Agent Is Merely Formal, such as power of attorney to make an indorsement which the bankrupt himself might have been compelled to make, the agency is not revoked by the bankruptcy of the principal. *Dixon v. Ewart*, 3 Meriv. 327.

7. Dictum that Bankruptcy of Agent Revokes Agency. — *Hudson v. Granger*, 5 B. & Ald. 27, 7 E. C. L. 10. See also *Evans Prin. & Agt.* 92; *Story on Agency*, 9th ed., § 486, in which the rule is laid down according to the dictum in the case cited above.

In Respect to Merely Formal Acts to be done by an agent, it is settled that his authority is not revoked. *Robson v. Kemp*, 4 Esp. 233; *Alley v. Hotson*, 4 Campb. 325.

that the agency is not affected, and the authorities tend to support this view.¹

5. Actions by Debtor — *a. RIGHT OF ACTION IN GENERAL.* — Though the bankrupt laws give to the assignee or trustee in bankruptcy all rights of action belonging to the bankrupt, so far as they grow out of debts or property which are assets, it is said that no bankrupt law of the United States has undertaken to prohibit actions on debts due the bankrupt before the bankruptcy to be brought in the name of the bankrupt, with the consent of the assignee, in the courts of those states whose judicial procedure and practice allow suits to be so brought.² On the other hand, many authorities hold that since the title to the bankrupt's property is in the assignee, the bankrupt cannot maintain any action in respect to it, but that all right of action is exclusively in the assignee,³ even though the property or claim was not scheduled with the other assets, and the bankruptcy proceeding was closed without knowledge of the bankrupt's right,⁴ unless an action by the assignee is no longer maintainable,

1. That the Authority of an Agent Is Not Revoked by His Bankruptcy is supported by the following decisions that a bankrupt agent may sue in respect to his principal's property, notwithstanding bankruptcy

England. — *Winch v. Keeley*, 1 T. R. 619; *Lempriere v. Pasley*, 2 T. R. 485; *Ex p. Byas*, 1 Atk. 124; *Ex p. Mowbray*, 1 Jac. & W. 425; *Watkins v. Maule*, 2 Jac. & W. 237; *Ex p. Rhodes*, 2 Deac. 364, 3 Mont. & A. 217; *Ex p. Douglas*, 3 Deac. & C. 310; *Webster v. Scales*, 4 Dougl. 7, 26 E. C. L. 191; *Tibbits v. George*, 5 Ad. & El. 107, 31 E. C. L. 293; *Parnham v. Hurst*, 8 M. & W. 743; *D'Arnay v. Chesneau*, 13 M. & W. 796; *Anonymous*, 1 Campb. 492, note; *Ex p. Greening*, 13 Ves. Jr. 206; *Ex p. Price*, 3 Mont. D. & De G. 586; *Smith v. Pickering*, Peake (N. P. ed. 1795) 50; *Ex p. Pike*, 40 L. T. N. S. 529.

United States. — *Wood v. Owings*, 1 Cranch (U. S.) 239.

Louisiana. — *Partee v. Corning*, 9 La. Ann. 539.

Massachusetts. — *Fogg v. Willcutt*, 1 Cush. (Mass.) 300.

New York. — *Hopkins v. Banks*, 7 Cow. (N. Y.) 650.

Vermont. — *Blin v. Pierce*, 20 Vt. 25.

Virginia. — *Tucker v. Daly*, 7 Gratt. (Va.) 330.

Analogies. — This proposition derives support by analogy from the rule in regard to trustees. A bankrupt or insolvent may take, hold and execute a trust, and the trust estate is not affected by the bankruptcy or insolvency proceeding. This is well settled. *Harris v. Harris*, 29 Beav. 107; *Copeman v. Gallant*, 1 P. Wms. 314; *Gardner v. Rowe*, 2 Sim. & St. 346; *Scott v. Surman*, Willes 402; *Carpenter v. Marnell*, 3 B. & P. 41; *Gladstone v. Hadwen*, 1 M. & S. 526; *Ex p. Gennys*, 1 Mont. & M. 258; *Ex p. Painter*, 2 Deac. & C. 584; *In re Watts*, 4 Eng. L. & Eq. 67; *Turner v. Maule*, 5 Eng. L. & Eq. 222; *Ex p. Proctor*, 1 Swanst. 532; *Ex p. Mildmay*, 3 Ves. Jr. 2; *Butler v. Merchants' Ins. Co.*, 14 Ala. 798; *Chew's Estate*, 4 Md. Ch. 60; *Kip v. State Bank*, 10 Johns. (N. Y.) 63; *Ontario Bank v. Mumford*, 2 Barb. Ch. (N. Y.) 596; *Lounsbury v. Purdy*, 11 Barb. (N. Y.) 490; *Shryock v. Waggoner*, 28 Pa. St. 431; *Ludwig v. Highley*, 5 Pa. St. 132; *Wilhelm v. Folmer*, 6 Pa. St. 296; *Blin v. Pierce*, 20 Vt. 25.

So, too, the bankruptcy or insolvency of a

trustee is cause for his removal from office by a court of equity. *Bainbrigg v. Blair*, 1 Beav. 495; *Harris v. Harris*, 29 Beav. 107; *In re Bridgman*, 1 Drew & Sm. 164; *In re Roche*, 1 Con. & Law. 306; *Com'rs of Charitable Donations v. Archbold*, 11 Ir. Eq. 187.

But it rests in the discretion of the court whether or not he shall be removed. *In re Roche*, 2 Dr. & War. 287; *In re Bridgman*, 1 Drew. & Sm. 164; *Turner v. Maule*, 5 Eng. L. & Eq. 222; *Williams v. Nichol*, 47 Ark. 254; *Rankin v. Barcroft*, 114 Ill. 441; *Belknap v. Belknap*, 5 Allen (Mass.) 468; *Shryock v. Waggoner*, 28 Pa. St. 430.

A further analogy is probably found in the rule in regard to executors and administrators, namely, that insolvency is a ground for refusing to grant letters, and also for revoking letters granted before the insolvency occurred, but that a revocation is effected only by an order of the court having jurisdiction. See the title EXECUTORS AND ADMINISTRATORS, vol. II, pp. 781, 824, 825.

2. Action by Debtor with Consent of Assignee or Trustee. — *Herring v. Downing*, 146 Mass. 10; *Mayhew v. Pentecost*, 129 Mass. 332. See also *Bird v. Pierpoint*, 1 Johns. (N. Y.) 118; *Bird v. Caritat*, 2 Johns. (N. Y.) 342, 3 Am. Dec. 433. But see *contra*, *Kirwan v. Latour*, 1 Har. & J. (Md.) 289, 2 Am. Dec. 519; *Ward v. Jenkins*, 10 Met. (Mass.) 590.

3. Rule that Only Assignee or Trustee Can Sue — *Louisiana.* — *State Bank v. Wilson*, 19 La. Ann. 1.

Kansas. — *Beeson v. Shively*, 28 Kan. 574.

Kentucky. — *Peters v. Wallace*, 9 Ky. L. Rep. 215; *Malone v. Martin*, (Ky. 1887) 2 S. W. Rep. 909.

Mississippi. — *Planters' Bank v. Conger*, 12 Smed. & M. (Miss.) 527; *Atwood v. Thomas*, 60 Miss. 162.

New Hampshire. — *Berry v. Gillis*, 17 N. H. 9, 43 Am. Dec. 584.

Pennsylvania. — *Laird v. Laird*, 2 Pa. L. J. Rep. 206, 3 Pa. L. J. 474.

Tennessee. — *Deadrick v. Armour*, 10 Humph. (Tenn.) 588.

4. Property or Rights of Action Not Scheduled with Assets. — *Planters' Bank v. Conger*, 12 Smed. & M. (Miss.) 527; *Laird v. Laird*, 2 Pa. L. J. Rep. 206, 3 Pa. L. J. 474; *Walker v. Stacey*, 2 Baxt. (Tenn.) 433. But see *Peery v. Carnes*, 86 Mo. 652; *Wood v. Baker*, 60 Hun (N. Y.) 337; *McMillan v. Croft*, 2 Tex. 397.

as where the time limited for actions by assignees has expired.¹

Actions Affecting Exempt Property are maintainable by the bankrupt for his own benefit, and the assignee or trustee has no interest therein.²

b. PROSECUTION OF PENDING ACTIONS. — A provision that all rights of action belonging to a debtor shall vest in his assignee or trustee in bankruptcy, and that he may, if he requires it, be admitted to prosecute a pending action, is generally construed as giving an option to the assignee or trustee to prosecute a pending action brought by the debtor before his bankruptcy.³ An action is not abated by the bankruptcy of the plaintiff,⁴ and it has generally been held that the bankrupt may proceed with the action, if the assignee or trustee in bankruptcy does not assert his right in the premises,⁵ though it has also been held that the right to prosecute the action belongs exclusively to the assignee or trustee in bankruptcy, and that, if it is to be prosecuted further, it must be in his name.⁶

6. Actions Against Debtor — a. ACTIONS BROUGHT AFTER COMMENCEMENT OF PROCEEDING. — The proof of a claim in an insolvency or bankruptcy proceeding, as affecting the creditor's right to sue the debtor, has already been noticed.⁷ The commencement of such proceeding is also held to deprive the

1. Action by Assignee Barred by Limitation — Right of Bankrupt to Sue. — *Coleman v. Riggs*, 61 Iowa 543; *Lafountain v. Burlington Sav. Bank*, 56 Vt. 332. But see *Beeson v. Shively*, 28 Kan. 574, holding that even where an action by the assignee is barred, the bankrupt cannot sue unless the assignee assigns the demand back to him.

And in *Parks v. Tirrell*, 3 Allen (Mass.) 15, it was held that where a right of action is barred as against the assignee, it is also barred as against the bankrupt, and that no action could afterwards be maintained by either. See also *Kenyon v. Wrisley*, 147 Mass. 476.

2. Actions Affecting Exempt Property. — *Winn v. Morse*, 59 N. H. 210; *Henly v. Lanier*, 75 N. Car. 172.

3. Bankruptcy of Plaintiff — Right of Assignee to Prosecute Action. — *Jackson v. North Eastern R. Co.*, 5 Ch. D. 844; *Stinson v. Fernald*, 77 Me. 576; *Merrill v. Tamany*, 3 Pa. St. 433. See also *infra*, this title, *Assignee or Trustee — What Passes to Assignee or Trustee — Choses in Action*.

4. Action Not Abated by Bankruptcy of Plaintiff — United States. — *Gear v. Fitch*, 3 B. & A. Pat. Cas. 573, 10 Fed. Cas. No. 5,290.

Arkansas. — *King v. Morrison*, 5 Ark. 519.
Colorado. — *Thatcher v. Rockwell*, 4 Colo. 375.

Indiana. — *Pittsburgh, etc., R. Co. v. Nuzum*, 60 Ind. 533; *Anderson v. Wilson*, 100 Ind. 402.
New York. — *Springer v. Vanderpool*, 4 Edw. (N. Y.) 362.

Pennsylvania. — *Shamburg v. Bank*, 35 Pa. L. J. 37.

But see *Cook v. Lansing*, 3 McLean (U. S.) 571, 6 Fed. Cas. No. 3,162. Compare *Lewis v. Fisk*, 6 Rob. (La.) 150.

5. Right of Bankrupt to Proceed with Action — United States. — *Thatcher v. Rockwell*, 105 U. S. 467.

Georgia. — *Conner v. Southern Express Co.*, 42 Ga. 37, 5 Am. Rep. 543.

Maine. — *Lancey v. Foss*, 88 Me. 215; *Sawtelle v. Rollins*, 23 Me. 196.

Massachusetts. — *Reed v. Paul*, 131 Mass. 129. Compare *Waterman v. Robinson*, 5 Mass. 303.

New Hampshire. — *Towle v. Rowe*, 58 N. H. 394; *Ramsey v. Fellows*, 58 N. H. 607.

Pennsylvania. — *Booth v. Meyer*, 3 W. N. C. (Pa.) 196.

Vermont. — *Steele v. Towne*, 28 Vt. 771.

The Assent of the Assignee to the maintenance of an action by the insolvent will be implied, where the assignee has knowledge of the pendency of the action, and does not interfere with it. *Herring v. Downing*, 146 Mass. 10.

Recovery for Benefit of Assignee. — Where a plaintiff who becomes a bankrupt is permitted to continue the prosecution of the action, the recovery will be for the benefit of the assignee in bankruptcy. *Moore v. Jones*, 17 Fed. Cas. No. 9,768; *Woddail v. Austin*, 44 Ga. 18; *Southern Express Co. v. Connor*, 49 Ga. 415; *Gilmore v. Bangs*, 55 Ga. 403.

6. Cases Denying Right of Plaintiff to Prosecute Action after Bankruptcy — England. — *Warder v. Saunders*, 10 Q. B. D. 114; *Selig v. Lion*, (1891) 1 Q. B. 513; *Farnham v. Milward*, (1895) 2 Ch. 731; *Wright v. Swindon, etc., R. Co.*, 4 Ch. D. 164; *Barter v. Dubeux*, 7 Q. B. D. 413. As to the decisions under former *English* statutes see *Fowler v. Down*, 1 B. & P. 44; *Webb v. Fox*, 7 T. R. 392; *Clark v. Calvert*, 8 Taunt. 742, 4 E. C. L. 266.

Alabama. — *McNutt v. King*, 59 Ala. 597; *Lacy v. Rockett*, 11 Ala. 1002.

Illinois. — *Vairin v. Edmonson*, 9 Ill. 120.

Indiana. — *Sutherland v. Davis*, 42 Ind. 26.

Iowa. — *Seaton v. Hinneman*, 50 Iowa 395; *Fulweiler v. Singer*, 2 Greene (Iowa) 372.

Kentucky. — *Parks v. Doty*, 13 Bush (Ky.) 727; *Charles v. Bain*, 9 Ky. L. Rep. 398.

Louisiana. — *Fisher v. Vose*, 3 Rob. (La.) 457, 38 Am. Dec. 243; *West v. His Creditors*, 4 Rob. (La.) 88; *Harrod v. Burgess*, 5 Rob. (La.) 449.

New York. — *Dessau v. Johnson*, (Supm. Ct. Spec. T.) 66 How. Pr. (N. Y.) 4; *McSpedon v. Bouton*, 5 Daly (N. Y.) 30.

Ohio. — *Negley v. Jeffers*, 28 Ohio St. 90.

Virginia. — *Cannon v. Wellford*, 22 Gratt. (Va.) 195.

7. See *supra*, this title, *Debts and Claims against Estate — Proof and Allowance — Effect of Proving Claims.*

creditor of his right to sue, where the statute requires notice to be given to creditors, thereby making them parties to the proceeding,¹ but in the absence of any provision in the statute taking away such right, it would seem not to be affected by the proceeding, though a judgment, if recovered, may not put the creditor in any better position than other creditors.² And even where the right to sue would not otherwise exist, the bankruptcy court may grant leave to the creditor to sue.³

Pending an Application for a Discharge, however, it is held that a creditor cannot sue the bankrupt for a debt which would be released by the discharge.⁴

As to Claims Not Dischargeable in Bankruptcy, the pendency of the proceeding does not affect the creditor's right to pursue any remedy that he may have, by action or otherwise.⁵

b ACTIONS PENDING AT COMMENCEMENT OF PROCEEDING.—The general rule is that, where the statute merely authorizes the assignee or trustee in bankruptcy to take on himself the defense of actions pending against the bankrupt, he may exercise such authority at his option, and if he fails to do so the action may proceed against the bankrupt, and the judgment, if any is recovered, will bind the assignee or trustee the same as any other party who acquires an interest *pendente lite*.⁶ But such a judgment cannot operate any further than to establish the creditor's claim. It does not give him a lien on the property of the debtor or otherwise affect the assignee's title and power of disposal.⁷

1. Creditors Made Parties to Proceeding.—*Cosh-Murray Co. v. Bothell*, 10 Wash. 314. Compare the statutes in other jurisdictions.

2. Right to Sue Bankrupt — Effect of Recovery — *United States*. — *In re Tift*, 19 Nat. Bankr. Reg. 201, 23 Fed. Cas. No. 14,034; *In re McBride*, 99 Fed. Rep. 686.

Indiana. — *Stone v. Brookville Nat. Bank*, 39 Ind. 284.

Maryland. — *Lewis v. Higgins*, 52 Md. 614.

Minnesota. — *Davidson v. Fisher*, 41 Minn. 363.

New Hampshire. — *Hobart v. Haskell*, 14 N. H. 127.

New York. — *Ansonia Brass, etc., Co. v. New Lamp Chimney Co.*, 64 Barb. (N. Y.) 435; *Ewart v. Schwartz*, 48 N. Y. Super. Ct. 390.

Ohio. — *Gardner v. Hengehold*, 6 Ohio Dec. (Reprint) 997; *Thompson v. Massie*, 41 Ohio St. 307.

Pennsylvania. — *Raiguel v. Gerson*, 2 W. N. C. (Pa.) 304.

Arrest for Fraud. — *In re Lewensohn*, 99 Fed. Rep. 73.

3. Leave of Court to Sue. — *In re McGilton*, 3 Biss (U. S.) 144, 7 Nat. Bankr. Reg. 294, 16 Fed. Cas. No. 8,798; *In re Ghiardelli*, 1 Sawy. (U. S.) 343, 4 Nat. Bankr. Reg. 164, 10 Fed. Cas. No. 5,376; *In re Scott*, 1 W. N. C. (Pa.) 21, 21 Fed. Cas. No. 12,520; *In re Whiting*, 1 W. N. C. (Pa.) 30, 29 Fed. Cas. No. 17,574; *Brooks v. Bates*, 7 Colo. 576; *Penn. Mut. L. Ins. Co. v. Fife*, 15 Wash. 605.

4. No Right to Sue Pending Application for Discharge. — *In re Archenbrow*, 11 Nat. Bankr. Reg. 149, 1 Fed. Cas. No. 504. See also *Payne v. Able*, 4 Nat. Bankr. Reg. 220; *Corey v. Ripley*, 57 Me. 69; *Symonds v. Barnes*, 59 Me. 191, 8 Am. Rep. 418; *Hill v. Robbins*, 22 Mich. 475.

5. Actions Respecting Claims Not Dischargeable in Bankruptcy. — *In re Shepard*, 97 Fed. Rep. 187; *In re Anderson*, 97 Fed. Rep. 321; *In re Nowell*, 99 Fed. Rep. 931.

6. Effect of Bankruptcy as to Pending Actions

— **General Rule.** — *United States*. — *Eyster v. Gaff*, 91 U. S. 521, 13 Nat. Bankr. Reg. 546; *Burbank v. Bigelow*, 92 U. S. 179, 14 Nat. Bankr. Reg. 445; *Norton v. Switzer*, 93 U. S. 355; *Jerome v. McCarter*, 94 U. S. 734, 15 Nat. Bankr. Reg. 546; *McHenry v. La Société Francaise, etc.*, 95 U. S. 58; *Davis v. Friedlander*, 104 U. S. 570; *Muser v. Kern*, 55 Fed. Rep. 916; *In re Bousfield, etc., Mfg. Co.*, 17 Nat. Bankr. Reg. 153, 3 Fed. Cas. No. 1,704.

Massachusetts. — *Holland v. Martin*, 123 Mass. 278.

Minnesota. — *Brackett v. Dayton*, 34 Minn. 219.

Ohio. — *Seymour v. Browning*, 17 Ohio 362. *South Carolina*. — *Cleverly v. McCullough*, 6 Rich. L. (S. Car.) 517.

Texas. — *Manwarring v. Kouns*, 35 Tex. 171.

Canada. — *Ireland v. Wagstaff*, 4 U. C. Q. B. 231.

If the Assignee Refuses to Defend an action pending against the bankrupt, it may be defended by the bankrupt. *Lane v. Moore*, 59 N. H. 80. So, too, a bankrupt may appeal from a judgment rendered against him, because if he fails to obtain a discharge the judgment will be a charge against him, though it may be erroneous. *Sanford v. Sanford*, 58 N. Y. 67; *Hughes v. Thweatt*, 57 Miss. 376. Compare *Daugherty v. Ringo*, 1 Ky. L. Rep. 282; *Wilson v. McMullen*, 4 Ky. L. Rep. 895.

Before an Assignee Is Appointed, a defendant who is adjudged a bankrupt may do whatever is necessary to protect his interests. *Hickcock v. Bell*, 46 Tex. 610.

7. Assignee's Title Not Affected by Judgment Against Insolvent. — *Norton v. Switzer*, 93 U. S. 355; *Titcomb v. Bradlee*, 159 Mass. 190. See also *In re Rundle*, 2 Nat. Bankr. Reg. 113, 21 Fed. Cas. No. 12,138; *In re Wynne*, Chase (U. S.) 227, 4 Nat. Bankr. Reg. 23, 30 Fed. Cas. No. 18,117; *Buschman v. Hanna*, 72 Md. 4; *McCabe v. Cooney*, 2 Sandf. Ch. (N. Y.) 314;

Stay of Proceedings. — It is usually provided that in pending actions against the debtor a stay of proceedings may be granted until the bankruptcy or insolvency matter is disposed of.¹

Actions Involving Title to Property. — Where the matter in controversy in an action pending at the time of the filing of the petition in bankruptcy is the title to property which the plaintiff claims adversely to the bankrupt, no stay will be granted.²

Actions on Debts Not Dischargeable in Bankruptcy. — If an action is pending on a debt that would not be released by the discharge of the defendant in bankruptcy, such action is not affected by a bankruptcy proceeding,³ but execution

Milne v. Bucknor, 13 Phila. (Pa.) 33, 36 Leg. Int. (Pa.) 26; *Manwarring v. Kouns*, 35 Tex. 171.

1. Stay of Proceedings in Pending Actions — England. — 46 & 47 Vict., c. 52, § 10, par. 2; 32 & 33 Vict., c. 71, § 163, par. 1; *Ex p. Locke*, L. R. 6 Ch. 795; *Ex p. Ditton*, 1 Ch. D. 557; *In re Davies*, 21 L. T. N. S. 685; *In re Robinson*, 22 L. T. N. S. 274.

United States. — The provision of the law of 1898 is that a pending action "shall be stayed." Act July 1, 1898 (30 U. S. Stat. at L. 544), § 11, par. a; *In re Brooks*, 91 Fed. Rep. 508; *In re Kletchka*, 92 Fed. Rep. 901; *In re Hollaway*, 93 Fed. Rep. 638; *In re Van Orden*, 96 Fed. Rep. 86, 2 Am. Bankr. Rep. 801; *In re Shepard*, 97 Fed. Rep. 187; *In re Anderson*, 97 Fed. Rep. 321; *In re Geister*, 97 Fed. Rep. 322; *In re Sullivan*, 2 Am. Bankr. Rep. 30; *Heath v. Shaffer*, 2 Am. Bankr. Rep. 98; *In re Globe Cycle Works*, 2 Am. Bankr. Rep. 447; *Carter v. People's Nat. Bank*, (Ga. 1900) 35 S. E. Rep. 61; *Smith v. Meisenheimer*, (Ky. 1898) 47 S. W. Rep. 1087.

California. — Act March 26, 1895 (Stat. 1895, p. 131, § 49).

See also the statutes in other jurisdictions.

The Court of Bankruptcy may stay an action pending in a state court. *In re Basch*, 97 Fed. Rep. 761. The law of 1867 provided for a stay on the application of the bankrupt. *In re Davis*, 1 Sawy. (U. S.) 260, 4 Nat. Bankr. Reg. 715, 7 Fed. Cas. No. 3,620; *Matter of Richardson*, 2 Ben. (U. S.) 517, 2 Nat. Bankr. Reg. 202, 20 Fed. Cas. No. 11,774; *Markson v. Heaney*, 1 Dill. (U. S.) 497, 4 Nat. Bankr. Reg. 510, 16 Fed. Cas. No. 9,098; *In re Tift*, 19 Nat. Bankr. Reg. 201, 23 Fed. Cas. No. 14,034; *In re Whipple*, 6 Biss. (U. S.) 516, 13 Nat. Bankr. Reg. 373, 29 Fed. Cas. No. 17,512; *First Nat. Bank v. Abner*, 1 MacArthur (D. C.) 590; *Rood v. Stevens*, 49 Conn. 45; *Cohen v. Duncan*, 64 Ga. 341; *Holden v. Sherwood*, 84 Ill. 92; *Stone v. Brookville Nat. Bank*, 39 Ind. 284; *Weaver v. Voils*, 68 Ind. 191; *Burke v. Pinnell*, 93 Ind. 540; *Goodpastor v. Richart*, 3 Ky. L. Rep. 392; *Darnall v. Cline*, 4 Ky. L. Rep. 537; *Pine Hill Coal Co. v. Harris*, 7 Ky. L. Rep. 517; *Serra & Hijo v. Hoffman*, 29 La. Ann. 17; *Schwartz v. Drinkwater*, 70 Me. 409; *Casco Nat. Bank v. Shaw*, 79 Me. 376, 1 Am. St. Rep. 319; *Bennett v. Goldthwait*, 109 Mass. 494, 12 Am. Rep. 742; *Seavey v. Beckler*, 128 Mass. 471; *Howes v. Holmes*, 2 Mo. App. 81; *Gardner v. Hengehold*, 6 Ohio Dec. (Reprint) 997; *Frostman v. Hicks*, 3 W. N. C. (Pa.) 202; *Platt v. Kelso*, 5 W. N. C. (Pa.) 57; *State Bank v. Officer*, 3 Baxt. (Tenn.) 173; Act March 2, 1867 (14 U. S. Stat. at L. 517), § 21.

Actions on Debts Not Provable in Bankruptcy. — The provision of the bankruptcy law for a stay of proceedings applies only to suits brought against the bankrupt on debts provable in bankruptcy. *Dows v. Griswold*, 122 Mass. 440.

Where the Amount Due the Plaintiff Is Disputed, the bankruptcy court may allow the suit to proceed for the purpose of ascertaining the amount due, but execution will be stayed if the debt is one that will be released by the discharge. *In re Rundle*, 2 Nat. Bankr. Reg. 113, 21 Fed. Cas. No. 12,138; *In re Cooke*, 1 W. N. C. (Pa.) 30, 6 Fed. Cas. No. 3,172; *Rutherford v. Rountree*, 68 Ga. 725.

Bankruptcy Not Available in Bar of Pending Action. — The provision in the bankruptcy law for staying pending actions does not make the bankruptcy proceeding available in bar of an action. *McCormick v. Raymond*, 13 Neb. 306; *Tinkum v. O'Neale*, 5 Nev. 93; *Brandon Mfg. Co. v. Frazer*, 47 Vt. 88, 19 Am. Rep. 118, 13 Nat. Bankr. Reg. 362. Nor is it a ground for dismissing the action. *Ballin v. Ferst*, 55 Ga. 546; *Hobart v. Haskell*, 14 N. H. 127.

Necessity of Adjudication to Authorize Stay. — *Givens v. Robbins*, 5 Ala. 676; *Stewart v. Sonneborn*, 51 Ala. 126; *Maxwell v. Faxton*, 4 Nat. Bankr. Reg. 210; *Murphy v. Young*, 6 W. N. C. (Pa.) 317.

"Unreasonable Delay on the Part of the Bankrupt in endeavoring to obtain his discharge" was a ground for refusing to grant a stay under the Act of 1867. *Matter of Kelly*, 3 Fed. Rep. 219; *Greenwald v. Appell*, 1 Fed. Rep. 140; *Kreiger v. Seng*, (Ky. 1892) 8 S. W. Rep. 1015; *McDonald v. Davis*, 12 H. (N. Y.) 95; *Calvert v. Peebles*, 80 N. Car. 334; *Dingee v. Becker*, 9 Phila. (Pa.) 196, 31 Leg. Int. (Pa.) 156; *Williams v. Whiting*, 1 W. N. C. (Pa.) 94. As to what constitutes "unreasonable delay," see *In re Sweet*, 36 Fed. Rep. 761; *Matter of Belden*, 5 Ben. (U. S.) 476, 6 Nat. Bankr. Reg. 443, 3 Fed. Cas. No. 1,239; *Palmer v. Hussey*, 87 N. Y. 303, reversing 24 Hun (N. Y.) 662; *Russell v. Rollins*, 86 N. Car. 327; *Pyles v. Bell*, 20 S. Car. 365.

2. Actions Involving Bankrupt's Title to Property. — *Hewett v. Norton*, 1 Woods (U. S.) 68, 13 Nat. Bankr. Reg. 276, 12 Fed. Cas. No. 6,441; *U. S. v. Mackoy*, 2 Dill. (U. S.) 299, 26 Fed. Cas. No. 15,696; *Leroux v. Hudson*, 109 U. S. 468; *Schott v. Hudson*, 109 U. S. 477; *Woodson v. Veal*, 60 Ga. 562; *Sutherland v. Davis*, 42 Ind. 26.

3. Actions for Debts Not Dischargeable in Bankruptcy — England. — *Ex p. Coker*, L. R. 10 Ch. 652.

United States. — *Matter of Heenocksburgh*, 6 Ben. (U. S.) 150, 7 Nat. Bankr. Reg. 37, 11

will not be allowed on the judgment recovered until after the discharge.¹

Actions Against Joint Debtors. — Where bankruptcy proceedings are commenced against one or more of several defendants in a pending action, such action may be stayed as to him or them and continued as to the other or others.²

Cases on Appeal. — A case pending on appeal from a judgment against the defendant at the time he is adjudged a bankrupt is not regarded as within the provision for the stay of pending actions.³

7. Liens on Debtor's Property — *a. LIENS NOT OBTAINABLE PENDING INSOLVENCY OR BANKRUPTCY PROCEEDINGS.* — The principle of equality among creditors forbids any creditor to obtain a lien on the debtor's property after the commencement of a bankruptcy or insolvency proceeding.⁴

b. LIENS EXISTING AT COMMENCEMENT OF PROCEEDING — (1) *General Rule.* — Liens existing at the time of the commencement of an insolvency or bankruptcy proceeding are not affected thereby in the absence of any special provision regulating the matter.⁵

(2) *Existing Liens Dissolved by Proceeding* — (a) *Liens Created by Act of Parties.* — A lien given by a debtor in contemplation of insolvency or bankruptcy for the purpose of securing an existing debt is avoided by an insolvency or

Fed. Cas. No. 6,367; *Matter of Seymour*, 1 Ben. (U. S.) 348, 1 Nat. Bankr. Reg. 29, 21 Fed. Cas. No. 12,684; *In re Leibenstein*, 4 Chicago Leg. N. 309, 15 Fed. Cas. No. 8,218. But see *Matter of Rosenberg*, 3 Ben. (U. S.) 14, 2 Nat. Bankr. Reg. 236, 20 Fed. Cas. No. 12,054; *Matter of Schwarz*, 14 Blatchf. (U. S.) 196, 15 Nat. Bankr. Reg. 330, 21 Fed. Cas. No. 12,502; *In re Van Buren*, 19 Nat. Bankr. Reg. 149, 28 Fed. Cas. No. 16,833.

Pennsylvania. — *Horter v. Harlan*, 9 Phila. (Pa.) 63, 29 Leg. Int. (Pa.) 229.

Texas. — *Coffee v. Ball*, 49 Tex. 16.

1. Execution Not Allowable until After Discharge. — *Cobham v. Dalton*, L. R. 10 Ch. 655.

2. Actions Against Joint Defendants — *United States.* — *Fellows v. Hall*, 3 McLean (U. S.) 487, 8 Fed. Cas. No. 4,723.

Alabama. — *Melvin v. Clark*, 45 Ala. 285.

Kansas. — *Hogendobler v. Lyon*, 12 Kan. 276.

Maine. — *West v. Furbish*, 67 Me. 17.

But see *Tinkum v. O'Neale*, 5 Nev. 93; *Mason v. Stacey*, 3 Cinc. L. Bul. 1100, 7 Ohio Dec. (Reprint) 567.

3. Cases on Appeal Not Subject to Stay — *Alabama.* — *Booker v. Adkins*, 48 Ala. 529.

California. — *Merritt v. Glidden*, 39 Cal. 559, 2 Am. Rep. 479.

Georgia. — *Alston v. Wingfield*, 53 Ga. 18.

Louisiana. — *Serra é Hijo v. Hoffman*, 29 La. Ann. 17.

Texas. — *Flanagan v. Pearson*, 42 Tex. 1, 19 Am. Rep. 40.

4. No Lien Obtainable After Commencement of Proceeding. — *Geilinger v. Philippi*, 133 U. S. 246; *In re Wynne*, Chase (U. S.) 227, 4 Nat. Bankr. Reg. 23, 30 Fed. Cas. No. 18,117; *In re Cheney*, 5 Law Rep. 19, 5 Fed. Cas. No. 2,636; *Woolfolk v. Murray*, 10 Nat. Bankr. Reg. 540, 30 Fed. Cas. No. 18,028; *Buschman v. Hanna*, 72 Md. 4; *Gottschalk v. Smith*, 74 Md. 560; *Fox v. Merfeld*, 81 Md. 80; *Lewis v. Higgins*, 52 Md. 614; *Phillips v. Helmbold*, 26 N. J. Eq. 202; *Williams v. Merritt*, 103 Mass. 184, 4 Am. Rep. 521. See also *supra*, this section, *Actions Against Debtor*.

5. Existing Liens Not Affected in Absence of Special Provisions — *England.* — *Ex p. Birming-*

ham, etc., Gas Light Co., L. R. 11 Eq. 615; *Ex p. Harrison*, 13 Q. B. D. 753; *Mitford v. Mitford*, 9 Ves. Jr. 87; *Grant v. Mills*, 2 Ves. & B. 306; *Ex p. Coppard*, 4 Deac. & C. 102.

United States. — *Hauselt v. Harrison*, 105 U. S. 401; *Cook v. Tullis*, 18 Wall. (U. S.) 332, 9 Nat. Bankr. Reg. 433; *In re Wynne*, Chase (U. S.) 227, 4 Nat. Bankr. Reg. 23, 30 Fed. Cas. No. 18,117; *Barnes v. Billington*, 1 Wash. (U. S.) 29; *Ex p. Newhall*, 2 Story (U. S.) 360; *Mitchell v. Winslow*, 2 Story (U. S.) 630, 17 Fed. Cas. No. 9,673; *In re Ferguson*, 2 Am. Bankr. Rep. 586.

California. — *Montgomery v. Merrill*, 62 Cal. 385.

Connecticut. — *Ingraham v. Phillips*, 1 Day (Conn.) 117.

Illinois. — *Hill v. Harding*, 93 Ill. 77; *Plume, etc., Mfg. Co. v. Caldwell*, 136 Ill. 163, 29 Am. St. Rep. 305.

Kentucky. — *Longdale Iron Co. v. Swift's Iron, etc., Works*, 91 Ky. 191; *Elliott v. Saufley*, 89 Ky. 52.

Louisiana. — *Switzer v. Heinn*, 27 La. Ann. 25; *Webre v. Beltran*, 47 La. Ann. 195.

Maine. — *Laughlin v. Reed*, 89 Me. 226.

Maryland. — *Storer v. Haynes*, 67 Me. 420; *Buschman v. Hanna*, 72 Md. 1; *Ratcliffe v. Sangston*, 18 Md. 391.

New Hampshire. — *Peterborough Sav. Bank v. Hartshorn*, 67 N. H. 156.

Oregon. — *Helm v. Gilroy*, 20 Oregon 517.

Texas. — *Elliott v. Booth*, 44 Tex. 180, 23 Am. Rep. 593, *overruling* *Taylor v. Bonnett*, 38 Tex. 521, and *Johnson v. Poag*, 39 Tex. 92.

It was held at one time that the lien of an attachment is not an absolute lien, but is contingent on the recovery of a judgment by the attachment plaintiff, and therefore not within the provision of the bankruptcy law of 1841, saving to creditors the benefit of existing liens. *Matter of Cook*, 2 Story (U. S.) 376, 6 Fed. Cas. No. 3,152. See also *Payson v. Payson*, 1 Mass. 283.

As to statutory provisions specially applicable to existing liens, see the next following subdivision of this section *Existing Liens Dissolved by Proceeding*.

bankruptcy proceeding commenced within a limited time thereafter, but liens given for a present consideration and without a fraudulent intent are not affected.¹

(b) **Liens Created by Statute.** — Liens created by statute, without any judicial proceeding, or any act on the part of the debtor, are not affected by the bankruptcy of the debtor after the lien is acquired,² but if any proceedings on the part of the creditor are necessary before the lien will attach, the matter is governed by the rules applicable to liens acquired by legal proceedings.³

(c) **Liens Acquired by Legal Proceedings** — *aa.* **RULE UNDER ENGLISH BANKRUPTCY LAW.** — The English bankruptcy law provides that where a creditor has attached any debt due him, or has issued an execution against the goods or lands of his debtor, he shall not be entitled to retain the benefit thereof against the trustee in bankruptcy of the debtor, unless he has completed the attachment or execution before the date of the receiving order and before notice of the presentation of any bankruptcy petition by or against the debtor or the commission of any available act of bankruptcy by the debtor.⁴

bb. **RULE UNDER BANKRUPTCY LAW OF UNITED STATES.** — The bankruptcy law of the United States is much more comprehensive in the particular under discussion than the English statute. It declares that a lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an attachment on mesne process, or a judgment by confession, which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person, shall be dissolved by the adjudication, if it appears that the lien was obtained or permitted while the defendant was insolvent, and that its existence and enforcement will work a preference, or that the party to be benefited had reasonable cause to believe the defendant to be insolvent and in contemplation of bankruptcy, or that the lien was sought and permitted in fraud of the provisions of the statute.⁵ Another

1. **Liens Created by Act of Parties.** — *In re Wolf*, 98 Fed. Rep. 84; *In re Teague*, 2 Am. Bankr. Rep. 168. See also *supra*, this title, *Acts of Bankruptcy or Insolvency — Preference of Creditors*.

Record of Mortgage. — A mortgage executed before the time limited by the statute, but recorded within the period is valid, except as to intervening creditors. *In re Adams*, 2 Am. Bankr. Rep. 415; *In re Wright*, 96 Fed. Rep. 187; *Thompson-Hiles Co. v. Dodds*, 95 Ga. 754; *Waters v. Riffin*, 19 Md. 536. But see *Langley v. Vaughn*, 10 Heisk. (Tenn.) 553.

In Massachusetts, if a mortgage of real estate is recorded more than four months after its date, it is invalid as against the mortgagor's assignee in insolvency. *Harriman v. Woburn Electric Light Co.*, 163 Mass. 85.

As to Liens Given for a Present Consideration, the bankruptcy law of 1898 provides that "liens given or accepted in good faith and not in contemplation of or in fraud upon this act and for a present consideration * * * shall not be affected by this act." Act July 1, 1898 (30 U. S. Stat. at L. 544), § 67, par. d. And see *In re Wolf*, 98 Fed. Rep. 84.

2. **Liens Created by Statute.** — *In re Kerby-Denis Co.*, 94 Fed. Rep. 818, 95 Fed. Rep. 116, construing the bankruptcy law of 1898; *Laughlin v. Reed*, 89 Me. 226. As to the lien of a landlord for rent, see Anonymous, 1 Atk. 102; *Ex p. Plummer*, 1 Atk. 103; *Buckley v. Taylor*, 2 T. R. 600; *Briggs v. Sowry*, 8 M. & W. 729; *Ex p. Hale*, 1 Ch. D. 285; *Marshall v. Knox*, 16 Wall. (U. S.) 551.

The Terms of the Statutes generally relate only

to such liens as are created by the act of the parties or are acquired by legal proceedings. See Act Cong. July 1, 1898 (30 U. S. Stat. at L. 544), § 67, and the various state insolvency laws.

3. *In re Sabin*, 1 N. Y. Wkly. Dig. 101, 12 Nat. Bankr. Reg. 142, 21 Fed. Cas. No. 12,194; *In re Brunquest*, 7 Biss. (U. S.) 208, 14 Nat. Bankr. Reg. 529, 4 Fed. Cas. No. 2,055; *In re Emslie*, 97 Fed. Rep. 929.

4. **Rule as to Attachments and Executions under English Statute.** — 46 & 47 Vict., c. 52, § 45; *In re Hobson*, 33 Ch. D. 493; *Ex p. Villars*, L. R. 9 Ch. 432; *Figg v. Moore*, (1894) 2 Q. B. 690; *Burns-Burns v. Brown*, (1895) 1 Q. B. 324. See also *Balme v. Hutton*, 9 Bing. 471, 23 E. C. L. 338; *Garland v. Carlisle*, 4 Cl. & F. 693; *Smith v. Milles*, 1 T. R. 475; *Cooper v. Chitty*, 1 Burr. 20; *Searle v. Blaise*, 14 C. B. N. S. 856, 108 E. C. L. 856; *Notley v. Buck*, 8 B. & C. 160, 15 E. C. L. 178; *Whitmore v. Greene*, 13 M. & W. 104; *Brydges v. Walford*, 6 M. & S. 42.

An order *nisi* charging shares under 1 & 2 Vict., 110, § 14, is not an execution under this provision of the statute, and therefore is not affected by the bankruptcy of the debtor. *In re Hutchinson*, 16 Q. B. D. 515.

5. **Judicial Liens Dissolved by Bankruptcy Proceedings under Law of 1898.** — Act July 1, 1898 (30 U. S. Stat. at L. 544), § 67 par. c; *In re Arnold*, 94 Fed. Rep. 1001; *In re Richards*, 95 Fed. Rep. 258; *In re Kenney*, 95 Fed. Rep. 427; *In re O'Connor*, 95 Fed. Rep. 943; *In re Higgins*, 97 Fed. Rep. 775; *In re Burrus*, 97 Fed. Rep. 926; *In re Booth*, 2 Am. Bankr. Rep.

paragraph of the same section provides that all levies, judgments, attachments, or other liens obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien, shall be deemed wholly discharged and released from the same.¹

The Act of 1867 provided that an assignment in bankruptcy should dissolve any attachment on mesne process made within four months next preceding the commencement of the bankruptcy proceeding, and no reference was made to the bankrupt's financial condition at the time of the attachment, or the creditor's knowledge thereof.²

770; *Bear v. Chase*, 99 Fed. Rep. 920; *In re Kavanaugh*, 99 Fed. Rep. 928.

Conflict with Paragraph *f*. — It has been held that paragraph *c* of section 67, referred to above, is irreconcilable with, and must give way to, paragraph *f*. See the next following note.

1. Act July 1, 1898 (30 U. S. Stat. at L. 544), § 67, par. *f*. And see the cases cited in the next preceding note.

Application of Paragraph *f* to Voluntary Bankruptcy Proceedings. — It has several times been held that paragraph *f* of section 67 applies only to involuntary proceedings in bankruptcy. *In re De Lue*, 91 Fed. Rep. 510; *In re Easley*, 93 Fed. Rep. 419; *In re O'Connor*, 95 Fed. Rep. 913.

But in later cases it has uniformly been held, in view of paragraph *a* of section 1, providing that "a person against whom a petition is filed" shall include a person who has filed a voluntary petition, that paragraph *f* of section 67 includes both classes of petitions. *In re Richards*, 95 Fed. Rep. 258; *In re Fellerath*, 95 Fed. Rep. 121; *In re Vaughan*, 97 Fed. Rep. 560; *In re Dobson*, 98 Fed. Rep. 86; *In re Rhoads*, 98 Fed. Rep. 399; *In re Friedman*, 2 Am. Bankr. Rep. 301, 1 Nat. Bankr. N. 208; *Peck Lumber Mfg. Co. v. Mitchell*, 1 Am. Bankr. Rep. 701, 2 Nat. Bankr. N. 262.

Repugnancy of Provisions. — The following differences between the provisions of paragraphs *c* and *f*, respectively, of section 67, will be observed: (1) Under paragraph *c* an attachment is dissolved by the bankruptcy of the debtor only when the attachment proceeding was commenced four months before the filing of the petition in bankruptcy, without regard to the time when the lien was obtained, while under paragraph *f* the attachment is dissolved if the lien was obtained within four months before the filing of the petition in bankruptcy, without regard to the time when the attachment proceeding was begun; (2) under paragraph *c* the insolvency of the debtor must have been known to the creditor in order to invalidate his lien, while under sub-paragraph *f* knowledge on the part of the creditor of the fact of the insolvency is immaterial. The Circuit Court of Appeals, after pointing out these differences, and referring to the fact that both paragraphs relate to the same subject, held that they were clearly antagonistic and not to be reconciled, and that therefore paragraph *f* being the later provision, in point of time, must prevail. The court also found confirmation of its conclusions in the history of the act. *In re Richards*, 96 Fed.

Rep. 935. See also *In re Rhoads*, 98 Fed. Rep. 399.

If the Lien Was Obtained Within the Period Named it is dissolved under paragraph *f* by the subsequent bankruptcy proceeding, without regard to the time of the commencement of the proceeding in which the lien was obtained. *In re Fellerath*, 95 Fed. Rep. 121; *In re Kenney*, 97 Fed. Rep. 554; *In re Vaughan*, 97 Fed. Rep. 560.

2. Attachments on Mesne Process Dissolved by Bankruptcy Proceedings under Law of 1867. — *United States*. — *Doe v. Childress*, 21 Wall. (U. S.) 642; *Davis v. Friedlander*, 104 U. S. 570; *West Philadelphia Bank v. Dickson*, 95 U. S. 180; *Matter of Housberger*, 2 Ben. (U. S.) 504, 2 Nat. Bankr. Reg. 92; *Miller v. O'Brien*, 9 Blatchf. (U. S.) 270, 9 Nat. Bankr. Reg. 26; *Zeiber v. Hill*, 1 Sawy. (U. S.) 269; *McCord v. McNeil*, 4 Dill. (U. S.) 173; *Chapman v. Brewer*, 114 U. S. 158; *In re Ellis*, 1 Nat. Bankr. Reg. 555, 8 Fed. Cas. No. 4,400; *Pennington v. Lowenstein*, 1 Nat. Bankr. Reg. 570, 19 Fed. Cas. No. 10,938; *In re Davis*, 1 Hask. (U. S.) 232, 7 Fed. Cas. No. 3,616; *Beers v. Place*, 94 Nat. Bankr. Reg. 45, 36 Conn. 578, 3 Fed. Cas. No. 1,233; *In re Preston*, 6 Nat. Bankr. Reg. 545, 19 Fed. Cas. No. 11,394; *Robinson v. Tuttle*, 2 Hask. (U. S.) 76, 20 Fed. Cas. No. 11,968; *Matter of Peck*, 9 Ben. (U. S.) 169, 16 Nat. Bankr. Reg. 43, 19 Fed. Cas. No. 10,886; *Bracken v. Johnston*, 4 Dill. (U. S.) 518, 15 Nat. Bankr. Reg. 107; *Hatfield v. Moller*, 4 Fed. Rep. 717; *Chapman v. Brewer*, 114 U. S. 158; *Matter of Nelson*, 9 Ben. (U. S.) 238, 16 Nat. Bankr. Reg. 312; *Conner v. Long*, 104 U. S. 228; Act March 2, 1867 (14 U. S. Stat. at L. 517), § 14.

California. — *Holladay v. Hare*, 69 Cal. 515.

Georgia. — *Loudon v. Blandford*, 56 Ga. 150; *Randell v. McLain*, 40 Ga. 162.

Kansas. — *Gillett v. McCarthy*, 23 Kan. 668.

Kentucky. — *Columbia Bank v. Overstreet*, 10 Bush (Ky.) 151.

Massachusetts. — *Blume v. Gilbert*, 124 Mass. 215.

Michigan. — *Lindner v. Brock*, 40 Mich. 618.

New Hampshire. — *Taylor v. Whitefield Lumber Co.*, 58 N. H. 369.

New York. — *Miller v. Bowles*, 58 N. Y. 253, reversing 2 Thomp. & C. (N. Y.) 568; *Brewers, etc., Ins. Co. v. Davenport*, 10 Hun (N. Y.) 264; *Duffield v. Horton*, 73 N. Y. 218; *Dickerson v. Spaulding*, 7 Hun (N. Y.) 288.

West Virginia. — *Weisenfeld v. Mispelhorn*, 5 W. Va. 46. Compare *Mason v. Warthens*, 7 W. Va. 532.

The Act of 1841 contained no provision in regard to attachment,¹ except so far as an attachment might be made the means of obtaining a preference in violation of the law.²

cc. RULE UNDER STATE INSOLVENCY LAWS. — The insolvency laws of the several states also provide for the dissolution of attachments within a certain time before the commencement of an insolvency proceeding, though with some variations as regards the period designated,³ but they do not generally affect judgment liens or the liens of executions obtained before the commencement of an insolvency proceeding.⁴

Only Attachments on Mesne Process Affected. — *Baltimore First Nat. Bank v. Jagers*, 31 Md. 38, 100 Am. Dec. 53; *Hirshiser v. Tinsley*, 9 Mo. App. 339; *Epperson v. Robertson*, 91 Tenn. 407.

Execution and Judgment Liens obtained before the commencement of a bankruptcy proceeding were not affected thereby, under the bankruptcy law of 1867. *Wilson v. City Bank*, 17 Wall. (U. S.) 473, 9 Nat. Bankr. Reg. 97; *In re Shirley*, 9 Fed. Rep. 901.

A Lien Acquired under a Distress Warrant was held to be included in mesne attachments within the law of 1867. *Morgan v. Campbell*, 22 Wall. (U. S.) 381, 11 Nat. Bankr. Reg. 529.

A Writ of Sequestration against the property of an absconding executor was held to be "mesne process," within the Act of 1867, and therefore not dissolved by a bankruptcy proceeding against the debtor. *Lightcap's Estate*, 25 Pittsb. Leg. J. (Pa.) 89.

An Attachment Execution under the *Pennsylvania* law is final and therefore is not dissolved by the bankruptcy law of 1867. *Wilbur v. Wilson*, 2 W. N. C. (Pa.) 496, 29 Fed. Cas. No. 17,637.

1. Attachments Not Dissolved by Proceedings under Act of 1841 — *United States*. — *Peck v. Jenness*, 7 How. (U. S.) 612, affirming 16 N. H. 516; *Downer v. Brackett*, 21 Vt. 599, 7 Fed. Cas. No. 4,043; *Clarke v. Rist*, 3 McLean (U. S.) 494; *Haughton v. Eastis*, 11 Fed. Cas. No. 6,224; *Matter of Reed*, 21 Vt. 635, 20 Fed. Cas. No. 11,640.

Indiana. — *Shaffer v. McMaken*, 1 Ind. 274. *Massachusetts*. — *Davenport v. Tilton*, 10 Met. (Mass.) 320; *Ames v. Wentworth*, 5 Met. (Mass.) 204.

New Hampshire. — *Buffum v. Seaver*, 16 N. H. 160; *Kittredge v. Warren*, 14 N. H. 509; *Kittredge v. Emerson*, 15 N. H. 227.

New Jersey. — *Vreeland v. Bruen*, 21 N. J. L. 214.

Pennsylvania. — *Miller v. Black*, 1 Pa. St. 420.

Compare Ex p. Foster, 2 Story (U. S.) 131, 9 Fed. Cas. No. 4,960; *Fisher v. Vose*, 3 Rob. (La.) 457, 38 Am. Dec. 243.

The Act of 1800 dissolved all attachments. *Harrison v. Sterry*, 5 Cranch (U. S.) 289.

2. Preferences Obtained by Means of Attachments. — *Howes v. Spalding*, 21 Vt. 610, note. See also *infra*, this title, *Assignee or Trustee — What Passes to Assignee or Trustee — Property Transferred by Debtor — Preferences*.

3. Attachments Dissolved by Proceedings under State Insolvency Laws — *California*. — *Baum v. Raphael*, 57 Cal. 361; *Hefner v. Herron*, 117 Cal. 473; *Elliott v. Warfield*, 122 Cal. 632.

Connecticut. — *Curtis v. Barnum*, 25 Conn. 370; *Palmer v. Woodward*, 28 Conn. 248;

Commercial Nat. Bank's Appeal, 59 Conn. 25; *Miner v. Goodyear India-Rubber Glove Mfg. Co.*, 62 Conn. 410.

Louisiana. — *Plassan v. Titus*, 20 La. Ann. 345.

Maine. — *Collins v. Chase*, 71 Me. 434; *Bel-fast Sav. Bank v. Lancey*, 93 Me. 422.

Massachusetts. — *Penniman v. Freeman*, 3 Gray (Mass.) 245; *Fern v. Cushing*, 4 Cush. (Mass.) 357; *Andrews v. Southwick*, 13 Met. (Mass.) 535; *Lewis v. Webber*, 116 Mass. 450; *O'Neil v. Harrington*, 129 Mass. 591.

Minnesota. — *Matter of Shakopee Mfg. Co.*, 37 Minn. 61.

New Hampshire. — *Bernard v. Martel*, 68 N. H. 466; *Berry v. Flanders*, (N. H. 1899) 45 Atl. Rep. 591.

Pennsylvania. — *Peck Lumber Mfg. Co. v. Mitchell*, 5 Lack. Leg. N. (Pa.) 81, 8 Pa. Dist. 203.

The fact that an insolvency proceeding was begun for the express purpose of dissolving attachments, will not prevent it from having that effect. *Wright v. Huntress*, 77 Me. 179.

In Maryland an insolvency proceeding does not affect the lien of an attachment, if the attachment was levied before the petition in insolvency was filed. *Thomas v. Brown*, 67 Md. 512.

In Wisconsin an attachment, though levied after the filing of a petition in insolvency, is not dissolved by the insolvency proceeding, if it was levied before the assignment was made. *Mowry v. White*, 21 Wis. 417; *Robinson Bros. Shoe Co. v. Knapp*, 82 Wis. 343.

An Attachment to Enforce a Mechanic's Lien is not dissolved by an insolvency proceeding. *Laughlin v. Reed*, 89 Me. 226.

4. Judgment Liens as Affected by State Insolvency Laws. — See generally the insolvency laws of the several states. As to when a judgment becomes a lien, see the title *JUDGMENTS*.

In Connecticut it is held that a judgment lien is in the nature of a statutory mortgage, rather than an attachment, and when placed on land attached in the suit in which the judgment is rendered is not to be regarded as a mere continuance of the attachment and therefore is not dissolved by an insolvency proceeding. *Beardsley v. Beecher*, 47 Conn. 408.

Execution Liens Not Generally Affected by State Insolvency Laws — *California*. — *Vermont Marble Co. v. San Francisco*, 99 Cal. 579; *Ward v. Healy*, 114 Cal. 191; *Hefner v. Herron*, 117 Cal. 473; *Elliott v. Warfield*, 122 Cal. 632.

Maine. — *Storer v. Haynes*, 67 Me. 420; *Nason v. Hobbs*, 75 Me. 396.

Maryland. — *Thomas v. Brown*, 67 Md. 512.

Massachusetts. — *Hall v. Crocker*, 3 Met. (Mass.) 245; *Cushing v. Arnold*, 9 Met. (Mass.) 23.

(3) *Circumstances Affecting Dissolution of Existing Liens* — In General. — The dissolution of liens is effected, not merely by the insolvent condition of the debtor, but by the operation of the proceeding under the bankruptcy or insolvency law.¹ Such a proceeding operates *ex proprio vigore*,² but in respect to those liens only which were obtained within the statutory period.³

New Hampshire. — Hurlbutt v. Carrier, 68 N. H. 94.

The *Minnesota* statute provides that an assignment thereunder shall vacate every levy then pending, if made within ten days before the assignment, unless the debtor shall within five days file notice of his intention to retain all pending levies; provided, however, that such assignment shall not affect any levy under an execution issued on a money judgment entered on a complaint which was on file for at least twenty days before the entry of such judgment. Wolf v. McKinley, 65 Minn. 156; *In re* Jones, 33 Minn. 405; Stat. Minn. 1894, § 4,240.

Under the *Rhode Island* statute, "any attachment, any levy and any lien" within four months is dissolved Sweet's Petition, 20 R. I. 398.

1. *Necessity of Proceeding under Statute.* — *Triebert v. Burgess*, 11 Md. 452; *Maennel v. Murdock*, 13 Md. 164; *McColgan v. Hopkins*, 17 Md. 395.

2. *Bankruptcy Proceeding Operates Ex Proprio Vigore* — *United States.* — *Conner v. Long*, 104 U. S. 228; *In re* Ellis, 1 Nat. Bankr. Reg. 555; *Pennington v. Lowenstein*, 1 Nat. Bankr. Reg. 570; *In re* Brand 3 Nat. Bankr. Reg. 324, 2 Am. L. T. Bankr. Reg. 66; *Miller v. O'Brien*, 9 Blatchf. (U. S.) 270, 9 Nat. Bankr. Reg. 26; *Sullivan v. Rabb*, 86 Ala. 433, *overruling* *Sims v. Jacobson*, 51 Ala. 186.

Georgia. — *King v. Loudon*, 53 Ga. 64.

Illinois. — *Hill v. Harding*, 93 Ill. 77.

Minnesota. — *Johnson v. Bray*, 35 Minn. 248.

Nevada. — *Barker v. McLeod*, 14 Nev. 148.

New York. — *Duffield v. Horton*, 73 N. Y. 218, *affirming* *10 Hun* (N. Y.) 140; *Miller v. Bowles*, 58 N. Y. 253; *Brewers, etc., Ins. Co. v. Davenport*, *10 Hun* (N. Y.) 264; *Kaiser v. Richardson*, 5 Daly (N. Y.) 301.

West Virginia. — *Weisenfeld v. Mispelhorn*, 5 W. Va. 46.

Intervention by the Assignee is not required in order to dissolve an attachment. *Boese v. Locke*, (Supm. Ct. Spec. T.) 53 How. Pr. (N. Y.) 148.

A Conveyance to Trustees under a provision authorizing the settlement of bankrupts' estates in certain cases by trustees, who are given all the rights and powers of assignees in bankruptcy, dissolves attachments the same as if assignees had been appointed. *Moors v. Albro*, 129 Mass. 9.

Estoppel to Assert Dissolution of Attachment. — If the assignee abandons his claim to property attached, as where he permits a creditor attaching in the hands of a fraudulent vendee goods omitted from the bankrupt's schedule, and to pursue the goods through a protracted and expensive litigation for several years, without any intervention or claim thereto, the assignee cannot then have the attachment dissolved because it was sued out within four months before the commencement of proceedings in bankruptcy, and claim the goods or

their proceeds as part of the bankrupt's estate. *Jacobson v. Sims*, 60 Ala. 185.

3. *Liens Not Obtained Within Period Designated by Statute* — *United States.* — *Doe v. Childress*, 21 Wall. (U. S.) 642.

Alabama. — *Crowe v. Reid*, 57 Ala. 281; *Martin v. Lile*, 63 Ala. 406.

Connecticut. — *Daggett v. Cook*, 37 Conn. 341.

Florida. — *Carr v. Thomas*, 18 Fla. 736.

Illinois. — *Hill v. Harding*, 93 Ill. 77.

Kansas. — *Gillett v. McCarthy*, 23 Kan. 668; *Robinson v. Wilson*, 15 Kan. 595, 22 Am. Rep. 272.

Maine. — *Bowman v. Harding*, 56 Me. 559, 4 Nat. Bankr. Reg. 20; *Leighton v. Kelsey*, 57 Me. 85.

Maryland. — *Franklin v. Clafin*, 49 Md. 24.

Massachusetts. — *Munson v. Boston, etc., R. Co.*, 120 Mass. 81, 21 Am. Rep. 409; *Sullivan v. Langley*, 128 Mass. 235; *Ray v. Wight*, 119 Mass. 426, 20 Am. Rep. 333; *Bates v. Tappan*, 99 Mass. 376, 3 Nat. Bankr. Reg. 647.

New Hampshire. — *Batchelder v. Putnam*, 54 N. H. 84, 20 Am. Rep. 115.

An Attachment by Trustee Process in *Vermont* is a lien on the funds in the hands of the trustee, and, where made more than four months before bankruptcy proceedings, is saved by the Act of 1867. *Matter of Peck*, 9 Ben. (U. S.) 160, 16 Nat. Bankr. Reg. 43, 19 Fed. Cas. No. 10,886.

In the Computation of Time the first day is to be excluded and if the last day falls on Sunday it is to be excluded also. *Richards v. Clark*, 124 Mass. 491; *Cooley v. Cook*, 125 Mass. 406.

Fractions of a Day are to be considered, and therefore, where an attachment was levied March 8th at seven o'clock P. M., and proceedings in bankruptcy were commenced July 8th at 2:50 P. M., the attachment was held to be dissolved. *Westbrook Mfg. Co. v. Grant*, 60 Me. 88, 11 Am. Rep. 181.

Time Computed from Filing of Petition. — Though it is the assignment, under the Act of 1867, that dissolves an attachment, it so operates, by relation, from the time of the filing of the petition, and therefore an attachment is dissolved if it was within four months before that time, though not within four months before the assignment. *Duffield v. Horton*, *10 Hun* (N. Y.) 140.

The recently enacted bankruptcy law of the United States contains, in the same section, two provisions respecting the dissolution of liens obtained in judicial proceedings, one referring to the time of the commencement of the suit or proceeding in which the lien was obtained, and the other referring to the time the lien actually attached. The weight of authority is that these two provisions are antagonistic, and that the one last mentioned must prevail (see *supra* this division of this section, *Liens Acquired by Legal Proceedings — Rule under Bankruptcy Law of United States*), though they seem at first to have been re-

Furthermore, it is the adjudication and the transfer of the bankrupt's property to the assignee that is effective. The mere filing of a petition, without any further proceedings, will not have that effect.¹ Neither does a composition under the bankruptcy law dissolve a lien, if no adjudication or assignment has been made, and the creditor has taken no part in the bankruptcy proceeding.² The fact that the assignment in bankruptcy was not recorded as required by the law does not affect its operation as to liens obtained within the statutory period.³

Knowledge on the Part of the Creditor of the conditions specified in the bankruptcy law of the United States is not material.⁴

If the Property Attached Is Not Subject to the Bankruptcy Law it has been held that the attachment is not dissolved by the bankruptcy proceeding,⁵ though the decisions of the federal courts have been to the contrary.⁶

Effect of Judgment in Attachment Suit.—An attachment within the statutory period is not saved from dissolution by the fact that the plaintiff in the attachment suit obtained a judgment after the bankruptcy or insolvency proceeding was commenced,⁷ or even if he obtained a judgment before the commencement of such proceeding, though judgments are not affected thereby, provided he acquired no lien by the judgment or by issuing an execution thereon.⁸

A Sale under an Attachment before the commencement of the bankruptcy proceeding does not secure to the creditor any rights that he would not otherwise have had. He cannot retain the proceeds of the sale as against the assignee in bankruptcy.⁹ *A fortiori*, a sale after the com-

garded as distinguishable. *In re De Lue*, 91 Fed. Rep. 510; *In re Lewis*, 91 Fed. Rep. 632.

1. Mere Filing of Petition Not Sufficient to Dissolve Liens.—*Golsan v. Powell*, 32 La. Ann. 521; *Haley v. Thurston*, 60 N. H. 204.

The Effect of a Failure to Obtain a Discharge does not seem to have been determined. *Exp. Foster*, 2 Story (U. S.) 131, 9 Fed. Cas. No. 4,960.

Presumption as to Assignment.—In *Janes v. Beach*, 1 Mich. N. P. 94, it was held that where a garnishment was made within four months before the garnishee filed a petition in bankruptcy it would be presumed that a subsequent assignment was made.

2. Liens Not Dissolved by Composition Proceeding.—*Sage v. Heller*, 124 Mass. 213; *Sullivan v. Langley*, 124 Mass. 264.

If Assignees Are Appointed attachments within the statutory period are dissolved, though a composition was assented to before the appointment of the assignees, and was subsequently carried into effect. *Cromwell v. Gallup*, 17 Hun (N. Y.) 49.

3. Failure to Record Assignment.—*Phillips v. Helmbold*, 26 N. J. Eq. 202.

4. Knowledge of Creditor as to Debtor's Insolvency, etc.—*In re Burrus*, 97 Fed. Rep. 926. Compare the various state insolvency laws.

5. Attachment of Exempt Property Held Not Dissolved by Bankruptcy Proceeding.—*Robinson v. Wilson*, 15 Kan. 595, 22 Am. Rep. 272; *Thole v. Watson*, 6 Mo. App. 592.

6. Attachment of Exempt Property Held to Be Dissolved by Bankruptcy Proceeding.—*In re Ellis*, 1 Nat. Bankr. Reg. 555; *In re Hambright*, 2 Nat. Bankr. Reg. 498; *In re Stevens*, 5 Nat. Bankr. Reg. 298. See also *Wooster v. Bullock*, 52 Vt. 48.

7. Judgment in Attachment Suit After Commencement of Bankruptcy Proceeding.—*Woolbridge v. Rickert*, 33 La. Ann. 234; *Butler v. Mullen*, 100 Mass. 453.

8. Judgment in Attachment Suit Before Commencement of Bankruptcy Proceeding—*California*.—*Howe v. Union Ins. Co.*, 42 Cal. 528. *Michigan*.—*Janes v. Beach*, 1 Mich. N. P. 94.

Nebraska.—*Tootle v. Sheldon*, 10 Neb. 44. *New Hampshire*.—*Peck v. Jenness*, 16 N. H. 516, 43 Am. Dec. 573.

New York.—*Boese v. Locke*, (Supm. Ct. Spec. T.) 53 How. Pr. (N. Y.) 148; *Brewers, etc., Ins. Co. v. Davenport*, 10 Hun (N. Y.) 264.

But see *Henkelman v. Smith*, 42 Md. 164.

The recovery of a judgment in an attachment proceeding, even though execution is issued thereon before the commencement of the bankruptcy proceeding, can make no difference under the bankruptcy law of 1898, because under that statute an adjudication in bankruptcy dissolves the lien of a judgment or execution as well as the lien of attachment, if obtained within four months before the commencement of the bankruptcy proceeding. Act July 1, 1898 (30 U. S. Stat. at L. 544), § 67, par. f.

A Garnishee Lien, it has been held, is not dissolved by a bankruptcy proceeding against the principal debtor, where judgment has been rendered both against the principal debtor and the garnishee. *Krupp v. Tabor*, 31 Mich. 174.

9. Sale of Attached Property—Assignee in Bankruptcy Entitled to Proceeds.—*McCord v. McNeil*, 4 Dill. (U. S.) 173, 15 Fed. Cas. No. 8,714; *West Philadelphia Bank v. Dickson*, 95 U. S. 180; *In re Ellis*, 1 Nat. Bankr. Reg. 555. 8 Fed. Cas. No. 4,400; *Wheelock v. Hastings*, 4 Met. (Mass.) 504; *Andrews v. Southwick*, 13 Met. (Mass.) 535; *Edwards v. Sumner*, 4 Cush. (Mass.) 393.

The Purchaser May Take a Good Title under the sale, as where the attachment was regularly commenced, a levy made, no stay of proceedings or other measures had to arrest

commencement of a bankruptcy proceeding will give the creditor no right to retain the proceeds.¹

Foreign Attachments. — A proceeding under the bankruptcy law of the United States will dissolve the lien of an attachment obtained within the time limited, though in a state other than that in which the bankruptcy court is sitting,² but a proceeding under a state law cannot affect attachments in other states.³

Continuation of Lien by Order of Court. — The statutes providing that certain liens obtained before bankruptcy or insolvency proceedings are commenced against the debtor shall be dissolved by such proceedings, generally provide also that the liens may be continued by order of court, when that course will be beneficial to the estate.⁴

The Obligation of Contracts Is Not Impaired by the statutory provisions under consideration. Their only effect is to vary the remedy.⁵

The Nature of the Claim Is Not Material. — An attachment in an action for malicious prosecution is dissolved, as well as an attachment in an action on a contract.⁶

(4) **Priority Between Creditors.** — If the statute does not provide for the dissolution of liens acquired by judgments and executions, the recovery of a judgment and levy of execution thereunder relates back to the attachment and gives the execution creditor priority over a creditor who acquired a lien intermediate such attachment and levy of execution.⁷ In case creditors obtain successive liens on the property of the debtor, the first of which is subject to dissolution by bankruptcy proceedings, while the other is not affected thereby, it has been held that, if the first lien was for the full value of the property, its dissolution by an adjudication of bankruptcy would not operate in favor of the second lien, because that lien would not have been an effective security if the debtor had not been adjudged a bankrupt, and the provision of the statute preserving existing securities was not designed to improve the condition of any creditor, or to create new rights.⁸

The Acts of the Assignee in Bankruptcy cannot affect the priorities between lien creditors. Thus, it has been held that the affirmation by the assignee of a sale made by the bankrupt will not deprive an attaching creditor of his rights.⁹

XII. ASSIGNEE OR TRUSTEE — 1. **Appointment and Tenure** — *a.* **HOW SELECTION IS MADE** — (1) **Election by Creditors** — (a) **Statutory Provisions.** — The statutes generally provide that a person or persons to administer the estate of

the suit in the state court, and there was no fraud, and the property was duly sold under the judgment of the state court. *Doe v. Childress*, 21 Wall. (U. S.) 642.

If property purchased by a creditor from his debtor is attached as the property of the debtor who is afterwards adjudged a bankrupt, whereupon the property is seized by the marshal under order of the court of bankruptcy and sold without any adjudication as to the ownership, such creditor may recover its full value. *Bromley v. Goodrich*, 40 Wis. 131, 22 Am. Rep. 685, *distinguishing* *Cotton v. Reed*, 2 Wis. 458.

1. **Sale After Commencement of Bankruptcy Proceeding.** — *Ex p. Foster*, 2 Story (U. S.) 131, 9 Fed. Cas. No. 4,960; *Bracken v. Johnston*, 4 Dill. (U. S.) 518, 15 Nat. Bankr. Reg. 106, 3 Fed. Cas. No. 1,761.

2. **Foreign Attachments.** — *Mixer v. Excelsior Oil, etc., Co.*, 65 N. Car. 552.

3. **Proceedings under State Laws.** — *King v. Cross*, 20 U. S. Sup. Ct. Rep. 131, *affirming* *Cross v. Brown*, 19 R. I. 220.

4. **Continuation of Lien by Order of Court.** — *In re Hammond*, 98 Fed. Rep. 845; Act July

1, 1898 (30 U. S. Stat. at L. 544), § 67, par. c; *Nelson v. Winchester*, 133 Mass. 435; *Squire v. Lincoln*, 137 Mass. 399; *Powers v. Raymond*, 137 Mass. 483; *Shelton v. Codman*, 3 Cush. (Mass.) 318; *Denny v. Lincoln*, 13 Met. (Mass.) 200; Pub. Stat. Mass., c. 157, § 47. And see the statutes in other jurisdictions.

5. **Obligation of Contract Not Impaired.** — *Baldwin v. Buswell*, 52 Vt. 57. See also the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 15, p. 351.

6. **Nature of Claim Not Material.** — *Stetson v. Hayden*, 8 Met. (Mass.) 29; *Sprague v. Wheatland*, 3 Met. (Mass.) 416; *Grant v. Lyman*, 4 Met. (Mass.) 470.

7. **Priority Between Creditors — When Execution Relates Back.** — *Hudson v. Adams*, 18 Nat. Bankr. Reg. 102, 12 Fed. Cas. No. 6,832.

8. **Dissolution of Prior Lien — Effect as to Junior Lien.** — *Matter of Klancke*, 4 Ben. (U. S.) 326, 4 Nat. Bankr. Reg. 648, 14 Fed. Cas. No. 7,864; *In re Steele*, 27 Biss. (U. S.) 504, 16 Nat. Bankr. Reg. 105, 22 Fed. Cas. No. 13,345.

9. **Priorities of Creditors Not Affected by Act of Assignee.** — *State v. Merritt*, 70 Mo. 275.

the debtor, and variously designated by the statutes as assignees, trustees, or syndics, shall be chosen by the creditors at a creditors' meeting,¹ though other methods are prescribed in some jurisdictions.²

(b) **Meeting of Creditors** — *aa. HOW CONVENED.* — In *England*, the first meeting of creditors, at which the election of a trustee or trustees is ordinarily held, is summoned by the official receiver by publication of a notice of not less than seven days.³ Under the bankruptcy law of the *United States* the meeting is called by an order of the court.⁴ The corresponding provisions of the state statutes vary more or less in the different states, and in each case reference must be had to the local statute.

bb. TIME OF MEETING. — The time of the meeting is generally left, within certain limits, to the discretion of the court or officer whose duty it is to convene the creditors.⁵

cc. PLACE OF MEETING. — The *English* statute provides that the meeting shall be held at such place as, in the opinion of the official receiver, is most convenient to the majority of the creditors.⁶ In the *United States* the meeting is to be held at the county seat of the county in which the bankrupt had his principal place of business, resided, or had his domicile, unless that place would be manifestly inconvenient, or the bankrupt does not do business, reside, or have his domicile in the United States, in which case the court shall fix a place for the meeting which is most convenient for the parties in interest.⁷

dd. CONDUCT OF MEETING. — The meeting should be organized at the time designated in the notice, and should be kept open until an assignee is elected

1. Election of Assignee or Trustee by Creditors — *England.* — 46 & 47 Vict., c. 52, § 21, par. 1.

Canada. — *Luxton v. Hamilton*, 10 U. C. L. J. 334; *Brown v. Pearman*, Russ. Eq. Dec. (Nova Scotia) 491.

United States. — Act July 1, 1898 (30 U. S. Stat. at L. 544), § 44; *In re Lewensohn*, 98 Fed. Rep. 575.

California. — *Menke v. Lyndon*, 124 Cal. 160; *Ohleyer v. Bunce*, 65 Cal. 544.

Idaho. — *Gaffney v. Piper*, (Idaho 1896) 44 Pac. Rep. 552.

Louisiana. — *Kocke v. Their Creditors*, 51 La. Ann. 937; *Spears v. His Creditors*, 40 La. Ann. 650.

Maine. — *Coombs v. Persons Unknown*, 82 Me. 326; *Twitchell v. Blaney*, 75 Me. 577.

See also the codes and statutes of the several states.

Under the *Washington Statute* an election of an assignee in place of the person named by the insolvent may be ordered on the application of two or more creditors. *Lammon v. Giles*, 3 Wash. Ter. 117; Ball. Annot. Codes and Statutes (Wash.), § 5,843.

Designation of Office — Assignee. — Where the statute requires an assignment of the debtor's property to be made to the person chosen to represent the estate, such person is usually called an "assignee." This was the case under the bankruptcy law of the United States of 1867, and so it is still under some of the state laws. See Act March 2, 1867 (14 U. S. Stat. at L. 517), § 13, and the statutes of the several states.

Trustees. — When no assignment is required, but the title to the estate passes by force of the decree in bankruptcy, as is generally the case under the more recent statutes, the designation used is "trustee." 46 & 47 Vict., c. 52, § 21, par. 1; Act. Cong. July 1, 1898 (30 U. S. Stat. at L. 544), § 44.

Syndic. — In *Louisiana* the term "syndic" is used. Rev. Laws La. 1897, §§ 1793, 1796; *Field v. U. S.*, 9 Pet. (U. S.) 182; *Tennessee Bank v. Horn*, 17 How. (U. S.) 157.

2. Other Methods of Appointing Assignee or Trustee. — See *infra*, this section, *Appointment by Court*, and *Appointment by Debtor*.

3. Convening Creditors under English Statute. — 46 & 47 Vict., c. 52, 1st schedule, par. 2.

4. Convening Creditors under Bankruptcy Law of United States. — Act July 1, 1898 (30 U. S. Stat. at L. 544), § 55, par. a; Act March 2, 1867 (14 U. S. Stat. at L. 517), § 11.

5. Time of Meeting — England. — (Not later than fourteen days after the date of the receiving order, unless the court, for special reasons, directs otherwise). 46 & 47 Vict., c. 52, 1st schedule, par. 1.

United States. — (Not less than ten nor more than thirty days after the adjudication.) Act July 1, 1898 (30 U. S. Stat. at L. 544), § 55, par. a.

Under the bankruptcy law of 1867, providing that the meeting should be held not less than ten nor more than ninety days after the issuing of a warrant in bankruptcy, it was held that the time within such limits was in the discretion of the register, and that sixty days from the date of the warrant was a reasonable time where all the creditors resided in Germany. *Matter of Heys*, 1 Ben. (U. S.) 333, 1 Nat. Bankr. Reg. 21, 12 Fed. Cas. No. 6,447.

Meeting Held on Holiday. — Where a meeting was on Thanksgiving day, it was held that the proceedings had would not be set aside if it appeared that nobody was injured. *McGlynn*, 2 Lowell (U. S.) 127, 16 Fed. Cas. No. 8,804.

6. Place of Meeting in England. — 46 & 47, c. 52, 1st schedule, par. 4.

7. Place of Meeting in United States. — Act July 1, 1898 (30 U. S. Stat. at L. 544), § 55, par. a.

or it becomes apparent that no election can be had.¹ No creditor has a right to participate in the meeting until he has proved his claim.² In the election of the assignee the choice by the creditors should not be interfered with or influenced by the officer holding the meeting.³

Mode of Voting. — If no particular mode of voting is prescribed, it may be either by ballot or *viva voce*.⁴

A Creditor May Change His Vote as often as he chooses until the election is completed,⁵ but not after the meeting has adjourned.⁶

A Meeting May Be Adjourned for sufficient reasons,⁷ but if there is no regular adjournment, and the officer whose duty it is to preside fails to attend, the meeting wholly fails and another meeting must be regularly called.⁸

(c) **Right to Vote** — *aa. IN GENERAL.* — The right to vote for the assignee or trustee is generally limited to creditors who have proved their claims,⁹ and are not secured in respect thereto,¹⁰ or entitled to priority over other creditors.¹¹ All creditors who come within this description are entitled to vote,¹² and this right may not be inquired into except for the purpose of postponing the allowance of claims.¹³

1. Meeting Should Be Organized Pursuant to Notice. — *In re Phelps*, 1 Nat. Bankr. Reg. 525, 19 Fed. Cas. No. 11,071.

The Act of 1867 required the meeting to be kept open for one hour, and creditors appearing within the hour were entitled to vote, though the polls had been declared closed. *Re Gilley*, 2 Lowell (U. S.) 250, 10 Fed. Cas. No. 5,438.

2. Proof of Claims Essential to Right to Participate in Meeting. — *Matter of Hill*, 1 Ben. (U. S.) 321, 1 Nat. Bankr. Reg. 16, 12 Fed. Cas. No. 6,481. See also *supra*, this title, *Debts and Claims Against Estate* — *Proof and Allowance*.

3. Choice by Creditors Not to Be Interfered With. — *Matter of Smith*, 2 Ben. (U. S.) 113, 1 Nat. Bankr. Reg. 243, 22 Fed. Cas. No. 12,971.

4. Mode of Voting. — *In re Lake Superior Ship Canal R., etc., Co.*, 7 Nat. Bankr. Reg. 376, 14 Fed. Cas. No. 7,997.

An Expression of Opinion by the creditors as to their preference of a person for assignee has been held to be a vote. *In re Pearson*, 2 Nat. Bankr. Reg. 477, 19 Fed. Cas. No. 10,878.

5. Changing Vote. — *In re Pfromm*, 8 Nat. Bankr. Reg. 357, 19 Fed. Cas. No. 11,061.

6. After the Meeting Has Adjourned a creditor cannot change his vote. If there has been a mistake he must present his objection to the judge. *In re Scheiffer*, 2 Nat. Bankr. Reg. 591, 21 Fed. Cas. No. 12,445.

7. An Adjournment may be granted to permit a proper publication and service of notice of the meeting of creditors, if that was not done in the first instance. *Matter of Devlin*, 1 Ben. (U. S.) 335, 1 Nat. Bankr. Reg. 35, 7 Fed. Cas. No. 3,841.

8. Failure of Meeting Without Regular Adjournment. — *In re Dickinson*, 18 Nat. Bankr. Reg. 514, 7 Fed. Cas. No. 3,895.

9. Right to Vote Limited to Creditors Who Have Proved — *England*, — 46 & 47 Vict., c. 52, 1st schedule, par. 8.

United States. — Act July 1, 1898 (30 U. S. Stat. at L. 544), § 56, par. a, giving the right to vote to creditors whose claims have been proved and allowed, in which respect this act differs from the act of 1867 (section 13) which merely required, for the purpose of voting, that claims should be proved.

The Certification of Claims by creditors merely gives them the right to vote, and cannot operate as an estoppel or *res judicata* in respect to subsequent judicial proceedings. *Spears v. His Creditors*, 40 La. Ann. 650.

As to the Degree of Proof required to entitle a creditor to vote, see *In re Northern Iron Co.*, 14 Nat. Bankr. Reg. 356, 18 Fed. Cas. No. 10,322.

10. See the next following subdivision of this section, *Secured Creditors*.

11. See the next following subdivision but one of this section, *Preferred Creditors*.

12. Right to Vote in General. — *Ex p. Parr*, 18 Ves. Jr. 70, 1 Rose 76, 11 Rev. Rep. 149; *Ex p. Jepson*, 19 Ves. Jr. 224; *Ex p. Hamer*, 1 Rose 321; *Ex p. Jones*, 15 L. T. N. S. 74; *Ex p. Moss*, L. R. 3 Ch. 29, 17 L. T. N. S. 279, 16 W. R. 65; *Mercadal v. His Creditors*, 16 La. Ann. 82; *Blake v. Hall*, 19 La. Ann. 49.

Officers of Bankrupt Corporation. — If the managing officers of a bankrupt corporation are *bona fide* creditors of the corporation, they may vote for the assignee. *In re Northern Iron Co.*, 14 Nat. Bankr. Reg. 356, 18 Fed. Cas. No. 10,322.

Assignee of Claim. — Where a claim is assigned after it has been proved, the assignee may vote. *Matter of Frank*, 5 Ben. (U. S.) 164, 5 Nat. Bankr. Reg. 194, 9 Fed. Cas. No. 5,050. Compare *In re Hart*, 1 Fonbl. 57.

An Insolvent Tutor who is indebted to his wards cannot vote at the election of a syndic. In such case the wards must be represented by the under tutor. *Major v. Her Creditors*, 46 La. Ann. 367.

Appeal from Allowance of Claim. — It has been held that a person is not a creditor and therefore cannot vote, where an appeal from the allowance of his claim is pending. *Betton v. Allen*, 9 Cush. (Mass.) 382.

13. Postponing Allowance of Claims. — By Act July 1, 1898 (30 U. S. Stat. at L. 544), § 56, par. a, the right to vote is given to creditors whose claims have been allowed, and section 57, par. d, provides that claims which have been duly proved shall be allowed unless objection to their allowance shall be made by parties in interest, or their consideration be continued for cause by the court on its own

Partnerships. — Where one member of a partnership goes into bankruptcy or insolvency, it is held that partnership creditors, as well as the individual creditors of the bankrupt, may vote for the assignee or trustee,¹ but only the partnership creditors can vote in case of the bankruptcy of the firm.²

Corporations may vote by their officers or by any other person on whom they may confer the authority.³

The Executor or Administrator of a deceased creditor represents the decedent in the matter of voting.⁴

bb. SECURED CREDITORS. — The *English* bankruptcy law gives a secured creditor the right to vote only in respect to the balance that may be due him after deducting the value of his security,⁵ and to the same effect is the existing act of Congress,⁶ and also the insolvency laws of some of the states.⁷

cc. PREFERRED CREDITORS. — Creditors entitled to priority are, in respect to their right to vote, governed by the same rule as secured creditors.⁸

dd. POWER OF ATTORNEY. — A creditor may, by a power of attorney, authorize another to represent him in voting for the assignee or trustee.⁹

motion. See also *infra*, this section, *Postponing Proof or Allowance of Claims*.

1. Separate Bankruptcy of Partner — Right of Firm Creditors to Vote — England. — 46 & 47 Vict., c. 52, 1st schedule, par. 13.

United States. — *Wilkins v. Davis*, 2 Lowell (U. S.) 511, 15 Nat. Bankr. Reg. 60, 29 Fed. Cas. No. 17,664; *In re Webb*, 4 Sawy. (U. S.) 326, 16 Nat. Bankr. Reg. 258, 29 Fed. Cas. No. 17,317; *In re Falkner*, 16 Nat. Bankr. Reg. 503, 8 Fed. Cas. No. 4,624. But see *contra*, *In re Purvis*, 1 Nat. Bankr. Reg. 163, 20 Fed. Cas. No. 11,476.

Massachusetts. — *Clarke v. Stanwood*, 166 Mass. 379.

2. Bankruptcy of Firm. — *In re Phelps*, 1 Nat. Bankr. Reg. 525, 19 Fed. Cas. No. 11,071; *In re Scheiffer*, 2 Nat. Bankr. Reg. 591, 21 Fed. Cas. No. 12,445.

If a partner, having a claim against the firm, assigns it to a third person, as collateral security, it is held that neither can vote on it. *In re Eagles*, 99 Fed. Rep. 695.

3. Voting by Corporations. — *Ex p. Bank of England*, 1 Swanst. 10; *Ex p. Ackroyd*, 1 Mont. D. & De G. 555.

4. Executors and Administrators. — *Ex p. Cadwallader*, 4 De G. F. & J. 499, 31 L. J. Bankr. 66, 6 L. T. N. S. 485.

5. Secured Creditor under English Statute. — 46 & 47 Vict., c. 52, 1st schedule, par. 10. See also *Ex p. Bagshaw*, 13 Ch. D. 304; *Ex p. Schofield*, 12 Ch. D. 337; *Rainbow v. Juggins*, 5 Q. B. D. 138, 422; *Ex p. Ashworth*, L. R. 13 Eq. 705.

6. Secured Creditors under U. S. Bankruptcy Law. — *In re Eagles*, 99 Fed. Rep. 695; Act July 1, 1898 (30 U. S. Stat. at L. 544), § 57, par. *e*. See also section 56, par. *b*.

The Act of 1867 did not allow secured creditors to vote for the assignee, unless they waived their security. *In re High*, 3 Nat. Bankr. Reg. 191, 12 Fed. Cas. No. 6,473; *Matter of Hanna*, 5 Ben. (U. S.) 5, 7 Nat. Bankr. Reg. 502, 11 Fed. Cas. No. 6,027; *In re Davis*, 1 Nat. Bankr. Reg. 120, 7 Fed. Cas. No. 3,614; *In re Hunt*, 17 Nat. Bankr. Reg. 205, 12 Fed. Cas. No. 6,884.

The exclusion of secured creditors did not apply when only a specific part of the debt was secured. In such case the creditor could vote on so much of his debt as was unsecured.

In re Parkes, 10 Nat. Bankr. Reg. 82, 18 Fed. Cas. No. 10,754.

And if the security was on exempt property, as in the case of a mortgage of a homestead, the creditor could vote on his whole claim. *In re Tertelling*, 2 Dill. (U. S.) 339, 23 Fed. Cas. No. 13,842; *In re Stillwell*, 2 Nat. Bankr. Reg. 526, 23 Fed. Cas. No. 13,447.

7. Secured Creditors under State Insolvency Laws. — *Widder v. Superior Ct.*, 94 Cal. 430. And see the several state statutes.

8. Preferred Creditors. — Act July 1, 1898 (30 U. S. Stat. at L. 544), § 57, par. *c*; *Re Saunders*, 2 Lowell (U. S.) 444, 13 Nat. Bankr. Reg. 164, 21 Fed. Cas. No. 12,371.

9. Power of Attorney to Vote — England. — 46 & 47 Vict., c. 52, 1st schedule, par. 15; *In re Parrott*, (1891) 2 Q. B. 151; *Ex p. Mitchell*, 14 Ves. Jr. 597, 9 Rev. Rep. 357; *Ex p. Banister*, 15 L. T. N. S. 53; *Ex p. Bank of England*, 1 Wills. Ch. 295, 1 Swanst. 10, 1 Rose 142.

United States. — *Matter of Knoepfel*, 1 Ben. (U. S.) 398, 1 Nat. Bankr. Reg. 70, 14 Fed. Cas. No. 7,892; *Matter of Frank*, 5 Ben. (U. S.) 164, 5 Nat. Bankr. Reg. 194, 9 Fed. Cas. No. 5,050; *Matter of Higgins*, 8 Ben. (U. S.) 100, 12 Fed. Cas. No. 6,467; *In re Barrett*, 2 Hughes (U. S.) 444, 2 Nat. Bankr. Reg. 533, 2 Fed. Cas. No. 1,043; *In re Eagles*, 99 Fed. Rep. 695.

Power of Attorney to Represent Partnership. — One member of a creditor firm may execute a power of attorney to cast the vote of the firm. *In re Barrett*, 2 Hughes (U. S.) 444, 2 Nat. Bankr. Reg. 533, 2 Fed. Cas. No. 1,043.

A Power of Attorney Given to a Partnership, but not to either partner individually, does not authorize one partner alone to vote. *Matter of Frank*, 5 Ben. (U. S.) 164, 5 Nat. Bankr. Reg. 194, 9 Fed. Cas. No. 5,050.

Necessity of Power of Attorney. — An agent of a creditor, though he is an attorney at law, cannot vote for the assignee in bankruptcy without a power of attorney from the creditor. *In re Purvis*, 1 Nat. Bankr. Reg. 163, 20 Fed. Cas. No. 11,476.

Sufficiency of Power of Attorney. — In *Menke v. Lyndon*, 124 Cal. 160, a power of attorney given by a creditor of an insolvent authorized the person named as attorney to "protect in every respect" the interest of the creditor in all parts of the United States, and to act in the creditor's name for that purpose, and to

cc. POSTPONING PROOF OR ALLOWANCE OF CLAIMS. — The bankruptcy law of 1867 authorized the court or the register, as the case might be, to postpone the proof of a claim until an assignee should be chosen, where there was doubt as to the validity of the claim or the right of the creditor to prove it, thus depriving the creditor, in such case, of his right to vote for the assignee.¹ Under the Act of 1898, the allowance of a claim may be postponed either on objections made by parties in interest, or by the court on its own motion, and under this provision, also, a creditor may be deprived of his right to vote, since only those whose claims have been allowed give such right.²

(d) **Votes Necessary to Elect.** — The statutes vary as to whether a majority in number of the creditors, or a majority in amount, or both, is necessary to elect an assignee or trustee. The *English* statute provides that the creditors entitled to vote may by ordinary resolution appoint a trustee.³ The bankruptcy law of the *United States* and some of the state insolvency laws require a majority vote in number and amount of all creditors present whose claims have been allowed,⁴ while others merely require a majority in amount.⁵ But whatever majority may be required, it must relate to claims proved before the election takes place, and the result cannot be affected by a claim subse-

collect debts and do everything necessary with reference to claims in dispute, was held sufficient. See also *Matter of Knoepfel*, 1 Ben. (U. S.) 398, 1 Nat. Bankr. Reg. 70, 14 Fed. Cas. No. 7,892; *Pinsky v. Resweber*, 49 La. Ann. 246.

An Attorney at Law is not, by virtue of a general retainer to represent a creditor in a bankruptcy proceeding, authorized to vote for the trustee. *In re Blankfein*, 97 Fed. Rep. 191.

1. Postponement of Proof under Act of 1867. — *Matter of Orne*, 1 Ben. (U. S.) 361, 1 Nat. Bankr. Reg. 57, 18 Fed. Cas. No. 10,581; *Matter of Stevens*, 4 Ben. (U. S.) 513, 4 Nat. Bankr. Reg. 367, 23 Fed. Cas. No. 13,391; *In re Walton*, Deady (U. S.) 442, 29 Fed. Cas. No. 17,128; *In re Bartusch*, 9 Nat. Bankr. Reg. 478, 2 Fed. Cas. No. 1,086; *In re Herrman*, 3 Nat. Bankr. Reg. 618, 12 Fed. Cas. No. 6,426; *In re Jones*, 2 Nat. Bankr. Reg. 59, 13 Fed. Cas. No. 7,447; *In re Milwain*, 12 Nat. Bankr. Reg. 358, 17 Fed. Cas. No. 9,623; *In re Parham*, 17 Nat. Bankr. Reg. 300, 18 Fed. Cas. No. 10,712.

Postponement Discretionary. — *In re Jacoby*, 1 W. N. C. (Pa.) 15, 13 Fed. Cas. No. 7,166.

Reasonable and Substantial Doubt in regard to the claim must exist in order to justify a postponement. *In re Jackson*, 7 Biss. (U. S.) 280, 14 Nat. Bankr. Reg. 449, 13 Fed. Cas. No. 7,123.

Admissibility of Evidence. — Evidence bearing on the validity of a claim, or the right of the creditor under it, may be received for the purpose of enabling the court or officer to determine whether there is such a reasonable and substantial doubt in regard thereto as will authorize a postponement. *Matter of Orne*, 1 Ben. (U. S.) 361, 1 Nat. Bankr. Reg. 57, 18 Fed. Cas. No. 10,581; *Matter of Frank*, 5 Ben. (U. S.) 164, 5 Nat. Bankr. Reg. 194, 9 Fed. Cas. No. 5,050.

Extent of Inquiry. — No inquiry can be had into the validity of a claim or the right of the creditor to vote, except for the purpose of postponing proof of the claim until an assignee is elected. *Matter of Noble*, 3 Ben. (U. S.) 333, 3 Nat. Bankr. Reg. 96, 18 Fed. Cas. No. 10,282.

Effect of a Postponement. — A postponement deprives the creditor of no right, except the right to vote for the assignee. *In re Lake Superior Ship Canal R., etc., Co.*, 7 Nat. Bankr. Reg. 376, 14 Fed. Cas. No. 7,997.

2. Postponement of Allowance under Act of 1898. — Act July 1, 1898 (30 U. S. Stat. at L. 544), § 57, par. d.

3. 46 & 47 Vict., c. 52, § 21, par. 1.

4. Majority in Number and Amount of Claims — United States. — Act July 1, 1898 (30 U. S. Stat. at L. 544), § 56, par. a. The Act of 1867 required a majority "in value and in number of the creditors who have proved their debts." Act March 2, 1867 (14 U. S. Stat. at L. 517), § 13.

Louisiana. — *Winkler v. Their Creditors*, 34 La. Ann. 1221; *Lesseps v. His Creditors*, 7 La. Ann. 624.

And see the various local statutes.

The Vote of a Single Creditor is sufficient to elect, where his claim is the only one proved. *Anonymous*, 1 Nat. Bankr. Reg. 216, 1 Fed. Cas. No. 458; *In re Haynes*, 2 Nat. Bankr. Reg. 227, 11 Fed. Cas. No. 6,269. *Compare Matter of A. B.*, 3 Ben. (U. S.) 66, 1 Fed. Cas. No. 2.

And if in such case the trustee-elect dies before he qualifies, the creditor who named him may name another without a new notice to creditors, if the meeting has been merely continued and not adjourned without day. *In re Wright*, 2 Am. Bankr. Rep. 497.

Majority Must Be of All Claims Proved or Allowed. — *In re Purvis*, 1 Nat. Bankr. Reg. 163, 20 Fed. Cas. No. 11,476; *In re Scheiffer*, 2 Nat. Bankr. Reg. 591, 21 Fed. Cas. No. 12,445. These cases, holding that a majority of all the votes cast is not sufficient, unless it is also a majority of all that have been proved, were decided under the Act of 1867, but they are authority for the proposition that, under the Act of 1898, there must be a majority of all the claims allowed.

5. Majority in Amount of Claims. — *Menke v. Lyndon*, 124 Cal. 160; *O'Neill v. Reynolds*, 116 Cal. 264; *Gaffney v. Piper*, (Idaho 1896) 44 Pac. Rep. 552.

quently added to the schedules.¹

In Computing the Amount of a Claim for the purpose of the election of an assignee or trustee, interest to the day of the adjudication will be added if the claim bears interest, while a corresponding amount will be deducted if it did not bear interest and was not payable at the time of the adjudication.² The whole amount of a joint claim cannot be voted by one of the joint creditors without authority from the other or others, unless such creditors are partners.³ The amount of an indebtedness to the bankrupt of one of his creditors may be set off against the claim of such creditor,⁴ but the amount of a creditor's claim, as affecting his right to vote, cannot be reduced by an unliquidated claim of the bankrupt against him for damages.⁵

In Computing the Number of Creditors it would seem from the language of the statutes that joint creditors are ordinarily to be counted separately, but where they compose a partnership and one partner casts the vote of the firm, as he may do by virtue of his general authority as such partner, without special authorization from his copartners, it is to be counted as one vote only.⁶

(e) **Confirmation of Election** — *aa. NECESSITY.* — The statutes generally require the approval or confirmation by the court of the election of an assignee or trustee by the creditors. Some of the state insolvency laws contain this requirement,⁷ and so did the late bankruptcy law of the *United States*.⁸ The present bankruptcy law (1898) does not expressly require the approval by the bankruptcy court of the creditors' choice of a trustee;⁹ but it provides that the court may appoint trustees pursuant to the recommendation of the creditors, or when the creditors neglect to recommend or appoint,¹⁰ also that the Supreme Court of the United States may prescribe rules, forms, and orders for carrying the action into force and effect;¹¹ and one of the rules made by virtue of the authority so conferred provides that the appointment of a trustee by the creditors shall be subject to be approved or disapproved by the referee or by the judge.¹² The *English* statute provides that the board of trade may certify to the high court for its decision objections to the trustee appointed by the creditors.¹³

If Confirmation Is Refused, a new election may be ordered.¹⁴

bb. GROUNDS FOR REFUSING. — It is not the purpose of the statutes requiring confirmation that the court should arbitrarily disregard the wishes of the creditors manifested by an election according to law. Sound reasons should exist for refusing confirmation.¹⁵

1. Claims Added to Schedule After Election. — *Matter of Carson*, 5 Ben. (U. S.) 277, 5 Nat. Bankr. Reg. 290, 5 Fed. Cas. No. 2,460.

2. Interest. — *Matter of Orne*, 1 Ben. (U. S.) 361, 1 Nat. Bankr. Reg. 57, 18 Fed. Cas. No. 10,581.

3. Joint Creditors. — *In re Purvis*, 1 Nat. Bankr. Reg. 103, 20 Fed. Cas. No. 11,476.

4. See supra, this title, *Debts and Claims Against Estate—Proof and Allowance—Amount Allowable—Set-off.*

5. Unliquidated Claims. — *Matter of Orne*, 1 Ben. (U. S.) 361, 1 Nat. Bankr. Reg. 57, 18 Fed. Cas. No. 10,581.

6. Counting Number of Votes—Joint Creditors. — *In re Purvis*, 1 Nat. Bankr. Reg. 103, 20 Fed. Cas. No. 11,476.

7. Confirmation Required by State Insolvency Laws. — *Twitchell v. Blaney*, 75 Me. 577. And see the statutes of the several states.

8. Confirmation Required by Bankruptcy Law of 1867. — Act March 2, 1867 (14 U. S. Stat. at L. 517), § 13; *In re Scheiffer*, 2 Nat. Bankr. Reg. 591, 21 Fed. Cas. No. 12,445, holding that an assignee has no power to act until the judge's approval is certified.

9. Provisions of Bankruptcy Law of 1898. — The only express provision as to the appointment of trustee is that creditors shall appoint one trustee or three trustees, and if the creditors do not make the appointment, the court shall do so. Act July 1, 1898 (30 U. S. Stat. at L. 544), § 44.

10. Act July 1, 1898 (30 U. S. Stat. at L. 544), § 2, subd. 17.

11. Act July 1, 1898 (30 U. S. Stat. at L. 544), § 30.

12. General Orders and Forms in Bankruptcy XIII. And see *In re Lewensohn*, 98 Fed. Rep. 576; *In re Eagles*, 99 Fed. Rep. 695.

13. 46 & 47 Vict., c. 52, § 21, par. 1; *In re Lamb*, (1894) 2 Q. B. 805. See also *Ex p. Credit Co.*, 53 L. J. Ch. 161, 24 Ch. D. 353, 40 L. T. N. S. 385, 32 W. R. 47; *Ex p. Board of Trade*, 1 Mor. Bankr. Cas. 216.

14. New Election Ordered on Refusal to Confirm. — *In re Scheiffer*, 2 Nat. Bankr. Reg. 591, 21 Fed. Cas. No. 12,445.

15. Confirmation Refused Only for Cause. — *In re Grant*, 2 Nat. Bankr. Reg. 106, 10 Fed. Cas. No. 5,092; *In re Funkenstein*, 9 Fed. Cas. No. 5,457.

Confirmation Has Been Refused where the assignee was chosen by the influence of the bankrupt or in his interest,¹ or in the interest of some of the creditors, to the prejudice of others;² where a large number of the creditors could not be represented at the meeting,³ or were wrongfully deprived of their right to vote;⁴ where the person elected made it a regular business to solicit the votes of creditors in bankruptcy proceedings;⁵ where a near relative of the bankrupt was elected;⁶ and where neither of the assignees appointed resided within the jurisdiction of the court.⁷

cc. WHO MAY OPPOSE. — The right to oppose the confirmation is not limited to the creditors, but belongs to the bankrupt also.⁸

(2) *Appointment by Court.* — In the event of the failure of an election by the creditors, the judge, or some other officer of the bankruptcy court, may make the appointment. This provision is probably common to all the statutes which authorize an election by creditors.⁹ Under some of the state insolvency laws there is no election by the creditors, but the appointment is made directly by the court.¹⁰

Matters Not Affecting the Result of the Election do not call for a refusal to confirm it. *In re Jackson*, 7 Biss. (U. S.) 280, 14 Nat. Bankr. Reg. 449, 13 Fed. Cas. No. 7,123; *In re Pfromm*, 8 Nat. Bankr. Reg. 357, 19 Fed. Cas. No. 11,061.

The Burden of Proof is on the party who alleges that the syndic was elected by a person who was not a creditor. *Gwartney v. His Creditors*, 13 La. Ann. 188.

Duty of Officer Holding Election. — The officer presiding at an election, if satisfied that there are reasons existing why the assignee elected should not be approved, ought to state such reasons fully in submitting the matter to the judge. *Matter of Bliss*, 1 Ben. (U. S.) 407, 1 Nat. Bankr. Reg. 78, 3 Fed. Cas. No. 1,543.

1. Election by Influence or in Interest of Bankrupt. — *Ex p. Morse*, 1 De G. 473; *Ex p. Molineux*, 1 Deac. 603, 38 E. C. L. 618; *Ex p. Carter*, 1 De G. & J. 116; *In re Houghton*, 2 Lowell (U. S.) 243, 12 Fed. Cas. No. 6,729; *Matter of Bliss*, 1 Ben. (U. S.) 407, 1 Nat. Bankr. Reg. 78, 3 Fed. Cas. No. 1,543; *In re Wetmore*, 16 Nat. Bankr. Reg. 514, 29 Fed. Cas. No. 17,466.

2. Election in Interest of Certain Creditors — *In re Haas*, 8 Nat. Bankr. Reg. 189, 11 Fed. Cas. No. 5,884.

3. Creditors Not Represented at Election. — *Ex p. Edwards*, Buck 411; *Ex p. Danby*, Montagu 67; *Ex p. Bousfield*, 1 Montagu 128; *Ex p. Spiller*, 2 Mont. D. & De G. 43; *Ex p. Stallard*, 2 Mont. D. & De G. 469; *Dechapeaurouge*, Mont. & M. 174; *Re Gilley*, 2 Lowell (U. S.) 250, 10 Fed. Cas. No. 5,438; *In re Wetmore*, 16 Nat. Bankr. Reg. 514, 29 Fed. Cas. No. 17,466. See also *Ex p. Kimber*, 11 Ch. D. 869; *Ex p. Surtees*, 12 Ves. Jr. 10; *Ex p. Milner*, 3 Deac. & C. 235; *Ex p. Durent*, Buck 201.

4. Creditors Deprived of Right to Vote — **Improper Disallowance of Claims.** — *Ex p. Edwards*, Buck 411; *Ex p. Hawkins*, Buck 520; *Dechapeaurouge*, 1 Mont. & M. 174; *Ex p. Scholey*, 1 Glyn & J. 2. Compare *Ex p. Milner*, 3 Deac. & C. 235, 3 L. J. Bankr. 73; *Ex p. Gregnier*, 1 Atk. 91; *Ex p. Surtees*, 12 Ves. Jr. 10; *Ex p. Parr*, 18 Ves. Jr. 65, 11 Rev. Rep. 149.

5. Habitually Soliciting Votes. — *Matter of A. B.*, 3 Ben. (U. S.) 66, 1 Fed. Cas. No. 2.

sub nom. In re Doe, 2 Nat. Bankr. Reg. 308, 7 Fed. Cas. No. 3,957. See also *In re Mallory*, 4 Nat. Bankr. Reg. 153, 16 Fed. Cas. No. 8,990.

6. Election of Near Relative of Bankrupt. — *In re Zinn*, (U. S. Dist. Ct.) 40 How. Pr. (N. Y.) 461, 4 Nat. Bankr. Reg. 370, 30 Fed. Cas. No. 18,216; *In re Stillwell*, 2 Nat. Bankr. Reg. 526, 23 Fed. Cas. No. 13,447.

7. Residence of Assignees. — *In re Boston*, etc., R. Co., 5 Nat. Bankr. Reg. 233, 3 Fed. Cas. No. 1,680.

8. Bankrupt May Oppose Confirmation. — *Re McGlynn*, 2 Lowell (U. S.) 127, 16 Fed. Cas. No. 8,804.

9. Appointment in Default of Election. — Act July 1, 1898 (30 U. S. Stat. at L. 544), § 44; *In re Lewensohn*, 98 Fed. Rep. 576; *In re Smith*, 93 Fed. Rep. 791; *In re Kuffer*, 97 Fed. Rep. 187; *In re Jackson*, 7 Biss. (U. S.) 280, 14 Nat. Bankr. Reg. 449, 13 Fed. Cas. No. 7,123; *Birdsey v. Vansands*, 24 Conn. 176; *Morris v. Williams*, 6 La. Ann. 391; *Hackett v. His Creditors*, 43 La. Ann. 485; *Harrison v. Their Creditors*, 42 La. Ann. 1054. Compare the statutes in other jurisdictions.

Even if No Debts Are Proved and no assets are shown, an assignee should be appointed, because creditors may appear and assets may be found. Anonymous, 1 Nat. Bankr. Reg. 22, 1 Fed. Cas. No. 457; *Matter of Cogswell*, 1 Ben. (U. S.) 388, 1 Nat. Bankr. Reg. 62, 6 Fed. Cas. No. 2,959.

When an Insolvency Proceeding Is Suspended on account of a proposed composition, the court may appoint an assignee in order to preserve the property while the composition is pending. *Jordan v. Palmer*, 165 Mass. 317.

10. Appointment by Court under State Insolvency Laws. — Commercial Nat. Bank's Appeal, 59 Conn. 25; *Atlanta Brewing, etc., Co. v. Bluthenthal*, 101 Ga. 541. Compare the statutes of other states.

In New Hampshire the assignee is appointed by the judge of probate, on the recommendation of two-thirds in number, and the majority in value of the creditors who prove their debts; but the recommendation is optional with the creditors, and not compulsory. If they fail to agree or neglect to recommend, the jury may appoint an assignee. *Tucker v. Chick*, 67 N. H. 77.

(3) *Appointment by Debtor.* — Under some of the state insolvency laws proceedings are commenced by making an assignment for the benefit of creditors, the assignee in which is chosen by the assignor.¹

b. WHO MAY BE APPOINTED. — The statutes do not generally contain any restrictions as to the persons who may be appointed assignees or trustees,² though there are various disqualifying conditions, such as having an interest adverse to the creditors generally,³ near relationship to the debtor,⁴ residence out of the jurisdiction of the court⁵ or anything which, in the opinion of the court, shows unfitness for the office.⁶ But it is not an objection to the person proposed that he is a creditor,⁷ or the attorney of a creditor,⁸ or the attorney of the bankrupt in matters not connected with the bankruptcy,⁹ or that he is an officer of the bankrupt corporation.¹⁰ Nor does mere poverty disqualify.¹¹

c. NOTICE OF APPOINTMENT. — It is a usual requirement that notice of the appointment shall be given by publication or otherwise as the statute may direct.¹²

d. BOND. — An assignee or trustee, before entering on the duties of his office, must give a sufficient bond with sureties to secure the parties in interest against any loss that may occur by his fault,¹³ unless the creditors dispense

1. *Appointment by Debtor.* — *Hyde v. Weitzner*, 45 Minn. 35; *Lammon v. Giles*, 3 Wash. Ter. 117; Ball. Annot. Codes & Stat. Wash., § 5843.

2. See the various bankruptcy and insolvency laws.

The Bankruptcy Law of 1898 provides that trustees may be (1) individuals who are respectively competent to perform the duties of that office, and reside or have an office in the judicial district within which they are appointed, or (2) corporations authorized by their charters or by-laws to act in such capacity and having an office in the judicial district within which they are appointed. Act July 1, 1898 (30 U. S. Stat. at L. 544), § 48.

3. *Adverse Interest.* — *Re Clairmont*, 1 Lowell (U. S.) 230, 1 Nat. Bankr. Reg. 276, 5 Fed. Cas. No. 2,781. See also *Ex p.* Board of Trade, 60 L. T. N. S. 190, 37 W. R. 511, 6 Mor. Bankr. Cas. 7; *In re Lamb*, 64 L. J. Q. B. 71, (1894) 2 Q. B. 805, 9 Reports 636, 71 L. T. N. S. 312, 1 Manson 373, reversing 42 W. R. 544; *Ex p.* Lacey, 6 Ves. Jr. 625, 6 Rev. Rep. 9; *Ex p.* Rice, Montagu 259; *Ex p.* Badcock, Mont. & M. 231; *Ex p.* Hall, 1 Mont. & C. 413; *Jackson v. Irvin*, 2 Campb. 49, 11 Rev. Rep. 658; *Ex p.* Turner, 3 Mont. D. & De G. 523; *Tap-penden v. Burgess*, 4 East 230, 1 Smith 33; *In re Martin*, 57 L. J. Q. B. 384, 21 Q. B. D. 29, 58 L. T. N. S. 889, 36 W. R. 698, 5 Mor. Bankr. Cas. 129.

There is an Adverse Interest where the assignee is a director of a bank to which the bankrupt had shortly before confessed judgment. *In re Powell*, 2 Nat. Bankr. Reg. 45, 19 Fed. Cas. No. 11,354.

4. *Near Relatives of Debtor.* — *In re Bogert*, 3 Nat. Bankr. Reg. 651, 3 Fed. Cas. No. 1,600; *In re Powell*, 2 Nat. Bankr. Reg. 45, 19 Fed. Cas. No. 11,354. But see *Matter of Zinn*, 4 Ben. (U. S.) 500, 4 Nat. Bankr. Reg. 436, 30 Fed. Cas. No. 18,215.

5. *Nonresidence.* — *Ex p.* Grey, 13 Ves. Jr. 274; *McWhirter v. Learmouth*, 18 U. C. C. P. 136; *Re Clairmont*, 1 Lowell (U. S.) 230, 1 Nat. Bankr. Reg. 276, 5 Fed. Cas. No. 2,781;

In re Havens, 1 Nat. Bankr. Reg. 485, 11 Fed. Cas. No. 6,231.

Nonresidence will not disqualify, however, if the person has a fixed place of daily business within the jurisdiction. *In re Loder*, 2 Nat. Bankr. Reg. 515, 15 Fed. Cas. No. 8,459.

6. See generally the title ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, vol. 3, p. 32; and *supra*, this section, *Confirmation of Election — Grounds for Refusing*.

7. *Creditors Not Disqualified.* — *Re Clairmont*, 1 Lowell (U. S.) 230, 1 Nat. Bankr. Reg. 276, 5 Fed. Cas. No. 2,781.

8. *Agent or Attorney of Creditor Not Disqualified.* — *Re Clairmont*, 1 Lowell (U. S.) 230, 1 Nat. Bankr. Reg. 276, 5 Fed. Cas. No. 2,781; *In re Lawson*, 2 Nat. Bankr. Reg. 113, 15 Fed. Cas. No. 8,150; *In re Barrett*, 2 Hughes (U. S.) 444, 2 Nat. Bankr. Reg. 533, 2 Fed. Cas. No. 1,043; *Redick v. Woolworth*, 17 Neb. 260, 52 Am. Rep. 410; *In re Campbell*, 1 U. C. L. J. N. S. 135.

9. *Attorney of Bankrupt.* — *Re Clairmont*, 1 Lowell (U. S.) 230, 1 Nat. Bankr. Reg. 276, 5 Fed. Cas. No. 2,781.

10. *Officer of Corporation.* — *Conlee Lumber Co. v. Ripon Lumber, etc., Co.*, 66 Wis. 481. See also *Pope v. Brandon*, 2 Stew. (Ala.) 401, 20 Am. Dec. 49; *Covert v. Rogers*, 38 Mich. 363, 31 Am. Rep. 319; *De Ruyter v. St. Peter's Church*, 3 N. Y. 238.

11. *Poverty.* — *Ex p.* Copeland, 3 Deac. & C. 561, 1 Mont. & A. 305, 3 L. J. Bankr. 47.

12. *Notice of Appointment.* — *Matter of Bellamy*, 1 Ben. (U. S.) 390, 1 Nat. Bankr. Reg. 64, 3 Fed. Cas. No. 1,266. And see the various statutes.

The requirement of the *Maine* statute that notice of his appointment shall be given by the assignee is merely directory. *Coombs v. Persons Unknown*, 82 Me. 326.

13. *Bond Required* — *England*. — 46 & 47 Vict., c. 52, § 21, par. 2.

United States. — Act July 1, 1898 (30 U. S. Stat. at L. 544), § 50, par. 6. The Act of 1867 did not provide that a bond should be given in all cases, but only when required either by the

with the bond; and even then the court may require it.¹ The statutes usually prescribe with considerable particularity the requisites to be observed in taking such bonds,² and it has been held that these provisions are mandatory, and must be strictly followed.³

Who May Question Sufficiency of Bond. — Only the creditors and the debtor are interested in the sufficiency of the bond, and if they acquiesce in the bond given, no one else can question it.⁴

Effect of Failure to Give Bond. — If a bond is not given as required by law the court may refuse to recognize the assignee or trustee as such,⁵ or may remove him and appoint another in his place,⁶ but if he is recognized by the court, all acts done by him are valid.⁷

e. TERMINATION OF OFFICE — (1) *Discharge After Completion of Duties.* — The assignee or trustee is entitled to be discharged from office on the completion of his duties and the settlement of his accounts, and when such a discharge is granted, he and his sureties are relieved of all further liability.⁸ But the court may, in a proper case, set aside the discharge, as where property of the insolvent is subsequently discovered.⁹

(2) *Removal* — **The Power.** — The English Bankruptcy Law provides that the creditors may, by ordinary resolution, at a meeting specially called for the purpose, remove a trustee appointed by them. The power of removal is also given to the board of trade, but if the creditors disapprove of the removal, an appeal may be taken to the high court.¹⁰

judge on his own motion or at the request of any creditor. *In re Fernberg*, 2 Nat. Bankr. Reg. 353, 8 Fed. Cas. No. 4,743; *In re McFaden*, 3 Nat. Bankr. Reg. 104, 16 Fed. Cas. No. 8,785; *In re Bininger*, 9 Nat. Bankr. Reg. 568, 3 Fed. Cas. No. 1,421.

California. — *Buhlert v. Superior Ct.*, 72 Cal. 97.

Maryland. — *Stewart v. Stone*, 3 Gill & J. (Md.) 510.

Ohio. — *State v. Sherman*, 3 Ohio 507.

Pennsylvania. — *Immel v. Stoeve*, 1 P. & W. (Pa.) 262; *Power v. Hollman*, 2 Watts (Pa.) 218.

Wisconsin. — *Fuhrman v. Jones*, 68 Wis. 497.

And see the insolvency laws of the other states.

A Surety Company is a sufficient surety on the bond of a trustee. *In re Kalter*, 2 Am. Bankr. Rep. 590.

1. Bond Dispensed With by Creditors. — *Philipi v. Their Creditors*, 44 La. Ann. 675.

2. The Wisconsin Statute provides that the sureties shall, by their several affidavits, satisfy the officer taking the bond that their property is worth, in the aggregate, the sum specified therein; and under this provision it has been held essential to the validity of the assignment that it should appear in writing on the bond itself that the officer is thus satisfied with the sufficiency of the sureties. *Fuhrman v. Jones*, 68 Wis. 497. But see *Lindsay v. Guy*, 57 Wis. 200; *Churchill v. Whipple*, 41 Wis. 611; *Klauber v. Charlton*, 45 Wis. 603; *Ball v. Bowe*, 49 Wis. 495.

The officer taking the bond must sign the jurat to the affidavits of the sureties at the time the bond is taken, and he cannot attach his signature after the affidavits have been filed, unless authorized to do so by an order of the court. *German-American Bank v. Devlin*, 96 Wis. 155.

The Attorney of a Party to an Assignment is

not the proper person to approve the bond, though he is an officer qualified to do so. *Hammel v. Schuster*, 65 Wis. 669.

3. Strict Compliance with Statute Required. — *Grever v. Culver*, 84 Wis. 298; *Ingram v. Osborn*, 70 Wis. 184; *Goll v. Hubbell*, 61 Wis. 293; *Auley v. Osterman*, 65 Wis. 118.

4. Only Creditors and Debtor Can Question Sufficiency of Bond. — *Mogk v. Peterson*, 75 Cal. 496; *Luhrs v. Kelly*, 67 Cal. 289.

5. Failure to Give Bond — Refusal to Recognize Assignee. — *Ex p. Bryan*, 2 Hughes (U. S.) 273, 14 Nat. Bankr. Reg. 71, 4 Fed. Cas. No. 2,061. Compare *Fitzgerald v. Neustadt*, 91 Cal. 600.

6. Removal for Failure to Give Bond. — *Matter of Sands*, 7 Ben. (U. S.) 19, 21 Fed. Cas. No. 12,301.

Under the bankruptcy law of 1898 the failure to give bond creates a vacancy in the office. Act July 1, 1898 (30 U. S. Stat. at L. 544), § 50, par. k.

7. Validity of Acts Done Without Giving Bond. — *Ex p. Bryan*, 2 Hughes (U. S.) 273, 14 Nat. Bankr. Reg. 71, 4 Fed. Cas. No. 2,061.

8. Discharge After Completion of Duties. — See the various bankruptcy and insolvency laws.

9. Setting Aside Discharge. — *Maybin v. Raymond*, 15 Nat. Bankr. Reg. 353, 16 Fed. Cas. No. 9,338; *Geisreiter v. Sevier*, 33 Ark. 522; *Rued v. Coper*, 109 Cal. 682, holding that the *California* statute, which provides that no judgment or proceeding shall be set aside after six months from the time it was taken, does not apply.

10. Removal under English Bankruptcy Law. — 46 & 47 Vict., c. 52, § 86.

For decisions under former statutes see *Ex p. Bates*, 1 De G. M. & G. 452, 21 L. J. Bankr. 20, 16 Jur. 459; *Ex p. Sheard*, 16 Ch. D. 107, 44 L. T. N. S. 259; *Ex p. Spiller*, 2 Mont. D. & De G. 43, 10 L. J. Bankr. 48, 5 Jur. 659; *Ex p. Carter*, 3 De G. & J. 116.

Removal under Canadian Statutes. — *In re Evans*, 13 Nova Scotia 326.

The Bankruptcy Law of the United States gives the court power to remove a trustee for cause on complaints of creditors.¹

The State Insolvency Laws generally provide for the removal of an assignee or trustee by the court.²

Who May Ask for Removal. — When judicial action is invoked to obtain the removal of an assignee or trustee, it may, in the absence of restrictions in the statute, be at the instance of any creditor,³ or of the bankrupt himself,⁴ or the court may act on its own motion.⁵

Grounds of Removal. — Any misconduct on the part of the assignee or trustee, or neglect of his duty, whereby the parties in interest may be prejudiced, furnishes grounds for removing him from office.⁶ It is also cause for removal

1. Removal under Bankruptcy Law of United States. — Act July 1, 1898 (30 U. S. Stat. at L. 541), § 2, subdiv. 17.

The Act of 1867, like the act now in force, provided that an assignee might be removed by the court for cause. Act March 2, 1867 (14 U. S. Stat. at L. 517), § 18.

It also gave the creditors the power, by a majority vote, to remove the assignee with the consent of the court. *In re* New York Mail Steamship Co., 2 Nat. Bankr. Reg. 74, 18 Fed. Cas. No. 10,209; *Re* Dewey, 1 Lowell (U. S.) 493, 4 Nat. Bankr. Reg. 412, 7 Fed. Cas. No. 3,849.

And it was discretionary with the court to grant or withhold such consent. *Re* Dewey, 1 Lowell (U. S.) 493, 4 Nat. Bankr. Reg. 412, 7 Fed. Cas. No. 3,849.

2. Removal under State Insolvency Laws — Louisiana. — State v. Rightor, 45 La. Ann. 235; Harrison v. Their Creditors, 32 La. Ann. 1054; Phillips v. Her Creditors, 37 La. Ann. 701.

Maryland. — Hoffman v. Armstrong, (Md. 1899) 44 Atl. Rep. 1012.

Minnesota. — Lyman-Eliel Drug Co. v. Spencer, 70 Minn. 183; Gunn v. Smith, 71 Minn. 281; *In re* Mast, etc., Co., 58 Minn. 313; *In re* Nicolini, 55 Minn. 130.

New York. — Matter of Cohn, 78 N. Y. 248.

Rhode Island. — Merrill v. Bowler, 20 R. I. 226; Colt v. Sears Commercial Co., 20 R. I. 323.

Wisconsin. — Burt v. Barnes, 87 Wis. 519.

See also the codes and statutes of the several states.

3. Removal at Instance of Creditors. — *In re* Blodget, 5 Nat. Bankr. Reg. 472, 3 Fed. Cas. No. 1,552; *In re* Morse, 7 Nat. Bankr. Reg. 56, 17 Fed. Cas. No. 9,852; Matter of Sacchi, (U. S. Dist. Ct.) 43 How. Pr. (N. Y.) 250, 6 Nat. Bankr. Reg. 398, 21 Fed. Cas. No. 12,201; *In re* Prouty, 24 Fed. Rep. 554.

4. Removal at Instance of Bankrupt. — *In re* Stokes, 1 Nat. Bankr. Reg. 489, 23 Fed. Cas. No. 13,475.

5. Removal by Court of Its Own Motion. — *In re* Price, 4 Nat. Bankr. Reg. 406, 19 Fed. Cas. No. 11,409.

6. Grounds of Removal — Neglect or Misconduct in General. — *Ex p.* Perryer, 1 Mont. D. & De G. 276; *Ex p.* Stagg, 2 Mont. D. & De G. 186; *Ex p.* Molineux, 1 Deac. 603, 38 E. C. L. 618, 3 Mont. & A. 703; *Ex p.* Angle, 4 Deac. & C. 118, 2 Mont. & A. 28, 4 L. J. Bankr. 5; *Ex p.* Oulton, 3 Mont. D. & De G. 336; *Ex p.* Divers, 9 W. R. 237; *Ex p.* Singlehurst, 3 De G. & J. 451; *In re* Beesley, 11 W. R. 878; *In re* Prouty,

24 Fed. Rep. 554; *In re* Price, 4 Nat. Bankr. Reg. 406, 19 Fed. Cas. No. 11,409.

Instances of Neglect and Misconduct. — The following matters have been held to constitute grounds for removing an assignee or trustee:

Refusal to act. *Ex p.* Cattaral, 1 Deac. 193, 38 E. C. L. 437; *Ex p.* Rolls, 1 Deac. 618, 38 E. C. L. 625, 3 Mont. & A. 702, 5 L. J. Bankr. 44; *Ex p.* Shaw, 1 Glyn & J. 127; *Ex p.* Wilson, 1 Mont. D. & De G. 234, 4 Jur. 584; *Ex p.* Wolverhampton, etc., Banking Co., 6 L. T. N. S. 207; *In re* Saph, 13 W. R. 352.

Absconding. *Ex p.* Higgins, 1 Ball. & B. 218; *Ex p.* Collins, 2 Cox Ch. 427; *Ex p.* Hunter, 1 Meriv. 408, 2 Rose 363; Smith v. D. Chandos, Barn. Ch. 419.

Failure to account. *Ex p.* Mendell, 4 Deac. & C. 725, 4 L. J. Bankr. 81; *Ex p.* Rawlings, 9 Jur. N. S. 1183, 9 L. T. N. S. 275, 12 W. R. 3.

Purchasing for his own benefit the bankrupt's estate. *Ex p.* Reynolds, 5 Ves. Jr. 707, 5 Rev. Rep. 143; *Ex p.* Alexander, 1 Deac. 273, 38 E. C. L. 461, 2 Mont. & A. 492. Compare *In re* Milton, 9 L. J. Ch. 17.

Becoming a bankrupt. *Ex p.* Bonsor, 1 Mont. D. & De G. 194; *Ex p.* Coslett, 1 Molloy 62; *In re* Adams, 48 L. J. Ch. 613, 12 Ch. D. 634, 41 L. T. N. S. 607, 28 W. R. 163; Merrick's Estate, 5 W. & S. (Pa.) 9.

Suppression of facts in regard to the condition of the assets, when made in the interest of one class of creditors. *Ex p.* Perkins, 5 Biss. (U. S.) 254, 8 Nat. Bankr. Reg. 56, 19 Fed. Cas. No. 10,982.

Failure to deposit funds of the estate, and suffering the foreclosure of a mortgage, instead of purchasing it at less than its face as might have been done. *In re* Price, 4 Nat. Bankr. Reg. 406, 19 Fed. Cas. No. 11,409.

Allowing property of the estate to be sold for taxes. *In re* Morse, 7 Nat. Bankr. Reg. 56, 17 Fed. Cas. No. 9,852.

Good Faith. — An assignee may be removed for mismanagement, though he acted in entire good faith, but in such case he will be protected against costs of the proceeding for removal. *In re* Mallory, 4 Nat. Bankr. Reg. 153, 16 Fed. Cas. No. 8,990.

Unsuccessful or Unnecessary Litigation is not cause for removal, if it was pursuant to the advice of counsel, or appeared to be justifiable under the circumstances. *In re* Blodget, 5 Nat. Bankr. Reg. 472, 3 Fed. Cas. No. 1,552; Matter of Sacchi, (U. S. Dist. Ct.) 43 How. Pr. (N. Y.) 250, 6 Nat. Bankr. Reg. 398, 21 Fed. Cas. No. 12,201.

After the Cause of Complaint Has Ceased, the
Volume XVI.

that improper influences were made use of in his selection,¹ or that he is an improper person, or does not possess the required qualifications.²

(3) *Death of Debtor*. — The death of the bankrupt or insolvent does not terminate the authority of the assignee or trustee.³

(4) *Death of Assignee or Trustee*. — The death of the assignee or trustee terminates his connection with the estate, of course, and his personal representative does not succeed him, but a new appointment must be made.⁴

f. *ADDITIONAL APPOINTMENT*. — It has been held that the court may, on sufficient reasons being shown, appoint an additional assignee, to act with one theretofore appointed.⁵

g. *POSTPONING APPOINTMENT*. — The appointment of a trustee may be postponed in a proper case, as where the bankrupt makes an offer of compromise.⁶

2. What Passes to Assignee or Trustee — a. *GENERAL RULE*. — The general rule is that all property and rights of property of every name and nature, whether real, personal, or mixed, belonging to a debtor at the time he is adjudged a bankrupt or insolvent, pass to the trustee or assignee to be administered for the benefit of creditors.⁷ If, however, he abandons any

court will not remove an assignee for proceeding in disregard of the insolvency law, unless there is the proof of fraud or of injury to the estate. *Rogers v. Jackman*, 12 Gray (Mass.) 144.

1. *Choice Procured by Improper Influences*. — *Ex p. Molineux*, 3 Mont. & A. 703, 1 Deac. 603.

2. *Selection of Improper Person*. — *Ex p. Smale*, 7 L. T. N. S. 376, 11 W. R. 47; *Ex p. Ashmore*, 3 Mont. D. & De G. 461; *Ex p. Oakes*, 2 Mont. D. & De G. 60, 5 Jur. 612.

As to what constitutes a disqualification to act as assignee or trustee, see *supra*, this section, *Who May Be Appointed*.

3. *Death of Debtor*. — *Gardner v. Letcher*, (Ky. 1895) 29 S. W. Rep. 868.

4. *Death of Assignee or Trustee*. — *In re Mahoney*, 5 Fed. Rep. 518. Compare *Richards v. Maryland Ins. Co.*, 8 Cranch (U. S.) 84.

5. *Additional Assignee*. — *In re Overton*, 5 Nat. Bankr. Reg. 266, 18 Fed. Cas. No. 10,625.

6. *Postponing Appointment Offer of Compromise*. — The appointment of the trustee should be postponed where bankrupt makes an offer of composition. *In re Rung*, 2 Am. Bankr. Rep. 620.

7. *All Property of Bankrupt or Insolvent Passes to Assignee* — *England*. — *Turner v. Hardcastle*, 11 C. B. N. S. 683, 103 E. C. L. 683, 31 L. J. C. Pl. 193, 5 L. T. N. S. 748; *In re Carey*, 73 L. T. N. S. 221, 2 Manson 198, affirmed (1895) 2 Q. B. 624, 44 W. R. 59; *Ex p. Cooper*, 39 L. T. N. S. 260; *Ex p. Jackson*, 2 Deac. & C. 458; *Beck v. Welsh*, 1 Wils. C. Pl. 276.

Canada. — *Wilson v. Vogt*, 24 U. C. Q. B. 635.

United States. — *Tennessee Bank v. Horn*, 17 How. (U. S.) 157; *Hunt v. Danforth*, 2 Curt. (U. S.) 592; *Ex p. Newhall*, 2 Story (U. S.) 360, 18 Fed. Cas. No. 10,159; *Matter of Rosenberg*, 3 Ben. (U. S.) 366, 3 Nat. Bankr. Reg. 130, 20 Fed. Cas. No. 12,055; *In re Cheney*, 5 Law Rep. 19, 5 Fed. Cas. No. 2,636; *Maybin v. Raymond*, 15 Nat. Bankr. Reg. 353, 16 Fed. Cas. No. 9,338; *In re Barrow*, 98 Fed. Rep. 582; *In re Hammond*, 98 Fed. Rep. 845; *In re Wood*, 98 Fed. Rep. 972.

Arkansas. — *Pearce v. Foreman*, 29 Ark. 563.

California. — *Ruggles v. Cannedy*, (Cal.

1898) 53 Pac. Rep. 911; *Poehlmann v. Kennedy*, 48 Cal. 201.

Connecticut. — *Lovell v. Hammond Co.*, 66 Conn. 500; *Barstow v. Adams*, 2 Day (Conn.) 70.

Indiana. — *Redman v. Gould*, 7 Blackf. (Ind.) 361.

Kentucky. — *Pindell v. Vimont*, 14 B. Mon. (Ky.) 322; *Boone v. Hall*, 7 Bush (Ky.) 66, 3 Am. Rep. 288; *Starks v. Curd*, 88 Ky. 164.

Louisiana. — *McGraw v. Andrus*, 45 La. Ann. 1073; *Gumbel v. Andrus*, 45 La. Ann. 1081; *Andrus v. His Creditors*, 45 La. Ann. 1067; *May v. New Orleans, etc.*, R. Co., 44 La. Ann. 444; *Chachere v. Block*, 46 La. Ann. 1386; *Dubois v. Ziques*, 14 La. Ann. 430.

Maryland. — *In re Banks*, 87 Md. 425; *Matter of Leiman*, 32 Md. 225, 3 Am. Rep. 132.

Massachusetts. — *Palmer v. Jordan*, 163 Mass. 350; *Billings v. Marsh*, 153 Mass. 311, 25 Am. St. Rep. 635; *Merrick v. Bragg*, 102 Mass. 437; *Spurr v. Dean*, 139 Mass. 84.

Mississippi. — *Reed v. Bullington*, 49 Miss. 223.

New Jersey. — *Phillips v. Helmbold*, 26 N. J. Eq. 202.

New York. — *Kip v. State Bank*, 10 Johns. (N. Y.) 63; *Roseboom v. Mosher*, 2 Den. (N. Y.) 61; *Marsh v. Wendover*, 3 Cow. (N. Y.) 69.

Pennsylvania. — *Dohner v. Dohner*, 1 Am. L. J. 78; *Morris v. Tams*, 1 Phila. (Pa.) 23, 7 Leg. Int. (Pa.) 11; *Shuman v. Reigart*, 7 W. & S. (Pa.) 168; *Moncure v. Hanson*, 15 Pa. St. 385; *McAllister v. Samuel*, 17 Pa. St. 114.

South Carolina. — *Cohen v. Gibbes*, 1 Hill L. (S. Car.) 206.

Texas. — *Smith v. Talbot*, 18 Tex. 774.

Vermont. — *Brunswick-Balke Collender Co. v. Herrick*, 63 Vt. 286.

The Language of the Statutes is comprehensive enough to include every kind of property that can be made applicable to the payment of debts. Thus the earlier bankrupt laws declared that the assignee should take all the estate, real and personal, of every description. Act April 4, 1800 (2 U. S. Stat. at L. 19), §§ 6, 7. Act August 19, 1841, c. 9 (5 U. S. Stat. at L. 440), § 3; Act March 2, 1867, c. 176 (14 U. S. Stat. at L. 517), § 14.

The present Bankruptcy Act enumerates

Volume XL.

property, as he may do, because it will be a burden instead of a benefit to the estate, the title to such property remains in the bankrupt.¹

Property of Bankrupt's Wife. — Under the common-law rule in regard to the property rights of married women, all the personalty of a married woman, including choses in action which the husband had reduced into possession, and any other interest acquired by him *jure mariti*, passed to his trustee in bankruptcy,² subject to the wife's right to an adequate provision out of such property;³ but this doctrine is not applicable under the modern statutes securing to married women property owned by them at the time of marriage, or acquired afterwards.⁴ There are, however, still interests which a husband acquires *jure mariti* in his wife's property, such as an estate by the curtesy, or the

specifically the kinds of property which will pass to the trustee. See Act July 1, 1898 (30 U. S. Stat. at L. 544), § 70.

See also the several state insolvency laws.

Whatever an Administrator Would Take, in case of intestacy, will pass to the trustee or assignee in bankruptcy or insolvency. Williams v. Heard, 140 Mass. 529.

Omission from the Schedule does not prevent property from passing to the assignee. Holbrook v. Coney, 25 Ill. 543.

Insolvency of Purchaser while Goods Are in Transit. — Where the purchaser of goods sold on credit and shipped to him becomes insolvent while the goods are in transit, and the seller does not exercise his right of stoppage *in transitu*, the title vests in the trustee on delivery. McElroy v. Seery, 61 Md. 389, 48 Am. Rep. 110.

Where Movables Are Sequestered and Bonded by the defendant, the title to them remains in him until divested by due course of law, and therefore where he becomes insolvent while so in possession of such movables, it is his duty to put them in his schedule. Downey v. Kenner, 42 La. Ann. 1129. Compare *In re Albrecht*, 17 Nat. Bankr. Reg. 287, 1 Fed. Cas. No. 145, holding that where money attached is released on bond and deposited to indemnify the sureties, such money does not pass to the assignee.

Property Acquired After the Adjudication of insolvency does not pass to the assignee, under the present Maryland statute. *In re Banks*, 87 Md. 425.

But under the Maryland Act of 1834, property accruing to an insolvent after his discharge, by gift, descent, bequest, devise, or in course of distribution, passed to the trustee. Lavender v. Gosnell, 43 Md. 153.

Property Transferred Pending Insolvency Proceedings. — Where a debtor, pending insolvency proceedings against him, makes an assignment for the benefit of creditors, the property so assigned passes to the receiver afterwards appointed in the insolvency proceeding. Arnold's Petition, 15 R. I. 15.

Improvements on Public Lands are property and as such pass to an assignee in bankruptcy. French v. Carr, 7 Ill. 664.

1. Property Abandoned by Assignee or Trustee. — See *infra*, this section, *Powers, Duties, and Liabilities — Collection of Assets*.

2. Property of Bankrupt's Wife — Rule at Common Law. — Mitford v. Mitford, 9 Ves. Jr. 87; Jewson v. Moulson, 2 Atk. 420; Pierce v. Thornely, 2 Sim. 167; Saddington v. Kins-

man, 1 Bro. C. C. 44; Gayner v. Wilkinson, 2 Dick. 491; Van Epps v. Van Deusen, 4 Paige (N. Y.) 64, 25 Am. Dec. 516. See also Grey v. Kentish, 1 Atk. 280. Compare Miles v. Williams, 1 P. Wms. 249; Bosvil v. Brander, 1 P. Wms. 458; Michell v. Hughes, 6 Bing. 689, 19 E. C. L. 205; Chilton v. Cabiness, 14 Ala. 447; Richwine v. Heim, 1 P. & W. (Pa.) 373. And see Krumbaar v. Burt, 2 Wash. (U. S.) 406, 14 Fed. Cas. No. 7,944; Butler v. Merchants' Ins. Co., 14 Ala. 777; Smith v. Chandler, 3 Gray (Mass.) 392; Shay v. Sessaman, 10 Pa. St. 432.

Choses in Action Not Reduced into Possession do not pass under the rule stated in the text. *In re Snow*, 1 N. Y. Leg. Obs. 264, 22 Fed. Cas. No. 13,142; Wickham v. Valle, 11 Nat. Bankr. Reg. 83, 29 Fed. Cas. No. 17,613.

And it is not a reduction into possession to include such choses in action in the schedule of his assets. Poor v. Hazleton, 15 N. H. 564.

Earnings of Wife. — *In re Hammond*, 98 Fed. Rep. 845.

Jewelry and Personal Ornaments given by a husband to his wife, and compatible with his circumstances when they were given, do not pass to his assignee. *In re Ludlow*, 1 N. Y. Leg. Obs. 322, 15 Fed. Cas. No. 8,599.

3. Provision for Wife out of Her Own Property — England. — Vandeancker v. Desbrough, 2 Vern. 96; Burnett v. Kinnaston, 2 Vern. 401; Holland v. Calliford, 2 Vern. 662; Jacobson v. Williams, 1 P. Wms. 383; Bosvil v. Brander, 1 P. Wms. 459; Bennet v. Davis, 2 P. Wms. 316; *Ex p.* Michell, 1 Atk. 120; *Ex p.* Coysegame, 1 Atk. 192; Middlecome v. Marlow, 2 Atk. 519; Parker v. Dykes, 1 Eq. Cas. Abr. 54, par. 6; Tanfield v. Davenport, Tothill 114; *Ex p.* Mitford, 1 Bro. C. C. 398; Steinmetz v. Halthin, 1 Glyn & J. 64; *Ex p.* Thompson, 2 Mont. & A. 505, 38 E. C. L. 387, 1 Deac. 90, 4 L. J. Bankr. 75; Basevi v. Serra, 3 Meriv. 674; Ineson v. Moulson, 9 Mod. 393; *Ex p.* Winchester, 9 Mod. 471; Brown v. Clark, 3 Ves. Jr. 166; Freeman v. Parsley, 3 Ves. Jr. 421; Pringle v. Hodgson, 3 Ves. Jr. 617; Lumb v. Milnes, 5 Ves. Jr. 517; Burdon v. Dean, 2 Ves. Jr. 607.

United States. — Clark v. Hezekiah, 24 Fed. Rep. 663.

Georgia. — Bell v. Bell, 7 Ga. 637.

New York. — Van Epps v. Van Deusen, 4 Paige (N. Y.) 64.

4. For a Full Discussion as to the modern rule respecting the property rights of married women, see the title SEPARATE PROPERTY OF MARRIED WOMEN. See also the title HUSBAND AND WIFE, vol. 15, p. 785.

statutory substitute therefor.¹ By the dealings of the parties also a husband may acquire interests in his wife's property, or its increase, which will pass to his assignee or trustee, as where she permitted him to buy property in his own name with her means, on the faith of which he contracted debts,² or where he made accumulations by his own skill and energy in using her capital, though the transactions were in her name.³

The Property of a Bankrupt's Minor Children, accumulated by their own efforts with the bankrupt's consent, is not assets of the bankrupt's estate.⁴

An Interest Accruing under a Will, if of such a nature as to be transferable or transmissible, is an existing interest in the party, and will pass to his assignee or trustee in bankruptcy.⁵

The Good Will of a Business is a well-recognized species of personal property which will pass to a trustee in bankruptcy or insolvency.⁶

b. LEASES.—Leaseholds are property which will pass to the lessee's assignee or trustee in bankruptcy, subject to his power of disclaimer, unless they are specially excepted by the statute, or by the terms of the lease.⁷

An Agreement to Lease also passes by virtue of the same principles as are applicable to leases.⁸

c. FRANCHISES AND LICENSES.—**A Franchise** from which the owner derives profit passes to his assignee or trustee.⁹

1. Estates by the Curtesy.—*In re McKenna*, 9 Fed. Rep. 27; *Conolly v. Gayle*, 54 Ala. 269; *Gayle v. Randall*, 71 Ala. 469; *Parks v. Tirrell*, 3 Allen (Mass.) 15. But see *Hesseltine v. Prince*, 2 Am. Bankr. Rep. 600, decided under the bankruptcy law of 1898.

2. Purchase in Husband's Name with Wife's Means.—*Keating v. Keefer*, 5 Nat. Bankr. Reg. 133, 14 Fed. Cas. No. 7,635.

3. Accumulations Made with Wife's Capital.—*Muirhead v. Aldridge*, 14 Nat. Bankr. Reg. 249, 17 Fed. Cas. No. 9,904.

4. Earnings of Bankrupt's Minor Children.—*Ex p. Tebbets*, 23 Fed. Cas. No. 13,816. And see generally the title PARENT AND CHILD.

5. Interests Accruing under Wills.—*In re Wood*, 98 Fed. Rep. 972; *Rugely v. Robinson*, 10 Ala. 702; *Belcher v. Burnett*, 126 Mass. 230; *Putnam v. Story*, 132 Mass. 205; *Dohner v. Dohner*, 1 Am. L. J. 78; *Churchman's Estate*, 20 W. N. C. (Pa.) 367; *Churchman's Appeal*, (Pa. 1888) 12 Atl. Rep. 600, 22 W. N. C. (Pa.) 131.

A Devisee Cannot Renounce the Devise after acceptance, and thereby defeat the title of his assignee in bankruptcy. *Ex p. Fuller*, 2 Story (U. S.) 327, 9 Fed. Cas. No. 5,147.

A Contingent Remainder passes to the assignee of the remainderman. *Bodenhamer v. Welch*, 89 N. Car. 78. See also *infra*, this section, *Conditional, Contingent, and Defeasible Interests*.

6. Good Will as Assets in Bankruptcy.—*Chisum v. Dewes*, 5 Russ. 29; *Ex p. Thomas*, 2 Mont. D. & De G. 294; *Ex p. Punnett*, 16 Ch. D. 226; *Crutwell v. Lye*, 17 Ves. Jr. 336; *Walker v. Mottram*, 19 Ch. D. 355.

The trustee may prevent the bankrupt from representing that he owns the good will. *Hudson v. Osborne*, 21 L. T. N. S. 386; *Leggott v. Barrett*, 15 Ch. D. 306; *Walker v. Mottram*, 19 Ch. D. 355; *Wotherspoon v. Currie*, L. R. 5 H. L. 508; *Thorley's Cattle Food Co. v. Massam*, 14 Ch. D. 763; *Churton v. Douglas*, Johns. Ch. (Eng.) 174.

But he cannot prevent the bankrupt from engaging in his former business in his own

name. *Johnson v. Helleley*, 2 De G. J. & S. 446; *Crutwell v. Lye*, 17 Ves. Jr. 336, 1 Rose 128; *Cook v. Collingridge*, Jac. 607; *Ginesi v. Cooper*, 14 Ch. D. 596; *Walker v. Mottram*, 19 Ch. D. 355; *Helmbold v. Henry T. Helmbold Mfg. Co.*, (Supm. Ct.) 53 How. Pr. (N. Y.) 453.

As to the nature and characteristics in general of good will, see the titles EXECUTORS AND ADMINISTRATORS, vol. II, p. 831; and GOOD WILL, vol. 14, p. 1085.

7. Rule that Leaseholds Pass to Assignee or Trustee.—*Wilson v. Wallani*, 49 L. J. Exch. 437, 5 Ex. D. 155, 42 L. T. N. S. 375, 28 W. R. 597, 44 J. P. 475; *Wildman v. Taylor*, 4 Ben. (U. S.) 42, 29 Fed. Cas. No. 17,654; *White v. Griffing*, 44 Conn. 437; *Evans v. Hamrick*, 61 Pa. St. 19, 100 Am. Dec. 595. But see *In re Jefferson*, 93 Fed. Rep. 948, holding that bankruptcy terminates the lease.

Right to Remove Machinery.—A tenant's right to remove machinery from the leased building passes to his assignee in bankruptcy. *Matter of Breck*, 8 Ben. (U. S.) 93, 12 Nat. Bankr. Reg. 215, 4 Fed. Cas. No. 1,822.

8. Agreements to Lease.—*Morgan v. Rhodes*, 1 Mont. & A. 214, 1 Myl. & K. 435; *Buckland v. Papillon*, 36 L. J. Ch. 81, L. R. 2 Ch. 67, 12 Jur. N. S. 992, 15 L. T. N. S. 378, 15 W. R. 92; *Ex p. Benecke*, 1 Deac. 186; *Powell v. Lloyd*, 2 Y. & J. 372; *Page v. Broom*, 6 Jur. 308; *Gibbon v. Dudgeon*, 45 J. P. 748; *Ex p. Lucas*, 3 Deac. & C. 144, 1 Mont. & A. 93.

9. Franchises, Licenses, etc.—*Doe v. Clark*, 5 B. & Ald. 458, 7 E. C. L. 160, 1 Dowl. & R. 44, 24 Rev. Rep. 457; *Sweatt v. Boston*, etc., R. Co., 3 Cliff. (U. S.) 339, 5 Nat. Bankr. Reg. 234, 23 Fed. Cas. No. 13,684; *Stewart v. Hargrove*, 23 Ala. 429; *People v. Duncan*, 41 Cal. 507.

Privileges—Estoppel to Deny Character as Property.—A bankrupt is estopped to deny that his assignee was entitled to a permit held by him from the comptroller of a city, because it was revocable at the pleasure of the comptroller, and could not be transferred without permission, where he had, before his bankruptcy,

Patent Rights are therefore included, though they are not subject to seizure under attachment or execution, and though title thereto can be transferred only by assignment.¹

Liquor Licenses, if they are transferable and have a pecuniary value, are assets in bankruptcy.²

d. **TRADE MARKS AND TRADE NAMES.** — A trade mark is property which, if not personal in its character, passes to the assignee or trustee in bankruptcy of the owner,³ but it has been held that the right to use one's name as a trade mark does not so pass.⁴

e. **POWERS OF APPOINTMENT.** — A mere power of appointment does not pass to the assignee or trustee, nor is there any equity to compel a bankrupt to execute such a power in favor of his creditors;⁵ but if, in default of appointment, the property is to vest in the bankrupt in fee, and the bankruptcy occurs before an appointment is made, the power is then defeated, and the property vests in the assignee in bankruptcy.⁶

f. **CHOSSES IN ACTION** — (1) *In General.* — Under the comprehensive terms of the bankruptcy and insolvency laws, the trustee or assignee succeeds to the title to all choses in action, so far as they arise out of contract, or injuries in respect to property; and it is immaterial whether or not such choses in action are negotiable, or whether they stand in the name of the bankrupt or of some other person.⁷ Accordingly he may recover the compensation due for services

placed a certain value on it in a statement of his assets as a basis for credit. Matter of Gallagher, 16 Blatchf. (U. S.) 410, 19 Nat. Bankr. Reg. 224, 9 Fed. Cas. No. 5,192.

1. **Patent Rights.** — *Barton v. White*, 144 Mass. 281, 59 Am. Rep. 84; *Keach's Petition*, 14 R. I. 571. And see generally the title **PATENTS**.

The present bankruptcy law of the United States includes patent rights in the enumeration of property passing to a trustee in bankruptcy. Act July 1, 1898 (30 U. S. Stat. at L. 544), § 70.

2. **Liquor Licenses.** — *In re Brodbine*, 93 Fed. Rep. 643; *In re Fisher*, 98 Fed. Rep. 89; *In re Becker*, 98 Fed. Rep. 407. And see generally the title **INTOXICATING LIQUORS**.

3. **Trade Marks** — *England.* — *Motley v. Downman*, 3 Myl. & C. 1; *Ex p. Foss*, 2 De G. & J. 230; *Hall v. Barrows*, 4 De G. J. & S. 150; *Bury v. Bedford*, 4 De G. J. & S. 352; *Leather Cloth Co. v. American Leather Cloth Co.*, 4 De G. J. & S. 137, 11 H. L. Cas. 523; *Longman v. Tripp*, 2 B. & P. N. R. 67; *Hudson v. Osborne*, 21 L. T. N. S. 386.

United States. — *Richmond Nerve Co. v. Richmond*, 159 U. S. 293; *Stachelberg v. Ponce*, 23 Fed. Rep. 439; *Filkins v. Blackman*, 13 Blatchf. (U. S.) 440, 9 Fed. Cas. No. 4,786; *Pepper v. Labrot*, 8 Fed. Rep. 29.

Illinois. — *Hazelton Boiler Co. v. Hazelton Tripod Boiler Co.*, 142 Ill. 494.

Massachusetts. — *Warren v. Warren Thread Co.*, 134 Mass. 247; *Hoxie v. Chaney*, 143 Mass. 592, 58 Am. Rep. 149; *Chadwick v. Covell*, 151 Mass. 190, 21 Am. St. Rep. 442.

Missouri. — *Skinner v. Oakes*, 10 Mo. App. 45.

And see generally the title **TRADE MARKS**.

4. **Name as Trade Mark.** — *Austen v. Boys*, 2 De G. & J. 626; *Farr v. Pearce*, 3 Madd. 74; *Mattingly v. Stone*, (Ky. 1860) 14 S. W. Rep. 47; *Helmhold v. Henry T. Helmhold Mfg. Co.* (Supm. Ct.) 53 How. Pr. (N. Y.) 453; *Carmichael v. Latimer*, 11 R. I. 395, 23 Am. Rep. 481.

5. **Power of Appointment.** — *Thorpe v. Goodall*, 1 Rose 40, 270, 17 Ves. Jr. 388, 460; *Townshend v. Windham*, 2 Ves. 3; *Nichols v. Nixey*, 55 L. J. Ch. 146, 29 Ch. D. 1005, 52 L. T. N. S. 803, 33 W. R. 840; *Jones v. Clifton*, 101 U. S. 225, 2 Flipp. (U. S.) 191, 18 Nat. Bankr. Reg. 125, 13 Fed. Cas. No. 7, 457; *Brandies v. Cochrane*, 112 U. S. 344.

The **Bankruptcy Law of the United States** provides that powers which the bankrupt might have exercised for his own benefit shall pass to the trustee in bankruptcy, but not those which he might have exercised for some other person. Act July 1, 1898 (30 U. S. Stat. at L. 544), § 70, par. a (3).

6. **Property Vesting in Bankrupt in Default of Appointment.** — *Doe v. Britain*, 2 B. & Ald. 93.

7. **Choses in Action** — *England.* — *Wright v. Fairfield*, 2 B. & Ad. 727, 22 E. C. L. 175; *Beckham v. Drake*, 2 H. L. Cas. 579, 11 M. & W. 315, 12 L. J. Exch. 486, 13 Jur. 921; *Hodgson v. Sidney*, 4 H. & C. 492, 35 L. J. Exch. 182, L. R. 1 Exch. 313, 12 Jur. N. S. 694, 14 L. T. N. S. 624, 14 W. R. 923; *Akhuist v. Jackson*, 1 Swanst. 85; *Hancock v. Caffyn*, 1 L. J. C. Pl. 104, 1 Moo. & S. 521, 8 Bing. 359, 21 E. C. L. 318; *Porter v. Vorley*, 9 Bing. 93, 23 E. C. L. 272, 2 Moo. & S. 141, 1 L. J. C. Pl. 170; *Ashdown v. Ingamells*, 5 Ex. D. 280, 43 L. T. N. S. 424.

United States. — *Sherman v. International Bank*, 8 Biss. (U. S.) 371, 21 Fed. Cas. No. 12,765, affirmed 101 U. S. 403; *Hunter v. U. S.*, 5 Pet. (U. S.) 173.

Arkansas. — *Collier v. Hunter*, 27 Ark. 74.

Connecticut. — *Lovell v. Hammond Co.*, 66 Conn. 500; *Stanton v. Lewis*, 26 Conn. 444.

Georgia. — *Hale-Berry Co. v. Diamond State Iron Co.*, 94 Ga. 61.

Illinois. — *Fraser v. Gates*, 118 Ill. 99, affirming 9 Ill. App. 624; *Stow v. Yarwood*, 20 Ill. 497; *Westbay v. Williams*, 5 Ill. App. 521; *Rankin v. Barcroft*, 114 Ill. 441.

Massachusetts. — *Ward v. Jenkins*, 10 Met. (Mass.) 583; *Sullivan v. Bridge*, 1 Mass. 511.

rendered by the bankrupt,¹ money lost at gaming,² usurious interest paid by the bankrupt, when the right to recover therefor is given by statute,³ claims for money paid on illegal contracts,⁴ waste committed on the bankrupt's estate,⁵ and negligence, fraud, or other wrong causing the loss of or injury to specific property of the bankrupt;⁶ but he cannot recover for torts to the person of the bankrupt,⁷ or on causes of action for fraud or deceit which does not affect specific property.⁸

Payment to the Bankrupt of money due him after the commencement of the bankruptcy proceeding does not affect the right of the assignee or trustee to recover, even though made in the usual course of business and without actual notice of the proceeding.⁹ Nor is a debt due a bankrupt subject to garnish-

Michigan. — *McMaster v. Campbell*, 41 Mich. 513.

Minnesota. — *Miller v. Condit*, 52 Minn. 455.

New Hampshire. — *Streeter v. Sumner*, 31 N. H. 542.

Pennsylvania. — *Wickersham v. Nicholson*, 14 S. & R. (Pa.) 118.

Texas. — *Pope v. Davenport*, 52 Tex. 206.

Money Loaned by the Bankrupt after commencement of the bankruptcy proceeding may be recovered by the assignee. *Crompton v. Conkling*, 9 Ben. (U. S.) 225, 6 Fed. Cas. No. 3,497.

Notes Belonging to a Bankrupt pass to his assignee and are enforceable only by him, though the assignee never received them. *Beeson v. Shively*, 28 Kan. 574; *Griswold v. McMillan*, 11 Ill. 590.

Judgments rendered in favor of a bankrupt or insolvent pass to and are enforceable by his assignee or trustee. *Moore v. Jones*, 23 Vt. 739, 17 Fed. Cas. No. 9,768; *Brown v. Wygant*, 6 Mackey (D. C.) 447; *Zantzing v. Ribble*, 36 Md. 32; *Hale v. Christy*, 24 Neb. 746; *Mollitt v. Cruise*, 7 Coldw. (Tenn.) 137.

1. Compensation for Services Rendered by Bankrupt. — *In re Jones*, 4 Nat. Bankr. Reg. 347, 13 Fed. Cas. No. 7,448; *Burton v. Lockert*, 9 Ark. 411.

Though the Service Were Rendered Without a Contract the right to demand the value thereof passes to the assignee in bankruptcy of the party. *Buckingham v. Buckingham*, 36 Ohio St. 68.

It Is Only Services Rendered Before Bankruptcy for which the assignee may recover compensation, though the contract was made previously. As to subsequent services the right belongs to the bankrupt. *Burton v. Lockert*, 9 Ark. 411. See also *Streeter v. Sumner*, 31 N. H. 542.

2. Money Lost at Gaming. — *Brandon v. Pate*, 2 H. Bl. 308; *Brandon v. Sands*, 2 Ves. Jr. 514.

3. Usurious Interest Paid by Bankrupt — *United States*, — *Crocker v. Chetopa First Nat. Bank*, 4 Dill. (U. S.) 358, 6 Fed. Cas. No. 3,397.

Massachusetts. — *Gray v. Bennett*, 3 Met. (Mass.) 522; *Tamplin v. Wentworth*, 99 Mass. 63.

New Hampshire. — *Pearson v. Gooch*, (N. H. 1899) 45 Atl. Rep. 406.

New York. — *Wheelock v. Lee*, (Brooklyn City Ct. Gen. T.) 15 Abb. Pr. N. S. (N. Y.) 24, 64 N. Y. 242.

Pennsylvania. — *Monongahela Nat. Bank v. Overholt*, 96 Pa. St. 327.

In Vermont it is held that an assignee in bankruptcy is not entitled to recover usurious

interest paid by the bankrupt, because the Vermont statute gives such right only to debtors personally. *Lafountain v. Burlington Sav. Bank*, 56 Vt. 332.

4. Claims for Money Paid on Illegal Contracts. — *Rued v. Cooper*, 109 Cal. 682.

5. Actions for Waste. — *Bullock v. Hayward*, 10 Allen (Mass.) 460.

6. Damages for Taking or Injuring Property. — *Smith v. Commercial Union Ins. Co.*, 33 U. C. Q. B. 520.

Negligence in Keeping a Ferry, in consequence of which property was lost while being carried over the ferry, supports a claim in favor of the owner of such property which will pass to his assignee in bankruptcy. *Borden v. Bradshaw*, 68 Ala. 362.

Fraudulent Representations by the defendant, by which the bankrupt was induced to enter into partnership with him and contribute to the capital of the concern, which contribution was afterwards lost by the defendant's fraud, give a cause of action which passes to the assignee in bankruptcy. *Hyde v. Tufts*, 45 N. Y. Super. Ct. 56.

A Cause of Action for Detaining the Bankrupt's Ship and delaying a voyage passes to his assignee in bankruptcy. *Hempstead v. Bird*, 2 Day (Conn.) 293; *Bird v. Hempstead*, 3 Day (Conn.) 272, 3 Am. Dec. 260.

Damages on Attachment Bond Recoverable by Assignee of Attachment Defendant. — *Darcy v. Spivey*, 57 Miss. 527.

7. Personal Torts Not Assets. — *Stone v. Boston, etc., R. Co.*, 7 Gray (Mass.) 539; *Bird v. Hempstead*, 3 Day (Conn.) 272, 3 Am. Dec. 260; *Noonan v. Orton*, 34 Wis. 259, 17 Am. Rep. 441; *Rand v. Fleishman*, 6 W. N. C. (Pa.) 497; *White v. Elliott*, 30 U. C. Q. B. 253. *Compare Lovell v. Hammond Co.*, 66 Conn. 500.

8. Fraud and Deceit. — *Stanly v. Duhurst*, 2 Root (Conn.) 52; *Matter of Crockett*, 2 Ben. (U. S.) 514, 2 Nat. Bankr. Reg. 208, 6 Fed. Cas. No. 3,402; *Tufts v. Matthews*, 10 Fed. Rep. 609.

9. Effect of Payment to Bankrupt. — *Babbitt v. Burgess*, 2 Dill. (U. S.) 169, 7 Nat. Bankr. Reg. 561, 2 Fed. Cas. No. 693; *Beecher v. Gillespie*, 6 Ben. (U. S.) 356, 3 Fed. Cas. No. 1,224; *Howard v. Crompton*, 14 Blatchf. (U. S.) 328, 12 Fed. Cas. No. 6,758.

Payment Before Bankruptcy Proceedings will discharge a debt as against the assignee, if the bankrupt's debtor acted in good faith, without reasonable cause to believe that the bankrupt intended to make therewith any fraudulent payments or preferences. *Borland v. Phillips*, 2 Dill. (U. S.) 353, 3 Fed. Cas. No. 1,661.

ment after the bankruptcy proceeding has been commenced.¹

(2) *Contracts to Purchase Land.* — Where a bankrupt has entered into a contract for the purchase of land, his right thereunder is a right of property which will pass to his assignee or trustee,² unless the bankrupt has forfeited his right by nonperformance of his part of the contract.³

(3) *Shares or Memberships in Corporations and Exchanges.* — Shares of stock in a corporation are assets which on the insolvency or bankruptcy of the owner pass to his assignee or trustee, if accepted by him.⁴

Memberships in Exchanges and similar associations constitute property and are assets in the bankruptcy, though the power of disposal is subject to the rules and regulations of the association. This is now well settled,⁵ though the contrary has been held.⁶

(4) *Liabilities of Stockholders.* — The liabilities of stockholders for unpaid subscriptions are assets of the corporation which pass to its assignee or trustee in bankruptcy,⁷ but their statutory liability for the debts of the corporation is not such an asset.⁸

(5) *Insurance Policies.* — Insurance policies on the life of a bankrupt, if they are payable to himself or his estate and have a present value, pass to his assignee or trustee as assets for the payment of debts,⁹ but not if the policies are payable to third persons, where the premiums are paid by the beneficiaries,¹⁰ or where the insurance is for the benefit of the bankrupt's family, and the premiums were paid by the bankrupt before bankruptcy or did not exceed the amount allowed therefor by local statutes.¹¹

Thus, where the depositor of money in bank becomes a bankrupt after payment of a check drawn by him against the deposit, the assignee cannot compel the bank to pay the amount of such check. *Chicago Fourth Nat. Bank v. City Nat. Bank*, 68 Ill. 398.

1. **Debts Not Garnishable After Commencement of Bankruptcy Proceedings.** — *Smith v. Eaton*, 36 Me. 298, 58 Am. Dec. 746.

2. **Contracts to Purchase Land.** — *Rea v. Richards*, 56 Ala. 396; *Clements v. Taylor*, 65 Ala. 363; *McDonald v. McMahon*, 66 Ala. 115; *Smith v. Hornesby*, 58 Ga. 529.

3. **Forfeiture of Contract Before Bankruptcy.** — *Norton v. Hood*, 124 U. S. 20; *In re Gregg*, 1 Hask. (U. S.) 173, 3 Nat. Bankr. Reg. 529, 10 Fed. Cas. No. 5,796.

4. **Shares in Corporations.** — *Turner v. Trellawny*, 12 Sim. 49, 10 L. J. Ch. 249, 5 Jur. 698; *Nelson v. London Assur. Co.*, 2 Sim. & St. 292; *Ex p. Lawrence*, 1 De G. 269; *Ex p. Lancaster Canal Co.*, 1 Deac. & C. 411, 1 Montagu 116, 1 Mont. & B. 94; *In re Warder*, 10 Fed. Rep. 275; *State v. Ferris*, 42 Conn. 560.

Acceptance by Assignee. — *Graham v. Van Diemen's Land Co.*, 3 C. L. R. 887; *Levi v. Ayers*, 38 L. T. N. S. 725, 3 App. Cas. 842, 27 W. R. 79; *South Staffordshire R. Co. v. Burnside*, 6 R. & Can. Cas. 611, 5 Exch. 129, 20 L. J. Exch. 120.

Right to Vote Shares. — It has been held that as long as the shares stand in the name of the bankrupt, he may vote on them with the assent of the assignee in bankruptcy. *State v. Ferris*, 42 Conn. 560.

5. **Membership in Exchange, etc.** — *Hyde v. Woods*, 2 Sawy. (U. S.) 655, 10 Nat. Bankr. Reg. 54, 12 Fed. Cas. No. 6,975, affirmed 94 U. S. 523; *Sparhawk v. Yerkes*, 142 U. S. 1; *In re Ketchum*, 1 Fed. Rep. 810; *In re Werder*, 15 Fed. Rep. 789. See also opinion of Crompton, J., in *Nicholson v. Gooch*, 5 El. & Bl. 999, 85 E. C. L. 999.

The Proceeds of a Sale May Not Be General Assets, because the rules of the exchange provide that a member, on becoming insolvent, may assign his seat to be sold, and that the proceeds shall, to the exclusion of his outside creditors, be first applied to the benefit of the members to whom he is indebted, the surplus, if any, remaining after such application. *Hyde v. Woods*, 94 U. S. 523, 15 Nat. Bankr. Reg. 518.

Acceptance by Assignee. — If it is doubtful whether the membership is valuable to the estate, the assignees must elect, within a reasonable time, whether they will accept it or not. *Sparhawk v. Yerkes*, 142 U. S. 1.

6. *In re Sutherland*, 6 Biss. (U. S.) 526, 23 Fed. Cas. No. 13,637.

7. **Liability of Stockholders for Unpaid Subscriptions.** — *Payson v. Stoeper*, 2 Dill. (U. S.) 427, 19 Fed. Cas. No. 10,863; *Lane v. Nickerson*, 99 Ill. 284.

8. **Statutory Liability of Stockholders for Corporate Debts.** — *Dutcher v. Marine Nat. Bank*, 12 Blatchf. (U. S.) 435, 11 Nat. Bankr. Reg. 457, 8 Fed. Cas. No. 4,203; *Pfohl v. Simpson*, (Supm. Ct. Spec. T.) 50 How. Pr. (N. Y.) 341.

9. **Insurance on Debtor's Life.** — *In re Sawyer*, 2 Hask. (U. S.) 153, 21 Fed. Cas. No. 12,393; *In re Lange*, 91 Fed. Rep. 361; *In re Steele*, 98 Fed. Rep. 78; Act July 1, 1898 (30 U. S. Stat. at L. 541), § 70, par. a, subd. (5); *Bassett v. Parsons*, 140 Mass. 169; *Brigham v. Home L. Ins. Co.*, 131 Mass. 319. Compare *Pace v. Pace*, 19 Fla. 438.

If the Policy Has No Surrender Value and can only become valuable at the death of the bankrupt, it does not pass to the trustee. *In re Baelow*, 98 Fed. Rep. 86.

10. **Insurance Effectuated and Premiums Paid by Beneficiaries.** — *In re Murrin*, 2 Dill. (U. S.) 120, 8 Nat. Bankr. Reg. 6, 17 Fed. Cas. No. 9,965.

11. **Insurance for Benefit of Bankrupt's Family.** — *In re Bear*, 1 Cent. L. J. 607, 11 Nat. Bankr.

(6) *Claims Against Government.* — Claims against the government, when founded on contract, or for property taken or injured, including claims for spoliation, will pass to the trustee or assignee appointed on the bankruptcy or insolvency of the claimant,¹ regardless of whether payment can be enforced,² and notwithstanding the statute forbidding the assignment of claims against the United States,³ because that statute does not apply to devolutions of title by force of law, without any act of the parties, or to involuntary assignments compelled by law.⁴ But if a claim is founded on a gratuity or voluntary donation, there is no right of property which can pass to trustee or assignee.⁵

g. CONDITIONAL, CONTINGENT, AND DEFEASIBLE INTERESTS. — A contingent claim to property which is a mere expectancy or possibility, dependent on an event which may never happen, so that the insolvent, at the time of the adjudication, had no interest which he could assign or devise, or which could have descended from him, does not pass to his assignee, unless it is so provided by statute,⁶ or the expectancy is coupled with an interest, as in cases of contingent remainders, executory devises, etc.⁷ Conditional interests in property do not pass, if the condition is such that the party has no power of disposal,⁸ but the rule is otherwise as to property of which the bankrupt is

Reg. 46, 2 Fed. Cas. No. 1,178; *In re Steele*, 98 Fed. Rep. 78; *In re Dews*, 96 Fed. Rep. 181; *Belt v. Brooklyn L. Ins. Co.*, 12 Mo. App. 100.

Premiums Paid by Insured While Insolvent. — *In re Bear*, 1 Cent. L. J. 607, 11 Nat. Bankr. Reg. 46, 2 Fed. Cas. No. 1,178.

Statutory Allowance for Premiums. — *In re Sawyer*, 2 Hask. (U. S.) 153, 21 Fed. Cas. No. 12,393.

1. Claims Against United States. — *Phelps v. McDonald*, 99 U. S. 298, 16 Nat. Bankr. Reg. 217; *Bachman v. Lawson*, 109 U. S. 659; *Erwin v. U. S.*, 97 U. S. 392, 19 Nat. Bankr. Reg. 172; *Williams v. Heard*, 140 U. S. 529; *Clark v. Clark*, 17 How. (U. S.) 315; *Milnor v. Metz*, 16 Pet. (U. S.) 221; *U. S. v. Hunter*, 5 Mason (U. S.) 62, *affirmed* 5 Pet. (U. S.) 173; *Dockery v. U. S.*, 26 Ct. Cl. 148.

Claims under Treaties with Foreign Governments. — Where money has been paid to the United States by a foreign government to indemnify citizens of the United States for the capture or destruction of their property by persons for whose acts such foreign government is responsible, a claim against such fund for property destroyed or captured will pass to the assignee in insolvency or bankruptcy. *Comegys v. Vasse*, 1 Pet. (U. S.) 193, *reversing* 4 Wash. (U. S.) 570; *Clark v. Clark*, 17 How. (U. S.) 315.

Spoliation Claims. — *Comegys v. Vasse*, 1 Pet. (U. S.) 193, *reversing* 4 Wash. (U. S.) 570, 28 Fed. Cas. No. 16,893; *Williams v. Heard*, 140 U. S. 529, *reversing* *Heard v. Sturgis*, 146 Mass. 545, *overruling* *Kingsbury v. Mattocks*, 81 Me. 310; *Williamson v. Colcord*, 1 Hask. (U. S.) 620, 13 Nat. Bankr. Reg. 319, 30 Fed. Cas. No. 17,752; *Brooks v. Ahrens*, 68 Md. 212; *Leonard v. Nye*, 125 Mass. 455; *Taft v. Marsily*, 47 Hun (N. Y.) 175, 120 N. Y. 474.

A Claim for Sugar Bounty under the Act of Congress passes to the assignee in insolvency. *Calder v. Henderson*, 54 Fed. Rep. 802.

2. The Inability of the Claimant to Enforce Payment without the voluntary action of the government does not affect the right of the claimant or introduce any element of donation into the ultimate payment of the claim, because the payment of debts by a sovereign depends

wholly on his will and pleasure. *Phelps v. McDonald*, 99 U. S. 298, 19 Nat. Bankr. Reg. 187. To the same effect are *Erwin v. U. S.*, 97 U. S. 392, 19 Nat. Bankr. Reg. 172; *Bachman v. Lawson*, 109 U. S. 659.

3. Assignment of Claims Against United States Forbidden Before Allowance. — Rev. Stat. U. S., § 3477.

4. Statutory Prohibition Not Applicable to Assignments in Bankruptcy or Insolvency. — *Butler v. Goreley*, 146 U. S. 303, *affirming* *Goreley v. Butler*, 147 Mass. 8; *Bailey v. U. S.*, 109 U. S. 432; *St. Paul, etc., R. Co. v. U. S.*, 112 U. S. 733; *U. S. v. Gillis*, 95 U. S. 407; *Goodman v. Niblack*, 102 U. S. 556; *Erwin v. U. S.*, 97 U. S. 392, 19 Nat. Bankr. Reg. 172.

5. Donations and Gratuities. — *Dockery v. U. S.*, 26 Ct. Cl. 148; *Kingsbury v. Mattocks*, 81 Me. 310. See also *Brooks v. Ahrens*, 68 Md. 212; *Heard v. Sturgis*, 146 Mass. 546.

6. Contingent Claims. — *In re Banks*, 87 Md. 425; *Culbreth v. Banks*, 87 Md. 444.

Even under the *Maryland* statute of 1774 which passed to the assignee estates in possession, reversion, and remainder, it was intimated that a mere possibility of a reverter would not pass to a trustee in insolvency. *Kelso v. Stigar*, 75 Md. 398. See *Churchman's Estate*, 20 W. N. C. (Pa.) 367, 4 Pa. Co. Ct. 237.

Instances of Mere Expectancies are as follows:

An inchoate right of curtesy in a vested remainder. *Gibbins v. Eyden*, L. R. 7 Eq. 371.

The expectation of inheriting property from a person who is still living. *Moth v. Frome*, Ambl. 394; *Jones v. Roe*, 3 T. R. 88; *Carleton v. Leighton*, 3 Meriv. 667; *In re Inkson*, 21 Beav. 310; *Lyde v. Mynn*, 4 Sim. 505; *In re Duggan*, L. R. 8 Eq. 697; *Smith v. Baker*, 1 Y. & C. Ch. 223.

A possibility or expectation of becoming the appointee under a power of appointment. *In re Vizard*, L. R. 1 Ch. 588; *Lee v. Olding*, 2 Jur. N. S. 850; *Ex p. Dever*, 18 Q. B. D. 660.

7. Possibilities Coupled with Interest. — *Bodenhamer v. Welch*, 89 N. Car. 78.

8. Conditional Interests as Distinguished from Ownership. — *In re O'Dowd*, 8 Nat. Bankr. Reg. 451, 18 Fed. Cas. No. 10,439; *Ex p. Gen-*

the substantial owner, though he holds it subject to a condition which may affect his right to possession or enjoyment, or which may even eventually defeat his title.¹ The bankrupt may have acquired property subject to the condition that it should terminate on the event of his bankruptcy, so that it will not pass to his assignee or trustee, but such conditions are strictly construed.²

Property Obtained by the Fraud of the Bankrupt for which the other party may disaffirm the transaction and recover the property does not pass.³

h. TRUSTS AND EQUITABLE INTERESTS — (1) *Property Held in Trust by Debtor*. — Bankruptcy and insolvency laws contemplate only property in which debtors have a beneficial interest, and which is applicable to the payment of their debts. Therefore, property held by a debtor in trust for another does not pass to the debtor's assignee or trustee in bankruptcy or insolvency.⁴

eral Assignee, 1 N. Y. Leg. Obs. 131, 10 Fed. Cas. No. 5,306.

1. Ownership Subject to Condition. — *Atwood v. Kittell*, 9 Ben. (U. S.) 473, 17 Nat. Bankr. Reg. 406, 2 Fed. Cas. No. 641; *Tillinghast v. Bradford*, 5 R. I. 205.

In case of a conditional sale of chattels, it has been held that the buyer's assignee in bankruptcy may acquire the title by paying the balance due the seller. *In re Lyon*, 7 Nat. Bankr. Reg. 182, 15 Fed. Cas. No. 8,644. See also *In re Ohio Co-operative Shear Co.*, 2 Am. Bankr. Rep. 775; *In re Yukon Woolen Co.*, 2 Am. Bankr. Rep. 805; *In re Bozeman*, 2 Am. Bankr. Rep. 809. Compare *In re Pusey*, 6 Nat. Bankr. Reg. 40, 20 Fed. Cas. No. 11,477.

Property in the possession of the seller thereof under an agreement with the buyer that the rent shall be applied to the reduction of the purchase money, passes to the buyer's assignee in bankruptcy. *Hall v. Scovel*, 10 Nat. Bankr. Reg. 295, 11 Fed. Cas. No. 5,945.

The fee simple title to land subject to the public easement of a highway is "property" which vests in the assignee. *Kinzie v. Winston*, 4 Nat. Bankr. Reg. 84, 14 Fed. Cas. No. 7,835, affirmed in (1870) 56 Ill. 56.

In *Minot v. Tappan*, 122 Mass. 535, a testator devised a portion of his estate in trust for the benefit of his son G. for life, directing the trustees, in default of issue of G., to convey and transfer the property so held in trust "to my heirs at law." G. died leaving no issue, and another son of the testator was adjudged a bankrupt and died after the testator's death, but before the death of G. It was held that the bankrupt had a vested interest in the trust estate, which passed to his assignee in bankruptcy.

Memberships in Stock Exchanges and similar associations furnish another instance of conditional or qualified rights of property which pass to the owner's assignee or trustee in bankruptcy. See *supra*, this section, *Choses in Action* — *Shares or Memberships in Corporations and Exchanges*.

2. Interests Defeasible on Bankruptcy. — *Roe v. Galliers*, 2 T. R. 133.

Conditions Operating by Way of Defeasance Strictly Construed. — *Lea v. Leggett*, 2 Sim. 479; *Graves v. Dolphin*, 1 Sim. 66; *Ex p. Pixley*, 6 Mor. Bankr. Cas. 95; *Bird v. Johnson*, 18 Jur. 976; *Brandon v. Robinson*, 1 Rose 107.

3. Purchase Procured by Fraud and with Intent

Not to Pay. — *Montgomery v. Bucyrus Mach. Works*, 92 U. S. 257, 14 Nat. Bankr. Reg. 193; *Donaldson v. Farwell*, 93 U. S. 631, 15 Nat. Bankr. Reg. 277, affirming 5 B'ss. (U. S.) 451, 7 Fed. Cas. No. 3,983; *Bradley Fertilizer Co. v. Fuller*, 58 Vt. 315. Compare *In re Vogel*, 7 Blatchf. (U. S.) 18, 3 Nat. Bankr. Reg. 198, 28 Fed. Cas. No. 16,982, 2 Nat. Bankr. Reg. 427, 28 Fed. Cas. No. 16,983. And see generally the titles RESCISSION; SALES.

A Loan procured by a bankrupt through his agent by fraudulently concealing his insolvency, and with the intent of not repaying the lender, does not pass to the assignee in bankruptcy, where the money loaned never came into the bankrupt's possession. *Purviance v. Union Nat. Bank*, 8 Nat. Bankr. Reg. 447, 20 Fed. Cas. No. 11,475.

4. Assignee Not Entitled to Trust Property — *England*. — *Gardner v. Rowe*, 5 Russ. 258, affirming 2 Sim. & St. 346; *Winch v. Keeley*, 1 T. R. 619; *Copeman v. Gallant*, 1 P. Wms. 314; *Ex p. Gennys*, Mont. & M. 258; *Ex p. Painter*, 2 Deac. & C. 584; *Ludlow v. Browning*, 11 Mod. 138; *Carpenter v. Marnell*, 3 B. & P. 40; *Webster v. Scales*, 4 Dougl. 7, 26 E. C. L. 191; *Carvalho v. Burn*, 4 B. & Ad. 382, 24 E. C. L. 82; *Castelli v. Boddington*, 1 El. & Bl. 66, 72 E. C. L. 66; *Boddington v. Castelli*, 1 El. & Bl. 879, 72 E. C. L. 879; *Parnham v. Hurst*, 8 M. & W. 743; *Scott v. Surman*, Willes 402; *Gladstone v. Hadwen*, 1 M. & S. 526; *Houghton v. Koenig*, 25 L. J. C. Pl. 218.

United States. — *Hosmer v. Jewett*, 6 Ben. (U. S.) 208, 12 Fed. Cas. No. 6,713; *In re Anderson*, 2 Hughes (U. S.) 378, 9 Nat. Bankr. Reg. 360, 1 Fed. Cas. No. 351; *In re Anderson*, 23 Fed. Rep. 482; *In re Campbell*, 3 Hughes (U. S.) 276, 17 Nat. Bankr. Reg. 4, 4 Fed. Cas. No. 2,348; *Ex p. Hobbs*, 2 Lowell (U. S.) 491, 14 Nat. Bankr. Reg. 495, 12 Fed. Cas. No. 6,549; *Goddard v. Weaver*, 1 Woods (U. S.) 257, 6 Nat. Bankr. Reg. 440, 10 Fed. Cas. No. 5,495; *Safford v. Burgess*, 16 Nat. Bankr. Reg. 402, 21 Fed. Cas. No. 12,213.

Connecticut. — *Vail's Appeal*, 37 Conn. 185. *Massachusetts*. — *Low v. Welch*, 139 Mass. 33; *Audenried v. Betteley*, 5 Allen (Mass.) 382, 81 Am. Dec. 755; *Chace v. Chapin*, 130 Mass. 128; *Holmes v. Winchester*, 133 Mass. 140; *Sibley v. Quinsigamond Nat. Bank*, 133 Mass. 515.

New York. — *Kip v. New York Bank*, 10 Johns. (N. Y.) 63; *Ontario Bank v. Mumford*, 2 Barb. Ch. (N. Y.) 596.

though the trust is implied and no declaration of trust has been recorded.¹ But if the trust was a secret and fraudulent one, the trustee's assignee in bankruptcy is entitled to the property so held.²

In the Case of Money Held in Trust for another, the rule is that if it is ear-marked or separately kept and retained as a trust fund, it will not pass to the trustee's assignee in bankruptcy or insolvency. But an amount of money due from the bankrupt or insolvent, as trustee, and which could not be distinguished from any other moneys in his possession or under his control, or which was only due from him because he had used trust funds for his own purposes or otherwise had misapplied them, cannot be considered as property held by him in trust.³ The general estate of an insolvent trustee will, however, pass to his assignee in insolvency or bankruptcy, subject to a lien in favor of the *cestui que trust*, where the insolvent has misappropriated the trust funds or property, or has so commingled the same with his own that separation and identification are no longer possible, if it appears that such trust funds or property form a part of the insolvent's general estate,⁴ and the burden of proving this fact is on the *cestui que trust*.⁵

A Factor or Commission Merchant or Other Agent who has only a special property in the goods of his principal is a trustee in respect to such goods, and therefore on his insolvency or bankruptcy, goods remaining in his hands, proceeds of goods which can be identified, debts due him for goods sold on credit, and

Pennsylvania. — Sharp v. Philadelphia Warehouse Co., 14 Phila. (Pa.) 419, 37 Leg. Int. (Pa.) 85; Merrick's Estate, 5 W. & S. (Pa.) 9.

Compare Carr v. Gale, 3 Woodb. & M. (U. S.) 38, 5 Fed. Cas. No. 2,435, holding that the trust property passes into the custody of the assignee to be held by him until a new trustee is appointed.

Rescission of Sale for Fraud. — Where a sale of goods is induced by the fraud of one of the buyers, the seller may, as against the buyer's assignee in bankruptcy, rescind the sale and recover possession of the goods, if he can identify them. *Montgomery v. Bucyrus Mach. Works*, 92 U. S. 257, 14 Nat. Bankr. Reg. 193; *Donaldson v. Farwell*, 93 U. S. 631, 15 Nat. Bankr. Reg. 277.

A Note Taken by a Guardian who was indebted to his ward's estate, payable to himself as guardian, but in settlement of an individual debt, will nevertheless pass to his assignee in bankruptcy, where the probate court, in settling his account as guardian, disallowed the note as a credit, or as belonging to the ward's estate. *Beeson v. Shively*, 28 Kan. 574.

A Note Taken by a Husband for a Debt Due His Wife for the rent of a house owned by her will not pass to the husband's assignee in bankruptcy, and the question whether the house was fraudulently conveyed to the wife cannot be determined on an application by the assignee to compel the delivery to him of such note. *In re Westervelt*, 3 N. J. L. J. 279, 29 Fed. Cas. No. 17,445a.

Goods Stored with a person who afterwards becomes insolvent do not pass to the syndic, though they were included in the surrender. *Rose v. Smith*, 20 La. Ann. 218.

Land Conveyed by Unrecorded Deed. — An assignee does not take land which the debtor had conveyed by an unrecorded deed to a *bona fide* purchaser for value. *Smythe v. Sprague*, 149 Mass. 310.

1. Implied Trusts. — *Low v. Welch*, 139 Mass.

33. See also the title IMPLIED TRUSTS, vol. 15, p. 1119.

2. Secret and Fraudulent Trusts. — *Cooper v. De Tastet*, 2 Moo. & S. 714, 28 E. C. L. 301; *Carr v. Gale*, 3 Woodb. & M. (U. S.) 38, 5 Fed. Cas. No. 2,435.

3. Rules to Trust Funds Stated. — *Hosmer v. Jewett*, 6 Ben. (U. S.) 208, 12 Fed. Cas. No. 6,713. See also *Bush v. Moore*, 133 Mass. 198; *Vanlieu v. Disborough*, 15 N. J. L. 343.

4. Right of Cestui Que Trust to Lien on General Estate. — *Morrison v. Lincoln Sav. Bank, etc.*, Co., 57 Neb. 225; *State v. Bank of Commerce*, 54 Neb. 725; *Cavin v. Gleason*, 105 N. Y. 256; *Nonotuck Silk Co. v. Flanders*, 87 Wis. 237. As to the right to follow trust funds, see generally the title TRUSTS AND TRUSTEES. For *English* authorities on this point see *Ex p. Sayers*, 5 Ves. Jr. 169; *Taylor v. Plumer*, 3 M. & S. 562; *Clayton's Case*, 1 Meriv. 572; *Ex p. Brown*, 8 Mor. Bankr. Cas. 86; *Ex p. Manchester Bank*, 8 Mor. Bankr. Cas. 69; *Whitecomb v. Jacob*, 1 Salk. 161; *Scott v. Surman*, Willes 400; *Mace v. Cadell*, 1 Cowp. 232; *Ex p. Cooke*, 4 Ch. D. 123; *In re West of England, etc.*, Dist. Bank, 11 Ch. D. 772; *In re Hallett*, 13 Ch. D. 696; *In re Hallett*, (1894) 2 Q. B. 237; *Harris v. Truman*, 9 Q. B. D. 264; *Brown v. Adams*, L. R. 4 Ch. 764; *Pennell v. Deffell*, 23 L. J. Ch. 115; *Frith v. Cartland*, 31 L. J. Ch. 301; *Ex p. Grainger*, 24 L. T. N. S. 334; *Ex p. Hardcastle*, 44 L. T. N. S. 523; *Gibert v. Gonard*, 52 L. T. N. S. 54; *Ex p. Rankart*, 52 L. T. N. S. 630.

The Converse of the proposition stated in the text is that if the trust funds are actually traced out of the insolvent trustee's hands and are shown to have been dissipated by him, then the *cestui que trust* is not entitled to any lien on the trustee's general estate. *State v. Bank of Commerce*, 54 Neb. 725.

5. Burden of Proof. — *Morrison v. Lincoln Sav. Bank, etc.*, Co., 57 Neb. 225.

Presumptions. — When a trustee wrongfully

securities taken by him for the price, do not pass to his assignee in insolvency or bankruptcy, but remain the property of the principal.¹

A Banker, as respects general deposits, does not hold the funds deposited as a trustee, but becomes an ordinary debtor of the depositor.² If, however, a deposit is made for a particular purpose, the rule is different. In such case the fund remains the property of the depositor, and does not pass to the banker's trustee in bankruptcy.³ In case of a deposit, for collection, of bills not due, the banker is the agent of the depositor, as long as such bills remain uncollected, and they do not pass to the banker's trustee in bankruptcy.⁴

A Partner in Possession of Partnership Assets is a trustee for the partnership creditors, and if he becomes a bankrupt such assets do not pass to his assignee.⁵

A Vendor in an Executory Contract to Convey Land holds the legal title in trust for the vendee, but he has a beneficial interest in it until the price is paid, and therefore on his bankruptcy such interest passes to his assignee.⁶

(2) *Property Held in Trust for Debtor*. — The general rule is that property to which a debtor is beneficially entitled is assets in bankruptcy or insolvency, though the legal title is held by a third person,⁷ but the terms of the instrument creating the trust may preclude any interest from passing to the beneficiary's assignee in bankruptcy.⁸

(3) *Equities and Rights of Redemption*. — Equities and rights of redemption are property, and pass to the assignee or trustee in bankruptcy of the owner,⁹

commingles trust money with his own and makes payments from the common fund, it will be presumed that he paid out his own money and not the trust money. *State v. Bank of Commerce*, 54 Neb. 725.

1. **Factors, Commission Merchants, etc.** — *England*. — *Mace v. Cadell*, 1 Cowp. 232; *Godfrey v. Furzo*, 3 P. Wms. 185; *Whitfield v. Brand*, 16 M. & W. 282; *Zinck v. Walker*, 2 W. Bl. 1154; *Hollingworth v. Tooke*, 2 H. Bl. 501; *Scott v. Surman*, Willes 400; *In re Hallett*, 13 Ch. D. 696.

United States. — *Hourquebie v. Girard*, 2 Wash. (U. S.) 212; *Thompson v. Perkins*, 3 Mason (U. S.) 232; *Veil v. Mitchel*, 4 Wash. (U. S.) 105; *London, etc., Bank v. Parke, etc.*, *Machinery Co.*, 64 Fed. Rep. 687; *In re Coan, etc.*, *Carriage Mfg. Co.*, 6 Biss. (U. S.) 315, 12 Nat. Bankr. Reg. 203, 5 Fed. Cas. No. 2,915.

Illinois. — *Doran v. Hodson*, 43 Ill. App. 411.

Kentucky. — *Fahnestock v. Bailey*, 3 Met. (Ky.) 48, 77 Am. Dec. 161.

Louisiana. — *Ward v. Brandt*, 11 Martin (La.) 331, 13 Am. Dec. 352.

Massachusetts. — *Denston v. Perkins*, 2 Pick. (Mass.) 86; *Chesterfield Mfg. Co. v. Dehon*, 5 Pick. (Mass.) 7, 16 Am. Dec. 367; *Goodenow v. Tyler*, 7 Mass. 36, 5 Am. Dec. 22; *Kelly v. Bowman*, 12 Pick. (Mass.) 383; *Beckwith v. Sibley*, 11 Pick. (Mass.) 482; *Merrill v. Norfolk Bank*, 19 Pick. (Mass.) 32; *Rhoades v. Blackiston*, 106 Mass. 334, 8 Am. Rep. 332.

New York. — *Bertha Zinc, etc., Co. v. Clute*, (C. Pl. Gen. T.) 7 Misc. (N. Y.) 123; *Rabel v. Griffin*, 12 Daly (N. Y.) 241; *Merrill v. Thomas*, 7 Daly (N. Y.) 393; *Franklyn v. Sprague*, 10 Hun (N. Y.) 589; *Kip v. State Bank*, 10 Johns. (N. Y.) 63; *Duguid v. Edwards*, 50 Barb. (N. Y.) 290; *Converseville Co. v. Chambersburg Woolen Co.*, 14 Hun (N. Y.) 609; *Hutchinson v. Reed*, 1 Hoffm. (N. Y.) 316.

Pennsylvania. — *Messier v. Amery*, 1 Yeates (Pa.) 533, 1 Am. Dec. 316; *Price v. Ralston*, 2 Dall. (Pa.) 60, 1 Am. Dec. 260,

2. **Bankers Not Trustees as to General Deposits.**

— *Ex p. Sargeant*, 1 Rose 153; *In re Madison Bank*, 5 Biss. (U. S.) 515, 9 Nat. Bankr. Reg. 184, 2 Fed. Cas. No. 890; *Phelan v. Iron Mt. Bank*, 4 Dill. (U. S.) 88, 16 Nat. Bankr. Reg. 308, 19 Fed. Cas. No. 11,069. And see generally the title BANKS AND BANKING, vol. 3, p. 787.

3. **Rule as to Special Deposits.** — *Parke v. Eliason*, 1 East 544; *Thompson v. Giles*, 2 B. & C. 422, 9 E. C. L. 127.

4. **Deposits for Collection.** — *Giles v. Perkins*, 9 East 12; *Ex p. Barkworth*, 27 L. J. Bankr. 5; *Ex p. Twogood*, 19 Ves. Jr. 229; *Ex p. Pease*, 19 Ves. Jr. 25; *Ex p. Stannard*, 10 Mor. Bankr. Cas. 193; *Matter of Havens*, 8 Ben. (U. S.) 309, 11 Fed. Cas. No. 6,230.

5. **Partner in Possession of Partnership Assets.** — *Jones v. Newsom*, 7 Biss. (U. S.) 321, 13 Fed. Cas. No. 7,484.

6. **Vendor in Executory Contract to Convey Land.** — *Swepson v. Rouse*, 65 N. Car. 34, 6 Am. Rep. 735.

7. **Property Held in Trust for Debtor.** — *Carr v. Hilton*, 1 Curt. (U. S.) 230, 5 Fed. Cas. No. 2,436; *Sanford v. Lackland*, 2 Dill. (U. S.) 6, 21 Fed. Cas. No. 13,312; *Nutter v. Wheeler*, 2 Lowell (U. S.) 346, 18 Fed. Cas. No. 10,384; *In re Long*, 7 Phila. (Pa.) 578, 26 Leg. Int. (Pa.) 349, 15 Fed. Cas. No. 8,477; *Dixon v. Dixon*, 81 N. Car. 323; *Smith v. Proffitt*, 82 Va. 832.

8. **Assignee Precluded by Terms of Trust.** — *Nichols v. Eaton*, 3 Cliff. (U. S.) 595, 18 Fed. Cas. No. 10,241, *affirmed* 91 U. S. 716, 13 Nat. Bankr. Reg. 421; *Durant v. Massachusetts Hospital L. Ins. Co.*, 2 Lowell (U. S.) 575, 16 Nat. Bankr. Reg. 324, 8 Fed. Cas. No. 4,188; *Billings v. Marsh*, 153 Mass. 311, 25 Am. St. Rep. 635. See also *supra*, this section, *Conditional, Contingent, and Defeasible Interests*.

9. **Equities and Rights of Redemption** — *Alabama*. — *Robinson v. Denny*, 57 Ala. 492.

Illinois. — *Foraast v. Hyman*, 138 Ill. 423, *affirming* 37 Ill. App. 636.

as does also property subject to liens and incumbrances.¹

i. **UNDIVIDED INTERESTS** — (1) *Partnership Property*. — In case a member of a partnership is adjudged a bankrupt or insolvent, his interest in the firm passes to the trustee or assignee, the same as other property in which he has an undivided interest,² that is, the trustee or assignee becomes a tenant in common with the solvent partners,³ and is entitled to share the surplus of the partnership property remaining after payment of the partnership debts;⁴ but it is generally held that he does not acquire the right to deal with the joint property.⁵

(2) *Undivided Interests in Real Estate*. — An undivided interest in real estate passes to the owner's assignee or trustee in bankruptcy.⁶

j. **PROPERTY TRANSFERRED BY DEBTOR** — (1) *In General*. — Where a debtor transfers property before bankruptcy proceedings are commenced, and there is no fraud in the transaction, such property cannot pass to the assignee or trustee, though the deed, when the transfer was in that form, has not been recorded.⁷

Maryland. — *Grove v. Rentch*, 26 Md. 367.

Massachusetts. — *Moors v. Albro*, 120 Mass. 9; *Gardner v. Hooper*, 3 Gray (Mass.) 398.

New York. — *Winslow v. Clark*, 47 N. Y. 261.

Tennessee. — *Pillow v. Langtree*, 5 Humph. (Tenn.) 389; *Toombs v. Palmer*, 4 Heisk. (Tenn.) 331.

And see generally the title **EQUITY OF REDEMPTION**, vol. II, p. 205.

When the Time to Redeem Has Expired the owner has no interest which will pass to his assignee or trustee. *Chicago, etc., R. Co. v. Watson*, 113 Ill. 195.

1. **Encumbered Property**. — *Hunter v. Hays*, 7 Biss. (U. S.) 362, 12 Fed. Cas. No. 6,906; *In re Bennett*, 2 Hughes (U. S.) 156, 12 Nat. Bankr. Reg. 257, 3 Fed. Cas. No. 1,313; *Lyll v. Miller*, 6 McLean (U. S.) 482, 15 Fed. Cas. No. 8,613; *Conrad v. Prieur*, 5 Rob. (La.) 49; *Crocker v. Hopps*, 78 Md. 260; *Buschman v. Hanna*, 72 Md. 1; *McMaster v. Campbell*, 41 Mich. 513; *Omwake v. Jackson*, 5 Ohio N. P. 119, 7 Ohio Dec. 238; *McMillan v. Love*, 72 N. Car. 18. See also *Brunswick-Balke-Collender Co. v. Herrick*, 63 Vt. 286. *Compare Webre v. Beltran*, 47 La. Ann. 195; *Pindell v. Vimont*, 14 B. Mon. (Ky.) 322.

2. **Interests in Partnerships** — *England*. — *Barker v. Goodair*, 11 Ves. Jr. 78; *Burdon v. Dean*, 2 Ves. Jr. 607; *Jewson v. Moulson*, 2 Atk. 420; *Jacobson v. Williams*, 1 P. Wms. 382; *Bosvil v. Brander*, 1 P. Wms. 458.

Canada. — *Hamilton v. Roy*, 1 Montreal Leg. N. 592.

United States. — *Parker v. Muggridge*, 2 Story (U. S.) 334; *Harrison v. Sterry*, 5 Cranch (U. S.) 289; *Ayer v. Brastow*, 5 Law Rep. 498, 2 Fed. Cas. No. 682; *McLean v. Johnson*, 3 McLean (U. S.) 202, 16 Fed. Cas. No. 8,883; *In re Farmer*, 18 Nat. Bankr. Reg. 207, 8 Fed. Cas. No. 4,650; *In re Tomes*, 19 Nat. Bankr. Reg. 36, 24 Fed. Cas. No. 14,084; *In re Montgomery*, 3 Ben. (U. S.) 567, 3 Nat. Bankr. Reg. 429, 17 Fed. Cas. No. 9,727.

Arkansas. — *Peel v. Ringgold*, 6 Ark. 546.

Georgia. — *Jenkins v. Atwater*, 61 Ga. 291.

Massachusetts. — *Judd v. Gibbs*, 3 Gray (Mass.) 539; *Jones v. Dexter*, 125 Mass. 469.

New York. — *Murray v. Murray*, 5 Johns. Ch. (N. Y.) 60; *Mumford v. Murray*, 1 Paige (N. Y.) 620; *Smith v. Kane*, 2 Paige (N. Y.)

303; *Van Epps v. Van Deusen*, 4 Paige (N. Y.) 64, 25 Am. Dec. 516.

Separate Assignments by Partners of all their property, made to the same assignee, convey to the assignee their partnership property. *Boughton v. Crosby*, 47 Conn. 577.

Where a Surviving Partner Is Adjudged Insolvent the firm assets pass to his trustee. *Pinckney v. Lanahan*, 62 Md. 447. But see *McCandless v. Hadden*, 9 B. Mon. (Ky.) 186.

Dormant Partner. — In *Talcott v. Dudley*, 5 Ill. 427, it was held that the assignee in bankruptcy of a dormant partner is not entitled to the possession of the partnership effects, as against the attaching creditors of the firm.

Where All the Partners Are Adjudged Insolvent the assignee takes both the individual property and the firm property, under the *Massachusetts* statute. *Jaquith v. Fuller*, 167 Mass. 123.

3. **Assignee or Trustee Becomes Tenant in Common with Solvent Partners**. — *Ex p. Norcross*, 1 N. Y. Leg. Obs. 100, 18 Fed. Cas. No. 10,293; *Forsaith v. Merritt*, 1 Lowell (U. S.) 336, 3 Nat. Bankr. Reg. 48, 9 Fed. Cas. No. 4,946; *Wilkins v. Davis*, 2 Lowell (U. S.) 511, 15 Nat. Bankr. Reg. 60, 29 Fed. Cas. No. 17,664; *McNutt v. King*, 59 Ala. 597; *Murray v. Murray*, 5 Johns. Ch. (N. Y.) 60; *Daugherty v. Strauss*, 1 Tex. App. Civ. Cas., § 892.

4. **Only Share in Surplus Passes**. — *Parker v. Muggridge*, 2 Story (U. S.) 334, 18 Fed. Cas. No. 10,743; *Russell v. Cole*, 167 Mass. 6, 57 Am. St. Rep. 432.

5. **Assignee of One Partner Not Entitled to Deal with Joint Property**. — *Matter of Shepard*, 3 Ben. (U. S.) 347, 3 Nat. Bankr. Reg. 172, 21 Fed. Cas. No. 12,754; *In re Winkens*, 2 Nat. Bankr. Reg. 349, 30 Fed. Cas. No. 17,875; *Hudgins v. Lane*, 2 Hughes (U. S.) 361, 11 Nat. Bankr. Reg. 462, 12 Fed. Cas. No. 6,827; *Crompton v. Konkling*, 9 Ben. (U. S.) 225, 6 Fed. Cas. No. 3,407; *Wright v. Nostrand*, 94 N. Y. 31. See *contra*, *In re Shanahan*, 6 Biss. (U. S.) 39, 21 Fed. Cas. No. 12,701; *Wilkins v. Davis*, 2 Lowell (U. S.) 511, 15 Nat. Bankr. Reg. 60, 29 Fed. Cas. No. 17,664.

6. **Undivided Interests in Real Estate**. — *Ford v. Belmont*, 35 N. Y. Super. Ct. 135; *Smith v. Scholtz*, 68 N. Y. 41.

7. **Property Transferred Before Bankruptcy** — *United States*. — *Laughlin v. Caiumet, etc.*,

(2) *Fraudulent Conveyances*. — The insolvency and bankruptcy laws give to the assignee or trustee the right to sue to set aside conveyances made by the debtor in fraud of his creditors, and vest in him the title to the property so recovered, in order that it may be applied to the claims of creditors.¹

A Conveyance or Transfer in Contemplation of Insolvency, with a view to prevent the property from coming to the assignee, or to prevent it from being distributed under the insolvency laws, is a fraudulent conveyance, and the assignee may

Canal, etc., Co., 65 Fed. Rep. 441, 24 U. S. App. 573.

Illinois. — Hardin v. Osborne, 94 Ill. 571.

Maine. — Goss v. Coffin, 66 Me. 432, 22 Am. Rep. 585.

Massachusetts. — Bourne v. Cabot, 3 Met. (Mass.) 305; Butler v. Breck, 7 Met. (Mass.) 164, 39 Am. Dec. 768; Fogg v. Willcutt, 1 Cush. (Mass.) 300; Morton v. Austin, 12 Cush. (Mass.) 389.

New York. — Muir v. Schenck, 3 Hill (N. Y.) 228; Ontario Bank v. Mumford, 2 Barb. Ch. (N. Y.) 596; Hopkins v. Banks, 7 Cow. (N. Y.) 650; Hasford v. Nichols, 1 Paige (N. Y.) 220; Scheitlin v. Stone, 43 Barb. (N. Y.) 634.

Virginia. — McAden v. Keen, 30 Gratt. (Va.) 400.

The Mere Fact of Insolvency, not known at the time of the conveyance, is not material. Metropolitan Nat. Bank v. Rogers, 53 Fed. Rep. 776, 3 U. S. App. 406, affirming 47 Fed. Rep. 148.

Failure to Record a Chattel Mortgage or Take Possession under It renders it void as to the trustee, if, by the state law, it is void as to creditors. *In re Leigh*, 2 Am. Bankr. Rep. 606; Dole v. Bodman, 3 Met. (Mass.) 130.

A Check paid by the bank in the ordinary course of business is good as against the assignee of the drawer. Cushman v. Libbey, 15 Gray (Mass.) 358.

1. Assignees in Insolvency May Avoid Fraudulent Conveyances — *England*. — Holmes v. Penny, 3 Kay & J. 90.

Canada. — Rickaby v. Bell, 2 Can. Sup. Ct. 560.

United States. — Trimble v. Woodhead, 102 U. S. 647; Glenn v. Langdon, 98 U. S. 20, 19 Am. Bankr. Reg. 24; *In re Lowe*, 19 Fed. Rep. 58; Crooks v. Stuart, 7 Fed. Rep. 800; *In re Taylor*, 95 Fed. Rep. 956; Matter of Meyers, 2 Ben. (U. S.) 424, 1 Nat. Bankr. Reg. 581; Bradshaw v. Klein, 2 Biss. (U. S.) 20, 1 Nat. Bankr. Reg. 542; *In re Gurney*, 7 Biss. (U. S.) 414, 15 Nat. Bankr. Reg. 373; Cady v. Whaling, 7 Biss. (U. S.) 430; Carr v. Hilton, 1 Curt. (U. S.) 230; Pratt v. Curtis, 2 Lowell (U. S.) 87, 6 Nat. Bankr. Reg. 130; Nicholas v. Murray, 5 Sawy. (U. S.) 320, 18 Nat. Bankr. Reg. 469; *In re McNamara*, 2 Am. Bankr. Reg. 566.

California. — Ruggles v. Cannedy, (Cal. 1898) 53 Pac. Rep. 911; Salisbury v. Burr, 114 Cal. 451.

Connecticut. — Greenthal v. Lincoln, 67 Conn. 372, 68 Conn. 384; Hayden v. Allyn, 55 Conn. 280; Filley v. King, 49 Conn. 211; Crosswell v. Allis, 25 Conn. 301; Robertson v. Todd, 31 Conn. 555.

Hawaii. — Green v. Asiona, 6 Hawaii 233.

Kentucky. — Shackelford v. Collier, 6 Bush (Ky.) 149; Edwards v. Coleman, 2 Bibb (Ky.) 204.

Louisiana. — Chapoton v. Her Creditors, 44 La. Ann. 350.

Maine. — Stuart v. Redman, 89 Me. 435; Simpson v. Warren, 55 Me. 18.

Maryland. — Vogler v. Rosenthal, 85 Md. 37, 60 Am. St. Rep. 298; Preston v. Horwitz, 85 Md. 164; Manning v. Carruthers, 83 Md. 1; Lynch v. Roberts, 57 Md. 150; Waters v. Dashiell, 1 Md. 455; Atkinson v. Phillips, 1 Md. Ch. 507.

Massachusetts. — Day v. Cooley, 118 Mass. 524; Bartholomew v. McKinstry, 2 Allen (Mass.) 448; Hubbell v. Currier, 10 Allen (Mass.) 333; Lynde v. McGregor, 13 Allen (Mass.) 172.

Michigan. — McMaster v. Campbell, 41 Mich. 513.

Minnesota. — Williamson v. Hatch, 55 Minn. 344; Gallagher v. Rosenfeld, 47 Minn. 507; Greaves v. Neal, 57 Fed. Rep. 816, construing the Minnesota statute.

Mississippi. — Allen v. Montgomery, 48 Miss. 101.

New Jersey. — Pillsbury v. Kington, 33 N. J. Eq. 287, 36 Am. Rep. 556.

New York. — Dewey v. Moyer, 72 N. Y. 70; Southard v. Benner, 72 N. Y. 424; Kendall v. Mellen, 59 Hun (N. Y.) 623, 13 N. Y. Supp. 207; Swift v. Hart, 35 Hun (N. Y.) 128; Bates v. Bradley, 24 Hun (N. Y.) 85; Goodwin v. Sharkey, (C. Pl. Spec. T.) 5 Abb. Pr. N. S. (N. Y.) 64. Compare Bishop v. Halsey, (N. Y. Super. Ct. Spec. T.) 3 Abb. Pr. (N. Y.) 400.

North Carolina. — Guthrie v. Bacon, 107 N. Car. 337.

Pennsylvania. — Englebert v. Blanlot, 2 Whart. (Pa.) 240; Thomas v. Phillips, 9 Pa. St. 355.

Compare Reavis v. Garner, 12 Ala. 661.

A Conveyance May Be Constructively Fraudulent, under the insolvency law, because it was made within a limited time before the insolvency occurred. Anstedt v. Bentley, 61 Wis. 629. See also the insolvency laws of the several states.

But such constructive fraud is purged, where the purchase money is paid, before insolvency proceedings are commenced, to a creditor of the insolvent who had no notice of the fraud. Enright v. Amsden, 70 Vt. 183.

If the Transfer Was Made Before the Passage of the Insolvency Law, no right passes to the assignee. Abbey v. Commercial Bank, 34 Miss. 571, 69 Am. Dec. 401.

The Fact that a Deed Was Without Consideration does not give the grantor's assignee in insolvency the right to impeach it, if the grantor had no creditors when he made the conveyance and there is no evidence of fraud. Babcock v. Chase, 111 Cal. 351.

As to voluntary conveyances generally, see the title FRAUDULENT SALES AND CONVEYANCES, vol. 14, p. 300 *et seq.*

recover the property or its value from the transferee, if he (the transferee) knew, or had reasonable cause to believe, that the transferor was insolvent or in contemplation of insolvency.¹ It is *prima facie* evidence of such cause of belief that a sale or other transfer was not made in the ordinary course of the business of the debtor.²

(3) *Assignments for Benefit of Creditors.* — Under the former bankruptcy laws of the *United States* an assignment for the benefit of creditors was invalid as against the assignor's assignee in bankruptcy appointed within a limited time after the making of such assignment, and he was entitled to recover the property so assigned.³ Though it has been held that the assignment is void,⁴ there have been numerous decisions to the effect that it is only voidable, where bankruptcy proceedings are commenced within the time limited.⁵ The

1. Conveyances, etc., in Contemplation of Insolvency. — *McClellan v. Chipman*, 164 U. S. 347, *affirming* 159 Mass. 363; *Cunningham v. Seavey*, 171 Mass. 341; *Steel Edge Stamping, etc., Co. v. Manchester Sav. Bank*, 163 Mass. 252.

Payment of Full Value by the Purchaser is immaterial, if he knew that his vendor was endeavoring to evade the provisions of the insolvency law. *Tapscott v. Lyon*, 103 Cal. 297.

2. Cause of Belief — Sale, etc., Not in Ordinary Course of Business. — *McClellan v. Chipman*, 164 U. S. 347, *affirming* 159 Mass. 363; *Tuttle v. Truax*, 1 Nat. Bankr. Reg. 601, 24 Fed. Cas. No. 14,277; *In re Dean*, 2 Nat. Bankr. Reg. 89, 7 Fed. Cas. No. 3,700; *North v. House*, 6 Nat. Bankr. Reg. 365, 18 Fed. Cas. No. 10,310; *Matthews v. Chaboya*, 111 Cal. 435; *Chevalier v. Commins*, 106 Cal. 580; *Tapscott v. Lyon*, 103 Cal. 297; *Godfrey v. Miller*, 80 Cal. 420; *Ohleyer v. Bunce*, 65 Cal. 544; *Washburn v. Huntington*, 78 Cal. 573.

3. Assignments for Benefit of Creditors — United States. — *Barton v. Tower*, 1 Pa. L. J. 209, 2 Fed. Cas. No. 1,085; *McLean v. Johnson*, 3 McLean (U. S.) 202, 16 Fed. Cas. No. 8,883; *McLean v. Meline*, 3 McLean (U. S.) 199, 16 Fed. Cas. No. 8,890; *Windsor v. Whiting*, 10 Hunt. Mer. Mag. 175, 30 Fed. Cas. No. 17,865; *Hobson v. Markson*, 1 Dill. (U. S.) 421, 12 Fed. Cas. No. 6,555; *Barnevelt v. Jones*, 14 Nat. Bankr. Reg. 278, 2 Fed. Cas. No. 1,027; *Globe Ins. Co. v. Cleveland Ins. Co.*, 14 Nat. Bankr. Reg. 311, 10 Fed. Cas. No. 5,486; *Macdonald v. Moore*, 8 Ben. (U. S.) 579, 15 Nat. Bankr. Reg. 26, 16 Fed. Cas. No. 8,763; *In re Temple*, 4 Sawy. (U. S.) 92, 17 Nat. Bankr. Reg. 345, 23 Fed. Cas. No. 13,825; *Matter of Beisenthal*, 14 Blatchf. (U. S.) 146, 15 Nat. Bankr. Reg. 228, 3 Fed. Cas. No. 1,236; *Harding v. Crosby*, 17 Blatchf. (U. S.) 348, 11 Fed. Cas. No. 6,050; *Platt v. Preston*, 19 Nat. Bankr. Reg. 241, 19 Fed. Cas. No. 11,219; *In re Kraft*, 4 Fed. Rep. 523; *Wald v. Wehl*, 6 Fed. Rep. 163; *Jackson v. McCulloch*, 1 Woods (U. S.) 433, 13 Nat. Bankr. Reg. 283, 13 Fed. Cas. No. 7,140; *Stobough v. Mills*, 8 Nat. Bankr. Reg. 361, 23 Fed. Cas. No. 13,461; *In re Beadle*, 5 Sawy. (U. S.) 351, 2 Fed. Cas. No. 1,155; *In re Broome*, 3 Nat. Bankr. Reg. 441, 4 Fed. Cas. No. 1,967; *In re Meyer*, 2 Nat. Bankr. Reg. 422, 17 Fed. Cas. No. 9,515; *In re Stubbs*, 4 Nat. Bankr. Reg. 376, 23 Fed. Cas. No. 13,557; *Matter of Moses*, 1 Fed. Rep. 845.

Alabama. — *Ashley v. Robinson*, 29 Ala. 112, 65 Am. Dec. 387.

Massachusetts. — *Bartlett v. Bramhall*, 3 Gray (Mass.) 257.

New York. — *Freeman v. Deming*, 3 Sandf. Ch. (N. Y.) 327.

Pennsylvania. — *Cornwell's Appeal*, 7 W. & S. (Pa.) 305.

See *contra*, *Anonymous*, 1 Pa. L. J. 323, 1 Pa. L. J. Rep. 121, 1 Fed. Cas. No. 467; *Sedgwick v. Place*, 1 Nat. Bankr. Reg. 673, 21 Fed. Cas. No. 12,622; *Farrin v. Crawford*, 2 Nat. Bankr. Reg. 602, 8 Fed. Cas. No. 4,686; *In re Kintzing*, 3 Nat. Bankr. Reg. 217, 14 Fed. Cas. No. 7,833; *Langley v. Perry*, 2 Nat. Bankr. Reg. 596, 14 Fed. Cas. No. 8,067; *Barnes v. Rettew*, 8 Phila. (Pa.) 133, 28 Leg. Int. (Pa.) 124, 2 Fed. Cas. No. 1,019; *In re Wells*, 1 Nat. Bankr. Reg. 171, 29 Fed. Cas. No. 17,387; *In re Marter*, 12 Nat. Bankr. Reg. 185, 16 Fed. Cas. No. 9,143; *Strong v. Carrier*, 17 Conn. 319; *Hawkins's Appeal*, 34 Conn. 548; *West v. His Creditors*, 8 Rob. (La.) 123; *Haas v. O'Brien*, 66 N. Y. 597, 1 Abb. N. Cas. (N. Y.) 173; *Boese v. King*, 78 N. Y. 471, *reversing* 17 Hun (N. Y.) 270.

4. Assignments Held Void Per Se. — *Bostwick v. Burnett*, 11 Hun (N. Y.) 301.

5. Assignments Held Merely Voidable — United States. — *Mayer v. Hellman*, 91 U. S. 496, 13 Nat. Bankr. Reg. 440; *In re Arledge*, 1 Nat. Bankr. Reg. 644, 1 Fed. Cas. No. 533; *In re Kimball*, 16 Nat. Bankr. Reg. 188, 14 Fed. Cas. No. 7,770; *Belden v. Smith*, 16 Nat. Bankr. Reg. 302, 3 Fed. Cas. No. 1,242; *Barnes v. Rettew*, 8 Phila. (Pa.) 133, 28 Leg. Int. (Pa.) 124, 2 Fed. Cas. No. 1,019; *Ostrander v. Meunch*, 12 Fed. Rep. 562.

Connecticut. — *Maltbie v. Hotchkiss*, 38 Conn. 80, 9 Am. Rep. 364, 5 Nat. Bankr. Reg. 485; *Geery's Appeal*, 43 Conn. 289, 21 Am. Rep. 653.

Massachusetts. — *Atkins v. Spear*, 8 Met. (Mass.) 499.

Michigan. — *Cook v. Rogers*, 31 Mich. 391, 13 Nat. Bankr. Reg. 97; *Mathews v. Stewart*, 44 Mich. 209.

Nevada. — *Sadler v. Immel*, 15 Nev. 265.

New York. — *Seaman v. Stoughton*, 3 Barb. Ch. (N. Y.) 344; *Thrasher v. Bentley*, 59 N. Y. 649, 1 Abb. N. Cas. (N. Y.) 39, *affirming* 2 Thomp. & C. (N. Y.) 309; *Williams v. Pitts*, (Supm. Ct. Eq. T.) 55 How. Pr. (N. Y.) 331; *Bostwick v. Burnett*, 74 N. Y. 317; *Von Hein v. Elkus*, 8 Hun (N. Y.) 516.

South Carolina. — *Israel v. Ayer*, 2 S. Car. 344.

An assignment cannot be avoided in part only. *Wehl v. Wald*, 3 Fed. Rep. 93.

present bankruptcy law provides that all assignments, etc., made by a bankrupt within four months before the filing of the petition, with the intent to hinder, delay, or defraud creditors, shall be "null and void," and that the property assigned shall pass to the trustee in bankruptcy.¹

(4) *Preferences — Time Limitation in the Statutes.* — A preference given by a bankrupt within a limited time before the filing of the petition in bankruptcy (three months in *England* and four months under the bankruptcy law of the *United States*) is void as to the trustee, and he may recover from the preferred creditor the property so received by him or its value.² Similar provisions are contained in the state insolvency laws, varying somewhat in the different states as to the period within which the preference must have been given.³

Void — Voidable. — But a provision in an insolvent or bankrupt law that a

1. **Assignments Void under Act of 1898.** — Act July 1, 1898 (30 U. S. Stat. at L. 544), § 67, par. c. Under this provision an assignment for the benefit of creditors, made within the time limited, is considered as having been made with intent to hinder, delay, and defraud creditors, whether it contains preferences or not, because its necessary effect is to withdraw the estate from the operation of the bankruptcy law. *In re Gutwillig*, 92 Fed. Rep. 337.

2. **Preferences — Recovery by Trustee — England.** — 46 & 47 Vict., c. 52, § 48; *Dutton v. Morrison*, 17 Ves. Jr. 109; *Lindon v. Sharp*, 6 M. & G. 895, 46 E. C. L. 895; *Worseley v. Demattos*, 1 Burr. 467; *Stewart v. Moody*, 1 C. M. & R. 777.

Canada. — *Brent v. Perry*, 7 U. C. Q. B. 24; *Adams v. McCall*, 25 U. C. Q. B. 219; *McGregor v. Hume*, 28 U. C. Q. B. 380; *Archibald v. Haldan*, 31 U. C. Q. B. 295; *Stevenson v. Canadian Bank of Commerce*, 23 Can. Sup. Ct. 530; *Coates v. Joslin*, 12 Grant Ch. (U. C.) 524; *Curtis v. Dale*, 2 Ch. Chamb. (Ont.) 184; *McWhirter v. Thorne*, 19 U. C. C. P. 302.

United States. — Act July 1, 1898 (30 U. S. Stat. at L. 544), § 60, par. b; *Merchants' Nat. Bank v. Cook*, 95 U. S. 342, 16 Nat. Bankr. Rep. 391; *Cincinnati First Nat. Bank v. Cook*, 154 U. S. 628; *Carter v. Hobbs*, 94 Fed. Rep. 108; *Moore v. American L. & T. Co.*, 80 Fed. Rep. 49; *Knower v. Haines*, 31 Fed. Rep. 513; *Blakey v. Boonville Nat. Bank*, 95 Fed. Rep. 267; *In re Conhaim*, 97 Fed. Rep. 923; *In re Boston*, 98 Fed. Rep. 587; *Shutts v. Aurora First Nat. Bank*, 98 Fed. Rep. 705; *In re Eggert*, 98 Fed. Rep. 843.

Maryland. — *Jamison v. Chesnut*, 8 Md. 34; *Westminster Bank v. Whyte*, 3 Md. Ch. 508; *Manro v. Gittings*, 1 Har. & J. (Md.) 492; *Harding v. Stevenson*, 6 Har. & J. (Md.) 264; *Hickley v. Farmers, etc., Bank*, 5 Gill & J. (Md.) 377; *Dulaney v. Hoffman*, 7 Gill & J. (Md.) 170; *Powles v. Dilley*, 9 Gill (Md.) 222; *Cole v. Albers*, 1 Gill (Md.) 412; *Syester v. Brewer*, 27 Md. 288.

Massachusetts. — *Penniman v. Cole*, 8 Met. (Mass.) 496; *Holbrook v. Jackson*, 7 Cush. (Mass.) 136; *Beals v. Clark*, 13 Gray (Mass.) 18; *Coburn v. Proctor*, 15 Gray (Mass.) 38.

New York. — *Crooks v. People's Nat. Bank*, 46 N. Y. App. Div. 335, reversing 29 Misc. (N. Y.) 30.

Vermont. — *Hazen v. Lyndonville Nat. Bank*, 70 Vt. 543.

Money Paid to a Creditor for the purpose of preferring him may be recovered from such creditor by the debtor's assignee in bank-

ruptcy. *West Philadelphia Bank v. Dickson*, 95 U. S. 180, 17 Nat. Bankr. Reg. 482.

What Constitutes a Preference has been considered in another connection. See *supra*, this title, *Acts of Bankruptcy or Insolvency — Preference of Creditors*.

3. **Preferences Forbidden by State Insolvency Laws — California.** — *Riego v. Foster*, 125 Cal. 178; *Smith v. Fratt*, (Cal. 1894) 37 Pac. Rep. 1033; *Hass v. Whittier*, 87 Cal. 613, 97 Cal. 411; *Godfrey v. Miller*, 80 Cal. 420; *Bernheim v. Christal*, 76 Cal. 569.

Connecticut. — *Hayden v. Allyn*, 55 Conn. 280; *Hall v. Gaylor*, 37 Conn. 550; *Bloodgood v. Beecher*, 35 Conn. 469; *Quinebaug Bank v. Brewster*, 30 Conn. 559.

Kentucky. — *Simmons Hardware Co. v. Whittaker*, (Ky. 1896) 34 S. W. Rep. 1086; *King v. Moody*, 79 Ky. 63; *Southworth v. Casey*, 78 Ky. 395.

Louisiana. — *Prevost v. Walther*, 48 La. Ann. 227.

Maine. — *Stuart v. Redman*, 89 Me. 435; *Mathews v. Riggs*, 80 Me. 107; *King v. Storer*, 75 Me. 62; *Merrill v. McLaughlin*, 75 Me. 64.

Maryland. — *Vogler v. Rosenthal*, 85 Md. 37, 60 Am. St. Rep. 298; *Willison v. Frostburg First Nat. Bank*, 80 Md. 196; *Pfaff v. Prag*, 79 Md. 369; *Riley v. Carter*, 76 Md. 581, 35 Am. St. Rep. 443; *Baker v. Kunkel*, 70 Md. 392; *Dumler v. Bergmann*, (Md. 1894) 29 Atl. Rep. 826; *Brown v. Smart*, 69 Md. 320, affirmed 145 U. S. 454; *Ensor v. Keech*, 64 Md. 378.

Massachusetts. — *Cunningham v. Seavey*, 171 Mass. 341; *Hall v. Haskell*, 169 Mass. 291; *Weston v. Jordan*, 168 Mass. 401; *Chipman v. McClellan*, 159 Mass. 363, affirmed 164 U. S. 347; *Forbes v. Howe*, 102 Mass. 427, 3 Am. Rep. 475; *Simpson v. Carleton*, 1 Allen (Mass.) 109, 79 Am. Dec. 707; *Mitchell v. Black*, 6 Gray (Mass.) 100; *Blodgett v. Hildreth*, 11 Cush. (Mass.) 311.

Minnesota. — *Cumbe v. Ueland*, 72 Minn. 453; *Penney v. Haugan*, 61 Minn. 279; *In re Kahn*, 55 Minn. 509; *Thompson v. Johnson*, 55 Minn. 515; *Hawkes v. Fraser*, 52 Minn. 201; *Dow v. Sutphin*, 47 Minn. 479; *Thomas Mfg. Co. v. Foote*, 46 Minn. 240; *Merrill v. Ressler*, 37 Minn. 82, 5 Am. St. Rep. 822; *Bliss v. Doty*, 36 Minn. 168; *Corliss v. Jewett*, 36 Minn. 364; *Matter of Gazett*, 35 Minn. 532; *Weston v. Loyhed*, 30 Minn. 221; *Moore v. American L. & T. Co.*, 80 Fed. Rep. 49, construing the *Minnesota* statute.

Rhode Island. — *Colt v. Sears Commercial Co.*, 20 R. I. 64, 323; *Market Nat. Bank v. Heintzeman*, 15 R. I. 431.

preferential conveyance made in fraud of the statute shall be void is to be construed as meaning simply that it is voidable only in favor of proceedings under and in aid of the law. A creditor who is not a party to the insolvency proceedings, but is claiming the property by virtue of an attachment or judgment against the insolvent debtor, can claim no benefit from this provision.⁴

The Term "Creditor" is used in the statutes in a large sense, and means one who has a right to require the fulfilment of an obligation or contract.²

Intent of Debtor. — The rule as to the materiality of the debtor's intent in regard to acts which operate as preferences is generally the same whether the validity of the transaction, or its effect as an act of bankruptcy, is the matter in question.³ If nothing has been done or omitted by the debtor with such intent, where the intent is material, a creditor cannot be deprived of the benefit of any measures that he may have taken to obtain satisfaction of his claim, though he knew that the debtor was insolvent.⁴

Creditor's Knowledge as to Circumstances and Intent of Debtor. — Under some of the statutes, the assignee can recover money or property paid or transferred to a creditor by the debtor only when the creditor knew or had reasonable cause to believe that the debtor was insolvent or in contemplation of insolvency, and that he intended to create a preference.⁵ Other statutes do not require such

South Carolina. — *Wagener v. Pape*, 46 S. Car. 245.

Tennessee. — *Toof v. Miller*, 73 Miss. 756, reciting the *Tennessee* statute.

Vermont. — *Lewis v. Burlington Sav. Bank*, 61 Vt. 626; *Bartlett v. Walker*, 65 Vt. 594; *Gilbert v. Vail*, 60 Vt. 261; *Witters v. Sowles*, 32 Fed. Rep. 762, 33 Fed. Rep. 542, and *Knower v. Haines*, 31 Fed. Rep. 513, reciting the *Vermont* statute. See also *Desany v. Thorp*, 70 Vt. 31; *Enright v. Amsden*, 70 Vt. 183.

Wisconsin. — *Barnes v. National Bank*, 97 Wis. 16; *McCaul v. Thayer*, 70 Wis. 138; *Second Ward Sav. Bank v. Schranck*, 97 Wis. 250; *In re Ellis*, 97 Wis. 88.

Payment of Money. — It has been held that money paid by the debtor, with intent to prefer, cannot be recovered back by his assignee, under the *Massachusetts* statute, though the creditor, when he received the money, also purchased goods of the debtor, knowing him to be insolvent. *Wall v. Lakin*, 13 Met. (Mass.) 167.

As to payments as constituting preferences, see *supra*, this title, *Acts of Bankruptcy or Insolvency* — *Preference of Creditors* — *What Constitutes Preference* — *Payment of Money to Creditor*.

1. Preferences Impeachable Only in Proceedings under Insolvency and Bankruptcy Law. — *Haugan v. Sunwall*, 60 Minn. 367; *Smith v. Brainerd*, 37 Minn. 479; *Berry v. O'Connor*, 33 Minn. 29; *Smith v. Deidrick*, 30 Minn. 60; *Perkins v. Hutchinson*, 17 R. I. 450; *Smith v. Wilson*, 1 Tex. Civ. App. 115.

A Preference Is Not Void, but only voidable at the instance of the assignee. *Colt v. Sears Commercial Co.*, 20 R. I. 64, explaining *Hamilton v. Colt*, 14 R. I. 209.

2. Creditor Defined. — *Mohr v. Minnesota Elevator Co.*, 40 Minn. 343. See also CREDITOR, vol. 8, p. 238.

The Holder of a Warehouse Receipt is a creditor of the warehouseman, within the spirit and meaning of the insolvency law of *Minnesota*. *Daniels v. Palmer*, 41 Minn. 116.

A Guardian Who Has Misappropriated His Ward's Money is an ordinary debtor of the ward within the insolvency laws relating to preferences. *Bush v. Moore*, 133 Mass. 198.

Sureties Are Creditors of their Principal within the meaning of the insolvency laws, and therefore a mortgage given by the principal in contemplation of insolvency, for the purpose of securing the sureties, is an unlawful preference. *Thompson v. Heffner*, 11 Bush (Ky.) 353. And see *Abbott v. Pomfret*, 1 Bing. N. Cas. 462, 27 E. C. L. 459. See also CREDITOR defined, vol. 8, pp. 243-245.

3. Intent of Debtor. — *Compare* Act July 1, 1898 (30 U. S. Stat. at L. 544), § 60, par. a, b, and § 67, par. c, with § 3, par. a; and see the various state insolvency laws.

As to the effect of a preference as an act of bankruptcy, see *supra*, this title, *Acts of Bankruptcy or Insolvency* — *Preference of Creditors*.

4. Assignment of Claim to Nonresident. — In *Proctor v. National Bank of Republic*, 152 Mass. 223, it was held that where a resident creditor, before the debtor was adjudged insolvent, transferred his claim to a nonresident, the assignee in insolvency could not recover from him the amount received therefor, though he made the transfer with knowledge of the debtor's insolvency, and agreed to pay the transferee any deficit that might result on the collection of the claim, and also the expenses of collection.

A Judgment Recovered in Another State by a creditor who resides in the same state as the debtor is not affected by the insolvency law, in the absence of any co-operation by the debtor, and therefore the assignee cannot recover from such creditor the amount received by him on such judgment. *Thompson v. Tetley*, 68 N. H. 481.

5. Creditor's Knowledge or Belief as to Debtor's Insolvency and Intent to Prefer — *California.* — *Matthews v. Chaboya*, 111 Cal. 435.

Louisiana. — *Chapoton v. Her Creditors*, 45 La. Ann. 451.

Maine. — *Stuart v. Redman*, 89 Me. 435.

Massachusetts. — *Lothrop v. Highland Foundry Co.*, 128 Mass. 120.

knowledge or belief in order to avoid the transaction, but declare it void if only the debtor was insolvent or in contemplation of insolvency.¹

Reasonable Cause to Believe that a Debtor Is Insolvent or in contemplation of insolvency, or that he intends to give an unlawful preference, is held to consist of a knowledge of some fact or facts calculated to produce such a belief in the mind of an ordinarily intelligent man. It is not sufficient that there is a reasonable cause to suspect that such condition exists; "reasonable cause to believe" is not synonymous with "reasonable cause to suspect."²

Evidence. — As bearing on the question whether a creditor, at the time of a transfer or payment to him by his debtor, knew or had reasonable cause to believe that the debtor was insolvent or in contemplation of insolvency, it is competent to show his general reputation as to solvency or insolvency in the vicinity of the creditor's place of business.³ The circumstances of the creditor, or any use that he proposed to make of security given him by the debtor, are not admissible to show whether or not he had reasonable cause to believe that the debtor was insolvent.⁴

Knowledge of Agent Imputed to Principal. — It is not necessary that a creditor should, in all cases, personally know that his debtor is insolvent or in contemplation of insolvency. If the preference was given through an agent of the creditor, the agent's knowledge of the facts will be imputed to his principal.⁵

Liability of Agent. — If the transfer or payment was made to an agent of the creditor a recovery may be had against the agent, though his agency was known to the debtor at the time of the payment, and he had since turned the money over to his principal. This is in accordance with the rule that where an agent receives money which the law prohibits him from taking, it is no defense to a suit brought against him by the person entitled to recover the money that he has paid it over to his principal.⁶

Validity of Prohibition Against Preferences. — The validity of a provision of a state insolvency law prohibiting any transfer or payment by a debtor to a creditor for the purpose of giving him a preference over other creditors is not open to question, as far as resident creditors are concerned, because it is well settled that each state, so long as it does not impair the obligation of any contract, has the power, by general laws, to regulate the conveyance and disposition of all property, real or personal, within its limits and jurisdiction.⁷ In regard

Minnesota. — *Weston v. Sumner*, 31 Minn. 456; *Kells v. Webster*, 71 Minn. 276.

Vermont. — *Larkin v. Hapgood*, 56 Vt. 597.

Actual Fraud on the part of the transferee is not necessary to avoid a preferential transfer by an insolvent debtor. *Riego v. Foster*, 125 Cal. 178; *Matthews v. Chaboya*, 111 Cal. 435.

1. Creditor's Knowledge or Belief as to Insolvency Held Not Material. — Act July 1, 1898 (30 U. S. Stat. at L. 544), § 60, par. b; *Otis v. Hadley*, 112 Mass. 100 (decided under the bankruptcy law of 1867); *Castleberg v. Wheeler*, 68 Md. 279, and *Willison v. Frostburg First Nat. Bank*, 80 Md. 196 (decided under the insolvency law of *Maryland*).

2. What Constitutes Reasonable Cause to Believe Debtor to Be Insolvent. — *Grant v. National Bank*, 97 U. S. 80; *Barbour v. Priest*, 103 U. S. 293, 19 Nat. Bankr. Reg. 518; *Morey v. Milliken*, 86 Me. 464; *King v. Storer*, 75 Me. 62; *Merrill v. McLaughlin*, 75 Me. 64; *Holcombe v. Ehrmantraut*, 46 Minn. 397; *Dow v. Sutphin*, 47 Minn. 479.

Actual Belief is not necessary. It is sufficient if there was reasonable cause to believe that the debtor was insolvent. *Coburn v. Proctor*, 15 Gray (Mass.) 38; *Larkin v. Batchelder*, 56 Vt. 416.

A Creditor Is Chargeable with Knowledge of an Intent to Prefer where he knows that facts giving him reasonable cause to believe that his debtor is insolvent are also known by the debtor. *Cozzens v. Holt*, 136 Mass. 237.

3. General Reputation of Debtor as to Solvency or Insolvency. — *Larkin v. Hapgood*, 56 Vt. 597.

4. Circumstances of Creditor. — *Purinton v. Chamberlin*, 131 Mass. 589.

5. Knowledge of Agent Imputed to Principal. — *Witters v. Sowles*, 32 Fed. Rep. 762; *In re Meyer*, 2 Nat. Bankr. Reg. 422; *Vogle v. Lathrop*, 4 Nat. Bankr. Reg. 439; *North v. House*, 6 Nat. Bankr. Reg. 365; *Mayer v. Hermann*, 10 Blatchf. (U. S.) 256; *Markson v. Hobson*, 2 Dill. (U. S.) 327; *Mathews v. Riggs*, 80 Me. 107.

6. Transfer or Payment to Agent of Creditor. — *Perkins v. Smith*, 1 Wils. K. B. 328; *Larkin v. Hapgood*, 56 Vt. 597.

As to the liability of an agent for money illegally received on behalf of his principal, see the title *AGENCY*, vol. 1, p. 1131.

7. Validity of Prohibition Against Preferences—Resident Creditors. — *Brown v. Smart*, 145 U. S. 454, *affirming* 69 Md. 320.

to nonresident creditors, it has been argued that such a provision is invalid, but it was held to be a usual and valid exercise of the power of the state over all property within its jurisdiction as to all such conveyances, whether made to its own citizens or citizens of other states.¹

k. PROPERTY IN OTHER COUNTRIES OR STATES — (1) *Rule in England.* — **The Personal Estate** of a bankrupt, wherever situate, has always been held, under the English bankruptcy laws, to pass to the assignee or trustee in accordance with the rule that personalty follows the person of the owner, and is governed by the law of his domicile.²

Real Property, on the other hand, so far as it is situate in the Queen's dominions vests in the trustee,³ and though the present statute in terms includes real estate, "whether situate in England or elsewhere,"⁴ such provision is probably of no practical effect, because real estate is governed by the law of its situs, and there is no principle which would require the recognition by that law of the adjudication as affecting such property.⁵

(2) *Rule in United States.* — Under the National Bankruptcy Act, the purpose of which is to establish a uniform system of bankruptcies throughout the United States, the trustee takes all the property of the bankrupt, whether it is in the state of the bankrupt's domicile, or in other states,⁶ but it is held that his title does not extend to property in foreign countries,⁷ nor is the title of a foreign trustee or assignee recognized, either in the federal or state courts, so far as to affect the right of resident creditors to resort to the local assets, or to prevent the bankrupt from transferring them.⁸

Under the State Insolvency Laws the assignee or trustee takes only such property as has its situs within the jurisdiction of the court in which the proceeding is pending,⁹ unless the insolvent assigns to him assets which may be situate in

1. Prohibition Against Preferences Valid as to Nonresidents. — *Brown v. Smart*, 145 U. S. 454, affirming 69 Md. 320; *Macdonald v. Corunna First Nat. Bank*, 47 Minn. 67, 28 Am. St. Rep. 328.

2. Personalty Abroad — Rule in England. — *Scotland Bank v. Cuthbert*, 1 Rose 462; *Selkirk v. Davies*, 2 Rose 97. The present statute expressly includes personalty of all sorts, "whether situate in England or elsewhere," 46 & 47 Vict., c. 52, § 168.

3. Real Estate in Foreign Countries. — *Callender v. Colonial Secretary*, (1891) A. C. 460.

4. 46 & 47 Vict., c. 52, § 168.

5. Rule that Lex Loci Governs as to Realty. — See the title PRIVATE INTERNATIONAL LAW.

Even when the Land Is in the Colonies it is held that it will pass only subject to the laws thereof. *Ex p. Rogers*, 16 Ch. D. 665; *Callender v. Colonial Secretary*, (1891) A. C. 460.

Land in Canada does not pass to the assignee under proceedings had in the United States. *Macdonald v. Georgian Bay Lumber Co.*, 2 Can. Sup. Ct. 364.

6. All Property in United States Vests in Trustee under Federal Statute. — This necessarily follows from the purpose of the bankruptcy laws, as expressed in the Constitution, giving Congress control of the subject. And see section 70 of the Act of 1898, relating to the trustee's title.

7. Trustee under Federal Statute Not Entitled to Foreign Assets. — *Oakey v. Bennett*, 11 How. (U. S.) 33; *Phelps v. McDonald*, 16 Nat. Bankr. Reg. 217; *Barnett v. Pool*, 23 Tex. 517.

The Subsequent Annexation of the Foreign Country does not operate to pass property of the bankrupt therein. *Oakey v. Bennett*, 11 How. (U. S.) 33.

16 C. of L.—47

8. Title of Foreign Trustee Not Recognized in United States — United States. — *Harrison v. Sterry*, 5 Cranch (U. S.) 289; *Ogden v. Saunders*, 12 Wheat. (U. S.) 213.

Connecticut. — *Taylor v. Geary*, Kirby (Conn.) 313.

Maryland. — *Burk v. M'Clain*, 1 Har. & M. (Md.) 236; *Wallace v. Patterson*, 2 Har. & M. (Md.) 463.

Massachusetts. — *Blake v. Williams*, 6 Pick. (Mass.) 286, 17 Am. Dec. 372.

New York. — *Abraham v. Plestoro*, 3 Wend. (N. Y.) 538, 20 Am. Dec. 738, reversing 1 Paige (N. Y.) 236; *Matter of Waite*, 99 N. Y. 433; *Matter of Bristol*, (Supm. Ct.) 16 Abb. Pr. (N. Y.) 184.

North Carolina. — *McNeil v. Colquhoun*, 2 Hayw. (3 N. Car.) 24.

Pennsylvania. — *Milne v. Moreton*, 6 Binn. (Pa.) 353, 6 Am. Dec. 466.

South Carolina. — *Topham v. Chapman*, 1 Mill (S. Car.) 283, 12 Am. Dec. 627; *Robinson v. Crowder*, 4 McCord L. (S. Car.) 519, 17 Am. Dec. 762.

But see *Holmes v. Remsen*, 4 Johns. Ch. (N. Y.) 460, 8 Am. Dec. 581. Compare *Byrne v. Walker*, 7 S. & R. (Pa.) 483; *Devisme v. Martin*, Wythe (Va.) 133.

9. Only Local Assets Affected by State Insolvency Laws — United States. — *Betton v. Valentine*, 1 Curt. (U. S.) 168; *Security Trust Co. v. Dodd*, 173 U. S. 624.

Connecticut. — *Upton v. Hubbard*, 28 Conn. 274, 73 Am. Dec. 670.

Delaware. — *King v. Johnson*, 5 Harr. (Del.) 31.

Massachusetts. — *Osborn v. Adams*, 18 Pick. (Mass.) 245.

Michigan. — *Wood v. Parsons*, 27 Mich. 159.

Volume XVI.

other jurisdictions,¹ and even the title so acquired is subordinate to the claims of creditors in such other jurisdictions who have seized the property under attachments.²

1. PROPERTY ACQUIRED AFTER COMMENCEMENT OF PROCEEDINGS.— In England, all the property acquired by a bankrupt after the commencement of the proceedings and before a discharge, except wages or salary earned by him, passes to the assignee or trustee,³ but the right to such property remains in the bankrupt until his assignee or trustee interferes to claim it,⁴ and in the absence of such interference he may sue on any contract made by him,⁵ and may also, for a valuable consideration, transfer any of his after-acquired property so as to give a good and indefeasible title to the transferee.⁶ Property acquired after the discharge belongs to the bankrupt free from all the debts from which he was discharged.⁷

In the United States, the assignee or trustee does not take any property acquired by the bankrupt after the adjudication, but all such property belongs to the bankrupt, free from all provable debts, if he obtains a discharge.⁸ As to property acquired intermediate the filing of the petition in bankruptcy and the adjudication, it was held under the late statute (1867) that the title passed to the assignee;⁹ but the present law has been construed as giving the

Minnesota. — *Matter of Dalpay*, 41 Minn. 532, 16 Am. St. Rep. 729.

New Jersey. — *Hutcheson v. Peshine*, 16 N. J. Eq. 167.

New York. — *Hoyt v. Thompson*, 19 N. Y. 207; *Kelly v. Crapo*, 45 N. Y. 86, 6 Am. Rep. 35; *Mosselman v. Caen*, 34 Barb. (N. Y.) 66; *Raymond v. Johnson*, 11 Johns. (N. Y.) 488.

Ohio. — *Rogers v. Allen*, 3 Ohio 488.

Vermont. — *Fisk v. Brackett*, 32 Vt. 798, 78 Am. Dec. 612.

A Ship at Sea, which is registered in the state of the insolvent's domicile, is an asset there, and passes to his assignee in insolvency, though it is bound for a port in another state, where it is seized under attachment by creditors at such port. *Crapo v. Kelly*, 16 Wall. (U. S.) 610, reversing *Kelly v. Crapo*, 45 N. Y. 86, 6 Am. Rep. 35. But see *Wilson v. Matthews*, 32 Ala. 332; *Hoag v. Hunt*, 21 N. H. 106; *Hall v. Boardman*, 14 N. H. 38; *Smith v. Brown*, 43 N. H. 44.

1. Assignment of Foreign Assets. — *Lamb v. Fries*, 2 Pa. St. 83; *Hazen v. Lyndonville Nat. Bank*, 70 Vt. 543.

2. Assignment of Foreign Assets as Against Local Creditors. — *The Watchman, Ware* (U. S.) 232; *Felch v. Bugbee*, 48 Me. 9; *Beer v. Hooper*, 32 Miss. 246; *Dunlap v. Rogers*, 47 N. H. 281.

3. After-acquired Property Rule in England. — *Kitchen v. Barisch*, 7 East 53; *Wadling v. Oliphant*, 1 Q. B. D. 145, 45 L. J. Q. B. 173, 33 L. T. N. S. 837, 24 W. R. 246; *In re Dowling*, 46 L. J. Bankr. 74, 4 Ch. D. 689, 36 L. T. N. S. 117, 25 W. R. 515; *Ex p. Storks*, 3 Ves. & B. 105, 2 Rose 179; *Everett v. Backhouse*, 10 Ves. Jr. 94.

Wages or Salary earned by an undischarged bankrupt do not pass to his trustee. *In re Rogers*, (1894) 1 Q. B. 425; *Mercer v. Vans Colina*, 78 L. T. N. S. 21.

4. Failure of Trustee to Assert Claim. — *Ex p. Bolland*, 47 L. J. Bankr. 74, 9 Ch. D. 312, 38 L. T. N. S. 693, 26 W. R. 807; *Chambers v. Bernasconi*, 8 L. J. C. Pl. 159, 6 Bing. 501, 19 E. C. L. 149, 4 M. & P. 278; *Sample v. London, etc., R. Co.*, 2 Jur. 296; *Webb v. Fox*, 7 T. R. 391, 4 Rev. Rep. 472.

5. Right of Bankrupt to Sue. — *Hayllar v. Sherwood*, 2 N. & M. 401, 28 E. C. L. 364; *Engelback v. Nixon*, 14 L. J. C. Pl. 396, L. R. 10 C. P. 645, 33 L. T. N. S. 831; *Silk v. Osborn*, 1 Esp. 140; *Coles v. Barrow*, 4 Taunt. 754, 2 Rose 277, 14 Rev. Rep. 658; *Herbert v. Sayer*, 5 Q. B. 965, 48 E. C. L. 965, 8 Jur. 812; *Jameson v. Brick, etc., Co.*, 48 L. J. Q. B. 249, 4 Q. B. D. 208, 39 L. T. N. S. 594, 27 W. R. 221; *Cumming v. Roebuck*, Holt N. P. 172, 3 E. C. L. 75; *Webster v. Sales*, 4 Dougl. 7, 26 E. C. L. 191; *Cohen v. Mitchell*, 7 Mor. Bankr. Cas. 207.

Money Loaned by an undischarged bankrupt may be recovered by him, if his assignee does not interfere. *Evans v. Brown*, 1 Esp. 170; *Chippendale v. Tomlinson*, 7 East 57, note a, 4 Dougl. 318, 26 E. C. L. 380.

6. Right of Bankrupt to Make Transfers. — *Laroché v. Wakeman*, Peake N. P. (ed. 1795) 140; *In re Reed*, 45 L. J. Bankr. 120, 3 Ch. D. 123, 34 L. T. N. S. 664, 24 W. R. 904; *In re Cazneau*, 2 Jur. N. S. 157; *Kerakoose v. Brooks*, 3 L. T. N. S. 712.

Money Received by an Undischarged Bankrupt and Paid away for value cannot be followed by the trustee, though the person to whom the money was paid has notice of the bankruptcy. *Ex p. Dewhurst*, 41 L. J. Bankr. 18, L. R. 7 Ch. 185, 25 L. T. N. S. 731, 20 W. R. 172.

7. Property Acquired After Discharge. — *Moth v. Frome*, Ambl. 394; *Davis v. Shapley*, 1 B. & Ad. 54, 20 E. C. L. 344; *Barrow v. Poile*, 1 B. & Ad. 629, 20 E. C. L. 460; *In re Laforest*, 32 L. J. Bankr. 50, 9 Jur. N. S. 856, 8 L. T. N. S. 481, 11 W. R. 738; *In re Learmouth*, 14 W. R. 628; *Ebbs v. Boulmois*, 44 L. J. Ch. 691, L. R. 10 Ch. 479, 33 L. T. N. S. 342, 23 W. R. 820; *In re Bennett*, L. R. 10 Ch. 490, 32 L. T. N. S. 652, 23 W. R. 822, reversing 44 L. J. Ch. 244.

8. Property Acquired After Adjudication — Assignee or Trustee Not Entitled. — *Nichols v. Eaton*, 91 U. S. 716, 13 Nat. Bankr. Reg. 421; *Hall v. Gill*, 10 Gill & J. (Md.) 325; *Bennett v. Bailev*, 150 Mass. 257.

9. Acquisitions Intermediate Petition and Adjudication — Act 1867. — *Ex p. Newhall*, 2 Story (U. S.) 360, 18 Fed. Cas. No. 10,159.

trustee only such property as the bankrupt owned at the time the petition was filed.¹

m. EXEMPTIONS AND ALLOWANCES. — The English Statute allows the bankrupt absolute exemptions only to a very limited extent, namely, the tools of his trade, if any, and the necessary wearing apparel and bedding of himself, his wife and his children, the whole not to exceed twenty pounds in value.² If the bankrupt is an officer of the army or navy or is in the civil service of the crown, the trustee is entitled to receive so much of the pay of the bankrupt as the court, with the consent of the chief officer of the department under which the pay is enjoyed, may direct.³ If he is in the receipt of any salary or income otherwise than as aforesaid, or any half pay, or pension from the treasury, the court may order the whole, or any part, as it thinks just, to be paid to the trustee.⁴

In the United States, the practice of exempting a part of the debtor's property has been carried to a great extent. The present bankruptcy law allows the exemptions which are prescribed by the law of the debtor's domicile at the time of the filing of the petition in bankruptcy.⁵ The state insolvency laws generally allow the debtor the same exemptions as are provided in case of executions or other forced sales,⁶ and in some states the right of exemption

1. Rule under Act 1898. — *In re Harris*, 2 Am. Bankr. Rep. 359. But see *Re Smith*, 1 Nat. Bankr. N. 136.

2. Exemptions in England — Tools, Apparel, and Bedding. — 46 & 47 Vict., c. 52, § 44, par. (2).

3. Pay of Army or Navy Officers or Persons in Civil Service. — 46 & 47 Vict., c. 52, § 53, par. (1).

4. Salary, Income, or Pension. — 46 & 47 Vict., c. 52, § 53, par. (2).

A Voluntary Allowance made to the bankrupt is not within this provision of the statute, which applies only to payments to which he has a legal or equitable claim. *Ex p. Wicks*, 17 Ch. D. 70; *Ex p. Webber*, 18 Q. B. D. 111.

Pensions and Retired Pay. — *In re Saunders*, (1895) 2 Q. B. 424; *In re Ward*, (1897) 1 Q. B. 266; *Ex p. Huggins*, 21 Ch. D. 85; *Gibson v. East India Co.*, 7 Scott 74, 5 Bing. N. Cas. 262, 35 E. C. L. 112, 8 L. J. C. Pl. 193.

Salary or Income. — *Ex p. Brindle*, 4 Mor. Bankr. Cas. 104; *Ex p. Official Receiver*, 8 Mor. Bankr. Cas. 59; *In re Shine*, (1892) 1 Q. B. 522; *In re Rogers*, (1894) 1 Q. B. 425; *In re Graydon*, (1896) 1 Q. B. 417.

The terms "income" and "salary" do not include the prospective earnings of a professional man in the exercise of his profession, *Ex p. Benwell*, 14 Q. B. D. 301; or the wages of a working collier, *In re Jones*, (1891) 2 Q. B. 231.

5. Exemptions under United States Bankruptcy Law. — Act July 1, 1898 (30 U. S. Stat. at L. 544), § 6; *In re Coffman*, 93 Fed. Rep. 422; *In re Garden*, 93 Fed. Rep. 423; *In re Stevenson*, 93 Fed. Rep. 789; *In re Richard*, 94 Fed. Rep. 633; *In re Dawley*, 94 Fed. Rep. 795; *In re Grimes*, 94 Fed. Rep. 800; *In re Woodward*, 95 Fed. Rep. 260; *In re Hill*, 96 Fed. Rep. 185; *In re Lentz*, 97 Fed. Rep. 486; *In re Hoag*, 97 Fed. Rep. 543; *In re Jones*, 97 Fed. Rep. 773; *In re Buelow*, 98 Fed. Rep. 86; *In re Rennie*, 2 Am. Bankr. Rep. 182; *In re Overstreet*, 2 Am. Bankr. Rep. 486; *In re Nelson*, 2 Am. Bankr. Rep. 556; *In re Petersen*, 2 Am. Bankr. Rep. 630; *In re Thompson*, 23 Fed. Cas. No. 13,938; *In re Barrow*, 98 Fed. Rep. 582; *In re Pope*, 98 Fed. Rep. 722; *In re*

Booth's Estate, 98 Fed. Rep. 975; *In re Harrington*, 99 Fed. Rep. 390; *In re Bean*, 100 Fed. Rep. 262; *In re Duguid*, 100 Fed. Rep. 274; *In re Friedrich*, 100 Fed. Rep. 284; *In re Sisler*, 2 Am. Bankr. Rep. 760; *Williams v. Scott*, 122 N. Car. 545.

The Act of 1867, after specifying certain exemptions, further provided that the bankrupt should also be entitled to retain such property as was, by the law of the bankrupt's domicile, exempt from forced sale at the time the bankruptcy proceeding was commenced, not exceeding, however, the amount allowed by the law in force in such state in the year 1864. Act March 2, 1867 (14 U. S. Stat. at L. 517), § 14; *Rix v. Capitol Bank*, 2 Dill. (U. S.) 367; *In re Stevens*, 2 Biss. (U. S.) 373, 5 Nat. Bankr. Reg. 298; *In re Ellis*, 1 Nat. Bankr. Reg. 555, 8 Fed. Cas. No. 4,400; *In re Hambright*, 2 Nat. Bankr. Reg. 498; *In re Parker*, 5 Sawy. (U. S.) 58, 18 Nat. Bankr. Reg. 43; *In re Wyllie*, 2 Hughes (U. S.) 449, 30 Fed. Cas. No. 18,112; *In re Kean*, 2 Hughes (U. S.) 322, 8 Nat. Bankr. Reg. 367, 14 Fed. Cas. No. 7,630; *In re Everitt*, 9 Nat. Bankr. Reg. 90, 8 Fed. Cas. No. 4,579; *In re Jordan*, 8 Nat. Bankr. Reg. 180, 13 Fed. Cas. No. 7,514, 10 Nat. Bankr. Reg. 427, 13 Fed. Cas. No. 7,515; *In re Smith*, 8 Nat. Bankr. Reg. 401, 22 Fed. Cas. No. 12,986; *Robinson v. Wilson*, 15 Kan. 595, 22 Am. Rep. 272.

6. Exemptions under State Insolvency Laws — California. — *Dascey v. Harris*, 65 Cal. 357. Connecticut. — *Raymond's Appeal*, 28 Conn. 47. Georgia. — *Smith v. Rogers*, 16 Ga. 479. Louisiana. — *Bier v. His Creditors*, 15 La. Ann. 167.

Massachusetts. — *Copeland v. Sturtevant*, 156 Mass. 114; *Barton v. White*, 144 Mass. 281, 50 Am. Rep. 84; *Eager v. Taylor*, 9 Allen (Mass.) 156.

North Dakota. — *In re Kaeppler*, 7 N. Dak. 435.

Rhode Island. — *Keach's Petition*, 14 R. I. 571.

See also the various local statutes, and the title ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, vol. 3, p. 42.

is secured by constitutional provisions.¹ Questions relating to the persons entitled to exemptions, the property exempt, the enforcement and protection of the right, etc., are discussed in other parts of this work.²

3. Title of Assignee or Trustee — *a. QUANTITY OF TITLE.* — An assignee or trustee in insolvency or bankruptcy stands in the place of the debtor, as a general rule, taking such title only as the debtor had, and all equities that could have been enforced against him may be enforced against the assignee or trustee.³ Liens and incumbrances also, whether created by the debtor or obtained by creditors by process of law, are effectual as against the title of the assignee or trustee,⁴ unless they were given or obtained within such time before the insolvency or bankruptcy, or under such circumstances, as to be annulled by operation of law.⁵ In some jurisdictions, however, the assignee or trustee is clothed with much higher and more extensive rights than the debtor himself possessed, as where the statute provides that he shall take all

1. Constitutional Provisions as to Exemptions. — See the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 71; HOMESTEAD, vol. 15, p. 528.

2. See the titles EXEMPTIONS (FROM EXECUTION), vol. 12, p. 59; HOMESTEAD, vol. 15, p. 516.

3. Assignee Takes Title Subject to Equities Against Debtor — *England.* — *Lempriere v. Pasley*, 2 T. R. 485; *Belcher v. Oldfield*, 6 Bing. N. Cas. 102, 37 E. C. L. 299; *Brown v. Heathcote*, 1 Atk. 169; *Ex p. Coysegame*, 1 Atk. 192; *Hinton v. Hinton*, 2 Ves. 631; *Mitford v. Mitford*, 9 Ves. Jr. 100; *Ex p. Hanson*, 12 Ves. Jr. 349, 8 Rev. Rep. 335; *Ex p. Herbert*, 13 Ves. Jr. 185; *Whitworth v. Davis*, 1 Ves. & B. 517; *Grant v. Mills*, 2 Ves. & B. 309, 13 Rev. Rep. 101; *Saunders v. Leslie*, 2 Ball & B. 515; *Burn v. Carvalho*, 4 N. & M. 889, 30 E. C. L. 425, 1 Ad. & El. 843, 28 E. C. L. 226, *affirming Carvalho v. Burn*, 4 B. & Ad. 382, 24 E. C. L. 82, 1 N. & M. 700; *Harris v. Truman*, 51 L. J. Q. B. 338, 9 Q. B. D. 264, 46 L. T. N. S. 844, 30 W. R. 533; *Reg. v. Roberts*, 43 L. J. M. C. 17, L. R. 9 Q. B. 77, 29 L. T. N. S. 674, 22 W. R. 60, 12 Cox C. C. 574; *Ex p. Dressler*, 48 L. J. Bankr. 20, 9 Ch. D. 252, 39 L. T. N. S. 377, 27 W. R. 144; *Titterton v. Cooper*, 51 L. J. Q. B. 472, 9 Q. B. D. 473, 45 L. T. N. S. 870, 30 W. R. 866.

United States. — *Hauselt v. Harrison*, 105 U. S. 406; *Yeatman v. New Orleans Sav. Inst.*, 95 U. S. 764, 17 Nat. Bankr. Reg. 187; *Gibson v. Warden*, 14 Wall. (U. S.) 244; *Norton v. Hood*, 124 U. S. 20; *Mitchell v. Winslow*, 2 Story (U. S.) 630, 17 Fed. Cas. No. 9,673; *Ex p. Newhall*, 2 Story (U. S.) 360, 18 Fed. Cas. No. 10,159; *Fletcher v. Morey*, 2 Story (U. S.) 555, 9 Fed. Cas. No. 4,864; *Winsor v. McLellan*, 2 Story (U. S.) 492, 30 Fed. Cas. No. 17,887; *Winsor v. Kendall*, 3 Story (U. S.) 507, 30 Fed. Cas. No. 17,886; *Ex p. Rockford*, etc., R. Co., 1 Lowell (U. S.) 345, 3 Nat. Bankr. Reg. 50, 20 Fed. Cas. No. 11,078; *Ex p. Dalby*, 1 Lowell (U. S.) 431, 3 Nat. Bankr. Reg. 731, 6 Fed. Cas. No. 3,540; *Potter v. Coggeshall*, 4 Nat. Bankr. Reg. 73, 19 Fed. Cas. No. 11,322, *affirmed* *Holmes* (U. S.) 75, 6 Nat. Bankr. Reg. 10, 6 Fed. Cas. No. 2,953; *Williamson v. Colcord*, 1 Blask. (U. S.) 620, 13 Nat. Bankr. Reg. 319, 30 Fed. Cas. No. 17,752; *Mutlocks v. Baker*, 2 Fed. Rep. 455; *Taylor v. Robertson*, 21 Fed. Rep. 209; *In re Bozeman*, 2 Am. Bankr. Rep. 899.

California. — *Kirk v. Roberts*, (Cal. 1892) 31 Pac. Rep. 620.

Connecticut. — *White v. Griffing*, 44 Conn. 437; *Palmer v. Thayer*, 28 Conn. 237.

Illinois. — *Webber v. Clark*, 136 Ill. 256; *Catlin Coal Co. v. Lloyd*, 180 Ill. 398.

Kentucky. — *Exchange, etc., Bank v. Stone*, 80 Ky. 109.

Louisiana. — *Clarke v. Rosenda*, 5 Rob. (La.) 27; *Campbell v. Slidell*, 5 La. Ann. 274.

Maine. — *New Jert v. Fletcher*, 84 Me. 408; *Ballantyne v. Appleton*, 82 Me. 570; *Hutchinson v. Murchie*, 74 Me. 187; *Deering v. Cobb*, 74 Me. 332, 43 Am. Rep. 596; *Herrick v. Marshall*, 66 Me. 435.

Massachusetts. — *Kenney v. Ingalls*, 126 Mass. 488; *Chace v. Chapin*, 130 Mass. 128; *Audenried v. Beteley*, 5 Allen (Mass.) 382, 81 Am. Dec. 755; *Pratt v. Wheeler*, 6 Gray (Mass.) 520; *Clake v. M'not*, 4 Met. (Mass.) 346.

Michigan. — *Lockwood v. Noble*, 113 Mich. 418.

Mississippi. — *Abbey v. Commercial Bank*, 34 Miss. 571, 69 Am. Dec. 401; *Davis v. Lumpkin*, 57 Miss. 506.

New Hampshire. — *Ætna Ins. Co. v. Thompson*, 68 N. H. 20; *Adams v. Lee*, 64 N. H. 421.

New Jersey. — *Shaw v. Glen*, 37 N. J. Eq. 32.

New York. — *Sayles v. National Water Purifying Co.*, 16 N. Y. Supp. 555, 62 Hun (N. Y.) 618; *Mower v. Kip*, 2 Edw. (N. Y.) 165; *Kip v. Bank of New York*, 10 Johns. (N. Y.) 63.

Rhode Island. — *Wilson v. Esten*, 14 R. I. 621.

See also *Rumsey v. Town*, 20 Fed. Rep. 558; and *supra*, this section, *What Passes to Assignee or Trustee — Trusts and Equitable Interests.*

4. Liens Valid as Against Assignee or Trustee. — *In re Bozeman*, 2 Am. Bankr. Reg. 800; *Clason v. Morris*, 10 Johns. (N. Y.) 524. See also *supra*, this title, *Debts and Claims Against Estate — Priorities — In General.*

An Unrecorded Chattel Mortgage, if valid as between the parties, is valid as against the mortgagee's assignee in bankruptcy. *In re Ohio Co-operative Shear Co.*, 2 Am. Bankr. Rep. 778.

5. Liens Annulled by Operation of Law. — See *supra*, this title, *Operation and Effect of Insolvency and Bankruptcy Proceedings — Liens on Debtor's Property.*

the property of the debtor that might have been levied on under execution against the debtor.¹

b. WHEN TITLE VESTS. — Where the statute requires an assignment of the debtor's property, whether it is to be made by the debtor himself, or by the judge or some other officer, it is evident that the assignee acquires his title by virtue of the assignment. This was the principle of the late bankruptcy law of the *United States*,² and some of the state insolvency laws still embrace this feature.³ By the more recent bankruptcy laws, however, the assignment is dispensed with, and a trustee is appointed.⁴ Under these statutes, the title of the trustee vests at the time of his appointment,⁵ and relates back, in *England*, to the time of the commission of the act of bankruptcy on which the proceeding is founded,⁶ and in the *United States*, to the time of the adjudication.⁷ Under the late bankruptcy law of the *United States* (1867) the assignee's title related back to the time the petition in bankruptcy was filed,⁸ and it did also under the Act of 1841.⁹ The state insolvency laws vary somewhat in their provisions on this subject.¹⁰

c. HOW TITLE IS DIVESTED. — On the termination of a bankruptcy or insolvency proceeding and the discharge of the assignee or trustee, the title to the surplus, if any, remaining in his hands after the payment of debts and expenses, reverts in the debtor.¹¹ The title of the assignee or trustee is also

1. Rule that Assignee Takes All Property Subject to Execution Against Debtor. — *Clarke v. Minot*, 4 Met. (Mass.) 346; *Bingham v. Jordan*, 1 Allen (Mass.) 373; *Freeland v. Freeland*, 102 Mass. 477; *Collender Co. v. Marshall*, 57 Vt. 232. Compare *Mitchell v. Black*, 6 Gray (Mass.) 100.

In *Connecticut* it is held that the assignee represents the creditors, and therefore takes the absolute title to personal property in the possession of the insolvent under an unrecorded contract of conditional sale, though he had actual knowledge of such conditional sale before the assignment. *National Cash Register Co. v. Woodbury*, 70 Conn. 321; *In re Wilcox*, etc., Co., 70 Conn. 220.

Goods Bought by a Retail Trader on Condition that the property shall not vest in him until they are paid for, but with an understanding that they are to go into his store and be sold by him in the regular course of trade, will not pass to his assignee in insolvency, though the original vendor would be estopped to deny the title of those who might purchase portions of them of the retailer in the regular course of the business. *Rogers v. Whitehouse*, 71 Me. 222.

2. Title Acquired by Assignment. — Act March 2, 1867 (14 U. S. Stat. at L. 517), § 14.

Under this statute it was held that no title vested in the assignee until the assignment. *Hampton v. Rouse*, 22 Wall. (U. S.) 263. See also *Shipman v. Daubert*, 7 Mo. App. 576.

3. Assignments under State Laws. — In *Louisiana* the title of the syndic vests on the acceptance of the cession. *Bowles v. His Creditors*, 6 La. Ann. 680; *Herrick v. Conant*, 4 La. Ann. 276; *West v. His Creditors*, 4 La. Ann. 447; *McIntosh v. Merchants*, etc., Ins. Co., 16 La. Ann. 12; *Ventress v. His Creditors*, 20 La. Ann. 359.

And see the various local statutes.

4. See supra, this section, *Appointment and Tenure* — *Statutory Provisions*, note *Designation of Office*.

5. Trustee's Title Vests at Time of Appointment — *England*. — 16 & 17 Vict., c. 52, § 54, par. (2).

United States. — Act July 1, 1898 (30 U. S. Stat. at L. 544), § 70, par. a.

See also the various state insolvency laws.

6. Relation of Trustee's Title in England. — *Ex p. Learoyd*, 10 Ch. D. 3; *Ex p. Helder*, 24 Ch. D. 339; *Ex p. Edwards*, 13 Q. B. D. 747; *Ex p. Snowball*, L. R. 7 Ch. 534; *Ex p. Villars*, L. R. 9 Ch. 432; *Edwards v. Gabriel*, 31 L. J. Exch. 113; *Brittain v. Brown*, 24 L. T. N. S. 504; *King v. Leith*, 2 T. R. 141; *In re Pixley*, 8 Mor. Bankr. Cas. 127.

7. Relation of Trustee's Title in United States. — Act July 1, 1898 (30 U. S. Stat. at L. 544), § 70, par. a.

8. Relation of Assignee's Title under Act 1867. — *Morgan v. Campbell*, 22 Wall. (U. S.) 381. 11 Nat. Bankr. Reg. 529; *Matter of Dey*, 3 Ben. (U. S.) 450, 3 Nat. Bankr. Reg. 305, 7 Fed. Cas. No. 3,870; *In re Tift*, 19 Nat. Bankr. Reg. 201, 23 Fed. Cas. No. 14,034; *Sicard v. Buffalo*, etc., R. Co., 15 Blatchf. (U. S.) 525, 22 Fed. Cas. No. 12,831; *In re Pierson*, 19 Fed. Cas. No. 11,153; *Stuart v. Hines*, 33 Iowa 61; *Potter v. Martin*, (Mich. 1899) 81 N. W. Rep. 424; *Manwarring v. Kouns*, 35 Tex. 171.

9. Relation of Assignee's Title under Act 1841. — *McLean v. Rockey*, 3 McLean (U. S.) 235, 16 Fed. Cas. No. 8,891.

10. Relation of Title under State Insolvency Laws. — In *Connecticut* the trustee's title relates back to the time of the institution of the insolvency proceeding. *Adams v. Lewis*, 31 Conn. 501.

In *Massachusetts* the assignee's title vests as of the time of the first publication of notice. *Palmer v. Jordan*, 163 Mass. 350.

In *Vermont* his title relates to the time of filing the petition. *Goss v. Cardell*, 53 Vt. 447. See also the various local statutes.

11. Title Divested by Discharge of Assignee or Trustee. — *Frazier v. Desha*, (Ky. 1897) 40 S. W. Rep. 678; *Wilson v. Boylston*, 170 Mass. 9. See also *supra*, this title, *Operation and Effect of Insolvency and Bankruptcy Proceedings* — *Control of Property* — *Surplus Remaining After Termination of Proceeding*.

divested by a discontinuance of the proceeding,¹ or by a composition,² but not by the mere fact that the debtor fails to receive a discharge.³

4. Powers, Duties, and Liabilities — a. GENERAL PRINCIPLES — Power to Bind Estate. — The general rule is that the powers of the assignee or trustee are simply administrative in character,⁴ and, while he may incur personal liability, he cannot bind the estate by contract or otherwise so as to impose any liability on it,⁵ though in some jurisdictions he is authorized to accept leases held by the insolvent.⁶

Good Faith and Diligence. — An assignee or trustee is required to exercise good faith and reasonable diligence in the administration of his trust, and his responsibilities are measured accordingly.⁷

Joint Trustees. — Where there are joint trustees, the general rule is that they must unite in legal proceedings, but if one has an interest adverse to the estate, the other or others may act without him.⁸ And one cannot be bound

If a surplus remains in the hands of the syndic after paying all the debts scheduled, he is not bound to pay it over to the debtor, if new debts appear. *Gottschalk v. Creditors*, 12 La. Ann. 70.

1. Title Divested by Discontinuance. — *Warren v. Howe*, 44 Ill. App. 157.

2. Title Divested by Composition. — *Ligon v. Allen*, 56 Miss. 632. See also *infra*, this title, *Compositions*.

3. Title Not Divested by Failure to Receive Discharge. — *Traders' Bank v. Van Wagenen*, 2 Wash. 172.

4. Powers of Assignee or Trustee Administrative in Character. — *Nouvet v. Bollinger*, 15 La. Ann. 293.

5. No Authority to Bind Estate. — *Smith v. Goodman*, 43 Ill. App. 530; *Moran v. Risley*, (Marine Ct. Tr. T.) 1 City Ct. (N. Y.) 229.

Occupation of Leased Premises. — The assignee in insolvency of a tenant at will does not become liable for the use and occupation of the premises, merely because the goods of the insolvent were allowed to remain on the premises for two months and the assignee entered with workmen, who for several days were engaged in removing the goods. *Wales v. Chase*, 139 Mass. 538.

Torts of Assignee. — A bankrupt's estate is not liable for torts committed by the assignee. *Adams v. Meyers*, 1 Sawy. (U. S.) 306, 8 Nat. Bankr. Reg. 214, 1 Fed. Cas. No. 62.

Employment of Attorney. — An assignee in bankruptcy cannot employ an attorney on an agreement to give him a contingent fee without authority from the court. *In re Brinker*, 19 Nat. Bankr. Reg. 195, 4 Fed. Cas. No. 1,882.

Waiver of Rights. — Performance of conditions of an insurance policy cannot be waived by the insurance company's assignee in bankruptcy. *In re Firemen's Ins. Co.*, 3 Biss. (U. S.) 462, 8 Nat. Bankr. Reg. 123, 9 Fed. Cas. No. 4,706.

Liabilities of Assignees in General. — *Re Fortune*, 1 Lowell (U. S.) 306, 2 Nat. Bankr. Reg. 662, 9 Fed. Cas. No. 4,955; *Re Pierce*, 2 Lowell (U. S.) 343, 19 Fed. Cas. No. 11,140; *Matter of Bruce*, 9 Ben. (U. S.) 236, 16 Nat. Bankr. Reg. 318, 4 Fed. Cas. No. 2,045; *Gardner v. Cook*, 7 Nat. Bankr. Reg. 346, 9 Fed. Cas. No. 5,226; *In re Peabody*, 16 Nat. Bankr. Reg. 243, 9 Chicago Leg. N. 409, 19 Fed. Cas. No. 10,866; *In re Kelly*, 18 Fed. Rep. 528; *May v. New Orleans, etc.*, R. Co., 44 La. Ann. 444.

6. Acceptance of Leases. — *International Trust Co. v. Boardman*, 149 Mass. 158; *Bowditch v. Raymond*, 146 Mass. 100.

If the Assignee Accepts a Lease or Occupies the Premises he is liable therefor, but he will be allowed credit for the rent paid where he occupied the premises for the use of the estate. *In re Brown*, 4 Fed. Cas. No. 1,973a; *In re Appold*, 6 Phila. (Pa.) 469, 25 Leg. Int. (Pa.) 180, 1 Nat. Bankr. Reg. 621, 1 Fed. Cas. No. 499; *In re Rose*, 3 Nat. Bankr. Reg. 265, 20 Fed. Cas. No. 12,043; *In re Butler*, 6 Nat. Bankr. Reg. 501, 19 Pittsb. Leg. J. (Pa.) 146, 4 Fed. Cas. No. 2,236; *In re Walton*, 1 Nat. Bankr. Reg. 557, 29 Fed. Cas. No. 17,131; *In re Hamburger*, 12 Nat. Bankr. Reg. 277, 1 N. Y. Wkly. Dig. 53, 11 Fed. Cas. No. 5,975; *Matter of Fowler*, 8 Ben. (U. S.) 421, 9 Fed. Cas. No. 4,997; *In re Wheeler*, 18 Nat. Bankr. Reg. 385, 26 Pittsb. Leg. J. (Pa.) 84, 29 Fed. Cas. No. 17,490; *In re Ives*, 18 Nat. Bankr. Reg. 28, 13 Fed. Cas. No. 7,116; *Ex p. Faxon*, 1 Lowell (U. S.) 404, 8 Fed. Cas. No. 4,704; *In re Merrifield*, 3 Nat. Bankr. Reg. 98, 17 Fed. Cas. No. 9,465; *In re Dunham*, 7 Phila. (Pa.) 611, 8 Fed. Cas. No. 4,145; *Re Yeaton*, 1 Lowell (U. S.) 420, 30 Fed. Cas. No. 18,133; *Matter of McGrath*, 5 Ben. (U. S.) 183, 5 Nat. Bankr. Reg. 254, 16 Fed. Cas. No. 8,808; *Longstreth v. Pennock*, 7 Nat. Bankr. Reg. 449, 9 Phila. (Pa.) 394, 30 Leg. Int. (Pa.) 29, 15 Fed. Cas. No. 8,488; *In re Ten Eyck*, 7 Nat. Bankr. Reg. 26, 23 Fed. Cas. No. 13,829; *In re Webb*, 6 Nat. Bankr. Reg. 302, 29 Fed. Cas. No. 17,315; *In re Washburn*, 11 Nat. Bankr. Reg. 66, 29 Fed. Cas. No. 17,211; *Matter of Breck*, 8 Ben. (U. S.) 93, 12 Nat. Bankr. Reg. 215, 4 Fed. Cas. No. 1,822; *In re Hufnagel*, 12 Nat. Bankr. Reg. 554, 12 Fed. Cas. No. 6,837; *In re Commercial Bulletin Co.*, 2 Woods (U. S.) 220, 6 Fed. Cas. No. 3,060; *In re Hoagland*, 18 Nat. Bankr. Reg. 530, 12 Fed. Cas. No. 6,545; *In re Lucus Hart Mfg. Co.*, 17 Nat. Bankr. Reg. 459, 15 Fed. Cas. No. 8,592; *Matter of Metz*, 6 Ben. (U. S.) 571, 17 Fed. Cas. No. 9,509; *In re Secor*, 18 Fed. Rep. 319. See also *Bray v. Cobb*, 100 Fed. Rep. 270; *Hoyt v. Stoddard*, 2 Allen (Mass.) 442.

7. Good Faith and Ordinary Diligence Required. — *Manhattan Cloak, etc., Co. v. Dodge*, 120 Ind. 1; *Matter of Robbins*, 36 Minn. 66; *Torrance v. Chapman*, 6 L. C. Jur. 32.

8. Joint Trustees. — *Hoffman v. Armstrong*, (Md. 1899) 44 Atl. Rep. 1012.

by a contract made by the others.¹

Personal Liability to Creditors. — An assignee in bankruptcy is personally liable to creditors entitled to priority, if he pays other claims, leaving unpaid claims of the creditors entitled to priority,² or if he neglects to reserve funds to pay known and undetermined claims as required by the statute.³

b. COLLECTION OF ASSETS — (1) *In General.* — The first duty of the assignee or trustee is to collect and preserve the assets of the estate, whether they are in the hands of third persons or of the debtor himself.⁴ The authority vested in him for this purpose corresponds in extent with the duty. As the successor to the title of the debtor, the assignee or trustee may pursue all the remedies for the recovery of the assets of the estate that would have been available to the debtor himself.⁵ He also represents the creditors and may pursue any remedy that may be necessary to protect their interests, and there-

1. One Assignee Not Bound by Contract of Others. — *Blight v. Ashlev*, Pet. (C. C.) 15, 3 Fed. Cas. No. 1,541.

2. Personal Liability of Assignee for Claims Entitled to Priority. — *U. S. v. Murphy*, 15 Fed. Rep. 589; *U. S. v. Barnes*, 31 Fed. Rep. 705.

3. Failure to Reserve Funds for Undetermined Claims. — *Russell v. Phelps*, 42 Mich. 377.

4. Duty to Collect Assets Prescribed — *England*, — 46 & 47 Vict., c. 52, § 50.

Canada. — *Archibald v. Haldan*, 30 U. C. Q. B. 30; *Jameson v. Kerr*, 6 Ont. Pr. 3; *Smith v. Lines*, 1 Ch. Chamb. (Ont.) 398; *Simpson v. Newton*, 4 U. C. L. J. N. S. 46.

United States. — Act July 1, 1898 (30 U. S. Stat. at L. 544), § 47, par. a; *In re Mayer*, 98 Fed. Rep. 839; *Norcross v. Nathan*, 99 Fed. Rep. 414; *In re Endl*, 99 Fed. Rep. 915.

Ohio. — *Davis v. Coe*, 10 Ohio Cir. Dec. 264.

And see the various state insolvency laws.

Order to Pay Over Money or Deliver Property to Trustee. — The court of bankruptcy may order the bankrupt to pay over money or deliver property in his possession to the trustee and may enforce such order by a commitment for contempt. *In re McCormick*, 97 Fed. Rep. 566; *In re Schlesinger*, 97 Fed. Rep. 930; *In re Purvine*, 96 Fed. Rep. 192; *In re Dresser*, 3 Nat. Bankr. Reg. 557, 7 Fed. Cas. No. 4,077; *In re Ettinger*, 18 Nat. Bankr. Reg. 222, 8 Fed. Cas. No. 4,543; *In re How*, 18 Nat. Bankr. Reg. 565, 11 Chicago Leg. N. 141, 12 Fed. Cas. No. 6,747; *In re Peltasohn*, 4 Dill. (U. S.) 107, 16 Nat. Bankr. Reg. 265, 19 Fed. Cas. No. 10,912; *Brown v. Wygant*, 21 D. C. 16.

Authority to Take Possession of Property Wherever Found. — *In re Litchfield*, 13 Fed. Rep. 863.

The Referee may cite the bankrupt to show cause why property in his possession should not be delivered to the trustee, and may order him to make such delivery. *In re Oliver*, 2 Am. Bankr. Rep. 783, 96 Fed. Rep. 85; *In re Mayer*, 98 Fed. Rep. 839.

Recovery from Debtor by Action. — *Cady v. Leonard*, 81 Cal. 622; *Dunlap v. O'Conner*, 9 La. Ann. 558; *Lewis v. Fisk*, 6 Rob. (La.) 159.

Property Sold under Mortgage Without Leave of Court. — Where a mortgage is foreclosed without leave of the bankruptcy court, after the adjudication, the court may, on the application of the trustee, direct the restoration of such property to him. *In re Brooks*, 91 Fed. Rep. 508.

But Where Property Was in Possession of the Mortgagee when the bankruptcy proceeding was commenced, the bankruptcy court cannot, on a summary application, order him to deliver it to the trustee. *Yeatman v. Savings Inst.*, 95 U. S. 764; *In re Buntrock Clothing Co.*, 92 Fed. Rep. 886. See also *Heath v. Shaffer*, 93 Fed. Rep. 647.

Discounting Notes belonging to the estate is not proper, unless authorized by the court. *Nicholson v. Chapman*, 1 La. Ann. 222.

A Debt Due from the Assignee to the debtor must be accounted for at its face value and not merely for what it sells at public auction. *Benchley v. Chapin*, 10 Cush. (Mass.) 173.

Deposit of Funds. — The bankruptcy law of the *United States* requires the trustee to deposit the funds of the estate in such depositories as shall be designated by the court. Act July 1, 1898 (30 U. S. Stat. at L. 544), § 61; Act March 2, 1867 (14 U. S. Stat. at L. 517), § 17; State Nat. Bank v. Dodge, 124 U. S. 333.

As to the requirements of the state insolvency laws in this respect, see the various local statutes.

If the trustee fails to deposit funds as required by law, he is liable for the interest which the depository would have paid. *In re Newcomb*, 32 Fed. Rep. 826.

And if, without reasonable excuse, he retains money in his hands for a considerable time, he is liable for legal interest on the amount. *In re Thorp*, 2 Ware (U. S.) 294, 23 Fed. Cas. No. 14,002; *In re Burt*, 27 Fed. Rep. 548.

Completing Manufacture of Goods. — Where partly manufactured goods come into the hands of an assignee, the court may order him to finish them where it appears that the estate will be benefited thereby. *Foster v. Ames*, 1 Lowell (U. S.) 313, 2 Nat. Bankr. Reg. 455, 9 Fed. Cas. No. 4,905.

Redemption of Property by Assignee. — *Foster v. Ames*, 1 Lowell (U. S.) 313, 2 Nat. Bankr. Reg. 455, 9 Fed. Cas. No. 4,905; *Lloyd v. Hoo Sue*, 5 Sawy. (U. S.) 74, 17 Nat. Bankr. Reg. 170, 15 Fed. Cas. No. 8,432; *Swenson v. Halberg*, 1 Fed. Rep. 444; *Haworth v. Travis*, 67 Ill. 301.

5. Assignee or Trustee Entitled to All Remedies that Debtor Would Have Had. — *Flagg v. Reed*, 157 Mass. 468.

Creditors Have No Right to Interfere with the collection of assets by the assignee or trustee. *Cochrane v. Bridenbald*, 72 Md. 275.

fore he may contest claims and rights of property which the bankrupt himself could not contest.¹

(2) *Property Claimed or Held Adversely*. — It is the duty of an assignee or trustee, when he is satisfied that property which has come into his hands did not belong to the debtor, to return it to the owner,² but if he is in doubt about the matter, he should retain possession, and leave the claimant to seek his remedy in the proper court.³

Property Held under Judicial Process. — The present bankruptcy law of the *United States* provides that all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months before the filing of a petition in bankruptcy against him, shall be deemed null and void, in case he is adjudged a bankrupt, and the property affected shall be deemed wholly discharged and released from such liens, and shall pass to the trustee as a part of the estate of the bankrupt. It is also provided that the court may order such conveyances as may be necessary to carry into effect the purposes of this provision.⁴ The late statute (Act 1867) dissolved the liens of attachments only, and therefore property held under an execution issued out of a state court could not be taken from him by a federal court.⁵

Where Property Is in the Possession of a Receiver appointed by a state court before the commencement of bankruptcy proceedings, it is held that the bankruptcy court has no power to interfere,⁶ unless the receiver's title is for some cause

1. **Assignee or Trustee as Representative of Creditors** — *United States*. — *Moore v. Young*, 4 Biss. (U. S.) 128, 17 Fed. Cas. No. 9,782; *In re Gurney*, 7 Biss. (U. S.) 414, 15 Nat. Bankr. Reg. 373, 11 Fed. Cas. No. 5,873; *Atlas Nat. Bank v. F. B. Gardner Co.*, 8 Biss. (U. S.) 537, 19 Nat. Bankr. Reg. 213, 2 Fed. Cas. No. 635; *In re Werner*, 5 Dill. (U. S.) 119, 29 Fed. Cas. No. 17,416; *Edmondson v. Hyde*, 2 Sawy. (U. S.) 205, 7 Nat. Bankr. Reg. 1, 8 Fed. Cas. No. 4,285; *In re Morrill*, 2 Sawy. (U. S.) 357, 8 Nat. Bankr. Reg. 117, 17 Fed. Cas. No. 9,821; *Partridge v. Dearborn*, 2 Lowell (U. S.) 286, 9 Nat. Bankr. Reg. 474, 18 Fed. Cas. No. 10,785; *Beers v. Place*, 4 Nat. Bankr. Reg. 459, 36 Conn. 578, 3 Fed. Cas. No. 1,233; *Richards v. Maryland Ins. Co.*, 8 Cranch (U. S.) 84; *Alexander v. Galt*, 9 Fed. Rep. 149.

Illinois. — *Jenkins v. Pierce*, 98 Ill. 646.

Louisiana. — *Nouvet v. Bollinger*, 15 La. Ann. 293.

Pennsylvania. — *Merrick's Estate*, 5 W. & S. (Pa.) 9.

Virginia. — *Cannon v. Wellford*, 22 Gratt. (Va.) 195.

2. **Return of Property Belonging to Third Persons**. — *In re Noakes*, 1 Nat. Bankr. Reg. 592, Bankr. Ct. Rep. 162, 18 Fed. Cas. No. 10,281.

3. **Doubt as to Ownership of Property Received**. — *In re Noakes*, 1 Nat. Bankr. Reg. 592, Bankr. Ct. Rep. 162, 18 Fed. Cas. No. 10,281; *In re Sabin*, 18 Nat. Bankr. Reg. 151, 10 Chicago Leg. N. 364, 21 Fed. Cas. No. 12,195; *In re Chisholm*, 4 Fed. Rep. 526.

4. **Property Held under Process of State Court** — **Rule under Act 1898**. — Act July 1, 1898 (30 U. S. Stat. at L. 544), § 67, par. f.

A trustee in bankruptcy may have an injunction to restrain a sheriff from paying over the proceeds of a sale under a judgment which is void under the bankruptcy law. *In re Kenney*, 2 Am. Bankr. Rep. 404.

And the sheriff may be compelled, on a sum-

mary petition by the trustee, to pay over or deliver money or property so held. *In re Etheridge Furniture Co.*, 1 Am. Bankr. Rep. 112; *Davis v. Bohle*, 92 Fed. Rep. 325, *affirming In re Sievers*, 91 Fed. Rep. 366; *In re Smith*, 2 Am. Bankr. Rep. 9; *In re Fellerath*, 95 Fed. Rep. 121, 2 Am. Bankr. Rep. 40; *In re Francis-Valentine Co.*, 93 Fed. Rep. 953, *affirmed* 94 Fed. Rep. 793. See also *In re Gutwillig*, 1 Am. Bankr. Rep. 78, *affirmed* 1 Am. Bankr. Rep. 388; *In re Sievers*, 91 Fed. Rep. 366, *affirmed sub nom. Davis v. Bohle*, 92 Fed. Rep. 325; *Lea v. Geo. M. West Co.*, 1 Am. Bankr. Rep. 261; *In re Bruss-Ritter Co.*, 1 Am. Bankr. Rep. 58. But see *contra*, *In re Abraham*, 93 Fed. Rep. 767, 2 Am. Bankr. Rep. 266; *In re Franks*, 95 Fed. Rep. 635, 2 Am. Bankr. Rep. 634.

As to Property in the Hands of a Receiver appointed in a suit for dissolution between insolvent partners who are afterwards adjudged bankrupts, see *In re Price*, 92 Fed. Rep. 987.

5. **Property Held by Officer of State Court** — **Rule under Act 1867**. — *Townsend v. Leonard*, 3 Dill. (U. S.) 370, 24 Fed. Cas. No. 14,117; *Johnson v. Bishop*, 1 Woolw. (U. S.) 324, 8 Nat. Bankr. Reg. 533, 13 Fed. Cas. No. 7,373; *Marshall v. Knox*, 16 Wall. (U. S.) 551, 8 Nat. Bankr. Reg. 97; *Goddard v. Weaver*, 1 Woods (U. S.) 257, 6 Nat. Bankr. Reg. 440, 10 Fed. Cas. No. 5,495; *In re Shuey*, 9 Nat. Bankr. Reg. 526, 6 Chicago Leg. N. 248, 22 Fed. Cas. No. 12,821. Compare *Matter of Schnepf*, 2 Ben. (U. S.) 72, 1 Nat. Bankr. Reg. 190, 21 Fed. Cas. No. 12,471.

6. **Receiver Appointed Before Petition in Bankruptcy**. — *Davis v. Railroad Co.*, 1 Woods (U. S.) 661, 13 Nat. Bankr. Reg. 258, 7 Fed. Cas. No. 3,648; *Matter of Clark*, 4 Ben. (U. S.) 88, 3 Nat. Bankr. Reg. 491, 5 Fed. Cas. No. 2,798; *Clark v. Binninger*, (N. Y. Super. Ct. Spec. T.) 39 How. Pr. (N. Y.) 363; *Roberts v. Albany, etc., R. Co.*, 25 Barb. (N. Y.) 662.

impeachable under the bankruptcy law.¹ The assignee's remedy is by an application to the state court.²

An Assignee for the Benefit of Creditors cannot retain the assigned estate as against a trustee in bankruptcy, though the assignment was made before the bankruptcy proceedings were commenced.³

(3) *Discovery of Assets.* — Provision is usually made for the examination of the debtor and third persons in order to obtain disclosures as to the property and credits of the debtor,⁴ though it is the duty of the assignee or trustee, independently of such provision, to make reasonable inquiries concerning the matter.⁵

c. ABANDONMENT OF PROPERTY. — The assignee or trustee is not bound to take any property which may be a burden to the estate instead of a benefit,⁶

See also *Watson v. Citizens' Sav. Bank*, 2 Hughes (U. S.) 200, 11 Nat. Bankr. Reg. 161, 29 Fed. Cas. No. 17,279. Compare *In re Whipple*, 6 Biss. (U. S.) 516, 13 Nat. Bankr. Reg. 373, 29 Fed. Cas. No. 17,512.

After a Petition in Bankruptcy Has Been Filed, the appointment of a receiver is ineffectual if the debtor is adjudged a bankrupt. *Smith v. Buchanan*, 8 Blatchf. (U. S.) 153, 4 Nat. Bankr. Reg. 397, 22 Fed. Cas. No. 13,016; *Matter of Nolan*, 8 Ben. (U. S.) 559, 18 Fed. Cas. No. 10,289.

1. Receiver's Title Impeachable under Bankruptcy Law. — *Matter of Clark*, 4 Ben. (U. S.) 83, 3 Nat. Bankr. Reg. 491, 5 Fed. Cas. No. 2,798; *Alden v. Boston*, etc., R. Co., 5 Nat. Bankr. Reg. 230, 1 Fed. Cas. No. 152; *Davis v. Railroad Co.*, 1 Woods (U. S.) 661, 13 Nat. Bankr. Reg. 258, 7 Fed. Cas. No. 3,648.

2. Application to State Court. — *Ex p. Waddell*, 1 N. Y. Leg. Obs. 53, 28 Fed. Cas. No. 17,027. See also *Freeman v. Fort*, 52 Ga. 371.

3. Assignee for Benefit of Creditors. — *Hobson v. Markson*, 1 Dill. (U. S.) 421, 12 Fed. Cas. No. 6,555; *Ostrander v. Meunch*, 2 McCrary (U. S.) 267, 12 Fed. Rep. 562.

4. Discovery of Assets — England. — 46 & 47 Vict., c. 52, § 27.

Canada. — *Ryan v. Cullen*, 1 Chamb. (U. C.) 229; *McLean v. Maitland*, 5 U. C. L. J. 279; *Davidson v. Gordon*, 5 U. C. L. J. 279; *Herr v. Douglass*, 4 Ont. Pr. 124.

United States. — Act July 1, 1898 (30 U. S. Stat. at L. 544), § 21.

California. — *Goodday v. Superior Ct.*, 65 Cal. 580; *Ex p. Clark*, 110 Cal. 405.

Maine. — *Messer v. Storer*, 79 Me. 512.

Massachusetts. — *Davis v. Bunker*, 168 Mass. 82.

New York. — *Matter of Stonebridge*, 53 Hun (N. Y.) 545; *Matter of Wilkinson*, 36 Hun (N. Y.) 134. See also the various state insolvency laws.

Arrest of Bankrupt. — The bankruptcy law authorizes the arrest of the bankrupt, if he is about to depart with the intent of evading an examination. *In re Lipke*, 98 Fed. Rep. 970.

Examination of Books and Papers. — The bankrupt cannot refuse to produce his books and papers for examination by the trustee on the ground that they may contain incriminating matter. *In re Supiro*, 92 Fed. Rep. 310.

Books of Corporation Organized by Insolvent Partners. — Where the circumstances indicate that a corporation, organized by partners who had failed in business, was a mere fiction, and that its assets were really the assets of the

partners, their wives being the holders of substantially all the stock, the books of such corporation may be examined, to ascertain the debts due it, in bankruptcy proceedings subsequently instituted on the voluntary petition of the partners. *In re Horgan*, 97 Fed. Rep. 319.

Examination of Bankrupt's Wife. — In those states where a wife is a competent witness in proceedings to which her husband is a party, she may, on his bankruptcy, be examined as to transactions to which she was a party or facts of which she was a witness. *In re Foerst*, 93 Fed. Rep. 190; *Matter of Woolford*, 4 Ben. (U. S.) 9, 3 Nat. Bankr. Reg. 444, 30 Fed. Cas. No. 18,029; *Church v. Choate*, 9 Allen (Mass.) 573.

But she cannot be required to testify as to any communications which are privileged between husband and wife. *Re Gilbert*, 1 Lowell (U. S.) 340, 3 Nat. Bankr. Reg. 152, 10 Fed. Cas. No. 5,410.

In any state where she is not a competent witness the trustee must proceed against her by a bill of discovery, in order to reach property alleged to have been conveyed to her by her husband in fraud of his creditors. *In re Fowler*, 93 Fed. Rep. 417.

Examination of Third Persons. — *Sawin v. Martin*, 11 Allen (Mass.) 439.

Inheritances. — An assignee is not obliged to make a search for interests in the estates of the bankrupt's ancestors, if no such interest is shown by the inventory or suggested by the creditors. *In re Mott*, 17 Fed. Cas. No. 9,878a.

A Person Disqualified as a Witness may still be examined on his application as an insolvent debtor. Anonymous, 11 N. J. L. 93.

5. Duty to Make Inquiries. — *In re Cook*, 17 Fed. Rep. 328.

Search Warrants. — The *Massachusetts* statute of 1856 (c. 284, § 36), providing for the issuing of warrants by judges of insolvency, on the complaint of an assignee, to search for property of the debtor, was held unconstitutional. *Robinson v. Richardson*, 13 Gray (Mass.) 454.

6. Abandonment of Onerous Property — England. — *Copeland v. Stephens*, 1 B. & Ald. 593.

United States. — *Glenny v. Langdon*, 19 Nat. Bankr. Reg. 24, 98 U. S. 20; *Taylor v. Irwin*, 20 Fed. Rep. 615; *Kimberling v. Hartly*, 1 Fed. Rep. 571; *McLean v. Rockey*, 3 McLean (U. S.) 235; *Amory v. Lawrence*, 3 Cliff. (U. S.) 523, 1 Fed. Cas. No. 336; *Smith v. Gordon*, 2 N. Y. Leg. Obs. 325, 22 Fed. Cas. No. 13,052; *In re Lambert*, 2 Nat. Bankr. Reg. 426; *In re Chambers*, 98 Fed. Rep. 865.

or which is encumbered to the amount of its full value;¹ and if he elects not to take it, the title remains in the bankrupt.² A reasonable time is allowed the assignee or trustee to make his election, and an unreasonable delay in electing to take will be deemed an election to reject.³

d. SETTING ASIDE FRAUDULENT OR PREFERENTIAL TRANSFERS. — Since the assignee or trustee represents the creditors, he may sue to set aside any transfer or incumbrance by the debtor, if it was fraudulent as to creditors generally, or was made in violation of the bankruptcy or insolvency law,⁴ if the assets in hand are not sufficient to pay all the debts.⁵ While it is largely a matter of discretion whether or not he will undertake to avoid a preference or fraudulent conveyance,⁶ it is nevertheless his duty as well as his right to do this, when the interests of the creditors clearly require it, and if he neglects his plain duty in the premises, the creditors may compel him to act or may have him removed,⁷ but the weight of authority seems to be that the right of action belongs exclusively to the assignee or trustee, and that the creditors

Alabama. — *Rugely v. Robinson*, 19 Ala. 404.

Arkansas. — *Brookfield v. Stephens*, 40 Ark. 366.

Connecticut. — *White v. Griffing*, 44 Conn. 437.

Louisiana. — *Oakey v. Gardiner*, 2 La. Ann. 1,005.

Maine. — *Nash v. Simpson*, 78 Me. 142.

Massachusetts. — *Abbott v. Stearns*, 139 Mass. 163.

What Constitutes Abandonment. — *Sparhawk v. Yerkes*, 142 U. S. 1 (stock exchange seat); *Sessions v. Romadka*, 145 U. S. 29, reversing 21 Fed. Rep. 124 (patent); *Taylor v. Irwin*, 20 Fed. Rep. 615 (land); *Bradley v. Norton*, 33 Conn. 157, 87 Am. Dec. 200 (trademark).

Knowledge on the Part of the Assignee of the bankrupt's ownership is necessary, however, before an abandonment can be predicated on his failure to assert his title. *Dushane v. Beall*, 161 U. S. 513; *Saunders v. Mitchell*, 61 Miss. 321; *Buckingham v. Buckingham*, 36 Ohio St. 68.

1. Abandonment of Encumbered Property. — *Brookfield v. Stephens*, 40 Ark. 366; *Louisville Second Nat. Bank v. National State Bank*, 10 Bush (Ky.) 367.

2. Title to Abandoned Property Remains in Bankrupt. — *Webb v. Fox*, 7 T. R. 391; *Fowler v. Down*, 1 B. & P. 44; *Burton v. Perry*, 146 Ill. 71; *Deadrick v. Armour*, 10 Humph. (Tenn.) 588.

An Election not to Assume a Lease held by the bankrupt does not affect the assignee's right to rents due from sublessees at the time of the bankruptcy. *Haley v. Boston Belting Co.*, 140 Mass. 73.

3. Reasonable Time Allowed for Making Election. — *Lawrence v. Knowles*, 5 Bing. N. Cas. 399, 35 E. C. L. 150; *Tuck v. Fyson*, 6 Bing. 321, 19 E. C. L. 94; *Carter v. Warne*, 4 C. & P. 191, 19 E. C. L. 336; *Graham v. Van Diemen's Land Co.*, 11 Exch. 101; *Ex p. Blandy*, 1 Deac. 286, 38 E. C. L. 468; *Smith v. Gordon*, 2 N. Y. Leg. Obs. 325, 22 Fed. Cas. No. 13,052; *White v. Griffing*, 44 Conn. 437; *Nash v. Simpson*, 78 Me. 142.

4. Setting Aside Fraudulent or Preferential Conveyances. — *California.* — *Ruggles v. Cannedy*, (Cal. 1898) 53 Pac. Rep. 911; *Davis v. Winona Wagon Co.*, 120 Cal. 244; *McNeil v. Hansen*, 115 Cal. 214.

Connecticut. — *Quinnipiac Brewing Co. v. Fitzgibbons*, 71 Conn. 80; *Shipman v. Aetna Ins. Co.*, 29 Conn. 245.

Louisiana. — *Keane v. Goldsmith*, 14 La. Ann. 349.

Maine. — *Taylor v. Taylor*, 74 Me. 582.

Maryland. — *Applegarth v. Wagner*, 86 Md. 468; *Vogler v. Rosenthal*, 85 Md. 37, 60 Am. St. Rep. 298; *Dietus v. Fuss*, 8 Md. 148; *Atkinson v. Phillips*, 1 Md. Ch. 507.

Massachusetts. — *Cunningham v. Seavey*, 171 Mass. 341; *Buffum v. Jones*, 144 Mass. 29; *Rayner v. Whicher*, 6 Allen (Mass.) 292; *Thomson v. O'Sullivan*, 6 Allen (Mass.) 303; *Bartholomew v. McKinstry*, 6 Allen (Mass.) 567; *Whittemore v. Cowell*, 7 Allen (Mass.) 446; *Hubbell v. Currier*, 10 Allen (Mass.) 333; *Blake v. Sawin*, 10 Allen (Mass.) 340; *Metcalf v. Munson*, 10 Allen (Mass.) 491; *Marsh v. Hammond*, 11 Allen (Mass.) 483; *Lynde v. McGregor*, 13 Allen (Mass.) 172; *Lee v. Kilburn*, 3 Gray (Mass.) 594.

Minnesota. — *Rossman v. Mitchell*, 73 Minn. 198.

New York. — *Matter of Gray*, 47 N. Y. App. Div. 554.

Pennsylvania. — *Weber v. Samuel*, 7 Pa. St. 499; *Tams v. Bullitt*, 35 Pa. St. 308; *Englebert v. Blanjet*, 2 Whart. (Pa.) 240; *Huntsecker v. Heiney*, 11 S. & R. (Pa.) 250.

Vermont. — *Crampton v. Valido Marble Co.*, 60 Vt. 291. See also *supra*, this section, *What Passes to Assignee or Trustee — Property Transferred by Debtor — Fraudulent Conveyances.*

Embezzlements. — The *California* statute provides for the recovery of funds embezzled by third persons, but this provision does not apply to money received by a creditor of an insolvent from the purchaser of the insolvent's property at a judicial sale thereof in consideration of not bidding at such sale. *Crawford v. Maddux*, 100 Cal. 222.

5. Insufficiency of Assets in Hand. — *Sanborn v. Wilder*, 68 N. H. 471.

6. Discretion to Avoid Preferences, etc. — *Snow v. Lang*, 2 Allen (Mass.) 18; *Butler v. Hildreth*, 5 Met. (Mass.) 49; *Colt v. Sears Commercial Co.*, 20 R. I. 323.

7. Neglect of Duty to Avoid Preferences. — *Trimble v. Woodhead*, 102 U. S. 647; *Glenny v. Langdon*, 19 Nat. Bankr. Reg. 24, 98 U. S. 20; *McMaster v. Campbell*, 41 Mich. 513; *Colt v. Sears Commercial Co.*, 20 R. I. 323.

cannot sue.¹ There are, however, numerous decisions which hold that, in the event of his failure or refusal, the creditors may sue, though the fund or property recovered is to be paid or delivered to the assignee or trustee for distribution according to law.²

Distinction Between Preferences and Fraudulent Conveyances. — In regard to conveyances, etc., which are voidable in accordance with the general principles of law, because made with intent to hinder, delay, and defraud creditors, the assignee or trustee merely succeeds to the rights of the creditors, and if he neglects or refuses to sue to set aside such a conveyance, a suit for that purpose may be brought by the creditors,³ or by any one to whom the assignee or trustee may have sold his title to the property fraudulently conveyed.⁴ But mere preferences, which are impeachable only because they are in contravention of the bankruptcy or insolvency laws, stand on a different footing. The right to avoid them belongs exclusively to the assignee or trustee, and his vendee cannot exercise such right.⁵

The Evidence admissible in suits to set aside conveyances by insolvent debtors is necessarily the same, whether the suit is brought by a creditor or by the trustee in bankruptcy or insolvency, and the rules which govern have already been considered in another part of this work.⁶

c. CONTINUING BUSINESS. — When the interests of the creditors require it, the assignee or trustee may, by leave of court, continue the business of the debtor for a limited time.⁷

f. SALE OF PROPERTY — (1) *Authority to Sell* — (a) *In General.* — Authority

1. Action Held Not Maintainable by Creditors — *United States.* — Trimble v. Woolhead, 102 U. S. 647; Moyer v. Dewey, 103 U. S. 301; Glenn v. Langdon, 98 U. S. 20, 19 Nat. Bankr. Reg. 24.

Alabama. — Bolling v. Munchus, 59 Ala. 482.

Illinois. — Jolly v. Fitzgerald, 23 Ill. App. 514.

Indiana. — Blair v. Hanna, 87 Ind. 298.

Kentucky. — Edwards v. Coleman, 2 Bibb (Ky.) 204; Botts v. Patton, 10 B. Mon. (Ky.) 452.

Michigan. — Cook v. Rogers, 31 Mich. 391; McMaster v. Campbell, 41 Mich. 513.

Mississippi. — Allen v. Montgomery, 48 Miss. 101; Winters v. Claitor, 54 Miss. 341.

New Jersey. — McCartin v. Perry, 39 N. J. Eq. 193; Mount v. Manhattan Co., 41 N. J. Eq. 211.

Pennsylvania. — Miners' Nat. Bank's Appeal, (Pa. 1887) 9 Atl. Rep. 299.

Tennessee. — Alsabrooks v. Cates, 5 Heisk. (Tenn.) 271.

See also Whittington v. Simmons, 32 Ark. 377; Fenlon v. Lonegan, 29 Pa. St. 471; Connell's Estate, 9 W. N. C. (Pa.) 406.

2. Action Held Maintainable by Creditors — *United States.* — Freeland v. Holloman, 9 Nat. Bankr. Reg. 331, 9 Fed. Cas. No. 5,081.

Connecticut. — Filley v. King, 49 Conn. 211.

Maine. — Spaulding v. Fisher, 57 Me. 411.

Maryland. — Preston v. Horwitz, 85 Md. 164; Diggs v. McCullough, 69 Md. 592; Haugh v. Maulsby, 68 Md. 423; Matter of Leiman, 32 Md. 225, 3 Am. Rep. 132; Svester v. Brewer, 27 Md. 288; Swan v. Dent, 2 Md. Ch. 111.

New York. — Crouse v. Frothingham, 97 N. Y. 105; Dewey v. Moyer, 72 N. Y. 70, reversed 103 U. S. 301; Bates v. Bradley, 24 Hun (N. Y.) 85; Swift v. Hart, 35 Hun (N. Y.) 128; Sands v. Colwise, 4 Johns. (N. Y.) 536, 4 Am. Dec. 305; Clarkson v. Dunning, (Supm. Ct. Gen. T.) 4 N. Y. Supp. 430.

Ohio. — Monitor Furnace Co. v. Peters, 40 Ohio St. 575.

Virginia. — Tichenor v. Allen, 13 Gratt. (Va.) 15.

The Assignee Must Be Made a Party to a suit by a creditor to set aside a fraudulent conveyance by the debtor. Jamison v. Chesnut, 8 Md. 34. See also Holmes v. Little, 86 Hun (N. Y.) 226.

And when so made a party defendant, he can as effectually maintain his rights as if he were the complainant. Haugh v. Maulsby, 68 Md. 423.

3. Fraudulent Conveyances—Avoidance by Creditors. — Quinipiac Brewing Co. v. Fitzgibbons, 71 Conn. 80.

4. Fraudulent Conveyances—Avoidance by Vendee of Assignee or Trustee. — Shay v. Security Bank, 67 Minn. 287. See also Gibbs v. Thayer, 6 Cush. (Mass.) 30; Freeland v. Freeland, 102 Mass. 475; Hastings Mailing Co. v. Heller, 47 Minn. 71.

5. Preferences Avoidable Only by Assignee or Trustee. — Fisher v. Utendorfer, 68 Minn. 226; Colt v. Sears Commercial Co., 20 R. I. 323.

6. See the title FRAUDULENT SALES AND CONVEYANCES, vol. 14, p. 485.

7. Continuing Debtor's Business — *England.* — Ex p. Robertson, L. R. 8 Ch. 602; Ex p. Ford, 1 Ch. D. 521; Ex p. Russell, 2 Ch. D. 424; In re Dowling, 4 Ch. D. 689; Ex p. Bolland, 9 Ch. D. 312; Engelback v. Nixon, L. R. 10 C. P. 645; Wadling v. Oliphant, 1 Q. B. D. 145; Cohen v. Mitchell, 25 Q. B. D. 262; In re Clark, (1894) 2 Q. B. 393.

Canada. — Boyd v. Mortimer, 30 Ont. 290.

United States. — Act July 1, 1898 (30 U. S. Stat. at L. 544), § 2, clause (5).

Connecticut. — Harding v. Mill River Woolen Mfg. Co., 34 Conn. 458.

Ohio. — St. James Hotel Co.'s Assignment, 3 Ohio N. P. 42, 4 Ohio Dec. 209.

to sell the property of the debtor, so that it may be converted into money for the payment of debts, is clearly necessary, and is usually conferred on the assignee or trustee in express terms.¹

(b) **Leave or Approval of Court.** — The English Statute does not require the trustee to obtain leave of court to make a sale, nor does it expressly require approval by the court of sales that may be made, but the intention that the matter shall be under the control of the court clearly appears from other provisions.²

The Bankruptcy Law of the United States requires property to be sold subject to the approval of the court, "when practicable," and provides that it shall not be sold otherwise than subject to the approval of the court for less than seventy-five per cent. of its appraised value.³

Some of the State Insolvency Laws require leave of court to be obtained before a sale can be made.⁴

1. Authority to Sell — England. — 46 & 47 Vict., c. 52, § 56; *Turquand v. Board of Trade*, 11 App. Cas. 286, *affirming sub nom. Ex p. Board of Trade*, 15 Q. B. D. 196; *Ex p. Lloyd*, 47 L. T. N. S. 64.

Canada. — *Bénard v. Dupuy*, 3 Montreal Leg. N. 93.

United States. — The bankruptcy law of 1898 is not very explicit in this regard, though it undoubtedly authorizes trustees to sell. Thus, section 47, par. a, declares that one of their duties shall be "to collect and reduce to money the property of the estates for which they are trustees." Another provision (section 70, par. c) relates to conveyances by trustees of property sold; and Rule 18 prescribes the mode of exercising the power of sale by trustees. The following cases recognize the trustees' power to sell under the Act of 1898: *In re Worland*, 92 Fed. Rep. 893; *In re Pittelkow*, 92 Fed. Rep. 901; *In re Styer*, 98 Fed. Rep. 290.

The Act of 1867 did not require an order of court to authorize the sale of unencumbered property. *Matter of White*, 2 Ben. (U. S.) 85, 1 Nat. Bankr. Reg. 218, 29 Fed. Cas. No. 17,531; *Curdy v. Stafford*, 88 Tex. 120.

Under the Act of 1841 an order of court was necessary. *Cleveland v. Boeram*, 27 Barb. (N. Y.) 252.

Duty to Sell. — It is the duty of the assignee to sell the bankrupt's property for the benefit of creditors, and if he fails or refuses to do so he is personally liable to them. *In re Jackson*, 2 Nat. Bankr. Reg. 508, 13 Fed. Cas. No. 7,127.

Sale by Deputy. — *Bénard v. Dupuy*, 3 Montreal Leg. N. 93.

Power to Sell under State Insolvency Laws — California. — *In re Nichols*, (Cal. 1897) 50 Pac. Rep. 1072.

Louisiana. — *Bastable v. Curry*, 5 La. Ann. 411; *Andrus v. His Creditors*, 46 La. Ann. 1351.

Maryland. — *Gable v. Scott*, 56 Md. 176; *McHenry v. McVeigh*, 56 Md. 578; *Zeigler v. King*, 9 Md. 330.

Massachusetts. — *Tuite v. Stevens*, 98 Mass. 305; *Gibbs v. Thayer*, 6 Cush. (Mass.) 30.

Minnesota. — *New Prague Milling Co. v. Schreiner*, 70 Minn. 125.

New Hampshire. — *Gignoux v. Bilbruck*, 63 N. H. 22.

New Jersey. — *Potts v. New Jersey Arms, etc., Co.*, 17 N. J. Eq. 395.

New York. — *Partridge v. Havens*, 10 Paige (N. Y.) 618.

Pennsylvania. — *Thompson's Appeal*, 126 Pa. St. 467.

South Carolina. — *Farrar v. Farley*, 3 S. Car. 11.

Virginia. — *Taylor v. Mallory*, 96 Va. 18.

See also the various local statutes.

A Conventional Trustee may sell, under the Maryland statute where the trustee in insolvency would have to await the result of pending litigation before he could make a sale. *Ensor v. Keech*, 64 Md. 378.

2. Power of Court to Control Sales in England. — Section 56 of the English statute (46 & 47 Vict., c. 52) declares that "subject to the provisions of this act, the trustee may * * * sell all or any part of the property of the bankrupt." Section 89 requires him to have regard to the wishes of creditors in dealing with the bankrupt's property. And section 90 provides that any person aggrieved by any act of the trustee may apply to the court for redress.

3. Approval by Court Required by Statute of United States. — Act July 1, 1898 (30 U. S. Stat. at L. 514), § 70, par. b.

An Application for Leave to Sell in any case seems to be regarded as the proper practice. See Rules in Bankruptcy XVIII, and Form 42.

Confirmation Required by Former Bankruptcy Laws. — *In re McGilton*, 3 Biss. (U. S.) 144, 7 Nat. Bankr. Reg. 294, 16 Fed. Cas. No. 8,798; *In re O'Fallon*, 2 Dill. (U. S.) 548, 18 Fed. Cas. No. 10,445; *Ex p. Bryan*, 2 Hughes (U. S.) 273, 14 Nat. Bankr. Reg. 71, 4 Fed. Cas. No. 2,061; *Donnell's Case*, 7 Fed. Cas. No. 3,986a; *In re Alden*, 16 Nat. Bankr. Reg. 39, 23 Int. Rev. Rec. 234, 282, 1 Fed. Cas. No. 151; *In re Peabody*, 16 Nat. Bankr. Reg. 243, 9 Chicago Leg. N. 409, 19 Fed. Cas. No. 10,866; *In re Ewing*, 16 Fed. Rep. 753; *In re Herdic*, 40 Fed. Rep. 360; *Smith v. Long*, 9 Daly (N. Y.) 429; *Herbst v. Bates*, 13 Cinc. L. Bul. 565, 9 Ohio Dec. (Reprint) 444.

4. Leave to Sell Required. — *Bastable v. Curry*, 5 La. Ann. 411; *Spears v. His Creditors*, 40 La. Ann. 650; *Warren v. Homestead*, 33 Me. 256; *Gable v. Scarlett*, 56 Md. 176. See also the statutes in other states.

In Louisiana a sale made without leave of court is nevertheless valid, where it appears that the creditors, at meetings held under orders of court, advised a sale and fixed its terms. *Coiron v. Millaudon*, 3 La. Ann. 64.

Mortgaged Property can be sold only under an order of court in Vermont. *Olcott v. Davis*, 67 Vt. 685.

(2) *Property Subject to Sale.* — The terms of the statutes include all the debtor's property, real as well as personal, except such as may be exempt.¹

Where Property Has Been Fraudulently Conveyed by the debtor, the assignee or trustee may sell and convey his interest in it, without himself first bringing an action to set the conveyance aside.²

(3) *Manner and Terms of Sale.* — **The General Rule** is that the court of bankruptcy or insolvency has control of the debtor's entire property and may direct the sale to be made in such manner as will, in its opinion, protect the rights and interests of all concerned.³

Auction or Private Sale. — In *England* the trustee may sell either at auction or private sale.⁴ In the *United States* sales by trustees in bankruptcy must be at public auction, unless otherwise ordered.⁵

Cash or Credit. — The sale should be for cash, unless the court authorizes a sale on credit.⁶

Sale in Parcels or En Masse. — The court may direct the property to be sold as an entirety or in parcels, the rule being to adopt the mode which will realize the best price.⁷

Doubtful Claims may be sold for less than their face value.⁸

Perishable Property. — In the *United States*, where the trustee is required to obtain leave of court or to give notice, or both, before making any sales,

1. **All Property Subject to Sale.** — See the various bankruptcy and insolvency laws.

Book Debts. — *Shipley v. Marshall*, 32 L. J. C. Pl. 258; 46 & 47 Vict., c. 52, § 56, par. (1).

Good Will. — *Walker v. Mottram*, 19 Ch. D. 355; 46 & 47 Vict., c. 52, § 56, par. (1).

Crops and Fruit Gathered are not part of the land, when sold in insolvency proceedings. *Andrus v. His Creditors*, 40 La. Ann. 1351.

Intoxicating Liquors may be sold by the assignee, though the insolvent himself could not lawfully have sold them. *Gignoux v. Bilbruck*, 63 N. H. 22.

Property Held Adversely to the bankrupt may be sold in bankruptcy proceedings. *Carlisle v. Cassidy*, (Ky. 1898) 46 S. W. Rep. 490.

Property or Rights of Property Held by an Insolvent in Trust cannot be sold by his assignee, though the insolvent has an interest therein. This was held where the insolvent had an interest in a patent under an assignment which required him to prosecute all claims for infringement at his expense. *Murphy v. Philbrook*, 57 N. Y. Super. Ct. 204.

Encumbered Property may be sold by the assignee, but the sale is subject to the incumbrances unless leave of court is obtained to sell free from the incumbrances. *In re McClellan*, 1 Nat. Bankr. Reg. 389, 1 Am. L. T. Bankr. Rep. 48, 15 Fed. Cas. No. 8,694; *Bucknam v. Dunn*, 2 Hask. (U. S.) 215, 16 Nat. Bankr. Reg. 470, 4 Fed. Cas. No. 2,096; *In re Mebane*, 3 Nat. Bankr. Reg. 347, 16 Fed. Cas. No. 9,380; *Pauley v. Cauthorn*, 101 Ind. 91; *State v. Recorder*, 21 La. Ann. 401; *Seibel v. Simeon*, 62 Mo. 255; See *v. Rogers*, 31 W. Va. 473.

But if the amount of the incumbrance exceeds the value of the property, the assignee is not ordinarily required to sell it. *In re Bowie*, 1 Nat. Bankr. Reg. 628, 15 Pittsb. Leg. J. (Pa.) 448, 3 Fed. Cas. No. 1,728; *Foster v. Ames*, 1 Lowell (U. S.) 313, 2 Nat. Bankr. Reg. 455, 9 Fed. Cas. No. 4,965; *In re Ludwigson*, 3 Woods (U. S.) 13, 15 Fed. Cas. No. 8,601; *In re*

Hahnen, 1 Pa. L. J. Rep. 10, 11 Fed. Cas. No. 5,901.

Disputed Property in the possession of a third person could not be sold by the assignee under the bankruptcy law of 1867 without leave of court. *Knight v. Cheney*, 5 Nat. Bankr. Reg. 305, 14 Fed. Cas. No. 7,883; *Shaw v. Lindsey*, 60 Ala. 344; *Stanley v. Sutherland*, 54 Ind. 339; *Wisner v. Brown*, 50 Mich. 553. Compare *Ex p. Bryan*, 2 Hughes (U. S.) 273, 14 Nat. Bankr. Reg. 71, 4 Fed. Cas. No. 2,061.

2. **Property Fraudulently Conveyed.** — *Gibbs v. Thayer*, 6 Cush. (Mass.) 30; *Tuite v. Stevens*, 98 Mass. 305; *Freeland v. Freeland*, 102 Mass. 475; *Morgan v. Abbott*, 148 Mass. 507.

3. **Power of Court to Regulate Manner of Sale.** — *In re Worland*, 92 Fed. Rep. 893; *Traer v. Clews*, 115 U. S. 528; *In re Knott*, 1 W. N. C. (Pa.) 52, 14 Fed. Cas. No. 7,893.

4. **Trustee Authorized to Sell Either Privately or at Auction in England.** — 46 & 47 Vict., c. 52, § 56, par. 1.

5. **Auction Sale Required in United States.** — This requirement is contained in the rules formulated by the Supreme Court. Rule 18, par. 1.

The statute merely provides that "creditors shall have at least ten days' notice by mail of * * * all proposed sales of property." Act July 1, 1898 (30 U. S. Stat. at L. 544), § 58, par. a.

The Act of June 22, 1874 (18 U. S. Stat. at L. 178), amending the bankruptcy law of 1867, required the assignee to sell by public auction. *In re Newcomb*, 32 Fed. Rep. 826; *Reid v. Robrecht*, 102 Cal. 520.

The New Jersey Statute requires all sales of land to be at auction. *Sloan v. Appar*, 24 N. J. L. 608; Gen. Stat. N. J. 1896, p. 80, § 12.

6. **Cash or Credit.** — *In re Newcomb*, 32 Fed. Rep. 826.

7. **Sale in Parcels or En Masse.** — *In re Worland*, 92 Fed. Rep. 893.

8. **Doubtful Claims.** — *Shaeffer v. Child*, 7 Watts (Pa.) 84.

special provision is usually made concerning perishable property.¹

If the Property Is Encumbered the court may direct it to be sold free from the incumbrance, and transfer the lien or charge to the proceeds, if it deems that mode more beneficial to the general creditors, and not injurious to the lien creditors.²

(4) *Who May Purchase.*—The trustee or other person occupying an official relation to the estate is not allowed to become a purchaser,³ without obtaining leave of court or the consent of the creditors;⁴ and the disqualification has been held to extend also to the trustee's partner⁵ and the bankrupt's solicitor.⁶

The Bankrupt himself may become the purchaser.⁷

1. *Perishable Property*—*United States.*—General Orders and Forms in Bankruptcy, Rule XVIII, par. 3, dispenses with notice.

Louisiana.—Provisional syndics may sell by virtue of Rev. Stat., art. 1793, allowing them to perform "all the conservatory acts which may be necessary." *Calder v. Their Creditors*, 44 La. Ann. 454.

Vermont.—Where the title to perishable property claimed by the assignee as belonging to the insolvent's estate is disputed, the assignee may sell it under the Vermont statute, and hold the proceeds in lieu of the property. *Nichols v. Bingham*, 70 Vt. 320. Compare the statutes in other jurisdictions.

2. *Sale Free from Incumbrances.*—*United States.*—*In re Worland*, 92 Fed. Rep. 893; *In re Pittelkow*, 92 Fed. Rep. 901; *In re Styer*, 98 Fed. Rep. 290; *Ray v. Norseworthy*, 23 Wall. (U. S.) 128; *Houston v. City Bank*, 6 How. (U. S.) 486; *In re Barrow*, 1 Nat. Bankr. Reg. 481, 1 Am. L. T. Bankr. Rep. 63, 2 Fed. Cas. No. 1,057; *In re Salmons*, 2 Nat. Bankr. Reg. 55, 15 Pittsb. Leg. J. (Pa.) 541, 21 Fed. Cas. No. 12,208; *In re Kahley*, 2 Biss. (U. S.) 383, 4 Nat. Bankr. Reg. 378, 14 Fed. Cas. No. 7,593; *Davis v. Anderson*, 6 Nat. Bankr. Reg. 145, 7 Fed. Cas. No. 3,623; *In re Rhodes*, 6 West Jur. 123, 20 Fed. Cas. No. 11,746; *In re Kirland*, 10 Blatchf. (U. S.) 515, 14 Fed. Cas. No. 7,851; *In re National Iron Co.*, 8 Nat. Bankr. Reg. 422, 10 Phila. (Pa.) 274, 30 Leg. Int. (Pa.) 272, 17 Fed. Cas. No. 10,045; *Foster v. Ames*, 1 Lowell (U. S.) 313, 2 Nat. Bankr. Reg. 455, 9 Fed. Cas. No. 4,965; *Anonymous*, 29 Leg. Int. (Pa.) 20, 1 Fed. Cas. No. 456; *In re McGilton*, 3 Biss. (U. S.) 144, 7 Nat. Bankr. Reg. 294, 16 Fed. Cas. No. 8,798; *In re Dillard*, 2 Hughes (U. S.) 190, 9 Nat. Bankr. Reg. 8, 7 Fed. Cas. No. 3,912; *In re Major*, 2 Hughes (U. S.) 215, 16 Fed. Cas. No. 8,951; *In re Blue Ridge R. Co.*, 2 Hughes (U. S.) 224, 13 Nat. Bankr. Reg. 315, 3 Fed. Cas. No. 1,570; *In re Addison*, 3 Hughes (U. S.) 430, 1 Fed. Cas. No. 76; *Moran v. Schnugg*, 7 Ben. (U. S.) 399, 17 Fed. Cas. No. 9,786; *In re Devore*, 16 Nat. Bankr. Reg. 56, 24 Pittsb. Leg. J. (Pa.) 185, 7 Fed. Cas. No. 3,847; *In re Columbian Metal Works*, 3 Nat. Bankr. Reg. 75, 6 Fed. Cas. No. 3,039; *Given v. Smith*, 1 Hask. (U. S.) 358, 10 Fed. Cas. No. 5,467; *Matter of Moller*, 8 Ben. (U. S.) 526, 17 Fed. Cas. No. 9,699, *affirmed* 14 Blatchf. (U. S.) 207, 17 Fed. Cas. No. 9,700; *In re National Iron Co.*, 8 Nat. Bankr. Reg. 422, 10 Phila. (Pa.) 274, 30 Leg. Int. (Pa.) 272, 17 Fed. Cas. No. 10,045; *In re Rowland*, 2 Hughes (U. S.) 210, 20 Fed. Cas. No. 12,096.

Georgia.—*Stokes v. State*, 46 Ga. 412, 12 Am. Rep. 588; *Fleming v. Butts*, 63 Ga. 231.

Louisiana.—*Phillipi v. Their Creditors*, 44 La. Ann. 675; *Conrad v. Prieur*, 5 Rob. (La.) 49; *Willard v. Brigham*, 25 La. Ann. 600; *Thompson v. Lemelle*, McGloin (La.) 245.

New Jersey.—*Potts v. New Jersey Arms, etc.*, Co., 17 N. J. Eq. 395.

Pennsylvania.—*Thompson's Appeal*, 126 Pa. St. 467.

Vermont.—*Nichols v. Bingham*, 70 Vt. 320 (applicable to perishable property).

The Referee may order the trustee to sell the real estate free of liens, unless the property is in the hands of a receiver before adjudication, in which case an order of sale can be made only by the court. *In re Styer*, 98 Fed. Rep. 290.

In Louisiana mortgage creditors may determine whether the mortgaged property shall be sold for cash, or on credit. *Spears v. His Creditors*, 40 La. Ann. 650.

Taxes are to be first paid out of the proceeds, though the proceeds are insufficient to satisfy the incumbrance. *Stewart v. Clark*, 60 Md. 310.

3. *Assignee, etc., Not Permitted to Purchase.*—*Ex p. Lewis*, 1 Glyn & J. 69; *Pooley v. Quilter*, 2 De G. & J. 327. See also *King v. Remington*, 36 Minn. 15; *Farrar v. Farley*, 3 S. Car. 11. The assignee may purchase at sheriff's sale of the debtor's property under a mortgage which incumbered it before the insolvency. *Fisk v. Sarber*, 6 W. & S. (Pa.) 18.

4. *Leave Obtained by Assignee, etc., to Purchase.*—*Ex p. Bennett*, 10 Ves. Jr. 381; *Ex p. Farley*, 3 Deac. & C. 110; *Ex p. Molineux*, 4 Deac. & C. 460; *Ex p. Towne*, 4 Deac. & C. 519; *Ex p. Thwaites*, 1 Mont. & A. 233; *Ex p. Beaumont*, 1 Mont. & A. 304.

5. *Trustee's Partner Disqualified.*—*Ex p. Moore*, 45 L. T. N. S. 558. But see *contra*, the late case of *In re Gallard*, (1897) 2 Q. B. 8.

6. *Bankrupt's Solicitor.*—*Luddy v. Peard*, 33 Ch. D. 500.

7. *Purchase by Bankrupt.*—*Kitson v. Hardwick*, L. R. 7 C. P. 473; *Traer v. Clews*, 115 U. S. 528; *Phelps v. McDonald*, 2 MacArthur (D. C.) 375, 16 Nat. Bankr. Reg. 217; *Gates v. Fraser*, 9 Ill. App. 624; *Shorten v. Booth*, 32 La. Ann. 397; *Arnold v. Leonard*, 12 Smed. & M. (Miss.) 258; *Udall v. School Dist.* No. 4, 48 Vt. 588. See also *Roby v. Colehour*, 146 U. S. 153; *Schermerhorn v. Talman*, 14 N. Y. 93.

A Secret Agreement Between the Debtor and the Nominal Purchaser creating a trust in favor of

(5) *Title and Rights of Purchasers.* — The title of a purchaser is not defeated by mere delay of the assignee in making the sale,¹ or by noncompliance with merely directory provisions of the statute,² or by the fact that the sale was made after a composition proceeding was commenced.³ The purchaser has the right to a good title, and cannot be compelled to complete his purchase if there are irregularities which may make his title questionable;⁴ but he cannot, in any case, acquire any better title than the bankrupt had.⁵ He is also entitled to a diminution of price in case of a deficiency in quantity.⁶ If the sale was made subject to incumbrances, the purchaser cannot avoid a mortgage on the ground of fraud or want of consideration.⁷

(6) *Setting Aside Sale.* — A court of bankruptcy or insolvency has power to set aside a sale, or may refuse to confirm it, on the same principles in general as apply to other judicial sales.⁸

(7) *Resale.* — If a sale is not completed, or if it is set aside for any reason,

¹ The debtor has been held improper. *Evans v. Folsom*, 5 Minn. 422.

1. *Delay in Making Sale.* — In *Potter v. Martin*, (Mich. 1899) 81 N. W. Rep. 424, a delay of six years was held not to invalidate the sale.

2. *Noncompliance with Directory Provisions of Statute.* — *Tuite v. Stevens*, 98 Mass. 305.

Failure to Record a Transfer by the assignee will not affect the purchaser's title as against the insolvent. *Bemis v. Wilder*, 100 Mass. 446.

3. *Effect of Composition Proceeding.* — *Titcomb v. Bradlee*, 159 Mass. 190.

4. *Irregularities Affecting Title.* — *Burke v. His Creditors*, 9 La. Ann. 1. And see *Buckler v. Rogers*, (Ky. 1899) 53 S. W. Rep. 529, (Ky. 1900) 54 S. W. Rep. 848.

Trustees are bound to make a good title, unless they expressly stipulated to sell only such title as they had. *M'Donald v. Hanson*, 12 Ves. Jr. 277; *White v. Foljambe*, 11 Ves. Jr. 343.

Where the Sale Purports to Be Free from All Incumbrances, the purchaser may refuse to take the title, if the property be subject to the dower right of the bankrupt's wife. *In re Angier*, 10 Am. L. Reg. N. S. 190, 4 Nat. Bankr. Reg. 619, 1 Fed. Cas. No. 388.

5. *Purchaser Acquires No Better Title than Bankrupt Had.* — *United States v. Greene v. Taylor*, 132 U. S. 415; *In re Woods*, 7 Fed. Rep. 665; *McAlpine v. Tourtelotte*, 24 Fed. Rep. 69; *Erwin's Case*, 13 Ct. Cl. 49.

Alabama. — *Camack v. Bisquay*, 18 Ala. 286.

Illinois. — *De Haven v. Sherman*, 131 Ill. 115; *Wilson v. Dresser*, 152 Ill. 387.

Kansas. — *Wilkins v. Tourtellott*, 28 Kan. 825, 42 Kan. 176; *Chellis v. Coble*, 37 Kan. 558.

Kentucky. — *Louisville Second Nat. Bank v. New Jersey Nat. State Bank*, 10 Bush (Ky.) 367.

Louisiana. — *McKiernan v. Fletcher*, 2 La. Ann. 438; *Judson v. Lathrop*, 6 La. Ann. 587.

Maine. — *Baker v. Vining*, 30 Me. 121, 50 Am. Dec. 617.

Mississippi. — *Anderson v. Miller*, 7 Smed. & M. (Miss.) 586.

Pennsylvania. — *Zeigler v. Shomo*, 78 Pa. St. 357.

Texas. — *Renick v. Dawson*, 55 Tex. 102.

All Liens and Equities affecting the property in the hands of the bankrupt exist against a purchaser from the assignee, unless the sale is free from incumbrances.

United States. — *Noyes v. Willard*, 1 Woods (U. S.) 187, 18 Fed. Cas. No. 10,374.

Alabama. — *Smith v. Perry*, 56 Ala. 266.

Illinois. — *Strong v. Clawson*, 10 Ill. 346; *Burgett v. Paxton*, 99 Ill. 288.

Louisiana. — *King v. Bowman*, 24 La. Ann. 506.

Massachusetts. — *Faxon v. Folvey*, 110 Mass. 392.

New Hampshire. — *Brewer v. Hyndman*, 18 N. H. 9; *Bean v. Brackett*, 34 N. H. 102.

North Carolina. — *Steadman v. Taylor*, 77 N. Car. 134; *Motz v. Stowe*, 83 N. Car. 434; *Williams v. Munroe*, 67 N. Car. 164.

Pennsylvania. — *Worcester v. Clark*, 2 Grant Cas. (Pa.) 84; *Lazear v. Porter*, 87 Pa. St. 513, 30 Am. Rep. 380; *Bryar's Appeal*, 111 Pa. St. 81; *Cooper v. Tabor*, 8 W. N. C. (Pa.) 341; *Schwartz v. Kleber*, (Pa. 1886) 7 Atl. Rep. 209.

South Carolina. — *Speake v. Kinard*, 4 S. Car. 54.

Texas. — *Converse v. Sorley*, 39 Tex. 515; *John v. Battle*, 58 Tex. 591; *Spring v. Eisenach*, 51 Tex. 432.

Compare *Moorman v. Arthur*, 90 Va. 455.

A Prior Unrecorded Deed made by the bankrupt is not effectual as against a purchaser from the assignee. *Holbrook v. Dickenson*, 56 Ill. 497; *Webber v. Clark*, 136 Ill. 256. See also *Burt v. Batavia Paper Mfg. Co.*, 86 Ill. 66.

Property Encumbered by Bankrupt in Fraud of Creditors. — It has been held that where an assignee sells land which the bankrupt had encumbered in fraud of his creditors, the purchaser takes it free from the incumbrance. *Dwinel v. Perley*, 32 Me. 197.

6. *Deficiency in Quantity.* — *Hall v. Nevill*, 3 La. Ann. 326.

7. *Mortgaged Property.* — *New Prague Milling Co. v. Schreiner*, 70 Minn. 125.

8. *Setting Aside Sale in General.* — *In re Conant*, 6 Fed. Cas. No. 3,085; *In re Mott*, 1 Nat. Bankr. Reg. 223, 17 Fed. Cas. No. 9,879; *Ex p. Bryan*, 2 Hughes (U. S.) 273, 14 Nat. Bankr. Reg. 71, 4 Fed. Cas. No. 2,061; *Davis v. Railroad Co.*, 1 Woods (U. S.) 661, 13 Nat. Bankr. Reg. 258, 7 Fed. Cas. No. 3,648; *Searcy v. McChord*, 1 Fed. Rep. 261; *In re Stevenson*, 6 Fed. Rep. 710; *Coombs v. Persons Unknown*, 82 Me. 326; *McHenry v. McVeigh*, 56 Md. 578; *Murphy v. Philbrook*, 57 N. Y. Super. Ct. 204. And see the title JUDICIAL SALES.

Fraud. — *Clark v. Clark*, 17 How. (U. S.) 315; *In re Troy Woolen Co.*, 8 Blatchf. (U. S.) 465,

the assignee or trustee may resell the property¹ at the risk of the purchaser at the first sale, if the resale was rendered necessary by his fault.²

g. ARBITRATION AND COMPROMISE. — The statutes generally confer express authority on assignees and trustees to submit to arbitration or to compromise any claim either in favor of or against the estate.³

h. ACTIONS — (1) *Actions by Assignee or Trustee* — (a) *Right to Maintain.* — The right to sue for the recovery of debts due and property belonging to a bankrupt or insolvent is a necessary incident to the title which vests in the assignee or trustee.⁴

(b) *Evidence of Official Character.* — Under statutes which require an assignment to transfer the debtor's title, the assignment or a certified copy thereof is conclusive evidence of the assignee's right to sue.⁵

(2) *Actions Against Assignee or Trustee.* — Persons who are injured by an assignee or trustee in the exercise of his powers, as by the conversion of their property, etc., may sue him therefor. This principle has frequently been recognized in actions brought against assignees and has probably never been questioned.⁶ It has been held, however, that an assignee is an officer of the court by which he is appointed, and that leave of court must be obtained before a party can sue him.⁷

Action on Disallowed Claim. — In some jurisdictions creditors whose claims have been disallowed are authorized to test the validity thereof by bringing suit against the assignee or trustee.⁸

(3) *Intervention and Substitution in Pending Actions* — (a) *Actions Brought by Bankrupt.* — An assignee or trustee has the right to prosecute to final judgment any action brought by the bankrupt and pending at the time of the adjudication, if the subject-matter of the action constitutes an asset of the bankrupt's estate;⁹ but he does not, by allowing the action to proceed in the bankrupt's

4 Nat. Bankr. Reg. 629, 24 Fed. Cas. No. 14,201; *Matter of King*, 3 Fed. Rep. 839.

Fiduciary Character of Purchaser. — *Citizens' Bank v. Ober*, 1 Woods (U. S.) 80, 13 Nat. Bankr. Reg. 328, 5 Fed. Cas. No. 2,731.

Improvident or Irregular Sales. — *In re Mott*, 17 Fed. Cas. No. 9,878; *In re Hyde*, 6 Fed. Rep. 587; *In re Lloyd*, 11 Fed. Rep. 586.

Inadequacy of Price. — *In re Ryan*, 6 Nat. Bankr. Reg. 235, 21 Fed. Cas. No. 12,182; *In re Bousfield*, 16 Nat. Bankr. Reg. 481, 3 Fed. Cas. No. 1,702; *In re Troy Woolen Co.*, 8 Blatchf. (U. S.) 465, 4 Nat. Bankr. Reg. 629, 24 Fed. Cas. No. 14,201; *In re Palmer*, 13 Fed. Rep. 870; *In re Ewing*, 16 Fed. Rep. 753; *In re Nichols*, (Cal. 1897) 50 Pac. Rep. 1072. *Compare In re Thompson*, 2 Am. Bankr. Rep. 216.

The Jurisdiction of suits to set aside sales in bankruptcy is exclusively in the bankruptcy court. The state courts have no jurisdiction. *Akins v. Stradley*, 51 Iowa 414.

1. *Resale.* — *New Orleans Mut. Ins. Co. v. Ruddock*, 22 La. Ann. 46.

2. *Resale at Risk of Delinquent Purchaser.* — *Pooley v. Quilter*, 2 De G. & J. 327; *Ex p. Bennett*, 10 Ves. Jr. 381; *Ex p. Farley*, 3 Deac. & C. 110; *Ex p. Towne*, 4 Deac. & C. 519; *Gordon v. Matthews*, 30 Md. 235.

3. *Arbitration and Compromise* — *England.* — 46 & 47 Vict., c. 52, § 57; *In re Wansborough*, 2 Chit. 40, 18 E. C. L. 242; *Davies v. Ridge*, 3 Esp. 101.

United States. — Act July 1, 1898 (30 U. S. Stat. at L. 544), §§ 26, 27; *Matter of Dibblee*, 3 Ben. (U. S.) 354, 3 Nat. Bankr. Reg. 72, 7 Fed. Cas. No. 3,885; *In re Firemen's Ins. Co.*, 3 Biss. (U. S.) 462, 8 Nat. Bankr. Reg. 123, 9

Fed. Cas. No. 4,796; *In re Furbish*, 2 Hask. (U. S.) 120, 9 Fed. Cas. No. 5,159; *Matter of Hoole*, 3 Fed. Rep. 496; *Duff v. Hopkins*, 33 Fed. Rep. 599; *In re McLam*, 97 Fed. Rep. 922.

See also the several state insolvency laws.

4. See *supra*, this section, *What Passes to Assignee or Trustee*. And see also *supra*, this title, *Operation and Effect of Insolvency and Bankruptcy Proceedings* — *Actions by Debtor*.

In Quebec the assignee has no power to engage in litigation, even to collect debts due the estate or to recover property belonging to it, except by permission of the judge. *In re Plamondon*, 13 Quebec Super. Ct. 377.

5. *Assignment Conclusive Evidence of Assignee's Right to Sue.* — *Palmer v. Jordan*, 163 Mass. 350; *Partridge v. Hannum*, 2 Met. (Mass.) 569; *Doane v. Russell*, 3 Gray (Mass.) 382.

Certified Copy of Assignment. — *Fitzgerald v. Neustadt*, 91 Cal. 600. See also the various statutes on the subject.

6. *Recognition of Liability of Assignee to Be Sued.* — *Rutan v. Wolters*, 116 Cal. 403; *Rogers v. Sibley*, 150 Mass. 180; *Holbrook v. Dow*, 12 Gray (Mass.) 357; *Stein v. Swensen*, 44 Minn. 218.

Action for Dividend. — *Carney v. Dewing*, 10 Cush. (Mass.) 408.

7. *Leave of Court Required to Sue Assignee.* — *Lloyd v. Ball*, 77 Fed. Rep. 365.

8. *Action to Test Validity of Claims.* — *Parsons v. Parsons*, 67 N. H. 296; *Niantic Mills Co. v. Riverside, etc., Mills*, 10 R. I. 34. *Compare* the statutes in other jurisdictions.

9. *Intervention and Substitution in Actions Brought by Bankrupt* — *United States.* — *Wise v.*

name, lose his right to whatever may be recovered,¹ unless his conduct amounts to laches and third persons have acquired an interest in the judgment.²

(b) **Actions Brought Against Bankrupt.** — The assignee or trustee may also assume the defense of any action pending against the bankrupt which may result in a diminution of the estate,³ and if he neglects to do so, the plaintiff on recovering a judgment therein obtains a prior right to the property affected;⁴ but if the trustee had no opportunity to defend the action, as where the bankrupt confesses judgment, he may still intervene and claim the proceeds of a sale under execution.⁵

(4) **Jurisdiction** — (a) **Under Former Statutes.** — In actions by assignees appointed under former bankruptcy laws of the United States, the question frequently arose as to whether the state or the federal courts had jurisdiction. Cases involving the construction and application of the bankruptcy law are clearly within the jurisdiction of the federal courts, without regard to the citizenship of the parties, as cases "arising under the laws of the United States," and it has frequently been so held.⁶ In cases which did not involve federal questions, and in which there was no matter of diverse citizenship to give the federal courts jurisdiction, there was a conflict of opinion. Under a provision of the judiciary act giving to the federal courts exclusive jurisdiction "of all matters and proceedings in bankruptcy,"⁷ it was several times held that the

Decker, 1 Cranch (C. C.) 190, 30 Fed. Cas. No. 17,907; *Samson v. Burton*, 5 Ben. (U. S.) 325, 4 Nat. Bankr. Reg. 1, 21 Fed. Cas. No. 12,285; *Person's Case*, 8 Ct. Cl. 543.

Alabama. — *Brandon v. Cabiness*, 10 Ala. 155; *Lacy v. Rockett*, 11 Ala. 1002; *Gary v. Bates*, 12 Ala. 544; *Appling v. Bailey*, 44 Ala. 333.

Georgia. — *Home Ins. Co. v. Hollis*, 53 Ga. 659.

Illinois. — *Chicago, etc., R. Co. v. Jenkins*, 103 Ill. 588.

Louisiana. — *Serra é Hijo v. Hoffman*, 29 La. Ann. 17.

Massachusetts. — *Ames v. Gilman*, 10 Met. (Mass.) 239.

New York. — *Clark v. Binninger*, (N. Y. Super. Ct. Spec. T.) 39 How. Pr. (N. Y.) 363.

Pennsylvania. — *Cottrell v. Mann*, 1 W. N. C. (Pa.) 157; *Silk Co. v. Disston*, 7 W. N. C. (Pa.) 63.

Tennessee. — *Northman v. Liverpool, etc., Ins. Co.*, 1 Tenn. Ch. 319; *Cheek v. Anderson*, 2 Lea (Tenn.) 194.

Vermont. — *Hayden v. Rice*, 18 Vt. 353.

Virginia. — *Cannon v. Wellford*, 22 Gratt. (Va.) 195.

See also *supra*, this title, *Operation and Effect of Insolvency and Bankruptcy Proceedings — Actions by Debtor*; and *supra*, this section, *What Passes to Assignee or Trustee — Choses in Action*.

1. **Permitting Action to Proceed in Bankrupt's Name.** — *Peck v. U. S.*, 15 Ct. Cl. 364; *Thatcher v. Rockwell*, 4 Colo. 375; *Reed v. Paul*, 131 Mass. 129. See also *Jones v. McKenna*, 4 Lea (Tenn.) 642.

2. **Effect of Delay in Asserting Right.** — *Beall v. Dushane*, 149 Pa. St. 439, 30 W. N. C. (Pa.) 182. See also *supra*, this division of this section, *Abandonment of Property*.

3. **Intervention and Substitution in Actions Against Bankrupt — United States.** — *Wilson v. Stewart*, 1 Cranch (C. C.) 128, 30 Fed. Cas. No.

17,837; *In re Moseley*, 8 Nat. Bankr. Reg. 208, 17 Fed. Cas. No. 9,868; *Smith v. Gordon*, 2 N. Y. Leg. Obs. 325, 22 Fed. Cas. No. 13,052; *Matter of Babcock*, 3 Story (U. S.) 393, 2 Fed. Cas. No. 696.

Georgia. — *Smith v. Lawton*, 39 Ga. 29; *Kent v. Downing*, 44 Ga. 116; *Louden v. King*, 50 Ga. 302; *King v. Loudon*, 53 Ga. 64; *Loudon v. Blandford*, 56 Ga. 150.

Maryland. — *Collateral Security Bank v. Fowler*, 42 Md. 393.

New York. — *American L. Ins., etc., Co. v. Sackett*, 1 Barb. Ch. (N. Y.) 585; *Lee v. Pfeffer*, 25 Hun (N. Y.) 97.

Virginia. — *Barger v. Buckland*, 28 Gratt. (Va.) 850.

See also *supra*, this title, *Operation and Effect of Insolvency and Bankruptcy Proceedings — Actions Against Debtor*.

Defenses Available to Assignee. — The assignee cannot defend on the ground that the bankruptcy proceeding is a bar to the action, because that is a right personal to the bankrupt. *Serra é Hijo v. Hoffman*, 29 La. Ann. 17.

4. **Neglect to Defend Pending Action.** — *Smith v. Gordon*, 2 N. Y. Leg. Obs. 325, 22 Fed. Cas. No. 13,052; *Esterbrook Steel Pen Mfg. Co. v. Ahern*, 31 N. J. Eq. 3. See also *Norton v. Switzer*, 93 U. S. 355.

5. **Intervention After Judgment.** — *Jordan v. Downey*, 40 Md. 401. Compare *Krupp v. Tabor*, 31 Mich. 174; *Keck v. Werder*, 46 N. Y. Super. Ct. 339, 86 N. Y. 264.

6. **Jurisdiction — Construction and Application of Bankruptcy Law.** — *Burbank v. Bigelow*, 92 U. S. 179, 14 Nat. Bankr. Reg. 445; *Clafflin v. Houseman*, 93 U. S. 130, 15 Nat. Bankr. Reg. 49; *Wehl v. Wald*, 17 Blatchf. (U. S.) 342, 29 Fed. Cas. No. 17,356; *Atkinson v. Purdy*, *Crabbe* (U. S.) 551, 2 Fed. Cas. No. 616; *Payson v. Dietz*, 2 Dill. (U. S.) 504, 8 Nat. Bankr. Reg. 193, 19 Fed. Cas. No. 10,861; *Connor v. Scott*, 4 Dill. (U. S.) 242, 6 Fed. Cas. No. 3,119; *Woolridge v. McKenna*, 8 Fed. Rep. 650.

7. *Rev. Stat. U. S.*, § 711, cl. 6.

state courts were wholly without jurisdiction;¹ but it was afterwards authoritatively decided that the state courts had jurisdiction in such cases, and that a provision of the bankruptcy law giving the circuit courts of the United States jurisdiction where a certain amount was in controversy did not take away the jurisdiction of the state courts, but merely created a concurrent jurisdiction.²

(b) **Jurisdiction under Act 1898** — *aa. DISTRICT COURTS OF UNITED STATES.* — The Act of 1898 contains several provisions respecting the jurisdiction in actions by trustees, as follows: Section 2, clause 7, gives the district courts of the United States, as courts of bankruptcy, jurisdiction to "cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, except as herein otherwise provided." Section 23, paragraph *a*, provides that "the United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy between trustees, as such, and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted, and such controversies had been between the bankrupts and such adverse claimants;" and paragraph *b* provides that "suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt whose estate is being administered by such trustee might have brought or prosecuted them, if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant." And finally, sections 26 and 27 authorize the trustees, by leave of court, to submit to arbitration or to compromise, respectively, any controversy arising in the administration of the estate. The question of the jurisdiction of the district courts under these provisions has occasioned much conflict of opinion, but it has recently been determined by the Supreme Court of the United States that paragraph *b* of section 23 limits and controls the jurisdiction of all courts over controversies not strictly or properly a part of the proceedings in bankruptcy, and that the district courts, therefore, have no jurisdiction of actions to collect debts due the bankrupt or to set aside transfers made by him "unless by the consent of the proposed defendant."³ Before this decision the rulings of the circuit and district courts on the question were very conflicting. In some cases it was held that the limitation was found in paragraph *b* of section 23, and that no action could be brought or maintained in a district court unless the ordinary requirements of federal

1. Jurisdiction of State Courts Denied — *United States.* — Hallack *v.* Tritch, 17 Nat. Bankr. Reg. 293.

Georgia. — Dodd *v.* Hammock, 59 Ga. 403.

Indiana. — Sherwood *v.* Burns, 38 Ind. 502, Seavey *v.* Maples, 94 Ind. 205.

Iowa. — Hecht *v.* Springstead, 51 Iowa 502; Brewster *v.* Dryden, 53 Iowa 657. Compare Wetmore *v.* McMillan, 57 Iowa 344, 42 Am. Rep. 45.

Michigan. — Voorhies *v.* Frisbie, 25 Mich. 476, 12 Am. Rep. 291.

New York. — Frost *v.* Hotchkiss, 14 Nat. Bankr. Reg. 443; Olcott *v.* Maclean, 16 Nat. Bankr. Reg. 79. The opposite rule was afterwards followed in *New York*. See case cited in the next following note.

Wisconsin. — Brigham *v.* Clafflin, 31 Wis. 607, 11 Am. Rep. 623.

2. Jurisdiction of State Courts Declared — *United States.* — Lathrop *v.* Drake, 91 U. S. 516, 13 Nat. Bankr. Reg. 472; Clafflin *v.* Houseman, 93 U. S. 130, 15 Nat. Bankr. Reg. 40; Clark *v.* Ewing, 3 Fed. Rep. 83.

Illinois. — McLean *v.* St. John, 10 Ill. App.

307, 1sett *v.* Stuart, 80 Ill. 404, 22 Am. Rep. 194.

Kentucky. — Boone *v.* Hall, 7 Bush (Ky.) 663, Am. Rep. 288.

Louisiana. — Wooldridge *v.* Rickert, 33 La. Ann. 234.

Maryland. — Jordan *v.* Downey, 40 Md. 401. *Minnesota.* — Mann *v.* Flower, 25 Minn. 500.

New York. — Kidder *v.* Horrobin, 72 N. Y. 159. It was formerly held otherwise in *New York*. See the next preceding note.

North Carolina. — Cogdell *v.* Exum, 69 N. Car. 464, 12 Am. Rep. 657.

Pennsylvania. — Peiper *v.* Harmer, 8 Phila. (Pa.) 100.

Tennessee. — Barton *v.* Geiler, 3 Lea (Tenn.) 296.

3. District Courts — *Statute Construed by Supreme Court.* — Bards *v.* Hawarden First Nat. Bank, 178 U. S. 524; Mitchell *v.* McClure, 178 U. S. 539; Hicks *v.* Knost, 178 U. S. 541. These cases overturn the several views taken by the cases cited in the four next following notes.

jurisdiction should exist.¹ Other authorities held that the limitation was to be found in sections 26 and 27 relating to arbitration and compromise, and that the only jurisdiction of the district courts in regard to controversies between trustees and strangers respecting the assets of the estate consisted in permitting or directing trustees to submit such controversies to arbitration or to compromise them.² Another view was that, while the limitation was found in section 23, that section related only to actions which the bankrupt himself could have maintained — that is, causes of action which accrued in favor of the bankrupt before the adjudication — and that as to causes of action accruing to the trustee in his official capacity, the district court had jurisdiction.³ Still another line of authorities, without determining what, if any, limitation on the jurisdiction of the district courts was imposed by other portions of the act, held that section 23 contained no such limitation, but related exclusively to the circuit courts, and was intended to govern cases which were not within the territorial jurisdiction of the bankruptcy court.⁴

bb. CIRCUIT COURTS OF UNITED STATES. — The circuit courts have jurisdiction of actions at law and suits in equity to recover debts due the bankrupt or to establish the title of the estate to property claimed by third persons, in any case where the facts requisite generally to the jurisdiction of such courts exist,⁵ except so far as that jurisdiction is limited by the bankruptcy law.⁶

cc. STATE COURTS. — The jurisdiction conferred on the federal courts in actions between trustees in bankruptcy and strangers to the bankruptcy proceedings is not exclusive, but it is well settled that the state courts have concurrent jurisdiction.⁷

(5) *Limitation of Actions.* — The special limitation prescribed by the bankruptcy laws is applicable to all judicial controversies between the trustee or assignee and any person whose interest is adverse to his in behalf of the bankrupt's estate.⁸ Within this principle, such special limitation applies to actions

1. Limitation to Ordinary Requirements of Federal Jurisdiction. — *Burnett v. Morris Mercantile Co.*, 91 Fed. Rep. 365; *Mitchell v. McClure*, 91 Fed. Rep. 621, *affirmed* on another ground, 4 Am. Bankr. Rep. 177; *Perkins v. McCauley*, 98 Fed. Rep. 286.

2. Limitation to Compromise or Arbitration of Controversies. — *In re Abraham*, 93 Fed. Rep. 767; *Hicks v. Knost*, 94 Fed. Rep. 625, *affirmed* on another ground, 4 Am. Bankr. Rep. 178; *Camp v. Zellars*, 94 Fed. Rep. 799.

3. Limitation as to Causes of Actions Accruing to Bankrupt Before Adjudication. — *In re Gutwillig*, 90 Fed. Rep. 481, *affirmed* 92 Fed. Rep. 337; *Carter v. Hobbs*, 92 Fed. Rep. 594; *Murray v. Beal*, 97 Fed. Rep. 567; *Pepperdine v. Headley*, 98 Fed. Rep. 863; *Lehman v. Crosby*, 99 Fed. Rep. 542.

4. Jurisdiction of District Courts Held Not Limited by Section 23. — *In re Sievers*, 91 Fed. Rep. 366, *affirmed sub nom.* *Davis v. Bohle*, 92 Fed. Rep. 325; *In re Newberry*, 97 Fed. Rep. 24; *Louisville Trust Co. v. Marx*, 98 Fed. Rep. 456; *Shutts v. Aurora First Nat. Bank*, 98 Fed. Rep. 705; *In re Woodbury*, 98 Fed. Rep. 833; *In re Hammond*, 98 Fed. Rep. 845; *Norcross v. Nathan*, 99 Fed. Rep. 414; *Cox v. Wall*, 99 Fed. Rep. 546.

5. Jurisdiction of Circuit Courts. — *Chattanooga Nat. Bank v. Rome Iron Co.*, 99 Fed. Rep. 82. See also *In re Abraham*, 35 C. C. A. 592, 93 Fed. Rep. 767; *Camp v. Zellars*, 36 C. C. A. 501, 94 Fed. Rep. 799. But see *Bardes v. Hawarden First Nat. Bank* 4 Am. Bankr. Rep. 163. As to the jurisdiction generally of

the circuit courts of the United States, see the title UNITED STATES COURTS.

6. Limitation of Jurisdiction of Circuit Courts. — Act July 1, 1898 (30 U. S. Stat. at L. 544), § 23, recited in the text *supra*. And see *In re Sievers*, 91 Fed. Rep. 366, *affirmed sub nom.* *Davis v. Bohle*, 92 Fed. Rep. 325; *Goodier v. Barnes*, 94 Fed. Rep. 798; *In re Newberry*, 97 Fed. Rep. 24; *Louisville Trust Co. v. Marx*, 98 Fed. Rep. 456; *Shutts v. Aurora First Nat. Bank*, 98 Fed. Rep. 705; *Cox v. Wall*, 99 Fed. Rep. 546. Compare *Bardes v. Hawarden First Nat. Bank*, 4 Am. Bankr. Rep. 163.

7. Jurisdiction of State Courts. — *Heath v. Shaffer*, 93 Fed. Rep. 647; *Robinson v. White*, 97 Fed. Rep. 33; *In re Woodbury*, 98 Fed. Rep. 833; *Norcross v. Nathan*, 99 Fed. Rep. 414. See also *Leidigh Carriage Co. v. Stengel*, 95 Fed. Rep. 637; *Chattanooga Nat. Bank v. Rome Iron Co.*, 99 Fed. Rep. 82; *In re Baker-Ricketson Co.*, 97 Fed. Rep. 489; *Hicks v. Knost*, 94 Fed. Rep. 625.

8. Limitations — Applicability in General — United States. — *Bailey v. Glover*, 21 Wall. (U. S.) 342; *Scovill v. Shaw*, 4 Cliff. (U. S.) 549, 21 Fed. Cas. No. 12,552; *Walker v. Towner*, 4 Dill. (U. S.) 165, 16 Nat. Bankr. Reg. 285, 29 Fed. Cas. No. 17,089; *Wisner v. Brown*, 122 U. S. 214; *Gifford v. Helms*, 98 U. S. 248, 19 Nat. Bankr. Reg. 113; *Greene v. Taylor*, 132 U. S. 415.

Alabama. — *Steele v. Moody*, 53 Ala. 418; *Moses v. St. Paul*, 67 Ala. 168.

Illinois. — *Burton v. Perry*, 146 Ill. 71, *distinguishing* *Gage v. Du Puy*, 127 Ill. 216, *follow-*

brought by the trustee or assignee against third persons to collect the assets of the estate,¹ even though the action is brought exclusively for the benefit of another person;² but it does not apply to actions founded on the assignee's dealings with the estate after it came into his hands,³ or to actions in respect to interests existing in the bankrupt himself,⁴ or to actions brought by or against the bankrupt, before bankruptcy, and to which the assignee became a party,⁵ though it is applicable to writs of error by assignees to judgments against the bankrupts.⁶

The Period of Limitation prescribed by the Act of 1898 is two years after the estate has been closed.⁷

5. Accounting—*a. DUTY TO ACCOUNT.*—Trustees or assignees in bankruptcy or insolvency are required, like other fiduciaries, to render periodical statements of the administration of the estates in their hands, and also to render final accounts when the estates are closed.⁸

b. ALLOWANCES TO ASSIGNEE OR TRUSTEE—(1) *Compensation.*—The English Statute does not give the trustee any absolute rights to compensation, but leaves the matter to the determination of the creditors.⁹

ing Miller v. Cook, 135 Ill. 190; Coryell v. Klehm, 157 Ill. 462.

Minnesota.—Lewis v. Prendergast, 45 Minn. 533.

New York.—Burnham v. De Bevoise, (Supm. Ct. Spec. T.) 8 How. Pr. (N. Y.) 159; Cleveland v. Boerum, 27 Barb. (N. Y.) 252.

A Provisional Trustee has the same authority to commence actions as the permanent trustee, and therefore the statute begins to run from the time the provisional trustee qualified. Teackle v. Gibson, 8 Md. 70.

1. Actions for Collection of Assets.—Payson v. Coffin, 4 Dill. (U. S.) 386, 19 Fed. Cas. No. 10,858; Ross v. Wilcox, 134 Mass. 21.

An Action Against Stockholders of a bankrupt corporation, brought by the assignee in bankruptcy, is governed by the special limitation. Payson v. Coffin, 5 Dill. (U. S.) 473, 19 Fed. Cas. No. 10,859.

2. Action for Benefit of Third Person.—Pike v. Lowell, 32 Me. 245, in which the assignee sued for the benefit of a person to whom he had sold a claim of the estate against the defendant.

3. Actions Arising Out of Assignee's Dealings with Estate.—*In re* Conant, 5 Blatchf. (U. S.) 54, 6 Fed. Cas. No. 3,086.

4. Actions Respecting Interests of Bankrupt.—Phelps v. McDonald, 99 U. S. 298, 19 Nat. Bankr. Reg. 187; Clark v. Clark, 17 How. (U. S.) 315.

5. Limitation Not Applicable to Actions Pending at Time of Bankruptcy.—Jenkins v. Chicago, etc., R. Co., 6 Ill. App. 192; Chicago, etc., R. Co. v. Jenkins, 103 Ill. 583; Latting v. Fassman, 29 La. Ann. 280.

6. Limitation Applicable to Writs of Error.—International Bank v. Jenkins, 104 Ill. 143, 107 Ill. 291.

7. Period of Limitation under Act 1898.—Act July 1, 1898 (30 U. S. Stat. at L. 544), § 11, par. d.

Under the Act of 1867 the period of limitation was two years after the cause of action accrued. Bailey v. Glover, 21 Wall. (U. S.) 342; Ludeling v. Chaffe, 143 U. S. 301; Hewett v. Norton, 1 Woods (U. S.) 68, 13 Nat. Bankr. Reg. 276; Norton v. De la Villebeuve, 1 Woods (U. S.) 163, 13 Nat. Bankr. Reg. 304; Sedg-

wick v. Casey, 4 Nat. Bankr. Reg. 496; *In re* Masterson, 4 Nat. Bankr. Reg. 553; *In re* Krogman, 5 Nat. Bankr. Reg. 116; Peiper v. Harmer, 5 Nat. Bankr. Reg. 252; Davis v. Anderson, 6 Nat. Bankr. Reg. 145; Scott v. Little, 76 Fed. Rep. 563; Scott v. Devlin, 89 Fed. Rep. 970; Bowen v. Delaware, etc., R. Co., 153 N. Y. 476, reversing 82 Hun (N. Y.) 39.

Under the Act of 1841 it was two years after the declaration and decree of bankruptcy or after the cause of suit first accrued. Nash v. Nash, 12 Allen (Mass.) 345.

8. Duty to Account—*England.*—46 & 47 Vict., c. 52, § 78 *et seq.* And see *Twogood v. Swanston*, 6 Ves. Jr. 485; *Ex p. Kyley*, 4 Deac. & C. 50; *Montgomery v. Montgomery*, 2 Molloy 446; *Ex p. Malachy*, 1 Mont. D. & De G. 353, 10 L. J. Bankr. 7, 4 Jur. 1092; *Tarleton v. Hornby*, 1 Y. & C. Exch. 172; *Ex p. Carew*, 44 L. J. Bankr. 67, L. R. 10 Ch. 308, 32 L. T. N. S. 318, 23 W. R. 459.

United States.—Act July 1, 1898 (30 U. S. Stat. at L. 544), § 47, cl. 6-8. And see the following cases decided under the former bankruptcy laws: *Sands's Case*, 1 U. S. J. 15, 21 Fed. Cas. No. 12,302; *Lucas v. Morris*, 1 Paine (U. S.) 396, 15 Fed. Cas. No. 8,587; *Matter of Bellamy*, 1 Ben. (U. S.) 300, 1 Nat. Bankr. Reg. 64, 3 Fed. Cas. No. 1,266; *In re* Bowie, 1 Nat. Bankr. Reg. 628, 15 Pittsb. Leg. J. (Pa.) 448, 3 Fed. Cas. No. 1,728; *In re* Goodwin, 3 Nat. Bankr. Reg. 417, 10 Fed. Cas. No. 5,550; *Matter of Clark*, 5 Ben. (U. S.) 389, 6 Nat. Bankr. Reg. 197, 5 Fed. Cas. No. 2,799; *In re* Clark, 6 Nat. Bankr. Reg. 194, 5 Fed. Cas. No. 2,807; *Jones v. Newsom*, 7 Biss. (U. S.) 321, 13 Fed. Cas. No. 7,484; *Neill v. Jackson*, 8 Fed. Rep. 144; *Matter of Straus* (Supm. Ct. Gen. T.) 61 How. Pr. (N. Y.) 243.

See also the several state insolvency laws.

9. Compensation under English Statute.—46 & 47 Vict., c. 52, § 72, par. 1. And see *In re* Gallard, (1892) 1 Q. B. 532; *Re Marsden*, 9 Mor. Bankr. Cas. 70; *Re Shirley*, 9 Mor. Bankr. Cas. 147.

Services as an Accountant rendered by the assignee cannot be made the subject of an allowance. *Ex p. Read*, 1 Glyn & J. 77.

In the United States and Canada the statutes provide that trustees shall receive compensation for their services, usually in the form of commissions.¹

Forfeiture of Compensation. — The court is generally given power to withhold the compensation of the assignee or trustee for misconduct or neglect of duty.²

(2) **Expenses.** — A trustee or assignee is always entitled to an allowance for the necessary expenses incurred in the performance of his duties.³

1. Compensation in United States. — Act July 1, 1898 (30 U. S. Stat. at L. 544), § 48; *In re* Ft. Wayne Electric Corp., 94 Fed. Rep. 109; *In re* Collin, 2 Am. Bankr. Reg. 344; *In re* Gerson, 2 Am. Bankr. Reg. 352; Act March 2, 1867 (14 U. S. Stat. at L. 517), §§ 17, 28; Matter of Hughes, 2 Ben. (U. S.) 85, 1 Nat. Bankr. Reg. 226, 12 Fed. Cas. No. 6,841; *In re* Pegues, 3 Nat. Bankr. Reg. 80, 2 Am. L. T. 136, 19 Fed. Cas. No. 10,907; *In re* Tulley, 3 Nat. Bankr. Reg. 82, 2 Am. L. T. 137, 24 Fed. Cas. No. 14,235; *In re* Jones, 9 Nat. Bankr. Reg. 491, 13 Fed. Cas. No. 7,451; Matter of Muldaur, 8 Ben. (U. S.) 65, 17 Fed. Cas. No. 9,905; *Ex p.* Whitcomb, 2 Lowell (U. S.) 523, 15 Nat. Bankr. Reg. 92, 29 Fed. Cas. No. 17,529; Matter of Many, 9 Ben. (U. S.) 160, 17 Nat. Bankr. Reg. 429, 16 Fed. Cas. No. 9,053; *In re* Slevin, 4 Dill. (U. S.) 131, 22 Fed. Cas. No. 12,942; *In re* Welge, 1 Fed. Rep. 216; *In re* Scott, 8 Fed. Rep. 420; *In re* Stewart Rubber Co., 16 Fed. Rep. 220; *In re* Burt, 27 Fed. Rep. 549; *Cowing v. Altman*, 71 N. Y. 435, 27 Am. Rep. 70.

California. — Matter of Raley, 123 Cal. 38.

Louisiana. — *West v. His Creditors*, 1 La. Ann. 365; *Landry v. His Creditors*, 1 La. Ann. 39; *Hollander v. His Creditors*, 6 La. Ann. 668; *Spiller v. Their Creditors*, 16 La. Ann. 292; *Brady v. His Creditors*, 43 La. Ann. 165; *Clarke v. Their Creditors*, 43 La. Ann. 735; *Delogny v. Her Creditors*, 48 La. Ann. 488.

Massachusetts. — *Loud v. Holden*, 14 Gray (Mass.) 154.

Minnesota. — *Gallagher v. Walsh*, 60 Minn. 527.

Ohio. — *In re Commercial Bank*, 3 Ohio N. P. 193, 4 Ohio Dec. 440.

Vermont. — *Sowles v. Flinn*, 63 Vt. 563.

Compensation in Canada. — *Ex p.* Sturdee, 17 Can. L. J. 65, 33 Can. L. J. 125.

See also the various state insolvency laws.

Legal Services Rendered by Assignee. — It has been held that if an assignee renders services as an attorney for the benefit of the estate he is entitled to compensation therefor. *In re* Thomas, 45 Fed. Rep. 784, affirmed in 55 Fed. Rep. 961, 8 U. S. App. 414. But see Matter of Muldaur, 8 Ben. (U. S.) 65, 17 Fed. Cas. No. 9,905.

2. Forfeiture of Compensation. — *In re* Newcomb, 32 Fed. Rep. 826; Act June 22, 1874 (18 U. S. Stat. at L. 178), § 4; Act July 1, 1898 (30 U. S. Stat. at L. 544), § 48, par. c.

3. Allowance for Expenses — *England.* — 53 & 54 Vict. c. 71, § 15, par. 2; *Ex p.* Molineux, 2 Deac. 33, 3 Mont. & A. 721; *In re* Chisholm, 1 Fonbl. 50; *Ex p.* Shaw, 1 De G. 242; *Ex p.* Newton, 5 De G. & Sm. 584, 18 L. J. Bankr. 1, 13 Jur. 94.

Canada. — *Hyde v. Lindsay*, 29 Can. Sup. Ct. 595.

United States. — Gen. Orders & Forms in Bankruptcy, 1898, Rule 35, par. 3, Act March

2, 1867 (14 U. S. Stat. at L. 517), §§ 17, 28; *In re* Dean, 1 Nat. Bankr. Reg. 249, 1 Am. L. T. Bankr. Reg. 9, 7 Fed. Cas. No. 3,699.

The Necessity of the Expense must be clearly shown to authorize the allowance. *In re* Sweet, 9 Nat. Bankr. Reg. 48, 21 Pittsb. Leg. J. (Pa.) 82, 23 Fed. Cas. No. 13,688; *In re* Davenport, 3 Nat. Bankr. Reg. 77, 2 Am. L. T. 136, 7 Fed. Cas. No. 3,587; *In re* Sawyer, 2 Lowell (U. S.) 551, 16 Nat. Bankr. Reg. 460, 21 Fed. Cas. No. 12,396; Matter of Staff, 5 Ben. (U. S.) 574, 22 Fed. Cas. No. 13,273; *In re* Barnes, 18 Fed. Rep. 158.

Expenses Allowable. — Allowances have been made for expenses as follows:

Advertising Sales. — *In re* Downing, 3 Nat. Bankr. Reg. 741, 2 Chicago Leg. N. 313, 7 Fed. Cas. No. 4,045.

Attorney's Fees. — *Ex p.* Christy, 3 Mont. & A. 90, 2 Deac. 115, 6 L. J. Bankr. 68; *In re* Noyes, 6 Nat. Bankr. Reg. 277, 18 Fed. Cas. No. 10,371; *Hunker v. Bing*, 9 Fed. Rep. 277; *In re* Treadwell, 23 Fed. Rep. 442; *In re* Hubbel, 9 Nat. Bankr. Reg. 523, 19 Int. Rev. Rec. 150, 12 Fed. Cas. No. 6,820; Matter of Raley, 123 Cal. 38; *In re* Genesee Bank, (Idaho 1897) 51 Pac. Rep. 406; *Nelson v. Pierson*, 8 Md. 300. The charge must be reasonable in amount and in proportion to the services rendered. *In re* Davenport, 3 Nat. Bankr. Reg. 77, 2 Am. L. T. 136, 7 Fed. Cas. No. 3,587; *In re* Drake, 14 Nat. Bankr. Reg. 150, 3 N. Y. Wkly. Dig. 50, 7 Fed. Cas. No. 4,058; *Maybin v. Raymond*, 15 Nat. Bankr. Reg. 353, 4 Am. L. T. Rep. N. S. 21, 16 Fed. Cas. No. 9,338; *In re* Brinker, 19 Nat. Bankr. Reg. 195, 4 Fed. Cas. No. 1,882; *In re* Cook, 17 Fed. Rep. 328. No allowance will ordinarily be made for attorney's fees where the services were rendered before the appointment of the assignees, *In re* New York Mail Steamship Co., 2 Nat. Bankr. Reg. 423, 1 Chicago Leg. N. 210, 18 Fed. Cas. No. 10,210; or where the charge was incurred in litigation affecting the rights of creditors *inter se*, unless the disbursement was authorized by the court, *In re* Barnes, 18 Fed. Rep. 158; or where more counsel were employed than were necessary, *In re* New York Mail Steamship Co., 2 Nat. Bankr. Reg. 423, 1 Chicago Leg. N. 210, 18 Fed. Cas. No. 10,210.

Auctioneer's Charges. — *In re* Sweet, 9 Nat. Bankr. Reg. 48, 21 Pittsb. Leg. J. (Pa.) 82, 23 Fed. Cas. No. 13,688. Compare *In re* Pegues, 3 Nat. Bankr. Reg. 80, 2 Am. L. T. 136, 19 Fed. Cas. No. 10,907, holding that the assignee must act as salesman unless leave of court is obtained to employ an auctioneer.

Hire of Clerks, Bookkeepers, etc. — *In re* Barnes, 18 Fed. Rep. 158; *In re* Noyes, 6 Nat. Bankr. Reg. 277, 18 Fed. Cas. No. 10,371.

Publishing Notice of Appointment. — *In re* Pegues, 3 Nat. Bankr. Reg. 80, 2 Am. L. T. 136, 19 Fed. Cas. No. 10,907; *In re* Tulley, 3

XIII. ASSIGNMENT. — By the recent bankruptcy laws no assignment of the bankrupt's property is required, but the adjudication itself operates to divest his title.¹ Under the earlier statutes an assignment was necessary,² as it still is under some of the state insolvency laws.³

By Whom Made. — The assignment is to be executed by the person designated by the statute, usually the judge or some officer of the court.⁴

XIV. COMPOSITIONS — 1. **Authority to Make Compositions.** — Bankruptcy and insolvency laws generally provide that the debtor may make a composition with his creditors on such terms as they may mutually agree on, thereby arresting the bankruptcy or insolvency proceeding, and enabling the debtor to obtain his discharge on paying the sums agreed on.⁵

When Proposal May Be Made. — In *England* a proposal for a composition may be made at any time after the adjudication.⁶ In the *United States* the bankrupt may offer terms of composition to his creditors after, but not before, he has been examined in open court or at a meeting of creditors, and has filed in

Nat. Bankr. Reg. 82, 2 Am. L. T. 137, 24 Fed. Cas. No. 14,235.

Traveling Expenses. — *Ex p.* Lovegrove, 3 Deac. & C. 763, 2 Mont. & A. 4; *Ex p.* Joyner, 2 Mont. & A. 1, *overruling Ex p.* Elsee, 1 Montagu 1.

1. **Assignment Not Required by Modern Bankruptcy Laws** — *England.* — 46 & 47 Vict., c. 52, § 54, par. (2).

United States. — Act July 1, 1898 (30 U. S. Stat. at L. 544), § 70, par. a.

2. **Assignment Required by Former Bankruptcy Laws.** — See Act March 2, 1867 (14 U. S. Stat. at L. 517), § 14. See also *supra*, this title. *Assignment or Trustee* — *Appointment and Tenure* — *Statutory Provisions*, note *Designation of Office*; and also *Title of Assignee or Trustee* — *When Title Vests*.

Adjudication an Essential Prerequisite to Assignment. — *Wright v. Johnson*, 8 Blatchf. (U. S.) 150, 4 Nat. Bankr. Reg. 626, 30 Fed. Cas. No. 18,082. Compare *Wells v. Brander*, 10 Smed. & M. (Miss.) 348.

The Recording of the Assignment was required by the late bankruptcy law. Act March 2, 1867 (14 U. S. Stat. at L. 517), § 14; *In re Alexander*, 3 Nat. Bankr. Reg. 29, 2 Am. L. T. 137, 1 Fed. Cas. No. 163. See also the various state insolvency laws. But this was held not to be essential to the validity of the assignment. *Davis v. Anderson*, 6 Nat. Bankr. Reg. 145, 7 Fed. Cas. No. 3,623; *Phillips v. Helmbold*, 26 N. J. Eq. 202.

As to the requirements necessary to admit an assignment to record, see *In re Neale*, 3 Nat. Bankr. Reg. 177, 1 Am. L. T. Bankr. Rep. 295, 17 Fed. Cas. No. 10,066; *Harris v. Pratt*, 37 Kan. 316; *Zeigler v. Shomo*, 78 Pa. St. 357.

3. **Assignment Required by State Insolvency Laws.** — See the various local statutes.

4. **Who May Execute Assignment.** — The bankruptcy law of 1867 provided that the judges should execute the assignment, except where there was no "opposing interest," in which case the register might act. *In re Wylie*, 2 Nat. Bankr. Reg. 137, 30 Fed. Cas. No. 19,109; *Hale v. Christy*, 24 Neb. 746.

The **Signature of the Judge** was held not to be essential under this statute, though the provision was that the judge should convey "by an instrument under his hand." This pro-

vision was regarded as merely directory. *Zantinger v. Ribble*, 36 Md. 32.

5. **Authority to Make Compositions** — *England.* — 46 & 47 Vict., c. 52, § 23, par. (1); 53 & 54 Vict., c. 71, § 3, par. (1).

Canada. — *Forster v. Bettes*, 5 U. C. Q. B. 599; *Brunskill v. Metcalf*, 3 U. C. C. P. 143.

United States. — Act July 1, 1898, (30 U. S. Stat. at L. 544), § 12; Act June 22, 1874 (18 U. S. Stat. at L. 178); *Matter of Reiman*, 7 Ben. (U. S.) 455, 11 Nat. Bankr. Reg. 21, 20 Fed. Cas. No. 11,673, 12 Blatchf. (U. S.) 562, 13 Nat. Bankr. Reg. 128, 20 Fed. Cas. No. 11,675, *affirming* 7 Ben. (U. S.) 505, 20 Fed. Cas. No. 11,674.

Delaware. — *Macalitioner v. Croasdale*, 3 Houst. (Del.) 365.

Louisiana. — *Drew v. His Creditors*, 49 La. Ann. 690; *Schminke v. Their Creditors*, 50 La. Ann. 511.

Maine. — *Cobbossee Nat. Bank v. Rich*, 81 Me. 164.

Massachusetts. — *Hill v. McKim*, 168 Mass. 100; *Wilson v. Boylston Nat. Bank*, 170 Mass. 9; *Holder v. Hillson*, 170 Mass. 466.

New Hampshire. — *Drake v. McQuade*, 66 N. H. 303.

And see the various local statutes.

A Case in Bankruptcy Must Be Pending in order to authorize a composition, under the statute. *Matter of Reiman*, 7 Ben. (U. S.) 455, 11 Nat. Bankr. Reg. 21, 20 Fed. Cas. No. 11,673.

As to when a case is pending in bankruptcy, so that a composition may be proposed and made, see *Ex p.* Jewett, 2 Lowell (U. S.) 393, 11 Nat. Bankr. Reg. 443, 12 Nat. Bankr. Reg. 170, 13 Fed. Cas. No. 7,303.

Corporations may make compositions. *In re Weber Furniture Co.*, 13 Nat. Bankr. Reg. 529, 20 Fed. Cas. No. 17,330.

Partnerships. — As to compositions in case the bankrupt is a firm, or a member of a firm, see *In re Spades*, 6 Biss. (U. S.) 448, 13 Nat. Bankr. Reg. 72, 22 Fed. Cas. No. 13,196; *South Boston Iron Co., Petitioners*, 4 Cliff. (U. S.) 343, 22 Fed. Cas. No. 13,183; *Pool v. McDonald*, 15 Nat. Bankr. Reg. 560, 9 Chicago Leg. N. 322, 19 Fed. Cas. No. 11,268; *In re Henry*, 9 Ben. (U. S.) 449, 17 Nat. Bankr. Reg. 463, 11 Fed. Cas. No. 6,370.

6. **When Proposal May Be Made in England.** — 46 & 47 Vict., c. 52, § 23, par. (1).

court a schedule of his property and a list of his creditors.¹

The Theory of a Composition is that the cash value of the bankrupt's estate is substantially divided among the creditors in proportion to their respective debts.²

Constitutionality. — The provision in the bankruptcy law authorizing compositions is held to be within the constitutional power of Congress.³

2. Composition Meetings — *a.* **CONVENING CREDITORS.** — When a composition is proposed, the proposal must be submitted to the creditors for their action, and therefore a meeting must be called for that purpose.⁴ If, for any reason, the object of the meeting fails, or other matters afterwards arise requiring consideration, a second meeting may be called.⁵

b. **INVESTIGATION OF DEBTOR'S AFFAIRS.** — In considering the proposal, the creditors have the right to make such an inquiry into the debtor's affairs as will aid them in determining whether or not the composition should be accepted.⁶ Accordingly, the debtor may be examined,⁷ and he may also be required to submit his books and papers for examination;⁸ but it has been held that third persons cannot be compelled to testify.⁹

c. **RIGHT TO VOTE.** — The right to vote on a proposal for a composition depends on the same considerations in general as govern in the election of a trustee or assignee, that is, it is limited to creditors who have proved their claims, and are not secured or entitled to priority in respect thereto.¹⁰

1. When Proposal May Be Made in United States. — Act July 1, 1898 (30 U. S. Stat. at L. 544), § 12, par. *a.*

In this respect the present statute differs from the late one, which permitted a composition either before or after an adjudication. See Act June 22, 1874 (18 U. S. Stat. at L. 178), § 17.

In *Massachusetts* an offer of composition may be made at the time of filing a petition in insolvency, or at any other stage of the proceedings. *Van Ingen v. Beal*, 165 Mass. 582. Compare the statutes in other jurisdictions.

2. Theory of Composition. — Matter of Lissburger, 2 Fed. Rep. 153, affirmed 7 Fed. Rep. 584.

3. Constitutionality of Provision for Compositions. — Matter of Reiman, 7 Ben. (U. S.) 455, 13 Nat. Bankr. Reg. 128, 12 Blatchf. (U. S.) 562.

4. Composition Meetings. — See the statutory provisions cited in the preceding notes.

As to the conduct of composition meetings under the Act of June 22, 1874 (18 U. S. Stat. at L. 178), see *Re Ewing*, 2 Lowell (U. S.) 407, 8 Fed. Cas. No. 4,587; Matter of Holmes, 8 Ben. (U. S.) 74, 12 Nat. Bankr. Reg. 86, 12 Fed. Cas. No. 6,632; *In re Cheney*, 19 Nat. Bankr. Reg. 16, 5 Fed. Cas. No. 2,637; The Richmond, 18 Nat. Bankr. Reg. 362, 20 Fed. Cas. No. 11,798; *Woodruff v. Terry*, 45 N. Y. Super. Ct. 176.

Notice of the Meeting must be given to the creditors, but an accommodation maker of a note is not a creditor of an indorsee who makes a composition after the accommodated payee had been adjudged a bankrupt. *Liebke v. Thomas*, 116 U. S. 605.

If Timely Notice Is Not Given to any of the creditors the meeting may be reopened at their instance, where it appears that their presence might affect the result of the vote. *In re Spencer*, 18 Nat. Bankr. Reg. 199, 22 Fed. Cas. No. 13,229.

5. Second Meeting. — *In re McDowell*, 6 Biss.

U. S.) 193, 10 Nat. Bankr. Reg. 459, 16 Fed. Cas. No. 8,776; Matter of Reiman, 7 Ben. (U. S.) 455, 11 Nat. Bankr. Reg. 21, 20 Fed. Cas. No. 11,673; Matter of Dumahaut, 15 Blatchf. (U. S.) 20, 7 Fed. Cas. No. 4,124; *In re Scott*, 15 Nat. Bankr. Reg. 73, 4 Cent. L. J. 29, 21 Fed. Cas. No. 12,519; *In re Keller*, 18 Nat. Bankr. Reg. 331, 14 Fed. Cas. No. 7,654.

6. Investigation of Debtor's Affairs. — *Ex p. Jewett*, 2 Lowell (U. S.) 393, 11 Nat. Bankr. Reg. 443, 12 Nat. Bankr. Reg. 170, 13 Fed. Cas. No. 7,303.

7. Examination of Debtor. — Matter of Holmes, 8 Ben. (U. S.) 74, 12 Nat. Bankr. Reg. 86, 12 Fed. Cas. No. 6,632; *In re Ash*, 17 Nat. Bankr. Reg. 19, 2 Fed. Cas. No. 571; *In re Proby*, 17 Nat. Bankr. Reg. 175, 20 Fed. Cas. No. 11,439; *In re Little*, 19 Nat. Bankr. Reg. 234, 2 N. J. L. J. 211, 15 Fed. Cas. No. 8,392.

The Creditors May Excuse the Debtor from Examination on account of illness, though he is present. *In re Wilson*, 18 Nat. Bankr. Reg. 300, 30 Fed. Cas. No. 17,785, 16 Blatchf. (U. S.) 112, 30 Fed. Cas. No. 17,781.

8. Examination of Debtor's Books and Papers. — Matter of Holmes, 8 Ben. (U. S.) 74, 12 Nat. Bankr. Reg. 86, 12 Fed. Cas. No. 6,632; *In re Ash*, 17 Nat. Bankr. Reg. 19, 2 Fed. Cas. No. 571.

9. Third Persons Not Compellable to Testify. — *In re Dobbins*, 18 Nat. Bankr. Reg. 268, 7 Fed. Cas. No. 3,943.

10. Who May Vote in General — England. — 53 & 54 Vict., c. 71, § 3, par. (2).

United States. — *In re Scott*, 15 Nat. Bankr. Reg. 73, 4 Cent. L. J. 29, 21 Fed. Cas. No. 12,519; *In re Keller*, 18 Nat. Bankr. Reg. 331, 14 Fed. Cas. No. 7,654; *In re Mathers*, 17 Nat. Bankr. Reg. 225, 16 Fed. Cas. No. 9,274; *In re Bryce*, 19 Nat. Bankr. Reg. 287, 4 Fed. Cas. No. 2,069; Matter of Troth, 1 Fed. Rep. 405.

Louisiana. — *Herwig v. Their Creditors*, 36 La. Ann. 760.

See also the statutes of the various states. Provable Debts alone give the right to vote.

d. NUMBER AND AMOUNT OF CONSENTING CREDITORS. — The English Statute requires the consent of a majority in number and three-fourths in value of all the creditors who have proved their claims, to constitute an acceptance of a composition.¹

The Bankruptcy Law of the United States requires a majority in number and amount.²

And the State Insolvency Laws generally contain the same requirement.³

3. Terms of Composition. — The terms of a composition are a matter for the determination of a majority of the creditors, and their decision is conclusive, where there is nothing to show fraud, mistake, or accident.⁴

4. Confirmation of Composition — *a.* NECESSITY. — After the required number and amount of creditors have assented to the proposed composition, it must be confirmed by the court before it can become operative.⁵

b. GROUNDS FOR REFUSING CONFIRMATION — **Prejudice to Creditors.** — A com-

Ex p. Trafton, 2 Lowell (U. S.) 505, 14 Nat. Bankr. Reg. 507, 24 Fed. Cas. No. 14,133; *In re* Bailey, 2 Woods (U. S.) 222, 2 Fed. Cas. No. 729.

Disputed Claims are to be examined and passed on by the officer who presides at the meeting. *In re* Keller, 18 Nat. Bankr. Reg. 331, 14 Fed. Cas. No. 7,654. See also *In re* Spencer, 18 Nat. Bankr. Reg. 199, 22 Fed. Cas. No. 13,229.

An objection to the validity of a claim cannot be raised for the first time on a motion to confirm a composition. *In re* Bloch, 18 Nat. Bankr. Reg. 328, 3 Fed. Cas. No. 1,551.

A Claim Standing in the Name of a Guardian for money loaned by the guardian to a firm of which he was a member, and which afterwards became bankrupt, may be voted on by the ward, in favor of a proposed composition, on coming of age. *In re* Bailey, 2 Woods (U. S.) 222, 2 Fed. Cas. No. 729.

Buying Debt for Purpose of Opposing Composition. — The creditor may vote on a debt which he bought with the intent of preventing the adoption of the proposal for a composition, if his motive was not fraudulent or oppressive. *Ex p.* Jewett, 2 Lowell (U. S.) 393, 11 Nat. Bankr. Reg. 443, 12 Nat. Bankr. Reg. 170, 13 Fed. Cas. No. 7,303.

A Creditor May Vote by Proxy or may ratify the act of another in voting on his claim. Thus, where a creditor made an affidavit that he had authorized his wife to vote in favor of a composition, it is a ratification and estoppel which renders her vote binding on him. *In re* Bailey, 2 Woods (U. S.) 222, 2 Fed. Cas. No. 729. See also *Phillips v. Her Creditors*, 36 La. Ann. 904.

Secured Creditors. — See *supra*, this title, *Assignee or Trustee — Appointment and Tenure — How Selection Is Made — Election by Creditors — Right to Vote.*

And see the following cases decided under the late bankruptcy law: *In re* Spades, 6 Biss. (U. S.) 448, 13 Nat. Bankr. Reg. 72, 22 Fed. Cas. No. 13,196; *Re* O'Neil, 2 Lowell (U. S.) 470, 14 Nat. Bankr. Reg. 210, 18 Fed. Cas. No. 10,528; *In re* Snelling, 19 Nat. Bankr. Reg. 120, 22 Fed. Cas. No. 13,140; *In re* Van Auker, 14 Nat. Bankr. Reg. 425, 28 Fed. Cas. No. 16,828; *Flower v. Greenebaum*, 50 Fed. Rep. 190.

The provision of the bankruptcy law of the

United States respecting the right of creditors to vote applies to voting for any purpose. See Act July 1, 1898 (30 U. S. Stat. at L. 544), § 56.

Nonresident Creditors may vote in respite proceedings under the *Louisiana* insolvency laws, though not summoned. *Phillips v. Her Creditors*, 36 La. Ann. 904.

1. Number and Amount of Consenting Creditors in England. — 53 & 54 Vict., c. 71, § 3, par. (2).

2. Majority in Number and Amount Required by Bankruptcy Law of United States. — Act July 1, 1898 (30 U. S. Stat. at L. 544), § 12, par. *b.*

The Act of 1867 provided that the adoption of a proposal for a composition should be by a resolution passed by a majority in number and three-fourths in value of the creditors, and confirmed by the signatures of two-thirds in number and one-half in value. Act June 22, 1874 (18 U. S. Stat. at L. 178), § 17; *Matter of Reiman*, 7 Ben. (U. S.) 455, 11 Nat. Bankr. Reg. 24, 20 Fed. Cas. No. 11,673; *In re* Gilday, 7 Ben. (U. S.) 491, 11 Nat. Bankr. Reg. 108, 10 Fed. Cas. No. 5,422; *In re* Spades, 6 Biss. (U. S.) 448, 13 Nat. Bankr. Reg. 72, 22 Fed. Cas. No. 13,196; *In re* Wald, 12 Nat. Bankr. Reg. 491, 28 Fed. Cas. No. 17,054; *In re* Purcell, 18 Nat. Bankr. Reg. 447, 20 Fed. Cas. No. 11,470; *In re* Scott, 15 Nat. Bankr. Reg. 73, 4 Cent. L. J. 29, 21 Fed. Cas. No. 12,519.

3. Majority in Number and Amount Required by State Insolvency Laws. — *Morgan v. Nye*, 14 La. Ann. 30; *Anderson v. His Creditors*, 33 La. Ann. 1155; *Masser v. Storer*, 79 Me. 512.

Under the *Massachusetts* statute the consent of a majority in number and value of the creditors who have proved their claims is required if the proposal be for the payment of not less than fifty per centum to the general creditors, or if less than fifty per centum, of three-fourths in number and value of such creditors. Stat. 1885, c. 353, § 2; *Van Ingen v. Beal*, 165 Mass. 582; *Fenton v. Graham*, 101 Mass. 554.

4. Terms of Composition Determinable by Creditors. — *In re* Weber Furniture Co., 13 Nat. Bankr. Reg. 559, 29 Fed. Cas. No. 17,331; *Matter of Wronkow*, 15 Blatchf. (U. S.) 38, 18 Nat. Bankr. Reg. 81, 30 Fed. Cas. No. 18,105.

5. Confirmation Required — England. — 53 & 54 Vict., c. 71, § 3, par. (2).

United States. — Act July 1, 1898 (30 U. S. Stat. at L. 544), § 12, par. *d.*

position will not be confirmed by the court where it appears that it is not for the best interests of the creditors.¹

Debtor Not Entitled to Discharge. — Another ground for refusing confirmation is the existence of facts which operate to bar the debtor's right to a discharge.²

1. Prejudice to Creditors — *England*. — 53 & 54 Vict., c. 71, § 3, par. (8).

United States. — Act July 1, 1898 (30 U. S. Stat. at L. 544), § 12, par. d.

The Late Bankruptcy Law provided that if it should at any time appear to the court that a composition could not, "in consequence of legal difficulties, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor," the court might refuse to confirm it. Act June 22, 1874 (18 U. S. Stat. at L. 178), § 17.

And see the following cases in which various matters were considered and held not to require refusal of confirmation. *In re Scott*, 15 Nat. Bankr. Reg. 73, 4 Cent. L. J. 29, 21 Fed. Cas. No. 12,519; *In re Allen*, 2 Month. J. 58, 1 Fed. Cas. No. 209, 17 Nat. Bankr. Reg. 157, 17 Alb. L. J. 170, 1 Fed. Cas. No. 210; *Matter of Dumahaut*, 15 Blatchf. (U. S.) 20, 7 Fed. Cas. No. 4,124; *In re Greenbaum*, 1 Chicago L. J. 599, 10 Fed. Cas. No. 5,709; *In re Keiler*, 18 Nat. Bankr. Reg. 36, 10 Chicago Leg. N. 209, 14 Fed. Cas. No. 7,648; *In re Weber Furniture Co.*, 13 Nat. Bankr. Reg. 559, 29 Fed. Cas. No. 17,331; *Ex p. Trafton*, 2 Lowell (U. S.) 505, 14 Nat. Bankr. Reg. 507, 24 Fed. Cas. No. 14,133; *In re Welles*, 18 Nat. Bankr. Reg. 525, 29 Fed. Cas. No. 17,377; *In re McNab, etc.*, Mfg. Co., 18 Nat. Bankr. Reg. 388, 21 Pittsb. Leg. J. (Pa.) 88, 16 Fed. Cas. No. 8,906; *In re Purcell*, 18 Nat. Bankr. Reg. 447, 20 Fed. Cas. No. 11,470; *Matter of Reiman*, 7 Ben. (U. S.) 505, 20 Fed. Cas. No. 11,604, *affirmed* 12 Blatchf. (U. S.) 562, 13 Nat. Bankr. Reg. 128, 20 Fed. Cas. No. 11,675; *In re Van Auken*, 14 Nat. Bankr. Reg. 425, 28 Fed. Cas. No. 16,828; *In re Walshe*, 2 Woods (U. S.) 225, 29 Fed. Cas. No. 17,118; *In re Snelling*, 19 Nat. Bankr. Reg. 120, 22 Fed. Cas. No. 13,140; *In re Tift*, 18 Nat. Bankr. Reg. 227, 23 Fed. Cas. No. 14,033; *In re Cavan*, 19 Nat. Bankr. Reg. 303, 5 Fed. Cas. No. 2,528; *Fourchy v. Bayly*, 33 La. Ann. 778; *Leggett v. Barton*, 40 N. J. L. 83; *Beebe v. Pyle*, 71 N. Y. 20.

Approval Has Been Refused where a creditor's right to make suitable inquiries of the debtor was denied, *Ex p. Jewett*, 2 Lowell (U. S.) 393, 11 Nat. Bankr. Reg. 443, 12 Nat. Bankr. Reg. 170, 13 Fed. Cas. No. 7,303; where the proceedings were collusive, though there was only one dissenting creditor, *In re Keiler*, 18 Nat. Bankr. Reg. 36, 10 Chicago Leg. N. 299, 14 Fed. Cas. No. 7,648; where the terms of the composition required that all the property of the bankrupts should be restored to them on their giving their individual notes, unsecured and unindorsed, for seventy-five per cent. of their debts; *Matter of Jancway*, 8 Ben. (U. S.) 267, 13 Fed. Cas. No. 7,207; *In re McNab, etc.*, Mfg. Co., 18 Nat. Bankr. Reg. 388, 21 Pittsb. Leg. J. (Pa.) 88, 16 Fed. Cas. No. 8,906; where the resolution provided for the return to the debtor of a part of his property, and it appeared that on a former occasion he had misappropriated funds of another; *In re Bloch*, 18 Nat.

Bankr. Reg. 328, 3 Fed. Cas. No. 1,551; and where, by means of a preference, injustice has been done to the body of creditors, *In re Jacobs*, 18 Nat. Bankr. Reg. 48, 13 Fed. Cas. No. 7,159.

Special Advantage to Creditors. — It has been held that in order to bring a composition within the rule that it must be for the benefit of the creditors, there must be some advantage to the creditors which they would not have in bankruptcy. *Ex p. Bischoffsheim*, 19 Q. B. D. 33.

In determining whether a composition is beneficial, its provisions should be compared with what the creditors would receive through an assignee in bankruptcy, and not with what the debtor might possibly be able to pay them. *Re Whipple*, 2 Lowell (U. S.) 404, 11 Nat. Bankr. Reg. 524, 29 Fed. Cas. No. 17,513.

The relation to the debtor of the creditors favoring the composition, and the relative number thereof as compared with those who oppose the composition, should also be considered. *In re Weber Furniture Co.*, 13 Nat. Bankr. Reg. 529, 29 Fed. Cas. No. 17,330.

Benefit to Particular Creditors. — A composition will not be disapproved merely because the disapproval would specially benefit the objecting creditor. *In re Scott*, 15 Nat. Bankr. Reg. 73, 4 Cent. L. J. 29, 21 Fed. Cas. No. 12,519.

But it has been held that, where a composition was opposed by two creditors, who had theretofore successfully opposed a discharge, confirmation should be refused. *Matter of Hannahs*, 8 Ben. (U. S.) 533, 11 Fed. Cas. No. 6,033.

False Schedule of Creditors. — It is said not to be a ground of opposition for a respite, that the debtor placed on his schedule parties who were not his creditors; because, by so doing, he cannot prejudice the real creditors, any of whom, though not on his schedule, can, by making oath, vote at the meeting. *Weems v. Delta Moss Co.*, 33 La. Ann. 973.

Offer of Trivial Amount. — Under the *Massachusetts* statute requiring the judge to confirm a composition, if it "appears to have been duly assented to, and to be consistent with justice and for the interests of the creditors," confirmation will not be ordered where the proposal is to distribute \$4.09 among twenty-two creditors aggregating \$4096. *Hill v. McKim*, 168 Mass. 100.

2. Debtor Not Entitled to Discharge — *England*. — 53 & 54 Vict., c. 71, § 3, par. (9).

United States. — Act July 1, 1898 (30 U. S. Stat. at L. 544), § 12, par. (d).

But under the Act of June 22, 1874 (18 U. S. Stat. at L. 178), § 17, a debtor could make a composition, though, by reason of preference or otherwise, he would not be able to obtain his discharge. *In re Haskell*, 11 Nat. Bankr. Reg. 164, 1 Cent. L. J. 531, 11 Fed. Cas. No. 6,192; *In re Troth*, 19 Nat. Bankr. Reg. 253, 2 N. J. L. 147, 24 Fed. Cas. No. 14,188; *Matter of Odell*, 9 Ben. (U. S.) 247, 16 Nat. Bankr.

Want of Good Faith, etc. — If the offer to compromise and its acceptance are not made in good faith, or have been made or procured otherwise than as the statute provides, or by any means, promises, or acts which are forbidden, confirmation will be refused.¹

Other Matters. — The *English* statute provides that the court "shall refuse to approve the proposal" for the reasons stated above, but that "in any other case the court may either approve or refuse to approve the proposal."² The statute of the *United States* provides that the judge "shall confirm a composition" where none of the grounds for refusing confirmation exist.³

5. Payment of Dividends — *a* **MODE OF PAYMENT.** — The provisions relating to compositions contemplate payment in money of the dividends agreed on, and a composition cannot be performed by giving notes.⁴

b. **TIME OF PAYMENT.** — Though payment cannot be made with the notes of the debtor, nevertheless immediate payment is not required. The dividends may be made payable at a future time or times, and the debtor may give his notes for the several amounts, with or without security, unless the statute provides otherwise.⁵

c. **CLAIMS PAYABLE** — **Secured Claims.** — Where a creditor holds security for his claim, but the amount of the claim exceeds the value of the security, he is entitled to participate with the other creditors as to so much of his claim as is not covered by the security.⁶

Reg. 501, 18 Fed. Cas. No. 10,427; *In re Joseph*, 24 Fed. Rep. 137.

The Interest of the Creditors Will Be Considered as well as the conduct of the debtor, and the court is not bound to refuse its approval because the debtor had committed offenses which would have prevented his discharge. *Ex p. Kearsley*, 18 Q. B. D. 168; *Re Bottomley*, 10 Mor. Bankr. Cas. 262.

As to the acts or omissions which will bar the right to discharge, see *infra*, this title, *Discharge of Debtor—Grounds for Refusing Discharge*.

1. Want of Good Faith, etc. — Act July 1, 1898 (30 U. S. Stat. at L. 544), § 12, par. (d).

2. 53 & 54 Vict., c. 71, § 3, par. (10).

Under this provision the court may refuse its approval in all cases. *In re Burr*, (1892) 2 Q. B. 467.

The discretion of the court must be exercised with regard to the requirements of commercial morality and the conduct of the debtor on the one hand, and to the best interests of the creditors on the other. *In re Staniar*, 20 Q. B. D. 544; *Re Barlow*, 3 Mor. Bankr. Cas. 304; *Re McTear*, 5 Mor. Bankr. Cas. 182.

A proposal has been held unreasonable where it provided that the debtor "shall be discharged when the committee of inspection shall so resolve." *Ex p. Clark*, 13 Q. B. D. 426.

The court may refuse to approve a proposal where a large part of the debts had not been proved, or where the court thinks that the proofs require investigation. *Ex p. Rogers*, 13 Q. B. D. 438. See also *Ex p. Merchant Banking Co.*, 16 Ch. D. 623; *Ex p. Strawbridge*, 25 Ch. D. 266; *In re Burr*, (1892) 2 Q. B. 467.

3. Act July 1, 1898 (30 U. S. Stat. at L. 544), § 12, par. (d).

4. Dividends Payable Only in Money. — *Re Langdon*, 2 Lowell (U. S.) 387, 13 Nat. Bankr. Reg. 60, 14 Fed. Cas. No. 8,058; *In re McNab, etc.*, Mfg. Co., 18 Nat. Bankr. Reg. 388, 21

Pittsb. Leg. J. (Pa.) 88, 16 Fed. Cas. No. 8,906; *In re Hyman*, 18 Nat. Bankr. Reg. 299, 12 Fed. Cas. No. 6,985.

A Deposit in Bank and notice thereof to the creditors is a sufficient tender to them. *Noyes v. Dobson*, 30 Kan. 361.

5. Time of Payment. — The *English* statute does not require immediate payment. This appears from the provision as to defaults in the payment of instalments due under the composition, and from other provisions respecting the terms on which compositions may be made. See 46 & 47 Vict., c. 52, § 23; 53 & 54 Vict., c. 71, § 3.

Under the late bankruptcy law of the *United States* it was held that payments might be made in instalments or otherwise in future, with or without security. *Matter of Wilson*, 16 Blatchf. (U. S.) 112, 30 Fed. Cas. No. 17,781; *Re Langdon*, 2 Lowell (U. S.) 387, 13 Nat. Bankr. Reg. 60, 14 Fed. Cas. No. 8,058; *In re McNab, etc.*, Mfg. Co., 18 Nat. Bankr. Reg. 388, 21 Pittsb. Leg. J. (Pa.) 88, 16 Fed. Cas. No. 8,906; *Matter of Alexander*, 8 Ben. (U. S.) 99, 1 Fed. Cas. No. 159; *In re Hurst*, 1 Flipp. (U. S.) 462, 13 Nat. Bankr. Reg. 455, 12 Fed. Cas. No. 6,925; *Matter of Louis*, 7 Ben. (U. S.) 481, 15 Fed. Cas. No. 8,528, *sub. nom.* *In re Lewis*, 14 Nat. Bankr. Reg. 144, 15 Fed. Cas. No. 8,314; *Matter of Reiman*, 12 Blatchf. (U. S.) 562, 13 Nat. Bankr. Reg. 128, 20 Fed. Cas. No. 11,675, 7 Ben. (U. S.) 505, 20 Fed. Cas. No. 11,674; *In re Wilson*, 18 Nat. Bankr. Reg. 300, 30 Fed. Cas. No. 17,785; *Evans v. Gallantine*, 57 Ind. 367; *Boese v. Locke*, (Supm. Ct. Spec. T.) 53 How. Pr. (N. Y.) 148.

The present statute, however, requires that the consideration to be paid by the bankrupt to his creditors shall have been deposited in such place as shall be designated by and subject to the order of the judge. Act July 1, 1898 (30 U. S. Stat. at L. 544), § 12, par. b.

6. Rights of Secured Creditors. — *Paret v. Ticknor*, 4 Dill. (U. S.) 111, 16 Nat. Bankr. Reg. 315, 18 Fed. Cas. No. 10,711; *Flower v.*

Claims Entitled to Priority must be provided for, under the bankruptcy law of the *United States*, by a deposit of the necessary amount.¹

An **Unliquidated Claim** may be provided for under a composition by permitting the prosecution of a pending suit in the state court, or by ordering an inquiry in the matter at the bar of the bankruptcy court.²

Agreement Not to Press for Payment. — A creditor is not precluded from sharing under a composition by the fact that he had loaned money to the debtor with the understanding that payment should not be pressed, there having been no definite agreement deferring payment, or any misrepresentation to other creditors.³

Proof of Claims. — Where the statute requires a meeting to be called within a certain time, for the purpose of hearing proof of unproved claims, and providing that the money deposited on claims then remaining unproved shall be refunded to the debtor or person depositing the same, a creditor, on failure to present his claim at that hearing, loses his right to prove it.⁴

d. DEFAULT IN MAKING PAYMENTS. — The *English* statute provides that, if default is made in payment of any instalment due in pursuance of a composition, the court may, on the application of any person interested, adjudge the debtor a bankrupt and annul the composition, but without prejudice to the validity of any sale, disposition, or payment duly made, or thing duly done under or in pursuance of the composition.⁵ Under the present bankruptcy law of the *United States* it would seem that no question as to default in payment can arise, because that statute requires a deposit, subject to the order of the judge, of the consideration to be paid by the bankrupt, and provides for the distribution thereof as the judge shall direct, on the confirmation of the composition.⁶ Under the late statute it was held that a composition made and confirmed did not take the proceeding out of the jurisdiction of the bankruptcy court, and that in case of a default in any payment the creditor could not sue for his debt in an ordinary action, but that his remedy was on motion made in a summary manner in the bankruptcy court.⁷

Greenebaum, 9 Biss. (U. S.) 455, 2 Fed. Rep. 897; Cavanna v. Bassett, 3 Fed. Rep. 215; Matter of Colby, (U. S. Dist. Ct.) 57 How. Pr. (N. Y.) 250. See also Johnson v. Dickinson, 78 N. Y. 42.

1. Claims Entitled to Priority. — Act July 1, 1898 (30 U. S. Stat. at L. 544), § 12, par. b.

The late statute did not impose on the debtor, as a condition precedent to a composition, that he should pay in full all claims entitled to priority under such section, and it was held that the owner of such a claim could have priority in payment only out of the assets that would go to the debtor's assignee. Matter of Chamberlin, 9 Ben. (U. S.) 149, 17 Nat. Bankr. Reg. 49, 5 Fed. Cas. No. 2,580.

2. Unliquidated Claims. — *Ex p.* Trafton, 2 Lowell (U. S.) 505, 14 Nat. Bankr. Reg. 507, 24 Fed. Cas. No. 14,133.

3. In Re Lane, 2 Lowell (U. S.) 333, 10 Nat. Bankr. Reg. 135, 14 Fed. Cas. No. 8,044.

4. Failure to Prove Claim at Time Designated. — Holder v. Hillson, 170 Mass. 466.

5. Default in Payment — Rule in England. — 46 & 47 Vict., c. 52, § 23, par. (3). And see *Ex p.* Jarvis, 10 Ch. D. 179.

Formerly the rule in *England* was that the effect of a default in the payment of a composition was to remit the creditor to his original rights, so that he could sue for the whole debt, giving credit for the amount of the composition received. Edwards v. Coombe, L. R. 7 C. P. 519; *In re Shiers*, 7 Ch. D. 416; *Ex p.* Burden,

16 Ch. D. 675; Edwards v. Hancher, 1 C. P. D. 111; Fessard v. Mugnier, 18 C. B. N. S. 286, 114 E. C. L. 286; Hazard v. Mare, 6 H. & N. 434; *Ex p.* Amos, 3 Manson 324; *In re Hatton*, L. R. 7 Ch. 723; *Ex p.* Watson, 2 Ch. D. 63.

6. Act July 1, 1898 (30 U. S. Stat. at L. 544), § 12, par. b, c.

7. Effect of Default in Payment under Act of 1874. — *In re Bayly*, 19 Nat. Bankr. Reg. 73, 26 Pittsb. Leg. J. (Pa.) 172, 2 Fed. Cas. No. 1,144; Shelly v. Bayly, 32 La. Ann. 1171; DeFord v. Hewlett, 49 Md. 51; Bidwell v. Bidwell, 92 Pa. St. 61. But see Pierce v. Gilkey, 124 Mass. 300; Whittemore v. Stephens, 48 Mich. 573; Harrison v. Gamble, 69 Mich. 96; Pupke v. Churchill, 16 Mo. App. 334, affirmed 91 Mo. 81.

Where a creditor refused to receive payment because a petition to review the order of confirmation was pending, it was held that the money should be paid into court, or the bankrupt would be liable to a summary order. *In re Reynolds*, 16 Nat. Bankr. Reg. 176, 5 N. Y. Wkly. Dig. 51, 20 Fed. Cas. No. 11,725.

If a creditor makes no effort to obtain his own share, he will be estopped to object to payments made to other creditors. *Ex p.* Hamlin, 2 Lowell (U. S.) 571, 16 Nat. Bankr. Reg. 320, 11 Fed. Cas. No. 5,993.

As to the effect, in general, of defaults in making payments, see *In re Ewing*, 17 Nat. Bankr. Reg. 109, 8 Fed. Cas. No. 4,588; *In re*

6. SECURITY FOR PAYMENT. — In some jurisdictions a debtor may be required to give security for the payments to be made to the creditors.¹

6. Effect of Composition. — A composition accepted by the creditors and approved by the court operates as a discharge of the debtor from all debts which are provable in bankruptcy against him, but it does not affect any debt or liability not so dischargeable, unless the particular creditor assents to the composition.² It also prevents the divesting of the bankrupt's title, if made before an adjudication of bankruptcy, or, if made after the adjudication, the bankrupt's title reverts in him.³

7. Secret Agreements with and Preference of Creditors. — It is unlawful for the debtor to make any secret agreement to pay a creditor a greater proportion of his debt than the other creditors receive, for the purpose of obtaining his consent to the composition, and, if he does so, the composition may be set aside.⁴ So, too, any note or other obligation that he may give to the creditor is void, as in fraud of the law,⁵ and any payment made pursuant to such an agreement or understanding may be recovered by the debtor, or by injured creditors, or by the assignee.⁶ But an agreement to pay an agent of a creditor

Hurst, 1 Flipp. (U. S.) 462, 13 Nat. Bankr. Reg. 455, 12 Fed. Cas. No. 6,925; *In re Kohl-saat*, 18 Nat. Bankr. Reg. 570, 14 Fed. Cas. No. 7,918; *In re Bayly*, 19 Nat. Bankr. Reg. 73, 26 Pittsb. Leg. J. (Pa.) 172, 2 Fed. Cas. No. 1,144; *Matter of Tooker*, 8 Ben. (U. S.) 390, 14 Nat. Bankr. Reg. 35, 24 Fed. Cas. No. 14,096; *Matter of Hinsdale*, 9 Ben. (U. S.) 91, 16 Nat. Bankr. Reg. 550, 12 Fed. Cas. No. 6,526; *Matter of Remsen*, 9 Ben. (U. S.) 260, 20 Fed. Cas. No. 11,698; *In re Waitzfelder*, 18 Nat. Bankr. Reg. 260, 28 Fed. Cas. No. 17,048; *Robinson v. Clement*, 73 Ind. 29.

1. Security for Payment. — *Eyrick v. His Creditors*, 44 La. Ann. 183. See also the various bankruptcy and insolvency laws.

A Deposit of Money is required by some statutes. See Act July 1, 1898 (30 U. S. Stat. at L. 544), § 12, par. 6; Stat. Mass. 1890, c. 387; *Claffin v. Lowe*, 157 Mass. 252.

2. Effect of Composition as a Discharge. — 53 & 54 Vict., c. 71, § 3, par. (12); 46 & 47 Vict., c. 52, § 19; Act July 1, 1898 (30 U. S. Stat. at L. 544), § 14, par. c; *In re Bjornstad*, 9 Biss. (U. S.) 13, 5 Fed. Rep. 797; *Deford v. Hewlett*, 49 Md. 51.

In Louisiana the debtor is merely granted a respite by which he is allowed a delay for the payment of the sums which he owes. *Vicksburg Liquor, etc., Co. v. Jefferies*, 45 La. Ann. 621.

What Debts Are Discharged. — Only those debts which would be barred by a discharge in bankruptcy are barred by a composition. *Ex p. Halford*, L. R. 19 Eq. 436; *Wilmot v. Mudge*, 103 U. S. 217; *Bayly v. Washington, etc., University*, 106 U. S. 11.

A Person Jointly Indebted with the bankrupt is not released by a composition. *Moore v. Stanwood*, 98 Ill. 605.

Fiduciary Debts are not released. *Bayly's Succession*, 30 La. Ann. 75.

The Claim of a Secured Creditor is not discharged by a composition, except as to the excess of the claim over the value of the security. *Flower v. Greenebaum*, 9 Biss. (U. S.) 455, 2 Fed. Rep. 807; *Cavanna v. Bassett*, 3 Fed. Rep. 215; *Paret v. Ticknor*, 4 Dill. (U. S.) 111, 16 Nat. Bankr. Reg. 315, 18 Fed. Cas. No. 10,711.

The Claims of Creditors Who Did Not Take Part in a Composition proceeding are nevertheless discharged, if the names of the creditors, their addresses and claims, were placed on the statement presented at the creditors' meeting, but not any whose names, etc., did not so appear. *In re Becket*, 2 Woods (U. S.) 173, 12 Nat. Bankr. Reg. 201, 3 Fed. Cas. No. 1,210; *In re Blackmore*, 11 Fed. Rep. 412; *Robinson v. Soule*, 56 Miss. 549. And see generally *infra*, this title, *Discharge of Debtor*.

3. Effect of Composition on Title of Bankrupt. — *Ligon v. Allen*, 56 Miss. 632.

4. See the next following subdivision of this section, *Setting Aside Compositions*.

5. Promise to Pay Creditor More than Proportionate Amount Held Void — England. — *Cockshott v. Bennett*, 2 T. R. 763; *Ex p. Barrow*, 18 Ch. D. 464; *Wood v. Barker*, L. R. 1 Eq. 139; *McKewan v. Sanderson*, L. R. 20 Eq. 65; *Mallalieu v. Hodgson*, 16 Q. B. 689, 71 E. C. L. 689; *Daughlish v. Tennent*, L. R. 2 Q. B. 49; *Bissell v. Jones*, L. R. 4 Q. B. 49; *Ex p. Milner*, 15 Q. B. D. 605; *Ex p. Phillips*, 36 W. R. 567. Compare *Ex p. Burrell*, 1 Ch. D. 537; *In re Balbirnie*, 3 Ch. D. 488; *In re McHenry*, (1894) 3 Ch. 365.

Canada. — *McDonald v. Senez*, 21 L. C. Jur. 290.

United States. — *Bullene v. Blain*, 6 Biss. (U. S.) 22, 4 Fed. Cas. No. 2,124; *Fairbanks v. Amoskeag Nat. Bank*, 38 Fed. Rep. 630; *Matter of Bennett*, 8 Ben. (U. S.) 561, 3 Fed. Cas. No. 1,312; *Brownsville Mfg. Co. v. Lockwood*, 11 Fed. Rep. 705.

Delaware. — *Macalitioner v. Croasdale*, 3 Houst. (Del.) 365.

Illinois. — *Woodman v. Stow*, 11 Ill. App. 613.

Indiana. — *Carey v. Hess*, 112 Ind. 398.

Massachusetts. — *Lothrop v. King*, 8 Cush. (Mass.) 382.

Michigan. — *Tinker v. Hurst*, 70 Mich. 159, 14 Am. St. Rep. 482.

Missouri. — *Claffin v. Torlina*, 56 Mo. 369.

New Hampshire. — *Winslow v. Locke*, 60 N. H. 580.

New York. — *Russell v. Rogers*, 10 Wend. (N. Y.) 473, 25 Am. Dec. 574.

6. Recovery of Money Paid. — *Smith v. Cuff*, 6

for his services in urging the compromise is valid.¹

8. Setting Aside Compositions — a. THE POWER. — Power is given to the court, in a proper case, to set aside a composition and reinstate the bankruptcy proceeding,² even after the composition has been performed.³

b. WHO MAY MOVE. — An application to set aside composition may be made by any person interested,⁴ unless he has in some manner lost or waived his right.⁵

c. GROUNDS FOR SETTING ASIDE COMPOSITION. — **Fraud** in procuring a composition is made a ground for setting it aside by probably all the statutes,⁶ an instance of which is paying or promising to pay any creditor a larger proportion of his claim than the other creditors receive, as an inducement to consent to the composition.⁷

M. & S. 160; *In re Lenzberg*, 7 Ch. D. 650; *Bean v. Brookmire*, 2 Dill. (U. S.) 108, 7 Nat. Bankr. Reg. 568, 2 Fed. Cas. No. 1,170.

1. Agreement to Pay Agent of Creditor. — *Bulene v. Blain*, 6 Biss. (U. S.) 22, 4 Fed. Cas. No. 2,124.

2. Power to Set Aside Composition. — 46 & 47 Vict., c. 52, § 23, par. (3); Act July 1, 1898 (30 U. S. Stat. at L. 544), § 13; *St. Louis Nat. Bank v. Bloch*, 44 La. Ann. 893; *Marx v. His Creditors*, 46 La. Ann. 1271. See also the statutes in other jurisdictions.

3. Setting Aside Composition After Performance. — See statutes cited in the next preceding note.

In Louisiana a respite cannot be set aside, unless opposition is made to it in ten days. *Block v. Jefferies*, 46 La. Ann. 1104.

4. Application by Any Person Interested — England. — 46 & 47 Vict., c. 52, § 23, par. (3).

United States. — Act July 1, 1898 (30 U. S. Stat. at L. 544), § 13.

Louisiana. — Rev. Civ. Code, art. 3093, as amended by Act 134 of 1888; *State v. Judge*, 45 La. Ann. 1349.

See also the statutes in other jurisdictions. **The Debtor Cannot Urge His Own Fraud** as a ground for setting aside a composition. The right, in such case belongs exclusively to the creditors who are wronged. *In re Hamlin*, 8 Biss. (U. S.) 122, 16 Nat. Bankr. Reg. 522, 11 Fed. Cas. No. 5,994.

5. Loss or Waiver of Right. — *In re Starr*, 56 Fed. Rep. 142.

6. Fraud a Ground for Setting Aside Compositions — England. — 46 & 47 Vict., c. 52, § 23, par. (3).

United States. — Act July 1, 1898 (30 U. S. Stat. at L. 544), § 13; *In re Dunn*, 53 Fed. Rep. 341.

Maine. — *Cobbossee Nat. Bank v. Rich*, 81 Me. 164.

See also the various state insolvency laws.

More Irregularities which result from mistake and do not involve any fraud are not grounds for setting aside compositions. *In re Henry*, 9 Ben. (U. S.) 449, 17 Nat. Bankr. Reg. 463, 11 Fed. Cas. No. 6,370; *In re Rodger*, 18 Nat. Bankr. Reg. 381, 20 Fed. Cas. No. 11,992; *Smith v. Engle*, 44 Iowa 265.

Erroneously Stating a Creditor's Address in the schedule, in consequence of which such creditor did not receive notice of the bankruptcy proceeding and therefore did not prove his debt, does not furnish cause for setting aside a composition, unless the erroneous statement

of the creditor's address was fraudulent. *In re Rudnick*, 93 Fed. Rep. 787.

Fraud is the Only Ground on which a composition can be set aside under the bankruptcy law of the *United States*. The provision of section 13, authorizing the judge to set aside a composition if it shall be made to appear "that fraud was practiced" in procuring it, defines exclusively the ground on which he may act and limits the general authority given by section 2 to "set aside compositions." *In re Rudnick*, 93 Fed. Rep. 787.

7. Extra Inducements to Particular Creditors. — *Matter of Diggles*, 8 Ben. (U. S.) 36, 7 Fed. Cas. No. 3,095; *Matter of Bennett*, 8 Ben. (U. S.) 561, 3 Fed. Cas. No. 1,312. And see *supra*, this section, *Secret Agreements with and Preference of Creditors*.

The Fact that a Sufficient Number of Creditors Accepted the Composition will not save it, where a threatened opposition was bought off by a preference, even though there is no evidence that the action of the consenting creditors was influenced by the creditor who received the preference. *In re Sawyer*, 2 Lowell (U. S.) 475, 14 Nat. Bankr. Reg. 241, 21 Fed. Cas. No. 12,395.

Inducement Furnished by Third Persons. — A promise or expectation of benefit by which a creditor is induced to consent to the composition is ground for avoiding it, though the bankrupt had nothing to do with it. *In re Sawyer*, 2 Lowell (U. S.) 475, 14 Nat. Bankr. Reg. 241, 21 Fed. Cas. No. 12,395; *In re Shine*, 15 Alb. L. J. 293, 21 Fed. Cas. No. 12,788.

Acts of Bankrupt's Agent. — The bankrupt is chargeable with the acts of his agent employed to obtain the assent of creditors to a composition, though he had no actual knowledge of what the agent did in the matter. *Matter of Bennett*, 8 Ben. (U. S.) 561, 3 Fed. Cas. No. 1,312.

Inducement Paid Out of Fund Not Included in Schedule. — *In National Park Bank v. People's Bank*, 25 Int. Rev. Rec. 169, 17 Fed. Cas. No. 10,040, it was held that where the inducement was paid out of a fund which was not included in the schedule, the other creditors could not complain.

Collateral Attack. — A composition cannot be collaterally impeached for fraud in an action at law by a creditor who was a party to the proceeding. *Farwell v. Raddin*, 129 Mass. 7.

Laches. — If the creditors fail to move promptly after knowledge of the wrong, and the debtor has, in the meantime, entered into

Injustice or Undue Delay. — Some of the statutes provide that a composition may be set aside if it appears that it cannot proceed without injustice or undue delay.¹

Default in Payment of Instalments. — It is sometimes provided by statutes which permit the consideration of a composition to be paid in instalments, that the composition may be set aside if default is made in the payment of any instalment due.²

Failure to Comply with the Statute regulating compositions has been held ground for setting them aside.³

d. EFFECT AS TO PRIOR ACTS. — When a composition is set aside all acts regularly done pursuant to the resolution are valid.⁴

XV. DISCHARGE OF DEBTOR — 1. Right to Discharge — a. IN GENERAL. — The right of a debtor to a discharge, when it exists at all, exists only by virtue of the statute creating it; and to determine whether, in any case, a debtor has such a right, reference must be had to the statute governing the matter. One of the principal objects of all bankruptcy laws is to discharge from liability debtors who are unable to pay all their debts in full.⁵ In *England* a very wide discretion is given to the court, either to grant or refuse an absolute discharge, or to grant a conditional discharge and afterwards to modify the order.⁶ In the United States the court is obliged to grant a discharge unless certain facts appear.⁷

b. SURRENDER OF ALL PROPERTY. — One of the chief requisites to the right of a debtor to be discharged from his debts under the bankruptcy or insolvency laws is the surrender to his creditors of all his property which is liable for the payment of his debts.⁸

new business relations, they cannot have the composition set aside. *Matter of Herman*, 9 Ben. (U. S.) 436, 17 Nat. Bankr. Reg. 440, 12 Fed. Cas. No. 6,405.

1. Injustice or Undue Delay. — 46 & 47 Vict., c. 52, § 23, par. (3).

This provision was contained in the late bankruptcy law of the *United States*. Act June 22, 1874 (18 U. S. Stat. at L. 178), § 17.

Mere Inadequacy of Consideration is not a ground for setting aside a composition. *In re Shaw*, 9 Fed. Rep. 495.

2. Default in Payment of Instalments Due. — 46 & 47 Vict., c. 52, § 23, par. (3).

3. Failure to Comply with Statute. — In *Lay v. His Creditors*, 48 La. Ann. 1053, it was held that a respite should be set aside where the creditor failed to file a schedule of his assets as required by the statute when demand therefor was made by the creditors.

4. Effect as to Prior Acts. — 46 & 47 Vict., c. 52, § 23, par. (3); *Ex p. Hamlin*, 2 Lowell (U. S.) 571, 16 Nat. Bankr. Reg. 320, 11 Fed. Cas. No. 5,993; *In re Shaw*, 9 Fed. Rep. 495.

5. Object of Bankruptcy Laws Stated. — *Day v. Bardwell*, 97 Mass. 248.

The Repeal of the Statute while an application for a discharge is pending deprives the court of power to grant it unless the repealing act contains a saving clause. *State v. Shinn*, 5 N. J. L. 637.

6. Rule as to Granting Discharges in England. — 53 & 54 Vict., c. 71, § 8.

The discretion of the court in this matter is not unlimited, but judicial, with reference to the particular circumstances of the case. *Ex p. Cooper*, 3 Mor. Bankr. Cas. 228.

And if it takes the wrong view of the facts and exercises its discretion thereon, the court of appeal will review the decision and vary it as

may seem just. *Re Sultzberger*, 4 Mor. Bankr. Cas. 82; *Re Rankin*, 5 Mor. Bankr. Cas. 23; *Re Shackleton*, 6 Mor. Bankr. Cas. 304; *Re Freeman*, 7 Mor. Bankr. Cas. 38; *Ex p. Castle Mail Packets Co.*, 18 Q. B. D. 154; *In re Stainton*, 19 Q. B. D. 182; *Re Swabey*, 76 L. T. N. S. 534.

7. Rule as to Granting Discharges in United States. — Act July 1, 1898 (30 U. S. Stat. at L. 544), § 14, par. b. See also *In re Heller*, 9 Fed. Rep. 373; *Re Fowler*, 2 Lowell (U. S.) 122, 9 Fed. Cas. No. 4,994.

Partnerships. — A partner may obtain his individual discharge, where the partnership was adjudged bankrupt on the petition of the parties. *In re Meyers*, 97 Fed. Rep. 757.

Corporations. — It has been questioned whether a corporation is entitled to a discharge under the present bankruptcy law of the *United States*; but the discussion of the matter was addressed to the necessity or expediency of permitting the discharge, rather than to the provisions of the statute. *In re Marshall Paper Co.*, 95 Fed. Rep. 419, 2 Am. Bankr. Rep. 653.

The relevant provisions of the statute are as follows: "Any corporation engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt * * * and shall be subject to the provisions and entitled to the benefits of this Act." Act July 1, 1898 (30 U. S. Stat. at L. 544), § 4, par. 3. "Any person" who has been adjudged a bankrupt may file an application for a discharge. Section 14, par. a. "The words 'persons' shall include corporations, except where otherwise specified." Section 1, cl. 19.

8. Surrender of All Unexempt Property Essential

c. AMOUNT OF INDEBTEDNESS. — In some jurisdictions the discharge of a debtor is not permitted if his debts do not exceed a designated sum.¹

d. CONSENT OF CREDITORS. — It is sometimes provided that a discharge shall not be granted where the debts exceed in amount a designated proportion of the assets, unless the creditors consent.² Again, it is sometimes left

to Discharge — *England.* — 53 & 54 Vict., c. 71, § 8, par. (3), cl. (c).

United States. — Act July 1, 1898 (30 U. S. Stat. at L. 544), § 14, par. b, authorizes the judge to refuse a discharge, if the bankrupt "has committed an offense punishable by imprisonment as herein provided," one of which offenses is (section 29, par. b) concealing by a bankrupt from his trustee any property belonging to the estate in bankruptcy.

California. — *Ex p. Clark*, 110 Cal. 405.

Georgia. — *Ex p. M'Allister*, T. U. P. Charl't. (Ga.) 222; *Ex p. Bishop*, T. U. P. Charl't. (Ga.) 267.

Minnesota. — *Matter of Harrison*, 46 Minn. 331.

New Jersey. — *Meliski v. Sloan*, 47 N. J. L. 82.

The Future Earnings of a Public Officer do not constitute an estate in expectancy which he must surrender before he can obtain his discharge. *Grow v. His Creditors*, 31 Cal. 328.

1. Amount of Indebtedness. — Under the *California* statute a discharge in insolvency will not be granted, unless the debts of the insolvent amount to three hundred dollars. *In re Marsh*, 115 Cal. 230 Compare the statutes in other jurisdictions.

2. Consent of Creditors — Proportion Between Debts and Value of Assets. — *Revere v. Newell*, 4 Cush. (Mass.) 584; *Crocker v. Stone*, 7 Cush. (Mass.) 341; *Gates v. Campbell*, 8 Cush. (Mass.) 104; *Bartlett, Appellant*, 8 Met. (Mass.) 72; *Kelman v. Sheen*, 11 Allen (Mass.) 566; *Gifford v. Barker*, 9 Gray (Mass.) 364; *Ruffin, Petitioner*, 168 Mass. 232. And see *Boston Nat. Bank v. Hammond*, (Wash. 1899) 21 Wash. 158.

Under the **Bankruptcy Law of 1867**, in proceedings commenced within a certain time after the passage of the law, a debtor whose assets did not pay fifty per cent. of the claims against his estate was not entitled to be discharged unless by assent of a majority in number and value of his creditors who had proved their claims. *Re Wilson*, 2 Lowell (U. S.) 453, 30 Fed. Cas. No. 17,784; *In re Griffiths*, 2 Lowell (U. S.) 340, 10 Nat. Bankr. Reg. 456, 11 Fed. Cas. No. 5,825; *In re King*, 3 Dill. (U. S.) 3, 10 Nat. Bankr. Reg. 566, 14 Fed. Cas. No. 7,781; *Matter of Francke*, 7 Ben. (U. S.) 420, note, 9 Fed. Cas. No. 5,045, reversing 7 Ben. (U. S.) 420, 10 Nat. Bankr. Reg. 438, 9 Fed. Cas. No. 5,046; *Singer v. Sloan*, 11 Nat. Bankr. Reg. 433, 2 Cent. L. J. 141, 22 Fed. Cas. No. 12,899, affirmed 3 Dill. (U. S.) 110, 12 Nat. Bankr. Reg. 208, 22 Fed. Cas. No. 12,898; *In re Thompson*, 2 Biss. (U. S.) 481, 23 Fed. Cas. No. 13,937; *In re Lincoln*, 7 Nat. Bankr. Reg. 334, 15 Fed. Cas. No. 8,353; *In re Kahley*, 3 Biss. (U. S.) 169, 6 Nat. Bankr. Reg. 189, 14 Fed. Cas. No. 7,594; *In re Perkins*, 6 Biss. (U. S.) 185, 10 Nat. Bankr. Reg. 529, 19 Fed. Cas. No. 10,983; *In re Longest*, 7 Biss. (U. S.) 477, 15 Fed. Cas. No. 8,485; *Matter of Loder*, 4 Ben. (U. S.) 305, 4 Nat. Bankr. Reg. 190, 15 Fed. Cas. No. 8,457; *Matter of Borden*, 5 Ben. (U. S.) 228, 5 Nat. Bankr. Reg. 128, 3 Fed. Cas. No. 1,654; *Matter*

of *Bunster*, 5 Ben. (U. S.) 242, 5 Nat. Bankr. Reg. 82, 4 Fed. Cas. No. 2,136; *Matter of Swift*, 6 Ben. (U. S.) 324, 7 Nat. Bankr. Reg. 591, 23 Fed. Cas. No. 13,693; *Matter of Sheldon*, 8 Ben. (U. S.) 67, 12 Nat. Bankr. Reg. 63, 21 Fed. Cas. No. 12,747; *In re Cerf*, 11 Nat. Bankr. Reg. 143, 7 Chicago Leg. N. 79, 5 Fed. Cas. No. 2,556; *In re Wilson*, 2 Hughes (U. S.) 228, 30 Fed. Cas. No. 17,782; *In re Gifford*, 16 Nat. Bankr. Reg. 135, 10 Fed. Cas. No. 5,408; *In re Graham*, 5 Nat. Bankr. Reg. 155, 25 Leg. Int. (Pa.) 317, 10 Fed. Cas. No. 5,661; *In re Seay*, 4 Nat. Bankr. Reg. 271, 4 Am. L. T. 16, 21 Fed. Cas. No. 12,597; *In re Shower*, 6 Nat. Bankr. Reg. 586, 4 Chicago Leg. N. 299, 22 Fed. Cas. No. 12,816; *In re Freiderick*, 3 Nat. Bankr. Reg. 465, 3 Am. L. T. 71, 9 Fed. Cas. No. 5,092; *In re Webb*, 3 Nat. Bankr. Reg. 720, 29 Fed. Cas. No. 17,314; *In re Wheeler*, 11 Chicago Leg. N. 407, 19 Nat. Bankr. Reg. 258, 29 Fed. Cas. No. 17,491, reversing 16 Nat. Bankr. Reg. 277, 10 Chicago Leg. N. 18, 29 Fed. Cas. No. 17,489; *In re Hershman*, 7 Nat. Bankr. Reg. 604, 12 Fed. Cas. No. 6,430; *In re Parrish*, 9 Nat. Bankr. Reg. 573, 18 Fed. Cas. No. 10,769; *In re Schumpert*, 8 Nat. Bankr. Reg. 415, 21 Fed. Cas. No. 12,491; *In re Pierston*, 10 Nat. Bankr. Reg. 193, 19 Fed. Cas. No. 11,154; *In re Taggart*, 16 Nat. Bankr. Reg. 351, 23 Fed. Cas. No. 13,725; *In re Van Riper*, 6 Nat. Bankr. Reg. 573, 28 Fed. Cas. No. 16,874; *In re Vinton*, 7 Nat. Bankr. Reg. 138, 28 Fed. Cas. No. 16,951; *In re Townsend*, 2 Fed. Rep. 559; *Matter of Van Buren*, 2 Fed. Rep. 649; *In re Hyndman*, 5 Fed. Rep. 705; *In re Read*, 5 Fed. Rep. 721; *In re Waggoner*, 5 Fed. Rep. 914; *In re Ekins*, 6 Fed. Rep. 170; *In re Brokaw*, 11 Fed. Rep. 704; *Van Nostrand v. Carr*, 30 Md. 128; *Clark v. Clark*, 86 Mo. 114.

Surety Debts of the bankrupt will not be considered in computing the amount of his indebtedness under this provision. *In re Hyndman*, 5 Fed. Rep. 705; *Matter of Loder*, 4 Ben. (U. S.) 305, 4 Nat. Bankr. Reg. 190, 15 Fed. Cas. No. 8,457, 4 Ben. (U. S.) 328, 15 Fed. Cas. No. 8,458; *Matter of Derby*, 8 Ben. (U. S.) 118, 12 Nat. Bankr. Reg. 241, 7 Fed. Cas. No. 3,816.

A Surviving Partner may give the consent of his firm to the discharge of a firm debtor in bankruptcy, and it is not necessary that the administrator of the deceased partner should unite in the consent. *In re Sauls*, 5 Fed. Rep. 715.

Partnership and Individual Creditor. — The consent of a majority in number and value of the aggregate of both individual and firm creditors is sufficient. It is not necessary that a majority of both classes should consent. *In re Morrill*, 1 Hask. (U. S.) 542, 17 Fed. Cas. No. 9,820. But see *In re Johnston*, 17 Fed. Rep. 71.

Withdrawal of Consent. — The consent of a creditor cannot be withdrawn after it has been acted on and filed. *In re Brent*, 2 Dill. (U. S.)

more or less to the creditors, whether or not the debtor shall be discharged, without regard to the amount of debts or the amount of assets. Thus, the *Minnesota* act provides for the discharge of the debtor only from the claims of creditors who will file releases of the amounts due them, after receiving their *pro rata* shares of the estate, while in *New York* the discharge must be consented to by one or more of his creditors, whose claims amount to two-thirds of all the debts.¹ In some jurisdictions the creditors determine by vote, at a creditors' meeting, whether a discharge shall be granted to the debtor.²

e. DEATH OF DEBTOR. — Where a debtor dies pending bankruptcy proceeding, the proceeding does not abate on that account, but may be continued, and a discharge granted, as if he were living.³

2. Effect of Discharge — *a.* CONCLUSIVENESS IN GENERAL. — In *England* a discharge in bankruptcy is conclusive in all collateral actions.⁴ In the *United States* a discharge is generally held to be conclusive, and the statutes have sometimes expressly so declared,⁵ though there have been both decisions and

129, 8 Nat. Bankr. Reg. 444, 4 Fed. Cas. No. 1,832.

Consent Procured by Improper Influences. — A discharge will be refused where the consent of a creditor was purchased, or procured by fraud. *Robson v. Calze*, 1 Dougl. 228; *Holland v. Palmer*, 1 B. & P. 95; *Ex p. Butt*, 10 Ves. Jr. 359; *Ex p. Hall*, 17 Ves. Jr. 62; *Ex p. Harrison*, Buck 227, note; *Jackson v. Lomas*, 4 T. R. 166; *Leicester v. Rose*, 4 East 372; *Daglish v. Tennent*, L. R. 2 Q. B. 49; *Phillips v. Dicas*, 15 East 248; *Ex p. Briggs*, 2 Lowell (U. S.) 389; *Re Whitney*, 2 Lowell (U. S.) 455, 14 Nat. Bankr. Reg. 1, 29 Fed. Cas. No. 17,580; *Bright's Estate*, 14 Phila. (Pa.) 608, 38 Leg. Int. (Pa.) 441.

And any agreement in consideration of obtaining a creditor's consent is illegal and cannot be enforced. *Thimming v. Miller*, 13 Ill. App. 595; *Blasdel v. Fowle*, 120 Mass. 447, 21 Am. Rep. 533.

Form of Consent. — It has been held that the consent of the creditors to the discharge must be in writing, and must be before the hearing of the application. *Matter of Derby*, 8 Ben. (U. S.) 118, 12 Nat. Bankr. Reg. 241, 7 Fed. Cas. No. 3,816.

But see *In re Balmer*, 3 Hughes (U. S.) 637, 2 Fed. Cas. No. 820, holding that it is sufficient, where the creditor, by his attorney in fact, or by his counsel, states in open court that the consent is given.

Second Bankruptcy. — Under the bankruptcy law of 1867 no person who had been discharged and afterwards become a bankrupt on his own application, was allowed to obtain a discharge, if his estate was insufficient to pay seventy per centum of the debts proved against it, unless three-fourths in value of his creditors assented to the discharge. *Re Drisko*, 2 Lowell (U. S.) 430, 13 Nat. Bankr. Reg. 112.

A discharge effected by means of a composition was held to be a discharge within this provision. *In re Bjornstad*, 5 Fed. Rep. 791.

1. Consent of Creditors Required Regardless of Amount of Debts or Assets — *Minnesota.* — *Megins v. Pary*, 72 Minn. 113; *John V. Farwell Co. v. Dickinson*, 60 Minn. 528; *Matter of Welch*, 43 Minn. 7; Stat. Minn. 1894, § 4249.

New York. — *Matter of Dimock*, 4 N. Y. App. Div. 301, *affirming* (County Ct.) 11 Misc. (N. Y.) 610, 24 Civ. Pro. (N. Y.) 312; *Duer v. Hunt*, 41 N. Y. App. Div. 581; *Morrow v.*

Freeman, 61 N. Y. 515; *Payne v. Eden*, 3 Cai. (N. Y.) 213; *Waite v. Harper*, 2 Johns. (N. Y.) 386; *Wiggin v. Bush*, 12 Johns. (N. Y.) 306, 7 Am. Dec. 324; Code Civ. Proc. N. Y., § 2152.

Pennsylvania. — *Eckstein v. Shoemaker*, 3 Whart. (Pa.) 15.

Compare the statutes in other jurisdictions.

It Is the Judgment of the Court and Not the Releases filed by the creditors that operates to discharge the debtor. *Megins v. Pary*, 72 Minn. 113.

2. Discharge by Vote of Creditors. — *Angelovich v. His Creditors*, 43 La. Ann. 1161; *Reilly v. Their Creditors*, 45 La. Ann. 470.

3. Discharge Not Prevented by Death of Debtor — *England.* — 46 & 47 Vict., c. 52, § 108; *Ex p. Sharp*, 3 Mor. Bankr. Cas. 69, 54 L. T. N. S. 682; *In re Hardy*, (1896) 1 Ch. 904.

United States. — Act July 1, 1898, (30 U. S. Stat. at L. 544), § 8.

Formerly, neither in *England* nor in the *United States* could a discharge be granted after the death of the debtor, if he died before the adjudication. *In re Obbard*, 24 L. T. N. S. 145; *Frazier v. McDonald*, 20 Pittsb. Leg. J. (Pa.) 185, 8 Nat. Bankr. Reg. 237, 9 Fed. Cas. No. 5,073; *Matter of O'Farrell*, 3 Ben. (U. S.) 191, 2 Nat. Bankr. Reg. 454, 18 Fed. Cas. No. 10,446; *In re Gunike*, 4 Nat. Bankr. Reg. 92, 11 Fed. Cas. No. 5,868, *sub nom.* *In re Quinke*, 2 Diss. (U. S.) 354, 20 Fed. Cas. No. 11,514.

But a discharge could be granted if the death occurred after the adjudication. *Young v. Ridenbaugh*, 3 Dill. (U. S.) 239, 11 Nat. Bankr. Reg. 563, 30 Fed. Cas. No. 18,173; *Robinson v. Butler*, 4 Ky. L. Rep. 449. See also *Ex p. May*, 2 Mont. D. & De G. 381; *Ex p. Waterhouse*, 2 Mont. D. & De G. 760; *Ex p. Currie*, 10 Ves. Jr. 51.

4. Conclusiveness of Discharge in England. — *Gill v. Barron*, L. R. 2 P. C. 157; *Wadsworth v. Pickles*, 5 Q. B. D. 470.

5. Discharge Held Conclusive in United States — *United States.* — *Simms v. Slocum*, 3 Cranch (U. S.) 300; *Ammidon v. Smith*, 1 Wheat. (U. S.) 447; *Lathrop v. Stuart*, 5 McLean (U. S.) 167, 14 Fed. Cas. No. 8,113; *In re Judkins*, 2 Hughes (U. S.) 401, 13 Fed. Cas. No. 7,560.

Alabama. — *Milhouse v. Aicardi*, 51 Ala. 594.

Connecticut. — *Beardsley v. Hall*, 36 Conn. 270, 4 Am. Rep. 74.

Georgia. — *Blake v. Bigelow*, 5 Ga. 437.

statutes to the opposite effect.¹

b. EFFECT AS TO DEBTOR — (1) *Release from Debts* — (a) *In General*. — The general rule is that the discharge of a debtor granted in a bankruptcy or insolvency proceeding operates to relieve the debtor entirely of liability for all debts which were provable against him,² though proof was not actually

Iowa. — *Wright v. Watkins*, 2 Greene (Iowa) 547.

Kentucky. — *Payne v. Able*, 7 Bush (Ky.) 344, 3 Am. Rep. 316; *Thurmond v. Andrews*, 10 Bush (Ky.) 400.

Maine. — *Stetson v. Bangor*, 56 Me. 274; *Corey v. Ripley*, 57 Me. 69, 2 Am. Rep. 19; *Bailey v. Corruthers*, 71 Me. 172.

Maryland. — *Talbott v. Suit*, 68 Md. 443.

Massachusetts. — *Burnside v. Brigham*, 8 Met. (Mass.) 75; *Williams v. Coggeshall*, 11 Cush. (Mass.) 442; *Burpee v. Sparhawk*, 108 Mass. 111, 11 Am. Rep. 320; *Way v. Howe*, 108 Mass. 502, 11 Am. Rep. 386; *Black v. Blazo*, 117 Mass. 17; *Keimpton v. Saunders*, 130 Mass. 236; *Fuller v. Pease*, 144 Mass. 390; *Upham v. Raymond*, 132 Mass. 186. But see *Gardner v. Nute*, 2 Cush. (Mass.) 333.

Mississippi. — *Stevens v. Brown*, 49 Miss. 597.

Missouri. — *Brown v. Covenant Mut. L. Ins. Co.*, 86 Mo. 51.

Nebraska. — *Seymour v. Street*, 5 Neb. 85.

New Hampshire. — *Morrison v. Woolson*, 23 N. H. 11, 29 N. H. 510; *Parker v. Atwood*, 52 N. H. 181.

New Jersey. — *Linn v. Hamilton*, 34 N. J. L. 305.

North Carolina. — *Jordan v. James*, 3 Hawks (10 N. Car.) 110; *Williams v. Scott*, 122 N. Car. 545. But see *State v. Bethune*, 8 Ired. L. (30 N. Car.) 139.

Ohio. — *Rayl v. Lapham*, 27 Ohio St. 452; *Howland v. Carson*, 28 Ohio St. 625; *Smith v. Ramsey*, 15 Nat. Bankr. Reg. 447. These Ohio cases were decided under the bankruptcy law of 1867. As to the rule laid down under the Act of 1841, see the next following note.

Pennsylvania. — *Richards v. Nixon*, 20 Pa. St. 19; *Sheets v. Hawk*, 14 S. & R. (Pa.) 173, 16 Am. Dec. 486; *Fritts v. Doe*, 22 Pa. St. 335; *Peterson v. Speer*, 29 Pa. St. 478.

Texas. — *Alston v. Robinett*, 37 Tex. 56, 9 Nat. Bankr. Reg. 74.

1. Discharge Held Not Conclusive in United States — *California*. — *Pope v. Kirchner*, 77 Cal. 152.

New York. — *Stanton v. Ellis*, 12 N. Y. 575, 64 Am. Dec. 512; *Soule v. Chase*, 39 N. Y. 342; *Hale v. Sweet*, 40 N. Y. 97; *American Flask, etc., Co. v. Son*, 7 Robt. (N. Y.) 233; *Lester v. Thompson*, 1 Johns. (N. Y.) 300; *People v. Machado*, (Supm. Ct. Gen. T.) 16 Abb. Pr. (N. Y.) 460; *O'Connell v. Sutherland*, (N. Y. Super. Ct. Tr. T.) 16 Abb. Pr. (N. Y.) 460, note. See also *Rusher v. Sherman*, 28 Barb. (N. Y.) 416; *Rich v. Salinger*, (C. Pl. Spec. T.) 11 Abb. Pr. (N. Y.) 344; *Stuart v. Salinger*, (C. Pl. Gen. T.) 14 Abb. Pr. (N. Y.) 291; *Manhattan Oil Co. v. Thorn*, (Supm. Ct.) 14 Abb. Pr. (N. Y.) 291, note; *Wall v. Thorn*, (Supm. Ct.) 14 Abb. Pr. (N. Y.) 292, note; *Jenks v. Stebbins*, 11 Johns. (N. Y.) 224. *Compare Robens v. Sweet*, 48 Hun (N. Y.) 436.

Ohio. — *Suydam v. Walker*, 16 Ohio 122; *Card v. Walbridge*, 18 Ohio 411.

Vermont. — *Batchelder v. Low*, 43 Vt. 662, 5 Am. Rep. 311.

2. Discharge as Release from Debts — *General Rule* — *England*. — 46 & 47 Vict., c. 52, § 30, par. (2); *Hardy v. Fothergill*, 13 App. Cas. 351; *Davis v. Shaplev*, 1 B. & Ad. 54, 20 E. C. L. 344; *Bamford v. Burrell*, 2 B. & P. 1; *Armani v. Castrique*, 13 M. & W. 413, 14 L. J. Exch. 36; *Scotland Bank v. Stein*, 1 Rose 462; *Edwards v. Ronald*, 1 Knapp 259; *Odwin v. Forbes*, Buck 57.

Canada. — *Cunningham v. Scoullar*, 9 N. Bruns. 385.

United States. — Act July 1, 1898 (30 U. S. Stat. at L. 544), § 17; *Dean v. Justices*, 2 Am. Bankr. Rep. 163.

Arkansas. — *Olinphint v. Eckerley*, 36 Ark. 69.

California. — *Mooney v. Detrick*, 85 Cal. 549; *Porter v. Imus*, 79 Cal. 183; *Lowenberg v. Levine*, 93 Cal. 215.

Connecticut. — *Shieffelin v. Wheaton*, 1 Gall. (U. S.) 441, construing the Connecticut statute.

Georgia. — *McLendon v. Turner*, 65 Ga. 577.

Indiana. — *Lefler v. Hunt*, 8 Blackf. (Ind.) 195; *Jenks v. Opp*, 43 Ind. 108.

Iowa. — *Magoon v. Warfield*, 3 Greene (Iowa) 293; *Thornburgh v. Madren*, 33 Iowa 380.

Louisiana. — *City Bank v. Walton*, 5 Rob. (La.) 158; *Murphy v. Smith*, 22 La. Ann. 441; *Miller v. Chandler*, 29 La. Ann. 88; *Bayly's Succession*, 30 La. Ann. 75.

Maine. — *White v. Cushing*, 30 Me. 267; *Wardwell v. Foster*, 31 Me. 558; *Cape Elizabeth v. Skillin*, 79 Me. 593.

Maryland. — *Talbott v. Suit*, 68 Md. 443.

Minnesota. — *W. W. Kimball Co. v. Coon*, 45 Minn. 45; *Higgins v. Dale*, 28 Minn. 126.

Missouri. — *Fleming v. Lullman*, 11 Mo. App. 104.

New Jersey. — *Stewart v. Reckless*, 24 N. J. L. 427; *Skillman v. Baker*, 18 N. J. L. 134; *State v. Giberson*, 14 N. J. L. 388.

New York. — *Murray v. De Rottenham*, 6 Johns. Ch. (N. Y.) 52; — *v. Gardner*, (Supm. Ct. Spec. T.) 2 Code Rep. (N. Y.) 65; *Ex p. Smith*, 5 Cow. (N. Y.) 276; *Ruckman v. Cowell*, 1 N. Y. 505; *Campbell v. Perkins*, 8 N. Y. 430; *New Loan Officers v. Capron*, 17 Johns. (N. Y.) 44.

North Carolina. — *Hoskins v. Wall*, 77 N. Car. 249; *Withers v. Stinson*, 79 N. Car. 341; *Fralely v. Kelly*, 88 N. Car. 227, 43 Am. Rep. 743.

Pennsylvania. — *McMullin v. Penn Tp. Bank*, 2 Pa. St. 343; *Field's Estate*, 2 Rawle (Pa.) 351, 21 Am. Dec. 454; *Earnest v. Parke*, 4 Rawle (Pa.) 452, 27 Am. Dec. 280; *Kline v. Guthart*, 2 P. & W. (Pa.) 494; *Thomas v. Hodgson*, 4 Whart. (Pa.) 492; *Reeside v. Hadden*, 12 Pa. St. 243; *Peterson v. Speer*, 29 Pa. St. 478; *Knap v. Duncan*, 7 W. N. C. (Pa.) 343.

Rhode Island. — *White v. Murray*, 20 R. I. 40; *Brouillard's Petition*, 20 R. I. 617; *Harris v. Peck*, 1 R. I. 262.

Vermont. — *Harrington v. McNaughton*, 20 Vt. 293; *Walbridge v. Harroon*, 18 Vt. 448.

made.¹ Even the omission of a debt from the schedule will not exempt it from the operation of the discharge, if there was no fraud in the omission.²

Extinguishment of Debt or Liability. — The effect of a discharge, however, is not

Wisconsin. — *Wisconsin State Grange v. Kniffen*, 90 Wis. 14.

Debts Payable at Future Time are barred by the discharge equally with those which are payable presently. *Mooney v. Detrick*, 85 Cal. 549.

A Debt Payable in Labor is barred by a discharge. *Hart's Case*, 1 Browne (Pa.) 298.

The Payee of a Note Who Has Indorsed It Over, and who is afterwards obliged to pay to the indorsee the balance due, after deducting the dividend received from the estate of the insolvent maker, cannot recover such amount from the maker. The indorsement does not create a new debt against the maker, but is merely a transfer of the old debt which was discharged by the insolvency proceeding. *Columbia Falls Brick Co. v. Glidden*, 157 Mass. 175.

Debts Provable in Former Proceeding. — In *Massachusetts*, when a discharge has been refused, but afterwards a second proceeding is instituted and a discharge is granted therein, it does not bar any debts that were provable under the former proceedings, unless those to whom such debts were due elected to prove them under the new proceeding. *Gilbert v. Hebard*, 8 Met. (Mass.) 129.

The Assignment of a Claim pending the insolvency proceeding does not withdraw such claim from the operation of the discharge, though the assignee did not know that the proceeding was pending. This rests on the principle that subsequent events cannot defeat jurisdiction after it has once attached. *Perkins v. Quint*, (N. H. 1899) 45 Atl. Rep. 143.

A Claim for Conversion of Personal Property is barred by a discharge in bankruptcy. *Sumner v. Richie*, 54 Iowa 554; *Brickford v. Barnard*, 8 Allen (Mass.) 314; *Gunter v. Greenfield*, (Supm. Ct. Spec. T.) 8 Abb. Pr. N. S. (N. Y.) 191; *Cole v. Roach*, 37 Tex. 413.

A Fine Imposed for Violating an Injunction has been held not to be a debt, and therefore not released by a discharge in bankruptcy. *Spalding v. People*, 4 How. (U. S.) 21, *affirming* 7 Hill (N. Y.) 301, 10 Paige (N. Y.) 284.

The Obligation to Return Specific Property to the owner is not a debt which a discharge in bankruptcy will affect. *Falkland v. St. Nicholas Nat. Bank*, 84 N. Y. 145, *reversing* 21 Hun (N. Y.) 450.

Cancellation of Judgments. — A debtor who has received his discharge may, under the *New York* statute, obtain an order canceling of record judgments which have been rendered against him. *Wheeler v. Emmeluth*, 58 Hun (N. Y.) 369.

Scire Facias to Revive a Judgment entered before a discharge in bankruptcy is barred by the discharge. *Throop v. Griffin*, 180 Pa. St. 452.

A Set-off, acquired by the maker of a note against the payee before notice of its transfer, is not lost by the payee's subsequent discharge in bankruptcy. *Harwell v. Steel*, 17 Ala. 372.

The Burden of Proof, when it is claimed, in an action to recover a debt, that the defendant has been released from liability by a discharge

in insolvency, is on the defendant to show that the debt is such as would be released by the discharge, though the statute makes the certificate of discharge *prima facie* evidence of the regularity thereof. *Herrlich v. McDonald*, 80 Cal. 472.

What Law Governs. — The law in force when a discharge is obtained governs as to its operation and effect, and not the law in force when the insolvency proceedings were begun. *Batten v. Sisson*, 133 Mass. 557.

A Mere Right in Equity, such as the right of a seller to rescind a contract of sale on the ground of fraud, is not affected by the discharge of the purchaser in bankruptcy. *Smith v. Babcock*, 2 Woodb. & M. (U. S.) 246, 22 Fed. Cas. No. 13,009.

1. Discharge of Debts Provable but Not Proved. — *Dean v. Justices*, 173 Mass. 453; *Hubbard v. Smith*, 4 Gray (Mass.) 72; *Wetherbee v. Martin*, 16 Gray (Mass.) 518; *W. W. Kimball Co. v. Coon*, 45 Minn. 45.

A Debt for Necessaries furnished to the debtor or his family is not barred by a discharge under the *Massachusetts* statute, unless it is proved. *Lincoln v. Dunbar*, 7 Allen (Mass.) 264; *Prentice v. Richards*, 8 Gray (Mass.) 226; *Pub. Stat. Mass.*, c. 157, § 84. See also *Plympton v. Roberts*, 12 Allen (Mass.) 366.

Within this provision the rent of a boarding-house kept by a single woman without a family is not a claim for necessaries. *Prentice v. Richards*, 8 Gray (Mass.) 226.

Nor is a claim for articles delivered to a firm a claim for necessaries, though the article were actually used in the families of the partners. *Drake v. Bailey*, 5 Allen (Mass.) 210.

If a Judgment Is Recovered on a Debt for Necessaries, the debt is merged in the judgment, and is barred by the discharge. *Bangs v. Watson*, 9 Gray (Mass.) 211.

2. Discharge of Debts Not Scheduled — *United States*. — *Lamb v. Brown*, 7 Chicago Leg. N. 363, 12 Nat. Bankr. Reg. 522, 14 Fed. Cas. No. 8,011.

District of Columbia. — *Hoffman v. Haight*, 3 Mackey (D. C.) 21.

Georgia. — *Heard v. Arnold*, 56 Ga. 570.

Indiana. — *Hurd v. Indiana Mut. F. Ins. Co.*, 1 Ind. 162.

Louisiana. — *Rogers v. Western M. & F. Ins. Co.*, 1 La. Ann. 161.

Michigan. — *Benedict v. Smith*, 48 Mich. 593; *Graves v. Wright*, 53 Mich. 425.

Missouri. — *Shelton v. Pease*, 10 Mo. 473.

New York. — *Hull v. Robbins*, 4 Lans. (N. Y.) 463, 61 Barb. (N. Y.) 33; *Briggs v. Angus*, 52 Hun (N. Y.) 613, 5 N. Y. Supp. 313; *Hutbell v. Cramp*, 11 Paige (N. Y.) 310; *Platt v. Parker*, 4 Hun (N. Y.) 135, 6 Thomp. & C. (N. Y.) 377.

Ohio. — *Mitchell v. Singletary*, 19 Ohio 291.

Tennessee. — *Eberhardt v. Wood*, 6 Lea (Tenn.) 467.

Texas. — *Blum v. Ricks*, 39 Tex. 112; *Brown v. Causey*, 56 Tex. 340.

Vermont. — *Downer v. Dana*, 22 Vt. 337; *Steele v. Towne*, 28 Vt. 771.

Wisconsin. — *Thomas v. Jones*, 39 Wis. 124.

to extinguish the debt or liability, but merely to take away the creditor's right of action.¹ This principle will be considered presently in another connection.²

Pending Actions. — The general rule as to the discharge of existing debts applies to claims in suit at the time the discharge was granted, and precludes the entry thereafter of any personal judgment against the defendant.³

(b) **Alimony and Maintenance of Children.** — It is generally held that bankruptcy laws are not intended to relieve a debtor from his natural obligation to support his wife and children, and that therefore a discharge will not release him from liability to pay alimony which has been awarded against him,⁴ or an annuity which a husband had agreed to pay his wife under a separation agreement,⁵ or to comply with a decree entered against him before his bankruptcy, requiring him to make periodical payments for the support of his infant children or others whom he may lawfully be required to support.⁶ And the same has been held in respect to a promise by the father of a bastard to make regular payments to the mother for the support of the child.⁷

(c) **Judgments.** — So far as they create a personal liability, judgments recovered before the commencement of a bankruptcy or insolvency proceeding are barred by a discharge the same as other debts owing by the judgment debtor.⁸ It follows from this rule that an execution issued after the discharge

See *contra*, *Hill v. Robbins*, 1 Mich. N. P. 305. Compare the various state insolvency laws.

The bankruptcy law of the United States provides that "a discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy." *Fider v. Mannheim*, (Minn. 1899) 81 N. W. Rep. 2; Act July 1, 1898 (30 U. S. Stat. at L. 544). § 17.

1. **Debts Not Extinguished by Discharge.** — The principle that a discharge does not extinguish debts was applied where the bankrupt, after his discharge, became entitled through the death of his father to a distributive share of the father's estate. It was held that the amount of the indebtedness of the bankrupt to his father's estate should be deducted from the amount of his distributive share. *Wilson v. Kelly*, 16 S. Car. 216.

Another application of this principle is that no one but the bankrupt can plead the discharge. The bankrupt may, if he chooses, treat his covenants and obligations as still binding on him. *Bush v. Stanley*, 122 Ill. 406.

2. See *infra*, this division of this section, *New Promise to Pay Debts Released*.

3. **Pending Actions** — *United States*. — *In re Herzberg*, 25 Fed. Rep. 699.

Illinois. — *Phelps v. Curtis*, 80 Ill. 109.

Louisiana. — *Viosca v. Weed*, 22 La. Ann. 218.

Massachusetts. — *Payson v. Payson*, 1 Mass. 283; *Minot v. Brickett*, 8 Met. (Mass.) 560; *National Bank v. Taylor*, 120 Mass. 124.

New York. — *Camp v. Gifford*, 7 Hill (N. Y.) 169; *Cox v. Dorwin*, 29 Hun (N. Y.) 293.

4. **Claims for Alimony Not Released by Discharge** — *England*. — *In re Robinson*, 27 Ch. D. 160; *Linton v. Linton*, 15 Q. B. D. 239.

United States. — *In re Shepard*, 97 Fed. Rep. 187; *In re Anderson*, 97 Fed. Rep. 321; *In re*

Garrett, 2 Hughes (U. S.) 235, 11 Nat. Bankr. Reg. 493, 10 Fed. Cas. No. 5,252. But see *contra*, *In re Van Orden*, 96 Fed. Rep. 86, 2 Am. Bankr. Rep. 801; *In re Challoner*, 98 Fed. Rep. 82.

Pennsylvania. — *Newhouse v. Com.*, 5 Whart. (Pa.) 82; *Com. v. Miller*, 12 Phila. (Pa.) 569, 34 Leg. Int. (Pa.) 20.

Vermont. — *Noyes v. Hubbard*, 64 Vt. 302, 33 Am. St. Rep. 928.

See also *supra*, this title, *Debts and Claims Against Estate* — *What Debts and Claims Are Provable*.

5. **Annuity under Separation Agreement.** — *Mudge v. Rowan*, L. R. 3 Exch. 85.

6. **Order for Support of Infant Children Not Released by Discharge.** — *St. Martin-in-the-Fields v. Warren*, 1 B. & Ald. 491; *In re Hubbard*, 98 Fed. Rep. 710.

Bond to Support Parent. — *Bancroft v. Mitchell*, L. R. 2 Q. B. 549.

Order for Maintenance of Bastard Not Barred. — *Hawes v. Cooksey*, 13 Ohio 242; *Com. v. Erisman*, 21 Pittsb. Leg. J. (Pa.) 69.

Release from Imprisonment. — A person who is committed until he shall comply with an order to make weekly payments for the support of his wife and child and to give security therefor is entitled to his discharge under the insolvency law. *Texas's Case*, 1 Ashm. (Pa.) 175.

7. **Promise to Support Bastard.** — *Millen v. Whittenbury*, 1 Campb. 428.

8. **Judgments Barred by Discharge** — *United States*. — *Long v. Dickerson*, 15 Blatchf. (U. S.) 459, 15 Fed. Cas. No. 8,480; *Warner v. Cronkhite*, 6 Biss. (U. S.) 453, 13 Nat. Bankr. Reg. 52, 29 Fed. Cas. No. 17,180.

California. — *Imlay v. Carpentier*, 14 Cal. 173.

Connecticut. — *Betts v. Lockwood*, 8 Conn. 487.

Indiana. — *Root v. Espy*, 93 Ind. 511.

Kentucky. — *Botts v. Patton*, 10 B. Mon. (Ky.) 452.

Louisiana. — *Alling v. Egan*, 11 Rob. (La.) 244.

of a judgment debtor, on a judgment rendered before the discharge, is void,¹ and if the goods of the bankrupt are seized under the execution the judgment creditor is liable to the bankrupt as a trespasser *ab initio*, though the officer will be protected by the writ if it is regular on its face.² If, however, the bankrupt voluntarily pays the amount of the execution, without any mistake as to his rights, he cannot recover it back again.³

Judgments Rendered After the Commencement of a Proceeding in bankruptcy or insolvency, but before the discharge, are generally held to be barred as well as those recovered before the proceeding was commenced,⁴ though the opposite

Maryland. — *State v. Walsh*, 2 Gill & J. (Md.) 406.

Mississippi. — *McDonald v. Ingraham*, 30 Miss. 389, 64 Am. Dec. 166.

Nebraska. — *Smith v. Kinney*, 6 Neb. 447.
New Jersey. — *Heywood v. Shreve*, 44 N. J. L. 94; *Lloyd v. Ford*, 12 N. J. L. 151.

New York. — *Roosevelt v. Mark*, 6 Johns. Ch. (N. Y.) 266; *Graham v. Pierson*, 6 Hill (N. Y.) 247; *Crouch v. Gridley*, 6 Hill (N. Y.) 250; *Boyd v. Vanderkemp*, 1 Barb. Ch. (N. Y.) 273; *Alcott v. Avery*, 1 Barb. Ch. (N. Y.) 347; *McDonald v. Davis*, 105 N. Y. 508; *American Exch. Bank v. Brandreth*, 12 Hun (N. Y.) 384; *Matter of Brandreth*, 14 Hun (N. Y.) 585; *Bergen v. Patterson*, 24 Hun (N. Y.) 250.

North Carolina. — *Wall v. Fairley*, 77 N. Car. 105.

Judgment Liens. — As to the effect of a discharge on existing judgment liens, see *infra*, this division of this section, *Lien Debts*.

Discharging Judgment of Record. — In *New York* it is provided by the statute that the bankrupt, at any time after two years from a discharge in bankruptcy, may apply to the court in which a judgment had been rendered against him, for an order to cancel the judgment of record, if it appears that he has been discharged from liability under it; *Seaman v. McReynolds*, (N. Y. Super. Ct. Spec. T.) 65 How. Pr. (N. Y.) 521; *Blumenthal v. Anderson*, 28 Hun (N. Y.) 93, 91 N. Y. 171; *West Philadelphia Bank v. Gerry*, 106 N. Y. 467; *Eberspacher v. Boehm*, 58 Hun (N. Y.) 603, 11 N. Y. Supp. 404.

1. **Execution Issued After Discharge.** — *Ewing v. Peck*, 17 Ala. 339; *Brown v. Branch Bank*, 20 Ala. 420; *Milhouse v. Aicardi*, 51 Ala. 594; *Murphy v. Smith*, 22 La. Ann. 441; *Francis v. Ogden*, 22 N. J. L. 210; *Leo v. Joseph*, 56 Hun (N. Y.) 644, 9 N. Y. Supp. 612; *Mabbott v. Van Beuren*, 1 Wheel. Crim. (N. Y.) 320; *Baker v. Mount*, (Supm. Ct. Spec. T.) 1 How. Pr. (N. Y.) 238; *Alcott v. Avery*, 1 Barb. Ch. (N. Y.) 347; *Dawson v. Hartfield*, 79 N. Car. 334; *Alexander v. Stuart*, 2 Kulp (Pa.) 385; *Leonard v. Yohnk*, 68 Wis. 587, 60 Am. Rep. 884. *Compare* *McMurry v. Edgerly*, 20 Neb. 457; *Bangs v. Strong*, 1 Den. (N. Y.) 619, 1 How. Pr. (N. Y.) 181; *Bangs v. Avery*, (Supm. Ct. Spec. T.) 2 How. Pr. (N. Y.) 49.

2. **Seizure of Bankrupt's Goods — Judgment Creditor Liable as Trespasser.** — *Hays v. Ford*, 55 Ind. 52; *Ruckman v. Cowell*, 1 N. Y. 50.

3. **Voluntary Payment by Debtor.** — *Ewing v. Peck*, 26 Ala. 413.

4. **Judgments Rendered Pending Bankruptcy Proceeding Held to Be Barred — United States.** — *Boynton v. Ball*, 121 U. S. 457, reversing 105 Ill. 627; *Braman v. Snider*, 21 Fed. Rep. 871.

Alabama. — *McDougald v. Reid*, 5 Ala. 810. See also *Cogburn v. Spence*, 15 Ala. 549, 50 Am. Dec. 140.

Georgia. — *Anderson v. Anderson*, 65 Ga. 518, 38 Am. Rep. 797. See also *Sosnowski v. Rape*, 69 Ga. 548. *Compare* *Steadman v. Lee*, 61 Ga. 58.

Kansas. — *Widner v. Yeast*, 32 Kan. 400; *Tefft v. Knox*, 37 Kan. 37.

Kentucky. — *Pine Hill Coal Co. v. Harris*, 86 Ky. 421.

Louisiana. — *Rogers v. Western M. & F. Ins. Co.*, 1 La. Ann. 161.

Massachusetts. — *Huntington v. Saunders*, 166 Mass. 92; *Minot v. Brickett*, 8 Met. (Mass.) 560. But see *Woodbury v. Perkins*, 5 Cush. (Mass.) 86, 51 Am. Dec. 51; *Haggerty v. Amory*, 7 Allen (Mass.) 458; *Bradford v. Rice*, 102 Mass. 472, 3 Am. Rep. 483.

Mississippi. — *McDonald v. Ingraham*, 30 Miss. 389, 64 Am. Dec. 166.

New Jersey. — *Williams v. Humphreys*, 50 N. J. L. 500; *Whyte v. McGovern*, 51 N. J. L. 356.

New York. — *Dresser v. Brooks*, 3 Barb. (N. Y.) 429; *Johnson v. Fitzhugh*, 3 Barb. Ch. (N. Y.) 360; *Fox v. Woodruff*, 9 Barb. (N. Y.) 498; *Clark v. Rowling*, 3 N. Y. 216, 53 Am. Dec. 290; *Monroe v. Upton*, 6 Lans. (N. Y.) 255, affirmed 50 N. Y. 593; *Arnold v. Oliver*, (Supm. Ct. Gen. T.) 2 Civ. Pro. (N. Y.) 457, 64 How. Pr. (N. Y.) 452; *World Co. v. Brooks*, 7 Abb. Pr. N. S. (N. Y.) 212; *West Philadelphia Bank v. Gerry*, 106 N. Y. 467. But see *Ingersoll v. Rhoades*, Hill & D. Supp. (N. Y.) 371; *Kellogg v. Schuyler*, 2 Den. (N. Y.) 73; *Thompson v. Hewitt*, 6 Hill (N. Y.) 254.

North Carolina. — *Sanderson v. Daily*, 83 N. Car. 67.

Pennsylvania. — *Curtis v. Slosson*, 6 Pa. St. 265; *Guffy v. Blackmore*, 35 Pittsb. Leg. J. (Pa.) 84; *Wise's Appeal*, 99 Pa. St. 193.

Tennessee. — *Dick v. Powell*, 2 Swan (Tenn.) 632; *Stratton v. Perry*, 2 Tenn. Ch. 633; *Locheimer v. Stewart*, 91 Tenn. 385, 30 Am. St. Rep. 887.

Texas. — *Kaufman v. Alexander*, 2 Tex. Unrep. Cas. 532.

Vermont. — *Harrington v. McNaughton*, 20 Vt. 293; *Downer v. Rowell*, 26 Vt. 397.

Virginia. — *Blair v. Carter*, 78 Va. 621.

West Virginia. — *Zumbro v. Stump*, 38 W. Va. 325.

Wisconsin. — *Leonard v. Yohnk*, 68 Wis. 587, 60 Am. Rep. 884.

In *Massachusetts* a judgment recovered in the Superior Court is vacated by the allowance of exceptions by the Supreme Court, and the debtor having obtained a discharge in insolvency pending such exceptions, may be permitted to waive them and plead his discharge.

view has been taken in many cases.¹ If an appeal is pending at the time the discharge is granted, it is held that the right to prosecute the appeal is not barred thereby.² In some jurisdictions the recovery of a judgment pending an insolvency proceeding is prevented by a statutory provision that any action for a provable debt, whether brought before or after the defendant therein has filed his petition in insolvency, shall be continued until the insolvency proceedings are closed.³ It is the duty of the insolvent, however, to ask for a continuance, and if he neglects to do so and judgment is rendered against him, a discharge in the insolvency proceeding will not affect the judgment.⁴

Judgments Rendered After the Discharge, however, are not affected, if the debtor failed to interpose the discharge as a defense,⁵ but it has been held that in a proper case the judgment may be opened, so as to enable the debtor to interpose the discharge as a defense.⁶

If the Original Debt Was Not Dischargeable, but has been reduced to judgment, the effect thereon of a discharge subsequently granted depends on whether or not a judgment operates as a merger of the original debt. It has been held that such merger takes place, and that the debt is therefore discharged,⁷ but other

Swan v. Easterbrooks, 16 Gray (Mass.) 520; *Glazier v. Carpenter*, 16 Gray (Mass.) 385. See also *Lewis v. Shattuck*, 4 Gray (Mass.) 572; *Gardner v. Way*, 8 Gray (Mass.) 191.

1. Judgments Rendered Pending Bankruptcy Proceeding Held Not to Be Barred — *Connecticut*. — *Percy v. Foote*, 36 Conn. 102; *Waterman v. Curtis*, 30 Conn. 135.

Dakota. — *Wells v. Edmison*, 4 Dak. 46.

Illinois. — *Boynton v. Ball*, 105 Ill. 627, reversed 121 U. S. 457; *McLaughlin v. MacLachlan*, 12 Ill. App. 631; *Kiely v. McFarland*, 13 Ill. App. 642.

Indiana. — *Bowen v. Eichel*, 91 Ind. 22, 46 Am. Rep. 574.

Maine. — *Pike v. McDonald*, 32 Me. 418, 54 Am. Dec. 597; *Uran v. Houdlette*, 36 Me. 15; *Fisher v. Foss*, 30 Me. 459; *Wilkins v. Warren*, 27 Me. 438.

Missouri. — *McCarthy v. Goodwin*, 8 Mo. App. 380.

New Hampshire. — *Wheeler, etc., Mfg. Co. v. Taft*, 61 N. H. 1. Compare *Goodall v. Batchelder*, 17 N. H. 386.

Ohio. — *Gardner v. Hengehold*, 9 Am. L. Rec. 414, 6 Ohio Dec. (Reprint) 997.

In *Leisure v. Kneeland*, 2 Wash. 537, 26 Am. St. Rep. 888, a voluntary insolvency proceeding was instituted while an action was pending against the debtor to foreclose a mortgage. After a discharge had been granted to the debtor, but before it was entered, a judgment was rendered against him in the foreclosure suit for the full amount of the mortgage debt, with a direction that the mortgaged premises be sold and the proceeds applied to the debt. It was held that the mortgagee's right to sue the debtor for a deficiency arising on sale was not affected by such discharge, because it took effect, not on the day that it was entered, but on the day that it was granted, which was before the rendition of the judgment of foreclosure.

2. Pendency of Appeal at Time of Discharge. — *Lomax v. Spear*, 51 Ala. 532; *Merritt v. Glidden*, 39 Cal. 559, 2 Am. Rep. 479; *Stockwell v. Silloway*, 105 Mass. 517; *Burnett v. Waddell*, 54 Tex. 273. And see *Goodrich v. Wilson*, 135 Mass. 31; *Bostwick v. Dodge*, 2 Dougl. (Mich.) 331; *Parks v. Goodwin*, 1 Mich. 35; *Haggerty*

v. Morrison, 59 Mo. 324; *Heywood v. Wingate*, 14 N. H. 73; *Exchange Bank v. Knox*, 19 Gratt. (Va.) 739.

3. Continuance of Actions Pending Insolvency Proceedings. — *Simmons v. Lander*, 85 Me. 197; *White v. McCaughey*, 20 R. I. 1.

4. Failure of Insolvent to Ask for Continuance. — *Simmons v. Lander*, 85 Me. 197.

5. Judgments Rendered After Discharge — *Georgia*. — *Bellamy v. Woodson*, 4 Ga. 175, 48 Am. Dec. 221; *Finney v. Mayer*, 61 Ga. 500.

Louisiana. — *Galiaher v. Michel*, 26 La. Ann. 41; *Goodrich v. Hunton*, 31 La. Ann. 582.

Missouri. — *Rees v. Butler*, 18 Mo. 173.

New Hampshire. — *Hollister v. Abbott*, 31 N. H. 442, 64 Am. Dec. 342.

New York. — *Dewey v. Moyer*, 72 N. Y. 70, affirming 9 Hun (N. Y.) 473; *Revere Copper Co. v. Dimock*, 90 N. Y. 33, affirmed in 117 U. S. 559; *Sands v. Perry*, 38 Hun (N. Y.) 268; *Steward v. Green*, 11 Paige (N. Y.) 535; *Rudge v. Rundle*, 1 Thomp. & C. (N. Y.) 649. But see *Ennis v. Devlin*, (Marine Ct. Spec. T.) 1 City Ct. (N. Y.) 426.

North Carolina. — *Paschall v. Bullock*, 80 N. Car. 329; *Bell v. Cunningham*, 81 N. Car. 83.

Pennsylvania. — *Nassau v. Parker*, 1 Pa. L. J. Rep. 317, 2 Pa. L. J. 298.

Tennessee. — *State v. Williams*, 9 Baxt. (Tenn.) 64.

Texas. — *Coffee v. Ball*, 49 Tex. 16. But see *Easley v. Bledsoe*, 59 Tex. 488.

6. Opening Judgment Rendered After Discharge. — *Lee v. Phillips*, 6 Hill (N. Y.) 246; *Sandford v. Sinclair*, 6 Hill (N. Y.) 248; *Johnson v. Anthony*, (Supm. Ct. Spec. T.) 1 How. Pr. (N. Y.) 10; *Barstow v. Hansen*, 4 Thomp. & C. (N. Y.) 569; *Com. v. Huber*, 3 Pa. L. J. Rep. 383, 5 Pa. L. J. 331; *Payne v. Beech*, 2 Tenn. Ch. 708; *Bellows Falls Bank v. Onion*, 16 Vt. 470.

7. Judgment for Non-Dischargeable Debt Held to Be Barred — *United States*. — *Packer v. Whittier*, 81 Fed. Rep. 335; *In re Wiggers*, 2 Biss. (U. S.) 71, 29 Fed. Cas. No. 17,623, *Whitehouse, Petitioner*, 4 Nat. Bankr. Reg. 63; *In re Robinson*, 6 Blatchf. (U. S.) 253, 2 Nat. Bankr. Reg. 341.

Indiana. — *Hays v. Ford*, 55 Ind. 52.

Massachusetts. — *Bangs v. Watson*, 9 Gray (Mass.) 211; *Pierce v. Eaton*, 11 Gray (Mass.)

and more numerous decisions are to the effect that a debt is not merged in a judgment so far as to change its nature, and that, if it is one which the bankruptcy or insolvency law expressly declares shall not be discharged, it remains in force, notwithstanding the fact that it has been reduced to judgment.¹ Thus, it is held by this line of decisions, that the discharge does not affect judgments recovered for debts created by fraud,² or incurred while the debtor was acting in a fiduciary capacity.³

The Costs included in a judgment are considered as accessory to the debt, and are included in the discharge if the judgment is barred.⁴

(a) *Lien Debts.* — Since a discharge in bankruptcy or insolvency is not an extinguishment of the debts owing by the bankrupt or insolvent, but merely a personal release, it follows that any lien which was valid and enforceable at the time the proceeding was commenced remains unimpaired,⁵ unless it has been waived by proof of the debt as unsecured,⁶ or has been dissolved by

398; *Wolcott v. Hodge*, 15 Gray (Mass.) 547, 77 Am. Dec. 381.

Pennsylvania. — *Kames v. Fox*, 14 Phila. (Pa.) 208, 37 Leg. Int. (Pa.) 282.

Rhode Island. — *Manning v. Keyes*, 9 R. I. 224, 11 Am. Rep. 249.

Vermont. — *Comstock v. Grout*, 17 Vt. 512, *Palmer v. Preston*, 45 Vt. 154, 12 Am. Rep. 191.

Where the Original Claim Was for Unliquidated Damages, such as arise out of personal torts, breach of promise of marriage, and the like, and for that reason are not provable in bankruptcy, the recovery of a judgment fixes the amount and brings the claim within the operation of the discharge. As to this the cases are agreed. *In re Simpson*, 2 Nat. Bankr. Reg. 47, 22 Fed. Cas. No. 12,879; *In re Sidle*, 2 Nat. Bankr. Reg. 220, 22 Fed. Cas. No. 12,844; *In re Book*, 3 McLean (U. S.) 317, 3 Fed. Cas. No. 1,637; *In re Wiggers*, 2 Biss. (U. S.) 71, 29 Fed. Cas. No. 17,623; *Hays v. Ford*, 55 Ind. 52; *Manning v. Keyes*, 9 R. I. 224, 11 Am. Rep. 249; *Comstock v. Grout*, 17 Vt. 512.

1. Judgment for Non-Dischargeable Debt Held Not to Be Barred — *United States.* — *In re Pettis*, 2 Nat. Bankr. Reg. 44, 19 Fed. Cas. No. 11,046; *Warner v. Cronkhite*, 6 Biss. (U. S.) 453, 13 Nat. Bankr. Reg. 52, 29 Fed. Cas. No. 17,180. *Illinois.* — *Horner v. Spelman*, 78 Ill. 206. *Iowa.* — *Wade v. Clark*, 52 Iowa 158, 35 Am. Rep. 262.

Missouri. — *Brooks v. Yocum*, 42 Mo. App. 516.

New Jersey. — *Linn v. Hamilton*, 34 N. J. L. 305.

New York. — *Freiberg v. Popper*, 12 Hun (N. Y.) 658; *Kaufman v. Lindner*, (N. Y. City Ct. Spec. T.) 67 How. Pr. (N. Y.) 322. *Compare Shuman v. Strauss*, 34 N. Y. Super. Ct. 6; *Bergen v. Patterson*, 24 Hun (N. Y.) 250; *Mulock v. Byrnes*, 59 Hun (N. Y.) 623, *affirmed* 129 N. Y. 23; *Stern v. Meyer*, (C. Pl. Gen. T.) 9 Misc. (N. Y.) 102.

North Carolina. — *Simpson v. Simpson*, 80 N. Car. 332.

Ohio. — *Newshuler v. Maule*, 10 Ohio Cir. Ct. 232, 6 Ohio Cir. Dec. 806.

Texas. — *Easley v. Bledsoe*, 50 Tex. 488.

2. Judgments Created by Fraud Held Not Barred — *United States.* — *Balliett v. Seeley*, 54 Fed. Rep. 300, *reversing* 27 Fed. Rep. 507; *In re Pettis*, 2 Nat. Bankr. Reg. 44, 19 Fed. Cas. No. 11,046; *Warner v. Cronkhite*, 6 Biss. (U.

S.) 453, 13 Nat. Bankr. Reg. 52, 29 Fed. Cas. No. 17,180.

Illinois. — *Horner v. Spelman*, 78 Ill. 206; *Forsyth v. Vehmeyer*, 176 Ill. 359, *affirming* 75 Ill. App. 308.

New York. — *Freiberg v. Popper*, 12 Hun (N. Y.) 658; *Kaufman v. Lindner*, (N. Y. City Ct. Spec. T.) 67 How. Pr. (N. Y.) 322; *Stern v. Meyer*, (C. Pl. Gen. T.) 9 Misc. (N. Y.) 102.

Ohio. — *Newshuler v. Maule*, 10 Ohio Cir. Ct. 232, 6 Ohio Cir. Dec. 806.

Rhode Island. — *Young v. Grau*, 14 R. I. 340.

It is now provided by the bankruptcy law of the United States that a discharge shall not release judgments in actions for frauds. *In re Blumberg*, 94 Fed. Rep. 476; *In re Lewensohn*, 99 Fed. Rep. 73; Act July 1, 1898 (30 U. S. Stat. at L. 544), § 17.

3. Fiduciary Debts Held Not Barred. — *Wade v. Clark*, 52 Iowa 158, 35 Am. Rep. 262; *Brooks v. Yocum*, 42 Mo. App. 516; *Simpson v. Simpson*, 80 N. Car. 332; *Palmer v. Hussey*, 87 N. Y. 303, *reversing* 24 Hun (N. Y.) 662.

4. Costs of Judgment. — *Warne v. Constant*, 5 Johns. (N. Y.) 135; *Thomas v. Striker*, 5 Johns. (N. Y.) 136, note; *Clark v. Rowling*, 3 N. Y. 216, 53 Am. Dec. 290; *Harrington v. McNaughton*, 20 Vt. 293. *Compare Stockwell v. Woodward*, 52 Vt. 228.

5. Liens Not Released by Discharge — *United States.* — *Dixon v. Barnum*, 3 Hughes (U. S.) 207, 7 Fed. Cas. No. 3,928.

Georgia. — *Clanton v. Estes*, 77 Ga. 352.

Indiana. — *Truitt v. Truitt*, 38 Ind. 16; *Haggerty v. Byrne*, 75 Ind. 499.

Kentucky. — *Fetter v. Cirode*, 4 B. Mon. (Ky.) 482.

Massachusetts. — *Bowditch Mut. F. Ins. Co. v. Jackson*, 12 Gray (Mass.) 114; *Champion v. Buckingham*, 165 Mass. 76.

Minnesota. — *Nicolay v. Mallery*, 62 Minn. 119.

Mississippi. — *Roach v. Bennett*, 24 Miss. 98; *Reed v. Ballington*, 49 Miss. 223.

New York. — *Ocean Nat. Bank v. Olcott*, 46 N. Y. 12.

North Carolina. — *Ex p. Walker*, 107 N. Car. 340.

Pennsylvania. — *Tintzman v. Flenniken*, 6 W. N. C. (Pa.) 29.

Texas. — *Boone v. Revis*, 44 Tex. 384.

6. Waiver of Liens. — See *supra*, this title, *Debts and Claims Against Estate — What Debts and Claims Are Provable — Secured Claims.*

operation of law, because it was obtained within the time limited by the statute before the commencement of the bankruptcy proceeding.¹ Subject, then, to these limitations, the discharge does not affect the lien of any pre-existing judgment,² attachment,³ creditors' suit,⁴ mortgage,⁵ or any mechanic's lien⁶ or vendor's lien.⁷

(e) **Contingent Liabilities.** — A contingent liability is barred by the discharge of the debtor, if it is provable against the estate,⁸ but if it is not provable the

1. Liens Dissolved by Operation of Law. — See *supra*, this title, *Operation and Effect of Insolvency and Bankruptcy Proceedings — Liens on Debtor's Property — Existing Liens Dissolved by Proceeding.*

2. Judgment Liens Not Released — *United States*. — Dixon v. Barnum, 3 Hughes (U. S.) 207, 7 Fed. Cas. No. 3,928.

Alabama. — Freeny v. Ware, 9 Ala. 370; Rugely v. Robinson, 10 Ala. 702.

Arkansas. — Oliphant v. Hartley, 32 Ark. 465.

Georgia. — Barber v. Terrell, 54 Ga. 146; Jones v. Lellyett, 39 Ga. 64; Clanton v. Estes, 77 Ga. 352; Darsey v. Mumpford, 58 Ga. 119.

Illinois. — Wales v. Bogue, 31 Ill. 464.

Indiana. — Pauley v. Cauthorn, 101 Ind. 91. *Compare* Mayer v. Haggerty, 138 Ind. 628.

Kentucky. — Fetter v. Cirode, 4 B. Mon. (Ky.) 482.

Maine. — Franklin Bank v. Bachelder, 23 Me. 60, 39 Am. Dec. 601.

Mississippi. — Davis v. Lumpkin, 57 Miss. 506; Reed v. Bullington, 49 Miss. 223; Russell v. Cheatham, 8 Smed. & M. (Miss.) 703.

New York. — See Fellows v. Kittredge, (Marine Ct. Spec. T.) 56 How. Pr. (N. Y.) 498.

Pennsylvania. — Alexander v. Stuart, 2 Kulp (Pa.) 385; Clark v. Israel, 6 Binn. (Pa.) 301.

Virginia. — McCance v. Taylor, 10 Gratt. (Va.) 580.

This principle is also recognized by the provisions of the statutes respecting the proof of claims secured by liens and the dissolution of liens in certain cases by the adjudication. See *supra*, this title, *Debts and Claims Against Estate — What Debts and Claims Are Provable — Secured Claims*; and *Operation and Effect of Insolvency and Bankruptcy Proceedings — Liens on Debtor's Property — Existing Liens Dissolved by Proceeding.*

3. Attachment Liens — *United States*. — *In re Blumberg*, 94 Fed. Rep. 476.

Alabama. — May v. Courtney, 47 Ala. 185; Sims v. Jacobson, 51 Ala. 186.

Illinois. — Hill v. Harding, 116 Ill. 92.

Kansas. — Gillett v. McCarthy, 23 Kan. 668.

Massachusetts. — Ives v. Sturgis, 12 Met. (Mass.) 462; Davenport v. Tilton, 10 Met. (Mass.) 320.

New Hampshire. — Kittredge v. Warren, 14 N. H. 509; Colby v. Ledden, 17 N. H. 273.

New Jersey. — Vreeland v. Bruen, 21 N. J. L. 214.

Tennessee. — Wilson v. Eifer, 11 Heisk. (Tenn.) 179.

Texas. — Hancock v. Henderson, 45 Tex. 479.

Vermont. — Stoddard v. Locke 43 Vt. 574, 5 Am. Rep. 308.

It was denied at an early day by Judge Story that attachments were liens, because they depended on the subsequent recovery of a judgment by the plaintiff. *Exp. Foster*, 2 Story (U.

S.) 131, 9 Fed. Cas. No. 4,960; *Fiske v. Hunt*, 2 Story (U. S.) 582, 9 Fed. Cas. No. 4,831; *Matter of Cook*, 2 Story (U. S.) 376, 6 Fed. Cas. No. 3,152; *Matter of Bellows*, 3 Story (U. S.) 428, 3 Fed. Cas. No. 1,278; *Everett v. Stone*, 3 Story (U. S.) 446, 8 Fed. Cas. No. 4,577.

His view was not accepted by some of the state courts, however. *Smith v. Brown*, 14 N. H. 67; *Kittredge v. Warren*, 14 N. H. 509; *Ames v. Wentworth*, 5 Met. (Mass.) 294; *Schaffer v. McMaken*, 1 Ind. 274.

And it was finally decided by the Supreme Court of the United States that attachments were liens. *Peck v. Jenness*, 7 How. (U. S.) 612.

Where an Attachment Is Dissolved by Giving Bond, with sureties, conditioned to pay any judgment that may be rendered against the defendant, the discharge of the defendant in bankruptcy will not prevent the attachment plaintiff from taking judgment *pro forma* against the defendant so as to enable him to proceed against the sureties on the bond. *Hill v. Harding*, 130 U. S. 699. But see *contra*, *Carpenter v. Turrell*, 100 Mass. 450; *Hamilton v. Bryant*, 114 Mass. 543.

4. Liens Acquired in Creditors' Suits. — *M'Lean v. Lafayette Bank*, 3 McLean (U. S.) 587, 16 Fed. Cas. No. 8,888; *Phelps v. Curtis*, 80 Ill. 109; *Storm v. Waddell*, 2 Sandf. Ch. (N. Y.) 494; *Lowry v. Morrison*, 11 Paige (N. Y.) 327; *Macy v. Jordan*, 2 Den. (N. Y.) 570; *Smith v. —*, 4 Edw. (N. Y.) 653.

5. Mortgage Liens — *Alabama*. — *Carlisle v. Wilkins*, 51 Ala. 371; *Stewart v. Anderson*, 10 Ala. 504.

Arkansas. — *Oliphant v. Eckerley*, 36 Ark. 69.

California. — *Luning v. Brady*, 10 Cal. 265.

Georgia. — *Thaxton v. Roberts*, 66 Ga. 704; *Price v. Amis*, 58 Ga. 604.

Louisiana. — *Labauve v. Slack*, 28 La. Ann. 296.

Massachusetts. — *Briggs v. Parkman*, 2 Met. (Mass.) 258, 37 Am. Dec. 69.

New Hampshire. — *Chamberlain v. Meeder*, 16 N. H. 381.

Pennsylvania. — *Insurance Co. v. Ketterlinus*, 1 W. N. C. (Pa.) 130.

Texas. — *French v. Pyron*, 2 Tex. Unrep. Cas. 720.

No Personal Decree, however, can be entered against the mortgagor. *Wolfe v. Bate*, 9 B. Mon. (Ky.) 208; *Savage v. Kinloch*, Spears Eq. (S. Car.) 464.

6. Mechanics' Liens. — *McCullough v. Caldwell*, 5 Ark. 237. See *Steamboat Charlotte v. Lumm*, 9 Mo. 64. *Compare* *Cosgrave v. Mitchell*, 74 Ga. 824.

7. Vendors' Liens. — *Barnett v. Salyers*, (Ky. 1889) 12 S. W. Rep. 303; *Elliott v. Booth*, 44 Tex. 180, 23 Am. Rep. 593; *Jackson v. Elliott*, 49 Tex. 62.

8. Contingent Debts Barred by Discharge — *California*. — *Mooney v. Detrick*, 8 Cal. 549.

discharge does not affect it.¹

(f) *Continuing Contracts.* — In the case of a continuing contract to which the bankrupt is a party, his liability continues, notwithstanding his discharge, for subsequent indebtedness accruing under the contract, unless the statute provides otherwise or the contract is rescinded.²

Maryland. — *State v. Culler*, 18 Md. 418.
Massachusetts. — *Fisher v. Tiftt*, 127 Mass. 313; *Rand v. King*, 156 Mass. 515.
Missouri. — *Shelton v. Pease*, 10 Mo. 473.
New York. — *Clinton v. Hart*, 1 Johns. (N. Y.) 375.

Pennsylvania. — *Bond v. Gardiner*, 4 Binn. (Pa.) 269; *Nesbit v. Greaves*, 6 W. & S. (Pa.) 120; *Clarke v. Porter*, 25 Pa. St. 141.

Rhode Island. — *Fisher v. Tiftt*, 12 R. I. 56.
Vermont. — *Spalding v. Dixon*, 21 Vt. 45.

A Stockholder's Liability to creditors of the corporation is not released by his discharge in bankruptcy where the claims of such creditors were provable when the discharge was granted. *Irons v. Manufacturers' Nat. Bank*, 27 Fed. Rep. 591; *Barre First Nat. Bank v. Hingham Mfg. Co.*, 127 Mass. 563; *Marr v. West Tennessee Bank*, 4 Lea (Tenn.) 578. *Compare Carey v. Mayer*, 79 Fed. Rep. 926, 51 U. S. App. 184.

The Liability of a Bankrupt as Surety, Indorser, etc., is provable against his estate, and is barred by the discharge.

Alabama. — *Jones v. Knox*, 46 Ala. 53. 7 Am. Rep. 583. But see *Turner v. Esselman*, 15 Ala. 690.

Arkansas. — *Jones v. State*, 28 Ark. 119.
Illinois. — *Reitz v. People*, 72 Ill. 435.

Indiana. — *McDonald v. State*, 77 Ind. 26; *Begein v. Brehm*, 123 Ind. 160.

Kentucky. — *Mason v. Com.*, 6 Ky. L. Rep. 360.

Maine. — *Fowler v. Kendall*, 44 Me. 448. *Compare Woodard v. Herbert*, 24 Me. 358.

New York. — *Rathbone v. Blackford*, 1 Cai. (N. Y.) 588; *Roosevelt v. Mark*, 6 Johns. Ch. (N. Y.) 266; *Tobias v. Rogers*, 13 N. Y. 59, *affirming* 2 Edm. Sel. Cas. (N. Y.) 168. But see *Mechanics*, etc., *Bank v. Capron*, 15 Johns. (N. Y.) 467. *Compare Smith v. Krauskopf*, 13 Hun (N. Y.) 526.

Pennsylvania. — *Stone v. Miller*, 16 Pa. St. 450; *Watmough v. Gilliams*, 1 Phila. (Pa.) 572, 12 Leg. Int. (Pa.) 263.

Tennessee. — *Bouie v. Pucket*, 7 Humph. (Tenn.) 169 (surety of guardian); *Choate v. Quinichett*, 12 Heisk. (Tenn.) 427.

But see *Jacobson v. Horne*, 52 Miss. 185; *Paddelford v. State*, 57 Miss. 118; *Eastman v. Hibbard*, 54 N. H. 504, 20 Am. Rep. 157; *Greive v. Gibbons*, 9 Cinc. L. Bul. 56, 8 Ohio Dec. (Reprint) 605.

Damages for Breach of Covenants. — A covenant against incumbrances is broken by the existence of an incumbrance. The amount thereof is provable on the subsequent bankruptcy of the covenantor, and his liability therefor is consequently released by his discharge. *Bailey v. Moore*, 21 Ill. 165; *Parker v. Bradford*, 45 Iowa 311; *Reed v. Pierce*, 36 Me. 455, 58 Am. Dec. 761.

In the Case of a Covenant of Warranty the covenantor's liability thereon is released by his discharge in bankruptcy, if the breach occurred before the discharge.

Georgia. — *Williams v. Harkins*, 55 Ga. 172.
Kentucky. — *Cardwell v. Kemple*, 2 Ky. L. Rep. 320.

Maine. — *Merrill v. Schwartz*, 68 Me. 514; *Dow v. Davis*, 73 Me. 288.

New York. — *Jemison v. Blowers*, 5 Barb. (N. Y.) 686.

Canada. — *Cunningham v. Scoullar*, 9 N. Bruns. 385.

But if the breach did not occur until after the discharge, the covenantor's liability is not affected.

United States. — *Bush v. Person*, 18 How. (U. S.) 82.

Alabama. — *Abercrombie v. Conner*, 10 Ala. 293.

Massachusetts. — *French v. Morse*, 2 Gray (Mass.) 111.

Mississippi. — *Bush v. Cooper*, 26 Miss. 599, 59 Am. Dec. 270; *Burrus v. Wilkinson*, 31 Miss. 537.

Missouri. — *Magwire v. Riffin*, 44 Mo. 512.
New Hampshire. — *Kezer v. Clifford*, 59 N. H. 208.

New York. — *Murray v. De Rottenham*, 6 Johns. Ch. (N. Y.) 52.

Tennessee. — *Wight v. Gottschalk*, (Tenn. Ch. 1897) 48 S. W. Rep. 140.

Compare Bates v. West, 19 Ill. 134.

As to the provability of contingent claims, see *supra*, this title, *Debts and Claims Against Estate — What Debts and Claims Are Provable — Contingent and Unliquidated Claims.*

1. Liabilities Dependent on Contingencies. — *White v. Blake*, 79 Me. 114; *Dyer v. Cleveland*, 18 Vt. 241.

Liability on Forthcoming Bond. — Where a defendant in replevin had given a forthcoming bond, and was afterwards adjudged a bankrupt and granted his discharge, judgment may still be rendered against him for the restoration of the property. *Robinson v. Soule*, 56 Miss. 549. See also *Sleeper v. Miller*, 7 Cush. (Mass.) 594, note.

The Distinction between the two classes of cases referred to in the text, that is, those which are dischargeable and those which are not, is that in the one case the demands are in existence and in a condition, so that this value may be estimated, while in the other there is a mere contingency whether there ever will be a demand. *Woodard v. Herbert*, 24 Me. 360; *Ellis v. Ham*, 28 Me. 385; *Dole v. Warren*, 32 Me. 94, 52 Am. Dec. 640; *Fernald v. Clark*, 84 Me. 234.

2. Continuing Contracts. — *Thomas v. Williams*, 1 Ad. & El. 685, 28 E. C. L. 180; *Hopkins v. Thomas*, 7 C. B. N. S. 711, 97 E. C. L. 711; *Stinemets v. Ainslie*, 4 Den. (N. Y.) 573; *Robinson v. Pesant*, 53 N. Y. 419.

Assessments on Corporate Stock. — According to the principle stated in the text, the bankrupt is not relieved from liability for assessments on shares of stock made after the discharge, where the shares were not accepted by the assignee, because in such case the

Rents Accruing After the Discharge are an ordinary instance of the matter in question. A claim for future rents is a claim dependent on a contingency and is not capable of valuation within the statutes providing for the proof of contingent debts, and therefore it is held that the discharge of the lessee in bankruptcy does not release him from liability on future instalments of rent, unless it is so provided by the statute,¹ as is sometimes done.² Though the present bankruptcy law of the United States (1898) contains no such provision, it has nevertheless been held that the bankruptcy of a tenant terminates the lease and cancels all liability for future instalments of rent.³

(g) **Time of Accrual of Liabilities.** — Under the *English* statute, all debts and liabilities, present or future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge, by reason of any obligation incurred before the date of the receiving order, are provable, and are therefore barred by the discharge.⁴ Under the bankruptcy law of the *United States*, the operation of a release is limited to debts and liabilities existing at the time the petition in bankruptcy was filed,⁵ and the rule is generally the same under the state insolvency laws.⁶

Note Given for Pre-existing Debt. — It has accordingly been held that an obligation incurred after the petition was filed, though for a pre-existing consideration, is not affected by the discharge. An instance of this is where a note is given by the debtor for a debt which existed before the petition was filed.⁷

shares still belonged to the bankrupt. *Glenn v. Howard*, 65 Md. 40.

Employment of Counsel. — In *Maybin v. Raymond*, 15 Nat. Bankr. Reg. 353, 16 Fed. Cas. No. 9,338, it was held that, where the bankrupt had employed counsel to conduct a suit for a contingent fee, payable out of the recovery, the counsel were entitled to such fee though they recovered after the bankrupt's discharge.

Clerk Hire accruing for services rendered after the discharge, under a contract made before the bankruptcy, may be recovered. *Freeman v. Griggs*, 137 Mass. 75.

1. Future Rents Not Affected by Discharge. — *Rodick v. Bunker*, 84 Me. 441, 30 Am. St. Rep. 364; *Treadwell v. Marden*, 123 Mass. 390, 25 Am. Rep. 108; *Plympton v. Roberts*, 12 Allen (Mass.) 366; *Lansing v. Prendergast*, 9 Johns. (N. Y.) 127; *Hamilton v. Atherton*, 1 Ashm. (Pa.) 67.

2. Future Rents Barred by Terms of Statute. — The *Massachusetts* statute provides that if any property of a debtor consists of a lease whereby he is liable for rent, the assignee, at any time, may, and at the request of either the debtor or the lessor shall elect, either to accept and hold under a lease or to disclaim the same, and if he elects to disclaim, such lease shall thereupon be deemed to have been surrendered; and the debtor, provided he obtains his discharge in insolvency, shall be discharged from all liability under or by reason of said lease, whether the assignee does or does not disclaim. *Mason v. Clough*, 155 Mass. 389; *Pub. Stat. Mass.*, c. 157, § 26. Compare the statutes in other jurisdictions.

3. Lease Terminated by Bankruptcy of Tenant. — *In re Jefferson*, 93 Fed. Rep. 948; *Bray v. Cobb*, 100 Fed. Rep. 270.

4. Only Liabilities Existing at Date of Receiving Order Discharged in England. — 40 & 47 Vict., c. 52, § 30, par. (2), and § 37, par. (3).

5. Only Liabilities Existing When Petition Was

Filed Dischargeable in United States. — Act July 1, 1898, §§ 17, 63.

The Act of 1867 was the same in this respect as the Act of 1898. *Stern v. Nussbaum*, (C. Pl. Gen. T.) 47 How. Pr. (N. Y.) 489; *Jersey City Ins. Co. v. Archer*, (Supm. Ct. Gen. T.) 7 N. Y. St. Rep. 326, affirmed 122 N. Y. 376.

As to the rule under the earlier statutes of the *United States* see *Sparhawk v. Broome*, 6 Binn. (Pa.) 256; *Spalding v. Dixon*, 21 Vt. 45.

Money Borrowed for Expenses of Proceeding. — The rule that all debts existing at the time the petition was filed are barred has been held to apply to a note given by the bankrupt only two days before he filed his petition, though it recited that it was given for "cash bona fide advanced to enable him to take the benefit of the bankrupt law, and without such advance it would be impossible for him to do so." *Nelson v. Stewart*, 54 Ala. 115, 25 Am. Rep. 660.

6. Rule under State Insolvency Laws. — *Berry v. McLean*, 11 Md. 92; *Buel v. Gordon*, 6 Johns. (N. Y.) 126; *Stebbins v. Willson*, 14 Johns. (N. Y.) 403; *M'Neilly v. Richardson*, 4 Cow. (N. Y.) 607; *Ainslie v. Wilson*, 7 Cow. (N. Y.) 662; *Frost v. Carter*, 1 Johns. Cas. (N. Y.) 73. See also the various local statutes.

7. Note Given for Antecedent Debt — England. — *Brix v. Br ham*, 1 Bing. 281, 8 E. C. L. 509; *Kirkpatrick v. Tattersall*, 13 M. & W. 766.

United States. — *Allen v. Ferguson*, 18 Wall. (U. S.) 1, 9 Nat. Bankr. Reg. 481.

Iowa. — *Knapp v. Hoyt*, 57 Iowa 591, 42 Am. Rep. 59.

Massachusetts. — *Lerow v. Wilmarth*, 7 Allen (Mass.) 463, 83 Am. Dec. 701.

New York. — *Jersey City Ins. Co. v. Archer*, 122 N. Y. 376, affirming (Supm. Ct. Gen. T.) 7 N. Y. St. Rep. 326; *Stilwell v. Coope*, 4 Den. (N. Y.) 225.

North Carolina. — *Hornthal v. McRae*, 67 N. Car. 21; *Fraley v. Kelly*, 67 N. Car. 78.

Volume XVI.

Rents Accruing After Adjudication. — So, too, it has been held that rent is not barred, where it accrues pending a bankruptcy proceeding and before the discharge,¹ or where it becomes due after the discharge on account of the occupation of the premises at the time.²

Payments by Sureties and Indorsers. — The effect of a discharge in respect to sureties, indorsers, etc., who pay the debt after the discharge has been granted to the principal debtor, will be considered presently.³

Judgments. — The effect of a discharge on a judgment recovered after the adjudication has already been considered.⁴

Costs. — A discharge in bankruptcy does not bar a claim for costs awarded against the bankrupt in an action pending at the time of the discharge.⁵

Debts Contracted Before Passage of Law. — A discharge granted under a state insolvency law cannot affect a debt contracted before the passage of the law, because the states are expressly forbidden by the Federal Constitution to pass any law impairing the obligation of contracts;⁶ but this rule does not apply where the original debt has been paid by giving a new obligation in its place,⁷ and the creditor, by participating in the proceeding, may also waive his right to deny the validity of the discharge as to such debt.⁸

(h) **Taxes and Other Debts Due the Government.** — In England, debts due the crown are not barred by a discharge in bankruptcy, if the statute does not expressly so provide.⁹

In the United States the doctrine of the *English* cases is applied to debts due from a bankrupt or insolvent to the federal government,¹⁰ and also, as a

Pennsylvania. — *Donnell v. Swaim*, 2 Pa. L. J. Rep. 134, 3 Pa. L. J. 393.

1. **Rents Accruing Pending Bankruptcy Proceeding.** — *Rodick v. Bunker*, 84 Me. 441, 30 Am. St. Rep. 364; *Stinemets v. Ainslie*, 4 Den. (N. Y.) 573; *Kingsley v. Prentiss*, 4 Pa. L. J. Rep. 71, 6 Pa. L. J. 479, 10 Pa. St. 120.

2. **Rents Accruing for Premises Occupied After Discharge.** — *Savory v. Stocking*, 4 Cush. (Mass.) 607; *Hendricks v. Judah*, 2 Cai. (N. Y.) 25; *Ryerss v. Farwell*, 9 Barb. (N. Y.) 615; *Large v. Bosler*, 2 Pa. L. J. Rep. 29, 3 Pa. L. J. 246; *Bosler v. Kuhn*, 8 W. & S. (Pa.) 183. And see the next preceding subdivision of this section, *Continuing Contracts*.

3. See *infra*, this division of this section, *Effect as to Persons Liable with Debtor*.

4. See *supra*, this division of this section, *Judgments*.

5. **Costs of Pending Actions Not Barred.** — *Wilkins v. Warren*, 27 Me. 438; *Mann v. Houghton*, 7 Cush. (Mass.) 592; *Hall v. Brown*, 59 N. H. 198; *Ward v. Barber*, 1 E. D. Smith (N. Y.) 423.

6. **Debts Antedating Insolvency Law Not Discharged.** — *Danforth v. Robinson*, 80 Me. 466, 6 Am. St. Rep. 224; *Whitney v. Whiting*, 35 N. H. 457; *Matter of Wendell*, 19 Johns. (N. Y.) 153; *Wyman v. Mitchell*, 1 Cow. (N. Y.) 316; *Moore v. McMillan*, 54 Vt. 27.

Judgment Rendered After Passage of Law on Pre-existing Debt. — Whether a judgment rendered after the passage of the insolvency law on a debt existing previously merges the debt so as to bring it within the operation of the discharge, depends on the effect given to judgments in the particular jurisdiction. In some states it is held that a judgment, instead of being regarded strictly as a new debt, is held to be merely the old debt in a new form, so that the debt is not barred by the discharge. *Conway v. Seamons*, 55 Vt. 8, 45 Am. Rep. 579.

In other states it is held that the merger takes place. *Sampson v. Clark*, 2 Cush. (Mass.) 173; *Faxon v. Baxter*, 11 Cush. (Mass.) 37; *Bangs v. Watson*, 9 Gray (Mass.) 211; *Pierce v. Eaton*, 11 Gray (Mass.) 398; *Wolcott v. Hodge*, 15 Gray (Mass.) 547, 77 Am. Dec. 381; *Bradford v. Rice*, 102 Mass. 472, 3 Am. Rep. 483. Formerly in *Massachusetts*, the contrary doctrine was held. *Betts v. Bagley*, 12 Pick. (Mass.) 572.

As to the effect of a judgment as a merger of the original cause of action, see generally the title MERGER.

7. **Renewal Note.** — Where a note given before the enactment of the insolvent law, is taken up and another note given after the enactment, and there is nothing to rebut the presumption of payment of the old note by the new one, the debt is barred by a discharge in insolvency. *Snow v. Foster*, 79 Me. 558.

But a Mere Extension of Time to pay a debt given after the passage of the law does not bring the debt within the operation of the discharge. *Lambert v. Scandinavian-American Bank*, 66 Minn. 185.

8. **Waiver of Right.** — *Eustis v. Bolles*, 146 Mass. 413, 4 Am. St. Rep. 327; *Lambert v. Scandinavian-American Bank*, 66 Minn. 185; *Van Hook v. Whitlock*, 7 Paige (N. Y.) 373.

9. **Debts Due Crown Not Barred.** — *Ex p. Russell*, 19 Ves. Jr. 165; *Rex v. Pixley*, Bunb. 202; *Anonymous*, 1 Atk. 262.

It is now provided by statute that an order of discharge shall not release the bankrupt from any debt with which the bankrupt may be chargeable at the suit of the crown. 46 & 47 Vict., c. 52, § 30, par. (1).

10. **Debts Due United States Not Barred by Discharge.** — *U. S. v. Herron*, 20 Wall. (U. S.) 251, 9 Nat. Bankr. Reg. 535; *U. S. v. Rob Roy*, 1 Woods (U. S.) 42, 13 Nat. Bankr. Reg. 235, 27 Fed. Cas. No. 16,179; *Glenn v. Humphreys*, 4

general rule, to debts due a state.¹

(i) **Partnership Debts.** — In England the rule is well settled that if a member of a partnership is individually adjudged a bankrupt and granted a discharge, it operates as a release of his liability for the debts of the firm, as well as his individual debts.² And, conversely, the individual debts of the partners are discharged by a joint proceeding.³

In the United States the weight of authority accords with the English doctrine.⁴ It has been held, however, that such a discharge will not release the bankrupt from liability on his partnership debts, if there was no proceeding by or against the firm,⁵ and some cases hold that a separate discharge will relieve the bankrupt from the firm debts only in cases where there was no firm property at the time the discharge was granted.⁶

(j) **Fiduciary Debts** — *aa.* STATUTORY PROVISIONS. — The bankruptcy and insolvency laws, probably without exception, provide that a discharge shall not

Wash. (U. S.) 424; U. S. v. Wilson, 8 Wheat. (U. S.) 253; U. S. v. King, Wall. Jr. (C. C.) 13, 26 Fed. Cas. No. 15,536; Hamilton v. Reynolds, 88 Ind. 191; Smith v. Hodson, 50 Wis. 279.

The present bankruptcy law of the United States expressly excepts from the operation of the discharge such debts "as are due as a tax levied by the United States, the state, county, district, or municipality in which he (the bankrupt) resides." Act July 1, 1898 (30 U. S. Stat. at L. 544), § 17.

Customs Duties. — Debts due for customs duties were held to be barred under the Act of 1841. U. S. v. Zerega, 28 Fed. Cas. No. 16,786.

1. **Debts Due a State Not Barred by Discharge** — *Connecticut.* — State v. Shelton, 47 Conn. 400. *Kentucky.* — Com. v. McMillen, 1 Ky. L. Rep. 270; Johnson v. Auditor, 78 Ky. 282. *Maine.* — Cape Elizabeth v. Skillin, 79 Me. 593.

New York. — People v. Rossiter, 4 Cow. (N. Y.) 143; People v. Herkimer, 4 Cow. (N. Y.) 345; People v. Spalding, 10 Paige (N. Y.) 284. *Pennsylvania.* — Com. v. Hutchinson, 10 Pa. St. 466.

Virginia. — Saunders v. Com., 10 Gratt. (Va.) 494. *Compare* State v. White, 125 N. Car. 674.

In Maryland this prerogative right of the state is not admitted. State v. Walsh, 2 Gill & J. (Md.) 406.

2. **Rule in England — Joint Debts Discharged by Separate Proceeding.** — Adilo v. Fourdrinier, 6 Bing. 306, 19 E. C. L. 89; Booth v. Middlecoat, 6 Bing. 445, 19 E. C. L. 126; *Ex p.* Yale, 3 P. Wms. 25, note *a*; Matter of Simpson, 1 Atk. 137; *Ex p.* Young, 2 Rose 40; Grace v. Heyham, Fitzg. 231; *Ex p.* Hammond, L. R. 16 Eq. 614; Bovill v. Wood, 2 M. & S. 23; Nock v. Ingham, 1 Wils. C. Pl. 89.

3. **Separate Debts Discharged by Joint Proceeding.** — Horsely's Case, 3 P. Wms. 23; Howard v. Poole, 2 Stra. 995; Wickes v. Strahan, 2 Stra. 1157; Twiss v. Massey, 1 Atk. 67.

4. **English Rule Followed in United States** — *United States.* — Tucker v. Oxley, 5 Cranch (U. S.) 34; *In re* Stevens, 1 Sawy. (U. S.) 397, 5 Nat. Bankr. Reg. 112, 23 Fed. Cas. No. 13,393; Wilkins v. Davis, 2 Lowell (U. S.) 511, 15 Nat. Bankr. Reg. 60, 20 Fed. Cas. No. 17,664; *In re* Abbe, 2 Nat. Bankr. Reg. 75, 7 Am. L. Reg. N. S. 824, 1 Fed. Cas. No. 4; Matter of Leland,

5 Ben. (U. S.) 168, 5 Nat. Bankr. Reg. 222, 15 Fed. Cas. No. 8,228; *In re* Brick, 4 Fed. Rep. 804; *In re* Gay, 98 Fed. Rep. 870.

California. — Hawley v. Campbell, 62 Cal. 442, distinguishing Meyer v. Kohlman, 8 Cal. 44; California Furniture Co. v. Halsey, 54 Cal. 315; Glenn v. Arnold, 56 Cal. 631; Freeman v. Campbell, 56 Cal. 639, and *In re* Baker, 55 Cal. 302; Dresbach v. His Creditors, 63 Cal. 187.

Indiana. — Mattix v. Leach, 16 Ind. App. 112.

Massachusetts. — Rice, Appellant, 7 Allen (Mass.) 112; Barclay v. Phelps, 4 Met. (Mass.) 397; Lothrop v. Tilden, 8 Cush. (Mass.) 375; Rand v. King, 156 Mass. 515.

Mississippi. — Buckner v. Calcote, 28 Miss. 432.

New Hampshire. — Morrison v. Woolson, 23 N. H. 11.

New York. — West Philadelphia Bank v. Gerry, 106 N. Y. 467; Willson v. Gomperts, 11 Johns. (N. Y.) 193; Butcher v. Forman, 6 Hill (N. Y.) 583. But see Trimble v. More, 47 N. Y. Super. Ct. 340; Honegger v. Wettstein, 47 N. Y. Super. Ct. 125; Poillon v. Lawrence, 77 N. Y. 207.

Ohio. — Hamilton v. Cutler, 11 Cinc. L. Bul. 176, 9 Ohio Dec. (Reprint) 187; Keeler v. Snodgrass, 8 Cinc. L. Bul. 219, 8 Ohio Dec. (Reprint) 490. See also White v. Francis, 4 Am. L. Rec. 501, 5 Ohio Dec. (Reprint) 323.

Texas. — Daugherty v. Strauss, 1 Tex. App. Civ. Cas., § 893.

Wisconsin. — Curtis v. Woodward, 58 Wis. 499, 46 Am. Rep. 647.

5. **Absence of Proceedings by or Against Firm.** — *In re* Noonan, 3 Biss. (U. S.) 491, 10 Nat. Bankr. Reg. 330, 18 Fed. Cas. No. 10,292; Hudgins v. Lane, 2 Hughes (U. S.) 361, 11 Nat. Bankr. Reg. 462, 12 Fed. Cas. No. 6,827; Matter of Plumb, 9 Ben. (U. S.) 279, 17 Nat. Bankr. Reg. 76, 19 Fed. Cas. No. 11,231; Matter of Little, 2 Ben. (U. S.) 186, 1 Nat. Bankr. Reg. 341, 15 Fed. Cas. No. 8,390; Glenn v. Arnold, 56 Cal. 631; Perkins v. Fisher, 80 Ky. 11.

6. **Existence of Partnership Assets.** — *In re* Abbe, 2 Nat. Bankr. Reg. 75, 7 Am. L. Reg. N. S. 824, 1 Fed. Cas. No. 4; Crompton v. Conkling, 9 Ben. (U. S.) 225, 15 Nat. Bankr. Reg. 417, 6 Fed. Cas. No. 3,408; *In re* Carmichael, 2 Am. Bankr. Reg. 815; Corey v. Perry, 67 Me. 140, 24 Am. Rep. 15.

release a debtor from any debt created by his fraud, misappropriation, etc., while acting in any fiduciary capacity or as a public officer.¹

bb. WHAT CONSTITUTES FIDUCIARY RELATION—Technical Trusts.—The existence of a technical or special trust clearly constitutes the fiduciary relation contemplated by the statutes.² In this category are all trustees proper,³ executors and administrators,⁴ and guardians.⁵ The exception to the operation of the release relates only to the trustee himself, without affecting any one who is liable with him, and therefore the liability of a surety on the bond of a trustee or public officer is released by the discharge of the surety in bankruptcy.⁶ It is also held that the liabilities which are not dischargeable are those only of the trustees to the beneficiary,⁷ and such as were created while acting in the fiduciary capacity, excluding any liability that may have been created by contract between the parties in reference to the subject of the trust.⁸

1. Fiduciary Debts Not Discharged—England.—46 & 47 Vict., c. 52, § 30; *Orritt v. Corser*, 21 Beav. 52; *Emma Silver Min. Co. v. Grant*, 17 Ch. D. 122.

United States.—Act July 1, 1898 (30 U. S. Stat. at L. 544), § 17; *Chapman v. Forsyth*, 2 How. (U. S.) 202; *In re Brown*, 5 Law Rep. 258, 4 Fed. Cas. No. 1,979; *In re Tebbetts*, 5 Law Rep. 259, 23 Fed. Cas. No. 13,817; *Clatlin Dry Goods Co. v. Eason*, 2 Am. Bankr. Rep. 263; *Herrlich v. McDonald*, 80 Cal. 472; *Dyer v. Bradley*, 89 Cal. 557; *Dyer v. Martin*, (Cal. 1891) 26 Pac. Rep. 1105; *Mayberry v. Cook*, 121 Cal. 588.

California.—*Dyer v. Bradley*, 89 Cal. 557.
Massachusetts.—*Raphael v. Mullen*, 171 Mass. 111.

Vermont.—*Slayton v. Wells*, 66 Vt. 62; *Pawlet v. Kelley*, 69 Vt. 398.

Debts Created by Defalcations, etc., of Public Officers, Not Discharged—Kentucky.—*Johnson v. Auditor*, 78 Ky. 282.

Maine.—*Richmond v. Brown*, 66 Me. 373.
Massachusetts.—*Morse v. Lowell*, 7 Met. (Mass.) 152.

New Hampshire.—*Grantham v. Clark*, 62 N. H. 426.

North Carolina.—*Councill v. Horton*, 88 N. Car. 222.

What Constitutes Defalcation.—*Courtney v. Beale*, 84 Va. 692.

City Auctioneer Held a Public Officer.—*Jones v. Russell*, 44 Ga. 460.

Wrongful Levy of Attachment.—A conversion of property by seizure under an attachment issued against a third person is not a "defalcation" by the officer, within the meaning of the statute, and therefore the discharge of the officer in bankruptcy bars the claim against him for the conversion, though an incidental effect of the bar is to exonerate the sureties on the officer's official bond. *Hayes v. Nash*, 129 Mass. 62.

2. What Constitutes Fiduciary Relation—Ex-istence of Technical Trust—United States.—*Keine v. Graff*, 17 Nat. Bankr. Reg. 319, 14 Fed. Cas. No. 7,650; *Neal v. Clark*, 95 U. S. 704.

Indiana.—*Goddin v. Neal*, 99 Ind. 334.

Maryland.—*Morrison v. Savage*, 56 Md. 143.

New Jersey.—*Gibson v. Gorman*, 44 N. J. L. 325.

New York.—*Lawrence v. Harrington*, 122

N. Y. 408; *Ocean Nat. Bank v. Olcott*, 46 N. Y. 12; *Guilfoyle v. Anderson*, 9 Daly (N. Y.) 64.

North Carolina.—*Williamson v. Dickens*, 5 Ired. L. (27 N. Car.) 259; *Hervey v. Devereux*, 72 N. Car. 463.

Ohio.—*Bissell v. Couchaine*, 15 Ohio 58.

3. Trustees Proper.—*Pinkston v. Brewster*, 14 Ala. 315; *Donovan v. Haynie*, 67 Ala. 51; *Flagg v. Ely*, 1 Edm. Sel. Cas. (N. Y.) 206; *Kingsland v. Spalding*, 3 Barb. Ch. (N. Y.) 341; *Mock v. Howell*, 101 N. Car. 443.

4. Executors and Administrators.—*Laramore v. McKinzie*, 60 Ga. 532; *Waller v. Edwards*, Litt. Sel. Cas. (Ky.) 348; *Crisfield v. State*, 55 Md. 192.

5. Guardians.—*In re Maybin*, 15 Nat. Bankr. Reg. 468, 16 Fed. Cas. No. 9,337; *Simpson v. Simpson*, 80 N. Car. 332.

The Liability of a Guardian to His Surety who has paid money due from the guardian to the ward is not a debt created while acting in a fiduciary character. *Cromer v. Cromer*, 29 Gratt. (Va.) 280. Compare *Carlin v. Carlin*, 8 Bush (Ky.) 141.

6. Surety on Bond of Trustee, etc.—United States.—*U. S. v. Davis*, 3 McLean (U. S.) 483, 25 Fed. Cas. No. 14,929; *U. S. v. Throckmorton*, 8 Nat. Bankr. Reg. 309, 28 Fed. Cas. No. 16,516; *Ex p. Taylor*, 1 Hughes (U. S.) 617, 16 Nat. Bankr. Reg. 40, 23 Fed. Cas. No. 13,773.

Alabama.—*Jones v. Knox*, 46 Ala. 53, 7 Am. Rep. 583.

Illinois.—*Reitz v. People*, 72 Ill. 435.

Maine.—*Fowler v. Kendall*, 44 Me. 448.

Missouri.—*Miller v. Gillespie*, 59 Mo. 220.

North Carolina.—*Simpson v. Simpson*, 80 N. Car. 332; *McMinn v. Allen*, 67 N. Car. 131.

Tennessee.—*Eberhardt v. Wood*, 6 Lea (Tenn.) 467.

Virginia.—*Saunders v. Com.*, 10 Gratt. (Va.) 494.

Wisconsin.—*Davis v. McCurdy*, 50 Wis. 569.

7. A Note Given by an Administrator to His Sureties for the amount of his defalcation is not a debt created in a fiduciary capacity. *Light v. Merriam*, 132 Mass. 285.

8. Debts Created by Contract.—An executor does not incur a debt "while acting in any fiduciary character," by guaranteeing payment of a claim against the estate, and admitting sufficient assets therefor, *Amoskeag Mfg. Co. v. Barnes*, 49 N. H. 312; or by giving his individual note for the balance due a distributee,

Implied Trusts. — Though there are some decisions to the contrary, it is now well settled that implied trusts do not come within the statutory provision under consideration. Therefore a discharge releases all debts incurred by persons while acting as ordinary agents,¹ attorneys at law,² bailees,³ pledgees,⁴ bankers,⁵ brokers, factors and commission merchants,⁶ or in any case where mere trust or confidence is reposed in the debtor in the popular sense of the terms.⁷

Elliott v. Higgins, 83 N. Car. 459. See also *Coleman v. Davies*, 45 Ga. 489; *Madison Tp. v. Dunkle*, 114 Ind. 262; *Wilkes County v. Staley*, 82 N. Car. 395.

1. Ordinary Agents Held Not to Be Fiduciaries — *United States*. — *Grover, etc., Sewing-Mach. Co. v. Clinton*, 5 Biss. (U. S.) 324, 8 Nat. Bankr. Reg. 312, 11 Fed. Cas. No. 5,845; *Keime v. Graff*, 17 Nat. Bankr. Reg. 319, 14 Fed. Cas. No. 7,650.

Indiana. — *Du Pont v. Beck*, 81 Ind. 271. *Massachusetts*. — *Halpine v. May*, 100 Mass. 498; *Woodward v. Towne*, 127 Mass. 41, 34 Am. Rep. 337.

New Jersey. — *Gibson v. Gorman*, 44 N. J. L. 325.

New York. — *Lawrence v. Harrington*, 122 N. Y. 408; *Barber v. Sterling*, 68 N. Y. 267; *Mulock v. Byrnes*, 129 N. Y. 23, *affirming* (Supm. Ct. Gen. T.) 13 N. Y. Sapp. 199; *Guilfoyle v. Anderson*, 9 Daly (N. Y.) 64.

North Carolina. — *Hervey v. Devereux*, 72 N. Car. 463; *Williamson v. Dickens*, 5 Ired L. (27 N. Car.) 259.

Ohio. — *Strader v. Baldwin*, 4 West. L. J. 528, 1 Ohio Dec. (Reprint) 219.

See *contra*, *Fulton v. Hammond*, 11 Fed. Rep. 297; *Matteson v. Kellogg*, 15 Ill. 517; *Peterborough R. Co. v. Wood*, 61 N. H. 418; *White v. Platt*, 5 Den. (N. Y.) 269.

In *Herrlich v. McDonall*, 80 Cal. 472, the creditor employed the debtor to purchase mining stock for her, and gave her three thousand six hundred dollars to be used for that purpose. The debtor purchased the stocks for said amount, but refused to deliver them or to pay over the dividends. It was held that this transaction created a fiduciary relation, because the stocks, when purchased, were the property of the creditor, and the debtor held them as trustee for her; and a distinction was drawn between a case like the present and one where the dealings are between a general factor and his client.

And in another case an auctioneer was held to act in a fiduciary character within the meaning of the Act of 1841. *Jure Lord*, 5 Law Rep. 258, 15 Fed. Cas. No. 8,501.

Partners are merely agents in respect to each other, and not trustees. *Hill v. Sheibley*, 68 Ga. 556; *Pierce v. Shippee*, 90 Ill. 371.

2. Attorneys at Law. — *Wolcott v. Hodge*, 15 Gray (Mass.) 547, 77 Am. Dec. 381. See also *Hayman v. Pond*, 7 Met. (Mass.) 328; *Woodward v. Towne*, 127 Mass. 41, 34 Am. Rep. 337. See *contra*, *Heffren v. Jayne*, 39 Ind. 463, 13 Am. Rep. 281; *Flanagan v. Pearson*, 42 Tex. 1, 19 Am. Rep. 40.

3. Bailees. — *Keime v. Graff*, 17 Nat. Bankr. Reg. 319, 14 Fed. Cas. No. 7,650; *Grannis v. Cubbedge*, 71 Ga. 582; *Phillips v. Russell*, 42 Me. 360; *Halpine v. May*, 100 Mass. 498; *Cronan v. Cotting*, 104 Mass. 245, 6 Am. Rep.

232. See *contra*, *Herman v. Lynch*, 26 Kan. 435, 40 Am. Rep. 320.

4. Pledgees. — *Hennequin v. Clews*, 111 U. S. 676, *affirming* 77 N. Y. 427, 33 Am. Rep. 641.

5. Bankers. — *Maxwell v. Evans*, 90 Ind. 596, 46 Am. Rep. 234; *Shaw v. Vaughan*, 52 Mich. 405; *Green v. Chilton*, 57 Miss. 598, 34 Am. Rep. 483.

6. Brokers, Factors, and Commission Merchants — *United States*. — *Chapman v. Forsyth*, 2 How. (U. S.) 202; *Owsley v. Cobin*, 2 Hughes (U. S.) 433, 15 Nat. Bankr. Reg. 489, 18 Fed. Cas. No. 10,636; *Keime v. Graff*, 17 Nat. Bankr. Reg. 319, 14 Fed. Cas. No. 7,650; *Zeperink v. Card*, 11 Fed. Rep. 295; *Matter of Smith*, 9 Ben. (U. S.) 494, 18 Nat. Bankr. Reg. 24, 22 Fed. Cas. No. 12,976; *Palmer v. Hussey*, 119 U. S. 96, *affirming* 87 N. Y. 303; *In re Basch*, 97 Fed. Rep. 761. But see *contra*, *Matter of Seymour*, 1 Ben. (U. S.) 348, 1 Nat. Bankr. Reg. 29, 21 Fed. Cas. No. 12,684.

Alabama. — *Austill v. Crawford*, 7 Ala. 335; *Woolsey v. Cade*, 54 Ala. 378, 25 Am. Rep. 711.

Florida. — *Chipley v. Frierson*, 18 Fla. 639. *Indiana*. — *Du Pont v. Beck*, 81 Ind. 271.

Louisiana. — *Commercial Bank v. Buckner*, 2 La. Ann. 1023; *Desobry v. Tete*, 31 La. Ann. 809, 33 Am. Rep. 232; *Baines v. Adams*, 33 La. Ann. 46. But see *contra*, *Banning v. Bleakley*, 27 La. Ann. 257, 21 Am. Rep. 554; *Brown v. Garrard*, 28 La. Ann. 870.

Massachusetts. — *Hayman v. Pond*, 7 Met. (Mass.) 328.

New York. — *Stratford v. Jones*, 97 N. Y. 586, *affirming* 48 N. Y. Super. Ct. 185. But see *contra* *Whitaker v. Chapman*, 3 Lans. (N. Y.) 155; *Hardenbrook v. Collson*, 24 Hun (N. Y.) 475, 61 How. Pr. (N. Y.) 426.

Ohio. — *Kesler v. Snodgrass*, 8 Cinc. L. Bul. 219, 8 Ohio Dec. (Reprint) 490. But see *contra*, *Gay v. Farran*, 2 Cinc. Super. Ct. 426.

Pennsylvania. — *Scott v. Porter*, 93 Pa. St. 38, 39 Am. Rep. 719.

Tennessee. — *Pankey v. Nolan*, 6 Humph. (Tenn.) 154.

Texas. — *Kaufman v. Alexander*, 53 Tex. 562.

Vermont. — *Slayton v. Wells*, 66 Vt. 62.

The Opposite View to that stated in the text has been taken by the courts of the following states:

California. — *Mayberry v. Cook*, 121 Cal. 588; *Treadwell v. Holloway*, 46 Cal. 547.

Georgia. — *Meador v. Sharpe*, 54 Ga. 125; *Gilreath v. Holston Salt, etc., Co.*, 67 Ga. 702.

Missouri. — *Lemcke v. Booth*, 47 Mo. 385, 4 Am. Rep. 376; *Brunswick v. Taylor*, 2 Mo. App. 351; *Brooks v. Vocum*, 42 Mo. App. 516.

7. Trust or Confidence in Popular Sense. — *Upshur v. Briscoe*, 138 U. S. 365, *affirming* 37 La. Ann. 138.

cc. EFFECT OF PROVING DEBT. — Under the bankruptcy law of 1841 it was held that if a creditor elected to prove a fiduciary debt, it would then be barred by the discharge, the same as other debts,¹ but under the Act of 1867 making proof had no such effect.²

(k) **Debts Contracted by Fraud.** — Another instance of debts specially excepted by the statutes from the operation of the discharge is found in those which are created by the fraud of the debtor.³

Actual, Positive Fraud in the creation of the debt is necessary to bring a case within the exception. An implied or constructive fraud is not sufficient.⁴

Fraud in Creation of Debt. — The debt must have been created by the fraud of the debtor. Fraud subsequent to the creation of the debt does not affect the discharge.⁵

Proving the Debt and Receiving Dividends thereon does not bring the debt within the operation of the discharge, but the debtor still remains liable for so much as may be unpaid.⁶

What Are Debts Created by Fraud. — Common instances of debts not releasable by a discharge in bankruptcy or insolvency because created by fraud, are where goods are purchased on credit by the false representations of the purchaser as

1. Proving Fiduciary Debt — Effect under Act 1841. — *In re Tebbetts*, 5 Law Rep. 259, 23 Fed. Cas. No. 13,817; *Fisher v. Currier*, 7 Met. (Mass.) 424; *Morse v. Lowell*, 7 Met. (Mass.) 152.

2. Effect under Act 1867. — *Madison Tp. v. Dunkle*, 114 Ind. 262; *Richmond v. Brown*, 66 Me. 373; *Minshall v. Arthur*, 2 Hun (N. Y.) 662.

3. Debts Created by Fraud Not Discharged — England. — 46 & 47 Vict., c. 52, § 30; *Ex p. Hemming*, 13 Ch. D. 163; *Emma Silver Min. Co. v. Grant*, 17 Ch. D. 122; *Ex p. Coker*, L. R. 10 Ch. 652; *Cobham v. Dalton*, L. R. 10 Ch. 655.

United States. — Act July 1, 1898 (30 U. S. Stat. at L. 544), § 17, cl. (4); *Neal v. Clark*, 95 U. S. 704; *Strang v. Bradner*, 114 U. S. 555; *Noble v. Hammond*, 129 U. S. 65, reversing 57 Vt. 193; *Ames v. Moir*, 138 U. S. 306, affirming 130 Ill. 582; *Matter of Patterson*, 2 Ben (U. S.) 155, 1 Nat. Bankr. Reg. 307, 18 Fed. Cas. No. 10,817; *Re Devoe*, 1 Lowell (U. S.) 251, 2 Nat. Bankr. Reg. 27, 7 Fed. Cas. No. 3,843; *In re Pettis*, 2 Nat. Bankr. Reg. 44, 19 Fed. Cas. No. 11,046; *Whitehouse*, Petitioner, 1 Lowell (U. S.) 429, 4 Nat. Bankr. Reg. 63, 29 Fed. Cas. No. 17,564; *In re Pitts*, 19 Nat. Bankr. Reg. 63, 19 Fed. Cas. No. 11,190; *In re Rhutassel*, 2 Am. Bankr. Reg. 697.

California. — *Matter of McEachran*, 82 Cal. 219; *Dyer v. Bradley*, 89 Cal. 557; *Dyer v. Martin*, (Cal. 1891) 26 Pac. Rep. 1105.

Illinois. — *Forsyth v. Vehmeyer*, 176 Ill. 359, affirming 75 Ill. App. 308.

Kentucky. — *Taylor v. Farmer*, 81 Ky. 458. *Massachusetts.* — *Morse v. Hutchins*, 102 Mass. 439; *Merchants' Ins. Co. v. Abbott*, 131 Mass. 397; *Wilson v. Hawley*, 158 Mass. 250. *New Hampshire.* — *Ely v. Curtis*, 60 N. H. 513.

New York. — *Hennequin v. Clews*, 77 N. Y. 427, 33 Am. Rep. 641; *Grocers' Nat. Bank v. Clark*, (Supm. Ct. Spec. T.) 31 How. Pr. (N. Y.) 115.

North Dakota. — *In re Kaeppler*, 7 N. Dak. 435.

Pennsylvania. — *Hughes v. Oliver*, 8 Pa. St. 426.

Vermont. — *Johnson v. Worden*, 47 Vt. 457; *Darling v. Woodward*, 54 Vt. 101.

And see the various state insolvency laws.

Pledge of Goods Held as Collateral Security. — Where a debtor who holds goods as collateral security under a contract which authorizes him to sell, transfer, or hypothecate them for his own use, pledges such goods, and the pledgee sells them after the insolvency of the debtor, the debt created by the failure of the debtor to restore the goods to the owner is not "a debt or claim against a pledgee created by his sale of collateral securities in a manner not authorized by his contract with the pledgor," within the *Massachusetts* statute providing that no such debt shall be released by a discharge in insolvency. *Wilson v. Hawley*, 158 Mass. 250.

4. Only Positive Fraud Contemplated by Exception — United States. — *Neal v. Clark*, 95 U. S. 704; *Strang v. Bradner*, 114 U. S. 555; *Noble v. Hammond*, 129 U. S. 65, reversing 57 Vt. 193; *Hennequin v. Clews*, 111 U. S. 676, affirming 77 N. Y. 427, 33 Am. Rep. 641.

Illinois. — *Allen v. Hickling*, 11 Ill. App. 549. *New Hampshire.* — *Ely v. Curtis*, 60 N. H. 513.

New York. — *Rowe v. Guillaume*, 18 Hun (N. Y.) 556; *Sheldon v. Clews*, (Supm. Ct. Gen. T.) 13 Abb. N. Cas. (N. Y.) 40.

5. Fraud Subsequent to Creation of Debt. — *Hennequin v. Clews*, 111 U. S. 676, affirming 77 N. Y. 427, 33 Am. Rep. 641; *Neal v. Clark*, 95 U. S. 704; *U. S. v. Rob Roy*, 1 Woods (U. S.) 42, 13 Nat. Bankr. Reg. 235, 27 Fed. Cas. No. 16,179; *Brown v. Broach*, 52 Miss. 536; *Bank of North America v. Crandall*, 87 Mo. 208; *Hughes v. Oliver*, 8 Pa. St. 426. See also *Shattuck v. Haworth*, 91 Pa. St. 449; *Flanagan v. Cary*, 37 Tex. 67.

6. Exception Not Affected by Proof of Debt. — *Strang v. Bradner*, 114 U. S. 555; *In re Robinson*, 6 Blatchf. (U. S.) 253, 2 Nat. Bankr. Reg. 341; *Matter of Patterson*, 2 Ben. (U. S.) 155, 1 Nat. Bankr. Reg. 307; *Forsyth v. Vehmeyer*, 176 Ill. 359, affirming 75 Ill. App. 308; *Minshall v. Arthur*, 2 Hun (N. Y.) 662, 5 Thomp. & C. (N. Y.) 213; *Stokes v. Mason*, 10 R. I. 261.

to his financial condition,¹ or where the purchaser knows that he is insolvent, and purchases with the intention of disposing of the goods without paying for them,² or where the claim is for damages for false representations concerning property sold by the bankrupt to the claimant,³ or where worthless collaterals were knowingly given as security for a loan,⁴ or where money is obtained by false representations.⁵ But a debt is not created by fraud in the case of liability on a replevin bond given by a fraudulent purchaser of goods which had been seized under attachment at the suit of creditors of the seller,⁶ or in case of a judgment for the seduction of the plaintiff's daughter not accomplished under a promise of marriage fraudulently made for the purpose.⁷

Liability of Partners for Acts of Copartner. — Where a firm debt is created by the fraud of one of the partners, those who did not participate in the fraud are nevertheless chargeable therewith to the extent that a discharge in bankruptcy does not relieve them of liability for such debt.⁸

(1) **Liabilities Arising Out of Torts.** — An unliquidated claim for damages arising out of a tort is not provable in bankruptcy or insolvency and is not barred by the discharge,⁹ and it has been held that where the claimant has the option of suing either in contract or in tort, the form of his action will determine whether his claim is barred by the discharge or not.¹⁰

Judgments for Wilful and Malicious Injuries to the persons or property of others are expressly excepted by the bankruptcy law of the *United States* from the operation of the discharge.¹¹

(m) **Extra-territorial Effect of Discharge** — *aa. IN GENERAL.* — A discharge in bankruptcy granted in one country is, by the comity of nations, recognized in other countries to the extent of barring debts due to citizens or subjects of such other countries, if the debts were contracted and payable in the country where the discharge was granted,¹² but not if they were contracted in the country where the creditors reside;¹³ though in any case a foreign discharge will be

1. **Purchase on Credit by False Representations.** — *In re Lewensohn*, 99 Fed. Rep. 73; *Broadnax v. Bradford*, 50 Ala. 270; *Thomas v. Snyder*, 77 Hun (N. Y.) 365.

2. **Intent to Dispose of Goods Without Paying Price.** — *Ames v. Moir*, 138 U. S. 306, *affirming* 130 Ill. 582; *In re Alsberg*, 16 Nat. Bankr. Reg. 116, 1 Fed. Cas. No. 261; *Classen v. Schoenemann*, 80 Ill. 304.

3. **False Representations by Bankrupt to His Vendee.** — *Peel v. Bryson*, 72 Ga. 331; *Turner v. Atwood*, 124 Mass. 411.

4. **Giving Worthless Collaterals as Security for Loan.** — *Bank of North America v. Crandall*, 87 Mo. 208.

5. **Money Obtained by False Representations.** — *Forbes v. Thomas*, 22 Neb. 541; *Bradner v. Strang*, 23 Hun (N. Y.) 445, *affirmed* 89 N. Y. 299, 114 U. S. 555.

6. **Replevin Bond by Purchaser of Goods Attached by Seller's Creditors.** — *Wolf v. Stix*, 99 U. S. 1.

7. **Judgment for Seduction.** — *Howland v. Carson*, 23 Ohio St. 625.

8. **Liability of Partners for Acts of Copartner.** — *Strang v. Bradner*, 114 U. S. 555, *affirming* 89 N. Y. 299, 23 Hun (N. Y.) 445; *Schroeder v. Frey*, 60 Hun (N. Y.) 58, *reversing* 12 N. Y. Supp. 625.

9. **Unliquidated Claims for Tort Not Discharged.** — *Dusar v. Murgatroyd*, 1 Wa. L. (U. S.) 13, 8 Fed. Cas. No. 4,199; *Haggood v. Blood*, 11 Gray (Mass.) 400; *Kellogg v. Schuyler*, 2 Den. (N. Y.) 73; *Zinn v. Ritterman*, (N. Y. Super. Ct. Spec. T.) 2 Abb. Pr. N. S. (N. Y.) 261; *Hun v. Cary*, 82 N. Y. 61, 37 Am. Rep. 545, *affirming* (Supm. Ct. Gen. T.) 59 How. Pr. (N. Y.)

426; *Newman v. Goddard*, 20 Hun (N. Y.) 563; *Johnson v. Worden*, 47 Vt. 457.

Even Where a Verdict Has Been Recovered, the claim is not barred, if judgment is not entered before the discharge. *Nassau v. Parker*, 1 Pa. L. J. Rep. 317, 2 Pa. L. J. 298; *Hodges v. Chace*, 2 Wend. (N. Y.) 248.

10. **Option to Sue Either in Tort or Contract.** — *Williamson v. Dickens*, 5 Ired. L. (27 N. Car.) 259. But see *Hatten v. Speyer*, 1 Johns. (N. Y.) 37.

11. **Judgments for Wilful and Malicious Injuries.** — Act July 1, 1898 (30 U. S. Stat. at L. 544), § 17, cl. (3).

Judgment for Criminal Conversation. — It has been suggested that a judgment for criminal conversation is not within this provision. *In re Tinker*, 99 Fed. Rep. 79.

The *English* statute, however, in terms includes such claims and others of a similar character. 53 & 54 Vict., c. 71, § 10.

12. **Foreign Discharge—Bar as Debts Contracted and Payable Where Discharge Was Granted.** — *Very v. McHenry*, 29 Me. 206; *Long v. Hammond*, 40 Me. 204; *May v. Breed*, 7 Cush. (Mass.) 15, 54 Am. Dec. 700; *Olyphant v. Atwood*, 4 Bosw. (N. Y.) 459; *Peck v. Hibbard*, 26 Vt. 698, 62 Am. Dec. 605.

13. **Debts to Nonresidents Contracted at Creditors' Domicil.** — *Gibbs v. La Société Industrielle*, etc., 25 Q. B. D. 399; *Ellis v. M'Henry*, L. R. 6 C. P. 228; *Smith v. Buchanan*, 1 East 6; *Phillips v. Allan*, 8 B. & C. 477, 15 E. C. L. 269; *M'Millan v. M'Neill*, 4 Wheat. (U. S.) 209; *Green v. Sarmiento*, Pet. (C. C.) 74, 3 Wash. (U. S.) 17, 10 Fed. Cas. No. 5,760.

held to bar the claim of a domestic creditor who was a party to the bankruptcy proceeding, or received a dividend under it,¹ and will always be recognized as a bar to debts contracted in the country where it was granted, if the creditors, as well as the debtor, are residents of that country.²

Effect of Domestic Discharge on Foreign Creditors. — The rule that has been laid down in *England* is that a discharge releases the bankrupt from all his contracts in any part of the world, so far as their enforcement in the *English* courts is concerned.³ In the *United States* the authorities do not agree as to whether a discharge in bankruptcy is a bar to an action by a foreign creditor in this country. The federal courts hold that the discharge does operate as such a bar, and in some state courts the same rule has been laid down,⁴ but in other states the decisions are to the contrary.⁵

bb. DISCHARGE UNDER STATE INSOLVENCY LAWS — Nonresidence of Creditors. — A discharge under a state insolvent law is wholly ineffectual to release the debtor from the claims of nonresidents of the state who do not in any way assent to or acquiesce therein,⁶ even in case of an appearance to contest the

1. **Participation in Foreign Proceeding.** — *Phelps v. Borland*, 103 N. Y. 406, 57 Am. Rep. 755, *affirming* 30 Hun (N. Y.) 366; *Munroe v. Guilleaume*, 3 Abb. App. Dec. (N. Y.) 334; *Philippe v. James*, 3 Robt. (N. Y.) 720; *Morel v. Garely*, (C. Pl. Gen. T.) 16 Abb. Pr. (N. Y.) 269.

2. **Foreign Discharge Recognized as Against Fellow Citizens of Debtor.** — *Potter v. Brown*, 5 East 124; *Harris v. Mandeville*, 2 Dall. (Pa.) 625, 2 Yeates (Pa.) 99.

3. **Discharge in England Held Operative as to Debts Everywhere.** — *Armani v. Castrique*, 13 M. & W. 443, 14 L. J. Exch. 36. See also *Scotland Bank v. Stein*, 1 Rose 462; *Edwards v. Ronald*, 1 Knapp 259; *Odwin v. Forbes*, Buck 57.

4. **Discharge in United States Held to Bar Actions by Foreign Creditors.** — *Ruiz v. Eickerman*, 2 McCrary (U. S.) 259, 5 Fed. Rep. 790, 12 Cent. L. J. 60; *Zarega's Case*, 1 N. Y. Leg. Obs. 40, note, 30 Fed. Cas. No. 18,204; *Murray v. De Rottenham*, 6 Johns. Ch. (N. Y.) 52. See also *Ritchie v. Garrison*, (N. Y. Super. Ct. Spec. T.) 10 Abb. Pr. (N. Y.) 246; *Pattison v. Wilbur*, 10 R. I. 445. *Compare* *M'Menomy v. Murray*, 3 Johns. Ch. (N. Y.) 435.

5. **State Decisions that Foreign Creditors Are Not Barred.** — *Lizardi v. Cohen*, 3 Gill (Md.) 430; *Moore v. Horton*, 32 Hun (N. Y.) 393; *McDougall v. Page*, 55 Vt. 187, 28 Alb. L. J. 372, 45 Am. Rep. 602, 17 Cent. L. J. 476.

6. **Debts Due Nonresidents Not Discharged — United States.** — *Cook v. Moffat*, 5 How. (U. S.) 310; *Baldwin v. Hale*, 1 Wall. (U. S.) 223, 3 Am. L. Reg. N. S. 462, and note by Judge Redfield; *Gilman v. Lockwood*, 4 Wall. (U. S.) 409; *M'Millan v. M'Neill*, 4 Wheat. (U. S.) 209; *Ogden v. Saunders*, 12 Wheat. (U. S.) 213; *Boyle v. Zacharie*, 6 Pet. (U. S.) 348; *Suydam v. Broadnax*, 14 Pet. (U. S.) 75; *Von Glahn v. Varrenne*, 1 Dill. (U. S.) 515; *Woodhull v. Wagner*, *Baldw.* (U. S.) 300; *Byrd v. Badger*, 1 McAll. (U. S.) 263; *Stevenson v. King*, 2 Cliff. (U. S.) 1; *Latapee v. Pecholier*, 2 Wash. (U. S.) 160; *Riston v. Content*, 4 Wash. (U. S.) 476.

California. — *Stone v. Hammell*, (Cal. 1889) 22 Pac. Rep. 203; *Bean v. Loryea*, 81 Cal. 151; *Rhodes v. Borden*, 67 Cal. 7.

Connecticut. — *Easterly v. Goodwin*, 35 Conn. 279, 95 Am. Dec. 237; *Anderson v. Wheeler*, 25 Conn. 603; *Norton v. Cook*, 9 Conn. 314,

23 Am. Dec. 342; *Atwater v. Townsend*, 4 Conn. 47, 10 Am. Dec. 97; *Smith v. Healy*, 4 Conn. 49; *Woodbridge v. Wright*, 3 Conn. 523. *Compare* *Barber v. Minturn*, 1 Day (Conn.) 136. *Florida.* — *Rosenheim v. Morrow*, 37 Fla. 183. *Idaho.* — *Security Sav., etc., Co. v. Rogers*, (Idaho 1899) 57 Pac. Rep. 316.

Illinois. — *Mason v. Wash*, 1 Ill. 39, 12 Am. Dec. 138.

Indiana. — *Pugh v. Bussell*, 2 Blackf. (Ind.) 394.

Iowa. — *Hawley v. Hunt*, 27 Iowa 303.

Louisiana. — *Marx v. His Creditors*, 48 La. Ann. 1340; *Fisher v. Wheeler*, 5 La. Ann. 271.

Maine. — *Silverman v. Lessor*, 88 Me. 599; *Felch v. Bugbee*, 48 Me. 9, 9 Am. L. Reg. 104; *Palmer v. Goodwin*, 32 Me. 535; *Bancher v. Fisk*, 33 Me. 316.

Maryland. — *Downes v. Fisher*, (Md. 1893) 27 Atl. Rep. 121; *Poe v. Duck*, 5 Md. 1; *Owens v. Bowie*, 2 Md. 457; *Glenn v. Boston*, etc., *Glass Co.*, 7 Md. 287; *Frey v. Kirk*, 4 Gill & J. (Md.) 509, 23 Am. Dec. 581; *Potter v. Kerr*, 1 Md. Ch. 275.

Massachusetts. — *Haman v. Brennan*, 170 Mass. 405; *Pattee v. Paige*, 163 Mass. 352, 47 Am. St. Rep. 459; *Regina Flour Mill Co. v. Holmes*, 156 Mass. 11; *Phoenix Nat. Bank v. Batcheller*, 151 Mass. 589; *Maxwell v. Cochran*, 136 Mass. 73; *Lawrence v. Batcheller*, 131 Mass. 504; *Savoye v. Marsh*, 10 Met. (Mass.) 594, 43 Am. Dec. 451; *Fiske v. Foster*, 10 Met. (Mass.) 597; *Woodbridge v. Allen*, 12 Met. (Mass.) 470; *Dinsmore v. Bradley*, 5 Gray (Mass.) 457; *Houghton v. Maynard*, 5 Gray (Mass.) 552; *McKim v. Willis*, 1 Allen (Mass.) 512; *Fessenden v. Willey*, 2 Allen (Mass.) 67, 79 Am. Dec. 762; *Agnew v. Platt*, 15 Pick. (Mass.) 417; *Braynard v. Marshall*, 8 Pick. (Mass.) 194; *Proctor v. Moore*, 1 Mass. 198; *Watson v. Bourne*, 10 Mass. 337, 6 Am. Dec. 120; *Bradford v. Farland*, 13 Mass. 18; *Prentiss v. Savage*, 13 Mass. 20; *Kelley v. Drury*, 9 Allen (Mass.) 27, *overruling* *Scribner v. Fisher*, 2 Gray (Mass.) 43, and *following* *Baldwin v. Hale*, 1 Wall. (U. S.) 223. Earlier decisions in *Massachusetts* inconsistent with the doctrine of those cited above are declared to be overruled or modified by the decisions of the Supreme Court of the United States. See *Chase v. Henry*, 166 Mass. 577, 55 Am. St. Rep. 423.

discharge,¹ because the insolvency laws of a state have no extra-territorial operation which will conclude the rights of creditors who are citizens of other states.²

The Application of This Rule is not affected by the fact that the debt was contracted in the state where the discharge was granted and was to be performed there,³ or had previously been reduced to judgment in that

Mississippi. — Beer v. Hooper, 32 Miss. 246.

Missouri. — Crow v. Coons, 27 Mo. 512.

New Hampshire. — Stirn v. McQuade, 66 N. H. 403, 49 Am. St. Rep. 623; Whitney v. Whiting, 35 N. H. 457; Newmarket Bank v. Butler, 45 N. H. 236; Dunlap v. Rogers, 47 N. H. 281, 93 Am. Dec. 433.

New Jersey. — Ballantine v. Haight, 16 N. J. L. 196; Vanuxem v. Hazlehurst, 4 N. J. L. 218, 7 Am. Dec. 582; Olden v. Hallet, 5 N. J. L. 535.

New York. — Pratt v. Chase, 44 N. Y. 597, 4 Am. Rep. 718; Soule v. Chase, 39 N. Y. 342; reversing 1 Robt. (N. Y.) 222; Donnelly v. Corbett, 7 N. Y. 500; Witt v. Follett, 2 Wend. (N. Y.) 457; Van Raugh v. Van Arsdale, 3 Cai. (N. Y.) 154, 2 Am. Dec. 259; Hicks v. Hotchkiss, 7 Johns. Ch. (N. Y.) 297. *Compare* Hamersley v. Lambert, 2 Johns. Ch. (N. Y.) 508; Penniman v. Meigs, 9 Johns. (N. Y.) 325; Hicks v. Brown, 12 Johns. (N. Y.) 142; Sherrill v. Hopkins, 1 Cow. (N. Y.) 103; Raymond v. Merchant, 3 Cow. (N. Y.) 147.

Oregon. — Main v. Messner, 17 Oregon 78.

Pennsylvania. — Walsh v. Nourse, 5 Binn. (Pa.) 385.

South Carolina. — Wilson v. Keels, 54 S. Car. 545.

Texas. — Beers v. Rhea, 5 Tex. 349.

Vermont. — Roberts v. Atherton, 60 Vt. 563, 6 Am. St. Rep. 133; Ruszits v. Hilliard, 57 Vt. 60; Herring v. Selding, 2 Aik. (Vt.) 12.

Washington. — Weber v. Yancy, 7 Wash. 84.

Foreign Corporations Doing Business in State. — The fact that a foreign corporation has obtained a license to do business in the state, and has appointed an agent or attorney on whom process in any action or proceeding against it may be served, does not bring it within the jurisdiction of the insolvency courts, and therefore a debt due it from a citizen is not affected by the discharge of the debtor. *Hammond Beef, etc., Co. v. Best*, 91 Me. 431; *Bergner, etc., Brewing Co. v. Dreyfus*, 172 Mass. 154.

Partnership Having Nonresident Member. — In *Chase v. Henry*, 160 Mass. 577, 55 Am. St. Rep. 423, it was held that a discharge under the laws of *Massachusetts* did not bar a debt due a partnership doing business in the state where one of the members thereof was neither a citizen nor a resident of the state. From this conclusion of the majority of the court, Field, C. J., and Allen and Holmes, JJ., dissented.

Assignment by Nonresident to Resident. — If a claim held by a nonresident is assigned to a resident of the debtor's state, such claim is brought within the operation of the insolvency laws of that state and is released by the discharge of the debtor. *Wheelock v. Leonard*, 20 Pa. St. 440.

If the Debtor Becomes a Resident of the Creditor's State and takes the benefit of the insolvency laws thereof, the debt is discharged. *Beal v. Burchstead*, 10 Cush. (Mass.) 523.

Evidence of Residence. — A debtor residing in

California obtained a discharge in 1859, under the insolvent laws of that state. The creditor had been a citizen of New York, and went to California in 1850, and resided there at intervals till 1854, when he returned to New York. He again went to California in 1855, and remained there three years. In each case he went on business, purposing to return when that business was completed. His family remained in New York during the whole time. He voted once or twice in California. It was held that the facts did not necessarily constitute him a citizen of California when the discharge was granted so as to make such discharge effectual against him. *Easterly v. Goodwin*, 35 Conn. 279, 95 Am. Dec. 237.

The Burden of Proof is on the creditor to show that he was not a citizen or resident of the state at the time the discharge was granted. *Porter v. Imus*, 79 Cal. 183.

1. Appearance by Nonresident to Contest Discharge. — *Collins v. Rodolph*, 3 Greene (Iowa) 299.

2. Reason of Rule. — *Von Glahn v. Varrenne*, 1 Dill. (U. S.) 515, and cases cited.

3. Debts to Nonresidents Contracted in State Where Discharge Was Granted — *United States*. — *Baldwin v. Hale*, 1 Wall. (U. S.) 223, 1 Cliff. (U. S.) 511; *Springer v. Foster*, 2 Story (U. S.) 333.

Connecticut. — *Easterly v. Goodwin*, 35 Conn. 279, 95 Am. Dec. 237.

Maryland. — *Poe v. Duck*, 5 Md. 1.

Massachusetts. — *Isley v. Merriam*, 7 Cush. (Mass.) 242, 54 Am. Dec. 721; *Clark v. Hatch*, 7 Cush. (Mass.) 455; *Tebbetts v. Pickering*, 5 Cush. (Mass.) 83, 51 Am. Dec. 48; *Fiske v. Foster*, 10 Met. (Mass.) 597; *Savoye v. Marsh*, 10 Met. (Mass.) 594, 43 Am. Dec. 451; *Kelley v. Drury*, 9 Allen (Mass.) 27. But see *Scribner v. Fisher*, 2 Gray (Mass.) 43; *Burrall v. Rice*, 5 Gray (Mass.) 539.

New Hampshire. — *Newmarket Bank v. Butler*, 45 N. H. 236; *Carbee v. Mason*, 64 N. H. 10.

New York. — *Smith v. Gardner*, 4 Bosw. (N. Y.) 54. But see *Parkinson v. Scoville*, 19 Wend. (N. Y.) 150; *Pratt v. Chase*, (Supm. Ct. Gen. T.) 19 Abb. Pr. (N. Y.) 150.

Texas. — *Beers v. Rhea*, 5 Tex. 349.

Vermont. — *Bedell v. Scruton*, 54 Vt. 493.

See *contra*, *St. Clair v. U. S. Bank*, 7 Ohio (pt. ii.) 169.

Notes Made to a Resident and by Him Transferred to a Nonresident are not barred by the discharge in insolvency of the maker, if the transferee has not voluntarily submitted himself to the jurisdiction of the laws of the state where the discharge was granted. *Security Sav., etc., Co. v. Rogers*, (Idaho 1899) 57 Pac. Rep. 316; *Felch v. Bugbee*, 48 Me. 9, 77 Am. Dec. 203; *Chase v. Flagg*, 48 Me. 182.

A Contract Made by a Nonresident through a Resident Agent is not on that account within the operation of the debtor's discharge in insolvency. *Regina Flour Mill Co. v. Holmes*, 156 Mass. 11.

state,¹ or that the creditor was a resident at the time the debt was contracted, but subsequently became a nonresident.²

In Case a Claim Stands in the Name of a Third Person, in a representative capacity, the beneficial interest being in others, the debt will be released only in case such representative is a resident of the state where the discharge was granted.³

Where the Court Had Jurisdiction of Both the Debtor and the Creditor, the discharge is available as a defense in an action in any other jurisdiction, to recover a debt that was provable in the insolvency proceeding.⁴

Contracts Made in Other States. — The principle that the insolvency laws of a state have no extra-territorial effect is also applicable in the case of a debt arising under a contract made in another state, and accordingly it is held that such a debt is not affected by the discharge, though at the time of the insolvency proceeding both the debtor and the creditor are residents of the state under whose laws the insolvency proceeding was instituted.⁵

And it is immaterial that the agent did not disclose his principal at the time of making the contract, and the debtor thought that the agent was contracting in his own right. *Guernsey v. Wood*, 130 Mass. 503.

The Forum in which the creditor seeks to enforce his claim is immaterial. The discharge is inoperative as against him everywhere. *Soule v. Chase*, 39 N. Y. 342; *Bedell v. Scruton*, 54 Vt. 493; *Weber v. Yancy*, 7 Wash. 84.

1. Judgment Recovered by Nonresident Creditor. — *Worthington v. Jerome*, 5 Blatchf. (U. S.) 279; *Whitney v. Whiting*, 35 N. H. 457; *Murphy v. Manning*, 134 Mass. 488.

2. Creditor Becoming Nonresident After Debt Was Contracted. — *Pullen v. Hillman*, 84 Me. 129, 30 Am. St. Rep. 340; *Norris v. Atkinson*, 64 N. H. 87; *Roberts v. Atherton*, 60 Vt. 563, 6 Am. St. Rep. 133. But see *contra*, *Brigham v. Henderson*, 1 Cush. (Mass.) 430, 48 Am. Dec. 610; *Converse v. Bradley*, 1 Cush. (Mass.) 434, note; *Stoddard v. Harrington*, 100 Mass. 87, 1 Am. Rep. 92. The case last cited was considered by the court in *Pullen v. Hillman*, 84 Me. 129, 30 Am. St. Rep. 340, cited *supra*, this note, and the opinion was expressed that such decision could not be sustained, and that it must be overruled when the question should be again presented.

3. Where a Creditor Is a Trustee, residing in the state, and the debt is due to him as such, the discharge of the debtor operates against all the beneficiaries of the trust, nonresidents as well as residents. *Wade v. Sewell*, 56 Fed. Rep. 129.

Thus where a nonresident creditor assigns his claim to a resident attorney for collection, and the attorney recovers judgment thereon in his own name, such judgment is barred by the discharge of the debtor in insolvency. *French v. Robinson*, 86 Me. 142, 41 Am. St. Rep. 533.

An Ancillary Administrator was appointed in *Massachusetts* to collect a judgment recovered by the decedent in *New Hampshire*, of which state both were citizens, against a citizen of *Massachusetts*. The judgment debtor, having obtained his discharge in the insolvency court of *Massachusetts*, claimed that it barred a recovery by such special administrator on the theory that, for the purposes of an action by him in his representative capacity, he must be considered a citizen of the state in which he was appointed (*Massachusetts*); but it was held

that no distinction could be made between the natural and the artificial person for any such purpose, and that therefore the judgment was not barred by the discharge. *Adams v. Batchelder*, 173 Mass. 258. Compare *Crow v. Coons*, 27 Mo. 512, where a resident attorney, to whom a note, held by a nonresident, had been sent for collection, took a renewal note payable to himself as "attorney of" the creditor. While this note remained in the hands of the attorney the debtor obtained a discharge under the insolvency laws. It was held that the discharge did not release the debtor from liability on the note which was afterwards indorsed by the attorney to the creditor and sent to him in the state of his residence.

4. Discharge Available as Defense in Any Jurisdiction — *Connecticut*. — *Hempstead v. Reed*, 6 Conn. 480.

Maine. — *Clark v. Cousins*, 65 Me. 42; *Manufacturers Nat. Bank v. Hall*, 86 Me. 107; *Stone v. Tibbetts*, 26 Me. 110.

Massachusetts. — *Baker v. Wheaton*, 5 Mass. 509, 4 Am. Dec. 71; *Watson v. Bourne*, 10 Mass. 337, 6 Am. Dec. 129; *Walsh v. Farrand*, 13 Mass. 19; *Braynard v. Marshall*, 8 Pick. (Mass.) 194; *Betts v. Bagley*, 12 Pick. (Mass.) 572; *Agnew v. Platt*, 15 Pick. (Mass.) 417.

Mississippi. — *Williams v. Guignard*, 2 How. (Miss.) 722.

New Hampshire. — *Stevens v. Norris*, 30 N. H. 466; *Brown v. Collins*, 41 N. H. 405.

New York. — *Murphy v. Philbrook*, 57 N. Y. Super. Ct. 204; *Matter of Coates*, 3 Abb. App. Dec. (N. Y.) 231.

Pennsylvania. — *Mount v. Bradford*, 2 Miles (Pa.) 17; *Carey v. Conrad*, 2 Miles (Pa.) 92; *Warner v. Bancroft*, 2 Miles (Pa.) 95.

South Carolina. — *Brown v. Wallen*, 4 McCord L. (S. Car.) 364; *Hunt v. Simons*, 2 Bay (S. Car.) 104.

5. Contracts Made in Other States — *United States*. — *Clark v. Van Riemsdyk*, 9 Cranch (U. S.) 153; *Suydam v. Broadnax*, 14 Pet. (U. S.) 67; *Van Riemsdyk v. Kane*, 1 Gall. (U. S.) 371; *Towne v. Smith*, 1 Woodb. & M. (U. S.) 115; *Byrd v. Badger*, 1 McAll. (U. S.) 263; *Kendall v. Badger*, 1 McAll. (U. S.) 523. And see *Cook v. Moffat*, 5 How. (U. S.) 295; *Adams v. Storey*, 1 Paine (U. S.) 79; *Babcock v. Weston*, 1 Gall. (U. S.) 168; *Wray v. Reilly*, 1 Cranch (C. C.) 513; *Channing v. Reiley*, 4 Cranch (C. C.) 528; *Claggett v. Ward*, 5 Cranch (C. C.) 669.

Abandonment of Extra-territorial Immunity. — While the rights of nonresident creditors cannot be affected against their will by the discharge of their debtor under the insolvency laws of the state of his residence, they have the right to abandon or waive their extra-territorial immunity, and this they may do by voluntarily becoming parties to the insolvency proceeding, or accepting dividends thereunder.¹ It requires, however, some such conduct on their part, and such a claim is not released by the discharge of the debtor, merely because it was named in the petition and schedule in the insolvency proceeding.²

(2) *Exemption from Arrest and Imprisonment.* — The discharge of a debtor in bankruptcy or insolvency releases him from liability to future arrests.³ The state insolvency laws also provide that the discharge shall relieve the

Indiana. — Pugh v. Bussel, 2 Blackf. (Ind.)

394.
Iowa. — Hawley v. Hunt, 27 Iowa 303.

Louisiana. — Spear v. Peabody, 10 La. Ann.

145.
Massachusetts. — Dayton v. Crane, 9 Gray (Mass.) 250. And see Marsh v. Putnam, 3 Gray (Mass.) 551; Woodbridge v. Allen, 12 Met. (Mass.) 470.

Texas. — Beers v. Rhea, 5 Tex. 349.

Washington. — Webster v. Massey, 2 Wash. (U. S.) 157.

A Judgment Rendered in Another State is a foreign contract within this rule, and a discharge in insolvency will not affect such judgment, though, when the insolvency proceedings were instituted and the discharge granted, both the debtor and the creditor resided in the state where the discharge was granted. Lowenberg v. Levine, 93 Cal. 215; Bean v. Loryea, 81 Cal. 151. See also Guldemann v. Lerdall, 99 Wis. 495.

1. Abandonment or Waiver of Extra-territorial Immunity. — *United States.* — Clay v. Smith, 3 Pet. (U. S.) 411; Cook v. Moffat, 5 How. (U. S.) 308; Baldwin v. Hale, 1 Wall. (U. S.) 223.

California. — Lowenberg v. Levine, 93 Cal.

215.

Florida. — Rosenheim v. Morrow, 37 Fla.

183.

Massachusetts. — Dinsmore v. Bradley, 5 Gray (Mass.) 487; Houghton v. Maynard, 5 Gray (Mass.) 552; Murray v. Roberts, 150 Mass. 353, 15 Am. St. Rep. 209; Eustis v. Bolles, 146 Mass. 413, 4 Am. St. Rep. 327, 150 U. S. 361.

New York. — Witt v. Follett, 2 Wend. (N. Y.) 457.

Participation in, or Assent to, the Insolvency Proceeding by a nonresident creditor is essential to constitute an abandonment or waiver of his extra-territorial immunity, and the mere fact of his appearance in the court of insolvency for some other purpose is not sufficient. Thus, in one case it was held that creditors did not participate in the insolvency proceeding so as to conclude them by the discharge of the debtor, where they brought suit against a syndic of the estate to enforce a vendor's lien on some goods sold by them to the debtor, and went into the insolvency court to take a rule to have certain goods delivered to them which they alleged were his property and not included in the *cessio bonorum* made by the debtor. Sylvester v. Danziger, 32 Fed. Rep. 1.

In another case it was held that bringing in a state court a suit which was, under the laws of the state, transferred to the insolvency court in which the defendant's insolvency proceedings were then pending, and cumulating that suit with such proceedings, was not a participation therein in such manner as to constitute an assent to the defendant's discharge. Hyde v. Stone, 20 How. (U. S.) 170.

Accepting a Dividend in Composition Proceedings is equivalent to proving the claim. Murray v. Roberts, 150 Mass. 353, 15 Am. St. Rep. 209.

Proving Claim Against One of Two Firms in Insolvency Proceedings Against Both. — Where there are two firms, one of which is composed of some of the members of the other, and a foreign creditor of both proves his claim against one in insolvency proceedings which include both firms, his claim against the other is not affected by a discharge granted to all the debtors. Pattee v. Paige, 163 Mass. 352, 47 Am. St. Rep. 459.

Assignment by Foreign Creditor—Liability Over to Assignee. — In Columbia Falls Erick Co. v. Glidden, 157 Mass. 175, the debtor had made a note to a foreign corporation, which had it discounted at a bank. On the insolvency of the maker, the bank presented the note as a claim, receiving a dividend on account of it, and compelled the assignor to pay the difference between such dividend and the amount of the note. It was held that the effect of the presentation of the claim on the note and the receipt of the dividend by the bank was to bring the note within the operation of the discharge in the insolvency proceeding, and that the claim of the payee against the maker, on account of the amount that it was obliged to pay the bank, was a part of the maker's original indebtedness, and was therefore barred by the discharge.

2. Debt of Nonresident Included in Schedule. — Scamman v. Bonslett, 118 Cal. 93.

3. Exemption from Arrest. — *United States.* — Act July 1, 1893 (30 U. S. Stat. at L. 544), § 9, par. a.

California. — Cohen v. Barrett, 5 Cal. 195.

Delaware. — Smith's Case, 4 Harr. (Del.) 554.

District of Columbia. — Emmerson v. Beale, 2 Cranch (C. C.) 340; Keene v. Jackson, 2 Cranch (C. C.) 166; Hauptman v. Nelson, 4 Cranch (C. C.) 341; Reily v. Lamar, 2 Cranch (U. S.) 344.

Massachusetts. — Moan v. Wilmarth, 3 Woodb. & M. (U. S.) 399, (decided under the *Massachu-*

debtor from existing imprisonment,¹ but under the bankruptcy law of the United States, the court of bankruptcy has no authority to release a debtor who was imprisoned before the commencement of the bankruptcy proceeding.² Discharge from imprisonment or liability thereto is the only effect of the discharge under some of the state insolvency laws, the debts still remaining enforceable against the debtor's after-acquired property.³

Nature of Debts or Liabilities. — In some states it is only when the party is imprisoned in a civil action that the statute authorizes his discharge,⁴ while

sett's statute); *Bennett v. Justices*, 166 Mass. 126; *Hall v. Justices*, 164 Mass. 155; *Pub. Stat. Mass.*, c. 157, § 83.

New Jersey. — *State v. Ward*, 8 N. J. L. 120.

North Carolina. — *Burton v. Dickens*, 3 Murph. (7 N. Car.) 103; *Jordan v. James*, 3 Hawks (10 N. Car.) 110.

Pennsylvania. — *George v. Hoover*, 3 S. & R. (Pa.) 559.

Rhode Island. — *Taylor v. Ames*, 5 R. I. 361.

South Carolina. — *Aiken v. Moore*, 1 Hill L. (S. Car.) 432; *Man v. Lowden*, 4 McCord L. (S. Car.) 485; *State v. Kenny*, 1 Bailey L. (S. Car.) 375. See also the various state insolvency laws.

If a Discharge Is Void as to Debts, it is also inoperative to protect the debtor from imprisonment. *Witt v. Follett*, 4 Wend. (N. Y.) 501.

If Any Debt Is Not Dischargeable the debtor is not relieved from liability to arrest by a discharge under the bankruptcy law of the *United States*. Act July 1, 1893 (30 U. S. Stat. at L. 544), § 9, par. a, cl. (2).

Under some of the state insolvency laws the debtor is exempt from imprisonment on account of debts which are not discharged, as well as those which are discharged; for instance, foreign debts, or debts for necessities. *Choteau v. Richardson*, 12 Allen (Mass.) 365; *Van Ingen v. Justices*, 166 Mass. 128; *Everett v. Henderson*, 150 Mass. 411 (*disapproving* the decision to the contrary in *Stockwell v. Sillo-way*, 105 Mass. 517); *Maag's Case*, 1 Ashm. (Pa.) 97.

Discharge Granted in Another State. — It has been held that where a debtor is discharged from imprisonment in one state, the immunity from arrest thereby given will be recognized in another state where the debtor may be sued. *Millar v. Hall*, 1 Dall. (Pa.) 229; *Thompson v. Young*, 1 Dall. (Pa.) 294; *Bailey v. Seal*, 1 Harr. (Del.) 367; *M'Kim v. Marshall*, 1 Har. & J. (Md.) 101; *M'Causland v. Waller*, 1 Har. & J. (Md.) 156; *Lewis v. Norwood*, 4 Harr. (Del.) 460. But see *contra*, *Boston Type, etc., Foundry v. Wallack*, 8 Pick. (Mass.) 186; *Woodhuil v. Wagner*, *Baldw.* (U. S.) 296; *Sicard v. Whale*, 11 Johns. (N. Y.) 194; *Ayres v. Audubon*, 2 Hill L. (S. Car.) 601.

The Exemption Is Waived where the discharged debtor promises to pay a debt which was released by the discharge. *Kenyon v. Worslev*, 2 R. I. 341.

Imprisonment for Disobeying Order of Court. — A person who is imprisoned for disobedience of an order to pay over money collected in violation of an injunction is not entitled to be discharged from imprisonment by reason of a subsequent discharge in bankruptcy. *In re Meggett*, (Wis. 1900) 81 N. W. Rep. 419.

1. Discharge from Existing Imprisonment. — *Ex p. Whitehead*, 23 Ala. 93; *Smith's Case*, 4 Harr. (Del.) 554; *Pugh v. Bussel*, 2 Blackf. (Ind.) 394; *Wentzel's Appeal*, 160 Pa. St. 252; *Hurst v. Samuels*, 29 S. Car. 476; *Howard v. Pasteur*, 3 Murph. (7 N. Car.) 270; *Com. v. Riddle*, 1 S. & R. (Pa.) 311; *Com. v. Cornman*, 4 S. & R. (Pa.) 2. And see the various local statutes.

A Debtor Imprisoned under Process of a Federal Court cannot be discharged by a state officer acting under a state insolvency law. *Duncan v. Darst*, 1 How. (U. S.) 301; *Sadler v. Fallen*, 2 Curt. (U. S.) 190. See *contra*, *Wood v. Funk*, 7 Ohio (pt. i.) 196.

2. Bankruptcy Court Not Authorized to Release from Existing Imprisonment. — The provision of the statute is that "a bankrupt shall be exempt from arrest upon civil process, except" in certain cases. Act July 1, 1893 (30 U. S. Stat. at L. 544), § 9, par. a.

Under a similar provision in the Act of 1867, it was held that the bankruptcy court had no power to release a debtor who was imprisoned before the bankruptcy proceeding was commenced. *Re Walker*, 1 Lowell (U. S.) 222, 1 Nat. Bankr. Reg. 318, 29 Fed. Cas. No. 17,060; *Hazleton v. Valentine*, 1 Lowell (U. S.) 270, 2 Nat. Bankr. Reg. 31, 11 Fed. Cas. No. 6,287; *Stockwell v. Sillo-way*, 100 Mass. 287.

The application for release from imprisonment in such case must be made to the state court. *In re O'Mara*, 4 Biss. (U. S.) 506, 18 Fed. Cas. No. 10,509.

3. Discharge Limited to Exemption from Arrest — United States. — *King v. Riddle*, 7 Cranch (U. S.) 168.

Delaware. — *Smith's Case*, 4 Harr. (Del.) 554.

Indiana. — *Pugh v. Bussel*, 2 Blackf. (Ind.) 394; *Horner's St. Ind.*, § 810.

New York. — *Wright v. Paton*, 10 Johns. (N. Y.) 300.

Pennsylvania. — *Wentzel's Appeal*, 160 Pa. St. 252.

South Carolina. — *Hurst v. Samuels*, 29 S. Car. 476.

And see *Titus v. Hobart*, 5 Mason (U. S.) 378; *Hinkley v. Marean*, 3 Mason (U. S.) 88; *White v. Canfield*, 7 Johns. (N. Y.) 117, 5 Am. Dec. 249; *Coffin v. Coffin*, 16 Pick. (Mass.) 323.

4. Discharge Limited to Civil Actions. — *Clements v. Camden County*, 51 N. J. L. 424; *Perth Amboy v. Brophy*, 43 N. J. L. 589, holding that under the *New Jersey* statute a discharge cannot be granted to one who is in custody under an execution issued on a judgment of conviction imposing a fine for violation of a city ordinance; *Com. v. Miller*, 12 Phila. (Pa.) 509, 34 Leg. Int. (Pa.) 20.

in other states there is no such restriction.¹

(3) *New Promise to Pay Debt Released.* — The discharge of the debtor does not operate as an absolute extinguishment or satisfaction of the debt, but merely releases the debtor from his legal obligation to pay. The moral obligation remains and furnishes a sufficient consideration for a new promise to pay the debts discharged, and such promise is therefore valid and enforceable,²

1. Discharge Not Limited to Civil Actions. — In *Pennsylvania* a person who is sentenced to pay costs in a criminal proceeding and committed to jail in default of payment may be discharged under the insolvency law. *Conley's Petition*, 3 Pa. Dist. 623.

In *North Carolina*, one who has been adjudged to be the father of a bastard and committed for nonpayment of the allowance to the mother, and the fine and costs of the proceeding, may be discharged from imprisonment under the insolvent debtor's act. *State v. Parsons*, 115 N. Car. 730.

Contra in Pennsylvania. *Com. v. Miller*, 12 Phila. (Pa.) 569, 34 Leg. Int. (Pa.) 20.

2. Debtor Bound by New Promise to Pay Discharged Debts — *England.* — *Besford v. Saunders*, 2 H. Bl. 116; *Penn v. Bennett*, 4 Camph. 205; *Kirkpatrick v. Tattersall*, 13 M. & W. 766; *Rimini v. Van Praagh*, L. R. 8 Q. B. 1; *Thompson v. Cohen*, L. R. 7 Q. B. 527; *Jones v. Phelps*, 20 W. R. 92; *Heather v. Webb*, 2 C. P. D. 1; *Jakeman v. Cook*, 4 Ex. D. 26; *Ex p. Barrow*, 18 Ch. D. 464.

Canada. — *Austin v. Gordon*, 32 U. C. Q. B. 621.

United States. — *Allen v. Ferguson*, 18 Wall. (U. S.) 1, 9 Nat. Bankr. Reg. 481; *Mutual Reserve Fund L. Assoc. v. Beatty*, 93 Fed. Rep. 747.

Alabama. — *Branch Bank v. Boykin*, 9 Ala. 320; *Herndon v. Givens*, 16 Ala. 261; *Evans v. Carcy*, 29 Ala. 109; *Griel v. Solomon*, 82 Ala. 85, 60 Am. Rep. 733.

Arkansas. — *Worthington v. De Bardlekin*, 33 Ark. 651; *Apperson v. Stewart*, 27 Ark. 619.

California. — *Feeny v. Daly*, 8 Cal. 84; *Chaffee v. Browne*, 109 Cal. 211; *Smith v. Richmond*, 19 Cal. 476; *Chabot v. Tucker*, 39 Cal. 434; *Lambert v. Schmalz*, 118 Cal. 33.

Georgia. — *Ross v. Jordan*, 62 Ga. 298; *Anderson v. Clark*, 70 Ga. 362.

Illinois. — *Marshall v. Tracy*, 74 Ill. 379; *Classen v. Schoenemann*, 80 Ill. 304.

Indiana. — *Carey v. Hess*, 112 Ind. 398; *Willis v. Cushman*, 115 Ind. 100.

Kentucky. — *Eckler v. Galbraith*, 12 Bush (Ky.) 71; *Thornberry v. Dils*, 80 Ky. 241.

Louisiana. — *Linton v. Stanton*, 4 La. Ann. 401; *Blanc v. Banks*, 10 Rob. (La.) 115, 43 Am. Dec. 175; *Andrieu's Succession*, 44 La. Ann. 103.

Maine. — *Hussey v. Danforth*, 77 Me. 17; *Otis v. Gazlin*, 31 Me. 568; *Corliss v. Shepherd*, 28 Me. 552.

Maryland. — *Wilson v. Russell*, 13 Md. 404, 71 Am. Dec. 645; *Katz v. Moore*, 13 Md. 566; *Yates v. Hollingsworth*, 5 Har. & J. (Md.) 216.

Massachusetts. — *Maxim v. Morse*, 8 Mass. 127; *Way v. Sperry*, 6 Cush. (Mass.) 238, 52 Am. Dec. 779; *Williams v. Bugbee*, 6 Cush. (Mass.) 418; *United Soc. Church v. Winkley*, 7 Gray (Mass.) 460.

Michigan. — *Craig v. Seitz*, 63 Mich. 727;

Edwards v. Nelson, 51 Mich. 121; *Atwood v. Gillett*, 2 Dougl. (Mich.) 206.

Mississippi. — *Prewett v. Caruthers*, 12 Smed. & M. (Miss.) 491; *McWillie v. Kirkpatrick*, 28 Miss. 802, 64 Am. Dec. 125. But see *Rice v. Maxwell*, 13 Smed. & M. (Miss.) 289, 53 Am. Dec. 85.

Missouri. — *Wislizenus v. O'Fallon*, 91 Mo. 184; *Swan v. Lullman*, 12 Mo. App. 584.

Nebraska. — *Seymour v. Street*, 5 Neb. 85.

New Hampshire. — *Trumball v. Tilton*, 21 N. H. 128; *Fletcher v. Neally*, 20 N. H. 464; *Nashua Second Nat. Bank v. Wood*, 59 N. H. 407; *Badger v. Gilmore*, 33 N. H. 361, 66 Am. Dec. 729.

New Jersey. — *Stewart v. Reckless*, 24 N. J. L. 427.

New York. — *Scouton v. Eislord*, 7 Johns. (N. Y.) 36; *Shippey v. Henderson*, 14 Johns. (N. Y.) 178, 7 Am. Dec. 458; *Erwin v. Saunders*, 1 Cow. (N. Y.) 249, 13 Am. Dec. 520; *Nash v. Russell*, 5 Barb. (N. Y.) 556; *Dusenbury v. Hoyt*, 53 N. Y. 521, 13 Am. Rep. 543; *Fitzgerald v. Alexander*, 19 Wend. (N. Y.) 402; *Decker v. Kitchen*, 33 Hun (N. Y.) 268; *Ingersoll v. Rhoades, Hill & D.* (N. Y.) 371.

North Carolina. — *Riggs v. Roberts*, 85 N. Car. 151, 39 Am. Rep. 692; *Fraley v. Kelly*, 67 N. Car. 78; *Shaw v. Burney*, 86 N. Car. 331, 41 Am. Rep. 461.

Ohio. — *Turner v. Chrisman*, 20 Ohio 332; *Dye v. Bertram*, 6 Am. L. Rec. 355, 5 Ohio Dec. (Reprint) 508; *Dyer v. Isham*, 4 Ohio Cir. Ct. 429, 2 Ohio Cir. Dec. 633.

Pennsylvania. — *Hobough v. Murphy*, 114 Pa. St. 358; *Murphy v. Crawford*, 114 Pa. St. 496; *Bolton v. King*, 105 Pa. St. 78; *Kingston v. Wharton*, 2 S. & R. (Pa.) 208, 7 Am. Dec. 638; *Huffman v. Johns*, (Pa. 1856) 6 Atl. Rep. 205; *Osner v. Conrad*, 1 W. N. C. (Pa.) 601.

Rhode Island. — *Bennett v. Everett*, 3 R. I. 152, 67 Am. Dec. 498.

Vermont. — *Farmers, etc., Bank v. Flint*, 17 Vt. 508, 44 Am. Dec. 351; *Wells v. Mace*, 17 Vt. 503; *Barron v. Benedict*, 44 Vt. 518.

Promise by Third Person. — Since the debts are not extinguished by the discharge, a promise by a third person to pay a creditor whose debt has been so released, whereupon the debt is to be regarded as wholly extinguished, is supported by a sufficient consideration. *Webster v. Le Compte*, 74 Md. 249.

The sons of a bankrupt are not under a moral obligation to pay the debts from which their father has been discharged, and therefore their promise to do so, made after his death, is without consideration. *McElven v. Sloan*, 56 Ga. 208.

To Whom Made. — The promise may be made to the agent or attorney of the creditor with like effect as if made to the creditor himself.

Indiana. — *Hunt v. Jones*, 1 Ind. App. 545.

Kentucky. — *Jones v. Talbott*, 13 Ky. L. Rep. 303.

though it does not revive the rights to imprison the debtor.¹

An Express, Positive, and Unconditional Promise is generally held to be necessary.² Therefore merely making a partial payment after the discharge has been granted

Missouri. — *Reith v. Lullmann*, 11 Mo. App. 254.

New Hampshire. — *Underwood v. Eastman*, 18 N. H. 582.

North Carolina. — *Shaw v. Burney*, 86 N. Car. 331, 41 Am. Rep. 461.

Pennsylvania. — *McKinley v. O'Keson*, 5 Pa. St. 369 (promise to debtor's son); *Comfort v. Eisenbeis*, 11 Pa. St. 13; *Bolton v. King*, 105 Pa. St. 78.

Vermont. — *Jones v. Sennott*, 57 Vt. 355; *Hill v. Kendall*, 25 Vt. 528.

It has also been held that the promise is binding if spoken to any third person.

Alabama. — *Evans v. Carey*, 29 Ala. 99.

Kentucky. — *Jones v. Talbott*, 13 Ky. L. Rep. 303 (promise to debtor's wife).

New Jersey. — *Stewart v. Reckless*, 24 N. J. L. 427.

Pennsylvania. — *McKinley v. O'Keson*, 5 Pa. St. 369.

Tennessee. — *Moseley v. Coldwell*, 3 Baxt. (Tenn.) 208.

But see *Prewett v. Caruthers*, 12 Smed. & M. (Miss.) 491; *Underwood v. Eastman*, 18 N. H. 582.

Time of Making Promise. — The cases generally involve promises made after the discharge, but it has often been held that a promise made after the petition was filed and before the discharge was granted are taken out of the operation of the discharge.

England. — *Brix v. Braham*, 1 Bing. 281. 8 E. C. L. 509; *Kirkpatrick v. Tattersall*, 13 M. & W. 766.

United States. — *Allen v. Ferguson*, 18 Wall. (U. S.) 1, 9 Nat. Bankr. Reg. 481.

Alabama. — *Griel v. Solomon*, 82 Ala. 85, 60 Am. Rep. 733.

Arkansas. — *Lanagin v. Nowland*, 44 Ark. 84.

Illinois. — *Cheney v. Barge*, 26 Ill. App. 182; *Katz v. Moessinger*, 7 Ill. App. 536.

Iowa. — *Knapp v. Hoyt*, 57 Iowa 591, 42 Am. Rep. 59.

Kentucky. — *Thornberry v. Dils*, 80 Ky. 241. But see *Ogden v. Redd*, 13 Bush (Ky.) 581; *Graves v. McGuire*, 79 Ky. 332.

Maine. — *Corliss v. Shepherd*, 28 Me. 550; *Otis v. Gazlin*, 31 Me. 567.

Massachusetts. — *Lerow v. Wilmarth*, 7 Allen (Mass.) 463, 63 Am. Dec. 701.

New Hampshire. — *Wiggin v. Hodgdon*, 63 N. H. 39.

New York. — *Stilwell v. Coope*, 4 Den. (N. Y.) 225; *Jersey City Ins. Co. v. Archer*, (Supm. Ct. Gen. T.) 7 N. Y. St. Rep. 326, affirmed 122 N. Y. 376. But see *Stebbins v. Sherman*, 1 Sandf. (N. Y.) 510.

North Carolina. — *Fraleigh v. Kelly*, 67 N. Car. 78; *Hornthal v. McRae*, 67 N. Car. 21.

Pennsylvania. — *Kingston v. Wharton*, 2 S. & R. (Pa.) 208, 7 Am. Dec. 638.

Wisconsin. — *Hill v. Trauer*, 49 Wis. 537.

Compare *Chapman v. Pennie*, (Cal. 1895) 39 Pac. Rep. 14.

New Promise Enures to Benefit of Assignee of Claim. — *Wolfe v. Eberlein*, 74 Ala. 99, 49 Am. Rep. 809; *Way v. Sperry*, 6 Cush. (Mass.)

238, 52 Am. Dec. 779, *Underwood v. Eastman*, 18 N. H. 582; *Badger v. Gilmore*, 33 N. H. 361, 66 Am. Dec. 729; *Clark v. Atkinson*, 2 E. D. Smith (N. Y.) 112. But see *White v. Cushing*, 30 Me. 267; *Wardwell v. Foster*, 31 Me. 558; *Moore v. Viele*, 4 Wend (N. Y.) 420; *Walbridge v. Harroon*, 18 Vt. 448.

1. Liability to Imprisonment Not Revived by New Promise. — *Couch v. Ash*, 5 Cow. (N. Y.) 265; *Hubert v. Williams*, 5 Cow. (N. Y.) 537; *Glazier v. Stafford*, 4 Harr. (Del.) 240. But see *Kenyon v. Worsley*, 2 R. I. 341.

2. Express Promise Required — *Alabama.* — *Evans v. Carey*, 29 Ala. 99.

Illinois. — *Willets v. Cotherson*, 3 Ill. App. 644; *Katz v. Moessinger*, 110 Ill. 372.

Indiana. — *Shockey v. Mills*, 71 Ind. 288, 36 Am. Rep. 196; *Hubbard v. Farrell*, 87 Ind. 215.

Iowa. — *Knapp v. Hoyt*, 57 Iowa 591, 42 Am. Rep. 59.

Kentucky. — *Green v. McGowan*, 7 Ky. L. Rep. 661; *Jones v. Talbott*, 13 Ky. L. Rep. 303.

Maine. — *Porter v. Porter*, 31 Me. 169.

Massachusetts. — *United Soc. Church v. Winkley*, 7 Gray (Mass.) 460.

New Hampshire. — *Stark v. Stinson*, 23 N. H. 259.

North Carolina. — *Riggs v. Roberts*, 85 N. Car. 151, 39 Am. Rep. 692.

Ohio. — *Turner v. Chrisman*, 20 Ohio 332; *Dyer v. Isham*, 4 Ohio Cir. Ct. 429, 2 Ohio Cir. Dec. 633.

Pennsylvania. — *Hobough v. Murphy*, 114 Pa. St. 358; *Bolton v. King*, 105 Pa. St. 78; *Hazleton's Estate*, 32 Leg. Int. (Pa.) 13.

Rhode Island. — *Bennett v. Everett*, 3 R. I. 152, 67 Am. Dec. 498.

Virginia. — *Horner v. Speed*, 2 Patt. & H. (Va.) 616.

Unconditional Promise Required — *Alabama.* — *Branch Bank v. Boykin*, 9 Ala. 320; *Dearing v. Moffitt*, 6 Ala. 776.

Iowa. — *Fell v. Cook*, 44 Iowa 485.

Kentucky. — *Egbert v. McMichael*, 9 B. Mon. (Ky.) 44.

Massachusetts. — *Bigelow v. Norris*, 139 Mass. 12.

Mississippi. — *Prewett v. Caruthers*, 12 Smed. & M. (Miss.) 491.

New Hampshire. — *Wiggin v. Hodgdon*, 63 N. H. 39.

Pennsylvania. — *Breit v. Osner*, 2 W. N. C. (Pa.) 601.

Tennessee. — *Brown v. Collier*, 8 Humph. (Tenn.) 510.

A promise is held to be unconditional, where any condition that may originally have been imposed had been performed before action brought.

Alabama. — *Branch Bank v. Boykin*, 9 Ala. 320; *Griel v. Solomon*, 82 Ala. 85, 60 Am. Rep. 733.

Arkansas. — *Apperson v. Stewart*, 27 Ark. 619.

Kentucky. — *Buford v. Crigler*, 7 Ky. L. Rep. 662; *Duff v. Hagins*, 8 Ky. L. Rep. 358; *Doom v. Snyder*, 10 Ky. L. Rep. 281.

is not sufficient,¹ except as a waiver of conditions that may have been annexed to the promise to pay,² or to identify the debt in respect to which an express promise has been made;³ and *a fortiori*, such a payment, made while the bankruptcy proceeding is pending, does not operate as a new promise.⁴

A Written Promise is not necessary,⁵ unless a statute expressly requires it to

Maryland. — *Yates v. Hollingsworth*, 5 Har. & J. (Md.) 216.

Mississippi. — *La Tourrette v. Price*, 28 Miss. 702.

New York. — *Goldman v. Abrahams*, 9 Daly (N. Y.) 223.

South Carolina. — *Lanier v. Tolleson*, 20 S. Car. 57.

Vermont. — *Sherman v. Hobart*, 26 Vt. 60; *Hill v. Kendall*, 25 Vt. 528.

Thus a promise to pay the debt "when able" will authorize a recovery if the plaintiff shows that the defendant is able to pay. *Green v. McGowan*, 7 Ky. L. Rep. 661; *Taylor v. Nixon*, 4 Sneed (Tenn.) 352. See also *Griel v. Solomon*, 82 Ala. 85, 60 Am. Rep. 733; *Samuel v. Cravens*, 10 Ark. 380; *Mason v. Hughart*, 9 B. Mon. (Ky.) 480; *Eckler v. Gabraith*, 12 Bush (Ky.) 71; *Patten v. Ellingwood*, 32 Me. 163; *Yoxheimer v. Keyser*, 11 Pa. St. 364, 51 Am. Dec. 555.

Where the promise was that the defendant "would pay it as soon as he finished" a certain building, it was held that the words quoted referred to a time, and did not create a condition. *Eaton v. Yarrowborough*, 19 Ga. 82. See also *Swan v. Lullman*, 12 Mo. App. 584.

Positive and Unequivocal Promise Required — *England*. — *Kirkpatrick v. Tattersall*, 13 M. & W. 766; *Fleming v. Hayne*, 1 Stark. 370, 2 E. C. L. 144; *Alsop v. Brown*, 1 Dougl. 192; *Lynbui v. Weightman*, 5 Esp. 198; *Mucklow v. St. George*, 4 Taunt. 613; *Brook v. Wood*, 13 Price 667.

United States. — *Allen v. Ferguson*, 18 Wall. (U. S.) 1, 9 Nat. Bankr. Reg. 481.

Arkansas. — *Pindall v. Loague*, 56 Ark. 525; *Apperson v. Stewart*, 27 Ark. 619.

California. — *Lambert v. Schmalz*, 118 Cal. 33.

Illinois. — *Cheney v. Barge*, 26 Ill. App. 182; *St. John v. Stephenson*, 90 Ill. 82; *Willets v. Cotherson*, 3 Ill. App. 644.

Indiana. — *Meech v. Lamont*, 103 Ind. 515, 53 Am. Rep. 540; *Hockett v. Jones*, 70 Ind. 227; *Shockey v. Mills*, 71 Ind. 288, 36 Am. Rep. 196; *Hubbard v. Farrell*, 87 Ind. 215.

Kentucky. — *Jones v. Talbott*, 13 Ky. L. Rep. 303.

Louisiana. — *Bartlett v. Peck*, 5 La. Ann. 669.

Maine. — *Porter v. Porter*, 31 Me. 169.

Maryland. — *Baltimore, etc., R. Co. v. Clark*, 19 Md. 509.

Massachusetts. — *Pratt v. Russell*, 7 Cush. (Mass.) 462; *Kelley v. Pike*, 5 Cush. (Mass.) 484.

Michigan. — *Brewer v. Boynton*, 71 Mich. 254; *Craig v. Seitz*, 63 Mich. 727.

Mississippi. — *La Tourrette v. Price*, 28 Miss. 702.

New York. — *Lawrence v. Harrington*, 122 N. Y. 408; *Tompkins v. Hazen*, 30 N. Y. App. Div. 359; *Scheper v. Briggs*, 28 N. Y. App. Div. 115; *Stern v. Nussbaum*, 5 Daly (N. Y.) 382, 47 How. Pr. (N. Y.) 489; *Depuy v. Swart*, 3 Wend. (N. Y.) 139; *Moore v. Viele*, 4 Wend. (N. Y.) 422; *Jersey City Ins. Co. v. Archer*,

(Supm. Ct. Gen. T.) 7 N. Y. St. Rep. 326, affirmed 122 N. Y. 376.

North Carolina. — *Riggs v. Roberts*, 85 N. Car. 151, 39 Am. Rep. 692; *Fraley v. Kelly*, 67 N. Car. 78.

Ohio. — *Turner v. Chrisman*, 20 Ohio 332; *Dyer v. Isham*, 4 Ohio Cir. Ct. 429, 2 Ohio Cir. Dec. 633.

Pennsylvania. — *Hobough v. Murphy*, 114 Pa. St. 358; *Murphy v. Crawford*, 114 Pa. St. 496; *Huffman v. Johns*, (Pa. 1886) 6 Atl. Rep. 205; *Earnest v. Parke*, 4 Rawle (Pa.) 452, 27 Am. Dec. 280.

Rhode Island. — *Bennett v. Everett*, 3 R. I. 152, 67 Am. Dec. 498.

Vermont. — *Warren v. Bishop*, 22 Vt. 607; *McDougall v. Page*, 55 Vt. 187, 45 Am. Rep. 602.

Virginia. — *Horner v. Speed*, 2 Patt. & H. (Va.) 616.

A Confession of Judgment after discharge on a debt which has been released by the discharge is equivalent to a new promise. *Dewey v. Moyer*, 72 N. Y. 70; *Anderson v. Clark*, 70 Ga. 362.

Giving a Note for a pre-existing debt, after the discharge of the debtor in bankruptcy, is a new promise to pay such debt. *Christie v. Bridgman*, 51 N. J. Eq. 331; *Bown v. Thompson*, 34 Leg. Int. (Pa.) 305.

1. Part Payment Not Sufficient — *Alabama*. — *Griel v. Solomon*, 82 Ala. 85, 60 Am. Rep. 733.

Illinois. — *Willets v. Cotherson*, 3 Ill. App. 644.

Iowa. — *Viele v. Ogilvie*, 2 Greene (Iowa) 326.

Kentucky. — *Tolle v. Smith*, 98 Ky. 464.

Maine. — *Ames v. Storer*, 80 Me. 243.

Massachusetts. — *Cambridge Sav. Inst. v. Littlefield*, 6 Cush. (Mass.) 210; *Merriam v. Bayley*, 1 Cush. (Mass.) 77, 48 Am. Dec. 591.

New Hampshire. — *Stark v. Stinson*, 23 N. H. 259.

New York. — *Wheeler v. Simmons*, 60 Hun (N. Y.) 404; *Lawrence v. Harrington*, 122 N. Y. 408.

Ohio. — *Dyer v. Isham*, 4 Ohio Cir. Ct. 429, 2 Ohio Cir. Dec. 633.

2. Conditions Waived by Part Payment. — *Tompkins v. Hazen*, 30 N. Y. App. Div. 359.

3. Part Payment as Identification of Debt. — *Willets v. Cotherson*, 3 Ill. App. 644. Compare *Jacobs v. Carpenter*, 161 Mass. 16; *Heazleton's Estate*, 1 W. N. C. (Pa.) 67; *Warren v. Bishop*, 22 Vt. 607.

4. Payment Made Pending Bankruptcy Proceeding. — *Heim v. Chapman*, 171 Mass. 347.

5. Writing Not Required. — *Apperson v. Stewart*, 27 Ark. 619; *Ross v. Jordan*, 62 Ga. 298; *Fleming v. Lullman*, 11 Mo. App. 104; *Marshall v. Tracy*, 74 Ill. 379; *Lanier v. Tolleson*, 20 S. Car. 57.

In *Graham v. Hunt*, 8 B. Mon. (Ky.) 7, which has been cited as holding the doctrine that a promise to pay a note barred by a discharge in bankruptcy, to be valid, must be in

be in that form.¹

The Question Whether the New Promise Is the Real Cause of Action, and the discharged debt the consideration that supports it, or whether the new promise operates as a waiver of the defense given by the discharge against the original demand, has occasioned great diversity of opinion. In some jurisdictions the former view is adopted.² But the weight of authority is that the new promise revives the old debt, and that the cause of action is on it and not on the new promise.³

(4) *Jurisdiction over Debtor.* — With the discharge of the debtor the summary jurisdiction of the court of bankruptcy or insolvency over his person terminates.⁴

c. EFFECT AS TO PERSONS LIABLE WITH DEBTOR — Co-obligors' Liability to Creditors. — A surety, partner, or other person jointly liable with the bankrupt or insolvent is not released from his liability to the creditor by the discharge of his co-obligor.⁵

writing, the indebtedness seems to have been secured by a specialty, and it was held that a mere parol promise to pay the debt did not revive the specialty by which it was originally secured.

1. Writing Expressly Required by Statute — *Arkansas.* — *Worthington v. De Bardiekin*, 33 Ark. 651.

Georgia. — *Ross v. Jordan*, 62 Ga. 298.

Kentucky. — *Graham v. Hunt*, 8 B. Mon. (Ky.) 7.

Maine. — *Kingley v. Cousins*, 47 Me. 91; *Spooner v. Russell*, 30 Me. 454; *Otis v. Gazlin*, 31 Me. 567.

Massachusetts. — *Jacobs v. Carpenter*, 161 Mass. 16; *Elwell v. Cumner*, 136 Mass. 102; *Way v. Sperry*, 6 Cush. (Mass.) 238, 52 Am. Dec. 779.

Michigan. — *Craig v. Seitz*, 63 Mich. 727.

New York. — *Scheper v. Briggs*, 28 N. Y. App. Div. 115.

North Carolina. — *Henly v. Lanier*, 75 N. Car. 172; *Kull v. Farmer*, 78 N. Car. 339.

Pennsylvania. — *Kearns v. Boyle*, 13 Phila. (Pa.) 193, 36 Leg. Int. (Pa.) 460.

South Carolina. — *Lanier v. Tolleson*, 20 S. Car. 57.

Texas. — *Calloway v. Baldwin*, 1 Tex. App. Civ. Cas., § 592.

Vermont. — *Farmers, etc., Bank v. Flint*, 17 Vt. 508, 44 Am. Dec. 351; *Barron v. Benedict*, 44 Vt. 518.

2. New Promise Regarded as the Cause of Action — *Kentucky.* — *Graham v. Hunt*, 8 B. Mon. (Ky.) 7; *Egbert v. McMichael*, 9 B. Mon. (Ky.) 44; *Carson v. Osborne*, 10 B. Mon. (Ky.) 155.

Louisiana. — *Beck v. Howard*, 3 La. Ann. 501; *Glenn v. Dunbar*, 10 La. Ann. 253.

Maine. — *Williams v. Robbins*, 32 Me. 181.

Mississippi. — *Rice v. Maxwell*, 13 Smed. & M. (Miss.) 289, 53 Am. Dec. 85.

Missouri. — *Fleming v. Lallman*, 11 Mo. App. 104.

New Jersey. — *Stewart v. Reckless*, 24 N. J. L. 427; *Briggs v. Sutton*, 20 N. J. L. 581.

Pennsylvania. — *Hobough v. Murphy*, 114 Pa. St. 358; *Murphy v. Crawford*, 114 Pa. St. 496; *Bolton v. King*, 105 Pa. St. 78; *Ott v. Perry*, 1 Phila. (Pa.) 77, 7 Leg. Int. (Pa.) 118; *Field's Estate*, 2 Rawle (Pa.) 356, 21 Am. Dec. 454; *Earnest v. Parke*, 4 Rawle (Pa.) 452, 27 Am. Dec. 280.

3. Old Debt Regarded as the Cause of Action — *Arkansas.* — *Apperson v. Stewart*, 27 Ark. 619; *Nowland v. Lanagan*, 45 Ark. 108.

Illinois. — *Marshall v. Tracy*, 74 Ill. 379; *Classen v. Schoenemann*, 80 Ill. 304.

Massachusetts. — *Way v. Sperry*, 6 Cush. (Mass.) 238, 52 Am. Dec. 779; *Maxim v. Morse*, 8 Mass. 127.

New Hampshire. — *Badger v. Gilmore*, 33 N. H. 361, 66 Am. Dec. 729; *Underwood v. Eastman*, 18 N. H. 582.

New York. — *Graham v. O'Hern*, 24 Hun (N. Y.) 221; *Shippey v. Henderson*, 14 Johns. (N. Y.) 180, 7 Am. Dec. 458; *Clark v. Atkinson*, 2 E. D. Smith (N. Y.) 112; *Dusenbury v. Hoyt*, 53 N. Y. 521, 13 Am. Rep. 543, reversing 36 N. Y. Super. Ct. 94, affirming 45 How. Pr. (N. Y.) 147, 14 Abb. Pr. N. S. (N. Y.) 132. See also *Wait v. Morris*, 6 Wend. (N. Y.) 394; *Fitzgerald v. Alexander*, 19 Wend. (N. Y.) 402. At one time the contrary view was held in New York. *Depuy v. Swart*, 3 Wend. (N. Y.) 139; *Hopkins v. Ward*, 67 Barb. (N. Y.) 452.

North Carolina. — *Riggs v. Roberts*, 85 N. Car. 151, 39 Am. Rep. 692. See *Fraley v. Kelly*, 88 N. Car. 227, 43 Am. Rep. 743.

Ohio. — *Turner v. Chrisman*, 20 Ohio 332.

4. Discharge Ends Summary Jurisdiction over Debtor's Person. — *In re Dole*, 11 Blatchf. (U. S.) 499, 9 Nat. Bankr. Reg. 193, 7 Fed. Cas. No. 3,964.

Liens of Creditors cannot be enforced in a court of bankruptcy after a discharge has been granted. *In re Dean*, 3 Nat. Bankr. Reg. 768, 7 Fed. Cas. No. 3,701.

5. Liability of Co-obligors Not Affected by Discharge — *United States.* — *Wolf v. Stix*, 99 U. S. 1; *Abendroth v. Van Dolsen*, 131 U. S. 66; *In re Marshall Paper Co.*, 2 Am. Bankr. Rep. 653; *Matter of Levy*, 2 Ben. (U. S.) 169, 1 Nat. Bankr. Reg. 327, 15 Fed. Cas. No. 8,297.

Alabama. — *Garnett v. Roper*, 10 Ala. 842.

Georgia. — *Phillips v. Solomon*, 42 Ga. 192; *King v. Central Bank*, 6 Ga. 257; *Rountree v. Rutherford*, 65 Ga. 444.

Illinois. — *Sandusky v. Exchange Bank*, 81 Ill. 353.

Indiana. — *Gregg v. Wilson*, 50 Ind. 490; *Ricketts v. Harvey*, 78 Ind. 152; *Post v. Losey*, 111 Ind. 74, 60 Am. Rep. 677.

Kansas. — *Ray v. Brenner*, 12 Kan. 105; *Burtis v. Wait*, 33 Kan. 478.

Kentucky. — *Edwards v. Coleman*, 2 A. K. Marsh. (Ky.) 249; *Com. v. Anderson*, 1 Ky. L. Rep. 275.

Louisiana. — *Serra é Hijo v. Hoffmann*, 30 La. Ann. 67.

Co-obligors' Claim for Reimbursement. — It is generally held that if a person secondarily liable with a bankrupt or insolvent, such as a surety, indorser, etc., makes a payment on account of the debt, after his principal has been discharged, his claim for reimbursement is not one arising after the bankruptcy, where his liability constituted a provable claim;¹ and if the creditor neglects to prove, the surety or indorser may discharge the debt, and prove it in his own name, or the court may permit him to prove it for his own benefit, without payment.² There are cases, however, which hold that a payment by a surety, etc., after the discharge of the principal debtor, creates a new debt which is not barred by the discharge.³

Contribution Between Bankrupt and His Co-obligor. — Though the liability of a bankrupt or insolvent as a surety or indorser is released by the discharge, as far as the creditor is concerned,⁴ yet if another is bound with him as co-surety for the same debt, such co-surety's claim for contribution, on payment of the

Maine. — *Horn v. Nason*, 23 Me. 101; *Craggin v. Bailey*, 23 Me. 104; *Farnham v. Gilman*, 24 Me. 250.

Massachusetts. — *Cochrane v. Cushing*, 124 Mass. 219; *Thayer v. Daniels*, 110 Mass. 345; *Sigourney v. Williams*, 1 Gray (Mass.) 623; *New England Steam, etc., Co. v. Parker*, 10 Gray (Mass.) 333; *Pub. Stat. Mass.*, c. 157, § 85. See *Cutter v. Evans*, 115 Mass. 27.

Missouri. — *Fisse v. Einstein*, 5 Mo. App. 78; *Field v. Zalle*, 5 Mo. App. 596.

Nevada. — *Tinkum v. O'Neale*, 5 Nev. 93; *Dorn v. O'Neale*, 6 Nev. 155.

New Hampshire. — *Towle v. Robinson*, 15 N. H. 408; *Goodwin v. Stark*, 15 N. H. 218; *Claffin v. Cogan*, 48 N. H. 411.

New Jersey. — *Linn v. Hamilton*, 34 N. J. L. 305. See *Kirby v. Garrison*, 21 N. J. L. 179.

New York. — *Hall v. Fowler*, 6 Hill (N. Y.) 630; *Moore v. Paine*, 12 Wend. (N. Y.) 123; *Elsworth v. Caldwell*, (Supm. Ct.) 18 Abb. Pr. (N. Y.) 20, 27 How. Pr. (N. Y.) 188; *Knapp v. Anderson*, 7 Hun (N. Y.) 295, 71 N. Y. 466; *Bowery Sav. Bank v. Clinton*, 2 Sandf. (N. Y.) 113; *Wilson v. Field*, 27 Hun (N. Y.) 46; *McCombs v. Allen*, 18 Hun (N. Y.) 190, *affirmed* 82 N. Y. 114; *Springfield Third Nat. Bank v. Hastings*, 58 Hun (N. Y.) 531. See also *Camp v. Gifford*, 7 Hill (N. Y.) 169.

North Carolina. — *Jones v. Hagler*, 6 Jones L. (51 N. Car.) 542; *Commercial Nat. Bank v. Simpson*, 90 N. Car. 467.

Ohio. — *Childs v. Childs*, 10 Ohio St. 339, 75 Am. Dec. 512.

Pennsylvania. — *Sharpe v. Speckenagle*, 3 S. & R. (Pa.) 463.

Rhode Island. — *White v. McCaughey*, 20 R. I. 1.

Vermont. — *Dyer v. Cleaveland*, 18 Vt. 241; *Noble v. Scofield*, 44 Vt. 281; *Pawlet v. Kelley*, 69 Vt. 398.

Wisconsin. — *Hill v. Trainer*, 49 Wis. 537. But see *Greenville, etc., R. Co. v. Maffett*, 8 S. Car. 307; *Martin v. Kilbourn*, 12 Heisk. (Tenn.) 331.

Wife as Surety for Insolvent Husband. — The discharge of a husband under the insolvency law does not discharge the wife from her liability on their joint note. The contrary rule which formerly obtained has been changed by modern legislation respecting married women. *Allers v. Forbes*, 59 Md. 374, 43 Am. Rep. 557.

For a Full Discussion as to the operation and

effect of the married women's laws, see the titles *HUSBAND AND WIFE*, vol. 15, p. 785; *SEPARATE PROPERTY OF MARRIED WOMEN*.

1. Payment by Surety, etc., After Discharge — Claim for Reimbursement Held to Be Barred — *United States.* — *Mace v. Wells*, 7 How. (U. S.) 272, *reversing* 17 Vt. 503.

Alabama. — *Jones v. Knox*, 46 Ala. 53, 7 Am. Rep. 583.

Arkansas. — *Lipscomb v. Grace*, 26 Ark. 231, 7 Am. Rep. 607.

Indiana. — *Post v. Losey*, 111 Ind. 74, 60 Am. Rep. 677; *Hamilton v. Reynolds* 88 Ind. 191.

Kentucky. — *Buford v. Cigler*, 7 Ky. L. Rep. 662.

Louisiana. — *Noland v. Wayne*, 31 La. Ann. 401.

Massachusetts. — *Fairbanks v. Lambert*, 137 Mass. 373; *Columbia Falls Brick Co. v. Glidden*, 157 Mass. 175; *Hunt v. Taylor*, 108 Mass. 508. See *Thayer v. Daniels*, 110 Mass. 345.

New York. — *Morse v. Hovey*, 1 Sandf. Ch. (N. Y.) 187; *Crafts v. Mott*, 4 N. Y. 604, *affirming* 5 Barb. (N. Y.) 305.

Pennsylvania. — *Reed v. Emory*, 1 S. & R. (Pa.) 339; *Fulwood v. Bushfield*, 14 Pa. St. 90.

Tennessee. — *Hardy v. Carter*, 8 Humph. (Tenn.) 153.

Vermont. — *Liddell v. Wiswell*, 50 Vt. 365.

If the Claim of the Surety Was Not Provable in the bankruptcy proceeding, he may recover from the bankrupt the amount of payments made after the discharge. *Pogue v. Joyner*, 6 Ark. 241, 42 Am. Dec. 603; *Dunn v. Sparks*, 7 Ind. 490; *Halliburton v. Carter*, 55 Mo. 435; *Manion v. Campbell*, 79 Mo. 105, *affirming* 10 Mo. App. 92.

2. Right of Surety if Creditor Neglects to Prove. — *Ailalo v. Fourdrinier*, 6 Bing. 306, 19 E. C. L. 89; *Mace v. Wells*, 7 How. (U. S.) 272, *reversing* 17 Vt. 503; *In re Babcock*, 3 Story (U. S.) 393; *Fernald v. Clark*, 84 Me. 234; *Fowler v. Kendall*, 44 Me. 448; *Spalding v. Dixon*, 21 Vt. 45.

3. Claim of Surety, etc., for Reimbursement Held Not Barred. — *Stone v. Hammell*, (Cal. 1889) 22 Pac. Rep. 203; *Ellis v. Ham*, 28 Me. 385; *Leighton v. Atkins*, 35 Me. 118; *Lewis v. Brown*, 41 Me. 448; *Paxson v. Haster*, 11 N. J. L. 410.

4. Discharge of Surety Debts. — See *supra*, this section, *Release from Debts — Contingent Liabilities*.

debt, is not barred by the discharge, where the payment was made after the discharge was granted,¹ but it is barred where the payment was made before the discharge was granted, because in that event the claim was provable against the bankrupt's estate.² So, too, a claim for contribution is barred where the joint obligors were not co-sureties for a third person, but were both principal debtors, because in that case each is a surety for the other or others for the amount of the debt above his own proportionate share,³ and the rule in regard to the reimbursement of sureties applies.⁴

Set-off of Claim for Contribution or Reimbursement. — Even where a claim for contribution or reimbursement is barred, it is still available as a set-off against any liability to the bankrupt. This is in accordance with the principle that a discharge does not extinguish debts, but merely takes away the creditor's remedy.⁵

d. EFFECT AS TO ASSIGNEE OR TRUSTEE. — The discharge of the debtor does not terminate the functions of the assignee or trustee, and he may still sue for and recover any property that may afterwards be discovered.⁶

3. Opposition to Discharge. — **a. WHO MAY OPPOSE.** — The right to oppose the granting of a discharge in bankruptcy or insolvency is given to any person interested in the matter, that is, generally speaking, creditors who have provable claims,⁷ though it has been held that a creditor must have proved his

1. Claim for Contribution Arising After Discharge — *Connecticut.* — *Brown v. J. & E. Stevens Co.*, 52 Conn. 110.

Illinois. — *Byers v. Alcorn*, 6 Ill. App. 39; *Byers v. Bower*, 6 Ill. App. 48.

Indiana. — *Dunn v. Sparks*, 7 Ind. 490, 1 Ind. 397, 50 Am. Dec. 473.

Maine. — *Dole v. Warren*, 32 Me. 94, 52 Am. Dec. 640.

New Jersey. — *Wyckoff v. Gardner*, (N. J. 1886) 5 Atl. Rep. 801.

Tennessee. — *Goss v. Gibson*, 8 Humph. (Tenn.) 197. This case was afterwards doubted in *Cocke v. Hoffman*, 5 Lea (Tenn.) 105, 40 Am. Rep. 23, and in *Eberhardt v. Wood*, 6 Lea (Tenn.) 467, affirming 2 Tenn. Ch. 488, the court reached the conclusion that the discharge was a bar to a claim for contribution.

Vermont. — *Swain v. Barber*, 29 Vt. 292; *Liddell v. Wiswell*, 59 Vt. 365.

Wisconsin. — *Smith v. Hudson*, 50 Wis. 279. But see *contra*, *Tobias v. Rogers*, 2 Edm. Sel. Cas. (N. Y.) 168, affirmed in 13 N. Y. 59.

2. Claim for Contribution Arising Before Discharge. — *Hays v. Ford*, 55 Ind. 52.

3. Contribution Between Principal Debtors. — *Dean v. Speakman*, 7 Blackf. (Ind.) 317; *Fren-tress v. Markle*, 2 Greene (Iowa) 553.

4. See *supra*, this subdivision of this section, paragraph *Co-obligors' Claim for Reimbursement*.

5. Set-off of Claim for Contribution or Reimbursement. — *Cosgrove v. Cosby*, 86 Ind. 511; *Scott v. Timberlake*, 83 N. Car. 382.

6. Effect of Discharge as to Assignee. — *Maybin v. Raymond*, 15 Nat. Bankr. Reg. 353, 16 Fed. Cas. No. 9,338.

7. Opposition by Creditors or Other Persons Interested — *United States.* — *In re Boutelle*, 2 Nat. Bankr. Reg. 129, 15 Pittsb. Leg. J. (Pa.) 616, 3 Fed. Cas. No. 1,705; *In re Sheppard*, 1 Nat. Bankr. Reg. 439, 7 Am. L. Reg. N. S. 484, 21 Fed. Cas. No. 12,753; *Re Murdock*, 1 Lowell (U. S.) 362, 3 Nat. Bankr. Reg. 146, 17 Fed. Cas. No. 9,939; *In re Smith*, 8 Blatchf. (U. S.) 461, 22 Fed. Cas. No. 12,977; *In re Book*, 3 McLean (U. S.) 317, 3 Fed. Cas. No. 1,637 (per-

son not technically a creditor); *In re Leavitt*, 1 Hask. (U. S.) 194, 15 Fed. Cas. No. 8,169 (partnership creditors on bankruptcy of individual partner); *In re Stansfield*, 4 Sawy. (U. S.) 334, 16 Nat. Bankr. Reg. 268, 22 Fed. Cas. No. 13,294; *In re Gallison*, 2 Lowell (U. S.) 72, 5 Nat. Bankr. Reg. 353, 9 Fed. Cas. No. 5,203; *In re Ely*, 5 Law Rep. 323, 8 Fed. Cas. No. 4,428. *Ex p.* Traphagen, 1 N. Y. Leg. Obs. 98, 24 Fed. Cas. No. 14,140 (contingent claim); *In re Tebbetts*, 5 Law Rep. 259, 23 Fed. Cas. No. 13,817 (equitable claim); *In re Sauls*, 5 Fed. Rep. 715; Act July 1, 1898 (30 U. S. Stat. at L. 544), § 14, par. b.

California. — *Davenport v. His Creditors*, 62 Cal. 29; *Lambert v. Slade*, 4 Cal. 337.

Illinois. — *People v. Hanchett*, 111 Ill. 90; *Kitson v. Farwell*, 132 Ill. 327.

Maine. — *In re Butterfield*, 80 Me. 594; *Dow v. Young*, (Me. 1887) 9 Atl. Rep. 893.

Maryland. — *Michael v. Schroeder*, 4 Har. & J. (Md.) 227; *Trayhern v. Hamill*, 53 Md. 91.

Massachusetts. — *Clarke v. Stanwood*, 166 Mass. 379.

New York. — *Haxtum v. Corse*, 2 Barb. Ch. (N. Y.) 506. See also the insolvency laws of the various states.

North Carolina. — *State v. Parsons*, 115 N. Car. 730 (mother of bastard to whom award for support has been made).

Claims Must Be Provable. — *In re Boutelle*, 2 Nat. Bankr. Reg. 129, 15 Pittsb. Leg. J. (Pa.) 616, 3 Fed. Cas. No. 1,705.

The Assignee, if a schedule creditor, may oppose the discharge like any other creditor. *Hinkel v. His Creditors*, 63 Cal. 328.

An Agreement by Some of the Creditors not to oppose the discharge of the debtor does not affect the right of the others. *Gottschalk v. Smith*, 74 Md. 560.

Withdrawing Opposition. — A creditor who has appeared in opposition to the discharge of an insolvent may withdraw his opposition at any time, and without the consent of other creditors. *Brangon v. His Creditors*, 64 Cal. 394.

Estoppel to Oppose Discharge. — *Matter of* Volume XVI.

claim in order to give him this right.¹

b. EVIDENCE. — When the discharge of a debtor is opposed, the burden of proof is on the party making the opposition to show the existence of the ground alleged,² and in order to sustain this burden he is authorized to examine the bankrupt,³ or third persons,⁴ and to require them to produce their books and papers.⁵ The debtor is also a competent witness in his own behalf.⁶

c. AGREEMENTS TO WITHDRAW OPPOSITION. — It is contrary to public policy to permit the debtor, or any one for him, by means of special inducements, to refrain from opposing the discharge, or to withdraw his opposition, and any contract based on such a consideration is void.⁷

d. GROUNDS FOR REFUSING DISCHARGE — (1) *In General.* — In England a very wide discretion is given to the court to refuse a discharge in any case when that course seems proper on a consideration of the bankrupt's conduct and affairs,⁸ and it is provided that the court must either refuse an absolute discharge, or suspend it for a certain time, if it appears that the bankrupt has been guilty of reckless trading,⁹ or extravagance in living;¹⁰ has continued to

Schuyler, 3 Ben. (U. S.) 200, 2 Nat. Bankr. Reg. 549, 21 Fed. Cas. No. 12,494; *In re Borst*, 11 Nat. Bankr. Reg. 96, 3 Fed. Cas. No. 1,666; *In re Antisdell*, 18 Nat. Bankr. Reg. 289, 1 Fed. Cas. No. 490; *In re Kraft*, 3 Fed. Rep. 892; *In re Jones*, 12 Nat. Bankr. Reg. 48, 7 Chicago Leg. N. 162, 13 Fed. Cas. No. 7,452; *Hester v. Baldwin*, 2 Woods (U. S.) 433, 12 Fed. Cas. No. 6,438.

A creditor, by accepting a dividend in an insolvency proceeding, loses his right to oppose a discharge. *Boston Nat. Bank v. Hammond*, 21 Wash. 158.

1. *Proof of Claims Held Necessary.* — *In re Co-haus*, 6 Fed. Cas. No. 2,959b; *In re King*, 10 Nat. Bankr. Reg. 104, 14 Fed. Cas. No. 7,784; *In re Burk*, Deady (U. S.) 425, 3 Nat. Bankr. Reg. 296, 4 Fed. Cas. No. 2,156; *Matter of Levy*, 2 Ben. (U. S.) 169, 1 Nat. Bankr. Reg. 327, 15 Fed. Cas. No. 8,297; *In re Brisco*, 2 Nat. Bankr. Reg. 226, 4 Fed. Cas. No. 1,886; *In re King*, 10 Nat. Bankr. Reg. 104, 14 Fed. Cas. No. 7,784; *In re Balmer*, 3 Hughes (U. S.) 637, 2 Fed. Cas. No. 820; *Hester v. Baldwin*, 2 Woods (U. S.) 433, 12 Fed. Cas. No. 6,438.

2. *Burden of Proof.* — *In re Holman*, 92 Fed. Rep. 512; *In re Hirsch*, 97 Fed. Rep. 571; *In re Wetmore*, 99 Fed. Rep. 703; *In re Shertzer*, 99 Fed. Rep. 706.

3. *Examination of Debtor.* — *In re Price*, 91 Fed. Rep. 635; *In re Mellen*, 97 Fed. Rep. 326.

4. *Examination of Third Persons.* — *In re Horgan*, 98 Fed. Rep. 414, *affirming* 97 Fed. Rep. 319.

5. *Production of Books and Papers.* — *In re Horgan*, 98 Fed. Rep. 414, *affirming* 97 Fed. Rep. 319.

6. *Debtor Competent Witness in His Own Behalf.* — *Mayewski v. His Creditors*, 40 La. Ann. 94.

7. *Invalidity of Agreements to Withdraw Opposition* — *England.* — *Holland v. Palmer*, 1 B. & P. 95; *Nerot v. Wallace*, 3 T. R. 17; *Jackson v. Davison*, 4 B. & Ald. 691, 6 E. C. L. 656; *Birch v. Jervis*, 3 C. & P. 379, 14 E. C. L. 358.

Maine. — *Marble v. Grant*, 73 Me. 423.

Massachusetts. — *Phelps v. Thomas*, 6 Gray (Mass.) 327; *Dexter v. Snow*, 12 Cush. (Mass.) 594, 59 Am. Dec. 206; *Blasdel v. Fowle*, 120 Mass. 447, 21 Am. Rep. 533; *Tirrell v. Freeman*, 139 Mass. 297.

Mississippi. — *Rice v. Maxwell*, 13 Smed. & M. (Miss.) 289, 53 Am. Dec. 85.

New York. — *Bell v. Leggett*, 7 N. Y. 176, *reversing* 2 Sandf. (N. Y.) 450; *Waite v. Harper*, 2 Johns. (N. Y.) 386; *Yeomans v. Chatterton*, 9 Johns. (N. Y.) 295, 6 Am. Dec. 277; *Wiggin v. Bush*, 12 Johns. (N. Y.) 306, 7 Am. Dec. 324; *Tuxbury v. Miller*, 19 Johns. (N. Y.) 311.

8. *Conduct and Affairs of Bankrupt as Ground for Refusing Discharge.* — 53 & 54 Vict., c. 71, § 8, par. (2).

The conduct referred to means such as may have operated either to prejudice the creditors or to affect the proceedings. *Re Barker*, 7 Mor. Bankr. Cas. 111.

Thus, in *In re Betts*, 19 Q. B. D. 39, *affirmed sub nom.* *Board of Trade v. Block*, 13 App. Cas. 570, it was held that the refusal of a bankrupt to submit to a medical examination for the purpose of enabling the trustee to insure his life, was not a ground for refusing or suspending the discharge. And see generally, as to the matter of conduct, *Re Carne*, 6 Mor. Bankr. Cas. 55; *Re Cook*, 6 Mor. Bankr. Cas. 224; *Re Oswell*, 9 Mor. Bankr. Cas. 202; *In re Hawkins*, (1892) 1 Q. B. 890; *Re Swabey*, 76 L. T. N. S. 534.

9. *Reckless Trading.* — *Ex p. Dornford*, 4 De G. & Sm. 29; *Ex p. Wakefield*, 4 De G. & Sm. 18; *Ex p. Martyn*, 2 De G. M. & G. 225; *In re Buckland*, Fonbl. 250; *Ex p. Turner*, 4 Jur. N. S. 470; *Re Preager*, 27 L. T. 26; *Ex p. Curties*, 2 De G. M. & G. 255.

As to losses in speculation, see *Ex p. Evans*, 31 L. J. Bankr. 63; *Ex p. Dowman*, 32 L. J. Bankr. 49; *Ex p. Fryer*, 10 L. T. N. S. 197; *Ex p. Rogers*, 13 Q. B. D. 438; *Ex p. Salaman*, 14 Q. B. D. 936; *Ex p. Young*, 2 Mor. Bankr. Cas. 37; *Re Barlow*, 3 Mor. Bankr. Cas. 304; *Re Rankin*, 5 Mor. Bankr. Cas. 23; *Re Nicholas*, 7 Mor. Bankr. Cas. 54; *Re Jenkins*, 8 Mor. Bankr. Cas. 36; *Re Keays*, 9 Mor. Bankr. Cas. 18.

In Canada a discharge will not be granted where the debtor recklessly granted or indorsed accommodation paper. *Johnson v. Leaf*, 23 L. C. Jur. 160.

10. *Extravagance in Living.* — *In re Stevens*, 7 L. T. N. S. 649; *Ex p. Sparham*, 9 L. T. N. S. 548; *Re Stainton*, 4 Mor. Bankr. Cas. 242;

trade after knowledge of insolvency,¹ contracted debts without reasonable expectation of ability to pay,² indulged in vexatious litigation,³ or has been guilty of certain other acts or omissions.⁴

In the United States, the statutes are generally more liberal to the debtor than is the English statute in this respect. The present federal bankruptcy law gives only two grounds for refusing a discharge, viz.: that the bankrupt has committed an offense punishable by imprisonment under the statute, or that he has destroyed, concealed, or failed to keep books of account.⁵ These grounds, and those specified in the state insolvency laws, will be considered in the following paragraphs of this section.

Only Statutory Grounds Available. — It is well settled that the right of the debtor to his discharge in a bankruptcy or insolvency proceeding can be denied only on some ground designated in the statute,⁶ with the exception, of course, that want of jurisdiction may always be made a ground of opposition.⁷ According to this rule it has been held that a discharge will not be refused because of irregularities on the part of the assignee or others for which the debtor was not responsible,⁸ or because a previous application had been denied merely on account of irregularities in the proceedings,⁹ if the denial did not involve a final adjudication adverse to the right of the debtor to a discharge.¹⁰

(2) *Offenses Against Statute.* — The statutes both in *England* and in the *United States* provide that a discharge may be refused where the debtor has been guilty of certain criminal offenses.¹¹

In re Wilson, 14 L. T. N. S. 492; *Ex p. Ryley* 14 L. T. N. S. 707.

1. **Continuing Trade After Knowledge of Insolvency.** — *Re Stainton*, 4 Mor. Bankr. Cas. 242; *Ex p. Johnson*, 4 De G. & Sm. 25; *Ex p. Dornford*, 4 De G. & Sm. 29; *Ex p. Rufford*, 2 De G. M. & G. 234.

2. **Contracting Debts Without Reasonable Expectation of Ability to Pay.** — *Re Sharp*, 10 Mor. Bankr. Cas. 114; *Ex p. White*, 14 Q. B. D. 600; *Ex p. Mee*, L. R. 1 Ch. 337; *Ex p. Brundrit*, L. R. 3 Ch. 26; *Ex p. Bayley*, L. R. 3 Ch. 244; *Ex p. Rufford*, 2 De G. M. & G. 234; *Ex p. Simond*, 3 Jur. N. S. 424; *Ex p. Wooldridge*, 24 L. J. Bankr. 17; *Re Drake*, 30 L. T. 312.

3. **Vexatious Litigation.** — *Re Pownall*, Fonbl. 221; *Ex p. Blackhurst*, 3 De G. & J. 39; *Ex p. Johnson*, 4 De G. & Sm. 25; *Re Smith*, 29 L. T. 147.

4. **The Various Acts and Omissions referred to are enumerated in 53 & 54 Vict., c. 71, § 8, par. (3).**

5. See Act July 1, 1898 (3 U. S. Stat. at L. 544), § 14, par. b.

6. **Opposition Only on Statutory Grounds.** — *In re Hixon*, 93 Fed. Rep. 440; *In re Thomas*, 92 Fed. Rep. 912; *In re Clark*, 2 Biss. (U. S.) 73, 3 Nat. Bankr. Reg. 16, 5 Fed. Cas. No. 2,800; *In re Elliott*, 2 Nat. Bankr. Reg. 110, 8 Fed. Cas. No. 4,391; *Dresbach v. His Creditors*, 63 Cal. 187; *Demartin v. Demartin*, 85 Cal. 76; *Davis v. Hendrickson*, 15 N. J. L. 481.

Illustrations. — Within the rule stated in the text, the following matters have been held not to authorize the refusal of a discharge: Under the bankruptcy law of the *United States*, wilful and malicious injury to property, *In re Carmichael*, 2 Am. Bankr. Reg. 815; discharge of the assignee in bankruptcy, *In re Forsyth*, 4 Fed. Rep. 629. Under the *New Jersey* statute, accidental omission to give notice to one or more creditors, as required by law, *Weeks v. Buderus*, 39 N. J. L. 448. Under the *Minnesota* statute, mere negligence or want of prudence

in business affairs, living beyond one's income, or honest inability to show how his property has been expended and disposed of, *Matter of Welch*, 43 Minn. 7. Under the *Vermont* statute, perjury, when not committed in the insolvency proceeding, *In re Chapman*, (Vt. 1899) 45 Atl. Rep. 232.

If a Prohibited Act Has Been Undone and Matters Placed in Statu Quo before the benefits of the insolvent law are claimed, a discharge will not be refused because such prohibited act was done. *Kallman v. His Creditors*, 39 La. Ann. 1089.

7. **Want of Jurisdiction.** — *In re Clisdell*, 2 Am. Bankr. Reg. 424; *Matter of Penn*, 4 Ben. (U. S.) 99, 3 Nat. Bankr. Reg. 582, 19 Fed. Cas. No. 10,926; *In re Ives*, 5 Dill. (U. S.) 146, 19 Nat. Bankr. Reg. 97, 13 Fed. Cas. No. 7,115; *West v. Shepardson*, 11 Cush. (Mass.) 164. See also *Eddy v. Ames*, 9 Met. (Mass.) 585. Compare *Allen v. Thompson*, 10 Fed. Rep. 116.

8. **Irregularities Not Ground for Refusing Discharge.** — *Re Littlefield*, 1 Lowell (U. S.) 331, 3 Nat. Bankr. Reg. 57, 15 Fed. Cas. No. 8,398; *Matter of Strachan*, 1 N. Mex. 468; *In re Piereson*, 10 Nat. Bankr. Reg. 107, 19 Fed. Cas. No. 11,153. But see *contra*, *Matter of Bellamy*, 1 Ben. (U. S.) 426, 1 Nat. Bankr. Reg. 90, 3 Fed. Cas. No. 1,267; *In re Bushey*, 3 Nat. Bankr. Reg. 685, 27 Leg. Int. (Pa.) 111, 4 Fed. Cas. No. 2,227.

9. **Previous Denial for Mere Irregularities.** — *Connelly's Case*, 2 Cranch (C. C.) 415, 6 Fed. Cas. No. 3,111; *In re Farrell*, 5 Nat. Bankr. Reg. 125, 8 Fed. Cas. No. 4,680; *In re White*, 18 Nat. Bankr. Reg. 107, 29 Fed. Cas. No. 17,533.

10. **Previous Denial Involving Final Adjudication.** — *In re Brockway*, 23 Fed. Rep. 583.

11. **Offenses Against Statute.** — The provision of the *English* statute is that the court may refuse a discharge where the bankrupt has committed any misdemeanor under the bankruptcy act, or the debtor's act of 1869, or any

(3) *Fraud*. — Fraud is a ground for refusing a discharge under the *English* and *Canadian* statutes,¹ but not under the bankruptcy law of the *United States*,² though it is under many of the state insolvency laws.³

Fraud Affecting the Creditors Generally is usually contemplated by the provision in question,⁴ and not a fraud practiced on any particular creditor,⁵ though a debt contracted by fraud may not be released by the discharge.⁶

(4) *Concealment of or False Statements as to Assets and Liabilities*. — **The Bankruptcy Law of the United States** makes it an offense punishable by imprisonment for a bankrupt knowingly and fraudulently to conceal any of his property from his trustee or to make a false oath in relation to any proceeding in bankruptcy,⁷ and provides that a discharge may be refused where the bankrupt is guilty of any such offense.⁸

felony or misdemeanor connected with the bankruptcy. 53 & 54 Vict., c. 71, § 8, par. (2). And see *In re Hedley*, (1895) 1 Q. B. 923; *Re Sultzberger*, 4 Mor. Bankr. Cas. 82; *Re Heap*, 4 Mor. Bankr. Cas. 314; *Re Barker*, 7 Mor. Bankr. Cas. 111.

The bankruptcy law of the *United States* authorizes the judge to refuse a discharge, if the bankrupt "has committed any offense punishable by imprisonment as herein provided." Act July 1, 1898 (30 U. S. Stat. at L. 544), § 14, par. b.

The acts constituting offenses under the statute are enumerated in section 29.

As to the provisions of the state laws, see the various local statutes.

1. **Fraud as Ground for Refusing Discharge in England and Canada** — *England*. — 53 & 54 Vict., c. 71, § 8, par. (3), subd. (1).

Canada. — *Ex p. Watt*, 2 L. C. L. J. 284; *In re Thurber*, 11 L. C. Jur. 35; *Ex p. Tempest*, 11 L. C. Jur. 57; *In re Freer*, 12 L. C. Jur. 315.

2. **Fraud Not Specified in Bankruptcy Law of United States**. — See Act July 1, 1898 (30 U. S. Stat. at L. 544), § 14; *In re Thomas*, 92 Fed. Rep. 912; *In re Black*, 97 Fed. Rep. 493.

The Act of 1867 made fraud a ground for refusing a discharge. Act Mar. 2, 1867 (14 U. S. Stat. at L. 517), § 29; *Maxwell v. Evans*, 90 Ind. 596, 46 Am. Rep. 234.

3. **Fraud under State Insolvency Laws** — *California*. — *Dyer v. Bradley*, 89 Cal. 557; *Siegel v. His Creditors*, 95 Cal. 409; *Matter of Harris*, 81 Cal. 350.

Louisiana. — *Burdeau v. His Creditors*, 44 La. Ann. 11; *Romano v. Their Creditors*, 46 La. Ann. 1176.

Maine. — *Huston v. Goudy*, 90 Me. 128.

Massachusetts. — *Clarke v. Stanwood*, 166 Mass. 379.

Minnesota. — *Matter of Welch*, 43 Minn. 7.

New York. — *Matter of Brady*, 69 N. Y. 215; *Matter of Watson*, 2 E. D. Smith (N. Y.) 429. Compare *People v. White*, (Supm. Ct. Spec. T.) 14 How. Pr. (N. Y.) 498.

North Carolina. — *State v. Parsons*, 115 N. Car. 720.

South Carolina. — *Ex p. Maffet*, 11 Rich. L. (S. Car.) 358; *State Bank v. Ballard*, 12 Rich. L. (S. Car.) 259; *Hyams v. Valentine*, 4 Strobb. L. (S. Car.) 408; *Thomson v. Linam*, 2 Bailey L. (S. Car.) 131.

Washington. — *Rosenthal v. Schneider*, 2 Wash. Ter. 144.

Wisconsin. — *Hempsted v. Wisconsin F. & M. Ins. Co. Bank*, 78 Wis. 375.

See also the various local statutes.

Reserving Property as Exempt, when it is not properly subject to exemption, may not afford cause for denying a discharge, if the reservation was made in good faith. Thus where an insolvent, in good faith, retained as firewood for family use certain posts, it was held that a discharge would not be denied because of the fact that he thereafter sold them, their value being small. *In re Bowman*, 83 Cal. 153.

It is a Question of Fact whether, in any case, a transfer by a debtor was with fraudulent intent. *In re Mabbett*, 73 Wis. 351.

A Jury Trial may be had on an issue of fraud in an insolvency proceeding. *Romano v. Their Creditors*, 46 La. Ann. 1176.

The Burden of Proving Fraud is on the persons contesting the debtor's right to a discharge. *Matter of Harris*, 81 Cal. 350.

4. **Fraud Affecting Creditors Generally**. — *Siegel v. His Creditors*, 95 Cal. 409.

5. **Fraud in Contracting Particular Debt**. — *Siegel v. His Creditors*, 95 Cal. 409; *McEachran v. McEachran*, 82 Cal. 219; *John V. Farwell Co. v. Dickinson*, 60 Minn. 528; *Hempsted v. Wisconsin F. & M. Ins. Co. Bank*, 78 Wis. 375.

In *Massachusetts* the rule is the other way. The statute of that state provides that the discharge shall not be granted if the debtor, within six months before the filing of the petition by or against him, has obtained on credit, from any person, any money, goods, chattels, or other thing of value, with intent not to pay for the same. *Clarke v. Stanwood*, 166 Mass. 379.

6. See *supra*, this section, *Release from Debts — Debts Contracted by Fraud*.

7. Act July 1, 1898 (30 U. S. Stat. at L. 544), § 29, par. b, cl. (1), (2).

8. **Concealment, etc. — Refusal of Discharge under Law of United States**. — Act July 1, 1898 (30 U. S. Stat. at L. 544), § 14, par. b; *In re Walther*, 95 Fed. Rep. 941; *In re Skinner*, 97 Fed. Rep. 190; *In re Kamsler*, 97 Fed. Rep. 194; *In re O'Gara*, 97 Fed. Rep. 932; *In re Wood*, 98 Fed. Rep. 972.

Omission from Schedule of Property Fraudulently Conveyed. — *In re Welch*, 100 Fed. Rep. 65; *In re Lowenstein*, 2 Am. Bankr. Rep. 193; *In re McNamara*, 2 Am. Bankr. Rep. 566; *In re Crenshaw*, 2 Am. Bankr. Rep. 623.

Concealment by Bankrupt's Husband and Managing Agent. — *In re Hyman*, 97 Fed. Rep. 195.

A Mere Belief that the bankrupt is concealing property is not sufficient to justify refusing his discharge. The fact must be established, and the creditors may do this by examination of the bankrupt. *In re Thomas*, 92 Fed. Rep. 912.

The English Statute does not expressly name the concealment of property or the listing of false debts as a ground for refusing a discharge, but the very comprehensive provision that the court, on consideration of the "bankrupt's conduct and affairs," may either grant or refuse a discharge, would seem to include this ground as well as others.¹

The State Insolvency Laws, also, generally provide that a discharge may be refused if the debtor was guilty of false swearing as to any material fact in regard to his debts or estate.² This includes falsity in the inventory or schedules, as where the debtor, with intent to defraud, omitted property from his inventory,³ or scheduled debts which did not exist,⁴ and also where he failed to file an inventory, as well as where he filed one that was false or incorrect.⁵

The Fraudulent Intent is always material, and a discharge will not be refused because of omissions which were unintentional, or where the debtor acted on an honest conviction that the item omitted was worthless.⁶

(5) *Preferences.* — Since one of the chief purposes of bankruptcy and insolvency laws is to secure an equal distribution of a debtor's effects among his creditors, the statutes in some jurisdictions make it a ground for refusing a discharge that the debtor, in contemplation of bankruptcy or insolvency, or within a specified time before proceedings are commenced, preferred one or more creditors.⁷ But this is not the case under the present bankruptcy law of

Merely Inability to Account for Property in the bankrupt's possession shortly before bankruptcy does not show concealment of it. Present possession or control must be shown. *In re Idzall*, 2 Am. Bankr. Rep. 741.

1. **Provision of English Statute.** — See 53 & 54 Vict., c. 71, § 8, par. (2).

2. **False Swearing as to Debts or Estate.** — *Demartin v. Demartin*, 85 Cal. 76; *Johnson v. Martin*, 25 Ga. 268; *Jones v. First Nat. Bank*, 79 Me. 191; *Thaxter v. Johnson*, 79 Me. 348; *In re Mabbett*, 73 Wis. 351.

3. **Omitting Property from Inventory.** — *Hinkel v. His Creditors*, 63 Cal. 328; *Dean v. Baker*, 64 Cal. 232; *Thaxter v. Johnson*, 79 Me. 348; *Talbot v. Jones*, 5 Mo. 217; *People v. White*, (Supm. Ct. Spec. T.) 14 How. Pr. (N. Y.) 498; *Burns v. Evans*, 3 Hill L. (S. Car.) 294.

4. **False Schedule of Debts.** — *In re Bregard*, 84 Cal. 322; *Romano v. Their Creditors*, 46 La. Ann. 1176.

5. **Failure to File Inventory and Schedule.** — *Phillips v. Her Creditors*, 36 La. Ann. 904; *Starr v. Patterson*, (Supm. Ct.) 27 Abb. N. Cas. (N. Y.) 19. But see *contra*, *Shepard v. Abbott*, 137 Mass. 224.

6. **Omissions Without Fraudulent Intent.** — *In re Morrow*, 97 Fed. Rep. 574; *In re Freund*, 98 Fed. Rep. 81 (property claimed by wife of bankrupt); *In re Dews*, 96 Fed. Rep. 181 (life insurance for benefit of bankrupt's wife); *In re Webb*, 98 Fed. Rep. 404 (property transferred before enactment of bankrupt law); *In re McAdam*, 98 Fed. Rep. 409 (contract for services by bankrupt as attorney for contingent fee); *In re Hirsch*, 2 Am. Bankr. Rep. 715; *Demartin v. Demartin*, 85 Cal. 76; *Widmier's Case*, 10 Phila. (Pa.) 81, 30 Leg. Int. (Pa.) 344. But see *Matter of Cohen*, (C. Pl. Spec. T.) 18 Civ. Pro. (N. Y.) 156, in which it was held that a strict compliance with the statute is necessary, and that the want of a sufficient schedule of debts goes to the jurisdiction of the court.

Omitting Exempt Property Held Not Fraudulent. — *Sellers v. Bell*, 94 Fed. Rep. 801.

Property Without Value to Estate. — It is not fraudulent for the bankrupt to omit to list a leasehold under a yearly lease, where it does not appear that the use of the leased premises exceeded in value the rent reserved. *In re Hirsch*, 97 Fed. Rep. 571. See also *In re Phillips*, 98 Fed. Rep. 844.

A Preferential Transfer before bankruptcy does not amount to a concealment of property from the trustee. *In re De Leeuw*, 98 Fed. Rep. 408.

As to preferences generally see *infra*, the next following division of this section, *Preferences*.

7. **Right to Discharge Forfeited by Giving Preferences** — *England*. — 53 & 54 Vict., c. 71, § 8, par. (3), cl. (i); *Re Skegg*, 63 L. T. N. S. 90; *In re Bryant*, (1895) 1 Q. B. 420.

United States (Acts 1841 and 1867). — *In re Amory*, 1 Fed. Cas. No. 336 *b*, affirmed 1 Fed. Cas. No. 336 *c*; *Ex p. Garwood*, *Crabbe* (U. S.) 516, 10 Fed. Cas. No. 5,258; *Matter of Pearce*, 21 Vt. 611, 19 Fed. Cas. No. 10,873; *Matter of Chase*, 22 Vt. 649, 5 Fed. Cas. No. 2,624; *Matter of Chapman*, 9 Ben. (U. S.) 311, 5 Fed. Cas. No. 2,601; *In re Leavitt*, 1 Hask. (U. S.) 194, 15 Fed. Cas. No. 8,169; *Re Locke*, 1 Lowell (U. S.) 293, 2 Nat. Bankr. Reg. 382, 15 Fed. Cas. No. 8,439; *Re Batchelder*, 1 Lowell (U. S.) 373, 3 Nat. Bankr. Reg. 150, 2 Fed. Cas. No. 1,098; *Re Goodfellow*, 1 Lowell (U. S.) 510, 3 Nat. Bankr. Reg. 452, 10 Fed. Cas. No. 5,536; *In re Adams*, 3 Nat. Bankr. Reg. 561, 1 Fed. Cas. No. 43; *Aspinwall's Case*, 3 Pa. L. J. 212, 2 Fed. Cas. No. 592; *In re Croft*, 8 Biss. (U. S.) 188, 17 Nat. Bankr. Reg. 324, 6 Fed. Cas. No. 3,404; *In re Finn*, 8 Nat. Bankr. Reg. 525, 9 Fed. Cas. No. 4,795; *In re Perry*, 7 West. Jur. 379, 19 Fed. Cas. No. 10,999; *In re Piereson*, 10 Nat. Bankr. Reg. 107, 19 Fed. Cas. No. 11,153; *In re Rosenfield*, 1 Nat. Bankr. Reg. 575, 7 Am. L. Reg. N. S. 618, 20 Fed. Cas. No. 12,058; *In re Seeley*, 19 Nat. Bankr. Reg. 1, 21 Fed. Cas. No. 12,628; *In re Vernia*, 5 Fed. Rep. 723.

the United States.¹

The Intent of the Debtor to create an unlawful preference is material,² and therefore his right to a discharge cannot be denied on this ground, where the preference was not the result of his voluntary act,³ or where he made a payment or transfer with the *bona fide* intention and expectation of preventing bankruptcy;⁴ nor can he be charged with the consequences of a fraudulent preference given by his partner without his knowledge or consent.⁵

Insolvency or Contemplation of Insolvency. — In order that a discharge may be refused on the ground that the debtor has preferred creditors, it must appear that, at the time of the act constituting the alleged preference, he was insolvent or in contemplation of insolvency.⁶

The Knowledge of the Creditor that the transfer or payment to him was intended as a preference is not material. If the debtor intended to create a preference, his discharge will be refused, though the creditor had no knowledge of such intent.⁷

(6) **Failure to Keep, Concealment, or Destruction of Books of Account.** — **Failure to Keep Books of Account**, such as are usual and proper in the business carried on by the debtor, is usually, if not always, declared by the bankruptcy and insolvency laws to be a ground for refusing to grant a discharge.⁸

California. — *Hinkel v. His Creditors*, 63 Cal. 328.

Louisiana. — *Kallman v. His Creditors*, 39 La. Ann. 1089.

Maine. — *Huston v. Goudy*, 90 Me. 128.

Massachusetts. — *Lane*, Appellant, 3 Met. (Mass.) 213; *Fernald v. Gay*, 12 Cush. (Mass.) 506; *Phillips*, Appellant, 132 Mass. 233; *Fletcher*, Appellant, 136 Mass. 340; *Kenney v. Brown*, 139 Mass. 345.

Minnesota. — *Matter of Welch*, 43 Minn. 7.

Pennsylvania. — *Ex p. M'Clenachan*, 2 Yeates (Pa.) 502.

South Carolina. — *Crenshaw v. Wetsel*, 2 Hill L. (S. Car.) 418.

Conversion of Money Received in a Fiduciary Capacity is not within a statute denying the right of discharge to a debtor who disposes of his property with the intention of defrauding creditors. *Suydam v. Belknap*, 20 Hun (N. Y.) 87, *distinguishing* *Matter of Brady*, 69 N. Y. 215.

Under the *California Act of 1876*, a conveyance or transfer, with intent to prefer a creditor, did not avoid a discharge, unless made out of the usual course of business. *Dean v. Grimes*, 72 Cal. 442.

A Conveyance by a Husband to his Wife, and her declaration of a homestead in the land conveyed, made two years before insolvency proceedings were commenced against the husband, are not alone evidence of a fraudulent intent. *Matter of McEachran*, 82 Cal. 219.

Expressing an Expectation and Intention of Paying a Creditor does not affect the insolvent's right to a discharge. *Dennan v. Gould*, 141 Mass. 16.

1. **Preferences Not Ground for Refusal under Present Statute of United States.** — Act July 1, 1898 (30 U. S. Stat. at L. 544), § 14, par. b.

2. **Intent of Debtor.** — *In re Gay*, 1 Hask. (U. S.) 108, 2 Nat. Bankr. Reg. 358, 10 Fed. Cas. No. 5,279; *In re Burgess*, 3 Nat. Bankr. Reg. 196, 4 Fed. Cas. No. 2,153; *Matter of Pearce*, 21 Vt. 611, 19 Fed. Cas. No. 10,873; *In re Perry*, 7 West. Jur. 379, 19 Fed. Cas. No. 10,909; *Matter of Reed*, 21 Vt. 635, 20 Fed. Cas. No. 11,640; *Matter of Rowell*, 21 Vt. 620, 20 Fed.

Cas. No. 12,095; *In re Boynton*, 10 Fed. Rep. 277.

Payment of Attorney's Fees Not Ground for Refusing Discharge. — *In re Sidle*, 2 Nat. Bankr. Reg. 220, 22 Fed. Cas. No. 12,844; *In re Boynton*, 10 Fed. Rep. 277; *In re Rosenfield*, 2 Nat. Bankr. Reg. 116, 1 Am. L. T. Bankr. Rep. 100, 20 Fed. Cas. No. 12,057.

A General Assignment Without Preferences will not bar a discharge. *In re Ely*, 1 N. Y. Leg. Obs. 343, 8 Fed. Cas. No. 4,429; *Matter of Goldschmidt*, 3 Ben. (U. S.) 379, 3 Nat. Bankr. Reg. 164, 10 Fed. Cas. No. 5,520; *In re Pierce*, 3 Nat. Bankr. Reg. 258, 26 Leg. Int. (Pa.) 332, 19 Fed. Cas. No. 11,141. But see *In re Kasson*, 18 Nat. Bankr. Reg. 379, 14 Fed. Cas. No. 7,617.

3. **Preferences Not Resulting from Voluntary Act of Bankrupt.** — *Matter of Rowell*, 21 Vt. 620, 20 Fed. Cas. No. 12,095; *In re Belden*, 2 Nat. Bankr. Reg. 42, 15 Pittsb. Leg. J. 547, 3 Fed. Cas. No. 1,240.

4. **Transfers or Payments to Prevent Bankruptcy.** — *Matter of Pearce*, 21 Vt. 611, 19 Fed. Cas. No. 10,873; *In re Brent*, 2 Dill. (U. S.) 129, 8 Nat. Bankr. Reg. 444, 4 Fed. Cas. No. 1,832; *In re White*, 18 Nat. Bankr. Reg. 107, 29 Fed. Cas. No. 17,533.

5. **Preferences by Partner of Bankrupt.** — *In re Leavitt*, 1 Hask. (U. S.) 194, 15 Fed. Cas. No. 8,169.

6. **Insolvency or Contemplation of Insolvency.** — *Re George*, 1 Lowell (U. S.) 409, 10 Fed. Cas. No. 5,325; *Forsythe v. Ballance*, 6 McLean (U. S.) 562, 9 Fed. Cas. No. 4,961; *In re Rosenfield*, 2 Nat. Bankr. Reg. 116, 1 Am. L. T. Bankr. Rep. 100, 20 Fed. Cas. No. 12,057; *In re Warner*, 5 Nat. Bankr. Reg. 414, 29 Fed. Cas. No. 17,177.

7. **Knowledge of Creditor.** — *In re Gay*, 1 Hask. (U. S.) 108, 2 Nat. Bankr. Reg. 358, 10 Fed. Cas. No. 5,279; *In re Doyle*, *Holmes* (U. S.) 61, 7 Fed. Cas. No. 4,050, *affirming* 3 Nat. Bankr. Reg. 640, 7 Fed. Cas. No. 4,051.

8. **Failure to Keep, Concealing, or Destroying Books of Account** — *England.* — *Re Tracey*, 1 Fonbl. 13; *In re Smart*, 1 Fonbl. 14; *In re Sparrow*, 1 Fonbl. 69; *Ex p. Carter*, 1 Fonbl.

Destruction or Concealment of Books. — The bankruptcy law of the *United States* specifies the destruction or concealment of books, as well as a failure to keep any, as a ground for refusing a discharge.¹ The *English* statute does not contain this provision in so many words, but it authorizes the court, on an application for a discharge, to take into consideration the "conduct and affairs" of the bankrupt, and grant or refuse it as justice may require.²

What Are "Proper" Books. — The books are "proper" when they are so kept that any competent person, by an examination of them, can ascertain the real condition of the insolvent's affairs, though the books are imperfect and inartistic, and even inaccurate in unimportant particulars.³ If they do not come up to this standard, no discharge can be granted, even though the party acted in good faith.⁴

Time of Act or Omissions. — Failure to keep books of account, or the destruction of books, before the passage of the statute, does not constitute a ground for refusing to grant a discharge,⁵ but such omissions or acts after the passage

83; *Re Freeman*, 7 Mor. Bankr. Cas. 38; *Re Griffin*, 8 Mor. Bankr. Cas. 1; *Re Heap*, 4 Mor. Bankr. Cas. 314; *Ex p. Reed*, 17 Q. B. D. 244; *Ex p. Board of Trade*, 19 Q. B. D. 102.

Canada. — *Donovan v. McCormick*, 2 Montreal Leg. N. 322.

United States. — *In re Ablowich*, 99 Fed. Rep. 81; *In re Shorer*, 96 Fed. Rep. 90; *In re Bound*, 4 Nat. Bankr. Reg. 510, 3 Fed. Cas. No. 1,697; *In re Bassett*, 8 Fed. Rep. 206; *Tyler v. Angevine*, 15 Blatchf. (U. S.) 536, 24 Fed. Cas. No. 14,306; *In re Colcord*, 2 Hask. (U. S.) 455, 6 Fed. Cas. No. 2,970.

California. — *Siegel v. His Creditors*, 95 Cal. 409; *Matter of Good*, 78 Cal. 399.

Maine. — *Huston v. Goudy*, 90 Me. 128; *In re Mooers*, 86 Me. 484.

Massachusetts. — *Wilkins v. Jenkins*, 136 Mass. 38.

Minnesota. — *Dunham v. Messing*, 68 Minn. 257; *Ekberg v. Schloss*, 62 Minn. 427.

Vermont. — *In re Howard*, 59 Vt. 594.

See also the various local statutes.

Compare Re Keach, 1 Lowell (U. S.) 335, 3 Nat. Bankr. Reg. 13, 14 Fed. Cas. No. 7,629, holding that a failure to keep proper books of account is no ground for denying discharge, where the bankrupt carried on a cash business, and had no debts, assets, or capital outstanding.

1. **Destruction or Concealment of Books.** — Act July 1, 1898 (30 U. S. Stat. at L. 544), § 14, par. b.

2. 53 & 54 Vict., c. 71, § 8, par. (2).

3. **What Are "Proper" Books** — *United States*. — *Matter of Newman*, 3 Ben. (U. S.) 20, 2 Nat. Bankr. Reg. 302, 18 Fed. Cas. No. 10,175; *Matter of Bellis*, 4 Ben. (U. S.) 53, 3 Nat. Bankr. Reg. 496, 3 Fed. Cas. No. 1,275; *Matter of Garrison*, 5 Ben. (U. S.) 430, 7 Nat. Bankr. Reg. 287, 10 Fed. Cas. No. 5,254; *Matter of Brockway*, 6 Ben. (U. S.) 326, 7 Nat. Bankr. Reg. 595, 4 Fed. Cas. No. 1,917; *Matter of Hannabs*, 8 Ben. (U. S.) 475, 11 Fed. Cas. No. 6,032; *Matter of Jorey*, 2 Bond. (U. S.) 336, 2 Nat. Bankr. Reg. 603, 13 Fed. Cas. No. 7,530; *In re Gay*, 1 Hask. (U. S.) 108, 2 Nat. Bankr. Reg. 358, 10 Fed. Cas. No. 5,279; *In re Colcord*, 2 Hask. (U. S.) 455, 6 Fed. Cas. No. 2,970; *Re Littlefield*, 1 Lowell (U. S.) 331, 3 Nat. Bankr. Reg. 57, 15 Fed. Cas. No. 8,308; *Re Batchelder*, 1 Lowell (U. S.) 373, 3 Nat. Bankr. Reg. 150, 2 Fed. Cas. No. 1,098; *Re Hammond*,

1 Lowell (U. S.) 381, 3 Nat. Bankr. Reg. 273, 11 Fed. Cas. No. 5,999; *In re Anketell*, 19 Nat. Bankr. Reg. 268, 1 Fed. Cas. No. 394; *In re Antisdell*, 18 Nat. Bankr. Reg. 289, 1 Fed. Cas. No. 490; *In re Archibrown*, 12 Nat. Bankr. Reg. 17, 7 Chicago Leg. N. 231, 1 Fed. Cas. No. 505; *In re Banks*, 1 N. Y. Leg. Obs. 274, 2 Fed. Cas. No. 958; *In re Bartenbach*, 11 Nat. Bankr. Reg. 61, 2 Am. L. T. N. S. 33, 2 Fed. Cas. No. 1,068; *In re Blumenthal*, 18 Nat. Bankr. Reg. 575, 3 Fed. Cas. No. 1,576; *In re Burgess*, 3 Nat. Bankr. Reg. 196, 4 Fed. Cas. No. 2,153; *In re Grieves*, 15 Alb. L. J. 167, 11 Fed. Cas. No. 5,809; *In re McCarthy*, 15 Alb. L. J. 293, 15 Fed. Cas. No. 8,680; *In re Mackay*, 4 Nat. Bankr. Reg. 66, 16 Fed. Cas. No. 8,837, 4 Nat. Bankr. Reg. 67, 16 Fed. Cas. No. 8,838; *In re Marsh*, 19 Nat. Bankr. Reg. 297, 16 Fed. Cas. No. 9,109; *In re Perry*, 7 West. Jur. 379, 19 Fed. Cas. No. 10,999; *In re Reed*, 12 Nat. Bankr. Reg. 360, 1 N. Y. Wkly. Dig. 100, 20 Fed. Cas. No. 11,639; *In re Schumpert*, 8 Nat. Bankr. Reg. 415, 21 Fed. Cas. No. 12,491; *In re White*, 2 Nat. Bankr. Reg. 590, 29 Fed. Cas. No. 17,532; *In re Winsor*, 16 Nat. Bankr. Reg. 152, 30 Fed. Cas. No. 17,885; *In re Townsend*, 2 Fed. Rep. 559; *Matter of Jewett*, 3 Fed. Rep. 503; *In re Vernia*, 5 Fed. Rep. 723; *In re Frey*, 9 Fed. Rep. 376; *In re Brockway*, 12 Fed. Rep. 69, *affirmed* 23 Fed. Rep. 583; *In re Williams*, 13 Fed. Rep. 30; *In re Smith*, 16 Fed. Rep. 465; *In re Graves*, 24 Fed. Rep. 550; *In re Hunt*, 26 Fed. Rep. 739.

California. — *Siegel v. His Creditors*, 95 Cal. 409.

Maine. — *In re Tolman*, 83 Me. 353; *In re Patten*, 85 Me. 154.

Minnesota. — *Work v. Holmboe*, 64 Minn. 383; *Dunham v. Messing*, 68 Minn. 257.

It Is a Question of Fact, in any case, whether or not proper books of account have been kept. *Wilkins v. Jenkins*, 136 Mass. 38, *Ekberg v. Schloss*, 62 Minn. 427; *In re Howard*, 59 Vt. 594.

4. **Good Faith** may enter into the question under certain circumstances, but it is not controlling. Thus, if the party kept no books at all or so kept them that they were utterly incomprehensible, it is immaterial that he acted in good faith. *Matter of Good*, 78 Cal. 399. See also *Jones v. Portland First Nat. Bank*, 79 Me. 191.

5. **Failure to Keep, or Destruction of, Books Before Passage of Law.** — *In re Friedberg*, 19 Nat.

of the statute are within its operation, though they relate to prior transactions.¹

Intent of Debtor. — Under the bankruptcy law of the *United States* a discharge will be refused because of the conduct of the bankrupt in regard to books of account, only when he acted with fraudulent intent to conceal his true financial condition,² but the requirement of the *English* statute is absolute in this particular, as is also the case, as a general rule, with the state insolvency laws; and it is therefore immaterial whether the debtor acted with a fraudulent intent or was merely neglectful of the ordinary principles of business.³

Rule Limited to Merchants or Traders. — The late bankruptcy law of the *United States* (1867) and some of the state insolvency laws make the provision in regard to keeping books of account applicable only to merchants or traders,⁴ but there is no such limitation in the present federal law,⁵ or in the *English* statute.⁶

(7) **Influencing Creditors.** — Some of the statutes provide that no discharge shall be granted if the debtor, or any other person on his account, has influenced the action of any creditor by any pecuniary obligation or consideration.⁷ This provision is not contained in the bankruptcy law of the *United States*,⁸ or in the *English* statute, though the authority given to the court by the last

Bankr. Reg. 302, 9 Fed. Cas. No. 5,116; *In re Carmichael*, 2 Am. Bankr. Rep. 815; *In re McNamara*, 2 Am. Bankr. Rep. 566; *In re Phillips*, 98 Fed. Rep. 844; *In re Shorer*, 96 Fed. Rep. 90; *In re Dews*, 96 Fed. Rep. 181; *In re Stark*, 96 Fed. Rep. 88; *Sellers v. Bell*, 94 Fed. Rep. 801; *In re Holman*, 92 Fed. Rep. 512; *Matter of Lukes*, 71 Cal. 113.

1. **Transactions Before Passage of Law.** — *In re Hirsch*, 2 Am. Bankr. Rep. 715.

2. **Intent Made Material by Statute of United States.** — Act July 1, 1898 (30 U. S. Stat. at L. 544, § 14), par. *b*; *In re Idzall*, 2 Am. Bankr. Rep. 741; *In re Solomon*, 2 Nat. Bankr. Reg. 285, 6 Phila. (Pa.) 481, 25 Leg. Int. (Pa.) 364, 22 Fed. Cas. No. 13,167; *In re Archenbrow*, 12 Nat. Bankr. Reg. 17, 7 Chicago Leg. N. 231, 1 Fed. Cas. No. 505; *Re George*, 1 Lowell (U. S.) 409, 10 Fed. Cas. No. 5,325; *Re Hammond*, 1 Lowell (U. S.) 381, 3 Nat. Bankr. Reg. 273, 11 Fed. Cas. No. 5,999.

3. **Intent Not Material in Some Jurisdictions.** — *England.* — 53 & 54 Vict., c. 71, § 8, par. (3), cl. (b).

Maine. — *Jones v. Portland First Nat. Bank*, 79 Me. 191. See also the various state insolvency laws.

4. **Rule Limited to Merchants or Traders.** — *United States (Act 1867).* — *Matter of Newman*, 3 Ben. (U. S.) 20, 2 Nat. Bankr. Reg. 302, 18 Fed. Cas. No. 10,175; *Matter of Cocks*, 3 Ben. (U. S.) 260, 5 Fed. Cas. No. 2,933; *Matter of Marston*, 5 Ben. (U. S.) 313, 16 Fed. Cas. No. 9,142; *Matter of Garrison*, 5 Ben. (U. S.) 430, 7 Nat. Bankr. Reg. 287, 10 Fed. Cas. No. 5,254; *Matter of Woodward*, 8 Ben. (U. S.) 563, 30 Fed. Cas. No. 18,001; *Matter of Sherwood*, 9 Ben. (U. S.) 66, 17 Nat. Bankr. Reg. 112, 21 Fed. Cas. No. 12,773; *Matter of Odell*, 9 Ben. (U. S.) 209, 17 Nat. Bankr. Reg. 73, 18 Fed. Cas. No. 10,426; *Matter of Chapman*, 9 Ben. (U. S.) 311, 5 Fed. Cas. No. 2,061; *In re Ragsdale*, 7 Biss. (U. S.) 154, 20 Fed. Cas. No. 11,530; *Re Stickney*, 5 Dill. (U. S.) 91, 17 Nat. Bankr. Reg. 305, 23 Fed. Cas. No. 13,439; *In re Sawyer*, 2 Hask. (U. S.) 337, 21 Fed. Cas. No. 12,394; *Re Rogers*, 1 Lowell (U. S.) 423, 3

Nat. Bankr. Reg. 564, 20 Fed. Cas. No. 12,001; *Re Coté*, 2 Lowell (U. S.) 374, 14 Nat. Bankr. Reg. 503, 6 Fed. Cas. No. 3,267; *In re Moss*, 19 Nat. Bankr. Reg. 132, 17 Fed. Cas. No. 9,877; *In re O'Bannon*, 2 Nat. Bankr. Reg. 15, 18 Fed. Cas. No. 10,394; *In re Rugsdale*, 16 Nat. Bankr. Reg. 215, 25 Pittsb. Leg. J. (Pa.) 64, 20 Fed. Cas. No. 12,123; *In re Tyler*, 4 Nat. Bankr. Reg. 104, 24 Fed. Cas. No. 14,305; *Matter of Herdic*, 1 Fed. Rep. 242; *In re Dull*, 4 Fed. Rep. 519; *In re Kimball*, 7 Fed. Rep. 461; *In re Merritt*, 7 Fed. Rep. 853; *In re Bassett*, 8 Fed. Rep. 266.

California. — *Matter of Lukes*, 71 Cal. 113.

Maine. — *Groves v. Kilgore*, 72 Me. 489; *Ex p. Conant*, 77 Me. 275, 52 Am. Rep. 759; *Merryfield's Case*, 80 Me. 233; *In re Tolman*, 83 Me. 353; *Huston v. Goudy*, 90 Me. 128.

See also the various state insolvency laws.

As to What Constitutes a "Merchant" or "Trader," see the definitions of those terms, and the cases cited *supra*, this note.

5. See Act July 1, 1898 (30 U. S. Stat. at L. 544), § 14, par. *b*, enumerating the grounds for refusing a discharge.

6. **The Provision of the English Statute** is "that the bankrupt has omitted to keep such books of account as are usual and proper in the business carried on by him." 53 & 54 Vict., c. 71, § 8, par. (3), cl. (b).

7. **Influencing Creditors.** — *Estudillo v. Meyerstein*, 72 Cal. 319; *Thaxter v. Johnson*, 79 Me. 348; *Decelles v. Bertrand*, 21 L. C. Jur. 291.

8. See Act July 1, 1898 (30 U. S. Stat. at L. 544), § 14, par. *b*, enumerating the grounds for refusing a discharge. Under the late bankruptcy law (1867) it was a ground for refusing a discharge that the bankrupt purchased the consent of a creditor. *In re Palmer*, 2 Hughes (U. S.) 177, 14 Nat. Bankr. Reg. 437, 18 Fed. Cas. No. 10,678; *Re Whitney*, 2 Lowell (U. S.) 455, 14 Nat. Bankr. Reg. 1, 29 Fed. Cas. No. 17,580; *Matter of Mawson*, 2 Ben. (U. S.) 412, 1 Nat. Bankr. Reg. 548, 16 Fed. Cas. No. 9,319; *In re Ekins*, 6 Fed. Rep. 170; *In re Bright*, 9 Fed. Rep. 491.

mentioned statute to refuse a discharge if the conduct of the bankrupt is such as to make that course proper, doubtless includes the conduct of the bankrupt in influencing a creditor not to oppose the discharge.¹

(8) *Refusal to Submit to Examination.* — Under the late bankruptcy law of the *United States* (1867) a discharge in bankruptcy might be denied if the bankrupt refused to submit to an examination,² and the same consequence was visited on the refusal of his wife to be examined, unless he should show that he was unable to procure her attendance.³ The *English* statute does not contain this provision, though the court is authorized to withhold a discharge for any misconduct on the part of the bankrupt.⁴

(9) *Existence of Debts Not Affected by Discharge.* — The fact that the debtor owes debts which would not be affected by the discharge is not made a ground for refusing it. If the party is entitled to his discharge on the facts shown, the court will grant it without any determination as to the debts affected thereby.⁵

(10) *Previous Bankruptcy or Insolvency.* — Sometimes it is provided that no discharge shall be granted to a person who has previously received a discharge in bankruptcy or insolvency.⁶

4. Setting Aside or Impeaching Discharge — *a. DIRECT ATTACK* — (1) *Authority to Set Aside or Annul Discharge.* — The statutes generally provide that on certain grounds a discharge may be revoked, annulled, or set aside in a proceeding brought for the purpose within a time limited,⁷ and it has been held

1. See 53 & 54 Vict., c. 71, § 8, par. (2).

2. *Refusal to Submit to Examination* — Act 1867. — *In re Kingsley*, 16 Nat. Bankr. Reg. 301, 14 Fed. Cas. No. 7,820.

The Present Statute does not contain this provision. Act July 1, 1898 (30 U. S. Stat. at L. 544), § 14, par. *b*.

3. *Refusal of Bankrupt's Wife to Submit to Examination.* — *Matter of Van Tuyl*, 3 Ben. (U. S.) 237, 28 Fed. Cas. No. 16,879.

4. See 53 & 54 Vict., c. 71, § 8, par. 2.

5. *Existence of Debts Not Affected by Discharge.* — *In re Mussey*, 99 Fed. Rep. 71; *In re Tinker*, 99 Fed. Rep. 79; *In re Rhutassel*, 2 Am. Bankr. Reg. 697; *Chapman v. Forsyth*, 2 How. (U. S.) 202; *In re Brown*, 5 Law Rep. 258, 4 Fed. Cas. No. 1,979; *In re Lord*, 5 Law Rep. 258, 15 Fed. Cas. No. 8,501; *In re Tebbetts*, 5 Law Rep. 259, 23 Fed. Cas. No. 13,817; *In re Young*, 5 Law Rep. 128, 30 Fed. Cas. No. 18,147; *In re Parker*, 1 Pa. L. J. 370, 18 Fed. Cas. No. 10,723; *In re Tracy*, 2 Nat. Bankr. Reg. 298, 1 Chicago Leg. N. 123, 24 Fed. Cas. No. 14,124. Compare *Ex p. Wright*, 1 West. L. J. 143, 30 Fed. Cas. No. 18,064.

6. *Previous Bankruptcy or Insolvency.* — The *English* statute provides that the court may refuse to grant a discharge, if the bankrupt has "on any previous occasion been adjudged a bankrupt or made a composition or arrangement with his creditors." 53 & 54 Vict., c. 71, § 8, par. (3), cl. (4); *Ex p. Hodgson*, 3 De G. M. & G. 547.

The *California* statute provides that a discharge in insolvency shall not be granted to a debtor who has had the benefit of the insolvent law within three years next preceding his application. *In re Marsh*, 115 Cal. 230.

The *Massachusetts* statute provides that a discharge shall not be granted to a debtor a second time insolvent, whose assets do not pay fifty per cent. of the claims proved against his estate, unless the assent, in writing, of

three-fourths in value of his creditors who have proved their claims, is filed in the case within six months after the date of the assignment; and that no discharge shall be granted to a debtor a third time insolvent, except that a debtor who has paid all the debts owing by him at the time of his previous insolvency, or who has been voluntarily released therefrom by his creditors, shall be entitled to a discharge in the same manner and with the same effect as if he had not been previously insolvent. *Whitney v. Weed*, 156 Mass. 224; Pub. Stat. Mass., c. 157, § 87.

The bankruptcy law of the *United States* does not forbid the discharge of a person who has received a discharge in a prior proceeding. See Act July 1, 1898 (30 U. S. Stat. at L. 544), § 14, par. *b*, enumerating the grounds for refusing a discharge.

7. *Authority to Set Aside Discharge* — *England.* — 53 & 54 Vict., c. 71, § 8, par. (6).

United States. — Act July 1, 1898 (30 U. S. Stat. at L. 544), § 15.

California. — *Sanborn v. Doe*, 92 Cal. 152, 27 Am. St. Rep. 101; *Wagner v. Superior Ct.*, 100 Cal. 359.

Louisiana. — *Mohr v. Marks*, 39 La. Ann. 575.

Maine. — *Blake v. Clary*, 83 Me. 154.

Maryland. — *Goodwin v. Selby*, 77 Md. 444.

Massachusetts. — *Kempton v. Saunders*, 132 Mass. 466.

New York. — *People v. Stryker*, 24 Barb. (N. Y.) 650.

Jurisdiction. — Under the bankruptcy law of the *United States* a proceeding to set aside a discharge can be brought only in the bankruptcy court.

United States. — *Commercial Bank v. Buckner*, 20 How. (U. S.) 108; *Nicholas v. Murray*, 5 Sawy. (U. S.) 320, 18 Nat. Bankr. Reg. 460, 18 Fed. Cas. No. 10,223; *Allen v. Thompson*, 10 Fed. Rep. 116.

that when the statute prescribes a mode for annulling or setting aside a discharge on designated grounds, such mode is exclusive, and the validity of a discharge cannot be questioned, on the grounds named in the statute, in any proceeding other than that prescribed.¹

(2) *Who May Make Application.* — A proceeding to set aside or annul a discharge may be brought by any creditor or party in interest,² and the fact that a creditor did not oppose the discharge will not prevent him from applying to have it set aside on the statutory grounds, if they were not known to him at the time the discharge was granted,³ or if his failure to oppose the discharge was due to the withdrawal, without notice to him, of objections filed by other creditors, and on which he relied.⁴

(3) *Grounds of Relief.* — The *English* statute does not specify the grounds on which the court may set aside the discharge, but merely provides that it may do so "if it thinks fit."⁵ The bankruptcy law of the *United States* and the state insolvency laws generally authorize the court to set aside a discharge only where it has been procured by fraud,⁶ though some of the statutes allow

Alabama. — *Milhous v. Aicardi*, 51 Ala. 594.

Maine. — *Corey v. Ripley*, 57 Me. 69, 2 Am. Rep. 19.

Massachusetts. — *Fuller v. Pease*, 144 Mass. 399.

Texas. — *Daugherty v. Strauss*, 1 Tex. App. Civ. Cas., § 894.

1. *Statutory Remedy Exclusive* — *Kentucky.* — *Payne v. Able*, 7 Bush (Ky.) 344, 3 Am. Rep. 316.

Maine. — *Corey v. Ripley*, 57 Me. 69, 2 Am. Rep. 19.

Massachusetts. — *Burpee v. Sparhawk*, 108 Mass. 111, 11 Am. Rep. 320; *Way v. Howe*, 108 Mass. 502, 11 Am. Rep. 386; *Black v. Blazo*, 117 Mass. 17.

New Hampshire. — *Parker v. Atwood*, 52 N. H. 181.

New Jersey. — *Linn v. Hamilton*, 34 N. J. L. 305.

New York. — *Ocean Nat. Bank v. Olcott*, 46 N. Y. 12.

Nebraska. — *Seymour v. Street*, 5 Neb. 85.

Ohio. — *Smith v. Ramsey*, 27 Ohio St. 339; *Rayl v. Lapham*, 27 Ohio St. 452.

But see *contra*, *Beardsley v. Hall*, 36 Conn. 270, 4 Am. Rep. 74.

Under the *California Statute* (Act 1895, § 57; Act 1880, § 49), which is almost identical in terms with the Bankruptcy Act of 1867, the practice seems to be uniform in bringing a direct proceeding to set aside a discharge on the grounds specified in the statute. *Wagner v. Superior Ct.*, 100 Cal. 359; *Sanborn v. Doe*, 92 Cal. 152, 27 Am. St. Rep. 101; *Estudillo v. Meyerstein*, 72 Cal. 317. But it is held that an independent action may be brought to set aside a discharge, and that it is not necessary to make a motion for that purpose in the insolvency proceeding, as the statute merely directs that an application shall be made, within a certain time, to the court by which the discharge was granted, but does not say how the application shall be made. *Estudillo v. Meyerstein*, 72 Cal. 317.

Under the *California Insolvency Act* of 1852, a direct proceeding was not necessary. A creditor could impeach the discharge in an action for his debt. *Dean v. Baker*, 64 Cal. 232.

2. *Who May Attack Discharge* — *United States.*

— Act July 1, 1898 (30 U. S. Stat. at L. 544), § 15; *In re Douglass*, 11 Fed. Rep. 403; *In re Bates*, 27 Fed. Rep. 604.

California. — *Wagner v. Superior Ct.*, 100 Cal. 359; *Sanborn v. Doe*, 92 Cal. 152, 27 Am. St. Rep. 101.

Louisiana. — *Mohr v. Marks*, 39 La. Ann. 575.

Maine. — *Blake v. Clary*, 83 Me. 154.

Maryland. — *Goodwin v. Selby*, 7 Md. 444.

New Jersey. — *Browning v. Cooper*, 18 N. J. L. 196.

New York. — *People v. Stryker*, 24 Barb. (N. Y.) 650.

See also the various state insolvency laws.

The Assignee of a Claim Against an Insolvent, under an assignment made after the discharge was granted, cannot maintain a proceeding to set aside the discharge under the *California* statute, giving such right to any creditor of the insolvent "whose debt was proved or provable against the estate." *Sanborn v. Doe*, 92 Cal. 152, 27 Am. St. Rep. 101.

The Fact that a Creditor Opposed the Discharge will not preclude him from afterwards objecting to its validity. *Small v. Wheaton*, 4 E. D. Smith (N. Y.) 306.

3. Failure to Oppose Discharge. — *Re Fowler*, 2 Lowell (U. S.) 122, 9 Fed. Cas. No. 4,999.

If the Grounds of Objection Appear in the Record a creditor, by proving his claim and receiving his dividend without objecting to the discharge, cannot afterwards impeach it. *Wright v. Worthley*, 84 Me. 182; *Goodwin v. Selby*, 77 Md. 444.

4. Withdrawal of Opposition by Other Creditors. — *In re Dietz*, 97 Fed. Rep. 563.

5. 53 & 54 Vict., c. 71, § 8, par. (8)

6. Grounds for Setting Aside Discharge in United States — Fraud. — Act July 1, 1898 (30 U. S. Stat. at L. 544), § 15, providing that the court may revoke a discharge if it appears to have been obtained by the fraud of the bankrupt, knowledge of which has come to the petitioner since the discharge was granted, and that the actual facts did not warrant the discharge.

And see the various state insolvency laws.

Mere Irregularities in the Proceedings will not suffice under the *Maryland* statute. *Waters v. Momeny*, 68 Md. 171.

other grounds.¹

(4) *Time of Application.* — The statutes generally provide that an application to set aside a discharge must be made within a certain time after the discharge was granted.² The *English* statute, however, does not contain this restriction.³

b. COLLATERAL ATTACK — (1) *Liability to Collateral Attack* — (a) *Rule under National Bankruptcy Law.* — The rule that has been laid down under the bankruptcy law of the United States is that, since the statute itself prescribes a mode in which a discharge may be set aside, namely, by a direct application to the bankruptcy court, the remedy so given is exclusive, and a discharge cannot be attacked collaterally in either a federal or a state court,⁴ unless it is absolutely void for want of jurisdiction in the court to grant it.⁵

The Act of 1841 permitted a discharge to be collaterally attacked on certain grounds.⁶

1. *Discharge Set Aside for Inadvertence, Surprise, Excusable Neglect, etc.* — *Longnecker v. His Creditors*, (Cal. 1865) 17 Pac. Rep. 220; *Matter of Wolfe*, 81 Cal. 652.

Under the Bankruptcy Law of 1867, the following matters afforded grounds for setting aside a discharge: concealment and false swearing, *In re Herrick*, 7 Nat. Bankr. Reg. 341, 12 Fed. Cas. No. 6410; *In re Augenstein*, 2 Mac Arthur (D. C.) 322; *In re Rainsford*, 5 Nat. Bankr. Reg. 381, 20 Fed. Cas. No. 11,537; purchasing the consent of a creditor, *Matter of Marshall*, 3 Fed. Rep. 220; *In re Douglass*, 11 Fed. Rep. 403; or any act which would have prevented a discharge, *Ex p. Briggs*, 2 Lowell (U. S.) 389, 4 Fed. Cas. No. 1,808.

2. *Time of Application.* — Act July 1, 1898 (30 U. S. Stat. at L. 544), § 15 (one year after discharge was granted).

The Act of 1867 allowed two years. *Pickett v. McGavick*, 14 Nat. Bankr. Reg. 236, 3 Cent. L. J. 303, 19 Fed. Cas. No. 11,126; *In re Brown*, 19 Nat. Bankr. Reg. 312, 4 Fed. Cas. No. 1,983; *Mall v. Ullrich*, 37 Fed. Rep. 653; *In re Douglass*, 11 Fed. Rep. 403; *Matter of Herzog*, (U. S. Dist. Ct.) 15 Abb. N. Cas. (N. Y.) 179.

Right to Set Aside Discharge Lost by Delay. — *Clatlin v. Lowe*, 157 Mts. 252.

Delay Caused by the Debtor will not affect a creditor's right to have the discharge set aside. *Matter of Wolfe*, 81 Cal. 652.

3. *Time of Application Not Specified by English Statute.* — See 53 & 54 Vict., c. 71, § 8, par. (8).

4. *Discharge under National Bankruptcy Law Not Subject to Collateral Attack* — *United States*. — *Palmer v. Hussey*, 119 U. S. 96.

Alabama. — *Oates v. Parish*, 47 Ala. 157; *Jones v. Knox*, 51 Ala. 367.

Dakota. — *Sawyer v. Rector*, 5 Dak. 110. *Indiana.* — *Blair v. Hanna*, 87 Ind. 298; *Begein v. Brehm*, 123 Ind. 160.

Kentucky. — *Ewell v. Pitman*, (Ky. 1894) 27 S. W. Rep. 870.

Maine. — *Corey v. Ripley*, 57 Me. 69, 2 Am. Rep. 19; *Bailey v. Coriuthers*, 71 Me. 172. Compare *Symonds v. Barnes*, 59 Me. 191, 8 Am. Rep. 418.

Massachusetts. — *Burpee v. Sparhawk*, 108 Mass. 111, 11 Am. Rep. 320; *Way v. Howe*, 108 Mass. 502, 11 Am. Rep. 386; *Black v. Blazo*, 117 Mass. 17.

Michigan. — *Grover v. Fox*, 36 Mich. 453; *Benedict v. Smith*, 48 Mich. 593.

Mississippi. — *Stevens v. Brown*, 49 Miss. 597.

Missouri. — *Brown v. Covenant Mut. L. Ins. Co.*, 86 Mo. 51. But see *Thornton v. Hogan*, 63 Mo. 143.

Nebraska. — *Seymour v. Street*, 5 Neb. 85.

New Hampshire. — *Parker v. Atwood*, 52 N. H. 181; *Marshall v. Sumner*, 59 N. H. 218, 47 Am. Rep. 194.

New Jersey. — *Linn v. Hamilton*, 34 N. J. L. 305.

New York. — *Ocean Nat. Bank v. Olcott*, 46 N. Y. 12; *Dusenbury v. Hoyt*, (N. Y. Super. Ct. Spec. T.) 45 How. Pr. (N. Y.) 147, 36 N. Y. Super Ct. 94. But see *Crouse v. Whittlesey*, 61 Hun (N. Y.) 622, 15 N. Y. Supp. 851, affirmed 138 N. Y. 615; *Poillon v. Lawrence*, 77 N. Y. 207; *Argall v. Jacobs*, 21 Hun (N. Y.) 114, affirmed 87 N. Y. 110, 41 Am. Rep. 357; *Platt v. Parker*, 4 Hun (N. Y.) 135; *Jones v. Le Baron*, 3 Dem. (N. Y.) 37.

Ohio. — *Smith v. Ramsey*, 27 Ohio St. 339; *Rayl v. Lapham*, 27 Ohio St. 452; *Howland v. Carson*, 28 Ohio St. 625; *Brown v. Kroh*, 31 Ohio St. 492.

Pennsylvania. — *Farr v. Evans*, 26 Pittsb. Leg. J. (Pa.) 141. But see *Williams v. Butcher*, 1 W. N. C. (Pa.) 304, 32 Leg. Int. 284.

Rhode Island. — *Pattison v. Wilbur*, 10 R. I. 448.

South Carolina. — *Sinclair v. Smyth*, 1 Brev. (S. Car.) 402.

Tennessee. — *Morris v. Creed*, 11 Heisk. (Tenn.) 155; *Hudson v. Bigham*, 12 Heisk. (Tenn.) 58.

Texas. — *Alston v. Robinett*, 37 Tex. 56; *Brown v. Causey*, 56 Tex. 340.

See *contra*, *Beardsley v. Hall*, 36 Conn. 270, 4 Am. Rep. 74; *Knabe v. Hayes*, 71 N. Car. 109; *Batchelder v. Low*, 43 Vt. 662, 5 Am. Rep. 311.

5. *Void Discharge* — *Want of Jurisdiction.* — *Alabama.* — *Stiles v. Lay*, 9 Ala. 795.

Iowa. — *Smith v. Engle*, 44 Iowa 265.

Kentucky. — *Landy v. Cummings*, 5 Ky. L. Rep. 511.

Maine. — *Wells v. Brackett*, 30 Me. 61.

New York. — *Poillon v. Lawrence*, 77 N. Y. 207, reversing 43 N. Y. Super. Ct. 385.

Tennessee. — *Hennessee v. Mills*, 1 Baxt. (Tenn.) 38.

But see *Reed v. Vaughan*, 15 Mo. 137, 55 Am. Dec. 133.

6. *Collateral Attack under Act 1841* — *United States.* — *Fellows v. Hall*, 3 McLean (U. S.) 487, 8 Fed. Cas. No. 4,723; *Matter of Bellows*, 3 Story (U. S.) 428, 3 Fed. Cas. No. 1,278.

(b) *Rule under State Insolvency Laws.* — The state insolvency laws generally allow a discharge to be collaterally attacked.¹

(2) *Grounds of Attack.* — Under the statutes permitting the collateral attack of a discharge, it is a ground of impeachment that the debtor has committed any fraud,² influenced the action of any creditor at any stage of the proceeding by any pecuniary consideration or obligation,³ given a preference to any creditor,⁴ or that the discharge was not granted in accordance with the requirements of the statute;⁵ but mere irregularities in the proceedings are not grounds for setting aside a discharge.⁶ The omission of property or debts from the schedule is also a ground for avoiding a discharge, if it is done with

Alabama. — *Mabry v. Herndon*, 8 Ala. 848; *Fox v. Paine*, 10 Ala. 523; *Gilbert v. Bradford*, 15 Ala. 769; *Rugely v. Robinson*, 19 Ala. 404; *Pearsall v. McCartney*, 28 Ala. 110.

Delaware. — *Randall v. Sutton*, 2 Houst. (Del.) 510.

Georgia. — *Bond v. Baldwin*, 9 Ga. 9.

Kentucky. — *Dupuy v. Harris*, 6 B. Mon. (Ky.) 534.

Louisiana. — *Selby v. Gibson*, 3 La. Ann. 209; *Drake v. Jones*, 3 La. Ann. 638; *Beach v. Miller*, 15 La. Ann. 601.

Maine. — *Crooker v. Trevett*, 28 Me. 271; *Humphreys v. Swett*, 31 Me. 192.

Massachusetts. — *Burnside v. Brigham*, 8 Met. (Mass.) 75; *Beekman v. Wilson*, 9 Met. (Mass.) 434; *Goward v. Dunbar*, 4 Cush. (Mass.) 500; *Swan v. Littlefield*, 4 Cush. (Mass.) 574.

Mississippi. — *Abbey v. Commercial Bank*, 34 Miss. 571, 69 Am. Dec. 401; *Edwards v. Gibbs*, 39 Miss. 166.

Missouri. — *Reed v. Vaughan*, 15 Mo. 137, 55 Am. Dec. 133.

New Hampshire. — *Morrison v. Woolson*, 23 N. H. 11, 29 N. H. 510; *Morse v. Presby*, 25 N. H. 299; *Gove v. Lawrence*, 26 N. H. 484.

New Jersey. — *Price v. Bray*, 21 N. J. L. 13.

New York. — *Hubbell v. Cramp*, 11 Paige (N. Y.) 310; *Brereton v. Hull*, 1 Den. (N. Y.) 75; *Chamberlin v. Griggs*, 3 Den. (N. Y.) 9; *Penniman v. Norton*, 1 Barb. Ch. (N. Y.) 246; *Alcott v. Avery*, 1 Barb. Ch. (N. Y.) 347; *Dresser v. Brooks*, 3 Barb. (N. Y.) 429; *Caryl v. Russell*, 13 N. Y. 194, reversing 18 Barb. (N. Y.) 429. *Compare* *North American F. Ins. Co. v. Graham*, 5 Sandf. (N. Y.) 197.

North Carolina. — *Sanders v. Smallwood*, 8 Ired. L. (30 N. Car.) 125; *State v. Bethune*, 8 Ired. L. (30 N. Car.) 139.

Ohio. — *Suydam v. Walker*, 16 Ohio 122.

Pennsylvania. — *King v. Dietz*, 12 Pa. St. 156; *Richards v. Nixon*, 20 Pa. St. 19; *Peterson v. Speer*, 29 Pa. St. 478.

South Carolina. — *Brown v. Rebb*, 1 Rich. L. (S. Car.) 374.

Tennessee. — *Conner v. Gupton*, 10 Humph. (Tenn.) 320, 11 Humph. (Tenn.) 287.

Vermont. — *Downer v. Rowell*, 25 Vt. 336.

Virginia. — *Jichenor v. Allen*, 13 Gratt. (Va.) 15.

1. Collateral Attack under State Insolvency Laws. — *Alabama.* — *Morrow v. Parkman*, 14 Ala. 769.

California. — *Dean v. Baker*, 64 Cal. 232; *Estudillo v. Meyerstein*, 72 Cal. 319; *Pope v. Kirchner*, 77 Cal. 152.

Massachusetts. — *Whiton v. Nichols*, 3 Allen (Mass.) 583; *Pettee v. Coggeshall*, 5 Gray (Mass.) 51, *Phelps v. Thomas*, 6 Gray (Mass.)

327; *Greenough v. Whittemore*, 8 Gray (Mass.) 193; *Sanderson v. Taylor*, 1 Cush. (Mass.) 87; *Gates v. Mack*, 4 Cush. (Mass.) 48; *Williams v. Robinson*, 4 Cush. (Mass.) 529; *Thompson v. Stone*, 8 Cush. (Mass.) 103; *Williams v. Coggeshall*, 8 Cush. (Mass.) 377, 11 Cush. (Mass.) 442; *Cox v. Austin*, 11 Cush. (Mass.) 32; *Blodgett v. Hildreth*, 11 Cush. (Mass.) 311; *Blanchard v. Young*, 11 Cush. (Mass.) 341; *Journey v. Gardner*, 11 Cush. (Mass.) 355; *Goodhue v. Hitchcock*, 8 Met. (Mass.) 62; *Atkins v. Spear*, 8 Met. (Mass.) 490; *Heim v. Chapman*, 171 Mass. 347.

New Jersey. — *Stephens v. Tucker*, 14 N. J. L. 600.

New York. — *Davis v. Reynolds*, 10 Johns. (N. Y.) 442; *Matter of Hurst*, 7 Wend. (N. Y.) 239; *Muzzy v. Whitney*, 10 Johns. (N. Y.) 226; *Pratt v. Chase*, (Supm. Ct. Gen. T.) 19 Abb. Pr. (N. Y.) 150, 29 How. Pr. (N. Y.) 296; *Dresser v. Shufeldt*, (Supm. Ct. Spec. T.) 7 How. Pr. (N. Y.) 85; *Cramer v. —*, 3 Sandf. (N. Y.) 700; *American Flask, etc., Co. v. Son*, (N. Y. Super. Ct. Spec. T.) 3 Abb. Pr. N. S. (N. Y.) 333; *Emberston's Case*, (N. Y. Super. Ct.) 16 Abb. Pr. (N. Y.) 457; *Merry v. Sweet*, 43 Barb. (N. Y.) 475; *Morewood v. Hollister*, 6 N. Y. 309.

Ohio. — *Utica Bank v. Card*, 8 Ohio 519.

Pennsylvania. — *Senior's Case*, 2 Ashm. (Pa.) 118; *Throop v. Griffin*, 180 Pa. St. 452.

Washington. — *Rosenthal v. Schneider*, 2 Wash. Ter. 144.

Wisconsin. — *Read v. Bennett*, 23 Wis. 372.

2. Fraud. — *Dean v. Baker*, 64 Cal. 232; *Dresser v. Shufeldt*, (Supm. Ct. Spec. T.) 7 How. Pr. (N. Y.) 85; *Cramer v. —*, 3 Sanuf. (N. Y.) 700; *Throop v. Griffin*, 180 Pa. St. 452.

3. Influencing Action of Creditor. — *Estudillo v. Meyerstein*, 72 Cal. 319; *Phelps v. Thomas*, 6 Gray (Mass.) 327.

4. Preference of Creditors. — *Williams v. Coggeshall*, 8 Cush. (Mass.) 377; *Thompson v. Stone*, 8 Cush. (Mass.) 103; *Blodgett v. Hildreth*, 11 Cush. (Mass.) 311; *Goodhue v. Hitchcock*, 8 Met. (Mass.) 62; *Matter of Hurst*, 7 Wend. (N. Y.) 239; *Morewood v. Hollister*, 6 N. Y. 309.

5. Noncompliance with Statute. — *Greenough v. Whittemore*, 8 Gray (Mass.) 193; *Sanderson v. Taylor*, 1 Cush. (Mass.) 87; *Williams v. Robinson*, 4 Cush. (Mass.) 529; *Cox v. Austin*, 11 Cush. (Mass.) 32; *Merry v. Sweet*, 43 Barb. (N. Y.) 475.

6. Irregularities in Proceedings. — *Blanchard v. Young*, 11 Cush. (Mass.) 341; *Pratt v. Chase*, (Supm. Ct. Gen. T.) 19 Abb. Pr. (N. Y.) 150, 29 How. Pr. (N. Y.) 296; *American Flask, etc., Co. v. Son*, (N. Y. Super. Ct. Spec. T.) 3 Abb. Pr. N. S. (N. Y.) 333.

fraudulent intent,¹ but such omissions are not available in the absence of such intent.²

XVI. OFFENSES AGAINST INSOLVENCY AND BANKRUPTCY LAWS — 1. Creation of Offenses. — In order to effectuate the purpose, common to all bankruptcy and insolvency laws, of realizing to the best advantage on the debtor's estate, and making a proportionate distribution thereof among his *bona fide* creditors, certain acts or conduct on the part of the debtor, the officers charged with the administration of the law, or third persons, done with the intent of defeating the purpose of the law, or for the personal benefit of the wrongdoer, at the expense of the creditors, are declared to be offenses punishable by fine or imprisonment, or both.³

2. Constitutionality of Penal Provisions. — The power of Congress to enforce, by suitable penalties, all legislation necessary or proper to the execution of the powers with which it is intrusted, undoubtedly authorizes it to prescribe penalties for violation of the provisions of the bankruptcy law;⁴ but a provision making it an offense to obtain money or goods under false pretenses before becoming a bankrupt is unconstitutional, where the statute is not limited in its application to acts committed in contemplation of bankruptcy.⁵

3. Jurisdiction. — The bankruptcy law of the United States gives concurrent jurisdiction of offenses against it to the district courts and the circuit courts of the United States.⁶ Where jurisdiction is not specially conferred by the statute, as is generally the case with the insolvency laws of the states, the offenses are to be prosecuted in those courts having general criminal jurisdiction.⁷

4. Limitations. — The statute sometimes prescribed a special limitation for the prosecution of offenses created thereby. Under the present bankruptcy law of the United States the period is one year after the commission of the offense.⁸

XVII. INSOLVENT DECEDENTS' ESTATES — Statutory Provisions. — In several

1. Fraudulent Omissions from Inventory. — *Heim v. Chapman*, 171 Mass. 347.

2. Omissions without Fraudulent Intent. — *Pope v. Kirchner*, 77 Cal. 152, *Whiton v. Nichols*, 3 Allen (Mass.) 583; *Williams v. Coggeshall*, 11 Cush. (Mass.) 442.

3. Creation of Offenses — England. — 32 & 33 Vict., c. 62, § 11 *et seq.*; 46 & 47 Vict., c. 52, § 31; 53 & 54 Vict., c. 71, § 8, par. (2).

United States. — Act July 1, 1898 (30 U. S. Stat. at L. 544), § 29; *U. S. v. Nichols*, 4 McLean (U. S.) 23, 27 Fed. Cas. No. 15,880; *U. S. v. Smith*, 13 Nat. Bankr. Reg. 61, 27 Fed. Cas. No. 16,339; *U. S. v. Bayer*, 13 Nat. Bankr. Reg. 88, 24 Fed. Cas. No. 14,548; *U. S. v. Clark*, 1 Lowell (U. S.) 402, 4 Nat. Bankr. Reg. 59, 25 Fed. Cas. No. 14,806; *U. S. v. Thomas*, 7 Nat. Bankr. Reg. 188; *U. S. v. Swett*, 2 Hask. (U. S.) 310, 28 Fed. Cas. No. 16,427; *U. S. v. Frank*, 2 Biss. (U. S.) 263, 25 Fed. Cas. No. 15,159; *U. S. v. Geary*, 4 Nat. Bankr. Reg. 534, 25 Fed. Cas. No. 15,105a; *U. S. v. Penn*, 13 Nat. Bankr. Reg. 464, 27 Fed. Cas. No. 16,025; *U. S. v. Bayer*, 4 Dill. (U. S.) 407, 13 Nat. Bankr. Reg. 400, 24 Fed. Cas. No. 14,547.

Louisiana. — *Leland v. Rose*, 11 La. Ann. 69; *Marx v. His Creditors*, 48 La. Ann. 1340.

And see the various state insolvency laws.

Perjury cannot be predicated on the verification of a petition, schedule, etc., before an officer who is not authorized to administer oaths in bankruptcy proceedings. *U. S. v.*

Deming, 4 McLean (U. S.) 3, 25 Fed. Cas. No. 14,945.

Acts Done under the Advice of Counsel, and without fraudulent intent, are not criminal. *U. S. v. Conner*, 3 McLean (U. S.) 573, 25 Fed. Cas. No. 14,847.

4. Constitutionality of Penal Provisions. — *U. S. v. Fox*, 95 U. S. 670.

5. Acts Not Connected with Bankruptcy. — *U. S. v. Fox*, 95 U. S. 670, *overruling U. S. v. Pusey*, 6 Nat. Bankr. Reg. 284, 27 Fed. Cas. No. 16,098. And see *U. S. v. Clark*, 1 Lowell (U. S.) 402, 4 Nat. Bankr. Reg. 59, 25 Fed. Cas. No. 14,806.

6. Jurisdiction under Bankruptcy Law of United States. — Act July 1, 1898, § 2, cl. (4), and § 23, par. c.

Under the Act of 1800 it was held that perjury committed in bankruptcy proceedings could not be prosecuted under the general criminal law, and was not indictable at common law. *Anonymous*, 1 Wash. (U. S.) 84, 1 Fed. Cas. No. 475.

Jurisdiction of State Courts. — An act may be an offense against the bankruptcy law, and the same time punishable under a state law. *Com. v. Walker*, 108 Mass. 309; *State v. Thompson*, 58 N. H. 270.

7. Jurisdiction under State Insolvency Laws. — See the various local statutes.

8. Limitations. — Act July 1, 1898 (30 U. S. Stat. at L. 544), § 29, par. d. See also the various state insolvency laws.

states the settlement of the estates of decedents in case of insolvency is specially provided for by statute.¹

Declaration of Insolvency. — In order to bring an estate within these special statutory provisions, it must be declared insolvent by the court of probate at the instance of or on information furnished by the personal representative or the creditors of the decedent.² The payment of claims in full before the time for the presentation thereof has elapsed does not prevent the administrator from afterwards having the estate declared insolvent.³

Effect of Declaration of Insolvency. — When an estate is declared insolvent, exclusive jurisdiction of claims against it is given to the probate court, and no action at law can be maintained against the executor or administrator by a creditor, except for the *pro rata* share of his claim, which may be decreed to him in the proceeding.⁴ The estate must then be administered according to statute, though it afterwards proves to be solvent, unless the statute provides otherwise.⁵ Under some statutes the functions of the administrator cease on the declaration of insolvency, and a new administrator is to be appointed, or commissioners are appointed to pass on claims against the estate.⁶

1. See the statutes of the following states: *Alabama, Connecticut, Florida, Indiana, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Mississippi, New Hampshire, New Jersey, Ohio, Pennsylvania, Rhode Island, Tennessee, Vermont*, and the cases cited in this section.

2. **Suggestion or Declaration of Insolvency** — *Alabama*. — Feagan v. Kendall, 43 Ala. 628. *Florida*. — Holliday v. McKinne, 22 Fla. 153.

Maine. — Longfellow v. Patrick, 25 Me. 18. *Massachusetts*. — Hunt v. Whitney, 4 Mass. 620; Walker v. Hill, 17 Mass. 386.

Michigan. — Quackenbush v. Campbell, Walk. (Mich.) 525.

Mississippi. — Neibert v. Withers, Smed. & M. Ch. (Miss.) 599; Yandell v. Pugh, 53 Miss. 295.

New Hampshire. — Edes v. Durkee, 8 N. H. 460; Barker v. Wendell, 17 N. H. 159.

Tennessee. — Gilchrist v. Cannon, 1 Coldw. (Tenn.) 581; Frazier v. Pankey, 1 Swan (Tenn.) 75.

See also the various local statutes.

3. **Recovery of Payments.** — If an administrator pays a claim under an agreement that the creditor will "hold the administrator harmless, in case said estate, on settlement, does not pay enough to cover the above amount," it is not an absolute payment or an admission that the claim is just; and if the estate is declared insolvent and the claim is rejected for want of presentation in time to the administrator, he may recover back the money so paid. *Gorman v. Nairne*, 12 Ala. 338. See also *Bliss v. Lee*, 17 Pick. (Mass.) 53; *Paine v. Drury*, 19 Pick. (Mass.) 400.

4. **Exclusive Jurisdiction of Court of Probate** — *Alabama*. — Colbert v. Chandler, Minor (Ala.) 254; Melone v. Gaines, Minor (Ala.) 317; Woods v. McCann, 3 Ala. 61; Hale v. Cummings, 3 Ala. 398; Edwards v. Gibbs, 11 Ala. 292; Watts v. Gayle, 20 Ala. 817; Ray v. Thompson, 43 Ala. 434, 94 Am. Dec. 696; McGehee v. Lomax, 49 Ala. 131; Lambert v. Mallett, 50 Ala. 73; Balkum v. Harper, 50 Ala. 429; Thames v. Herbert, 61 Ala. 340; Thornton v. Moore, 61 Ala. 347.

Maine. — Dillingham v. Weston, 21 Me. 263; Severance v. Hammatt, 28 Me. 511; Pattee v.

Lowe, 36 Me. 138; Thayer v. Comstock 39 Me. 140.

Massachusetts. — Todd v. Bradford, 17 Mass. 567.

New Hampshire. — Ticknor v. Harris, 14 N. H. 272, 40 Am. Dec. 186.

Vermont. — Probate Ct. v. Vanduzer, 13 Vt. 135.

The Jurisdiction of the Court Attaches on the report of insolvency made by the administrator. *Hine v. Hussey*, 45 Ala. 496.

5. **Solvency Appearing After Declaration of Insolvency.** — Walker v. Newton, 85 Me. 458.

The Administration of an Estate as Insolvent is valid and binding, though it proves to have been solvent in fact. *Ticknor v. Harris*, 14 N. H. 272, 40 Am. Dec. 186.

The Heirs are not affected by a declaration of insolvency. It simply declares the status of the estate, as between creditors and the administrator. *McGuire v. Shelby*, 20 Ala. 456; *State Bank v. Ellis*, 30 Ala. 478; *Grant v. Lloyd*, 12 Smed. & M. (Miss.) 191; *Snodgrass v. Andrews*, 30 Miss. 472, 64 Am. Dec. 169; *Plumer v. Plumer*, 30 N. H. 558.

6. **Termination of Administrator's Authority.** — Code Ala. 1896, § 290 *et seq.* See *Paine v. Skinner*, 8 Ohio 159.

In Connecticut an executor is not precluded from paying debts, merely because the estate is represented insolvent and the commissioners have not made their report, though it may be that he acts at his peril. *Johnson v. Blackman*, 11 Conn. 355.

In Louisiana the administrator remains in charge of the estate, but he represents the creditors, and not the deceased. *Judson v. Connolly*, 4 La. Ann. 169.

Payment of Expenses of Last Illness and Funeral. — After an estate is reported insolvent, the only vouchers for money paid out which can be allowed on settlement with the administrator are, for the "last sickness and necessary funeral expenses." *Shadden v. Sterling*, 23 Ala. 518.

Appointment and Powers of Commissioners — *Connecticut*. — Bailey v. Bussing, 37 Conn. 349; *Stoddard v. Moulthrop*, 9 Conn. 502.

Maine. — Flitner v. Hanley, 19 Me. 261; *Ludwig v. Blackmon*, 24 Me. 25.

Failure or Neglect to Suggest Insolvency. — The administrator is chargeable with knowledge of the condition of the estate as soon as the time for the presentation of claims against it has elapsed, and if he neglects to make such suggestion when he knows that the estate is insolvent, the allowance of a claim will render him liable for the amount, where he opposed the allowance solely on the ground that the claim was invalid.¹

The Procedure in the settlement of insolvent estates under the statute is fully treated in another place.²

INSPECT — INSPECTION — INSPECTION LAWS. — To inspect means to look upon; to examine for the purpose of determining quality, detecting what is wrong, and the like; to view narrowly and critically; as, to inspect conduct.³ Inspection is the examination of certain articles made by law subject to such examination, so that they may be declared fit for commerce; an examination of an article to determine its fitness for a given purpose.⁴

Massachusetts. — *Stanwood v. Owen*, 5 Allen (Mass.) 439.

Michigan. — *Fish v. Morse*, 8 Mich. 34; *Clark v. Davis*, 32 Mich. 154; *Shurbun v. Hooper*, 40 Mich. 503.

New Hampshire. — *Harris v. Parker*, 66 N. H. 324.

Pennsylvania. — *Com. v. Anthony*, 4 W. & S. (Pa.) 511.

Who May Act as Commissioners. — A creditor cannot be one of the commissioners upon an insolvent estate. *Barker v. Wales*, 1 Root (Conn.) 265; *Lyon v. Lyon*, 2 Root (Conn.) 203; *Fairbanks's Case*, 2 Root (Conn.) 386; *Preston v. Cutter*, 64 N. H. 461.

1. Failure to Suggest Insolvency — Liability of Administrator. — *Clark v. Knox*, 70 Ala. 607, 45 Am. Rep. 93; *Builer v. Ricker*, 6 Me. 268; *Newcomb v. Goss*, 1 Met. (Mass.) 333; *Woodward v. Fisher*, 11 Smed. & M. (Miss.) 303.

2. See the title SETTLEMENT OF DECEDENTS' ESTATES, 19 ENCYC. OF PL. AND PR., p. 986 *et seq.*

3. *Fairchild v. Ada County*, (Idaho, 1898) 55 Pac. Rep. 655, in which case it was held that an autopsy might come under the word *inspection*, where the statute provided that the coroner might cause the body of a deceased person to be *inspected* by a physician.

Inspection of Documents. — See the title DISCOVERY, PRODUCTION, AND INSPECTION, 6 ENCYC. OF PL. AND PR. 728; and see in this work the titles DOCUMENTARY EVIDENCE, vol. 9, p. 877; PRODUCTION OF DOCUMENTS.

Water Main. (See also the title MUNICIPAL CORPORATIONS.) — In an action against a city for damages for the bursting of a water main the trial court instructed the jury that in order to recover the plaintiff must show by preponderance of evidence that the defects in the pipes were known to the defendant corporation or were of such a character "as to have been readily ascertained upon reasonable *inspection* thereof." The appellate court said: "It is claimed that the instruction should have gone to the effect that tests should have been used to ascertain the defects in the pipe. We think this objection is far-fetched, and that the appellant has not placed a proper or ordinary construction upon the language used by the court. *Inspection* is not necessarily confined to optical observation, but is ordinarily understood to embrace tests and examina-

tions. The definition cited from Webster by the appellant, namely, 'to look upon; to examine for the purpose of determining quality and detecting what is wrong and the like,' seems to us sufficient to show the failure of the contention, and we think the ordinarily accepted meaning of the word *inspection* is fully as broad and comprehensive as the definition given by the lexicographer above. The name 'inspector' is given to a person whose duty it is to make tests of machinery, and it is a generally recognized fact that when an officer or agent of any kind is instructed to *inspect*, the duty goes beyond a mere survey of the eye, and implies such tests as are necessary to ascertain the quality of the thing *inspected*, whatever it may be; and we have no doubt that the jury in this case understood that a reasonable *inspection* meant a reasonable examination." *Fidelity, etc., Co. v. Seattle*, 16 Wash. 445.

Inspection — Copying. — In *People v. General Committee*, 25 N. Y. App. Div. 347, it was held that a member of the Republican organization of Erie county, in the state of New York, was entitled to make a copy of enrolment books containing the names of the members of the party qualified to vote at the next primaries, that being included in the right to an *inspection*, where in so doing he was not taking unnecessary time or interfering with the right of any other member of the party to examine such books.

4. Inspection Laws. (See also the titles ADULTERATION, vol. 1, p. 738; BOARDS OF HEALTH, vol. 4, p. 596; INTOXICATING LIQUORS; MUNICIPAL CORPORATIONS; OCCUPATION, BUSINESS, AND PRIVILEGE TAXES; PUBLIC OFFICERS; REVENUE LAWS; TAXATION.) — In *People v. Compagnie Generale Transatlantique*, 10 Fed. Rep. 362, it was said: "In Burrill's Law Dictionary *inspection* is defined thus: 'Official view or examination of commodities or manufactures, to ascertain their quality, under some statute requiring it.' In Bouvier's Law Dictionary this is the definition: 'The examination of certain articles made by law subject to such examination, so that they may be declared fit for commerce.' In *Clintman v. Northrop*, 8 Cow. (N. Y.) 45, the *inspection laws* of New York are said to be laws 'to protect the community, so far as they apply to domestic sales, from fraud and impositions,

and, in relation to articles designed for exportation, to preserve the character and reputation of the state in foreign markets.' "

The Constitution of *Alabama* provided that no state office should be continued or created for the *inspection* of merchandise, manufactures, etc. In construing this provision in *State v. McGough*, 118 Ala. 159, the court said: "The word *inspection* has been defined by the Supreme Court of the United States — as accurately, perhaps, as may be elsewhere found — to be 'something which can be accomplished by looking at or weighing or measuring the thing to be *inspected*, or applying to it at once some crucial test. When testimony or evidence is to be taken and examined, it is not *inspection* in any sense whatever.' *People v. Compagnie Generale Transatlantique*, 107 U. S. 59. Laws for the purpose are applied to articles of domestic produce and manufacture for domestic use, to those intended for exportation as well as those imported for consumption at home. *Clintsmen v. Northrop*, 8 Cow. (N. Y.) 46; 1 Story Const., § 1017; 11 AM. AND ENG. ENCYC. OF LAW [1st ed.] 234, note 11."

In *Neilson v. Garza*, 2 Woods (U. S.) 287, 17

Fed. Cas. No. 10,091, Bradley, J., said: "Bouvier defines *inspection* as the examination of certain articles made by law subject to such examination, so that they may be declared fit for commerce. Law Dict., *verb. Inspection*. The removal or destruction of unsound articles is undoubtedly, says Chief Justice Marshall, an exercise of that power. *Brown v. Maryland*, 12 Wheat. (U. S.) 419; Story on the Const., § 1024. 'The object of the *inspection laws*,' says Justice Sutherland, 'is to protect the community, so far as they apply to domestic sales, from frauds and impositions; and, in relation to articles designed for exportation, to preserve the character and reputation of the state in foreign markets.' *Clintsmen v. Northrop*, 8 Cow. (N. Y.) 46."

Same — Laws — Constitutionality. — The constitutionality of *inspection laws* will be fully treated in the titles INTERSTATE COMMERCE; POLICE POWER. See also *Gibbons v. Ogden*, 9 Wheat. (U. S.) 203; *Brown v. Maryland*, 12 Wheat. (U. S.) 419; *Turner v. Maryland*, 107 U. S. 38; *Minnesota v. Barber*, 136 U. S. 313; *Crutcher v. Kentucky*, 141 U. S. 47; *Voight v. Wright*, 141 U. S. 62; *Patapsco Guano Co. v. North Carolina Board of Agriculture*, 171 U. S. 345.

INSPECTION AND PHYSICAL EXAMINATION.

BY D. MOUNTJOY CLOUD.

I. TRIAL BY INSPECTION UNDER EARLY ENGLISH PRACTICE, 810.

II. IN ACTIONS FOR PERSONAL INJURIES, 811.

1. *When Not Authorized by Statute*, 811.
 - a. *View that No Power Exists to Compel Submission to Examination*, 811.
 - b. *View that Courts May Compel Submission to Examination*, 812.
2. *Statutory Authorization to Compel Submission to Examination*, 813.
3. *Discretion of Court as to Making Order for Examination*, 813.
4. *Application for Order for Examination*, 814.
5. *What Must Be Shown to Entitle Party to Order*, 814.
6. *Selection, Qualification, Number, and Status of Examiners*, 815.
7. *Manner of Conducting Examination*, 816.
8. *Place of Examination*, 816.
9. *Expenses of Examination*, 816.
10. *Effect of Refusal to Obey Order for Examination*, 816.
11. *Exhibition of Injuries to Jury*, 817.
 - a. *Voluntary Exhibition*, 817.
 - b. *Compulsory Exhibition*, 817.

III. IN CRIMINAL PROSECUTIONS, 818.

1. *Examination and Inspection of Defendant's Person*, 818.
2. *Examination and Inspection of Person of Witness*, 818.
3. *Determination of Age by Inspection*, 818.
4. *Inspection of Infant in Filiation Cases*, 819.

IV. IN PROCEEDINGS FOR DIVORCE, 819.

1. *Power of Courts to Order Inspection and Examination*, 819.
2. *How Examination Conducted*, 819.
3. *Methods of Enforcing Order*, 820.
4. *Expenses of Examination*, 820.

V. WRIT DE VENTRE INSPICIENDO, 820.

CROSS-REFERENCES.

For matters of *PROCEDURE* see the title *PERSONAL INJURIES*, 16 *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*, 371.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject see the following titles in this work: *ASSAULT AND BATTERY*, vol. 2, p. 952; *DAMAGES*, vol. 8, p. 537; *DIVORCE*, vol. 9, p. 723; *EVIDENCE*, vol. 11, p. 484; *EXPERIMENTS (IN EVIDENCE)*, vol. 12, p. 398; *RAPE; SEDUCTION*.

I. TRIAL BY INSPECTION UNDER EARLY ENGLISH PRACTICE.—In former times the English courts of common law might, if they saw fit, try by inspection or examination, without the aid of a jury, the question of the infancy or the identity of a party; or, on an appeal of mayhem, the issue of mayhem or no mayhem; and in an action of trespass for mayhem, or for an atrocious battery, might, after a verdict for the plaintiff, and on his motion, and upon their own inspection of the wound, *super visum vulneris*, increase the damages at their discretion. In each of those exceptional cases it was not thought necessary to summon a jury to decide it, because it was considered that the

fact, from its nature, must be evident to the court.¹ This, as a distinct method of trial, has long been disused.² Other exceptional instances in which the English courts recognize the right of inspection and physical examination will be found in other sections of this article.³

II. IN ACTIONS FOR PERSONAL INJURIES — 1. When Not Authorized by Statute — *a. VIEW THAT NO POWER EXISTS TO COMPEL SUBMISSION TO EXAMINATION — In England.* — So far as the books show, no order to inspect the body of a party in a personal action appears to have been made or even moved for in any English courts of common law at any period of their history.⁴

In the United States. — In the United States the decisions are very conflicting on the question whether a court has the power to compel the suitor in an action for personal injuries to submit his person to an examination and inspection at the instance of the opposite party where there is no statute expressly authorizing this practice, and decisions even in the same states are not always harmonious. In the federal courts it is well settled that a court has no power at any time or under any circumstances to compel a plaintiff in an action for personal injuries to submit his person to a physical examination;⁵ and the same rule has been laid down in some of the state courts.⁶ It has also been held that the introduction by the plaintiff, upon the trial of an action for personal injuries, of the testimony of expert witnesses who had examined him

1. In What Cases Allowable at Common Law. — Gray, J., in *Union Pac. R. Co. v. Botsford*, 141 U. S. 250; 3 Black. Com. 331-333.

2. Abb. L. Dict.

3. See *infra*, this title, *In Proceedings for Divorce*, and *Writ de Ventre Inspiciendo*.

4. Compulsory Examination in Personal Action Not Permissible in England. — *Union Pac. R. Co. v. Botsford*, 141 U. S. 253.

5. No Authority to Direct Compulsory Examination. — *Illinois Cent. R. Co. v. Griffin*, 80 Fed. Rep. 278; *Union Pac. R. Co. v. Botsford*, 141 U. S. 250.

Unreasonable Refusal to Show Injuries. — Though it is denied that the court has power to compel a party to show his injuries, it is held that if he unreasonably refuses to do so when requested, that fact may be considered by the jury as bearing upon his good faith, as in any other case of the party declining to produce the best evidence in his power. *Union Pac. R. Co. v. Botsford*, 141 U. S. 255; *Freepport v. Isbell*, 93 Ill. 381.

6. Delaware. — *Mills v. Wilmington City R. Co.*, 1 Marv. (Del.) 269.

Illinois. — *Parker v. Enslow*, 102 Ill. 272, 40 Am. Rep. 583; *Chicago, etc., R. Co. v. Holland*, 18 Ill. App. 423; *Joliet St. R. Co. v. Call*, 143 Ill. 178; *Peoria, etc., R. Co. v. Rice*, 144 Ill. 227. See also *Chicago, etc., R. Co. v. Reith*, 65 Ill. App. 462, in which case the question was not decided, and it was held that, conceding that the court had power to order an examination, its exercise of such power would always be discretionary.

Indiana. — *Pennsylvania Co. v. Newmeyer*, 129 Ind. 402, *criticising* a dictum to the contrary in *Hess v. Lowrey*, 122 Ind. 225, 17 Am. St. Rep. 355, and *explaining* *Terre Haute, etc., R. Co. v. Brunker*, 128 Ind. 512, in which case the court, without expressly deciding that the court had power to order a physical examination, held that the application was made too late. See also *Kern v. Bridwell*, 119 Ind. 227, 12 Am. St. Rep. 409, where the court, without expressly deciding that a physical examination

could not be ordered in any case, held that where, in an action by an unmarried woman for slander, it was alleged that the defendant had spoken of the plaintiff that she was a whore, and had become pregnant, and had suffered an abortion to be procured upon her, the defendant was not entitled, under a plea of justification, to an order requiring the plaintiff to submit her person to an examination by medical experts.

New York. — *McQuigan v. Delaware, etc., R. Co.*, 129 N. Y. 50; *Elfers v. Woolley*, 116 N. Y. 297; *Roberts v. Ogdensburgh, etc., R. Co.*, 29 Hun (N. Y.) 154; *Neuman v. Third Ave. R. Co.*, 50 N. Y. Super. Ct. 412; *McSwyny v. Broadway, etc., R. Co.*, (Supm. Ct. Gen. T.) 27 N. Y. St. Rep. 363; *Cole v. Fall Brook Coal Co.*, 159 N. Y. 59.

The early New York decisions to the contrary, *Walsh v. Sayre*, (N. Y. Super. Ct. Spec. T.) 52 How. Pr. (N. Y.) 334, and *Shaw v. Van Rensselaer*, (C. Pl. Spec. T.) 60 How. Pr. (N. Y.) 143, were *disapproved* by the cases cited *supra*, and are no longer authority in New York.

Texas. — *Gulf, etc., R. Co. v. Pendery*, 14 Tex. Civ. App. 60, *following* *Union Pac. R. Co. v. Botsford*, 141 U. S. 250.

In the earlier Texas decisions, *Gulf, etc., R. Co. v. Norfleet*, 78 Tex. 321, and *International, etc., R. Co. v. Underwood*, 64 Tex. 463, which have been frequently cited as sustaining the view that a court has power in a proper case to compel the plaintiff in an action for personal injuries to submit to a personal examination, the question was not decided. In the second of these cases it was merely held that the cause would not be reversed for the refusal to order an examination, in the absence of a showing that it was necessary for a full presentation of the facts; and in the first it was held that the court did not err in refusing to compel the plaintiff to be examined by the one physician to whom he expressed an objection, although this objection did not affect the competency or the integrity of the physician proposed.

as to his condition at the time of such examination does not constitute a waiver by him of the privacy of his person or affect the inability of the court to compel his physical examination in the absence of statutory authorization.¹

b. VIEW THAT COURTS MAY COMPEL SUBMISSION TO EXAMINATION. — The decided weight of authority is against the rule stated in the preceding sections. In a number of decisions it is held that in an action to recover for personal injuries the court has power to require the plaintiff to submit to examination by physicians or surgeons for the purpose of ascertaining the nature, extent, and permanency of the injuries for which a recovery is sought,² and that the examination should be ordered and had under the direction and control of the court whenever it fairly appears that the ends of justice require the disclosure or more certain ascertainment of facts which can be brought to light or fully elucidated only by such an examination, and that the examination may be made without danger to the plaintiff's life or health, and without the infliction of serious pain.³ In support of this view it has been urged that when a person appeals to the sovereign for justice he impliedly consents to the doing of justice to the other party and impliedly agrees in advance to make any disclosure which is necessary in order that justice may be done;⁴ that a party to an action has the right to demand the administration of exact justice, and to this end that evidence essential thereto and within the control of the court shall be produced;⁵ that it is within the power of the court to compel an examination, since the plaintiff is before it as a witness;⁶ that if the plaintiff can exhibit his injuries to the jury for the purpose of determining their nature and extent (which it is well settled he can do), he should, in a

1. Introduction by Plaintiff of Experts Not Waiver of Right. — *Cole v. Fall Brook Coal Co.*, 159 N. Y. 59.

2. View that Courts May Order Examination — *Alabama*. — *Alabama G. S. R. Co. v. Hill*, 90 Ala. 71, 24 Am. St. Rep. 764.

Arkansas. — *Sibley v. Smith*, 46 Ark. 275, 55 Am. Rep. 584; *St. Louis Southwestern R. Co. v. Dobbins*, 60 Ark. 486.

Georgia. — *Richmond, etc., R. Co. v. Childress*, 82 Ga. 722, 14 Am. St. Rep. 189; *Savannah, etc., R. Co. v. Wainwright*, 99 Ga. 255.

Iowa. — *Schroeder v. Chicago, etc., R. Co.*, 47 Iowa 375.

Kansas. — *Atchison, etc., R. Co. v. Thul*, 29 Kan. 466, 44 Am. Rep. 659.

Kentucky. — *Belt Electric Line Co. v. Allen*, (Ky. 1898) 44 S. W. Rep. 89.

Michigan. — *Graves v. Battle Creek*, 95 Mich. 266, 35 Am. St. Rep. 561; *Strudgeon v. Sand Beach*, 107 Mich. 496.

Minnesota. — *Hatfield v. St. Paul, etc., R. Co.*, 33 Minn. 130, 53 Am. Rep. 14.

Missouri. — *Owens v. Kansas City, etc., R. Co.*, 95 Mo. 178, 6 Am. St. Rep. 39; *Haynes v. Trenton*, 123 Mo. 326; *Shepard v. Missouri Pac. R. Co.*, 85 Mo. 629, 55 Am. Rep. 390; *Sidekum v. Wabash, etc., R. Co.*, 93 Mo. 400, 3 Am. St. Rep. 549. The earliest Missouri decision, *Loyd v. Hannibal, etc., R. Co.*, 53 Mo. 515, maintaining the contrary doctrine, is no longer law in Missouri.

Ohio. — *Miami, etc., Turnpike Co. v. Bailly*, 37 Ohio St. 104.

Pennsylvania. — *Demenstein v. Richardson*, 2 Pa. Dist. 825; *Hess v. Lake Shore, etc., R. Co.*, 7 Pa. Co. Ct. 567; *Harvey v. Philadelphia Traction Co.*, 26 W. N. C. (Pa.) 231.

Washington. — See *Smith v. Spokane*, 16

Wash. 403, in which case the rule stated in the text seems to be approved.

Wisconsin. — *White v. Milwaukee City R. Co.*, 61 Wis. 537, 50 Am. Rep. 154.

Rule in Nebraska. — In Nebraska the question has not been expressly decided. In *Chadron v. Glover*, 43 Neb. 737, it was said that it had been twice intimated (*Sioux City, etc., R. Co. v. Finlayson*, 16 Neb. 578, 49 Am. Rep. 724; *Ellsworth v. Fairbury*, 41 Neb. 881), that it was within the power of the court to make such an order. "In each case, however, the court disclaimed the intention of deciding the question. It was not necessary in either of those cases, and it is not necessary here. The record shows that the application was made during the trial. If the court was not justified on other grounds in overruling the motion, it was justified in doing so because of the time when the motion was made. If such an application is proper under any circumstances, it must be made before trial."

3. Under What Circumstances Examination Ordered. — *Alabama G. S. R. Co. v. Hill*, 90 Ala. 77, 24 Am. St. Rep. 764; *Schroeder v. Chicago, etc., R. Co.*, 47 Iowa 375; *Atchison, etc., R. Co. v. Thul*, 29 Kan. 466, 44 Am. Rep. 659; *Belt Electric Line Co. v. Allen*, (Ky. 1898) 44 S. W. Rep. 89; *Miami, etc., Turnpike Co. v. Bailly*, 37 Ohio St. 104.

4. Reasons for Rule — Implied Agreement to Make Necessary Disclosure. — *Richmond, etc., R. Co. v. Childress*, 82 Ga. 721, 14 Am. St. Rep. 189; *Graves v. Battle Creek*, 95 Mich. 266, 35 Am. St. Rep. 561.

5. Propriety of Compelling Production of Evidence Within Control of Court. — *Schroeder v. Chicago, etc., R. Co.*, 47 Iowa 375.

6. *Schroeder v. Chicago, etc., R. Co.*, 47 Iowa 375.

proper case and under proper circumstances, be required to do the same thing for a like purpose upon the request of the other party.¹ It has also been said that the right to a physical examination of the plaintiff upon the defendant's request rests upon the analogy which the proceeding bears to the discovery of books and papers.² This doctrine is, of course, denied in jurisdictions where it is held that the plaintiff in an action for personal injuries cannot be compelled to submit to a physical examination.³

2. Statutory Authorization to Compel Submission to Examination. — In some states statutes have been passed authorizing the courts to compel the plaintiff in an action for personal injuries to submit to a physical examination.⁴ Such statutes, it has been held, do not violate any of the express or implied restraints upon the legislative power to be found in the federal or state constitutions.⁵

3. Discretion of Court as to Making Order for Examination. — In jurisdictions where the power to order a physical examination is upheld the defendant cannot, in any case, demand a physical examination as a matter of right. The application is addressed to the sound discretion of the trial court,⁶ which will not be interfered with on appeal except where it has been manifestly abused.⁷ And the refusal of the court to order an examination of the plaintiff will not be presumed to have been made on the ground of a want of power in the court to make the order, but, in the absence of any showing to the contrary, on the ground that under the circumstances the order ought not to have been

1. *Schroeder v. Chicago, etc., R. Co.*, 47 Iowa 375.

2. *Analogy to Discovery of Books and Papers.* — *Hess v. Lake Shore, etc., R. Co.*, 7 Pa. Co. Ct. 565.

3. See *Roberts v. Ogdensburgh, etc., R. Co.*, 29 Hun (N. Y.) 154.

4. *Statutory Authority for Compelling Examination.* — See for examples *McGovern v. Hope*, (N. J. 1899) 42 Atl. Rep. 830; Act N. J. May 12, 1896, P. L. 344; Laws N. Y. 1893, c. 721.

Under the *New York* statute it is held that the court cannot order a physical examination apart from or independently of an examination of the plaintiff as a witness before trial. *Lyon v. Manhattan R. Co.*, 142 N. Y. 298.

5. *Statutes Held Constitutional.* — *Lyon v. Manhattan R. Co.*, 142 N. Y. 298.

6. *Discretion of Court as to Making Order.* — *Alabama.* — *Alabama G. S. R. Co. v. Hill*, 90 Ala. 71, 24 Am. St. Rep. 764.

Arkansas. — *Sibley v. Smith*, 46 Ark. 275, 55 Am. Rep. 584.

Georgia. — *Richmond, etc., R. Co. v. Childress*, 82 Ga. 719, 14 Am. St. Rep. 189; *Savannah, etc., R. Co. v. Wainwright*, 99 Ga. 255.

Iowa. — *Schroeder v. Chicago, etc., R. Co.*, 47 Iowa 375.

Kansas. — *Atchison, etc., R. Co. v. Thul*, 29 Kan. 466, 44 Am. Rep. 659.

Kentucky. — *Belt Electric Line Co. v. Allen*, (Ky. 1898) 44 S. W. Rep. 99; *Belle of Nelson Distilling Co. v. Riggs*, (Ky. 1898) 45 S. W. Rep. 100.

Michigan. — *Graves v. Battle Creek*, 95 Mich. 266, 35 Am. St. Rep. 561; *Strudgeon v. Sand Beach*, 107 Mich. 496.

Minnesota. — *Hatfield v. St. Paul, etc., R. Co.*, 33 Minn. 130, 53 Am. Rep. 14.

Missouri. — *Sidekum v. Wabash, etc., R. Co.*, 93 Mo. 403, 3 Am. St. Rep. 549; *Owens v. Kansas City, etc., R. Co.*, 95 Mo. 169, 6 Am. St. Rep. 39; *Hill v. Sedalia*, 64 Mo. App. 494;

Shepard v. Missouri Pac. R. Co., 85 Mo. 629, 55 Am. Rep. 390; *Norton v. St. Louis, etc., R. Co.*, 40 Mo. App. 642; *Kinney v. Springfield*, 35 Mo. App. 97.

Pennsylvania. — *Hess v. Lake Shore, etc., R. Co.*, 7 Pa. Co. Ct. 565.

Washington. — *Smith v. Spokane*, 16 Wash. 403.

Wisconsin. — *O'Brien v. La Crosse*, 99 Wis. 421.

See also the following decisions in which it was held, without deciding whether the power did or did not exist, that if it did exist it was in the discretion of the court: *Chicago, etc., R. Co. v. Reith*, 65 Ill. App. 462; *Joliet St. R. Co. v. Call*, 143 Ill. 177, 42 Ill. App. 41; *Terre Haute, etc., R. Co. v. Brunker*, 128 Ind. 542; *Hess v. Lowrey*, 122 Ind. 225, 17 Am. St. Rep. 355; *Gulf, etc., R. Co. v. Norfleet*, 78 Tex. 321; *International, etc., R. Co. v. Underwood*, 64 Tex. 463.

Denial of Application — When Not Ground for Reversal. — The refusal of an order for a physical examination will not be ground for reversal if it appears that opportunity for such examination was afforded during the trial. *Gulf, etc., R. Co. v. Norfleet*, 78 Tex. 324.

Person of Nervous Temperament. — The mere fact that the plaintiff was of a nervous temperament or in a nervous condition was held not a tenable objection to an order for a physical examination, especially where the plaintiff had contracted the opium habit, which without hurt to her could have been utilized to allay nervousness. *Alabama G. S. R. Co. v. Hill*, 90 Ala. 79, 24 Am. St. Rep. 764.

7. **No Interference Except in Case of Abuse of Discretion.** — *Shepard v. Missouri Pac. R. Co.*, 85 Mo. 629, 55 Am. Rep. 390; *Hill v. Sedalia*, 64 Mo. App. 495; *Marler v. Springfield*, 65 Mo. App. 301; *Owens v. Kansas City, etc., R. Co.*, 95 Mo. 169, 6 Am. St. Rep. 39; *Smith v. Spokane*, 16 Wash. 403.

granted.¹ Nevertheless, the appellate court has ample power to review the exercise of the trial court's discretion, and correct it in case of abuse,² and a refusal to grant an order for inspection and examination when the circumstances present a reasonably clear case for the examination is considered such an abuse of the discretion lodged in the trial court as will operate to reverse a judgment in the plaintiff's favor.³

4. Application for Order for Examination — Time of Making Application. — As regards the time of applying for an order for a physical examination of the plaintiff, the application ought to be so made as not unnecessarily to prolong the trial or to prejudice the plaintiff in proving his case.⁴ While one court has held it not a sufficient ground to deny an application that it was made after the trial was commenced and the jury sworn,⁵ the weight of authority is to the effect that the application should be made before trial, and a sufficient time before trial that the examination may be deliberately and carefully made without interfering with the progress of the proceeding.⁶ It has accordingly been held that the application should be denied when not made until after the close of the plaintiff's evidence;⁷ and an application was also refused when made only one day before the date set for trial.⁸

Good Faith of Application — How Determined. — The question whether the application is made in good faith is to be determined by a reference to the affidavit and the circumstances which characterize the purposes of the applicant in making it; and if the affidavit meets the requirement of the statute, something quite substantial and satisfactory must be shown in order to defeat its efficiency for the purpose sought.⁹

5. What Must Be Shown to Entitle Party to Order — Examination Must Be Indispensable. — To authorize the granting of an order for a physical examination it must be shown that knowledge of necessary and material facts can be acquired only by such examination,¹⁰ and the right to the order, being founded on

1. Presumption on Appeal. — *Miami, etc., Turnpike Co. v. Baily*, 37 Ohio St. 104.

2. Discretion Reviewable in Case of Abuse. — *Alabama G. S. R. Co. v. Hill*, 90 Ala. 76, 24 Am. St. Rep. 764; *Sibley v. Smith*, 46 Ark. 275, 55 Am. Rep. 584; *Belt Electric Line Co. v. Allen*, (Ky. 1898) 44 S. W. Rep. 90; *Owens v. Kansas City, etc., R. Co.*, 95 Mo. 169, 6 Am. St. Rep. 39.

3. When Refusal Will Operate to Reverse. — *Alabama G. S. R. Co. v. Hill*, 90 Ala. 77, 24 Am. St. Rep. 764; *Sibley v. Smith*, 46 Ark. 275, 55 Am. Rep. 584; *Schroeder v. Chicago, etc., R. Co.*, 47 Iowa 375; *Atchison, etc., R. Co. v. Thul*, 29 Kan. 466, 44 Am. Rep. 659; *Belt Electric Line Co. v. Allen*, (Ky. 1898) 44 S. W. Rep. 90; *Sidekum v. Wabash, etc., R. Co.*, 93 Mo. 403, 3 Am. St. Rep. 549; *White v. Milwaukee City R. Co.*, 61 Wis. 536, 50 Am. Rep. 154.

4. Trial Should Not Be Unnecessarily Delayed. — *Miami, etc., Turnpike Co. v. Baily*, 37 Ohio St. 104.

5. Application After Commencement of Trial. — *Schroeder v. Chicago, etc., R. Co.*, 47 Iowa 381.

6. Savannah, etc. R. Co. v. Wainwright, 99 Ga. 255; *Galesburg v. Benedict*, 22 Ill. App. 111; *Southern Kansas R. Co. v. Michaels*, 57 Kan. 480; *Kinney v. Springfield*, 35 Mo. App. 97; *Stuart v. Havens*, 17 Neb. 211; *Chadron v. Glover*, 43 Neb. 737; *Sioux City, etc., R. Co. v. Finlayson*, 16 Neb. 578, 49 Am. Rep. 724.

7. Application After Close of Plaintiff's Evidence. — *Savannah, etc., R. Co. v. Wainwright*, 99

Ga. 255; *Terre Haute, etc., R. Co. v. Brunker*, 128 Ind. 542; *Hess v. Lowrey*, 122 Ind. 225, 17 Am. St. Rep. 355; *Archer v. Sixth Ave. R. Co.*, 52 N. Y. Super. Ct. 378; *Miami, etc., Turnpike Co. v. Baily*, 37 Ohio St. 104.

8. Application One Day Before Trial. — *Kinney v. Springfield*, 35 Mo. App. 97.

9. Sewell v. Butler, 16 N. Y. App. Div. 77.

10. Examination Must Be Indispensable. — *Alabama, — Alabama G. S. R. Co. v. Hill*, 90 Ala. 77, 24 Am. St. Rep. 764.

Arkansas. — *Sibley v. Smith*, 46 Ark. 276, 55 Am. Rep. 584.

Illinois. — *St. Louis Bridge Co. v. Miller*, 138 Ill. 466.

Kansas. — *Atchison, etc., R. Co. v. Thul*, 29 Kan. 466, 44 Am. Rep. 659; *Southern Kansas R. Co. v. Michaels*, 57 Kan. 474.

Kentucky. — *Belt Electric Line Co. v. Allen*, (Ky. 1898) 44 S. W. Rep. 89; *Belle of Nelson Distilling Co. v. Riggs*, (Ky. 1898) 45 S. W. Rep. 100.

Missouri. — *Sidekum v. Wabash, etc. R. Co.*, 93 Mo. 400, 3 Am. St. Rep. 549; *Owens v. Kansas City, etc., R. Co.*, 95 Mo. 178, 6 Am. St. Rep. 39.

Nebraska. — *Sioux City, etc., R. Co. v. Finlayson*, 16 Neb. 580, 49 Am. Rep. 724.

New York. — *Neuman v. Third Ave. R. Co.*, 50 N. Y. Super. Ct. 412; *Shaw v. Van Rensselaer*, (C. Pl. Spec. T.) 60 How. Pr. (N. Y.) 143.

Texas. — *International, etc., R. Co. v. Underwood*, 64 Tex. 463; *Gulf, etc., R. Co. v. Norfleet*, 78 Tex. 321.

necessity, will not extend beyond the necessities of the case.¹ In no case will the order be granted merely for the purpose of obtaining cumulative evidence² or where the injuries complained of are so patent as to be apparent to all.³

Unwillingness to Submit to Examination. — It must always be made to appear that the plaintiff is unwilling to submit to an examination; in no case should the order be granted when the party is willing to be examined by competent and disinterested persons.⁴

6. Selection, Qualification, Number, and Status of Examiners — Selection of Physicians. — The physicians to conduct the examination should either be agreed upon by the parties or selected by the court;⁵ and in one case it has been said that it would be better that a physician should be selected by the court, rather than by one or both of the parties.⁶ The parties should, at least, have an equal opportunity of having qualified witnesses present at the examination.⁷ The court should never order an examination by physicians in the employ of the defendant⁸ or chosen by the defendant;⁹ nor should an examination by a physician who has already testified adversely to the plaintiff be directed.¹⁰ It has also been held that the court will not compel the plaintiff to submit to examination by a physician personally obnoxious to him, and that it is immaterial that the objection does not go to the competency or integrity of the physician.¹¹

Qualification of Physicians. — The physicians appointed to conduct the examination should possess the skill and qualifications requisite to an intelligent performance of that duty.¹²

Number of Physicians. — The court will not order an examination of the plaintiff by a greater number of experts than is actually necessary to an intelligent and thorough examination of the injuries complained of.¹³

1. Right Not Extended Beyond Necessities of Case. — *Atchison, etc., R. Co. v. Thul*, 29 Kan. 466, 44 Am. Rep. 659.

2. Order Not Granted to Obtain Cumulative Evidence. — *Sibley v. Smith*, 46 Ark. 276, 55 Am. Rep. 584; *Atchison, etc. R. Co. v. Thul*, 29 Kan. 466, 44 Am. Rep. 659; *Neuman v. Third Ave. R. Co.*, 50 N. Y. Super. Ct. 412.

3. Order Not Granted when Injuries Patent. — *Belle of Nelson Distilling Co. v. Riggs*, (Ky. 1898) 45 S. W. Rep. 99.

Distinction Between Patent and Latent Injuries. — An injury to the spine is latent, and can be verified or disproved only by means of an examination by experts, skilled in human anatomy and in medical science. It is not like the case of a loss of a limb, which is apparent, and can be seen by the jury at the trial. *Hess v. Lake Shore, etc., R. Co.*, 7 Pa. Co. Ct. 565.

4. Party Must Be Unwilling to Submit to Examination. — *International, etc., R. Co. v. Underwood*, 64 Tex. 463; *Gulf, etc., R. Co. v. Norfleet*, 78 Tex. 321.

5. Physicians Selected by Court or by Agreement of Parties. — *Stuart v. Havens*, 17 Neb. 215; *Houston, etc., R. Co. v. Berling*, 14 Tex. Civ. App. 544; *Missouri Pac. R. Co. v. Johnson*, 72 Tex. 95.

6. Selection by Court Preferable. — *Richmond, etc., R. Co. v. Childress*, 82 Ga. 722, 14 Am. St. Rep. 189.

7. McGovern v. Hope, (N. J. 1899) 42 Atl. Rep. 830.

8. Physicians in Employ of Defendant. — *Peoria, etc., R. Co. v. Rice*, 46 Ill. App. 60; *Gulf, etc., R. Co. v. Nelson*, 5 Tex. Civ. App. 387.

9. Physicians Chosen by Defendant. — *Sioux City, etc., R. Co. v. Finlayson*, 16 Neb. 578, 49 Am. Rep. 724.

10. Physicians Who Have Testified Adversely to Plaintiff. — *Houston, etc., R. Co. v. Berling*, 14 Tex. Civ. App. 544.

Reason for Rule. — "Where * * * experts are called by a party and permitted to make a personal examination of the person injured, and to testify therefrom, there is danger that they will feel under obligations to the party calling them, and, however honest they may be, color their testimony somewhat in its interest, while in many if not most cases their general views upon the question will be known to the party producing them before they are called. In any event, the evidence partakes somewhat of a partisan character." *Stuart v. Havens*, 17 Neb. 214.

Examination of Females by Female Physicians. — The *New York* code provision authorizing physical examinations in actions for personal injuries provides that females shall be examined by female physicians. *Lawrence v. Samuels*, (Supm. Ct. App. T.) 20 Misc. (N. Y.) 280.

11. Physicians Personally Obnoxious to Plaintiff. — *Missouri Pac. R. Co. v. Johnson*, 72 Tex. 95.

12. Qualifications of Examiners. — *Atchison, etc., R. Co. v. Thul*, 29 Kan. 466, 44 Am. Rep. 659, 10 Am. & Eng. R. Cas. 783.

13. Number of Physicians. — *Atchison, etc., R. Co. v. Thul*, 29 Kan. 466, 44 Am. Rep. 659; *Shepard v. Missouri Pac. R. Co.*, 85 Mo. 635, 55 Am. Rep. 390, wherein the court refused to order an examination by three physicians.

Status of Physician. — A physician appointed to make an examination is an officer of the court and should be sworn.¹

7. Manner of Conducting Examination. — The examination should be made under such restrictions and directions as may seem proper to the court.² The plaintiff should not be subjected to any unnecessary annoyance or exposure of the person.³ The examination should be so conducted as to avoid the infliction of pain, the subjection to indignity, or the endangering of health and life;⁴ and where the test is such that it will be liable to endanger the health of the plaintiff, an application for an order for examination will be refused.⁵ So the court will not require the plaintiff to submit to a painful test.⁶ An order for an examination necessarily involving the use of anæsthetics, opiates, or narcotics will also be refused; there is no obligation on the plaintiff to submit to a test rendering necessary the use of these drugs.⁷

Interrogating Plaintiff as to Condition. — According to one decision, during the physical examination a physician may ask any questions which in his opinion may be necessary to ascertain and report fully upon the nature and extent of the injury complained of;⁸ but in another decision it was held that to interrogate the plaintiff as to his condition and the nature of the injury, or the manner in which it was sustained, thus perhaps eliciting declarations from him which might be used in evidence against him, would be highly improper.⁹

8. Place of Examination. — It is within the sound discretion of the court, depending on the circumstances of each case, whether the examination shall be made in court or out of court.¹⁰

9. Expenses of Examination. — The expenses of the examination should be borne by the party at whose instance it is made.¹¹

10. Effect of Refusal to Obey Order for Examination. — It has been said that a refusal to submit to an examination is a contempt of the court's authority and punishable as such,¹² and in a number of decisions it has either been said or held that on the refusal of the plaintiff to comply with the order when properly made, the court may dismiss the action or refuse to allow the plaintiff to give evidence to establish the injury.¹³ If, in case of a refusal to submit to

1. **Physician Should Be Sworn.** — Lawrence v. Samuels, (N. Y. City Ct. Gen. T.) 20 Misc. N. Y.) 15.

2. **Examination Should be Made under Direction of Court.** — McGovern v. Hope, (N. J. 1899) 42 Atl. Rep. 830.

3. **Unnecessary Annoyance and Exposure to Be Avoided.** — McGovern v. Hope, (N. J. 1899) 42 Atl. Rep. 830.

4. **Infliction of Pain, etc., to Be Avoided.** — Alabama G. S. R. Co. v. Hill, 90 Ala. 77, 24 Am. St. Rep. 764; Schroeder v. Chicago, etc., R. Co., 47 Iowa 375; Belt Electric Line Co. v. Allen, (Ky. 1898) 44 S. W. Rep. 90; Hess v. Lake Shore, etc., R. Co., 7 Pa. Co. Ct. 567.

5. **Examination Dangerous to Health Refused.** — O'Brien v. La Crosse, 99 Wis. 421.

6. **Submission to Painful Test Not Required.** — Schroeder v. Chicago, etc., R. Co., 47 Iowa 382; Belt Electric Line Co. v. Allen, (Ky. 1898) 44 S. W. Rep. 89; O'Brien v. La Crosse, 99 Wis. 421.

Where the Plaintiff, a Woman, Had Been Once Examined, which examination was declared by her to have been of a very painful nature, and she feared the result of another, it was held that she would not be compelled to undergo a further examination. Shepard v. Missouri Pac. R. Co., 85 Mo. 629, 55 Am. Rep. 300.

7. **Examination Requiring Use of Anæsthetics Not Permissible.** — Schroeder v. Chicago, etc.,

R. Co., 47 Iowa 375; Strudgeon v. Sand Beach, 107 Mich. 496; Hess v. Lake Shore, etc., R. Co., 7 Pa. Co. Ct. 567. Compare Alabama G. S. R. Co. v. Hill, 90 Ala. 77, 24 Am. St. Rep. 764.

8. **View that Plaintiff May Be Interrogated as to Condition.** — Wunsch v. Weber, (C. Pl.) 31 Abb. N. Cas. (N. Y.) 365.

9. **The Contrary View.** — Hess v. Lake Shore, etc., R. Co., 7 Pa. Co. Ct. 567.

10. **Where Examination May Be Had.** — St. Louis Southwestern R. Co. v. Dobbins, 60 Ark. 481; Demenstein v. Richardson, 2 Pa. Dist. 825.

11. **Expenses of Examination.** — Richmond, etc., R. Co. v. Childress, 82 Ga. 722, 14 Am. St. Rep. 189.

12. **Refusal to Obey Order Contempt.** — Schroeder v. Chicago, etc., R. Co., 47 Iowa 381.

13. **Dismissal of Action for Refusal to Obey Order.** — Miami, etc., Turnpike Co. v. Baily, 37 Ohio St. 104; Hess v. Lake Shore, etc., R. Co., 7 Pa. Co. Ct. 565; Demenstein v. Richardson, 2 Pa. Dist. 825. See also Schroeder v. Chicago, etc., R. Co., 47 Iowa 381, in which case it was said that should such recusancy too long delay the court, or prove an effective obstruction to the progress of the case, the court could have all the allegations as to permanent injury stricken from the pleadings and withdraw from the jury that part of the case.

a proper order for examination, the court should permit the trial to proceed, the fact of such refusal is competent and strong evidence in the defendant's favor;¹ but where the court has refused an order for physical examination because such application was made too late, the fact that the plaintiff has not submitted to an examination is not a circumstance to be considered against him.²

11. Exhibition of Injuries to Jury — a. VOLUNTARY EXHIBITION. — In actions for personal injuries resulting from accident, unskilful treatment by physicians, and the like, it is well established that the court may in its discretion permit the plaintiff to submit his injuries to the view of the jury,³ provided this does not necessitate an exposure so indecent as to be offensive and shocking to feelings of modesty.⁴ The rule does not apply, however, where the legitimate purposes for which such an exhibition may be made are slight and the evident tendency of it is to work improper and illegal results.⁵

b. COMPULSORY EXHIBITION. — In jurisdictions where the view is taken that the plaintiff in an action for personal injuries cannot be compelled to submit to a physical examination by a physician, it is also held that the plaintiff cannot be compelled to submit his injuries to a view of the jury;⁶ but in jurisdictions where the court has power to order an examination of the plaintiff by physicians, it may, in a proper case, direct the plaintiff to exhibit his injuries to the jury, if no indecent exposure is thereby involved.⁷

1. Evidence of Refusal Competent. — *Kinney v. Springfield*, 35 Mo. App. 97.

2. Where Application for Order Refused. — *Savannah, etc., R. Co. v. Wainwright*, 99 Ga. 255.

3. Exhibition of Injuries to Jury — United States. — *Osborne v. Detroit*, 32 Fed. Rep. 36. *Illinois.* — *Lanark v. Dougherty*, 153 Ill. 163; *Chicago, etc., R. Co. v. Clausen*, 173 Ill. 100, affirming 70 Ill. App. 550; *Seltzer v. Saxton*, 71 Ill. App. 229; *Springer v. Chicago*, 135 Ill. 563.

Indiana. — *Indiana Car Co. v. Parker*, 100 Ind. 181; *Louisville, etc., R. Co. v. Wood*, 113 Ind. 544; *Hess v. Lowrey*, 122 Ind. 225, 17 Am. St. Rep. 355; *Citizens' St. R. Co. v. Willoby*, 134 Ind. 563; *Freeman v. Hutchinson*, 15 Ind. App. 639.

Iowa. — *Schroeder v. Chicago, etc., R. Co.*, 47 Iowa 375; *Barker v. Perry*, 67 Iowa 146.

Kentucky. — *Newport News, etc., R. Co. v. Carroll*, (Ky. 1895) 31 S. W. Rep. 132.

Michigan. — *Langworthy v. Green*, 95 Mich. 93; *Graves v. Battle Creek*, 95 Mich. 266, 35 Am. St. Rep. 561; *Edwards v. Three Rivers*, 96 Mich. 625.

Minnesota. — *Hatfield v. St. Paul, etc., R. Co.*, 33 Minn. 130, 53 Am. Rep. 14, 18 Am. & Eng. R. Cas. 292.

Nebraska. — *Omaha St. R. Co. v. Emminger*, 57 Neb. 240.

New York. — *Jordan v. Bowen*, 46 N. Y. Super. Ct. 355; *Roberts v. Ogdensburgh, etc., R. Co.*, 29 Hun (N. Y.) 154; *Mulhado v. Brooklyn City R. Co.*, 30 N. Y. 370.

Texas. — *Jackson v. Wells*, 13 Tex. Civ. App. 275.

West Virginia. — *Carrico v. West Virginia Cent., etc., R. Co.*, 39 W. Va. 86.

It has been said of such evidence that it "is of an important and satisfactory nature. It brings before the jury part of the *res gesta*, and enables them to determine the nature and character of the injury better than to receive it in a secondary way as it must be when described by witnesses." *Barker v. Perry*, 67

Iowa 146. See also *Schroeder v. Chicago, etc., R. Co.*, 47 Iowa 375. To the same effect is the reasoning in *Mulhado v. Brooklyn City R. Co.*, 30 N. Y. 370.

Injury Exhibited Must Not Be Worse than When Inflicted. — Where one was permitted to exhibit to the jury the injury complained of, it having been inflicted by a vicious dog several years before, it was held that such exhibition should have been accompanied by evidence tending to show that no change for the worse had taken place. *French v. Wilkinson*, 93 Mich. 322.

Injuries to Women — Tendency of Exhibition to Excite Undue Sympathy. — Where the plaintiff was a young and attractive woman, it was held that the exhibition of the injury to the jury was not improper merely because the sympathies of the jury might thereby have been unduly excited in her behalf. *Omaha St. R. Co. v. Emminger*, 57 Neb. 240.

The Principle that the Jurors Must Not Decide on Their Own Private Knowledge is not Violated by the Exhibition of the Injury. *Hiller v. Sharon Springs*, 28 Hun (N. Y.) 348.

4. Indecent Exposure of Person Not Permissible. — In *Brown v. Swineford*, 44 Wis. 282, 28 Am. Rep. 582.

5. Preservation of Amputated Parts in Alcohol. — Where the foot of a child had been amputated and preserved in a glass jar filled with spirits, the exhibition thereof to the jury was held to be unwarranted and good ground for a new trial, as it might tend to excite the passion and prejudice of the jurors. *Rost v. Brooklyn Heights R. Co.*, 10 N. Y. App. Div. 477.

6. View that Plaintiff Cannot Be Compelled to Show Injuries to Jury. — *Mills v. Wilmington City R. Co.*, 1 Marv. (Del.) 269; *Parker v. Enslow*, 102 Ill. 272, 40 Am. Rep. 588; *Roberts v. Ogdensburgh, etc., R. Co.*, 29 Hun (N. Y.) 154.

7. Contrary View. — *Hall v. Manson*, 99 Iowa 608; *Graves v. Battle Creek*, 95 Mich. 266, 35 Am. St. Rep. 561.

Experiments in Court. — Arguing by analogy to those cases which sanction a physical examination of the plaintiff, it is well settled that, under proper circumstances, the court may require the plaintiff to undergo some experiment, or do some physical act, in the presence of the jury, in order to enable the jurors the better to determine what amount of credence to attach to the plaintiff's claim of injury or disability.¹

III. IN CRIMINAL PROSECUTIONS — 1. Examination and Inspection of Defendant's Person. — In *England* it has been held that a compulsory examination of the person of the defendant in a criminal case cannot be ordered,² and there have been decisions to the same effect in the *United States*,³ though the contrary has been held.⁴

In Regard to a Comparison of Footprints for the purpose of showing that footprints found at or near the scene of the crime were the defendant's, it is generally held that such a comparison is proper,⁵ though some cases hold that the defendant cannot be compelled to exhibit his feet to the jury, try on shoes, or make footprints for the purpose of such comparison, because it would be compelling him to give evidence against himself.⁶

2. Examination and Inspection of Person of Witness. — In a criminal prosecution for an assault, it has been held that the prosecuting witness may exhibit his injuries to the jury,⁷ and also that he may be compelled to do so at the instance of the defendant.⁸ On the other hand, it has been held that the defendant in a rape case cannot insist, as a matter of right, that the prosecuting witness shall submit to an examination of her person by medical experts, and that if such examination can be compelled in any case it is a matter of judicial discretion and not revisable.⁹

3. Determination of Age by Inspection. — According to some decisions the personal appearance of a party or witness cannot be considered by the court or jury as evidence in determining the question of the age of such party or witness.¹⁰ The contrary view has been taken, however, in other decisions.¹¹

1. Performing Physical Act. — *Hatfield v. St. Paul, etc., R. Co.*, 33 Minn. 130, 53 Am. Rep. 14, 18 Am. & Eng. R. Cas. 292.

Pin Pricking to Establish Paralysis. — *Osborne v. Detroit*, 32 Fed. Rep. 36.

2. Power to Order Compulsory Examination Denied in England. — *Agnew v. Jobson*, 13 Cox C. C. 625, 19 Moak 612.

3. Power to Order Compulsory Examination Denied in United States. — *Blackwell v. State*, (Ga.) 3 Crim. L. Mag. 393; *People v. McCoy*, (Supm. Ct.) 45 How. Pr. (N. Y.) 216; *State v. Jacobs*, 5 Jones L. (50 N. Car.) 259, distinguished in *State v. Garrett*, 71 N. Car. 87. And see generally the titles *CONFESSIONS*, vol. 6, p. 520; *IDENTITY*, vol. 15, p. 918.

4. Power to Order Compulsory Examination Asserted in United States. — *State v. Ah Chuey*, 14 Nev. 79, 33 Am. Rep. 530, holding that where a question was raised as to the identity of the defendant he might be compelled to exhibit his arm to the jury in order to determine whether it bore certain marks as testified to by a witness.

In *Iowa* this question has not been expressly decided, but it was held that the examination could not be said to be compulsory where the only evidence of compulsion was that the sheriff accompanied the physician who made the examination, it not being shown that the sheriff said or did anything in respect of the examination. *State v. Struble*, 71 Iowa 11.

5. Comparison of Footprints — General Rule. — *State v. Prudhomme*, 25 La. Ann. 523. See also the title *IDENTITY*, vol. 15, p. 923.

6. Comparison of Footprints, etc., Held Improper.

— In *Day v. State*, 63 Ga. 667, it was held that evidence that a witness forcibly placed the defendant's foot in certain tracks near the scene of the burglary, and that they were of the same size, was not admissible, because a defendant cannot be compelled to criminate himself by acts or words.

In *People v. Mead*, 50 Mich. 228, it was held that the defendant could not be required, against objection, to try on a shoe to determine whether tracks found at the scene of the offense were his own.

In *Stokes v. State*, 5 Baxt. (Tenn.) 619, 30 Am. Rep. 72, it was held improper for the prosecuting attorney to place a pan of soft earth in front of the jury and then request the defendant to make a footprint in it.

See also the titles *CONFESSIONS*, vol. 6, p. 520; *EXPERIMENTS (IN EVIDENCE)*, vol. 12, p. 411; *IDENTITY*, vol. 15, p. 923.

7. Allowing Prosecuting Witness to Exhibit Injuries to Jury. — *Parrish v. State*, 32 Tex. Crim. 583.

8. Compelling Prosecuting Witness to Exhibit Injuries to Jury. — *King v. State*, 100 Ala. 85.

9. In Prosecution for Rape. — *McGuff v. State*, 88 Ala. 147, 16 Am. St. Rep. 25.

10. View that Age Cannot Be Determined by Inspection. — *Robinius v. State*, 63 Ind. 237; *Stephenson v. State*, 28 Ind. 272; *Ihinger v. State*, 53 Ind. 251.

11. View that Age May Be Determined by Inspection. — *Williams v. State*, 98 Ala. 52; *State v. Arnold*, 13 Ired. L. (35 N. Car.) 184.

4. Inspection of Infant in Filiation Cases. — In a number of cases it has been held that in prosecutions for bastardy the child may be exhibited to the jury for the purpose of comparison with the supposed father and to determine whether there is a family resemblance.¹ In another decision it was denied that such practice was permissible;² and on a prosecution for seduction it was held error to allow an infant three months old, alleged to be the fruit thereof, to be exhibited to the jury to corroborate the prosecutrix by reason of the supposed resemblance between the child and the father.³

Where the Legitimacy of a Child Was in Issue, the claim having been made that it was of mixed blood, it was held competent to permit the child to be shown to the jury as the jurors were as well qualified as any one else to judge whether it was or was not of pure white blood.⁴

IV. IN PROCEEDINGS FOR DIVORCE — 1. Power of Courts to Order Inspection and Examination. — It is well settled both in *England* and *America* that in proceedings for divorce where the impotency of a party is in question the court has power to order an examination of the person of the party alleged to be impotent, and, if the exigencies of the case require it, of the party instituting the proceedings.⁵ The court must necessarily have some discretion in the matter of ordering an examination,⁶ and it will be denied if the court has good reason to doubt the good faith and sincerity of the party making the application.⁷

Old Persons. — The court will act with much greater hesitancy in the case of an old person than of a young one.⁸

Where a Woman Has Submitted Herself to the Examination of Competent Surgeons, whose testimony can be readily obtained, it has been held that the court will not order her to submit to another examination.⁹

Triennial Cohabitation. — It was formerly held that in a suit for nullity of marriage by reason of impotency the courts would not order an inspection unless there had been a triennial cohabitation,¹⁰ but this is certainly not the rule now.¹¹

2. How Examination Conducted. — The appointment of inspectors and the determination of their number seem to be wholly matters of judicial discretion.¹²

1. Exhibiting Infant to Jury in Bastardy Cases. — *State v. Smith*, 54 Iowa 104, 37 Am. Rep. 192; *State v. Woodruff*, 67 N. Car. 90.

2. Risk v. State, 19 Ind. 152.

3. Exhibiting Infant to Jury in Prosecution for Seduction. — *State v. Danforth*, 48 Iowa 43, 30 Am. Rep. 387.

4. Warlick v. White, 76 N. Car. 175.

5. Examination of Person in Divorce Cases — England. — *Briggs v. Morgan*, 3 Phill. Ecc. 325; *Norton v. Seton*, 3 Phill. Ecc. 147; *Greenstreet v. Cumyns*, 2 Phill. Ecc. 10; *H. v. P.*, L. R. 3 P. & D. 126; *Pollard v. Wybourn*, 1 Hag. Ecc. 725.

Alabama. — Anonymous, 35 Ala. 226; *McGuff v. State*, 88 Ala. 152, 16 Am. St. Rep. 25; Anonymous, 89 Ala. 291, 18 Am. St. Rep. 116.

New York. — *Devanbagh v. Devanbagh*, 5 Paige (N. Y.) 558, 28 Am. Dec. 443; *Cahn v. Cahn*, (Supm. Ct. Spec. T.) 21 Misc. (N. Y.) 506; *Newell v. Newell*, 9 Paige (N. Y.) 25.

Vermont. — *Le Barron v. Le Barron*, 35 Vt. 365.

But in *Ohio* the right to order an examination seems to have been denied. See 2 West. L. J. 131.

Statutory Authority Unnecessary. — *Le Barron v. Le Barron*, 35 Vt. 365. The power is derived from the civil and canon law, as administered in spiritual and ecclesiastical courts. *Union Pac. R. Co. v. Botsford*, 141 U. S. 252.

Indelicacy of Examination Not Ground for Refusing It. — *Briggs v. Morgan*, 3 Phill. Ecc.

325; *Devanbagh v. Devanbagh*, 5 Paige (N. Y.) 558, 28 Am. Dec. 443.

6. Discretion as to Making Order. — Anonymous, 35 Ala. 226.

7. Absence of Good Faith of Complainant. — *Briggs v. Morgan*, 3 Phill. Ecc. 325.

8. In the Case of Old Persons. — *Briggs v. Morgan*, 3 Phill. Ecc. 325; *Brown v. Brown*, 1 Hag. Ecc. 523; *Shafto v. Shafto*, 28 N. J. Eq. 34.

9. Where Party Has Already Submitted to Examination. — *Devanbagh v. Devanbagh*, 5 Paige (N. Y.) 554, 28 Am. Dec. 443. Compare *Newell v. Newell*, 9 Paige (N. Y.) 25, where it was held that in a suit to annul a marriage on the ground of the physical incapacity of the defendant, if the answer admits the present incapacity, but denies that it existed at the time of the marriage, and the nature of the incapacity is such as to render a surgical examination of the defendant necessary, in connection with a personal examination on oath as to the commencement and progress of the disease which has created the incapacity, the court will direct the defendant to submit to such examination, although she has been previously examined *ex parte* and without oath by her own medical attendants.

10. View that Triennial Cohabitation Was Necessary. — *Aleson v. Aleson*, 2 Lee Ecc. 576.

11. The Contrary View. — See the cases cited in the first note in this section.

12. Discretion of Court. — 2 Bishop on Marriage and Divorce (6th ed.), § 597.

In the leading American case on the subject the court ordered a reference to a master to take proof of the facts and circumstances stated in the bill, directed an examination of the defendant, and ordered that no person should be present at the examination except the surgeons and matrons selected by the master, unless with the consent of the party to be examined;¹ and in another decision the court appointed a commissioner to take proofs, to select the examiners, and to prescribe such rules as would insure a fair examination.² In each of these cases the order further directed a report of all the proceedings had before the referee or commissioner, together with the evidence of the inspectors as to the facts and results of the examination.

3. Methods of Enforcing Order. — If the complainant refuses to submit to an examination, the bill may be dismissed,³ or the order for the examination may be enforced by an attachment,⁴ or the party may be proceeded against for contempt;⁵ and where the defendant was a woman and out of the jurisdiction it was directed that the allowance for alimony be suspended until she consented to the examination.⁶

4. Expenses of Examination. — In the only case where any question as to the expenses of the examination seems to have been raised, the complainant in the case being the husband, it was held that he must furnish the necessary funds to pay the expenses of the examination of the defendant.⁷

V. WRIT DE VENTRE INSPICIENDO — In Criminal Cases. — The writ *de ventre inspiciendo* to ascertain whether a woman convicted of a capital crime was quick with child, was allowed by the common law in order to guard against taking the life of an unborn child for the crime of the mother.⁸ This writ has rarely been resorted to in America.⁹ The usual practice, it seems, is for the examination to be made by a jury of twelve matrons,¹⁰ but in case they were in doubt they might, with the permission of the court, call in an experienced and skilled surgeon to aid them in the examination.¹¹

In Matters of Civil Right the writ was allowed to protect the rightful succession to the property of a deceased person against fraudulent claims of bastards, when a widow was supposed to feign herself with child in order to produce a supposititious heir to the estate, in which case the heir or devisee might have this writ to examine whether she was with child, and, if she was, to keep her under proper restraint until delivered.¹² This writ was said to be of common right¹³ and has been issued in England in quite recent times,¹⁴ but there is no "instance of its ever having been considered in any part of the United States as suited to the habits and condition of the people."¹⁵

INSPECTION OF BOOKS. — See the title STOCKHOLDERS.

INSPECTION OF MUNICIPAL RECORDS. — See the title MUNICIPAL CORPORATIONS.

1. Reference to Master to Take Proofs. — *Devanbagh v. Devanbagh*, 5 Paige (N. Y.) 554, 28 Am. Dec. 443.

2. *Le Barron v. Le Barron*, 35 Vt. 365.

3. Dismissal of Bill. — Anonymous, 89 Ala. 291, 18 Am. St. Rep. 116.

4. Attachment. — *B. v. L.*, L. R. 1 P. & D. 639.

5. Contempt Proceedings. — *Cahn v. Cahn*, (Supm. Ct. Spec. T.) 21 Misc. (N. Y.) 506; *Harrison v. Sparrow*, 3 Curt. Ecc. 1.

6. Suspending Allowance of Alimony. — *Newell v. Newell*, 9 Paige (N. Y.) 25.

7. Expenses of Examination. — *Devanbagh v. Devanbagh*, 5 Paige (N. Y.) 559, 28 Am. Dec. 443.

8. In Case of Woman Condemned to Death. — *Reg. v. Wycherley*, 8 C. & P. 262, 34 E. C. L. 381. See also *Union Pac. R. Co. v. Botsford*, 141 U. S. 253; *Demenstein v. Richardson*, 2 Pa.

Dist. 826, in which this writ was mentioned.

9. *State v. Arden*, 1 Bay (S. Car.) 489; *Coroner's Case*, 2 Chand. Crim. Tr. 381.

10. Examination Usually Conducted by Jury of Matrons. — *Reg. v. Wycherley*, 8 C. & P. 262, 34 E. C. L. 381; *State v. Arden*, 1 Bay (S. Car.) 489.

11. Examination by Surgeon. — *Reg. v. Wycherley*, 8 C. & P. 262, 34 E. C. L. 381.

12. In Civil Cases — To Protect Rightful Succession to Property. — *In re Blakemore*, 14 L. J. Ch. 336; *Ex p. Aiscough*, 2 P. Wms. 593; 1 Black. Com. 456.

13. *Ex p. Aiscough*, 2 P. Wms. 593.

14. See *Union Pac. R. Co. v. Botsford*, 141 U. S. 253, citing *In re Blakemore*, 14 L. J. Ch. 336.

15. Writ Not in Use in United States. — *Union Pac. R. Co. v. Botsford*, 141 U. S. 253.

INSPECTION OF PUBLIC RECORDS—INSTANTANEOUS.

INSPECTION OF PUBLIC RECORDS.—See the titles RECORDING ACTS; RECORDS.

INSPECTOR.—See the title PUBLIC OFFICERS.

INSTALMENT. (See also the titles CONDITIONAL SALES, vol. 6, p. 436; PAYMENT.)—See note 1.

INSTANCE.—See note 2.

INSTANT—INSTANTLY. (See also FORTHWITH, vol. 13, p. 1157; IMMEDIATE—IMMEDIATELY, vol. 15, p. 1020.)—See note 3.

INSTANTANEOUS.—Instantaneous means done or occurring in an instant or without any perceptible duration of time; as, the passage of electricity appears to be instantaneous.⁴

1. **Instalment.**—By a bill of sale goods were assigned as security for the repayment of five hundred pounds and interest thereon at the rate of sixty pounds per cent. per annum, and the grantor agreed to pay "the principal sum aforesaid, with the interest then due, by twelve equal monthly payments of forty-one pounds, thirteen shillings, fourpence, * * * until the whole of the said sum and interest shall be fully paid," and that "in default of payment of any *instalment*" then the grantor would pay interest thereon at the rate aforesaid from the date when such *instalment* should become due until full payment thereof. The grantor also agreed (*inter alia*) to insure the assigned goods, and pay all premiums, and that upon default the grantee might do so and charge the costs thereof, with interest at the rate of twenty per cent. per annum, to the grantor, and that the same should be considered to be included in the security, and that the grantee might pay all rent, rates, and taxes at any time due in respect of the message in which the goods might be, and that thereupon all such payments made by the grantee, together with the interest at the rate of twenty per cent. per annum, should be charged on the goods, which should not be redeemed until full payment of all such sums and interest. It was held that upon the true construction of the bill of sale, interest upon interest was not reserved, but that the word *instalment* referred only to the monthly payments of principal. *Goldstrom v. Tallerman*, 18 Q. B. D. 1.

2. **Instances.**—The term *instances* has been held to mean specified cases; enumerated cases. *Padelford v. Savannah*, 14 Ga. 477. This case was upon the construction of that passage of the ratification of the Constitution of the United States by the Virginia convention which reads as follows: "That, therefore, no right, of any denomination, can be canceled, abridged, restrained, or modified, by the Congress; by the Senate or House of Representatives, acting in any capacity; by the President; or any department or officer of the United States, except in those *instances* in which power is given, by the Constitution, for those purposes," etc.

3. **Instant.**—An *instant* is not to be considered in law, as in logic, a point of time and no parcel of time. By intendment of law it may be divided and applied to several purposes. *Jackson v. Eddy*, 2 Cow. (N. Y.) 601.

Instant Acceptance.—Where a telegram making an offer demanded an instant acceptance, but was not received until ten o'clock on Saturday night, and the answer was delayed

until Monday, the delay was held unreasonable and the acceptance not binding. *James v. Marion Fruit Jar, etc., Co.*, 69 Mo. App. 207.

Inquisition of Coroner's Jury.—The time of death is not sufficiently set out in an inquisition of a coroner's jury that, after describing the cause of the death and the nature of the injuries sustained by the deceased, proceeds: "Of which, etc., the said A B * * * *instantly* died." Lord Denman, C. J., said: "The time when the death took place is not pointed out with sufficient accuracy and precision; the words are, 'of which blow, shock, and concussion the deceased *instantly* died.' And on this point it was contended that the word *instantly* was equivalent to the words 'then and there.' 'Then' or *ad tunc* involves the precise time at which the accident happened, something done at the same time and moment. *Instantly* means some time after, that is, *instantly* upon, and immediately following, but not at the same moment. But the word *instantly* is not sufficient, and the words *instantly* and *incontinenter*, according to the whole course of precedents, do not dispense with the words *ad tunc et ibidem*." *Reg. v. Brownlow*, 8 Dowl. 157, 3 Per. & Dav. 52, 11 Ad. & El. 119, 39 E. C. L. 34.

Indictment for Murder.—The indictment in the case of *Lester v. State*, 9 Mo. 666, alleged that the defendant did inflict divers wounds and contusions on the head of one Scott, of which he, the said Scott, "did *instantly* die." Napton, J., who delivered the opinion of the court, said: "Here the word *instantly* seems designed to supply the place of the words 'then and there;' and the attorney-general insists that both in its popular and proper legal acceptation it will embrace everything which is conveyed by those words. This may be true so far as time is concerned, but in capital cases it has been thought expedient to require great strictness, and it would be difficult to foresee to what extent innovations would go, if we lose sight of the established precedents, so far as they fix the form of material averments." See also *State v. Lakey*, 65 Mo. 218; *State v. Sides*, 64 Mo. 383.

Reasonable Time.—A bill of sale provided for redemption if the plaintiff should *instantly* on demand pay the sum due. It was held that what was contemplated by this was a demand and reasonable time for complying with it. *Massey v. Sladen*, L. R. 4 Exch. 13.

4. **Instantaneous Death.**—In *Sawyer v. Perry*, 88 Me. 48, the court, after giving the definition in the text, said that "while other courts and some writers of text books have used indis-

INSTANTER.—See note 1.

INSTEAD OF.—In the place or room of.²

INSTIGATE. (See generally the title AIDER AND ABETTOR, vol. 2, p. 29.)—Instigate means to stimulate or goad to an action, especially to a bad action. One of its synonyms is to abet.³

INSTITUTE.—See note 4.

INSTITUTION. (See also the title EXEMPTIONS (FROM TAXATION), vol. 12, p. 266.)—The term "institution" is sometimes used as descriptive of the

criminally the words *instantaneous* and 'immediate,' and the adverbs *instantaneously* and 'immediately,' we have not regarded them, in this class of cases, as meaning precisely the same thing, and have preferred to use the words 'immediate' and 'immediately,' as being more comprehensive and elastic in their meaning than the words *instantaneous* and *instantaneously*, and better calculated to convey the idea which we wish to express. Of course an *instantaneous* death is an immediate death, but we have not supposed that an immediate death is necessarily, and in all cases, an *instantaneous* death." See also the title DEATH BY WRONGFUL ACT, vol. 8, p. 851.

1. **Instanter**—**Procedure.**—"The term *instanter* means, it is said, that the act shall be done within twenty-four hours (Price v. Simpson, 1 Taunt. 343; Tidd 567, 641, 674); but a doubt has been suggested by whom the account of hours is to be kept, and whether the term *instanter*, as applied to the subject-matter, may not more properly be taken to mean 'before the rising of the court,' when the act is to be done in court; or 'before the shutting of the office on the same night,' when the act is to be done there. Tidd 567, 641; Rex v. Johnson, 6 East 587, note." 3 Chitty's Pr. 111. The *New York* courts have adopted the former of these meanings. Champlin v. Champlin, 2 Edw. (N. Y.) 328; Jackson v. Eddy, 2 Cow. (N. Y.) 601; Harman v. Glover, 10 Wend. (N. Y.) 617; Sabin v. Johnson, 7 Cow. (N. Y.) 421. And so in *Missouri*, State v. Clevenger, 20 Mo. App. 627; and in *Colorado*, Moffat v. Dikson, 3 Colo. 315. But the *Illinois* courts have adopted the latter. Northrop v. McGee, 20 Ill. App. 108; Montague v. Hanchett, 20 Ill. App. 226.

In *Smith v. Little*, 53 Ill. App. 160, it was said: "The order was that the defendants plead *instanter*. This was assumed to mean instantly. Technically, however, it means within the judicial day then begun. 1 Bouv. Law Dict. 645. It is probably true that the term, as ordinarily used, is understood to mean instantly, immediately, or at once, so that upon such a rule a default may follow the entry of the rule, and this, in effect, makes the rule unnecessary, for the default might as well be entered without it."

Same—**Bail Bond.**—In *Fentress v. State*, 16 Tex. 79, the bail bond was conditioned as follows: "Now, if the said Rainey Fentress shall make his personal appearance before the District Court of Bexar county to answer to said indictment *instanter*, to be holden in the town of San Antonio, A. D. 1882, there to remain until discharged by the court," etc. It was held sufficient as to both place and time, the term *instanter* having a legal signification,

and usually meaning within the next twenty-four hours, and when not so meaning, signifying "within a reasonable time."

2. **Instead Of.**—Laws N. Y. 1853, c. 245, § 1, provided as follows: "*Instead* of the toll authorized to be demanded and received on plank-roads by section 35 of chapter 210 of the Laws of 1847, the following rates of toll may hereafter be demanded and received," etc. In a case arising under this section the court said: "The term *instead of* means in the place or room of; and the plain intent of the legislature was to supersede section 35 by section 1; and the result was that section 35 was repealed by implication. The intent could not have been more patent had that section read that section 35 is hereby amended so as to read as follows." *Southport Plank Road Co. v. Russell*, (Supm. Ct. Gen. T.) 7 N. Y. St. Rep. 506. See generally the title TURNPIKES.

3. *State v. Fraker*, 148 Mo. 143. And in that case it was held that the beneficiary in an insurance policy could not be said to have *instigated* his executor in an attempt to defraud the insurance company by his prior acts in obtaining the policy, executing a will, and pretending to drown.

4. **Institute**—**Commence.**—An English statute provided that no prosecution should be *instituted* for any offense under the Sunday Act, except with the consent of the chief of police. In construing this statute in *Thorpe v. Priestnall*, (1897) 1 Q. B. 162, the court said: "It is clear that the *institution* of a prosecution is something which may be done by the chief constable as well as with his consent. The chief constable cannot grant a summons, nor, when a summons is once granted, has he any discretion to exercise as to whether it shall be served or not. Neither of those things, therefore, is the *institution* of the prosecution, which is a matter within his discretion. The *institution* of the prosecution must, therefore, be the laying of the information. I do not think that any distinction can properly be drawn between the words *institute* and 'commence.' The passages in the judgments in *Yates v. Reg.*, 14 Q. B. D. 648, which were relied upon in support of the conviction, only amount to dicta, for the decision in that case related to a prosecution for libel by a criminal information filed by order of the court."

A proceeding *instituted* means one commenced. *Blackburne v. Blackburne*, L. R. 1 P. & D. 563.

Instituting and Bringing.—In *Com. v. Duane*, 1 Binn. (Pa.) 608, it was said: "For, without entering into a critical examination of the meaning of the word *institute*, in common parlance, when applied to legal proceedings, it signifies the commencement of the proceed-

establishment or place where the business of a society or association is done or its operations are carried on, and at other times it is used to designate the organized body.¹

ing. When we talk of *instituting* an action, we understand bringing an action."

Art Institute. — See ART, vol. 2, p. 943.

1. *Indianapolis v. Sturdevant*, 24 Ind. 391; Appeal Tax Ct. *v. St. Peter's Academy*, 50 Md. 345; *Gerke v. Purcell*, 25 Ohio St. 244; *Humphries v. Little Sisters of Poor*, 29 Ohio St. 201; *Morris v. Lone Star Chapter No. 6*, 68 Tex. 698.

Implying Incorporation. — So in *Dodge v. Williams*, 46 Wis. 100, it was said: "The words *institution* and 'organized' appear to imply an incorporation. A private school or college may by courtesy be called an *institution* according to the American fashion of promoting people and things by brevet names. But in legal parlance an *institution* implies foundation by law, by enactment or prescription. One may open and keep a private school; he cannot be properly said to *institute* it."

Institution in the Sense of the Organization. — In *Nobles County v. Hamline University*, 46 Minn. 316, the act considered provided that "all corporate property belonging to the *institution*, both real and personal, is and shall be free from taxation;" and to the claim that only "the university itself and the necessary grounds for its proper use" were exempt, the court replied as follows: "The * * * proposition is based upon an untenable attempted distinction between the *institution* and the 'corporation.' * * * The term *institution*, although sometimes used as descriptive of the establishment or place where a business is carried on, properly means an association or society organized or established for promoting some specific purpose. * * * The *institution*, as distinguished from the 'corporation,' has no being, and is incapable of owning property. Had it been intended to limit the exemption to property directly used and occupied by the university, different language would have been used." And see also *Montana Catholic Missions v. Lewis County*, 13 Mont. 565.

Upon a statute exempting charitable *institutions* from taxation, the court in *Kentucky Female Orphan School v. Louisville*, 100 Ky. 486, said: "Upon the whole, it would seem that when the statute exempts the *institution* from taxation, and no qualifying words are used showing or tending to show that only the property 'used' by the *institution* or 'connected' with the *institution* is to be exempt, then the associated entity — the corporate being — with its estate as an entirety, is embraced by the word *institution*. The exemption of the *institution* would thus embrace its endowment fund and property, in whatever form these assets might be found. This is precisely what we find in the section under consideration, so far as reference is made to '*institutions* of purely public charity.'"

In the Sense of Establishment. — In *Richmond County v. Bohler*, 80 Ga. 161, it was said: "That the word *institution*, both in legal and colloquial use, admits of application to physical things, cannot be questioned. One of its meanings, as defined in Webster's Unabridged

Dictionary, is, 'an establishment, especially of a public character, affecting a community.' And one of the meanings of 'establishment,' as defined by the same authority, is 'the place in which one is permanently fixed for residence or business; residence with grounds, furniture, equipage, etc., with which one is fitted out; also, any office or place of business, with its fixtures.'" And in that case it was held that in an exemption statute the word was used in the sense of the establishment of the society and not as meaning the organization itself.

In *Morris v. Lone Star Chapter No. 6*, 68 Tex. 701, it was said: "The grammatical construction of this provision is not clear. The word *institution* properly means an association organized or established for some specific purpose (see the word in Webster's Dictionary), though it is sometimes used in statutes and in common parlance in the sense of the building or establishment in which the business of such a society is carried on." And in that case it was held that the word in the exemption statute was used in the latter sense. See also *Montgomery v. Wyman*, 130 Ill. 22; Appeal Tax Ct. *v. St. Peter's Academy*, 50 Md. 345.

Exemption. — The exemption from income tax granted by the English Income Tax Act of 1842 (Sched. A, § 61, No. VI.) to any building "the property of any literary or scientific *institution*," includes buildings appropriated to free public libraries and used solely for the purposes of the libraries, whoever may be the owners of the buildings, and whether they are or are not supported by rates. *Manchester v. McAdam*, (1860) A. C. 500.

System. — In *Manchester v. McAdam*, (1896) A. C. 507, Lord Herschell said: "It may be well to consider, first, what is the meaning of the word *institutions* as used in the section. It is a word employed to express several different ideas. It is sometimes used in a sense in which the *institution* cannot be said to consist of any persons, or body of persons, who could, strictly speaking, own property. The essential idea conveyed by it in connection with such adjectives as 'literary' and 'scientific' is often no more than a system, scheme, or arrangement by which literature or science is promoted, without reference to the persons with whom the management may rest, or in whom the property appropriated for these purposes may be vested, save in so far as these may be regarded as a part of such system, scheme, or arrangement. That is certainly a well-recognized meaning of the word. One of the definitions contained in the Imperial Dictionary is as follows: 'A system, plan, or society, established either by law or by the authority of individuals, for promoting any object, public or social.'"

Transient Organization. — By the term *institution* is to be understood an organization which is permanent in its nature, as contradistinguished from an undertaking which is transient and temporary. *Indianapolis v. Sturdevant*, 24 Ind. 391; *Humphries v. Little Sisters of Poor*, 29 Ohio St. 201.

INSTRUCTIONS. (See also the title *INSTRUCTIONS*, 11 ENCYC. OF PL. AND PR. 47.)—An instruction is an exposition of the principles of law, applicable to a case or some branch or phase of a case, which the jury is bound to apply in order to render a verdict establishing the rights of the parties in accordance with the facts proven.¹ In common parlance an instruction is an order or direction.²

INSTRUMENT. (See also the titles *FORGERY*, vol. 13, pp. 1086, 1093; *LIMITATION OF ACTIONS*; *RECORDING ACTS*; and see *WRITING*.)—The term "instrument," in its broadest sense, comprises formal or legal documents in writing, including contracts, deeds, wills, bonds, leases, mortgages, etc. In the law of evidence it has still a wider meaning, and includes not merely documents, but witnesses, and things animate or inanimate, which may be presented for inspection.³

A Bequest to a Benevolent, Religious, Charitable Institution was held void, as by force of the term "benevolent" it embraced objects which were not legal charities. It was contended by counsel that the term *institution* gave definiteness to the expression of the use intended, but the court said: "An *institution* is a mere organism for the accomplishment of an object, and the existence of such organism cannot, in the nature of things, make such object definite. To make the argument of any value it should appear that the class of benevolent purposes which are not comprehended in the definition of legal charities are not and cannot be executed by institutions, that is, associations of persons." *Thomson v. Norris*, 20 N. J. Eq. 524.

1. Instructions.—*Lehman v. Hawks*, 121 Ind. 541.

In *Lawler v. McPheeters*, 73 Ind. 579, it was said: "*Instructions* proper are directions in reference to the law of the case."

Writing.—Within the meaning of a statute requiring that *instructions* shall be in writing, it has been held that an *instruction* is an announcement to the jury by the court of the rules of law, which it is the duty of the jury to apply from the facts it may find from the evidence before it. *Illinois Cent. R. Co. v. Wheeler*, 50 Ill. App. 209, *affirmed* 149 Ill. 525.

In *McCallister v. Mount*, 73 Ind. 507, the court said: "A direction to retire with their bailiff; to separate for their meals; to seal up their verdict; to abstain from talking among themselves or with others; to sign their general verdict, or to answer interrogatories, are not *instructions* within the meaning of the law."

Same — Interrogatories.—In *Trentman v. Wiley*, 85 Ind. 33, a direction given to the jury in regard to interrogatories was held not to be an *instruction* and therefore was not required to be in writing.

Same — Directing Jury to Retire After Informal Verdict.—In *Lehman v. Hawks*, 121 Ind. 541, it was held, where a proper request was made that all the *instructions* to the jury should be given in writing, and all the *instructions* given before the jury retired were in writing, and afterwards the jury returned with an informal verdict, and the court orally directed the jury to retire and bring in a verdict covering the issues of the case, that the court committed no error in making such oral statement; that it was not an *instruction* in the true sense of the word.

Same — Oral Statement as to Evidence.—In *Stanley v. Sutherland*, 54 Ind. 354, the court was requested to *instruct* the jury in writing before any evidence was introduced. The defendant introduced certain evidence, to which the plaintiff objected, and the court said to the jury: "Gentlemen of the jury, I *instruct* you that this evidence will have no bearing on the case unless the plaintiff is connected with it in some way, or the facts brought to the knowledge of the plaintiff." It was held that such statement to the jury did not constitute an *instruction* within the meaning of the statute requiring that *instructions* be given in writing.

2. Instructions — Building Contract. (See also the title *WORKING CONTRACTS*.)—A company contracted with a builder to do the work of a building "in a substantial and workmanlike manner" and "in accordance with the plans, specifications, and *instructions* furnished" by the company. It was held that the word *instructions* referred to the kind of structure, etc., relating to planning the building, but the mode of accomplishing the work was left to the builder's own skill and judgment. *Hunt v. Pennsylvania R. Co.*, 51 Pa. St. 475.

Instruction and Regulation Distinguished.—"Section 251 [Rev. Stat. U. S.], which empowers the Secretary of the Treasury to issue regulations for the government of collectors, makes a distinction between *instructions* and 'regulations.' This distinction is inherent in the nature of the two things. An *instruction* is a direction to govern the conduct of the particular officer to whom it is addressed. A regulation affects a class or classes of officers." *Landram's Case*, 16 Ct. Cl. 85.

3. Instrument.—*Cardenas v. Miller*, 108 Cal. 250.

"Abbott, in his law dictionary, defines the word *instrument* as 'something reduced to writing as a means of evidence,' and Webster describes it as a writing expressive of 'some act, contract, process, or proceeding, as a deed, contract, writ,' etc." *State v. Kelsey*, 44 N. J. L. 34.

In *Foarman v. Wallace*, 75 Cal. 552, it was said that an *instrument* is a writing that contains some agreement, and is said to be so called because it has been prepared as a memorial of what has taken place or been agreed upon. It includes conveyances, leases, mortgages, bonds, promissory notes, wills, etc.

A generic term for bills, bonds, conveyances, leases, mortgages, promissory notes,

wills, and like formal or solemn writings. It scarcely includes accounts, letters in ordinary correspondence, memoranda, and similar writings, with respect to which the creation of evidence to bind the party or the establishment of an obligation or title is not the primary motive. *Abbott's L. Dict.*; *Hankinson v. Page*, 31 Fed. Rep. 186.

Recording Acts. — As used in a recording act, the word *instrument* has been defined to mean "some written paper or *instrument* signed and delivered by one person to another, transferring the title to or creating a lien on property, or giving a right to a debt or duty." *Hoag v. Howard*, 55 Cal. 564; *Warnock v. Harlow*, 96 Cal. 307.

Instrument of Conveyance. — In *Matter of Potts*, 1 Ashm. (Pa.) 343, it was said: "When we speak of an '*instrument of conveyance*' we use a phrase of the broadest extent. Lexicographers define *instrument* to be the '*agent or mean of anything*.' If, therefore, we suffer the language of our lawgivers to convey the same ideas we derive from language coming from any other source, we have no difficulty in determining that a devise in trust is a '*conveyance in trust*,' and that a last will and testament may be an '*instrument of creating a trust*.'"

Instrument in the Sense of Written Instrument. — In *Hoag v. Howard*, 55 Cal. 566, it was said: "In fact the word *instrument* appears to be used, as suggested by *Abbott* in his definition of the word (see *Abbott's Law Dictionary*, word *Instrument*), as an abbreviated form of '*written instrument*,' the word '*written*' being elided."

A statute applied to charities which had an *instrument of foundation or statutes*. In construing this provision *Lord Selborne, L. C.*, said: "Certainly the other words '*instrument of foundation or statutes*' point with great distinctness to written *instruments*." *Matter of Endowed Schools Act*, 10 App. Cas. 307.

Engravings. — The term *instrument*, in a forgery statute, has been held to include not only written instruments and writings, but also an engraved or printed *instrument*, being or purporting to be the act of another. *People v. Rhoner*, (Supm. Ct.) 4 Park. Crim. (N. Y.) 166; *Benson v. McMahon*, 127 U. S. 470.

Signature. — As to whether a signature is necessary to constitute an *instrument*, see *Hunter v. Parker*, 7 M. & W. 342.

Deed Not Necessary — Mere Writing. — The articles of association of a company permitted the transfer of stock by *instruments* in writing. It was held that a deed was not necessary. *In re Tahiti Cotton Co.*, L. R. 17 Eq. 273; *Ortigosa v. Brown*, 47 L. J. Ch. 168.

It was provided that a power might be executed by "deed, *instrument*, or will." It was held that a mere writing which was neither a deed nor a will was all that was necessary. *Boderick v. Brown*, 1 Kay & J. 328. But in *Conservators v. Inland Revenue Com'rs*, 18 Q. B. D. 279, it was held that where a statute provided for stamps on bonds, covenants, or *instruments* of any kind whatsoever, the term *instrument* meant an *instrument* of the same nature as a bond or covenant.

Annexation Proceedings. — In *Logansport v.*

La Rose, 99 Ind. 117, it was held that the annexation proceedings annexing real estate to a city were not a written *instrument* within the meaning of the statute providing that it should not be necessary to copy a written *instrument* into a bill of exception.

By-laws — Instrument. — *In re Henderson*, 29 Ont. 669, 18 Can. L. T. 362, a by-law was held to be an *instrument*, but not an *instrument* capable of registration.

Certificate of Notary Public. — In *Rogers v. State*, 8 Tex. App. 404, it was held that the fabrication of a certificate of a notary public purporting to authenticate the acknowledgment of a conveyance or transfer was not a forgery of an *instrument* within the *Texas* statute which provides that it shall be forgery to make a false *instrument* which if true would have transferred or in any manner have affected any property whatever, and which further defines an *instrument* as follows: "By an *instrument* which would 'have transferred or in any manner have affected' property is meant every species of conveyance or undertaking, in writing, which supposes a right in the person purporting to execute it to dispose of or change the character of property of every kind, and which can have such effect when genuine."

A Judgment Is Not a Written Instrument within the meaning of the *Indiana* statute which provides as follows: "When any pleading is founded on a written *instrument*, or on account, the original, or a copy thereof, must be filed with the pleading. * * * Such copy of a written *instrument*, when not copied in the pleadings, shall be taken as part of the record." The court said: "Deeds, mortgages, bonds, written contracts, promissory notes, bills of exchange, etc., are written *instruments*. Judgments are in writing, but are not usually called written *instruments*. The legislature, in framing and enacting the section, evidently had in view only *instruments* of which 'the original, or a copy,' might be filed, as the party might elect." *Lyle v. Lyle*, 37 Ind. 281. See also *Wilson v. Vance*, 55 Ind. 584; *Morrison v. Fishel*, 64 Ind. 177; *Becknell v. Becknell*, 110 Ind. 42; *Dumbould v. Rowley*, 113 Ind. 353.

Letters. (See also the titles **LETTERS**; **SECONDARY EVIDENCE**.) — Within a rule that a written *instrument* must be proved by the *instrument* itself, the court thus defined *instrument* in *Rose v. Otis*, 5 Colo. App. 472: "The word *instrument* has a technical meaning in law. It is something reduced to writing as a means of evidence. It is the formal expression in writing of some agreement or obligation, or of some act upon which the rights of parties are dependent. Contracts may be made by letter, and when a contract is thus made the letters evidencing it are within the definition of the term; but ordinarily a letter is not a written *instrument*, and the doctrine as stated would not apply to it. But at the trial of *Queen Caroline*, in 1820, the rule which obtained in the case of written *instruments* was applied to letters." The court then went on to say that the rule of *Queen Caroline's* case has been followed in the United States, citing *Stamper v. Griffin*, 12 Ga. 450; 1 Greenl. Ev., §§ 88, 463, *Jackson v. Jackson*, 47 Ga. 99; and

held that the writer of a letter could not be questioned as to statements made therein, until the letter itself had been put in evidence.

Lis Pendens.—In *Warnock v. Harlow* 96 Cal. 301, it was held that a notice of lis pendens was not an *instrument* within a California statute providing that an unrecorded *instrument* should be valid as between the parties and those who had notice thereof.

Mortgage.—In *Tolman v. Smith*, 74 Cal. 345, it was held that a mortgage executed by a married woman upon her separate real estate was an *instrument* of conveyance, within a statute providing for acknowledgment. See generally the title ACKNOWLEDGMENTS, vol. I. p. 483.

Same—Statute of Limitations.—A suit to foreclose a mortgage has been held to be a suit upon a sealed *instrument*. *Meier v. Kelly*, 22 Oregon 136.

Returns of Marriages, Births, Deaths, etc.—A statute provided that the secretary of state and register of the Prerogative Court should be entitled to receive twelve cents for filing every bond or instrument or writing of a public nature. It was held that this did not entitle the secretary of state to charge the state for filing the returns of marriages, births, and deaths, required to be sent to his office. The court said: "It appears that the textual associates of the term '*instrument* of writing' are bonds, deeds, records, and laws, and the proposition therefore is, Does this expression, in view of its intrinsic signification and of its relationship in this sentence, have so wide a scope as to embrace every possible paper writing that may be directed by the legislature to be put among the files of this office? Unless the expression '*instrument* of writing' has this very extensive import, it will not take in the returns in question, for such returns have no legal character or force, being mere statistical collections deposited in this public office for the purposes of economic science. * * * I cannot construe this language in this broad sense. In my apprehension it has a restrictive connotation from being associated with such things as bonds, laws, deeds, and records; and independently of such surroundings and connections, the expression, standing by itself, would not comprehend all written papers, but only written papers of a class. Abbott, in his Law Dictionary, defines the word *instrument* as 'something reduced to writing as a means of evidence,' and Webster describes it as a writing expressive of 'some act, contract, process, or proceeding, as a deed, contract, writ,' etc. It has just been shown that these returns do not embrace the contents of any of these definitions; they are not 'reduced to writing as a means of evidence,' nor are they expressive 'of some act, contract, process, or proceeding, as a deed, contract, writ,' etc." *State v. Kelsey*, 44 N. J. L. 33.

Power of Attorney.—A power of attorney to convey real estate is included in the term *instrument* whereby real estate may be affected. *Arnold v. Stevenson*, 2 Nev. 234. In *Williams v. Birbeck, Hoffm.* (N. Y.) 369, it was held that the term included a power of attorney to assign a mortgage. These cases arose under recording acts.

Stenographer's Report.—In *Patterson v. Churchman*, 122 Ind. 385, a stenographer's report was held not to be a written *instrument* within a statute providing that it should not be necessary to copy a written *instrument* into a bill of exceptions. The court said: "We quote from Anderson's Dictionary of Law: '*Instrument* * * * (3) Anything reduced to writing; a "*written instrument*," or "*instrument of writing*;" more particularly, a document of a formal or solemn character. * * * "*Instruments* in writing," associated in a statute with "bonds," "laws," "deeds," and "records," have a restrictive connotation. Independently of such surroundings, the expression, by itself, does not comprehend all written papers, but only written papers of a class. An *instrument* is "something reduced to writing as a means of evidence." Returns of births, marriages, and deaths, to a department of government, are not *instruments*. A generic term for bills, bonds, conveyances, leases, mortgages, promissory notes, wills, and like formal or solemn writings. Scarcely includes accounts, letters in ordinary correspondence, memoranda, and similar writings with respect to which the creation of evidence to bind the party, or the establishment of an obligation or title, is not the primary motive." In Bouvier's Law Dictionary the word *instrument* is defined as follows: "The writing which contains some agreement, and is so called because it has been prepared as a memorial of what has taken place, or been agreed upon. It includes bills, bonds, conveyances, leases, mortgages, promissory notes, and wills, but scarcely accounts, ordinary letters, or memoranda. The agreement and the *instrument* in which it is contained are very different things, the latter being only evidence of the former. The *instrument* or form of the contract may be valid, but a contract itself may be void on account of fraud."

Writing on Back of Note.—The writing "Extended to December 1st, 1891," placed by the payee thereof on a promissory note, has been held a written *instrument*, importing a consideration. The court said: "A '*written instrument*' is defined to be 'something reduced to writing as a means of evidence' (11 AM. AND ENG. ENCYC. OF LAW 275, note); 'a writing expressive of some act' (Webst. Dict.); 'anything reduced to writing' (And. Law Dict.)." *Corbett v. Clough*, 8 S. Dak. 180.

Forgery—Telegram.—A telegram has been held an *instrument*. In *Reg. v. Riley*, (1896) 1 Q. B. 314. Hawkins, J., said: "Now, can this telegram properly be called an *instrument*? I am not aware of any authority for saying that in law the term *instrument* has ever been confined to any definite class of legal documents. In the absence of such authority, I cannot but think the term ought to be interpreted according to its generally understood and ordinary meaning, as stated in the dictionaries of Dr. Johnson and of Webster. Both these give definitions first how the word is to be treated when applied to a chattel, namely, as 'a tool used for any work or purpose.' When applied to a writing, Dr. Johnson defines it as 'a writing— a writing containing any contract or order.' Webster's definition

An instrument is also a tool used for any work or purpose.¹

is, 'a writing expressive of some act, contract, process, or proceeding.' When used generally, Dr. Johnson speaks of it as 'that by means whereof something is done;' Webster, as 'one who, or that which, is made a means, or caused to serve a purpose.' These definitions cover an infinite variety of writings, whether penned for the purpose of creating binding obligations or as records of business or other transactions."

Verdict. — A statute provided that a creditor should receive interest, when there was no agreement as to rate, at a certain per cent. per annum for all moneys after they became due on bonds, bills, promissory notes, or other instruments of writing. It was held that under this statute interest was not recoverable on a verdict. The court said: "To the first proposition it may be replied that the term 'instrument of writing,' as here used, has a definite legal meaning, which excludes a verdict as something essentially different. An instrument of writing implies an agreement or contract which it contains, and of which it is the memorial. (Bouvier.) A verdict is the unanimous decision made by a jury and reported to the court on the matters lawfully submitted to them in the course of the trial of a cause. (Bouvier.)" *Hawley v. Barker*, 5 Colo. 120.

A Writ of Attachment Is Not an Instrument within the meaning of section 1107 of the *California Code of Civil Procedure*, which provides as follows: "Every grant of an estate in real property is conclusive against the grantor, also every one subsequently claiming under him, except a purchaser or incumbrancer who in good faith, and for a valuable consideration, acquires a title or lien by an instrument that is first duly recorded." *Hoag v. Howard*, 55 Cal. 564.

A Sheriff's Certificate of Sale under Section 700 of the California Code of Civil Procedure Is an Instrument within the meaning of section 1107 of that code. (See the preceding paragraph.) The court said: "The question recurs, was the sheriff's certificate of sale, issued to the respondent and recorded, good as against an unrecorded deed? * * * Appellant contends that a sheriff's certificate is not an instrument whereby a title or lien is acquired within the purview of section 1107 of the Civil Code. An instrument is a writing which contains some agreement, and is said to be so called because it has been prepared as a memorial of what has taken place or been agreed upon. It includes conveyances, leases, mortgages, bills, bonds, promissory notes, wills, etc. (Bouvier's Law Dictionary.) * * * The sheriff's certificate to the purchaser is the evidence of the equitable interest which the purchaser has in the land, and is an instrument whereby an interest or title is created, within the meaning of section 1107 of the Civil Code." *Foorman v. Wallace*, 75 Cal. 552, citing *Page v. Rogers*, 31 Cal. 301.

Tax Duplicate. — In *Hazzard v. Heacock*, 39 Ind. 173, it was held that a tax duplicate was not a written instrument within the meaning of a statute requiring that copies of instruments be filed with the pleadings. See also *Ewing v. Robeson*, 15 Ind. 26.

A Will is an instrument in writing within the meaning of a power to appoint by an "instrument in writing." *Sugden on Powers* (3d Am. ed.) 262; *Smith v. Adkins*, L. R. 14 Eq. 402.

Instrument for Payment of Money Only. — In *Carrington v. Bayley*, 43 Miss. 507, it was held that a guardian's bond was not an instrument for the payment of money only, and therefore that a breach of the bond must be clearly assigned.

In *Leggett v. Jones*, 10 Wis. 34, a promissory note for the payment of money, adding the words "with exchange on New York," was held to be an instrument for the payment of money only.

Instrument in Writing Not under Seal — Chattel Mortgage. — In *Hope v. Johnston*, 28 Fla. 55, it was held that a chattel mortgage not under seal was an instrument in writing not under seal, within the meaning of a statute of limitations.

Sealed Instrument. — See the titles LIMITATION OF ACTIONS; SEALS; and see OBLIGATIONS.

1. Instrument — Escape. — *Hurst v. State*, 79 Ala. 58. This case was upon a statute making it an indictable offense to assist a prisoner to escape from jail. See also the title ESCAPE, vol. 11, p. 258.

Exemption. (See also the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 118.) — In holding the office furniture of a practicing lawyer exempt from execution the court said. "Strictly speaking, perhaps a table is not an instrument. Its general use is such that the word instrument seems inapplicable. But it should be borne in mind that a lawyer's table is used specifically in his employment; it is one of the things which he employs as a means in the accomplishment of his work. The fact that a table in its general use is not an instrument is not important. It appears quite different when it is adopted specifically as a means in an employment. It then fulfils all the essential ideas of an instrument." *Abraham v. Davenport*, 73 Iowa 112.

Same — Safe, Abstracts, Cabinet, and Table. — In *Davidson v. Sechrist*, 28 Kan. 324, one iron safe, one set of abstracts, and one cabinet and table were held exempt as instruments, where their owner carried on the business of insurance agent and abstracts of titles.

Same — Snakes. — Certain trained snakes, imported by a professional snake charmer, were held to be free from duty as implements, instruments, and tools of trade. The court said: "One definition of instrument is: 'One who or that which is made a means or caused to serve a purpose.' *Webst. Dict., Instrument*. 4. These snakes are clearly instruments within this definition. They are instruments with which she practices her profession, and are her professional instruments. As such, she seems to have been entitled to have them come with her, duty free." *Magnon v. U. S.*, 66 Fed. Rep. 152.

Fishing Net. — In *Jones v. Davies*, (1898) 1 Q. B. 405, it was held that a fishing net with an illegally small mesh was not a like instrument to a snare, within the meaning of an English fishery act.

INSTRUMENTALITY. — See note 1.

INSUFFICIENCY — INSUFFICIENT. — See note 2.

Instrument of Gaming. (See also the title **GAMING**, vol. 14, p. 664.) — In *Hirst v. Molesbury*, L. R. 6 Q. B. 130, it was held that a deposit of a half sovereign as a bet on a dog race was not betting with the coin as an *instrument* of gaming at a game of chance, within an English gaming act.

In *Tollet v. Thomas*, 24 L. T. N. S. 509, a machine used for registering bets was held to be an *instrument* of gaming.

1. Instrumentality. — A statute provided that a solicitor through whose *instrumentality* property had been recovered should be entitled to charge for his costs upon such property, although his client might have been discharged before the trial of the action. In construing this statute Kay, J., said: "The words are 'through the *instrumentality*' of such solicitor. Suppose that a solicitor is employed in a hotly contested action, and prepares the whole of the case of the plaintiff down to the moment of trial, and that just before the trial the plaintiff changes his solicitor, and then, owing to the exertions of the solicitor formerly employed, succeeds in the action. Can it possibly be said that success is not owing to the *instrumentality* of the discharged solicitor? I cannot conceive that it could fairly be held that such a case as that is not within the statute." *In re Wadsworth*, 29 Ch. D. 520.

2. Insufficiency in Pleading. (See also the title **ANSWERS IN EQUITY PLEADING**, 1 ENCYC. OF PL. AND PR. 896 *et seq.*) — "In common-law pleadings the word [*insufficiency*] was sometimes used. A pleading was said to be defective, uncertain, or bad, but it was not generally called *insufficient*. In chancery, however, the word was extensively used in connection with answers which were called *insufficient* when they did not distinctly and fully respond to the allegations or interrogatories in the bill. But it was always applied to those answers which did not explicitly respond, either by admitting or denying specifically the matters charged or inquired of by the complainant, and was not deemed applicable to the statement of new matter." *Salinger v. Lusk*, (Supm. Ct. Spec. T.) 7 How. Pr. (N. Y.) 435, *citing* *Spencer v. Van Duzen*, 1 Paige (N. Y.) 556, and holding that the word was used in the same sense in Code Pro. N. Y., § 153 (Code Civ. Pro., § 494), providing that the plaintiff may demur to the answer for *insufficiency*.

Insufficient Evidence. (See also the title **NEW TRIAL**, 14 ENCYC. OF PL. AND PR. 707.) — By Rev. Stat. D. C. 1875, § 804 (Comp. Stat. D. C. 1894, c. 55, § 6), it is provided as follows: "The justice who tries the cause may, in his discretion, entertain a motion, to be made on his minutes, to set aside a verdict and grant a new trial upon exceptions, or for *insufficient* evidence, or for excessive damages." By section 805 (c. 55, § 7) it is provided that "when such motion is made and heard upon the minutes, an appeal to the general term may be taken from the decision." It has been held that the phrase "*insufficient* evidence," as thus used, includes evidence that is insufficient in fact as well as that which is insufficient in law,

and that, therefore, an appeal lies on a motion to set aside a verdict as being against the weight of the evidence. The court said: "Strictly speaking, evidence is said to be *insufficient* in law only in those cases where there is a total absence of such proof, either in its quantity or kind, as in the particular case some rule of law requires as essential to the establishment of the fact. Such, for instance, would be the case where a fact was attested by one witness only, when the law required two; or when the alleged evidence was proven to be verbal, when the law required it to be in writing. In such cases a verdict might be said to be against law because founded on insufficient evidence. *Insufficiency* in point of fact may exist in cases where there is no *insufficiency* in point of law; that is, there may be some evidence to sustain every element of the case, competent both in quantity and quality in law to sustain it, and yet it may be met by countervailing proof so potent as to leave no reasonable doubt of the opposing conclusion." *Metropolitan R. Co. v. Moore*, 121 U. S. 569.

For a similar construction of the phrase as used in the New York Code, see *Algeo v. Duncan*, 39 N. Y. 313; *McDonald v. Walter*, 40 N. Y. 551.

Under the *Wisconsin* statute which provides that a verdict may be set aside "for *insufficient* evidence," it has been held that where the plaintiff, if entitled to recover at all, is clearly entitled to a larger amount than that allowed by the jury, the verdict may be set aside as being found on "*insufficient* evidence," within the meaning of the section. *Emmons v. Sheldon*, 26 Wis. 648, the court saying: "In the case of *Moore v. Wood*, (Supm. Ct. Gen. T.) 19 How. Pr. (N. Y.) 405, the court held that a party could not move on the minutes to set aside a verdict in his own favor, on the ground that the damages found by the jury were too small. 'By *insufficient* evidence,' the court say, 'is intended a case where the verdict is contrary to the evidence, not where the jury have found a verdict upon evidence, but have ignorantly or perversely found too small damages.' It seems to us, if a jury ignorantly or perversely finds for a plaintiff five dollars damages, when the evidence shows that he should recover a thousand dollars damages, that such a verdict is clearly contrary to evidence, and found upon *insufficient* evidence. See *McDonald v. Walter*, 40 N. Y. 551."

Streets. (See also the title **STREETS AND SIDEWALKS**) — In *Schultz v. Milwaukee*, 49 Wis. 254, 35 Am. Rep. 779, it was held that a city was not liable for an injury done to a person on a public street by a collision with others sliding down a hill thereon. The court said: "The injury of which the plaintiff complains was not caused by the *insufficiency* or want of repairs of the street in which he was injured, and hence the action will not lie" under Rev. Stat. Wis., in force in 1880, § 1339.

Defective and Insufficient. — In *State v. Lavalley*, 9 Mo. 836, it was said: "The words 'defective' and *insufficient*, although differing

INSULTING. — See note 1.

INSURABLE INTEREST. — See the titles BENEFICIARIES (IN INSURANCE), vol. 3, p. 929 *et seq.*; FIRE INSURANCE, vol. 13, p. 136 *et seq.*; FIRES, vol. 13, p. 424; INSURANCE, *post*, p. 830; LIFE INSURANCE; MARINE INSURANCE.

somewhat in signification, are frequently used indifferently by the legislature as meaning the same thing; and as applied to recognizances, there can scarcely be said to be any distinction in fact."

Public Officers. — **Insufficiency** is an original incapacity which creates a forfeiture of office. *People v. Wells*, 2 Cal. 211. See also the title PUBLIC OFFICERS.

Insufficient on Demurrer. — In *State v. Burghofer*, 107 Mo. 9, the court said: "The language of section 4290 [Rev. Stat. Mo. 1889] is: 'When any indictment is quashed or adjudged *insufficient* upon demurrer, or when judgment thereon is arrested.' The defendant insists that this language 'clearly indicates the intention of the legislature to limit the discretion of the trial court to situations where, upon motion to quash, demurrer, or motion in arrest, an indictment has been held *insufficient*.' In the second place, in order to maintain his construction, he interpolates two words, 'form or substance,' after the word *insufficient*. * * * There are three cases where the state has a right to appeal: first, where the indictment is quashed; second, when the indictment is adjudged *insufficient* on demurrer; third, where the judgment thereon is arrested. The plain grammatical construction of this language would limit the word *insufficient* as a qualifying term to the second phrase only. * * * That the word *insufficient* has not the restricted meaning contended for by defendant appears from another consideration. The word 'demurrer' is used in its generic sense, and when it is affirmed that an appeal will lie when an indictment is adjudged *insufficient* on demurrer it must mean any *insufficiency* that can be presented by demurrer, and the failure to state facts constituting an offense is one ground of demurrer. This is elementary law. 4 Black. Com. 333."

Insufficiency of Sureties. — A statute provided that the court might require additional security if it had cause to suspect the *insufficiency* of the securities to a guardian's bond. In construing this statute in *State v. Hull*, 53 Miss. 644, the court said: "*Insufficient* is a comprehensive term, embracing every cause or ground the court may regard as amounting to that." See generally the title OFFICIAL BONDS.

1. Insulting Language. — The *Alabama Criminal Code*, section 4306, provides for the punishment of "any person who enters into or goes sufficiently near to the dwelling house of another, and in the presence or hearing of the family of the occupant thereof, or any member

of his family, or any person who, in the presence or hearing of any female, uses abusive, *insulting*, or obscene language." In *Benson v. State*, 68 Ala. 513, the defendant went into the dwelling house of his niece, and speaking to her said, "If you don't give up my pistol I'll knock your brains out, by God," and speaking to a man there with her said, "Do you take it up?" It was held that the language was *insulting*. The court said: "If the same language had been used to a male it would doubtless have been construed as *insulting*, and would have tended to provoke a breach of the peace. Indeed, the defendant himself seems to have considered it *insulting*, for he turned immediately to a gentleman present and inquired if he 'took it up.' Why make this inquiry if there was no insult to be resented, or taken up? We would be loth to hold that language which would insult a man would not be *insulting* to a female, because, by reason of her sex and gentler nature, she would not resent it with blows."

Insulting Words Towards Female. — By the *Texas Penal Code*, article 698, manslaughter is defined as "voluntary homicide committed under the immediate influence of sudden passion arising from an adequate cause, but neither justified nor excused by law." *Inter alia*, the use of "*insulting* words" * * * by the person killed towards a female relation of the party guilty of the homicide" is specified as an "adequate cause." In *Simmons v. State*, 23 Tex. App. 657, in which case Simmons, the defendant, was charged with murder by stabbing, there was evidence showing that just before the defendant stabbed the deceased the latter applied to the former the words "damned son of a bitch." It was held that the use of these words did not make the homicide manslaughter. The court said: "We do not think this language comes within the meaning of the statute upon this subject. The term used is rather a sudden expression of anger and contempt, and, when used, no one understands it to be directed at the mother of the person to whom used." See also the title MURDER AND MANSLAUGHTER.

Under an indictment for using abusive, *insulting*, or vulgar language in or near the dwelling house of the prosecutor, in the presence of a female member of his household, it is not necessary to prove the exact words charged, but it is sufficient to prove them substantially as charged, providing there is no variance in the sense. *Benson v. State*, 68 Ala. 544.

INSURANCE.

BY THE EDITORIAL STAFF.

I INTRODUCTION, 838.

1. *Definition*, 838. —
2. *Origin and History*, 839.
3. *Various Kinds of Insurance*, 839.

II. THE CONTRACT, ITS NATURE, REQUISITES, AND INCIDENTS, 839.

1. *Nature of Contract*, 839.
 - a. *In General*, 839.
 - b. *Contract of Indemnity*, 840.
 - (1) *Insurance of Property*, 840.
 - (a) *In General*, 840.
 - (b) *Liability of Insurer*, 840.
 - aa. *Limited to Loss Actually Sustained*, 840.
 - bb. *When Property Is Destroyed by Tortfeasor*, 841.
 - cc. *Liability of Several Insurers*, 841.
 - (aa) *In Absence of "Other Insurance" Clause*, 841.
 - (bb) *When Policies Contain Clause*, 842.
 - (2) *Life Insurance*, 842.
 - c. *Personal Contract*, 843.
2. *Requisites of Contract*, 844. —
 - a. *Proper Parties*, 844.
 - (1) *Who May Insure*, 844. —
 - (2) *Who May Be Insured*, 844.
 - b. *Insurable Interest*, 845. —
 - (1) *Necessity at Time of Creation of Contract*, 845.
 - (2) *Necessity at Time of Loss*, 846. —
 - (a) *Property Insurance*, 846.
 - (b) *Life Insurance*, 846.
 - c. *Subject-matter*, 847.
 - (1) *Existence*, 847.
 - (2) *Property Illegally Kept or Used*, 847.
 - d. *Risk*, 848.
 - (1) *Insurer Must Be Subjected to Liability*, 848.
 - (2) *Causes of Loss*, 848.
 - (a) *In General*, 848.
 - (b) *Negligence of Insured*, 848.
 - (c) *Seaworthiness of Vessel*, 848.
 - (3) *Commencement and Duration of Risk*, 848.
 - (a) *Commencement*, 848.
 - aa. *In General*, 848.
 - bb. *Prospective Insurance*, 849.
 - cc. *Retrospective Insurance*, 849.
 - (b) *Duration*, 849.
 - e. *Agreement*, 849.
 - (1) *In General*, 849.
 - (2) *Mode of Agreement*, 850.
 - (a) *In General*, 850.
 - (b) *Application by Insured and Acceptance by Insurer*, 850.
 - (c) *Tender of Policy by Insurer and Acceptance by Insured*, 851.

INSURANCE.

- (3) *Form of Contract*, 851.
 - (a) *In General*, 851.
 - (b) *Preliminary Contract*, 851.
 - aa. *Power of Insurance Companies to Make*, 851.
 - bb. *No Formality Required*, 852.
 - (aa) *In General*, 852.
 - (bb) *May Be Oral*, 852.
 - cc. *Enforcement of Contract*, 853.
 - (c) *Policy*, 853.
 - aa. *Must Conform to Preliminary Agreement*, 853.
 - bb. *Validity*, 854.
 - (aa) *In General*, 854.
 - (bb) *Conditions*, 854.
 - (cc) *Execution*, 854.
 - (dd) *Delivery and Acceptance*, 855.
 - aaa. *Necessity of*, 855.
 - bbb. *Sufficiency of*, 855.
 - ccc. *Effect of*, 856.
- 4. *Consideration — Premium*, 857.
 - (1) *In General*, 857.
 - (2) *Payment*, 857.
 - (a) *Necessity of*, 857.
 - aa. *In General*, 857.
 - bb. *When Condition of Policy Requires*, 857.
 - (aa) *Validity of Requirement*, 857.
 - (bb) *Waiver of Condition*, 858.
 - (b) *Mode of Payment*, 859.
 - aa. *Payment in Cash*, 859.
 - bb. *Payment by Note*, 859.
 - cc. *Payment by Agent Individually*, 859.
 - (c) *To Whom Made*, 860.
 - aa. *Payment to Agent*, 860.
 - bb. *Payment to Broker*, 860.
 - (3) *Suspension of Policy for Nonpayment of Premium Note*, 861.
 - (a) *Insurer Not Liable During Default*, 861.
 - (b) *Revival of Policy*, 861.
 - (4) *Forfeiture of Policy for Nonpayment of Premium Note*, 862.
- 3. *Interpretation and Construction*, 862.
 - a. *General Principles*, 862.
 - (1) *Interpretation to Be Made by Court*, 862.
 - (2) *General Rules of Construction*, 862.
 - (3) *When Terms Admit of Two Constructions*, 863.
 - (4) *Construction of Printed and Written Parts*, 864.
 - (5) *Construction of Attached Clauses and General Conditions*, 864.
 - (6) *Memorandum Construed as Part of Policy*, 864.
 - b. *Construing Contents of Other Instruments as Part of Contract*, 865.
 - (1) *Application and Survey*, 865.
 - (2) *Conditions of Premium Note*, 867.
 - (3) *Charter and By-laws of Mutual Insurance Companies*, 867.
 - c. *Construing Several Policies on Same Subject-matter*, 867.
- 4. *Modification of Contract*, 868.
- 5. *Renewal of Policy*, 868.
 - a. *In General*, 868.
 - b. *How Effected*, 868.
 - c. *Breach of Contract to Renew*, 869.
- 6. *Reformation of Policy*, 869.

INSURANCE.

- a. Power of Equity to Reform, 869.*
- b. Mistake Must Be Mutual, 870.*
- c. Evidence to Support, 870.*
- 7. *Cancellation and Rescission, 870.*
 - a. By Act of Parties Themselves, 870.*
 - (1) *Cancellation of Valid Policies, 870.*
 - (a) *Right to Cancel in General, 870.*
 - (b) *Cancellation by Mutual Agreement, 871.*
 - aa. In General, 871.*
 - bb. Mode of Cancellation, 871.*
 - cc. Conditional Agreements, 872.*
 - dd. Cancellation Induced by Fraud, 872.*
 - (c) *Cancellation by Right Reserved to Insurer, 872.*
 - aa. In General, 872.*
 - bb. Mode of Cancellation, 873.*
 - (aa) *Conditions Must Be Strictly Complied With, 873.*
 - (bb) *Notice of Cancellation, 873.*
 - aaa. Necessity of, 873.*
 - bbb. Form of Notice, 873.*
 - ccc. Authority of Agent to Accept Notice, 874.*
 - ddd. Time of Notice, 875.*
 - (cc) *Return of Unearned Premium, 875.*
 - aaa. Necessity of, 875.*
 - bbb. Actual Tender Must Be Made, 875.*
 - ccc. Full Amount Returnable Must Be Tendered, 876.*
 - (dd) *Entry on Books, 876.*
 - cc. Effect of Cancellation, 876.*
 - (d) *Cancellation by Right Reserved to Assured, 876.*
 - (e) *Cancellation under Right Conferred by Statute, 877.*
 - (2) *Rescission of Policies Tainted with Fraud, 877.*
 - (a) *When Fraud Affects Interest of Assured, 877.*
 - (b) *When Fraud Affects Insurer Only, 877.*
 - b. By Courts of Equity, 878.*

III. THE INSURER, 878.

- 1. *Definition, 878.*
- 2. *Who May Insure, 878.*
- 3. *Insurance Companies, 878.*
 - a. Several Kinds of Insurance Companies, 878.*
 - (1) *In General, 878.*
 - (2) *Stock Companies, 878.*
 - (3) *Mutual Companies, 878.*
 - (4) *Mixed Companies, 879.*
 - b. Organization, 879.*
 - c. Consolidation and Amalgamation, 881.*
 - (1) *Consolidation, 881.*
 - (2) *Amalgamation, 882.*
 - (a) *Amalgamation Defined — Right to Amalgamate, 882.*
 - (b) *Rights of Policy Holders in Amalgamated Company, 882.*
 - d. Regulation, 884.*
 - (1) *Power of State to Regulate, 884.*
 - (a) *Police Power, 884.*
 - (b) *Power Reserved in Constitution, 884.*
 - (2) *Regulations Prescribed in Exercise of Power, 884.*
 - e. Taxation, 886.*
 - (1) *State, 886.*

INSURANCE.

- (2) *Municipal*, 886.
- (3) *Property Liable to Taxation — Unearned Premiums*, 887.
- (4) *Exemptions*, 887.
 - (a) *In General*, 887.
 - (b) *Exemptions Strictly Construed*, 887.
 - (c) *Exemption of Bona Fide Debts*, 887.
- f. *Powers*, 888.
 - (1) *In General*, 888.
 - (2) *Power to Amend or Repeal Charter*, 889.
 - (3) *Power to Make By-laws*, 889.
 - (4) *Power to Contract*, 890.
 - (a) *In General*, 890.
 - (b) *Power to Borrow Money and Procure Sureties*, 890.
 - (c) *Power to Make Loans and Investments*, 891.
 - (d) *Power to Give and Take Notes and Other Securities*, 892.
 - (e) *No Power to Engage in Banking Business*, 892.
 - (5) *Character of Business in Which Insurance Companies May Engage*, 892.
 - (6) *Power to Insure Property in Foreign State*, 893.
 - (7) *When Defense of Ultra Vires Will Avail*, 893.
- g. *Dissolution and Forfeiture of Charter*, 893.
 - (1) *Voluntary Dissolution*, 893.
 - (2) *Involuntary Dissolution and Forfeiture of Charter*, 893.
 - (a) *At Common Law*, 893.
 - (b) *By Statute*, 894.
 - aa. *At Suit of Creditor or Stockholder*, 894.
 - bb. *Upon Petition of Officer Designated by Statute*, 894.
 - (aa) *Text of Statutes*, 894.
 - (bb) *Constitutionality*, 894.
 - (cc) *Construction*, 894.
 - (dd) *Penalty of Statute Cannot Be Avoided by Voluntary Assignment*, 895.
 - cc. *Standard of Solvency Required by Statutes*, 895.
 - (3) *Rights and Duties of Receivers*, 896.
- h. *Foreign Companies*, 896.
 - (1) *Authority to Transact Business*, 896.
 - (a) *In General*, 896.
 - (b) *In United States*, 897.
 - aa. *Rule Stated*, 897.
 - bb. *Constitutionality of Statutes Imposing Conditions upon Right to Transact Business*, 898.
 - (aa) *Such Statutes Do Not Regulate Commerce*, 898.
 - (bb) *Not in Conflict with Citizenship Clause of Federal Constitution*, 898.
 - (cc) *Right to Remove Causes into Federal Courts*, 898.
 - cc. *Various Conditions Prescribed*, 899.
 - (aa) *In General*, 899.
 - (bb) *License and What Is Required to Obtain It*, 899.
 - (cc) *Conditions Relating to Form and Legal Effect of Policies*, 901.
 - (dd) *Retaliatory Legislation*, 901.
 - (c) *Power of State to Change Conditions of Admission*, 901.
 - (d) *Company Charged with Notice of Conditions Imposed*, 901.

INSURANCE.

- (e) *What Constitutes Doing Business Within Meaning of Statutes*, 902.
- (f) *Effect upon Contracts of Noncompliance with Conditions*, 903.
 - aa. *Contracts Void in Hands of Company*, 903.
 - bb. *Right of Holder Without Notice of Premium Note*, 904.
 - cc. *Presumptions in Suits on Premium Notes*, 904.
 - (aa) *Performance of Statutory Requirements Prima Facie Presumed*, 904.
 - (bb) *Presumption as to Place Where Note Was Made*, 905.
 - dd. *Company Estopped to Allege Want of Authority*, 905.
- (g) *Revocation of License to Transact Business*, 905.
- (h) *Penalties Imposed for Transacting Business Without Complying with Statutory Requirements*, 906.
- (2) *Obligations and Liabilities of Companies That Have Become Domesticated*, 907.

IV. INSURANCE AGENTS, 907.

- 1. *Who Are Insurance Agents*, 907.
 - a. *In General*, 907.
 - (1) *At Common Law*, 907.
 - (2) *By Statute*, 908.
 - b. *General Agents*, 908.
 - c. *Subagents*, 908.
 - d. *Brokers*, 909.
- 2. *Insurer's Agent Not Agent of Insured*, 909.
 - a. *Rule Stated*, 909.
 - b. *Effect of Provisions in Application or Policy*, 910.
- 3. *Statutory Regulation of Agents*, 911.
- 4. *Powers, Rights, Duties, and Liabilities of Agent*, 911.
 - a. *In Respect to Principal*, 911.
 - (1) *Powers and Rights*, 911.
 - (a) *In General*, 911.
 - (b) *Right to Compensation*, 911.
 - (2) *Duties and Liabilities*, 912.
 - (a) *In General*, 912.
 - (b) *Liability for Writing Insurance Contrary to Instructions*, 912.
 - (c) *Liability for Neglect to Cancel Policies*, 913.
 - (d) *Duty to Preserve Rights Created for Principal*, 914.
 - (e) *Liability of Sureties on Agents' Bonds*, 914.
 - b. *In Respect to Assured*, 914.
 - (1) *Power to Bind Principal*, 914.
 - (a) *In General*, 914.
 - (b) *Nature and Extent of Authority*, 915.
 - aa. *Real Authority*, 915.
 - (aa) *General Agents*, 915.
 - (bb) *Special Agents*, 915.
 - aaa. *In General*, 915.
 - bbb. *Soliciting Agents*, 915.
 - ccc. *Collecting Agents*, 916.
 - ddd. *Adjusters*, 916.
 - bb. *Ostensible Authority*, 916.
 - (aa) *In General*, 916.
 - (bb) *Effect of Private Instructions to Agent*, 917.
 - (cc) *Acts Done After Termination of Agency*, 917.

INSURANCE.

- cc. Waiver of Limitation and Ratification of Acts,*
917.
 - (c) Effect of Limitation in Policy,* 917.
 - (2) Personal Liability,* 917.
 - (a) Liability for Sums Received as Premiums,* 917.
 - aa. Where Agent Fails to Deliver Policy,* 917.
 - bb. Where Person Induced by Fraudulent Representations to Insure,* 917.
 - cc. Where Company Has No Authority to Do Business,* 918.
 - dd. When Company Becomes Insolvent Before Receiving Premium,* 918.
 - (b) Liability for Neglect to Effect Insurance,* 918.
 - (c) Liability for Loss Resulting from Unauthorized Acts or Representations,* 918.
 - (d) Where Agency Is of Foreign Company Not Authorized to Do Business,* 918.
- 5. Termination of Agency,* 918.
 - a. How It May Be Terminated,* 918.
 - b. Effect of Termination,* 919.
 - (1) Agent's Power to Bind Principal Ceases,* 919.
 - (2) Right to Commissions on Renewal Policies,* 919.

V. FORFEITURE AND AVOIDANCE, 919.

- 1. Ground of Forfeiture,* 919.
 - a. In General,* 919.
 - b. Warranties,* 919.
 - (1) Definition,* 919.
 - (2) Kinds of Warranties,* 920.
 - (3) Nature of Warranties,* 920.
 - (a) In General,* 920.
 - (b) Materiality,* 920.
 - (c) Good Faith of Warrantor,* 922.
 - (4) Warranties Distinguished from Representations,* 922.
 - (5) What Constitutes Warranty,* 923.
 - (a) In General,* 923.
 - (b) Warranties Not Created or Extended by Construction,* 923.
 - (c) Warranties Not Favored,* 923.
 - (d) Form or Language of Statements,* 924.
 - (e) Statements Incorporated in Policy,* 924.
 - (f) Incorporation of Application in Policy,* 925.
 - (g) Parol Representations,* 926.
 - (6) Construction of Warranties,* 927.
 - (7) Effect of Breach of Warranty,* 928.
 - (8) Breach of Warranties,* 929.
 - (a) General Rule,* 929.
 - (b) Particular Warranties,* 930.
 - c. Representations,* 932.
 - (1) Definition,* 932.
 - (2) Falsity of Representations,* 932.
 - (3) Representations to Avoid Policy Must Be Material,* 933.
 - (4) Good Faith of Insured Immaterial,* 933.
 - (5) Materiality of Representations,* 933.
 - (a) General Rule,* 933.
 - (b) Materiality Question of Fact,* 934.
- 2. Waiver and Estoppel,* 934.
 - a. General Statement,* 934.
 - b. What Constitutes Waiver or Estoppel,* 934.
 - (1) In General,* 934.

INSURANCE.

- (2) *Issuance of Policy Without Objection to Known Grounds of Forfeiture*, 935.
 - (a) *In General*, 935.
 - (b) *Effect of Constructive Knowledge*, 936.
 - (c) *Failure to Examine or Inquire as to Existing Facts*, 936.
 - (d) *Omission or Imperfect Answer Appearing on Face of Application*, 937.
- (3) *Acts After Issuance of Policy but Prior to Forfeiture*, 937.
- (4) *Conduct After Forfeiture*, 938.
 - (a) *In General*, 938.
 - (b) *Mere Silence or Nonaction*, 939.
 - (c) *Acceptance of Payment of Premium*, 940.
 - (d) *Requiring Proofs of Loss*, 941.
- c. *By Whom Waiver May Be Made*, 942.
 - (1) *President or Vice-President of Company*, 942.
 - (2) *Secretary*, 942.
 - (3) *Agents*, 942.
 - (a) *In General*, 942.
 - (b) *General Agent*, 942.
 - (c) *Soliciting Agent*, 943.
 - aa. *In General*, 943.
 - bb. *Insertion of False Statements in Application*, 945.
 - (d) *Adjuster*, 947.
 - (e) *Collector*, 947.
 - (f) *Effect of Agent's Knowledge Acquired Outside of Agency*, 948.
 - (g) *Limitations of Authority*, 948.
 - aa. *In General*, 948.
 - bb. *Limitations on Face of Policy*, 948.
 - (aa) *In General*, 948.
 - (bb) *Clauses Prohibiting Waiver by Agents*, 948.
 - (cc) *Limitations as to Mode of Waiver*, 949.
 - aaa. *Effect on Agent's Authority At or Before Issuance of Policy*, 949.
 - bbb. *Effect on Agent's Authority After Issuance of Policy*, 950.
 - (dd) *Application of Limitations to Waiver of Conditions to Be Performed After Loss*, 952.

VI. LIABILITY FOR PREMIUMS, 952.

- 1. *Liability of Assured for Premiums*, 952.
 - a. *When Policy Is Void*, 952.
 - b. *When Policy Does Not Conform to Application*, 952.
 - c. *When Liability on Policy Is Suspended*, 953.
 - d. *When Insurer Cancels Policy*, 953.
- 2. *Liability of Insurer for Return of Premiums*, 953.
 - a. *In General*, 953.
 - b. *When Risk Has Never Attached*, 954.
 - (1) *Insurer Must Return Premiums*, 954.
 - (2) *Misrepresentation, Concealment, or False Warranty by Assured*, 954.
 - c. *When Risk Has Attached*, 954.
 - (1) *Forfeiture of Insurance by Acts of Assured*, 954.
 - (2) *Wrongful Cancellation by Insurer*, 954.
 - d. *Entire and Divisible Contracts*, 954.

VII. EVIDENCE, 955.

- 1. *Burden of Proof*, 955.

INSURANCE.

- a. *In General*, 955.
- b. *Title and Interest of Plaintiff*, 955.
- c. *Conditions, Representations, and Warranties*, 955.
- d. *Estoppel and Waiver*, 957.
- e. *Cause of Loss or Injury*, 957.
- f. *Payment of Premiums*, 959.
- g. *Cancellation of Policy*, 959.
- h. *Notice and Proofs of Loss*, 959.
- i. *Arbitration or Reference*, 959.
- j. *Amount of Loss*, 959.
- k. *Payment as Defense*, 959.
2. *Evidence as to Particular Issues*, 960.
 - a. *Existence and Terms of Contract*, 960.
 - b. *Fraud in Application*, 960.
 - c. *Breach of Conditions*, 960.
 - d. *Payment of Premiums*, 960.
 - e. *Matters Material to Risk*, 961.
 - (1) *Property Insurance*, 961.
 - (2) *Life Insurance*, 962.
 - f. *Title*, 962.
 - g. *Fire Caused by Insured*, 962.
 - h. *Intentional Killing of Insured*, 963.
 - i. *Amount of Loss*, 964.
3. *Particular Classes of Evidence*, 966.
 - a. *Policy and Application*, 966.
 - b. *Parol Evidence*, 966.
 - c. *Declarations by Insured or Beneficiary*, 968.
 - d. *Admissions by Insurer's Representatives*, 968.
 - e. *Proofs of Loss*, 968.
 - f. *Proceedings Before Coroner*, 969.
 - g. *Expert and Opinion Evidence*, 969.

CROSS-REFERENCES.

For matters of PROCEDURE, see the ENCYCLOPÆDIA OF PLEADING AND PRACTICE, *title* INSURANCE, vol. 11, p. 375.

For matters of SUBSTANTIVE LAW and EVIDENCE connected with this subject, see the titles ABANDONMENT AND TOTAL LOSS, vol. 1, p. 4; ACCIDENT INSURANCE, vol. 1, p. 284; ALCOHOLISM, INTEMPERANCE, AND NARCOTICS (IN INSURANCE), vol. 2, p. 38; BENEFICIARIES (IN INSURANCE), vol. 3, p. 923; BENEVOLENT OR BENEFICIARY ASSOCIATIONS, vol. 3, p. 1041; DEVIATION (IN MARINE INSURANCE), vol. 9, p. 418; EMPLOYERS' LIABILITY INSURANCE, vol. 11, p. 9; ENDOWMENT INSURANCE, vol. 11, p. 24; FIDELITY AND GUARANTY INSURANCE, vol. 13, p. 3; FIRE INSURANCE, vol. 13, p. 86; LIFE INSURANCE; LIVE-STOCK INSURANCE; MARINE INSURANCE; TITLE INSURANCE; TONTINE INSURANCE. *And see* BOILER INSURANCE, vol. 4, p. 614; CREDIT INSURANCE, vol. 8, p. 235; CYCLONE INSURANCE, vol. 8, p. 534; HAIL INSURANCE, vol. 15, p. 249; LIGHTNING INSURANCE; PLATE-GLASS INSURANCE; RENT INSURANCE.

As to the Character of the Insurer and His Relation to the Insured, see the titles LLOYDS INSURANCE; MUTUAL INSURANCE.

As to the Rights and Liabilities of Insurers inter se, see the titles CONTRIBUTION AND EXONERATION, vol. 7, p. 352; REINSURANCE.

As to the Right of Insurers Against Parties Responsible for the Loss or Liable for its Reparation, see the title SUBROGATION.

As to the Relative Rights and Liabilities of Carrier and Insurance Company, see the title CARRIERS OF GOODS, vol. 5, p. 420.

As to the Assignment or Other Transfer of Insurance Policies, see the title ASSIGNMENTS, vol. 2, p. 1007, *and the several Insurance titles.*

As to the Effect of Stipulations in Regard to Arbitration and Appraisement, see the titles ARBITRATION AND AWARD, vol. 2, p. 574; FIRE INSURANCE, vol. 13, p. 359.

As to Alterations of Insurance Policies, see the title ALTERATION OF INSTRUMENTS, vol. 2, p. 248.

As to the Duty of Agents and Others to Insure, see the titles AGENCY, vol. 1, p. 1068; FACTORS OR COMMISSION MERCHANTS, vol. 12, p. 656.

As to the Rights and Liabilities of Insurance Brokers, see the titles DEL CREDERE AGENCY, vol. 9, p. 185; INSURANCE BROKERS, post.

I. INTRODUCTION — 1. Definition. — Insurance, in its most general and comprehensive signification, is a system of business by which one party, for an agreed consideration, proportionate to the risk involved, undertakes to a specified extent and under stipulated conditions to indemnify another against pecuniary loss arising from the destruction of or injury to property from certain perils, or to pay a stipulated sum upon the death or physical disability of a specified person, or upon his attaining a certain age.¹

In its more limited and technical sense insurance is the contract or agreement by means of which this indemnity or undertaking is effected.² The party who

1. Insurance Defined — General and Comprehensive Signification. — Century Dict.

2. Insurance as a Contract Defined. — Phillips on Insurance 1; Burr. L. Dict.; Black's L. Dict.; Bouv. L. Dict.; 2 Black. Com. 458; Com. v. Wetherbee, 105 Mass. 149; State v. Farmers, etc., Mut. Benev. Assoc., 18 Neb. 276.

In the leading case of *Lucena v. Craufurd*, 2 B. & P. N. R. 269, Mr. Justice Lawrence defined insurance as "a contract by which the one party, in consideration of a price paid to him, adequate to the risk, becomes security to the other that he shall not suffer loss, damage, or prejudice by the happening of the perils specified to certain things which may be exposed to them."

"The General Object or Purpose of an Insurance Company is to afford indemnity or security against loss. Its engagement is not founded in any philanthropic, benevolent, or charitable principle; it is a purely business adventure, in which one, for a stipulated consideration or premium per cent., engages to make up, wholly or in part, or in a certain agreed amount, any specific loss which another may sustain; and it may apply to loss of property, to personal injury, or to loss of life. To grant indemnity or security against loss, for a consideration, is not only the design and purpose of an insurance company, but is also the dominant and characteristic feature of the contract of insurance." Com. v. Equitable Beneficial Assoc., 137 Pa. St. 419.

A contract to indemnify a merchant or manufacturer, either wholly or partially, for loss by the insolvency of customers, is a contract of insurance; and a corporation whose business is the making of such contracts is an insurance corporation, within the meaning of the *Wisconsin* statutes. *Shakman v. U. S. Credit System Co.*, 92 Wis. 366, 53 Am. St. Rep. 920.

In *Com. v. Philadelphia Inquirer*, 15 Pa. Co. Ct. 463, it was held that an advertisement in a newspaper, signed by its publishers, a corporation, offering to pay the sum of five hundred dollars "to the legal heir of any one

who meets death by accident while pursuing his ordinary avocation, providing this coupon or a copy of the Inquirer [the newspaper making the offer] containing it be found on his or her person at the time of the accident which resulted in death, with his or her name signed in full," was in effect a contract of insurance, and upon *quo warranto* proceedings the corporation was excluded from the exercise of this franchise as not included in the powers granted to it.

What is known as a Beneficial Association, however, has a wholly different object and purpose in view. The great underlying purpose of the organization is not to indemnify or secure against loss; its design is to accumulate a fund from the contributions of its members, "for beneficial or protective purposes," to be used in their own aid or relief, in the misfortunes of sickness, injury, or death. The benefits, although secured by contract, and for that reason to a limited extent assimilated to the proceeds of insurance, are not so considered. Com. v. Equitable Beneficial Assoc., 137 Pa. St. 419. See the title BENEVOLENT OR BENEFICIAL ASSOCIATIONS, vol. 3, p. 1041.

Protection Against Loss of Bicycle. — A corporation was chartered under the *Pennsylvania* Act of April 29, 1874, by a Court of Common Pleas "for the purpose of the accumulation of a fund by assessments for the protection of its members from loss by reason of injury to or the losing of bicycles." Each member was required to pay six dollars per year, by virtue of which payments the corporation agreed (1) to clean the bicycle twice during the year; (2) to repair tires when punctured by accident; (3) to repair the bicycle when damaged by accident; (4) to replace the bicycle when destroyed by accident; (5) to replace the bicycle when stolen, if not recovered in eight weeks, and provide a bicycle during that time. There was no agreement to pay money for any loss. It was held that the corporation was not an insurance company. Com. v. Provident Bicycle Assoc., 178 Pa. St. 636.

Marriage Endowment Contract. — A contract between an association and its members pro-

so insures is termed the insurer or underwriter, he who is indemnified is termed the insured or assured, the agreed consideration is termed the premium, and the instrument by which the undertaking is effected is termed the policy.¹

2. Origin and History. — The contract of insurance sprang from the law maritime, and derives all its material rules and incidents therefrom. It undoubtedly grew out of the doctrine of contribution and general average, which is found in the maritime laws of the ancient Rhodians. By this law, if either ship, freight, or cargo was sacrificed to save the others, all had to contribute their proportionate share of the loss. This division of loss naturally suggested a provisional division of risk, first among those engaged in the same enterprise, and next among associations of shipowners and shipping merchants. Hence it is found that the earliest form of the contract of insurance was that of mutual insurance, which, according to Pardessus, dates back to the tenth century, if not earlier, and in Italy and Portugal was made obligatory. By a regulation of the latter kingdom, made in the fourteenth century, every shipowner and merchant in Lisbon and Oporto was bound to contribute two per cent. of the profits of each voyage to a common fund from which to pay losses whenever they should occur.² The next step in the system was that of insurance upon premium. Capitalists, familiar with the risks of navigation, were found willing to guarantee against them for a small consideration or premium paid. This, the final form of the contract, was in use as early as the beginning of the fourteenth century, and the tradition is that it was introduced into England in that century by the Lombard merchants, who settled in London and brought with them the maritime usages of Venice and other Italian cities.³ Insurance against fire and the other forms of property insurance are derived by natural process of evolution from marine insurance, and are governed by the same general principles, but life and accident insurance are of a much later date, and differ in many material respects from the insurance of property.

3. Various Kinds of Insurance. — The kinds of insurance are almost as various as are the things which are susceptible of injury or destruction and the perils to which they are exposed. Not only does the system with its ramifications provide indemnity and protection against the risk of loss from such natural causes as the death or injury of the insured and the destruction of property by fire, storm, and the perils of the sea, but it provides also against loss from such artificial causes as the insolvency of debtors, the failure of the title to land, and the infidelity and negligence of employees. These various sorts of insurance and the principles which govern them will be considered under special titles in this work;⁴ it is intended under this title to treat only those principles which are applicable to all.

II. THE CONTRACT, ITS NATURE, REQUISITES, AND INCIDENTS — 1. Nature of Contract — a. IN GENERAL — An Aleatory Contract. — The contract of insurance has been termed an aleatory contract, for the reason that it is one involving risk or hazard. It is, however, very different in its nature from a mere wager. In the latter the risk of loss is created by the contract itself; in the former

vided that if a member paid an initiation fee and certain annual dues for nine years and until he was married, and also an assessment on the marriage of any associate, the association would, upon the marriage of such member, pay to his wife as many dollars as there were associates in the order, not exceeding one thousand dollars, provided the member did not, on pain of forfeiture of all rights under the contract, marry within two years. It was held that this was not a contract of insurance, and the insurance commissioner had no jurisdiction in such business. *State v. Towle*, 80

Me. 287. See also *White v. Equitable Nuptial Ben. Union*, 76 Ala. 251, 52 Am. Rep. 325.

1. Bouv. L. Dict.

2. See the title *GENERAL AVERAGE*, vol. 14, p. 955.

3. See the opinion of Bradley, J., in *New England Mut. Marine Ins. Co. v. Dunham*, 11 Wall. (U. S.) 1, whence this paragraph is derived. See also *Nye v. Grand Lodge*, etc., 9 Ind. App. 131.

4. See the table of cross-references at the beginning of this title.

the risk exists independently of the contract, and the insurance merely shifts the liability from the one party to the other.¹ But the nature of the risk in property insurance is very different from that in life insurance. In the former the loss may or may not occur, and, should it occur, may be total or partial. In the latter the event insured against is certain to occur, and, when it occurs, to cause a total loss, so that the time of the happening is the only contingent element.²

Executed and Executory Contract. — A contract of insurance is both executed and executory. It is executed as to the insured by the payment of the annual premiums,³ while it is wholly executory on the part of the insurer, whose undertaking depends upon a future event.⁴

b. CONTRACT OF INDEMNITY — (1) *Insurance of Property* — (a) *In General.* — The purpose of property insurance is indemnity, and the contract by which this purpose is effected must be so construed as to advance this principle and to prevent its prostitution to illegal uses as a mode of speculation. A sound public policy forbids the enforcement of any contract by which the insured would derive a profit from the happening of the event insured against. The insured should have an interest in the preservation of the thing rather than in its destruction.⁵

(b) **Liability of Insurer** — *aa. LIMITED TO LOSS ACTUALLY SUSTAINED.* — Hence it follows that the insured is entitled to recover under the policy only such loss as he has actually sustained, not exceeding the sum stipulated.⁶ This is the rule of the common law, except in marine insurance, where valued policies are permitted;⁷ but in some of the states statutes have been enacted providing that where the insured property is wholly destroyed, the amount written in

1. May on Insurance, § 5; Porter on Insurance 7.

2. Nye v. Grand Lodge, etc., 9 Ind. App. 131.

3. A Contract of Insurance Is a Conditional One. McKee v. Metropolitan L. Ins. Co., 25 Hun (N. Y.) 583; Stevenson v. Snow, 3 Burr. 1237.

A contract of insurance may be a conditional or qualified one, in respect either to the causes of loss or to the situation of the property. Coledge v. Continental Ins. Co., 67 Vt. 14.

3. New York Mut. L. Ins. Co. v. Wager, 27 Barb. (N. Y.) 354.

4. Cohen v. New York Mut. L. Ins. Co., 50 N. Y. 610, 10 Am. Rep. 522.

5. **Property Insurance Contract of Indemnity** — *England.* — Darrell v. Tibbitts, 5 Q. B. D. 560; Kulen Kemp v. Vigne, 1 T. R. 309; Lloyd v. Fleming, L. R. 7 Q. B. 299; Hamilton v. Mendes, 2 Burr. 1198; Castellain v. Preston, 11 Q. B. D. 380; Powels v. Innes, 11 M. & W. 10.

United States. — Phoenix Mut. L. Ins. Co. v. Bailey, 13 Wall. (U. S.) 618, per Clifford, J.; Mercantile Mut. Ins. Co. v. Folsom, 18 Wall. (U. S.) 237.

Connecticut. — Glendale Woolen Co. v. Protection Ins. Co., 21 Conn. 19, 54 Am. Dec. 309; Bevin v. Connecticut Mut. L. Ins. Co., 23 Conn. 244.

Maryland. — Bosley v. Chesapeake Ins. Co., 3 Gill & J. (Md.) 468, 22 Am. Dec. 337, per Dorsey, J.

Massachusetts. — Wilson v. Hill, 3 Met. (Mass.) 66; Eager v. Atlas Ins. Co., 14 Pick. (Mass.) 141, 25 Am. Dec. 363.

Missouri. — Morrison v. Tennessee M. & F. Ins. Co., 18 Mo. 262, 59 Am. Dec. 299.

New Hampshire. — Cummings v. Cheshire County Mut. F. Ins. Co., 55 N. H. 457.

New York. — Cross v. National F. Ins. Co., 132 N. Y. 133.

Ohio. — McDonald v. Black, 20 Ohio 185, 55 Am. Dec. 448; Commercial Mut. Ins. Co. v. Detroit F. & M. Ins. Co., 38 Ohio St. 15, 43 Am. Rep. 413; Farmers' Ins. Co. v. Butler, 38 Ohio St. 133.

Oregon. — Chrisman v. State Ins. Co., 16 Oregon 283.

Pennsylvania. — Commonwealth Ins. Co. v. Sennett, 37 Pa. St. 205, 78 Am. Dec. 418; Eureka Ins. Co. v. Robinson, 56 Pa. St. 256, 94 Am. Dec. 65.

Wisconsin. — Johannes v. Phenix Ins. Co., 66 Wis. 50, 57 Am. Rep. 249.

The Objection to Over-insurance is entirely of a public nature and is grounded upon those moral and political circumstances which require that contracts of insurance be restrained to the cases of real interest and to indemnities for actual losses. Clark v. United F. & M. Ins. Co., 7 Mass. 365, 5 Am. Dec. 50.

6. Eagle Ins. Co. v. Lafayette Ins. Co., 9 Ind. 443; Marchesseau v. Merchants Ins. Co., 1 Rob. (La.) 438; Franklin F. Ins. Co. v. Hamill, 6 Gill (Md.) 87.

7. **Valued Policies.** — A policy of insurance is not a perfect contract of indemnity. It must be taken with this qualification, that the parties may agree beforehand in estimating the value of the subject assured, by way of liquidated damages, as indeed they may in any other contract to indemnify. Irving v. Manning, 1 H. L. Cas. 287, cited in Aitchison v. Lohre, 4 App. Cas. 755.

In a valued policy the exact value need not be proven by the plaintiff to make a *prima facie* case. The value named in it is the amount agreed upon by the parties as the liquidating

the policy shall be taken as the value of the property and is the measure of recovery by the insured.¹

Want of Insurable Interest. — If the insured has no insurable interest in property, he cannot be damaged by its destruction, and consequently can recover nothing under the policy.²

Restoration of Property. — So if a mortgagee insures his interest in property, the purpose of the contract is that the property shall remain unimpaired as security, and if, after a loss, the property is made as good as before by other parties than the insurance company, no right of action against the company exists.³

bb. WHEN PROPERTY IS DESTROYED BY TORTFEASOR. — When property insured is destroyed by the wilful act or negligence of a third person, the owner has a cause of action against both the wrongdoer and the insurer. The liability of the wrongdoer is in legal effect first and principal, and that of the insurer secondary, not in order of time, but in order of ultimate liability. The insured may apply to whichever one of these parties he pleases—to the wrongdoer by his right of law, to the insurer by virtue of his contract.

If He Applies First to the Wrongdoer, who pays him, he thereby diminishes his loss by the application of the sum arising out of the subject of the insurance, and his claim is for the balance.⁴

If He Applies First to the Insurer and receives the whole loss, he holds the claim against the wrongdoer in trust for the insurer,⁵ for he cannot for his own benefit recover against both.⁶

Waiver by Insurer. — It seems, however, that the insurer may, by declining to become a party plaintiff to a suit against the tortfeasor, estop himself from subsequently claiming the benefit of the damages which the insured may recover by a successful prosecution of the suit.⁷

Rights Renounced by Insured. — It has also been held that the insurer may recover from the insured the full value of any rights or remedies against a third person which have been renounced by the insured, and to which the insurer, but for such renunciation, would have had the right to be subrogated.⁸

cc. LIABILITY OF SEVERAL INSURERS — (aa) *In Absence of "Other Insurance" Clause.* — When a loss occurs to property which is insured by two or more insurers, the insured cannot recover for the whole loss from each of them, since he is entitled

damages in case of loss. It is so agreed upon for the express purpose of relieving the other party from the task of proving precise values, as either party may find it for his or their interest to repose upon the stipulated value. The value fixed by the policy is conclusive upon the parties, unless there is fraud or accident or mistake. *Sturm v. Atlantic Mut. Ins. Co.*, 63 N. Y. 77; *Watson v. Insurance Co. of North America*, 3 Wash. (U. S.) 1; *Marine Ins. Co. v. Hodgson*, 6 Cranch (U. S.) 206; *Clark v. Ocean Ins. Co.*, 16 Pick. (Mass.) 289.

The Effect of a Valued Policy is not to conclude the underwriter from showing that the assured had no interest, and that in fact it was a mere wagering policy within the statute; but in order to avoid disputes as to the quantum of the interest of the assured, the parties agree that it shall be estimated at a certain value. *Shawe v. Felton*, 2 East 109.

In the Adjustment of Partial Losses, valued policies are to be treated as open policies, and the insurer is not to be prejudiced or injured by a stipulation which is commonly made at the nomination of the assured, without examination or inquiry. *Clark v. United F. & M. Ins. Co.*, 7 Mass. 365, 5 Am. Dec. 50.

And see the title MARINE INSURANCE.

1. See the title FIRE INSURANCE, vol. 13, p. 323.

2. See *infra*, this section, *Requisites of Contract — Insurable Interest*.

3. *Friemansdorf v. Watertown Ins. Co.*, 9 Biss. (U. S.) 167.

4. *Hart v. Western R. Corp.*, 13 Met. (Mass.) 99, 46 Am. Dec. 719; *Connecticut F. Ins. Co. v. Erie R. Co.*, 73 N. Y. 399; *Atlantic Ins. Co. v. Storrow*, 1 Edw. (N. Y.) 621.

5. See the title SUBROGATION.

6. *Hart v. Western R. Corp.*, 13 Met. (Mass.) 99, 46 Am. Dec. 719; *Monmouth County Mut. F. Ins. Co. v. Hutchinson*, 21 N. J. Eq. 107; *Mobile Ins. Co. v. Columbia, etc., R. Co.*, 41 S. Car. 408, 44 Am. St. Rep. 725.

7. *Waiver by Insurer.* — *Ætna Ins. Co. v. Confer*, 158 Pa. St. 598.

8. *Rights Renounced by Insured.* — *West of England F. Ins. Co. v. Isaacs*, (1896) 2 Q. B. 377.

Qualified Release. — When a loss upon insured property has been caused by the alleged negligent act of a gas company, resulting in an explosion and fire, the assured may settle with and release the gas company from all claim for injuries not covered by the insurance, without prejudice to his right to recover from the

merely to indemnity, but he may elect to consider each insurer as liable to bear a proportionate share of the loss, and recover accordingly, or he may require any one of them to pay the whole loss;¹ in which case the one who pays the whole or a disproportionate part of the loss will have a remedy against the others for a contribution, so as to equalize the liability of each.²

(bb) *When Policies Contain Clause.* — To obviate this circuitry of action it is now the practice for insurance companies to incorporate in their policies a clause providing that where there is other insurance, each insurer shall be liable only for such proportion of the loss as the amount of its policy bears to the whole insurance.³ Where this provision is contained in the policies, the fact that one of the companies proves insolvent does not increase the liability of the others.⁴

Policies Must Cover Same Interest in Same Property. — In order that there may be an apportionment of liability between different insurers, it is not essential that the policies should be issued to the same person, but the insurance must be upon the same interest in the same property or in some part thereof.⁵ If the policies cover the same interest and inure to the benefit of the same person, it is sufficient. Thus, if the agent and the principal each take out a policy on the same goods, and both for the benefit of the principal, an apportionment of liability between the insurers must be made.⁶

But Where a Mortgagor and Mortgagee insure their respective interests in property in different companies, each company is liable in case of loss according to the insurable interest of the insured in the property, and there can be no apportionment of the loss between them.⁷

So Where a Carrier and a Shipper, each for his own benefit, obtain insurance upon goods carried, there will be no apportionment between the insurance companies.⁸

(2) *Life Insurance.* — In an early *English* case an attempt was made to

insurers for the loss occasioned by the fire. *Insurance Co. of North America v. Fidelity Title, etc., Co.*, 123 Pa. St. 523, 10 Am. St. Rep. 546.

1. **Liability of Several Insurers.** — *Wiggin v. Suffolk Ins. Co.*, 18 Pick. (Mass.) 145, 29 Am. Dec. 576; *Millaudon v. Western M. & F. Ins. Co.*, 9 La. 27, 29 Am. Dec. 433.

Where in such case the party insured commenced an action on both policies at the same time, and one of the insurers paid into court one-half of the actual loss (first making certain deductions by way of set-off), and the insured took the money out of court, it was held that this was *prima facie* evidence that he had made his election to consider each insurer responsible for one half of the sum actually at risk. *Wiggin v. Suffolk Ins. Co.*, 18 Pick. (Mass.) 145, 29 Am. Dec. 576.

2. **Security Ins. Co. v. St. Paul F., etc., Ins. Co.**, 50 Conn. 233. And see the title CONTRIBUTION AND EXONERATION, vol. 7, p. 352.

Double Insurance takes place where the assured makes two or more insurances on the same subject, risk, and interest, in which case the policies are considered as one, and the insurers are liable *pro rata* and are entitled to contribution to equalize payments made on account of losses. *Sloat v. Royal Ins. Co.*, 49 Pa. St. 14, 88 Am. Dec. 477.

The right to contribution is based upon the concurrence of the policies, and the necessary incident of its existence is that the several insurers should be bound with equal certainty,

and in the same sense for the same loss. *Baltimore F. Ins. Co. v. Loney*, 20 Md. 20.

3. **When Policies Contain "Other Insurance" Clause.** — *Barnes v. Hartford F. Ins. Co.*, 3 McCrary (U. S.) 226; *Page v. Sun Ins. Office*, 74 Fed. Rep. 203; *Golde v. Whipple*, 7 N. Y. App. Div. 48.

Where there are several policies containing a clause providing for only a ratable payment in case of other policies on the same subject, they are all and each liable to pay the ratable proportion mentioned in the clause, although it happened that some have paid more than their share, and even enough to cover the whole loss, and this whether they had or had not knowledge of all the policies at the time. *Lucas v. Jefferson Ins. Co.*, 6 Cow. (N. Y.) 635.

If a Greater Loss Is Proved than the Whole Amount Insured by Different Policies, the party insured will be entitled to recover the full amount of each policy, unless the recovery is limited by the policy to only a proportion of the loss. *Peoria M. & F. Ins. Co. v. Lewis*, 18 Ill. 553.

4. *Rickerson v. German-American Ins. Co.*, 6 N. Y. App. Div. 550.

5. *Lowell Mfg. Co. v. Safeguard F. Ins. Co.*, 88 N. Y. 591.

6. *Robbins v. Firemen's Fund Ins. Co.*, 16 Blatchf. (U. S.) 122.

7. *Hardy v. Lancashire Ins. Co.*, 166 Mass. 210, 55 Am. St. Rep. 395; *Tuck v. Hartford F. Ins. Co.*, 56 N. H. 326.

8. *Royster v. Roanoke, etc., Steam Boat Co.*, 26 Fed. Rep. 492.

apply the principle of indemnity to the contract of life insurance,¹ but the case has long since been overruled, and it is now the doctrine that life insurance is not a contract of indemnity, but an agreement to pay a certain sum in the event therein specified, in consideration of the payment of the stipulated premium or premiums.²

c. PERSONAL CONTRACT. — Insurance is a personal contract, and appertains to the insured and not to the thing which is subject to the risk against which he is protected. It is not a contract running with the land in the case of real estate, nor running with the personalty, so to speak, in the case of a chattel.³ An insurer contracts with reference to the character of the assured for integrity and prudence. He might be willing to make good the loss of one by the destruction of property owned by him, while he would be altogether unwilling to insure the same property if owned by another.⁴

Vendor and Purchaser. — Hence, if property insured be sold, the contract, unless it be assigned to the purchaser, with the consent of the insurer, is at an end, and no suit or action can be maintained upon it. It does not pass to the purchaser as incident to the thing sold.⁵ A policy may, however, be so framed that the insurance will be inseparably attached to the property meant to be covered, so that successive owners, during the continuance of the risks, may become, in turn, the parties really insured.⁶

If One Who Has Taken Out Insurance upon Real Property Dies, the contract does not pass to the heir as an incident of the property, and the executor or administrator is the only one who can take the contract and enforce it;⁷ but in case

1. *Godsall v. Voldero*, 9 East 72.

2. *Life Insurance Not Contract of Indemnity* — *England*. — *Dalby v. India, etc., L. Assur. Co.*, 28 Eng. L. & Eq. 312.

United States. — *Connecticut Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 457; *Sides v. Knickerbocker L. Ins. Co.*, 16 Fed. Rep. 650; *Phoenix Mut. L. Ins. Co. v. Bailey*, 13 Wall. (U. S.) 616, by Clifford, J.

Massachusetts. — *Loomis v. Eagle L., etc., Ins. Co.*, 6 Gray (Mass.) 396.

Missouri. — *McKee v. Phoenix Ins. Co.*, 28 Mo. 383, 75 Am. Dec. 129.

New Jersey. — *Trenton Mut. L., etc., Ins. Co. v. Johnson*, 24 N. J. l. 576.

New York. — *Ferguson v. Massachusetts Mut. L. Ins. Co.*, 32 Hun (N. Y.) 306, affirmed 102 N. Y. 647; *Rawls v. American L. Ins. Co.*, 36 Barb. (N. Y.) 357, 27 N. Y. 282; *Miller v. Eagle L., etc., Ins. Co.*, 2 E. D. Smith (N. Y.) 268.

Pennsylvania. — *Corson's Appeal*, 113 Pa. St. 438, 57 Am. Rep. 479.

Rhode Island. — *Mowry v. Home L. Ins. Co.*, 9 R. I. 346.

3. *Insurance a Personal Contract* — *England*. — Lord Chancellor King, in *Lynch v. Dalzell*, 4 Bro. P. C. (Toml. ed.) 431.

United States. — *Carpenter v. Providence Washington Ins. Co.*, 16 Pet. (U. S.) 495; *Imperial F. Ins. Co. v. Coos County*, 151 U. S. 452; *Wheeler v. Factors', etc., Ins. Co.*, 3 Woods (U. S.) 43.

Maine. — *Adams v. Rockingham Mut. F. Ins. Co.*, 29 Me. 292.

Maryland. — *Eichelberger v. Miller*, 20 Md. 332.

New Hampshire. — *Cummings v. Cheshire County Mut. F. Ins. Co.*, 55 N. H. 457.

New York. — *Wyman v. Prosser*, 36 Barb. (N. Y.) 368.

South Carolina. — *Annelly v. De Saussure*, 26 S. Car. 505; *Pelzer Mfg. Co. v. Sun Fire Office*, 36 S. Car. 266.

None but the parties to the contract, or their legal representatives in case of their death, can avail themselves of the contract, although others may in fact have an equitable or even a legal interest in the property insured. The only exception to this rule which has been admitted exists where a policy has been *bona fide* and for a valuable consideration assigned with notice to the underwriter and an assent on his part, either express or implied. *Carroll v. Boston Marine Ins. Co.*, 8 Mass. 515. See the title BENEFICIARIES (IN INSURANCE), vol. 3, p. 923.

4. *Quarles v. Clayton*, 87 Tenn. 308.

5. *Vendor and Purchaser*. — *Sadlers Co. v. Badcock*, 2 Atk. 554; *Powles v. Innes*, 11 M. & W. 13; *Rayner v. Preston*, 18 Ch. D. 1; *Disbrow v. Jones, Harr. (Mich.)* 48; *Waring v. Indemnity F. Ins. Co.*, 45 N. Y. 606; *Ætna F. Ins. Co. v. Tyler*, 16 Wend. (N. Y.) 385, 30 Am. Dec. 90; *Wyman v. Wyman*, 26 N. Y. 253; *Lett v. Guardian F. Ins. Co.*, 125 N. Y. 82; *McDonald v. Black*, 20 Ohio 185, 55 Am. Dec. 448.

A fire-insurance policy was issued to A, "his heirs, executors, administrators, and assigns," on his dwelling house a certain sum, and "on furniture and clothing therein" a certain other sum. A sold the real estate to B, and assigned the policy to him with the consent of the insurers. A did not sell the furniture and clothing to B, but removed it, and B, when he took possession of the house, placed therein his own furniture and clothing of equal character and value, and this was burned with the house. It was held that B might recover of the insurers the amount of the original insurance upon the furniture and clothing. *Cummings v. Cheshire County Mut. F. Ins. Co.*, 55 N. H. 457.

6. *Waring v. Indemnity F. Ins. Co.*, 45 N. Y. 606.

7. *Wyman v. Prosser*, 36 Barb. (N. Y.) 368.

of loss, the amount recovered stands in the hands of the administrator or executor, not as personal assets, but as realty, subject to dower and to the lien of creditors by judgment before distribution among the heirs at law.¹

Insurance Money Which a Purchaser at an Execution Sale May Receive within the year, upon a policy taken out on the property purchased, belongs to him, and cannot be recovered by the execution debtor seeking to redeem the property from the sale.²

Insurance upon Property Fraudulently Conveyed. — If property which has been conveyed in fraud of creditors is insured by the grantee, and is destroyed before suit is brought to have the conveyance set aside, the amount due upon the policy is not to be deemed proceeds of the property, and cannot be subjected by the grantor's creditors to the payment of his debts.³

Mortgagor and Mortgagee. — A mortgagee cannot claim the benefit of a policy of insurance effected upon the mortgaged property by the mortgagor, or *vice versa*. Each has an insurable interest, but neither can, as a general rule, take advantage of an insurance effected by the other.⁴ If a mortgagee in possession for condition broken insures his interest in the premises, without any agreement therefor between him and the mortgagor, and a loss accrues, which is paid to the mortgagee, the mortgagor, on a bill to redeem and an account stated for the purpose, is not entitled to have the amount of such loss deducted from the mortgagee's charges for repairs.⁵

Bailor and Bailee. — In the absence of special contract a bailee is not bound to insure the goods intrusted to him, and if he voluntarily effects insurance upon such goods and they are destroyed by fire the bailor cannot recover the proceeds of such insurance, either from the insurer or from the bailee.⁶

A Trespasser in whose hands personal property is accidentally destroyed cannot avail himself of the recovery of insurance money by the owner to reduce the recovery of damages against him for his trespass.⁷

2. Requisites of Contract — *a. PROPER PARTIES* — (1) *Who May Insure.* — It may be stated as a general rule that any one legally capable of contracting, and every corporation which is empowered by its charter so to do, may enter into and be bound by a contract of insurance.⁸

(2) *Who May Be Insured.* — Legal capacity to contract is also the only requisite to enable one to take out a policy of insurance. The rights of infants, married women, corporations, partnerships, and the like, to effect insurance, will be treated in other parts of this work, under the various insurance titles⁹ and in the articles devoted to the discussion of the legal rights of these persons.¹⁰

1. Wyman v. Wyman, 26 N. Y. 253.

2. Cushing v. Thompson, 34 Me. 496. See also McIntire v. Plaisted, 68 Me. 363.

3. Carpenter v. Providence Washington Ins. Co., 16 Pet. (U. S.) 495; Forrester v. Gill, 11 Colo. App. 410; Lerow v. Wilmarth, 9 Allen (Mass.) 382; Bernheim v. Beer, 56 Miss. 149; Nippes's Appeal, 75 Pa. St. 472. See also the title FRAUDULENT SALES AND CONVEYANCES vol. 14, p. 343.

4. Mortgagor and Mortgagee. — Ryan v. Adamson, 57 Iowa 30; McDonald v. Black, 20 Ohio 185, 55 Am. Dec. 448. See also Wilson v. Hill, 3 Met. (Mass.) 66; Stearns v. Quincy Mut. F. Ins. Co., 124 Mass. 61, 26 Am. Rep. 647; Dick v. Franklin F. Ins. Co., 81 Mo. 103; Reid v. McCrum, 91 N. Y. 412.

5. A Mortgagor Cannot Take Advantage of a Policy Issued to a Mortgagee, although the debt due to the latter has been paid. Carpenter v. Providence Washington Ins. Co., 16 Pet. (U. S.) 495.

6. A Mortgagee Has No Right to Claim the Benefit of a Policy Underwritten for the Mortgagor on the mortgaged property, in case of a loss by fire. The contract is not attached or an incident to his mortgage. It is strictly a personal contract for the benefit of the mortgagor, to which the mortgagee has no more title than any other creditor. Columbia Ins. Co. v. Lawrence, 10 Pet. (U. S.) 512.

7. White v. Brown, 2 Cush. (Mass.) 412.

8. Bailor and Bailee. — Sickles v. Brabbits, 82 Iowa 747; Gutman v. Rogers, (C. Pl. Gen. T.) 13 N. Y. Supp. 891; Stillwell v. Staples, 19 N. Y. 401.

9. Trespasser. — Perrott v. Shearer, 17 Mich. 48.

10. See *infra*, this title, *The Insurer*.

11. See the titles FIRE INSURANCE, vol. 13, p. 134; LIFE INSURANCE; MARINE INSURANCE, etc.

12. See such titles as HUSBAND AND WIFE, vol. 15, p. 785; INFANTS, *ante*, p. 255; PARTNERSHIP; JOINT TENANTS AND TENANTS IN COMMON.

Agency.—The contract of insurance, like other contracts, may be effected through the agency of a third person without the authority of the party to be benefited, if he subsequently recognizes it. But to enable the beneficiary to sue upon it directly, he must be expressly named, or the policy must be so framed as to cover generally or specifically the interest of all concerned.¹

Agent Insuring His Own Property.—In conformity to the rule that an agent cannot represent two parties whose interests are antagonistic, it is held that a policy written by an agent of an insurance company upon his own property is not binding until the contract is approved by the company.² But if the company accepts the premium and makes no objection to the risk, it has been held that this is equivalent to approval and renders the policy binding.³

Q **b. INSURABLE INTEREST**—(1) *Necessity at Time of Creation of Contract*—**Validity of Wager Policies.**—It seems to have been anciently the doctrine of the common law that mere wager policies, that is, policies in which the insured has no interest whatever in the matter insured, were void as against public policy.⁴ This was the law of *England* prior to the Revolution of 1688. After that period a course of decisions grew up, sustaining wager policies.⁵ The legislature finally interposed and prohibited such insurance, first in regard to marine insurance, by the statute 19 Geo. II., c. 37, and later with regard to lives, by the statute 14 Geo. III., c. 48.⁶ In the *United States* statutes to the same effect have been passed in some of the states; but where there has been no such legislation, in most cases either the English statutes have been considered as operative or the older common law has been followed.⁷

1. *Miltenerger v. Beacom*, 9 Pa. St. 198.

2. **Agent Insuring His Own Property.**—*Zimmermann v. Dwelling-House Ins. Co.*, 110 Mich. 399. See also *People's Ins. Co. v. Padon*, 8 Ill. App. 447; *Huggins Cracker, etc., Co. v. People's Ins. Co.*, 41 Mo. App. 530; *New York Cent. Ins. Co. v. National Protection Ins. Co.*, 14 N. Y. 85; *Bentley v. Columbia Ins. Co.*, 17 N. Y. 421; *Neuendorff v. World Mut. L. Ins. Co.*, 69 N. Y. 391.

The agent of an insurance company cannot bind it by issuing without authority a policy on property in which a bank of which he is president holds the beneficial interest. *Rockford Ins. Co. v. Winfield*, 57 Kan. 576.

And an authority to countersign a policy issued to himself, cannot be extended so as to cover verbal contracts made with himself or with a firm of which he is a partner. Nor can it be extended so as to cover a policy executed after a fire. *Glens Falls Ins. Co. v. Hopkins*, 16 Ill. App. 220.

But it has been held that a person employed by the owner of property as a mere watchman or guard thereof is not by such employment incapacitated to issue a valid policy on the property in behalf of an insurance company of which he is the agent. *Northrup v. Germania F. Ins. Co.*, 48 Wis. 420.

Secretary of Insurance Company Insuring His Own Property.—*Pratt v. Dwelling-House Mut. F. Ins. Co.*, 130 N. Y. 206.

If the Agent Did Not Assume to Represent the Insurance Company in entering into the contract with it, but dealt with its officers, who were independent agents, and had authority to act for it, the contract is binding. *British Ins. Co. v. Lambert*, 26 Oregon 199.

Contract of Reinsurance.—An insurance agent, acting as such for both the plaintiff and the defendant, issued a policy for the former for

twenty-five hundred dollars, and was notified by it to cancel the policy or reduce it to one thousand dollars. Upon receipt of this notice, the agent reinsured the risk in the latter company for fifteen hundred dollars by entering the agreement for reinsurance in his "binder book." The property insured was destroyed by fire before the reinsurance had been reported to the defendant company, or had come to its knowledge. It was held that an action was not maintainable upon the agreement for reinsurance, since the agent had a discretion to exercise for both parties, and could not, without their knowledge and assent, make a binding contract between them. *Empire State Ins. Co. v. American Cent. Ins. Co.*, 138 N. Y. 446.

3. *Hanover F. Ins. Co. v. Shrader*, 11 Tex. Civ. App. 255.

4. *Connecticut Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 457.

5. *Dalby v. India, etc., L. Assur. Co.*, 28 Eng. L. & Eq. 312; *St. John v. American Mut. L. Ins. Co.*, 2 Duer (N. Y.) 419.

6. The Statute 14 Geo. III., c. 48, "recites that the making assurances on lives and other events wherein the insured shall have no interest hath introduced a mischievous kind of gaming, and for the remedy thereof it enacts that no assurances shall be made by any one on the life or lives of any person or persons or on any other events whatsoever, wherein the person or persons for whose use and benefit or on whose account such policy shall be made shall have no interest, or by way of gaming or wagering; and that every assurance made contrary to the true intent and meaning thereof shall be null and void, to all intents and purposes whatsoever." *Dalby v. India, etc., L. Assur. Co.*, 28 Eng. L. & Eq. 312.

7. *Connecticut Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 457.

Insurable Interest Now Necessary. — At all events, it has become a fixed rule of insurance law that the assured must have an interest of some kind in the subject-matter of the insurance, whether property¹ or life.² Two reasons may be assigned for this rule. In the first place, it is inexpedient that a contract so necessary for the protection of legitimate business should be prostituted to illegal uses as a mode of speculation; and in the second place, it is opposed to public policy, because demoralizing to the insured, that he should be permitted to enter into any contract under which he would have an interest in the destruction of the subject-matter rather than in its preservation.³

(2) **Necessity at Time of Loss** — (a) **Property Insurance.** — When the insurance is upon property, not only must the insured have an interest in the subject-matter of the contract at its inception, but also at the time of the loss; for the contract being one of indemnity, the recovery by the insured is limited to the loss actually sustained by him. As soon as his interest ceases in the property, the contract is at an end, from the impossibility of any loss happening to him afterward.⁴

(b) **Life Insurance.** — But this principle does not apply to life insurance, for the reason that it is not a contract of indemnity. The only reason for requiring an insurable interest is to eliminate from the contract the character of a wager; and if a fair and proper insurable interest, of whatever kind, exists at the time of taking out the policy, and it is taken out in good faith, the object and purpose of the rule which condemns wager policies is sufficiently attained, and the insurer must pay the full amount of insurance, according to the contract, without reference to the subsequent diminution or cessation of the insurable interest.⁵

1. Necessity of Insurable Interest — Property Insurance — England. — *Lucena v. Craufurd*, 2 B. & P. N. R. 269; *Sadlers Co. v. Badcock*, 2 Atk. 554.

United States. — *Carpenter v. Providence Washington Ins. Co.*, 16 Pet. (U. S.) 495.

Indiana. — *Bersch v. Sinnissippi Ins. Co.*, 28 Ind. 64.

Maine. — *Sawyer v. Mayhew*, 51 Me. 398.

Maryland. — *Whiting v. Independent Mut. Ins. Co.*, 15 Md. 207.

Michigan. — *Balow v. Teutonia Farmers' Mut. F. Ins. Co.*, 77 Mich. 540.

New York. — *Tallman v. Atlantic F. & M. Ins. Co.*, (Supm. Ct. Gen. T.) 20 How. Pr. (N. Y.) 71, 3 Keyes (N. Y.) 87; *Freeman v. Fulton F. Ins. Co.*, 38 Barb. (N. Y.) 247; *Peabody v. Washington County Mut. Ins. Co.*, 20 Barb. (N. Y.) 339; *Fowler v. New York Indemnity Ins. Co.*, 26 N. Y. 422.

Ohio. — *Farmers' Ins. Co. v. Butler*, 38 Ohio St. 133.

Oregon. — *Chrisman v. State Ins. Co.*, 16 Oregon 283.

Pennsylvania. — *Sweeney v. Franklin F. Ins. Co.*, 20 Pa. St. 337.

2. Life Insurance. — *Bevin v. Connecticut Mut. L. Ins. Co.*, 23 Conn. 244; *Nye v. Grand Lodge, etc.*, 9 Ind. App. 131; *Kennedy v. New York L. Ins. Co.*, 10 La. Ann. 809.

In *New Jersey* it is not necessary that the beneficiary have an interest in the life of the insured, since wagers on indifferent questions are not prohibited by the laws of that state. *Trenton Mut. L., etc., Ins. Co. v. Johnson*, 24 N. J. L. 576.

The Assignment of a Policy to a Party Not Having an Insurable Interest is as objectionable as the taking out of a policy in his name. Nor is its character changed because it is for a portion

merely of the insurance money. To the extent to which the assignee stipulates for the proceeds of the policy beyond the sums advanced by him, he stands in the position of one holding a wager policy. *Warnock v. Davis*, 104 U. S. 775.

But a person has a right to insure his own life and afterwards assign the policy to another, provided it be not done by way of cover for a wager policy. *Connecticut Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 457.

3. Reason of Rule. — *Nye v. Grand Lodge, etc.*, 9 Ind. App. 131; *Warren v. Davenport F. Ins. Co.*, 31 Iowa 464, 7 Am. Rep. 160.

4. Insured Must Have Interest in Property at Time of Loss. — *Sadlers Co. v. Badcock*, 2 Atk. 554; *Carpenter v. Providence Washington Ins. Co.*, 16 Pet. (U. S.) 495; *Wilson v. Hill*, 3 Met. (Mass.) 68; *McDonald v. Black*, 20 Ohio 185, 55 Am. Dec. 448; *Chrisman v. State Ins. Co.*, 16 Oregon 283.

Where a mortgagee insures the property mortgaged, it is in fact but an insurance of his debt, and if the debt be afterwards paid or extinguished, the policy ceases from that time to have any operation; and even if the premises insured are subsequently destroyed by fire, he has no right to recover for the loss, for he sustained no damage thereby. *Carpenter v. Providence Washington Ins. Co.*, 16 Pet. (U. S.) 495.

5. Cessation or Diminution of Interest Does Not Affect Life Insurance — England. — *Dalby v. India, etc., L. Assur. Co.*, 28 Eng. L. & Eq. 312, overruling *Godsall v. Boldero*, 9 East 72.

United States. — *Connecticut Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 457; *Sides v. Knickerbocker L. Ins. Co.*, 16 Fed. Rep. 650.

Missouri. — *McKee v. Phoenix Ins. Co.*, 28 Mo. 383, 75 Am. Dec. 129.

New York. — *Rawls v. American Mut. L.*

c. SUBJECT MATTER — (1) *Existence*. — The third requisite of a valid contract of insurance is a proper subject-matter. In the first place, the property insured must be in existence, or the person whose life is the subject of the risk must be alive, at the time when the contract takes effect; for if the property has been destroyed¹ or the life insured has become extinct² prior to that time, there is nothing for the insurance to operate upon, and the contract is consequently void.

(2) *Property Illegally Kept or Used*. — Whether the insurance contract will be rendered void by the illegal use to which the property insured is being put at time of the loss, is a doubtful question. The rule is that where the direct purpose of the contract is to effect, advance, or encourage acts in violation of law, it is void; but if the contract which it is sought to enforce is collateral and independent, though in some measure connected with acts done in violation of law, the contract is not void.³ The application of this rule is by no means easy.

Insurance upon Voyage Illegally Undertaken. — In respect to marine insurance, it has been held that where a voyage is undertaken in violation of a blockade, or of an embargo, or of the provisions of a treaty, it is illegal, and that insurance on either the ship, freight, or cargo embarked in the illegal traffic is void.⁴

So the Insurance of Lottery Tickets has been held to be against public policy and void.⁵

Articles Kept for Sale in Violation of Law. — In *Massachusetts* it has been held that a policy of insurance against loss by fire on intoxicating liquors kept by the insured for sale in violation of law is void.⁶ A contrary decision has, however, been rendered in *Michigan*.⁷ The cases may perhaps be distinguished by the fact that the Massachusetts statute rendered the liquors subject to confiscation, while in Michigan the illegal sale of them merely rendered the seller liable to a penalty. Conformably to this distinction it has been held that an insurance policy on a stock of medicines kept for sale by an unregistered pharmacist is not void.⁸

Ins. Co., 27 N. Y. 282, 36 Barb. (N. Y.) 357; *Ferguson v. Massachusetts Mut. L. Ins. Co.*, 32 Hun (N. Y.) 306, *affirmed* 102 N. Y. 647. See also *Miller v. Eagle L., etc., Ins. Co.*, 2 E. D. Smith (N. Y.) 268.

Pennsylvania. — *Corson's Appeal*, 113 Pa. St. 438, 57 Am. Rep. 479.

Rhode Island. — *Mowry v. Home L. Ins. Co.*, 9 R. I. 346.

See also *Bevin v. Connecticut Mut. L. Ins. Co.*, 23 Conn. 244; *Loomis v. Eagle L., etc., Ins. Co.*, 6 Gray (Mass.) 396.

Right of Divorced Wife to Recover. — Where, after a husband and his wife had effected insurance on their joint lives, payable to the survivor on the death of either, they were divorced *a vinculo matrimonii*, and the wife thereafter paid the premiums to the time of the husband's death, it was held that she might recover on the policy. *Connecticut Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 457.

Right of Creditor Whose Debt Has Been Paid. — Where a creditor procures an insurance upon the life of his debtor, his insurable interest continues although the statute of limitations would have barred his action if pleaded before the debtor's death. *Rawls v. American L. Ins. Co.*, 36 Barb. (N. Y.) 357, 27 N. Y. 282.

1. *Existence of Subject-matter*. — *Hazard v. New England Marine Ins. Co.*, 1 Sumn. (U. S.) 218; *Clark v. Insurance Co. of North America*, 89 Me. 26; *Mead v. Phenix Ins. Co.*, 158 Mass. 124; *Stebbins v. Lancashire Ins. Co.*, 60 N. H.

65; *Bentley v. Columbia Ins. Co.*, 17 N. Y. 421; *Riegel v. American L. Ins. Co.*, 153 Pa. St. 134.

2. *Misselhorn v. Mutual Reserve Fund L. Assoc.*, 30 Fed. Rep. 545. See also *Piedmont, etc., L. Ins. Co. v. Ewing*, 92 U. S. 377.

Excepted Risks. — Where an insurance policy by its terms forbade its agents from taking risks upon certain classes of property, among which were steam sawmills, it was held that this prohibition did not apply to a building erected and formerly used for that purpose, but lying inactive and unused when insured. *Etna Ins. Co. v. Maguire*, 51 Ill. 342.

A rule of an insurance company not to insure the property of minors, and instructions to that effect to its agents, cannot affect the rights of a minor to whom a policy is issued by general agents, where neither he nor the person who acted for him in procuring the policy had notice of such rule or instructions. *Johnson v. Scottish Union, etc., Ins. Co.*, 93 Wis. 223.

3. *Boardman v. Merrimack Mut. F. Ins. Co.*, 8 Cush. (Mass.) 583.

4. *Richardson v. Maine F. & M. Ins. Co.*, 6 Mass. 102, 4 Am. Dec. 92.

5. *Mount v. Waite*, 7 Johns (N. Y.) 434.

6. *Articles Kept for Sale in Violation of Law*. — *Kelly v. Home Ins. Co.*, 97 Mass. 288.

7. *Niagara F. Ins. Co. v. De Graff*, 12 Mich. 124.

8. *Erb v. German-American Ins. Co.*, 98 Iowa 606, 99 Iowa 727.

Illegal Use of Building. — It has been held that the illegal use of a part of a building did not render void an insurance policy thereon.¹

d. RISK — (1) *Insurer Must Be Subjected to Liability.* — From the very nature of the contract, it is essential to its validity that the insurer should be subjected to liability; for if from the nonexistence of the subject-matter, or from any other cause, the event insured against cannot by any possibility occur, the contract is void.²

(2) *Causes of Loss* — (a) **In General.** — The causes of loss against which the insurance contract may be framed to indemnify the insured are as various as the perils to which things insurable may be exposed. These will be properly considered under the particular insurance titles in this work.

(b) **Negligence of Insured.** — It is well settled that a loss occasioned by the ordinary negligence of the assured or by his servants or agents, without fraud or design, is a loss within the policy for which the insurers are liable. Negligence of the assured is always one of the risks insured against.³

Fraudulent Negligence. — But fraudulent negligence is not insured against. If the insured knows that a fire which he can readily put out, if so inclined, has originated on the insured premises by his negligence, and he fails to make any effort to put it out, he cannot recover upon the policy.⁴

Carriers' Negligence. — While a common carrier cannot stipulate for exemption from liability for loss of goods or injury to passengers caused by the negligence of its servants, there is no reason of public policy which prohibits the carrier from contracting with a third party for insurance against losses from this cause. Such insurance does not diminish the carrier's responsibility to the passenger, but increases his means of meeting the responsibility.⁵

(c) **Seaworthiness of Vessel.** — In marine insurance there is an implied warranty that the vessel which is the subject of insurance, or in which the goods insured are to be carried, or out of which the freight insured is to arise, is seaworthy; and if the vessel is not seaworthy, the contract is void.⁶

(3) **Commencement and Duration of Risk** — (a) **Commencement** — *aa. IN GENERAL.* — If no time at which the risk is to commence is mentioned in the contract of insurance, it will be presumed to take effect immediately.⁷

Date Not Conclusive. — The date of the policy itself is not conclusive, for although the policy may by its terms profess to take effect at a certain time, yet it may be shown that from want of delivery, failure to comply with some condition precedent, or other cause, it did not take effect until a subsequent time.⁸

A Fire-insurance Policy upon a Stock of Fireworks and other merchandise, hazardous or extra-hazardous, will not be presumed to cover an article so specially hazardous that the assured was prohibited by a town ordinance from keeping it, but the term "fireworks" within the meaning of the policy has reference only to such fireworks as might properly be kept in store. *Jones v. Fireman's Fund Ins. Co.*, 51 N. Y. 318.

1. Building Used for Lottery. — In an action on a policy of insurance on a building described as a shoe factory, and its contents, it appeared in evidence that on the evening preceding the fire a lottery was drawn in one of the rooms of the building and that about fifty persons were present in the course of the evening. This use of the building was with the consent of the plaintiffs, both of whom were present, and each held a ticket. The insurance company set up these facts as a defense, claiming that the illegal use of the building avoided the policy, but it was held that there was no natural, probable, or actual connection between the offense committed and the loss by

fire, and judgment for the plaintiff was rendered. *Boardman v. Merrimack Mut. F. Ins. Co.*, 8 Cush. (Mass.) 583.

2. *Stevenson v. Snow*, 3 Burr. 1237.

3. **Negligence of Insured.** — *Citizens' Ins. Co. v. McLaughlin*, 53 Pa. St. 485.

4. **Fraudulent Negligence.** — *Fleisch v. Insurance Co. of North America*, 58 Mo. App. 596.

5. **Carriers' Negligence.** — *Phoenix Ins. Co. v. Erie, etc., Transp. Co.*, 117 U. S. 312; *California Ins. Co. v. Union Compress Co.*, 133 U. S. 387; *American Casualty Ins. Co.'s Case*, 82 Md. 535; *Minneapolis, etc., R. Co. v. Home Ins. Co.*, 64 Minn. 61.

6. **Seaworthiness of Vessel.** — *Seaman v. Enterprise F. & M. Ins. Co.*, 21 Fed. Rep. 778; *Draper v. Commercial Ins. Co.*, 21 N. Y. 378; *Allison v. Corn Exch. Ins. Co.*, 57 N. Y. 87; *Van Winkle v. Mechanics, etc., Ins. Co.*, 97 N. Y. 350; *Howard v. Orient Mut. Ins. Co.*, 2 Robt. (N. Y.) 539.

7. **Commencement of Risk.** — *Potter v. Phenix Ins. Co.*, 63 Fed. Rep. 382; *Hubbard v. Hartford F. Ins. Co.*, 33 Iowa 325, 11 Am. Rep. 125.

8. *Atlantic Ins. Co. v. Goodall*, 35 N. H. 328.

bb. PROSPECTIVE INSURANCE. — The parties may fix a future date for the commencement of the risk,¹ for it is not essential that the commencement of the term should be coincident with the execution of the contract.

cc. RETROSPECTIVE INSURANCE. — Nor is it in contravention of public policy for the parties to frame their contract so as to give a retrospective operation to it. When, as in marine insurance, the thing to be insured is at a distance, and its status is unknown to the parties, an insurance "lost or not lost" may bind the insurer for a loss occurring within the term contemplated by the contract, but before the date of its actual execution. Such a provision is quite usual in fire as well as in marine insurance, and without these express words circumstances may sufficiently imply the same intent.²

Fraudulent Concealment by Insured. — The utmost good faith, however, is required in making such a contract, and if the insured had knowledge of the loss at the time when he procured the policy, his concealment of the fact from the insurer is a fraud upon him, and avoids the contract.³

(b) Duration. — The duration of a risk is an essential element of the contract,⁴ and must be fixed by the agreement of the parties, yet it is sufficient if it was agreed between them that the insurance should terminate at such time as either party should elect.⁵

e. AGREEMENT — (1) In General — Terms Must Be Fixed. — The agreement of the parties must include all the elements and terms essential to the existence of the contract. If the parties have not agreed on the subject of insurance, the limit and duration of the risk, the perils insured against, the amount to be paid in the event of a loss, the rate of premium, or upon any other element or term which may be peculiar to the particular contract, whatever may have been the negotiations or propositions passing between them, these have not reached the form and obligation of a subsisting contract.⁶ In other

1. Prospective Insurance. — *Michigan Pipe Co. v. North British, etc., Ins. Co.*, 97 Mich. 493.

A policy of insurance bearing a given date and purporting to insure for the future only cannot be made the basis of an action to recover for a loss occurring upon a prior date; and if for any reason such policy is subject to reformation as to date, it can be reformed only in a court having power to grant affirmative equitable relief in such matters. *Fowler v. Preferred Acc. Ins. Co.*, 100 Ga. 331.

A verbal agreement made in October to issue a policy of insurance for twelve months beginning in the "early part" of November covers a loss occurring on the 19th day of November. *Home Ins. Co. v. Adler*, 77 Ala. 242.

2. Retrospective Insurance. — *Hooper v. Robinson*, 98 U. S. 528; *General Interest Ins. Co. v. Ruggles*, 12 Wheat (U. S.) 408; *Hammond v. Allen*, 2 Sumn. (U. S.) 387; *Mercantile Mut. Ins. Co. v. Folsom*, 18 Wall. (U. S.) 237; *Security F. Ins. Co. v. Kentucky M. & F. Ins. Co.*, 7 Bush (Ky.) 81, 3 Am. Rep. 301; *Hallock v. Commercial Ins. Co.*, 26 N. J. L. 278; *Commercial Ins. Co. v. Hallock*, 27 N. J. L. 645, 72 Am. Dec. 379.

3. Fraudulent Concealment of Loss. — *Merchants' Ins. Co. v. Paige*, 60 Ill. 448; *Wales v. New York Bowery F. Ins. Co.*, 37 Minn. 106; *Nippolt v. Firemen's Ins. Co.*, 57 Minn. 275; *Blake v. Hamburg-Bremen F. Ins. Co.*, 67 Tex. 160, 60 Am. Rep. 15. See also *Wilson v. New Hampshire F. Ins. Co.*, 140 Mass. 210.

4. Duration of Risk. — A policy of insurance issued and dated October 28, 1890, "for the term of one year from the 28th day of October,

1890, * * * to the 28th day of October, 1890," shows on its face that a mistake was made in the draft of it, in making the date of its expiration the same as the date of its issue; and such policy is construed to be "for the term of one year" from the date of its issuance. *Boulden v. Phoenix Ins. Co.*, 96 Ala. 609.

A policy of insurance, expressed to be "from the first day of August in the year 1854, at noon, until the first day of August in the year 1854, at noon," may be shown, by reference to the indorsements made by the insurers on the back of the policy, and to the amount of the premium and deposit note, to be an insurance of five years from the first of August, 1854. *Liberty Hall Assor. v. Housatonic Mut. F. Ins. Co.*, 7 Gray (Mass.) 261.

A policy of insurance expired June 10, 1878. On or prior to June 13, 1878, an application for renewal was made, and on June 19, 1878, a written renewal was issued which, by its terms, continued the original policy in force for the term of one year, to wit, from June 10, 1878, to June 10, 1879. The premises were destroyed by fire June 16, 1879. It was held that the term of the renewal had then expired. Even if there was no contract of renewal until June 19, 1878, the period expressly fixed in the agreement cannot be extended by construction to one year from that date. *Fuchs v. Germantown Farmers' Mut. Ins. Co.*, 60 Wis. 286.

5. Imboden v. Detroit F. & M. Ins. Co., 31 Mo. App. 321.

6. Agreement upon Terms of Contract — United States. — *Kimball v. Lion Ins. Co.*, 17 Fed.

words, the negotiations must leave nothing open for future determination, but must attain the condition of a definite and complete agreement, binding the insured to pay the premium though the loss does not happen, as well as binding the insurer to pay the amount insured if the loss does happen.¹

General Agreement. — If, however, it is impossible at the time of negotiation to obtain important facts affecting the subject of their dealings, the parties may make a general agreement to accomplish their purpose as well as they can. If the value and situation of the property are in doubt, they may assess its value at a certain sum temporarily, and agree upon the rate of premium which would be fair and reasonable, until such time as the proper rate can be fixed.²

(2) *Mode of Agreement* — (a) *In General.* — The agreement is usually effected by an offer or application by the insured and its acceptance by the insurer, or else by the tender of a policy by the insurer and its acceptance by the insured.

The Acceptance of the Proposal, from whomsoever emanating, is essential to the creation of a contract, for it is not consummated until the minds of the parties have met in the fixing of all of its terms and conditions.³

The Assent of the Parties may be shown by their acts and the attending circumstances, as well as by the words they employed.⁴

(b) *Application by Insured and Acceptance by Insurer.* — When an application for insurance is presented to an insurance company, stating what is wanted, and

Rep. 625; *Orient Mut. Ins. Co. v. Wright*, 23 How. (U. S.) 401; *Piedmont, etc., L. Ins. Co. v. Ewing*, 92 U. S. 379; *Mutual L. Ins. Co. v. Young*, 23 Wall (U. S.) 85.

Alabama. — *Alabama Gold L. Ins. Co. v. Mayes*, 61 Ala. 163; *Commercial F. Ins. Co. v. Morris*, 105 Ala. 498.

Iowa. — *Sater v. Henry County Farmers Ins. Co.*, 92 Iowa 579.

Maine. — *Clark v. Insurance Co. of North America*, 89 Me. 26.

Massachusetts. — *Hartshorn v. Shoe, etc., Dealers' Ins. Co.*, 15 Gray (Mass.) 240.

New York. — *First Baptist Church v. Brooklyn F. Ins. Co.*, 28 N. Y. 161; *Tyler v. New Amsterdam F. Ins. Co.*, 4 Robt. (N. Y.) 151.

Ohio. — *Connecticut F. Ins. Co. v. Bennett*, 1 Ohio N. P. 71, 1 Ohio Dec. 60.

Pennsylvania. — *Hamilton v. Lycoming Mut. Ins. Co.*, 5 Pa. St. 339.

Wisconsin. — *Strohn v. Hartford F. Ins. Co.*, 37 Wis. 625, 19 Am. Rep. 777; *Mattoon Mfg. Co. v. Oshkosh Mut. F. Ins. Co.*, 69 Wis. 564; *John R. Davis Lumber Co. v. Scottish Union, etc., Ins. Co.*, 91 Wis. 472.

A Contract Which Expresses No Time for the Risk to Continue is too vague and uncertain to be treated as complete. *Clark v. Brand*, 62 Ga. 23.

Rate of Premium Not Settled. — A contract of insurance upon mill property will not be held to have been completed where in the oral negotiations between the parties the rate of premium was not determined, nor was the apportionment of the risk between the building and the machinery therein fixed. *Kimball v. Lion Ins. Co.*, 17 Fed. Rep. 625.

Where an Agent for Several Insurance Companies Is Directed to Place a Given Amount of Insurance, without any expectation on the part of the applicant that it will all be written in any one of the companies, which are not mentioned by name, no contract exists as to any one nor

as to all of them, and no liability attaches, until further action to determine and define the risk, in doing which the agent acts as agent for the insured. *Michigan Pipe Co. v. Michigan F. & M. Ins. Co.*, 92 Mich. 482. See also *New Orleans Ins. Assoc. v. Boniel*, 20 Fla. 815; *Connecticut F. Ins. Co. v. Bennett*, (Super. Ct. Cin.) 1 Ohio N. P. 71.

1. *Baubie v. Etna Ins. Co.*, 2 Dill. (U. S.) 156; *Johnson v. Connecticut F. Ins. Co.*, 84 Ky. 470.

2. *Scammell v. China Mut. Ins. Co.*, 164 Mass. 341, 49 Am. St. Rep. 462; *Fabbri v. Mercantile Mut. Ins. Co.*, 6 Lans. (N. Y.) 446, 64 Barb. (N. Y.) 85.

3. **Offer Not Binding until Accepted** — *United States.* — *New York L. Ins. Co. v. McMaster*, 87 Fed. Rep. 63.

Alabama. — *Alabama Gold L. Ins. Co. v. Mayes*, 61 Ala. 163.

Idaho. — *Easley v. New Zealand Ins. Co.*, (Idaho 1897) 51 Pac. Rep. 418.

Illinois. — *Manchester F. Assur. Co. v. Benson*, 66 Ill. App. 615.

Iowa. — *Walker v. Farmers' Ins. Co.*, 51 Iowa 680; *Armstrong v. State Ins. Co.*, 61 Iowa 215; *Atkinson v. Hawkeye Ins. Co.*, 71 Iowa 340; *Winchell v. Iowa State Ins. Co.*, 103 Iowa 189.

Michigan. — *Faughner v. Manufacturers' Mut. F. Ins. Co.*, 86 Mich. 536.

Minnesota. — *Heiman v. Phoenix Mut. L. Ins. Co.*, 17 Minn. 153, 10 Am. Rep. 154; *Schwarz v. Germania L. Ins. Co.*, 18 Minn. 448.

West Virginia. — *McCully v. Phoenix Mut. L. Ins. Co.*, 18 W. Va. 782.

A Mere Agreement of a Soliciting Agent to procure the issuance of a policy of insurance does not create a present liability against the insurance company, his principal. *Farmers, etc., Ins. Co. v. Graham*, 50 Neb. 818.

4. *Newark Mach. Co. v. Kenton Ins. Co.*, 50 Ohio St. 549.

the terms, and its officer or any agent having authority accepts the risk, the contract is complete.¹

Approval of Home Office. — If, however, the application provides that no liability shall attach to the agent's acceptance until the application has been approved by the home office, the company is not liable if the person upon whose life the insurance is placed dies² or if the property which is the subject of insurance is destroyed or damaged³ before the application is approved.

The Acceptance must be signified by some act.⁴ The delay of the insurer in accepting or rejecting the proposal for insurance does not take the place of assent.⁵

Withdrawal of Application. — The applicant may withdraw his application at any time before it has been accepted, and if he does so he will not be bound to accept a policy subsequently made out and tendered to him.⁶

(c) **Tender of Policy by Insurer and Acceptance by Insured.** — If the parties do not agree upon all the terms of the policy before it is issued,⁷ or if the policy as issued does not conform to the terms proposed by the insured,⁸ the policy is not binding as a contract until accepted by the insured.

(3) **Form of Contract** — (a) **In General.** — For sake of convenience, the contracts of fire and marine insurance usually, and life and accident insurance sometimes, exist in two forms: first, a preliminary contract intended to protect the applicant until the policy can be properly issued, and second, the executed contract or policy itself.⁹

(b) **Preliminary Contract** — *aa.* **POWER OF INSURANCE COMPANIES TO MAKE.** — This preliminary contract is of the greatest importance, for if the applicant could not be made secure until all the formal documents were executed and delivered, the beneficial effect of the insurance system would be greatly impaired;¹⁰ and a clause in the state insurance law¹¹ or in the charter of an insurance company¹²

1. **Acceptance of Application.** — *Firemen's Ins. Co. v. Kuessner*, 164 Ill. 275; *Brownfield v. Phoenix Ins. Co.*, 35 Mo. App. 54. See also *Winne v. Niagara F. Ins. Co.*, 91 N. Y. 186.

Where, in an action upon a contract, the plaintiff's case consists of the proof of a proposal, with the presumption of assent thereto arising from the silence of the defendant, no legal inference of a contract can arise out of such silence without evidence of a duty to speak on the part of the defendant which was neglected to the plaintiff's harm. *Royal Ins. Co. v. Beatty*, 119 Pa. St. 6, 4 Am. St. Rep. 622.

2. **Approval by Home Office.** — *Covenant Mut. Ben. Assoc. v. Conway*, 10 Ill. App. 348; *Allen v. Massachusetts Mut. Acc. Assoc.*, 167 Mass. 18; *Jacobs v. New York L. Ins. Co.*, 71 Miss. 656; *Coker v. Atlas Acc. Ins. Co.*, (Tex. Civ. App. 1895) 31 S. W. Rep. 703.

3. *Pickett v. German F. Ins. Co.*, 39 Kan. 697; *Harp v. Grangers' Mut. F. Ins. Co.*, 49 Md. 307.

Approval of General Agent. — Where a policy is issued which by its terms is subject to the approval or disapproval of the general agent, the receipt of the premium by such general agent and his subsequent notification to the local agent to cancel the policy constitute sufficient proof of his original approval of it. *Ætna Ins. Co. v. Maguire*, 51 Ill. 343.

4. **Acceptance Must Be Signified by Some Act.** — *Heiman v. Phoenix Mut. L. Ins. Co.*, 17 Minn. 153, 10 Am. Rep. 154; *Schwartz v. Germania L. Ins. Co.*, 18 Minn. 448.

5. **Delay Not Equivalent to Acceptance.** — *Misels horn v. Mutual Reserve Fund L. Assoc.*, 30 Fed. Rep. 545; *Alabama Gold L. Ins. Co. v.*

Mayes, 61 Ala. 163; *Atkinson v. Hawkeye Ins. Co.*, 71 Iowa 340; *More v. New York Bowery F. Ins. Co.*, 130 N. Y. 537; *New York Union Mut. Ins. Co. v. Johnson*, 23 Pa. St. 72.

6. *Globe Mut. L. Ins. Co. v. Snell*, 19 Hun (N. Y.) 560.

7. *Wallingford v. Home Mut. F. & M. Ins. Co.*, 30 Mo. 46; *Wood v. Poughkeepsie Mut. Ins. Co.*, 32 N. Y. 619.

8. **When Policy Does Not Conform to Application.** — *Stephens v. Capital Ins. Co.*, 87 Iowa 283; *Myers v. Keystone Mut. L. Ins. Co.*, 27 Pa. St. 268, 67 Am. Dec. 462.

An insurance agent agreed to insure the plaintiff's house, on certain specified terms, in some company represented by him, but not designated. The defendant, one of those companies, decided to insure the house on entirely different terms; but before the plaintiff was informed thereof the company determined not to take the risk. It was held that there was no contract by the defendant to insure. *Sheldon v. Hekia F. Ins. Co.*, 65 Wis. 436.

9. *Franklin Ins. Co. v. Colt*, 20 Wall. (U. S.) 567.

10. *Franklin Ins. Co. v. Colt*, 20 Wall. (U. S.) 567.

11. *Hening v. U. S. Insurance Co.*, 2 Dill. (U. S.) 26; *Walker v. Metropolitan Ins. Co.*, 56 Me. 371.

12. *Constant v. Allegheny Ins. Co.*, 3 Wall. Jr. (C. C.) 313; *Davenport v. Peoria M. & F. Ins. Co.*, 17 Iowa 276; *Sanborn v. Fireman's Ins. Co.*, 16 Gray (Mass.) 448, 77 Am. Dec. 419; *Cook v. Ætna Ins. Co.*, 7 Daly (N. Y.) 555; *Zell v. Herman Farmers' Mut. Ins. Co.*, 75 Wis. 521.

providing that policies shall be executed in a certain manner does not affect the power of the insurer to make these preliminary arrangements. Such a contract remains in force until it is superseded by the issuance of a regular policy, or until the risk is rejected by the insurer, and the insurer is liable for any loss in the meanwhile.¹

bb. NO FORMALITY REQUIRED — (aa) *In General*. — It is necessarily of the most informal character, for it would be impracticable for a company to carry on its business at a distance — or, at least, business so conducted would be attended with great embarrassment and inconvenience — if such preliminary arrangements required for their validity and efficacy the formalities required for the executed contract.²

(bb) *May Be Oral*. — The contract is sometimes evidenced by a binding slip signed by the insurer's agent³ or by a memorandum in his record book, but neither the statute of frauds⁴ nor public policy requires it to be in writing, and it is equally valid if made orally.⁵

1. *Cooper v. Pacific Mut. L. Ins. Co.*, 7 Nev. 116, 8 Am. Rep. 705.

2. *United States*. — *Taylor v. Merchants' F. Ins. Co.*, 9 How. (U. S.) 390; *Commercial Mut. Marine Ins. Co. v. Union Mut. Ins. Co.*, 19 How. (U. S.) 321.

Alabama. — *Hartford F. Ins. Co. v. King* 106 Ala. 519.

Illinois. — *Hartford F. Ins. Co. v. Farrish*, 73 Ill. 166; *Firemen's Ins. Co. v. Kuessner*, 164 Ill. 275; *Philadelphia F. Assoc. v. Smith*, 53 Ill. App. 655.

Indiana. — *Barr v. Insurance Co. of North America*, 61 Ind. 488.

New York. — *First Baptist Church v. Brooklyn F. Ins. Co.*, 19 N. Y. 305; *Ellis v. Albany City F. Ins. Co.*, 50 N. Y. 402, 10 Am. Rep. 495.

3. *Binding Slip Evidences Valid Contract*. — *Goodall v. New England Mut. F. Ins. Co.*, 25 N. H. 169; *Lipman v. Niagara F. Ins. Co.*, 121 N. Y. 454; *Van Tassel v. Greenwich Ins. Co.*, 151 N. Y. 130.

4. *Oral Contract of Insurance Not Within Statute of Frauds*. — *Walker v. Metropolitan Ins. Co.*, 56 Me. 371; *Sanborn v. Fireman's Ins. Co.*, 16 Gray (Mass.) 448, 77 Am. Dec. 419.

A verbal agreement to insure goods not only against loss by fire but against other risks or perils which are within the statute of frauds is valid as to the former provision, although it may be void as to the latter. *Mobile Marine Dock, etc., Ins. Co. v. McMillan*, 31 Ala. 711.

5. *Oral Contracts of Insurance Valid* — *United States*. — *Union Mut. Ins. Co. v. Commercial Mut. Marine Ins. Co.*, 2 Curt. (U. S.) 524, 19 How. (U. S.) 318; *Franklin Ins. Co. v. Colt*, 20 Wall. (U. S.) 560; *Potter v. Phenix Ins. Co.*, 63 Fed. Rep. 382; *Eames v. Home Ins. Co.*, 94 U. S. 621; *Humphrey v. Hartford F. Ins. Co.*, 15 Blatchf. (U. S.) 504; *Relief F. Ins. Co. v. Shaw*, 94 U. S. 574.

Alabama. — *Mobile Marine Dock, etc., Ins. Co. v. McMillan*, 31 Ala. 711; *Alabama Gold L. Ins. Co. v. Maves*, 61 Ala. 163; *Home Ins. Co. v. Adler*, 77 Ala. 242.

Illinois. — *Hartford F. Ins. Co. v. Farrish*, 73 Ill. 166; *Firemen's Ins. Co. v. Kuessner*, 164 Ill. 275; *People's Ins. Co. v. Paddon*, 8 Ill. App. 447; *Stoelke v. Hahn*, 55 Ill. App. 497.

Indiana. — *American Horse Ins. Co. v. Pat-*

terson, 28 Ind. 17; *New England F. & M. Ins. Co. v. Robinson*, 25 Ind. 536.

Iowa. — *Hubbard v. Hartford F. Ins. Co.*, 33 Iowa 325, 11 Am. Rep. 125; *Smith v. State Ins. Co.*, 64 Iowa 716; *Green v. Liverpool, etc., Ins. Co.*, 91 Iowa 615.

Kansas. — *Western Massachusetts Ins. Co. v. Duffy*, 2 Kan. 347.

Maine. — *Walker v. Metropolitan Ins. Co.*, 56 Me. 371.

Massachusetts. — *Putnam v. Home Ins. Co.*, 123 Mass. 324, 25 Am. Rep. 93; *Emery v. Boston Marine Ins. Co.*, 138 Mass. 398; *Sanborn v. Fireman's Ins. Co.*, 16 Gray (Mass.) 448, 77 Am. Dec. 419.

Minnesota. — *Salisbury v. Hekla F. Ins. Co.*, 32 Minn. 458; *Ganser v. Fireman's Fund Ins. Co.*, 38 Minn. 74.

Missouri. — *Lingenfelter v. Phoenix Ins. Co.*, 19 Mo. App. 252; *Henning v. U. S. Insurance Co.*, 47 Mo. 425, 4 Am. Rep. 332.

Nebraska. — *Nebraska, etc., Ins. Co. v. Seivers*, 27 Neb. 541.

New York. — *First Baptist Church v. Brooklyn F. Ins. Co.*, 19 N. Y. 305; *Audubon v. Excelsior Ins. Co.*, 27 N. Y. 216; *First Baptist Church v. Brooklyn F. Ins. Co.*, 28 N. Y. 153, 18 Barb. (N. Y.) 69; *Ellis v. Albany City F. Ins. Co.*, 50 N. Y. 402, 10 Am. Rep. 495; *Ruggles v. American Cent. Ins. Co.*, 114 N. Y. 415, 11 Am. St. Rep. 674; *Clarkson v. Western Assur. Co.*, 92 Hun (N. Y.) 527; *Reynolds v. Westchester F. Ins. Co.*, 8 N. Y. App. Div. 193; *Cooke v. Aetna Ins. Co.*, 7 Daly (N. Y.) 555; *Rhodes v. Railway Pass. Ins. Co.*, 5 Lans. (N. Y.) 71; *Hicks v. British America Assur. Co.*, 13 N. Y. App. Div. 444; *Kelly v. Commonwealth Ins. Co.*, 10 Bosw. (N. Y.) 82; *Squier v. Hanover F. Ins. Co.*, 18 N. Y. App. Div. 575.

Ohio. — *Newark Mach. Co. v. Kenton Ins. Co.*, 50 Ohio St. 549.

Oregon. — *Hardwick v. State Ins. Co.*, 20 Oregon 547.

Pennsylvania. — *Patterson v. Benjamin Franklin Ins. Co.*, 81 Pa. St. 454.

South Carolina. — *Stickley v. Mobile Ins. Co.*, 37 S. Car. 56.

Wisconsin. — *Strohn v. Hartford F. Ins. Co.*, 33 Wis. 649; *Campbell v. American F. Ins. Co.*, 73 Wis. 100.

Under the Code of Georgia, 1873, § 2794

Power of Agent. — As a general rule any agent having power to bind the insurer by the issuance of a policy has power to bind him by a parol contract.¹

Conditions of Ordinary Policy Govern. — Such a contract, however, is subject to the conditions incorporated in an ordinary policy issued by the insurer.² When nothing is said in the negotiations about special rates of insurance or special conditions of the policy, it will be presumed that those which are usual and customary were intended.³

cc. ENFORCEMENT OF CONTRACT — Action at Law. — The insured may bring an action at law upon the preliminary contract in the same manner as upon the policy.⁴

Suit in Equity. — He may, however, treat the contract as an agreement to insure, and resort to a court of equity to compel the delivery of a policy either before or after the happening of the loss; and being properly in that court after the loss has happened, it is according to the established course of procedure, in order to avoid delay and expense to the parties, for that court to proceed and give such final relief as the circumstances of the case demand.⁵ As the only real question is the one which a court of equity must necessarily have to decide in the exercise of its peculiar jurisdiction in enforcing a specific execution of the agreement, it would be an idle technicality for that court to turn the party over to his remedy at law upon the policy. And no doubt it was a strong sense of this injustice that led the court at an early date to establish the rule that, having properly acquired jurisdiction over the subject for a necessary purpose, it was the duty of the court to proceed and do final and complete justice between the parties where it could as well be done in that court as in a proceeding at law.⁶

(c) Policy — aa. MUST CONFORM TO PRELIMINARY AGREEMENT. — If the parties have entered into a preliminary agreement for insurance, the insurer is bound in good faith to furnish a policy in the usual form and with the usual clauses.⁷

(Code 1895, § 2089), a contract of fire insurance, to be binding, must be in writing, though delivery is not essential if the contract is consummated in other respects. *Symington v. Liverpool, London & Globe Fire Ins. Co.*, 51 Ga. 76. See also *Fowler v. Preferred Acc. Ins. Co.*, 100 Ga. 330; *Clark v. Brand*, 62 Ga. 23.

1. Power of Agents to Bind Insurer by Parol. — *Philadelphia F. Assoc. v. Smith*, 59 Ill. App. 655; *Brown v. Franklin Mut. F. Ins. Co.*, 105 Mass. 565, 52 Am. St. Rep. 535; *Post v. Aetna Ins. Co.*, 43 Barb. (N. Y.) 351; *Ellis v. Albany City F. Ins. Co.*, 4 Lans. (N. Y.) 433; *Angell v. Hartford F. Ins. Co.*, 59 N. Y. 171, 17 Am. Rep. 322; *Hotchkiss v. Germania F. Ins. Co.*, 5 Hun (N. Y.) 91; *Cooke v. Aetna Ins. Co.*, 7 Daly (N. Y.) 555; *Stickley v. Mobile Ins. Co.*, 37 S. Car. 56, 73, 16 S. E. Rep. 838; *Stehlick v. Milwaukee Mechanics' Ins. Co.*, 87 Wis. 322.

2. Conditions of Regular Policy Govern — *United States*. — *Eames v. Home Ins. Co.*, 94 U. S. 621.

Iowa. — *Smith v. State Ins. Co.*, 64 Iowa 716, *Minnesota*. — *Salisbury v. Hekla F. Ins. Co.*, 32 Minn. 458.

New Jersey. — *Agricultural Ins. Co. v. Fritz*, 61 N. J. L. 211.

Ohio. — *Newark Mach. Co. v. Kenton Ins. Co.*, 50 Ohio St. 549.

Pennsylvania. — *Eureka Ins. Co. v. Robinson*, 56 Pa. St. 256, 40 Am. Dec. 65; *State F. & M. Ins. Co. v. Porter*, 3 Grant Cas. (Pa.) 123.

An oral agreement for additional insurance retains all conditions of the policy which is

added to, except as changed by the verbal contract, and that whether the original policy is valid or invalid. *Green v. Liverpool, etc., Ins. Co.*, 91 Iowa 615.

While a binding slip contains none of the conditions usually found in insurance policies, the contract evidenced by it is the ordinary policy of insurance issued by the insurer, so that in any construction of the contract it must be regarded as though it had expressed that the present insurance was under the terms of the usual policy of the company, to be thereafter delivered. *Karelsen v. Sun Fire Office*, 122 N. Y. 545; *De Grove v. Metropolitan Ins. Co.*, 61 N. Y. 594, 19 Am. Rep. 305.

3. Newark Mach. Co. v. Kenton Ins. Co., 50 Ohio St. 549.

4. Actions at Law. — *Schultz v. Phenix Ins. Co.*, 77 Fed. Rep. 375; *Firemen's Ins. Co. v. Kuessner*, 164 Ill. 275; *New England F. & M. Ins. Co. v. Robinson*, 25 Ind. 536; *State F. & M. Ins. Co. v. Porter*, 3 Grant Cas. (Pa.) 123.

5. Suit in Equity. — *Motteux v. London Assur. Co.*, 1 Atk. 545; *Walker v. Metropolitan Ins. Co.*, 56 Me. 371; *Sanborn v. Fireman's Ins. Co.*, 16 Gray (Mass.) 448, 77 Am. Dec. 419; *Perkins v. Washington Ins. Co.*, 4 Cow. (N. Y.) 646.

6. Tayloe v. Merchants' F. Ins. Co., 9 How. (U. S.) 399; *Union Mut. Ins. Co. v. Commercial Mut. Marine Ins. Co.*, 2 Curt. (U. S.) 524; *Phoenix Ins. Co. v. Ryland*, 69 Md. 437; *Franklin F. Ins. Co. v. Taylor*, 52 Miss. 441; *Gerrish v. German Ins. Co.*, 55 N. H. 355.

7. Bradley v. Nashville Ins. Co., 3 La. Ann. 708, 48 Am. Dec. 465.

If the Policy Does Not Conform to the Previous Agreement, the applicant may refuse to accept it, and recover back any money he may have paid in premiums;¹ or if he has accepted it, supposing it to conform to his contract with the insurer, a court of equity will reform it in a proper case.²

bb. VALIDITY — (aa) In General. — It is not essential to the validity of a contract of insurance that the person to be insured thereby should be named in the policy. If the name of the person for whose benefit the insurance is obtained does not appear upon the face of the policy, or if the designation used is applicable to several persons, or if the description of the assured is imperfect or ambiguous, so that it cannot be understood without explanation, resort to extrinsic evidence may be had in order to ascertain the meaning of the contract. And when thus ascertained, it will be held to apply to the interests intended to be covered by it; and they will be deemed to be comprehended within it who were in the minds of the parties when the contract was made.³

(bb) Conditions — At Common Law. — The contract of insurance is a voluntary one, and in the absence of statute the insurers have the right to incorporate in their policy whatever conditions it may please them to impose.⁴ If the assured objects to them he is under no obligation to consummate the contract;⁵ but if he assents to them, by accepting the policy or otherwise, the insurer has the right to insist upon a due observance of these conditions and to the benefit of every restriction and limitation upon his liability provided for in the contract.⁶

By Statute. — But many of the states, by the adoption of a standard policy, have protected the insured from the imposition of onerous and unreasonable conditions, and though a policy containing a clause not provided for in the standard policy is not void, it is voidable at the option of the insured.⁷

(cc) Execution — Signature of Officers. — In some jurisdictions it is held to be necessary, in order that the policy may take effect as a valid written contract, that it should be signed by the proper officers of the corporation and countersigned by the issuing agent.⁸ If the policy itself provides for the mode of its execution, this mode must be complied with.⁹ But in other jurisdictions it has been held that notwithstanding the express terms of the policy, its execution in the prescribed manner is not under all circumstances essential to its validity. On an equitable interpretation of the whole transaction, it may become the duty of the court to dispense with a portion of the forms of the contract, if it can find any reliable substitute for them, on the principle which cures defective execution of powers where the intention to execute is sufficiently plain. Hence it has been held to be no objection to the validity of

1. *Mutual L. Ins. Co. v. Gorman*, (Ky. 1897) 40 S. W. Rep. 571; *Lawrence v. Griswold*, 30 Mich. 410; *Tift v. Phoenix Mut. L. Ins. Co.*, 6 Lans. (N. Y.) 198.

2. See *infra*, this section, *Reformation of Policy*.

3. *Clinton v. Hope Ins. Co.*, 45 N. Y. 454.

Mistake in Name of Assured Cured by Indorsement. — The fact that one who has no interest in property is mistakenly named as the assured in the policy of insurance thereon does not invalidate it, if, by subsequent indorsement made by the insurer, with notice of the mistake, the loss, if any, is made payable to the mortgagee named in the indorsement. *Solms v. Rutgers F. Ins. Co.*, 4 Abb. App. Dec. (N. Y.) 279.

4. *Newcomb v. Provident Fund Soc.*, 5 Colo. App. 140.

5. *Keig v. Home Mut. F. & M. Ins. Co.*, 42 Mo. 38, 97 Am. Dec. 291.

6. *Rann v. Home Ins. Co.*, 59 N. Y. 387.

7. *Armstrong v. Western Manufacturers' Mut. Ins. Co.*, 95 Mich. 137.

8. *Peoria M. & F. Ins. Co. v. Walser*, 22 Ind. 73.

9. *Globe Acc. Ins. Co. v. Reid*, 19 Ind. App. 203.

Where a Policy Provides for Its Being Countersigned by the Agent, it is not valid without such countersigning. *Lynn v. Burgoyne*, 13 B. Mon. (Ky.) 400. See also *Noyes v. Phoenix Mut. L. Ins. Co.*, 1 Mo. App. 584.

That a policy of life insurance shall be countersigned by the agent of the company before it shall become a valid obligation is a stipulation which the company has a right to make, and the completion of the contract with the signature of such agent during the lifetime of the insured is essential to the existence of an obligation which can be enforced against the company. *Newcomb v. Provident Fund Soc.*, 5 Colo. App. 140. *Badger v. American Popular L. Ins. Co.*, 103 Mass. 244, 4 Am. Rep. 547.

the instrument that it was signed by officers who had ceased to be such at the time when the policy was issued,¹ or that it was not countersigned by the insurer's agent, though this was expressly required by the terms of the policy.²

Sealing Policies. — The failure of an insurance company to attach its common seal to an insurance policy will not invalidate it in the absence of a requirement to that effect in the company's charter.³ But it has been held that if the charter of the insurance company provides that its policies shall be sealed, an unsealed policy cannot be introduced in evidence to recover in an action for the premium.⁴

(*dd*) **Delivery and Acceptance** — *aaa. Necessity of.* — If all the terms of a contract have been agreed upon between the parties, the formal delivery of the policy by the insurer and its acceptance by the insured are not essential to its validity;⁵ but if the terms have not been agreed upon, or if the application provides, and if it is a condition of the policy itself, that it shall not become effective until it is delivered to the applicant, the contract of insurance will not become binding until such delivery.⁶

bbb. Sufficiency of — **Manual Delivery of Policy Not Essential.** — Whether an insurance policy has or has not been delivered after its issuance so as to complete the contract and give it binding effect, does not depend upon its manual possession by the assured, but rather upon the intention of the parties as manifested by their acts or agreement.⁷ As a general rule, whenever one parts with the custody and control of anything with the intention at the time that it shall pass into the possession of another, its delivery to such other person has, in contemplation of law, become complete. The manual possession of the thing which it is intended to deliver is a matter of little consequence. Such possession may exist without any legal delivery, and it may not exist where a legal delivery has been effected. The controlling question is not who has the actual possession of the policy, but who has the right of possession.⁸

1. *Matter of Pelican Ins. Co.*, 47 La. Ann. 935.

2. *Kantrener v. Penn. Mut. L. Ins. Co.*, 5 Mo. App. 581; *Myers v. Keystone Mut. L. Ins. Co.*, 27 Pa. St. 268, 67 Am. Dec. 462.

If the Agent of an Insurance Company Delivers a Policy with His Name Written upon It as a completed instrument, neither he nor the company is at liberty afterwards to object that it was not countersigned by him. *Hibernia Ins. Co. v. O'Connor*, 29 Mich. 241.

3. *National Banking, etc., Co. v. Knaup*, 55 Mo. 154.

4. *Lindauer v. Delaware Mut. Safety Ins. Co.*, 13 Ark. 461.

5. **When Delivery of Policy Not Essential** — *Kansas*. — *German F. Ins. Co. v. Laggart*, 47 Kan. 663.

Maine. — *Loring v. Proctor*, 26 Me. 18; *Wass v. Maine Mut. Marine Ins. Co.*, 61 Me. 537.

Michigan. — *Home Ins. Co. v. Curtis*, 32 Mich. 402.

Mississippi. — *Alabama Gold L. Ins. Co. v. Herron*, 56 Miss. 643; *Equitable F. Ins. Co. v. Alexander*, (Miss. 1892) 12 So. Rep. 25.

Nebraska. — *Star Union Lumber Co. v. Finney*, 35 Neb. 214.

New Jersey. — *Commercial Ins. Co. v. Hallock*, 27 N. J. L. 645, 72 Am. Dec. 379.

Ohio. — *Newark Mach. Co. v. Kenton Ins. Co.*, 50 Ohio St. 549.

Tennessee. — *Whiteman v. American Cent. Ins. Co.*, 14 Lea (Tenn.) 327.

6. **When Delivery Essential.** — *Kohen v. Mu-*

tual Reserve Fund L. Assoc., 28 Fed. Rep. 705; *Steinle v. New York L. Ins. Co.*, 81 Fed. Rep. 489; *New York L. Ins. Co. v. Babcock*, 104 Ga. 67; *Gallant v. Metropolitan L. Ins. Co.*, 167 Mass. 79; *Poste v. American Union L. Ins. Co.*, 32 N. Y. App. Div. 189; *More v. New York Bowery F. Ins. Co.*, 130 N. Y. 537; *McCully v. Phoenix Mut. L. Ins. Co.*, 18 W. Va. 782.

Where a policy contains a clause that no liability shall arise unless the premium is paid and the policy delivered in the lifetime of the insured, a delivery after the death of the assured will not avail. *Hawley v. Michigan Mut. L. Ins. Co.*, 92 Iowa 593; *McClave v. Mutual Reserve Fund L. Assoc.*, 55 N. J. L. 187.

An insurance policy issued as a substitute for a policy previously made which was to be surrendered cannot be enforced if the first policy is not surrendered. *Faunce v. State Mut. L. Assur. Co.*, 101 Mass. 279.

7. **Delivery of Policy.** — *Phoenix Assur. Co. v. McAuthor*, 116 Ala. 659.

8. **What Is Delivery.** — *New York L. Ins. Co. v. Babcock*, 104 Ga. 67.

What Is Not Delivery. — Where the agreement between the applicant and the insurance agent was that the latter should forward the policy to the address of the former, who, if the policy was found to be as agreed, was to send the premium, otherwise to return the policy, and the policy never reached the applicant, but the letter containing it was returned undelivered, it was held that there was no delivery of the

Leaving Policy with Agent. — While the agent cannot act for both parties in making a contract of insurance, he can act as custodian of the policy until called for by the insured.¹ The insured may leave the policy with the agent to be kept in his safe, and the delivery of the policy is not less complete because it remains in the agent's safe until after loss.² So the assured may leave the policy in the hands of the agent subject to the order and control of a third person.³

The Delivery of the Policy to the Broker through whom the application was made, to be delivered by him to the assured, is sufficient, although the applicant died while the policy was yet in the broker's hands.⁴

Acceptance by Applicant. — If the applicant receives the policy and retains it without objection, this is to be construed as an acceptance of it by him.⁵

ccc. Effect of — Merger of Preliminary Contract. — The policy of insurance is the final contract between the parties, and the effect of its acceptance is to supersede all preliminary agreements in respect to insurance.⁶ It is a well-settled principle of law that parol declarations cannot be received to vary or contradict the terms of a written contract. All that was said between the contracting parties in relation to the terms and stipulations of the contract is presumed to have been merged in the written contract, which is the highest and best evidence of the contract between the parties, in the absence of any evidence as to fraud, accident, or mistake, at the time of its execution, delivery, and acceptance by the contracting parties.⁷

Assent to Conditions. — The applicant, by accepting the policy, assents to all its conditions, and they are just as obligatory upon him as though he had signed the policy.⁸ Having an opportunity to read it, he is presumed to know the contents thereof, and in the absence of fraud or mistake he will not be heard to say that he was ignorant of its contents.⁹

instrument. *Rogers v. Charter Oak L. Ins. Co.*, 41 Conn. 97.

Where the defendant's agent made out a policy of fire insurance to the plaintiff, and placed it in the hands of a third party until he could learn whether the defendant would accept the risk, and the defendant refused to accept it, it was held that there was no delivery of the policy and no consummated contract of insurance, even though the agent at the time received the premium from the plaintiff, with the understanding that if the defendant refused the risk the agent was to endeavor to effect the insurance in another company. *Brown v. American Cent. Ins. Co.*, 70 Iowa 390.

1. *Dibble v. Northern Assur. Co.*, 70 Mich. 1, 14 Am. St. Rep. 470.

2. *Phoenix Ins. Co. v. Meier*, 28 Neb. 124.

3. *Home Ins. Co. v. Curtis*, 32 Mich. 402.

4. *Mutual L. Ins. Co. v. Thomson*, 94 Ky. 253.

5. **Acceptance by Applicant.** — *Massachusetts Ben. L. Assoc. v. Sibley*, 158 Ill. 411; *New York L. Ins. Co. v. Easton*, 69 Ill. App. 479; *Adams v. Eidam*, 42 Minn. 53.

Questions of Law and of Fact. — The effect of an acceptance of a policy of insurance is a matter of law, but whether the policy is or is not in fact accepted is a question of fact. *New York L. Ins. Co. v. Easton*, 69 Ill. App. 479; *Loring v. Proctor*, 26 Me. 18.

Where the applicant complains of the terms of his policy, but nevertheless takes it away with him and places it in his safe-deposit box with another policy, and shortly afterwards dies, the question whether the act constituted

an acceptance of it is for the jury. *Smith v. Provident Sav. L. Assur. Soc.*, 31 U. S. App. 163.

For cases where the circumstances were held not to establish delivery and acceptance of the policy see *Rogers v. Charter Oak L. Ins. Co.*, 41 Conn. 97; *Markey v. Mutual Ben. L. Ins. Co.*, 103 Mass. 78, 118 Mass. 178, 126 Mass. 158; *Marks v. Hope Mut. L. Ins. Co.*, 117 Mass. 528; *Heiman v. Phoenix Mut. L. Ins. Co.*, 17 Minn. 153, 10 Am. Rep. 154; *Rossiter v. Aetna L. Ins. Co.*, 91 Wis. 121.

6. **Merger of Preliminary Agreement.** — *Union Mut. L. Ins. Co. v. Mowry*, 96 U. S. 544; *Masons' Union L. Ins. Assoc. v. Brockman*, 20 Ind. App. 206; *Moore v. State Ins. Co.*, 72 Iowa 414; *National Mut. Ben. Assoc. v. Heckman*, 86 Ky. 254; *Poste v. American Union L. Ins. Co.*, 32 N. Y. App. Div. 189.

If the insured accepts the policy of insurance issued to him he cannot ignore it and sue upon the preliminary parol contract. If the policy does not conform to the oral agreement, his remedy is for a reformation of the contract in a court of equity. *Kleis v. Niagara F. Ins. Co.*, 117 Mich. 469; *Hartford F. Ins. Co. v. Davenport*, 37 Mich. 609.

7. *Sullivan v. Cotton States L. Ins. Co.*, 43 Ga. 423.

8. *Guinn v. Phoenix Ins. Co.*, (Tex. Civ. App. 1893) 31 S. W. Rep. 566.

9. *New York L. Ins. Co. v. McMaster*, 87 Fed. Rep. 63; *Security L. Ins., etc., Co. v. Gober*, 50 Ga. 404; *Cleaver v. Traders' Ins. Co.*, 71 Mich. 414, 15 Am. St. Rep. 275; *Quinlan v. Provident Washington Ins. Co.*, 133 N. Y. 356, 28 Am. St. Rep. 645; *Susquehanna*

f. CONSIDERATION — PREMIUM — (1) In General. — The contract of insurance, like every other contract, must have a consideration to support it.¹ This is usually fixed by the express agreement of the parties, but it is not essential that it should be so fixed where there is an established rate for property of the character and location of that designed to be insured, and the parties contracted with reference to this established rate.²

(2) *Payment — (a) Necessity of — aa. IN GENERAL.* — It is not necessary, however, that the premium should actually be paid, provided a condition of the policy does not make payment a prerequisite and the insurer does not insist upon it. The promise of the insured to pay, whether express or merely implied from the circumstances attending the delivery of the policy to him, is a valid consideration, and will support the contract.³ But no such promise can be implied unless the insured accepts the policy as an executed and binding contract.⁴ Whether there is in fact such an acceptance is a question of fact for the jury.⁵

Withholding Delivery of Policy. — Where the delivery of a policy is purposely withheld until the premium upon it is paid, the payment of the premium is obviously requisite to the consummation of the contract.⁶

bb. WHEN CONDITION OF POLICY REQUIRES — (aa) Validity of Requirement. — It is not uncommon, however, for policies of insurance to contain a stipulation that the contract shall not be binding until the premium is actually paid. Such a stipulation is valid, and the holder cannot recover for a loss while the premium remains unpaid, provided the insurer has not, by his conduct, waived compliance with it.⁷

Mut. F. Ins. Co. v. Swank, 102 Pa. St. 17; Goddard v. East Texas F. Ins. Co., 67 Tex. 71, 60 Am. Rep. 1; Morrison v. Insurance Co. of North America, 69 Tex. 353, 5 Am. St. Rep. 63; Aetna Ins. Co. v. Holcomb, 89 Tex. 404.

1. Davis v. German American Ins. Co., 135 Mass. 251. See generally the title CONSIDERATION, vol. 6, p. 667.

2. Michigan Pipe Co. v. North British, etc., Ins. Co., 97 Mich. 493; Boice v. Thames, etc., Marine Ins. Co., 38 Hun (N. Y.) 246; Train v. Holland Purchase Ins. Co., 62 N. Y. 598.

3. **Payment of Premium Not Necessary — United States.** — Equitable L. Assur. Soc. v. McElroy, 49 U. S. App. 548.

Arkansas. — King v. Cox, 63 Ark. 204.

Illinois. — Firemen's Ins. Co. v. Kuessner, 164 Ill. 275.

Indiana. — Ohio Farmers' Ins. Co. v. Stowman, 16 Ind. App. 205.

Massachusetts. — Jones v. New York L. Ins. Co., 168 Mass. 245.

Michigan. — Lum v. U. S. Fire Ins. Co., 104 Mich. 397.

Missouri. — Worth v. German Ins. Co., 64 Mo. App. 583, 2 Mo. App. Rep. 1048.

Wisconsin. — Campbell v. American F. Ins. Co., 73 Wis. 100.

See also Carson v. German Ins. Co., 62 Iowa 433; Newark Mach. Co. v. Kenton Ins. Co., 50 Ohio St. 550.

Where One Policy Is Substituted for Another, and the agent, in transmitting the substituted policy to the assured, informs him that there is a small balance due on the premium, but makes no request for a prompt remittance, the omission of the assured to remit the amount does not invalidate the policy. Trundle v. Providence-Washington Ins. Co., 54 Mo. App. 188.

Enforcing Renewal of Policy. — If the assured, under a provision in his policy allowing its

renewal for a term of three years, desires to avail himself of this privilege against the refusal of the insurer to renew, he must not only give notice of his desire, but must tender the renewal premium as well. American Casualty Ins. Co.'s Case, 82 Md. 525.

4. Wood v. Poughkeepsie Mut. Ins. Co., 32 N. Y. 619.

5. **Question for Jury.** — Where the agent sent two policies by mail to an applicant for insurance, with a statement that the premium charged was higher than usual, and saying: "Should you decline the policies, please return them by return mail; if you retain them, please send me the amount," mentioning the sum, it was held that this was a waiver of prepayment, and that the policy in suit became effectual upon the insured retaining and thereby accepting it, or, at all events, that the question should have been submitted to the jury. Sheldon v. Atlantic F. & M. Ins. Co., 26 N. Y. 460, 84 Am. Dec. 213. See also Bowman v. Agricultural Ins. Co., 59 N. Y. 521.

6. **Withholding Delivery of Policy.** — Union Cent. L. Ins. Co. v. Pauly, 8 Ind. App. 85. Collins v. Insurance Co., 7 Phila. (Pa.) 201. See also Marland v. Royal Ins. Co., 71 Pa. St. 393.

Where there is no indication of any purpose to contract other than by a policy to be made and delivered upon payment of at least half of the premium, the fact that the insurance agent wrote the person seeking insurance, saying: "Your policy has come; the first time you are in town come around and get your policy," does not show a constructive delivery of the policy, a waiver of payment, and a consummation of the contract, neither does it show that the agent simply held the policy in trust for the insured. Union Cent. L. Ins. Co. v. Pauly, 8 Ind. App. 85.

7. **When Policy Requires Payment.** — Union

(bb) *Waiver of Condition.* — But such a stipulation, being entirely for the benefit of the insurer, will be considered waived by such conduct on his part as shows an intention not to insist upon its performance.¹

Unconditional Delivery of Policy. — Thus, if the insurer delivers the policy as a completed and executed contract under an express or implied agreement that a credit shall be given for the premium, it will be deemed that the stipulation has been waived.²

Power of Agent to Waive. — An agent authorized to make contracts of insurance and issue policies may thus waive the condition requiring payment of the premium, unless there are restrictions upon his authority of which the insured has notice;³ and this although the policy itself declares that agents have no

Cent. L. Ins. Co. v. Pauly, 8 Ind. App. 85; Watrous v. Mississippi Valley Ins. Co., 35 Iowa 582; St. Louis Mut. L. Ins. Co. v. Kennedy, 6 Bush (Ky.) 450; Misselhorn v. Mutual Reserve Fund L. Assoc., 30 Mo. App. 589; Werner v. Metropolitan L. Ins. Co., 11 Daly (N. Y.) 176; Ormond v. Fidelity L. Assoc., 96 N. Car. 158.

1. **Waiver of Condition** — *England.* — Roberts v. Security Co., (1897) 1 Q. B. 111.

Alabama. — Commercial F. Ins. Co. v. Morris, 105 Ala. 498.

California. — Berliner v. Travelers' Ins. Co., 121 Cal. 451.

Illinois. — German Ins. Co. v. Orr, 56 Ill. App. 637.

Louisiana. — Pino v. Merchants' Mut. Ins. Co., 19 La. Ann. 214, 92 Am. Dec. 529.

Missouri. — Baldwin v. Chouteau Ins. Co., 56 Mo. 151, 17 Am. Rep. 671; New York L. Ins. Co. v. Stone, 42 Mo. App. 383.

Nebraska. — Nebraska, etc., Ins. Co. v. Christensen, 29 Neb. 572, 26 Am. St. Rep. 407; Western Home Ins. Co. v. Richardson, 40 Neb. 1.

New York. — New York Cent. Ins. Co. v. National Protection Ins. Co., 20 Barb. (N. Y.) 468; Wood v. Poughkeepsie Mut. Ins. Co., 32 N. Y. 619.

To Constitute a Waiver on the Ground of Extension of Credit, the existence of an indebtedness from the assured to the insurer for the premium must appear. The option of taking a policy at any time during a given month by paying the premium thereon is not an extension of credit, but is rather a denial of it. Home Ins. Co. v. Field, 42 Ill. App. 392.

Submission of Question to Jury. — See Bowman v. Agricultural Ins. Co., 59 N. Y. 521, where it was held that the facts warranted a submission to the jury of the question whether the condition had been waived, and were sufficient to sustain a verdict in the plaintiff's favor.

2. **Unconditional Delivery of Policy** — *United States.* — Knickerbocker L. Ins. Co. v. Norton, 96 U. S. 234; Miller v. Brooklyn L. Ins. Co., 12 Wall. (U. S.) 285; Smith v. Provident Sav. L. Assur. Soc., 31 U. S. App. 163; Ball, etc., Wagon Co. v. Aurora F. & M. Ins. Co., 20 Fed. Rep. 232; O'Brien v. Union Mut. L. Ins. Co., 22 Fed. Rep. 586; Tennant v. Travellers' Ins. Co., 31 Fed. Rep. 322; Potter v. Phenix Ins. Co., 63 Fed. Rep. 382; Bang v. Farmville Ins., etc., Co., 1 Hughes (U. S.) 290.

Arkansas. — American Employers' Liability Ins. Co. v. Fordyce, 62 Ark. 562, 54 Am. St. Rep. 305; King v. Cox, 63 Ark. 204.

California. — Farnum v. Phoenix Ins. Co.,

83 Cal. 252, 17 Am. St. Rep. 233; Berliner v. Travelers' Ins. Co., 121 Cal. 451.

Georgia. — Mechanics', etc., Ins. Co. v. Mutual Real-Estate, etc., Assoc., 98 Ga. 262.

Illinois. — Daft v. Drew, 40 Ill. App. 266; Gosch v. State Mut. F. Ins. Assoc., 44 Ill. App. 263; Home Ins. Co. v. Field, 53 Ill. App. 119.

Iowa. — Young v. Hartford F. Ins. Co., 45 Iowa 378, 24 Am. Rep. 784.

Kentucky. — Mississippi Valley L. Ins. Co. v. Neyland, 9 Bush (Ky.) 430.

Louisiana. — Pino v. Merchants' Mut. Ins. Co., 19 La. Ann. 233, 92 Am. Dec. 529; La Societe, etc. v. Morris, 24 La. Ann. 347; Latoix v. Germania Ins. Co., 27 La. Ann. 113.

Mississippi. — Planters' Ins. Co. v. Ray, 52 Miss. 325.

Missouri. — Lungstrass v. German Ins. Co., 48 Mo. 201, 8 Am. Rep. 100; Huggins Cracker, etc., Co. v. People's Ins. Co., 41 Mo. App. 530; New York L. Ins. Co. v. Stone, 42 Mo. App. 383.

New York. — Sheldon v. Atlantic F. & M. Ins. Co., 26 N. Y. 460, 84 Am. Dec. 213; First Baptist Church v. Brooklyn F. Ins. Co., 38 N. Y. 153; Wood v. Poughkeepsie Mut. Ins. Co., 32 N. Y. 619; Boehen v. Williamsburg City Ins. Co., 35 N. Y. 131, 90 Am. Dec. 787; Van Schoick v. Niagara F. Ins. Co., 68 N. Y. 440; Bodine v. Exchange F. Ins. Co., 51 N. Y. 117, 10 Am. Rep. 566; Bowman v. Agricultural Ins. Co., 59 N. Y. 521; Dean v. Aetna L. Ins. Co., 62 N. Y. 642; Church v. La Fayette F. Ins. Co., 66 N. Y. 222; Washoe Tool Mfg. Co. v. Hibernia F. Ins. Co., 66 N. Y. 613; First Baptist Church v. Brooklyn F. Ins. Co., 18 Barb. (N. Y.) 69; Goit v. National Protection Ins. Co., 25 Barb. (N. Y.) 190; Post v. Aetna Ins. Co., 43 Barb. (N. Y.) 351; Hodge v. Security Ins. Co., 33 Hun (N. Y.) 584. Compare Hubbell v. Pacific Mut. Ins. Co., 100 N. Y. 41.

Ohio. — Dayton Ins. Co. v. Kelly, 24 Ohio St. 345, 15 Am. Rep. 612.

Pennsylvania. — Pittsburgh Boat-Yard Co. v. Western Assur. Co., 118 Pa. St. 415; Pennsylvania Ins. Co. v. Carter, (Pa. 1887) 11 Atl. Rep. 102.

Rhode Island. — Heaton v. Manhattan F. Ins. Co., 7 R. I. 506.

Tennessee. — Southern L. Ins. Co. v. Booker, 9 Heisk. (Tenn.) 606.

Virginia. — Wytheville Ins., etc., Co. v. Teiger, 90 Va. 277.

West Virginia. — Eagan v. Aetna F. & M. Ins. Co., 10 W. Va. 583.

3. **Power of Agent.** — Franklin Ins. Co. v. Colt, 20 Wall. (U. S.) 560; Ball, etc., Wagon

authority to extend the time of payment of any premium.¹

(b) **Mode of Payment** — *aa. PAYMENT IN CASH.* — The payment contemplated by the contract is a payment of money; and it has been held that an agent's authority to collect premiums does not imply an authority to accept property in payment thereof in lieu of money.²

bb. PAYMENT BY NOTE. — But if the insurance company accepts a promissory note of the assured, it must, in the absence of any express agreement to the contrary, be considered as payment of the premium as contemplated in a condition contained in the policy that it should not be valid or binding until the first premium was paid to the company.³

cc. PAYMENT BY AGENT INDIVIDUALLY. — If the agent of an insurance company, upon his individual responsibility, extends credit for the premium to the assured, and pays the amount to or is charged with it by the company, such payment inures to the benefit of the assured and consummates the contract;⁴ and the fact that the amount advanced is not paid to the agent when due does not invalidate the policy.⁵ The agent may sue for and recover the

Co. v. Aurora F. & M. Ins. Co., 20 Fed. Rep. 232; *O'Brien v. Union Mut. L. Ins. Co.*, 22 Fed. Rep. 586; *Young v. Hartford F. Ins. Co.*, 45 Iowa 377, 24 Am. Rep. 784; *Brownfield v. Phoenix Ins. Co.*, 35 Mo. App. 54; *Jackson v. German Ins. Co.*, 27 Mo. App. 62; *Wood v. Poughkeepsie Mut. Ins. Co.*, 32 N. Y. 619; *Newark Mach. Co. v. Kenton Ins. Co.*, 50 Ohio St. 549; *Murphy v. Southern L. Ins. Co.*, 3 Baxt. (Tenn.) 440; *Croft v. Hanover F. Ins. Co.*, 40 W. Va. 508, 52 Am. St. Rep. 902.

Where It Is the Custom of an Insurance Agent to Give Credit for premiums due, and the company, with knowledge of the agent's custom, receives and retains a premium when paid, it is estopped by its action from claiming the benefit of a clause in the policy making the actual payment of the premium a condition precedent to its binding force; and this although it is specially provided in the policy that no waiver shall be claimed by reason of anything done by any agent unless specially authorized in writing. *Tennant v. Travellers' Ins. Co.*, 31 Fed. Rep. 322.

1. *Berliner v. Travellers' Ins. Co.*, 121 Cal. 451; *Dunn v. National L. Ins. Co.*, (N. H. 1898) 39 Atl. Rep. 1075.

2. *Hoffman v. John Hancock Mut. L. Ins. Co.*, 92 U. S. 161; *Willcuts v. Northwestern Mut. L. Ins. Co.*, 81 Ind. 300; *Equitable L. Assur. Soc. v. Cole*, 13 Tex. Civ. App. 486.

Payment in Fees. — An application for life insurance declared that the policy should not be binding until the first premium should have been received by the company during the lifetime and good health of the person insured. The agent of the company contracted with the insured that the first year's premium was to be paid in services to be rendered by the insured to the company as medical examiner, and that if such services exceeded the first year's premium a credit was to be entered for the excess on that of the next. The insured died during the first year, having rendered services as medical examiner to the time of his death, but the fees did not amount to the first year's premium. It was held that the agent exceeded his authority in making the contract, and that the beneficiary of the policy was not entitled to recover thereon. *Carter v. Cotton States L. Ins. Co.*, 56 Ga. 237.

3. *New York L. Ins. Co. v. McGowan*, 18 Kan. 300; *Union Central L. Ins. Co. v. Taggart*, 55 Minn. 95, 43 Am. St. Rep. 474; *Carson v. Jersey City Ins. Co.*, 43 N. J. L. 300, 39 Am. Rep. 584.

4. **Payment by Agent Individually.** — *Wiley v. Fidelity, etc., Co.*, 77 Fed. Rep. 961, *affirmed* *Fidelity, etc., Co. v. Wiley*, 80 Fed. Rep. 497, 39 U. S. App. 599; *Mississippi Valley L. Ins. Co. v. Neyland*, 9 Bush (Ky.) 430; *Baker v. Commercial Union Assur. Co.*, 162 Mass. 358; *Stebbins v. Lancashire Ins. Co.*, 60 N. H. 65; *Agricultural Ins. Co. v. Montague*, 38 Mich. 548, 31 Am. Rep. 326; *Dayton Ins. Co. v. Kelly*, 24 Ohio St. 345, 15 Am. Rep. 612; *Butler v. American, Popular L. Ins. Co.*, 42 N. Y. Super. Ct. 342; *Wytheville Ins., etc., Co. v. Teiger*, 90 Va. 277.

If the agent pays the premium to the company, but collects from the assured a part of the premium only, and holds the policy as security for payment of the remainder, the insurer will nevertheless be liable. *Wheeler v. Watertown F. Ins. Co.*, 131 Mass. 1.

Two provisions in a contract between a life insurance company and an agent, one expressly withholding from the agent authority to give credit for premiums, the other stating that agents crediting premiums not actually received do so at their own risk, will be construed together to mean, not that the agent may not give credit upon his own responsibility, but that he cannot give credit for the company. *Smith v. Provident Sav. L. Assur. Soc.*, 31 U. S. App. 163.

The fact that the agent is charged by an insurance company with the amount of the premium is a mere matter of account between the insurer and the agent, and if the transaction between the agent and the insured does not constitute a binding contract, so as to entitle the agent to bring an action against the insured for the premium, the agent's payment to the company does not accrue to the benefit of the insured, and he cannot ratify it after a loss has occurred. *Van Wert v. St. Paul F. & M. Ins. Co.*, 90 Hun (N. Y.) 465.

5. **Nonpayment of Note Given to Agent Individually.** — Where an agent of an insurance company is not authorized to take anything except money in payment of premiums, but

amount in his own name.¹

Application of Debt Due by Agent. — If an agent, in his individual capacity, owes money to the assured, or has in his possession money belonging to him, it has been held that the agent's agreement to apply such money to the payment of the premium is equivalent to payment, and binds the company;² but there are cases to the contrary.³

(c) **To Whom Made** — *aa.* PAYMENT TO AGENT. — Agreeably to the principles of the law of agency, payment of the premium to an agent of the insurance company is payment to the company;⁴ and a notice printed on the back of a policy that payment to an agent will not be deemed valid unless a receipt signed by certain specified officers of the company is received at the time, does not limit the rule.⁵

If an Unauthorized Person Solicits an Application for insurance, and the insurance company recognizes the regularity of the application and the legitimacy of the channel through which it came, such person becomes the agent of the company, and the payment of the premium to such agent is a payment to the company.⁶

bb. PAYMENT TO BROKER. — The rule is well established that in the absence of extrinsic proof the insurance broker is held to be the agent of the insured, and the payment of a premium to the broker is not payment to the insurer; and if the broker misapplies the amount, the insurer may recover of the insured the premium for which the broker failed to account.⁷

But if the Insurer Keeps an Account with the Broker, and treats him as its debtor for premiums received by him, a payment to such broker is equivalent to payment to the company.⁸

upon his own responsibility takes the note of a policy holder, and becomes individually liable to the insurance company for the premium, the nonpayment of the note at maturity does not avoid the policy. *Griffith v. New York L. Ins. Co.*, 101 Cal. 627, 40 Am. St. Rep. 96.

1. *Waters v. Wandless*, (Tex. Civ. App. 1896) 35 S. W. Rep. 184.

2. **Application of Debt Due by Agent.** — *Chickering v. Globe Mut. L. Ins. Co.*, 116 Mass. 321; *Phoenix Ins. Co. v. Meier*, 28 Neb. 124; *Thompson v. American Tontine L., etc., Ins. Co.*, 46 N. Y. 674; *Woody v. Old Dominion Ins. Co.*, 31 Gratt. (Va.) 362.

If the Insurance Agent Owes to the Insured a Sum Less than the Amount of the Premium, and the insured is told by the agent to pay to him the excess of the premium over the amount owed by him, and that he will pay to the company the full amount of the premium, and if the insured, in entire good faith, does as instructed, he has the right to assume that the agent will pay the premium to the insurance company, and is not bound to see that it is done. *Kerlin v. National Acc. Assoc.*, 8 Ind. App. 628.

3. *Clyngerman v. Pheasant*, 18 Pa. Co. Ct. 203; *Lycoming F. Ins. Co. v. Storrs*, 97 Pa. St. 354. See also *Sullivan v. Germania L. Ins. Co.*, 15 Mont. 522; *Pister v. Keystone Mut. Ben. Assoc.*, 3 Pa. Super. Ct. 5.

4. **Payment to Agent.** — *Idle v. Phoenix Ins. Co.*, 2 Biss. (U. S.) 333; *Hallock v. Commercial Ins. Co.*, 26 N. J. L. 268; *Pennsylvania Ins. Co. v. Carter*, (Pa. 1887) 11 Atl. Rep. 102. See generally the title AGENCY, vol. 1, p. 930.

If an insurance company delivers a policy to an agent to be delivered to the assured, the

fact gives to the agent an apparent authority to receive payment of the premium, and payment to him will bind the company. *Gosch v. State Mut. F. Ins. Assoc.*, 44 Ill. App. 263.

Payment to Surviving Partner. — Where the agency of an insurance company is given to two persons, not as individuals, but as partners composing a firm, the agency of the firm ceases upon the death of one member of it, and cannot be exercised by the survivor, either in the name of the firm or of himself individually, and the payment of a premium to the survivor does not bind the insurance company. *Martine v. International L. Assur. Soc.*, 62 Barb. (N. Y.) 181.

5. *McNeilly v. Continental L. Ins. Co.*, 66 N. Y. 23.

6. *Terry v. Provident Fund Soc.*, 13 Ind. App. 1, 55 Am. St. Rep. 217; *Lebanon Mut. Ins. Co. v. Erb*, 112 Pa. St. 149.

Collection of Note by Unauthorized Person. — Where a note given for a premium is made payable at the home office of the company, the agent of the company, though he has authority to solicit applications for insurance, counter-sign and deliver policies, and receive and transmit premiums, has no authority to receive payment of a note which is not in his possession, and which he has not been called upon by the company to collect. *Long Creek Bldg. Assoc. v. State Ins. Co.*, 29 Oregon 569.

7. *Citizens' F. Ins. Co. v. Swartz*, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 671.

8. *Greenwich Ins. Co. v. Union Dredging Co.*, 14 Daly (N. Y.) 237.

Under the Revised Statutes of Ohio (now Bates's Annot. Stat. 1897, § 3644), an insurance broker is to be considered the agent of the insurer, so that a payment of premium to him

The Fact that the Insurance Policy Provides that any broker procuring it shall be deemed the agent of the insured and not of the insurer, and that the payment of a premium to any one except the insurers or their agent shall be at the risk of the insured, is therefore not conclusive on the question of such agency. Whether such broker was or was not the agent of the insurer is a question of fact.¹ The question should not, however, be left to the jury when there is no evidence to support a finding that such broker was the agent of the insurer.²

(3) **Suspension of Policy for Nonpayment of Premium Note** — (a) **Insurer Not Liable During Default.** — A stipulation in an insurance policy that the company shall not be liable for any loss or damage sustained by the insured while a note given for the premium remains due and unpaid is one which the company has the right to make, and, if inserted without any fraud, misrepresentation, or concealment, is binding upon the insured. The nonpayment of the note does not extinguish the policy, but defeats the right of the holder to recover for any loss occurring during its discontinuance. The subsequent payment of the note revives the policy for the remainder of the term, but for a loss occurring during the default no recovery can be had, notwithstanding the subsequent payment.³

Waiver of Stipulation. — Such a stipulation is, however, for the benefit of the insurer, and may be waived by him.⁴

But an Insurance Agent authorized to receive applications and collect premiums has no authority to grant an extension of time for the payment of an installment on a premium note and to waive a provision of the policy suspending the operation of the contract during such default.⁵

Notice. — Ordinarily the insurance company is under no obligation to give notice of the maturity of the premium note or to make demand for its payment. The insured ought to know when it matures, and provide for its payment.⁶

(b) **Revival of Policy — Partial Payment.** — Where the operation of a policy is

is payment to the insurer. *Central Ohio Ins. Co. v. Lake Erie Provision Co.*, 13 Ohio Cir. Ct. 661, 7 Ohio Cir. Dec. 562.

1. **Payment to Broker.** — *Estes v. Home Manufacturers, etc.*, Mut. Ins. Co., 67 N. H. 462; *Arthurholt v. Susquehanna Mut. F. Ins. Co.*, 159 Pa. St. 1, 39 Am. St. Rep. 659.

Where the insurer's agent delivers a policy to the insured through an insurance broker to whom the insured has paid the premium, the insurer will be liable for a loss occurring prior to the transmission of the premium in the usual course of business by the broker to the agent, although the policy provides that it shall not be binding until the actual cash payment of the premium. *Riley v. Commonwealth Mut. F. Ins. Co.*, 110 Pa. St. 144.

2. **When Insurer Denies Agency of Broker.** — *Wilber v. Williamsburgh City F. Ins. Co.*, 122 N. Y. 439.

3. **Suspension of Policy for Nonpayment of Premium Note** — *United States*, — *New York L. Ins. Co. v. Statham*, 93 U. S. 24. See also *Klein v. New York L. Ins. Co.*, 104 U. S. 88.

Illinois, — *Forest City Ins. Co. v. School Directors*, 4 Ill. App. 145.

Indiana, — *American Ins. Co. v. Henley*, 60 Ind. 515; *Phenix Ins. Co. v. Tomlinson*, 125 Ind. 84, 21 Am. St. Rep. 204; *Continental Ins. Co. v. Dorman*, 125 Ind. 189; *Michigan Mut. L. Ins. Co. v. Custer*, 128 Ind. 25; *Continental Ins. Co. v. Miller*, 4 Ind. App. 553.

Iowa, — *Shakey v. Hawkeye Ins. Co.*, 44 Iowa 540; *Garlick v. Mississippi Valley Ins. Co.*, 44 Iowa 553; *Greeley v. State Ins. Co.*, 50

Iowa 86; *Critchett v. American Ins. Co.*, 53 Iowa 404, 36 Am. Rep. 230.

Kentucky, — *Home Ins. Co. v. Karn*, (Ky. 1897) 39 S. W. Rep. 501.

Michigan, — *Williams v. Albany City Ins. Co.*, 19 Mich. 451, 2 Am. Rep. 95; *McIntyre v. Michigan State Ins. Co.*, 52 Mich. 188; *Robinson v. Continental Ins. Co.*, 76 Mich. 641.

Missouri, — *Barnes v. Continental Ins. Co.*, 30 Mo. App. 539; *Palmer v. Continental Ins. Co.*, 31 Mo. App. 467; *Dircks v. German Ins. Co.*, 34 Mo. App. 31; *Mooney v. Home Ins. Co.*, 72 Mo. App. 92.

Nebraska, — *Home F. Ins. Co. v. Garbacz*, 48 Neb. 827; *Phenix Ins. Co. v. Bachelder*, 32 Neb. 490, 29 Am. St. Rep. 443.

New York, — *Wheeler v. Connecticut Mut. L. Ins. Co.*, 82 N. Y. 543, 37 Am. Rep. 594.

North Carolina, — *Ferebee v. North Carolina Mut. Home Ins. Co.*, 68 N. Car. 11.

Texas, — *East Texas F. Ins. Co. v. Perky*, 5 Tex. Civ. App. 608.

4. **Waiver of Stipulation.** — *Michigan Mut. L. Ins. Co. v. Custer*, 128 Ind. 25; *Farmers' Mut. F. Ins. Co. v. Bowen*, 40 Mich. 147; *Hastings v. Brooklyn L. Ins. Co.*, 138 N. Y. 473; *Robinson v. Pacific F. Ins. Co.*, 18 Hun (N. Y.) 395; *East Texas F. Ins. Co. v. Perky*, 5 Tex. Civ. App. 608; *Alexander v. Continental Ins. Co.*, 67 Wis. 422, 58 Am. Rep. 869.

5. *Critchett v. American Ins. Co.*, 53 Iowa 404, 36 Am. Rep. 230.

6. *Continental Ins. Co. v. Dorman*, 125 Ind. 189; *Webb v. Mutual F. Ins. Co.*, 63 Md. 213; *McIntyre v. Michigan State Ins. Co.*, 52 Mich.

suspended during the default of the insured in the payment of his premium note, a partial payment thereon does not revive the policy in the absence of an agreement with the insured that it should so operate.¹

(4) *Forfeiture of Policy for Nonpayment of Premium Note.* — Policies of insurance sometimes provide that in case any note or obligation given for the premium shall not be paid at maturity, such failure of payment shall terminate the insurance, and the note or obligation shall be considered the premium for the risk thus terminated. Where such a condition is imposed, there can be no recovery for a loss occurring after default.²

Waiver. — The insurer's waiver of the forfeiture of the policy for nonpayment of the premium may, however, be inferred from conduct inconsistent with the purpose to insist thereon,³ and any agent duly authorized to issue policies may waive the forfeiture.⁴ Thus, the forfeiture will be considered waived by the subsequent receipt of the premium by the insurer without objection,⁵ except in a case where the insurer was ignorant that a loss had already occurred;⁶ but the mere demand for the payment of an overdue premium, without its payment, is not sufficient to reinstate the forfeited policy.⁷

3. Interpretation and Construction — *a. GENERAL PRINCIPLES* — (1) *Interpretation to Be Made by Court.* — It is a firmly established and universally recognized rule of law that the construction of a written instrument is a question of law for the court; and where there is no ambiguity or conflicting inference of the language of the insurance policy when applied to the undisputed facts, it is error to leave its interpretation to the jury.⁸

(2) *General Rules of Construction.* — The same general rule of construction which applies to other instruments applies equally to policies of insurance;⁹ that is, they are to be construed agreeably to the intention of the parties.¹⁰

Interpretation of Terms Used. — This intention is in the first place to be drawn from the language of the instrument.¹¹ The words employed are themselves

188; *Redfield v. Paterson F. Ins. Co.* (Brooklyn City Ct. Gen. T.) 6 Abb. N. Cas. (N. Y.) 456.

1. Partial Payment Does Not Revive. — *Curtin v. Phenix Ins. Co.*, 78 Cal. 619; *German Ins. Co. v. Denny*, 70 Ill. App. 437; *Carlock v. Phoenix Ins. Co.*, 138 Ill. 210.

2. Forfeiture of Policy for Nonpayment of Premium Note. — *Muhleman v. National Ins. Co.*, 6 W. Va. 508.

Death of Assured No Excuse. — *Continental Ins. Co. v. Daly*, 33 Kan. 601; *Sauner v. Phoenix Ins. Co.*, 41 Mo. App. 480.

3. Waiver of Forfeiture. — *Thompson v. Knickerbocker L. Ins. Co.*, 104 U. S. 252; *Gayssville Mig. Co. v. Phoenix Mut. F. Ins. Co.*, 67 N. H. 457; *Estes v. Home Manufacturers', etc., Mut. Ins. Co.*, 67 N. H. 462.

4. Power of Agent to Waive. — *Cohen v. Continental F. Ins. Co.*, 67 T. x. 325, 60 Am. Rep. 24.

5. Subsequent Receipt of Payment on Note. — *Marshall Farmers' Home F. Ins. Co. v. Liggett*, 16 Ind. App. 598; *Sims v. State Ins. Co.*, 47 Mo. 54, 4 Am. Rep. 311; *Froehlich v. Atlas L. Ins. Co.*, 47 Mo. 406; *Phoenix Ins. Co. v. Lansing*, 15 Neb. 494.

6. Acceptance of Payment in Ignorance of Loss. — *Harle v. Council Bluffs Ins. Co.*, 71 Iowa 401.

7. Cohen v. Continental F. Ins. Co., 67 Tex. 325, 60 Am. Rep. 24.

8. Home Mut. Ins. Co. v. Roe, 71 Wis. 33. See generally the title **QUESTIONS OF LAW AND FACT.**

9. General Rules of Construction. — *Robertson v. French*, 4 East 135; *Clay v. Phoenix Ins. Co.*, 97 Ga. 44; *Aurora F. Ins. Co. v. Eddy*, 49 Ill. 106; *Mitchell Furniture Co. v. Imperial F. Ins. Co.*, 17 Mo. App. 627; *Ripley v. Aetna Ins. Co.*, 30 N. Y. 136, 86 Am. Dec. 362; *Farmers' Mut. F. Ins. Co. v. Marshall*, 29 Vt. 23. See the title **INTERPRETATION AND CONSTRUCTION.**

10. Policies of Insurance Are Rarely Subjected to Any Critical Construction, and the intent is regarded, rather than any grammatical accuracy in the use of language. *Bradley v. Nashville Ins. Co.*, 3 La. Ann. 708, 48 Am. Dec. 465.

"In the interpretation of conditions inserted in and making a part of the contract by insurers, and in language chosen by them, care should be taken that a strained and unnatural effect should not be given to words and terms to the prejudice of the insured; and in no case should they be extended by implication so as to embrace cases not clearly or reasonably within the very words of the condition, as such words are ordinarily used and understood." *Rann v. Home Ins. Co.*, 59 N. Y. 387.

11. Interpretation of Terms Used. — *Grace v. American Cent. Ins. Co.*, 109 U. S. 278; *Sperry v. Springfield F. & M. Ins. Co.*, 26 Fed. Rep. 234; *State Ins. Co. v. Horner*, 14 Colo. 391.

The meaning and intent of insurance contracts, like all others, is to be obtained first from the language employed, and if by settled rules of construction the intent is not clear from the language itself, then resort to the surrounding

to be understood in their plain, ordinary, and popular sense, unless they have generally, in respect to the subject-matter, as by the known usages of trade, or the like, acquired a peculiar sense distinct from the popular sense of the same words, or unless the context evidently points out that they must in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense.¹

Conditions Prescribing Forfeitures Strictly Construed. — Every condition and provision in an insurance policy the breach of which involves a forfeiture of the contract is to be construed strictly.²

(3) *When Terms Admit of Two Constructions.* — If the terms of a policy are capable of two interpretations equally reasonable, it is the general rule that that construction which is most favorable to the insured must be adopted. As it is the company that prepares the contract, the insured not being consulted with regard to the form thereof, all doubts in regard to its meaning must be solved against the company.³

circumstances existing at the time when the contract was entered into may be had in order to solve the difficulty and to dispel any obscurity. *Savage v. Howard Ins. Co.*, (Supm. Ct. Gen. T.) 44 How. Pr. (N. Y.) 40.

Custom, or the Course of Dealing Between the Parties, may sometimes be considered in order to interpret what is doubtful in the policy of insurance, but not to contradict plain and ambiguous stipulations. *Waxahachie First Nat. Bank v. Lancashire Ins. Co.*, 62 Tex. 461.

The Fact that the Policy Was Issued by a Mutual Company to one of its members gives to words used for a definite purpose and applied to transactions of a clearly defined character no significance different from what would be their fair construction in a similar contract between any parties. *Cluff v. Mutual Ben. L. Ins. Co.*, 99 Mass. 317.

1. *Robertson v. French*, 4 East 135; *Ripley v. Aetna Ins. Co.*, 30 N. Y. 136, 86 Am. Dec. 362.

Usage of Trade. — It is a rule of construction settled by numerous authorities, that every usage of trade which is so well settled or so generally known that all persons engaged in that trade may fairly be considered as contracting with reference to it is regarded as forming part of every policy designed to protect risks in that trade, unless by the express terms of the policy or by necessary implication such inference is repelled. *Mobile Marine Dock, etc., Ins. Co. v. McMillan*, 27 Ala. 77.

But while usage is admissible to explain an ambiguity, it is never received to contradict what is plain in the written contract. *Hearne v. Marine Ins. Co.*, 20 Wall. (U. S.) 488.

2. *Westchester F. Ins. Co. v. Earle*, 33 Mich. 143.

Forfeitures Not Favored. — In construing a contract of the parties and their acts in connection therewith, the rule is to avoid a forfeiture when it may be fairly done. *McMaster v. New York L. Ins. Co.*, 78 Fed. Rep. 33; *Knickerbocker L. Ins. Co. v. Norton*, 96 U. S. 234; *New York L. Ins. Co. v. Eggleston*, 96 U. S. 572; *Thompson v. Knickerbocker L. Ins. Co.*, 104 U. S. 252; *Clay v. Phoenix Ins. Co.*, 97 Ga. 44.

3. **Doubts Resolved in Favor of Insured.** — *England.* — *Kent v. Bird*, 2 Cowp. 535; *Godall v.*

Boldero, 9 East 72; *Bainbridge v. Neilson*, 10 East 329; *Pelly v. Royal-Exchange Assur. Co.*, 1 Burr. 349; *Wolffe v. Horncastle*, 1 B. & P. 322.

United States. — *McMaster v. New York L. Ins. Co.*, 78 Fed. Rep. 33; *Kansas City First Nat. Bank v. Hartford F. Ins. Co.*, 95 U. S. 673; *Grace v. American Cent. Ins. Co.*, 109 U. S. 278; *Moulton v. American L. Ins. Co.*, 111 U. S. 335; *Palmer v. Warren Ins. Co.*, 1 Story (U. S.) 364; *American Credit Indemnity Co. v. Wood*, 73 Fed. Rep. 81, 38 U. S. App. 583; *Tebbetts v. Mercantile Credit Guarantee Co.*, 73 Fed. Rep. 95, 38 U. S. App. 431; *Phenix Ins. Co. v. Wilcox, etc.*, 38 U. S. App. 65 Fed. Rep. 724, 25 U. S. App. 201; *American Surety Co. v. Pauly*, 170 U. S. 133; *Commercial Travelers' Mut. Acc. Assoc. v. Fulton*, 79 Fed. Rep. 423, 45 U. S. App. 578; *Guarantee Co. of North America v. Mechanics' Sav. Bank, etc., Co.*, 80 Fed. Rep. 766; *Wallace v. German American Ins. Co.*, 41 Fed. Rep. 742.

Alabama. — *Mobile Marine Dock, etc., Ins. Co. v. McMillan*, 27 Ala. 77.

California. — *Wells v. Pacific Ins. Co.*, 44 Cal. 397.

Illinois. — *Commercial Ins. Co. v. Robinson*, 64 Ill. 265, 16 Am. Rep. 557; *Fireman's Fund Ins. Co. v. Western Refrigerating Co.*, 55 Ill. App. 329; *Illinois Mut. Ins. Co. v. Hoffman*, 31 Ill. App. 295, affirmed in 132 Ill. 522; *Niagara F. Ins. Co. v. Scammon*, 100 Ill. 644; *Healey v. Mutual Acc. Assoc.*, 133 Ill. 556, 23 Am. St. Rep. 637.

Indiana. — *Germania F. Ins. Co. v. Deckard*, 3 Ind. App. 361.

Iowa. — *Goodwin v. Provident Sav. L. Assur. Assoc.*, 97 Iowa 226, 59 Am. St. Rep. 411.

Kentucky. — *Aetna Ins. Co. v. Jackson*, 16 B. Mon. (Ky.) 242; *American Acc. Co. v. Reigart*, 94 Ky. 547, 42 Am. St. Rep. 374.

Massachusetts. — *Dole v. New England Mut. Marine Ins. Co.*, 6 Allen (Mass.) 385; *Parkhurst v. Gloucester Mut. Fishing Ins. Co.*, 100 Mass. 301, 1 Am. Rep. 105.

Mississippi. — *Boyd v. Mississippi Home Ins. Co.*, 75 Miss. 47.

Missouri. — *Ethington v. Dwelling House Ins. Co.*, 55 Mo. App. 129.

New York. — *Hoffman v. Aetna F. Ins. Co.*, 32 N. Y. 405, 88 Am. Dec. 337; *Rolker v. Great Western Ins. Co.*, 4 Abb. App. Dec. (N. Y.) 76;

Construction of Standard Policy. — To what extent this rule of construction is to be modified when the policy is in the standard form prescribed by state authorities, does not seem to have been settled; but it may be assumed that the terms used in the standard policy are to be construed in the sense in which they had previously been defined by the courts.¹

(4) *Construction of Printed and Written Parts.* — Effect is to be given, if possible, to all parts of a policy, both printed and written. No part of the policy is to be rejected as insensible or inoperative if a rational or intelligent meaning can be given to it, consistent with the general design and object of the whole instrument.² If, however, there should be any reasonable doubt upon the sense and meaning of the whole, that part which is superadded in writing is entitled to have a greater effect attributed to it than to the printed part, inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, while the printed words are a general formula adapted equally to their case and to that of all other contracting parties upon similar occasions and subjects.³

(5) *Construction of Attached Clauses and General Conditions.* — For the same reason, a manifest inconsistency between the provisions of a policy and a mortgage clause attached thereto will be resolved in favor of the clause.⁴

(6) *Memorandum Construed as Part of Policy.* — A memorandum attached to the face⁵ or entered upon the margin⁶ of an insurance policy prior to its execution and delivery is to be regarded as a part of the contract.

An Indorsement on the Back of a Policy may be regarded as part of the contract, provided it is referred to in the policy as constituting a part thereof; but if

White v. Hudson River Ins. Co., (Supm. Ct. Spec. T.) 15 How. Pr. (N. Y.) 288; *People v. Commercial Alliance L. Ins. Co.*, 21 N. Y. App. Div. 533.

Pennsylvania. — *Doud v. Citizens' Ins. Co.*, 141 Pa. St. 47, 23 Am. St. Rep. 263; *Haws v. Fire Assoc.*, 114 Pa. St. 431; *Boie v. New Hampshire F. Ins. Co.*, 159 Pa. St. 53; *McKeesport Mach. Co. v. Ben Franklin Ins. Co.*, 173 Pa. St. 53; *Western, etc., Pipe Lines v. Home Ins. Co.*, 145 Pa. St. 346, 27 Am. St. Rep. 703, 28 W. N. C. (Pa.) 347; *Hendel v. Reverting Fund Assur. Assoc.*, 2 Pa. Dist. 116; *Merrick v. Germania F. Ins. Co.*, 54 Pa. St. 277; *Western Ins. Co. v. Cropper*, 32 Pa. St. 351, 75 Am. Dec. 561.

Tennessee. — *State Ins. Co. v. Hughes*, 10 Lea (Tenn.) 461.

Vermont. — *Brink v. Merchants, etc., Ins. Co.*, 49 Vt. 442.

West Virginia. — *Bryan v. Peabody Ins. Co.*, 8 W. Va. 605.

1. **Construction of Standard Policy.** — *Davis v. Insurance Co. of North America*, 115 Mich. 382.

Where an Act Prescribing a Standard Policy of Insurance Is Declared Unconstitutional, a policy issued in the form prescribed by the act must be regarded as depending for its validity and construction wholly upon the consent of the parties, and not as a policy prescribed by the authority of the state. *Flatley v. Phenix Ins. Co.*, 95 Wis. 618.

2. **Effect to Be Given to All Parts of Policy.** — *Goss v. Citizens' Ins. Co.*, 18 La. Ann. 97; *Bargett v. Orient Mut. Ins. Co.*, 3 Bosw. (N. Y.) 385; *Stettiner v. Granite Ins. Co.*, 5 Duer (N. Y.) 594; *Lancaster F. Ins. Co. v. Lenheim*, 80 Pa. St. 497.

3. **Written Part Controls Printed Part.** — *Robertson v. French*, 4 East 135; *Hernandez v.*

Sun Mut. Ins. Co., 6 Blatchf. (U. S.) 317; *Hugg v. Augusta Ins., etc., Co.*, Taney (U. S.) 159; *Mobile Marine Dock, etc., Ins. Co. v. McMillan*, 27 Ala. 77; *Goss v. Citizens' Ins. Co.*, 18 La. Ann. 97; *Howes v. Union Ins. Co.*, 16 La. Ann. 235; *Phoenix Ins. Co. v. Taylor*, 5 Minn. 492; *Moore v. Perpetual Ins. Co.*, 16 Mo. 98; *Chadsey v. Guion*, 97 N. Y. 333; *Johnston v. Niagara F. Ins. Co.*, 118 N. Car. 643; *West Branch Lumberman's Exch. v. American Cent. Ins. Co.*, 183 Pa. St. 366, 42 W. N. C. (Pa.) 6; *Mascott v. First Nat. F. Ins. Co.*, 69 Vt. 116; *Mascott v. Granite State F. Ins. Co.*, 68 Vt. 253.

A clause in the printed portion of an insurance policy prohibiting the keeping of certain articles as a part of the goods insured will be controlled by the written portion of the policy insuring the goods, if such accepted articles be a necessary part thereof. *Phoenix Ins. Co. v. Flemming*, 65 Ark. 54.

An insurance policy upon a stock of general merchandise "such as is usually kept for sale in country stores" will not be avoided by a clause in the printed portion of the policy prohibiting the keeping of benzine or fireworks, if these articles form a part of the stock of such stores. *Tubb v. Liverpool, etc., Ins. Co.*, 106 Ala. 651. Compare *Birmingham F. Ins. Co. v. Kroegher*, 83 Pa. St. 64, 24 Am. Rep. 147; *Lancaster F. Ins. Co. v. Lenheim*, 89 Pa. St. 497.

4. *German Ins. Co. v. Churchill*, 26 Ill. App. 206.

5. *City Drug Store v. Scottish Union, etc., Ins. Co.*, (Tex. Civ. App. 1898) 44 S. W. Rep. 21; *Johnson v. Scottish Union, etc., Ins. Co.*, 93 Wis. 223.

6. *Pierce v. Charter Oak L. Ins. Co.*, 138 Mass. 151; *Patch v. Phoenix Mut. L. Ins. Co.*, 44 Vt. 487.

there be no reference whatever to it in the policy, and nothing to show that the parties meant it to be a part of the contract, it will be regarded merely as an act of the insurer, and therefore not binding on the insured.¹

5. CONSTRUING CONTENTS OF OTHER INSTRUMENTS AS PART OF CONTRACT — (1) *Application and Survey*. — In order to constitute an application or survey upon which a policy of insurance is issued, a part thereof, the two instruments must be so connected as to make them in legal effect one contract.²

Application Need Not Be Attached to Policy. — In the absence of statute, it is not essential that the application should be attached to the policy.³

Must Be Referred to in Policy. — But there should be in the policy some reference to it which evidences that the parties understood and accepted it as part of the contract.⁴ A mere indication in the policy of the place where the application can be found on file is not such a reference to it as to make it a part of the policy.⁵

Statutes. — By statute in some of the states it is provided that no application or representation made by the insured shall be considered a part of the contract unless a copy of such application or representation is attached to or indorsed upon the policy.⁶

1. Indorsements. — *Fetzer v. Home Mut. Ins. Co.*, 47 Cal. 416; *Planters' Mut. Ins. Co. v. Rowland*, 66 Md. 236; *Kingsley v. New England Mut. F. Ins. Co.*, 8 Cush. (Mass.) 393; *Stone v. U. S. Casualty Co.*, 34 N. J. L. 371; *Farmers' Ins., etc., Co. v. Snyder*, 16 Wend. (N. Y.) 481, 30 Am. Dec. 118.

Where a policy is issued subject to answers contained in the application "indorsed" upon the policy, the word "indorsed" is not to be construed in the technical sense, but applies to a copy of the application attached to the back of the policy with mucilage or some other similar substance. *Reynolds v. Atlas Acc. Ins. Co.*, 69 Minn. 93.

2. *Miller v. Mutual Ben. L. Ins. Co.*, 31 Iowa 216, 7 Am. Rep. 122; *Ballston Spa First Nat. Bank v. Insurance Co. of North America*, 50 N. Y. 45.

3. *Sun Fire Office v. Wich*, 6 Colo. App. 103.

4. *Citizens' Ins. Co. v. Hoffman*, 128 Ind. 370; *Vilas v. New York Cent. Ins. Co.*, 72 N. Y. 530, 28 Am. Rep. 186; *Clinton v. Hope Ins. Co.*, 45 N. Y. 454; *Wall v. Howard Ins. Co.*, 14 Barb. (N. Y.) 383; *Queen Ins. Co. v. May*, (Tex. Civ. App. 1896) 35 S. W. Rep. 829.

5. *Commonwealth's Ins. Co. v. Monninger*, 18 Ind. 352.

6. Statutes Requiring Application to Be Attached — *Massachusetts*. — Acts Mass. 1893, c. 434, § 1; Acts Mass. 1894, c. 522, § 73; *Considine v. Metropolitan L. Ins. Co.*, 165 Mass. 462.

Iowa Statute. — Acts Eighteenth General Assembly, c. 211, § 2; Code Iowa (1897), § 1741; *MacKinnon v. Mutual F. Ins. Co.*, 89 Iowa 170.

Application of Statute. — Although this act is entitled, "An act relating to insurance and fire-insurance companies," it has been held that it applies to life insurance as well. *Cook v. Federal L. Assoc.*, 74 Iowa 746. It has also been held to apply to mutual life-insurance companies on the assessment plan, although neither that nor any similar provision is found in the Laws of 1886, c. 65, which regulates mutual benefit associations. *McConnell v. Iowa Mut. Aid Assoc.*, 79 Iowa 757; *Grimes v. Northwestern Legion of Honor*, 97 Iowa 315.

Extraterritorial Effect. — Questions affecting remedies upon contract are governed by the

law of the place where the suit is brought; hence where an action is brought in the courts of Colorado upon a contract of insurance made in Iowa, it is error to refuse to allow the introduction in evidence of the application, and evidence to show its false representation, because the copy of the application was not attached to or indorsed on the policy, as required by the statutes of the latter state. *Des Moines L. Assoc. v. Owen*, 10 Colo. App. 131.

Sufficiency of Copy. — Such copy need not be a facsimile, but must be so exact that on comparison it may be said to be a true copy, without resorting to construction. *Johnson v. Des Moines L. Ins. Co.*, 105 Iowa 273.

The substitution, in a purported copy of an application for life insurance, of "children" for "mother," as a term of relationship, the omission of a question as to the amount of other insurance in the same company, the consolidation of several questions into one, the setting out of answers to questions not given in the original, and the insertion of questions as to the details of general questions in the original are such variations as to require construction; and hence such a copy is not a true one. *Johnson v. Des Moines L. Ins. Co.*, 105 Iowa 273.

Where the purported copy of an application for reinstatement, attached to the policy, omits the examiner's report contained in the original, and also a part of the statements made by the assured in regard to his previous physical condition, and incorrectly states the place to which notices of premiums shall be addressed, it is not a copy as contemplated by the statute. *Goodwin v. Provident Sav. L. Assur. Assoc.*, 97 Iowa 226, 59 Am. St. Rep. 411.

A Special Report of a Medical Examiner is not a part of the "application or representation of the assured." *Johnson v. Des Moines L. Ins. Co.*, 105 Iowa 273.

Signature of Applicant. — The attachment to an insurance policy of a copy of the application, followed by the word "signed," but without the signature of the applicant, does not entitle the company to rely on any part of such application. *Seiler v. Economic L. Assoc.*, 105 Iowa 88.

Subsequent Delivery of Application. — If the survey and application are properly referred to and identified in the policy, the fact that they were not furnished until after the policy was delivered will not affect their validity as a part of the contract.¹ But if the policy is issued without any agreement to execute an application, the liability of the insurer cannot be qualified or defeated by the conditions of an application subsequently delivered,² unless there is a new consideration for the making of such application.³

Effect of Construction as One Contract. — When the application is referred to in the policy or attached thereto, and expressly made a part thereof, its conditions, representations, and warranties are as binding upon the insured as though they were set forth in the policy itself;⁴ and this although the application

Wisconsin Statute. — The Wisconsin statute (Stat. Wis. 1898, § 1945a), is a counterpart of that of Iowa. It has been held under this statute that a copy of the application for insurance which does not contain a copy of the applicant's name appended thereto is insufficient. *Dunbar v. Phenix Ins. Co.*, 72 Wis. 492.

This statute is binding upon a foreign corporation insuring property situated in the state, although the contract of insurance was made in another state. *Stanhilber v. Mutual Mill Ins. Co.*, 76 Wis. 285.

Pennsylvania Statute. — The Pennsylvania Act of May 11, 1881, provides that unless a copy of the application as signed by the insured is annexed to or contained in the policy, such application shall not be received in evidence nor considered a part of the contract between the parties. *Pickett v. Pacific Mut. L. Ins. Co.*, 144 Pa. St. 79, 27 Am. St. Rep. 618; *Mahon v. Pacific Mut. L. Ins. Co.*, 144 Pa. St. 409.

Application of Statute. — The terms of the statute limit its operation to "life and fire insurance policies," and therefore it does not apply to accident policies. *Standard L., etc., Ins. Co. v. Carroll*, 86 Fed. Rep. 567; *National Acc. Soc. v. Dolph*, 94 Fed. Rep. 743.

But an endowment policy is life insurance within the meaning of the statute. *Hendei v. Reverting Fund Assur. Assoc.*, 2 Pa. Dist. 116.

The statute does not apply to mutual benefit associations. *Donlevy v. Supreme Lodge, etc.*, 11 Pa. Co. Ct. 477.

This act applies to policies issued by companies incorporated under the laws of Pennsylvania on property situated in another state. *Hebb v. Kittanning Ins. Co.*, 138 Pa. St. 174.

The Purpose of the Statute is the protection of the assured, and the company cannot invoke the act to exclude an application offered in evidence by the beneficiary. *Norristown Title Co. v. Hancock Ins. Co.*, 132 Pa. St. 385.

The Application Contemplated is one in writing, and the statute does not apply to any oral application. *Lenox v. Greenwich Ins. Co.*, 165 Pa. St. 575.

Sufficiency of Copy. — The copy which is attached to the policy must conform to the original in all material particulars, and a mere statement copied on to the policy at the end thereof, without any signature, does not fulfil the statutory requirement. *Susquehanna Mut. F. Ins. Co. v. Hallock*, (Pa. 1888) 14 Atl. Rep. 167.

So where the medical examiner's report is made a part of the application, but is not contained in the copy of the application attached

to the policy, the application is not attached to the policy within the meaning of the Act of May 11, 1881, P. L. 20, and is not admissible in evidence. *Morris v. State Mut. L. Assur. Co.*, 183 Pa. St. 563.

Must Be Attached. — Furthermore, the application must be attached to the policy; if it is not attached it will not be considered a part of the contract, although the policy expressly provides that it shall be so considered. *Imperial F. Ins. Co. v. Dunham*, 117 Pa. St. 460, 2 Am. St. Rep. 686.

Ohio Statute. — See *Dickmeier v. Prudential Ins. Co.*, 6 Ohio Dec. 161.

1. *Rankin v. Amazon Ins. Co.*, (Cal. 1890) 25 Pac. Rep. 260.

2. *Michigan F. & M. Ins. Co. v. Wich*, 8 Colo. App. 409.

3. *Fire Assoc. v. Bynum*, (Tex. Civ. App. 1898), 44 S. W. Rep. 579.

4. **Application Construed to Be Part of Contract** — *United States*, — *Kelley v. Mutual L. Ins. Co.*, 75 Fed. Rep. 637.

Alabama. — *Kelly v. Life Ins. Clearing Co.*, 113 Ala. 453.

Colorado. — *Travelers' Ins. Co. v. Lampkin*, 5 Colo. App. 177.

Connecticut. — *Kelsey v. Universal L. Ins. Co.*, 35 Conn. 225; *Sheldon v. Hartford F. Ins. Co.*, 22 Conn. 235, 58 Am. Dec. 420.

Illinois. — *Thomas v. Fame Ins. Co.*, 108 Ill. 91; *Nelson v. Equitable L. Assur. Soc.*, 73 Ill. App. 133; *Northwestern Benev., etc., Assoc. v. Hand*, 29 Ill. App. 73.

Indiana. — *Phoenix Ins. Co. v. Benton*, 87 Ind. 132; *Standard L., etc., Ins. Co. v. Martin*, 133 Ind. 376; *Mutual Ben. L. Ins. Co. v. Miller*, 39 Ind. 475.

Iowa. — *Mandego v. Centennial Mut. L. Assoc.*, 64 Iowa 134.

Kentucky. — *Security Ins. Co. v. Bronger*, 6 Bush (Ky.) 146.

Louisiana. — *Goldman v. North British Mercantile Ins. Co.*, 48 La. Ann. 223; *Weinberger v. Merchants' Mut. Ins. Co.*, 41 La. Ann. 31.

Maine. — *Garcelon v. Hampden F. Ins. Co.*, 50 Me. 580; *Philbrook v. New England Mut. F. Ins. Co.*, 37 Me. 137.

Massachusetts. — *Tebbetts v. Hamilton Mut. Ins. Co.*, 1 Allen (Mass.) 305, 79 Am. Dec. 740; *Abbott v. Shawmut F. Ins. Co.*, 3 Allen (Mass.) 213; *McCoy v. Metropolitan L. Ins. Co.*, 133 Mass. 82.

Missouri. — *State v. Temperance Benev. Assoc.*, 42 Mo. App. 485.

New York. — *Kennedy v. St. Lawrence County Mut. Ins. Co.*, 10 Barb. (N. Y.) 285; *Ripley v. Aetna Ins. Co.*, 30 N. Y. 136, 86 Am.

may be written in lead pencil upon the blank of another company,¹ and though the insured mistakenly supposes that the policy refers to a different application.²

Parol Evidence. — If the statements made in an application for insurance are unambiguous, parol evidence is inadmissible to vary or contradict them.³

Policy Inadmissible Without Application. — The policy is inadmissible in evidence without the application, when it is within the power of the insurer to produce it.⁴

(2) *Conditions of Premium Note.* — Where an insurance policy and a premium note are executed contemporaneously, concern the same parties, and relate to the same subject-matter, such policy and note constitute parts of the same contract and must be so construed in determining the rights of the parties.⁵

Inconsistent Conditions. — But where the conditions of the policy and of the note are inconsistent, the terms of the policy must govern; hence, where the policy provides that the contract shall be nonforfeitable after a complete annual premium has been paid, no effect will be given to a stipulation in the note that a failure to pay interest shall forfeit the policy.⁶

(3) *Charter and By-laws of Mutual Insurance Companies.* — The charter and by-laws of a mutual insurance company are a part of the insurance contract, and as binding upon the insured as the conditions of the policy itself.⁷

c. CONSTRUING SEVERAL POLICIES ON SAME SUBJECT-MATTER. — Where several policies on the same property are taken out in different companies without any relation to each other, they are independent contracts, and a policy in one company cannot be received in evidence to explain or vary what is contained in another.⁸ But where two applications for insurance upon different portions of the same subject-matter are made at the same time, and two policies are issued by the same company, they may be construed together,

Dec. 362; *Shoemaker v. Glens Falls Ins. Co.*, 60 Barb. (N. Y.) 84; *Ballston Spa First Nat. Bank v. Insurance Co. of North America*, 50 N. Y. 45; *Holden v. Metropolitan L. Ins. Co.*, 11 N. Y. App. Div. 426; *Fitch v. American Popular L. Ins. Co.*, 59 N. Y. 557, 17 Am. Rep. 372; *Weed v. Schenectady Ins. Co.*, 7 Lans. (N. Y.) 452; *Steward v. Phoenix F. Ins. Co.*, 5 Hun (N. Y.) 261; *Pierce v. Empire Ins. Co.*, 62 Barb. (N. Y.) 636; *Clinton v. Hope Ins. Co.*, 51 Barb. (N. Y.) 647; *Studwell v. Mutual Ben. L. Assoc.*, 61 N. Y. Super. Ct. 287.

North Carolina. — *Cuthbertson v. North Carolina Home Ins. Co.*, 96 N. Car. 480; *Bobbitt v. Liverpool, etc., Ins. Co.*, 66 N. Car. 70, 8 Am. Rep. 494.

Oregon. — *Chrisman v. State Ins. Co.*, 16 Oregon 283.

Pennsylvania. — *City Ins. Co. v. Bricker*, 91 Pa. St. 488.

Canada. — *Fitzrandolph v. Mutual Relief Soc.*, 17 Can. Sup. Ct. 333.

The Insurer May Be Estopped by His Acceptance of an Application not signed by the applicant from afterwards setting up that fact as a ground for denial of liability on the policy. *Pickett v. Metropolitan L. Ins. Co.*, 20 N. Y. App. Div. 114.

The agent of the defendant company received from the plaintiff's husband a written application for a life-insurance policy. Without the knowledge of the applicant the agent copied the application upon the blank of another company, of which he had subsequently become the agent, and the second company

accepted the application in this form and issued a policy upon it. It was held that it was estopped by its action from denying its liability on the ground that the application had not been signed by the applicant. *Bohringer v. Empire Mut. L. Ins. Co.*, 2 Thomp. & C. (N. Y.) 610.

Assured Estopped from Denying Application. — The acceptance of a policy of insurance expressly referring to the application filed in the office, and making it a part of the policy, estops the assured from denying that the application is his, and he cannot set up that it was made by an agent employed by him to procure insurance upon his property, but without authority to bind him by representations in the application. *Draper v. Charter Oak F. Ins. Co.*, 2 Allen (Mass.) 569.

1. *Rankin v. Amazon Ins. Co.*, (Cal. 1890) 25 Pac. Rep. 260; *City Ins. Co. v. Bricker*, 91 Pa. St. 488.

2. *Le Roy v. Market F. Ins. Co.*, 45 N. Y. 80.

3. *Walker v. State Ins. Co.*, 46 Kan. 312.

4. *Lycoming F. Ins. Co. v. Storrs*, 97 Pa. St. 354.

5. *Laughlin v. Fidelity Mut. L. Assoc.*, 8 Tex. Civ. App. 448.

6. *Fithian v. Northwestern L. Ins. Co.*, 4 Mo. App. 386.

7. *Simeral v. Dubuque Mut. F. Ins. Co.*, 18 Iowa 319; *Douville v. Farmers' Mut. F. Ins. Co.*, 113 Mich. 158; *Com. v. Susquehanna Mut. F. Ins. Co.*, 14 Pa. Co. Ct. 438; *Stone v. Lorentz*, 19 Pa. Co. Ct. 51, 6 Pa. Dist. 17.

8. *Westinghouse Electric Co. v. Western Assur. Co.*, 42 La. Ann. 28.

so as to effect the indemnity intended, if the construction of each by itself would lead to an absurd result.¹

4. Modification of Contract. — A policy of insurance may be modified by a new and distinct agreement subsequently entered into by the parties or their authorized agents.²

5. Renewal of Policy — *a. IN GENERAL.* — Ordinarily every renewal of a policy of insurance is a new contract³ subject to the laws in force at the time when it is effected.⁴ A policy of fire insurance may, however, continue itself by its own terms on the payment of the premium and taking a receipt therefor; and in this case an action may be brought on the original policy.⁵ So where a policy is issued to insure the life of a person for the term of life, in consideration of the premium paid and to be paid in each year during the continuance of the contract, the payment of each annual premium does not create a new contract, but is merely a continuance of the old one.⁶

Power of Agent to Renew. — As a general rule an agent who has power to make a contract of insurance has power to renew it.⁷ The possession and use by an agent of certificates of renewal, together with the exercise of that authority in other instances, indicates that the power of renewing and continuing insurance has been conferred upon him.⁸

b. HOW EFFECTED. — To effect a renewal of a policy, it is necessary that the minds of the parties should meet upon all the essentials of the contract to the same extent as was required for its creation in the first instance. A proposition for renewal, unless accepted by the party to whom it is made, is nothing more than a mere offer, and does not create a binding contract of renewal.⁹

1. *Schreiber v. German-American Hail Ins. Co.*, 43 Minn. 367.

2. **Modification of Contract.** — *Willcuts v. Northwestern Mut. L. Ins. Co.*, 81 Ind. 300.

In *Leonard v. Charter Oak L. Ins. Co.*, 65 Conn. 529, the plaintiff was the beneficiary under a policy of life insurance issued by the defendant company. By the terms of the policy the company agreed to pay upon the death of the assured ten thousand dollars, "deducting therefrom the amount of all unpaid notes given for premiums." After its issuance the beneficiary and the assured agreed with the company to scale the amount to six thousand dollars, and that it should be "taken in all respects as if it had been originally issued for the sum of six thousand dollars." In an action upon the policy it was held that the beneficiary was entitled to recover only the sum of six thousand dollars, less the amount of unpaid premium notes.

"A written bargain is of no higher legal degree than a parol one. Either may vary or discharge the other, and there can be no more force in an agreement in writing not to agree by parol than in a parol agreement not to agree in writing. Every such agreement is ended by the new one which contradicts it." *Westchester F. Ins. Co. v. Earle*, 33 Mich. 153.

What Is Not Modification. — A steam boiler insurance company issued a policy on seven boilers of a manufacturing establishment. Afterwards, the manufacturer installed two additional boilers, and these were inspected by the insurance company. In a conversation between the inspector and the manufacturer the former stated that he considered the two additional boilers to be covered by the policy, the policy being intended to cover any seven boilers that might be in use at the time of an

explosion. One of the additional boilers afterward exploded, and in an action upon the policy for the loss it was held that the statement of the inspector did not constitute a modification of the policy. *Laclede F. Brick Mfg. Co. v. Hartford Steam Boiler Inspection, etc., Co.*, 19 U. S. App. 510.

An Alteration May Be Made by Subsequent Agreement Between the Parties to It, in a material part of a policy of insurance, by incorporating it in the body of the policy above the signature of the president and the corporate seal of the company, where the amount of the insurance is not increased by the alteration, provided the policy is afterwards redelivered, so altered, either in fact or in contemplation of law, to the other party, with the knowledge and consent of the company. *Hoffecker v. New Castle County Mut. Ins. Co.*, 4 Houst. (Del.) 306.

3. **Renewal of Policy New Contract.** — *Hartford F. Ins. Co. v. Walsh*, 54 Ill. 164, 5 Am. Rep. 115.

4. *Brady v. Northwestern Ins. Co.*, 11 Mich. 425.

5. *Herron v. Peoria M. & F. Ins. Co.*, 28 Ill. 235, 81 Am. Dec. 272; *New England F. & M. Ins. Co. v. Welmore*, 32 Ill. 221.

6. *Mutual Ben. L. Ins. Co. v. Robertson*, 59 Ill. 123, 14 Am. Rep. 8; *Northwestern Mut. L. Ins. Co. v. Amerman*, 119 Ill. 329, 59 Am. Rep. 799.

7. *McCallough v. Hartford F. Ins. Co.*, 2 Pa. Super. Ct. 233.

8. *Post v. Aetna Ins. Co.*, 43 Barb. (N. Y.) 351.

9. **Agreements in Respect to Renewal.** — *Stewart v. Helvetia Swiss F. Ins. Co.*, 102 Cal. 218. See also *New York Lumber, etc., Co. v. People's F. Ins. Co.*, 96 Mich. 20; *O'Reilly v.*

Terms and Conditions. — Unless otherwise expressed, the new contract will be construed to be subject to the terms and conditions contained in the original policy.¹

Description of Property Insured. — When the description of the property is general it must, however, if possible, be so construed as to cover the property according to its condition and location at the date of the last renewal.²

Change of Parties Insured. — The renewal receipt may be so framed as to change the parties insured and yet leave the contract in all other respects unaltered.³

Mode of Renewal. — An insurance contract is ordinarily renewed either by the execution of another policy or by the issuance of a renewal slip. This slip need not be under seal, although the original policy is so.⁴ On the contrary, the insurance company may, through its authorized agent, contract for the renewal of the policy by parol,⁵ and this notwithstanding it is stipulated in the policy itself that this shall not be done.⁶

c. BREACH OF CONTRACT TO RENEW. — An action may be maintained for a breach of contract to renew a policy of insurance,⁷ and in such action the policy is admissible in evidence to show the terms of the contract sued upon.⁸

6. Reformation of Policy — a. POWER OF EQUITY TO REFORM. — When a policy of insurance as issued does not conform to the contract which it purports to evidence, and the insured accepts the policy in the belief that it does conform to his contract, a court of equity will reform the instrument.⁹

London Assur. Corp., (Supm. Ct. Gen. T.) 5 N. Y. Supp. 360, 101 N. Y. 575.

Term of Renewal. — A policy was issued for one year at an annual premium of thirty dollars. It was renewed for a second year on the payment of a like premium. Upon an agreement for a second renewal the same amount of premium was paid, but the testimony does not show that anything was said as to the time for which the renewed policy was to run. It was held that the renewal was to be construed as being for the term of one year. *Scott v. Home Ins. Co.*, 53 Wis. 238.

1. Terms and Conditions of Renewal Contract. — *Day v. Mutual Ben. L. Ins. Co.*, 1 MacArthur (D. C.) 41, 29 Am. Rep. 505; *Hartford F. Ins. Co. v. Walsh*, 54 Ill. 164, 5 Am. Rep. 115; *Witherell v. Maine Ins. Co.*, 49 Me. 200. See also *Aurora F. & M. Ins. Co. v. Kranich*, 36 Mich. 289.

2. Garrison v. Farmers Mut. F. Ins. Co., 56 N. J. L. 235; *Ludwig v. Jersey City Ins. Co.*, 48 N. Y. 379, 8 Am. Rep. 556; *Eddy St. Iron Foundry v. Farmers Mut. F. Ins. Co.*, 5 R. I. 426.

3. Lancey v. Phoenix F. Ins. Co., 56 Me. 562.

4. Lockwood v. Middlesex Mut. Assur. Co., 47 Conn. 553.

5. Baubie v. Aetna Ins. Co., 2 Dill. (U. S.) 156; *Commercial F. Ins. Co. v. Morris*, 105 Ala. 498; *Squier v. Hanover F. Ins. Co.*, 18 N. Y. App. Div. 575. See also *Taylor v. Germania Ins. Co.*, 2 Dill. (U. S.) 282.

6. Cohen v. Continental F. Ins. Co., 67 Tex. 325, 60 Am. Rep. 24.

7. Gold v. Sun Ins. Co., 73 Cal. 216.

Estoppel by Act of Agent. — After a loss has occurred, an insurance company will be estopped to allege that the policy was not renewed, where its agent had represented to the insurer that the policy had been renewed, and had accepted the premium for such extended insurance. *International Trust Co. v. Norwich Union F. Ins. Soc.*, 36 U. S. App. 277.

Failure of Agent to Renew Insurance. — In *Idaho Forwarding Co. v. Fireman's Fund Ins. Co.*, 8 Utah 41, it appeared that the plaintiff's cashier was also the agent of the defendant, and through his agency several policies of insurance were issued to the plaintiff. When these were about to expire, he was told by the plaintiff's manager to renew the policies, and was authorized to use the funds of the plaintiff to do so. Through the agent's negligence, the policies were not renewed. It was held that no contract of insurance existed, although the agent had authority to issue the policy.

An Oral Agreement by an Insurance Agent with a person to whom he is issuing a policy, that he will never suffer the insurance to lapse, but will give notice when it is about to lapse, and will renew the insurance in the same or in some other company represented by him, is not binding upon the company which issued such policy, unless the agent was acting within his actual or apparent authority for such company and it was so understood by the insured, or the contract was afterwards ratified. It is the contract of the agent in his personal capacity. *Wood v. Prussian Nat. Ins. Co.*, 99 Wis. 497.

8. Commercial F. Ins. Co. v. Morris, 105 Ala. 498.

9. Reformation of Policy — United States. — *Delaware Ins. Co. v. Hogan*, 2 Wash. (U. S.) 4; *McMaster v. New York L. Ins. Co.*, 78 Fed. Rep. 33; *Western Assur. Co. v. Ward*, 75 Fed. Rep. 338, 41 U. S. App. 443; *Oliver v. Mutual Commercial Marine Ins. Co.*, 2 Curt. (U. S.) 277.

Kentucky. — *Franklin F. Ins. Co. v. Hewitt*, 3 B. Mon. (Ky.) 231.

Louisiana. — *Davega v. Crescent Co.*, 7 La. Ann. 228.

Maryland. — *National F. Ins. Co. v. Crane*, 16 Md. 260, 77 Am. Dec. 289.

Mississippi. — *Phoenix F. Ins. Co. v. Hoffheimer*, 46 Miss. 645.

The fact that the insured did not read the policy when delivered to him to see whether its terms were in conformity with the agreement is not such negligence as will defeat his right to reformation.¹

Reformation After Loss. — After a loss has occurred the reformation of the policy and judgment for the loss may be had in the same action.²

b. MISTAKE MUST BE MUTUAL. — The want of conformity must be occasioned by a mistake which is mutual and common to both parties to the instrument. A mistake on one side may be a ground for rescinding, but not for reforming, the contract. Where the minds of the parties have not met, there is no contract, and hence none to be rectified.³

c. EVIDENCE TO SUPPORT. — The insurance policy as issued and accepted is, however, *prima facie* the contract of the parties; and in order to have it reformed, the burden is on the plaintiff to show that a different contract was entered into from that which was reduced to writing, and this fact must be proved by clear and satisfactory evidence.⁴

Measure of Proof. — It is not sufficient that the plaintiff should prove this by a preponderance of evidence, but he must establish the fact by such evidence as to show conclusively that a mistake had been made and to satisfy the court and the jury of such mistake beyond a reasonable doubt.⁵

7. Cancellation and Rescission — *a.* BY ACT OF PARTIES THEMSELVES — (1) *Cancellation of Valid Policies* — (a) **Right to Cancel in General.** — The right of either party to a valid contract of insurance to cancel it at pleasure can accrue only in three ways: first, by a concurrent agreement with the other party to that effect; second, by a previous reservation of the right in the conditions of

Nebraska. — *Pacific Mut. L. Ins. Co. v. Frank*, 44 Neb. 320.

New York. — *Phoenix F. Ins. Co. v. Gurnee*, 1 Paige (N. Y.) 278; *Mahe v. Hibernia Ins. Co.*, 67 N. Y. 283.

Ohio. — *Mitchell v. Aetna Ins. Co.*, 6 Ohio Dec. 420, 4 Ohio N. P. 386; *Graham v. Firemen's Ins. Co.*, 2 Disney (Ohio) 255.

Texas. — *Home Ins., etc., Co. v. Lewis*, 48 Tex. 622.

Virginia. — *Hardin v. Alexandria Ins. Co.*, 90 Va. 413.

Where All the Terms of a Contract Are Agreed Upon by the Parties, the insured has the right to assume that the policy will accurately conform to the agreement thus made; and if it does not so conform, the policy may be reformed in equity. *Equitable Ins. Co. v. Hearne*, 20 Wall. (U. S.) 494.

Duration of Insurance. — A court of equity has power to reform and cancel an insurance policy issued by mistake for a longer term than was intended by the parties, and to enjoin the prosecution of a suit at law upon it. *North American Ins. Co. v. Whipple*, 2 Biss. (U. S.) 418.

Omitting Indorsement. — The clerk of the insurer's agent, in making out a policy renewing an existing insurance, by inadvertence omitted the last indorsement on the old policy. The omission materially affected the amount of recovery in case of a loss, and was not discovered until after the loss of a portion of the property insured. It was held that the policy should be reformed by the insertion of such indorsement. *Cochran Cotton Seed Oil Co. v. Phoenix Ins. Co.*, (C. Pl.) Gen. T. 7 Misc. (N. Y.) 695.

Introducing Unusual Clause. — A condition in a policy of insurance that "if this policy is delivered to or presented for cancellation

through, by, or in the interest of any other boiler insurance company, no return premium will be paid," will not be binding upon the assured if the condition was not incorporated in other policies formerly issued to the assured, and he had no knowledge of the condition in the policy in question, but, on the contrary, was led, by the representation of the company's agent, to suppose that no such condition existed. *Hartford Steam Boiler Inspection, etc., Co. v. Cartier*, 89 Mich. 41.

1. *Fitchner v. Fidelity Mut. F. Assoc.*, 103 Iowa 276.

2. *Phoenix F. Ins. Co. v. Hoffheimer*, 46 Miss. 645; *Mahe v. Hibernia Ins. Co.*, 67 N. Y. 283; *Graham v. Firemen's Ins. Co.*, 2 Disney (Ohio) 255.

3. **Mistake Must Be Mutual.** — *Hearne v. Marine Ins. Co.*, 20 Wall. (U. S.) 490; *Phenix Ins. Co. v. Rogers*, 11 Ind. App. 72; *Home F. Ins. Co. v. Wood*, 50 Neb. 381; *McHugh v. Imperial F. Ins. Co.*, (N. Y. Super. Ct. Spec. T.) 48 How. Pr. (N. Y.) 230; *London Assur. Corp. v. Thompson*, 22 N. Y. App. Div. 64; *Steinbach v. Relief F. Ins. Co.*, 12 Hun (N. Y.) 640; *Schmid v. Virginia F. & M. Ins. Co.*, (Tenn. Ch. 1896) 37 S. W. Rep. 1013.

4. **Burden of Proof.** — *National F. Ins. Co. v. Crane*, 16 Md. 260, 77 Am. Dec. 289; *Phoenix F. Ins. Co. v. Hoffheimer*, 46 Miss. 645; *McHoney v. German Ins. Co.*, 52 Mo. App. 94; *Slobodsky v. Phenix Ins. Co.*, 52 Neb. 395; *Devereux v. Sun Fire Office*, 51 Hun (N. Y.) 147; *German Ins. Co. v. Daniels*, (Tex. Civ. App. 1895) 33 S. W. Rep. 549; *Blake Opera House Co. v. Home Ins. Co.*, 73 Wis. 667.

5. **Measure of Proof.** — *Guernsey v. American Ins. Co.*, 17 Minn. 104; *Phoenix Ins. Co. v. Hoffheimer*, 46 Miss. 645; *Devereux v. Sun Fire Office*, 51 Hun (N. Y.) 147.

the policy itself; and third, by a provision in the state insurance law permitting it.¹

(b) **Cancellation by Mutual Agreement** — *aa. IN GENERAL.* — It is quite clear that a policy may be canceled by the mutual consent of the parties, although the right to do so has not been expressly reserved.²

But an Agent Employed by the Assured to Procure Insurance has no power, after the delivery of the policy to his principal, to consent to its cancellation without express authority from him.³

bb. MODE OF CANCELLATION. — The precise mode in which the agreement is reached is immaterial. If both parties agree that a policy is to be canceled, transactions in reference thereto are to be construed reasonably and fairly, and in accordance with the evident understanding of the parties at the time.⁴ The surrender of the policy by the insured and the acceptance of it by the authorized agent of the insurer, with the intention on the part of both that it shall no longer be a contract, effects the cancellation of it.⁵

1. **Right of Parties to Cancel Insurance.** — *Bo-land v. Whitman*, 33 Ind. 64; *Parker, etc., Mfg. Co. v. Exchange F. Ins. Co.*, 166 Mass. 481; *Rothschild v. American Cent. Ins. Co.*, 74 Mo. 41, 41 Am. Rep. 303.

Without Some Stipulation Authorizing It, an insurance company cannot cancel a contract of insurance once entered into, except with the assent of the insured. *Clark v. Insurance Co. of North America*, 89 Me. 26; *Alliance Mut. Ins. Co. v. Swift*, 10 Cush. (Mass.) 433; *East Texas F. Ins. Co. v. Flippen*, 4 Tex. Civ. App. 576.

An Insurance Agent Has No Right to Cancel a Policy and place the assured in any other company without the authority or request of the assured. *Clark v. Insurance Co. of America*, 89 Me. 26.

2. **Cancellation by Mutual Agreement.** — *Queen Ins. Co. v. Leonard*, 6 Ohio Cir. Dec. 49, 9 Ohio Cir. Ct. 46; *Akers v. Hite*, 94 Pa. St. 394, 39 Am. Rep. 792; *Skillern v. Continental Ins. Co.* (Tenn. Ch. 1897) 42 S. W. Rep. 180.

A Partner's Consent to the Cancellation of an Insurance Policy in which the firm is interested is conclusive on the firm. *Hillock v. Traders Ins. Co.*, 54 Mich. 531.

3. *Adams v. Manufacturers', etc., F. Ins. Co.*, 17 Fed. Rep. 630; *Insurance Co. of North America v. Forcheimer*, 86 Ala. 541; *Niagara F., etc., Ins. Co. v. Raden*, 87 Ala. 311, 13 Am. St. Rep. 36; *Rothschild v. American Cent. Ins. Co.*, 5 Mo. App. 596.

4. **Mode of Agreement Immaterial.** — *Hillock v. Traders Ins. Co.*, 54 Mich. 531. See also *Wheeler v. Odd Fellows' Mut. Aid, etc., Assoc.*, 44 Minn. 513.

5. *Train v. Holland Purchase Ins. Co.*, 62 N. Y. 598. See also *Atlantic Ins. Co. v. Goodall*, 35 N. H. 328; *Walters v. St. Joseph F. & M. Ins. Co.*, 39 Wis. 489.

For Cases Where the Facts Were Held to Show a Cancellation by Mutual Agreement, see *German Ins. Co. v. Davis*, (Ark. 1889) 12 S. W. Rep. 155; *Mosser v. Knights Templars, etc., L. Indemnity Co.*, 115 Mich. 672; *Von Wien v. Scottish Union, etc., Ins. Co.*, 118 N. Y. 94; *Farmers' Mut. Ins. Co. v. Wenger*, 90 Pa. St. 220; *Skillern v. Continental Ins. Co.*, (Tenn. Ch. 1897) 42 S. W. Rep. 180.

When Facts Do Not Show Cancellation. — In an

action by a widow to recover a death claim under an accident policy issued to her husband, it appeared that about a month previous to the happening of the accident from which the death occurred, the decedent sustained another accident, in settlement for which the company paid to him the sum of twenty-five dollars. The printed receipt which he gave to the company stated that the payment was in full satisfaction and final settlement of any and all claims that the insured had or might have had against the company for loss resulting from injuries received on a certain specified day, under the policy (giving its number), "which is hereby surrendered." The policy was not delivered up to or demanded by the company, but was retained by the insured, and the time for which premiums had been paid to continue the policy in force had not expired. It was held that the words "which is hereby surrendered" were to be construed as referring to the particular claim described in the context, and as indicating the surrender of the rights of the insured under the policy as to that, and that alone. *Martin v. Manufacturers' Acc. Indemnity Co.*, 151 N. Y. 94.

Abandonment of Policy. — In an action on a policy issued by a mutual fire-insurance company, it appeared that several months prior to the fire the assured received notice of an assessment. He never paid the assessment, but immediately afterwards took out other insurance, for the purpose of supplying the place of the policy sued upon. There was other evidence tending to show that the assured did not intend to pay the assessment, and that his purpose was to abandon the policy. A finding that the policy had been abandoned was sustained on appeal. *Jones v. Alliance Mut. F. Ins. Co.*, 174 Pa. St. 439.

The insured, after repeated requests for payment of the premium, surrendered the policy to the agent of the insurance company, without protest, or any pretense that she wanted to retain it, and made no tender of the premiums or further claim to the policy until after the property had been destroyed by fire. It was held that her acts constituted a surrender of the policy, and terminated the insurance. *Van Wert v. St. Paul F. & M. Ins. Co.*, 8 N. Y. App. Div. 107.

A Formal Surrender of the Policy is, however, not necessary, and is unimportant except as evidence.¹

cc. CONDITIONAL AGREEMENTS. — If the agreement to cancel is conditional, the insurer, if he relies upon such agreement to release him from liability on the policy, must show that the condition has been complied with.² If an insurance policy be surrendered for the purpose of having a new policy issued in its stead, the old policy is not canceled until the new policy takes effect.³

dd. CANCELLATION INDUCED BY FRAUD. — If the assured is induced to surrender the policy by the fraudulent misrepresentations of the insurer in regard to its validity, a bill will lie to revive it.⁴

(e) *Cancellation by Right Reserved to Insurer* — *aa. IN GENERAL.* — A clause in a policy of insurance authorizing the insurer to determine the insurance at any time by giving proper notice to that effect and refunding a ratable proportion of the premium is valid.⁵

The By-laws of a Mutual Insurance Company are a part of the insurance contract, and are as binding upon the insured as the conditions of the policy itself; and a by-law requiring the secretary to cancel any risk which in his opinion is unsafe is valid, and a cancellation effected thereunder is binding upon the insured.⁶

Fraudulent Cancellation. — The privilege reserved by the insurer to terminate the policy on notice cannot, however, be exercised under circumstances which would make it operate as a fraud on the insured, as in case of notice given pending an approaching conflagration, threatening to destroy the property insured,⁷ or, in the case of life insurance, after the insured has become so

1. *Hillock v. Traders Ins. Co.*, 54 Mich. 531; *Beiermeister v. City of London F. Ins. Co.*, (Supm. Ct. Gen. T.) 15 N. Y. Supp. 433.

2. *Conditional Agreements.* — *Queen Ins. Co. v. Leonard*, 6 Ohio Cir. Dec. 49, 9 Ohio Cir. Ct. 46.

3. If the insured leaves his policy with the insurer's agent, with the express understanding and for the sole purpose of having another policy issued in its place, it has been held that the old policy is not to be considered canceled until the new one is issued. *Hickey v. Hartford F. Ins. Co.*, 92 Hun (N. Y.) 192, 15 N. Y. App. Div. 224.

The owner of a boat, holding a time policy thereon having several months to run, the amount of which had been impaired by a partial but unadjusted loss, desiring to have his insurance restored to the original amount, with increased time and privileges, proposed to the underwriters to cancel the old policy and issue a new one for the former amount, with longer time and additional privileges, and requested them to send a new policy, offering to remit the increased premium arising from these changes. It was held that this was a proposition to continue the insurance with modifications of the existing policy, and must be accepted or rejected as an entirety. It did not authorize the insurers to cancel existing insurance and credit unearned premiums on outstanding premium notes without the assent of the insured. *Wilkins v. Tobacco Ins. Co.*, 30 Ohio St. 317, 27 Am. Rep. 455.

4. *Cancellation Induced by Fraud.* — An insurance policy was issued on the life of the plaintiff's mother, payable to him if living; if not living, to her executor or administrator. Subsequently, during the last illness of the insured, the president and secretary of the insurance company, by falsely representing to

the plaintiff that the insurance was speculative, and therefore void, induced him to surrender the policy on return of the premiums which he had paid in behalf of his mother, he having general charge of affairs. It was held that a bill would lie to revive the policy. *Heinlein v. Imperial L. Ins. Co.*, 101 Mich. 250, 45 Am. St. Rep. 409.

5. *Irwin v. National Ins. Co.*, 2 Disney (Ohio) 68.

A Binding Slip evidences the contract set forth in the policy of insurance ordinarily issued by the insurer, and if by the terms of the regular policy it is agreed that the insurance may be terminated at any time at the option of the insurer on giving notice to that effect and refunding the ratable proportion of the premium for the unexpired term of the policy, the insurer may terminate the insurance even before a policy is issued. *Karelsen v. Sun Fire Office*, 122 N. Y. 545; *Lipman v. Niagara F. Ins. Co.*, 121 N. Y. 454.

Reduction of Insurance. — The provision in a policy that "this insurance may be terminated at any time at the option of the company, on giving notice to that effect, and refunding a ratable proportion of the premium," does not authorize a reduction in the amount of the insurance, and a notice of such reduction indorsed on the policy in the hands of a holder as collateral security, without notice to the assured, is not binding on him unless subsequently ratified. *Western Assur. Co. v. Stoddard*, 88 Ala. 606.

6. *Douville v. Farmers' Mut. F. Ins. Co.*, 113 Mich. 158.

7. *Fraudulent Cancellations.* — *Home Ins. Co. v. Heck*, 65 Ill. 111. See also *Lipman v. Niagara F. Ins. Co.*, 121 N. Y. 454; *Smith v. People's Mut. Live Stock Ins. Co.*, 173 Pa. St. 15.

feeble in health that he cannot obtain desirable insurance upon his life in any other reputable company.¹

bb. MODE OF CANCELLATION — (aa) Conditions Must Be Strictly Complied With. — The conditions in the policy upon which the right of the insured to cancel it rests must be strictly construed; and in order to defeat an action on a policy upon the ground that it has been canceled, it must be shown either that these conditions have been faithfully complied with² or that the insured, knowing the facts, waived such compliance.³ An insurance company cannot rely partly on a mutual agreement to cancel and partly on the right reserved in the policy. It must pursue either one or the other of these modes.⁴

(bb) Notice of Cancellation — aaa. Necessity of. — Where an insurance company determines to cancel a risk, the insured is entitled to reasonable notice of such determination.⁵

If the Insurer Sends the Notice by Mail, the receipt of the notice by the insured, if denied, must be proven.⁶

Loss Payable to Mortgagee. — When, by the terms of the policy, the loss is made payable to a mortgagee of the insured premises, notice to such mortgagee of the cancellation of the policy is sufficient, and it is not necessary also to notify the owner.⁷

bbb. Form of Notice. — The form of the notice is immaterial. A direction to the agent to terminate the risk and cancel the policy, when communicated to the insured, is as effective as would be the most express notice that the policy had been terminated.⁸ The notice must not, however, be equivocal; it must be notice of an actual present cancellation, and not of an intention to cancel

1. *Mutual Ben. L. Ins. Co. v. Robison*, 54 Fed. Rep. 580, 58 Fed. Rep. 723.

2. *Reservation of Right to Cancel Strictly Construed.* — *Runkle v. Citizens' Ins. Co.*, 6 Fed. Rep. 143; *Quong Tue Sing v. Anglo-Nevada Assur. Corp.*, 86 Cal. 566; *Bennett v. City Ins. Co.*, 115 Mass. 241; *Lattan v. Royal Ins. Co.*, 45 N. J. L. 453; *Van Valkenburgh v. Lenox F. Ins. Co.*, 51 N. Y. 465; *John R. Davis Lumber Co. v. Hartford F. Ins. Co.*, 95 Wis. 226.

Assignment of Insurance Company. — The act of an insurance company in making an assignment for the benefit of its creditors is not in any sense a notification to its policy holders that their policies from that date are canceled. *Relfe v. Commercial Ins. Co.*, 10 Mo. App. 393.

Forfeiture of Charter. — The repeal of a statute under which an insurance company is organized, by a subsequent act of the legislature which declares the charter of such insurance company forfeited unless the company complies with the provisions of the repealing act within a limited time, does not work the cancellation of policies of such company outstanding at the time of the passage of the latter act, though the company failed to comply with its provisions and thus forfeited its charter. *Manlove v. Commercial Mut. F. Ins. Co.*, 47 Kan. 309.

3. *Waiver by Insured.* — *Aetna Ins. Co. v. Weissinger*, 91 Ind. 297; *Hopkins v. Phoenix Ins. Co.*, 78 Iowa 344; *Kirby v. Phoenix Ins. Co.*, 13 Lea (Tenn.) 340; *Lampasas Hotel, etc., Co. v. Home Ins. Co.*, 17 Tex. Civ. App. 615; *Bingham v. Insurance Co. of North America*, 74 Wis. 498.

4. *Queen Ins. Co. v. Leonard*, 6 Ohio Cir. Dec. 49, 9 Ohio Cir. Ct. 46.

5. *Notice of Cancellation — California.* — *Far-*

num v. Phoenix Ins. Co., 83 Cal. 246, 17 Am. St. Rep. 233.

Illinois. — *Watertown F. Ins. Co. v. Rust*, 141 Ill. 85.

Indiana. — *Commercial Union Assur. Co. v. State*, 113 Ind. 331; *King v. Enterprise Ins. Co.*, 45 Ind. 43.

Kentucky. — *London, etc., F. Ins. Co. v. Turnbull*, 86 Ky. 230.

Michigan. — *Mallory v. Ohio Farmers' Ins. Co.*, 90 Mich. 112; *Dove v. Royal Ins. Co.*, 98 Mich. 122.

Nebraska. — *German Ins. Co. v. Rounds*, 35 Neb. 752.

New York. — *McLean v. Republic F. Ins. Co.*, 3 Lans. (N. Y.) 421; *Van Tassel v. Greenwich Ins. Co.*, 72 Hun (N. Y.) 141, 151 N. Y. 130.

Pennsylvania. — *Scott v. Sun Fire Office*, 133 Pa. St. 322.

Texas. — *East Texas F. Ins. Co. v. Flippen*, 4 Tex. Civ. App. 576.

Where the general agent of an insurance company, acting for himself, advances to the company the first annual premium, and accepts the note of the assured for the amount as his own, the condition of the policy requiring that the premium be actually paid before the company shall be liable is sufficiently complied with, and the company cannot cancel the policy without notifying the assured and returning the unearned premium. *Krause v. Equitable L. Assur. Soc.*, 99 Mich. 461.

6. *American F. Ins. Co. v. Brooks*, 83 Md. 22.

7. *Mueller v. South Side F. Ins. Co.*, 87 Pa. St. 399.

8. *Form of Notice.* — *Springfield F. & M. Ins. Co. v. McKinnon*, 59 Tex. 507, citing *Bergson v. Builders' Ins. Co.*, 38 Cal. 541; *Fabyan v. Union Mut. F. Ins. Co.*, 33 N. H. 203; *Emmott v. Slater Mut. F. Ins. Co.*, 7 R. I. 563.

at a future time or upon the noncompliance of the insured with certain conditions.¹

ccc. **Authority of Agent to Accept Notice — Authority of Agent Procuring Insurance.** — The authority of a broker who is not a general agent to place and manage insurance on his principal's property, but who is employed especially to procure insurance on certain property, terminates with the procurement of the policy, and he has no authority to receive notice of cancellation so as to bind the insured.²

And a Condition in the Policy that the broker procuring the insurance shall be deemed to be the agent of the insured in any transaction relating to the insurance does not vary the rule, since the condition applies only to matters occurring before the issuing of the policy.³ So a stipulation that notice may be given to the assured "or to the person who may have procured this insurance to be taken" cannot be applied to a case where the same person acted as agent for both parties in procuring and issuing the policy, since it is contrary to public policy that one should thus occupy a position involving conflicting rights and duties.⁴

But if the Agent's Authority Is General in respect to the insurance of the property, or if the insured, to avoid the necessity of sending and returning policies as they are canceled and rewritten from time to time, leaves them with the agent, to whom authority to rewrite canceled or expired insurance is given, notice to such agent will be sufficient.⁵

After Agency Has Ceased. — A notice of cancellation served on the broker who

1. **Notice Must Not Be Equivocal.** — *Etna Ins. Co. v. Rosenberg*, 62 Ark. 507; *Petersburg Sav., etc., Co. v. Manhattan F. Ins. Co.*, 66 Ga. 446; *Newark F. Ins. Co. v. Sammons*, 110 Ill. 166; *Lyman v. State Mut. F. Ins. Co.*, 14 Allen (Mass.) 329; *Gardner v. Standard Ins. Co.*, 58 Mo. App. 611; *Hathorn v. Germania Ins. Co.*, 55 Barb. (N. Y.) 28; *Van Tassel v. Greenwich Ins. Co.*, 72 Hun (N. Y.) 141; *Griffey v. New York Cent. Ins. Co.*, 100 N. Y. 417, 53 Am. Rep. 202; *John R. Davis Lumber Co. v. Hartford F. Ins. Co.*, 95 Wis. 226.

The notice must state that the insurance was then and there and by the notice terminated, and not that it would be terminated at some future time. *Van Valkenburgh v. Lenox F. Ins. Co.*, 51 N. Y. 465.

A notice from the insurer to the insured, directing her attention to the fact of a failure to pay the premium and to the canceled condition of her policy, is not a sufficient notice to terminate the policy. *Savage v. Phoenix Ins. Co.*, 12 Mont. 458, 33 Am. St. Rep. 591.

In *American F. Ins. Co. v. Brooks*, 83 Md. 22, a notice that "the policy will be canceled on our books for nonpayment of premium on Dec. 6th, *proximo*, in accordance with the terms of the policy, unless payment be made before that date," was held to be ineffectual.

Where an insurance agent, on receiving instructions from his principal to cancel a policy, wrote to the insured requesting him to send in the policy for cancellation, and promising upon its receipt to refund to him his *pro rata* of the unearned premium, and the insured, acting upon the notice, sent the policy to the agent, but the property was destroyed while the policy was in the mail, it was held that there was no cancellation and that the insurer was liable. *Southern Ins. Co. v. Williams*, 62 Ark. 382.

2. **Authority of Agent Procuring Insurance** —

United States. — *Grace v. American Cent. Ins. Co.*, 109 U. S. 278.

California. — *Quong Tue Sing v. Anglo-Nevada Assur. Corp.*, 86 Cal. 566.

Colorado. — *British-American Assur. Co. v. Cooper*, 6 Colo. App. 25.

Indiana. — *Indiana Ins. Co. v. Hartwell*, 100 Ind. 566.

Massachusetts. — *White v. Connecticut F. Ins. Co.*, 120 Mass. 330.

Michigan. — *Buick v. Mechanics' Ins. Co.*, 103 Mich. 75; *Snedicor v. Citizens' Ins. Co.*, 106 Mich. 83.

Minnesota. — *Broadwater v. Lion F. Ins. Co.*, 34 Minn. 465.

Missouri. — *McCartney v. State Ins. Co.*, 45 Mo. App. 373; *Gardner v. Standard Ins. Co.*, 58 Mo. App. 611.

New York. — *Von Wein v. Scottish Union, etc., Ins. Co.*, 52 N. Y. Super. Ct. 490; *Hermann v. Niagara F. Ins. Co.*, 100 N. Y. 411, 53 Am. Rep. 197.

Wisconsin. — *Body v. Hartford F. Ins. Co.*, 63 Wis. 157.

3. **Effect of Condition in Policy.** — *Von Wein v. Scottish Union, etc., Ins. Co.*, 52 N. Y. Super. Ct. 490; *Hermann v. Niagara F. Ins. Co.*, 100 N. Y. 411, 53 Am. Rep. 197; *Mutual Assur. Soc. v. Scottish Union, etc., Ins. Co.*, 84 Va. 116, 10 Am. St. Rep. 819. See also *Newark F. Ins. Co. v. Sammons*, 11 Ill. App. 230, *affirmed* 110 Ill. 166.

4. *Niagara F., etc., Ins. Co. v. Raden*, 87 Ala. 311, 13 Am. St. Rep. 36.

5. **When Agent's Authority Is General.** — *Royal Ins. Co. v. Wight*, 55 Fed. Rep. 455; *Hartford F. Ins. Co. v. Reynolds*, 36 Mich. 502; *Buick v. Mechanics' Ins. Co.*, 103 Mich. 75; *McCartney v. State Ins. Co.*, 33 Mo. App. 652; *Karelson v. Sun Fire Office*, 122 N. Y. 545; *Stone v. Franklin F. Ins. Co.*, 105 N. Y. 543; *Schauer*

as agent for the assured procured the policies, after his agency has ceased, is ineffectual.¹

ddd. Time of Notice. — The cancellation clause of many of the fire-insurance policies provides that the insurer shall give five days' notice to the insured, and consequently the policy does not expire until five days after the receipt of such notice. But where the condition of the policy is that the insurance may be terminated at any time by the company on giving notice to that effect to the insured, the notice, when given, terminates the contract *eo instanti*.²

(cc) Return of Unearned Premium — aaa. Necessity of. — The provision of the standard insurance policy authorizing the cancellation of the policy at the instance of the insurer requires, as a condition precedent, that in addition to giving the necessary notice the insurer must return or tender the unearned premium.³ But where the policy merely provides for a termination of the insurance upon notice, it seems that the giving of notice is all that is required. The repayment of the unearned premium is held to be merely an incident not affecting the main object, the termination of the contract, and is therefore not a prerequisite.⁴

If No Premium Has Been Paid, tender of the unearned amount is of course unnecessary.⁵

bbb. Actual Tender Must Be Made. — When a tender of the premium is required, the insurer is bound to seek out the insured and tender to him the whole amount of the unearned premium due, and a statement in a notice that the unearned premium will be returned by the local agent of the insurer does not constitute a return or tender, and will not effect a cancellation,⁶ unless the subsequent

v. Queen Ins. Co., 88 Wis. 561. But see *Malory v. Ohio Farmers' Ins. Co.*, 90 Mich. 112.

1. *John R. Davis Lumber Co. v. Hartford F. Ins. Co.*, 95 Wis. 226.

2. **Time of Notice.** — In *Lipman v. Niagara F. Ins. Co.*, 121 N. Y. 454, the defendant, in order to provide temporary insurance pending an inquiry as to the character of the risk, or any delay in issuing the policy, signed a "binding slip," which stated on whose account the insurance was made, the amount insured, the term of insurance, and the date, and that it was binding until the policy should be delivered at the office of the brokers who procured it to be signed. The defendant's officers, having inquired as to the risk, notified the plaintiff's brokers before one o'clock in the afternoon of the next day that the defendant declined it. The property described in the binding slip was destroyed by fire which commenced about three o'clock that afternoon. It was held that the plaintiff was not entitled to recover, the contract of insurance having been terminated by the giving of the notice. See also *Springfield F. & M. Ins. Co. v. McKinnon*, 59 Tex. 507.

Where the property is of such a nature that insurance companies would not take the risk upon it without a survey, and there is a dispute as to whether there was sufficient time for such survey and reinsurance after the notice of cancellation was given and before the time of the fire, the question of reasonable notice should be submitted to the jury. *Chadbourne v. German-American Ins. Co.*, 31 Fed. Rep. 533.

3. **Return of Unearned Premium — Necessity of.** — *Southern Ins. Co. v. Williams*, 62 Ark. 382; *Etna Ins. Co. v. Rosenberg*, 62 Ark. 507; *Manlove v. Commercial Mut. F. Ins. Co.*, 47 Kan. 309; *German Ins. Co. v. Rounds*, 35 Neb.

752; *Holden v. Putnam F. Ins. Co.*, 46 N. Y. 1, 7 Am. Rep. 287; *Tisdell v. New Hampshire F. Ins. Co.*, 155 N. Y. 163; *Hartford F. Ins. Co. v. Cameron*, 18 Tex. Civ. App. 237.

The acts of an insurance company in deciding to close up its business and notifying the plaintiffs that the company will not be liable on its policies issued to them, without returning to the plaintiffs the unearned cash premiums paid by them to secure such policies, does not operate as a cancellation. *Manlove v. Commercial Mut. F. Ins. Co.*, 47 Kan. 309.

4. *Newark F. Ins. Co. v. Sammons*, 11 Ill. App. 230.

Where the Policy of a Mutual Fire-Insurance Company provided that the insurance might be terminated at the option of the company, on giving notice to that effect, and that when the assured should have paid the proportion of losses and expenses due to the company, under the provisions of the policy, at the date of such cancellation, the premium note should be surrendered, it was held that the return of the unearned premium was not a condition precedent to such cancellation. *Phoenix Mut. F. Ins. Co. v. Bruchelsen*, 50 Ohio St. 542.

5. **When No Premium Has Been Paid.** — *Mississippi Valley Manufacturers Mut. Ins. Co. v. Bermond*, 45 Ill. App. 22; *Von Wein v. Scottish Union, etc., Ins. Co.*, 52 N. Y. Super. Ct. 490; *Stone v. Franklin F. Ins. Co.*, 105 N. Y. 543; *Van Wert v. St. Paul F. & M. Ins. Co.*, 90 Hun (N. Y.) 465; *Mueller v. South Side F. Ins. Co.*, 87 Pa. St. 309.

6. **Actual Tender Must Be Made.** — *Hollingsworth v. Germania, etc., F. Ins. Co.*, 45 Ga. 294, 12 Am. Rep. 579; *Peoria M. & F. Ins. Co. v. Botto*, 47 Ill. 516; *Hathorn v. Germania Ins. Co.*, 55 Barb. (N. Y.) 28; *Tisdell v. New Hampshire F. Ins. Co.*, 155 N. Y. 163, (N. Y. Super. Ct. Gen. T.) 11 Misc. (N. Y.) 20; *Van*

conduct of the parties evidences the fact that both considered the policy to have been canceled.¹

ccc. Full Amount Returnable Must Be Tendered. — The underwriter must be certain that the whole ratable proportion is refunded. A payment of a smaller sum does not terminate the insurance² unless agreed upon by the parties.³

Issuing of Other Policies. — So a tender of part only of the premium returnable and of another policy for a lesser sum,⁴ or the issuing of other policies to the full amount of the canceled insurance,⁵ is not sufficient unless accepted by the insured.⁶

(dd) Entry on Books. — Where the charter of a mutual insurance company provides that the cancellation of any policy shall not take effect until entered on the books of the company, a resolution of the board of directors authorizing the cancellation of risks on notice to the assured, by the secretary of the company, is ineffective, and such notification to a policy holder will not terminate his insurance without such entry.⁷

cc. EFFECT OF CANCELLATION. — The effect of a cancellation is to relieve the insurer from any future liability on the policy, but it does not reach back and absolve him from any liability which he may have already incurred. If the subject-matter of the contract has already been destroyed, by the cause insured against, at the time when the cancellation is effected, the insurer is not discharged from liability thereby.⁸

(d) Cancellation by Right Reserved to Assured. — Where an insurance policy contains the stipulation that "the assured may also cancel this policy by surrendering the same at any time after the premium or premium notes have been paid, the company retaining short rates and all expenses incurred in taking

Valkenburgh v. Lenox F. Ins. Co., 51 N. Y. 465. See also *Griffey v. New York Cent. Ins. Co.*, 100 N. Y. 417, 53 Am. Rep. 202. *Contra*, *Backus v. Exchange F. Ins. Co.*, 26 N. Y. App. Div. 91.

There can be no cancellation of an insurance policy unaccompanied by a return of the unearned premium. It is not sufficient for the company to say, "Your money is ready for you, subject to your order." The acts of refunding and cancellation must be simultaneous. There is no obligation resting upon the assured to apply at the place of business of the insurance company and await its pleasure. It knows when it determines to cancel a policy, and forthwith, with its determination, it should tender the unearned premium. Until this is done, there cannot be a cancellation. *Aetna Ins. Co. v. Maguire*, 51 Ill. 342.

1. Waiver of Tender of Premium. — The insured may waive the right to insist upon the return of the premium as a condition precedent to cancellation. Whether his acts constitute such a waiver is ordinarily a question of fact. See *Hopkins v. Phoenix Ins. Co.*, 78 Iowa 344; *Hillock v. Traders Ins. Co.*, 54 Mich. 531; *Kirby v. Phoenix Ins. Co.*, 13 Lea (Tenn.) 340; *Lampasas Hotel, etc., Co. v. Home Ins. Co.*, 17 Tex. Civ. App. 615; *Bingham v. Insurance Co. of North America*, 74 Wis. 498.

2. Full Amount Returnable Must Be Tendered. — Where the amount of the return premium was thirty dollars and sixty-eight cents, and the sum actually refunded was only twenty-four dollars and forty-six cents, it was held that the payment of the latter sum did not terminate the insurance, although it did not appear that the assured made any objection to

the amount refunded. *Van Valkenburgh v. Lenox F. Ins. Co.*, 51 N. Y. 465.

3. *Aetna Ins. Co. v. Weissinger*, 91 Ind. 297.

4. *Quong Tue Sing v. Anglo-Nevada Assur. Corp.*, 86 Cal. 566.

5. *Partridge v. Milwaukee Mechanics' Ins. Co.*, 13 N. Y. App. Div. 519.

6. Acceptance of New Policy by Insured. — An insurance policy gave to the insurance company the right to cancel the policy on five days' notice. The company exercised this privilege through a broker, who, acting for the plaintiffs on the second day after the notice, reinsured them for the same amount in another company. The policy of the first company was not surrendered by the plaintiffs, nor was there any formal cancellation of it or a return of any part of the premium. On the day following the issuing of the new policy, the property was destroyed by fire. The evidence showed that it was the intention of all parties that the second policy should be substituted for the first, and that the plaintiffs did not intend to increase their line of insurance. The second company paid its proportion of the loss. It was held that the plaintiffs were not entitled to recover from the first company. *Arnfeld v. Guardian Assur. Co.*, 172 Pa. St. 605.

7. *Landis v. Home Mut. F. & M. Ins. Co.*, 56 Mo. 591.

8. *American Employers' Liability Ins. Co. v. Fordyce*, 62 Ark. 562, 54 Am. St. Rep. 305; *Hollingsworth v. Germania, etc., F. Ins. Co.*, 45 Ga. 294, 12 Am. Rep. 579; *Clark v. Insurance Co. of North America*, 89 Me. 26; *Stebbins v. Lancashire Ins. Co.*, 60 N. H. 65; *Van Valkenburgh v. Lenox F. Ins. Co.*, 51 N. Y. 465; *Stone v. Franklin F. Ins. Co.*, 105 N. Y. 543;

the risk," the question what are the reasonable expenses incurred by the company in taking the risk is one of fact for the jury, and not of law for the court.¹

(e) **Cancellation under Right Conferred by Statute.** — The New York Insurance Law provides that any corporations transacting the business of fire insurance within the state shall cancel any policy of insurance at the request of the party insured.²

Requisites. — Under this statute the sole requirement to effect a cancellation is a request by the insured. It is not necessary that there should be any action on the part of the insurer. No formal cancellation or physical defacement of the policy is required. The surrender of the policy with the request that it be terminated operates to cancel it, even if the insurer absolutely refuses to permit its cancellation.³

Request to Cancel. — In order, however, to terminate the contract of insurance, the request must be made by the insured or his authorized agent to the insurer or to one having adequate authority to act in the matter in his behalf.⁴

When the Request Is Sent by Mail, until it reaches the insurer or his agent the cancellation is incomplete and the policy remains in force.⁵

(2) **Rescission of Policies Tainted with Fraud** — (a) **When Fraud Affects Interest of Assured.** — When a person has been induced to take out a policy of insurance by the false representations of the agent of the insurer, in respect to matters affecting the interest of the assured under the policy, the assured may, upon discovering the fraud, repudiate the contract and recover back the premiums paid, or set up the facts as a defense to an action on a note given therefor.⁶

Repudiation Within Reasonable Time. — The right to repudiate the contract, however, must be exercised within a reasonable time.⁷ What is a reasonable time is of course a question of fact for the jury.⁸

(b) **When Fraud Affects Insurer Only.** — But when the misrepresentations of the agent are of facts that are of interest to the insurer alone, and their truth or falsity can be of moment and importance to him only, it is a question whether the fraud is of such a nature as to entitle the assured to rescind the contract, and there are decisions both ways in respect to it.⁹

Duncan v. New York Mut. Ins. Co., 138 N. Y. 88, *affirming* 61 N. Y. Super. Ct. 13.

1. *Burlington Ins. Co. v. McLeod*, 34 Kan. 189.

2. *Laws N. Y. 1880, c. 110, § 3; Laws 1892, c. 690, § 122.*

3. *Crown Point Iron Co. v. Aetna Ins. Co.*, 127 N. Y. 608.

4. **Request to Cancel.** — *Crown Point Iron Co. v. Aetna Ins. Co.*, 127 N. Y. 608.

A Mere Soliciting Agent, it has been held in *Missouri*, has no authority to accept notice of cancellation. *Gardner v. Standard Ins. Co.*, 58 Mo. App. 611.

5. *Crown Point Iron Co. v. Aetna Ins. Co.*, 127 N. Y. 608.

6. **Rescission by Assured for Fraud.** — *Beckwith v. Ryan*, 66 Conn. 589; *Fogg v. Griffin*, 2 Allen (Mass.) 1. See to the same effect *Wyman v. Gillett*, 54 Minn. 536; *U. S. Life Ins. Co. v. Wright*, 33 Ohio St. 533; *Sunbury F. Ins. Co. v. Humble*, 100 Pa. St. 405.

7. **Insured Must Repudiate Contract Within Reasonable Time.** — *Hlympton v. Dunn*, 148 Miss. 523; *Susquehanna Mut. F. Ins. Co. v. Oberholtzer*, 172 Pa. St. 223.

Thus a member of a mutual fire-insurance company cannot avoid his policy on the ground that he was induced to make the contract by fraudulent misrepresentations of the agent of the company, where he has made no objection for over a year, and has paid assessments, and

in the meantime a large number of other persons have been induced to become members on the faith of his membership. *Susquehanna Mut. F. Ins. Co. v. Oberholtzer*, 172 Pa. St. 223; *Eichman v. Hersker*, 170 Pa. St. 402.

8. **Reasonable Time Question of Fact.** — *Beckwith v. Ryan*, 66 Conn. 589.

The defendant gave his note for the premiums on certain life-insurance policies on June 8. On June 11 he learned that certain estimates, which were represented to be those of the company, were not theirs in fact, and on June 12 he wrote a letter of inquiry to the company. Not receiving any reply to that letter, he rescinded the contract on June 20. It was held that it was a question for the jury, under proper instructions, whether the rescission was seasonable. *Norton v. Gleason*, 61 Vt. 474.

9. **View that Fraud Not Available to Assured as Ground for Rescission.** — *Mailhoit v. Metropolitan L. Ins. Co.*, 87 Me. 374, 47 Am. St. Rep. 336.

Contra. — If the agent of an insurance company, without the knowledge of the assured, inserts in the application such misrepresentations as would avoid the policy if made by the assured, the assured, on discovering the fraud, may rescind the contract and show the facts as a defense in a suit by the company upon a note given for the premium. *Michigan Mut. L. Ins. Co. v. Reed*, 84 Mich. 524.

A married woman signed her husband's name, without his knowledge or consent, to

b. BY COURTS OF EQUITY. — While it is the general rule that a court of equity has not, or will not exercise, jurisdiction to cancel a contract merely because it has become void or inoperative by reason of some fact which has taken place since its execution, yet where a contract of life insurance has been declared void by the insurer on the ground of a breach of a condition in the policy, and the beneficiary refuses to surrender the policy, but annually tenders the premium due upon it to the insurer, it has been held that the circumstances render it inequitable to compel the parties to await the death of the insured to determine the validity of the policy by an action at law, and that a court of equity ought to take jurisdiction.¹

III. THE INSURER — 1. **Definition.** — The insurer is the underwriter or insurance company with whom the contract of insurance is made.²

2. **Who May Insure.** — In the absence of a prohibitory statute, any person able to make a valid contract may contract to insure another against a specified peril. Formerly a large proportion of the risks were underwritten by private individuals or common-law partnerships; but now the insurance business is carried on almost exclusively by incorporated companies,³ and in some of the United States it is confined by statute to such companies.⁴

3. **Insurance Companies** — *a.* **SEVERAL KINDS OF INSURANCE COMPANIES** — (1) *In General.* — Insurance companies may conveniently be divided into three classes: stock, mutual, and mixed.

(2) *Stock Companies.* — In stock companies the members or stockholders contribute a capital which is liable for the contracts of the company, and absorb the entire profits of the undertaking.⁵ The insured pay premiums which form the basis of their contract with the company.⁶

Stockholder's Interest. — A stockholder in an insurance company has the same rights that a stockholder in any other company has. He has no legal title to the property or profits of the corporation until a dividend is declared or a division is made on the dissolution of the corporation.⁷

(3) *Mutual Companies.* — A mutual company is one in which the members are both the insurers and the insured. The premiums paid by them constitute the fund which is liable for the losses and expenses, and they share in the profits in proportion to their interest, and control and regulate the affairs of the company.⁸ The premiums may, consistently with the principle of mutuality, in the absence of a charter provision to the contrary, be paid in cash as well as in assessable notes, or may be paid in both cash and notes.⁹

an application for a policy of insurance upon his life for her benefit. Under the conditions of the policy her act rendered it void. She was, however, innocent of any fraudulent intent, and was deceived by the agent of the insurance company, and induced by his fraudulent misrepresentations to make the application. It was held that she might rescind the contract and recover back the premium paid by her thereon. *Fisher v. Metropolitan L. Ins. Co.*, 162 Mass. 236.

1. **Rescission of Policy in Equity.** — *Connecticut Mut. L. Ins. Co. v. Home Ins. Co.*, 17 Blatchf. (U. S.) 142.

But where in the case of a fire-insurance policy, a loss has already occurred, and in consequence of a short-limitation clause in the policy there is no danger of long or indefinite delay, and no reason is shown why the matters charged in the bill were not plainly available as a complete defense at law, the bill will be dismissed. *Home Ins. Co. v. Stanchfield*, 1 Dill. (U. S.) 424.

2. **Insurer Defined.** — 1 Rap. & Lawr. L. Dict.; Black's L. Dict.

3. **Who May Insure** — **Classification of Insurers.** — 2 Parsons on Contracts (7th ed.) 350; *Northrup v. Mississippi Valley Ins. Co.*, 47 Mo. 435, 4 Am. Rep. 337; *Henning v. U. S. Insurance Co.*, 47 Mo. 425, 4 Am. Rep. 332.

4. **Power of Legislature to Confine Business to Incorporated Companies.** — *People v. Loew*, (Supm. Ct. Spec. T.) 26 Civ. Pro. (N. Y.) 132, 19 Misc. (N. Y.) 248.

5. *Commercial F. Ins. Co. v. Board of Revenue*, 99 Ala. 1, 42 Am. St. Rep. 17.

6. Rap. & Lawr. L. Dict., title Insurance Company.

7. *Commercial F. Ins. Co. v. Board of Revenue*, 99 Ala. 1, 42 Am. St. Rep. 17. See the titles STOCK; STOCKHOLDERS.

8. *Union Ins. Co. v. Hoge*, 21 How. (U. S.) 35; *Spruance v. Farmers', etc., Ins. Co.*, 9 Colo. 73; *State v. Manufacturer's Mut. F. Ins. Co.*, 91 Mo. 318.

9. **How Premiums May Be Paid.** — *Union Ins. Co. v. Hoge*, 21 How. (U. S.) 35; *Spruance v. Farmers', etc., Ins. Co.*, 9 Colo. 73; *State v. Manufacturer's Mut. F. Ins. Co.*, 91 Mo. 318; *Mygatt v. New York Protection Ins. Co.*, 21 N.

In some of the United States mutual insurance companies are defined by statute.¹

Distinction Between Stock and Mutual Companies. — There is an essential difference between stock and mutual insurance companies. The original design of mutual insurance was to provide cheap insurance by means of local associations, the members of which should insure each other. Such associations are in their nature adapted only to local business. They need many by-laws and conditions that are not required in stock companies.²

(4) **Mixed Companies.** — A mixed company is one that combines the characteristics of both stock and mutual companies.³

b. ORGANIZATION. — While insurance companies resemble other corporations in the manner and incidents of their organization,⁴ there are some points of difference, principally growing out of legislation passed for the protection of policy holders. Thus, in *England* and in most, if not all, of the *United States* statutes have been enacted prescribing certain conditions which must be fulfilled before an insurance company will be permitted to organize and transact business. Such legislation is enacted in pursuance of the inherent power of the state to prescribe such laws as may be essential for the good government of the community and the protection of the citizen.⁵ Some of the conditions prescribed by these statutes are, that the company shall possess a certain amount of capital before commencing business;⁶ that the capital shall be paid in, in cash or in certain prescribed securities;⁷ that the company shall deposit a certain sum with the state as security;⁸ that it shall receive

Y. 52; *Ohio Mut. Ins. Co. v. Marietta Woolen Factory Co.*, 3 Ohio St. 348.

1. **Statutory Definitions of Mutual Companies.** — *Covenant Mut. Ben. Assoc. v. Baldwin*, 49 Ill. App. 203; *Northwestern L. Assoc. v. Stout*, 32 Ill. App. 31; *State v. Manufacturer's Mut. F. Ins. Co.*, 91 Mo. 311.

Questions relating to mutual insurance companies will be treated in this title only so far as they relate to those general principles which govern all insurance companies. For a specific treatment of the law of mutual insurance, see the title **MUTUAL INSURANCE**.

2. *Baxter v. Chelsea Mut. F. Ins. Co.*, 1 Allen (Mass.) 294, 79 Am. Dec. 730.

Guaranty Fund. — An insurance company that is organized to insure only the property of its members from a fund to be raised by assessment on mutual pledges of such members, but whose articles of incorporation provide for a guaranty fund to meet losses and expenses when a sufficient amount for that purpose is not raised by assessment on pledges of members, such fund to be regarded as an advancement to be repaid by order of the directors from the funds of the association, is a mutual and not a stock company. *Corey v. Sherman*, 96 Iowa 114.

3. For a full treatment of the law relating to mixed companies see the title **MUTUAL INSURANCE**.

4. See the title **CORPORATIONS (PRIVATE)**, vol. 7, p. 620.

5. *State v. Mathews*, 44 Mo. 523; *State v. Stone*, 118 Mo. 388, 40 Am. St. Rep. 388.

6. **Possession of Specified Capital Required.** — *Mutual L. Ins. Co. v. Boyle*, 82 Fed. Rep. 705; *Hoadley v. Purifoy*, 107 Ala. 276; *People v. Flint*, 64 Cal. 49; *Gent v. Manufacturers'*, etc., *Mut. Ins. Co.*, 107 Ill. 652; *Davenport F. Ins. Co. v. Moore*, 50 Iowa 619; *International Fraternal Alliance v. State*, 86 Md. 550; *Williams v. Cheney*, 3 Gray (Mass.) 215; *State v.*

Critchett, 37 Minn. 13; *State v. Trubey*, 37 Minn. 97; *In re Babcock*, 21 Neb. 500; *People v. Rensselaer Ins. Co.*, 38 Barb. (N. Y.) 323; *People v. Manhattan Mut. F. Ins. Co.*, (Supm. Ct. Gen. T.) 12 N. Y. Supp. 264; *Trumbull County Mut. F. Ins. Co. v. Horner*, 17 Ohio 407.

Extension of Charter. — Under some statutes the extension of the charter of an insurance company will not be permitted unless the company is in possession of a certain amount of capital. *People v. Rensselaer Ins. Co.*, 38 Barb. (N. Y.) 323; *People v. Manhattan Mut. F. Ins. Co.*, (Supm. Ct. Gen. T.) 12 N. Y. Supp. 264.

Official Certificate that Company Has Requisite Capital Confers Only Prima Facie Right to Begin Business. — *People v. Rensselaer Ins. Co.*, 38 Barb. (N. Y.) 323.

7. **In What Capital Shall Consist.** — *Upton v. Hansbrough*, 3 Biss. (U. S.) 417; *Mutual L. Ins. Co. v. Boyle*, 82 Fed. Rep. 705; *Davenport F. Ins. Co. v. Moore*, 50 Iowa 619; *In re Babcock*, 21 Neb. 500; *People v. Manhattan Mut. F. Ins. Co.*, (Supm. Ct. Gen. T.) 12 N. Y. Supp. 264; *Matter of World's Safe Ins. Co.*, 40 Barb. (N. Y.) 409.

8. **Deposit of Sum as Security — England.** — *Ex p. Scottish Economic Assur. Soc.*, 45 Ch. D. 220.

Canada. — *Maritime Bank v. Reg.*, 17 Can. Sup. Ct. 657, reversing 27 N. Bruns. 357; *Peters v. St. John*, 21 Can. Sup. Ct. 674.

Maryland. — *International Fraternal Alliance v. State*, 86 Md. 550.

Michigan. — *Employers' Liability Assur. Co. v. Insurance Com'r*, 64 Mich. 614; *Imperial L. Ins. Co. v. Hamblitzer*, 95 Mich. 513.

Minnesota. — *Hayne v. Metropolitan Trust Co.*, 67 Minn. 245.

Missouri. — *State v. Stone*, 118 Mo. 388, 40 Am. St. Rep. 388.

New York. — *Atty.-Gen. v. North American*

applications for insurance to a certain amount;¹ that its articles of incorporation shall be subscribed by its members,² shall be recorded in the county in which it is located,³ and shall state the amount of stock actually subscribed;⁴ and that public notice of its formation, name, and object shall be given by the company.⁵

L. Ins. Co., 82 N. Y. 172, 92 N. Y. 654; *People v. Chapman*, 5 Hun (N. Y.) 222, *affirmed* 64 N. Y. 557; *Smyth v. Munroe*, 84 N. Y. 354, *Ruggles v. Chapman*, 59 N. Y. 163, *affirming* 1 Hun (N. Y.) 324, 2 Thomp. & C. (N. Y.) 600; *People v. American Steam Boiler Ins. Co.*, 147 N. Y. 25, *reversing* 87 Hun (N. Y.) 229, 81 Hun (N. Y.) 498; *Matter of Guardian Mut. L. Ins. Co.*, 13 Hun (N. Y.) 115, *affirmed* 74 N. Y. 617.

Constitutionality of Statute — State Incurs No Responsibility Except as Depository. — *Atty.-Gen. v. North America L. Ins. Co.*, 82 N. Y. 172.

Deposit Held in Trust for Policy Holders. — Under the *Minnesota* statute (Gen. Stat. 1894, § 3332 *et seq.*), requiring insurance companies to deposit securities with the insurance commissioner in trust for the benefit of the policy holders, the commissioner is merely a custodian of the securities, vested with the bare legal title in trust for the policy holders. He has no authority to transfer, surrender, or exchange the securities, without the approval of the state treasurer, in the cases and in the manner provided by section 3155; and an attempted transfer and surrender by him, except as so provided, is absolutely void. *Hayne v. Metropolitan Trust Co.*, 67 Minn. 245.

In *Michigan* a substantially similar statute has received a like construction. *Imperial L. Ins. Co. v. Hambitzer*, 95 Mich. 513.

Trust Binds Amount Deposited in Excess of Minimum Required. — *Hayne v. Metropolitan Trust Co.*, 67 Minn. 245; *Lancashire Ins. Co. v. Maxwell*, 131 N. Y. 286, *affirming* 61 Hun (N. Y.) 360, *reversing* 5 N. Y. Supp. 399.

Trust Binds Notes Deposited by Reinsuring Company to Replace Deposit Improperly Withdrawn. — *Relfe v. Columbia L. Ins. Co.*, 10 Mo. App. 150.

Right to Collect Income of Securities Deposited with State. — Under the *Rhode Island* statute (Gen. Stat. 1872, c. 143, § 18; Gen. Laws 1896, c. 181, § 18), an insurance company has not an absolute right to collect the income of securities deposited with the general treasurer of the state, but may receive such income with the permission of the treasurer. This permission the treasurer will grant or refuse as the interests of the policy holders may require. In case of refusal the income accrues to the principal of the securities, to pay first the policy holders and, second, all other creditors. *Moies v. Economical Mut. L. Ins. Co.*, 12 R. I. 259.

1. What Application Must State. — Where by statute the organization of an insurance company is made conditional upon its receiving applications for insurance to a certain amount, it is not essential to the completion of the organization that the applications should set forth all the particulars of the risk which it is intended to insure against; it is sufficient if they state the objects on which insurance is sought, without specifying the particulars. *Caryl v. McElrath*, 3 Sandf. (N. Y.) 176.

2. Unity Ins. Co. v. Cram, 43 N. H. 636.

3. The Michigan Statute, Laws 1859, p. 1083, § 9, requiring an insurance company to file a certified copy of its articles of association with the county clerk of the county in which such company is located, was not designed in any way to affect the validity of the contracts entered into by the company, but was intended simply to facilitate the means of proving the corporate existence. *Jhons v. People*, 25 Mich. 409.

Statutory Requirement that Certificate of Deposit of Requisite Capital Stock Be Filed. — Under an *Illinois* statute, a mutual fire-insurance company cannot transact business as a corporation until it has filed with the county clerk the certificate of the auditor of public accounts that the corporators have deposited the requisite capital stock. *Gent v. Manufacturers', etc., Mut. Ins. Co.*, 107 Ill. 652, *affirming* 13 Ill. App. 308.

4. People v. Flint, 64 Cal. 49.

5. Unity Ins. Co. v. Cram, 43 N. H. 636.

Right to Certificate of Authority to Do Business.

— Under the *Kansas* Act of 1889, c. 159, if an insurance company is solvent and has fully complied with the laws of the state, the superintendent of insurance has no power to refuse to it a certificate of authority to do business in the state. *Metropolitan L. Ins. Co. v. McNall*, 81 Fed. Rep. 888; *Mutual L. Ins. Co. v. Boyle*, 82 Fed. Rep. 705.

Legislative and Judicial Recognition of Validity of Incorporation. — An act of the legislature authorizing a fire-insurance company, on certain conditions, to take marine risks is not a legislative recognition of the valid incorporation of the company; nor will the appointment of a receiver for an insurance company by the court, and the consequent partial assumption and control by the court of the affairs and funds of the company, constitute a judicial recognition of the due incorporation of the company. *People v. Rensselaer Ins. Co.*, 36 Barb. (N. Y.) 323.

But in *White v. Coventry*, 29 Barb. (N. Y.) 305, it was held that if there are any defects in the organization of an insurance company, they will be cured by a subsequent act of the legislature which treats it as an existing corporation and changes its name.

Estoppel to Deny Corporate Existence. — Where an insurance company has attempted to increase its capital and has filed papers for that purpose, received subscriptions for and sold stock under such increase, and incurred liabilities upon policies of insurance bearing upon their face evidence of such increase, this is sufficient to constitute the company a corporation *de facto*, so that neither it nor its stockholders can object that it is not a corporation *de jure*. *Upton v. Hansbrough*, 3 Biss. (U. S.) 417. See also *Trumbull County Mut. F. Ins. Co. v. Horner*, 17 Ohio 407; and the title *DE FACTO CORPORATIONS*, vol. 8, p. 769.

So, on the other hand, parties who have

Statutes Applying to Individuals, Partnerships, and Unincorporated Associations. — Some of the statutes requiring the fulfilment of certain conditions as a prerequisite to the right to engage in the insurance business apply to individuals, partnerships, and unincorporated associations, as well as to incorporated companies.¹

Registration — England. — In England an insurance company consisting of more than twenty persons which fails to register as required by the statute of 1862² is incapable of suing either at law or in equity, and cannot even present a petition for its own winding up.³

Limitation upon Character of Business. — A company which proposes to carry on any other business than that of insurance cannot be incorporated under a statute providing for the incorporation of insurance companies.⁴

Vacation of Charter for Noncompliance with Its Conditions. — By statute in some jurisdictions, if an insurance company does not comply with the fundamental requisites of its charter or the act under which it is incorporated, it is liable to an action for the purpose of vacating its charter or annulling its corporate existence.⁵

c. CONSOLIDATION AND AMALGAMATION — (1) Consolidation. — By statute authority may be given to two or more insurance companies to consolidate.

contracted with an insurance company as such are estopped from afterwards denying that the company was legally incorporated. *White v. Coventry*, 29 Barb. (N. Y.) 305. But compare *Lagrone v. Timmerman*, 46 S. Car. 372. See generally on this subject the title *DE FACTO CORPORATIONS*, vol. 8, p. 760.

Injunction to Restrain Company from Doing Business Without Authority. — An insurance company legally authorized to do business in a state is not entitled to an injunction to restrain another company from doing business without authority, unless the acts of the latter company had actually caused some special injury, or would necessarily cause such injury, to the former company's business. *Employers' Liability Assur. Corp. v. Employers' Liability Ins. Co.*, 78 Hun (N. Y.) 446, *affirming* 61 Hun (N. Y.) 552.

1. Individuals, Partnerships, and Unincorporated Associations — Certain Capital Required. — The requirement of a certain capital under the *New York* statutes applies to individuals, etc., as well as to corporations. *People v. Loew*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 574.

Contra, under the *Alabama* statute. *Hoadley v. Purifoy*, 107 Ala. 276.

A certificate from the superintendent of the insurance department showing compliance with the laws as to insurance must be obtained by individuals or associations as well as by companies. *State v. Stone*, 118 Mo. 388, 40 Am. St. Rep. 388. Compare *Fort v. State*, 92 Ga. 8.

2. Companies Act 1862 (25 & 26 Vict., c. 89, § 209).

Requirement of Registration. — *In re Arthur Average Assoc.*, L. R. 10 Ch. 545, note; *In re Padstow Total Loss, etc.*, Assur. Assoc., 20 Ch. D. 137, 51 L. J. Ch. 344, 45 L. T. N. S. 774, 30 W. R. 326.

Companies registered under the Joint Stock Companies Act of 1844 (7 & 8 Vict., c. 110), are required by the Act of 1862 to register. *In re European Assur. Soc.*, 3 Ch. D. 388; *In re Waterloo L., etc.*, Assur. Co., 31 Beav. 589, 32 L. J. Ch. 370, 11 W. R. 134, 7 L. T. N. S. 459, 9 Jur. N. S. 291.

As to re-registering under the Joint Stock Companies Acts of 1856 and 1857, see *London, etc.*, Provident Soc. v. Ashton, 12 C. B. N. S. 709, 104 E. C. L. 709 [*reversing* the *London Monetary Advance, etc.*, Co. v. Smith, 3 H. & N. 543]; *In re Bank of London, etc.*, Ins. Assoc., L. R. 6 Ch. 421.

3. England — Effect of Failure to Register. — *In re Waterloo L., etc.*, Assur. Co., 31 Beav. 586, 32 L. J. Ch. 370, 11 W. R. 134, 7 L. T. N. S. 459, 9 Jur. N. S. 291.

See Further as to the Act of 1862, *Ernest v. Nicholls*, 6 H. L. Cas. 418; *Accident Ins. Co. v. Accident, etc.*, Ins. Corp., 54 L. J. Ch. 104, 51 L. T. N. S. 597; *Balfour v. Ernest*, 5 C. B. N. S. 601, 94 E. C. L. 601; *Prince of Wales L., etc.*, Assur. Co. v. Harding, El. Bl. & El. 183, 96 E. C. L. 183, 27 L. J. Q. B. 297, 4 Jur. N. S. 851.

Injunction to Restrain Use of Registered Name. — A company which is registered under the Companies Act of 1862 is entitled to an injunction to restrain another company from using its registered name. *Accident Ins. Co. v. Accident, etc.*, Ins. Corp., 54 L. J. Ch. 104, 51 L. T. N. S. 597.

4. Can Carry On No Other Business. — Thus a company which proposes to carry on as part of an insurance business "the inspection and certification as to the sanitary conditions of buildings and premises" cannot be incorporated under a statute providing for the incorporation of insurance companies. *People v. Rosendale*, 142 N. Y. 126, *affirming* 76 Hun (N. Y.) 103, *reversing* 5 Misc. (N. Y.) 378.

5. People v. Rensselaer Ins. Co., 38 Barb. (N. Y.) 323.

Unauthorized Revocation of License — Company Doing Business Without Authority Not Entitled to Relief. — Where an insurance company attempts to do business without complying with the requisites of a statute which forbids such companies doing business without complying with such requisites, it cannot obtain relief against the insurance commissioner for revoking its license, although such commissioner has no justification to revoke it. *National L. Ins. Co. v. State Com'rs*, 25 Mich. 321.

But a statute authorizing such consolidation cannot affect or impair the rights of parties under subsisting contracts with the companies proposing to consolidate, nor, without their consent, transfer such contracts to the new organization; and to the extent that the statute attempts this, it will be void.¹

Right to Issue Joint Policies. — In the absence of a statute authorizing them to do so, insurance companies cannot combine in issuing joint policies of insurance, unless such policies particularly specify the amount or proportion of premium received by each company, and also ascertain and definitely fix the amount of liability assumed by each, and further provide that each acts for itself and not for the other. Where these conditions are observed, the companies may adopt a name and designate the kind of policy issued.²

(2) **Amalgamation** — (a) **Amalgamation Defined — Right to Amalgamate.** — In *England* the transaction by which one insurance company absorbs another is called amalgamation. This is usually accomplished by the purchase of one company of the good will and the whole concern of the other. Such a purchase, not being one of the objects for which an insurance company is ordinarily incorporated, is *ultra vires* unless expressly authorized by its deed of settlement or by the statute under which the company was organized or registered.³ When authorized, such purchase must be made in strict conformity to the authority given.⁴

(b) **Rights of Policy Holders in Amalgamated Company — When Required to Accept Substituted Liability.** — When companies legally authorized to do so amalgamate, the holders of the policies in the amalgamated company are not bound to accept, in lieu of the liability of that company, the responsibility of the amalgamating company, unless the deed of settlement or other instrument constituting the former company, or the policies issued by it, or both construed together, require the policy holders to accept any subsequently substituted liability created by an *intra vires* amalgamation.⁵

1. Consolidation of Insurance Companies. — *Gardner v. Hamilton Mut. Ins. Co.*, 33 N. Y. 421. See generally the title CONSOLIDATION OF CORPORATIONS, vol. 6, p. 800.

2. Joint Policies. — Insurance Policies, 7 Pa. Dist. 17.

The Name Adopted to Designate the Kind of Policy Issued must not be intended to mislead or deceive, and must not give the impression that the policy is anything other than the obligation of the companies issuing it. Insurance Policies, 7 Pa. Dist. 17.

3. Amalgamation of Insurance Companies. — *Ernest v. Nicholls*, 6 H. L. Cas. 401; *In re Sovereign L. Assur. Co.*, 42 Ch. D. 540, 58 L. J. Ch. 811, 61 L. T. N. S. 455, 38 W. R. 58; *Indemnity Case*, Reilly Alb. Arb. Cas. 17; *In re Era Ins. Co.*, 2 Johns. & H. 400, 30 L. J. Ch. 137, 6 Jur. N. S. 1334, 3 L. T. N. S. 314, 9 W. R. 67; *King v. Accumulative, etc., Co.*, 3 C. B. N. S. 151, 91 E. C. L. 151, 27 L. J. C. Pl. 57, 3 Jur. N. S. 1264, 6 W. R. 12; *British Commercial Ins. Co. v. British National L. Assur. Assoc.*, 48 L. J. Ch. 118, 39 L. T. N. S. 136, 27 W. R. 88; *Kearns v. Leaf*, 1 Hem. & M. 681, 10 L. T. N. S. 185, 12 W. R. 462; *Matter of Joint-Stock Co.'s Winding-up Acts*, 1 De G. J. & S. 29, affirming 2 Johns. & H. 408. See generally AMALGAMATE — AMALGAMATION, vol. 2, p. 286; and the title CONSOLIDATION OF CORPORATIONS, vol. 6, p. 801.

As to Amalgamation of Companies Registered under the Companies Act of 1862, see *Southall v. British Mut. L. Assur. Soc.*, 40 L. J. Ch. 698, L. R. 6 Ch. 614, 19 W. R. 865, affirming 23 L. T. N. S. 682.

Where Amalgamation Is Ultra Vires It Cannot Be Ratified. — *In re Era Ins. Co.*, 2 Johns. & H. 400, 30 L. J. Ch. 137, 6 Jur. N. S. 1334, 3 L. T. N. S. 314, 9 W. R. 67, qualifying *Balfour v. Ernest*, 5 C. B. N. S. 601, 94 E. C. L. 601.

4. *In re Era Ins. Co.*, 2 Johns. & H. 400, 30 L. J. Ch. 137, 6 Jur. N. S. 1334, 3 L. T. N. S. 314, 9 W. R. 67; *Indemnity Case*, Reilly Alb. Arb. Cas. 25.

An Agreement to Pay Part of the Purchase Money to the Directors of the Selling Company does not invalidate the amalgamation. *Southall v. British Mut. L. Assur. Soc.*, 40 L. J. Ch. 698, L. R. 6 Ch. 614, 19 W. R. 865, affirming 23 L. T. N. S. 682.

Unauthorized Amalgamation May Be Restrained. — *Kearns v. Leaf*, 1 Hem. & M. 681, 10 L. T. N. S. 185, 12 W. R. 462.

5. When Policy Holders Must Accept Substituted Liability. — *In re India, etc., L. Assur. Co.*, L. R. 7 Ch. 651; *In re European Assur. Soc.*, 1 Ch. D. 307, 45 L. J. Ch. 321, 33 L. T. N. S. 766, 3 Ch. D. 384, 46 L. J. Ch. 402, 35 L. T. N. S. 653; *In re European Assur. Soc. Arbitration Acts*, 3 Ch. D. 1, 45 L. J. Ch. 822, 35 L. T. N. S. 290; *Re Waterloo L., etc., Assur. Co.*, 33 Beav. 542.

The deed of association of an insurance company, which bound the policy holders, contained a power to dissolve, and thereupon the directors were to get from another company an undertaking to pay all future liabilities, and to transfer to such company so much of the funds as should be agreed on between the contracting parties as sufficient to enable the latter company to comply with its undertak-

Accepting Substituted Liability. — Of course the contract of amalgamation may provide that a policy holder shall not be required to accept the substituted liability without his consent.¹ Where the consent of a policy holder is essential to a substitution of responsibility, the question whether such consent has been given and the responsibility of the amalgamating company accepted is one of fact.² Strict proof of such acceptance will always be required.³

If a Policy Holder in the Amalgamated Company Is Also a Shareholder in That Company, and the amalgamation is sanctioned at a meeting of the shareholders, such policy holder is bound by the amalgamation, and has no claim against the amalgamated company on his policy.⁴

Acceptance of Amalgamating Company's Indorsement. — An acceptance by a policy holder in the amalgamated company of an indorsement on his policy by the amalgamating company, charging the assets of the company with the payment of the policy, constitutes an acceptance of the liability of the latter company in lieu of, and not as surety for, the former company.⁵

Payment of Premiums to Amalgamating Company. — The acceptance of the substituted liability need not necessarily be express. Paying premiums to the amalgamating company and taking receipts therefor for a number of years, with full knowledge of the facts, will constitute an acceptance;⁶ not, however, where such payments are made subject to a formal written protest.⁷

Receipt of Annuity for Amalgamating Company. — The mere receipt by an annuitant in the amalgamated company of payments in respect of his annuity from the amalgamating company will not constitute an acceptance of the liability of the latter company.⁸

Acceptance Must Be with Full Knowledge of Facts. — An acceptance by a policy

ing. It was held that the amount to be paid over was a matter of agreement between the two companies, with which the policy holders had no concern, and that a policy holder who refused to be transferred had no claim upon the amalgamated company. *Re Waterloo L., etc., Assur. Co.*, 33 Beav. 542.

1. *In re Medical, etc., L. Assur. Soc.*, L. R. 6 Ch. 374.

2. **Questions of Acceptance of Substitution One of Fact.** — *In re Family Endowment Soc.*, L. R. 5 Ch. 118; *In re International L. Assur. Soc.*, L. R. 9 Eq. 316, 39 L. J. Ch. 295, 22 L. T. N. S. 467, 18 W. R. 370.

3. **Strict Proof of Acceptance Required.** — *In re Family Endowment Soc.*, L. R. 5 Ch. 118; *In re Anchor Assur. Co.*, L. R. 5 Ch. 632, 18 W. R. 1183.

Where Amalgamation Is Ultra Vires. — Though a policy holder has apparently accepted the liability of the amalgamating company, the old company will not be discharged if it appears that the amalgamation was *ultra vires*, and that the new company, consequently, is not liable on the policy. *Ex p. Era Assur. Co.*, 2 Johns. & H. 408, *affirming* 1 De G. J. & S. 20.

4. **Where Policy Is Held by Shareholder in Amalgamated Company.** — *In re European Assur. Soc.*, 1 Ch. D. 326. See also *In re National Provincial L. Assur. Soc.*, L. R. 6 Ch. 393, 19 W. R. 663, *affirming* 23 L. T. N. S. 770.

5. **Acceptance of Indorsement Charging Amalgamating Company with Liability on Policy.** — *In re International L. Assur. Soc.*, 39 L. J. Ch. 295, L. R. 9 Eq. 316, 22 L. T. N. S. 467, 18 W. R. 370; *Dale's Case*, Reilly Alb. Arb. Cas. 11. Compare *In re Medical, etc., L. Assur. Soc.*, L. R. 6 Ch. 374.

An indorsement by the amalgamating company on a policy of the amalgamated company, accepting liability for the payment of the policy upon condition that future premiums be paid to it, and the payment of the premiums accordingly, constitute a complete novation, and entirely relieve the amalgamated company from liability. *In re European Assur. Soc.*, 3 Ch. D. 391.

6. **Payment of Premiums Constituting Acceptance.** — *In re National Provincial L. Assur. Soc.*, 39 L. J. Ch. 250, L. R. 9 Eq. 306, 22 L. T. N. S. 465, 18 W. R. 398; *Dorning's Case*, Reilly Alb. Arb. Cas. 148; *In re European Assur. Soc. Arbitration Acts*, 3 Ch. D. 1, 45 L. J. Ch. 822, 35 L. T. N. S. 290.

7. **So Payment of Premiums and Acceptance of Bonus.** — *In re Times L. Assur., etc., Co.*, 39 L. J. Ch. 527, L. R. 5 Ch. 381, 23 L. T. N. S. 181, 18 W. R. 559. See also *In re Anchor Assur. Co.*, L. R. 5 Ch. 632, 18 W. R. 1183; *In re Medical, etc., L. Assur. Soc.*, L. R. 6 Ch. 362, 40 L. J. Ch. 455, 24 L. T. N. S. 455, 19 W. R. 491.

8. **By Whom Payment Must Be Made to Constitute Acceptance.** — Payment of premiums to an amalgamating company will not constitute an acceptance of the liability of that company unless made by the policy holder or some one legally authorized to act for him. *Dupre's Case*, Reilly Alb. Arb. Cas. 236.

9. **Premiums Paid Subject to Written Protest.** — *Wood's Case*, Reilly Alb. Arb. Cas. 54; *Dorning's Case*, Reilly Alb. Arb. Cas. 144; *How's Case*, Reilly Alb. Arb. Cas. 245.

10. **Receipt of Annuity.** — *In re India, etc., L. Assur. Co.*, 41 L. J. Ch. 601, L. R. 7 Ch. 651, 27 L. T. N. S. 191, 20 W. R. 790.

holder of the substituted responsibility, to be binding upon him, must be with full knowledge of all the facts.¹

d. REGULATION — (1) *Power of State to Regulate* — (a) *Police Power*. — The charter of an insurance company is a contract which the state, under the constitutional inhibition against impairing the obligation of contracts, is bound to respect; but in every such charter there is an implied condition that the corporation shall be subject to such reasonable regulations in respect to the general conduct of its affairs as the legislature, acting within the constitutional limitations, may from time to time prescribe, if they do not materially interfere with or obstruct the substantial enjoyment of the privileges which the state has granted, and serve only to secure the ends for which the corporation was created. The power to prescribe such regulations is inherent in every sovereignty, and cannot be surrendered.²

(b) *Power Reserved in Constitution*. — But apart from the police power inherent in the state, the power to regulate insurance companies is reserved in the constitutions of some of the United States. Thus, under a constitutional provision reserving to the legislature the power to alter, revoke, or annul any charter of incorporation, the legislature may change or modify the charter of an insurance company by requiring the company to conform to regulations enacted for the protection of the public and those doing business with the company.³

(2) *Regulations Prescribed in Exercise of Power*. — In pursuance of the power to regulate insurance companies, statutes have been enacted in England and in perhaps all of the United States. The regulations prescribed by these statutes are numerous and varied, and many of them have received the interpretation of the courts. Some of the requirements of the statutes are that no insurance company shall use a name or title which at the time of its organization is used to designate some other insurance company;⁴ that the officers of insurance companies shall give bonds to the state for the faithful performance

1. **Full Knowledge of Facts Essential to Binding Acceptance.** — *In re European Assur. Soc. Arbitration Acts*, 1 Ch. D. 334, 45 L. J. Ch. 336, 33 L. T. N. S. 762; *In re Manchester, etc., L. Assur., etc., Assoc.*, L. R. 5 Ch. 640, 23 L. T. N. S. 332, 18 W. R. 1185, *affirming* 39 L. J. Ch. 595; *Power's Case*, Reilly Alb. Arb. Cas. 232; *Clegg's Case*, Reilly Alb. Arb. Cas. 266.

In 1862 the business and assets of the Manchester Association were transferred to the Western Society, which was afterwards incorporated with the Albert Company. A policy holder in the Manchester Association paid his premiums at the different offices and took receipts, which mentioned the successive changes, the last receipts being in the name of the Albert Company alone. It was held that the receipts did not disclose enough to fix the policy holder with knowledge of what had taken place between the companies, and that his executors were entitled to obtain a winding-up order against the Manchester Association. *In re Manchester, etc., L. Assur., etc., Assoc.*, L. R. 5 Ch. 640, 23 L. T. N. S. 332, 18 W. R. 1185, *affirming* 39 L. J. Ch. 595. *Compare In re National Provincial L. Assur. Soc.*, L. R. 9 Eq. 306, 39 L. J. Ch. 250, 22 L. T. N. S. 465, 18 W. R. 308.

2. **Right to Regulate Insurance Companies under Police Power.** — *Chicago L. Ins. Co. v. Needles*, 113 U. S. 574; *Chicago L. Ins. Co. v. Auditor*, 101 Ill. 82; *Ward v. Farwell*, 97 Ill.

593; *People v. State Ins. Co.*, 19 Mich. 392; *State v. Mathews*, 44 Mo. 523; *People v. Loew*, (Supm. Ct. Spec. T.) 19 Misc. (N. Y.) 248, 26 Civ. Pro. (N. Y.) 132; *State v. Eagle Ins. Co.*, 50 Ohio St. 252; *Com. v. Hock Age Mut. Beneficial Assoc.*, 10 Phila. (Pa.) 554, 31 Leg. Int. (Pa.) 245. See the titles CORPORATIONS (PRIVATE), vol. 7, p. 676; POLICE POWER.

A statute requiring insurance companies annually or on demand to furnish to the state superintendent of insurance or other proper officer a statement of their conditions does not impair the obligation of the contract arising from a charter between the state and a company chartered previous to the passage of the act, and therefore is not unconstitutional. *Chicago L. Ins. Co. v. Needles*, 113 U. S. 574; *State v. Mathews*, 44 Mo. 523; *State v. Eagle Ins. Co.*, 50 Ohio St. 252; *Com. v. Hock Age Mut. Beneficial Assoc.*, 10 Phila. (Pa.) 554, 31 Leg. Int. (Pa.) 245.

3. *Com. v. Hock Age Mut. Beneficial Assoc.*, 10 Phila. (Pa.) 554, 31 Leg. Int. (Pa.) 245. See the titles CORPORATIONS (PRIVATE), vol. 7, p. 671; IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 15, p. 1043.

4. **Same Name Not to Be Used.** — The *New York* statute to this effect has been held not to prohibit a life-insurance company from using a name previously used by a fire-insurance company. *Commercial Union Assur. Co. v. Smith*, (Supm. Ct. Spec. T.) 2 N. Y. Supp. 296.

of their duties; ¹ that the policies or contracts of insurance shall be subscribed and countersigned by certain specified officers; ² that such policies shall state certain facts and contain certain conditions; ³ that companies shall not discriminate in rates of insurance between insurers of the same class; ⁴ that they shall not loan on a policy more than the reserve value thereof; ⁵ that they shall not cancel any policy unless they comply with the provisions of the statute relating thereto; ⁶ that companies of a certain class shall not insure against certain specified perils or shall insure against them only on certain conditions; ⁷ that existing companies shall not do business after a certain date unless in possession of a certain amount of capital; ⁸ that companies shall create and maintain reserve funds; ⁹ that investments and loans shall be made only on the pledge of securities of a certain character; ¹⁰ that companies shall annually, semiannually, or on demand furnish to the superintendent of insurance or other proper officer statements of their condition; ¹¹ and that there shall be an examination into the affairs of companies doing business in the state. ¹²

1. Bonds from Officers Required. — *Kaw L. Assoc. v. Lemke*, 40 Kan. 661.

2. Evidence Constituting Prima Facie Proof of Appointment of Officers. — Under a statute requiring the policies issued by an insurance company shall be subscribed by the president and countersigned by the secretary, evidence that the persons so subscribing and countersigning a policy have acted as president and secretary is *prima facie* proof of their appointment. *Dimock v. New Brunswick Marine Assur. Co.*, 6 N. Bruns. 398. See also *Robertson v. Provincial Mut., etc., Ins. Co.*, 8 N. Bruns. 379.

3. Statements and Conditions in Policies. — *Citizens Ins. Co. v. Parsons*, 7 App. Cas. 96, *affirming* 4 Can. Sup. Ct. 215; *National L. Ins. Co. v. State Commissioner*, 25 Mich. 321.

Power to Regulate Insurance Contracts in Canada. — In Canada, under the British North America Act, 1867, §§ 91, 92, the power to regulate the contracts of insurance companies in a particular province is in the provincial legislature. Such a regulation is not a "regulation of trade and commerce" within the meaning of section 91, subsec. 2, of the act. Therefore the Ontario Act, 39 Vict., c. 24, dealing with policies of insurance entered into or in force in the province of Ontario for insuring property situated therein against fire, and prescribing certain conditions which are to form part of such contracts, is a valid act. Such act is not inconsistent with the Dominion Act, 38 Vict., c. 20, which requires all insurance companies, whether incorporated by foreign, dominion, or provincial authority, to obtain a license, to be granted only upon compliance with the conditions prescribed by the act. *Citizens' Ins. Co. v. Parsons*, 7 App. Cas. 96, *affirming* 4 Can. Sup. Ct. 215; *Goring v. London Mut. F. Ins. Co.*, 11 Ont. 82. See also the title DOMINION OF CANADA, vol. 10, p. 82.

4. Discrimination Forbidden. — *People v. Mutual L. Ins. Co.*, 72 Ill. App. 560.

5. Loan in Violation of Statute Void. — A loan in violation of a statute prohibiting insurance companies from loaning on policies more than the reserve value of such policies is void. Such a loan, therefore, will constitute no defense to an action on a policy. *Hoover v. Union Cent. L. Ins. Co.*, 6 Ohio Dec. 432.

6. Regulation of Cancellation. — *Morrow v. Lancashire Ins. Co.*, 29 Ont. 377.

7. Specified Risks Forbidden. — Under the Wisconsin statutes, Laws of 1872, c. 103, § 10, and Stat. Wis., § 1931, which prohibit insurance companies of a certain class from insuring schoolhouses without a majority vote of the members, a policy issued by such a company upon a dwelling afterwards converted into a schoolhouse was held to be void. The term "schoolhouse" is used in this statute to designate a house or building in which a school is kept, and is not restricted in its application to a district school. *Luthe v. Farmers' Mut. F. Ins. Co.*, 55 Wis. 543.

8. Requirement as to Capital for Future Business of Existing Companies. — Such a requirement does not inhibit a company not in possession of the required amount of capital from indemnifying itself by reinsurance for the risks already assumed. *Davenport F. Ins. Co. v. Moore*, 50 Iowa 619.

9. Reserve Fund. — *Nicholson v. Nicholson*, 30 L. J. Ch. 617, 9 W. R. 676.

10. Land Mortgaged to Be Unencumbered. — The requirement of the New York statute that mortgages taken by insurance companies shall be upon "unencumbered" property does not avoid a mortgage to such a company of property previously encumbered. A disregard of the provisions of the statute is a matter of which cognizance can be taken by the state alone. *Washington L. Ins. Co. v. Clason*, 16 N. Y. App. Div. 434.

11. Statement of Condition of Companies Required. — *Chicago L. Ins. Co. v. Needles*, 113 U. S. 574; *State v. Mathews*, 44 Mo. 523; *Relfe v. Commercial Ins. Co.*, 5 Mo. App. 173, *affirmed* 75 Mo. 388; *State v. Case*, 53 Mo. 246; *People v. National F. Ins. Co.*, 27 Hun (N. Y.) 188; *State v. Eagle Ins. Co.*, 50 Ohio St. 252; *Com. v. Germania L. Ins. Co.*, 11 Phila. (Pa.) 553, 23 Leg. Int. (Pa.) 169; *Com. v. Hock Age Mut. Beneficial Assoc.*, 10 Phila. (Pa.) 554, 31 Leg. Int. (Pa.) 245.

12. Examination into Affairs of Companies. — *Fry v. Charter Oak L. Ins. Co.*, 31 Fed. Rep. 197; *Chicago L. Ins. Co. v. Needles*, 113 U. S. 574; *State Invest., etc., Co. v. San Francisco*, 101 Cal. 135; *Palache v. Pacific Ins. Co.*, 42 Cal. 419; *Stedman v. American Mut. L.*

Penal Statutes. — Some of these statutes prescribe a penalty for a violation of their provisions.¹ Such statutes must be strictly construed, and every fact necessary to constitute the offense for which the recovery of the penalty is sought must be clearly proven. No intendments will be allowed in favor of the party for whose benefit the suit is brought.²

e. TAXATION — (1) *State*. — The property and business of insurance companies are liable to taxation by the state unless exempted therefrom by the charter of the company or by constitutional provision.³ By the words "persons"⁴ or "associations"⁵ insurance companies are included in the provisions of tax laws which do not in their text indicate the contrary intent. But in many jurisdictions there are statutes relating exclusively to the taxation of insurance companies. Some of the provisions of statutes under which the property or business of insurance companies are taxed have received the interpretation of the courts.⁶

(2) *Municipal*. — The power of the state to tax the property and business of insurance companies may be delegated by the state to municipal corpora-

Ins. Co., 45 Conn. 377; *Ward v. Farwell*, 97 Ill. 593; *People v. State Ins. Co.*, 19 Mich. 392; *Relfe v. Commercial Ins. Co.*, 5 Mo. App. 173, affirmed 75 Mo. 388; *Fisher v. World Mut. L. Ins. Co.*, (Supm. Ct. Spec. T.) 15 Abb. Pr. N. S. (N. Y.) 363; *Atty.-Gen. v. Continental L. Ins. Co.*, (Supm. Ct. Spec. T.) 53 How. Pr. (N. Y.) 16; *Atty.-Gen. v. North America L. Ins. Co.*, 82 N. Y. 172; *State v. Equitable Indemnity Assoc.*, 18 Wash. 514; *In re Oshkosh Mut. F. Ins. Co.*, 77 Wis. 366.

A Michigan Statute (Laws 1869, Act No. 136) providing for the organization of insurance companies required existing companies, within a certain time, to make their organization conform to the provisions of the act, and further provided for an examination into the affairs of insurance companies by persons appointed for that purpose. Under this act it was held that existing companies might be required to submit to the examination authorized by the act before the expiration of the time within which they were required to conform their organization to the provisions of the act. *People v. State Ins. Co.*, 19 Mich. 392.

1. **Statutes Penalizing Violation of Regulations.** — *People v. Mutual L. Ins. Co.*, 72 Ill. App. 569; *People v. State Ins. Co.*, 19 Mich. 392; *Piedmont, etc., L. Ins. Co. v. Ray*, 50 Tex. 511.

2. **Penal Statutes Strictly Construed.** — *People v. Mutual L. Ins. Co.*, 72 Ill. App. 569. In this case it was held that there could be no recovery under the Illinois statute (Act of June 19, 1891) penalizing a discrimination in rates of insurance between insurers of the same class, unless there had been an actual insurance and delivery of the discriminating policy. A sale of such a policy and an offer to deliver it were held not sufficient to constitute the offense.

In *Fisher v. World Mut. L. Ins. Co.*, (Supm. Ct. Spec. T.) 15 Abb. Pr. N. S. (N. Y.) 363, it was held that an action against an insurance company to recover the penalty prescribed by the New York Act of 1853, § 18, for making a false annual statement, could be brought only by the district attorney in the name of the people; a stockholder could not bring such an action.

For Laws Relating to the Compulsory Suspension

or Dissolution of Companies shown on examination to be insolvent or of doubtful solvency or to have violated the law, see *infra*, this section, *Involuntary Dissolution and Forfeiture of Charter*.

3. See the title **TAXATION (CORPORATE)**.

4. "**Persons**" Held to Include Insurance Companies. — *British Commercial L. Ins. Co. v. Tax Com'rs*, 1 Keyes (N. Y.) 303; *People v. Utica Ins. Co.*, 15 Johns. (N. Y.) 358, 8 Am. Dec. 243.

5. "**Associations**" Held to Include Insurance Companies. — *British Commercial L. Ins. Co. v. Tax Com'rs*, 1 Keyes (N. Y.) 303.

6. **A Statute Taxing the Capital of Moneyed or Stock Corporations** has been held to render taxable a fund possessed by an insurance company arising from premiums earned upon policies invested so as to yield an income to be divided among the members, which fund could not, according to the charter, be withdrawn and divided among the members. The company had no other capital or effects. It was held, however, that surplus earnings or profits over and above the amount retained as permanent capital were not taxable under the statute. *Mutual Ins. Co. v. Erie County*, 4 N. Y. 442; *Sun Mut. Ins. Co. v. New York*, 8 N. Y. 241, affirming 5 Sandf. (N. Y.) 10, 8 Barb. (N. Y.) 450. See also *People v. New York*, 16 N. Y. 424, affirming 20 Barb. (N. Y.) 81.

Deposit to Secure Policy Holders Not Taxable as Net Profit. — *Peters v. St. John*, 21 Can. Sup. Ct. 674.

Stamp Act Distinguished from License Act — Direct Taxation. — An act purporting to be an act licensing insurance companies, by which such a company is not compelled either to take out or to pay for a license, but which merely provides that the price of the license shall consist of a stamp to be affixed to policies of insurance renewals and receipts, is not a license act. The tax imposed by such a statute is not a direct tax, and therefore is not warranted by a constitutional provision authorizing direct taxation. *Atty.-Gen. v. Queen Ins. Co.*, 3 App. Cas. 1090; *David v. Stadacona Ins. Co.*, 3 Montreal Leg. N. 118.

An Insurance Agent Is Not Personally Liable for the License exacted by law of persons, firms, or corporations who do an insurance business. *State v. Woods*, 40 La. Ann. 175.

tions, and in many jurisdictions the power to assess and collect such taxes upon companies doing business within their limits has been granted to municipalities. Some of the provisions of these statutes and of municipal ordinances enacted in pursuance to the power have been construed by the courts.¹

(3) *Property Liable to Taxation — Unearned Premiums.* — The idea of the difference between earned and unearned premiums, as affecting the question of present property, is too uncertain to form a basis for taxation. It is a matter of nice calculation and adjustment, beyond the reach of assessing officers, and within the exclusive knowledge of the corporation. So a tax on the property of insurance companies² or on the accumulated surplus of such companies³ applies to unearned as well as to earned premiums, and this notwithstanding a statute prohibiting the payment of dividends from unearned premiums.⁴

Taxation of Capital and Surplus at Its Actual Value. — But where by statute it is provided that the capital stock and surplus profit of a company shall be taxed "at its actual value," it has been held that the contingent liability of a company upon outstanding policies in force should be deducted from the full amount of the capital and surplus in determining the value thereof for taxation under the statute.⁵

(4) *Exemptions* — (a) **In General.** — In many jurisdictions there are statutes exempting from taxation the property, or certain kinds of property, belonging to insurance companies. Some of these statutes exempt such property from all taxation, some from state and others from municipal taxation.

(b) **Exemptions Strictly Construed.** — Such statutes are generally strictly construed. The exemption must be described in clear and unambiguous language, and must appear to be indisputably within the intention of the legislature.⁶

(c) **Exemption of Bona Fide Debts.** — It is quite usual for statutes to provide for the deduction of *bona fide* debts in assessing property for taxation. A *bona fide* debt, within the meaning of such a provision, is a fixed liability to pay a sum certain, due or to become due at all events. The uncertain liability of an insurance company to indemnify for a loss that may never occur is not

1. **Statute Authorising License Tax.** — Under a statute authorizing a municipal corporation to "license, tax, and regulate" insurance companies, the corporation may require such companies to pay a license tax, though a tax on their net income is also imposed. *St. Joseph v. Ernst*, 95 Mo. 360.

For the Construction of Statutes and Municipal Ordinances taxing the property and business of insurance companies, see *Columbus v. Hartford Ins. Co.*, 25 Neb. 83; *People v. Davenport*, 91 N. Y. 574, *affirming* 25 Hun (N. Y.) 630; *Ætna F. Ins. Co. v. Reading*, 119 Pa. St. 417.

2. **Tax on Property of Insurance Companies Applies to Unearned Premiums.** — *Kenton Ins. Co. v. Covington*, 86 Ky. 213; *State v. Parker*, 35 N. J. L. 575; *People v. Davenport*, 91 N. Y. 574, *affirming* 25 Hun (N. Y.) 630; *People v. Tax Com'rs*, 76 N. Y. 64.

3. The liability to losses upon policies issued and unexpired is a contingent, not a fixed, liability, and therefore does not affect the character of the fund arising from the premiums as surplus capital or accumulated surplus. *State v. Parker*, 35 N. J. L. 575. As to accumulated surplus, see **ACCUMULATED SURPLUS (OF A CORPORATION)**, vol. I, p. 481.

4. **Tax Applies to Unearned Premiums.** — *Kenton Ins. Co. v. Covington*, 86 Ky. 213; *People v. Davenport*, 91 N. Y. 574, *affirming* 25 Hun

(N. Y.) 630; *People v. Tax Com'rs*, 76 N. Y. 64; *Amazon Ins. Co. v. Cappellar*, 38 Ohio St. 560.

5. **Capital and Surplus to Be Taxed at Actual Value.** — *People v. Ferguson*, 38 N. Y. 89. See also *People v. Tax Com'rs*, 76 N. Y. 64.

6. Exemptions in general words from assessment and taxation have been held to apply to exemptions from state taxation only, and not to affect the right of municipal authorities to tax for local purposes. *People v. Davenport*, 91 N. Y. 574, *affirming* 25 Hun (N. Y.) 630. See also *Columbus v. Hartford Ins. Co.*, 25 Neb. 83.

A provision in the charter of an insurance company requiring it to pay into the state treasury a certain percentage upon its capital stock does not exempt such company from further taxation in the absence of a provision in the charter showing an intention so to exempt it. *Kenton Ins. Co. v. Covington*, 86 Ky. 213.

Exemption Held Constitutional. — A provision in the charter of an insurance company establishing a fixed bonus in commutation of all taxes on its capital stock and property does not violate a constitutional provision interdicting all "exclusive separate public emoluments or privileges but in consideration of public services." *Daughdrill v. Alabama L. Ins., etc., Co.*, 31 Ala. 91.

such a debt, and unearned premiums are not exempt from taxation under such a provision.¹ Nor is the reserve fund of a company exempt.²

f. POWERS — (1) *In General*. — Insurance companies, like other private corporations, have those powers, and only those, which they have derived by grant from the state, including the powers expressly granted and such incidental powers as are necessary to carry into effect those specifically conferred.³ They cannot engage in any transaction or business not calculated to advance the purposes for which they were incorporated,⁴ nor can their powers be enlarged by any act of the corporate body.⁵

Particular Powers Construed. — Some of the particular provisions of charters conferring powers upon insurance companies have received the interpretation of the courts.⁶

1. Unearned Premiums Not Exempt as Bona Fide Debts. — *Kenton Ins. Co. v. Covington*, 86 Ky. 113; *People v. Davenport*, 91 N. Y. 574, *affirming* 25 Hun (N. Y.) 630; *Amazon Ins. Co. v. Cappellar*, 38 Ohio St. 560.

2. Reserve Fund Not So Exempt. — *Amazon Ins. Co. v. Cappellar*, 38 Ohio St. 560. *Contra*, *Equitable L. Ins. Co. v. Board of Equalization*, 74 Iowa 178, *overruling* (Iowa 1887) 32 N. W. Rep. 376.

Ontario — Interest on Reserve Fund. — In Ontario it was held that where an insurance company is not bound to add the interest earned on its statutory reserve fund to the fund itself, but is free to do therewith as it pleases, such interest is part of its assessable income. The court did not decide whether the reserve fund itself was exempted from assessment on account of its being held to answer liability to holders of policies, a ruling on this question not being necessary to the decision of the case. *Confederation L. Assoc. v. Toronto*, 22 Ont. App. 166, *affirming* 24 Ont. 643.

3. Powers of Insurance Companies — England. — *Balfour v. Ernest*, 5 C. B. N. S. 601, 94 E. C. L. 601.

United States. — *Head v. Providence Ins. Co.*, 2 Cranch (U. S.) 127.

Alabama. — *Smith v. Alabama L. Ins., etc.*, Co., 4 Ala. 558.

Colorado. — *Denver F. Ins. Co. v. McClelland*, 9 Colo. 11.

Connecticut. — *New York Firemen Ins. Co. v. Ely*, 5 Conn. 560, 13 Am. Dec. 100; *New York Firemen Ins. Co. v. Bennett*, 5 Conn. 574, 13 Am. Dec. 109.

Illinois. — *Gent v. Manufacturers, etc., Mut. Ins. Co.*, 107 Ill. 552, *affirming* 13 Ill. App. 308.

Iowa. — *Coles v. Iowa State Mut. Ins. Co.*, 18 Iowa 425.

Kansas. — *Kansas Ins. Co. v. Craft*, 18 Kan. 283.

Maine. — *Andrews v. Union Mut. F. Ins. Co.*, 37 Me. 256.

Minnesota. — *Rochester Ins. Co. v. Martin*, 13 Minn. 59.

New Jersey. — *Trenton Mut. L., etc., Ins. Co. v. McKelway*, 12 N. J. Eq. 133.

New York. — *People v. Utica Ins. Co.*, 15 Johns. (N. Y.) 358, 8 Am. Dec. 243; *Utica Ins. Co. v. Cadwell*, 3 Wend. (N. Y.) 296; *North River Ins. Co. v. Lawrence*, 3 Wend. (N. Y.) 482; *New York Firemen Ins. Co. v. Ely*, 2 Cow. (N. Y.) 678; *New York Firemen Ins. Co. v. Sturges*, 2 Cow. (N. Y.) 664; *Hope Mut. L. Ins. Co. v. Perkins*, 38 N. Y. 404.

Ohio. — *Straus v. Eagle Ins. Co.*, 5 Ohio St.

60; *White's Bank v. Toledo F. & M. Ins. Co.*, 12 Ohio St. 601.

Tennessee. — *Ohio L. Ins., etc., Co. v. Merchants' Ins., etc., Co.*, 11 Humph. (Tenn.) 1, 53 Am. Dec. 742.

4. Cannot Engage in Alien Business. — *White's Bank v. Toledo F. & M. Ins. Co.*, 12 Ohio St. 601; *Ohio L. Ins., etc., Co. v. Merchants' Ins., etc., Co.*, 11 Humph. (Tenn.) 1, 53 Am. Dec. 742.

An Insurance Company Possesses No Powers Before Organization, and cannot enter into any kind of contract or transact any business whatever. Nor have the corporators bringing it into being any power to bind it by contract, unless so authorized by the charter. *Gent v. Manufacturers, etc., Mut. Ins. Co.*, 107 Ill. 652, *affirming* 13 Ill. App. 308.

5. Andrews v. Union Mut. F. Ins. Co., 37 Me. 256.

6. Under a Charter Authorising an Insurance Company to Grant Annuities, and providing that "it shall and may be lawful" for the company to set apart a fund to be held and pledged for payment of annuities, the company has power to grant annuities before setting apart the fund. *Verplanck v. Mercantile Ins. Co.*, 1 Edw. (N. Y.) 84.

Under an Authority to Declare Dividends from Profits, an insurance company is not justified in treating as profits subject to be divided premiums received upon unexpired risks, when it has not independent thereof a fund sufficient to meet all liabilities that may accrue on the pending risks. *Lexington L., etc., Ins. Co. v. Page*, 17 B. Mon. (Ky.) 412, 66 Am. Dec. 165; *Scott v. Eagle F. Co.*, 7 Paige (N. Y.) 198; *De Peyster v. American F. Ins. Co.*, 6 Paige (N. Y.) 486. Dividends thus made from unearned premiums may be reclaimed by the company. *Lexington L., etc., Ins. Co. v. Page*, 17 B. Mon. (Ky.) 412, 66 Am. Dec. 165. And where they are so made the directors will be personally liable to the creditors of the company if, in consequence of extraordinary losses, the company should become insolvent so as to be unable to pay its debts. *Scott v. Eagle F. Co.*, 7 Paige (N. Y.) 198.

For the construction of powers conferred by statute upon insurance companies, and for decisions relating to the powers of officers of such companies, see also the following cases:

England. — *Taunton v. Royal Ins. Co.*, 2 Hem. & M. 135, 33 L. J. Ch. 406, 10 Jur. N. S. 291, 10 L. T. N. S. 156, 12 W. R. 549; *Manby v. Gresham Assur. Soc.*, 29 Beav. 439, 31 L. J. Ch. 94, 7 Jur. N. S. 383, 4 L. T. N. S. 397, 9

(2) *Power to Amend or Repeal Charter.* — Power to amend or repeal its charter or deed of settlement is sometimes conferred upon an insurance company. Such a power will authorize a company whose deed of settlement contains no authority to sell or transfer its business to alter such deed so as to acquire that authority.¹

(3) *Power to Make By-laws.* — The power to make by-laws is incident to a grant of corporate power. Unless an insurance company's charter or a statute² specifically delegates this power to the board of directors or other integral part of the corporate body, it will be deemed to be vested in the corporation as a whole and can be exercised only by the members of the corporation.³ The provisions of a by-law must not conflict with any of the terms of the charter.⁴

Validity of By-laws. — A by-law of an insurance company which consists of several distinct and independent parts may be valid as to one of those parts though void as to the others.⁵ A by-law limiting the time within which an action for a loss may be instituted by a policy holder is valid.⁶ But a by-law requiring that any suit on a policy shall be brought in the county where the company is established is invalid.⁷

Disregard of By-law Not Sufficient to Show Its Repeal. — The mere fact that the officers of an insurance company have disregarded a by-law of the company is not sufficient to show its repeal.⁸

W. R. 547; *In re* Joint-Stock Co.'s Winding-up Acts, 4 Kay & J. 549, 27 L. J. Ch. 829, 4 Jur. N. S. 1140, 6 W. R. 779.

Illinois. — *Stoehlke v. Hahn*, 158 Ill. 79.

Maine. — *Leary v. Blanchard*, 48 Me. 269.

Massachusetts. — *Topping v. Bickford*, 4 Allen (Mass.) 120.

New York. — *Brouwer v. Appleby*, 1 Sandf. (N. Y.) 158; *Hone v. Allen*, 1 Sandf. (N. Y.) 171, note; First Baptist Church v. Brooklyn F. Ins. Co., 18 Barb. (N. Y.) 69; *Howland v. Myer*, 3 N. Y. 290; *McEvers v. Lawrence*, Hoffm. (N. Y.) 172.

Compare *Baxter v. Chelsea Mut. F. Ins. Co.*, 1 Allen (Mass.) 204, 79 Am. Dec. 730.

1. Power to Transfer Business Acquired by Amendment. — *In re* European Assur. Soc. Arbitration Acts, 3 Ch. D. 21; *In re* Argus L. Assur. Co., 39 Ch. D. 571, 28 L. J. Ch. 166, 59 L. T. N. S. 659, 37 W. R. 215.

Amendment Abrogating Provision as to Surrender of Policies. — Where the charter of an insurance company confers upon those making a contract of insurance with the company the right to surrender their policies on certain terms, and also authorizes the company to amend the charter, the company may amend the charter so as to abrogate the provision as to the surrender of policies, and such amendment will be binding upon the policy holders. *Allen v. Life Assoc. of America*, 8 Mo. App. 52.

Where the Charter of a Mutual Insurance Company, under which every member became the insurer of every other member, authorized the company to alter and amend its regulations, and on application to the legislature the charter was so changed that country members were to be alone liable for losses in the country, and *vice versa*, it was held that the amended charter was binding upon one who had become a member under the original charter. *Currie v. Mutual Assur. Soc.*, 4 Hen. & M. (Va.) 315.

2. Right of Directors to Make By-laws under Authority of Statute. — Though the articles of

incorporation are silent, the directors may adopt by-laws under a statute which gives to directors of insurance companies the power to establish by-laws not inconsistent with their charter. *Houdeck v. Merchants, etc., Ins. Co.*, 102 Iowa 303. See also the title BY-LAWS, vol. 5, p. 89.

3. *Houdeck v. Merchants, etc., Ins. Co.*, 102 Iowa 303.

4. Must Not Be Repugnant to Charter. — *Raub v. Masonic Mut. Relief Assoc.*, 3 Mackay (D. C.) 68.

A By-law of a Mutual Insurance Company Authorizing the Directors to Annul a Policy for nonpayment of an assessment warrants a resolution suspending delinquents during default and nonpayment, but continuing their liability for subsequent assessments. *Coles v. Iowa State Mut. Ins. Co.*, 18 Iowa 425.

As to How Far a Proven Custom May Affect the Construction of the By-laws of a life-insurance company, see *Georgia Masonic Mut. L. Ins. Co. v. Whitman*, 52 Ga. 419.

5. Validity of Part of By-laws. — *Amesbury v. Bowditch Mut. F. Ins. Co.*, 6 Gray (Mass.) 596. And see the title BY-LAWS, vol. 5, p. 103.

6. Limiting Period for Action on Loss. — *Nute v. Hamilton Mut. Ins. Co.*, 6 Gray (Mass.) 174; *Amesbury v. Bowditch Mut. F. Ins. Co.*, 6 Gray (Mass.) 596. See also *Gray v. Hartford F. Ins. Co.*, 1 Blatchf. (U. S.) 280; *Peoria M. & F. Ins. Co. v. Whitehill*, 25 Ill. 466; *Wilson v. Aetna Ins. Co.*, 27 Vt. 99; *Williams v. Vermont Mut. F. Ins. Co.*, 20 Vt. 222; *Ketchum v. Protection Ins. Co.*, 6 N. Bruns. 136. *Compare* *Grant v. Lexington F., etc., Ins. Co.*, 5 Ind. 26, 61 Am. Dec. 74. But see *French v. Lafayette Ins. Co.*, 5 McLean (U. S.) 461.

7. Limiting Place of Suit. — *Nute v. Hamilton Mut. Ins. Co.*, 6 Gray (Mass.) 174; *Amesbury v. Bowditch Mut. F. Ins. Co.*, 6 Gray (Mass.) 596.

8. Disregard by Officers Not Sufficient to Show Repeal of By-law. — *Houdeck v. Merchants, etc., Ins. Co.*, 102 Iowa 303.

(4) *Power to Contract* — (a) *In General.* — Unless restricted by its charter, an insurance company has the incidental power to make any contract and evidence it by any instrument that may be necessary and proper to accomplish the purposes and objects for which it was incorporated,¹ but it has no implied power to contract for any other purpose;² and when the charter prescribes a mode of contracting, the company must observe that mode, and cannot contract in any other.³

Contracts Prima Facie Valid. — But a contract made by an insurance company is *prima facie* within its corporate power, and the burden to show that it was unauthorized is upon the person denying the power of the corporation to make it.⁴

A Company May Make Contracts through Authorized Officers and Agents, and contracts made by them within the scope of their authority will bind the company.⁵

(b) *Power to Borrow Money and Procure Sureties.* — An insurance company may, for the purposes of its business, borrow money,⁶ contract for a loan,⁷ or procure sureties.⁸ But it cannot, under a pretense of borrowing money, provide a

1. *Power to Make Contracts.* — Mechanics, etc., Mut. Sav. Bank, etc., Assoc. v. Meriden Agency Co., 24 Conn. 159; Straus v. Eagle Ins. Co., 5 Ohio St. 60; White's Bank v. Toledo F. & M. Ins. Co., 12 Ohio St. 601. And see the title CORPORATIONS (PRIVATE), vol. 7, p. 754 *et seq.*

A Contract Between Two Insurance Companies is not void merely because the directors are the same in both companies. Alexander v. Williams, 14 Mo. App. 13.

2. *New York Firemen Ins. Co. v. Ely*, 5 Conn. 560, 13 Am. Dec. 100; Mechanics, etc., Mut. Sav. Bank, etc., Assoc. v. Meriden Agency Co., 24 Conn. 159; White's Bank v. Toledo F. & M. Ins. Co., 12 Ohio St. 601. And see the title CORPORATIONS (PRIVATE), vol. 7, p. 757; ULTRA VIRES.

Transaction for Individual Benefit of Officers or Third Person Unauthorized. — White's Bank v. Toledo F. & M. Ins. Co., 12 Ohio St. 601.

3. *Company Must Contract in Mode Prescribed.* — Head v. Providence Ins. Co., 2 Cranch (U. S.) 127; New York Firemen Ins. Co. v. Ely, 5 Conn. 560, 13 Am. Dec. 100. And see the title CORPORATIONS (PRIVATE), vol. 7, p. 760.

Charter Requiring that Policies Be Formally Executed. — A charter of an insurance company which requires that contracts on policies of insurance be executed in a certain form and be signed and attested by certain officers has reference only to executed contracts or policies of insurance, and does not require that the initial or preliminary arrangements for insurance which precede the execution of the formal instrument by the officers of the company shall conform to its provisions. Franklin Ins. Co. v. Colt, 20 Wall. (U. S.) 560; Constant v. Allegheny Ins. Co., 3 Wall. Jr. (C. C.) 313; Security F. Ins. Co. v. Kentucky M. & F. Ins. Co., 7 Bush (Ky.) 81, 3 Am. Rep. 301; Dayton Ins. Co. v. Kelly, 24 Ohio St. 345, 15 Am. Rep. 612.

4. *Contracts Prima Facie Within Corporate Power.* — New York Firemen Ins. Co. v. Sturges, 2 Cow. (N. Y.) 664; Barker v. Mechanic F. Ins. Co., 3 Wend. (N. Y.) 94, 20 Am. Dec. 664; New York Exch. Co. v. De Wolf, 5 Bosw. (N. Y.) 593; Straus v. Eagle Ins. Co., 5 Ohio St. 60. See the title CORPORATIONS (PRIVATE), vol. 7, pp. 703, 770; ULTRA VIRES.

5. *Contracts by Officers or Agents.* — Farmers, etc., Ins. Co. v. Chesnut, 50 Ill. 111, 99 Am. Dec. 492; Merchants', etc., Ins. Co. v. Curran, 45 Mo. 142, 100 Am. Dec. 361. See generally the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS.

Waiver by Secretary of Terms to Policy. — Where the by-laws of an insurance company provided that there should be no waiver of the terms or conditions of a policy "without the concurrence of the secretary of the company indorsed thereon or otherwise specifically acknowledged by him," it was held that the signing by the secretary with knowledge of the facts, of orders for payment on the adjustment of the loss, was a conclusive waiver in writing. Farmers' Mut. F. Ins. Co. v. Gargett, 42 Mich. 289.

The Trustees of an Insurance Company under the particular provisions of its charter and by-laws, were held not to have authority to enter into a contract with the retiring president to pay a certain sum to him annually during his life, in recognition of past services and of his future usefulness to the company. Beers v. New York L. Ins. Co., 66 Hun (N. Y.) 75.

6. *Company May Borrow Money for Purposes of Its Business.* — Trenton Mut. L., etc., Ins. Co. v. McKelway, 12 N. J. Eq. 133; Hope Mut. L. Ins. Co. v. Perkins, 38 N. Y. 404, 2 Abb. App. Dec. (N. Y.) 383, *affirming* 4 Robt. (N. Y.) 182. See generally the title CORPORATIONS (PRIVATE), vol. 7, p. 771.

Thus a company may borrow money to pay losses, Trenton Mut. L., etc., Ins. Co. v. McKelway, 12 N. J. Eq. 133; Furniss v. Gilchrist, 1 Sandf. (N. Y.) 53; and it may borrow a note upon which to raise money for that purpose, Furniss v. Gilchrist, 1 Sandf. (N. Y.) 53.

7. *Company May Contract for Loan.* — Trenton Mut. L., etc., Ins. Co. v. McKelway, 12 N. J. Eq. 133.

8. *Power to Procure Sureties.* — Hope Mut. L. Ins. Co. v. Perkins, 38 N. Y. 404, 2 Abb. App. Dec. (N. Y.) 383, *affirming* 4 Robt. (N. Y.) 182. In this case a note was given by the makers and received by the insurance company for the purpose of creating a guaranty fund for the prompt payment of losses in the absence of other means of the company for that purpose. It was held that the company, as incidental to

capital or fund for the purpose of giving to the company a credit and character which are entirely foreign to its charter.¹

(c) **Power to Make Loans and Investments.** — An insurance company has, as incidental to the purposes of its incorporation, the power to loan or invest its surplus funds or profits.² But where it is authorized to loan money in a particular mode, all other modes are necessarily excluded, and all securities other than those allowed to be taken are void.³

Company Cannot Take Stock in nor Advance Money to Other Corporations. — But though an insurance company has this incidental right to make loans and investments, it has been held that, in the absence of express authority in its charter, it has no power to invest in the capital stock of, or to advance its moneys or obligations to sustain, another corporation engaged in a similar or dissimilar business.⁴

Construction of Particular Powers. — Some of the particular provisions of charters authorizing loans and investments have received the interpretation of the courts.⁵

its general powers, had the right to receive the note. It was further held that the inducement held out to the public by reason of the security offered by the note was a sufficient consideration to support it.

Where notes are delivered to special trustees of an insurance company, under an agreement so to deliver them, to be used for the benefit of the company, a transfer of the notes made by the trustees to third persons in exchange for their notes, which are discounted and the proceeds used by the company, is within the power of the corporation, and conveys a good title to the notes. *Holbrook v. Basset*, 5 Bosw. (N. Y.) 147.

1. *Trenton Mut. L., etc., Ins. Co. v. McKelway*, 12 N. J. Eq. 133.

2. **Incidental Authority to Make Loans and Investments.** — *Life Assoc. of America v. Levy*, 33 La. Ann. 1203; *Utica Ins. Co. v. Cadwell*, 3 Wend. (N. Y.) 296; *New York F. Ins. Co. v. Donaldson*, 3 Edw. (N. Y.) 199. See the title CORPORATIONS (PRIVATE), vol. 7, p. 797.

Right to Require Borrower to Insure. — An insurance company may loan its surplus funds, and may lawfully require the borrower to effect an insurance with the company at the usual terms and to pay the premiums thereon in addition to interest at the legal rate. *Utica Ins. Co. v. Cadwell*, 3 Wend. (N. Y.) 296; *New York F. Ins. Co. v. Donaldson*, 3 Edw. (N. Y.) 199.

3. **Authority to Loan in Particular Mode Excludes All Others.** — *North River Ins. Co. v. Lawrence*, 3 Wend. (N. Y.) 482; *New York Firemen Ins. Co. v. Ely*, 2 Cow. (N. Y.) 678.

So an insurance company authorized to loan money on bond and mortgage cannot loan money on a note. *North River Ins. Co. v. Lawrence*, 3 Wend. (N. Y.) 482.

4. **Company Cannot Invest in Stock of nor Make Loans to Other Corporations.** — *Mechanics, etc., Mut. Sav. Bank, etc., Assoc. v. Meriden Agency Co.*, 24 Conn. 159; *Twiss v. Guaranty L. Assoc.*, 87 Iowa 733, 43 Am. St. Rep. 418; *Berry v. Yates*, 24 Barb. (N. Y.) 199.

It has been held that an insurance company has no power to subscribe to the stock of a savings bank and building association. *Mechanics, etc., Mut. Sav. Bank, etc., Assoc. v. Meriden Agency Co.*, 24 Conn. 159.

Statutory Power Construed. — An insurance company has not authority to subscribe for and invest its capital stock in the capital stock of another corporation, under a statutory power to invest its money "in real or personal property, stocks, or choses in action." *Commercial F. Ins. Co. v. Board of Revenue*, 99 Ala. 1, 42 Am. St. Rep. 17.

5. **Power to Invest in Bond and Mortgage.** — An insurance company which has the power to invest on bond and mortgage, having taken an absolute assignment of a mortgage, may purchase a claim against the mortgagor and have it paid out of the surplus money arising from a sale of the mortgaged premises after paying the mortgage debt, the purchase of the claim being considered as an investment on bond and mortgage. *Beekman F. Ins. Co. v. First M. E. Church*, 29 Barb. (N. Y.) 658.

An authority to invest its funds in bonds and mortgages does not authorize an insurance company to lend its credit by giving its bond payable in the future in exchange for the bond and mortgage of an individual. Such a transaction is void. *Smith v. Alabama L. Ins., etc., Co.*, 4 Ala. 558.

Under a statute authorizing an insurance company to invest its "capital and * * * funds * * * in bonds and mortgages," *Kansas Ins. Co. v. Craft*, 18 Kan. 283, or to invest its capital and funds "in such a way as the directors may deem best for the safety of the capital and interest of the stockholders," *Straus v. Eagle Ins. Co.*, 5 Ohio St. 59, a company had no power to purchase upon credit a mortgage or other obligation of one insured by it and entitled to indemnity for a loss, for the purpose of setting off such obligation against the policy.

Where a Power to Invest in Any Stock or Fund or Debt Created under Any Federal or State Statute was contained in the charter it was held that the company was not confined to investments in the funded debts of the federal and state governments, but might invest in the stock of the United States Bank and in the stock of the banks or moneyed corporations of any particular state. *Verplanck v. Mercantile Ins. Co.*, 1 Edw. (N. Y.) 84.

As to the power of insurance companies to loan money and make investments under the

(d) **Power to Give and Take Notes and Other Securities.** — An insurance company which is not prohibited by law from doing so may make a valid promissory note for a debt contracted in the course of its legitimate business,¹ although not expressly authorized by its charter to make notes.² It also has the power to take negotiable notes and other securities³ and to deal in exchange⁴ so far as necessary to carry on the business of insurance, but it has not the power to deal in exchange for any other purpose.⁵

(e) **No Power to Engage in Banking Business.** — Unless expressly authorized by its charter to do so, an insurance company cannot engage in the banking business,⁶ and in some jurisdictions such companies are expressly prohibited by statute from engaging in that business.⁷

(5) **Character of Business in Which Insurance Companies May Engage.** — An insurance company cannot engage in the insurance business on any other plan than that authorized by its charter or the statute under which it is incorporated;⁸ nor can it insure against any loss against which its charter does not authorize it to insure.⁹

peculiar provisions of particular charters or statutes, see also *Athenæum L. Assur. Soc. v. Pooley*, 3 De G. & J. 294, 28 L. J. Ch. 119, 5 Jur. N. S. 129, 7 W. R. 167; *St. Joseph F. & M. Ins. Co. v. Hauck*, 63 Mo. 112.

1. **Power to Make Notes.** — *Barker v. Mechanic F. Ins. Co.*, 3 Wend. (N. Y.) 94, 20 Am. Dec. 664. See the title CORPORATIONS (PRIVATE), vol. 7, p. 780.

2. *Atty.-Gen. v. Life, etc., Ins. Co.*, 9 Paige (N. Y.) 470.

Note by President of Company. — A note by which J. F., as president of an insurance company, promises to pay a certain sum, is not the note of the company, but of the maker alone. *Barker v. Mechanic F. Ins. Co.*, 3 Wend. (N. Y.) 94, 20 Am. Dec. 664.

An Insurance Company under Authority to Draw Bills for the purposes of the company cannot draw them for any other purpose. *Balfour v. Ernest*, 5 C. B. N. S. 601, 94 E. C. L. 601.

3. **Power to Take Notes and Other Securities.** — *Alexander v. Horner*, 1 McCrary (U. S.) 634. See also the title CORPORATIONS (PRIVATE), vol. 7, p. 728.

Under an authority in its charter to "receive notes for premiums in advance of persons to receive its policies" and to "negotiate such notes for the purpose of paying claims or otherwise, in the course of business," an insurance company may transfer a note so received as collateral security for the payment of a debt. *Brookman v. Metcalf*, 32 N. Y. 591, affirming 5 Bosw. (N. Y.) 429.

4. **Power to Deal in Exchange.** — *Alexander v. Horner*, 1 McCrary (U. S.) 634; *White's Bank v. Toledo F. & M. Ins. Co.*, 12 Ohio St. 601; *Ohio L. Ins., etc., Co. v. Merchants' Ins., etc., Co.*, 11 Humph. (Tenn.) 1, 53 Am. Dec. 742.

5. *White's Bank v. Toledo F. & M. Ins. Co.*, 12 Ohio St. 601; *Ohio L. Ins., etc., Co. v. Merchants' Ins., etc., Co.*, 11 Humph. (Tenn.) 1, 53 Am. Dec. 742.

The purchase by an insurance company of a bill of exchange to which one of its stockholders is a party, without the assent of such stockholder, with the purpose of subjecting his stock to the payment of the bill, is *ultra vires* and void. *White's Bank v. Toledo F. & M. Ins. Co.*, 12 Ohio St. 601.

6. **Company Cannot Engage in Banking Business.** — *People v. Utica Ins. Co.*, 15 Johns. (N.

Y.) 358, 8 Am. Dec. 243; *Utica Ins. Co. v. Cadwell*, 3 Wend. (N. Y.) 296; *Atty.-Gen. v. Life, etc., Ins. Co.*, 9 Paige (N. Y.) 470; *New York Firemen Ins. Co. v. Sturges*, 2 Cow. (N. Y.) 664; *Ohio L. Ins., etc., Co. v. Merchants' Ins., etc., Co.*, 11 Humph. (Tenn.) 1, 53 Am. Dec. 742. See further the title CORPORATIONS (PRIVATE), vol. 7, p. 704.

The Right to Loan Money on the Discount of Notes is not implied from the power to engage in the insurance business. *New York Firemen Ins. Co. v. Ely*, 5 Conn. 560, 13 Am. Dec. 100. But see *Corwin v. Urbana, etc., Mut. Ins. Co.*, 14 Ohio 6.

7. **Statutory Prohibition Against Engaging in Banking Business.** — *Atty.-Gen. v. Life, etc., Ins. Co.*, 9 Paige (N. Y.) 470; *North River Ins. Co. v. Lawrence*, 3 Wend. (N. Y.) 482; *New York Firemen Ins. Co. v. Ely*, 2 Cow. (N. Y.) 678.

Charters Prohibiting Companies Engaging in Banking Business. — *New York Firemen Ins. Co. v. Ely*, 5 Conn. 560, 13 Am. Dec. 100; *New York Firemen Ins. Co. v. Bennett*, 5 Conn. 574, 13 Am. Dec. 109; *Corwin v. Urbana, etc., Mut. Ins. Co.*, 14 Ohio 6.

What Is Banking Business. — The investment of the profits of insurance companies in loans secured by mortgage cannot be considered as banking business. *Life Assoc. of America v. Levy*, 33 La. Ann. 1203.

A single act of loaning money on bank discount of a promissory note, followed by several successive renewals of the note on the same discount, is not sufficient evidence to show that an insurance company has violated a statute prohibiting such companies from engaging in the banking business. *New York Firemen Ins. Co. v. Sturges*, 2 Cow. (N. Y.) 664; *New York Firemen Ins. Co. v. Ely*, 2 Cow. (N. Y.) 678.

To receive money on deposit is no violation of the charter of an insurance company which contains a clause prohibiting the exercise of banking powers. *Corwin v. Urbana, etc., Mut. Ins. Co.*, 14 Ohio 6.

8. *State v. Standard L. Assoc.*, 38 Ohio St. 281.

9. **What Losses May Be Insured Against.** — *Denver F. Ins. Co. v. McClelland*, 9 Colo. 11; *Andrews v. Union Mut. F. Ins. Co.*, 37 Me. 256; *Delaware Farmers' Mut. F. Ins. Co. v.*

(6) *Power to Insure Property in Foreign State.* — An insurance company, unless restricted by its charter, may insure a resident of a foreign state against loss of property situated in such foreign state.¹

(7) *When Defense of Ultra Vires Will Avail.* — The doctrine of the *ultra vires* contracts of corporations will be discussed elsewhere in this work.² The views of the courts on this subject are too conflicting to admit a statement of results here. Some decisions, however, may be indicated.³

g. *DISSOLUTION AND FORFEITURE OF CHARTER* — (1) *Voluntary Dissolution.* — In some of the United States there are statutes providing for the voluntary dissolution of corporations by petition to the proper court of the members, stockholders, or trustees.⁴ The provisions of some of these statutes as applied to insurance companies have received the interpretation of the courts.⁵

(2) *Involuntary Dissolution and Forfeiture of Charter* — (a) *At Common Law.* — At common law, a misuser by a corporation of its franchises is a cause of forfeiture;⁶ and for an insurance company to accept premiums for insurance without any probability of its ever being able to pay its losses is such an abuse of its franchises as affords good cause of forfeiture.⁷

Knuppel, 56 Minn. 243; Rochester Ins. Co. v. Martin, 13 Minn. 59; Knapp v. North Wales Mut. Live Stock Ins. Co., 11 Montg. Co. Rep. (Pa.) 119. See also the title CORPORATIONS (PRIVATE), vol. 7, p. 704.

1. Western v. Genesee Mut. Ins. Co., 12 N. Y. 258.

Restricting Statute Construed. — A statute prohibiting insurance companies from issuing policies on property "out of the limits of the territory" where they are authorized to do business is not violated by a company's issuing policies on property within such territory, but without restriction as to the place of loss. Eddy v. Farmers' Mut. Ins. Co., 20 N. Y. App. Div. 109, affirming 18 Misc. (N. Y.) 297.

2. See the title ULTRA VIRES.

3. *Defense of Ultra Vires.* — The older cases were inclined to consider the *ultra vires* character of the act as a complete defense in actions growing therefrom. See Smith v. Alabama L. Ins., etc., Co., 4 Ala. 558.

Ultra Vires No Defense. — Where an insurance company purchased the assets of another company, among which was a promissory note which was indorsed by the selling to the purchasing company, it was held, in an action by the purchasing company against the maker of the note, that the validity of the note being admitted, the fact that the agreement between the companies was unauthorized by their charters was not a good defense to the action. Ehrman v. Union Cent. L. Ins. Co., 35 Ohio St. 324, but see the dissenting opinion of Okey, J.; Union Cent. L. Ins. Co. v. Curtis, 35 Ohio St. 343, 357; Union Cent. L. Ins. Co. v. Jones, 35 Ohio St. 351; Union Cent. L. Ins. Co. v. Sutphin, 35 Ohio St. 360.

Upon the ground that where a corporation receives and retains the full benefit of a contract, and a failure to perform on its side would result in palpable injustice to the other contracting party, it is estopped from escaping liability thereunder through a plea of *ultra vires*, it has been held that an insurance company that has received premiums or assessments on policies issued by it cannot set up the defense of *ultra vires* to actions on such policies. Denver F. Ins. Co. v. McClelland, 9

Colo. 11; Matt v. Roman Catholic Mut. Protective Soc., 70 Iowa 455.

4. See the title DISSOLUTION OF CORPORATIONS vol. 9, p. 561.

5. *Court Cannot Take Funds from Trustee.* — In proceedings for the voluntary dissolution of an insurance company the court has power to decree the distribution of its funds among those entitled thereto, but it has no power to order a trustee to pay over to the receiver appointed in such proceedings funds placed in his hands by the company, pursuant to a contract obligation, for the security of the members or policy holders. Matter of Home Provident Safety Fund Assoc., 129 N. Y. 288.

The Provision of the New York Statute declaring void all transfers of choses in action or other assets of a corporation, made after the filing of a petition for a dissolution thereof, in payment of or as security for a debt does not apply to the extinguishment or satisfaction of the chose in action. Hence where, after the filing of a petition by a mutual insurance company, the maker of a premium note paid an assessment thereon and surrendered his policy under an agreement with the authorized agent of the company for the surrender and extinguishment of the note, it was held that the transaction was valid and the note was extinguished. Sands v. Hill, 55 N. Y. 18.

6. See the title DISSOLUTION OF CORPORATIONS, vol. 9, p. 574.

7. *Forfeiture of Charter at Common Law.* — Ward v. Farwell, 97 Ill. 594.

Nonuser. — An insurance company does not forfeit its charter because of nonuser by refusing to insure against extra-hazardous risks. Corwin v. Urbana, etc., Mut. Ins. Co., 14 Ohio 6.

Enforcing Termination of Contracts in Equity. — Where insurance companies become insolvent, policy holders generally become creditors of the company for the present value of their policies. Even where the company is not technically insolvent, if it has ceased for a long time to do new business and merely retains money sufficient to pay existing policies as they mature, the policy holders cannot be compelled to remain bound to a moribund con-

(b) **By Statute** — *aa.* AT SUIT OF CREDITOR OR STOCKHOLDER. — In some of the United States there are statutes which provide that when insurance companies become insolvent, courts having jurisdiction may, at the suit of a creditor or stockholder, enjoin them from continuing their business and may appoint a receiver to wind up their affairs. In most of the states there are similar statutes relating to private corporations, and such statutes apply to insurance companies although such companies are not expressly mentioned.¹ Some of the provisions of these statutes have received the interpretation of the courts.²

bb. UPON PETITION OF OFFICER DESIGNATED BY STATUTE — (*aa*) *Text of Statutes.* — By statute in a number of states it is provided in substance that if, after an examination by the insurance commissioner or other officer mentioned by the statute into the affairs of an insurance company, and upon his petition, or upon the petition of the attorney-general on his information³ to the proper court, and a hearing thereon, at which the company has an opportunity to defend, it shall appear that the company is insolvent, or that its condition is such as to render its continuance in business hazardous to the public or to those who do business with it, or that it has exceeded its corporate powers, or that it has violated the rules, restrictions, or conditions prescribed by law, the court may suspend, restrain, or prohibit the further continuance of business by the company and appoint a receiver or receivers to wind up its affairs.⁴

(*bb*) *Constitutionality.* — Such a statute is constitutional. It does not impair the obligation of the contract which the company by its charter has with the state, as in all such charters there is an implied condition that the privileges and franchises conferred upon the corporation shall not be abused or so employed as to defeat the ends for which it is established, and that when so abused or misemployed they may be withdrawn or reclaimed by the state by proper legal proceedings. Nor does such a statute impair the obligation of the contracts of the corporation with its creditors and policy holders.⁵ Nor does it deny to the corporation the equal protection of the laws,⁶ or deprive it of its property without due process of law.⁷

(*cc*) *Construction.* — These statutes, like all statutes of a penal nature, must be strictly construed, and the facts of the particular case must be brought

cern, and a court of equity will enforce the termination of their contracts and the payment to them of the present value of their policies. *Ingersoll v. Missouri Valley L. Ins. Co.*, 37 Fed. Rep. 530.

1. **Insurance Companies Included in Statute Though Not Expressly Mentioned.** — *Streit v. Citizens F. Ins. Co.*, 29 N. J. Eq. 21.

2. **That an Insurance Company Has Ceased to Do Business as Such,** that it has reinsured its risks, and that its officers are engaged merely in collecting its assets and paying its debts, are not sufficient reasons for appointing a receiver or issuing an injunction under the *New Jersey* statute. *Streit v. Citizens F. Ins. Co.*, 29 N. J. Eq. 22.

For a construction of the particular provisions of certain statutes, see also *Osgood v. Maguire*, 61 N. Y. 524; *In re Oshkosh Mut. F. Ins. Co.*, 77 Wis. 366.

3. **Under the New York Act of 1853, § 17,** application for a dissolution of an insurance company could be made only by the attorney-general; a stockholder could not make such application. *Fisher v. World Mut. L. Ins. Co.*, (Supm. Ct. Spec. T.) 15 Abb. Pr. N. S. (N. Y.) 363.

4. **But under the California Statute** (Pol. Code,

§ 601), the court, in decreeing the dissolution of a company, has no power to appoint a receiver or assume control of its effects. *State Investment, etc., Co. v. San Francisco*, 101 Cal. 135.

5. **Obligation of Contract Not Impaired.** — *Chicago L. Ins. Co. v. Needles*, 113 U. S. 574; *Ward v. Farwell*, 97 Ill. 593; *Chicago L. Ins. Co. v. Auditor*, 101 Ill. 82.

6. **No Denial of Equal Protection of Laws.** — *Chicago L. Ins. Co. v. Needles*, 113 U. S. 574.

7. **No Deprivation of Property Without Due Process of Law.** — *Chicago L. Ins. Co. v. Needles*, 113 U. S. 574; *Ward v. Farwell*, 97 Ill. 593; *Chicago L. Ins. Co. v. Auditor*, 101 Ill. 82; *Atty.-Gen. v. North America L. Ins. Co.*, 82 N. Y. 172.

Illinois Statute Constitutional. — The Illinois statute of February 17, 1874, which applies alike to all insurance companies, is not a special law regulating the practice in courts of justice within the prohibition of the state Constitution of 1870, art. 4, § 22. *Chicago L. Ins. Co. v. Auditor*, 101 Ill. 82. Nor is this statute void because it does not expressly provide for a trial by jury, as the action, both in its procedure and in its nature and effect, is an equitable one. *Ward v. Farwell*, 97 Ill. 593.

clearly within the language of the statute.¹

Rights of Creditors. — The decree under these statutes dissolving the corporation and appointing a receiver is in the nature of a judgment in favor of all the creditors, and they are entitled to come in on the distribution and to be heard in respect to their claims, and are subject to the summary jurisdiction of the court in matters pertaining to the administration of the estate of the insolvent corporation.²

(*dd*) **Penalty of Statute Cannot Be Avoided by Voluntary Assignment.** — An insurance company that, by insolvency or a violation of the law, has brought itself within the operation of the statute cannot escape therefrom by a voluntary assignment of its property, though made with the consent of the stockholders.³

cc. STANDARD OF SOLVENCY REQUIRED BY STATUTES. — The law requires a higher standard of solvency in an insurance company than that its assets shall be sufficient to meet and pay its matured liabilities. It requires that its assets shall be equal to all its liabilities, whether due or not due.⁴

1. California Statute Does Not Supersede State Insolvent Act. — *State Investment, etc., Co. v. San Francisco*, 101 Cal. 135.

The Condition of a Company Rendering Its Continuance in Business Hazardous to the Insured and the Public justifies dissolution under the Illinois law. *Chicago L. Ins. Co. v. Auditor*, 101 Ill. 82.

Where an Action to Wind Up the Company by Creditors and Stockholders Is Pending, an application made by the attorney-general under the provisions of the *Wisconsin* statute to effect the same purpose was held to have been properly denied. *In re Oshkosh Mut. F. Ins. Co.*, 77 Wis. 366.

The Court Cannot Order Dissolution Without a Hearing on the Merits under the *Illinois* Act of 1874. *Ward v. Farwell*, 97 Ill. 593.

An Offer by an Insurance Company to Reinsure in other companies for its policy holders is no defense to a proceeding under the *Illinois* statute. *Chicago L. Ins. Co. v. Auditor*, 101 Ill. 82.

No Defense that Mismanagement Is Attributable to Secretary Alone. — *Chicago L. Ins. Co. v. Auditor*, 101 Ill. 82.

Control of Company's Securities. — Under the *Missouri* statute, when the court dissolves a company and proceeds to wind up its affairs, as a necessary incident it takes possession, through its receiver, of the company's securities. The superintendent of insurance has no control of the securities as trustee, but it is the duty of the court to distribute among those entitled to it the property of the company dissolved. *Relfe v. Spear*, 6 Mo. App. 129; *Relfe v. Columbia L. Ins. Co.*, 11 Mo. App. 374.

Under the California Statute of March 26, 1868, the insurance commissioner might legally require an insurance company ascertained by him to be insolvent to repair its capital stock without revoking its certificate. *Palache v. Pacific Ins. Co.*, 42 Cal. 418.

For the construction of some of the peculiar provisions of the statutes see also *Fry v. Charter Oak L. Ins. Co.*, 31 Fed. Rep. 197; *Stedman v. American Mut. L. Ins. Co.*, 45 Conn. 377; *Ward v. Farwell*, 97 Ill. 593; *Relfe v. Commercial Ins. Co.*, 5 Mo. App. 173, affirmed 75 Mo. 388; *Relfe v. Spear*, 6 Mo. App. 129; *People v. Chapman*, 64 N. Y. 557; *Atty.-Gen. v. North America L. Ins. Co.*, 92 N. Y. 654;

Ruggles v. Chapman, 59 N. Y. 163, affirming 1 Hun (N. Y.) 324, 2 Thomp. & C. (N. Y.) 600; *People v. American Steam Boiler Ins. Co.*, 147 N. Y. 25, reversing 87 Hun (N. Y.) 229, 81 Hun (N. Y.) 498; *Atty.-Gen. v. Atlantic Mut. L. Ins. Co.*, 77 N. Y. 336, affirming 15 Hun (N. Y.) 84; *Smith v. Hopkins*, 10 Wash. 77.

2. Atty.-Gen. v. Guardian Mut. L. Ins. Co., 77 N. Y. 272.

3. Company Cannot Escape Operation of Statute by Voluntary Assignment. — *Relfe v. Commercial Ins. Co.*, 5 Mo. App. 173, affirmed 75 Mo. 388.

In *Stedman v. American Mut. L. Ins. Co.*, 45 Conn. 377, it was held to be no answer to a petition under the statute that by legislative permission the company had transferred all its assets to another company, which had assumed all its liabilities, so long as the holders of the policies had not assented to the arrangement.

But in *Alexander v. Williams*, 14 Mo. App. 14, it was held that a transaction made in good faith, whereby an insurance corporation, not alleged to be insolvent, having a controlling interest in another corporation, after the demand of a special statement from the latter by the superintendent of insurance, delayed that statement, and, without removing the assets of either corporation from the reach of the superintendent, proceeded to reinsure the risks of the second company, absorbing its assets *pro rata* as it assumed its burdens, was not necessarily void as in fraud of the statute or as against public policy.

Though the Law Relates Only to Insurance Companies Doing Business in the State, a company that has violated and acted in fraud of the statute while doing business in the state cannot avoid its penalties by making an assignment or by ceasing to take new risks or by any other subterfuge resorted to for the purpose of evading the statute. *Relfe v. Commercial Ins. Co.*, 5 Mo. App. 173, affirmed 75 Mo. 388.

4. Standard of Solvency Required. — *Chicago L. Ins. Co. v. Auditor*, 101 Ill. 82.

Company Held Insolvent. — See *State v. Equitable Indemnity Assoc.*, 18 Wash. 514.

Guaranty Fund Not Reckoned with Assets to Determine Question of Solvency. — *Russell v. Bristol*, 49 Conn. 251.

Good Will of Company Not an Asset. — *Chicago L. Ins. Co. v. Auditor*, 101 Ill. 82.

(3) *Rights and Duties of Receivers.* — Primarily the receiver of an insolvent insurance company represents the corporation; it is his duty to collect and preserve its assets and property, and to do with them as he may be directed by the court.¹ He possesses whatever rights the corporation possessed and might enforce against its directors or trustees for misfeasance or nonfeasance in office. He is also the trustee of, and represents, the creditors, stockholders, and all interested in the property and assets of the corporation, including policy holders.²

h. FOREIGN COMPANIES — (1) Authority to Transact Business — (a) In General. — The authority of an insurance company to transact business is strictly local, and does not extend as a matter of legal right beyond the state or country in which it is created. It is only by comity that such companies are permitted to do business and make contracts in countries other than that of their creation. There are statutes in most of the civilized states extending this right to foreign companies upon their complying with certain prescribed conditions.³

1. Powers of Appointing Court. — Where a receiver is appointed for an insolvent insurance company, the court making the appointment exercises, at its discretion, the powers of the board of directors as well as such additional authority as is conferred upon it by statute. *Rand v. Mutual F. Ins. Co.*, 58 Ill. App. 528. See generally the title RECEIVERS.

2. Powers and Duties of Receivers. — *Meley v. Whitaker*, 61 N. J. L. 602, *affirming* 61 N. J. L. 1; *Atty.-Gen. v. Guardian Mut. L. Ins. Co.*, 77 N. Y. 272; *Mason v. Henry*, 152 N. Y. 529.

The Receiver Has Power to Levy and Collect Assessments on a Premium Note where, by the terms of the note, such power was vested in the directors. *Meley v. Whitaker*, 61 N. J. L. 602, *affirming* 61 N. J. L. 1.

As to the Rights of the Liquidator of an Amalgamated Company under the *English* law, see *In re Albert L. Assur. Co.*, L. R. 11 Eq. 164, 40 L. J. Ch. 166, 23 L. T. N. S. 726, 19 W. R. 321.

Receiver's Right to Securities Deposited with Superintendent of Insurance. — *Under the New York Statutes* the receiver of an insurance company, unless it be a company issuing registered policies and annuity bonds, cannot compel the superintendent of insurance to deliver to him the securities deposited with him by the company under the provisions of the statute requiring such deposit for the security of policy holders, until the rights of the policy holders have been settled. *Ruggles v. Chapman*, 59 N. Y. 163, *affirming* 1 Hun (N. Y.) 321, 2 Thomp. & C. (N. Y.) 600; *Atty.-Gen. v. North America L. Ins. Co.*, 92 N. Y. 654; *People v. Chapman*, 64 N. Y. 557; *People v. American Steam Boiler Ins. Co.*, 147 N. Y. 25, *reversing* 87 Hun (N. Y.) 229, 81 Hun (N. Y.) 493; *Matter of Guardian Mut. L. Ins. Co.*, 13 Hun (N. Y.) 115, *affirmed* 74 N. Y. 617. Nor is he entitled to receive from the superintendent of insurance the interest collected on the securities deposited. *People v. American Steam Boiler Ins. Co.*, 147 N. Y. 25, *reversing* 87 Hun (N. Y.) 229, 81 Hun (N. Y.) 493. But under the special provisions of the New York statute (Laws 1892, c. 690, § 76; Laws 1899, c. 902, §§ 7, 8), the receiver of an insolvent company which issued registered policies and annuity bonds is entitled to receive from the superintendent of insurance the securities de-

posited with him for the protection of the policy holders. *Atty.-Gen. v. North American L. Ins. Co.*, 80 N. Y. 152, 82 N. Y. 172, 85 N. Y. 485; *Smyth v. Munroe*, 84 N. Y. 354; *People v. American Steam Boiler Ins. Co.*, 147 N. Y. 25, *reversing* 87 Hun (N. Y.) 229, 81 Hun (N. Y.) 493.

Minnesota Statute. — An attempted exchange by the insurance commissioner of securities deposited with him by an insurance company for the protection of policy holders under the provisions of the Minnesota statute (Gen. Stat. 1894, § 3332), not made in the manner required by the statute, is void; and a receiver appointed upon the company's becoming insolvent, in order to recover the securities unlawfully exchanged, is required only to tender back such of the securities received in the exchange as have come into his possession. *Hayne v. Metropolitan Trust Co.*, 67 Minn. 245.

As to the Duties and Compensation of an Actuary appointed by a receiver of an insurance company, pursuant to the provisions of Laws *New York*, 1869, c. 902, see *Matter of North American L. Ins. Co.*, (Supm. Ct. Spec. T.) 55 How. Pr. (N. Y.) 465.

By Whom Costs of Realizing Assets Are to Be Borne. — A company granted policies of assurance, by the terms of which the assured had no claim against the shareholders beyond the amount unpaid on their shares. Under the winding up, the assets of the company, including the full amount payable on the shares, were applied to paying the policy holders and the general creditors *pro rata*. It was held that the costs of realizing the assets, in the course of a winding up by the court, ought to be treated as a part of the costs of the winding up, and should be borne wholly by the shareholders. *In re Professional L. Assur. Co.*, L. R. 3 Ch. 167, 17 L. T. N. S. 631, 16 W. R. 295, *affirming* L. R. 3 Eq. 668.

Special Security Fund Not Chargeable with Costs Incurred in Administering General Fund. — Where an insurance company that has created a special trust fund as security for policy holders becomes insolvent, such fund is not chargeable with any part of the costs or commissions incurred in administering the general fund. *American Casualty Ins. Co.'s Case*, 82 Md. 535.

3. Authority of Foreign Companies to Transact Business. — *Paul v. Virginia*, 8 Wall. (U. S.) 168;

(b) In United States — *aa.* RULE STATED. — In the United States an insurance company's authority to transact business is restricted to the state in which it is incorporated, and it cannot transact business in any other state without the consent of such state, express or implied. This consent may be accompanied by such terms, conditions, and restrictions as the state may think proper to impose, if not repugnant to the Constitution or laws of the United States,¹ or inconsistent with those rules of public law which secure the jurisdiction and authority of each state from encroachment from all others, or that principle of natural justice which forbids condemnation without opportunity for defense.² But if there is no statute prohibiting or imposing conditions upon

Lamb v. Lamb, 13 Nat. Bankr. Reg. 17; *Barnes v. People*, 168 Ill. 425; *List v. Com.*, 118 Pa. St. 322; *Knorr v. Home Ins. Co.*, 25 Wis. 143, 3 Am. Rep. 26; *Duff v. Canadian Mut. F. Ins. Co.*, 27 Grant Ch. (U. C.) 391, following *Howe Mach. Co. v. Walker*, 35 U. C. Q. B. 37. Compare *Genesee Mut. Ins. Co. v. Westman*, 8 U. C. Q. B. 487. *Clarke v. Union F. Ins. Co.*, 10 Ont. Pr. 313.

The legislative enactments of a country have no binding force *proprio vigore* in another country, and a legislature cannot authorize corporations created by it to carry on business in a foreign country. Where, however, a legislature assumes so to do, such authority is only legislative sanction to the agreement of the incorporators to transact their business abroad as well as at home. *Clarke v. Union F. Ins. Co.*, 10 Ont. Pr. 313.

1. Rule in the United States — *United States*. — *Berry v. Knights Templars*, etc., L. Indemnity Co., 46 Fed. Rep. 440, affirmed 50 Fed. Rep. 511, 4 U. S. App. 353; *Wall v. Equitable L. Assur. Soc.*, 32 Fed. Rep. 273, affirmed 140 U. S. 226; *Doyle v. Continental Ins. Co.*, 94 U. S. 535; *Philadelphia F. Assoc. v. New York*, 119 U. S. 110; *Paul v. Virginia*, 8 Wall. (U. S.) 168; *Lafayette Ins. Co. v. French*, 18 How. (U. S.) 404; *Ducat v. Chicago*, 10 Wall. (U. S.) 410; *Hooper v. California*, 155 U. S. 648; *Lamb v. Lamb*, 13 Nat. Bankr. Reg. 17; *Northwestern Mut. L. Ins. Co. v. Overholt*, 4 Dill. (U. S.) 287; *Metropolitan L. Ins. Co. v. McNall*, 81 Fed. Rep. 888, *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. (U. S.) 566; *Fletcher v. New York L. Ins. Co.*, 13 Fed. Rep. 526; *Lamb v. Bowser*, 7 Biss. (U. S.) 315; *Ehrman v. Teutonia Ins. Co.*, 1 Fed. Rep. 471. *Illinois*. — *Barnes v. People*, 168 Ill. 425; *Indiana Millers' Mut. F. Ins. Co. v. People*, 65 Ill. App. 355; *Buell v. Breese Mill, etc.*, Co., 65 Ill. App. 271; *Cincinnati Mut. Health Assur. Co. v. Rosenthal*, 55 Ill. 85, 8 Am. Rep. 626.

Indiana. — *Wiestling v. Warthin*, 1 Ind. App. 217; *Farmers*, etc., Ins. Co. v. Harrah, 47 Ind. 236; *Phenix Ins. Co. v. Burdett*, 112 Ind. 204.

Iowa. — *Parker v. Lamb*, 99 Iowa 265. *Kansas*. — *Phoenix Ins. Co. v. Welch*, 29 Kan. 672.

Kentucky. — *Franklin Ins. Co. v. Louisville, etc., Packet Co.*, 9 Bush (Ky.) 590.

Louisiana. — *State v. Allgeyer*, 48 La. Ann. 104; *State v. Williams*, 46 La. Ann. 922.

Michigan. — *Home Ins. Co. v. Davis*, 29 Mich. 238; *People v. Judge*, 21 Mich. 577, 4 Am. Rep. 504; *People v. Howard*, 50 Mich. 239; *American Ins. Co. v. Stov*, 41 Mich. 385; *People v. Gay*, 107 Mich. 422; *Hartford F. Ins. Co. v. Raymond*, 70 Mich. 485.

Minnesota. — *Seamans v. Christian Bros. Mill Co.*, 66 Minn. 205.

Mississippi. — *Moses v. State*, 65 Miss. 56.

New York. — *People v. Imlay*, 20 Barb. (N. Y.) 68.

Pennsylvania. — *List v. Com.*, 118 Pa. St. 322.

Vermont. — *Lycoming F. Ins. Co. v. Wright*, 55 Vt. 526.

Wisconsin. — *State v. Doyle*, 40 Wis. 175, 22 Am. Rep. 692; *Morse v. Home Ins. Co.*, 30 Wis. 496, 11 Am. Rep. 580; *Knorr v. Home Ins. Co.*, 25 Wis. 143, 3 Am. Rep. 26; *Stanhilber v. Mutual Mill Ins. Co.*, 76 Wis. 288; *Ætna Ins. Co. v. Harvey*, 11 Wis. 394; *Milwaukee F. Department v. Helfenstein*, 16 Wis. 136.

2. *Lafayette Ins. Co. v. French*, 18 How. (U. S.) 404.

Status of Company Created in District of Columbia by Congress. — An insurance company created by Act of Congress while Congress was acting as the legislature of the District of Columbia is a "foreign corporation" within the meaning of a state statute imposing upon "foreign corporations" the performance of certain conditions as a prerequisite to their right to transact business in the state. *Daly v. National L. Ins. Co.*, 64 Ind. 1.

Authority of Superintendent of Insurance. — Under the *Kansas* Act of 1889, c. 159, the superintendent of insurance has no power to refuse to a foreign insurance company a certificate of authority to do business in the state if such company is solvent and has fully complied with the laws of the state. *Mutual L. Ins. Co. v. Boyle*, 82 Fed. Rep. 705; *Metropolitan L. Ins. Co. v. McNall*, 51 Fed. Rep. 888. Prior to the passage of this act the superintendent of insurance had discretionary power to grant or withhold such authority. *Dwelling-House Ins. Co. v. Wilder*, 40 Kan. 561.

A *New York* statute provided that the superintendent of insurance might refuse to permit any foreign insurance company to transact business in the state whenever in his judgment such refusal would best promote the interests of the people of the state. Under this statute it was held that where the name of a company seeking to do business in the state bears such a similarity to the name of another company already authorized to do business that confusion will probably result, the superintendent may refuse the authority to do business. *Employers' Liability Assur. Corp. v. Employers' Liability Ins. Co.*, 78 Hun (N. Y.) 416.

Prohibition Extending to Foreign Companies as Well as to Their Agents. — Under the *Indiana* statute of December 21, 1865, the prohibition against doing business in the state without compliance with the statute extended to for-

the transaction of business, the presumption, under the law of comity that prevails between the states of the Union, is that the state permits a company organized in a sister state to do any act authorized by its charter or the law under which it is created, unless such act is obnoxious to the policy of the law of the state.¹

State May Prohibit Citizens Contracting with Unauthorized Foreign Companies. — The power to prohibit foreign insurance companies from doing business in a state until they comply with prescribed conditions necessarily carries with it the right to enforce this power by appropriate legislation. The state, therefore, has the right to prohibit a citizen from making a contract in the state with a foreign company which has not complied with the prescribed conditions.²

bb. CONSTITUTIONALITY OF STATUTES IMPOSING CONDITIONS UPON RIGHT TO TRANSACT BUSINESS — (aa) *Such Statutes Do Not Regulate Commerce.* — A state statute prescribing certain conditions as a prerequisite to the right of a foreign insurance company to transact business in the state is not a regulation of commerce, and therefore is not a violation of that clause of the Constitution of the United States which vests in Congress power "to regulate commerce with foreign nations and among the several states."³

(bb) *Not in Conflict with Citizenship Clause of Federal Constitution.* — Nor is such a statute in conflict with the clause of the Federal Constitution which requires that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."⁴

(cc) *Right to Remove Causes into Federal Courts.* — A corporation is a citizen of the state by which it is created, within that provision of the Constitution of the United States and the laws enacted in pursuance thereof that secure to citizens of another state than that in which suit is brought the right to remove their cases into the federal courts;⁵ and the facts that an insurance company created by the laws of one state does business in another state, in conformity to its laws regulating the transaction of insurance business by foreign companies, and that its agents there are authorized to accept service of process from the courts of the state, do not deprive it of this constitutional right.⁶ Therefore a statute requiring such a company, as a condition precedent to its right to do business in the state, to agree not to remove suits from the state to the federal courts is unconstitutional, and the agreement of a company filed in pursuance of such an unconstitutional act derives no support from it, and is as void as it would be had no such act been passed.⁷

eign insurance companies as well as to the agents of such companies. *Union Cent. L. Ins. Co. v. Thomas*, 46 Ind. 44.

Foreign Companies Cannot, by the Insertion of Clauses in Their Policies of Insurance, withdraw themselves from the operation of a state statute prohibiting them from doing business in the state except upon the performance of certain conditions. *Fletcher v. New York L. Ins. Co.*, 13 Fed. Rep. 526.

1. Presumption under Law of Comity in Absence of Statutory Prohibition. — *Lamb v. Lamb*, 13 Nat. Bankr. Reg. 17; *People v. Fidelity, etc., Co.*, 153 Ill. 25; *Kennebec Co. v. Augusta Ins. Co., etc., Co.*, 6 Gray (Mass.) 204.

2. State v. Williams, 46 La. Ann. 922; *State v. Allgever*, 48 La. Ann. 101.

3. Statutes Imposing Conditions Do Not Violate Commerce Clause of Federal Constitution. — *Philadelphia F. Assoc. v. New York*, 119 U. S. 110; *Paul v. Virginia*, 8 Wall. (U. S.) 168; *Ducat v. Chicago*, 10 Wall. (U. S.) 410; *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. (U. S.) 566; *Cincinnati Mut. Health Assur. Co. v. Rosenthal*, 55 Ill. 85, 8 Am. Rep. 626; *Barnes v. People*, 168 Ill. 425; *People v. Gay*, 107 Mich. 422; *People v. Imlay*, 20 Barb. (N. Y.) 68; *Stanhilber v. Mutual Mill Ins. Co.*, 76 Wis. 285.

4. Such Statutes Not in Conflict with Citizenship Clause of Constitution. — *Paul v. Virginia*, 8 Wall. (U. S.) 168; *Philadelphia F. Assoc. v. New York*, 119 U. S. 110; *Ducat v. Chicago*, 10 Wall. (U. S.) 410; *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. (U. S.) 566; *Cincinnati Mut. Health Assur. Co. v. Rosenthal*, 55 Ill. 85, 8 Am. Rep. 626; *Barnes v. People*, 168 Ill. 425; *People v. Gay*, 107 Mich. 422; *People v. Imlay*, 20 Barb. (N. Y.) 68; *Stanhilber v. Mutual Mill Ins. Co.*, 76 Wis. 285. Compare *Hoadley v. Purifoy*, 107 Ala. 276.

5. Right under Constitution to Remove Cases into Federal Courts. — *Home Ins. Co. v. Morse*, 20 Wall. (U. S.) 445; *De Camp v. New Jersey Mut. L. Ins. Co.*, 2 Sweeny (N. Y.) 481; *Stevens v. Phoenix Ins. Co.*, 41 N. Y. 149, reversing (Supm. Ct. Spec. T.) 24 How. Pr. (N. Y.) 517; *Knorr v. Home Ins. Co.*, 25 Wis. 143, 3 Am. Rep. 26.

6. De Camp v. New Jersey Mut. L. Ins. Co., 2 Sweeny (N. Y.) 481; *Stevens v. Phoenix Ins. Co.*, 41 N. Y. 149, reversing (Supm. Ct. Spec. T.) 24 How. Pr. (N. Y.) 517; *Knorr v. Home Ins. Co.*, 25 Wis. 143, 3 Am. Rep. 26.

7. Home Ins. Co. v. Morse, 20 Wall. (U. S.)

cc. VARIOUS CONDITIONS PRESCRIBED — (aa) *In General*. — In pursuance of the power to impose conditions upon foreign companies seeking to do business in the state, statutes have been enacted in nearly all of the United States.

(bb) *License and What Is Required to Obtain It*. — An almost universal condition prescribed by these statutes is that the foreign company or its agents shall obtain from the proper officer a license or certificate of authority to transact business in the state.¹ For this license the payment of a fee is usually required,² and in some states it is required that the certificate of authority be filed with the proper officer of a county in which the company transacts business.³ A compliance with certain conditions is usually required by these statutes as a prerequisite to obtaining the license, and a license issued before such compliance is a nullity.⁴ Some of these conditions are that the company shall file with the proper officer a copy of its charter⁵ or a statement of its financial condition;⁶ that it shall deposit with the state in which it seeks to do business⁷ or with the state in which it was organized⁸ a fund for the

445, reversing 30 Wis. 496; *Doyle v. Continental Ins. Co.*, 94 U. S. 535; *Metropolitan L. Ins. Co. v. McNall*, 81 Fed. Rep. 888; *Railway Pass. Assur. Co. v. Pierce*, 27 Ohio St. 155, approving *New York L. Ins. Co. v. Best*, 23 Ohio St. 105, which held *contra*, but departing from it in deference to the decision of the Supreme Court of the United States. See also *Barron v. Burnside*, 121 U. S. 199. *Contra*, *Home Ins. Co. v. Davis*, 29 Mich. 238; *People v. Judge*, 21 Mich. 577, 4 Am. Rep. 504; *State v. Doyle*, 45 Wis. 175, 22 Am. Rep. 692. See *Continental Ins. Co. v. Kasey*, 27 Gratt. (Va.) 216.

1. **License or Certificate of Authority to Transact Business** — *United States*. — *Paul v. Virginia*, 8 Wall. (U. S.) 168.

Alabama. — *Noble v. Mitchell*, 100 Ala. 519.
Colorado. — *French v. People*, 6 Colo. App. 311.

Illinois. — *Cincinnati Mut. Health Assur. Co. v. Rosenthal*, 55 Ill. 85, 8 Am. Rep. 626; *Indiana Millers' Mut. F. Ins. Co. v. People*, 65 Ill. App. 355; *People v. Fesler*, 145 Ill. 150.

Indiana. — *Union Cent. L. Ins. Co. v. Thomas*, 46 Ind. 44; *Farmers', etc., Ins. Co. v. Harrah*, 47 Ind. 236; *American Ins. Co. v. Pettijohn*, 62 Ind. 382.

Maine. — *Scottish Commercial Ins. Co. v. Plummer*, 70 Me. 540.

Massachusetts. — *Com. v. Wetherbee*, 105 Mass. 149.

Minnesota. — *State v. Johnson*, 43 Minn. 350.

Ohio. — *State v. Ackerman*, 51 Ohio St. 163.

Vermont. — *Lycoming F. Ins. Co. v. Wright*, 55 Vt. 526.

When Issuance of License May Be Proved by Parol. — Where there is no law requiring a license or the recording of the fact that a license has been issued, it is competent, when its loss has been shown, to prove by parol that a license has been issued. *Lycoming F. Ins. Co. v. Wright*, 60 Vt. 515.

Indiana Statute Applies Only to Incorporated Companies. — The Indiana statute, Burns's Annot. Stat. 1894, § 4915 (Horner's Stat. 1896, § 3765), which forbids an agent "of any insurance company incorporated by any other state" to transact business without a license, applies only to incorporated companies. *State v. Campbell*, 17 Ind. App. 442.

The District of Columbia is a "state"

within the meaning of this statute. *State v. Briggs*, 116 Ind. 55.

2. **License Fee**. — *Philadelphia F. Assoc. v. New York*, 119 U. S. 110; *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. (U. S.) 566; *Hoadley v. Purifoy*, 107 Ala. 276; *Phoenix Ins. Co. v. Welch*, 29 Kan. 672; *Hartford F. Ins. Co. v. State*, 9 Kan. 210; *New Orleans v. Salamander Ins. Co.*, 25 La. Ann. 650; *Travelers' Ins. Co. v. Fricke*, 94 Wis. 258.

Liability for Interest on License Fee. — A company that does not pay its license fee when due is liable for the interest on such fee at the legal rate from the date when it became due. *Travelers' Ins. Co. v. Fricke*, 99 Wis. 367.

3. *American Ins. Co. v. Pettijohn*, 62 Ind. 382.

4. **License Null if Issued Before Complying with Conditions**. — *Hartford F. Ins. Co. v. State*, 9 Kan. 210.

5. **Company Required to File Copy of Charter**. — *Parker v. Lamb*, 99 Iowa 265; *General Mut. Ins. Co. v. Phillips*, 13 Gray (Mass.) 90; *State v. Rotwitt*, 17 Mont. 41; *Palatine Ins. Co. v. Crittenden*, 18 Mont. 413.

6. **Filing of Statement of Financial Condition Required**. — *Ehrman v. Teutonia Ins. Co.*, 1 Fed. Rep. 471; *Hoadley v. Purifoy*, 107 Ala. 276; *Cincinnati Mut. Health Assur. Co. v. Rosenthal*, 55 Ill. 85, 8 Am. Rep. 626; *Parker v. Lamb*, 99 Iowa 265; *People v. McCann*, 67 N. Y. 506; *Etna Ins. Co. v. Harvey*, 11 Wis. 394.

7. **Deposit with State for Security of Policy Holders**. — *Ehrman v. Teutonia Ins. Co.*, 1 Fed. Rep. 471; *Paul v. Virginia*, 8 Wall. (U. S.) 168; *People v. Fidelity, etc., Co.*, 153 Ill. 25; *Employers' Liability Assur. Co. v. Insurance Com'r*, 64 Mich. 614; *Rensenhous v. Seeley*, 72 Mich. 603; *State v. Gates*, 67 Mo. 496; *People v. New England Mut. L. Ins. Co.*, 26 N. Y. 303; *People v. Miller*, 56 N. Y. 449; *Continental Ins. Co. v. Kasey*, 27 Gratt. (Va.) 216.

8. *Cooke v. Warner*, 56 Conn. 234; *State v. Benton*, 25 Neb. 834.

Foreign Company Merely Licensed to Do Business in State Not "Organized" in That State. — Where a statute of one of the United States requires foreign companies to deposit a fund with the state in which they are "organized,"

security of policy holders;¹ that it shall appoint an agent or attorney in the state upon whom legal process may be served;² or constitute the insurance commissioner³ or superintendent of insurance⁴ its attorney to accept service of process;⁵ that it shall become responsible for the acts and neglects of its agents;⁶ that it shall enter into an agreement not to make any contract with any other insurance company to prevent competition between the two companies;⁷ and that it shall possess a certain amount of capital.⁸

a company formed under the laws of a foreign government cannot be considered as organized in another state of the Union where it is merely licensed to do business, so as to meet the requirements of the statute, by a deposit made with such other state. *Employers' Liability Assur. Co. v. Insurance Com'r*, 64 Mich. 614.

1. Officer with Whom Deposit Is Made Not Liable to Be Seized as Garnishee. — *Rollo v. Andes Ins. Co.*, 23 Gratt. (Va.) 509, 14 Am. Rep. 147.

Amount Deposited in Excess of Minimum Required Bound by Trust. — *Lancashire Ins. Co. v. Maxwell*, 131 N. Y. 286, affirming 61 Hun (N. Y.) 360, reversing 5 N. Y. Supp. 399.

For Whose Protection Deposit Required by Mississippi Statute Was Intended. — The fund required by the Mississippi statute, Code 1871, c. 55, art. 8, to be deposited in the state treasury by a foreign insurance company was intended as a security to protect policies issued to citizens of the state by agents appointed in the mode prescribed by the statute and doing business in the state. Therefore, if a citizen of the state took out a policy in a foreign company from an agent residing and doing business out of the state, he had no claim upon such deposit. *Piedmont, etc., L. Ins. Co. v. Wallin*, 58 Miss. 1.

2. Appointment of Agent or Attorney to Receive Process. — *United States*. — *Northwestern Mut. L. Ins. Co. v. Elliott*, 7 Sawy. (U. S.) 17; *Dixon v. Order of R. Conductors*, 49 Fed. Rep. 910; *Lafayette Ins. Co. v. French*, 18 How. (U. S.) 404.

Illinois. — *Cincinnati Mut. Health Assur. Co. v. Rosenthal*, 55 Ill. 85, 8 Am. Rep. 626.

Indiana. — *Lamb v. Lamb*, 13 Nat. Bankr. Reg. 17; *Byers v. Union Cent. L. Ins. Co.*, 17 Ind. App. 101.

Maryland. — *Oland v. Agricultural Ins. Co.*, 69 Md. 248.

Michigan. — *People v. Gay*, 107 Mich. 422.

Virginia. — *Continental Ins. Co. v. Kasey*, 27 Gratt. (Va.) 216.

Wisconsin. — *Morse v. Home Ins. Co.*, 30 Wis. 496, 11 Am. Rep. 580.

See also *Lamb v. Bowser*, 7 Biss. (U. S.) 315.

3. Connecticut Mut. L. Ins. Co. v. Spradley, 99 Tenn. 322.

4. Dougan v. Sun Fire Office, 39 Mo. App. 676.

5. Under the Arkansas Statute (Act of April 25, 1873), a foreign insurance company was required to file with the auditor a stipulation that service might be made on the auditor or an agent designated. *Ehrman v. Teutonia Ins. Co.*, 1 Fed. Rep. 471; *St. Louis, etc., R. Co. v. Commercial Union Ins. Co.*, 139 U. S. 223; *Maine Ins. Co. v. St. Louis, etc., R. Co.*, 41 Fed. Rep. 643; *Rothrock v. Dwelling-House Ins. Co.*, 161 Mass. 423, 42 Am. St. Rep. 418. The statute of this state (Acts of 1887, p. 234)

requiring foreign corporations to file with the secretary of state a certificate designating an agent upon whom service might be made did not apply to insurance companies. *St. Louis, etc., R. Co. v. Commercial Union Ins. Co.*, 139 U. S. 223; *Maine Ins. Co. v. St. Louis, etc., R. Co.*, 41 Fed. Rep. 643.

Effect of Constituting Insurance Commissioner Attorney to Receive Process. — A stipulation filed by a foreign insurance company in compliance with a statute requiring such company, before doing business in the state, to file a stipulation agreeing that any legal process affecting such company served on the insurance commissioner should have the same effect as if personally served on the company, does not give to the company a domicile in the state for all purposes, or bring into the state the situs of a debt which it owes elsewhere by reason of business transacted elsewhere. *Swedish-American Nat. Bank v. Bleeker*, 72 Minn. 383.

Conclusive Presumption of Compliance with Statute. — When a foreign insurance company is shown to have transacted business in a state wherein, by statute, it is made a condition precedent to doing business that it shall constitute the insurance commissioner its attorney to accept service of process, and providing that such service shall be binding on it, a conclusive presumption of compliance with the statute arises, and the company may not question the validity of the service. *Sparks v. National Masonic Acc. Assoc.*, 100 Iowa 458.

6. Lycoming F. Ins. Co. v. Wright, 55 Vt. 526.

The Phrase "Laws of the State" in a statute providing that a foreign company shall not transact business in the state unless it is responsible by "the laws of the state" of its residence for the acts and neglects of its agents, includes the common law, as well as the statute laws of the state. *Lycoming F. Ins. Co. v. Wright*, 60 Vt. 515.

7. Hartford F. Ins. Co. v. Raymond, 70 Mich. 485.

8. Possession of Certain Amount of Capital. — *Alabama*. — *Hoadley v. Purifoy*, 107 Ala. 276.

Illinois. — *Cincinnati Mut. Health Assur. Co. v. Rosenthal*, 55 Ill. 85, 8 Am. Rep. 626; *People v. Fidelity, etc., Co.*, 153 Ill. 25.

Iowa. — *State v. Miller*, 66 Iowa 26; *Parker v. Lamb*, 99 Iowa 265.

Massachusetts. — *Williams v. Cheney*, 3 Gray (Mass.) 215; *Atlantic Mut. F. Ins. Co. v. Concklin*, 6 Gray (Mass.) 73.

Nebraska. — *In re Babcock*, 21 Neb. 500.

New York. — *People v. McCann*, 67 N. Y. 506.

Tennessee. — *Mutual F. Ins. Co. v. House*, 69 Tenn. 438.

Vermont. — *Granite State Mut. Aid Assoc. v. Porter*, 58 Vt. 581.

Wisconsin. — *Ætna Ins. Co. v. Harvey*, 11 Wis. 394.

(cc) *Conditions Relating to Form and Legal Effect of Policies.* — The conditions which a state may impose on a foreign company may extend to the form and legal effect of the company's policies; and if, in the course of its business in the state, such a company issues policies on the lives or property of the citizens of the state which contain conditions prohibited by or in contravention of the laws of the state, such conditions are void.¹

(dd) *Retaliatory Legislation.* — In some states there are statutes imposing upon foreign companies seeking to do business in the state the same obligations and prohibitions that are imposed by the laws of the state of their domicile on companies organized under the laws of the state passing the enactment.² Such a statute is a complete and absolute expression of the legislative will, and though its operation depends on the contingency of legislative action in other states, it is not thereby rendered unconstitutional.³

Such a Statute Becomes Operative on the enactment by another state of a statute imposing obligations or prohibitions upon companies created in the former state, though there are no such companies doing business in the latter state.⁴

Construction of Statutes. — Being retaliatory in character, a statute of this nature must be strictly construed.⁵ A foreign company will not be excluded from the state under its provisions unless it clearly appears that the effect of the foreign law in its practical administration would be to exclude similar companies organized under the laws of the state.⁶

(e) *Power of State to Change Conditions of Admission.* — A state having the power to exclude foreign companies entirely has the power to change the conditions of admission at any time for the future.⁷

(d) *Company Charged with Notice of Conditions Imposed.* — A foreign company is bound at its peril to take notice of express provisions of law stating the terms upon which it will be permitted to do business in the state.⁸

1. Statutes Regulating Form and Legal Effect of Policies. — *Berry v. Knights Templars', etc., L. Indemnity Co.*, 46 Fed. Rep. 440, *affirmed* 50 Fed. Rep. 511, 4 U. S. App. 353; *Equitable L. Assur. Soc. v. Clements*, 140 U. S. 226, *affirming* *Wall v. Equitable L. Assur. Soc.*, 32 Fed. Rep. 273; *White v. Connecticut Mut. L. Ins. Co.*, 4 Dill. (U. S.) 177; *National L. Ins. Co. v. State Commissioner*, 25 Mich. 321; *Cross v. Armstrong*, 44 Ohio St. 613.

Doing Business in the State Brings the Policy Within the Operation of Its Laws, notwithstanding the policy may be signed and the loss made payable in another state. In such cases the company cannot, by any contrivance or device whatever, evade the effect and operation of the laws of the state where it is doing business. *Berry v. Knights Templars', etc., L. Indemnity Co.*, 46 Fed. Rep. 440, *affirmed* 4 U. S. App. 353, 50 Fed. Rep. 511; *Equitable L. Assur. Soc. v. Clements*, 140 U. S. 226, *affirming* *Wall v. Equitable L. Assur. Soc.*, 32 Fed. Rep. 273.

2. Retaliatory Statutes. — *Goldsmith v. Home Ins. Co.*, 62 Ga. 379; *Phoenix Ins. Co. v. Welch*, 29 Kan. 672; *State v. Gates*, 67 Mo. 490; *Haverhill Ins. Co. v. Prescott*, 42 N. H. 547, 80 Am. Dec. 123; *Griesa v. Massachusetts Ben. Assoc.*, 133 N. Y. 619, *affirming* (Supm. Ct. Gen. T.) 15 N. Y. Supp. 71; *State v. Moore*, 39 Ohio St. 486; *State v. Reinmund*, 45 Ohio St. 214.

3. Statutes Constitutional. — *Phoenix Ins. Co. v. Welch*, 29 Kan. 672; *Home Ins. Co. v. Swigert*, 104 Ill. 653. See generally the titles CONSTITUTIONAL LAWS, vol. 6, p. 1031; STATUTES.

4. When Statutes Become Operative. — *Germania Ins. Co. v. Swigert*, 128 Ill. 237; *Union Cent. L. Ins. Co. v. Durfee*, 164 Ill. 186; *State v. Fidelity, etc., Co.*, 77 Iowa 648.

5. Construction. — *State v. Fidelity, etc., Ins. Co.*, 49 Ohio St. 440, 34 Am. St. Rep. 573.

6. People v. Fidelity, etc., Co., 153 Ill. 25; *State v. Fidelity, etc., Co.*, 39 Minn. 538. See also *State v. Fidelity, etc., Ins. Co.*, 49 Ohio St. 440, 34 Am. St. Rep. 573.

Where such a retaliatory statute is in force in a state, any conditions, obligations, or prohibitions imposed by the laws of another state upon companies created in the former state and seeking to do business in the latter, not found in the statutes of such former state, will be treated as if found in so many words in such statutes, and will be enforced accordingly. *Talbot v. Fidelity, etc., Co.*, 74 Md. 536.

The Fact that for Twelve Years No Case Has Arisen calling for the enforcement of such a retaliatory statute does not render the statute inoperative or affect its validity as a binding law. *Home Ins. Co. v. Swigert*, 104 Ill. 653.

7. State May Change Conditions of Admission. — Thus a state may impose as a condition the payment of a new tax or further tax as a license fee. If it imposes such a license fee as a prerequisite for the future, the foreign company, until it pays such fee, is not entitled to admission within the state or within its jurisdiction. *Philadelphia F. Assoc. v. New York*, 119 U. S. 110.

8. Company Bound to Take Notice of Conditions Imposed. — *Hartford F. Ins. Co. v. State*, 9 Kan. 210.

(e) **What Constitutes Doing Business Within Meaning of Statutes — Issuing Policy in One State on Property Situated in Another.** — It has been generally held that to issue a policy of insurance in one state to a citizen of another state on property situated there is not to "do business" within the latter state.¹

Taking an Application for Insurance in the state by the agent of a foreign insurance company and forwarding it to the company, which alone had authority to accept or reject the application, at the place of its domicile, where it was accepted, and a policy issued thereon, has been held not to be "doing business" in the state.²

The Delivering of Policies and the Taking of Premium Notes in a state by a person compensated therefor by a foreign company, whether he is an accredited agent of the company or a mere insurance broker, constitutes, if the company has not complied with its requirements, a violation of a statute which prescribes the performance of certain conditions as a prerequisite to the right of foreign companies to transact business in the state.³

Business Not in Line of Insurance Not Prohibited. — A statute which forbids foreign insurance companies to "take any risk or transact any business of insurance" in the state without first complying with the requirements of the statute does not prohibit a company from transacting business not in the line of insurance.⁴

To Adjust a Loss by an agent of a foreign company is not to "transact the business of insurance" in the state.⁵

And to Take Subscriptions to the Stock of a Company or to receive notes given in payment therefor, is not to "take risks" or to "transact any business of insurance."⁶

Where a Foreign Company Takes Securities in a State for debts due it by residents of the state, it is not transacting the business of insurance therein.⁷

1. Insuring Property in Another State Not Doing Business Therein. — *Marine Ins. Co. v. St. Louis, etc., R. Co.*, 41 Fed. Rep. 643; *New Orleans v. Virginia F. & M. Ins. Co.*, 33 La. Ann. 10; *Clay F. & M. Ins. Co. v. Huron Salt, etc., Mfg. Co.*, 31 Mich. 346; *Western Massachusetts Mut. F. Ins. Co. v. Girard Point Storage Co.*, 41 W. N. C. (Pa.) 472. See also *Lamb v. Bowser*, 7 Biss. (U. S.) 315; *Columbia F. Ins. Co. v. Kinyon*, 37 N. J. L. 33.

An agent of an insurance company who keeps his office in one state, and there transacts business, but issues policies on houses in another state, and who, on a single occasion, examines a house in the latter state with a view to its insurance, is not "carrying on" the business of insurance within such latter state within the meaning of a statute prohibiting the carrying on of the insurance business without a license. *Jackson v. State*, 50 Ala. 141.

But in Illinois it has been held that the fact that a contract of insurance on property in that state was made by mail and consummated wholly within another state will not exempt either the foreign company or the agent who procured the application in Illinois from the penalty prescribed by the statute (1 Starr & Curt. Annot. Stat. 1896, c. 73, par. 4) for taking risks or transacting business in the state without a license. *Indiana Millers' Mut. F. Ins. Co. v. People*, 65 Ill. App. 355. See also *Buell v. Breese Mill, etc., Co.*, 65 Ill. App. 271.

And the Prohibition of the Wisconsin Statute (Stat. Wis. 1898, § 1915) that no foreign insurance company "shall directly or indirectly take risks or transact any business of insurance in this state" until it has complied with

the conditions prescribed was held to apply to a contract insuring property within the state, though made outside of the state. *Rose v. Kimberly, etc., Co.*, 89 Wis. 545, 46 Am. St. Rep. 855, *distinguishing* *Seamans v. Knapp*, 89 Wis. 171, 46 Am. St. Rep. 825. See also *Stanhill v. Mutual Mill Ins. Co.*, 76 Wis. 285.

In Mississippi a statute substantially similar to the Wisconsin statute has received a like construction. *Cowan v. London Assur. Corp.*, 73 Miss. 321.

Doing an "Act to Effect Insurance." — The mailing of a letter or telegraphing of a communication in *Louisiana* to a foreign insurance company in another state, by which instantly property is insured and the risk becomes attached, is doing an "act" in Louisiana "to effect insurance" within the prohibition of the statute, Acts 1894, No. 66. *State v. Allgeyer*, 48 La. Ann. 104.

2. Taking Application for Insurance. — *Hacheny v. Leary*, 12 Oregon 40.

3. Delivering Policies and Taking Premium Notes. — *Franklin Ins. Co. v. Louisville, etc., Packet Co.*, 9 Bush (Ky.) 590; *Hacheny v. Leary*, 12 Oregon 40; *Allison v. Robinson*, 15 N. Bruns. 103; *Jones v. Taylor*, 15 N. Bruns. 391. See also *Northwestern Mut. L. Ins. Co. v. Elliott, 7 Sawy. (U. S.) 17*; *Sparks v. National Masonic Acc. Assoc.*, 100 Iowa 458.

4. Boulware v. Davis, 90 Ala. 207.

5. Adjusting Loss. — *People v. Gilbert*, 44 Hun (N. Y.) 522.

6. Taking Subscriptions to Stock. — *Bartlett v. Chouteau Ins. Co.*, 18 Kan. 369.

7. Taking Securities for Debts Due. — *Charter Oak L. Ins. Co. v. Sawyer*, 44 Wis. 387.

Nor Is the Institution of a Suit by a Foreign Company in the courts of a state doing business in the state.¹

(f) **Effect upon Contracts of Noncompliance with Conditions** — *aa. CONTRACTS VOID IN HANDS OF COMPANY.* — Ordinarily where a statute declares that foreign insurance companies shall not transact any business in the state until they have complied with the conditions prescribed by the statute, a contract entered into in the state by a foreign company without complying with such conditions is void, so far as concerns the right of the company or its agents to sue upon it,² and this notwithstanding the statute imposes a penalty upon the company for doing business in the state in violation of its provisions.³ But the whole statute must be examined in order to decide whether it contains anything to indicate that the legislature did not intend to declare a contract made in contravention of its provisions void.⁴

1. Institution of Suit. — St. Louis, etc., R. Co. v. Fire Assoc., 55 Ark. 163.

2. Company Cannot Recover on Contracts Made Without Complying with Conditions — *United States.* — Northwestern Mut. L. Ins. Co. v. Elliott, 7 Sawy. (U. S.) 17; Lamb v. Lamb, 13 Nat. Bankr. Reg. 17.

Delaware. — Beeber v. Walton, 7 Houst. (Del.) 471.

Illinois. — Cincinnati Mut. Health Assur. Co. v. Rosenthal, 55 Ill. 85, 8 Am. Rep. 626; Buell v. Breese Mill, etc., Co., 65 Ill. App. 271.

Iowa. — Parker v. Lamb, 99 Iowa 265; Seamans v. Zimmerman, 91 Iowa 363.

Kansas. — Gilbert v. State Ins. Co., 3 Kan. App. 1.

Kentucky. — Franklin Ins. Co. v. Louisville, etc., Packet Co., 9 Bush (Ky. 590.)

Massachusetts. — Jones v. Smith, 3 Gray (Mass.) 500; Williams v. Cheney, 3 Gray (Mass.) 215, 8 Gray (Mass.) 206; National Mut. F. Ins. Co. v. Pursell, 10 Allen (Mass.) 231; Claflin v. U. S. Credit System Co., 165 Mass. 501, 52 Am. St. Rep. 528.

Michigan. — Seamans v. Temple Co., 105 Mich. 400, 55 Am. St. Rep. 457; People's Mut. Ben. Soc. v. Lester, 105 Mich. 716.

Mississippi. — Cowan v. London Assur., 73 Miss. 321.

New Jersey. — Columbia F. Ins. Co. v. Kinyon, 37 N. J. L. 33; Stewart v. Northampton Mut. Live Stock Ins. Co., 38 N. J. L. 436.

Tennessee. — New Hampshire Ins. Co. v. Kennedy, 96 Tenn. 711.

Vermont. — Lycoming F. Ins. Co. v. Wright, 55 Vt. 526.

Wisconsin. — Rose v. Kimberly, etc., Co., 89 Wis. 545, 46 Am. St. Rep. 855; Aetna Ins. Co. v. Harvey, 11 Wis. 394.

Canada. — Allison v. Robinson, 15 N. Bruns. 103; Jones v. Taylor, 15 N. Bruns. 391.

In Indiana the cases on this subject are in the utmost confusion, and it is impossible to reconcile them. But as was said by Coffey, C. J., in delivering the opinion of the court in *Phenix Ins. Co. v. Pennsylvania R. Co.*, 134 Ind. 215, the Supreme Court of that state "seems to have settled down upon the doctrine that such contracts are not void, but that the right of the corporation to enforce such contracts is suspended until it has complied with the terms of the statute, and that a failure to perform the duty required by law can only be taken advantage of by way of plea in abatement." The following cases support this

rule: *Daly v. National L. Ins. Co.*, 64 Ind. 1; *Behler v. German Mut. F. Ins. Co.*, 68 Ind. 347; *American Ins. Co. v. Wellman*, 69 Ind. 413; *Wiestling v. Warthin*, 1 Ind. App. 217. And see *Walter A. Wood Mowing Mach. Co. v. Caldwell*, 54 Ind. 270, 23 Am. Rep. 641; *Singer Mfg. Co. v. Effinger*, 79 Ind. 264; *Finch v. Travellers' Ins. Co.*, 87 Ind. 302; *Elston v. Piggott*, 94 Ind. 14. On the other hand, the following cases support the rule stated in the text: *The Rising Sun Ins. Co. v. Slaughter*, 20 Ind. 520; *Hoffman v. Banks*, 41 Ind. 1; *Union Cent. L. Ins. Co. v. Thomas*, 46 Ind. 44; *Cassaday v. American Ins. Co.*, 72 Ind. 95.

3. Cincinnati Mut. Health Assur. v. Rosenthal, 55 Ill. 85, 8 Am. Rep. 626.

4. Intention of Legislature Must Govern. — *The Manistee*, 5 Biss. (U. S.) 381, citing *Harris v. Runnels*, 12 How. (U. S.) 79.

Massachusetts Legislation. — By express provision of the statute in force in Massachusetts before Acts 1887, c. 214, if insurance was made by a foreign company without complying with the requisitions of the statute, the contract was declared valid. *Hartford Live Stock Ins. Co. v. Matthews*, 102 Mass. 221; *Williams v. Cheney*, 3 Gray (Mass.) 215; *Provincial Ins. Co. v. Lapsley*, 15 Gray (Mass.) 262; *National Mut. F. Ins. Co. v. Pursell*, 10 Allen (Mass.) 231; *Lester v. Webb*, 5 Allen (Mass.) 569; *Leonard v. Washburn*, 100 Mass. 251. But under Acts 1887, c. 214, a contract of insurance made by a foreign company without complying with the requisitions of the statute is void. *Claflin v. U. S. Credit System Co.*, 165 Mass. 501, 52 Am. St. Rep. 528.

Under the New Hampshire Statute (Gen. Stat., c. 159, § 10) which declared that a contract of insurance made by a foreign insurance company should be valid against the company although it had not complied with the conditions prescribed by statute, it was held that a foreign insurance company might recover in an action upon a premium note given as the consideration for a contract of insurance made in the state, although the company had not complied with the conditions prescribed. *Union Ins. Co. v. Smart*, 60 N. H. 458.

Indiana Statute Construed. — Where a foreign insurance company, prior to making contracts of insurance in Indiana, has substantially complied with the provisions of the statute (now *Horner's Stat. Ind.* 1896, § 3765) requiring the performance of certain conditions by such companies as a prerequisite to their right to do

Statute Does Not Affect Contracts Made Before Its Enactment. — Such a statute does not affect the validity of a contract made by a foreign company before the passage of the statute.¹

Where Statutory Requirement Is Not Condition Precedent to Right to Do Business. — Where the doing of an act which the state requires of foreign insurance companies transacting business in the state is not made a condition precedent to the right of the company to do business in the state, a failure by the company to do the act will not render invalid a contract made with it.²

bb. RIGHT OF HOLDER WITHOUT NOTICE OF PREMIUM NOTE. — A recovery may be had on a note given to a foreign insurance company for a premium of insurance at the suit of one who is a *bona fide* holder of the note without notice that the conditions prescribed by the statute have not been complied with.³

Notice of Noncompliance with Statutory Conditions Bars Recovery. — But if one takes such a note knowing, or with reasonable cause to know, when he takes it, that the statutory conditions have not been complied with, he cannot recover thereon.⁴

cc. PRESUMPTIONS IN SUITS ON PREMIUM NOTES — (*aa*) *Performance of Statutory Requirements Prima Facie Presumed.* — In an action on a premium note given to a foreign insurance company, the performance by the company of the acts required by statute to entitle it to transact business in the state will be presumed in the absence of evidence to the contrary.⁵

business in that state, its contracts are not rendered void by the fact that a certified copy of the statement required to be filed in the office of the clerk of the Circuit Court of the county wherein the company establishes its agency fails, through the neglect of the auditor of the state, to contain a copy of the company's act of incorporation. *American Ins. Co. v. Butler*, 70 Ind. 1.

Premium Note Given as Agent for Citizen of Another State. — A promissory note given by a resident of a state for a premium on a policy of insurance made to him there by a foreign company which had not complied with the statutory conditions is void in the hands of the company, although the person giving the note was a mere agent for a citizen of another state who was the owner of the property insured, and the policy was expressed to be "for whom it may concern." *Williams v. Cheney*, 8 Gray (Mass.) 206.

Company's Right to Recover from Carrier. — It has been held that in case of a loss on a policy issued by a foreign company without complying with the statutory requirements, a carrier will not be permitted to make such noncompliance by the company a defense to a libel, the loss having been paid by the company. *The Maister*, 5 Biss. (U. S.) 381; *Phenix Ins. Co. v. Pennsylvania R. Co.*, 134 Ind. 215.

Validity of Subscriptions to Capital Stock. — A statute making it unlawful for foreign insurance companies to "take risks" or "transact any business of insurance" within the state except upon certain conditions does not invalidate subscriptions made to the capital stock of such corporations, or notes given in payment therefor, as these are not "risks" or "business of insurance." *Bartlett v. Chouteau Ins. Co.*, 18 Kan. 369.

Contract Evading Statute Void for Contravening Policy of State. — A contract insuring property in *Michigan* was made through the mails by a resident of *Michigan* with an insurance company in another state which had not complied with the conditions prescribed to entitle it to

transact business in *Michigan*. It was held that, even conceding that the contract was not made in *Michigan*, and that it evaded the statute, yet, as it was in contravention of the policy of the state, it would not sustain an action against the insured for an assessment. *Seamans v. Temple Co.*, 105 Mich. 400, 55 Am. St. Rep. 457.

And so it has been held in *Iowa* and *Minnesota* under like statutes, and in cases where the facts were substantially similar to those in the above case. *Seamans v. Zimmerman*, 91 Iowa 363; *Seamans v. Christian Bros. Mill Co.*, 66 Minn. 205. See also *Cowan v. London Assur. Corp.*, 73 Miss. 321.

1. *St. Louis, etc., R. Co. v. Fire Assoc.*, 55 Ark. 163.

2. **Where Fulfilment of Requirement Is Not Condition Precedent.** — *Northwestern Mut. L. Ins. Co. v. Overholt*, 4 Dill. (U. S.) 287; *Continental Ins. Co. v. Rigger*, 31 Oregon 336.

Under a statute requiring the agencies of foreign insurance companies to take out licenses, and prescribing a penalty for their failure to do so, a neglect by an agency to procure a license will not render the policies of the company void, or disable it from maintaining or defending suits. *Columbus Ins. Co. v. Walsh*, 18 Mo. 229. See also *Clark v. Middleton*, 19 Mo. 54.

3. *Williams v. Cheney*, 3 Gray (Mass.) 215.

4. *Williams v. Cheney*, 8 Gray (Mass.) 206.

What Is Sufficient Evidence of Notice. — And the fact that the person taking such a note was a director, treasurer, or one of the executive committee of the company is sufficient evidence that he had reasonable cause to know of the company's noncompliance with the statutory conditions. *Williams v. Cheney*, 8 Gray (Mass.) 206.

5. **Presumption as to Performance of Statutory Conditions.** — *Cassaday v. American Ins. Co.*, 72 Ind. 95; *Williams v. Cheney*, 3 Gray (Mass.) 215; *American Ins. Co. v. Smith*, 73 Mo. 368; *New York L. Ins. Co. v. Stone*, 42 Mo. App. 383.

(bb) *Presumption as to Place Where Note Was Made.* — In an action on a premium note by a foreign company that has not complied with the statutory conditions entitling it to do business in the state, if the note is payable generally, and does not indicate the place where it was made, it will not be presumed that it was given in the state in violation of the statute. The plaintiff, therefore, in the absence of proof that the note was given in the state, may recover without proving that it had complied with the requisitions of the statute.¹

dd. *COMPANY ESTOPPED TO ALLEGE WANT OF AUTHORITY.* — Though a failure to comply with the laws of the state invalidates a contract made therein in the hands of the foreign company, it does not operate to the prejudice of the policy holders. The public has the right, in absence of bad faith and of actual knowledge to the contrary, to presume that a foreign company assuming to transact business in the state is acting lawfully, and the company, when sued upon a policy issued under such circumstances, is estopped to allege that it had no lawful authority to issue the policy. It can reap no advantage from its own wrong.²

(g) *Revocation of License to Transact Business.* — A state may revoke the license granted to a foreign insurance company to transact business within her territory,³ and the motives of her action in so doing are not the subject of judicial inquiry.⁴ Thus the legislature of one of the United States may provide that if a foreign company exercises a right to which it is entitled under the Constitution of the United States, its license shall be revoked.⁵

But in Kansas it has been held that before a foreign company can recover in an action brought by it to enforce a contract relating to the insurance business, it must allege and prove affirmatively that at the time of such contract it had qualified itself for transacting the business of insurance in the state by complying with the requisitions of the statute. *Gilbert v. State Ins. Co.*, 3 Kan. App. 1.

1. *American Ins. Co. v. Cutler*, 36 Mich. 261. See also *American Ins. Co. v. Woodruff*, 34 Mich. 6.

Assumption by Reviewing Court Where Company Introduced Evidence Below of Its Authority. — Where, in a suit by a foreign insurance company upon a premium note, the plaintiff, as part of its case, introduced evidence of its authority to do business in the state, a court of review may legitimately assume, though the record does not otherwise disclose it, that the contract of insurance was made in the state. *American Ins. Co. v. Woodruff*, 34 Mich. 6.

2. **Estoppel to Deny Want of Authority** — *United States*. — *Berry v. Knights Templars', etc.*, L. Indemnity Co., 46 Fed. Rep. 439; *Ehrman v. Teutonia Ins. Co.*, 1 Fed. Rep. 471, 1 McCrary (U. S.) 123; *Diamond Plate Glass Co. v. Minneapolis Mut. F. Ins. Co.*, 55 Fed. Rep. 27.

Illinois. — *Watertown F. Ins. Co. v. Rust*, 141 Ill. 85, affirming 40 Ill. App. 119.

Indiana. — *Phenix Ins. Co. v. Pennsylvania R. Co.*, 134 Ind. 215 (in effect overruling *Rising Sun Ins. Co. v. Slaughter*, 20 Ind. 520; *New England F. & M. Ins. Co. v. Robinson*, 25 Ind. 536).

Minnesota. — *Ganser v. Fireman's Fund Ins. Co.*, 34 Minn. 372; *Seamans v. Christian Bros. Mill Co.*, 66 Minn. 205.

Ohio. — *Union Mut. L. Ins. Co. v. McMillen*, 24 Ohio St. 67.

Pennsylvania. — *Swan v. Watertown F. Ins. Co.*, 96 Pa. St. 37; *Watertown F. Ins. Co. v. Simons*, 96 Pa. St. 520.

See also *Clay F. & M. Ins. Co. v. Huron Salt, etc., Mfg. Co.*, 31 Mich. 346.

3. **Revocation of License.** — *American Ins. Co. v. Stoy*, 41 Mich. 385.

Not Deprivation of Property Without Due Process of Law. — A statute empowering the insurance commissioner to revoke the license of a foreign insurance company for a violation of the conditions upon which the license was granted is valid, and does not contravene the constitutional inhibition against deprivation of property without due process of law. *Hartford F. Ins. Co. v. Raymond*, 70 Mich. 485.

4. **Motives in Revoking License Not Subject of Judicial Inquiry.** — *Doyle v. Continental Ins. Co.*, 94 U. S. 535; *State v. Doyle*, 40 Wis. 175, 22 Am. Rep. 692.

5. **Revocation for Exercising a Constitutional Right.** — *Doyle v. Continental Ins. Co.*, 94 U. S. 535. In this case the legislature of Wisconsin enacted that if any foreign insurance company transferred a suit brought against it from the state courts to the federal courts, the secretary of state should revoke and cancel its license to do business within that state. It was held that an injunction to restrain him from so doing because such a transfer was made could not be sustained. Mr. Justice Hunt, who delivered the opinion of the court, said: "It is said that we thus indirectly sanction what we condemn when presented directly; to wit, that we enable the state of Wisconsin to enforce an agreement to abstain from the federal courts. This is an 'inexact statement.' The effect of our decision in this respect is that the state may compel the foreign company to abstain from the federal courts or to cease to do business in the state. It gives the company the option. This is justifiable, because the complainant has no constitutional right to do business in that state. That state has authority at any time to declare that it shall not transact business there." See also

(h) **Penalties Imposed for Transacting Business Without Complying with Statutory Requirements.** — As a state has the power to prohibit a foreign insurance company from doing business within its limits, it has the right to make its prohibition effective by penal enactments,¹ and in many of the United States there are statutes making it a criminal or penal offense for foreign companies or their agents to transact business within the state without first complying with the statutory conditions.² Some of the provisions of these statutes have received the interpretation of the courts.³

People v. Pavey, 151 Ill. 101; *State v. Doyle*, 40 Wis. 175, 22 Am. Rep. 692. Compare *Home Ins. Co. v. Morse*, 20 Wall. (U. S.) 445; *Metropolitan L. Ins. Co. v. McNall*, 81 Fed. Rep. 888.

Company Cannot Recover on Instalment Notes After Revocation. — Where the commissioner of insurance, in pursuance of a statute authorizing him to do so, has revoked the authority of a foreign insurance company to do business within the state, it cannot thereafter recover on instalment notes upon which, by the terms of its policies, payments fall due in advance. *American Ins. Co. v. Stoy*, 41 Mich. 385.

Provision for Notice to Company Not Essential. — The validity of a statute requiring the revocation of the license of an insurance company in a certain contingency is not affected by the fact that no provision for notice to the company is made. *State v. Doyle*, 40 Wis. 175, 22 Am. Rep. 692.

For the Construction of the Peculiar Provisions of Certain Statutes authorizing, under certain circumstances, the revocation of licenses granted to foreign companies to transact business in the state, see *Metropolitan L. Ins. Co. v. McNall*, 81 Fed. Rep. 888; *Employers' Liability Assur. Corp. v. Merrill*, 155 Mass. 404; *State v. Carey*, 2 N. Dak. 36; *State v. Matthews*, 58 Ohio St. 1; *Travelers' Ins. Co. v. Fricke*, 99 Wis. 367.

1. **Right to Enforce Prohibitions by Penal Enactments.** — *Moses v. State*, 65 Miss. 56.

2. **Statutes Making It Criminal or Penal Offense to Transact Business Without Complying with Statutory Requirements.** — *United States*. — *Ehrman v. Teutonia Ins. Co.*, 1 Fed. Rep. 471. 1 *McCrary* (U. S.) 123; *Lamb v. Bowser*, 7 Biss. (U. S.) 315; *Hooper v. California*, 155 U. S. 648; *The Manistee*, 5 Biss. (U. S.) 381.

Alabama. — *Jackson v. State*, 50 Ala. 141; *Ex p. Robinson*, 86 Ala. 622; *Boulware v. Davis*, 90 Ala. 207.

Colorado. — *French v. People*, 6 Colo. App. 311.

Illinois. — *Watertown F. Ins. Co. v. Rust*, 141 Ill. 85, affirming 40 Ill. App. 119; *People v. Fesler*, 145 Ill. 150.

Indiana. — *Wiestling v. Warthin*, 1 Ind. App. 217; *Cassaday v. American Ins. Co.*, 72 Ind. 95; *State v. Campbell*, 17 Ind. App. 442.

Louisiana. — *State v. Allgeyer*, 48 La. Ann. 104.

Massachusetts. — *National Mut. F. Ins. Co. v. Pursell*, 10 Allen (Mass.) 231; *Lester v. Webb*, 5 Allen (Mass.) 569; *Com. v. Wetherbee*, 105 Mass. 149.

Michigan. — *Clay F. & M. Ins. Co. v. Huron Salt, etc., Mfg. Co.*, 31 Mich. 346; *People v. Howard*, 50 Mich. 239; *People v. Gay*, 107 Mich. 422.

Minnesota. — *State v. Johnson*, 43 Minn. 350.

Missouri. — *State v. New York L. Ins. Co.*, 81 Mo. 89; *State v. Phelan*, 66 Mo. App. 548; *State v. Charter Oak L. Ins. Co.*, 9 Mo. App. 364.

New Hampshire. — *Haverhill Ins. Co. v. Prescott*, 42 N. H. 547, 80 Am. Dec. 123.

New Jersey. — *Fay v. Brewster*, 45 N. J. L. 432.

Ohio. — *Union Mut. L. Ins. Co. v. McMillen*, 24 Ohio St. 67.

Pennsylvania. — *Com. v. Reinohl*, 163 Pa. St. 287, 35 W. N. C. (Pa.) 20; *McBride v. Rindard*, 172 Pa. St. 542, 37 W. N. C. (Pa.) 489, affirming 15 Pa. Co. Ct. 422, 25 Pittsb. Leg. J. N. S. (Pa.) 226; *Com. v. National Mut. Aid Assoc.*, 94 Pa. St. 481; *Lauck v. Myers*, 5 Pa. Dist. 377.

Texas. — *Eichlitz v. State*, 39 Tex. 487.

Wisconsin. — *Pryce v. Security Ins. Co.*, 29 Wis. 270; *State v. Spooner*, 47 Wis. 438.

3. **What Constitutes Agency.** — One who solicits its insurance through an agent, places it in a foreign company, and receives and delivers the policy, is an agent for such foreign company, and as such is liable to the penalty imposed upon the agents of unauthorized foreign companies. *Lauck v. Myers*, 5 Pa. Dist. 377.

Where a foreign company has issued policies on applications procured by A, neither the company nor A, in a suit against them to recover the penalty imposed for transacting business in the state without a license, can plead that A had no authority to act as the company's agent. *Indiana Millers' Mut. F. Ins. Co. v. People*, 65 Ill. App. 355.

As to who is an agent of a foreign company within the meaning of that word as defined by the *Alabama* statute, see *Ex p. Robinson*, 86 Ala. 622.

As to who are agents of insurance companies, see *infra*, this title, *Insurance Agents — Who Are Insurance Agents*.

Penalty Applies Only to Act Done in State by Company's Agent. — The penalty of a state statute which declares that "it shall not be lawful for any person to act within this state, as agent or otherwise," in receiving or procuring application for insurance or in any manner aiding in "transacting the insurance business of any company or association not incorporated under the laws of this state," until he shall have complied with the conditions of the statute, applies only when the actual agency is in the state and the thing done is actually done in the state. It is not a violation of the statute, for a person in the state to act as attorney for an applicant to a foreign insurance company, provided he acts in good faith as attorney for the applicant only, and not as agent of the company under cover of an attorneyship for the applicant. *People v. Imlay*, 20 Barb. (N. Y.) 68.

(2) *Obligations and Liabilities of Companies That Have Become Domesticated.*

— Where a foreign insurance company has sought and obtained the privilege of carrying on its business in a state under regulations fixed by the statutes of the state, and has established a permanent general agency, and conducts its business in the state as a distinct organization in the same manner as domestic corporations, it will be regarded, as to the business transacted there, as domiciled, and subject to the same obligations and liabilities as domestic corporations.¹

IV. INSURANCE AGENTS — 1. Who Are Insurance Agents — a. IN GENERAL

— (1) *At Common Law.* — An insurance agent is an agent employed by an insurer, usually an insurance company, to perform some act or acts in furtherance of the business of his principal. In a narrower but more familiar sense the term is used to designate those agents employed to solicit risks and effect insurances. While it is not necessary to prove an express contract between an insurance company and one alleged to be its agent to establish the relation of principal and agent between them, either that must be done or the conduct of the parties must be such that the relation may be inferred therefrom.² Whether, upon a given state of facts, one is or is not to be deemed the agent of the insurer, has generally been held to be a question of law.³ That the

Fact of Agency Not Essential to Conviction. — Under a statute which makes it a misdemeanor for any person to perform any of certain acts for a foreign company that has not complied with the statutory requirements, one who does any of the prohibited acts for such a company is liable to conviction, whether he is or is not in fact an agent. *Smith v. State*, 18 Tex. App. 69. See also *State v. Farmer*, 49 Wis. 459.

Owner of Property Insured Not Liable to Penalty. — Under the *Pennsylvania* Act of April 26, 1837 (P. L. 61), the owner of property may insure it in an unauthorized foreign company without incurring the penalty of the statute. *Conn. v. Biddle*, 139 Pa. St. 605, 27 W. N. C. (Pa.) 287.

One Acting in the State as the Agent of Citizens of Another State engaged in the insurance business, but not incorporated or associated as a partnership, is not liable for the penalty imposed by the *Illinois* statute. Rev. Stat. 1874, p. 593, § 22. *Barnes v. People*, 168 Ill. 425.

Prima Facie Evidence that Company Was Engaged in Insurance Business. — In a prosecution for a violation of a statute prohibiting any one from acting without a license as agent for a foreign company "engaged in the transaction of insurance business," the fact that the alleged principal of the defendant was engaged in the insurance business is shown *prima facie* by evidence that the contract made by the defendant for such a principal was one of insurance. *State v. Phelan*, 66 Mo. App. 548.

Penalty May Be Recovered for Each Separate Offense. — In a suit to recover the statutory penalty imposed upon a foreign company for transacting business in the state without complying with the statutory conditions, a recovery may be had for each separate and distinct offense. So where two distinct offenses are committed by issuing policies to two different persons at different times, two penalties may be recovered in one suit. *Indiana Millers' Mut. F. Ins. Co. v. People*, 65 Ill. App. 355.

Under a statute prohibiting an agent of any foreign company from soliciting insurance for such company without complying with the

statutory requirements, and prescribing a penalty for each offense, one who, in violation of the statute, placed policies for eighteen different companies, although he solicited for all of such companies at the same time and placed the policies with the same person on the same property, was held to be guilty of a separate offense for each policy placed, and liable for the statutory penalty in each case. *State v. Farmer*, 49 Wis. 459.

1. *Martine v. International L. Ins. Soc.*, 53 N. Y. 339, *limiting Robinson v. International L. Assur. Soc.*, 42 N. Y. 54, 1 Am. Rep. 490.

2. **What Is Essential to Establish Agency.** — *Sellers v. Commercial F. Ins. Co.*, 105 Ala. 282; *Commercial Union Assur. Co. v. State*, 113 Ind. 331; *Slater v. Capital Ins. Co.*, 89 Iowa 628; *Partridge v. Commercial F. Ins. Co.*, 17 Hun (N. Y.) 97; *Perkins v. Washington Ins. Co.*, 4 Cow. (N. Y.) 645.

Agency May Be Proved by Parol. — *Lumbermen's Mut. Ins. Co. v. Bell*, 166 Ill. 400, 57 Am. St. Rep. 140, *affirming* 63 Ill. App. 67.

3. **Agency Question of Law.** — *Sellers v. Commercial F. Ins. Co.*, 105 Ala. 282; *Young v. Newark F. Ins. Co.*, 59 Conn. 41; *Indiana Ins. Co. v. Hartwell*, 123 Ind. 177; *Hamilton v. Home Ins. Co.*, 94 Mo. 353; *Duluth Nat. Bank v. Knoxville F. Ins. Co.*, 85 Tenn. 76, 4 Am. St. Rep. 744; *Murphy v. Southern L. Ins. Co.*, 3 Baxt. (Tenn.) 440, 27 Am. Rep. 761; *Dickerman v. Quincy Mut. F. Ins. Co.*, 67 Vt. 609.

In Illinois and New York it has been held that the question is a mixed one of law and fact to be determined by the jury, from all the evidence in the case, under proper instructions by the court. *Lumbermen's Mut. Ins. Co. v. Bell*, 166 Ill. 400, 57 Am. St. Rep. 140; *Firemen's Ins. Co. v. Horton*, 170 Ill. 258, *affirming* 68 Ill. App. 497; *Partridge v. Commercial F. Ins. Co.*, 17 Hun (N. Y.) 97.

In New Hampshire it has been held that the question whether the person effecting the insurance is the agent of the insurer or the insured is one of fact for the jury. *Davis v. Aetna Mut. F. Ins. Co.*, 67 N. H. 335.

insurer held one out as agent or recognized his acts done as agent, has been held sufficient to establish agency.¹ But agency cannot be proven by the declarations and acts of the alleged agent unknown to the insurer.²

The Medical Examiner of an Insurance Company, as such, is not the agent of the company for the purpose of soliciting or filing out applications for insurance.³

(2) *By Statute*. — In some of the United States there are statutes declaring what persons shall be considered agents of insurance companies.⁴

b. GENERAL AGENTS. — A person authorized by an insurance company to accept risks, to agree upon and settle the terms of insurance, and to carry them into effect by issuing and renewing policies, is a general agent of the company,⁵ though he represents his principal only in a particular locality or within a limited territory, and is therefore called a local agent.⁶

Evidence of General Agency. — It has been held that the possession of blank policies and renewal receipts signed by the president and secretary of an insurance company is evidence of a general agency.⁷ So, too, the doing of acts which involve general powers, with the knowledge of and without objection from the insurance company, is admissible in evidence to prove the relation.⁸

c. SUBAGENTS. — A general agent of an insurance company may, in the

1. Holding Out or Recognition as Agent — *Illinois*. — *Indiana Millers' Mut. F. Ins. Co. v. People*, 65 Ill. App. 355.

Maine. — *Packard v. Dorchester Mut. F. Ins. Co.*, 77 Me. 149.

Missouri. — *Hamilton v. Home Ins. Co.*, 94 Mo. 353.

New York. — *Perkins v. Washington Ins. Co.*, 4 Cow. (N. Y.) 645.

Pennsylvania. — *List v. Com.*, 118 Pa. St. 322; *Kister v. Lebanon Mut. Ins. Co.*, 128 Pa. St. 553, 15 Am. St. Rep. 696, 24 W. N. C. (Pa.) 442; *Walker v. Lion F. Ins. Co.*, 175 Pa. St. 345, 38 W. N. C. (Pa.) 189.

South Carolina. — *Wilson v. Commercial Union Assur. Co.*, 51 S. Car. 540.

South Dakota. — *Enos v. St. Paul F. & M. Ins. Co.*, 4 S. Dak. 639, 46 Am. St. Rep. 796.

The Fact that One Has the Blank Proofs of Loss of an Insurance Company has not by itself any tendency to show that he is the agent of the company. *Dickerman v. Quincy Mut. F. Ins. Co.*, 67 Vt. 609.

But where an insurance company furnished a person with all needful papers and blanks, responded to his acts, approved permits of removal given by him, and paid his rent, it was held that such person was the agent of the company. *Hardin v. Alexandria Ins. Co.*, 90 Va. 413.

2. Declarations and Acts of Alleged Agent Unknown to Company. — *Packard v. Dorchester Mut. F. Ins. Co.*, 77 Me. 149; *Dickerman v. Quincy Mut. F. Ins. Co.*, 67 Vt. 609; *Rahr v. Manchester F. Assur. Co.*, 93 Wis. 355. See generally the title *ADMISSIONS*, vol. 1, p. 690 *et seq.*; *AGENCY*, vol. 1, p. 930.

A Policy of Insurance Purporting to Be Issued by a Company Which Had No Legal Existence could not render any of the parties agents of such nonexistent corporation. *Lagrone v. Timmerman*, 46 S. Car. 372.

3. Medical Examiner. — *Flynn v. Equitable L. Assur. Soc.*, 67 N. Y. 500, *reversing* 7 Hun (N. Y.) 387.

A provision in the application that the medical examiner "shall be held to be the agent of the applicant as to all answers and statements" made by him has been held not to

affect the rule stated in the text. *Knights of Pythias v. Cogbill*, 99 Tenn. 28.

4. Statutory Provisions — *United States*. — *McMaster v. New York Ins. Co.*, 78 Fed. Rep. 33; *Continental L. Ins. Co. v. Chamberlain*, 132 U. S. 304.

Alabama. — *Noble v. Mitchell*, 100 Ala. 519; *Ex p. Robinson*, 86 Ala. 622.

Illinois. — *Continental Ins. Co. v. Ruckman*, 127 Ill. 364, 11 Am. St. Rep. 121, *affirming* 29 Ill. App. 404.

Iowa. — *St. Paul F. & M. Ins. Co. v. Shaver*, 76 Iowa 282.

Nebraska. — *Bankers L. Ins. Co. v. Robbins*, 55 Neb. 117, *overruling* 53 Neb. 44.

Wisconsin. — *John R. Davis Lumber Co. v. Hartford F. Ins. Co.*, 95 Wis. 226; *Schomer v. Hekla F. Ins. Co.*, 50 Wis. 575; *Knox v. Lycoming F. Ins. Co.*, 50 Wis. 671; *Alkan v. New Hampshire Ins. Co.*, 53 Wis. 136.

See also the various local codes and statutes.

5. General Agents. — *Continental Ins. Co. v. Ruckman*, 127 Ill. 364, 11 Am. St. Rep. 121; *King v. Council Bluffs Ins. Co.*, 72 Iowa 310; *Hartford F. Ins. Co. v. Keating*, 86 Md. 130; *Post v. Aetna Ins. Co.*, 43 Barb. (N. Y.) 351; *Pitney v. Glens Falls Ins. Co.*, 65 N. Y. 6; *Harding v. Norwich Union F. Ins. Soc.*, 10 S. Dak. 64; *South Bend Toy Mfg. Co. v. Dakota F. & M. Ins. Co.*, 3 S. Dak. 205; *Goode v. Georgia Home Ins. Co.*, 92 Va. 392, 53 Am. St. Rep. 817; *Manhattan F. Ins. Co. v. Weill*, 28 Gratt. (Va.) 389, 26 Am. Rep. 364; *Kahn v. Traders' Ins. Co.*, 4 Wyo. 419.

6. Limitation to Particular Locality. — *Continental Ins. Co. v. Ruckman*, 127 Ill. 364, 11 Am. St. Rep. 121; *Southern L. Ins. Co. v. Booker*, 9 Heisk. (Tenn.) 606, 24 Am. Rep. 344.

7. Evidence of General Agency—Possession of Policies, etc., Executed in Blank. — *Continental Ins. Co. v. Ruckman*, 127 Ill. 364, 11 Am. St. Rep. 121; *Pitney v. Glen's Falls Ins. Co.*, 65 N. Y. 6; *Carroll v. Charter Oak Ins. Co.*, 40 Barb. (N. Y.) 292. But see *Lohnes v. Insurance Co. of North America*, 121 Mass. 439.

8. An Affidavit Made on Behalf of an Insurance Company to procure a continuance of a case to which the company was a party, to which affidavit the company made no opposition, is ad-

due prosecution of the business of his principal, delegate to another authority to do any act within the scope of his authority; and the acts of a subagent done in pursuance of such delegated authority will have the same effect as if done by the general agent himself. In such case the subagent becomes the agent and direct representative of the principal.¹ And the fact that he is compensated for his services by a commission on the business which he brings in does not affect his legal status or make him an insurance broker.²

A Provision in an Insurance Policy that no one not holding the commission of the company shall be considered as its agent does not prevent the agent's employment of the usual and necessary assistance to enable him properly to perform his duties to the company as commissioned agent or affect the legal status of subagents so employed.³

d. BROKERS. — Ordinarily an insurance broker is the agent of the insured and not of the insurer. He may, however, under certain circumstances and for certain purposes, become the agent of the insurer.⁴

2. Insurer's Agent Not Agent of Insured — *a. RULE STATED.* — The agent of an insurance company through whom a policy is effected cannot be considered in any sense as the agent of the insured in any matter connected with the issuing of the policy.⁵ So where the agent undertakes to prepare the

missile in evidence to show that the person making the affidavit was the general agent of the company. *Parker v. Citizens Ins. Co.*, 129 Pa. St. 533. See also *Schreiber v. German-American Hail Ins. Co.*, 43 Minn. 367.

1. Subagents — *United States*. — *May v. Western Assur. Co.*, 27 Fed. Rep. 260.

Connecticut. — *Woodbury Sav. Bank, etc., Assoc. v. Charter Oak F. & M. Ins. Co.*, 31 Conn. 517.

Indiana. — *Indiana Ins. Co. v. Hartwell*, 123 Ind. 177.

Minnesota. — *Swain v. Agricultural Ins. Co.*, 37 Minn. 390.

New York — *Van Schoick v. Niagara F. Ins. Co.*, 68 N. Y. 434; *Boline v. Exchange F. Ins. Co.*, 51 N. Y. 117, 10 Am. Rep. 566; *Arff v. Star Ins. Co.*, 125 N. Y. 57, 21 Am. St. Rep. 721, *reversing* (Supm. Ct. Gen. T.) 2 N. Y. Supp. 188. See also *Smith v. Home Ins. Co.*, 47 Hun (N. Y.) 30.

Ohio. — *Krumm v. Jefferson F. Ins. Co.*, 40 Ohio St. 225; *Massachusetts L. Ins. Co. v. Eshelman*, 30 Ohio St. 647.

Pennsylvania. — *Swan v. Watertown F. Ins. Co.*, 95 Pa. St. 37; *McGonigle v. Susquehanna Mut. F. Ins. Co.*, 168 Pa. St. 1.

South Dakota. — *Harding v. Norwich Union F. Ins. Soc.*, 10 S. Dak. 64.

Tennessee. — *Duluth Nat. Bank v. Knoxville F. Ins. Co.*, 85 Tenn. 82, 7 Am. St. Rep. 741.

Texas. — *Phoenix Ins. Co. v. Ward*, 7 Tex. Civ. App. 13; *Hartford F. Ins. Co. v. Josey*, 6 Tex. Civ. App. 290.

Virginia. — *Goode v. Georgia Home Ins. Co.*, 92 Va. 392, 53 Am. St. Rep. 817.

See also the title *AGENCY*, vol. 1, p. 980 *et seq.*

In *Alabama* and *Missouri* it has been held that an insurance agent cannot delegate powers involving the exercise of judgment and discretion, unless it be shown that he customarily delegated such powers with the consent of the company. *Waldman v. North British, etc., Ins. Co.*, 91 Ala. 170, 24 Am. St. Rep. 853; *McClure v. Mississippi Valley Ins. Co.*, 4 Mo. App. 143; *Albers v. Phoenix Ins. Co.*, 68 Mo. App. 543.

In *Kentucky* it has been held that where an agent who has no express authority from the company to appoint a subagent agrees, without the knowledge of the company, with a person engaged in loaning money upon property to divide with him his commission upon all insurance which he brings in upon the property in which he is thus interested, such third person is not the agent of the company. *Phoenix Ins. Co. v. Spiers*, 87 Ky. 285.

2. Arff v. Star F. Ins. Co., 125 N. Y. 57, 21 Am. St. Rep. 721, *reversing* (Supm. Ct. Gen. T.) 2 N. Y. Supp. 188.

3. Arff v. Star F. Ins. Co., 125 N. Y. 57, 21 Am. St. Rep. 721.

4. See the title INSURANCE BROKERS, post.

5. Agent of Insurer Not Agent of Insured. — *Commercial F. Ins. Co. v. Allen*, 80 Ala. 571; *Bernheimer v. Leadville*, 14 Colo. 518; *British-America Assur. Co. v. Cooper*, 6 Colo. App. 25; *Commercial Union Assur. Co. v. State*, 113 Ind. 331.

In *British-America Assur. Co. v. Cooper*, 6 Colo. App. 25, an insurance agent who was also the agent of the owner of a building for leasing it and collecting the rents was instructed by the owner to insure the building. The agent stated that he represented several insurance companies, and the owner then directed him to insure in his own companies, but did not specify the amount of insurance or designate the particular companies. The agent procured a policy in one of the companies and paid the premium out of rents which he held as agent of the insured. It was held that he acted in the transaction as agent of the insurance company, and not as agent of the insured.

Agent with Limited Powers Procuring Change in Policy Already Delivered. — An insurance agent whose power is limited to delivering to the assured a policy of insurance and receiving for the company the premium thereon acts as the agent of the assured, and not of the company, if after delivering the policy to the assured he receives from the assured an application for a change therein and undertakes to procure such change. *Duluth Nat. Bank v.*

application of the insured, or makes any representations to him as to the character or effect of the statements of the application, he will be regarded in doing so as the agent of the company, and not of the insured;¹ and his legal status in this respect is not affected by a stipulation inserted in the policy subsequently issued that the acts of such agent in making out the application shall be deemed the acts of the insured.² The insurer cannot limit the agency by instructions to the agent that he is agent only for the purpose of receiving and transmitting the application and the premium.³

Agent of Insurer Procuring Policies from Other Insurers. — Where an insurance agent procures several policies for a person, one in his own company and the others in several other companies, he acts, in procuring the former policy, as the agent of the company.⁴ But whose agent he is in reference to the other policies is a question upon which the cases are conflicting and not very clear.⁵

b. EFFECT OF PROVISIONS IN APPLICATION OR POLICY. — Where the party effecting the insurance is in fact the agent of the insurance company, a provision in the application or in the policy declaring that such party shall be deemed the agent of the insured cannot change his legal status;⁶ and the

Knoxville F. Ins. Co., 85 Tenn. 76, 4 Am. St. Rep. 744.

1. Agency in Preparing Application or in Making Representations in Regard Thereto — *United States*. — *Union Mut. Ins. Co. v. Wilkinson*, 13 Wall. (U. S.) 222; *American L. Ins. Co. v. Mahone*, 21 Wall. (U. S.) 152.

Connecticut. — *Woodbury Sav. Bank, etc., Assoc. v. Charter Oak F. & M. Ins. Co.*, 31 Conn. 517.

Iowa. — *Hingston v. Aetna Ins. Co.*, 42 Iowa 46.

Kansas. — *Continental Ins. Co. v. Pearce*, 39 Kan. 396, 7 Am. St. Rep. 557.

Minnesota. — *Kansal v. Minnesota Farmers' Mut. F. Ins. Assoc.*, 31 Minn. 17, 47 Am. Rep. 776.

Mississippi. — *Planters' Ins. Co. v. Myers*, 55 Miss. 479, 30 Am. Rep. 521.

New York. — *Masters v. Madison County Mut. Ins. Co.*, 11 Barb. (N. Y.) 624; *Bernard v. United L. Ins. Assoc.*, (C. Pl. Gen. T.) 12 Misc. (N. Y.) 10, *reversing* (N. Y. City Ct. Gen. T.) 11 Misc. (N. Y.) 441.

West Virginia. — *Deitz v. Providence Washington Ins. Co.*, 31 W. Va. 851, 13 Am. St. Rep. 909.

Compare Maier v. Fidelity Mut. L. Assoc., 47 U. S. App. 332; *Hubbard v. Mutual Reserve Fund L. Assoc.*, 80 Fed. Rep. 681; *New York L. Ins. Co. v. Fletcher*, 117 U. S. 519; *Cook v. Standard L. Ins. Co.*, 84 Mich. 12; *Pottsville Mut. F. Ins. Co. v. Fromm*, 100 Pa. St. 347, *distinguishing* *Eilenberger v. Protective Mut. F. Ins. Co.*, 89 Pa. St. 464.

2. Stipulations in Application. — *Continental Ins. Co. v. Pearce*, 39 Kan. 396, 7 Am. St. Rep. 557; *Kansal v. Minnesota Farmers' Mut. F. Ins. Assoc.*, 31 Minn. 17, 47 Am. Rep. 776; *Bushaw v. Women's Mut. Ins., etc., Co.*, (Supm. Ct. Gen. T. 8 (N. Y.) Supp. 423, *distinguishing* *Rohrbach v. Germania F. Ins. Co.*, 62 N. Y. 47; *Deitz v. Providence Washington Ins. Co.*, 31 W. Va. 851, 13 Am. St. Rep. 909. *Compare Planters' Ins. Co. v. Myers*, 55 Miss. 479; *Chase v. Hamilton Ins. Co.*, 20 N. Y. 52.

3. Instructions of Insurer to Agent. — *Union Mut. Ins. Co. v. Wilkinson*, 13 Wall. (U. S.) 222.

4. Procuring Policies from Other Insurers. — *Westfield Cigar Co. v. Insurance Co. of North America*, 169 Mass. 382.

5. In a *Michigan* case the following facts appeared: A applied for insurance to B. The latter, not being able to place the whole amount in companies which he represented, went to an agent who represented other companies, and from him obtained the rest. A had nothing to do with these negotiations. B collected the premiums on the policies and gave receipts for them. It was held that as to the policies thus obtained at second hand, B was the agent of the insurers, and not of A. *McGraw v. Germania F. Ins. Co.*, 54 Mich. 145. See also *May v. Western Assur. Co.*, 27 Fed. Rep. 260. But see *Westfield Cigar Co. v. Insurance Co. of North America*, 169 Mass. 382; *Hartford F. Ins. Co. v. Reynolds*, 36 Mich. 502.

6. Provisions in Application or in Policy. — *United States*. — *Rassell v. American F. Ins. Co.*, 2 Hughes (U. S.) 531. *Compare New York L. Ins. Co. v. Fletcher*, 117 U. S. 519; *Maier v. Fidelity Mut. L. Assoc.*, 47 U. S. App. 322; *Hubbard v. Mutual Reserve Fund L. Assoc.*, 80 Fed. Rep. 681.

Alabama. — *Sellers v. Commercial F. Ins. Co.*, 105 Ala. 282.

Illinois. — *Pierce v. People*, 106 Ill. 11, 46 Am. Rep. 683; *Union Ins. Co. v. Chipp*, 93 Ill. 96; *Commercial Ins. Co. v. Ives*, 56 Ill. 402.

Indiana. — *Indiana Ins. Co. v. Hartwell*, 100 Ind. 566, 123 Ind. 177; *Commercial Union Assur. Co. v. State*, 113 Ind. 331.

Mississippi. — *Planters' Ins. Co. v. Myers*, 55 Miss. 479, 30 Am. Rep. 521.

New York. — *Sprague v. Holland Purchase Ins. Co.*, 69 N. Y. 128; *Whited v. Germania F. Ins. Co.*, 76 N. Y. 415, 32 Am. Rep. 330; *Bushaw v. Women's Mut. Ins., etc., Co.*, (Supm. Ct. Gen. T.) 8 N. Y. Supp. 423; *Partridge v. Commercial F. Ins. Co.*, 17 Hun (N. Y.) 95; *Bernard v. United L. Ins. Assoc.*, (C. Pl. Gen. T.) 12 Misc. (N. Y.) 10, *reversing* (N. Y. City Ct. Gen. T.) 11 Misc. (N. Y.) 441. *Compare Chase v. Hamilton Ins. Co.*, 20 N. Y. 52, *reversing* 22 Barb. (N. Y.) 527; *Rohrbach v. Germania F. Ins. Co.*, 62 N. Y. 47, *reversing* 1

fact that he is the agent of the company may be shown by parol, notwithstanding such a provision in the policy.¹

3. Statutory Regulation of Agents. — In some of the United States there are statutes forbidding agents of insurance companies to act as such without a license, and requiring them to comply with certain conditions before a license shall be granted. Most of these statutes prescribe a penalty for a violation of their provisions.²

4. Powers, Rights, Duties, and Liabilities of Agent — *a. IN RESPECT TO PRINCIPAL* — (1) *Powers and Rights* — (a) *In General.* — The powers and rights of an insurance agent as regards his principal are, in the main, governed by the rules of law applicable to agents in general.³ Where there is an express contract its terms will govern.⁴

(b) *Right to Compensation.* — Thus where there is an express contract for the compensation of the agent, no proof of a general custom as to the compensation which is in conflict with its terms is admissible.⁵ But evidence of a well-established custom among insurance companies not in conflict with the terms of the contract is admissible to explain it, especially where its language is technical or ambiguous.⁶

Additional Insurance Secured by Another Agent. — Where an agent of an insurance company employed on a commission basis procures an application for insurance, and subsequently another agent of the company induces the applicant to increase the amount of the application, the former agent is not entitled to his commission on the additional insurance thus secured.⁷

Estoppel of Agent to Deny Terms of Employment. — Where an insurance agent receives a general circular from his company, containing in clear language the terms of his compensation, and acts on that circular without complaint for several years, he is estopped to deny that he was employed on those terms, and the production of a circular of prior date with other terms of compensation does not alter the case.⁸

Compensation of Subagents. — The general agent of an insurance company charged with the duty of appointing subagents has authority to fix the compensation

Thomp. & C. (N. Y.) 337; *Alexander v. Germania F. Ins. Co.*, 66 N. Y. 464 *reversing* 2 Hun (N. Y.) 655; *Allen v. German American Ins. Co.*, 123 N. Y. 6, *affirming* (Supm. Ct. Gen. T.) 3 N. Y. Supp. 170; *Wilber v. Williamsburgh City F. Ins. Co.*, 122 N. Y. 439, *reversing* (Supm. Ct. Gen. T.) 1 N. Y. Supp. 312.

West Virginia. — *Coles v. Jefferson Ins. Co.*, 41 W. Va. 261.

But see *Davis v. Aina Mut. F. Ins. Co.*, 67 N. H. 335, holding that the intention of the parties, evidenced by the policy and such other facts and circumstances as may be competent, must determine the question whether a person who secured a policy of insurance for another was the agent of the insurer or of the insured. Compare *Hamburg-Bremen F. Ins. Co. v. Lewis*, 4 App. Cas. (D. C.) 66; *Eilenberger v. Protective Mut. F. Ins. Co.*, 89 Pa. St. 465; *Columbia Ins. Co. v. Cooper*, 50 Pa. St. 331; *South Bend Toy Mfg. Co. v. Dakota F. & M. Ins. Co.*, 2 S. Dak. 17.

Although the By-laws of an Insurance Company make the person taking a survey in its behalf the agent of the applicant, still he is the agent of the company also, and it is bound by his acts. *Masters v. Madison County Mut. Ins. Co.*, 11 Barb. (N. Y.) 625.

1. Parol Evidence of Agency. — *Lumbermen's Mut. Ins. Co. v. Bell*, 106 Ill. 400, 57 Am. St. Rep. 140, *affirming* 63 Ill. App. 67.

2. Statutory Regulation of Agents — Licenses. — *State v. Hosmer*, 81 Me. 506. And see the statutes of the several states.

For the Construction of Statutes Requiring Agents of Foreign Companies to Secure a License, and imposing penalties for their neglect to do so, see *supra*, this title, *The Insurer — Insurance Companies — Foreign Companies.*

3. See the title AGENCY, vol. 1, p. 930.

4. For a Construction of the Peculiar Provisions of Contracts between insurance companies and their agents, see *Phoenix Mut. L. Ins. Co. v. Holloway*, 51 Conn. 310, 50 Am. Rep. 20; *Lea v. Union Cent. L. Ins. Co.*, 17 Tex. Civ. App. 451; *Cotton States L. Ins. Co. v. Mallard*, 57 Ga. 64.

5. Proof of Custom in Conflict with Contracts Not Admissible. — *Stagg v. Connecticut Mut. L. Ins. Co.*, 10 Wall. (U. S.) 589; *Partridge v. Life Ins. Co.*, 1 Dill (U. S.) 139, *affirmed* 15 Wall. (U. S.) 573.

6. Evidence of Custom Admissible to Explain Contract. — *Ensworth v. New York L. Ins. Co.*, 1 Flipp. (U. S.) 92; *Partridge v. Life Ins. Co.*, 1 Dill. (U. S.) 139, *affirmed* 15 Wall. (U. S.) 573. And see the title USAGES AND CUSTOMS.

7. Additional Insurance Secured by Another Agent. — *Brackett v. Metropolitan L. Ins. Co.*, (Supm. Ct. App. T.) 18 Misc. (N. Y.) 239.

8. Estoppel to Deny Terms of Employment. — *Stagg v. Connecticut Mut. L. Ins. Co.*, 10 Wall. (U. S.) 589.

of such subagents, and when, acting as agent, he so fixes their compensation, the company, and not he, is responsible to them for the amount fixed.¹ But of course the company is not liable where the contract expressly provides that the subagent shall have no claim against it.²

The Peculiar Provisions of Certain Contracts relating to the compensation of agents, especially in relation to their application to certain facts, have received the interpretation of the courts.³

Forfeiture of Compensation for Misconduct or Breach of Trust. — In contracts of employment between insurance companies and their agents there is an implied condition that the agent will perform the duties incident to his employment honestly, and will do nothing injurious to his employer's interests; and that if he proves radically unfaithful to his trust, or is guilty of gross misconduct, he forfeits all right to compensation.⁴ But his misconduct and infidelity must be gross and aggravated before such consequences will follow; ordinary or slight misconduct will not work a forfeiture of his compensation.⁵

(2) **Duties and Liabilities** — (a) **In General.** — An insurance agent is bound to serve the company in good faith to the best of his ability, and if he is careless or negligent in the transaction of his business, or acts in bad faith toward the company, he is liable for any damages which the company may sustain through such negligence or want of good faith.⁶

(b) **Liability for Writing Insurance Contrary to Instructions.** — An agent who writes insurance contrary to his instructions is liable to his principal for the loss resulting from his disobedience.⁷ But he is not liable if his act is ratified by

1. **Compensation of Subagents Fixed by General Agent.** — *Cotton States L. Ins. Co. v. Mallard*, 57 Ga. 64.

2. **Restriction of Authority of General Agent to Fix Compensation of Subagents.** — *U. S. Life Ins. Co. v. Hessberg*, 27 Ohio St. 393; *Lester v. New York L. Ins. Co.*, 84 Tex. 87.

But see *Cotton States L. Ins. Co. v. Mallard*, 57 Ga. 64, holding that if a general agent, in fixing the compensation of a subagent, exceeds his powers limited in the contract between him (the general agent) and the company, the company will still be bound to the subagent who had no knowledge of the restriction, and the general agent who exceeded his powers will be bound to reimburse the company.

3. **Peculiar Provisions Construed.** — *Stier v. Imperial L. Ins. Co.*, 58 Fed. Rep. 843, holding that a contract giving to the agent commissions on several distinct classes of policies to be issued by the company is not violated by a failure of the company to lend its support and co-operation in placing policies of a particular class, though the placing of that class of policies is more profitable to the agent than the placing of policies belonging to the other classes; *Ensworth v. New York L. Ins. Co.*, 1 Flipp. (U. S.) 92 (entire or divisible contract); *Bankers L. Ins. Co. v. Stephens*, 53 Neb. 660 (contract providing that the agent's compensation should be a certain percentage of the premiums collected and remitted on risks written by him; that for the first fifteen months he should have a salary of two hundred dollars per month, and if the income from the commission part of the contract should run more than the salary, he should be entitled to the benefit thereof; and that, in consideration of the contract as a whole, he should turn in to the company two hundred thousand dollars of insurance executed and paid for in the first

fifteen months); *North Western Mut. L. Ins. Co. v. Mooney*, 108 N. Y. 118, reversing 34 Hun (N. Y.) 626 (recovery of "advances" made by an insurance company to its agent); *Devereux v. Rochester German Ins. Co.*, 98 N. Car. 6 (voluntary return of commissions by the agent with full knowledge of the facts after cancellation of the policy by the company); *Lester v. New York L. Ins. Co.*, 84 Tex. 87 (contract held not to create exclusive agency); *Lea v. Union Cent. L. Ins. Co.*, 17 Tex. Civ. App. 451 (right of the agent to commissions where a policy was recalled by the company after issue, but before delivery); *Garfield v. Rutland Ins. Co.*, 69 Vt. 549 (provision that agents shall have twenty per cent. of the moneys received by them on account of premiums actually paid).

4. **Forfeiture of Compensation.** — *Ensworth v. New York L. Ins. Co.*, 1 Flipp. (U. S.) 94; *Myers v. Knickerbocker L. Ins. Co.*, 2 Big. Ins. Cas. 149, cited in *Phoenix Mut. L. Ins. Co. v. Holloway*, 51 Conn. 310, 50 Am. Rep. 20.

5. **Degree of Misconduct.** — *Ensworth v. New York L. Ins. Co.*, 1 Flipp. (U. S.) 94.

6. **Duties and Liabilities of Agents to Principal.** — *Phoenix Ins. Co. v. Pratt*, 36 Minn. 409; *American Cent. Ins. Co. v. Hagerty*, (Supm. Ct. Tr. T.) 21 Misc. (N. Y.) 213.

7. **Liability for Writing Insurance in Disobedience of Instructions.** — *Hanover F. Ins. Co. v. Ames*, 39 Minn. 150; *Sun Fire Office v. Ermentrout*, 11 Pa. Co. Ct. 21.

An Insurance Company Cannot Recover Substantial Damages from its agent through whose fault, while acting in good faith, it is drawn into a contract of insurance covered by its rates, somewhat different from what it supposed, but not less valuable to it. The court did not decide whether, in such case, the company could recover nominal damages. *State Ins. Co. v. Richmond*, 71 Iowa 519.

the principal, and a failure to repudiate may have the effect of a ratification. Such a failure, however, will not be tantamount to an approval of the agent's acts unless continued for more than a reasonable length of time allowable for looking into the case.¹

(c) **Liability for Neglect to Cancel Policies.** — Where an agent of an insurance company whose agency extends to the cancellation of policies receives orders to cancel a policy, and does not do so within a reasonable time, he will be liable for any loss resulting to the company from his negligence;² and the fact that he believed that the company was mistaken as to the safety or danger of the risk, or as to the wisdom of retaining it, will not excuse his delay.³ Nor will the fact that he gave notice of the cancellation to the broker who negotiated the insurance relieve him from liability. The broker in such case is the agent's agent.⁴ And it is not competent for the purpose of relieving the agent of liability to prove a custom to procure the cancellation of policies by the agency of the broker who negotiated the insurance.⁵

How Direction to Cancel Must Be Given. — In order to make it the duty of an insurance agent to cancel policies, it is not necessary that the order to do so should be given in the form of a command. The expression of a wish by the company may fairly be presumed to be an order.⁶

It Is Not Contributory Negligence on the part of the company that it does not itself proceed to cancel a policy on the failure of the agent to do so in accordance with his instructions.⁷

Waiver of Cancellation. — If, after requesting the cancellation of a policy, the conduct of the company is such as to mislead the agent into the belief that it has acquiesced in its noncancellation, the cancellation is waived, and the company cannot recover from the agent the loss sustained by reason of his failure to cancel.⁸

The Measure of Damages, in an action by an insurance company against its agent to recover for a loss resulting to the company from the neglect of the agent in not canceling a policy when so directed by the company, is the loss suffered by the company in consequence of such neglect.⁹

Failure to Notify Principal of Issuance of Policy. — Where the contract of an insurance agent with his principal requires him to notify the principal of the issuance of a policy on the day of its issuance, in order that the principal may exercise its right to cancel the policy, and as a result of the agent's failure so to notify the principal the latter is compelled to pay a loss under the policy, which it would have canceled had it been duly notified, the principal is entitled to recover from the agent the loss thus resulting from his negligence. *State Ins. Co. v. Jamison*, 79 Iowa 245.

1. **Ratification by Principal.** — *Sun Fire Office v. Ermentrout*, 11 Pa. Co. Ct. 21.

2. **Liability for Neglect to Cancel Policies.** — *Franklin Ins. Co. v. Sears*, 21 Fed. Rep. 293; *Washington F. & M. Ins. Co. v. Chesebro*, 35 Fed. Rep. 477; *Phoenix Ins. Co. v. Pratt*, 36 Minn. 409; *Sun Fire Office v. Ermentrout*, 11 Pa. Co. Ct. 21; *Kraber v. Union Ins. Co.*, 24 W. N. C. (Pa.) 547; *London Assur. Corp. v. Russell*, 1 Pa. Super. Ct. 320.

If the Agent Is Not Charged with the Duty of Canceling Policies, he cannot be guilty of negligence in not canceling a policy when so directed by the company, so as to make him liable to the company for not doing so. *Norwood v. Alamo F. Ins. Co.*, 13 Tex. Civ. App. 475.

What Is a Reasonable Time is always, where the facts are clear, a question for the court.

Franklin Ins. Co. v. Sears, 21 Fed. Rep. 293. See also *Washington F. & M. Ins. Co. v. Chesebro*, 35 Fed. Rep. 477.

3. **Agent's Belief as to Nature of Risk.** — *Washington F. & M. Ins. Co. v. Chesebro*, 35 Fed. Rep. 477; *Phoenix Ins. Co. v. Pratt*, 36 Minn. 409.

4. **Notifying Broker of Cancellation.** — *Franklin Ins. Co. v. Sears*, 21 Fed. Rep. 293; *Sun Fire Office v. Ermentrout*, 11 Pa. Co. Ct. 21.

5. *Franklin Ins. Co. v. Sears*, 21 Fed. Rep. 293.

6. **Sufficiency of Direction to Cancel.** — *London Assur. Corp. v. Russell*, 1 Pa. Super. Ct. 320; *Kraber v. Union Ins. Co.*, 24 W. N. C. (Pa.) 547.

Sufficient Evidence that Agent Understood Directions. — *Phoenix Ins. Co. v. Pratt*, 36 Minn. 409.

7. **Contributory Negligence.** — *London Assur. Corp. v. Russell*, 1 Pa. Super. Ct. 320.

8. **Cancellation Waived.** — *American Cent. Ins. Co. v. Hagerty*, (Supm. Ct. Tr. T.) 21 Misc. (N. Y.) 213, 92 Hun (N. Y.) 26; *London Assur. Corp. v. Russell*, 1 Pa. Super. Ct. 320.

9. **Measure of Damages.** — *Kraber v. Union Ins. Co.*, 24 W. N. C. (Pa.) 547; *London Assur. Corp. v. Russell*, 1 Pa. Super. Ct. 320.

Counsel Fees and Costs. — Where the company, on reasonable grounds, defends a suit brought on a policy which the agent had neglected to cancel, and notifies the agent that it

(d) **Duty to Preserve Rights Created for Principal.** — The power of an insurance agent to create rights by contract for his principal includes an implied duty to preserve, and not to defeat or destroy, those rights; and if he does defeat them, he will be liable to the principal for the resulting loss.¹

(e) **Liability of Sureties on Agents' Bonds.** — The liability of sureties on the bonds of insurance agents is governed by the terms of the contract,² and it is no defense to an action against them that they were ignorant as to the extent of the obligation assumed, or were misled by their principal in reference thereto, in the absence of proof that the insurance company was a party to the fraud.³

The Mere Failure of the Company Promptly to Notify the Surety of the Default of the principal will not discharge the surety.⁴

Foreign Insurance Company Without License to Do Business. — In an action on the bond of an agent of a foreign insurance company to recover the amount of premiums collected by the agent but not accounted for, it is no defense that the contracts between the company and the insured were invalid by reason of the company's not having complied with the statutory conditions entitling it to do business in the state.⁵

Sureties on the Bond of a General Agent are liable for a deficit caused by the failure of the subagents to pay over to the general agent moneys received by them.⁶

b. IN RESPECT TO ASSURED — (1) **Power to Bind Principal** — (a) **In General.** — Agreeably to the general law of agency, an insurance company is bound by the acts⁷ and representations⁸ of its agents done and made within the scope of their employment and authority, and by their knowledge of facts⁹ and receipt of notices¹⁰ affecting the business which they are authorized to conduct.

will hold him liable for the loss in case of failure of the suit, the agent will be liable for the costs of such suit, but not for counsel fees or for the expenses of an appeal, unless he himself demanded or requested that an appeal be taken. *Sun Fire Office v. Ermentrout*, 11 Pa. Co. Ct. 21.

1. Unauthorized or Wrongful Cancellation of Policies. — *Northern Assur. Co. v. Hamilton*, 50 Neb. 248; *American Steam Boiler Ins. Co. v. Anderson*, 130 N. Y. 134, *affirming* 57 N. Y. Super. Ct. 179.

2. Liability of Sureties on Agents' Bonds in General. — *Byington v. Sherman*, 64 Ark. 189; *Byrne v. Aetna Ins. Co.*, 56 Ill. 321; *British-American Assur. Co. v. Neil*, 76 Iowa 645; *Royal Ins. Co. v. Clark*, 61 Minn. 476.

3. Ignorance of Extent of Obligation Assumed No Defense. — *Phoenix Mut. L. Ins. Co. v. Holloway*, 51 Conn. 310, 50 Am. Rep. 20; *Western New York L. Ins. Co. v. Clinton*, 66 N. Y. 326, *reversing* 5 Hun (N. Y.) 118.

4. Notice of Default. — *Phoenix Mut. L. Ins. Co. v. Holloway*, 51 Conn. 310, 50 Am. Rep. 20.

5. Foreign Insurance Company Without License to Do Business. — *Rockford Ins. Co. v. Rogers*, 9 Colo. App. 127. See also *Manhattan Ins. Co. v. Ellis*, 32 Ohio St. 388.

6. Sureties of General Agent — Liability for Defaults of Subagents. — *Phoenix Mut. L. Ins. Co. v. Holloway*, 51 Conn. 310, 50 Am. Rep. 20.

Subrogation of General Agent to Rights of Company. — Where a general agent of an insurance company had appointed a local agent and had taken a bond from him in the name of the company, with sureties, conditioned that the local agent should pay over all moneys received by him, and the general agent paid to the company certain premiums received by the local agent but not accounted for by him, it was held in a suit upon the bond

that such settlement by the general agent with the company did not operate to discharge the bond, but that the general agent would be subrogated to the rights of the company in respect thereof. *Hough v. Aetna L. Ins. Co.*, 57 Ill. 318, 11 Am. Rep. 18.

7. Company Bound by Acts of Agent. — *Van Werden v. Equitable L. Assur. Soc.*, 99 Iowa 621; *Lingenfelter v. Phoenix Ins. Co.*, 19 Mo. App. 252; *Fish v. Cottenet*, 44 N. Y. 538, 4 Am. Rep. 715; *Continental Ins. Co. v. Kasey*, 25 Gratt. (Va.) 268, 18 Am. Rep. 681; *Muhleman v. National Ins. Co.*, 6 W. Va. 508.

8. Representations of Agents. — *Fogg v. Griffin*, 2 Allen (Mass.) 1.

Liability for Fraud of Agent. — An insurance company is liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, and omissions of duty of a general agent in the course of his employment, although the company did not authorize or justify such misconduct. *New York L. Ins. Co. v. McGowan*, 18 Kan. 300.

9. Agent's Knowledge of Facts. — *Keenan v. Missouri State Mut. Ins. Co.*, 12 Iowa 126; *Westchester F. Ins. Co. v. Earle*, 33 Mich. 143; *Eagle F. Co. v. Globe L. & T. Co.*, 44 Neb. 380.

10. Notice to Agent Binds Company — Illinois. — *Phoenix Ins. Co. v. Stocks*, 149 Ill. 319.

Iowa. — *Goodwin v. Provident Sav. L. Assur. Assoc.*, 97 Iowa 226, 59 Am. St. Rep. 411; *Frane v. Burlington Ins. Co.*, 87 Iowa 288.

Kansas. — *Capitol Ins. Co. v. Pleasanton Bank*, 50 Kan. 449.

Maryland. — *Schaeffer v. Farmer's Mut. F. Ins. Co.*, 80 Md. 563, 45 Am. St. Rep. 361.

Minnesota. — *Linder v. Fidelity, etc., Co.*, 52 Minn. 304.

Missouri. — *Moore v. Atlantic Mut. Ins. Co.*, 56 Mo. 343; *Pelkington v. National Ins. Co.*, 55 Mo. 172.

(b) **Nature and Extent of Authority** — *aa. REAL AUTHORITY* — (*aa*) *General Agents*. — A general agent of an insurance company may bind his principal by any act or agreement within the ordinary scope and limit of the insurance business which is not known by the assured to be beyond the authority granted to the agent.¹ Thus he may waive conditions in a policy issued through his agency, in the absence of any limitation upon his authority known to the other party,² and may alter a description of the property insured, in order to render it accurate.³

General Agent's Clerks. — An insurance company is responsible not only for the acts of its general agent, but also for the acts of his clerks or employees to whom he delegates authority to discharge his functions within the scope of his agency.⁴

(*bb*) *Special Agents* — *aaa. In General*. — When it is known that an agent of an insurance company is exercising mere special powers, the person dealing with him is bound at his peril to ascertain the scope of the agent's authority,⁵ and the company will not be bound by the acts, representations, or knowledge of facts of such agent beyond the scope of his employment.⁶

bbb. Soliciting Agents. — A soliciting agent who is authorized to receive applications for insurance and to transmit them to the company for its approval, but who has no authority to pass on risks or to make contracts of insurance, cannot bind the company by an oral agreement for insurance⁷ or for the

New York. — *Van Allen v. Farmers' Joint-Stock Ins. Co.*, 10 Hun (N. Y.) 397; *Forward v. Continental Ins. Co.*, 142 N. Y. 382. See also *Gates v. Penn F. Ins. Co.*, 10 Hun (N. Y.) 489.

Ohio. — *Dayton Ins. Co. v. Kelly*, 24 Ohio St. 345, 15 Am. Rep. 612.

Pennsylvania. — *Commonwealth Mut. F. Ins. Co. v. Huntzinger*, 98 Pa. St. 41.

Texas. — *Collins, etc., Co. v. U. S. Insurance Co.*, 7 Tex. Civ. App. 579.

Utah. — *West v. Norwich Union F. Ins. Co.*, 10 Utah 442.

Washington. — *Mesterman v. Home Mut. Ins. Co.*, 5 Wash. 524, 34 Am. St. Rep. 877.

See generally the title *AGENCY*, vol. I, p. 930.

1. Powers of General Agent Stated. — *American Cent. Ins. Co. v. McLanathan*, 11 Kan. 533; *Croft v. Hanover F. Ins. Co.*, 40 W. Va. 509, 52 Am. St. Rep. 902.

Authority to Issue Policy on Extra-hazardous Risk. — One dealing with a general agent of an insurance company is under no obligation to investigate the authority of such agent to issue a policy on a risk which is extra hazardous and located in a place other than the town in which the agent's office is situated. *German F. Ins. Co. v. Columbia Encaustic Tile Co.*, 15 Ind. App. 623.

Revival of Canceled Policies. — An insurance agent cannot revive a canceled policy already rejected by the company, unless he has authority from the company to rescind or revoke its action, and that, too, in the specific case; this authority cannot be presumed. *Hartford F. Ins. Co. v. Reynolds*, 36 Mich. 502.

2. Waiver of Conditions. — *Knickerbocker L. Ins. Co. v. Norton*, 96 U. S. 234; *Home Ins. Co. v. Duke*, 84 Ind. 253; *Day v. Dwelling-House Ins. Co.*, 81 Me. 244; *Parsons v. Knoxville F. Ins. Co.*, 132 Mo. 583; *Schmidt v. Charter Oak L. Ins. Co.*, 2 Mo. App. 339; *Bergman v. St. Louis L. Ins. Co.*, 2 Mo. App. 262; *Alexander v. Continental Ins. Co.*, 67 Wis. 422, 58 Am. Rep. 869; *Palmer v. St. Paul F. & M. Ins. Co.*, 44 Wis. 201.

3. Correcting Description of Property. — *Taylor v. State Ins. Co.*, 98 Iowa 521, 60 Am. St. Rep. 210; *Warner v. Peoria M. & F. Ins. Co.*, 14 Wis. 318.

4. Clerks and Subagents. — *International Trust Co. v. Norwich Union F. Ins. Soc.*, 71 Fed. Rep. 81, 36 U. S. App. 277; *German F. Ins. Co. v. Columbia Encaustic Tile Co.*, 15 Ind. App. 623; *Hilton v. Newman*, 6 Mo. App. 304; *German Ins. Co. v. Rounds*, 35 Neb. 752; *More v. New York Bowery F. Ins. Co.*, 55 Hun (N. Y.) 540; *Bergeron v. Pamlico Ins., etc., Co.*, 111 N. Car. 45; *Goode v. Georgia Home Ins. Co.*, 92 Va. 392, 53 Am. St. Rep. 817.

See also *supra*, this section, *Who Are Insurance Agents* — *Subagents*.

5. Special Agents. — *Sun Fire Office v. Wich*, 6 Colo. App. 103; *McClure v. Mississippi Valley Ins. Co.*, 4 Mo. App. 148.

6. Acts of Special Agents Beyond Scope of Employment Not Binding on Principal. — *Paine v. Pacific Mut. L. Ins. Co.*, 51 Fed. Rep. 689, 10 U. S. App. 256; *U. S. Mutual Acc. Assoc. v. Kittenring*, 22 Colo. 257; *Shaffer v. Milwaukee Mechanics' Ins. Co.*, 17 Ind. App. 204; *Keenan v. Dubuque Mut. F. Ins. Co.*, 13 Iowa 375; *Hamilton v. Aurora F. Ins. Co.*, 15 Mo. App. 59.

If the Authority Is Express and in Writing, the company cannot be bound by the act of the agent not within such authority, unless it has so acted or permitted the agent so to act as to justify the public or the plaintiff in believing that the agent has other or greater powers than those given by the written authority. *Reynolds v. Continental Ins. Co.*, 36 Mich. 131; *Farmers' Mut. Ins. Co. v. Taylor*, 73 Pa. St. 342.

7. Soliciting Agents. — *O'Brien v. New Zealand Ins. Co.*, 108 Cal. 227; *Winneshiek Ins. Co. v. Holzgrafe*, 53 Ill. 516, 5 Am. Rep. 64; *Armstrong v. State Ins. Co.*, 61 Iowa 212; *Embree v. German Ins. Co.*, 62 Mo. App. 132; *Allen v. St. Lawrence County Farmers' Ins. Co.*, 88 Hun (N. Y.) 461; *New York Union Mut. Ins. Co. v. Johnson*, 23 Pa. St. 72;

renewal of a policy,¹ or by his construction of its provisions;² nor has such an agent the power to vary the terms³ or to waive a condition of the policy,⁴ or to bind the company by his consent to additional insurance,⁵ or in writing on the back of the policy to consent to its assignment.⁶

ccc. **Collecting Agents.** — An agent employed by an insurance company merely to collect and forward the premiums upon policies cannot bind the company by his waiver of any of the terms of the policy⁷ or by his consent to additional insurance.⁸

ddd. **Adjusters.** — An agent whose business it is to adjust losses may bind the company by his waiver of the proof of loss⁹ or by his compromise of the loss,¹⁰ but he has no power to waive the forfeiture of a policy.¹¹

bb. **OSTENSIBLE AUTHORITY** — (aa) *In General.* — When a person deals with an agent in ignorance of the powers granted to him, the liability of the principal is coextensive with the agent's ostensible authority. If an insurance company clothes an agent with apparent authority to do an act, the company will be bound by the act when done, although the agent may not actually have been vested with authority to do it.¹² The question is not so much what authority the agent had in point of fact, as it is what powers a third person dealing with him

Fleming v. Hartford F. Ins. Co., 42 Wis. 616.

Such an agent having no power to make a binding contract of insurance, his failure to forward the application and premium to the company or to return them to the applicant within a reasonable time will not make his contract binding. *Trask v. German Ins. Co.*, 53 Mo. App. 625.

A parol contract of insurance made by a special agent, sanctioned by instructions from a general agent, is valid. *Harron v. City of London F. Ins. Co.*, 88 Cal. 16.

1. **Renewal of Policies.** — *Shank v. Glens Falls Ins. Co.*, 4 N. Y. App. Div. 516.

2. **Interpretation of Policies.** — *Smith v. Continental Ins. Co.*, 6 Dak. 443; *Dryer v. Security F. Ins. Co.*, 94 Iowa 471; *Stockton v. Firemen's Ins. Co.*, 33 La. Ann. 577, 39 Am. Rep. 277.

3. **Varying Terms of Policies.** — *Putnam Tool Co. v. Fitchburg Mut. F. Ins. Co.*, 145 Mass. 265; *Duluth Nat. Bank v. Knoxville F. Ins. Co.*, 85 Tenn. 76, 4 Am. St. Rep. 744.

4. **Waiver of Conditions.** — *Rockford Ins. Co. v. Boirum*, 40 Ill. App. 129; *Critchett v. American Ins. Co.*, 53 Iowa 404, 36 Am. Rep. 230; *Lohnes v. Insurance Co. of North America*, 121 Mass. 439; *Bowlin v. Hekla F. Ins. Co.*, 36 Minn. 433; *Home F. Ins. Co. v. Garbacz*, 48 Neb. 827; *Healey v. Imperial F. Ins. Co.*, 5 Nev. 268; *Bush v. Westchester F. Ins. Co.*, 63 N. Y. 531; *Van Allen v. Farmers' Joint-Stock Ins. Co.*, 64 N. Y. 469; *Hankins v. Rockford Ins. Co.*, 70 Wis. 1.

5. **Consent to Additional Insurance.** — *Heath v. Springfield F. Ins. Co.*, 58 N. H. 414.

6. **Consent to Assignment.** — *Strickland v. Council Bluffs Ins. Co.*, 66 Iowa 466.

7. **Collecting Agents.** — *Elsner v. Prudential Ins. Co.*, (Brooklyn City Ct. Gen. T.) 13 Misc. (N. Y.) 395.

8. *East Texas F. Ins. Co. v. Blum*, 76 Tex. 653.

9. **Adjusters.** — *Ætna Ins. Co. v. Shryer*, 85 Ind. 362.

10. *Millers' Nat. Ins. Co. v. Kinneard*, 136 Ill. 199; *Slater v. Capital Ins. Co.*, 89 Iowa 628.

11. *Hollis v. State Ins. Co.*, 65 Iowa 454;

Phoenix Ins. Co. v. Lawrence, 4 Met. (Ky.) 9, 81 Am. Dec. 521.

12. **Agent's Ostensible Authority** — *United States*. — *Potter v. Phenix Ins. Co.*, 63 Fed. Rep. 382; *Manhattan L. Ins. Co. v. Carder*, 82 Fed. Rep. 986, 42 U. S. App. 659; *Abraham v. North German Ins. Co.*, 40 Fed. Rep. 717.

Alabama. — *Syndicate Ins. Co. v. Catchings*, 104 Ala. 176.

Colorado. — *California Ins. Co. v. Gracey*, 15 Colo. 70, 22 Am. St. Rep. 376.

Illinois. — *Ætna Ins. Co. v. Maguire*, 51 Ill. 342.

Iowa. — *Slater v. Capital Ins. Co.*, 89 Iowa 628.

Kansas. — *Western Home Ins. Co. v. Hogue*, 41 Kan. 524.

Kentucky. — *Hartford L., etc., Ins. Co. v. Hayden*, 90 Ky. 39.

Mississippi. — *Rivara v. Queen's Ins. Co.*, 62 Miss. 720.

Nebraska. — *Pacific Mut. L. Ins. Co. v. Frank*, 44 Neb. 320.

New Jersey. — *Millville Mut. M. & F. Ins. Co. v. Mechanics', etc., Bldg., etc., Assoc.*, 43 N. J. L. 652.

New York. — *Carrol v. Charter Oak Ins. Co.*, 40 Barb. (N. Y.) 292; *Ruggles v. American Cent. Ins. Co.*, 114 N. Y. 415, 11 Am. St. Rep. 674.

Ohio. — *Dayton Ins. Co. v. Kelly*, 24 Ohio St. 345, 15 Am. Rep. 612.

Oregon. — *Hardwick v. State Ins. Co.*, 20 Oregon 547.

Pennsylvania. — *Farmers' Mut. Ins. Co. v. Taylor*, 73 Pa. St. 343; *Hoge v. Dwelling-House Ins. Co.*, 138 Pa. St. 66.

Virginia. — *Wytheville Ins., etc., Co. v. Teiger*, 90 Va. 277.

Wisconsin. — *Zell v. Herman Farmers' Mut. Ins. Co.*, 75 Wis. 521.

Ostensible authority is such as a principal intentionally or by want of ordinary care causes or allows a third person to believe the agent to possess. *O'Brien v. New Zealand Ins. Co.*, 108 Cal. 227.

And see generally the title AGENCY, vol. 1, p. 930.

had the right to suppose he possessed, judging from his acts and the acts of his principal.⁴

(bb) *Effect of Private Instructions to Agent.* — Hence, although an agent must answer to his principal for departing from his private instructions, the principal is bound by the acts of the agent so far as third persons dealing with him are concerned. If the agent is apparently exercising general powers in respect to insurance, the principal cannot discharge himself from liability upon a contract made by the agent by setting up private instructions to such agent which were wholly unknown to the insured when he entered into the contract.²

(cc) *Acts Done After Termination of Agency.* — The acts of a person apparently having authority will bind the company when such person has been the agent of the company and third parties who have dealt with him as such have had no notice of the revocation of his authority.³

cc. **WAIVER OF LIMITATION AND RATIFICATION OF ACTS.** — Although an agent may have no authority to perform an act, yet if the company subsequently waives the limitation and sanctions what he has done, it cannot afterwards object to his want of authority.⁴

(e) **Effect of Limitation in Policy.** — A provision in a policy of insurance that the agent shall have no power to waive, modify, or strike from the policy any of the printed conditions, is no restriction upon the power of the agent to make a contract of insurance,⁵ but limits the power of the agent after the contract has been consummated and the policy issued.⁶

(2) *Personal Liability* — (a) **Liability for Sums Received as Premiums** — aa. **WHERE AGENT FAILS TO DELIVER POLICY.** — One who pays to an insurance agent a certain sum as an insurance premium, upon the understanding that he is to have a policy, may, if no policy is issued to him, recover from the agent the amount so paid.⁷

bb. **WHERE PERSON INDUCED BY FRAUDULENT REPRESENTATIONS TO INSURE.** — A person who is induced by the false and fraudulent representations of the agent of an

1. *Lightbody v. North American Ins. Co.*, 23 Wend. (N. Y.) 18.

2. **Effect of Instructions to Agents.** — *Union Mut. Ins. Co. v. Wilkinson*, 13 Wall. (U. S.) 222; *Commercial F. Ins. Co. v. Morris*, 105 Ala. 498; *German F. Ins. Co. v. Columbia Encaustic Tile Co.*, 15 Ind. App. 623; *Hicks v. British America Assur. Co.*, 13 N. Y. App. Div. 444; *Lightbody v. North American Ins. Co.*, 23 Wend. (N. Y.) 18.

The fact that property is so situated that it is the agent's duty to refuse to insure it under instructions given to him by the company will not affect the validity of a policy issued by an agent having general authority to make contracts of insurance and accepted in good faith by the insured without knowledge of the agent's instructions. *Hartford F. Ins. Co. v. Farrish*, 73 Ill. 166; *Howard Ins. Co. v. Owen*, 94 Ky. 197.

The Right of an Infant to Recover on a Policy is not affected by private instructions from the company to the agent who issued the policy, directing him to take no risks on property belonging to infants. *Johnson v. Scottish Union, etc., Ins. Co.*, 93 Wis. 223.

3. **Acts Done After Termination of Agency.** — *Burlington Ins. Co. v. Threlkeld*, 60 Ark. 539; *Matter of Pelican Ins. Co.*, 47 La. Ann. 935. See also the title **AGENCY**, vol. 1, p. 1220.

4. **Ratification of Unauthorized Acts.** — *Keith v. Globe Ins. Co.*, 52 Ill. 518, 4 Am. Rep. 624; *Southwestern Mut. Ben. Assoc. v. Swenson*,

49 Kan. 449; *Howard Ins. Co. v. Owen*, 94 Ky. 197; *Equitable L. Assur. Soc. v. Cole*, 13 Tex. Civ. App. 486; *Niagara Ins. Co. v. Lee*, 73 Tex. 641; *New York L. Ins. Co. v. Taliaferro*, 95 Va. 522; *John R. Davis Lumber Co. v. Hartford F. Ins. Co.*, 95 Wis. 226.

5. **Limitation in Policy.** — *Mutual Ben. L. Ins. Co. v. Robison*, 19 U. S. App. 266; *Continental Ins. Co. v. Ruckman*, 127 Ill. 364, 11 Am. St. Rep. 121; *Zell v. Herman Farmers' Mut. Ins. Co.*, 75 Wis. 521; *Mathers v. Union Mut. Acc. Assoc.*, 78 Wis. 588.

6. *Cleaver v. Traders' Ins. Co.*, 65 Mich. 527, 8 Am. St. Rep. 908. Compare *St. Paul F. & M. Ins. Co. v. Parsons*, 47 Minn. 352.

Delivery During Life of Assured. — If a policy of life insurance declares on its face that it shall not be binding unless delivered while the person whose life is insured is in good health, the agent cannot make the policy binding upon the company by delivering it to the beneficiary after the death of the assured. *McClave v. Mutual Reserve Fund L. Assoc.*, 55 N. J. L. 187.

Mode of Waiver. — Where a policy provides that nothing less than a distinct, specific agreement indorsed on or attached to the policy will be construed as a waiver of any printed or written conditions or restrictions therein, a local agent of the insurance company cannot waive any of the provisions of the policy, except in the mode provided for. *Enos v. Sun Ins. Co.*, 67 Cal. 621.

7. *Collier v. Bedell*, 39 Hun (N. Y.) 238.

insurance company to take out a policy in the company and to pay the premium thereon may rescind the contract, and, in an action against the agent for the tort, recover as damages the amount of the premium so paid.¹

cc. WHERE COMPANY HAS NO AUTHORITY TO DO BUSINESS. — If an agent of an insurance company issues a policy and receives the premium after the company's certificate of authority to do business in the state has been revoked, the person thus paying the premium may recover it from the agent; and this though at the time of taking the premium the agent was not aware of the revocation, and the statutory requirements as to publication of notice of revocation had not been complied with.²

dd. WHEN COMPANY BECOMES INSOLVENT BEFORE RECEIVING PREMIUM. — Where a party insuring has paid the premium to the agent of the company, and before the agent has paid it over or assumed any liability on account of it the company becomes insolvent, and such party notifies the agent that he claims the money, and does not rely upon the policy issued to him, which is worthless, he may recover back the premium in a suit against the agent.³ But he cannot recover without proving that he has offered to return the policy, or that it is worthless.⁴

(b) **Liability for Neglect to Effect Insurance.** — Where an insurance agent contracts with a person to effect for him a policy of insurance and receives from him a premium thereon, he will doubtless be liable for the damages resulting from his neglect to do so.⁵ But an agent cannot be held liable for negligence in not forwarding promptly an application for insurance, where he refused to forward the only application authorized by the applicant, and several days later forwarded one prepared by himself.⁶

(c) **Liability for Loss Resulting from Unauthorized Acts or Representations.** — Where a person is induced by the unauthorized acts or representations of an insurance agent to enter into a contract of insurance, the agent will be personally liable for any loss sustained by such person in consequence of such acts or representations.⁷

(d) **Where Agency Is of Foreign Company Not Authorized to Do Business.** — An agent who issues a policy in a foreign insurance company that has not complied with the statutory requirements entitling it to do business in the state is personally liable to the policy holder for any loss occurring under the policy.⁸

5. Termination of Agency — a. HOW IT MAY BE TERMINATED — At Election of Either Party. — As a general rule a contract between an insurance company

1. Insurance Induced by Fraud. — Hedden v. Griffin, 136 Mass. 229, 49 Am. Rep. 25.

But it has been held that an action cannot be maintained by the holder of an insurance policy against the agents of the insurance company for premiums paid to them, when it appears that the policy on which the premiums were paid conforms to the application and is in accordance with the agreements of such agents. Farrow v. Cochran, 72 Me. 309.

2. Foreign Company Without License to Do Business. — McCutcheon v. Rivers, 65 Mo. 122.

3. Insolvency of Company Before Receiving Premium. — Smith v. Binder, 75 Ill. 492.

4. What Must Be Proved in Order to Recover. — Farrow v. Cochran, 72 Me. 309. Compare Smith v. Binder, 75 Ill. 492.

5. Failure to Procure Policy. — Haight v. Kremer, 9 Phila. (Pa.) 50, 29 Leg. Int. (Pa.) 30; Stadler v. Trever, 86 Wis. 42.

6. Negligence in Forwarding Application — Conversion of Policy. — The plaintiff applied to insurance brokers for insurance on his vessel. The brokers filled out an application and sent

it to the agent of an insurance company. The agent refused to forward the application to his company unless the valuation was raised. This was not acceded to by the brokers, but the agent filled out an application with the valuation increased, and forwarded it to the company. On the day when it was mailed the vessel was lost, and four days thereafter the agent received by telegram an order from the company to decline the risk and return the policy. The policy was received by the agent on the next day, and was returned at once. It was held that the plaintiff had no right to an action against the agent for negligence in forwarding the application, as he had refused to forward the only application authorized by the plaintiff, nor could he recover for conversion of the policy by the agent, as the property in it never passed out of the company. Buck v. Knowlton, 21 Can. Sup. Ct. 371.

7. Loss Sustained in Consequence of Agent's Unauthorized Acts or Representations. — Kroeger v. Pitcairn, 101 Pa. St. 311, 47 Am. Rep. 718.

8. Agent of Foreign Company. — Morton v. Hart, 88 Tenn. 427.

and one employed by it as its agent is determinable at the election of either party.¹

Or It May Be Terminated by Operation of Law where incapacity in either party to maintain the relation is brought about.²

The Exceptions to This Rule as Concerns the Right of the Principal to Revoke the Agency are where the power to revoke is restrained by express stipulation³ or where the agency is coupled with an interest in the subject-matter.⁴ The contract right of an agent to commissions on renewal policies is not such an interest as will prevent the principal terminating the agency at his will.⁵

b. EFFECT OF TERMINATION — (1) *Agent's Power to Bind Principal Ceases*. — The power of the agent to act for the principal or to bind it by his acts ceases upon the termination of the agency.⁶

(2) *Right to Commissions on Renewal Policies*. — Though the cases leave some ground for doubt, they seem to sanction the rule that a contract providing for the payment of commissions to the agent on renewal policies confers upon him no right to collect and retain such commissions after the termination of the agency, or to recover them from the company when collected by another agent.⁷ The question has generally been determined with reference to the peculiar provisions of the particular contract in question.⁸

V. FORFEITURE AND AVOIDANCE — 1. **Ground of Forfeiture** — *a. IN GENERAL*. — Contracts of insurance may be forfeited or avoided by the breach or falsity of warranties contained therein or of the representations of the insured which are collateral to the contract.

b. WARRANTIES — (1) *Definition*. — A warranty is a part of the contract evidenced by the policy, and consists of an assertion of a fact or an undertaking to do a particular act, upon the accuracy or performance of which the validity of the contract depends.⁹

1. Agency Terminable at Election of Either Party. — *Stier v. Imperial L. Ins. Co.*, 58 Fed. Rep. 843; *North Carolina State L. Ins. Co. v. Williams*, 91 N. Car. 69, 49 Am. Rep. 637. See the title AGENCY, vol. 1, p. 1215 *et seq.*

An Assignment for the Benefit of Creditors made by an insurance company operates as a revocation of the authority of its agents. *Franzen v. Zimmer*, 90 Hun (N. Y.) 103. And see the title INSOLVENCY AND BANKRUPTCY, *ante*, p. 630.

2. Termination by Operation of Law. — *North Carolina State L. Ins. Co. v. Williams*, 91 N. Car. 69, 49 Am. Rep. 637. See the title AGENCY, vol. 1, p. 1222 *et seq.*

3. Power to Revoke Restrained by Express Stipulation. — *Stier v. Imperial L. Ins. Co.*, 58 Fed. Rep. 843; *Sibley v. Mutual Reserve Fund L. Assoc.*, 87 Ga. 738. See the title AGENCY, vol. 1, p. 1215.

A provision in a contract of agency that the contract may be terminated upon certain specified grounds does not imply that the agency cannot be terminated on any other grounds. *Stier v. Imperial L. Ins. Co.*, 58 Fed. Rep. 843, *distinguishing Newcomb v. Imperial L. Ins. Co.*, 51 Fed. Rep. 725.

Designation of One as Agent to Accept Process. — When nothing in the original appointment of an agent of an insurance company binds the company to continue the agency for a specified time, the fact that the company, in compliance with a state statute, designated from year to year such person as its agent on whom legal process might be served, does not imply an intention or agreement to continue him as its agent for any special time, and such agency is revocable at will. *Davis v. Niagara F. Ins. Co.*, 11 Biss. (U. S.) 165.

4. Agency Coupled with Interest. — *Stier v. Imperial L. Ins. Co.*, 58 Fed. Rep. 843; *North Carolina State L. Ins. Co. v. Williams*, 91 N. Car. 69, 49 Am. Rep. 637.

5. Contract Right to Commissions on Renewals. — *Stier v. Imperial L. Ins. Co.*, 58 Fed. Rep. 843, *distinguishing Newcomb v. Imperial L. Ins. Co.*, 51 Fed. Rep. 725; *North Carolina State L. Ins. Co. v. Williams*, 91 N. Car. 69, 49 Am. Rep. 637.

6. Effect of Termination. — *Franzen v. Zimmer*, 90 Hun (N. Y.) 103.

7. Commissions on Renewals After Termination of Agency. — *North Carolina State L. Ins. Co. v. Williams*, 91 N. Car. 69, 49 Am. Rep. 637; *Ballard v. Traveller's Ins. Co.*, 119 N. Car. 187.

8. Question Determined with Reference to Peculiar Provisions of Contracts. — *Spaulding v. New York L. Ins. Co.*, 61 Me. 329; *Jacobson v. Connecticut Mut. L. Ins. Co.*, 61 Minn. 330; *Hale v. Brooklyn L. Ins. Co.*, 120 N. Y. 294, *affirming 46 Hun (N. Y.) 274*. See also *Phoenix Mut. L. Ins. Co. v. Holloway*, 51 Conn. 310, 50 Am. Rep. 20.

An Insurance Agent, on the Termination of His Agency, Cannot Enjoin the Company from Receiving Premiums, although he may be entitled to a commission thereon. *Machette v. Hodges*, 6 Phila. (Pa.) 206, 24 Leg. Int. (Pa.) 141.

9. Warranties Defined — *Colorado*. — *Lampkin v. Travelers' Ins. Co.*, 11 Colo. App. 249.

Indiana. — *Indiana Farmers' Live Stock Ins. Co. v. Byrket*, 9 Ind. App. 443.

Iowa. — *Stout v. City F. Ins. Co.*, 12 Iowa 371, 79 Am. Dec. 539.

Minnesota. — *Price v. Phoenix Mut. L. Ins. Co.*, 17 Minn. 497, 10 Am. Rep. 166.

(2) *Kinds of Warranties.* — Warranties may be affirmative or promissory.¹ Affirmative warranties may be express or implied, but they usually consist of positive representations in the policy of the existence of some fact or state of things at or previous to the time of making the policy.² Promissory warranties may be express or implied, but they usually have respect to the happening of some future event or the performance of some act in the future.³ The distinction between affirmative and promissory or executory warranties is that the former represent the existence of certain facts at the time when the policy is effected, and the latter represent that certain things shall exist during the continuance of the policy.⁴

(3) *Nature of Warranties* — (a) *In General.* — If there is a warranty, the only concern of the courts in the absence of contractual stipulations or statutory enactments to the contrary, is to determine the truth or falsity of the representation warranted.

(b) *Materiality — General Rule.* — Thus, whether a warranty be affirmative or promissory, the effect of a breach thereof upon the validity of the contract does not depend upon the materiality of the facts warranted; the stipulation of warranty is in effect an agreement that the facts warranted are material to the risk, and precludes any inquiry into the question of materiality.⁵

Nebraska. — *Ætna Ins. Co. v. Simmons*, 49 Neb. 811.

"As a general rule, a warranty is a stipulation expressly set out, or by inference incorporated, in the policy, whereby the assured agrees 'that certain facts relating to the risk are or shall be true, or certain acts relating to the same subject have been or shall be done.'" *Providence L. Assur. Soc. v. Reutlinger*, 58 Ark. 532.

1. *Affirmative and Promissory Warranties Defined.* — *James v. Lycoming Ins. Co.*, 4 Cliff. (U. S.) 272, 13 Fed. Cas. No. 7,182; *Indiana Farmers' Live Stock Ins. Co. v. Byrket*, 9 Ind. App. 443.

2. *James v. Lycoming Ins. Co.*, 4 Cliff. (U. S.) 272, 13 Fed. Cas. No. 7,182.

3. *James v. Lycoming Ins. Co.*, 4 Cliff. (U. S.) 272, 13 Fed. Cas. No. 7,182; *Copp v. German American Ins. Co.*, 51 Wis. 637.

4. *Distinction Between Affirmative and Promissory Warranties.* — *Borradale v. Hunter*, 5 M. & G. 639, 44 E. C. L. 335; *Stout v. City F. Ins. Co.*, 12 Iowa 371, 79 Am. Dec. 539; *Jennings v. Chenango County Mut. Ins. Co.*, 2 Den. (N. Y.) 78.

5. *Materiality of Facts Warranted* — *United States*. — *Jeffries v. Economical Mut. L. Ins. Co.*, 22 Wall. (U. S.) 47; *Ætna L. Ins. Co. v. France*, 91 U. S. 510; *Hoffman v. Supreme Council*, etc., 35 Fed. Rep. 252; *Cotten v. Fidelity*, etc., Co., 41 Fed. Rep. 506; *Mutual L. Ins. Co. v. Selby*, 72 Fed. Rep. 980.

Alabama. — *Alabama Gold L. Ins. Co. v. Garner*, 77 Ala. 210; *Kelly v. Life Ins. Clearing Co.*, 113 Ala. 453.

Arkansas. — *Providence L. Assur. Soc. v. Reutlinger*, 58 Ark. 528.

California. — *McKenzie v. Scottish Union*, etc., Ins. Co., 112 Cal. 548.

Colorado. — *Lampkin v. Travelers' Ins. Co.*, 11 Colo. App. 249.

Connecticut. — *Bennett v. Agricultural Ins. Co.*, 50 Conn. 420.

Iowa. — *Stout v. City F. Ins. Co.*, 12 Iowa 371, 79 Am. Dec. 539; *Wilkins v. Germania F. Ins. Co.*, 57 Iowa 529.

Kansas. — *Modern Woodmen of America v. Von Wald*, 6 Kan. App. 231.

Louisiana. — *Adema v. Lafayette F. Ins. Co.*, 36 La. Ann. 660.

Maine. — *Johnson v. Maine*, etc., Ins. Co., 83 Me. 183.

Michigan. — *American Ins. Co. v. Gilbert*, 27 Mich. 429.

Missouri. — *Lochner v. Home Mut. Ins. Co.*, 17 Mo. 247; *American Ins. Co. v. Barnett*, 73 Mo. 364, 39 Am. Rep. 517; *Mers v. Franklin Ins. Co.*, 68 Mo. 127; *Brooks v. Standard F. Ins. Co.*, 11 Mo. App. 349; *Roberts v. State Ins. Co.*, 26 Mo. App. 92; *Holloway v. Dwelling-House Ins. Co.*, 48 Mo. App. 1; *Maddox v. Dwelling House Ins. Co.*, 56 Mo. App. 343.

New York. — *Higbee v. Guardian Mut. L. Ins. Co.*, 66 Barb. (N. Y.) 462; *O'Shaughnessy v. Working Women's Co-operative Assoc.*, (N. Y. City Ct. Gen. T.) 8 Misc. (N. Y.) 491; *Levell v. Royal Arcanum*, (N. Y. Super. Ct. Tr. T.) 9 Misc. (N. Y.) 257; *Cogswell v. Chubb*, 1 N. Y. App. Div. 93; *Clements v. Connecticut Indemnity Co.*, 29 N. Y. App. Div. 131; *McCollum v. Mutual L. Ins. Co.*, 55 Hun (N. Y.) 103.

Oregon. — *Chrisman v. State Ins. Co.*, 16 Oregon 285.

South Dakota. — *Knudson v. Grand Council*, etc., 7 S. Dak. 214.

Virginia. — *Virginia F. & M. Ins. Co. v. Morgan*, 90 Va. 290.

But it has been held not error to instruct the jury in a suit upon an insurance policy to the effect that if the jurors believe the representation made by the plaintiff to be "essentially" untrue, they should find for the defendant. *Hoffman v. Supreme Council*, etc., 35 Fed. Rep. 252. *Hughes, J.*, in this case said that the word "essentially" was properly used in the instruction because synonymous with the word "strictly" and not synonymous with the legal term "materially."

Materiality as an Aid to Construction. — While the effect of a warranty is in no wise dependent upon the materiality of the statement, such materiality may sometimes become of import-

Contractual Stipulations as to Materiality. — Where, however, the warranty is that the facts stated are true so far as they are material to the risk, the falsity of one of the statements will invalidate the insurance only in case the fact misstated was material to the risk.¹

Statutory Provisions as to Materiality. — In a number of the United States statutes have been enacted which, while varying considerably in phraseology, provide in effect that the representations and statements of the insured shall not avoid the contract unless material to the risk. These statutes have been held to be remedial in character and within the police power of the state.²

Construction and Effect of Statutes. — Under these statutes a misrepresentation will not, of course, avoid a policy unless it relates to a matter which is material to the risk.³ And it has been held that, unless qualified by words restricting their operation to representations made in good faith, such statutory provisions apply as well to representations fraudulently made as to those made in good faith.⁴ But if the provision of the statute is that misrepresentations or statements made by the insured in good faith shall not avoid the policy unless material to the risk, an immaterial representation will avoid the policy if not made in good faith.⁵ It has been held that under a statute of this kind it is not competent for the parties to conclude for themselves that which the statute in effect declares shall remain open for the court.⁶

ance as an aid to the determination of the question whether the statement is or is not a warranty. *Lampkin v. Travelers' Ins. Co.*, 11 Colo. App. 249.

1. Stipulations Limiting Warranty to Material Facts. — *Mulville v. Adams*, 19 Fed. Rep. 887; *Eddy v. Hawkeye Ins. Co.*, 70 Iowa 472, 59 Am. Rep. 444; *Hunter v. International Fraternal Alliance*, 7 Ohio Dec. 239, 5 Ohio N. P. 35; *Redman v. Hartford F. Ins. Co.*, 47 Wis. 89, 32 Am. Rep. 751.

Where a policy referred to the application, expressly making it "a part of the policy and a warranty by the assured," and then provided that "false representation by the assured of the condition, situation, or occupancy of the property, or any omission to make known any fact material to the risk, or an over-valuation, or any misrepresentation whatever, either in the written application or otherwise, shall render the policy void," it was considered that the effect of these provisions was to make every actual misrepresentation contained in the application a warranty which, if false, should render the policy void, while the mere suppression of or omission to state any fact should have that effect only when the fact suppressed was material to the risk. *American Ins. Co. v. Gilbert*, 27 Mich. 429.

2. Constitutionality of Statutes Relating to Materiality. — *White v. Connecticut Mut. L. Ins. Co.*, 4 Dill. (U. S.) 177, 29 Fed. Cas. No. 17,545; *Equitable L. Assur. Soc. v. Clements*, 140 U. S. 226; *Eagle Ins. Co. v. Ohio*, 153 U. S. 446; *Wall v. Equitable L. Assur. Soc.*, 32 Fed. Rep. 273; *Penn Mut. L. Ins. Co. v. Mechanics' Sav. Bank, etc., Co.*, 72 Fed. Rep. 413; *Queen Ins. Co. v. Leslie*, 47 Ohio St. 409; *Reilly v. Franklin Ins. Co.*, 43 Wis. 449, 28 Am. Rep. 552.

3. Effect of Statutes — United States. — *Penn Mut. L. Ins. Co. v. Mechanics Sav. Bank, etc., Co.*, 73 Fed. Rep. 653.

Georgia. — *Southern L. Ins. Co. v. Wilkinson*, 53 Ga. 535; *Mobile F. Department Ins. Co. v. Coleman*, 58 Ga. 251; *Mobile F. Department Ins. Co. v. Miller*, 58 Ga. 420; *German*

American Mut. L. Assoc. v. Farley, 102 Ga. 720.

Maryland. — *Fidelity Mut. L. Assoc. v. Ficklen*, 74 Md. 172, construing Pennsylvania statute.

Missouri. — *Christian v. Connecticut Mut. L. Ins. Co.*, 143 Mo. 460; *Jacobs v. Omaha L. Assoc.*, 142 Mo. 49.

New Hampshire. — *Davis v. Aetna Mut. F. Ins. Co.*, 67 N. H. 335.

North Carolina. — *Albert v. Mutual L. Ins. Co.*, 122 N. Car. 92.

4. *Klostermann v. Germania L. Ins. Co.*, 6 Mo. App. 582.

5. *Penn Mut. L. Ins. Co. v. Mechanics Sav. Bank, etc., Co.*, 73 Fed. Rep. 653; *Germania Ins. Co. v. Rudwig*, 80 Ky. 223; *Fidelity Mut. L. Assoc. v. Ficklin*, 74 Md. 172; *Hogan v. Metropolitan L. Ins. Co.*, 164 Mass. 448; *Herman v. Fidelity Mut. L. Assoc.*, 151 Pa. St. 17.

Under the *Massachusetts* statute (Acts 1887, c. 214, § 21), in order to avoid a policy for a breach of warranty it must be established not only that the statements or answers were incorrect, but also either that the misrepresentations were made with actual intent to deceive or that the matter misrepresented increased the risk of loss. *Levie v. Metropolitan L. Ins. Co.*, 163 Mass. 117. And it is held that the statute applies not only to statements which are merely representations, but also to warranties incorporated in the policy by a reference to the application. *White v. Provident Sav. L. Assur. Soc.*, 163 Mass. 108.

6. *Herman v. Fidelity Mut. L. Assoc.*, 151 Pa. St. 17. See also *Johnson v. Maine, etc., Ins. Co.*, 83 Me. 182.

But in construing the *Kentucky* statute of February 4, 1874, providing that "all statements or descriptions in any application for or policies of insurance shall be deemed and held representations, and not warranties," it has been said that this statute would no doubt control in all cases in which the policy is silent as to the effect of such statements and descriptions, but that the parties have a right to de-

(c) **Good Faith of Warrantor.** — If a warranty is absolute and unqualified, it is immaterial that it was made by the insured in good faith, as where it was made by mistake or through ignorance as to the truth of the matter warranted; the insured will not be permitted to avoid the effect of a breach of his warranty by showing that he acted in good faith.¹ But where the warranty is qualified by the statement that the facts stated are true to the best of the warrantor's knowledge and belief, or by some similar phrase, the falsity of the fact warranted will invalidate the insurance only in case the insured knew or had reason to know that the representation was not true.² If the insured, by fraud or mistake of the agent of the insurer while acting within his authority, is induced to sign a statement which he did not make and did not intend to make, the statement is not only void as to himself, but it will not be sufficient to support a forfeiture of the policy.³

(4) **Warranties Distinguished from Representations.** — Warranties are to be clearly distinguished from representations. A representation is not a part of the contract, but is collateral thereto, while a warranty is a part of the contract.⁴ In consequence of this, while the falsity of a representation is not a ground for avoiding the contract unless material to the risk,⁵ a warranty as to any fact will, as has been shown, preclude any inquiry as to the materiality of the fact.⁶

clare in the policy itself the meaning and effect to be given to its stipulations, and there is nothing in the act quoted to indicate an intention on the part of the legislature to control the action of the parties in this respect. *Farmers, etc., Ins. Co. v. Curry*, 13 Bush (Ky.) 312, 26 Am. Rep. 194.

1. **Effect of Warrantor's Good Faith — General Rule** — *United States*. — *Provident Sav. L. Assur. Soc. v. Llewellyn*, 58 Fed. Rep. 940.

Alabama. — *Alabama Gold L. Ins. Co. v. Garner*, 77 Ala. 210.

Georgia. — *O'Connell v. Supreme Conclave, etc.*, 102 Ga. 143, citing 11 AM. AND ENG. ENCYC. OF LAW (1st ed.) 291.

Kansas. — *Modern Woodmen of America v. Von Wald*, 6 Kan. App. 231.

Maine. — *Johnson v. Maine, etc., Ins. Co.*, 83 Me. 183.

Massachusetts. — *Cobb v. Covenant Mut. Ben. Assoc.*, 153 Mass. 176, 25 Am. St. Rep. 619.

Missouri. — *Holloway v. Dwelling-House Ins. Co.*, 48 Mo. App. 1; *Maddox v. Dwelling House Ins. Co.*, 56 Mo. App. 343.

New York. — *Elliott v. Mutual Ben. L. Assoc.*, 76 Hun (N. Y.) 378; *Bernard v. United L. Ins. Assoc.*, (N. Y. City Ct. Gen. T.) 8 Misc. (N. Y.) 499; *Higgins v. John Hancock Mut. L. Ins. Co.*, (N. Y. City Ct. Gen. T.) 20 Misc. (N. Y.) 231; *Fowler v. Aetna Ins. Co.*, 7 Wend. (N. Y.) 270.

Pennsylvania. — *Blooming Grove Mut. F. Ins. Co. v. McAnerney*, 102 Pa. St. 335, 48 Am. Rep. 209; *Commonwealth Mut. F. Ins. Co. v. Huntzinger*, 98 Pa. St. 41.

Tennessee. — *Standard L., etc., Ins. Co. v. Lauderdale*, 94 Tenn. 635.

Texas. — *Mutual L. Ins. Co. v. Baker*, 10 Tex. Civ. App. 515.

2. **Same — Qualified Warranties — England.** — *Macdonald v. Law Union F., etc., Ins. Co.*, L. R. 9 Q. B. 328; *Fowkes v. Manchester, etc., L. Assur., etc., Assoc.*, 3 B. & S. 917, 113 E. C. L. 917.

United States. — *Northwestern Mut. L. Ins. Co. v. Gridley*, 100 U. S. 614; *Kansas City First Nat. Bank v. Hartford F. Ins. Co.*, 95 U. S. 673; *Mulville v. Adams*, 19 Fed. Rep. 887;

Mechanics' Sav. Bank, etc., Co. v. Guarantee Co. of North America, 68 Fed. Rep. 459.

Georgia. — *O'Connell v. Supreme Conclave, etc.*, 102 Ga. 143.

Iowa. — *Wilkins v. Germania F. Ins. Co.*, 57 Iowa 529.

Massachusetts. — *Houghton v. Manufacturers' Mut. F. Ins. Co.*, 8 Met. (Mass.) 114, 41 Am. Dec. 489; *Clapp v. Massachusetts Ben. Assoc.*, 146 Mass. 519.

Michigan. — *Hann v. National Union*, 97 Mich. 513, 37 Am. St. Rep. 365.

New Jersey. — *Anders v. Supreme Lodge, etc.*, 51 N. J. L. 175.

New York. — *Egan v. Supreme Council, etc.*, 32 N. Y. App. Div. 245; *Bernard v. United L. Ins. Assoc.*, (N. Y. City Ct. Gen. T.) 8 Misc. (N. Y.) 499; *Foot v. Aetna L. Ins. Co.*, 61 N. Y. 571; *Woehrl v. Metropolitan L. Ins. Co.*, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 88, reversing 20 Misc. (N. Y.) 719; *Breeze v. Metropolitan L. Ins. Co.*, 24 N. Y. App. Div. 377.

Ohio. — *Hunter v. International Fraternal Alliance*, 7 Ohio Dec. 239, 5 Ohio N. P. 35.

Wisconsin. — *Redman v. Hartford F. Ins. Co.*, 47 Wis. 89, 32 Am. Rep. 751.

Where the insured followed his answers to questions contained in his application by the qualification, "The above is as near correct as I remember," it was held that the jury was correctly instructed that a recovery on the policy could not be defeated unless it appeared that one of the answers was consciously incorrect. *Aetna L. Ins. Co. v. France*, 94 U. S. 561.

3. **Same — Fraud or Mistake of Agent of Insurer.** — *Williamson v. New Orleans Ins. Co.*, 84 Ala. 106; *Anson v. Winneshiek Ins. Co.*, 23 Iowa 84; *Plumb v. Penn Mut. L. Ins. Co.*, 108 Mich. 94; *Commonwealth Mut. F. Ins. Co. v. Huntzinger*, 98 Pa. St. 41.

4. *Burritt v. Saratoga County Mut. F. Ins. Co.*, 5 Hill (N. Y.) 188, 40 Am. Dec. 345.

5. See *infra*, this section, *Representations — Representations to Avoid Policy Must Be Material*.

6. **Distinction Between Warranties and Representations — England.** — *Anderson v. Fitzgerald*, 4 H. L. Cas. 484.

(5) *What Constitutes Warranty*—(a) **In General.**—Where a warranty is expressly and in terms declared, there is no room for construction, but the terms of the contract, in this respect, must control.¹ But when not expressly declared to be warranties, it is frequently difficult to determine under what circumstances representations which form a part of the contract of insurance acquire the character of warranties.

(b) **Warranties Not Created or Extended by Construction.**—In considering the question whether a statement which forms a part of the contract is a warranty, it must be borne in mind, as an established maxim, that warranties are not to be created or extended by construction. They must arise, if at all, from the fair interpretation and clear intendment of the words used by the parties.²

(c) **Warranties Not Favored.**—And since warranties must be literally fulfilled, they are not favored,³ and the courts, when there is room for construction, invariably manifest a strong reluctance to regard any statement made by the insured as a warranty, unless such was the obvious purpose of the parties to the contract.⁴ If it is doubtful whether statements made by the applicant relative to the subject of insurance are to be regarded as warranties or as representations, they will be deemed representations.⁵

United States.—*Selby v. Mutual L. Ins. Co.*, 67 Fe l. Rep. 490; *Fidelity, etc., Co. v. Alpert*, 67 Fed. Rep. 460, 28 U. S. App. 393.

Connecticut.—*Glendale Woolen Co. v. Protection Ins. Co.*, 21 Conn. 19, 54 Am. Dec. 309.

Indiana.—*Mutual Ben. L. Ins. Co. v. Miller*, 39 Ind. 475; *Indiana Farmers' Live Stock Ins. Co. v. Bogeman*, 9 Ind. App. 399.

Iowa.—*Miller v. Mutual Ben. L. Ins. Co.*, 31 Iowa 226, 7 Am. Rep. 122.

Maine.—*Witherell v. Maine Ins. Co.*, 49 Me. 200.

Massachusetts.—*Daniels v. Hudson River F. Ins. Co.*, 12 Cush. (Mass.) 416, 59 Am. Dec. 192.

Oregon.—*Chrisman v. State Ins. Co.*, 16 Oregon 283.

Pennsylvania.—*State Mut. F. Ins. Co. v. Arthur*, 30 Pa. St. 315; *Lycoming Ins. Co. v. Mitchell*, 48 Pa. St. 367.

1. Representations Expressly Declared to Be Warranties—*United States.*—*Provident Sav. L. Assur. Soc. v. Llewellyn*, 58 Fed. Rep. 940.

Alabama.—*Alabama Gold L. Ins. Co. v. Garner*, 77 Ala. 210.

Indiana.—*Mutual Ben. L. Ins. Co. v. Miller*, 39 Ind. 475; *Mutual Ben. L. Ins. Co. v. Cannon*, 48 Ind. 269; *Phoenix Ins. Co. v. Benton*, 87 Ind. 136.

New York.—*Foley v. Royal Arcanum*, 78 Hun (N. Y.) 222.

Rhode Island.—*Sweeney v. Metropolitan L. Ins. Co.*, 19 R. I. 171.

South Dakota.—*Knudson v. Grand Council*, etc., 7 S. Dak. 214.

2. Warranties Not Created or Extended by Construction—*Alabama.*—*Kelly v. Life Ins. Clearing Co.*, 113 Ala. 453.

Massachusetts.—*Daniels v. Hudson River F. Ins. Co.*, 12 Cush. (Mass.) 416, 59 Am. Dec. 192; *Blood v. Howard F. Ins. Co.*, 12 Cush. (Mass.) 472; *Forbush v. Western Massachusetts Ins. Co.*, 4 Gray (Mass.) 337; *Campbell v. New England Mut. L. Ins. Co.*, 98 Mass. 381.

Nebraska.—*Ætna Ins. Co. v. Simmons*, 49 Neb. 811.

New York.—*Jefferson Ins. Co. v. Cotheal*, 7 Wend. (N. Y.) 72, 22 Am. Dec. 567.

3. Warranties Not Favored.—*Union Cent. L.*

Ins. Co. v. Pauly, 8 Ind. App. 85; *Supreme Lodge, etc., v. Hutchinson*, 6 Ind. App. 399; *Northwestern Mut. L. Ins. Co. v. Hazelett*, 105 Ind. 212, 55 Am. Rep. 192; *Rogers v. Phenix Ins. Co.*, 121 Ind. 570; *Penn Mut. L. Ins. Co. v. Wiler*, 100 Ind. 92, 50 Am. Rep. 769; *Havens v. Home Ins. Co.*, 111 Ind. 90, 60 Am. Rep. 689; *Masons' Union L. Ins. Assoc. v. Brockman*, 20 Ind. App. 206.

4. United States.—*Missouri, etc., Trust Co. v. German Nat. Bank*, 77 Fed. Rep. 117, 40 U. S. App. 710; *Kansas City First Nat. Bank v. Hartford F. Ins. Co.*, 95 U. S. 673; *Moulou v. American L. Ins. Co.*, 111 U. S. 335.

Indiana.—*Northwestern Mut. L. Ins. Co. v. Hazelett*, 105 Ind. 212, 55 Am. Rep. 192; *Rogers v. Phenix Ins. Co.*, 121 Ind. 570.

Kansas.—*Northwestern Mut. L. Ins. Co. v. Woods*, 54 Kan. 663.

Massachusetts.—*Daniels v. Hudson River F. Ins. Co.*, 12 Cush. (Mass.) 424, 59 Am. Dec. 192.

Minnesota.—*Price v. Phoenix Mut. L. Ins. Co.*, 17 Minn. 497, 10 Am. Rep. 166.

New York.—*Fitch v. American Popular L. Ins. Co.*, 59 N. Y. 557, 17 Am. Rep. 372.

5. Statements of Doubtful Character Construed to Be Representations—*United States.*—*Kansas City First Nat. Bank v. Hartford F. Ins. Co.*, 95 U. S. 673.

Arkansas.—*Providence L. Assur. Co. v. Reutlinger*, 58 Ark. 528.

Illinois.—*Merchants, etc., Ins. Co. v. Schroeder*, 18 Ill. App. 216.

Indiana.—*Rogers v. Phenix Ins. Co.*, 121 Ind. 570; *Indiana Farmers' Live Stock Ins. Co. v. Rundell*, 7 Ind. App. 426; *Union Cent. L. Ins. Co. v. Pauly*, 8 Ind. App. 85; *Indiana Farmers Live Stock Ins. Co. v. Bogeman*, 9 Ind. App. 399; *Ætna Ins. Co. v. Norman*, 12 Ind. App. 652, citing 11 AM. AND ENG. ENCYC. OF LAW (1st ed.) 294; *Supreme Lodge, etc., v. Edwards*, 15 Ind. App. 524.

Kansas.—*Northwestern Mut. L. Ins. Co. v. Woods*, 54 Kan. 663.

Nebraska.—*Ætna Ins. Co. v. Simmons*, 49 Neb. 811.

New Jersey.—*Anders v. Supreme Lodge, etc.*, 51 N. J. L. 175.

(d) **Form or Language of Statements.** — While no particular form of words is necessary to create a warranty, the language of a stipulation will sometimes throw light upon its character. Thus, where it appears from the designation of the statements of the insured as "representations" or "statements," or from the form in which they are expressed, that there was no intention to give to them the force and effect of warranties, they will not be so construed.¹ But the language of the statements is not of controlling importance. Statements made by the applicant for insurance may be construed to be representations notwithstanding the fact that they are denominated warranties in the policy, when the language and context of the writings justify the construction.²

Words of Description. — If the terms used in a policy are fully satisfied as a description, they will not be extended to include a warranty unless it is clearly expressed that such was the design and meaning of the parties.³ A phrase which is not a statement of fact at all, but is merely a description of the person to whom the policy is payable, will not be construed as a warranty.⁴ And it has been held that a recital of ownership in a policy of insurance is not such a technical expression as amounts to a warranty.⁵ The effect of a warranty will not be given to words which are merely descriptive of the property insured.⁶ But a phrase, appearing on the face of the policy, which is not merely descriptive of the identity of the property, but relates to the character of the risk, has frequently been held to be a warranty.⁷

(e) **Statements Incorporated in Policy.** — One general rule in determining whether the particular statement does or does not constitute a warranty is that the warranty must be embraced in the policy itself.⁸ Thus, where warranties are contained in the application, they are always construed as representations, unless by the express provisions of the policy the application is made a part

Ohio. — *Hunter v. International Fraternal Alliance*, 7 Ohio Dec. 239, 5 Ohio N. P. 35.

Where an application apparently stipulated for a warranty, and contained a stipulation that it should form a part of the contract of insurance, but the policy on its face characterized the statements of the assured as representations, the doubt as to whether the representations were intended to be warranties was resolved in favor of the insured. *Moulor v. American L. Ins. Co.*, 111 U. S. 335.

1. **Form or Language of Statements.** — *Houghton v. Manufacturers' Mut. F. Ins. Co.*, 8 Met. (Mass.) 114, 41 Am. Dec. 489; *Jones Mfg. Co. v. Manufacturers' Mut. F. Ins. Co.*, 8 Cush. (Mass.) 83, 54 Am. Dec. 742; *Towne v. Fitchburg Mut. F. Ins. Co.*, 7 Allen (Mass.) 51; *Campbell v. New England Mut. L. Ins. Co.*, 98 Mass. 381; *Price v. Phoenix Mut. L. Ins. Co.*, 17 Minn. 497, 10 Am. Rep. 166.

2. **Use of Word "Warranty" Not Conclusive.** — *Seales v. Scanlan*, 6 Ir. L. R. 367; *Wheelton v. Hardisty*, 8 El. & Bl. 232, 92 E. C. L. 232; *Howard etc., Ins. Co. v. Cornick*, 24 Ill. 455; *Indiana Farmers' Live Stock Ins. Co. v. Rundell*, 7 Ind. App. 426; *Indiana Farmers' Live Stock Ins. Co. v. Byrkett*, 9 Ind. App. 443; *Kingsley v. New England Mut. F. Ins. Co.*, 8 Cush. (Mass.) 393; *Fitch v. American Popular L. Ins. Co.*, 59 N. Y. 557, 17 Am. Rep. 372.

3. **Words of Description.** — *Niagara F. Ins. Co. v. Johnson*, 4 Kan. App. 16; *Frisbie v. Fayette Mut. Ins. Co.*, 27 Pa. St. 325.

4. **Description of Persons.** — *Lampkin v. Travelers' Ins. Co.*, 11 Colo. App. 249, reversing *Travelers' Ins. Co. v. Lampkin*, 5 Colo. App. 177; *Standard L., etc., Ins. Co. v. Martin*, 133 Ind. 381.

5. **Recital of Ownership.** — *Southern Ins., etc., Co. v. Lewis*, 42 Ga. 587.

6. **Description of Property.** — *Niagara F. Ins. Co. v. Johnson*, 4 Kan. App. 16; *Kentucky, etc., Mut. Ins. Co. v. Southard*, 8 B. Mon. (Ky.) 634; *U. S. Fire, etc., Ins. Co. v. Kimberly*, 34 Md. 224, 6 Am. Rep. 325; *Frisbie v. Fayette Mut. Ins. Co.*, 27 Pa. St. 325; *Virginia F. & M. Ins. Co. v. Morgan*, 90 Va. 290.

7. **Statements as to Character of Risk.** — *Wall v. East River Mut. Ins. Co.*, 7 N. Y. 370; *Chaffee v. Cattaraugus County Mut. Ins. Co.*, 18 N. Y. 376; *Alexander v. Germania F. Ins. Co.*, 66 N. Y. 464, 23 Am. Rep. 76; *Maher v. Hibernia Ins. Co.*, 67 N. Y. 283; *Burleigh v. Gebhard F. Ins. Co.*, 90 N. Y. 220.

8. **Warranties Must Be Embraced in Policy** — *United States*. — *Fidelity, etc., Co. v. Alpert*, 67 Fed. Rep. 460, 28 U. S. App. 393.

Iowa. — *Miller v. Mutual Ben. L. Ins. Co.*, 31 Iowa 216, 7 Am. Rep. 122.

Kentucky. — *Kentucky, etc., Mut. Ins. Co. v. Southard*, 8 B. Mon. (Ky.) 634.

Massachusetts. — *Daniels v. Hudson River F. Ins. Co.*, 12 Cush. (Mass.) 416, 59 Am. Dec. 192.

New Jersey. — *American Popular L. Ins. Co. v. Day*, 39 N. J. L. 89.

New York. — *Boehm v. Commercial Alliance L. Ins. Co.*, (Supm. Ct. Spec. T.) 9 Misc. (N. Y.) 529; *Jans v. Workingman's Co operative Assoc.*, (N. Y. City Ct. Gen. T.) 10 Misc. (N. Y.) 785.

Texas. — *Liverpool, etc., Ins. Co. v. Stern*, (Tex. Civ. App. 1895) 29 S. W. Rep. 678; *Phoenix Ins. Co. v. Padgett*, (Tex. Civ. App. 1897) 42 S. W. Rep. 800.

thereof and the intent is manifest to give the effect of warranties to them.¹ But the statements or agreements of the insured do not necessarily become warranties because they are inserted or referred to in the policy.² The character of the representations of the insured, whether they are contained in the policy itself or in a separate writing referred to in such a manner as to make them a part of the contract, depends upon the language in which they are expressed, the apparent purpose of the insertion or reference, and sometimes upon the connection or relation of other parts of the instrument.³

Statutes Requiring Incorporation of Application in Policy. — In some of the United States it is required by statute that a copy of the application shall be set forth in, indorsed on, or attached to the policy, otherwise a company cannot avail itself of false statements in the application as a defense; and in these states it has accordingly been held that to enable the company to rely upon such statements there must be a compliance with the statute.⁴

(f) **Incorporation of Application in Policy — By Express Reference.** — The application may be made a part of the contract of insurance, by an express reference in the policy making the application a part of the contract.⁵ Thus it has been

1. *Missouri, etc., Trust Co. v. German Nat. Bank*, 77 Fed. Rep. 117, 40 U. S. App. 710; *Miller v. Mutual Ben. L. Ins. Co.*, 31 Iowa 216, 7 Am. Rep. 122; *Campbell v. New England Mut. L. Ins. Co.*, 98 Mass. 381. But compare *Price v. Phoenix Mut. L. Ins. Co.*, 17 Minn. 497, 10 Am. Rep. 166.

2. **Statements Held to Be Representations Notwithstanding Incorporation in Policy.** — *Alabama Gold L. Ins. Co. v. Johnston*, 80 Ala. 467, 60 Am. Rep. 112; *Providence L. Assur. Soc. v. Reutlinger*, 58 Ark. 528; *Lampkin v. Travelers' Ins. Co.*, 11 Colo. App. 249, *Campbell v. New England Mut. L. Ins. Co.*, 98 Mass. 381.

3. *Alabama Gold L. Ins. Co. v. Johnston*, 80 Ala. 467, 60 Am. Rep. 112; *Providence L. Assur. Soc. v. Reutlinger*, 58 Ark. 528; *Campbell v. New England Mut. L. Ins. Co.*, 98 Mass. 381; *Price v. Phoenix Mut. L. Ins. Co.*, 17 Minn. 497, 10 Am. Rep. 166; *Ætna Ins. Co. v. Simmons*, 49 Neb. 811.

4. *Cook v. Federal L. Assoc.*, 74 Iowa 746; *Eastern R. Co. v. Relief F. Ins. Co.*, 98 Mass. 420; *Imperial F. Ins. Co. v. Dunham*, 117 Pa. St. 460, 2 Am. St. Rep. 686; *Dunbar v. Phenix Ins. Co.*, 72 Wis. 492; *Johnson v. Scottish Union, etc., Ins. Co.*, 93 Wis. 223.

The *Massachusetts* statute of 1864 (Acts 1864, c. 196) which regulates a form to be used in all fire policies issued by companies chartered or doing business in that state, requires that "the conditions of the insurance shall be stated in the body of the policy, and neither the application of the insured nor the by-laws of the company shall be considered as a warranty or a part of the contract, except so far as they are incorporated in full into the policy and so appear on its face, before the signatures of the officers of the company." Under this statute written warranties of the assured, if not incorporated into the policy, must be disregarded in determining its rights against the insurer. *Eastern R. Co. v. Relief F. Ins. Co.*, 98 Mass. 420; *Luce v. Dorchester Mut. F. Ins. Co.*, 105 Mass. 297, 7 Am. Rep. 522; *Mullaney v. National F. & M. Ins. Co.*, 118 Mass. 393; *Taylor v. Ætna Ins. Co.*, 120 Mass. 254. See also *Barre Boot Co. v. Milford Mut. F. Ins. Co.*, 7 Allen (Mass.) 42, and *Kimball v. Ætna Ins. Co.*, 9 Allen (Mass.) 540, 85 Am. Dec. 786, decided under Acts 1861, c. 153.

Bates's Annot. Stat. Ohio (1897), § 3623, provides that the insurer must return with and as part of any policy issued to the insured a full and complete copy of each application or other document held by the insurer which is intended in any manner to affect the force or validity of the policy. Under this statute it has been held that unless a copy of the application is furnished to the insured with the policy, the application becomes no part of the contract of insurance, and the policy cannot be avoided by representations therein contained. *Andrews v. National L. Ins. Co.*, 7 Ohio Dec. 307.

5. **Mode of Incorporating Application in Policy — United States.** — *Kansas City First Nat. Bank v. Hartford F. Ins. Co.*, 95 U. S. 673; *Kelley v. Mutual L. Ins. Co.*, 75 Fed. Rep. 637.

Connecticut. — *Glendale Woolen Co. v. Protection Ins. Co.*, 21 Conn. 19, 54 Am. Dec. 309; *Wood v. Hartford F. Ins. Co.*, 13 Conn. 533, 35 Am. Dec. 92; *Treadway v. Hamilton Mut. Ins. Co.*, 29 Conn. 68; *Sheldon v. Hartford F. Ins. Co.*, 22 Conn. 235, 58 Am. Dec. 420; *Kelsey v. Universal L. Ins. Co.*, 35 Conn. 225. *Illinois.* — *Cedar Rapids Ins. Co. v. Shimp*, 16 Ill. App. 248.

Indiana. — *Mutual Ben. L. Ins. Co. v. Miller*, 39 Ind. 475.

Iowa. — *Miller v. Mutual Ben. L. Ins. Co.*, 3 Gray (Mass.) 580.

Maine. — *Battles v. York County Mut. F. Ins. Co.*, 41 Me. 208; *Richardson v. Maine Ins. Co.*, 46 Me. 304, 74 Am. Dec. 459.

Massachusetts. — *Tebbetts v. Hamilton Mut. Ins. Co.*, 1 Allen (Mass.) 305, 79 Am. Dec. 740; *Brown v. People's Mut. Ins. Co.*, 11 Cush. (Mass.) 280; *Miles v. Connecticut Mut. L. Ins. Co.*, 3 Gray (Mass.) 580.

Minnesota. — *Price v. Phoenix Mut. L. Ins. Co.*, 17 Minn. 497, 10 Am. Rep. 166.

New Hampshire. — *Marshall v. Columbian Mut. F. Ins. Co.*, 27 N. H. 157.

New Jersey. — *Deewees v. Manhattan Ins. Co.*, 34 N. J. L. 245.

New York. — *Jennings v. Chenango County Mut. Ins. Co.*, 2 Den. (N. Y.) 75; *Burritt v. Saratoga County Mut. F. Ins. Co.*, 5 Hill (N. Y.) 188, 40 Am. Dec. 345; *Fowler v. Ætna F. Ins. Co.*, 6 Cow. (N. Y.) 673, 16 Am. Dec. 460; *Trench v. Chenango County Mut. Ins. Co.*, 7

held that the stipulations in the application amount to an express warranty where the application is referred to in the policy for a more particular description of the property insured and as forming a part of the policy.¹ It is not necessary that the application be physically attached to the policy,² nor is it necessary that the policy state the date of the application.³ But the reference must be such as to make the application in legal effect a part of the policy.⁴ When a reference to the application is expressed to be for a purpose other than to make it a part of the policy, or when no purpose to make it a part of the policy is indicated, it will not have that effect.⁵

Without Express Reference. — An express reference to the application or other writing with a stipulation that it shall form a part of the policy is not invariably necessary. By applying the well-settled and familiar rule that different writings executed at the same time and relating to the same subject-matter will be construed as one instrument, the courts have sometimes treated the application and other writings as part of the contract of insurance though not expressly incorporated in the policy.⁶

(g) **Parol Representations.** — Parol representations, of course, can be converted

Hill (N. Y.) 122; Wall v. East River Mut. Ins. Co., 7 N. Y. 370; Kennedy v. St. Lawrence County Mut. Ins. Co., 10 Barb. (N. Y.) 285; Chaffee v. Cattaraugus County Mut. Ins. Co., 18 N. Y. 376; Le Roy v. Market F. Ins. Co., 39 N. Y. 90, 45 N. Y. 80; Ballston Spa First Nat. Bank v. Insurance Co. of North America, 50 N. Y. 45; Wright v. Equitable L. Assur. Soc., (N. Y. Super. Ct. Spec. T.) 50 How. Pr. (N. Y.) 367; Parmelee v. Hoffman F. Ins. Co., 54 N. Y. 193; Alexander v. Germania F. Ins. Co., 66 N. Y. 464, 23 Am. Rep. 76; Foley v. Royal Arcanum, 78 Hun (N. Y.) 222.

Oregon. — Chrisman v. State Ins. Co., 16 Oregon 283.

Pennsylvania. — Blooming Grove Mut. F. Ins. Co. v. McAnerney, 102 Pa. St. 335, 48 Am. Rep. 209.

Wisconsin. — Blumer v. Phoenix Ins. Co., 48 Wis. 535, 33 Am. Rep. 830.

In *Travelers' Ins. Co. v. Lampkin*, 5 Colo. App. 177, the policy referred to the application in the following terms: "The Travelers Insurance Company of Hartford, Conn., in consideration of warranties in application for this policy, * * * does hereby insure Joseph P. Lampkin," etc. It was held that this language was sufficient to make the application a part of the policy.

1. Reference to Application for Description of Property. — *Kennedy v. St. Lawrence County Mut. Ins. Co.*, 10 Barb. (N. Y.) 285; *Wall v. East River Mut. Ins. Co.*, 7 N. Y. 370; *Sexton v. Montgomery County Mut. Ins. Co.*, 9 Barb. (N. Y.) 191; *Smith v. Empire Ins. Co.*, 25 Barb. (N. Y.) 497; *Jennings v. Chenango County Mut. Ins. Co.*, 2 Den. (N. Y.) 75; *Egan v. Mutual Ins. Co.*, 5 Den. (N. Y.) 326. See also *Merrill v. Agricultural Ins. Co.*, 10 Hun (N. Y.) 430; *Mead v. North-western Ins. Co.*, 7 N. Y. 530; *Wilson v. Herkimer County Mut. Ins. Co.*, 6 N. Y. 53; *Duncan v. Sun Fire Ins. Co.*, 6 Wend. (N. Y.) 488, 22 Am. Dec. 539; *Westfall v. Hudson River F. Ins. Co.*, 12 N. Y. 289; *Murdock v. Chenango County Mut. Ins. Co.*, 2 N. Y. 210; *Gates v. Madison County Mut. Ins. Co.*, 2 N. Y. 43; *Trench v. Chenango County Mut. Ins. Co.*, 7 Hill (N. Y.) 122; *Burritt v. Saratoga County Mut. F. Ins. Co.*, 5 Hill (N. Y.) 188, 40 Am. Dec. 345; *Roberts v.*

Chenango County Mut. Ins. Co., 3 Hill (N. Y.) 501.

When the policy contains the words, "Reference being had to said application for a more particular description, and as forming a part of this policy," or a similar clause, the application, it has been held, is made a part of the contract of insurance. *Williams v. New England Mut. F. Ins. Co.*, 31 Me. 219; *Burritt v. Saratoga County Mut. F. Ins. Co.*, 5 Hill (N. Y.) 188, 40 Am. Dec. 345.

2. Physical Annexation of Application Not Necessary. — *Kelly v. Life Ins. Clearing Co.*, 113 Ala. 453; *Sun Fire Office v. Wich*, 6 Colo. App. 103; *Commonwealth Ins. Co. v. Monninger*, 18 Ind. 352; *Cox v. Aetna Ins. Co.*, 29 Ind. 586.

3. Date of Application Need Not Be Stated. — *Sun Fire Office v. Wich*, 6 Colo. App. 103.

4. Daniels v. Hudson River F. Ins. Co., 12 Cush. (Mass.) 423, 59 Am. Dec. 192.

Upon the expiration of an insurance policy the insured applied to the same agent for new insurance, but did not file another application. The agent effected the insurance in a company other than the one which had issued the first insurance. After the statements of the different buildings and amount of the insurance, the policy contained the words, "as per application on file No. 1234," which was the number of the application for the first insurance, on file with the agent. It was held that the reference was not sufficient to make this application a part of the contract. *Vilas v. New York Cent. Ins. Co.*, 72 N. Y. 590, 28 Am. Rep. 186, *affirming* 9 Hun (N. Y.) 121.

5. Kentucky, etc., Mut. Ins. Co. v. Southard, 8 B. Mon. (Ky.) 634; *Campbell v. New England Mut. L. Ins. Co.*, 98 Mass. 381; *Jefferson Ins. Co. v. Cotheal*, 7 Wend. (N. Y.) 72, 22 Am. Dec. 567; *Snyder v. Farmers' Ins., etc., Co.*, 13 Wend. (N. Y.) 92.

6. Express Reference Not Necessary. — *Kelly v. Life Ins. Clearing Co.*, 113 Ala. 453; *Cook v. Federal L. Assoc.*, 74 Iowa 746; *Eastern R. Co. v. Relief F. Ins. Co.*, 98 Mass. 420; *Imperial F. Ins. Co. v. Dunham*, 117 Pa. St. 460, 2 Am. St. Rep. 686; *Dunbar v. Phenix Ins. Co.*, 72 Wis. 492; *Johnson v. Scottish Union, etc., Ins. Co.*, 93 Wis. 223.

into warranties only by being afterwards written into the policy.¹

(6) *Construction of Warranties — In General.* — A contract of insurance is to be interpreted by the same rules as is any other contract.²

Intention of Parties Controls. — It must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as such intention is ascertainable.³

Parol Evidence in Aid of Construction. — While the intention of the parties is to be ascertained from the writing alone, if possible, parol evidence may, in a proper case, be received for the purpose of enabling the court to interpret the language of the policy and to understand the matter to which it relates and the circumstances under which it was made.⁴

Printed Controlled by Written Parts. — If there is a repugnancy between a written and a printed portion of a policy, the former controls the latter, as being the more deliberate expression of the contracting parties,⁵ without regard to the order of the conflicting parts.⁶

Strictly Construed. — Warranties in contracts of insurance are strictly construed and will not be extended to include anything not necessarily implied in their terms.⁷ When a warranty is that the answers made by the assured to questions are true, the warranty is limited by and cannot be extended beyond the answers given. If an answer is not responsive or satisfactory, the insurer waives a full answer; it cannot be treated as affirming a fact not stated, although called for by the interrogatories.⁸ Thus, if a question is only partially answered, the warranty cannot extend beyond the answer;⁹ and if it is not answered at all there is no warranty that there is nothing to answer;¹⁰ and

1. *Parol Representations.* — *Campbell v. New England Mut. L. Ins. Co.*, 98 Mass. 381.

2. *Usual Rules of Interpretation Apply.* — *Holloman v. Life Ins. Co.*, 1 Woods (U. S.) 674; *Yoch v. Home Mut. Ins. Co.*, 111 Cal. 503.

3. *Intention of Parties Governs.* — *Yoch v. Home Mut. Ins. Co.*, 111 Cal. 503.

4. *Parol Evidence to Aid Interpretation.* — *Yoch v. Home Mut. Ins. Co.*, 111 Cal. 503; *Maril v. Connecticut F. Ins. Co.*, 95 Ga. 604, 51 Am. St. Rep. 102; *Elliott v. Hamilton Mut. Ins. Co.*, 13 Gray (Mass.) 139; *Whitmarsh v. Conway F. Ins. Co.*, 16 Gray (Mass.) 359, 77 Am. Dec. 414; *Archer v. Merchants', etc., Ins. Co.*, 43 Mo. 434; *Fraim v. National F. Ins. Co.*, 170 Pa. St. 151, 50 Am. St. Rep. 753. See the title PAROL EVIDENCE.

5. *Written Words Control — United States.* — *Coster v. Phoenix Ins. Co.*, 2 Wash. (U. S.) 51; *Plinsky v. Germania F. & M. Ins. Co.*, 32 Fed. Rep. 47; *Mechanics' Sav. Bank, etc., Co. v. Guarantee Co. of North America*, 68 Fed. Rep. 459.

California. — *Yoch v. Home Mut. Ins. Co.*, 111 Cal. 503.

Mississippi. — *Liverpool, etc., Ins. Co. v. Van Os*, 63 Miss. 431, 56 Am. Rep. 870.

Missouri. — *Schroeder v. Stock, etc., Ins. Co.*, 46 Mo. 174.

New York — *Bargett v. Orient Mut. Ins. Co.*, 3 Bosw. (N. Y.) 396.

Pennsylvania. — *Fraim v. National Ins. Co.*, 170 Pa. St. 151, 50 Am. St. Rep. 753; *Grandin v. Rochester German Ins. Co.*, 107 Pa. St. 26.

Tennessee. — *People's Ins. Co. v. Kuhn*, 12 Heisk. (Tenn.) 518.

Texas. — *Georgia Home Ins. Co. v. Jacobs*, 56 Tex. 366.

6. *Hernandez v. Sun Mut. Ins. Co.*, 6 Blatchf. (U. S.) 317; *Leeds v. Mechanics Ins. Co.*, 8 N. Y. 351.

7. *Warranties Strictly Construed.* — *Hide v.*

Bruce, 3 Dougl. 213, 26 E. C. L. 81; *Penn Mut. L. Ins. Co. v. Wiler*, 100 Ind. 92, 50 Am. Rep. 769; *Loud v. Citizens' Mut. Ins. Co.*, 2 Gray (Mass.) 221; *Campbell v. New England Mut. L. Ins. Co.*, 98 Mass. 381; *Dilleber v. Home L. Ins. Co.*, 69 N. Y. 256, 25 Am. Rep. 182; *Driscoll v. German-American Ins. Co.*, 74 Hun (N. Y.) 153; *Gilliat v. Pawtucket Mut. F. Ins. Co.*, 8 R. I. 282.

Where there was a warranty that "the description of the property requested to be insured is a correct description, as far as regards the risk and value," it was held that an inquiry into the correctness of the description must be limited to the question whether it was a correct description so far as regarded the risk and value of the goods insured. *Lindsey v. Union Mut. F. Ins. Co.*, 3 R. I. 157.

8. *Warranties of Correctness of Answers Restricted to Answers Given — United States.* — *Mulville v. Adams*, 19 Fed. Rep. 887; *Ætna L. Ins. Co. v. France*, 94 U. S. 561.

Indiana. — *Penn Mut. L. Ins. Co. v. Wiler*, 100 Ind. 92, 50 Am. Rep. 769.

Minnesota. — *Hale v. Life Indemnity, etc., Co.*, 65 Minn. 548.

New York. — *Dilleber v. Home L. Ins. Co.*, 69 N. Y. 256, 25 Am. Rep. 182; *Edington v. Mutual L. Ins. Co.*, 67 N. Y. 185; *Higgins v. Phoenix Mut. L. Ins. Co.*, 74 N. Y. 6.

Pennsylvania. — *Meyers v. Lebanon Mut. Ins. Co.*, 156 Pa. St. 420 33 W. N. C. (Pa.) 35.

9. *Partial Answers.* — *Penn Mut. L. Ins. Co. v. Wiler*, 100 Ind. 92, 50 Am. Rep. 769; *Nichols v. Fayette Mut. F. Ins. Co.*, 1 Allen (Mass.) 63; *Fitch v. American Popular L. Ins. Co.*, 59 N. Y. 557, 17 Am. Rep. 372; *Dilleber v. Home L. Ins. Co.*, 69 N. Y. 256, 25 Am. Rep. 182.

10. *Failure to Make Answer — United States.* — *Mulville v. Adams*, 19 Fed. Rep. 887; *Man-*

though there is a warranty that the answers were "in full" and that no material facts were "concealed or withheld," such clause has no application where a question is not answered at all.¹

Construed Most Strongly Against Insurer. — The language of an insurance policy being that of the insurer, it is uniformly held, in accordance with a well-settled rule of construction, that it is to be construed most strongly against the insurer.²

(7) *Effect of Breach of Warranty.* — Even though an insurance policy may contain no provision that a breach of warranty shall *ipso facto* nullify the policy or entitle the insurer to claim a forfeiture of the premiums paid, there can be no question that a breach of warranty entitles the insurer to rescind the contract if, after being apprised of the breach, he elects to do so within a reasonable time.³ But since the insurer may waive the breach and treat the contract as binding,⁴ the question arises whether the breach of warranty has the effect upon a policy of this kind of rendering it absolutely void or only voidable at the election of the insurer. It has been held that such a contract is merely voidable, and to constitute a complete defense on the ground of a breach of warranty it must appear that the insurer had claimed and exercised its right within a reasonable time, and that there had been an actual rescission of the contract, or at least that there had been a tender of the premium paid.⁵

hatten L. Ins. Co. v. Willis, 60 Fed. Rep. 236, 23 U. S. App. 103.

Illinois. — *Thomas v. Fame Ins. Co.*, 108 Ill. 91.

Massachusetts. — *Liberty Hall v. Housatonic Mut. F. Ins. Co.*, 7 Gray (Mass.) 261. See also *Com. v. Hide, etc.*, *Ins. Co.*, 112 Mass. 136, 17 Am. Rep. 72.

New Jersey. — *Carson v. Jersey City Ins. Co.*, 43 N. J. L. 300.

New York. — *Dohn v. Farmers' Joint-Stock Ins. Co.*, 5 Lans. (N. Y.) 275; *Ames v. New York Union Ins. Co.*, 14 N. Y. 253.

Pennsylvania. — *Armenia Ins. Co. v. Paul*, 91 Pa. St. 520, 36 Am. Rep. 676.

And see *Castner v. Farmers' Mut. F. Ins. Co.*, 46 Mich. 15.

1. *Manhattan L. Ins. Co. v. Willis*, 60 Fed. Rep. 236, 23 U. S. App. 103; *Dilleber v. Home L. Ins. Co.*, 69 N. Y. 256, 25 Am. Rep. 182.

2. **Language Construed Most Strongly Against Insurer** — *England.* — *Pelly v. Royal-Exchange Assur. Co.*, 1 Burr. 341.

United States. — *Teutonia Ins. Co. v. Bovlston Mut. Ins. Co.*, 20 Fed. Rep. 148; *Mulville v. Adams*, 19 Fed. Rep. 887.

Alabama. — *Alabama Gold L. Ins. Co. v. Johnston*, 80 Ala. 467, 60 Am. Rep. 112; *Piedmont, etc., L. Ins. Co. v. Young*, 58 Ala. 476, 29 Am. Rep. 770.

Georgia. — *Northwestern Mut. L. Ins. Co. v. Ross*, 63 Ga. 199.

Indiana. — *Standard L., etc., Ins. Co. v. Martin*, 133 Ind. 376.

Kentucky. — *Phoenix Ins. Co. v. Spiers*, 87 Ky. 285.

Louisiana. — *Meyer v. Queen Ins. Co.*, 41 La. Ann. 1000.

Minnesota. — *Cargill v. Millers', etc., Mut. Ins. Co.*, 33 Minn. 90; *De Graff v. Queen Ins. Co.*, 38 Minn. 501, 8 Am. St. Rep. 685; *Olson v. St. Paul F. & M. Ins. Co.*, 35 Minn. 432, 59 Am. Rep. 333; *Boright v. Springfield F. & M. Ins. Co.*, 34 Minn. 352.

Mississippi. — *Liverpool, etc., Ins. Co. v. Van Os*, 63 Miss. 431, 56 Am. Rep. 810.

New Jersey. — *Carson v. Jersey City Ins. Co.*, 43 N. J. L. 300; *Anders v. Supreme Lodge, etc.*, 51 N. J. L. 175.

New York. — *Kratzenstein v. Western Assur. Co.*, 116 N. Y. 54; *Boehm v. Commercial Alliance L. Ins. Co.*, (Supm. Ct. Spec. T.) 9 Misc. (N. Y.) 529.

Pennsylvania. — *Metropolitan L. Ins. Co. v. Drach*, 101 Pa. St. 278; *Burkhard v. Travellers' Ins. Co.*, 102 Pa. St. 262, 48 Am. Rep. 205; *Grandin v. Rochester German Ins. Co.*, 107 Pa. St. 26; *Western Ins. Co. v. Cropper*, 32 Pa. St. 351, 75 Am. Dec. 561; *Franklin F. Ins. Co. v. Updegraff*, 43 Pa. St. 350; *Commonwealth Ins. Co. v. Berger*, 42 Pa. St. 285, 82 Am. Dec. 504.

Texas. — *Goddard v. East Texas F. Ins. Co.*, 67 Tex. 69, 60 Am. Rep. 1; *Mutual L. Ins. Co. v. Baker*, 10 Tex. Civ. App. 515.

Vermont. — *Brink v. Merchants, etc., Ins. Co.*, 49 Vt. 412.

In *Hoffman v. Aetna F. Ins. Co.*, 32 N. Y. 405, 88 Am. Dec. 337, it was said that when the language used in a policy may be understood in more senses than one, it is to be understood in the sense in which the insurer had reason to suppose it was understood by the assured.

3. See *supra*, this title, *The Contract, Its Nature, Requisites, and Incidents* — *Cancellation and Rescission.*

4. See *infra*, this section, *Waiver and Estoppel.*

5. **Breach of Warranty — Effect** — *United States.* — *Selby v. Mutual L. Ins. Co.*, 67 Fed. Rep. 490, citing 3 AM. AND ENG. ENCYC. OF LAW (1st ed.) 929-932; *Phinney v. Mutual L. Ins. Co.*, 67 Fed. Rep. 493.

Indiana. — *Northwestern Mut. L. Ins. Co. v. Hazelett*, 105 Ind. 212, 55 Am. Rep. 192; *Rogers v. Phenix Ins. Co.*, 121 Ind. 570; *Penn Mut. L. Ins. Co. v. Wiler*, 100 Ind. 92, 50 Am. Rep. 769; *Supreme Lodge, etc., v. Hutchinson*, 6 Ind. App. 399; *Union Cent. L. Ins. Co. v. Pauly*, 8 Ind. App. 85; *Aetna Ins. Co. v.*

But this question is of slight importance, because insurance policies ordinarily contain an express provision that the contract of insurance shall be deemed null and void if the facts warranted to be true are untrue, and stipulate that in that event the sums that have been paid as premiums thereunder shall be forfeited to the insurance company. Where a stipulation of this character is contained in a policy, the right to recover thereon is of course barred by a breach of warranty.¹

Effect of Attempted Rescission of Policy. — The attempted rescission of a contract of insurance by the insurer does not preclude the setting up of the defense of a breach of warranty.²

Effect of Assignment of Policy. — And a policy which is void because of false representations by the insured does not become binding upon the insurer in the hands of a third person to whom it is assigned with the consent of the insurer, but without knowledge of the misrepresentations.³

Effect of Breach on Attempted Revival of Policy. — It has been held that the falsity of declarations or warranties contained in the application for the revival of an insurance policy will prevent the revival of the policy from taking effect.⁴

(8) *Breach of Warranties* — (a) **General Rule.** — A warranty must be literally and exactly fulfilled,⁵ and as the insurer has the right to exact of the insured a literal performance, and cannot be compelled to accept a substantial compliance, or to show that the breach was any way material to its interest, so,

Norman, 12 Ind. App. 652; Supreme Lodge, etc., v. Edwards, 15 Ind. App. 524.

Kansas. — Northwestern Mut. L. Ins. Co. v. Woods, 54 Kan. 663.

Nebraska. — Kettenbach v. Omaha L. Assoc., 49 Neb. 842; Modern Woodman Acc. Assoc. v. Shryock, 54 Neb. 250; Aetna Ins. Co. v. Simmons, 49 Neb. 811.

But it is sometimes broadly stated that the effect of a breach of warranty is to make the policy void. Clements v. Connecticut Indemnity Co., 29 N. Y. App. Div. 131.

And it has been held that a breach of warranty bars a recovery in an insurance policy where by the express terms of the policy the warranty is made a condition precedent to, and a consideration for, the contract of insurance. Weil v. New York L. Ins. Co., 47 La. Ann. 1405.

1. **Effect of Breach Declared by Policy** — *United States.* — Jeffries v. Economical Mut. L. Ins. Co., 22 Wall. (U. S.) 47; Hoffman v. Supreme Council, etc., 35 Fed. Rep. 252.

Illinois. — Farmers' F. Ins. Co. v. Bates, 65 Ill. App. 37.

Louisiana. — Adema v. Lafayette F. Ins. Co., 36 La. Ann. 660.

Missouri. — Ramer v. American Cent. Ins. Co., 70 Mo. App. 47; Holloway v. Dwelling-House Ins. Co., 48 Mo. App. 1; Lama v. Dwelling-House Ins. Co., 51 Mo. App. 447; Maddox v. Dwelling-House Ins. Co., 56 Mo. App. 343.

New Jersey. — American Popular L. Ins. Co. v. Day, 39 N. J. L. 89; Carson v. Jersey City Ins. Co., 43 N. J. L. 300; Metropolitan L. Ins. Co. v. McTague, 49 N. J. L. 587; Glutting v. Metropolitan L. Ins. Co., 50 N. J. L. 287.

New York. — Jennings v. Chenango County Mut. Ins. Co., 2 Den. (N. Y.) 75; Bernard v. United L. Ins. Assoc. (N. Y. City Ct. Gen. T.) 8 Misc. (N. Y.) 499; O'Shaughnessy v. Working Women's Co-operative Assoc., (N. Y. City Ct. Gen. T.) 8 Misc. (N. Y.) 491; Ber-

nard v. United L. Ins. Assoc., (N. Y. City Ct. Gen. T.) 11 Misc. (N. Y.) 441.

Pennsylvania. — Pennsylvania Ins. Co. v. Gottsman, 48 Pa. St. 151.

Stipulations in Policy Declaring Insurance to Be in Consideration of Representations. — It has sometimes been contended that statements contained in insurance policies that the insurance is in consideration of the representations made to the insurer in the application for the policy are sufficient to give to the representations the character of conditions or warranties. While there is some authority for this view, the general rule is that statements to this effect are not sufficient to change the character of the representations in the application and elevate them to the importance of warranties or conditions of insurance. Campbell v. New England Mut. L. Ins. Co., 98 Mass. 381; Price v. Phoenix Mut. L. Ins. Co., 17 Minn. 497, 10 Am. Rep. 166; American Popular L. Ins. Co. v. Day, 39 N. J. L. 89.

2. **Attempted Rescission of Policy.** — McCollum v. Mutual L. Ins. Co., 55 Hun (N. Y.) 103.

3. **Assignment of Policy.** — Merrill v. Farmers', etc., Mut. F. Ins. Co., 48 Me. 285. Compare Jenkins v. Quincy Mut. F. Ins. Co., 7 Gray (Mass.) 370.

4. **Attempted Revival of Policy.** — McCoy v. Metropolitan L. Ins. Co., 133 Mass. 82; Gallant v. Metropolitan L. Ins. Co., 167 Mass. 79; Bottomley v. Metropolitan L. Ins. Co., 170 Mass. 274; Sweeney v. Metropolitan L. Ins. Co., 19 R. I. 171.

5. **Literal Compliance Required.** — Loehner v. Home Mut. Ins. Co., 17 Mo. 255; Mers v. Franklin Ins. Co., 68 Mo. 131; Brooks v. Standard F. Ins. Co., 11 Mo. App. 349.

A warranty that the insured would keep a watchman on the premises was held to be broken where the only watchman provided was a person who slept during the night in a house one thousand feet from the building, visiting it about ten o'clock at night and again

on the other hand, the insured is held only to a bare and literal compliance with his engagement, which is not to be extended by construction to include what is not necessarily implied in its terms.¹ In propounding questions to the applicant the insurer is understood to be actuated by an earnest desire to acquire such information as will enable it intelligently to decide as to the desirability of the risk, and if the applicant, when general terms are used in making an inquiry, so interprets it and gives faithful and true answers to the questions as so understood by him, and as really meant by the insurer, he should be held to have spoken truly.² This is especially true where the insurer has used such general terms in framing the questions as to render it impossible or even difficult for the applicant to understand their full scope and meaning.³

(b) **Particular Warranties.** — A discussion of what amounts to a breach of the different warranties contained in insurance contracts will be found elsewhere in this work,⁴ and only a few illustrations will be given at this place.

Warranty as to Situs of Personal Property. — Policies of insurance, unless the language excludes the presumption, must be presumed to be made with reference to the character of the property insured and to the owner's use of it in the ordinary manner and for the purposes for which such property is ordinarily held and used. Accordingly, where the policy describes the property insured as situated at a specified place, this statement must be interpreted upon this presumption, unless the language is too explicit to admit of such construction. And if the property is of such a description that its real and beneficial enjoyment forbids its being kept at all times in one place, as in the case of horses, carriages, farm machinery, etc., the policy will ordinarily be construed to cover the property when removed from the place where its description has been had at the date of the policy. But if language descriptive of the location of property occurs in the policy upon property which from its character and ordinary use is kept permanently and continuously in one place, such as a stock of merchandise, machinery in a building, household furniture, or things stored, the statement made will limit the risk to the property while in the place contained as described by the policy.⁵

Warranty Against Increase of Risk. — The above-stated presumption is to be applied not only to the clause describing the location of the property, but also

at two or three o'clock in the morning. *McKenzie v. Scottish Union, etc., Ins. Co.*, 112 Cal. 548.

1. *Hide v. Bruce*, 3 Dougl. 213, 26 E. C. L. 81; *Sayles v. North-Western Ins. Co.*, 2 Curt. (U. S.) 610; *Livingston v. Maryland Ins. Co.*, 6 Cranch (U. S.) 274; *Kemble v. Rhinelanders*, 3 Johns. Cas. (N. Y.) 134, *per* Kent, J.

An applicant for insurance upon a woolen factory was asked what kind of lamps were used, and whether they were opened or covered. It was held that this question referred to the lamps habitually used, and that there was no misrepresentation in the answer "closed lights," although an open hand lamp was commonly used for the purpose of lighting up. *Howard F. Ins. Co. v. Bruner*, 23 Pa. St. 50.

Where a fire-insurance policy on buildings in the course of construction contained the words, "Water tanks to be well supplied with water at all times," it was held that this warranty was complied with if at the commencement of the risk the tanks were reasonably advanced towards completion compared with the state of the buildings at that time, and their construction was afterwards continued

with reasonable dispatch until the time of the fire. *Gloucester Mfg. Co. v. Howard F. Ins. Co.*, 5 Gray (Mass.) 497, 66 Am. Dec. 376.

2. *Mutual L. Ins. Co. v. Baker*, 10 Tex. Civ. App. 515.

3. *Moulton v. American L. Ins. Co.*, 111 U. S. 335; *Mutual L. Ins. Co. v. Baker*, 10 Tex. Civ. App. 515.

4. See the titles ACCIDENT INSURANCE, vol. 1, p. 284; FIRE INSURANCE, vol. 13, p. 86; LIFE INSURANCE; MARINE INSURANCE.

5. **Warranty as to Situs of Personal Property.** — *Holbrook v. St. Paul F. & M. Ins. Co.*, 25 Minn. 229.

In *Everett v. Continental Ins. Co.*, 21 Minn. 76, a clause which stated that the property insured (a threshing machine) was "stored in barn on Sec. 36, T. 23, R. 28, owned and insured by L. L. Chaffin," was held to be a mere matter of description operating to identify the property, and not a promissory stipulation on the part of the insured nor a condition of insurance on the part of the insurer that the location mentioned must remain unchanged, or that if changed the insurance should cease or be suspended.

to the condition in reference to the increase of risk which is incident to the ordinary use of a particular kind of property which is insured, and such increased risk cannot be held to vitiate a contract of insurance.¹

Warranty of Ownership. — An equitable title is sufficient to support a warranty that the interest of the insured is the entire, unconditional, and sole ownership of the property.² And the fact that the widow of a former owner had a contingent right of dower in the property has been held not to amount to a breach of a warranty by the insured that he was the owner in fee simple.³

Warranty Against Incumbrances. — A warranty that there are no incumbrances upon the property insured is, of course, broken by the existence of a valid mortgage upon the property.⁴ It makes no difference that the mortgage not disclosed was given without consideration, and might be avoided by creditors and *bona fide* purchasers if binding between the parties.⁵ But to have this effect, the incumbrance must be a valid subsisting lien upon the property insured.⁶ Thus, the fact that a mortgage which has been paid is not discharged of record does not amount to a breach of the warranty.⁷

Warranty Against Alienation of Property. — Where the insurance policy contains a provision that it shall cease to be in force if a change shall take place in the title of the insured without the consent of the insurer, a violation of such provision by the insured terminates the contract of insurance.⁸ But it has been held that a policy which contains a clause prohibiting any transfer of the interest of the insured without the consent of the insurer is not rendered void by a mortgage of the property;⁹ nor by a sale and conveyance, the grantee having simultaneously reconveyed to the grantor in mortgage;¹⁰ nor by a conveyance in trust to pay the grantor's creditors where the grantor retains possession;¹¹ nor by a conditional sale;¹² nor by a contract to sell and

1. **Warranty Against Increase of Risk.** — *Holbrook v. St. Paul F. & M. Ins. Co.*, 25 Minn. 220.

Where there was a policy of insurance on a stock of merchandise "such as is usually kept in country stores," it was held that the policy covered a stock of gasoline if that was an article usually kept in country stores, and if such was the effect of the policy the insurance was not invalidated by reason of the fact that the insured kept gasoline upon the premises as a part of the stock of merchandise. *Yoch v. Home Mut. Ins. Co.*, 111 Cal. 503. See also the title *FIRE INSURANCE*, vol. 13, pp. 294, 295.

2. **Warranty of Ownership.** — *Millville Mut. F. Ins. Co. v. Wilgus*, 88 Pa. St. 107.

3. **Contingent Right of Dower.** — *Southern Mut. Ins. Co. v. Kloeber*, 31 Gratt. (Va.) 739; *Virginia F. & M. Ins. Co. v. Kloeber*, 31 Gratt. (Va.) 749.

4. **Warranty Against Incumbrances**—*Alabama*. — *Capital City Ins. Co. v. Autrey*, 105 Ala. 269, 53 Am. St. Rep. 121.

Connecticut. — *Treadway v. Hamilton Mut. Ins. Co.*, 29 Conn. 68.

Indiana. — *Cox v. Aetna Ins. Co.*, 29 Ind. 586.

Maine. — *Battles v. York County Mut. F. Ins. Co.*, 41 Me. 208; *Gould v. York County Mut. F. Ins. Co.*, 47 Me. 403.

Massachusetts. — *Davenport v. New England Mut. F. Ins. Co.*, 6 Cush. (Mass.) 340; *Packard v. Agawam Mut. F. Ins. Co.*, 2 Gray (Mass.) 334; *Murphy v. People's Equitable Mut. F. Ins. Co.*, 7 Allen (Mass.) 239.

New York. — *Smith v. Empire Ins. Co.*, 25 Barb. (N. Y.) 497.

5. **Mortgage Given Without Consideration.** —

Treadway v. Hamilton Mut. Ins. Co., 29 Conn. 68.

6. *Jackson v. Farmers' Mut. F. Ins. Co.*, 5 Gray (Mass.) 52.

A warranty that there are no incumbrances on the insured property is not broken by the existence of a judgment against the owner, where the lien of the judgment is limited and does not extend to the property insured. *Somerset Ins. Co. v. McAnally*, 46 Pa. St. 41.

It was provided in a contract of insurance that if the property should be encumbered the policy should be void, unless the true title of the assured and the incumbrance were expressed therein. The applicant for insurance stated that the property was encumbered, but did not state the amount. It was held that this was a sufficient compliance with the condition as to the statement of the incumbrance. *Bersche v. St. Louis Mut. F. & M. Ins. Co.*, 31 Mo. 555.

7. **Mortgage Paid but Not Discharged of Record.** — *Merrill v. Agricultural Ins. Co.*, 73 N. Y. 452, 29 Am. Rep. 184; *Hawkes v. Dodge County Mut. Ins. Co.*, 11 Wis. 188.

8. **Change of Title.** — *Farmers', etc., Ins. Co. v. Jensen*, 56 Neb. 284.

9. **Mortgagee Held Not a Transfer.** — *Folsom v. Belknap County Mut. F. Ins. Co.*, 30 N. H. 231; *Conover v. Mutual Ins. Co.*, 1 N. Y. 290, 3 Den. (N. Y.) 254.

10. **Simultaneous Conveyance and Reconveyance in Mortgage.** — *Stetson v. Massachusetts Mut. F. Ins. Co.*, 4 Mass. 330, 3 Am. Dec. 217.

11. **Conveyance in Trust to Pay Creditors.** — *Phoenix Ins. Co. v. Lawrence*, 4 Met. (Ky.) 9, 81 Am. Dec. 521.

12. **Conditional Sale.** — *Tittmore v. Vermont Mut. F. Ins. Co.*, 20 Vt. 546.

convey at a future day, the purchaser agreeing on that day to pay a certain sum and secure the residue of the money;¹ nor by a sale under execution while the assured has the right to redeem, at least in the absence of proof that such right is of no-value.² And where more than one building is insured separately by the same policy, the alienation of one of the buildings does not, it has been held, avoid the policy as to the others.³

Warranty to Give Notice of Incumbrances. — A stipulation in a policy of insurance requiring the insured to notify the insurer of any incumbrances or liens to which the property may become subject, and to obtain its consent thereto, is a substantive and material part of the contract, and is avoided by a failure of the insured to give the prescribed notice.⁴

Warranty Describing Property. — A warranty describing the property insured is, of course, broken if there is a misdescription with respect to the manner in which it is used,⁵ its situation with respect to other property,⁶ or otherwise.⁷

c. REPRESENTATIONS — (1) *Definition.* — A representation in insurance is a statement in regard to a material fact made by the applicant for insurance to the insurer with reference to a proposed contract of insurance.⁸

(2) *Falsity of Representations.* — It is held that a material misrepresentation defeats a contract of insurance without any express provision to that effect in the policy;⁹ but in order to have this effect, the representation must be materially untrue, or untrue in some particular material to the risk.¹⁰ It has been held that if a representation relating to a material matter is substantially true — that is to say, if it is so far true that the conduct of the insurer would not have been different if it had known the exact truth — this will not vitiate the policy.¹¹ And it has been held that a substantial compliance with a promissory representation is all that is required to entitle the insured to recover upon his policy.¹²

1. **Executory Contract of Sale.** — *Masters v. Madison County Mut. Ins. Co.*, 11 Barb. (N. Y.) 624.

2. **Execution Sale Subject to Redemption.** — *Strong v. Manufacturers' Ins. Co.*, 10 Pick. (Mass.) 40, 20 Am. Dec. 507.

3. **Several Parcels Covered by One Policy.** — *Clark v. New England Mut. F. Ins. Co.*, 6 Cush. (Mass.) 342, 53 Am. Dec. 44.

4. **Notice of Incumbrances.** — *Pennsylvania Ins. Co. v. Gottsman*, 48 Pa. St. 151.

5. **Misdescription with Respect to Use.** — *Goddard v. Monitor Mut. F. Ins. Co.*, 108 Mass. 56, 11 Am. Rep. 307; *Dolliver v. St. Joseph F. & M. Ins. Co.*, 131 Mass. 39; *Sarsfield v. Metropolitan Ins. Co.*, 61 Barb. (N. Y.) 479, 42 How. Pr. (N. Y.) 97.

6. **Misdescription with Respect to Situation.** — *Burritt v. Saratoga County Mut. F. Ins. Co.*, 5 Hill (N. Y.) 188, 40 Am. Dec. 345; *Jennings v. Chenango County Mut. Ins. Co.*, 2 Den. (N. Y.) 75; *Wilson v. Herkimer County Mut. Ins. Co.*, 6 N. Y. 53.

An applicant for fire insurance warranted that no building save dwelling houses was within eight rods of the one to be insured. In the action upon the insurance policy it was contended by the defendant that at the time of the insurance a carpenter shop stood directly in the rear of the house insured and in very close proximity thereto. It was held that if this was so, there was a breach of the warranty. *Pottsville Mut. F. Ins. Co. v. Horan*, 89 Pa. St. 438.

7. **Misdescription Generally.** — Where the building upon which a fire-insurance policy was issued was described in the policy as a

stone dwelling house, it was held that the fact that the kitchen attached to the building was a wooden structure amounted to a breach of the warranty. *Chase v. Hamilton Ins. Co.*, 20 N. Y. 52.

A warranty describing the building insured as two stories high was held not to be broken by reason of the fact that the building, the main part of which was two stories high, had a small one-story addition in the rear. The court said: "The building was, in fact, a two-story building. It would, we think, be usually so denominated, notwithstanding the one-story rear addition. The description in regard to height pertained, as it appears to us, rather to identification than the character of the risk; and where this is so, not quite the same accuracy is required." *Wilkins v. Germania F. Ins. Co.*, 57 Iowa 529.

8. **Representations Defined.** — *Indiana Farmers' Live Stock Ins. Co. v. Byrket*, 9 Ind. App. 443; *Price v. Phoenix Mut. L. Ins. Co.*, 17 Minn. 497, 10 Am. Rep. 166.

9. **Effect of Misrepresentations in General.** — *Carpenter v. American Ins. Co.*, 1 Story (U. S.) 57; *Hartford F. Ins. Co. v. Magee*, 47 Ill. App. 367; *Campbell v. New England Mut. L. Ins. Co.*, 98 Mass. 381; *Goddard v. Monitor Mut. F. Ins. Co.*, 108 Mass. 56, 11 Am. Rep. 307.

10. **Character of Representation.** — *Campbell v. New England Mut. L. Ins. Co.*, 98 Mass. 381; *Aetna Ins. Co. v. Simmons*, 40 Neb. 811.

11. **Substantial Truth of Representations.** — *Misouri, etc., Trust Co. v. German Nat. Bank*, 77 Fed. Rep. 117, 40 U. S. App. 710.

12. **Promissory Representations — Substantial**

(3) *Representations to Avoid Policy Must Be Material.* — Ordinarily, a false representation, unlike a warranty, to have the effect of avoiding a policy, must be material to the risk.¹ But a representation may, of course, be made material by the agreement of the parties,² as where it is stipulated that the policy shall be void in the case of any misrepresentation whatever.³ It has been held, however, that even if by the terms of the policy it is made an express condition of the contract that if the representations contained therein are found to be untrue the policy shall be null and void, this does not alter the character and constitute them warranties, though the effect of the stipulation may be to make them conclusively material.⁴

(4) *Good Faith of Insured Immaterial.* — But if a representation is false in substance and material to the risk, there can be no liability upon the policy, however innocently the misrepresentation may have been made; whether made fraudulently or by mistake or accident, the effect is the same.⁵

(5) *Materiality of Representations* — (a) *General Rule.* — Every fact untruly asserted or wrongfully suppressed must be regarded as material if the knowledge or ignorance of it would naturally influence the judgment of the underwriter in making the contract at all, or in estimating the degree and character of the risk, or in fixing the rate of premium. If the fact so untruly stated or purposely suppressed is not of this character, it is not material.⁶

Compliance. — *Liverpool, etc., Ins. Co. v. Kearney*, (Indian Ter. 1898) 46 S. W. Rep. 414.

1. **Materiality of Representations — United States.** — *Columbia Ins. Co. v. Lawrence*, 10 Pet. (U. S.) 507; *Holloman v. Life Ins. Co.*, 1 Woods (U. S.) 674; *Fidelity, etc., Co. v. Alpert*, 28 U. S. App. 393, 67 Fed. Rep. 460.

Indiana. — *Indiana Farmers' Live-Stock Ins. Co. v. Bogeman*, 9 Ind. App. 399.

Maine. — *Witherell v. Maine Ins. Co.*, 49 Me. 200.

Maryland. — *Mutual F. Ins. Co. v. Deale*, 18 Md. 26, 79 Am. Dec. 673.

Massachusetts. — *Campbell v. New England Mut. L. Ins. Co.*, 98 Mass. 381.

Minnesota. — *Price v. Phoenix Mut. L. Ins. Co.*, 17 Minn. 497, 10 Am. Rep. 166; *Perine v. Grand Lodge, etc.*, 51 Minn. 224.

Missouri. — *Schroeder v. Stock, etc., Ins. Co.*, 46 Mo. 174.

Nebraska. — *Ætna Ins. Co. v. Simmons*, 49 Neb. 811.

New Hampshire. — *Boardman v. New Hampshire Mut. F. Ins. Co.*, 20 N. H. 551.

New York. — *Boehm v. Commercial Alliance L. Ins. Co.* (Supm. Ct. Spec. T.) 9 Misc. (N. Y.) 529; *Higbee v. Guardian Mut. L. Ins. Co.*, 66 Barb. (N. Y.) 462.

Vermont. — *Mosley v. Vermont Mut. F. Ins. Co.*, 55 Vt. 142.

2. **Stipulations as to Materiality.** — See *Mutual Ben. L. Ins. Co. v. Wise*, 34 Md. 582; *American Ins. Co. v. Gilbert*, 27 Mich. 429.

3. *Cerys v. Iowa State Ins. Co.*, 71 Minn. 338; *Graham v. Fireman's Ins. Co.*, 87 N. Y. 69, 41 Am. Rep. 349.

And it has been held that a misrepresentation by the insured of a fact specifically inquired into by the insurer, though not material, will have the same effect in exonerating the latter from the contract as if the fact had been material, since by making such inquiry he implies that he considers it so. *Miller v. Mutual Ben. L. Ins. Co.*, 31 Iowa 216, 7 Am. Rep. 122.

4. **Representations Not Made Warranties by Stipulation as to Materiality.** — *Campbell v. New*

England Mut. L. Ins. Co., 98 Mass. 381; *Price v. Phoenix Mut. L. Ins. Co.*, 17 Minn. 497, 10 Am. Rep. 166.

5. **Good Faith in Respect to Representations Not Material — England.** — *Carter v. Boehm*, 3 Burr. 1905.

United States. — *Carpenter v. American Ins. Co.*, 1 Story (U. S.) 57.

Illinois. — *Bloomington Mut. L. Ben. Assoc. v. Cummins*, 53 Ill. App. 530.

Maine. — *Gould v. York County Mut. F. Ins. Co.*, 47 Me. 403.

Massachusetts. — *Clark v. New England Mut. F. Ins. Co.*, 6 Cush. (Mass.) 342, 53 Am. Dec. 44; *Lowell v. Middlesex Mut. F. Ins. Co.*, 8 Cush. (Mass.) 127; *Curry v. Commonwealth Ins. Co.*, 10 Pick. (Mass.) 535, 20 Am. Dec. 547; *Wilbur v. Bowditch Mut. F. Ins. Co.*, 10 Cush. (Mass.) 446; *Kimball v. Ætna Ins. Co.*, 9 Allen (Mass.) 540, 85 Am. Rep. 786; *Sawyer v. Coasters' Mut. Ins. Co.*, 6 Gray (Mass.) 221; *Campbell v. New England Mut. L. Ins. Co.*, 98 Mass. 381; *Ring v. Phenix Assur. Co.*, 145 Mass. 426.

Minnesota. — *Perine v. Grand Lodge, etc.*, 51 Minn. 224.

New Hampshire. — *Davis v. Ætna Mut. F. Ins. Co.*, 67 N. H. 335.

New York. — *Higbee v. Guardian Mut. L. Ins. Co.*, 66 Barb. (N. Y.) 462; *Armour v. Transatlantic F. Ins. Co.*, 90 N. Y. 450.

Pennsylvania. — *Aicher v. Metropolitan L. Ins. Co.*, 13 Phila. (Pa.) 139, 36 Leg. Int. (Pa.) 17.

Virginia. — *Continental Ins. Co. v. Kasey*, 25 Gratt. (Va.) 268, 18 Am. Rep. 681.

In *Campbell v. New England Mut. L. Ins. Co.*, 98 Mass. 381, an instruction that "an untrue statement innocently made, in regard to a latent disease of which the applicant was unconscious, would not avoid the policy," as a general statement of the law applicable to representations in insurance contracts, was held to be incorrect.

6. **What Representations Are Material — United States.** — *Hollman v. Life Ins. Co.*, 1 Woods

(b) **Materiality Question of Fact.** — The materiality of a representation is ordinarily a question of fact to be found by the jury, like any other fact, upon all the facts and circumstances of the particular case,¹ unless the parties have, by the terms of the contract, conclusively agreed to consider the representations material, in which event the question of materiality cannot be left to the jury.²

2. Waiver and Estoppel — *a. GENERAL STATEMENT.* — Since the conditions of a policy a breach of which by the assured will give rise to a forfeiture are inserted for the benefit of the insurance company, they may be waived either pending the negotiation for the insurance or after such negotiation has been completed and during the currency of the policy, and this either before or after the forfeiture is incurred.³ And since forfeitures are not favored in the law, the courts are always prompt to seize hold of any circumstances that indicate an election to waive.⁴

b. WHAT CONSTITUTES WAIVER OR ESTOPPEL — (1) *In General.* — A waiver may arise by express language⁵ or by acts from which an intention to

(U. S.) 674; *Columbia Ins. Co. v. Lawrence*, 10 Pet. (U. S.) 516.

Louisiana. — *Adema v. Lafayette F. Ins. Co.*, 36 La. Ann. 661.

Massachusetts. — *Daniels v. Hudson River F. Ins. Co.*, 12 Cush. (Mass.) 416, 59 Am. Dec. 192.

Nebraska. — *Ætna Ins. Co. v. Simmons*, 49 Neb. 811.

New Hampshire. — *Davis v. Ætna Mut. F. Ins. Co.*, 67 N. H. 335.

New Jersey. — *Garrison v. Farmers' Mut. F. Ins. Co.*, 56 N. J. L. 235.

Oregon. — *Chrisman v. State Ins. Co.*, 16 Oregon 283.

Pennsylvania. — *Freedman v. Fire Assoc.*, 168 Pa. St. 249.

South Carolina. — *Pelzer Mfg. Co. v. Sun Fire Office*, 36 S. Car. 213.

The *Missouri* statute (Rev. Stat. Mo. 1889, § 5849), providing that "no misrepresentation" made in procuring a policy "shall be deemed material or render the policy void unless the matter misrepresented shall have actually contributed to the contingency or event on which the policy is to become due and payable," has, in view of the proviso in section 5869, been held not to apply to policies on the assessment plan. *Hanford v. Massachusetts Ben. Assoc.*, 122 Mo. 50.

1. Materiality Question of Fact — *United States.* — *Fidelity, etc., Co. v. Alpert*, 28 U. S. App. 393, 67 Fed. Rep. 460; *Bulkley v. Protection Ins. Co.*, 2 Paine (U. S.) 82; *Penn Mut. L. Ins. Co. v. Mechanics' Sav. Bank, etc., Co.*, 72 Fed. Rep. 413.

Maine. — *Sweat v. Piscataquis Mut. Ins. Co.*, 79 Me. 109.

Maryland. — *Mutual F. Ins. Co. v. Deale*, 18 Md. 26, 79 Am. Dec. 673.

Missouri. — *Schroeder v. Stock, etc., Ins. Co.*, 46 Mo. 174.

New Jersey. — *Garrison v. Farmers' Mut. F. Ins. Co.*, 56 N. J. L. 235.

New York. — *Boehm v. Commercial Alliance L. Ins. Co.*, (Supm. Ct. Spec. T.) 9 Misc. (N. Y.) 529.

North Carolina. — *Albert v. Mutual L. Ins. Co.*, 122 N. Car. 92.

South Carolina. — *Hume v. Providence Washington Ins. Co.*, 23 S. Car. 202; *Pelzer Mfg. Co. v. Sun Fire Office*, 36 S. Car. 213.

2. Stipulation as to Materiality. — *Anderson v. Fitzgerald*, 4 H. L. Cas. 503; *Treadway v. Hamilton Mut. Ins. Co.*, 29 Conn. 68; *Mutual Ben. L. Ins. Co. v. Wise*, 34 Md. 582; *Campbell v. New England Mut. L. Ins. Co.*, 98 Mass. 381; *Price v. Phoenix Mut. L. Ins. Co.*, 17 Minn. 497, 10 Am. Rep. 166; *Stensgaard v. St. Paul Real Estate Title Ins. Co.*, 50 Minn. 429. And see *supra*, this division of this section, *Falsity of Representations*.

3. General Application of Waiver or Estoppel to Forfeitures of Insurance Policies. — *Globe Mut. L. Ins. Co. v. Wolff*, 95 U. S. 329; *Dupuy v. Delaware Ins. Co.*, 63 Fed. Rep. 689; *Viele v. Germania Ins. Co.*, 26 Iowa 9, 96 Am. Dec. 83; *Siltz v. Hawkeye Ins. Co.*, 71 Iowa 715; *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 419; *Georgia Home Ins. Co. v. Kinnier*, 28 Gratt. (Va.) 106.

4. Waiver Favored. — *Knickerbocker L. Ins. Co. v. Norton*, 96 U. S. 234; *Hartford L. Annuity Ins. Co. v. Unsell*, 144 U. S. 449; *Hollis v. State Ins. Co.*, 65 Iowa 459.

5. Express Waiver. — *Hartford L. Annuity Ins. Co. v. Unsell*, 144 U. S. 449; *Knickerbocker L. Ins. Co. v. Norton*, 96 U. S. 234; *New York L. Ins. Co. v. Eggleston*, 96 U. S. 572; *Mutual Reserve Fund L. Assoc. v. Cleveland Woolen Mills*, 54 U. S. App. 290; *Viele v. Germania Ins. Co.*, 26 Iowa 55, 96 Am. Dec. 83; *Rokes v. Amazon Ins. Co.*, 51 Md. 521.

Necessity of New Consideration. — In some decisions it has been intimated that a new consideration is necessary to the validity of an express waiver. *United Firemen's Ins. Co. v. Thomas*, 82 Fed. Rep. 406; *American Cent. Ins. Co. v. McCrea*, 8 Lea (Tenn.) 526, 41 Am. Rep. 647; *Dale v. Continental Ins. Co.*, 95 Tenn. 50; *Merchants Mut. Ins. Co. v. Lacroix*, 45 Tex. 158; *Sun Mut. Ins. Co. v. Texarkana Foundry, etc., Co.*, (Tex. App. 1889) 15 S. W. Rep. 35.

But in other cases this doctrine has been denied. *Viele v. Germania Ins. Co.*, 26 Iowa 56, 96 Am. Dec. 83; *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 418.

Express Conditional Waiver. — A promise to waive a forfeiture on conditions imposed on the assured which are never complied with does not amount to a waiver. *Hubert v. Southern Live-Stock Ins. Co.*, 703 Ga. 294.

Necessity of Materiality. — In *Hartford F. Ins. Co. v. Small*, 66 Fed. Rep. 490, it was held that

waive may be inferred or from which a waiver follows as a legal result.¹

Waiver and Estoppel Interchangeable Terms. — In many of the decisions attempted distinctions have been made between a waiver and an estoppel, it being contended that an implied waiver may arise from acts or conduct on the part of the insurer which do not create a technical estoppel.² But it seems to be the prevailing opinion that the doctrine of waiver as asserted against insurance companies to avoid the strict enforcement of conditions contained in their policies is only another name for the doctrine of estoppel,³ and the terms will be used interchangeably in the following discussion.

Parol Waiver. — As a general rule any condition of a contract of insurance may be waived by parol by the insurance company, since the contract of insurance is not within the statute of frauds and may be by parol.⁴ And this rule applies notwithstanding stipulations in the policy that nothing less than an express agreement indorsed on the policy shall be effectual for that purpose, since such a stipulation is itself a condition and is as capable of being waived or dispensed with as any other condition of the instrument, and since parties to contracts cannot so tie their wills as to be unable thereafter to do by consent what the law allows.⁵

(2) *Issuance of Policy Without Objection to Known Grounds of Forfeiture* —

(a) **In General.** — An insurance company will not be permitted to defeat a recovery upon a policy issued by it proving the existence of facts which, by the terms of the policy, would render it void, where at the issuance of the policy the company had full knowledge of such facts,⁶ or information which, if pur-

where an express waiver is relied on there must be evidence that the subject-matter of the waiver and consent was in the minds of the parties at the time.

1. **Waiver Inferred from Acts.** — *Hartford L. Annuity Ins. Co. v. Unsell*, 144 U. S. 449; *Knickerbocker L. Ins. Co. v. Norton*, 96 U. S. 234; *New York L. Ins. Co. v. Eggleston*, 96 U. S. 572; *Mutual Reserve Fund L. Assoc. v. Cleveland Woolen Mills*, 54 U. S. App. 290; *Viele v. Germania Ins. Co.*, 26 Iowa 55, 96 Am. Dec. 83; *Rokes v. Amazon Ins. Co.*, 51 Md. 521; *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 419.

2. **Implied Waiver Not Technical Estoppel.** — *Queen Ins. Co. v. Young*, 86 Ala. 431, 11 Am. St. Rep. 51; *Hollis v. State Ins. Co.*, 65 Iowa 459; *Billings v. German Ins. Co.*, 34 Neb. 502; *Goodwin v. Massachusetts Mut. L. Ins. Co.*, 73 N. Y. 480; *Prentice v. Knickerbocker L. Ins. Co.*, 77 N. Y. 489, 33 Am. Rep. 651; *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 418; *Kiernan v. Dutchess County Mut. Ins. Co.*, 150 N. Y. 195.

In New York, where this view has been expressed, it has been said, however, in some recent decisions that in the absence of an express waiver some of the elements of an estoppel must appear. *Armstrong v. Agricultural Ins. Co.*, 130 N. Y. 564; *Gibson Electric Co. v. Liverpool, etc., Ins. Co.*, 159 N. Y. 426.

3. **Waiver and Estoppel Identical in This Connection.** — *Globe Mut. L. Ins. Co. v. Wolff*, 95 U. S. 333; *Dupuy v. Delaware Ins. Co.*, 63 Fed. Rep. 689; *United Firemen's Ins. Co. v. Thomas*, 82 Fed. Rep. 406; *Securiv Ins. Co. v. Fay*, 22 Mich. 473, 7 Am. Rep. 670; *Dial v. Valley Mut. L. Assoc.*, 29 S. Car. 560; *American Cent. Ins. Co. v. McCrea*, 8 Lea (Tenn.) 526, 41 Am. Rep. 647; *Boyd v. Vanderbilt Ins. Co.*, 90 Tenn. 212, 25 Am. St. Rep. 676; *Dale v. Continental Ins. Co.*, 95 Tenn. 50;

Merchants' Mut. Ins. Co. v. Lacroix, 45 Tex. 158; *Sun Mut. Ins. Co. v. Texarkana Foundry, etc., Co.*, (Tex. App. 1889) 15 S. W. Rep. 35; *Georgia Home Ins. Co. v. Kinnier*, 28 Gratt. (Va.) 106.

4. **Parol Waiver Valid.** — *King v. Council Bluffs Ins. Co.*, 72 Iowa 310; *Liverpool, etc., Ins. Co. v. Sheffy*, 71 Miss. 919.

Sealed Policy. — But in *Canada* it has been held that the conditions of a sealed policy cannot be waived by parol. *Scott v. Niagara Dist. Mut. Ins. Co.*, 25 U. C. Q. B. 110.

5. **Parol Waiver Valid in Spite of Express Restriction.** — *Mutual Reserve Fund L. Assoc. v. Cleveland Woolen Mills*, 54 U. S. App. 290; *Greenwich Ins. Co. v. Sabotnick*, 91 Ga. 717; *Moffitt v. Phenix Ins. Co.*, 11 Ind. App. 233; *Viele v. Germania Ins. Co.*, 26 Iowa 9, 96 Am. Dec. 83; *Phoenix Ins. Co. v. Spiers*, 87 Ky. 285; *Westchester F. Ins. Co. v. Earle*, 33 Mich. 153; *Cromwell v. Phoenix Ins. Co.*, 47 Mo. App. 109; *Schmurr v. State Ins. Co.*, 30 Oregon 29; *McFarland v. Kittanning Ins. Co.*, 134 Pa. St. 590; *Stauffer v. Manheim Mut. F. Ins. Co.*, 150 Pa. St. 531; *American Cent. Ins. Co. v. McCrea*, 8 Lea (Tenn.) 524, 41 Am. Rep. 647; *Dale v. Continental Ins. Co.*, 95 Tenn. 50; *East Texas F. Ins. Co. v. Crawford*, (Tex. 1891) 16 S. W. Rep. 1068; *McFetridge v. American F. Ins. Co.*, 90 Wis. 138. See also *Imperial F. Ins. Co. v. Dunham*, 117 Pa. St. 460, 2 Am. St. Rep. 686.

6. **Issuance of Policy Without Objection to Known Grounds of Forfeiture — California.** — *Fishbeck v. Phenix Ins. Co.*, 54 Cal. 422.

Georgia. — *Mobile F. Department Ins. Co. v. Miller*, 58 Ga. 420.

Indiana. — *Home Ins. Co. v. Duke*, 84 Ind. 253; *Indiana Ins. Co. v. Capehart*, 108 Ind. 270; *Manchester F. Assur. Co. v. Glenn*, 13 Ind. App. 365.

Illinois. — *Commercial Ins. Co. v. Span-*
Volume XVI.

sued, would have led to actual knowledge.¹ Especially is this true if notice of the facts is incorporated in the application upon which the policy is based.² In some jurisdictions, however, it is held that the fact that the insured knew of a breach of condition of the policy at the time when a contract of insurance was issued will not amount to a waiver, since the effect would be to vary a written contract by parol.³

(b) **Effect of Constructive Knowledge.** — But it seems that the knowledge which is contemplated by this rule is actual and not constructive knowledge.⁴ Thus the fact that the title of the risk insured is of record at the time when the policy is issued will not be notice to the insurer of the state of the title.⁵

(c) **Failure to Examine or Inquire as to Existing Facts.** — According to some of the

knoble, 52 Ill. 53, 4 Am. Rep. 582; *Lumbermen's Mut. Ins. Co. v. Bell*, 166 Ill. 400, 57 Am. St. Rep. 140; *Rockford Ins. Co. v. Seyferth*, 29 Ill. App. 513.

Iowa. — *Anson v. Winnesheik Ins. Co.*, 23 Iowa 84; *Carey v. Home Ins. Co.*, 97 Iowa 619; *Hart v. National Masonic Acc. Assoc.*, 105 Iowa 717.

Kansas. — *Milwaukee Mechanics' Ins. Co. v. Brown*, 3 Kan. App. 225; *Niagara F. Ins. Co. v. Johnson*, 4 Kan. App. 16.

Kentucky. — *Queen Ins. Co. v. Kline*, (Ky. 1895) 32 S. W. Rep. 214; *Phoenix Ins. Co. v. Angel*, (Ky. 1897) 38 S. W. Rep. 1067; *Phenix Ins. Co. v. Coomes*, (Ky. 1893) 20 S. W. Rep. 90.

Michigan. — *Hilt v. Metropolitan L. Ins. Co.*, 110 Mich. 517.

Minnesota. — *Brandup v. St. Paul F. & M. Ins. Co.*, 27 Minn. 393, followed in *Devils Lake First Nat. Bank v. American Cent. Ins. Co.*, 58 Minn. 492; *Quigley v. St. Paul Title Ins., etc., Co.*, 60 Minn. 275; *Anderson v. Manchester F. Assur. Co.*, 59 Minn. 182, 50 Am. St. Rep. 400.

Mississippi. — *Rivara v. Queen's Ins. Co.*, 62 Miss. 720.

Missouri. — *Breckinridge v. American Cent. Ins. Co.*, 87 Mo. 62; *Columbia Planing Mill Co. v. American F. Ins. Co.*, 59 Mo. App. 204, 1 Mo. App. Rep. 26; *Prendergast v. Dwelling House Ins. Co.*, 67 Mo. App. 426.

Nebraska. — *Rochester Loan, etc., Co. v. Liberty Ins. Co.*, 44 Neb. 537, 48 Am. St. Rep. 745.

New York. — *McNally v. Phoenix Ins. Co.*, 137 N. Y. 389; *Forward v. Continental Ins. Co.*, 142 N. Y. 382; *Wood v. American F. Ins. Co.*, 149 N. Y. 385, 52 Am. St. Rep. 733; *Robbins v. Springfield F. & M. Ins. Co.*, 149 N. Y. 477; *Woodward v. Republic F. Ins. Co.*, 32 Hun (N. Y.) 365; *Baldwin v. Citizens Ins. Co.*, 60 Hun (N. Y.) 389; *Fulton v. Metropolitan L. Ins. Co.*, (C. Pl. Gen. T.) 19 N. Y. Supp. 669; *Koenig v. United L. Ins. Assoc.*, (Supm. Ct. Tr. T.) 16 Misc. (N. Y.) 531; *Neafie v. Woodcock*, 15 N. Y. App. Div. 618; *Van Tassel v. Greenwich Ins. Co.*, 28 N. Y. App. Div. 163.

Oregon. — *Koshland v. Home Ins. Co.*, 31 Oregon 321.

Pennsylvania. — *Davis v. Fireman's Fund Ins. Co.*, 5 Pa. Super. Ct. 506, 28 Pittsb. Leg. J. N. S. (Pa.) 91, 40 W. N. C. (Pa.) 569.

Rhode Island. — *Reed v. Equitable F. & M. Ins. Co.*, 17 R. I. 785.

South Carolina. — *Graham v. American F. Ins. Co.*, 48 S. Car. 195, 59 Am. St. Rep. 707; *Gandy v. Orient Ins. Co.*, 52 S. Car. 224.

Tennessee. — *American Cent. Ins. Co. v. McCrea*, 8 Lea (Tenn.) 513, 41 Am. Rep. 647. *Texas*. — *Phoenix Ins. Co. v. Ward*, 7 Tex. Civ. App. 13; *Hartford F. Ins. Co. v. Moore*, 13 Tex. Civ. App. 644; *Standard L., etc., Ins. Co. v. Davis*, (Tex. Civ. App. 1898) 45 S. W. Rep. 826; *German Ins. Co. v. Everett*, 18 Tex. Civ. App. 514.

Virginia. — *Morotock Ins. Co. v. Pankey*, 91 Va. 259; *Mutual F. Ins. Co. v. Ward*, 95 Va. 231.

West Virginia. — *Harvey v. Parkersburg Ins. Co.*, 37 W. Va. 272.

Wisconsin. — *Devine v. Home Ins. Co.*, 32 Wis. 471.

Effect of Fraudulent Representation in Application. — It has been held that receiving the premium and issuing the policy with full knowledge of all the facts by the insurer will create an estoppel to rely on such facts as a forfeiture though the assured made a false representation as to the facts in his application. *Standard L., etc., Ins. Co. v. Davis*, (Tex. Civ. App. 1898) 45 S. W. Rep. 826.

1. **Insurer Put on Notice.** — *North British, etc., Ins. Co. v. Steiger*, 124 Ill. 81; *Gandy v. Orient Ins. Co.*, 52 S. Car. 224; *Morrison v. Wisconsin Odd Fellows' Mut. L. Ins. Co.*, 59 Wis. 166. *Compare Sanders v. Cooper*, 115 N. Y. 289, 12 Am. St. Rep. 801.

Thus in *Emlaw v. Travelers' Ins. Co.*, 108 Mich. 554, it was held that a misstatement in the application to the effect that the applicant had no other insurance with the insurer would not avoid the policy, since the company was presumed to know of the falsity of the statement. *Compare Home Friendly Soc. v. Berry*, 94 Ga. 606.

2. *Davis v. Phoenix Ins. Co.*, 111 Cal. 409; *Phenix Ins. Co. v. Lorenz*, 7 Ind. App. 266.

Conditions as to Future Action. — This rule applies though the statement in the application has reference to intended acts of the assured after the policy is issued. *Phenix Ins. Co. v. Lorenz*, 7 Ind. App. 266.

3. **Knowledge at Time of Issuance No Waiver.** — *Batchelder v. Queen Ins. Co.*, 135 Mass. 449; *Franklin F. Ins. Co. v. Martin*, 40 N. J. L. 568, 29 Am. Rep. 271; *Bennett v. St. Paul F. & M. Ins. Co.*, 55 N. J. L. 377.

4. **Constructive Knowledge of Facts Material to Risk Not Binding on Company.** — *Orient Ins. Co. v. Williamson*, 98 Ga. 466; *Turnbull v. Home F. Ins. Co.*, 83 Md. 312.

5. **Title of Insured Property on Record.** — *Orient Ins. Co. v. Williamson*, 98 Ga. 464; *Milwaukee Mechanics' Ins. Co. v. Niewedde*, 12 Ind. App. 145; *Shaffer v. Milwaukee Mechanics' Ins.*

authorities the insurer may waive a forfeiture called for by the terms of the policy by reason of facts existing at the time when the contract is made, apart from any actual knowledge on its part at the time, where there was no written application and where no question was asked and no statements were made in regard to such facts, and the insured had no knowledge that such facts were material to the risk.¹ But a contrary view has been adopted by other authorities, the contention being that there is no duty on the part of the insurer to make inquiry as to the facts.²

(d) *Omission or Imperfect Answer Appearing on Face of Application.* — Where it appears upon the face of an application for insurance that a question is not answered at all or is imperfectly answered, the issuance of a policy without further inquiry will constitute a waiver of the imperfection in the application and will render immaterial the omission to give a fuller answer.³

(3) *Acts After Issuance of Policy but Prior to Forfeiture.* — Where the conduct of the insurer before the forfeiture occurs is such as fairly to induce the assured to believe that a requirement or condition of the policy will not be insisted on, such requirement or condition will be regarded as waived.⁴

Assertion of Specific Breach. — Sometimes the denial of liability for a specified ground of forfeiture operates as a waiver of a subsequent ground.⁵ This doctrine has been applied where the company has, by placing its nonliability on one ground, led the assured to believe that a compliance with other conditions will be unavailing.⁶ Thus it seems to be a well-established rule that where an insurance company refuses to pay a loss, placing its refusal upon a definite ground other than the want of preliminary proofs of loss or a defect in their form or substance, it waives the right to insist upon the failure to make the requisite proof as a defense to an action on the policy.⁷ And it has been held that by demanding compliance with one stipulation the insurer waives the right to insist upon the performance of another, the enforcement of which would be inconsistent with the prior demand, as where the company demands proofs of loss, the production of which consumes the time within

Co., 17 Ind. App. 204; *Ætna Ins. Co. v. Holcomb*, 89 Tex. 404.

1. *Waiver by Failure to Inquire as to Existing Facts.* — *German Mut. Ins. Co. v. Niewedde*, 11 Ind. App. 621; *Queen Ins. Co. v. Kline*, (Ky. 1895) 32 S. W. Rep. 214; *O'Brien v. Ohio Ins. Co.*, 52 Mich. 131; *Hall v. Niagara F. Ins. Co.*, 93 Mich. 184, 32 Am. St. Rep. 497; *Georgia Home Ins. Co. v. Holmes*, 75 Miss. 390; *Wright v. Fire Ins. Co.*, 12 Mont. 474; *Caldwell v. Fire Assoc.*, 177 Pa. St. 502.

2. *Failure to Inquire Does Not Create Estoppel.* — *Beck v. Hibernia Ins. Co.*, 44 Md. 95; *McFarland v. St. Paul F. & M. Ins. Co.*, 46 Minn. 519; *Ætna Ins. Co. v. Holcomb*, 89 Tex. 404; *Wilcox v. Continental Ins. Co.*, 85 Wis. 193. See also *Sanders v. Cooper*, 115 N. Y. 289, 12 Am. St. Rep. 80r. Compare *Short v. Home Ins. Co.*, 90 N. Y. 16, 43 Am. Rep. 138.

3. *Waiver or Omission Appearing on Face of Application.* — *Phoenix L. Ins. Co. v. Raddin*, 120 U. S. 183; *Tiefenthal v. Citizens' Mut. F. Ins. Co.*, 53 Mich. 306; *Miotke v. Milwaukee Mechanics Ins. Co.*, 113 Mich. 166; *American L. Ins. Co. v. Mahone*, 56 Miss. 180; *Carson v. Jersey City Ins. Co.*, 43 N. J. L. 300, 39 Am. Rep. 584; *Alexander v. Germania F. Ins. Co.*, 5 Thomp. & C. (N. Y.) 208, 2 Hun (N. Y.) 655; *Thies v. Mutual L. Ins. Co.*, 13 Tex. Civ. App. 280. See also *Milwaukee Mechanics' Ins. Co. v. Niewedde*, 12 Ind. App. 145.

Thus, where a condition in a contract of insurance requires that the property shall be free

of incumbrance, the requirement is waived by accepting the risk on an application in which the questions as to liens and incumbrances are not answered. *Sun Mut. Ins. Co. v. Hock*, 8 Ohio Cir. Ct. 341, 4 Ohio Cir. Dec. 553.

4. *Waiver After Issuance of Policy but Prior to Forfeiture.* — *New York L. Ins. Co. v. Eggleston*, 96 U. S. 572; *Phoenix Ins. Co. v. Doster*, 106 U. S. 35; *Hartford L. Annuity Ins. Co. v. Unsell*, 144 U. S. 449; *Home Protection of North Alabama Ins. Co. v. Avery*, 85 Ala. 348, 7 Am. St. Rep. 54; *Penn Mut. L. Ins. Co. v. Keach*, 32 Ill. App. 427, 134 Ill. 583; *Sweetser v. Odd Fellows Mut. Aid Assoc.*, 117 Ind. 97; *McColium v. Niagara F. Ins. Co.*, 61 Mo. App. 356; *People v. Liverpool, etc., Ins. Co.*, 2 Thomp. & C. (N. Y.) 268.

5. *Denial of Liability for Specific Breach as Waiver of Subsequent Breach.* — *Wolf v. District Grand Lodge No. 6*, 102 Mich. 23.

6. *Himmelein v. Supreme Council, etc.*, (Cal. 1892) 33 Pac. Rep. 1130.

7. *Waiver of Preliminary Proofs by Denial of Liability.* — *Williamsburg City F. Ins. Co. v. Cary*, 83 Ill. 454; *Ætna Ins. Co. v. Shryer*, 85 Ind. 362; *Little v. Phoenix Ins. Co.*, 123 Mass. 389, 25 Am. Rep. 96; *Pennsylvania F. Ins. Co. v. Dougherty*, 102 Pa. St. 568; *Lebanon Mut. Ins. Co. v. Erb*, 112 Pa. St. 149; *Western, etc., Pipe Lines v. Home Ins. Co.*, 145 Pa. St. 346; *Welsh v. London Assur. Corp.*, 151 Pa. St. 618; *Gross v. Milwaukee Mechanics' Ins. Co.*, 92 Wis. 656.

which suit was to be brought under a requirement of the policy.¹

(4) *Conduct After Forfeiture* — (a) *In General*. — And even after the forfeiture occurs the insurer is precluded from taking advantage thereof if, with full knowledge of the facts out of which the forfeiture arose, it neglects to declare its intention of insisting on the forfeiture, or by its acts recognizes and treats the policy as a valid and subsisting contract, and induces the assured to act in that belief, especially if such acts cause the assured to incur trouble or expense.²

1. Demanding Compliance with Incompatible Provision. — *Little v. Phoenix Ins. Co.*, 123 Mass. 389, 25 Am. Rep. 96; *Dibrell v. Georgia Home Ins. Co.*, 110 N. Car. 194, 28 Am. St. Rep. 678.

2. Waiver by Acts Subsequent to Forfeiture — *United States*. — *Knickerbocker L. Ins. Co. v. Norton*, 96 U. S. 234; *Travellers' Ins. Co. v. Edwards*, 122 U. S. 457; *New York L. Ins. Co. v. Baker*, 83 Fed. Rep. 647, 49 U. S. App. 690; *Missouri, etc., Trust Co. v. German Nat. Bank*, 77 Fed. Rep. 117.

Arkansas. — *King v. Cox*, 63 Ark. 204.

Connecticut. — *Rathbone v. City F. Ins. Co.*, 31 Conn. 193.

Illinois. — *Schim v. Cedar Rapids Ins. Co.*, 124 Ill. 356; *Rockford Ins. Co. v. Williams*, 56 Ill. App. 338.

Indiana. — *Replogle v. American Ins. Co.*, 132 Ind. 360.

Iowa. — *Viele v. Germania Ins. Co.*, 26 Iowa 9, 96 Am. Dec. 83; *Lewis v. Council Bluffs Ins. Co.*, 63 Iowa 193; *Hollis v. State Ins. Co.*, 65 Iowa 454; *Siltz v. Hawkeye Ins. Co.*, 71 Iowa 710.

Kansas. — *American Cent. Ins. Co. v. Mc-Lanathan*, 11 Kan. 533.

Maryland. — *Globe Reserve Mut. L. Ins. Co. v. Duffy*, 76 Md. 293; *Rokes v. Amazon Ins. Co.*, 51 Md. 521.

Massachusetts. — *Oakes v. Manufacturers' F. & M. Ins. Co.*, 135 Mass. 248.

Michigan. — *Olmstead v. Farmers' Mut. F. Ins. Co.*, 50 Mich. 200.

Minnesota. — *Schreiber v. German-American Hail Ins. Co.*, 43 Minn. 367.

Mississippi. — *American F. Ins. Co. v. Vicksburg First Nat. Bank*, 73 Miss. 469.

Missouri. — *Anthony v. German American Ins. Co.*, 48 Mo. App. 65; *McCullum v. Niagara F. Ins. Co.*, 61 Mo. App. 355.

Nebraska. — *Phoenix Ins. Co. v. Lansing*, 15 Neb. 494; *Western Horse, etc., Ins. Co. v. Scheidle*, 18 Neb. 495; *Billings v. German Ins. Co.*, 34 Neb. 502.

New Jersey. — *Martin v. Jersey City Ins. Co.*, 44 N. J. L. 274.

New York. — *Goodwin v. Massachusetts Mut. L. Ins. Co.*, 73 N. Y. 480; *Prentice v. Knickerbocker L. Ins. Co.*, 77 N. Y. 483, 33 Am. Rep. 651; *Brink v. Hanover F. Ins. Co.*, 80 N. Y. 103; *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410, 8 Abb. N. Cas. (N. Y.) 315; *Benninghoff v. Agricultural Ins. Co.*, 93 N. Y. 495; *Jones v. Howard Ins. Co.*, 117 N. Y. 103; *Roby v. American Cent. Ins. Co.*, 120 N. Y. 510; *Armstrong v. Agricultural Ins. Co.*, 130 N. Y. 560; *McNally v. Phoenix Ins. Co.*, 137 N. Y. 389; *Trippe v. Provident Fund Soc.*, 140 N. Y. 28, 37 Am. St. Rep. 529; *Walker v. Phoenix Ins. Co.*, 156 N. Y. 633; *Lobee v. Standard Live Stock Ins. Co.*, (Buffalo Super. Ct. Gen. T.) 12 Misc. (N. Y.) 504; *Pratt v. Dwelling*

House Mut. Ins. Co., (Ct. App.) 41 N. Y. St. Rep. 303; *Glens Falls Portland Cement Co. v. Travelers' Ins. Co.*, 11 N. Y. App. Div. 411.

Pennsylvania. — *Smith v. People's Mut. Live Stock Ins. Co.*, 173 Pa. St. 15; *McFarland v. Kittanning Ins. Co.*, 134 Pa. St. 590, 26 W. N. C. (Pa.) 174; *Everett v. London, etc., Ins. Co.*, 142 Pa. St. 332, 28 W. N. C. (Pa.) 203.

Texas. — *North British, etc., Ins. Co. v. Gunter*, 12 Tex. Civ. App. 598; *Crescent Ins. Co. v. Griffin*, 59 Tex. 509.

Wisconsin. — *Webster v. Phoenix Ins. Co.*, 36 Wis. 67, 17 Am. Rep. 479; *Northwestern Mut. L. Ins. Co. v. Germania F. Ins. Co.*, 40 Wis. 446; *Gans v. St. Paul F. & M. Ins. Co.*, 43 Wis. 108, 28 Am. Rep. 535; *Cannon v. Home Ins. Co.*, 53 Wis. 585; *Osterloh v. New Denmark Mut. Home F. Ins. Co.*, 60 Wis. 126; *Oshkosh Gas Light Co. v. Germania F. Ins. Co.*, 71 Wis. 454, 5 Am. St. Rep. 233; *Renier v. Dwelling House Ins. Co.*, 74 Wis. 89; *Dick v. Equitable F. & M. Ins. Co.*, 92 Wis. 46.

Payment of Dividend. — In *Combs v. Shrewsbury Mut. F. Ins. Co.*, 34 N. J. Eq. 403, it was held that the payment of a dividend to the assured after knowledge of the forfeiture was a waiver.

Subsequent Change in Form of Policy. — In the same way it has been held that if an insurance company with knowledge of a forfeiture makes a change in the form of a policy at the request of the assured, and returns the policy as one of binding obligation, the forfeiture is waived. *American F. Ins. Co. v. Vicksburg First Nat. Bank*, 73 Miss. 469.

Taking Additional Risk on Same Policy. — So it has been held that the taking of additional risk on the same policy with knowledge of a forfeiture will waive the forfeiture. *Rathbone v. City F. Ins. Co.*, 31 Conn. 193. See also *Viele v. Germania Ins. Co.*, 26 Iowa 55, 96 Am. Dec. 83.

And the same rule has been applied where an agent with knowledge of a forfeiture took risks on the property insured in other companies represented by him. *Crescent Ins. Co. v. Griffin*, 59 Tex. 509.

Consent to Assignment. — Also it has been held that if an insurance company with knowledge of a forfeiture subsequently consents to an assignment of the policy, the forfeiture is waived. *Rockford Ins. Co. v. Williams*, 56 Ill. App. 341; *Eureka Ins. Co. v. Robinson*, 56 Pa. St. 257, 94 Am. Dec. 65.

But a different rule has been laid down where by the terms of the consent to the transfer the transferred policy was subject to the same terms and conditions as when it was first issued. *Insurance Co. of North America v. Garland*, 108 Ill. 227. See also *Barnes v. Union Mut. F. Ins. Co.*, 45 N. H. 21.

The Assignment of One Ground of Forfeiture Only as a reason for refusal to pay has been

Conduct Relied on as Forfeiture Not Intended nor Understood as Such. — But there is no waiver where the conduct relied on to constitute a waiver is accompanied by other acts showing that it was not the intention of the insured to waive the forfeiture, and that the insured so understood it, as where the insurer at the time disclaimed liability on the policy.¹

Knowledge Necessary. — To make any act of the insurer the waiver of a breach of a condition for which he may elect to treat the policy as void, it must be with notice of the breach.² And the fact that the insurer waived one ground of forfeiture of which he was informed will not be an implied waiver of another ground of which he had no knowledge.³

Failure of Knowledge to Restore Insured to Former Status. — But an act done in recognition of the validity of a policy, in ignorance of the fact that it is subject to forfeiture, will be ratified and will constitute a waiver by a failure, after knowledge of the facts is acquired, to restore promptly that which was obtained by virtue of the policy and to place the assured in his former position.⁴

(b) **Mere Silence or Nonaction.** — In a number of cases the view has been expressed that in case of a breach of a condition of a policy the company is not bound at its peril, upon notice of such breach, to declare the policy forfeited, or to do or say anything to make the forfeiture effectual; that a waiver cannot be inferred from the insurer's mere silence or nonaction; and that it may wait until claim is made under the policy and then allege the forfeiture in denial thereof or in defense of a suit commenced therefor.⁵ But this rule does not

held to operate as a waiver of another ground, where the assured has thereby been reasonably induced to incur trouble or expense in making proofs or otherwise which he would not have incurred if the other ground had been originally insisted on. *Towle v. Ionia, etc., Farmers' Mut. F. Ins. Co.*, 91 Mich. 219.

1. *Burr v. German Ins. Co.*, 84 Wis. 76, 36 Am. St. Rep. 905.

2. **Necessity of Knowledge of Forfeiture to Create Waiver** — *United States*. — *Globe Mut. L. Ins. Co. v. Wolff*, 95 U. S. 332; *Bennecke v. Connecticut Mut. L. Ins. Co.*, 105 U. S. 355.

Alabama. — *Queen Ins. Co. v. Young*, 86 Ala. 424, 11 Am. St. Rep. 51.

Illinois. — *Security Ins. Co. v. Mette*, 27 Ill. App. 324; *Illinois Mut. Ins. Co. v. Mette*, 27 Ill. App. 330.

Iowa. — *Fitchpatrick v. Hawkeye Ins. Co.*, 53 Iowa 335; *Houdeck v. Merchants', etc., Ins. Co.*, 102 Iowa 303.

Kentucky. — *Baer v. Phoenix Ins. Co.*, 4 Bush (Ky.) 242.

Michigan. — *Finch v. Modern Woodmen of North America*, 113 Mich. 646.

Minnesota. — *St. Paul F. & M. Ins. Co. v. Parsons*, 47 Minn. 355; *Schreiber v. German-American Hail Ins. Co.*, 43 Minn. 368.

Mississippi. — *Greenwood Ice, etc., Co. v. Georgia Home Ins. Co.*, 72 Miss. 46.

Nebraska. — *Slobodisky v. Phenix Ins. Co.*, 52 Neb. 395.

New York. — *Robertson v. Metropolitan L. Ins. Co.*, 88 N. Y. 541; *Stuart v. Mutual Reserve Fund L. Assoc.*, 78 Hun (N. Y.) 191; *Gray v. Guardian Assur. Co.*, 82 Hun (N. Y.) 380.

Rhode Island. — *Cornell v. Tiverton, etc., Mut. F. Ins. Co.*, (R. I. 1896) 35 Atl. Rep. 579.

Tennessee. — *Bovd v. Vanderbilt Ins. Co.*, 90 Tenn. 212, 25 Am. St. Rep. 676.

Texas. — *McLeary v. Orient Ins. Co.*, (Tex. Civ. App. 1895) 32 S. W. Rep. 583; *U. S. In-*

urance Co. v. Moriarty, (Tex. Civ. App. 1896) 36 S. W. Rep. 943.

Constructive Knowledge, as for instance the fact that the title of the risk insured is of record, is not knowledge within the meaning of the rule. *Wicke v. Iowa State Ins. Co.*, 90 Iowa 4; *U. S. Insurance Co. v. Moriarty*, (Tex. Civ. App. 1894) 36 S. W. Rep. 943.

3. **Waiver of One Ground Does Not Bar Insistence on Another.** — *Dover Glass Works Co. v. American F. Ins. Co.*, 1 Marv. (Del.) 32; *Troit v. Woolwich Mut. F. Ins. Co.*, 83 Me. 362; *U. S. Insurance Co. v. Moriarty*, (Tex. Civ. App. 1896) 36 S. W. Rep. 943.

4. *Devils Lake First Nat. Bank v. Manchester F. Assur. Co.*, 64 Minn. 99.

5. **Mere Silence or Nonaction Not a Waiver.** — *United States*. — *Kansas City First Nat. Bank v. Hartford F. Ins. Co.*, 95 U. S. 673; *Adreveno v. Mutual Reserve Fund L. Assoc.*, 38 Fed. Rep. 806. See also *West End Hotel, etc., Co. v. American F. Ins. Co.*, 74 Fed. Rep. 114.

Connecticut. — *Ward v. Metropolitan L. Ins. Co.*, 66 Conn. 240, 50 Am. St. Rep. 80.

Illinois. — *Insurance Co. of North America v. Garland*, 108 Ill. 227; *Schimp v. Cedar Rapids Ins. Co.*, 124 Ill. 356.

Indiana. — *Replogle v. American Ins. Co.*, 132 Ind. 360.

Kansas. — *Concordia F. Ins. Co. v. Johnson*, 4 Kan. App. 7.

Michigan. — *Chippewa Lumber Co. v. Phenix Ins. Co.*, 80 Mich. 116; *Robinson v. Philadelphia F. Assoc.*, 63 Mich. 90.

Minnesota. — *Goldin v. Northern Assur. Co.*, 46 Minn. 471.

New York. — *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410; *Armstrong v. Agricultural Ins. Co.*, 130 N. Y. 560; *Gibson Electric Co. v. Liverpool, etc., Ins. Co.*, 159 N. Y. 418.

Wisconsin. — *Carey v. German American Ins. Co.*, 84 Wis. 80, 36 Am. St. Rep. 907.

apply where by the terms of the policy some further action on the part of the insurer is required after notice of the facts.¹ Also it has been held that failure of the insurer to object on notice of intention to violate one of the conditions of a policy will amount to a waiver, as the silence of the insurer will be deemed to have induced the breach of the condition.² But a different rule has been applied when such notice was communicated casually and not in a manner implying a request for permission to disregard a condition of the policy.³

(c) **Acceptance of Payment of Premium.** — If an insurer accepts or enforces payment of a premium or assessment after knowledge that there has been a breach of a condition or warranty, the acceptance of the premium is a waiver of the right to avoid the policy for that breach, since to hold otherwise would be to maintain that the contract of insurance requires good faith of the insured only and not of the insurer.⁴

See also *Merchants' Ins. Co. v. New Mexico Lumber Co.*, 10 Colo. App. 223.

Compare Phoenix Ins. Co. v. Spiers, 87 Ky. 285; *Hamilton v. Home Ins. Co.*, 94 Mo. 353; *Gould v. Dwelling-House Ins. Co.*, 134 Pa. St. 570.

Thus the failure of the insurance company to answer a letter informing it of a breach of a condition will not be a waiver of the breach. *Armstrong v. Agricultural Ins. Co.*, 130 N. Y. 560.

1. *Wakefield v. Orient Ins. Co.*, 50 Wis. 532.

2. **Notice of Intention to Violate Condition.** — *Hartford F. Ins. Co. v. McLemore*, 7 Tex. Civ. App. 317.

3. *Goldin v. Northern Assur. Co.*, 46 Minn. 473.

4. **Waiver by Acceptance of Payment of Premium** — *United States*. — *Phoenix L. Ins. Co. v. Raddin*, 120 U. S. 183; *Couten v. Fidelity, etc., Co.*, 41 Fed. Rep. 506.

Georgia. — *German American Mut. L. Assoc. v. Farley*, 102 Ga. 720.

Illinois. — *Commercial Ins. Co. v. Spankneble*, 52 Ill. 53, 4 Am. Rep. 582; *Reaper City Ins. Co. v. Jones*, 62 Ill. 458; *Lycoming Ins. Co. v. Barringer*, 73 Ill. 230; *Phenix Ins. Co. v. Hart*, 149 Ill. 514; *Germania L. Ins. Co. v. Koehler*, 168 Ill. 395, 61 Am. St. Rep. 108; *Northwestern Mut. L. Ins. Co. v. Amerman*, 16 Ill. App. 528; *German Ins. Co. v. Orr*, 56 Ill. App. 637; *Kingston Mut. County F., etc., Ins. Co. v. Olmstead*, 68 Ill. App. 111; *Metropolitan L. Ins. Co. v. Quandt*, 69 Ill. App. 649; *Germania F. Ins. Co. v. Klewer*, 129 Ill. 599.

Indiana. — *Masonic Mut. Ben. Assoc. v. Beck*, 77 Ind. 203, 40 Am. Rep. 295; *Phenix Ins. Co. v. Boyer*, 1 Ind. App. 329; *Union Cent. L. Ins. Co. v. Jones*, 17 Ind. App. 592.

Iowa. — *Keenan v. Missouri State Mut. Ins. Co.*, 12 Iowa 126; *Keenan v. Dubuque Mut. F. Ins. Co.*, 13 Iowa 375; *Bloom v. State Ins. Co.*, 94 Iowa 359.

Kentucky. — *Germania Ins. Co. v. Rudwig*, 80 Ky. 223.

Louisiana. — *Story v. Hope Ins. Co.*, 37 La. Ann. 254.

Michigan. — *Towle v. Ionia, etc., Farmers' Mut. F. Ins. Co.*, 91 Mich. 219.

Minnesota. — *Wiberg v. Minnesota Scandinavian Relief Assoc.*, 73 Minn. 297.

Missouri. — *Barnard v. National F. Ins. Co.*, 38 Mo. App. 106.

Nebraska. — *Schonenman v. Western Horse, etc., Ins. Co.*, 16 Neb. 404; *German Ins., etc., Inst. v. Kline*, 44 Neb. 395.

New York. — *Singleton v. Prudential Ins. Co.*, 11 N. Y. App. Div. 403; *Magner v. Mutual L. Assoc.*, 17 N. Y. App. Div. 13; *Flannigan v. Prudential Ins. Co.*, (County Ct.) 20 Misc. (N. Y.) 51.

Pennsylvania. — *Silk v. Mutual Reserve Fund L. Assoc.*, 159 Pa. St. 625; *Wilson v. Mutual F. Ins. Co.*, 174 Pa. St. 554, 38 W. N. C. (Pa.) 308; *Highlands v. Lurgan Mut. F. Ins. Co.*, 177 Pa. St. 566.

Rhode Island. — *Milkman v. United Mut. Ins. Co.*, 20 R. I. 10.

South Carolina. — *Schroeder v. Springfield F. & M. Ins. Co.*, 51 S. Car. 180.

Texas. — *Ætina L. Ins. Co. v. Hanna*, 81 Tex. 487; *Morris v. Travelers' Ins. Co.*, (Tex. Civ. App. 1897) 43 S. W. Rep. 898.

West Virginia. — *Schwarzbach v. Ohio Valley Protective Union*, 25 W. Va. 622, 52 Am. Rep. 227.

Wisconsin. — *Osterloh v. New Denmark Mut. Home F. Ins. Co.*, 60 Wis. 126; *McKinney v. German Mut. F. Ins. Soc.*, 89 Wis. 653, 46 Am. St. Rep. 861.

Retention of Premium After Knowledge of Breach. — In the same way the retention of an unearned premium after knowledge of the breach of a condition of the policy will amount to a waiver of the breach, though the insurer did not have notice of the breach at the time when the premium was collected. *Faker v. New York L. Ins. Co.*, 77 Fed. Rep. 550; *Williamsburg City F. Ins. Co. v. Cary*, 83 Ill. 456; *Home Ins. Co. v. Marple*, 1 Ind. App. 411; *Hanover F. Ins. Co. v. Dole*, 20 Ind. App. 333; *Phœnix Ins. Co. v. Spiers*, 87 Ky. 285; *Van Bories v. United L., etc., Ins. Co.*, 8 Bush (Ky.) 136; *Schreiber v. German American Hail Ins. Co.*, 43 Minn. 367; *Horton v. Home Ins. Co.*, 122 N. Car. 498; *Kalmutz v. Northern Mut. Ins. Co.*, 186 Pa. St. 571; *Schmurr v. State Ins. Co.*, 30 Oregon 29. *Compare West End Hotel, etc., Co. v. American F. Ins. Co.*, 74 Fed. Rep. 114.

But where the insurance company orders the return of the premium and the cancellation of the policy as soon as it is informed of the breach, there is no waiver. *Globe Mut. L. Ins. Co. v. Wolff*, 95 U. S. 332; *John R. Davis Lumber Co. v. Hartford F. Ins. Co.*, 95 Wis. 226.

Nor is there a waiver if a tender is made within a reasonable time after knowledge of the forfeiture. *Green v. Northwestern Live Stock Ins. Co.*, 87 Iowa 358.

Deposit of Premium in Court. — Under statute

Insured Must Understand Payment as Waiver. — But the mere act of receiving or collecting the premium by the insurance company with knowledge of an existing right of forfeiture will not estop the company from setting up the forfeiture unless the assured paid the premium under the belief, fairly induced by the acts or declarations of the company or its agents, that the payment would operate as a waiver or estoppel.¹ Hence if, at the time when the payment of a premium is made to the insurer having knowledge of a forfeiture, the insurer is informed that the company intends to insist on the forfeiture, no waiver will arise.²

Where the Premium Is Earned Before the Forfeiture the subsequent taking and retaining the premium are not inconsistent with a defense based upon such forfeiture, and will not amount to a waiver.³

A Mere Demand for Payment Which Is Refused by the insured will not amount to a waiver.⁴

(d) **Requiring Proofs of Loss.** — Where an insurer, after full knowledge of a forfeiture, calls for proofs of loss or otherwise negotiates with the insured with reference to the adjustment of the loss, whereby the insured is put to trouble and expense, the insurer thereby recognizes the continued validity of the policy and cannot afterward change its ground and claim that the policy is no longer in force.⁵ And this is especially true where not only first proofs but additional proofs are required.⁶

But a Distinction Has Been Drawn by Some of the Authorities in cases where by the

in *Missouri* it has been held that where, by the terms of the policy, the amount of the insurance was subject to correction for a misstatement as to the age of the insured, a misrepresentation by the insured as to her age was no defense in an action on the policy where the defendant failed at or before the trial to deposit in court, for the benefit of the plaintiff, the premiums recovered on the policy. *Floyd v. Prudential Ins. Co.*, 72 Mo. App. 455.

Effect of Prior Conditional Waiver. — An unconditional acceptance of an assessment waives all former known grounds of forfeiture, and this effect is not varied or limited because an acceptance of a former assessment had been on condition and had not amounted to such a waiver. *Rice v. New England Mut. Aid Soc.*, 146 Mass. 251. See also *Williams v. Maine State Relief Assoc.*, 89 Me. 164.

1. *Northwestern Mut. L. Ins. Co. v. Amerman*, 119 Ill. 329, 59 Am. Rep. 799; *Schimp v. Cedar Rapids Ins. Co.*, 124 Ill. 356.

2. *Northwestern Mut. L. Ins. Co. v. Amerman*, 119 Ill. 329, 59 Am. Rep. 799. See also *Schimp v. Cedar Rapids Ins. Co.*, 124 Ill. 354.

Premium Collected by Mistake of Fact After Disclaimer of Liability. — In *Ryan v. Rockford Ins. Co.*, 85 Wis. 573, it was held that there was no waiver when, after an insurance company had denied all liability on a policy on account of a forfeiture, a clerk of the company, in ignorance of the facts and without the direction or knowledge of any person having authority to bind the company, though in the regular course of business, collected a premium from the insured, which the company at once tendered back.

3. **Receipt of Premium Earned Before Forfeiture.** — *Smith v. Continental Ins. Co.*, 6 Dak. 433; *Schimp v. Cedar Rapids Ins. Co.*, 124 Ill. 356; *Burner v. German-American Ins. Co.*, (Ky. 1898) 45 S. W. Rep. 109.

An Assessment levied by a mutual fire-insur-

ance company on the premium note of a policy holder with knowledge of the forfeiture of the policy, and the collection of such assessment made to pay losses sustained by the company before the forfeiture, do not constitute a waiver of the forfeiture although such assessment was in excess of what was actually necessary to pay such losses. *Farmers' Mut. F. Ins. Co. v. Hull*, 77 Md. 498.

4. *Sullivan v. Connecticut Indemnity Assoc.*, 101 Ga. 809.

5. **Waiver by Requiring Proofs of Loss** — *Arkansas*. — *German Ins. Co. v. Gibson*, 53 Ark. 494.

Illinois. — *Rockford Ins. Co. v. Travelstead*, 29 Ill. App. 654.

Indiana. — *Home Ins. Co. v. Marple*, 1 Ind. App. 411.

Iowa. — *Brown v. State Ins. Co.*, 74 Iowa 428, 7 Am. St. Rep. 495.

Michigan. — *Pennsylvania F. Ins. Co. v. Kittle*, 39 Mich. 51.

Missouri. — *McCollum v. Niagara F. Ins. Co.*, 61 Mo. App. 352, 1 Mo. App. Rep. 631.

Nebraska. — *Eagle F. Co. v. Globe L. & T. Co.*, 44 Neb. 380.

North Carolina. — *Grubbs v. North Carolina Home Ins. Co.*, 108 N. Car. 472, 23 Am. St. Rep. 62.

Wisconsin. — *Webster v. Phoenix Ins. Co.*, 36 Wis. 67, 17 Am. Rep. 479; *Cannon v. Home Ins. Co.*, 53 Wis. 595; *Oshkosh Gas Light Co. v. Germania F. Ins. Co.*, 71 Wis. 454, 5 Am. St. Rep. 233; *Renier v. Dwelling House Ins. Co.*, 74 Wis. 89.

See also *McNally v. Phoenix Ins. Co.*, 137 N. R. 389; *Kierwan v. Dutchess County Mut. Ins. Co.*, 150 N. Y. 198. Compare *Labell v. Georgia Home Ins. Co.*, (Tex. Civ. App. 1894) 28 S. W. Rep. 133.

6. *Replogle v. American Ins. Co.*, 132 Ind. 360; *Gans v. St. Paul F. & M. Ins. Co.*, 43 Wis. 112, 28 Am. Rep. 535. Compare *Phoenix Ins. Co. v. Stevenson*, 8 Ins. L. J. 922.

terms of the policy the insured is required to furnish proofs of loss, and until he does so he has no cause of action, the contention being that the requirement by the insurer that the insured should perform his contract obligation does not estop the insurer from insisting on other conditions of the policy.¹ Nor, it is held, does the rule apply where the insurer is entitled to call for proofs for some special reason not inconsistent with an insistence upon the forfeiture of the policy.² Thus where the insurer is entitled by the terms of the policy to have proofs of loss submitted for the purpose, among other things, of getting information as to facts creating a forfeiture, the acceptance of proofs by which such information is imparted will not amount to a waiver of the forfeiture though it appears that the insured was notified, though not fully, from another source.³ And a demand by the insurer that the insured shall produce his books and make proofs of loss in accordance with the terms of the policy is not a waiver of any condition in the policy.⁴ It seems to be settled, also, that the rule does not apply when the communication inviting proofs of loss apprises the insured of the fact that the insurer will insist on the forfeiture.⁵

c. BY WHOM WAIVER MAY BE MADE — (1) *President or Vice-President of Company*. — Facts communicated to or waivers by the president⁶ or vice-president⁷ of the company have been held to be binding on the company.

(2) *Secretary*. — And the same has been held of waivers by the secretary⁸ or assistant secretary⁹ of the company.

(3) *Agents* — (a) *In General*. — The difficulty in nearly all cases where a waiver is alleged, in the absence of written proof of the fact, arises from a consideration of the effect to be given to the acts of agents of the company in their dealings with the assured. In order that the acts of such agents may effect a waiver binding upon the company, they must, of course, have authority to waive a compliance with the conditions upon a breach of which the forfeiture is claimed, or to waive the forfeiture when incurred, or their acts waiving such compliance or forfeiture must be subsequently approved by the company. The law of agency is the same whether it be applied to the act of an agent undertaking to continue a policy of insurance or to any other act for which it is sought to hold his principal responsible.¹⁰

(b) *General Agent*. — It may be laid down as a general rule that an agent with general authority, *i. e.*, an agent who is authorized to take risks and enter into contracts of insurance without consulting the company, may waive any of

1. *Wheaton v. North British, etc., Ins. Co.*, 76 Cal. 432, 9 Am. St. Rep. 216; *McCormick v. Orient Ins. Co.*, 86 Cal. 262; *Trippe v. Provident Fund Soc.*, 140 N. Y. 23, 37 Am. St. Rep. 529; *Lobee v. Standard Live Stock Ins. Co.*, (Buffalo Super. Ct. Gen. T.) 12 Misc. (N. Y.) 499; *Boyd v. Vanderbilt Ins. Co.*, 90 Tenn. 212, 25 Am. St. Rep. 676. See also *Armstrong v. Agricultural Ins. Co.*, 130 N. Y. 560; *Ronald v. Mutual Reserve L. Fund Assoc.*, (Supm. Ct. Gen. T.) 10 N. Y. Supp. 632. Compare *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410; *Roby v. American Cent. Ins. Co.*, 120 N. Y. 510.

2. *Bachmeyer v. Mutual Reserve Fund L. Assoc.*, 82 Wis. 255.

3. *Demanding Proofs of Loss to Obtain Information of Forfeiture*. — *Fitchpatrick v. Hawkeye Ins. Co.*, 53 Iowa 335; *Antes v. Western Assur. Co.*, 84 Iowa 355.

4. *Exercising Right to Inspect Books*. — *Phoenix Ins. Co. v. Flemming*, 65 Ark. 54. To the same effect see *Briggs v. Fireman's Fund Ins. Co.*, 65 Mich. 52. See also *Hill v. London Assur. Corp.*, 16 Daly (N. Y.) 120.

5. *Insured Informed that Forfeiture Not Waived*.

— *Sharpe v. Commercial Travelers' Mut. Acc. Assoc.*, 139 Ind. 92; *Donogh v. Farmers' F. Ins. Co.*, 104 Mich. 503.

6. *Waiver by President of Company*. — *Missouri Valley L. Ins. Co. v. Dunklee*, 16 Kan. 158; *Martin v. Jersey City Ins. Co.*, 44 N. J. L. 273. Compare *Stauffer v. Penn Mut. F. Ins. Assoc.*, 164 Pa. St. 199.

7. *Waiver by Vice-President of Company*. — *Koenig v. United L. Ins. Assoc.*, 12 N. Y. App. Div. 454.

8. *Waiver by Secretary of Company*. — *Tiefenthal v. Citizens' Mut. F. Ins. Co.*, 53 Mich. 306; *Wilson v. Mutual F. Ins. Co.*, 174 Pa. St. 554; *Morrison v. Wisconsin Odd Fellows' Mut. Ins. Co.*, 59 Wis. 166; *Bourgeois v. Mutual F. Ins. Co.*, 86 Wis. 404; *Moffatt v. Reliance Mut. L. Assur. Soc.*, 45 U. C. Q. B. 561. Compare *Swett v. Citizens' Mut. Relief Soc.*, 75 Me. 541.

9. *Piedmont, etc., L. Ins. Co. v. McLean*, 31 Gratt. (Va.) 517.

10. *Waiver by Agents Generally*. — *Globe Mut. L. Ins. Co. v. Wolff*, 95 U. S. 326; *Williams v. Maine State Relief Assoc.*, 89 Me. 164; *Martin v. Jersey City Ins. Co.*, 44 N. J. L. 279.

the conditions contained in the policy, and his knowledge of facts material to the risk is the knowledge of the company.¹

Issuance of Policy with Knowledge of Existing Ground of Forfeiture. — Thus if he issues a policy and accepts the premium with knowledge of existing facts which, by the terms of the policy, will render it voidable, the company will, in the absence of any showing of collusion between the agent and the assured, be estopped to set up a forfeiture.²

Waiver of Conditions to Be Performed in Future. — But it has been held that a general agent may not, by his acts or representations at the time of effecting the contract of insurance, waive conditions in the policy relating to future action.³

Waiver After Issuance of Policy. — As a general rule a general agent may waive a forfeiture after the issuance of the policy, and the company is chargeable with his knowledge of facts material to the risk coming to his knowledge after the policy is issued.⁴

(c) **Soliciting Agent** — *aa. IN GENERAL* — **Waiver at Time of Issuance of Policy.** — Where an insurance company transacts business through an agent having authority to solicit, make out, and forward applications for insurance, to deliver policies when executed, and to collect and transmit premiums, notice given to such agent when engaged in procuring an application will operate as notice to the company, and the company may be estopped by acts done by the agent in respect to the business which he is transacting, in the absence of evidence to show that special limitations upon his powers were known to the insured or were plainly to be inferred from the nature of the employment.⁵

1. Waiver by General Agent. — *Henderson v. Travelers' Ins. Co.*, 65 Fed. Rep. 438; *Standard Acc. Ins. Co. v. Friedenthal*, 1 Colo. App. 5; *Niagara F. Ins. Co. v. Brown*, 123 Ill. 356; *King v. Council Bluffs Ins. Co.*, 72 Iowa 310. See also *Horton v. Home Ins. Co.*, 122 N. Car. 495.

2. Effect of General Agent's Knowledge of Ground of Forfeiture at Time of Issuance of Policy — *United States*. — *Dupuy v. Delaware Ins. Co.*, 63 Fed. Rep. 689; *Glover v. National F. Ins. Co.*, 85 Fed. Rep. 125.

Alabama. — *Cowart v. Capital City Ins. Co.*, 114 Ala. 356.

California. — *Kruger v. Western F. & M. Ins. Co.*, 72 Cal. 91, 1 Am. St. Rep. 42.

Colorado. — *Farmer's, etc., Ins. Co. v. Nixon*, 2 Colo. App. 265.

Georgia. — *Mechanics, etc., Ins. Co. v. Mutual Real Estate, etc., Assoc.*, 98 Ga. 262; *Phenix Ins. Co. v. Seatless*, 100 Ga. 97.

Kansas. — *Rockford Ins. Co. v. Farmers' State Bank*, 50 Kan. 427.

Maryland. — *Hartford F. Ins. Co. v. Keating*, 86 Md. 130.

New York. — *Cross v. National F. Ins. Co.*, 132 N. Y. 133; *Wood v. American F. Ins. Co.*, 149 N. Y. 387, 52 Am. St. Rep. 733; *Robbins v. Springfield F. & M. Ins. Co.*, 149 N. Y. 477; *Ames v. Manhattan L. Ins. Co.*, 31 N. Y. App. Div. 180.

Pennsylvania. — *Burson v. Fire Assoc.*, 136 Pa. St. 267, 26 W. N. C. (Pa.) 408.

Tennessee. — *American Cent. Ins. Co. v. McCrea*, 8 Lea (Tenn.) 524, 41 Am. Rep. 647.

Utah. — *West v. Norwich Union F. Ins. Soc.*, 10 Utah 442.

Virginia. — *Manhattan F. Ins. Co. v. Weill*, 28 Gratt. (Va.) 389, 26 Am. Rep. 364.

Wisconsin. — *Renier v. Dwelling House Ins. Co.*, 74 Wis. 96.

3. Power of General Agent to Waive Conditions

as to Future Action. — *Eagle F. Co. v. Globe L. & T. Co.*, 44 Neb. 380; *Home F. Ins. Co. v. Wood*, 50 Neb. 381; *Gray v. Germania F. Ins. Co.*, 155 N. Y. 180. See *Union Mut. L. Ins. Co. v. Mowry*, 96 U. S. 547. Compare *Fireman's Fund Ins. Co. v. Norwood*, 69 Fed. Rep. 71, 32 U. S. App. 490; *Copeland v. Dwelling-House Ins. Co.*, 77 Mich. 554, 18 Am. St. Rep. 414; *Woolfart v. Franklin Ins. Co.*, 42 W. Va. 659.

Power to Strike Out Provisions of Policy. — But it has been held that a general agent issuing a policy has the power to strike out a provision therein relating to future conduct. *Parsons v. Knoxville F. Ins. Co.*, 132 Mo. 583.

4. Power of General Agent to Waive After Issuance of Policy. — *Mutual L. Ins. Co. v. Logan*, 87 Fed. Rep. 637; *Phoenix Ins. Co. v. Public Parks Amusement Co.*, 63 Ark. 187; *Standard Acc. Ins. Co. v. Friedenthal*, 1 Colo. App. 5; *Viele v. Germania Ins. Co.*, 26 Iowa 11, 96 Am. Dec. 83; *Little v. Phoenix Ins. Co.*, 123 Mass. 388, 25 Am. Rep. 96; *Bonenfant v. American F. Ins. Co.*, 76 Mich. 653; *German Ins. Co. v. Rounds*, 35 Neb. 752; *Slobodinsky v. Phenix Ins. Co.*, 52 Neb. 395; *Home F. Ins. Co. v. Bernstein*, 55 Neb. 260; *Grubbs v. North Carolina Home Ins. Co.*, 108 N. Car. 472, 23 Am. St. Rep. 62; *Phoenix Assur. Co. v. Coffman*, 10 Tex. Civ. App. 631; *Gans v. St. Paul F. & M. Ins. Co.*, 43 Wis. 112, 28 Am. Rep. 535; *Dick v. Equitable F. & M. Ins. Co.*, 92 Wis. 50. See also *Insurance Co. of North America v. Coombs*, 19 Ind. App. 331.

5. Waiver by Soliciting Agent at Time of Issuance of Policy — *United States*. — *West End Hotel, etc., Co. v. American F. Ins. Co.*, 74 Fed. Rep. 114.

Alabama. — *Piedmont, etc., L. Ins. Co. v. Young*, 58 Ala. 476, 29 Am. Rep. 770.

Colorado. — *Michigan F. & M. Ins. Co. v. Wich*, 8 Colo. App. 409.

Waiver of Conditions as to Future Conduct. — But by a number of authorities it has been held that a soliciting agent may not, at or before the issuance of the policy, waive conditions in the policy relating to future acts or defaults, on the ground that all verbal arrangements at that time are merged in the written agreement, and further that an estoppel cannot arise from a promise as to future action with respect to a right to be acquired upon an agreement not yet made.¹ It has been held, however, that where an agent, acting in the real or apparent scope of his authority, though he may not have authority to issue a policy, makes a preliminary oral contract of insurance to the effect that a policy shall thereafter be made out by the defendant company at its home office, and the company afterwards refuses to issue the policy, it cannot set up in defense of an action on such preliminary oral contract conduct of the assured subsequent to the contract to which the agent consented at the time when the contract was made.²

Waiver After Issuance of Policy. — And it has been held that the authority of a mere soliciting agent as to the particular policy ceases as soon as the contract is complete, and he has no power thereafter to waive any of the conditions of the policy.³ So it has been held that where an agent has power only to take applications and deliver policies, his knowledge of facts subsequent to the

Illinois. — *Germania F. Ins. Co. v. Klewer*, 129 Ill. 599; *American Cent. Ins. Co. v. Brown*, 29 Ill. App. 602; *John Hancock Mut. L. Ins. Co. v. Schlink*, 74 Ill. App. 181.

Indiana. — *Kerlin v. National Acc. Assoc.*, 8 Ind. App. 628; *Manchester F. Assur. Co. v. Koerner*, 13 Ind. App. 372.

Iowa. — *Miller v. Mutual Ben. L. Ins. Co.*, 31 Iowa 216, 7 Am. Rep. 122; *Fitchner v. Fidelity Mut. F. Assoc.*, 103 Iowa 276; *Bennett v. Council Bluffs Ins. Co.*, 70 Iowa 600; *Newman v. Covenant Mut. Ins. Assoc.*, 76 Iowa 56, 14 Am. St. Rep. 196.

Kansas. — *Burlington Ins. Co. v. Gibbons*, 43 Kan. 19, 19 Am. St. Rep. 118.

Kentucky. — *Queen Ins. Co. v. Kline*, (Ky. 1895) 32 S. W. Rep. 214.

Missouri. — *Ayres v. Phoenix Ins. Co.*, 66 Mo. App. 288; *Wooldridge v. German Ins. Co.*, 69 Mo. App. 413.

New York. — *Goldwater v. Liverpool, etc., Ins. Co.*, 39 Hun (N. Y.) 176; *Brothers v. California Ins. Co.*, (Supm. Ct. Gen. T.) 3 N. Y. Supp. 89.

North Carolina. — *Bergeron v. Pamlico Ins., etc., Co.*, 111 N. Car. 45.

Texas. — *Hartford F. Ins. Co. v. Josey*, 6 Tex. Civ. App. 230; *German Ins. Co. v. Everett*, (Tex. Civ. App. 1896) 36 S. W. Rep. 125; *German Ins. Co. v. Everett*, 18 Tex. Civ. App. 514.

Virginia. — *Lynchburg F. Ins. Co. v. West*, 76 Va. 579, 44 Am. Rep. 177; *Georgia Home Ins. Co. v. Kinnier*, 28 Gratt. (Va.) 96; *Mutual F. Ins. Co. v. Ward*, 95 Va. 231; *Farmers, etc., Benev. F. Ins. Assoc. v. Williams*, 95 Va. 248.

Wisconsin. — *Renier v. Dwelling House Ins. Co.*, 74 Wis. 95; *Knudson v. Hekla F. Ins. Co.*, 75 Wis. 198; *Bourgeois v. Mutual F. Ins. Co.*, 86 Wis. 402; *Stanhilber v. Mutual Mill Ins. Co.*, 76 Wis. 285; *Dowling v. Lancashire Ins. Co.*, 92 Wis. 63; *Goss v. Agricultural Ins. Co.*, 92 Wis. 234.

See also *Hardwick v. State Ins. Co.*, 23 Oregon 290. *Compare Reed v. Equitable F. & M. Ins. Co.*, 17 R. I. 785.

1. Waiver by Soliciting Agent of Conditions as to Future Conduct. — *Union Mut. L. Ins. Co. v. Mowry*, 96 U. S. 544; *Germania Ins. Co. v. Bromwell*, 62 Ark. 43; *Phoenix Ins. Co. v. Maxson*, 42 Ill. App. 164; *Home F. Ins. Co. v. Wood*, 50 Neb. 381; *Frankfurter v. Home Ins. Co.*, (C. Pl. Gen. T.) 10 Misc. (N. Y.) 157. See also *Goldin v. Northern Assur. Co.*, 46 Minn. 471; *Bourgeois v. Northwestern Nat. Ins. Co.*, 86 Wis. 606. *Compare Brumfield v. Union Ins. Co.*, 87 Ky. 123; *Queen Ins. Co. v. Kline*, (Ky. 1895) 32 S. W. Rep. 214; *Mitchell v. Mississippi Home Ins. Co.*, 72 Miss. 53, 48 Am. St. Rep. 535; *Virginia F. & M. Ins. Co. v. Goode*, 95 Va. 762.

Knowledge that Assured Is Arranging for Other Insurance. — In *Fitchner v. Fidelity Mut. F. Assoc.*, 103 Iowa 280, knowledge by a soliciting agent at the time when the application was made, that the assured was arranging for additional insurance and had definitely fixed the amount, was held to be binding on the company, on the ground that it was knowledge of a condition of things then existing. To the same effect see *Erb v. Fidelity Ins. Co.*, 99 Iowa 727; *Hagan v. Merchants, etc., Ins. Co.*, 81 Iowa 321, 25 Am. St. Rep. 493.

2. Hardwick v. State Ins. Co., 23 Oregon 290.

3. Soliciting Agent Unauthorized to Make Waiver After Issuance of Policy. — *Iowa.* — *Von Genechtin v. Citizens' Ins. Co.*, 75 Iowa 544; *Garretson v. Merchants', etc., Ins. Co.*, 81 Iowa 723; *Martin v. Farmers' Ins. Co.*, 84 Iowa 516; *Kirkmann v. Farmers' Ins. Co.*, 90 Iowa 458, 48 Am. St. Rep. 454.

Kansas. — *Burlington Ins. Co. v. Gibbons*, 43 Kan. 20, 19 Am. St. Rep. 118.

Minnesota. — *Bowlin v. Hekla F. Ins. Co.*, 36 Minn. 433; *Goldin v. Northern Assur. Co.*, 46 Minn. 473.

Missouri. — *Hausen v. Citizens' Ins. Co.*, 66 Mo. App. 29.

Wisconsin. — *Knudson v. Hekla F. Ins. Co.*, 75 Wis. 198; *Bourgeois v. Mutual F. Ins. Co.*, 86 Wis. 402; *Oshkosh Match Works v. Manchester F. Assur. Co.*, 92 Wis. 510.

issuance of the policy is not imputable to the company so as to estop it from insisting on a forfeiture.¹ Thus, notice to a soliciting agent of a forfeiture by reason of additional insurance after the issuance of the policy will not be binding on the company.²

bb. INSERTION OF FALSE STATEMENTS IN APPLICATION. — In the absence of a limitation of the agent's authority made known to the applicant by the terms of the application or otherwise at the time of taking it, the prevailing rule is that the insurer, after accepting the premium and issuing the policy, will be estopped to set up in avoidance of the policy false or misleading statements or omissions in the application, made, whether wilfully or by mistake, by the duly authorized soliciting agent, and without fraud or collusion by the applicant.³ The ground of these decisions is that the recitals in the application are not, when viewed in the light of the evidence offered, the representation of the applicant, but the statements of the insurer himself.⁴

1. *Sun Mut. Ins. Co. v. Texarkana Foundry, etc., Co.*, (Tex. App. 1889) 15 S. W. Rep. 34. See also *Hastings v. Brooklyn L. Ins. Co.*, (Supm. Ct. Gen. T.) 6 N. Y. Supp. 374.

2. *Goldin v. Northern Assur. Co.*, 46 Minn. 471. See also *Queen Ins. Co. v. Young*, 86 Ala. 424, 11 Am. St. Rep. 51; *Phoenix Ins. Co. v. Copeland*, 90 Ala. 390.

3. *False Statements Inserted by Agent in Application — United States.* — *New Jersey Mut. L. Ins. Co. v. Baker*, 94 U. S. 610; *Union Mut. L. Ins. Co. v. Wilkinson*, 13 Wall. (U. S.) 222; *American L. Ins. Co. v. Mahone*, 21 Wall. (U. S.) 152; *Langdon v. Union Mut. L. Ins. Co.*, 14 Fed. Rep. 272; *Phoenix Ins. Co. v. Warttemberg*, 79 Fed. Rep. 245, 48 U. S. App. 344.

Colorado. — *State Ins. Co. v. Du Bois*, 7 Colo. App. 214.

Georgia. — *German American Mut. L. Assoc. v. Farley*, 102 Ga. 720.

Illinois. — *New England F. & M. Ins. Co. v. Schettler*, 38 Ill. 166; *Lycoming F. Ins. Co. v. Jackson*, 83 Ill. 302, 25 Am. Rep. 386; *American Ins. Co. v. Luttrell*, 89 Ill. 314; *Home Ins. Co. v. Mendenhall*, 164 Ill. 458.

Iowa. — *Miller v. Mutual Ben. L. Ins. Co.*, 31 Iowa 216, 7 Am. Rep. 122; *Boetcher v. Hawkeye Ins. Co.*, 47 Iowa 253; *Jordan v. State Ins. Co.*, 64 Iowa 216; *Eggleston v. Council Bluffs Ins. Co.*, 65 Iowa 308; *Siltz v. Hawkeye Ins. Co.*, 71 Iowa 716; *Fitchner v. Fidelity Mut. F. Assoc.*, 103 Iowa 276, (Iowa 1896) 68 N. W. Rep. 710.

Kansas. — *Standard L., etc., Ins. Co. v. Davis*, 59 Kan. 521.

Maine. — *Caston v. Monmouth M. F. Ins. Co.*, 54 Me. 170; *Marston v. Kennebec Mut. L. Ins. Co.*, 89 Me. 266, 56 Am. St. Rep. 412.

Michigan. — *Etna Live Stock, etc., Ins. Co. v. Olmstead*, 21 Mich. 246, 4 Am. Rep. 483; *Michigan State Ins. Co. v. Lewis*, 30 Mich. 41.

Mississippi. — *Planters' Ins. Co. v. Myers*, 55 Miss. 479, 30 Am. Rep. 521.

Missouri. — *Shell v. German Ins. Co.*, 60 Mo. App. 644; *Scott v. German Ins. Co.*, 69 Mo. App. 337.

New York. — *Plumb v. Cattaraugus County Mut. Ins. Co.*, 18 N. Y. 392, 72 Am. Dec. 526; *Rowley v. Empire Ins. Co.*, 36 N. Y. 550; *Baker v. Home L. Ins. Co.*, 64 N. Y. 648; *Holmes v. Drew*, 16 Hun (N. Y.) 491; *Sentell v. Oswego County Farmers' Ins. Co.*, 16 Hun (N. Y.) 516; *Dacey v. Agricultural Ins. Co.*, 21 Hun (N. Y.) 83; *McArthur v. Globe Mut. L. Ins.*

Co., 14 Hun (N. Y.) 348; *Robinson v. Metropolitan L. Ins. Co.*, 1 N. Y. App. Div. 269; *Singleton v. Prudential Ins. Co.*, 11 N. Y. App. Div. 403; *Welis v. Metropolitan L. Ins. Co.*, 19 N. Y. App. Div. 18.

North Carolina. — *Follette v. Mutual Acc. Assoc.*, 110 N. Car. 378.

Ohio. — *Farmers' Ins. Co. v. Williams*, 39 Ohio St. 584, 48 Am. Rep. 474.

Pennsylvania. — *Howard F. Ins. Co. v. Bruner*, 23 Pa. St. 50; *Cumberland Valley Mut. Protection Co. v. Schell*, 29 Pa. St. 31.

South Carolina. — *Carpenter v. American Acc. Co.*, 46 S. Car. 541.

Texas. — *Home Ins., etc., Co. v. Lewis*, 48 Tex. 622; *Phoenix Assur. Co. v. Coffman*, 10 Tex. Civ. App. 631; *Queen Ins. Co. v. May*, (Tex. Civ. App. 1897) 43 S. W. Rep. 73; *Fire Assoc. v. Bynum*, (Tex. Civ. App. 1898) 44 S. W. Rep. 579.

Virginia. — *Lynchburg F. Ins. Co. v. West*, 76 Va. 580, 44 Am. Rep. 177; *Mutual F. Ins. Co. v. Ward*, 95 Va. 231.

West Virginia. — *McCall v. Phoenix Mut. L. Ins. Co.*, 9 W. Va. 237, 27 Am. Rep. 558; *Coles v. Jefferson Ins. Co.*, 41 W. Va. 261.

Wisconsin. — *McBride v. Republic F. Ins. Co.*, 30 Wis. 562; *Renier v. Dwelling House Ins. Co.*, 74 Wis. 89; *Johnston v. Northwestern Live Stock Ins. Co.*, 94 Wis. 117; *De Witt v. Home Forum Ben. Order*, 95 Wis. 305.

Medical Examiner. — The same rule has been applied to false answers inserted by a medical examiner in his certificate. *New York L. Ins. Co. v. Russell*, 77 Fed. Rep. 94, 40 U. S. App. 530; *Providence L. Assur. Soc. v. Reutlinger*, 58 Ark. 543; *Flynn v. Equitable L. Ins. Co.*, 78 N. Y. 568, 34 Am. Rep. 561; *Grattan v. Metropolitan L. Ins. Co.*, 80 N. Y. 281, 36 Am. Rep. 617, 92 N. Y. 274, 44 Am. Rep. 372.

Contra. — In some jurisdictions it is held that oral testimony cannot be received to show that the agent employed to solicit the insurance inserted untrue representations in the application without the knowledge of the applicant, who had orally stated the truth to the agent. *McCoy v. Metropolitan L. Ins. Co.*, 133 Mass. 82; *Lowell v. Middlesex Mut. F. Ins. Co.*, 8 Cush. (Mass.) 127; *Wilson v. Conway F. Ins. Co.*, 4 R. I. 142. See also *Franklin F. Ins. Co. v. Martin*, 40 N. J. L. 568, 29 Am. Rep. 271.

4. *Marston v. Kennebec Mut. L. Ins. Co.*, 89 Me. 274, 56 Am. St. Rep. 412; *North Amer-*

Applicant's Ignorance of False Statements. — This rule is applied where the applicant has no knowledge of the false statements,¹ as where he is unable to read and write,² or, indeed, though he can read and write, if he signed the application without reading it or having it read to him.³ The rule has been applied also where the application was not signed by the applicant,⁴ or where the false statement was inserted after it was signed.⁵

Where the Agent, on His Own Responsibility, Writes an Answer, though with the Knowledge and Assent of the Applicant, the insurer will, it has been held, be estopped to claim a forfeiture if the applicant relied in good faith on the assurance of the agent that this was the proper answer to be made.⁶

Misstatements as to Subject of Insurance. — But it has been held that the principle which relieves the party insured from responsibility for unauthorized representations made by the soliciting agent of the insurer in respect to some incident to the risk, and permits them to be disregarded in an action to enforce the contract, has no application where the point in issue is as to the subject of insurance and the contract is explicit on that point; and hence, that if the contract relates to one definite and distinct subject, it cannot be turned into a contract for the insurance of another and a different subject on proof that the agent of the company, by mistake, described the wrong property in his application.⁷

Effect of Stipulation in Application that Insurer Shall Be Bound by Written Statements Only. — The above rule has been held not to apply where the authority of the agent taking the application is limited by a provision in the application that no verbal statements made to the agent shall be binding on the company or in any way affect its rights.⁸ But the insurer can take advantage of no such limitation of authority in the face of a statute which substantially provides that the person procuring an application for insurance shall be regarded as the agent of the company, but not of the insured, notwithstanding a provision in

ican F. Ins. Co. v. Throop, 22 Mich. 146, 7 Am. Rep. 638; Patten v. Merchants', etc., Mut. F. Ins. Co., 40 N. H. 375.

1. Applicant Ignorant of False Statement. — Dwelling-House Ins. Co. v. Brodie, 52 Ark. 11; Southern Ins. Co. v. Hastings, 64 Ark. 253; Clubb v. American Acc. Co. 97 Ga. 502; Dahlberg v. St. Louis Mut. F. & M. Ins. Co., 6 Mo. App. 121; Boylan v. Prudential Ins. Co., (Supm. Ct. App. T.) 18 Misc. (N. Y.) 444; Jacobs v. Northwestern L. Assur. Co., 30 N. Y. App. Div. 285; Smith v. People's Mut. Live Stock Ins. Co., 173 Pa. St. 15; Schwarzbach v. Ohio Valley Protective Union, 25 W. Va. 622, 52 Am. Rep. 227.

2. Applicant Unable to Read and Write. — Sullivan v. Phenix Ins. Co., 34 Kan. 170; State Ins. Co. v. Jordan, 29 Neb. 514.

3. Signing Without Reading. — Van Houten v. Metropolitan L. Ins. Co., 110 Mich. 682; Home F. Ins. Co. v. Fallon, 45 Neb. 554; Peters v. U. S. Industrial Ins. Co., 10 N. Y. App. Div. 533; Mullen v. Union Cent. L. Ins. Co., 182 Pa. St. 150.

On the other hand, it has been held that a failure to read the application was inexcusable negligence. Ryan v. World Mut. L. Ins. Co., 41 Conn. 168, 19 Am. Rep. 490.

4. Applicant Not Signing. — Blass v. Agricultural Ins. Co., 18 N. Y. App. Div. 481. So where the application was signed by an employee of the insured, Phoenix Assur. Co. v. Coffman, 10 Tex. Civ. App. 631; or by the insurance agent, Rosencrans v. Insurance Co. of North America, 2 Mo. App. Rep. 1362.

5. False Statements Inserted After Applicant Has Signed. — Metropolitan Acc. Assoc. v. Clifton, 63 Ill. App. 197; Quinn v. Metropolitan L. Ins. Co., 10 N. Y. App. Div. 483; Swan v. Watertown F. Ins. Co., 96 Pa. St. 37.

6. Agent Misinforming Applicant. — Continental L. Ins. Co. v. Chamberlain, 132 U. S. 311; New York L. Ins. Co. v. Russell, 77 Fed. Rep. 94; Phoenix Ins. Co. v. McKernan, (Ky. 1898) 46 S. W. Rep. 10; Aetna Live Stock, etc., Ins. Co. v. Olmstead, 21 Mich. 250, 4 Am. Rep. 483; Thomas v. Hartford F. Ins. Co., 20 Mo. App. 150; Lasher v. Northwestern Nat. Ins. Co., (Supm. Ct. Spec. T.) 55 How. Pr. (N. Y.) 318; Boos v. World Mut. L. Ins. Co., 6 Thomp. & C. (N. Y.) 394, 4 Hun (N. Y.) 133; Eilenberger v. Protective Mut. F. Ins. Co., 89 Pa. St. 464; Ring v. Windsor County Mut. F. Ins. Co., 51 Vt. 563; Farmers', etc., Benev. F. Ins. Assoc. v. Williams, 95 Va. 248; Georgia Home Ins. Co. v. Goode, 95 Va. 751. See also Standard L., etc., Ins. Co. v. Fraser, 76 Fed. Rep. 705.

7. Sanders v. Cooper, 115 N. Y. 288, 12 Am. St. Rep. 801.

8. Provisions that Verbal Statements Not Binding. — New York L. Ins. Co. v. Fletcher, 117 U. S. 519; Maier v. Fidelity Mut. L. Assoc., 78 Fed. Rep. 566, 47 U. S. App. 322; Hamilton v. Fidelity Mut. L. Assoc., 27 N. Y. App. Div. 480; Hutchison v. Hartford L., etc., Ins. Co., (Tex. Civ. App. 1897) 39 S. W. Rep. 325. See also Smith v. Farmer's Mut. F. Ins. Co., 19 Ohio St. 287. Compare Standard L., etc., Ins. Co. v. Fraser, 76 Fed. Rep. 705.

the application to the contrary.¹

Provision that Solicitor Shall Be Agent of Applicant. — And it has been held that if the stipulation in the application is broad enough to constitute the person writing the application the agent of the insured, he will be bound thereby in accordance with its terms.²

Where There Is Fraud or Collusion. — The company is not bound by the statements contained in an application when not only the agent but the insured knows that they are untrue and calculated to deceive, and the application is to be forwarded to the company as the basis of its action, if the company, upon learning the situation, refuses to ratify the transaction, as by returning the premium and denying any liability under the policy.³ But under statute in *Ohio* it has been held that collusion by the applicant and the agent in furnishing false answers will not defeat a recovery on the policy.⁴

Burden of Proof. — It has been held that the burden of proof will be on the applicant to show that the false statements were inserted in the application without his knowledge.⁵

(a) **Adjuster.** — An adjuster, not being *ipso facto* a general agent, but a special agent of limited authority, has been held to have no power as a matter of law to waive any of the essential conditions of a policy of insurance; and when his acts, if authorized, would amount to a waiver, it must be shown that they were authorized by the company before it can be held bound thereby.⁶ But since the business of an adjuster is to ascertain the loss and agree with the assured on a settlement, it seems to be the rule that he has authority to waive all matters of form or detail, such as preliminary proofs of loss, connected with his business,⁷ and this is especially true where there is evidence other than his mere title of adjuster, of his authority to receive proofs of the loss in question and settle them.⁸

Waiver of Requirement for Action in Specified Time. — Also it has been held that the power of an adjuster to insist on proofs of loss necessarily involves authority to waive a requirement that the action on the policy shall be brought within a specified time, where the demand for proofs is inconsistent with the provision limiting the right of action.⁹

(e) **Collector.** — It seems that a mere collector of premiums has not, as a

1. **Statute Declaring Agent to Be Agent of Company Only.** — *Continental L. Ins. Co. v. Chamberlain*, 132 U. S. 304; *New York L. Ins. Co. v. Russell*, 77 Fed. Rep. 94; *Marston v. Kennebec Mut. L. Ins. Co.*, 89 Me. 266, 56 Am. St. Rep. 412; *Perry v. Dwelling-House Ins. Co.*, 67 N. H. 291.

2. *Rohrbach v. Germania F. Ins. Co.*, 62 N. Y. 47, 20 Am. Rep. 451; *Kabok v. Phoenix Mut. L. Ins. Co.*, (Supm. Ct. Gen. T.) 4 N. Y. Supp. 718; *Bernard v. United L. Ins. Assoc.*, 14 N. Y. App. Div. 142. *Compare O'Farrell v. Metropolitan L. Ins. Co.*, 22 N. Y. App. Div. 495.

3. **Effect of Collusion Between Agent and Assured.** — *Providence L. Assur. Soc. v. Reutlinger*, 58 Ark. 528; *Galbraith v. Arlington Mut. L. Ins. Co.*, 12 Bush (Ky.) 29; *Vose v. Eagle L., etc., Ins. Co.*, 6 Cush. (Mass.) 49; *Ketcham v. American Mut. Acc. Assoc.*, 117 Mich. 521; *Grattan v. Metropolitan L. Ins. Co.*, 92 N. Y. 274, 44 Am. Rep. 372; *Smith v. Cash Mut. F. Ins. Co.*, 24 Pa. St. 320; *Pottsville Mut. F. Ins. Co. v. Fromm*, 100 Pa. St. 347. See also *Centennial Mut. L. Assoc. v. Parham*, 80 Tex. 527; *Foot v. Aetna L. Ins. Co.*, 61 N. Y. 571. *Compare Rockford Ins. Co. v. Cline*, 72 Ill. App. 497; *Guardian Mut. L.*

Ins. Co. v. Hogan, 80 Ill. 40, 22 Am. Rep. 180; *Miller v. Mutual Ben. L. Ins. Co.*, 31 Iowa 223, 7 Am. Rep. 122.

4. *Prudential Ins. Co. v. Kilbane*, 15 Ohio Cir. Ct. 62, 8 Ohio Cir. Dec. 790.

5. *Hartford L., etc., Ins. Co. v. Gray*, 80 Ill. 31.

6. **Power of Adjuster to Waive.** — *Hollis v. State Ins. Co.*, 65 Iowa 454; *Weed v. London, etc., F. Ins. Co.*, 116 N. Y. 106; *Alspaugh v. British American Ins. Co.*, 121 N. Car. 290. See also *Dick v. Equitable F. & M. Ins. Co.*, 92 Wis. 46; *Oshkosh Gas Light Co. v. Germania F. Ins. Co.*, 71 Wis. 459, 5 Am. St. Rep. 233. *Compare German Ins. Co. v. Gibson*, 53 Ark. 494; *Devils Lake First Nat. Bank v. Manchester F. Assur. Co.*, 64 Minn. 99.

7. See *Aetna Ins. Co. v. Shryer*, 85 Ind. 362; *McCollum v. Liverpool, etc., Ins. Co.*, 67 Mo. App. 69.

8. *Aetna Ins. Co. v. Shryer*, 85 Ind. 362; *Harris v. Phoenix Ins. Co.*, 85 Iowa 238; *Little v. Phoenix Ins. Co.*, 123 Mass. 380, 25 Am. Rep. 96.

9. *Dibrell v. Georgia Home Ins. Co.*, 110 N. Car. 193, 28 Am. St. Rep. 678. See also *Little v. Phoenix Ins. Co.*, 123 Mass. 388, 25 Am. Rep. 96.

general rule, power to waive any of the conditions of a policy in the absence of proof of special authority to make waivers.¹

(f) **Effect of Agent's Knowledge Acquired Outside of Agency.** — It may be stated as a general proposition that an insurance company will not be chargeable with notice of facts material to the risk at the time of the issuance of the policy, merely because an agent had previously acquired knowledge of such facts in the course of an employment in no way relating to the agency and with which the insurance company was not connected.²

Where Knowledge Not Acquired in Confidential Relation, and Parties at Arm's Length. — But when, in effecting the contract of insurance, the assured and the agent of the insurer are dealing at arm's length, the agent is charged on behalf of the insurer with notice of any facts material to the risk of which he may have knowledge, though such knowledge was acquired outside of his agency, if it was not communicated to him with respect to some matter springing out of a confidential relation, and if the circumstances are such as to justify the inference that the agent had the facts in mind at the time when the policy was issued.³

Notice After Issuance of Policy. — Notice to a general agent after the issuance of the policy will be notice to the insurance company though the information was acquired in a capacity other than as the agent of the insurance company.⁴

Knowledge Acquired as Agent of Other Insurer. — Thus, under a policy providing for a forfeiture on account of other insurance it has been held that knowledge acquired by a general agent after the issuance of the policy as the agent of another company in procuring the insurance will be imputed to the company.⁵

(g) **Limitations of Authority** — *aa. IN GENERAL.* — The authority of an insurance agent may, of course, as in the case of any other agent, be limited by his principal, but his powers are coextensive with the business intrusted to his care and will not be narrowed by limitations not communicated to the person with whom he deals.⁶ But if knowledge of the agent's limitation of authority is brought home to the assured, he will be bound thereby.⁷

bb. LIMITATIONS ON FACE OF POLICY — *(aa) In General.* — It is usual for insurance companies to insert in their policies clauses by which the powers of their agents are restricted or sought to be restricted.

(bb) Clauses Prohibiting Waiver by Agents — **Effect on Agent's Authority At or Before Issuance of Policy.** — It seems to be the prevailing doctrine that the rule holding the company chargeable with the acts, declarations, or knowledge of facts of a general or soliciting agent at or before the issuance of the policy, is not affected by clauses in the policy prohibiting waivers by agents or stipulating that the agent shall be the agent of the assured, where it is not shown that such limitations were brought to the knowledge of the assured.⁸

1. **Power of Collector to Make Waivers.** — *State v. Temperance Benev. Assoc.*, 42 Mo. App. 485. See also *Martin v. Jersey City Ins. Co.*, 44 N. J. L. 273.

2. **Agent's Knowledge Acquired Outside of Agency.** — *Union Nat. Bank v. German Ins. Co.*, 71 Fed. Rep. 473; *Connecticut F. Ins. Co. v. Smith*, 10 Colo. App. 121; *Stennett v. Pennsylvania F. Ins. Co.*, 68 Iowa 674; *St. Paul F. & M. Ins. Co. v. Parsons*, 47 Minn. 352; *Martin v. Jersey City Ins. Co.*, 44 N. J. L. 273; *Shafer v. Phoenix Ins. Co.*, 53 Wis. 361. See also *Lahiff v. Ashuelot Ins. Co.*, 60 N. H. 75.

3. *German American Mut. L. Assoc. v. Farley*, 102 Ga. 720; *Wilson v. Minnesota Farmers' Mut. F. Ins. Assoc.*, 36 Minn. 112, 1 Am. St. Rep. 659; *Shafer v. Phoenix Ins. Co.*, 53 Wis. 361; *McDonald v. Fire Assoc.*, 93 Wis. 348.

4. *Clay v. Phoenix Ins. Co.*, 97 Ga. 44.

5. *Von Bories v. United L., etc., Ins. Co.*, 8 Bush (Ky.) 133; *McCollum v. Liverpool, etc., Ins. Co.*, 67 Mo. App. 71. Compare *Forbes v. Agawam Mut. F. Ins. Co.*, 9 Cush. (Mass.) 470; *West v. Norwich Union F. Ins. Soc.*, 10 Utah 442.

6. **Limitations on Agent's Authority.** — *Union Mut. Ins. Co. v. Wilkinson*, 13 Wall. (U. S.) 234.

7. *Sutherland v. Eureka F. & M. Ins. Co.*, 110 Mich. 668.

8. **Agent's Powers Before Issuance Not Affected by Clauses in Policy, Not Known to Insured.** — *Standard L., etc., Ins. Co. v. Fraser*, 76 Fed. Rep. 705, 44 U. S. App. 694; *Crouse v. Hartford F. Ins. Co.*, 79 Mich. 249; *Wooldridge v. German Ins. Co.*, 69 Mo. App. 417; *Hart v. Niagara F. Ins. Co.*, 9 Wash. 620. See also *New York L. Ins. Co. v. Russell*, 77 Fed. Rep. 103; *Haight v. Continental Ins. Co.*, 92 N. Y.

Effect on Agent's Authority After Issuance of Policy — Soliciting Agent. — But as a general rule a stipulation in a policy prohibiting a waiver of any condition therein by a mere soliciting agent after the issuance of the policy, as where the power to waive is limited to some specified officer of the company, such as the president or secretary, will be binding upon the assured, since in such case he will be presumed to take notice of the limitations on the face of the policy.¹

General Agent. — And in some jurisdictions it is held that where the policy declares that a general agent shall have no power to waive any of the conditions therein after the issuance of the policy, or that only certain officers among whom he is not included shall have such power, such limitation will be binding on the assured.² But according to another view any attempted restriction of this kind upon a general agent is ineffectual, especially in the case of a foreign insurance company whose officers are practically inaccessible to the assured.³

(cc) **Limitations as to Mode of Waiver** — **aaa. Effect on Agent's Authority At or Before Issuance of Policy.** — The restrictions inserted in the policy upon the power of the agent to waive any condition unless in a particular manner, as by indorsing the waiver on the policy, cannot be deemed to apply to those conditions which relate to the inception of the contract, when it appears that the agent has delivered it and received the premium with full knowledge of the actual situation. This doctrine has been applied to both general and mere soliciting agents.⁴ But

51; *Schwarzbach v. Ohio Valley Protective Union*, 25 W. Va. 622, 52 Am. Rep. 227; *Coles v. Jefferson Ins. Co.*, 41 W. Va. 261. Compare *Ward v. Metropolitan L. Ins. Co.*, 66 Conn. 238, 50 Am. St. Rep. 80 [*distinguishing McGurk v. Metropolitan L. Ins. Co.*, 56 Conn. 537]; *Rohrbach v. Germania F. Ins. Co.*, 62 N. Y. 47, 20 Am. Rep. 451; *Westchester F. Ins. Co. v. Wagner*, 10 Tex. Civ. App. 398.

1. Prohibition of Waiver by Soliciting Agent After Issuance. — *West End Hotel, etc., Co. v. American F. Ins. Co.*, 74 Fed. Rep. 114; *American Ins. Co. v. Hampton*, 54 Ark. 75; *Burlington Ins. Co. v. Gibbons*, 43 Kan. 15, 19 Am. St. Rep. 118; *Long Island Ins. Co. v. Great Western Mfg. Co.*, 2 Kan. App. 382; *Sprague v. Western Home Ins. Co.*, 49 Mo. App. 423; *Jenkins v. German Ins. Co.*, 58 Mo. App. 210; *Metropolitan L. Ins. Co. v. McGrath*, 52 N. J. L. 358; *Bernard v. United L. Ins. Assoc.*, (N. Y. City Ct. Gen. T.) 11 Misc. (N. Y.) 441; *Hankins v. Rockford Ins. Co.*, 70 Wis. 4; *Renier v. Dwelling House Ins. Co.*, 74 Wis. 98; *Stevens v. Queen Ins. Co.*, 81 Wis. 336, 29 Am. St. Rep. 905.

2. General Agent. — *Clevenger v. Mutual L. Ins. Co.*, 2 Dak. 119; *Taylor v. State Ins. Co.*, 98 Iowa 521, 60 Am. St. Rep. 210; *Porter v. U. S. Life Ins. Co.*, 160 Mass. 183; *Springfield Steam Laundry Co. v. Traders' Ins. Co.*, 66 Mo. App. 205; *Marvin v. Universal L. Ins. Co.*, 85 N. Y. 278, 39 Am. Rep. 657; *O'Brien v. Prescott Ins. Co.*, 134 N. Y. 32. See also *Messelback v. Norman*, 122 N. Y. 578; *Cleaver v. Traders' Ins. Co.*, 65 Mich. 527, 8 Am. St. Rep. 908; *Roberts v. Sun Mut. Ins. Co.*, 13 Tex. Civ. App. 64.

3. General Agent of Foreign Company. — *Renier v. Dwelling-House Ins. Co.*, 74 Wis. 98. To the same effect see *German Ins. Co. v. Gray*, 43 Kan. 497, 19 Am. St. Rep. 150; *Concordia F. Ins. Co. v. Johnson*, 4 Kan. App. 7. See also *Phenix Ins. Co. v. Hart*,

149 Ill. 514; *Germania L. Ins. Co. v. Koehler*, 168 Ill. 203; *Day v. Dwelling-House Ins. Co.*, 81 Me. 244; *Phenix Ins. Co. v. Rad Bila Hora Lodge*, 41 Neb. 21.

A stipulation requiring that any waiver shall be in writing signed by the president has been held to be ineffectual in the case of a parol waiver by the secretary of the company. *Mutual Reserve Fund L. Assoc. v. Cleveland Woolen Mills*, 54 U. S. App. 290.

4. Authority At or Before Issuance — Mode of Waiver — *Georgia*. — *Clay v. Phenix Ins. Co.*, 97 Ga. 44; *Swain v. Macon F. Ins. Co.*, 102 Ga. 96.

Kentucky. — *Rhode Island Underwriters' Assoc. v. Monarch*, 98 Ky. 305.

Michigan. — *Gristock v. Royal Ins. Co.*, 87 Mich. 428; *Crouse v. Hartford F. Ins. Co.*, 79 Mich. 240.

Missouri. — *Thackery Min., etc., Co. v. American F. Ins. Co.*, 1 Mo. App. Rep. 535, 62 Mo. App. 293; *Parsons v. Knoxville F. Ins. Co.*, 132 Mo. 583.

New York. — *Wood v. American F. Ins. Co.*, 149 N. Y. 385, 52 Am. St. Rep. 733; *Robbins v. Springfield F. & M. Ins. Co.*, 149 N. Y. 477; *McGuire v. Hartford F. Ins. Co.*, 7 N. Y. App. Div. 575; *Gibson Electric Co. v. Liverpool, etc., Ins. Co.*, 159 N. Y. 426; *Blass v. Agricultural Ins. Co.*, 18 N. Y. App. Div. 481.

Pennsylvania. — *McGonigle v. Susquehanna Mut. F. Ins. Co.*, 168 Pa. St. 1.

South Carolina. — *Gandy v. Orient Ins. Co.*, 52 S. Car. 224.

Texas. — *Hibernia Ins. Co. v. Malevinsky*, 6 Tex. Civ. App. 81.

West Virginia. — *Woolpert v. Franklin Ins. Co.*, 42 W. Va. 659.

Wisconsin. — *Renier v. Dwelling-House Ins. Co.*, 74 Wis. 94; *St. Clara Female Academy v. Northwestern Nat. Ins. Co.*, 98 Wis. 257; *Carey v. German American Ins. Co.*, 84 Wis. 89, 36 Am. St. Rep. 907; *Goss v. Agricultural*

by some of the authorities it has been held that the company will not be estopped to insist upon a compliance with such stipulations in the policy merely because at the time of the issuance of the policy the agent knew of an intention on the part of the insured to violate conditions of the policy, as that he intended subsequently to procure additional insurance.¹

bbb. Effect on Agent's Authority After Issuance of Policy. — Considerable discussion has arisen as to the effect on the authority of the insurance agent after the issuance of the policy, of various provisions in policies requiring in effect that a waiver of a condition be indorsed on the policy. The general rule which seems to be sanctioned by the weight of authority is that where an agent is intrusted with power to waive a condition in a policy by indorsement or in writing, he may also make a parol waiver notwithstanding a provision in the policy requiring that the waiver shall be indorsed on or attached to the policy.² Under this rule it has been held that a general agent may make a verbal waiver.³ And especially is this true where a general agent having authority to indorse a waiver has promised to make the indorsement, but without any fault of the insured has failed to do so.⁴

Ins. Co., 92 Wis. 233; *Schultz v. Caledonian Ins. Co.*, 94 Wis. 42.

See also *Hibernia Ins. Co. v. Malevinsky*, 6 Tex. Civ. App. 81; *Phenix Ins. Co. v. Covey*, 41 Neb. 727.

Compare Wilkins v. Iowa State Ins. Co., 43 Minn. 178; *Phoenix Ins. Co. v. Dunn*, (Tex. Civ. App. 1897) 41 S. W. Rep. 109.

1. Agent's Knowledge of Intended Breach. — *United Firemen's Ins. Co. v. Thomas*, 82 Fed. Rep. 406, 53 U. S. App. 517; *Home F. Ins. Co. v. Wood*, 50 Neb. 381; *Gray v. Germania F. Ins. Co.*, 155 N. Y. 180; *Frankfurter v. Home Ins. Co.*, (C. Pl. Gen. T.) 10 Misc. (N. Y.) 157. See also *Goldin v. Northern Assur. Co.*, 46 Minn. 471. *Compare Woolpert v. Franklin Ins. Co.*, 42 W. Va. 659.

2. Though Waiver Required to Be Indorsed, Parol Waiver Valid — *Arkansas*. — *German-American Ins. Co. v. Humphrey*, 62 Ark. 348, 54 Am. St. Rep. 297.

Mississippi. — *Liverpool, etc., Ins. Co. v. Sheffy*, 71 Miss. 919.

Missouri. — *Anthony v. German American Ins. Co.*, 48 Mo. App. 65.

North Carolina. — *Grubbs v. North Carolina Home Ins. Co.*, 108 N. Car. 472, 23 Am. St. Rep. 62.

Texas. — *Cohen v. Continental F. Ins. Co.*, 67 Tex. 325, 60 Am. Rep. 24; *Morrison v. Insurance Co. of North America*, 69 Tex. 353, 5 Am. St. Rep. 63; *East Texas F. Ins. Co. v. Crawford*, (Tex. 1891) 16 S. W. Rep. 1068; *Phoenix Ins. Co. v. Witt*, (Tex. Civ. App. 1894) 25 S. W. Rep. 796; *Burlington Ins. Co. v. Rivers*, 9 Tex. Civ. App. 177; *Pennsylvania F. Ins. Co. v. Faires*, 13 Tex. Civ. App. 111; *German Ins. Co. v. Cain*, (Tex. Civ. App. 1896) 37 S. W. Rep. 657.

Wyoming. — *Kahn v. Traders Ins. Co.*, 4 Wyo. 419.

See also *Bosworth v. Merchants' F. Ins. Co.*, 80 Wis. 397.

3. Verbal Waiver of General Agent Binding — *Arkansas*. — *Phoenix Ins. Co. v. Public Parks Amusement Co.*, 63 Ark. 188; *German-American Ins. Co. v. Humphrey*, 62 Ark. 348, 54 Am. St. Rep. 297.

Illinois. — *Manufacturers', etc., Ins. Co. v. Armstrong*, 145 Ill. 469.

Missouri. — *Barnard v. National F. Ins. Co.*, 38 Mo. App. 106.

Pennsylvania. — *Mentz v. Lancaster F. Ins. Co.*, 79 Pa. St. 475.

Texas. — *Morrison v. Insurance Co. of North America*, 69 Tex. 353, 5 Am. St. Rep. 63.

Wisconsin. — *Gans v. St. Paul F. & M. Ins. Co.*, 43 Wis. 108, 28 Am. Rep. 535; *Shafer v. Phoenix Ins. Co.*, 53 Wis. 361; *Renier v. Dwell-ing-House Ins. Co.*, 74 Wis. 98.

See also *Dick v. Equitable F. & M. Ins. Co.*, 92 Wis. 50. *Compare German Ins. Co. v. Heiduk*, 30 Neb. 288, 27 Am. St. Rep. 402.

The Secretary of the company has been held to be a general agent within the meaning of this rule. *Mutual Reserve Fund L. Assoc. v. Cleveland Woolen Mills*, 82 Fed. Rep. 508. *Compare O'Leary v. Merchants', etc., Mut. Ins. Co.*, 100 Iowa 173.

Treasurer. — In *Hook v. Mutual Ins. Co.*, 160 Pa. St. 229, it was held that where the assured fails to comply with a condition of the policy without obtaining the indorsement of the company's consent to such noncompliance, the knowledge of the breach by the treasurer of the company, who was also a director, will not be a waiver of the breach where it does not appear that he was a general agent of the company or was authorized to receive such notice.

4. Failure to Indorse Not Chargeable to Insured. — *Dupuy v. Delaware Ins. Co.*, 63 Fed. Rep. 680; *Manchester v. Guardian Assur. Co.*, 151 N. Y. 88, 56 Am. St. Rep. 600 [*distinguishing* *Baumgartel v. Providence-Washington Ins. Co.*, 136 N. Y. 547]; *Morrison v. Insurance Co. of North America*, 69 Tex. 353, 5 Am. St. Rep. 63; *West v. Norwich Union F. Ins. Soc.*, 10 Utah 442; *Henschel v. Oregon F. & M. Ins. Co.*, 4 Wash. 476. See also *Messelback v. Norman*, 122 N. Y. 578; *Ladd v. Aetna Ins. Co.*, 70 Hun (N. Y.) 490; *American Cent. Ins. Co. v. McCrea*, 8 Lea (Tenn.) 513, 41 Am. Rep. 647.

But where the promise is to indorse when the policy is produced, and the assured does not produce the policy, there is no waiver. *Connecticut F. Ins. Co. v. Smith*, 10 Colo. App. 121; *Baumgartel v. Providence-Washington Ins. Co.*, 136 N. Y. 547; *Tompkins v.*

Verbal Consent of Soliciting Agent Where Policy Requires Writing. — But the fact that an agent merely had authority to solicit insurance, receive and write applications for insurance, and forward such applications to the general agent of the company, will not confer on him power to waive orally a condition when the policy requires the written consent of the company to the waiver.¹ And the same has been held of a person employed by an insurance agent to do mere clerical work.²

Prohibition of Parol Waiver by Officers and Agents Generally. — The question here under discussion has arisen frequently in the later decisions in determining the validity and effect of a stipulation in the policy to the effect that no officer, agent, or other representative of the insurance company shall have power to waive any provision or condition of the policy unless such waiver is indorsed on the policy. According to some of the authorities such a provision is inoperative, for the reason that as a corporation can act only through its officers or agents, the provision practically precludes one of the parties to a written contract which is not required by law to be in writing, from subsequently waiving by parol agreement conditions which had been incorporated in the contract for his benefit.³ But by other authorities it is held that a provision of this character is valid⁴ and may restrict the authority of a general agent,⁵ and it is immaterial whether the insured read the policy or not, or had actually acknowledged all the conditions or limitations of the power of the agent.⁶

Under Statute Adopting Standard Form of Policy. — This latter view is now supported in some jurisdictions under statutes adopting a standard policy the use of which is made compulsory and in which the provision in question or a similar provision is incorporated.⁷

Hartford F. Ins. Co., 22 N. Y. App. Div. 380.

1. **Oral Waiver of Mere Soliciting Agent Where Policy Requires Written Consent.** — *American Ins. Co. v. Hampton*, 54 Ark. 75; *German-American Ins. Co. v. Humphrey*, 62 Ark. 348, 54 Am. St. Rep. 297; *Shuggart v. Lycoming F. Ins. Co.*, 55 Cal. 417; *Enos v. Sun Ins. Co.*, 67 Cal. 621; *Montgomery County Farmers' Mut. Ins. Co. v. Milner*, 90 Iowa 686; *Oshkosh Match Works v. Manchester F. Assur. Co.*, 92 Wis. 510; *Renier v. Dwelling-House Ins. Co.*, 74 Wis. 97; *Knudson v. Hekia F. Ins. Co.*, 75 Wis. 198; *Carey v. German-American Ins. Co.*, 84 Wis. 88, 36 Am. St. Rep. 907.

2. *Waldman v. North British, etc., Ins. Co.*, 91 Ala. 170, 24 Am. St. Rep. 883.

3. **General Provision Held Inoperative.** — *Hanover F. Ins. Co. v. Dole*, 20 Ind. App. 333; *Long Island Ins. Co. v. Great Western Mfg. Co.*, 2 Kan. App. 383; *Phenix Ins. Co. v. Munger*, 49 Kan. 178, 33 Am. St. Rep. 360; *Burnham v. Greenwich Ins. Co.*, 63 Mo. App. 85; *Wilson v. Commercial Union Assur. Co.*, 51 S. Car. 540.

4. **Held Valid.** — *Western Assur. Co. v. Williams*, 94 Ga. 131; *Burlington Ins. Co. v. Campbell*, 42 Neb. 208; *Walsh v. Hartford F. Ins. Co.*, 73 N. Y. 10; *Marvin v. Universal L. Ins. Co.*, 85 N. Y. 278, 39 Am. Rep. 657; *Allen v. German American Ins. Co.*, 123 N. Y. 6; *Lett v. Guardian F. Ins. Co.*, 125 N. Y. 82; *Armstrong v. Agricultural Ins. Co.*, 130 N. Y. 560; *Quinlan v. Providence Washington Ins. Co.*, 133 N. Y. 364, 28 Am. St. Rep. 645; *O'Brien v. Prescott Ins. Co.*, 134 N. Y. 28; *Baumgartel v. Providence-Washington Ins. Co.*, 136 N. Y. 547; *Frankfurter v. Home Ins.*

Co., (C. Pl. Gen. T.) 10 Misc. (N. Y.) 158; *Warren v. Phoenix Ins. Co.*, 65 Hun (N. Y.) 621, 19 N. Y. Supp. 990. See also *Hartford F. Ins. Co. v. Small*, 66 Fed. Rep. 490. Compare *Whited v. Germania F. Ins. Co.*, 76 N. Y. 415, 32 Am. Rep. 330; *Weed v. London, etc., F. Ins. Co.*, 116 N. Y. 117.

5. *McCormick v. Springfield F. & M. Ins. Co.*, 66 Cal. 364; *Burlington Ins. Co. v. Campbell*, 42 Neb. 208; *Walsh v. Hartford F. Ins. Co.*, 73 N. Y. 5; *Woodside Brewing Co. v. Pacific F. Ins. Co.*, 11 N. Y. App. Div. 68; *Egan v. Westchester Ins. Co.*, 28 Oregon 289; *Smith v. Niagara F. Ins. Co.*, 60 Vt. 682, 6 Am. St. Rep. 144.

But the assured may show that the agent has been in fact authorized, as by showing that authority was granted to him in the given instance or that he had done previous similar acts with the company's consent. *Western Assur. Co. v. Williams*, 94 Ga. 131; *Egan v. Westchester Ins. Co.*, 28 Oregon 289.

Where No Limitation Contained in Policy. — In *Pechner v. Phoenix Ins. Co.*, 65 N. Y. 196, it was held that a general agent may bind an insurance company by a parol waiver in the absence of a provision in the policy limiting the power of the agent.

6. *Gould v. Dwelling-House Ins. Co.*, 90 Mich. 302; *Quinlan v. Providence Washington Ins. Co.*, 133 N. Y. 364, 28 Am. St. Rep. 645.

7. **Under Standard Policy — Massachusetts.** — *Kyte v. Commercial Union Assur. Co.*, 144 Mass. 43; *Putnam Tool Co. v. Fitchburg Mut. F. Ins. Co.*, 145 Mass. 265; *Parker v. Rochester German Ins. Co.*, 162 Mass. 479.

Michigan. — *Gould v. Dwelling-House Ins.*

(*dd*) *Application of Limitations to Waiver of Conditions to Be Performed After Loss.* — The rule has been laid down in a number of jurisdictions that a stipulation in a policy limiting the power of agents to waive forfeitures or restricting them as to the mode of waiver, such as the provision that no officer, agent, or representative of the company shall be held to waive any of the terms or conditions of the policy unless such waiver shall be indorsed thereon in writing, applies only to those conditions and proofs in the policy which relate to the formation and continuance of the contract of insurance and are essential to the binding force of the contract while it is running, and does not apply to those conditions which are to be performed after the loss has occurred, such as giving notice and furnishing preliminary proof of the loss.¹

VI. LIABILITY FOR PREMIUMS — 1. Liability of Assured for Premiums —

a. WHEN POLICY IS VOID. — If an insurance policy is void for want of some element essential to the creation of a valid contract, or for breach of some condition precedent, a note given for the premium is also void for want of a valuable consideration.²

When Insurance Is Induced by Fraud. — So if a person is induced by the fraudulent representations of the agent to take out insurance upon his property, the insured may, after offering to return the policy to the insurer and his refusal to accept it, set up the facts as a defense to an action upon his premium note.³

b. WHEN POLICY DOES NOT CONFORM TO APPLICATION. — If a person applies for a policy of insurance and gives his note for the premium, he has a reasonable time after the receipt of the policy within which to discover that it does not conform to his application, and to object to and return it. If the policy is not of the sort contracted for, and the applicant offers to return it,

Co., 90 Mich. 302; *Wadhams v. Western Assur. Co.*, 117 Mich. 514.

Minnesota. — *St. Paul F. & M. Ins. Co. v. Parsons*, 47 Minn. 352; *Anderson v. Manchester F. Assur. Co.*, 59 Minn. 182, 50 Am. St. Rep. 400. Prior to the statute in this state a contrary rule was laid down in *Lamberton v. Connecticut F. Ins. Co.*, 39 Minn. 129.

New York. — *Moore v. Hanover F. Ins. Co.*, 141 N. Y. 219; *Woodside Brewing Co. v. Pacific F. Ins. Co.*, 11 N. Y. App. Div. 68. A similar ruling, however, was made in this state prior to the statute. *Walsh v. Hartford F. Ins. Co.*, 73 N. Y. 5.

1. Limitations Held Inapplicable to Conditions to Be Performed After Loss — *United States.* — *Harrison v. German-American F. Ins. Co.*, 67 Fed. Rep. 577.

Arkansas. — *Dwelling-House Ins. Co. v. Brodie*, 52 Ark. 11.

Illinois. — *Dwelling House Ins. Co. v. Dowdall*, 159 Ill. 179; *Fireman's Fund Ins. Co. v. Western Refrigerating Co.*, 162 Ill. 327.

Indiana. — *Indiana Ins. Co. v. Capehart*, 108 Ind. 270.

Maryland. — *Franklin F. Ins. Co. v. Chicago Ice Co.*, 36 Md. 120, 11 Am. Rep. 469; *Rokes v. Amazon Ins. Co.*, 51 Md. 524.

Massachusetts. — *Blake v. Exchange Mut. Ins. Co.*, 12 Gray (Mass.) 265; *Priest v. Citizens' Mut. F. Ins. Co.*, 3 Allen (Mass.) 602.

Michigan. — See also *O'Brien v. Ohio Ins. Co.*, 52 Mich. 139.

Mississippi. — *New Orleans Ins. Assoc. v. Matthews*, 65 Miss. 301.

North Carolina. — *Dibbrell v. Georgia Home Ins. Co.*, 110 N. Car. 193, 28 Am. St. Rep. 678.

Texas. — *Roberts v. Sun Mut. Ins. Co.*, 13 Tex. Civ. App. 64.

Vermont. — *Smith v. Niagara F. Ins. Co.*, 60 Vt. 682, 6 Am. St. Rep. 144.

Compare *Ruthven v. American F. Ins. Co.*, 92 Iowa 316.

2. No Liability upon Premium Note When Policy Is Void. — *Bersch v. Sinnissippi Ins. Co.*, 28 Ind. 64.

An applicant for insurance will not be liable upon his promissory note given for the first instalment of the premium if the contract is invalid on account of a provision in it rendering it inoperative until the premium is actually paid in cash. *Dunham v. Morse*, 158 Mass. 132, 35 Am. St. Rep. 473.

3. When Insured Is Induced to Take Policy by Fraud. — *Rockford Ins. Co. v. Hildreth*, 45 Ill. App. 428.

What Is Not Fraud. — A mistake by the assured as to the character of the instrument he was signing, no fraud or deception being alleged or shown, is not sufficient to relieve him from the obligation imposed by the premium note as a part of the contract of insurance. *Palmer v. Continental Ins. Co.*, 31 Mo. App. 467.

A statement by an insurance agent that the first premium upon a policy would be two hundred and thirteen dollars, when in fact it was two hundred and twenty-two dollars and fifty cents, is not such a misrepresentation as will render void a promissory note for the former sum given by the insured to the agent, who, by agreement, paid the first premium and sought to collect from the insured only the amount of the note. *Dunn v. Abrams*, 97 Ga. 762.

A statement by the insurance agent that the company will allow an advance dividend, even if not fulfilled, is not a misrepresentation of

and its tender is rejected, his retention of the policy thereafter without appropriating it or making any use of it will not render him liable upon his note, and he may set up the facts as a defense in a suit upon it by the insurer.¹

But if the Applicant Does Not Offer to Return the Policy, or does not request its correction, he cannot, in an action upon his note, set up the defense that the policy is *ultra vires*² or not of the kind contracted for,³ or that there is an error in spelling his name in it,⁴ or that it misdescribes the location of the property insured,⁵ or that he has, without fraud, made such misstatements of material facts as would, if pleaded by the insurer, defeat a recovery on the policy.⁶

Refusal to Accept Corrected Policy. — If, after the contract has been consummated, the insured discovers that the policy does not properly express the contract, and upon complaint the insurer tenders a corrected policy, the insured cannot refuse to accept it or deny his liability on the notes given for the premium.⁷

c. WHEN LIABILITY ON POLICY IS SUSPENDED. — A provision in a policy of insurance that if the note given for the premium is not paid at maturity the insurer will not be liable for any loss occurring while the note is unpaid, does not prevent its collection after its dishonor. The insured is not relieved from his obligation to pay the note by the fact that he forfeits for the time the protection to secure which it was given;⁸ but it has been held in *Ohio* that he is entitled to credit on the note for the premium unearned by the insurer while the note remained unpaid.⁹

d. WHEN INSURER CANCELS POLICY. — The fact that the insurer under a power reserved in the policy has canceled the risk before the payment of the premium note does not entirely discharge the insured from liability thereon, but discharges him only to the extent of the unearned premium.¹⁰

2. Liability of Insurer for Return of Premiums — a. IN GENERAL. — The

fact which would avoid a note. *Cunyus v. Guenther*, 96 Ala. 564.

1. *Jones v. Gilbert*, 93 Ga. 604.

Reservation of Right to Reject Policy. — An insurance agent with apparent authority to receive conditional applications for insurance obtained the defendant's note for a premium, under a written agreement with him that the policy should be sent by mail and if unsatisfactory might be rejected, and that on notice of the nonacceptance of the policy, the note should be returned. It was held that the note and written agreement formed one contract, and that upon the rejection of the policy the company could not treat the agreement of the agent as having been made without authority and sue on the note. *Jacoway v. German Ins. Co.*, 49 Ark. 320.

2. *Thompson Lumber Co. v. Mutual F. Ins. Co.*, 66 Ill. App. 254.

3. *Leigh v. Brown*, 99 Ga. 258.

When Policy Does Not Express Contract. — In *Perry v. Archard*, (Indian Ter. 1897) 42 S. W. Rep. 421, the defendant made application for a life-insurance policy that would mature in fifteen years, but received instead a policy to mature in twenty years. He made no complaint, and did not offer to return the policy, but set up the facts as a defense to an action on a note given for the first year's premium. It was held that the defense was without merit.

4. *Jones v. Methvin*, 97 Ga. 449.

5. *Phenix Ins. Co. v. Still*, 43 Ill. App. 233.

6. *St. Paul F. & M. Ins. Co. v. Neidecken*, 6 Dak. 494.

7. **Refusal to Accept Corrected Policy.** — *Pierce v. Home Ins. Co.*, 45 Kan. 576.

8. **When Liability upon Policy Is Suspended** — *Arkansas*. — *Robinson v. German Ins. Co.*, 51 Ark. 441.

Dakota. — *St. Paul F. & M. Ins. Co. v. Coleman*, 6 Dak. 458.

Kentucky. — *Blackerby v. Continental Ins. Co.*, 83 Ky. 574.

Michigan. — *Marskey v. Turner*, 81 Mich. 62.

Minnesota. — *Minnesota Farmers' Mut. F. Ins. Assoc. v. Olson*, 43 Minn. 21.

Missouri. — *German American Ins. Co. v. Divilbiss*, 67 Mo. App. 500.

Nebraska. — *McEvoy v. Nebraska, etc., Ins. Co.*, 46 Neb. 782; *Phenix Ins. Co. v. Rollins*, 44 Neb. 745.

South Carolina. — *Continental Ins. Co. v. Boykin*, 25 S. Car. 323; *Continental Ins. Co. v. Hoffman*, 25 S. Car. 327.

Tennessee. — *Equitable Ins. Co. v. Harvey*, 98 Tenn. 636.

9. **Credit Allowed for Unearned Premiums.** — *Matthews v. Insurance Co.*, 40 Ohio St. 135.

10. **When Insurer Cancels Policy.** — *American Ins. Co. v. Garrett*, 71 Iowa 243; *Hibernia Ins. Co. v. Blanks*, 35 La. Ann. 1175; *Atlantic Ins. Co. v. Goodall*, 35 N. H. 328; *Irwin v. National Ins. Co.*, 2 Disney (Ohio) 68.

Paying Premium in Quarterly Instalments. — Where the annual premium on a policy of life insurance, primarily payable in advance, was by express stipulation made payable quarterly in advance, and the insured died after the payment of the first quarterly instalment, the

liability of an insurance company for the return of premiums paid, in the absence of a provision in the policy or in the state insurance law regulating the matter, depends largely upon the question whether the policy has ever become a binding contract between the parties.¹

b. WHEN RISK HAS NEVER ATTACHED — (1) Insurer Must Return Premiums. — If, from noncompliance with some condition precedent, or other cause, the policy never takes effect as a binding contract, and the insurer has consequently been subjected to no liability, there has been no consideration for the payment of the premiums, and the person paying them may recover them back.²

Effect of Estoppel upon Company. — The fact that the insurance company might, in case of loss, be estopped by its knowledge of the breach of the condition precedent or by its action in receiving and retaining the premium from denying its liability on the policy, does not affect the right of the assured to demand the return of the premiums paid.³

(2) Misrepresentation, Concealment, or False Warranty by Assured. — If, on the other hand, a policy is void *ab initio* by reason of some misrepresentation, concealment, or false warranty by the assured, he cannot recover back the premiums paid.⁴

c. WHEN RISK HAS ATTACHED — (1) Forfeiture of Insurance by Acts of Assured. — If a policy which has once attached lapses by reason of the failure of the assured to comply with some of its conditions, he is not entitled to a recovery of the unearned premiums paid upon it.⁵

(2) Wrongful Cancellation by Insurer. — But if the insurance company wrongfully revokes the policy, the assured may recover the full amount of the premiums paid thereon, with interest, even though he has had the benefit of the insurance under it from its inception to the day of its wrongful revocation, and though such revocation would not operate in law to avoid the contract. The insured may elect whether he will enforce the policy or treat it as rescinded.⁶

d. ENTIRE AND DIVISIBLE CONTRACTS. — If the contract of insurance is entire and indivisible, a cause of avoidance or forfeiture in respect to a part of the property insured affects the whole contract, and the insured is not entitled to recover the premiums unearned upon the parts not affected.⁷ But if the risk consists of several separate parts and the insurer elects to cancel the whole contract, the insured is entitled to a return of the part of the premium paid upon the items not affected.⁸

Buildings and Contents. — When, however, a policy of insurance covers a building and personal property within it, or so attached to it that its loss would be the natural consequence of the destruction of the building, as a dwelling house and furniture or a gin house and fixtures, a false warranty as to the building avoids the whole policy.⁹

insurance company was held to be entitled, in an action on the policy, to have the three remaining instalments for the current year deducted from the amount of such policy. *Albert v. Mutual L. Ins. Co.*, 122 N. Car. 93.

1. *Liability of Insurer for Return of Premiums.* — *Mailhoit v. Metropolitan L. Ins. Co.*, 87 Me. 374, 47 Am. St. Rep. 336; *New York L. Ins. Co. v. Miller*, 11 Tex. Civ. App. 536.

2. *When Risk Has Never Attached.* — *Waller v. Northern Assur. Co.*, 64 Iowa 101; *Fulton v. Metropolitan L. Ins. Co.*, (C. Pl. Gen. T.) 4 Misc. (N. Y.) 76; *Fulton v. Metropolitan L. Ins. Co.*, (N. Y. City Ct. Gen. T.) 1 Misc. (N. Y.) 478.

3. *Hogben v. Metropolitan L. Ins. Co.*, 69 Conn. 503, 61 Am. St. Rep. 53.

4. *Venner v. Sun L. Ins. Co.*, 17 Can. Supm.

Ct. 394; *Ætna L. Ins. Co. v. Paul*, 10 Ill. App. 431.

5. *When Risk Has Attached.* — *Grant v. Alabama Gold L. Ins. Co.*, 76 Ga. 575.

Where an insurer has rightfully declared an insurance contract at an end because the insured has obtained additional insurance on the property without the consent of the first insurer, contrary to the provisions of the first policy, such insured has no cause of action against the insurer for the unearned premium. *Farmers Mut. Ins. Co. v. Home F. Ins. Co.*, 54 Neb. 740.

6. *Van Werden v. Equitable L. Assur. Sec.*, 99 Iowa 621.

7. *Tyrie v. Fletcher*, 2 Cowp. 666.

8. *Stevenson v. Snow*, 3 Burr. 1237.

9. *Western Assur. Co. v. Stoddard*, 88 Ala. 606.

VII. EVIDENCE — 1. Burden of Proof. — a. IN GENERAL. — As in the case of other contracts, one suing upon a policy of insurance has the burden of showing that the contract was made,¹ except so far as statutory provisions may dispense with such proofs.² It has been held that the defendant insurance company has the burden of showing that the action was not brought within the time stipulated in the policy.³ The rule that one in exclusive possession of knowledge of certain facts is bound to produce evidence in regard thereto, has been applied to the case of an insurance company failing to produce evidence upon the question of the authority of an alleged agent.⁴

b. TITLE AND INTEREST OF PLAINTIFF. — The burden is on the plaintiff upon an issue as to whether he has an insurable interest in the property insured.⁵ But the burden of showing that the plaintiffs are not beneficiaries named in the policy is on the defendant, if they are in actual possession of the policy and file it as a part of their petition.⁶ And the fact that a policy was issued to the plaintiff upon certain property as belonging to him constitutes such an admission of his title as to cast upon the insurer the burden of showing that he is not the owner.⁷ If the defendant insurance company, in an action by the assignee of the policy, defends on the ground that there has been a prior assignment to a third person, it has the burden of proving such defense.⁸

c. CONDITIONS, REPRESENTATIONS, AND WARRANTIES. — The majority of courts have adopted the rule that the plaintiff in an action on an insurance policy has not the burden of proving compliance with conditions therein, but the insurer wishing to avoid liability by showing the breach of a condition avoiding the policy has the burden of proving the existence of the condition and its breach.⁹ The same rule has been applied in regard to misstatements

1. Making of Contract. — *Mack v. Lancashire Ins. Co.*, 4 Fed. Rep. 59; *Schroeder v. Trade Ins. Co.*, 12 Ill. App. 651; *Sullivan v. Hartford F. Ins. Co.*, (Tex. Civ. App. 1896) 34 S. W. Rep. 999.

2. See Firemen's Ins. Co. v. Barnsch, 161 Ill. 629, 59 Ill. App. 78.

3. Time of Bringing Suit. — *Allibone v. Fidelity, etc., Ins. Co.*, (Tex. Civ. App. 1895) 32 S. W. Rep. 569.

4. Exclusive Knowledge of Agency. — *Flynn v. Equitable L. Ins. Co.*, 78 N. Y. 575, 34 Am. Rep. 561; *McGuire v. Hartford F. Ins. Co.*, 7 N. Y. App. Div. 575, affirmed 158 N. Y. 680.

5. Insurable Interest. — *Guardian Mut. L. Ins. Co. v. Hogan*, 80 Ill. 35, 22 Am. Rep. 180; *Orrell v. Hampden F. Ins. Co.*, 13 Gray (Mass.) 431; *Singleton v. St. Louis Mut. Ins. Co.*, 66 Mo. 63, 27 Am. Rep. 321; *Ruse v. Mutual Ben. L. Ins. Co.*, 23 N. Y. 516; *Petrel Guano Co. v. Providence, etc., Ins. Co.*, 52 N. Y. Super. Ct. 297; *Planters' Ins. Co. v. Diggs*, 8 Baxt. (Tenn.) 563.

6. Plaintiffs as Beneficiaries. — *Hartford L., etc., Ins. Co. v. Wayland*, (Ky. 1892) 20 S. W. Rep. 199. *Compare De Bolle v. Pennsylvania Ins. Co.*, 4 Whart. (Pa.) 68, 33 Am. Dec. 38.

7. Admission of Title. — *Nichols v. Fayette Mut. F. Ins. Co.*, 1 Allen (Mass.) 63; *Franklin v. National Ins. Co.*, 43 Mo. 491; *American F. Ins. Co. v. Landfare*, 56 Neb. 482; *Western Horse, etc., Ins. Co. v. Scheidle*, 18 Neb. 495; *Farmers, etc., Ins. Co. v. Peterson*, 47 Neb. 747; *Wood v. American F. Ins. Co.*, 78 Hun (N. Y.) 109; *Lindner v. St. Paul F. & M. Ins. Co.*, 93 Wis. 526. And see *Sprigg v. American Cent. Ins. Co.*, 101 Ky. 185.

8. Assignment to Third Person. — *Kelly v. Norwich F. Ins. Co.*, 82 Iowa 137.

9. Breach of Conditions — *United States*. — *Bittinger v. Providence Washington Ins. Co.*, 24 Fed. Rep. 549; *Manhattan L. Ins. Co. v. Willis*, 23 U. S. App. 103, 60 Fed. Rep. 236; *Catlin v. Springfield F. Ins. Co.*, 1 Sumn. (U. S.) 435.

California. — *Osterman v. District Grand Lodge No. 4*, (Cal. 1896) 43 Pac. Rep. 412.

Connecticut. — *Lounsbury v. Protection Ins. Co.*, 8 Conn. 459, 21 Am. Dec. 686; *Young v. Newark F. Ins. Co.*, 59 Conn. 41.

Indiana. — *American F. Ins. Co. v. Sisk*, 9 Ind. App. 305.

Iowa. — *Newman v. Covenant Mut. Ins. Assoc.*, 76 Iowa 64; *Russell v. Fidelity Ins. Co.*, 84 Iowa 93; *Sutherland v. Standard L., etc., Ins. Co.*, 87 Iowa 505.

Maine. — *Newhall v. Union Mut. F. Ins. Co.*, 52 Me. 180.

Massachusetts. — *Peirce v. Cohasset Mut. F. Ins. Co.*, 123 Mass. 572; *Underhill v. Agawam Mut. F. Ins. Co.*, 6 Cush. (Mass.) 440; *Jones Mfg. Co. v. Manufacturers' Mut. F. Ins. Co.*, 8 Cush. (Mass.) 82, 54 Am. Dec. 742; *Daniels v. Hudson River F. Ins. Co.*, 12 Cush. (Mass.) 416, 59 Am. Dec. 192; *Haskins v. Hamilton Mut. Ins. Co.*, 5 Gray (Mass.) 432; *Mulry v. Mohawk Valley Ins. Co.*, 5 Gray (Mass.) 511, 66 Am. Dec. 380; *Clark v. Hamilton Mut. Ins. Co.*, 9 Gray (Mass.) 148; *Orrell v. Hampden F. Ins. Co.*, 13 Gray (Mass.) 431; *Freeman v. Travelers' Ins. Co.*, 144 Mass. 526; *Coburn v. Travelers' Ins. Co.*, 145 Mass. 272; *Houghton v. Manufacturers' Mut. F. Ins. Co.*, 8 Met. (Mass.) 114, 41 Am. Dec. 489.

Minnesota. — *Newman v. Springfield F. & M. Ins. Co.*, 17 Minn. 123; *Mistilski v. German Ins. Co.*, 64 Minn. 366; *Perine v. Grand Lodge, etc.*, 51 Minn. 224.

or misrepresentations by the insured at the time of obtaining the insurance, which, it is held, are matters of defense to be established by the insurer.¹ In some cases, however, a distinction is made between mere representations and warranties, and it is held that a compliance with a warranty must be established by the plaintiff, on the ground that this is a condition precedent to the very existence of the contract of insurance.² Such distinction, however, is opposed by the weight of authority, especially in the later decisions; and the rule that the burden of proof is on the insurer is held to apply in the case of

Mississippi.—Grangers' L. Ins. Co. v. Brown, 57 Miss. 303, 34 Am. Rep. 446; Liverpool, etc., Ins. Co. v. Farnsworth Lumber Co., 72 Miss. 555.

Missouri.—Mueller v. Putnam F. Ins. Co., 45 Mo. 84; Hester v. Fidelity, etc., Co., 69 Mo. App. 186.

New York.—Germain v. Brooklyn L. Ins. Co., 30 Hun (N. Y.) 535; Spencer v. Citizens Mut. L. Ins. Assoc., 142 N. Y. 505; Jones v. Brooklyn L. Ins. Co., 61 N. Y. 79.

North Carolina.—Folb v. Phoenix Ins. Co., 109 N. Car. 568.

Ohio.—Moody v. Amazon Ins. Co., 52 Ohio St. 12.

Pennsylvania.—Dougherty v. Pacific Mut. L. Ins. Co., 154 Pa. St. 385.

South Carolina.—Roach v. Kentucky Mut. Security Fund Co., 28 S. Car. 431; Copeland v. Western Assur. Co., 43 S. Car. 26.

South Dakota.—Ormsby v. Phenix Ins. Co., 5 S. Dak. 72.

Tennessee.—London, etc., F. Ins. Co. v. Crunk, 91 Tenn. 376.

Texas.—East Texas F. Ins. Co. v. Dyches, 56 Tex. 565; Phoenix Assur. Co. v. Coifman, 10 Tex. Civ. App. 631.

Virginia.—Portsmouth Ins. Co. v. Reynolds, 32 Gratt. (Va.) 613.

Wisconsin.—Troy F. Ins. Co. v. Carpenter, 4 Wis. 20; Cronkhite v. Travelers Ins. Co., 75 Wis. 116, 17 Am. St. Rep. 184; Redman v. Aetna Ins. Co., 49 Wis. 431; River Falls Bank v. German American Ins. Co., 72 Wis. 535; Butternut Mfg. Co. v. Manufacturers' Mut. F. Ins. Co., 78 Wis. 202.

1. **Misstatements and Misrepresentations**—*England*.—Leete v. Gresham L. Ins. Soc., 7 Eng. L. & Eq. 578.

United States.—Carpenter v. American Ins. Co., 1 Story (U. S.) 57; Northwestern Mut. L. Ins. Co. v. Gridley, 100 U. S. 614; Penn Mut. L. Ins., Co. v. Mechanics' Sav. Bank, etc., Co., 72 Fed. Rep. 413, 37 U. S. App. 692; Fidelity, etc., Co. v. Alpert, 67 Fed. Rep. 460, 28 U. S. App. 393.

Alabama.—Boulden v. Phoenix Ins. Co., 112 Ala. 422. But see Williamson v. New Orleans Ins. Assoc., 84 Ala. 106.

Colorado.—Lampkin v. Travelers' Ins. Co., 11 Colo. App. 249.

Georgia.—O'Connell v. Supreme Conclave, etc., 102 Ga. 143.

Illinois.—Modern Woodmen of America v. Sutton, 38 Ill. App. 327; Mutual Ben. L. Ins. Co. v. Robertson, 59 Ill. 123, 14 Am. Rep. 8; Mutual Reserve Fund L. Assoc. v. Powell, 79 Ill. App. 482; Continental L. Ins. Co. v. Rogers, 119 Ill. 485, 59 Am. Rep. 810; Arnhorst v. National Union, 179 Ill. 486, reversing 74 Ill. App. 482.

Indiana.—John Hancock Mut. L. Ins. Co.

v. Daly, 65 Ind. 10; Penn Mut. L. Ins. Co. v. Wiler, 100 Ind. 92, 50 Am. Rep. 769; National Ben. Assoc. v. Granuman, 107 Ind. 288.

Massachusetts.—Campbell v. New England Mut. L. Ins. Co., 98 Mass. 381.

Minnesota.—Price v. Phoenix Mut. L. Ins. Co., 17 Minn. 497; Perine v. Grand Lodge, etc., 51 Minn. 224; Caplis v. American F. Ins. Co., 60 Minn. 376.

Mississippi.—Grangers' L. Ins. Co. v. Brown, 57 Miss. 308, 34 Am. Rep. 446.

Missouri.—Forse v. Supreme Lodge, etc., 41 Mo. App. 106; Jefferson v. German-American Mut. L. Assoc., 69 Mo. App. 126.

New York.—Spencer v. Citizens' Mut. L. Ins. Assoc., 142 N. Y. 505, affirming (N. Y. Super. Ct. Gen. T.) 3 Misc. (N. Y.) 458; Jones v. Brooklyn L. Ins. Co., 61 N. Y. 79.

Ohio.—Union Ins. Co. v. McGookey, 33 Ohio St. 555.

South Carolina.—Dial v. Valley Mut. L. Assoc., 29 S. Car. 560. Compare Roach v. Kentucky Mut. Security Fund Co., 28 S. Car. 431.

2. **Warranties and Representations Subject to Different Rules**—*United States*.—Craig v. U. S. Insurance Co., Pet. (C. C.) 410; Bidwell v. Connecticut Mut. L. Ins. Co., 3 Sayw. (U. S.) 261.

Alabama.—Williamson v. New Orleans Ins. Co., (Ala. 1888) 4 So. Rep. 36.

California.—Gilmore v. Lycoming F. Ins. Co., 55 Cal. 123.

Iowa.—Miller v. Mutual Ben. L. Ins. Co., 31 Iowa 216, 7 Am. Rep. 122; Wilkins v. Germania F. Ins. Co., 57 Iowa 529.

Massachusetts.—Campbell v. New England Mut. L. Ins. Co., 98 Mass. 389; McLoon v. Commercial Mut. Ins. Co., 100 Mass. 472, 1 Am. Rep. 129.

Minnesota.—Price v. Phoenix Mut. L. Ins. Co., 17 Minn. 497, 10 Am. Rep. 166.

Nevada.—Healey v. Imperial F. Ins. Co., 5 Nev. 268.

North Carolina.—Bobbitt v. Liverpool, etc., Ins. Co., 66 N. Car. 70, 8 Am. Rep. 494.

Rhode Island.—Wilson v. Hampden F. Ins. Co., 4 R. I. 159; Sweeney v. Metropolitan L. Ins. Co., 19 R. I. 171, 61 Am. St. Rep. 751.

But it has been held that where the pleadings are so framed that the defendant assumes the burden of showing a breach of warranty the burden is upon him. Leete v. Gresham L. Ins. Co., 7 Eng. L. & Eq. 578; Wilkins v. Germania F. Ins. Co., 57 Iowa 529.

And it has been held that when the allegation of breach of warranty amounts to the allegation of fraud, the burden of proof is upon the defendant, for the reason that the presumption is always in favor of innocence against fraud. Wilkins v. Germania F. Ins. Co., 57 Iowa 529.

warranties as well as in the case of mere representations, since to require proof by the insured of compliance with the multifarious stipulations in a modern policy of insurance would impose on him an excessive burden.¹ In a quite recent case in a federal court a distinction was made between warranties contained in the application and those in the policy, and it was held that the insured was bound to show compliance with the latter, while as to the former the burden was on the insurer.² And it has been held that a warranty which is qualified as being true to the best of the applicant's knowledge and belief, or in some similar manner, is not a condition precedent, the truth of which must be proven by the beneficiary in order to recover upon the policy; but the burden is upon the insurer to establish the falsity of the warranty and knowledge by the insured of such falsity.³ The fact that the insured in his complaint alleges performance of the conditions, this being denied by the insurer, does not cast the burden of proof on the insured.⁴

d. ESTOPPEL AND WAIVER. — The burden is on the insured to show that misstatements in the application were written therein by an agent of the insurer without the knowledge of the insured,⁵ or that the insurer knew at the time of issuing the policy that the facts were otherwise than as stated,⁶ or that the insurer either directly or through an agent waived a breach of condition subsequent to the issuance of the policy.⁷

e. CAUSE OF LOSS OR INJURY. — It is generally held that it is for the insurer to show that the loss or injury was from a cause or risk specifically excepted in the policy,⁸ though occasionally it has been held that the burden

1. Same Rule Applicable in Case of Warranties and Representations — *United States*. — Piedmont, etc., L. Ins. Co. v. Ewing, 92 U. S. 377; Swick v. Home L. Ins. Co., 2 Dill. (U. S.) 160; Holabird v. Atlantic Mut. F. Ins. Co., 2 Dill. (U. S.) 166.

Colorado. — Supreme Lodge, etc., v. Wollschlager, 22 Colo. 213.

Illinois. — Continental L. Ins. Co. v. Rogers, 119 Ill. 474, 59 Am. Rep. 810.

Indiana. — Northwestern Mut. L. Ins. Co. v. Hazlett, 105 Ind. 212, 55 Am. Rep. 192.

Louisiana. — Kennedy v. New York L. Ins. Co., 10 La. Ann. 809; Kathman v. General Ins. Co., 12 La. Ann. 35; Flynn v. Merchants' Mut. Ins. Co., 17 La. Ann. 135; Theodore v. New Orleans Mut. Ins. Assoc., 28 La. Ann. 917; Boisblanc v. Louisiana Equitable L. Ins. Co., 34 La. Ann. 1167; Benjamin v. Connecticut Indemnity Assoc., 44 La. Ann. 1017, 32 Am. St. Rep. 362, citing Pino v. Merchants' Mut. Ins. Co., 19 La. Ann. 214, 92 Am. Dec. 529.

Maryland. — Supreme Council, etc., v. Brashears, 89 Md. 624.

Minnesota. — Chambers v. Northwestern Mut. L. Ins. Co., 64 Minn. 495, 58 Am. St. Rep. 549, disapproving Price v. Phoenix Mut. L. Ins. Co., 17 Minn. 497, 10 Am. Rep. 166.

New York. — Dougherty v. Metropolitan L. Ins. Co., 3 N. Y. App. Div. 313; Breese v. Metropolitan L. Ins. Co., 37 N. Y. App. Div. 152; Spencer v. Citizens' Mut. L. Ins. Assoc., 142 N. Y. 505. Compare Jefferson Ins. Co. v. Cotteral, 7 Wend. (N. Y.) 72.

Texas. — Mutual L. Ins. Co. v. Nichols, (Tex. Civ. App. 1894) 24 S. W. Rep. 910.

Vermont. — Guiltinan v. Metropolitan L. Ins. Co., 69 Vt. 469.

Virginia. — Morotock Ins. Co. v. Fostoria Novelty Co., 94 Va. 361.

2. Distinction Between Warranties in Policy

and in Application. — *American Credit Indemnity Co. v. Wood*, 73 Fed. Rep. 81, 38 U. S. App. 583, citing Swick v. Home L. Ins. Co., 2 Dill. (U. S.) 160; Geib v. International Ins. Co., 1 Dill. (U. S.) 443; Murray v. New York L. Ins. Co., 85 N. Y. 236; Dwight v. Germania L. Ins. Co., 103 N. Y. 341, 57 Am. Rep. 729.

3. *O'Connell v. Supreme Conclave, etc.*, 102 Ga. 143; Clapp v. Massachusetts Ben. Assoc., 146 Mass. 519.

4. Allegations by Plaintiff. — *Farmers, etc., Ins. Co. v. Peterson*, 47 Neb. 747.

5. Estoppel and Waiver. — *Fletcher v. New York L. Ins. Co.*, 3 McCrary (U. S.) 603, 14 Fed. Rep. 846; *Garrison v. Merchants, etc.*, Ins. Co., 81 Iowa 727; *Welsh v. London Assur. Corp.*, 151 Pa. St. 607, 31 Am. St. Rep. 786.

6. *Wierengo v. American F. Ins. Co.*, 98 Mich. 621.

7. *Alabama State Mut. Assur. Co. v. Long Clothing, etc., Co.*, (Ala. 1899) 26 So. Rep. 655; *Security Ins. Co. v. Fay*, 22 Mich. 467, 7 Am. Rep. 670; *Reithmuller v. Fire Assoc.*, 38 Mo. App. 118; *Mellen v. Hamilton F. Ins. Co.*, 17 N. Y. 609; *Stapleton v. Greenwich Ins. Co.*, (N. Y. City Ct. Gen. T.) 16 Misc. (N. Y.) 483.

8. Exceptions in Policy — *United States*. — *Home Ben. Assoc. v. Sargent*, 142 U. S. 691.

California. — *Blasingame v. Home Ins. Co.*, 75 Cal. 633.

Illinois. — *Metropolitan L. Ins. Co. v. McKenna*, 73 Ill. App. 283.

Massachusetts. — *Anthony v. Mercantile Mut. Acc. Assoc.*, 162 Mass. 354, 44 Am. St. Rep. 367; *Coburn v. Travelers' Ins. Co.*, 145 Mass. 226.

Missouri. — *Meadows v. Pacific Mut. L. Ins. Co.*, 129 Mo. 76, 50 Am. St. Rep. 427.

Nebraska. — *Railway Officials, etc. Acc. Assoc. v. Drummond*, 56 Neb. 235.

New York. — *Buffalo Loan, etc., Co. v. Knights Templar, etc., Mut. Aid Assoc.*, 56

of showing that the case fell within an exception was on the insured;¹ but the tendency seems to be to regard such exceptions as in the nature of conditions subsequent rather than exceptions properly so called.² Accordingly it is held that where an accident or life policy excepts losses caused by suicide, the burden of showing suicide is on the insurance company.³ In cases of marine insurance, however, the plaintiff seems to be generally held to the duty of showing that the cause of loss was within the risks insured against;⁴ and in an action on a policy insuring against death or injury from accident, the burden is on the plaintiff to show that the death or injury was caused by an accident and not otherwise.⁵ The burden is on the insurer to show that the loss or injury was caused by the negligence⁶ or that a fire loss was intentionally caused by the insured.⁷ When the policy provides that it shall not cover death or injury caused by voluntary exposure to unnecessary danger, the burden of proving that it did result from such exposure is upon the insurer.⁸

Hun (N. Y.) 303; *Van Valkenburg v. American Popular L. Ins. Co.*, 70 N. Y. 605.

Tennessee. — *London, etc., F. Ins. Co. v. Crunk*, 91 Tenn. 376.

And see the title ACCIDENT INSURANCE, vol. 1, p. 332.

So it has been held that where the policy provides that the insurer shall not be liable in case of the fall of the building, except when this results from fire, the burden is on the insurer to show that it did not result from fire. *Blasingame v. Home Ins. Co.*, 75 Cal. 633; *Transatlantic F. Ins. Co. v. Bamberger*, (Ky. 1889) 11 S. W. Rep. 595; *London, etc., F. Ins. Co. v. Crunk*, 91 Tenn. 376. *Contra*, *Pelican Ins. Co. v. Troy Co-operative Assoc.*, 77 Tex. 225.

1. Burden on Insured. — *Pelican Ins. Co. v. Troy Co-operative Assoc.*, 77 Tex. 225; *Phoenix Ins. Co. v. Boren*, 83 Tex. 97.

So in *Sohier v. Norwich F. Ins. Co.*, 11 Allen (Mass.) 336, where a policy on a theatre building provided that it should not cover any loss or damage caused by fire originating in the theatre proper, the burden was held to be on the insured to show that the fire did not originate there.

2. Exceptions Construed as Conditions. — *Western Assur. Co. v. J. H. Mohlman Co.*, 83 Fed. Rep. 811; *Anthony v. Mercantile Mut. Acc. Assoc.*, 162 Mass. 354, 44 Am. St. Rep. 367; *Coburn v. Travelers' Ins. Co.*, 145 Mass. 226; *Van Valkenburg v. American Popular L. Ins. Co.*, 70 N. Y. 605; *Murray v. New York L. Ins. Co.*, 85 N. Y. 236; *Goldschmidt v. Union Mut. L. Ins. Co.*, 110 N. Y. 628.

3. Suicide. — *United States*. — *Home Ben. Assoc. v. Sargent*, 142 U. S. 691; *Supreme Lodge, etc., v. Beck*, 94 Fed. Rep. 751, 36 C. C. A. 467.

California. — *Dennis v. Union Mut. L. Ins. Co.*, 84 Cal. 570.

District of Columbia. — *National Union v. Thomas*, 10 App. Cas. (D. C.) 277.

Illinois. — *Gooding v. U. S. Life Ins. Co.*, 46 Ill. App. 307; *Fidelity, etc., Co. v. Weise*, 80 Ill. App. 499.

Iowa. — *Inghram v. National Union*, 103 Iowa 395; *Carnes v. Iowa Traveling Men's Assoc.*, 106 Iowa 281; *Stephenson v. Bankers' L. Assoc.*, 108 Iowa 637.

Kansas. — *Mutual L. Ins. Co. v. Wiswell*, 56 Kan. 765.

Louisiana. — *Leman v. Manhattan L. Ins. Co.*, 46 La. Ann. 1189, 49 Am. St. Rep. 348.

Maryland. — *Supreme Council, etc., v. Bra-shears*, 89 Md. 624.

New York. — *German v. Brooklyn L. Ins. Co.*, 30 Hun (N. Y.) 535.

Texas. — *Mutual L. Ins. Co. v. Hayward*, (Tex. Civ. App. 1894) 27 S. W. Rep. 36; *Mutual L. Ins. Co. v. Simpson*, (Tex. Civ. App. 1894) 28 S. W. Rep. 837.

See also the title ACCIDENT INSURANCE, vol. 1, p. 331. And see *Hopkins v. Northwestern L. Assur. Co.*, 94 Fed. Rep. 729; *Somerville v. Knights Templars, etc., L. Indemnity Assoc.*, 11 App. Cas. (D. C.) 417; *Star Acc. Co. v. Sib-ley*, 57 Ill. App. 315; *Nelson v. Equitable L. Assur. Soc.*, 73 Ill. App. 133; *Spruill v. North-western Mut. L. Ins. Co.*, 120 N. Car. 141; *Fisher v. Fidelity Mut. L. Assoc.*, 188 Pa. St. 1, 43 W. N. C. (Pa.) 95; *Bachmeyer v. Mutual Reserve Fund L. Assoc.*, 87 Wis. 325. See generally the title LIFE INSURANCE.

4. Marine Insurance. — *Richelieu, etc., Nav. Co. v. Boston Marine Ins. Co.*, 136 U. S. 408; *Heebner v. Eagle Ins. Co.*, 10 Gray (Mass.) 131, 69 Am. Dec. 308; *Baker v. Manufacturers' Ins. Co.*, 12 Gray (Mass.) 603; *Paddock v. Commercial Ins. Co.*, 104 Mass. 521; *Cory v. Boyiston F., etc., Ins. Co.*, 107 Mass. 147, 9 Am. Rep. 14; *McCarthy v. St. Paul F. & M. Ins. Co.*, (Supm. Ct. Tr. T.) 19 Misc. (N. Y.) 274. And see the title MARINE INSURANCE.

5. Accident Insurance. — *Travellers' Ins. Co. v. McConkey*, 127 U. S. 661; *National Masonic Acc. Assoc. v. Shryock*, 73 Fed. Rep. 774; *Ætna L. Ins. Co. v. Vandecar*, 86 Fed. Rep. 282; *Carnes v. Iowa Traveling Men's Assoc.*, 106 Iowa 281. But see *Jones v. U. S. Mutual Acc. Assoc.*, 92 Iowa 652.

6. Loss Caused by Negligence of Insured. — *Freeman v. Travelers' Ins. Co.*, 144 Mass. 572; *Morris v. Farmers Mut. F. Ins. Co.*, 63 Minn. 420; *Mulville v. Pacific Mut. L. Ins. Co.*, 19 Mont. 95; *Wolters v. Western Assur. Co.*, 95 Wis. 265.

7. Fire Caused by Insured. — *American Mut. Ins. Co. v. Anderson*, 33 N. J. L. 151; *Dwyer v. Continental Ins. Co.*, 57 Tex. 181, 63 Tex. 354; *Alamo F. Ins. Co. v. Lancaster*, 7 Tex. Civ. App. 677.

8. Exposure to Danger. — *Follis v. U. S. Mutual Acc. Assoc.*, 94 Iowa 435; *Badenfeld v. Massachusetts Mut. Acc. Assoc.*, 154 Mass.

f. PAYMENT OF PREMIUMS. — It has been held that the burden is on the insured to show that the policy was kept in force by the payment of premiums.¹ But it was held that where the amount of the premium was variable, and knowledge thereof rested solely with the insurer, the latter had the burden of showing such amount.²

g. CANCELLATION OF POLICY. — Where the insurer seeks to excuse himself from liability upon the ground that the contract of insurance, though once existent and valid, has been canceled, he has the burden of establishing such fact.³

h. NOTICE AND PROOFS OF LOSS. — It is conceded that the burden of showing that reasonable and proper notice and proofs of loss were furnished or that such requirements were waived is upon the person suing on the policy.⁴ But the burden is on the defendant to show that he notified the insured of a defect in such proofs within a reasonable time.⁵

i. ARBITRATION OR REFERENCE. — It has been held that the burden is on the plaintiff to show compliance with a requirement of arbitration or reference as a condition precedent to suit.⁶ After an award by appraisers or arbitrators, the burden of proof is upon one seeking to attack the award.⁷

j. AMOUNT OF LOSS. — In an action on a policy of insurance on property, the burden is on the plaintiff to show the amount of the loss,⁸ except, of course, in the case of a valued policy, or when the statute makes a policy *prima facie* proof of the value of the property.⁹

k. PAYMENT AS DEFENSE. — Where a policy was payable to a creditor of the insured as his interest might appear and otherwise to his representatives, it was held, in an action by the representatives, in which the company undertook to show payment to the creditor, that it had the burden of showing the

77; *Hess v. Preferred Masonic Mut. Acc. Assoc.*, 112 Mich. 196; *Williams v. U. S. Mutual Acc. Assoc.*, 82 Hun (N. Y.) 268.

1. *Payment of Premiums.* — *Farrell v. American Employers' Liability Ins. Co.*, 68 Vt. 136. But see to the contrary *Elmer v. Mutual Ben. L. Assoc.*, (Supm. Ct. Gen. T.) 19 N. Y. Supp. 289; *Union L. Ins. Co. v. Haman*, 54 Neb. 599.

2. *Goodwin v. Provident Sav. L. Assur. Assoc.*, 97 Iowa 226 159 Am. St. Rep. 411 [*citing* *Tobin v. Western Mut. Aid Soc.*, 72 Iowa 261; *Underwood v. Iowa Legion of Honor*, 66 Iowa 134].

3. *Cancellation of Policy.* — *Runkle v. Citizens' Ins. Co.*, 6 Fed. Rep. 148; *Mohr*, etc. *Distilling Co. v. Ohio Ins. Co.*, 13 Fed. Rep. 74; *Phoenix Assur. Co. v. McAuthor*, 116 Ala. 659; *American F. Ins. Co. v. Brooks*, 83 Md. 22; *McCartney v. State Ins. Co.*, 45 Mo. App. 373; *Crown Point Iron Co. v. Aetna Ins. Co.*, 127 N. Y. 608.

4. *Notice or Proofs of Loss* — *United States*. — *Mack v. Lancashire Ins. Co.*, 4 Fed. Rep. 59.

Kansas. — *Western Home Ins. Co. v. Thorp*, 48 Kan. 239; *Burlington Ins. Co. v. Ross*, 48 Kan. 228; *State Ins. Co. v. Belford*, 2 Kan. App. 280.

Louisiana. — *McCall v. Merchants' Ins. Co.*, 33 La. Ann. 142.

Maryland. — *Planters' Mut. Ins. Co. v. Deford*, 38 Md. 382; *Mispelhorn v. Farmers' F. Ins. Co.*, 53 Md. 473.

Massachusetts. — *Eastern R. Co. v. Relief F. Ins. Co.*, 105 Mass. 570.

Nebraska. — *German Ins. Co. v. Fairbank*, 32 Neb. 750, 29 Am. St. Rep. 459; *Western Home Ins. Co. v. Richardson*, 40 Neb. 1.

West Virginia. — *Flanagan v. Phenix Ins. Co.*, 42 W. Va. 426; *Adkins v. Globe F. Ins. Co.*, 45 W. Va. 384.

The defendant has the burden of showing that the plaintiff was guilty of "wilful" false swearing in making proofs of loss. *Phœnix Ins. Co. v. Summerfield*, 70 Miss. 827.

5. *Killips v. Putnam F. Ins. Co.*, 28 Wis. 472, 9 Am. Rep. 506.

6. *Arbitration or Reference.* — *Lamson Consol. Store Service Co. v. Prudential F. Ins. Co.*, 171 Mass. 433; *Mosness v. German-American Ins. Co.*, 50 Minn. 341. *Compare Kahn v. Traders Ins. Co.*, 4 Wyo. 419; *Kahnweiler v. Phenix Ins. Co.*, 67 Fed. Rep. 483; *Liverpool*, etc., *Ins. Co. v. Hall*, 1 Kan. App. 18.

7. *German-American Ins. Co. v. Johnson*, 4 Kan. App. 357; *Mosness v. German-American Ins. Co.*, 50 Minn. 341; *Liverpool*, etc., *Ins. Co. v. Goehring*, 99 Pa. St. 13; *Stache v. St. Paul F. & M. Ins. Co.*, 49 Wis. 89, 35 Am. Rep. 772.

8. *Amount of Loss.* — *Mack v. Lancashire Ins. Co.*, 4 Fed. Rep. 59; *Standard F. Ins. Co. v. Wren*, 11 Ill. App. 242; *Schroeder v. Trade Ins. Co.*, 12 Ill. App. 651; *Warshawsky v. Anchor Mut. F. Ins. Co.*, 98 Iowa 221; *Marchesau v. Merchants' Ins. Co.*, 1 Rob. (La.) 438; *Wightman v. Western M. & F. Ins. Co.*, 8 Rob. (La.) 442; *Millaudon v. Western M. & F. Ins. Co.*, 9 La. 27, 29 Am. Dec. 433; *Sullivan v. Hartford F. Ins. Co.*, (Tex. Civ. App. 1896) 34 S. W. Rep. 999.

9. See *Martin v. Capital Ins. Co.*, 85 Iowa 643; *Des Moines Ice Co. v. Niagara F. Ins. Co.*, 99 Iowa 193; *Scott v. Security F. Ins. Co.*, 98 Iowa 67.

indebtedness of the insured to such creditor.¹ But it has been held that an assignor of the policy who admitted the assignment had the burden of showing that a payment by the insurer to the assignee was collusive.²

2. Evidence as to Particular Issues — a. EXISTENCE AND TERMS OF CONTRACT. — Evidence that an agent was instructed to telegraph to the company upon the occurrence of a loss is admissible in connection with evidence that he did not so telegraph, to show that there was no contract of insurance at the time of the loss.³ But evidence as to the insurer's knowledge of the manner in which the premises were occupied was held to be too remote on the question whether the contract was made,⁴ and evidence that the wife of the insured objected to his taking the policy declared on is inadmissible on this issue.⁵ The fact that the alleged contract of insurance was verbal only does not render it necessary to establish its existence by more than a preponderance of the evidence.⁶ All papers on which the company acted in deciding to grant the policy are stated to be admissible,⁷ and previous contracts of insurance between the same parties are likewise admissible to show the terms of the new contract.⁸

b. FRAUD IN APPLICATION. — Similar false answers on applications for other insurance are admissible to show that a false answer was made in bad faith, though such other answers were given after the application for the particular insurance in question.⁹

c. BREACH OF CONDITIONS. — On an issue as to whether a certain house was occupied, evidence that another house belonging to the insured had more furniture in it than the house in question was held to be too remote.¹⁰ And a receipt showing when the last occupant of the insured building leased another residence has been held to be inadmissible to show when the former building was vacated.¹¹ Evidence that the suspension of the operation of a factory was for lack of supplies and was incidental to the business was admissible to show that it was not within a condition against a cessation of operations.¹²

d. PAYMENT OF PREMIUMS. — The insured may show payment of the premiums, and may testify to that fact himself;¹³ and declarations by an agent to a third person are admissible for this purpose.¹⁴ Where the defense to an action on the policy was based on failure of the insured to pay a premium note, evidence that the note belonged to the defendant's agent and not to the company was held admissible.¹⁵ A letter of the insured, inclosing the premium, is admissible to show tender as a prerequisite to suit on the policy.¹⁶

Receipt or Acknowledgment of Payment. — While a mere receipt for the premium is, like other receipts, merely *prima facie* evidence that the premium was paid,¹⁷ a different effect has been given by a majority of the courts to an

1. **Payment as Defense.** — *Andrews v. Union Cent. L. Ins. Co.*, 92 Tex. 584.

2. *Mellerup v. Travelers' Ins. Co.*, 95 Iowa 317.

3. **Existence of Contract.** — *Michigan Pipe Co. v. Michigan F. & M. Ins. Co.*, 92 Mich. 482.

4. *Audubon v. Excelsior Ins. Co.*, 27 N. Y. 216.

5. *Jones v. New York L. Ins. Co.*, 168 Mass. 245.

6. **Verbal Contract — Quantum of Evidence.** — *Farmers' Co-operative Soc. v. German Ins. Co.*, 97 Iowa 749; *Waldron v. Home Mut. Ins. Co.*, 16 Wash. 193.

7. **Papers on Which Contract Based.** — *Rawls v. American Mut. L. Ins. Co.*, 27 N. Y. 282, 84 Am. Dec. 280.

8. **Previous Insurance Contracts.** — *Home Ins. Co. v. Adler*, 71 Ala. 516; *Ganser v. Fireman's Fund Ins. Co.*, 38 Minn. 74.

9. **Fraud in Application.** — *Penn Mut. L. Ins.*

Co. v. Mechanics' Sav. Bank, etc., Co., 72 Fed. Rep. 413. And see *Brown v. Greenfield L. Assoc.*, 172 Mass. 498.

10. **Vacancy of Building.** — *Weidert v. State Ins. Co.*, 19 Oregon 261, 20 Am. St. Rep. 809.

11. *Piscataqua Sav. Bank v. Traders' Ins. Co.*, 8 Kan. App. 24.

12. **Cessation of Factory Operations.** — *City Planing, etc., Mill Co. v. Merchants', etc., Mut. F. Ins. Co.*, 72 Mich. 654, 16 Am. St. Rep. 552.

13. **Payment of Premium.** — *Crosswell v. Connecticut Indemnity Assoc.*, 51 S. Car. 103.

14. *Union L. Ins. Co. v. Haman*, 54 Neb. 599.

15. **Ownership of Premium Note.** — *Thies v. Mutual L. Ins. Co.*, 13 Tex. Civ. App. 280.

16. **Letter Inclosing Premium as Tender.** — *Hartford L. Annuity Ins. Co. v. Unsell*, 144 U. S. 439, affirming 32 Fed. Rep. 443.

17. **Receipt Prima Facie Evidence.** — *Knickerbocker L. Ins. Co. v. Pendleton*, 112 U. S. 696; *Scurry v. Cotton States L. Ins. Co.*, 51 Ga.

acknowledgment of payment in the policy itself, if this has been duly delivered, such an acknowledgment being considered sufficient to estop the insurer from contending that the contract is not in force on the ground that the premium has not been paid.¹ Some courts, however, give to such an acknowledgment in the policy the same effect merely as to other receipts, and consider it *prima facie* evidence only of payment.² Where a policy requires that a receipt for a premium shall be under seal, a receipt not under seal is inadmissible, but it may be otherwise shown that the premium has been paid.³

e. MATTERS MATERIAL TO RISK — (1) *Property Insurance*. — There is a decided conflict in the cases in both *England* and the *United States* as to whether persons engaged in and familiar with the insurance business can testify on the question whether facts undisclosed by the insured at the time of taking out the insurance, or changes thereafter occurring in the condition of the property insured, are material to the risk.⁴ The authorities, however, generally

624; *Mowry v. Home L. Ins. Co.*, 9 R. I. 346. See also the title RECEIPTS.

In *Brown v. Massachusetts Mut. L. Ins. Co.*, 59 N. H. 298, 47 Am. Rep. 205, it was held that one accepting a receipt acknowledging the payment of the advance premium could not claim that the company was estopped to deny that receipt, if he knew as a matter of fact that he was not entitled to the receipt, because the premium was not paid.

1. *Acknowledgment of Payment in Policy* — *England*. — *Dalzell v. Mair*, 1 Campb. 532; *Foy v. Bell*, 3 Taunt. 493.

United States. — *In re Insurance Co.*, 22 Fed. Rep. 109.

Illinois. — *Illinois Cent. Ins. Co. v. Wolf*, 37 Ill. 354, 87 Am. Dec. 251; *Provident L. Ins. Co. v. Fennell*, 49 Ill. 180; *Roach v. People*, 77 Ill. 25; *Teutonia L. Ins. Co. v. Anderson*, 77 Ill. 384; *Massachusetts Ben. L. Assoc. v. Sibley*, 158 Ill. 411.

Indiana. — *Kline v. National Ben. Assoc.*, 111 Ind. 462, 60 Am. Rep. 703; *Home Ins. Co. v. Gilman*, 112 Ind. 7.

Louisiana. — *Michael v. Mutual Ins. Co.*, 10 La. Ann. 737.

Maryland. — *Consolidated Real Estate, etc., Co. v. Cashow*, 41 Md. 59.

Missouri. — *Dobyns v. Bay State Beneficiary Assoc.*, 144 Mo. 95. But see *Mooney v. Home Ins. Co.*, 72 Mo. App. 92.

New Jersey. — *Basch v. Humboldt Mut. F. & M. Ins. Co.*, 35 N. J. L. 429.

Ohio. — *Fellowes v. Madison Ins. Co.*, 2 Disney (Ohio) 128.

The *California Civil Code*, § 2598, provides that an acknowledgment in the policy of the receipt of the premium shall be conclusive. *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246, 17 Am. St. Rep. 233. Before this enactment it was decided that such an acknowledgment might be contradicted. *Bergson v. Builders Ins. Co.*, 38 Cal. 546.

What Constitutes Acknowledgment of Payment. — A clause in a policy, "in further consideration of the sum of \$67.50, to be paid in advance," does not constitute an admission that the premium has been paid. *Quimby v. New York L. Ins. Co.*, 71 Hun (N. Y.) 104. Nor does a recital that the insurance company "in consideration of" the amount of the premium due insurer, etc., amount to such an acknowledgment. *Dircks v. German Ins. Co.*, 34 Mo. App. 31.

The Possession of a Policy of insurance is such evidence of the payment of the premium as on a demurrer to evidence is conclusive upon the court. *Fidelity, etc., Co. v. Chambers*, 93 Va. 138.

2. *Receipt in Policy Prima Facie Only*. — *Sheldon v. Atlantic F. & M. Ins. Co.*, 26 N. Y. 460, 84 Am. Dec. 213 [*disapproving* *Goit v. National Protection Ins. Co.*, 25 Barb. (N. Y.) 189; *New York Cent. Ins. Co. v. National Protection Ins. Co.*, 20 Barb. (N. Y.) 468]; *Baker v. Union Mut. L. Ins. Co.*, 43 N. Y. 283; *Pennsylvania Ins. Co. v. Smith*, 3 Whart. (Pa.) 520; *Texas Mut. L. Ins. Co. v. Davidge*, 51 Tex. 244; *Troy F. Ins. Co. v. Carpenter*, 4 Wis. 20; *Whiting v. Mississippi Valley Manufacturers' Mut. Ins. Co.*, 76 Wis. 592. And see *Henschel v. Oregon F. & M. Ins. Co.*, 4 Wash. 476.

In *Mayo v. Pew*, 101 Mass. 555, it was decided that the insurers, after delivering to a broker a policy made out in the name of the insured, containing an acknowledgment of the receipt of the premium, could not insist as a condition precedent on their own receipt of the premium note which was delivered by the insured to the broker at the time of receiving the policy.

3. *Receipt Not in Compliance with Policy*. — *American L. Ins. Co. v. Green*, 57 Ga. 469.

4. *Matters Material to Risk* — *Opinions Not Admissible* — *England*. — *Carter v. Boehm*, 3 Burr. 1905; *Durrell v. Bederley*, Holt N. P. 286; *Campbell v. Rickards*, 5 B. & Ad. 840, 27 E. C. L. 207.

United States. — *Penn Mut. L. Ins. Co. v. Mechanics' Sav. Bank, etc., Co.*, 72 Fed. Rep. 413. See also *Milwaukee, etc., R. Co. v. Kellogg*, 94 U. S. 472.

Maine. — *Joyce v. Maine Ins. Co.*, 45 Me. 169, 71 Am. Dec. 536; *Cannell v. Phoenix Ins. Co.*, 59 Me. 582; *Thayer v. Providence Washington Ins. Co.*, 70 Me. 539; *White v. Phoenix Ins. Co.*, 83 Me. 279.

Massachusetts. — *Mulry v. Mohawk Valley Ins. Co.*, 5 Gray (Mass.) 541, 66 Am. Dec. 380; *Lyman v. State Mut. F. Ins. Co.*, 14 Allen (Mass.) 329; *Luce v. Dorchester Mut. F. Ins. Co.*, 105 Mass. 297, 7 Am. Rep. 522; *First Cong. Church v. Holyoke Mut. F. Ins. Co.*, 158 Mass. 475, 35 Am. St. Rep. 508.

Michigan. — *Hill v. Lafayette Ins. Co.*, 2 Mich. 481.

Ohio. — *Hartford Protection Ins. Co. v. Harmer*, 2 Ohio St. 452, 59 Am. Dec. 684.

sustain the admissibility of the testimony of experts concerning the usage of insurance companies in charging higher rates of premium or in rejecting risks in consequence of the existence of certain conditions which existed at the time of obtaining the insurance, or which afterwards arose.¹ But a different view appears to have been taken in *Maine*,² and the usage of a particular company in this respect is inadmissible.³

(2) *Life Insurance*. — The usage of life-insurance companies to raise premiums or reject risks on account of the existence of particular conditions has also been considered to be admissible,⁴ while the opinion of an insurance expert as to the materiality of such conditions is not admissible.⁵

f. TITLE. — When the title to the property at the time of taking out the insurance is put in issue, any legal evidence bearing upon such issue is admissible.⁶ And the fact that the evidence tends to show an equitable rather than a legal title does not render it inadmissible.⁷

g. FIRE CAUSED BY INSURED. — Where the defense to an action on a fire-

Oregon. — *Hahn v. Guardian Assur. Co.*, 23 Oregon 576, 37 Am. St. Rep. 709.

Pennsylvania. — *Franklin F. Ins. Co. v. Gruver*, 100 Pa. St. 266. Compare *Hartman v. Keystone Ins. Co.*, 21 Pa. St. 466.

Tennessee. — *Kirby v. Phoenix Ins. Co.*, 9 Lea (Tenn.) 142.

Opinions Admissible — England. — *Seaman v. Fonereau*, 2 Stra. 1183; *Berthon v. Loughman*, 2 Stark. 258, 3 E. C. L. 400; *Rickards v. Murdoch*, 10 B. & C. 527, 21 E. C. L. 123; *Elton v. Larkins*, 5 C. & P. 392, 24 E. C. L. 375. And see *Chapman v. Walton*, 10 Bing. 57, 25 E. C. L. 28; *Ionides v. Pender*, L. R. 9 Q. B. 531.

United States. — *Moses v. Delaware Ins. Co.*, 1 Wash. (U. S.) 386; *Marshall v. Union Ins. Co.*, 2 Wash. (U. S.) 357.

Illinois. — *Traders' Ins. Co. v. Catlin*, 163 Ill. 355.

Iowa. — *Mitchell v. Home Ins. Co.*, 32 Iowa 424; *Russell v. Cedar Rapids Ins. Co.*, 78 Iowa 216. Compare *Lee v. Agricultural Ins. Co.*, 79 Iowa 379; *Warshawky v. Anchor Mut. F. Ins. Co.*, 98 Iowa 221.

Missouri. — *Kern v. South St. Louis Mut. Ins. Co.*, 40 Mo. 19.

New York. — *Leitch v. Atlantic Mut. Ins. Co.*, 66 N. Y. 100; *Cornish v. Farm Buildings F. Ins. Co.*, 74 N. Y. 297, *distinguishing* *Jefferson Ins. Co. v. Cotheal*, 7 Wend. (N. Y.) 72, 22 Am. Dec. 567.

1. Usage of Insurers as to Particular Risks — England. — *Chaurand v. Angerstein*, Peake N. P. (ed. 1795) 43; *Haywood v. Rodgers*, 4 East 590; *Littledale v. Dixon*, 1 B. & P. N. R. 152; *Quin v. National Assur. Co.*, *Jones & C.* 316; *Ionides v. Pender*, L. R. 9 Q. B. 531.

United States. — *Penn Mut. L. Ins. Co. v. Mechanics Sav. Bank, etc.*, Co., 72 Fed. Rep. 413; *Hawes v. New England Mut. Marine Ins. Co.*, 2 Curt. (U. S.) 229; *McLanahan v. Universal Ins. Co.*, 1 Pet. (U. S.) 170.

Maryland. — *Planters' Mut. Ins. Co. v. Rowland*, 56 Md. 236.

Massachusetts. — *Mulry v. Mohawk Valley Ins. Co.*, 5 Gray (Mass.) 541, 66 Am. Dec. 380; *Luce v. Dorchester Mut. F. Ins. Co.*, 105 Mass. 297, 7 Am. Rep. 522; *First Cong. Church v. Holyoke Mut. F. Ins. Co.*, 158 Mass. 475, 35 Am. St. Rep. 508.

New Jersey. — *Martin v. Franklin F. Ins. Co.*, 42 N. J. L. 46.

New York. — *Hobby v. Dana*, 17 Barb. (N. Y.) 111.

South Carolina. — *Pelzer Mfg. Co. v. Sun Fire Office*, 36 S. Car. 213.

Tennessee. — *Kirby v. Phoenix Ins. Co.*, 13 Lea (Tenn.) 340.

2. *Joyce v. Maine Ins. Co.*, 45 Me. 168, 71 Am. Dec. 536.

3. Custom of Particular Company Inadmissible. — *Carter v. Boehm*, 3 Burr. 1905; *Willow Grove Creamery Co. v. Planters' Mut. Ins. Co.*, 77 Md. 532; *Luce v. Dorchester Mut. F. Ins. Co.*, 105 Mass. 297, 7 Am. Rep. 522; *Hartford Protection Ins. Co. v. Harmer*, 2 Ohio St. 452, 59 Am. Dec. 684.

In *German-American Ins. Co. v. Steiger*, 109 Ill. 254, it was decided that after the admission without objection of the opinions of witnesses to the effect that there was an increase of risk by the use of certain machinery, the exclusion of evidence that the risk was uninsurable after the use of such machinery furnished no ground of complaint.

4. Life Insurance — Matters Material to Risk. — *Rawls v. American Mut. L. Ins. Co.*, 27 N. Y. 287, 84 Am. Dec. 280; *Higbie v. Guardian Mut. L. Ins. Co.*, 53 N. Y. 603; *Hartman v. Keystone Ins. Co.*, 21 Pa. St. 466; *Schwarzbach v. Ohio Valley Protective Union*, 25 W. Va. 622, 52 Am. Rep. 227.

5. *Penn Mut. L. Ins. Co. v. Mechanics Sav. Bank, etc.*, Co., 72 Fed. Rep. 413.

6. Issue as to Title. — *Manchester F. Assur. Co. v. Feibelman*, 118 Ala. 308.

So it was held that a judgment establishing the plaintiff's title was admissible though the defendant was not a party thereto, the loss having occurred after the termination of the suit. *Sprigg v. American Cent. Ins. Co.*, 101 Ky. 185.

And in an action by a railroad company on goods carried by it, it was allowed to introduce evidence that the goods could not have been removed from the yard because of an injury to the derrick, and that, consequently, they were held by the railroad company as carrier at the time of the fire. *Liverpool, etc., Ins. Co. v. McNeill*, 80 Fed. Rep. 132, 59 U. S. App. 499.

7. Equitable Title. — *Newman v. Springfield F. & M. Ins. Co.*, 17 Minn. 123; *Philadelphia F. Assoc. v. Jones*, (Tex. Civ. App. 1897) 40 S. W. Rep. 44.

insurance policy is that the fire was caused by the insured, any evidence tending to show motive on his part for causing the fire is admissible,¹ as that the amount of insurance was in excess of the value of the property;² and evidence as to the character of the fire is also admissible.³ The insured may, to rebut the charge, introduce evidence that property belonging to him or his near relatives, which was not insured, was also destroyed.⁴ Evidence of the good character of the insured is not admissible in his favor.⁵ Evidence that certain persons feared that the insured would cause a fire is inadmissible.⁶ Evidence that the insured made a false claim against another insurance company is admissible,⁷ as also is evidence that he asked a person to set fire to a building belonging to another with the purpose of then asking such person to set fire to his own building.⁸

Quantum of Evidence. — It is now generally held that a defense in an action on a policy of fire insurance on the ground that the fire was caused by the insured need be sustained only by a preponderance of evidence, and that the fact that an accusation of crime is involved does not require evidence excluding all reasonable doubt.⁹ In *England*, however, and occasionally in the *United States*, the contrary rule has been maintained.¹⁰ It is proper for the jury to consider the presumption in favor of one's innocence of a criminal act.¹¹

h. INTENTIONAL KILLING OF INSURED. — On an issue as to whether one insured by an accident policy was killed intentionally, evidence that the insured was found dead of wounds from a gun, and that another person was

1. Motive.—*Barnett v. Farmers' Mut. F. Ins. Co.*, 115 Mich. 247; *Storm v. Phenix Ins. Co.*, (Supm. Ct. Gen. T.) 15 N. Y. Supp. 281; *Portland First Nat. Bank v. Philadelphia F. Assoc.*, 33 Oregon 172; *Agnew v. Farmers' Mut. Protective F. Ins. Co.*, 95 Wis. 445; *Knopke v. Germantown Farmers' Mut. Ins. Co.*, 99 Wis. 289.

2. Hotchkiss v. Germania F. Ins. Co., 5 Hun (N. Y.) 91; *Dwyer v. Continental Ins. Co.*, 63 Tex. 354.

3. Character of Fire.—*Portland First Nat. Bank v. Philadelphia F. Assoc.*, 33 Oregon 172.

4. Other Property Destroyed.—*Menk v. Home Ins. Co.*, 76 Cal. 50, 9 Am. St. Rep. 158; *Farmers' Mut. F. Ins. Co. v. Crampton*, 43 Mich. 421.

5. Character.—*Stone v. Hawkeye Ins. Co.*, 68 Iowa 737, 56 Am. Rep. 870; *American F. Ins. Co. v. Hazen*, 110 Pa. St. 530. *Contra*, *Mosley v. Vermont Mut. F. Ins. Co.*, 55 Vt. 142.

6. Phoenix Ins. Co. v. Padgett, (Tex. Civ. App. 1897) 42 S. W. Rep. 800.

As to evidence that an employee of the insured had the reputation of being an incendiary, see *Portland First Nat. Bank v. Commercial Union Assur. Co.*, 33 Oregon 43.

7. Conduct of Insured.—*Barnett v. Farmers' Mut. F. Ins. Co.*, 115 Mich. 247.

8. Kelley-Goodfellow Shoe Co. v. Liberty Ins. Co., 8 Tex. Civ. App. 227.

9. Preponderance of Evidence Sufficient—United States.—*Huchberger v. Merchants' F. Ins. Co.*, 4 Biss. (U. S.) 265; *Mack v. Lancashire Ins. Co.*, 2 McCrary (U. S.) 211.

Indiana.—*Continental Ins. Co. v. Jachnichen*, 110 Ind. 59, 59 Am. Rep. 194.

Iowa.—*Behrens v. Germania Ins. Co.*, 58 Iowa 26, citing *Welch v. Jugenheimer*, 56 Iowa 11, 41 Am. Rep. 77.

Kentucky.—*Etna Ins. Co. v. Johnson*, 11 Bush (Ky.) 587, 21 Am. Rep. 223.

Louisiana.—*Hoffman v. Western M. & F. Ins. Co.*, 1 La. Ann. 216; *Wightman v. Western M. & F. Ins. Co.*, 8 Rob. (La.) 442.

Massachusetts.—*Schmidt v. New York Union Mut. F. Ins. Co.*, 1 Gray (Mass.) 529; *Gordon v. Parmalee*, 15 Gray (Mass.) 413.

Minnesota.—*Thoreson v. Northwestern Nat. Ins. Co.*, 29 Minn. 107.

Missouri.—*Marshall v. Thames F. Ins. Co.*, 43 Mo. 586; *Rothschild v. American Cent. Ins. Co.*, 62 Mo. 356.

New Jersey.—*Kane v. Hibernia Ins. Co.*, 39 N. J. L. 697, 23 Am. Rep. 239.

New York.—*Johnson v. Agricultural Ins. Co.*, 25 Hun (N. Y.) 251.

Pennsylvania.—*Somerses County Mut. F. Ins. Co. v. Usaw*, 112 Pa. St. 80, 56 Am. Rep. 307.

West Virginia.—*Simmons v. West Virginia Ins. Co.*, 8 W. Va. 474.

Wisconsin.—*Washington Union Ins. Co. v. Wilson*, 7 Wis. 169; *Blaeser v. Milwaukee Mechanics' Mut. Ins. Co.*, 37 Wis. 31, 19 Am. Rep. 747.

See also *Knowles v. Scribner*, 57 Me. 495; *Ellis v. Buzzell*, 60 Me. 209, 11 Am. Rep. 204; *Farmers' Mut. F. Ins. Co. v. Gargett*, 42 Mich. 289.

10. Proof Beyond Reasonable Doubt Required.—*Thurtell v. Beaumont*, 8 Moo. 612, 1 Bing. 339, 8 E. C. L. 538; *Richardson v. Canada West Farmers' Ins. Co.*, 17 U. C. C. P. 341; *McConnell v. Delaware Mut. Safety Ins. Co.*, 18 Ill. 228; *Germania F. Ins. Co. v. Klewer*, 129 Ill. 599. But see *Orient Ins. Co. v. Weaver*, 22 Ill. App. 122.

11. Presumption of Innocence.—*Huchberger v. Merchants' F. Ins. Co.*, 4 Biss. (U. S.) 265; *Scott v. Home Ins. Co.*, 1 Dill. (U. S.) 105; *American Mut. Ins. Co. v. Anderson*, 33 N. J. L. 151; *Kane v. Hibernia Ins. Co.*, 39 N. J. L. 697, 23 Am. Rep. 239; *Portland First Nat. Bank v. Commercial Assur. Co.*, 33 Oregon 43.

at the time near by, and that the two had previously quarreled, was held admissible, as was evidence that half an hour after the killing such other person stated that he had killed the insured; but the records of the indictment of such person for the killing and of his subsequent pardon were held to be too remote.¹

2. AMOUNT OF LOSS. — Except in the case of a valued policy, the amount named in the policy is not evidence of the value of the goods.² A former policy on the same stock, shown to the insurer at the time of taking out the insurance, is competent in connection with evidence that the quantity and value remained about the same until the time of the loss.³ The original cost of the goods destroyed is admissible,⁴ provided the condition at the time of purchase and of loss was the same.⁵ The cost of replacing the property lost or repairing the injury is admissible.⁶ So evidence of the cost at the time of trial of such a building as that destroyed is admissible as bearing on its value at the time of the loss;⁷ and the portion of the cost price which could be obtained for the injured stock after the fire is admissible.⁸ If the property has no fixed market value, the price at which the insured has offered to sell it is admissible.⁹ Where no better evidence is obtainable, one who has seen the property may testify as to its character and extent,¹⁰ as may the plaintiff himself;¹¹ and persons familiar with property of that character who have seen it may testify as to its value.¹² But persons who merely saw the debris and ashes after the fire cannot give their opinions as to the amount of property destroyed.¹³ The rental of the building insured is admissible on the question of its value,¹⁴ but the rental two years prior to the loss has been held to be too remote.¹⁵ Evidence as to the amount of loss is not rendered inadmissible by the fact that the policy provided for the arbitration or appraisal of the loss, if such provision is waived by the insurer.¹⁶

Accounts and Inventories. — The books of account of the persons whose goods were injured or destroyed are, if duly kept and proven, admissible to show the value of the goods;¹⁷ and if the accounts are voluminous, a statement

1. Intentional Killing of Insured. — *Masons' Fraternal Acc. Assoc. v. Riley*, 65 Ark. 261. See also the title ACCIDENT INSURANCE, vol. 1, pp. 331, 332.

2. Amount Named in Policy. — *Standard F. Ins. Co. v. Wren*, 11 Ill. App. 242; *Joy v. Security F. Ins. Co.*, 83 Iowa 12; *German Ins. Co. v. Everett*, (Tex. Civ. App. 1896) 36 S. W. Rep. 125.

3. Former Policy. — *Gulf City Ins. Co. v. Stephens*, 51 Ala. 121.

4. Cost of Property. — *St. Paul F. & M. Ins. Co. v. Gotthelf*, 35 Neb. 351.

5. Kelly v. Norwich F. Ins. Co., 82 Iowa 137, where it was held that the value of "cold-storage eggs" destroyed cannot be shown by the price paid for the eggs to the producers.

6. Cost of Repairing Loss. — *Phoenix Ins. Co. v. Copeland*, 86 Ala. 551; *Caraher v. Royal Ins. Co.*, 63 Hun (N. Y.) 82; *Sherlock v. German-American Ins. Co.*, 21 N. Y. App. Div. 18; *Cummins v. German American Ins. Co.*, 192 Pa. St. 359.

7. Holter Lumber Co. v. Fireman's Fund Ins. Co., 18 Mont. 282.

8. Joy v. Security F. Ins. Co., 83 Iowa 12.

9. Price at Which Offered. — *Joy v. Security F. Ins. Co.*, 83 Iowa 12.

10. Direct Testimony as to Property Destroyed. — *Living v. Home Mut. F. Ins. Co.*, 50 Mich. 207.

11. Coleman v. Retail Lumberman's Ins. Assoc., (Minn. 1899) 79 N. W. Rep. 588; *Whit-*

ing v. Mississippi Valley Manufacturers' Mut. Ins. Co., 76 Wis. 592.

12. Opinions as to Value. — *Gulf City Ins. Co. v. Stephens*, 51 Ala. 121; *Graves v. Merchants, etc., Ins. Co.*, 82 Iowa 637, 31 Am. St. Rep. 507; *Howard v. City F. Ins. Co.*, 4 Den. (N. Y.) 502; *Girard F. Ins. Co. v. Braden*, 96 Pa. St. 81. See also as to evidence of persons testifying as to value, *Names v. Union Ins. Co.*, 104 Iowa 612; *Siltz v. Hawkeye Ins. Co.*, 71 Iowa 710; *Metzger v. Manchester F. Assur. Co.*, 102 Mich. 334. See the title EXPERT AND OPINION EVIDENCE, vol. 12, p. 414.

13. Amount of Property Destroyed. — *Birmingham F. Ins. Co. v. Pulver*, 126 Ill. 329, 9 Am. St. Rep. 598; *Pulver v. Rochester German Ins. Co.*, 35 Ill. App. 24.

14. Rental of Building. — *Cumberland Valley Mut. Protection Co. v. Schell*, 29 Pa. St. 31.

15. Atlantic Ins. Co. v. Manning, 3 Colo. 224.

16. Effect of Provision for Arbitration. — *Western Assur. Co. v. Hall*, (Ala. 1898) 24 So. Rep. 936; *Virginia F. & M. Ins. Co. v. Cannon*, 18 Tex. Civ. App. 588; *Springfield F. & M. Ins. Co. v. Cannon*, (Tex. Civ. App. 1898) 46 S. W. Rep. 375. But see *Everett v. London, etc., Ins. Co.*, 142 Pa. St. 332, 24 Am. St. Rep. 499, 28 W. N. C. (Pa.) 203.

17. Books of Account. — *Ætna Ins. Co. v. Weide*, 9 Wall. (U. S.) 677; *German Ins. Co. v. Amsbaugh*, 8 Kan. App. 197; *Levine v. Lancashire Ins. Co.*, 66 Minn. 138; *Coleman v. Retail Lumberman's Ins. Assoc.*, (Minn.

made therefrom by an expert accountant is admissible.¹ But a witness cannot testify as to the contents of such books when they were not kept by him and are not verified in any way.² Inventories of the goods destroyed, made before their destruction, are admissible, if duly proven and authenticated, to show the amount of the loss;³ and it is immaterial that the inventory was made by a former owner of the goods before they became the property of the insured.⁴ The quantity of goods purchased after the making of the inventory and before the loss, the amount of sales, and the average profit thereon may also be shown.⁵ If an inventory has been destroyed, parol evidence of its contents is admissible.⁶ Where the policy required the insured to keep a set of books showing a complete record of the business, inventories and accounts not complying with such requirement are inadmissible;⁷ but a requirement that books shall be kept does not render inadmissible other testimony as to the value of the property.⁸ A schedule of the goods destroyed, made after the fire, by the bookkeeper of the insured, may be used by him to refresh his memory in testifying,⁹ and an invoice made by a sheriff levying an attachment after the fire has been held to be admissible.¹⁰

Overvaluation. — Evidence that the person whose stock of goods was insured was losing money in his business is not admissible to show fraud by him in making false statements as to the amount of goods which he had on hand at the time of the fire,¹¹ nor is evidence of drunkenness or idleness on his part after the fire admissible to show that he saved a greater amount than was stated by him.¹² Offers for the insured property made after the issuance of the policy are not admissible to show an overvaluation of the property at the time of obtaining a valued policy.¹³ To show that the plaintiff has exaggerated his loss, an affidavit as to the value of his stock, made at the time of applying for a trader's license, is admissible,¹⁴ as is a return made by him to the tax assessor.¹⁵ And it has been held that in the absence of trustworthy books and of specific evidence by persons other than the plaintiffs themselves, the defendant may show that persons engaged in the same trade in that locality did not carry a stock of more than a certain proportion of the annual sales, and that, consequently, the claim of the insured must be exaggerated.¹⁶

Total or Partial Loss. — On an issue as to whether there was a total loss, evidence that only a certain portion of the building had been destroyed, that about ninety per cent. of the material thereof was in good condition, and that the building could be entirely renovated by replacing the damaged portions,

1899) 79 N. W. Rep. 588; *De Groot v. Fulton F. Ins. Co.*, 4 Robt. (N. Y.) 504; *Orient Ins. Co. v. Moffatt*, 15 Tex. Civ. App. 385; *F. Dohmen Co. v. Niagara F. Ins. Co.*, 96 Wis. 38.

1. *Guarantee Co. of North America v. Mutual Bldg., etc., Assoc.*, 57 Ill. App. 254.

2. *F. Dohmen Co. v. Niagara F. Ins. Co.*, 96 Wis. 38.

3. **Inventories.** — *Insurance Companies v. Weides* 14 Wall. (U. S.) 375; *German Ins. Co. v. Amsbaugh*, 8 Kan. App. 137; *Wallach v. Commercial F. Ins. Co.*, 12 Daly (N. Y.) 387; *West Branch Lumberman's Exch. v. American Cent. Ins. Co.*, 183 Pa. St. 366, 42 W. N. C. (Pa.) 6; *Phoenix Ins. Co. v. Padgitt*, (Tex. Civ. App. 1897) 42 S. W. Rep. 800.

4. *Scottish Union, etc., Ins. Co. v. Stubbs*, 98 Ga. 754.

5. *Read v. State Ins. Co.*, 103 Iowa 307; *Scottish Union, etc., Ins. Co. v. Keene*, 85 Md. 263. And see *Levine v. Lancashire Ins. Co.*, 66 Minn. 138; *Coleman v. Retail Lumberman's Ins. Assoc.*, (Minn. 1899) 79 N. W. Rep. 588.

6. **Parol Evidence as to Inventory.** — *Liverpool,*

etc., Ins. Co. v. Kearney, (Indian Ter. 1898) 46 S. W. Rep. 414; *McNutt v. Virginia F. & M. Ins. Co.*, (Penn. Ch. 1897) 45 S. W. Rep. 61.

7. **Requirements as to Keeping Books.** — *Sun Mut. Ins. Co. v. Dudley*, 65 Ark. 240.

8. *Rissler v. American Cent. Ins. Co.*, 150 Mo. 366.

9. **Schedule or Invoice Made After Fire.** — *Kahn v. Traders Ins. Co.*, 4 Wyo. 419.

10. *Orient Ins. Co. v. Moffatt*, 15 Tex. Civ. App. 385.

11. **Condition of Business of Insured.** — *Morley v. Liverpool, etc., Ins. Co.*, 92 Mich. 590.

12. **Conduct of Insured After Fire.** — *Phoenix Ins. Co. v. Padgitt*, (Tex. Civ. App. 1897) 42 S. W. Rep. 800.

13. **Offers for Property.** — *Wood v. Firemen's F. Ins. Co.*, 126 Mass. 316.

14. **Statements by Insured.** — *Mispelhorn v. Farmers' F. Ins. Co.*, 53 Md. 473.

15. *Probst v. American Cent. Ins. Co.*, 2 Mo. App. Rep. 1280, 64 Mo. App. 408.

16. **Custom in Trade.** — *Home Ins. Co. v. Weide*, 11 Wall. (U. S.) 438. But see *Phoenix F. Ins. Co. v. Phillips*, 13 Wend. (N. Y.) 81.

has been held admissible.¹

3. Particular Classes of Evidence — a. POLICY AND APPLICATION. — According to some authorities the policy is admissible without the application on which it was issued although the latter is expressly made a part of the policy;² but elsewhere it is held that the policy is not admissible without the application.³ Where the statute requires that the application be attached to the policy in order to be a part thereof, the policy is admissible without the application if this is not so attached.⁴ And it has been held that where the application is not admissible for failure to comply with such a statute, parol evidence of the contents of the application is admissible.⁵ The policy is also admissible without the application if the latter is merely referred to in the policy, and is not made a part thereof,⁶ as it is where the alleged application was never signed by the applicant or by his authority.⁷ The policy is likewise admissible without the application if this is in the possession of the insurance company, which refuses to produce it.⁸

b. PAROL EVIDENCE. — As in the case of other written contracts, parol evidence is inadmissible to vary or contradict a written policy or contract of insurance.⁹ It is, however, admissible to explain the meaning and scope

1. Total or Partial Loss. — *Royal Ins. Co. v. McIntyre*, 90 Tex. 170, 59 Am. St. Rep. 797.

2. Policy Admissible Without Application. — *Travelers' Ins. Co. v. Sheppard*, 85 Ga. 751; *Cushman v. U. S. Life Ins. Co.*, 4 Hun (N. Y.) 783; *Roach v. Kentucky Mut. Security Fund Co.*, 28 S. Car. 431.

3. Contrary Decisions. — *Rogers v. Cedar Rapids Ins. Co.*, 72 Iowa 448; *American Underwriter's Assoc. v. George*, 97 Pa. St. 238; *Lycoming F. Ins. Co. v. Storrs*, 97 Pa. St. 361. And see *Megrue v. United L. Ins. Assoc.*, 71 Hun (N. Y.) 174; *Silverman v. Empire L. Ins. Co.*, (N. Y. City Ct. Gen. T.) 24 Misc. (N. Y.) 399.

4. Application Not Attached to Policy. — *Imperial F. Ins. Co. v. Dunham*, 117 Pa. St. 460, 2 Am. St. Rep. 686; *New Era L. Assoc. v. Musser*, 120 Pa. St. 384; *Norristown Title Co. v. Hancock Ins. Co.*, 132 Pa. St. 385; *Pickett v. Pacific Mut. L. Ins. Co.*, 144 Pa. St. 79, 27 Am. St. Rep. 618; *Mahon v. Pacific Mut. L. Ins. Co.*, 144 Pa. St. 409.

5. Considine v. Metropolitan L. Ins. Co., 165 Mass. 462; *Nugent v. Greenfield L. Assoc.*, 172 Mass. 278.

6. Application Merely Referred To. — *Edington v. Mutual L. Ins. Co.*, 67 N. Y. 185; *Albert v. Mutual L. Ins. Co.*, 122 N. Car. 92.

7. Application Not Signed. — *Allemania F. Ins. Co. v. Peck*, 133 Ill. 233; *Commercial Union Assur. Co. v. Elliott*, (Pa. 1888) 13 Atl. Rep. 790; *Harvey v. Parkersburg Ins. Co.*, 37 W. Va. 272; *Dunbar v. Phenix Ins. Co.*, 72 Wis. 492.

8. Application in Insurer's Possession. — *Albert v. Mutual L. Ins. Co.*, 122 N. Car. 92; *American Underwriter's Assoc. v. George*, 97 Pa. St. 238.

9. Parol Evidence to Vary Policy — England. — *Reis v. Scottish Equitable L. Assur. Soc.*, 2 H. & N. 19; *Hare v. Barstow*, 8 Jur. 928; *Weston v. Emes*, 1 Taunt. 115; *Mason v. Hartford F. Ins. Co.*, 29 U. C. Q. B. 585.

United States. — *Thompson v. Knickerbocker L. Ins. Co.*, 104 U. S. 252; *Orient Mut. Ins. Co. v. Wright*, 1 Wall. (U. S.) 456; *Sperry v. Springfield F. & M. Ins. Co.*, 26 Fed. Rep. 234; *Candee v. Citizens' Ins. Co.*, 4 Fed. Rep.

143; *Union Mut. L. Ins. Co. v. Mowry*, 96 U. S. 544.

Alabama. — *Russell v. Russell*, 64 Ala. 500; *Mobile L. Ins. Co. v. Pruett*, 74 Ala. 487.

Arkansas. — *Robinson v. German Ins. Co.*, 51 Ark. 441.

Georgia. — *Mutual Ben. L. Ins. Co. v. Ruse*, 8 Ga. 536; *Liverpool, etc., Ins. Co. v. Morris*, 79 Ga. 666.

Illinois. — *Leinweber v. Forest City Ins. Co.*, 32 Ill. App. 190; *Illinois Cent. Ins. Co. v. Wolf*, 37 Ill. 354, 87 Am. Dec. 251; *Schmidt v. Peoria M. & F. Ins. Co.*, 41 Ill. 295; *Winneshiek Ins. Co. v. Holzgrafe*, 53 Ill. 516, 5 Am. Rep. 64; *Hartford F. Ins. Co. v. Webster*, 69 Ill. 392.

Louisiana. — *Porter v. Sandridge*, 32 La. Ann. 449; *Todd v. Piedmont, etc., L. Ins. Co.*, 34 La. Ann. 63; *Weinberger v. Merchants' Ins. Co.*, 41 La. Ann. 31.

Maryland. — *Baltimore F. Ins. Co. v. Loney*, 20 Md. 20; *Hough v. People's F. Ins. Co.*, 36 Md. 398.

Massachusetts. — *Whitney v. Haven*, 13 Mass. 172; *Lewis v. Thatcher*, 15 Mass. 431. *Compare* *Sanborn v. Fireman's Ins. Co.*, 16 Gray (Mass.) 448, 77 Am. Dec. 419; *Markey v. Mutual Ben. L. Ins. Co.*, 103 Mass. 78; *Fitchburg Sav. Bank v. Amazon Ins. Co.*, 125 Mass. 431; *Batchelder v. Queen Ins. Co.*, 135 Mass. 449; *Pierce v. Charter Oak L. Ins. Co.*, 138 Mass. 151; *Finney v. Bedford Commercial Ins. Co.*, 8 Met. (Mass.) 348, 41 Am. Dec. 515; *Holmes v. Charlestown Mut. F. Ins. Co.*, 10 Met. (Mass.) 211, 43 Am. Dec. 428.

Minnesota. — *Frost's Detroit Lumber, etc., Works v. Millers', etc., Mut. Ins. Co.*, 37 Minn. 300, 5 Am. St. Rep. 846; *Bromberg v. Minnesota F. Assoc.*, 45 Minn. 318; *Stensgaard v. St. Paul Real Estate Title Ins. Co.*, 50 Minn. 429.

Missouri. — *Bunce v. Beck*, 43 Mo. 266; *Giddings v. Phoenix Ins. Co.*, 90 Mo. 272.

New Jersey. — *Franklin F. Ins. Co. v. Martin*, 40 N. J. L. 568, 29 Am. Rep. 271.

New York. — *Harper v. Albany Mut. Ins. Co.*, 17 N. Y. 194; *Van Tassel v. Greenwich Ins. Co.*, 28 N. Y. App. Div. 163; *New York v. Brooklyn F. Ins. Co.*, 3 Abb. App. Dec. (N. Y.) 251; *New York v. Brooklyn F. Ins. Co.*, 41

which it was intended to give to the words used to describe the property insured;¹ and for this purpose evidence of the usage of the trade or business in which the insured property is employed is admissible.² Parol evidence is also admissible, as in the case of all written contracts, to explain technical words and phrases in the policy or to show that common words therein have by usage obtained a technical meaning in the particular connection in which they are used.³ So where a policy was issued on a "fancy-goods and Yankee-notion store," it was held that evidence was admissible to show that fireworks were an ordinary part of the stock of such stores, so as to entitle the insured to keep them, although the policy provided that fireworks should not be covered unless "specially written in the policy."⁴ When the words designating the beneficiaries of the insurance are ambiguous or indefinite, parol evidence is admissible to show who are meant thereby and what their interests are.⁵

Barb. (N. Y.) 231; *Birmingham v. Empire Ins. Co.*, 42 *Barb. (N. Y.)* 457; *St. Nicholas Ins. Co. v. Mercantile Mut. Ins. Co.*, 5 *Bosw. (N. Y.)* 238; *Hovey v. American Mut. Ins. Co.*, 2 *Duer (N. Y.)* 554; *Mellen v. National Ins. Co.*, 1 *Hall (N. Y.)* 452; *Stebbins v. Globe Ins. Co.*, 2 *Hall (N. Y.)* 632; *Alston v. Mechanics' Mut. Ins. Co.*, 4 *Hill (N. Y.)* 329; *Edington v. Mutual L. Ins. Co.*, 5 *Hun (N. Y.)* 1; *Mumford v. Hallett, 1 Johns. (N. Y.)* 433; *New York Ins. Co. v. Thomas, 3 Johns. Cas. (N. Y.)* 1; *Pohalski v. Mutual L. Ins. Co.*, 56 *N. Y.* 640, 36 *N. Y. Super. Ct.* 234; *Hone v. Mutual Safety Ins. Co.*, 1 *Sandf. (N. Y.)* 137; *Rölker v. Great Western Ins. Co.*, 2 *Sweeny (N. Y.)* 275.

Pennsylvania. — *Meadowcraft v. Standard F. Ins. Co.*, 61 *Pa. St.* 91; *State F. & M. Ins. Co. v. Porter*, 3 *Grant Cas. (Pa.)* 123.

Virginia. — *Lynchburg F. Ins. Co. v. West*, 76 *Va.* 575, 44 *Am. Rep.* 177; *Home Ins. Co. v. Gwahnmeier*, 82 *Va.* 923.

See also the title **PAROL EVIDENCE**.

1. Explanation of Description — *United States.* — *Mauger v. Holyoke Mut. F. Ins. Co.*, *Holmes (U. S.)* 287.

Georgia. — *Scurry v. Cotton States L. Ins. Co.*, 51 *Ga.* 624.

Maine. — *Storer v. Elliot F. Ins. Co.*, 45 *Me.* 175; *Hartwell v. California Ins. Co.*, 84 *Me.* 524.

New York. — *Bowman v. Agricultural Ins. Co.*, 59 *N. Y.* 521.

Pennsylvania. — *Lycoming Mut. Ins. Co. v. Sailer*, 67 *Pa. St.* 108; *Stacey v. Franklin F. Ins. Co.*, 2 *W. & S. (Pa.)* 506; *Graybill v. Penn Tp. Mut. F. Ins. Assoc.*, 170 *Pa. St.* 75, 50 *Am. St. Rep.* 747.

Texas. — *Phoenix Ins. Co. v. Dunn*, (*Tex. Civ. App.* 1897) 41 *S. W. Rep.* 109.

2. Usage of Trade — *Georgia.* — *Maril v. Connecticut F. Ins. Co.*, 95 *Ga.* 604, 51 *Am. St. Rep.* 102.

Massachusetts. — *Whitmarsh v. Conway F. Ins. Co.*, 16 *Gray (Mass.)* 359, 77 *Am. Dec.* 414.

Ohio. — *Beer v. Forest City Mut. Ins. Co.*, 39 *Ohio St.* 109.

Texas. — *American Cent. Ins. Co. v. Green*, 16 *Tex. Civ. App.* 531.

Vermont. — *Mascott v. Granite State F. Ins. Co.*, 68 *Vt.* 253.

And see the title **FIRE INSURANCE**, vol. 13, p. 86.

3. Technical Words and Phrases — *Indiana.* — *Michigan Mut. L. Ins. Co. v. Custer*, 128 *Ind.* 25.

Massachusetts. — *Mooney v. Howard Ins. Co.*, 138 *Mass.* 375, 52 *Am. Rep.* 277; *Howard v. Great Western Ins. Co.*, 109 *Mass.* 384; *Houghton v. Watertown F. Ins. Co.*, 131 *Mass.* 300; *Daniels v. Hudson River F. Ins. Co.*, 12 *Cush. (Mass.)* 416, 59 *Am. Dec.* 192; *Whitmarsh v. Conway F. Ins. Co.*, 16 *Gray (Mass.)* 359, 77 *Am. Dec.* 414.

Missouri. — *Singleton v. St. Louis Mut. Ins. Co.*, 66 *Mo.* 63, 27 *Am. Rep.* 321.

New York. — *Nelson v. Sun Mut. Ins. Co.*, 71 *N. Y.* 453; *Reid v. Lancaster F. Ins. Co.*, 90 *N. Y.* 382; *Astor v. Union Ins. Co.*, 7 *Cow. (N. Y.)* 202; *Hone v. Mutual Safety Ins. Co.*, 1 *Sandf. (N. Y.)* 137; *Child v. Sun Mut. Ins. Co.*, 3 *Sandf. (N. Y.)* 26; *Sleght v. Hartshorne*, 2 *Johns. (N. Y.)* 531.

Pennsylvania. — *Weisenberger v. Harmony F. & M. Ins. Co.*, 56 *Pa. St.* 442; *Eyre v. Marine Ins. Co.*, 5 *W. & S. (Pa.)* 116.

Rhode Island. — *Evans v. Commercial Mut. Ins. Co.*, 6 *R. I.* 47.

Vermont. — *Hart v. Hammett*, 18 *Vt.* 127.

4. Barnum v. Merchants F. Ins. Co., 97 *N. Y.* 188.

5. Designation of Beneficiaries — *England.* — *Carruthers v. Sheddon*, 6 *Taunt.* 14, 1 *E. C. L.* 293.

Canada. — *Mitchell v. London F. Ins. Co.*, 12 *Ont.* 706.

United States. — *Daniels v. Citizens' Ins. Co.*, 10 *Biss. (U. S.)* 116; *Robbins v. Firemen's Fund Ins. Co.*, 16 *Blatchf. (U. S.)* 122.

Kansas. — *German F. Ins. Co. v. Thompson*, 43 *Kan.* 567.

Kentucky. — *Etna Ins. Co. v. Jackson*, 16 *B. Mon. (Ky.)* 242.

Maine. — *Stephenson v. Piscataqua F. & M. Ins. Co.*, 54 *Me.* 55.

Maryland. — *Planters' Mut. Ins. Co. v. Engle*, 52 *Md.* 468; *Fire Ins. Assoc. v. Merchants, etc.*, *Transp. Co.*, 66 *Md.* 330, 59 *Am. Rep.* 162; *Newson v. Douglass*, 7 *Har. & J. (Md.)* 417, 16 *Am. Dec.* 317.

Massachusetts. — *Shawmut Sugar Refining Co. v. Hampden Mut. Ins. Co.*, 12 *Gray (Mass.)* 540; *Foster v. U. S. Insurance Co.*, 11 *Pick. (Mass.)* 85; *Rider v. Ocean Ins. Co.*, 20 *Pick. (Mass.)* 259.

Missouri. — *Platho v. Merchants, etc., Ins. Co.*, 38 *Mo.* 248.

New York. — *Lee v. Adsit*, 37 *N. Y.* 78; *Clinnton v. Hope Ins. Co.*, 45 *N. Y.* 454; *Pitney v. Glen's Falls Ins. Co.*, 65 *N. Y.* 6; *Griswold v. Sawyer*, 125 *N. Y.* 411; *Richardson v. Home*

But evidence is not admissible to show the beneficiaries intended if they are clearly described in the policy.¹

c. DECLARATIONS BY INSURED OR BENEFICIARY. — It is a general rule that declarations by the insured are not admissible as against beneficiaries of the policy unless they may fairly be considered a part of the *res gestæ*.² Declarations by a beneficiary, however, are admissible as against him.³ So statements by the beneficiary in the preliminary proofs are admissible against him as admissions on his part of facts therein stated.⁴

d. ADMISSIONS BY INSURER'S REPRESENTATIVES. — Admissions by officers and agents of the company, made within the limits of their authority, and while performing their duties in respect to the particular matter under consideration, are admissible to bind the insurer.⁵ But such admissions are not admissible if made at a time subsequent to the exercise of their authority in that regard.⁶

e. PROOFS OF LOSS. — Preliminary proofs of loss, death, or injury, furnished to the insurer by the insured, in compliance with the stipulations in the policy, are admissible to show that they were furnished in compliance with such stipulations, but not to prove any of the facts set forth therein, they being mere *ex parte* statements.⁷ Evidence other than the proofs themselves

Ins. Co., 47 N. Y. Super. Ct. 138; Burrows v. Turner, 24 Wend. (N. Y.) 277; Catlett v. Pacific Ins. Co., 1 Wend. (N. Y.) 575, 4 Wend. (N. Y.) 89. Ohio. — Globe Ins. Co. v. Boyle, 21 Ohio St. 119; Graham v. Firemen's Ins. Co., 2 Disney (Ohio) 255.

Pennsylvania. — Fleming v. Pennsylvania Ins. Co., 12 Pa. St. 391.

South Carolina. — Graham v. American F. Ins. Co., 48 S. Car. 195, 59 Am. St. Rep. 707.

Texas. — Waxahachie First Nat. Bank v. Lancashire Ins. Co., 62 Tex. 461.

Wisconsin. — Strohn v. Hartford F. Ins. Co., 33 Wis. 657.

1. The Sidney, 23 Fed. Rep. 88; Woodbury Sav. Bank, etc., Assoc. v. Charter Oak F. & M. Ins. Co., 29 Conn. 374.

2. *Declarations by Insured.* — See the title BENEFICIARIES (IN INSURANCE), vol. 3, pp. 1018-1020, where the authorities are fully stated and considered. See also title LIFE INSURANCE.

3. *Declarations by Beneficiary.* — Furniss v. Mutual L. Ins. Co., 46 N. Y. Super. Ct. 467; Bachmeyer v. Mutual Reserve Fund L. Assoc., 82 Wis. 255.

4. *Admission in Proofs* — United States. — Mutual Ben. L. Ins. Co. v. Newton, 22 Wall. (U. S.) 32; Mutual Ben. L. Ins. Co. v. Higginbotham, 95 U. S. 380; Keels v. Mutual Reserve Fund L. Assoc., 29 Fed. Rep. 198.

Illinois. — North American F. Ins. Co. v. Zaenger, 63 Ill. 464.

Kansas. — Modern Woodmen of America v. Von Wald, 6 Kan. App. 231.

New York. — Goldschmidt v. Mutual L. Ins. Co., 33 Hun (N. Y.) 441; Spencer v. Citizens Mut. L. Ins. Assoc., 142 N. Y. 505; Hanna v. Connecticut Mut. L. Ins. Co., 150 N. Y. 526; Kipp v. Metropolitan L. Ins. Co., 41 N. Y. App. Div. 208.

5. *Admissions by Officers and Agents* — California. — Stockton Combined Harvester, etc., Works v. Glens Falls Ins. Co., 121 Cal. 167.

Illinois. — Phenix Ins. Co. v. Hart, 39 Ill. App. 517; State Ins. Co. v. Manchester F. Assur. Co., 77 Ill. App. 673; Phenix Ins. Co. v. La Pointe, 118 Ill. 384.

Indiana. — Heller v. Crawford, 37 Ind. 279.

Iowa. — Walker v. Farmers' Ins. Co., 51 Iowa 679; Bartlett v. Fireman's Fund Ins. Co., 77 Iowa 155; Reynolds v. Iowa etc., Ins. Co., 80 Iowa 563; Guinn v. Phoenix Ins. Co., 80 Iowa 346; Ruthven v. American F. Ins. Co., 102 Iowa 550; Medearis v. Anchor Mut. F. Ins. Co., 104 Iowa 88.

Maine. — Lewis v. Monmouth Mut. F. Ins. Co., 52 Me. 492.

Massachusetts. — Fogg v. Griffin, 2 Allen (Mass.) 1.

Michigan. — Mallory v. Ohio Farmers' Ins. Co., 90 Mich. 112.

Minnesota. — Powers Dry Goods Co. v. Imperial F. Ins. Co., 48 Minn. 380.

Missouri. — Franklin v. Atlantic F. Ins. Co., 42 Mo. 456; Arnold v. Hartford F. Ins. Co., 55 Mo. App. 149.

New York. — Burke v. Niagara F. Ins. Co., (Supm. Ct. Gen. T.) 12 N. Y. Supp. 254; Lang v. Eagle F. Ins. Co., 12 N. Y. App. Div. 39; Dean v. Etna L. Ins. Co., 62 N. Y. 642.

Pennsylvania. — Smith v. National L. Ins. Co., 103 Pa. St. 177, 49 Am. Rep. 121.

South Carolina. — Graham v. American F. Ins. Co., 48 S. Car. 195, 59 Am. St. Rep. 707.

Texas. — Home Forum Ben. Order v. Jones, 20 Tex. Civ. App. 68.

Washington. — Blagg v. Phoenix Ins. Co., 3 Wash. (U. S.) 5.

6. *Admissions After Event.* — American L. Ins. Co. v. Mahone, 21 Wall. (U. S.) 152; Crawford v. Transatlantic F. Ins. Co., 125 Cal. 609; John Hancock Mut. L. Ins. Co. v. Schlink, 175 Ill. 284; German F. Ins. Co. v. Schroeder, 48 Kan. 643; Hartford L. etc., Ins. Co. v. Hayden, 90 Ky. 39. Compare Graham v. American F. Ins. Co., 48 S. Car. 195, 59 Am. St. Rep. 707.

7. *Proofs Admissible for Limited Purpose Only* — California. — Menk v. Home Ins. Co., 76 Cal. 50, 9 Am. St. Rep. 158.

Florida. — Hanover F. Ins. Co. v. Lewis, 28 Fla. 209.

Georgia. — Travelers' Ins. Co. v. Sheppard, 85 Ga. 751.

Illinois. — Knickerbocker Ins. Co. v. Gould, 80 Ill. 388.

is admissible to show that they were furnished,¹ and it is not objectionable as being parol evidence.² The proofs of loss may also be admitted for the purpose of refreshing the memory of a witness as to a fact therein stated.³

Secondary Evidence of the contents of the proofs of loss may be admitted in a proper case,⁴ and it has been held that the bringing of suit is sufficient notice to the defendant insurer to produce them, to authorize the introduction of secondary evidence of their contents.⁵

Evidence Contradictory of Proofs. — The insured is not concluded by statements in his proofs, but may introduce evidence to correct mistakes therein.⁶

f. **PROCEEDINGS BEFORE CORONER.** — The finding of a coroner's jury is admissible as bearing upon the manner and cause of the death of the insured in an action on a life or accident policy,⁷ but the evidence taken before the coroner is inadmissible.⁸

g. **EXPERT AND OPINION EVIDENCE.** — The admissibility of expert or opinion evidence is considered elsewhere.⁹

Iowa. — Neese v. Farmers' Ins. Co., 55 Iowa 605; Lewis v. Burlington Ins. Co., 80 Iowa 259.

Kentucky. — Phoenix Ins. Co. v. Lawrence, 4 Met. (Ky.) 9, 81 Am. Dec. 521.

Louisiana. — Leman v. Manhattan L. Ins. Co., 46 La. Ann. 1189, 49 Am. St. Rep. 348.

Maryland. — Travelers' Ins. Co. v. Nicklas, 88 Md. 470.

Michigan. — Cook v. Standard L., etc., Ins. Co., 84 Mich. 12.

Missouri. — Browne v. Clay F. & M. Ins. Co., 68 Mo. 133; Newark v. Liverpool F., etc., Ins. Co., 30 Mo. 160, 77 Am. Dec. 608; Summers v. Home Ins. Co., 53 Mo. App. 521; Breckinridge v. American Cent. Ins. Co., 87 Mo. 62.

New York. — Pickett v. Metropolitan L. Ins. Co., 20 N. Y. App. Div. 114; Sexton v. Montgomery County Mut. Ins. Co., 9 Barb. (N. Y.) 191; Howard v. City F. Ins. Co., 4 Den. (N. Y.) 502.

Pennsylvania. — Kittaning Ins. Co. v. O'Neill, 110 Pa. St. 548; Cole v. Manchester F. Assur. Co., 188 Pa. St. 345; Penn Plate Glass Co. v. Spring Garden Ins. Co., 189 Pa. St. 255.

Tennessee. — Farrell v. Aetna F. Ins. Co., 7 Baxt. (Tenn.) 542.

Washington. — Hennessy v. Niagara F. Ins. Co., 8 Wash. 91.

West Virginia. — Schwarzbach v. Ohio Valley Protective Union, 25 W. Va. 622, 52 Am. Rep. 227.

Wisconsin. — Foster v. Fidelity, etc., Co., 99 Wis. 447.

Wyoming. — Kahn v. Traders Ins. Co., 4 Wyo. 419.

Affidavits concerning other matters obtained by the insurer are not admissible as against the insured in connection with the proofs of death. Plumb v. Penn Mut. L. Ins. Co., 108 Mich. 94.

1. Evidence as to Furnishing of Proofs. — Lampkin v. Travelers' Ins. Co., 11 Colo. App. 249; Farrell v. Farmers' Mut. F. Ins. Co., 66 Mo. App. 153, 2 Mo. App. Rep. 1297; McBride v. Rinard, 172 Pa. St. 542; Cummins v. German-American Ins. Co., 192 Pa. St. 359.

2. Commercial F. Ins. Co. v. Morris, 105 Ala. 498; Hagan v. Merchants, etc., Ins. Co., 81 Iowa 321, 25 Am. St. Rep. 493; Pelzer Mfg. Co. v. Sun Fire Office, 36 S. Car. 213.

3. Refreshing Memory of Witness. — Bini v. Smith, 36 N. Y. App. Div. 463.

4. Secondary Evidence. — Hagan v. Merchants', etc., Ins. Co., 81 Iowa 321, 25 Am. St. Rep. 493;

Dowling v. Lancashire Ins. Co., 92 Wis. 63.

5. Continental L. Ins. Co. v. Rogers, 119 Ill. 474.

6. Proofs Not Conclusive Against Insured — United States. — Connecticut Mut. L. Ins. Co. v. Schwenk, 94 U. S. 593.

Florida. — Hanover F. Ins. Co. v. Lewis, 28 Fla. 209.

Georgia. — Cotton States L. Ins. Co. v. Edwards, 74 Ga. 220.

Illinois. — Commercial Ins. Co. v. Huckerberger, 52 Ill. 464.

Indiana. — Aetna Ins. Co. v. Strout, 16 Ind. App. 160.

Massachusetts. — Campbell v. Charter Oak F., etc., Ins. Co., 10 Allen (Mass.) 213.

Michigan. — Gristock v. Royal Ins. Co., 84 Mich. 161.

New York. — Tuthill v. United L. Ins. Assoc., (Supm. Ct. Gen. T.) 21 N. Y. Supp. 191, 66 Hun (N. Y.) 632; Kipp v. Metropolitan L. Ins. Co., 41 N. Y. App. Div. 298; White v. Royal Ins. Co., (Brooklyn City Ct. Gen. T.) 8 Misc. (N. Y.) 613; Parmelee v. Hoffman F. Ins. Co., 54 N. Y. 193; National L. Assoc. v. Sturtevant, 78 Hun (N. Y.) 572; Spencer v. Citizens Mut. L. Ins. Assoc., 142 N. Y. 505; Bradley v. John Hancock Mut. L. Ins. Co., 20 N. Y. App. Div. 22; Hanna v. Connecticut Mut. L. Ins. Co., 150 N. Y. 526; McMaster v. Ins. Co. of North America, 64 Barb. (N. Y.) 536; Cummins v. Agricultural Ins. Co., 67 N. Y. 260, 23 Am. Rep. 111.

Pennsylvania. — Pittsburgh Ins. Co. v. Frazee, 107 Pa. St. 521.

West Virginia. — Smiley v. Citizens F., etc., Ins. Co., 14 W. Va. 33.

Wisconsin. — Waldeck v. Springfield F. & M. Ins. Co., 53 Wis. 129; Jarvis v. Northwestern Mut. Relief Assoc., 102 Wis. 546.

7. Proceedings Before Coroner. — Walther v. Mutual L. Ins. Co., 65 Cal. 417; U. S. Life Ins. Co. v. Vocke, 129 Ill. 557, reversing 26 Ill. App. 567; Fein v. Covenant Mut. Ben. Assoc., 60 Ill. App. 274. But see Union Cent. L. Ins. Co. v. Hollowell, 14 Ind. App. 611.

8. U. S. Life Ins. Co. v. Vocke, 129 Ill. 557; Union Cent. L. Ins. Co. v. Hollowell 14 Ind. App. 611; Ins. Co. v. Schmidt, 40 Ohio St. 112.

9. Expert and Opinion Evidence. — See the title EXPERT AND OPINION EVIDENCE, vol. 12, pp. 462-464. See also *supra*, this section, *Evidence as to Particular Issues—Matters Material to Risk;* and titles LIFE INSURANCE; MARINE INSURANCE.

INSURANCE BROKERS.

BY WALTER CARRINGTON.

I. DEFINITION, 970.

II. AGENCY OF BROKER, 971.

1. *In General*, 971.
 - a. *Ordinarily Agent of Insured*, 971.
 - b. *When Agent of Insurer*, 972.
 - (1) *When Employed as Such*, 972.
 - (2) *Agency in Delivering Policy and Collecting Premium*, 972.
 - c. *Effect of Provision in Policy Declaring Broker Agent of Insured*, 972.
2. *When Employed Only to Procure Policy*, 973.
3. *When Authorized to Represent Principal in All Insurance Matters*, 974.

III. STATUTES REQUIRING BROKER TO OBTAIN LICENSE, 974.

IV. RIGHTS, DUTIES, AND LIABILITIES OF BROKERS, 974.

1. *Lien upon Policy and Moneys Received Thereon*, 974.
 - a. *In General*, 974.
 - b. *When Broker Is Employed by Agent*, 974.
 - (1) *When Broker Knows of Agency*, 974.
 - (2) *When Broker Does Not Know of Agency*, 974.
 - c. *Extinguishment of Lien by Parting with Policy*, 975.
 - d. *Reattachment of Lien upon Repossession of Policy*, 975.
2. *Duty and Liability to Principal*, 975.
 - a. *In General*, 975.
 - b. *When Broker Receives Instructions from Principal*, 975.
 - c. *When Matter Is Left to Broker's Discretion*, 975.
 - d. *Liability for Fraudulently Procuring Insurance in Nonexistent Company*, 975.

CROSS-REFERENCES.

For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the titles AGENCY, vol. 1, p. 930; INSURANCE, ante, p. 830; and the various references there given.

I. DEFINITION. — An insurance broker is one who acts as a middleman between the insured and the insurer, and who solicits insurance from the public, under no employment from any special company, placing the orders secured either with companies selected by the insured, or, in the absence of such selection, with the companies selected by himself.¹

Distinguished from Insurance Agents. — There is a marked and well-defined distinction between insurance brokers and insurance agents representing corporations. Such insurance agents during their employment sustain a fixed and permanent

1. **Term Defined.** — *Arff v. Star F. Ins. Co.*, 125 N. Y. 57, 21 Am. St. Rep. 721, reversing 2 N. Y. Supp. 183; *Sellers v. Commercial F. Ins. Co.*, 105 Ala. 282. See also *Kings County F. Ins. Co. v. Swigert*, 11 Ill. App. 590.

The term "insurance broker" is generally understood to mean a person who owes no duty or allegiance to any particular corporation. He is free to procure insurance for others in any company he may select, and to solicit and procure business and patronage for

any insurance company or companies he may select. *McKinney v. Alton*, 41 Ill. App. 512.

The Massachusetts Statute (Acts 1887, c. 214, § 93) defines an insurance broker to be a person who "for compensation acts or aids in any manner in negotiating contracts of insurance or reinsurance, or placing risks, or effecting insurance or reinsurance for a person other than himself, and not being the appointed agent or officer of the company in which such insurance or reinsurance is effected." *Davis*

relation to the companies they represent. They are clothed with general powers and authority, and assume responsibilities not conferred upon or assumed by brokers. They owe duty and allegiance to the companies employing them, and seek patronage only for the profit and benefit of such companies, and are precluded from soliciting insurance business for others.¹

II. AGENCY OF BROKER — 1. In General — *a.* ORDINARILY AGENT OF INSURED. — Ordinarily, an insurance broker is not the agent of the insurer,² but is the agent of the insured in all matters within the scope of his employment,³ and within that scope his acts, representations, and concealments are chargeable to and binding upon the insured.⁴ This is so even though the broker solicits the insurance,⁵ and the fact that the policy is delivered to him,⁶

v. Aetna Mut. F. Ins. Co., 67 N. H. 335. See also *Pratt v. Burdon*, 168 Mass. 596.

1. **Brokers Distinguished from Insurance Agents.** — *Bernheimer v. Leadville*, 14 Colo. 518; *McKinney v. Alton*, 41 Ill. App. 512; *East St. Louis v. Brenner*, 59 Ill. App. 608; *Gude v. Exchange F. Ins. Co.*, 53 Minn. 220. Compare *Commercial Ins. Co. v. Ives*, 56 Ill. 402.

As to who are insurance agents, see the title **INSURANCE**, *ante*, p. 830.

2. **Broker Not Agent of Insurer.** — *Ben Franklin Ins. Co. v. Weary*, 4 Ill. App. 74; *Fame Ins. Co. v. Mann*, 4 Ill. App. 485; *Kings County F. Ins. Co. v. Swigert*, 11 Ill. App. 590; *Security Ins. Co. v. Mette*, 27 Ill. App. 324; *East St. Louis v. Brenner*, 59 Ill. App. 608; *Lange v. Lycoming F. Ins. Co.*, 3 Mo. App. 591; *Allen v. German-American Ins. Co.*, 123 N. Y. 6; *Arff v. Star F. Ins. Co.*, 125 N. Y. 57, 21 Am. St. Rep. 721.

3. **Insurance Broker Agent of Insured** — *United States*. — *Hamblet v. City Ins. Co.*, 36 Fed. Rep. 118; *Franklin Ins. Co. v. Sears*, 21 Fed. Rep. 290.

Alabama. — *Sellers v. Commercial F. Ins. Co.*, 105 Ala. 282.

Connecticut. — *Young v. Newark F. Ins. Co.*, 59 Conn. 41.

Illinois. — *Security Ins. Co. v. Mette*, 27 Ill. App. 324; *Illinois Mut. Ins. Co. v. Mette*, 27 Ill. App. 330; *Lycoming F. Ins. Co. v. Rubin*, 79 Ill. App. 402; *Fame Ins. Co. v. Mann*, 4 Ill. App. 485; *Ben Franklin Ins. Co. v. Weary*, 4 Ill. App. 74; *East St. Louis v. Brenner*, 59 Ill. App. 608; *McKinney v. Alton*, 41 Ill. App. 508; *Kings County F. Ins. Co. v. Swigert*, 11 Ill. App. 590.

Maryland. — *American F. Ins. Co. v. Brooks*, 83 Md. 22.

Massachusetts. — *Westfield Cigar Co. v. Insurance Co. of North America*, 169 Mass. 382; *Commonwealth Mut. F. Ins. Co. v. William Knabe etc., Mfg. Co.*, 171 Mass. 265; *Faulkner v. Manchester F. Assur. Co.*, 171 Mass. 349.

Michigan. — *Hartford F. Ins. Co. v. Reynolds*, 36 Mich. 502.

Minnesota. — *Gude v. Exchange F. Ins. Co.*, 53 Minn. 220.

Missouri. — *Lange v. Lycoming F. Ins. Co.*, 3 Mo. App. 591.

New York. — *Devens v. Mechanics, etc., Ins. Co.*, 83 N. Y. 168; *Mellen v. Hamilton F. Ins. Co.*, 17 N. Y. 609; *Allen v. German American Ins. Co.*, 123 N. Y. 6, *affirming* (Supm. Ct. Gen. T.) 3 N. Y. Supp. 170; *Wilber v. Williamsburgh City F. Ins. Co.*, 122 N. Y. 439, *reversing* (Supm. Ct. Gen. T.) 1 N. Y. Supp.

312; *Arff v. Star F. Ins. Co.*, 125 N. Y. 57, 21 Am. St. Rep. 721, *reversing* (Supm. Ct. Gen. T.) 2 N. Y. Supp. 188.

Pennsylvania. — *Pottsville Mut. F. Ins. Co. v. Minnequa Springs Imp. Co.*, 100 Pa. St. 137. *South Dakota*. — *Fromherz v. Yankton F. Ins. Co.*, 7 S. Dak. 187.

Texas. — *East Texas F. Ins. Co. v. Blum*, 76 Tex. 653; *East Texas F. Ins. Co. v. Brown*, 82 Tex. 636.

Wisconsin. — *John R. Davis Lumber Co. v. Hartford F. Ins. Co.*, 95 Wis. 226.

In **New Hampshire** it has been held that the intention of the parties evidenced by the policy, and such other facts and circumstances as may be competent, must determine the question whether a broker who procured a policy of insurance for another was the agent of the insurer or the insured. *Davis v. Aetna Mut. F. Ins. Co.*, 67 N. H. 335.

4. **Broker's Acts, Representations, and Concealments Chargeable to Insured** — *United States*. — *Hamblet v. City Ins. Co.*, 36 Fed. Rep. 122.

Alabama. — *Sellers v. Commercial F. Ins. Co.*, 105 Ala. 282.

New Jersey. — *Milliken v. Woodward*, (N. J. 1900) 45 Atl. Rep. 796.

South Dakota. — *Fromherz v. Yankton F. Ins. Co.*, 7 S. Dak. 187.

Wisconsin. — *John R. Davis Lumber Co. v. Hartford F. Ins. Co.*, 95 Wis. 226.

Broker's Clerk. — A applied to B, an insurance broker, for insurance. B obtained a policy from C, agent for the defendant company. Afterwards, the defendant requested C to cancel and return the policy. C went to B's office, but finding him absent, informed D, the clerk in charge, that he was instructed to cancel the policy, and requested D to get it for cancellation. It was held that D, in returning the policy for cancellation, acted as the agent of A, and not as the agent of the defendant. *Faulkner v. Manchester F. Assur. Co.*, 171 Mass. 349.

5. **Broker Agent of Insured though He Solicits Insurance.** — *Kings County F. Ins. Co. v. Swigert*, 11 Ill. App. 590; *American F. Ins. Co. v. Brooks*, 83 Md. 22; *Gude v. Exchange F. Ins. Co.*, 53 Minn. 220.

6. **Broker's Legal Status Not Changed by Delivery of Policy to Him** — *Alabama*. — *Sellers v. Commercial F. Ins. Co.*, 105 Ala. 282.

Illinois. — *Kings County F. Ins. Co. v. Swigert*, 11 Ill. App. 590; *McKinney v. Alton*, 41 Ill. App. 508; *Security Ins. Co. v. Mette*, 27 Ill. App. 324; *Illinois Mut. Ins. Co. v. Mette*, 27 Ill. App. 330; *Fame Ins. Co. v. Mann*, 4 Ill. App. 485.

and that by an arrangement or agreement with the insurer or with an agent of the insurer he obtains from either his compensation, does not change his legal status.¹

b. WHEN AGENT OF INSURER — (1) When Employed as Such. — Though ordinarily the agent of the insured, a broker may be employed by the insurer as its agent, and when so employed, the acts of the broker, within the scope of his employment, will bind the insurer.²

(2) Agency in Delivering Policy and Collecting Premium. — In some of the *United States* it has been held that a broker is the agent of the insurer for the purpose of delivering the policy and collecting the premium,³ but in other states it has been held that the broker is not the agent of the insurer for the purpose of receiving the premium.⁴

c. EFFECT OF PROVISION IN POLICY DECLARING BROKER AGENT OF INSURED. — Policies of insurance frequently contain a clause providing that if any broker or any person other than the insured has procured the policy, he shall be deemed to be the agent of the insured and not of the insurer in any transaction relating to the insurance. It has been held that this is a contract which it is entirely competent for the parties to make,⁵ and that under it the broker who procures the policy is the agent of the insured in all matters relating to its procurement,⁶ and that his representations will bind the insured.⁷ But in *Illinois* it has been held that if, in procuring the policy, or in some matter connected with it, the broker in fact acted as the agent of the insurer, he will be regarded as the insurer's agent, and his acts and knowledge will be binding upon the insurer, notwithstanding such a provision in the policy.⁸

Minnesota. — *Gude v. Exchange F. Ins. Co.*, 53 Minn. 220.

New York. — *Allen v. German American Ins. Co.*, 123 N. Y. 6, *affirming* (Supm. Ct. Gen. T.) 3 N. Y. Supp. 170.

1. Broker's Status Not Changed by Receiving Compensation from Insurer — *Alabama.* — *Sellers v. Commercial F. Ins. Co.*, 105 Ala. 282.

Illinois. — *Kings County F. Ins. Co. v. Swigert*, 11 Ill. App. 590; *Security Ins. Co. v. Mette*, 27 Ill. App. 324; *Illinois Mut. Ins. Co. v. Mette*, 27 Ill. App. 330; *Lycoming F. Ins. Co. v. Rubin*, 79 Ill. 402.

Indiana. — *Indiana Ins. Co. v. Hartwell*, 123 Ind. 177.

Massachusetts. — *Commonwealth Mut. F. Ins. Co. v. William Knabe, etc.*, Mfg. Co., 171 Mass. 265.

New York. — *Devens v. Mechanics, etc.*, Ins. Co., 83 N. Y. 168; *Mellen v. Hamilton F. Ins. Co.*, 17 N. Y. 609, *affirming* 5 Duer (N. Y.) 101.

2. Agency of Broker When Employed by Insurer. — *Union Ins. Co. v. Chipp*, 93 Ill. 96; *Newark F. Ins. Co. v. Sammons*, 110 Ill. 166, *affirming* 11 Ill. App. 230.

Both the insured and the insurer may, without relation to each other, place their business in the hands of a broker, with, it may be, conditioned terms, as with right of inspection or approval, etc. *East St. Louis v. Brenner*, 59 Ill. App. 608.

3. Broker Agent of Insurer in Delivering Policy and Collecting Premium. — *Indiana Ins. Co. v. Hartwell*, 123 Ind. 178 [*compare* *Criswell v. Riley*, 5 Ind. App. 496]; *Gude v. Exchange F. Ins. Co.*, 53 Minn. 220.

In *Texas* it has been held that an insurance broker is the agent of the insurer as to the premium, but for nothing else. *East Texas F.*

Ins. Co. v. Blum, 76 Tex. 653; *East Texas F. Ins. Co. v. Brown*, 82 Tex. 636.

Under the Massachusetts Statute (Acts 1887, c. 214, § 90) an insurance broker is the agent of the insurer for the purpose of receiving the premium, notwithstanding any conditions or stipulations to the contrary in the policy or contract. *Davis v. Aetna Mut. F. Ins. Co.*, 67 N. H. 335.

4. Broker Not Agent of Insurer to Receive Premium. — *Gentry v. Connecticut Mut. L. Ins. Co.*, 15 Mo. App. 215; *Pottsville Mut. F. Ins. Co. v. Minnequa Springs Imp. Co.*, 100 Pa. St. 137.

Rule in Illinois. — In *Illinois* it has been held that the question whether an insurance broker acted as the agent of the insurer in receiving the premium is one of fact, to be determined in the light of all the circumstances of the particular case; and that to determine the question, correspondence between the broker and the insurer is admissible in evidence for the purpose of showing their previous relations and methods of business in respect to insurance effected through the instrumentality of the broker. *Sun Mut. Ins. Co. v. Saginaw Barrel Co.*, 114 Ill. 99.

5. Stipulation in Policy Declaring Broker Agent of Insured. — *Davis v. Aetna Mut. F. Ins. Co.*, 67 N. H. 335; *Wilber v. Williamsburgh City F. Ins. Co.*, 122 N. Y. 439.

6. Wilber v. Williamsburgh City F. Ins. Co., 122 N. Y. 439. See also *Hermann v. Niagara F. Ins. Co.*, 100 N. Y. 411, 53 Am. Rep. 197.

7. Wood v. Firemen's F. Ins. Co., 126 Mass. 316.

For an interpretation of this provision, see also *infra*, this section, *When Employed Only to Procure Policy*.

8. Rule in Illinois. — *Union Ins. Co. v. Chipp*, Volume XVI.

2. When Employed Only to Procure Policy. — When the broker's employment extends only to the procurement of the policy, his agency is not continuing. It ceases when the purpose of his employment has been accomplished, that is, upon the execution and delivery of the policy;¹ and notice to him of the cancellation of the policy is not notice to the insured,² notwithstanding the provision frequently inserted in policies that the person who procures the insurance shall be deemed the agent of the insured and not of the company in any transaction relating to the insurance. Such a provision imports nothing more than that the person obtaining the insurance is to be deemed the agent of the insured in matters immediately connected with the procurement of the policy.³

Evidence of a General Custom in the Insurance Business authorizing an insurance company entitled to terminate its policy upon notice, to give such notice to the broker by or through whom the insurance was procured, is not admissible.⁴

If the Broker Undertakes to Do Acts Outside of His Employment, the question for whom he acts will depend upon the special circumstances of the case; and if either

93 Ill. 97; *Newark F. Ins. Co. v. Sammons*, 110 Ill. 166.

Upon this subject, see also the title *INSURANCE*, ante, p. 830.

1. Extent of Broker's Agency When Employed Only to Procure Policy — *United States*. — *Adams v. Manufacturers', etc.*, F. Ins. Co., 17 Fed. Rep. 630; *Franklin Ins. Co. v. Sears*, 21 Fed. Rep. 290; *Grace v. American Cent. Ins. Co.*, 109 U. S. 278, reversing 16 Blatchf. (U. S.) 433.

Connecticut. — *Young v. Newark F. Ins. Co.*, 59 Conn. 42.

District of Columbia. — *Hamburg-Bremen F. Ins. Co. v. Lewis*, 4 App. Cas. (D. C.) 66.

Indiana. — *Indiana Ins. Co. v. Hartwell*, 100 Ind. 566.

Maryland. — *American F. Ins. Co. v. Brooks*, 83 Md. 22.

Minnesota. — *Broadwater v. Lion F. Ins. Co.*, 34 Minn. 465.

Missouri. — *Rothschild v. American Cent. Ins. Co.*, 74 Mo. 41, 41 Am. Rep. 303.

New York. — *Hermann v. Niagara F. Ins. Co.*, 100 N. Y. 411, 53 Am. Rep. 197; *Von Wein v. Scottish Union, etc.*, Ins. Co., 52 N. Y. Super. Ct. 490; *Hodge v. Security Ins. Co.*, 33 Hun (N. Y.) 583.

Pennsylvania. — *Sun Fire Office v. Ermentrout*, 11 Pa. Co. Ct. 21.

Texas. — *East Texas F. Ins. Co. v. Blum*, 76 Tex. 653.

Wisconsin. — *Body v. Hartford F. Ins. Co.*, 63 Wis. 157; *John R. Davis Lumber Co. v. Hartford F. Ins. Co.*, 95 Wis. 226.

In *East St. Louis v. Brenner*, 59 Ill. App. 608, the court said: "As stated by Arnold on Ins., vol. 1, p. 108, § 60, 'Prima facie, the business of a policy broker would seem to be limited to receiving instructions from his principal as to the nature of the risk and the rate of premium at which he wishes to insure, communicating these facts to the underwriters, and effecting the policy with them, on the best possible terms, for his employer.'"

2. Notice to Broker of Cancellation Not Notice to Insured — *United States*. — *Kehler v. New Orleans Ins. Co.*, 23 Fed. Rep. 709; *Adams v. Manufacturers, etc.*, F. Ins. Co., 17 Fed. Rep. 630.

Indiana. — *Indiana Ins. Co. v. Hartwell*, 100 Ind. 566.

Minnesota. — *Broadwater v. Lion F. Ins. Co.*, 34 Minn. 465.

Missouri. — *Rothschild v. American Cent. Ins. Co.*, 74 Mo. 41, 41 Am. Rep. 303.

New York. — *Hermann v. Niagara F. Ins. Co.*, 100 N. Y. 411, 53 Am. Rep. 197.

Wisconsin. — *Body v. Hartford F. Ins. Co.*, 63 Wis. 157.

A broker employed only to apply for the renewal of a policy is not the agent of the insured to receive notice of cancellation. *Latoix v. Germania Ins. Co.*, 27 La. Ann. 113.

Policy Conditionally Delivered. — But the case is different where a policy is delivered upon condition of its approval by the insurance company and is not to take effect until so approved. Here the agent who procured the policy has not yet ceased to be the agent of the insured, since the policy is not yet absolutely delivered, and a notice by the insurance company to the agent that it does not approve the policy will be notice to the insured. *Young v. Newark F. Ins. Co.*, 59 Conn. 42.

3. Effect of Stipulation that Broker Shall Be Deemed Agent of Insured — *United States*. — *Grace v. American Cent. Ins. Co.*, 109 U. S. 278, reversing 16 Blatchf. (U. S.) 433; *Kehler v. New Orleans Ins. Co.*, 23 Fed. Rep. 709; *Adams v. Manufacturers', etc.*, F. Ins. Co., 17 Fed. Rep. 630.

Indiana. — *Indiana Ins. Co. v. Hartwell*, 100 Ind. 566.

Massachusetts. — *White v. Connecticut F. Ins. Co.*, 120 Mass. 330.

New York. — *Hermann v. Niagara F. Ins. Co.*, 100 N. Y. 411, 53 Am. Rep. 197; *Von Wein v. Scottish Union, etc.*, Ins. Co., 52 N. Y. Super. Ct. 490.

Compare Royal Ins. Co. v. Wight, 55 Fed. Rep. 455, reversing 53 Fed. Rep. 340.

But in *Illinois* it has been held that such a provision makes the broker procuring the insurance the agent of the insured to receive notice of cancellation. *Newark F. Ins. Co. v. Sammons*, 11 Ill. App. 230.

4. Evidence of General Custom to Give Notice of Cancellation to Broker Procuring Insurance, Not Admissible. — *Grace v. American Cent. Ins. Co.*, 109 U. S. 278; *Franklin Ins. Co. v. Sears*, 21 Fed. Rep. 290; *Hermann v. Niagara F. Ins. Co.*, 100 N. Y. 411, 53 Am. Rep. 197. But see

the assured or the insurer relies upon such acts to bind the other party, the burden of proof rests upon him who seeks to bind the other thereby to prove his authority. In the absence of direct proof of actual authority, and where the effort is to bind the insurer, the insured may establish the agency by showing what acts the insurer has permitted the broker to do, and that the act relied on ought reasonably to be inferred to be within the scope of the apparent authority implied from such acts.¹

3. When Authorized to Represent Principal in All Insurance Matters. — Where the broker is employed to represent the principal in all matters relating to insurance, his authority as agent extends not only to the procuring of a policy, but to the modifying or canceling of it,² and notice to him by the insurer of the cancellation of a policy will bind the insured.³

III. STATUTES REQUIRING BROKER TO OBTAIN LICENSE. — In some of the *United States* there are statutes prohibiting any person from acting as an insurance broker without a license,⁴ and the right to impose this prohibition upon and to require the payment of a license fee from persons desiring to carry on the insurance brokerage business within their limits has in many cases been conferred upon municipal corporations.⁵

Brokerage Contract by Unlicensed Broker Void. — Where, in violation of such a statute or of a municipal ordinance enacted in pursuance of an authority so conferred, an unlicensed broker enters into a contract to aid in negotiating contracts of insurance, such contract is void, and the broker cannot recover under it the compensation that it was agreed he should receive for his services.⁶

IV. RIGHTS, DUTIES, AND LIABILITIES OF BROKERS — **1. Lien upon Policy and Moneys Received Thereon** — *a. IN GENERAL.* — An insurance broker has a lien upon all policies in his hands procured by him for his principal, and also upon the moneys received by him upon such policies for the payment of the sums due to him for commissions, disbursements, advances, and services in and about the policies,⁷ but the lien does not extend to cover any balance due upon business foreign to that of effecting insurances.⁸ The mere intermingling of charges in reference to policies with other items in general account is not a waiver of the lien.⁹

b. WHEN BROKER IS EMPLOYED BY AGENT — (1) *When Broker Knows of Agency.* — When it is known to the insurance broker that the person who employs him is merely the agent for the party insured, he has a lien for the premiums paid by him and for his commissions upon the policies which he effects,¹⁰ but not for the general balance of his insurance account with the agent.¹¹

(2) *When Broker Does Not Know of Agency.* — But when it is not known to the broker that his employer is merely an agent, he has a lien for such general balance of his insurance account,¹² and has the right to apply money

Adams v. Manufacturers', etc., F. Ins. Co., 17 Fed. Rep. 630.

1. Agency of Broker in Acts Done Outside of His Employment. — *American F. Ins. Co. v. Brooks*, 83 Md. 22.

2. Authority of Broker Employed to Represent Principal in All Insurance Matters. — *Standard Oil Co. v. Triumph Ins. Co.*, 64 N. Y. 85; *Hodge v. Security Ins. Co.*, 33 Hun (N. Y.) 583; *McLean v. Republic F. Ins. Co.*, 3 Lans. (N. Y.) 421; *John R. Davis Lumber Co. v. Hartford F. Ins. Co.*, 95 Wis. 226.

3. Hartford F. Ins. Co. v. Reynolds, 36 Mich. 502. See also *Royal Ins. Co. v. Wight*, 55 Fed. Rep. 455, reversing 53 Fed. Rep. 340.

4. See the statutes of the several states.

5. Bernheimer v. Leadville, 14 Colo. 518; *Wilcox v. Atlanta*, 103 Ga. 320.

6. Pratt v. Burdon, 168 Mass. 596.

7. Lien upon Policies and Moneys Received on Them. — *Levy v. Barnard*, 8 Taunt. 149; *McKenzie v. Nevius*, 22 Me. 138, 38 Am. Dec. 291; *Sharp v. Whipple*, 1 Bosw. (N. Y.) 557. Compare *Reed v. Pacific Ins. Co.*, 1 Met. (Mass.) 166.

8. McKenzie v. Nevius, 22 Me. 138, 38 Am. Dec. 291. See also *Maanss v. Henderson*, 1 East 335.

9. McKenzie v. Nevius, 22 Me. 138, 38 Am. Dec. 291.

10. Extent of Lien When Broker Knows of Agency. — *Sharp v. Whipple*, 1 Bosw. (N. Y.) 557.

11. Man v. Shiffner, 2 East 523; *Foster v. Hoyt*, 2 Johns. Cas. (N. Y.) 327.

12. Extent of Lien When Broker Is Ignorant of Agency. — *Westwood v. Bell*, 4 Campb. 349; *Mann v. Forrester*, 4 Campb. 60; *Sharp v. Whipple*, 1 Bosw. (N. Y.) 557.

received upon the policy to the satisfaction of that balance, as well after as before notice that it belongs to a third person.¹

c. **EXTINGUISHMENT OF LIEN BY PARTING WITH POLICY.** — The lien of the broker is extinguished when he parts with the possession of the policies by their delivery to the insured or his agent.²

d. **REATTACHMENT OF LIEN UPON REPOSSESSION OF POLICY.** — The lien, however, again attaches, or, in the language of the books, is revived, if the policies come again into the broker's possession from the person against whom the right originally existed.³ But it does not reattach if they come again into his possession as the property of some other person, or if new intermediate equities have affected them;⁴ nor will it attach if the broker's manner of parting with the policies manifested an intention to abandon the lien.⁵

2. Duty and Liability to Principal — *a.* **IN GENERAL.** — Insurance brokers, by holding themselves out as persons engaged in the business of effecting insurance, assume to have the requisite knowledge and ability to transact such business for their patrons, and they are bound to use reasonable skill, care, and diligence in transacting that business. If they fail to do so, and their negligence proximately results in loss or damage to their employers, they will be liable for such loss or damage in an action therefor.⁶

b. **WHEN BROKER RECEIVES INSTRUCTIONS FROM PRINCIPAL.** — When a broker receives an instruction from his principal in any matter relating to the insurance, he is bound to obey it, and if he neglects to do so he will be liable to the principal for any loss proximately resulting from such negligence.⁷

c. **WHEN MATTER IS LEFT TO BROKER'S DISCRETION.** — But where a matter relating to the insurance is left to the discretion of the broker, and he acts *bona fide* and with due regard to his principal's interest, he will not be liable for a loss which would not have occurred had he pursued a different course in the matter.⁸

d. **LIABILITY FOR FRAUDULENTLY PROCURING INSURANCE IN NON-EXISTENT COMPANY.** — If an insurance broker wilfully and fraudulently procures insurance for a patron in a company which does not exist, he will be liable for any loss that results from his so doing.⁹

INSURED. — See note 10.

INSURGENT. (See also the titles *INSURRECTION*, *post*, p. 977; *INTERNATIONAL LAW*, *post*.) — An insurgent is one who is concerned in an insur-

1. Mann v. Forrester, 4 Campb. 60.

2. **Extinguishment of Lien.** — Sharp v. Whipple, 1 Bosw. (N. Y.) 557. See generally the title *LIENS*.

3. **Reattachment of Lien.** — Levy v. Barnard, 8 Taunt, 149; Spring v. South Carolina Ins. Co., 8 Wheat. (U. S.) 268; Sharp v. Whipple, 1 Bosw. (N. Y.) 557. See generally the title *LIENS*.

4. **When Lien Will Not Reattach.** — Sharp v. Whipple, 1 Bosw. (N. Y.) 557. Compare Levy v. Barnard, 8 Taunt, 149.

5. Spring v. South Carolina Ins. Co., 8 Wheat. (U. S.) 268.

6. **Duty to Principal — Liability for Negligence.** — Park v. Hamond, 4 Campb. 344; Criswell v. Riley, 5 Ind. App. 496; Milliken v. Woodward, (N. J. 1900) 45 Atl. Rep. 796; Burges v. Jackson, 18 N. Y. App. Div. 296.

7. **Broker Who Has Compromised with Insurers Liable for a Total Loss**, for a less sum than the amount then recoverable, and has given up the policy, is answerable to the holder of the policy for the whole sum insured, when it does

not appear that he had any authority, express or implied, to make the compromise. Sharp v. Whipple, 1 Bosw. (N. Y.) 557.

8. **Liability for Neglect to Obey Instructions.** — Park v. Hamond, 4 Campb. 344; Comber v. Anderson, 1 Campb. 523, Fomin v. Oswell, 3 Campb. 357; Milliken v. Woodward, (N. J. 1900) 45 Atl. Rep. 796.

9. **Discretion Allowed to Broker.** — Comber v. Anderson, 1 Campb. 523.

10. **Broker Not Liable if He Follows Written Instructions, Notwithstanding Prior Verbal Information.** — An insurance broker is not liable to an action for neglecting to insert in a marine policy a liberty to carry simulated papers, if the written instructions given to him contained no direction to insert such liberty, although it was verbally communicated to him that simulated papers were to be used in the voyage. Fomin v. Oswell, 3 Campb. 357.

9. Vann v. Downing, 10 Pa. Co. Ct. 59.

10. **Insured.** (See also *ASSURE — ASSURANCE*, vol. 3, p. 166.) — The person intended by the term "the insured" in a mutual fire-insurance

rection. He differs from a rebel in that the rebel unjustly opposes the constituted authorities, while an insurgent may be one who justly opposes the tyranny of constituted authorities.¹

policy is the person who owns the property, applies for the insurance, pays the premium, and signs the deposit note, and not another person to whom the money is payable in case of loss, although he may have a lease of the premises. *Sanford v. Mechanics' Mut. F. Ins. Co.*, 12 Cush. (Mass.) 541, where the erection of certain buildings by an under lessee of one to whom the insurance money was payable was held not to render the policy void as violating a by-law which prohibited the *insured* from altering the building without the consent of the company, or doing anything to increase the risk.

But in interpreting a policy of insurance containing a clause that before payment "all sums due to the company from the *insured*" should be first deducted, Story, J., said: "It appears to me that the *insured*, in the sense of the clause, must mean not the party who procures the insurance, but the party for whose

benefit the insurance is made. He and he only can properly be said to be the insured; for he is ultimately to pay the premium and to have the benefit if a loss occurs. I do not say that this, the primary meaning of the words, may not be displaced by showing that the parties to the contract have used them in a different sense, as the designation of the person in whose name the policy is made. But the language ought to be very clear in its import which should lead to such a result." *Hurlbert v. Pacific Ins. Co.*, 2 Sumn. (U. S.) 479.

With reference to orders sent to common carriers to forward goods, it was said in *Peek v. North Staffordshire R. Co.*, El. Bl. & El. 979, 96 E. C. L. 979: "The ordinary meaning of 'insured' is that the insurer stands the risk, and 'uninsured,' that the owner does so."

1. Bouv. L. Dict. (15th ed.); Worcester's Dict.

INSURRECTION.

BY A. S. H. BRISTOW.

- I. DEFINITION, 977.
- II. SCOPE OF ARTICLE, 977.
- III. SUPPRESSION OF INSURRECTION, 977.

CROSS-REFERENCES.

For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the titles MOBS; RIOTS; WAR.

I. DEFINITION. — An insurrection is a rising against civil or political authority; the open and active opposition of a number of persons to the execution of law in a city or state.¹

Bloodshed Unnecessary. — To constitute an insurrection it is not necessary that there should be bloodshed or that the dimensions of the rising should be so portentous as to insure probable success.²

II. SCOPE OF ARTICLE. — The late war between the states is frequently referred to in the decisions as an insurrection; but, as has been said, it was not the less a civil war because it might be called an insurrection,³ and hence the adjudications to which it has given rise will be reserved for discussion in a subsequent title.⁴

III. SUPPRESSION OF INSURRECTION — By State Military. — Although a state cannot establish a permanent military government, yet it may use its military power to put down an armed insurrection too strong to be controlled by the civil authority; and the state must determine for itself what degree of force the crisis demands.⁵

After Martial Law Is Declared an officer may lawfully arrest any one who he has reasonable grounds to believe is engaged in the insurrection, or may order the forcible entry of a house. But no more force can be used than is necessary to accomplish the object; and if the power is exercised for the purpose of oppression, or if any injury is wilfully done to person or property, the person by whom or by whose order it is committed will be answerable.⁶

When President May Assist in Suppression. — By the Act of Congress of Feb. 28, 1795, it was provided that in case of an insurrection in any state against the government thereof "it shall be lawful for the President of the United States, on application of the legislature of such state or of the executive (when the legislature cannot be convened), to call forth such number of the militia of any other state or states as may be applied for, as he may judge sufficient to suppress such insurrection."⁷ In a recent decision in *Idaho* it was held that the proclamation of the governor declaring a county to be in a state of insur-

1. **Insurrection Defined.** — *In re* Charge to Grand Jury, 62 Fed. Rep. 828; *Allegheny County v. Gibson*, 90 Pa. St. 397, 35 Am. Rep. 670. See also *McCargo v. New Orleans Ins. Co.*, 10 Rob. (La.) 202, 43 Am. Dec. 180; *Lochner v. Home Mut. Ins. Co.*, 17 Mo. 247; *Spruill v. North Carolina Mut. L. Ins. Co.*, 1 Jones L. (46 N. Car.) 127.

2. **Bloodshed Unnecessary.** — *In re* Charge to Grand Jury, 62 Fed. Rep. 830.

16 C. of L.—62

3. *The Brig Amy Warwick*, 2 Black (U. S.) 635.

4. See the title WAR.

5. **State May Suppress Insurrection by Military Force.** — *Luther v. Borden*, 7 How. (U. S.) 1.

6. *Luther v. Borden*, 7 How. (U. S.) 1.

7. **Invoking Aid of President in Suppression.** — 1 U. S. Stat. at L. 424; *Luther v. Borden*, 7 How. (U. S.) 1. See also *Houston v. Moore*, 5 Wheat. (U. S.) 13.

rection, and his action in calling to his aid the military force of the United States for the purpose of restoring good order and the supremacy of the law, had the effect to put into force, to a limited extent, martial law in the county, and such action was not in violation of the Constitution.¹

INT. — "Int." is sometimes used as an abbreviation of "interest."²

INTAKE. — See note 3.

INTEGRITY. — See note 4.

INTELLIGENCE — INTELLIGENT. (See also the titles *INSANITY*, *ante*, p. 558; *UNDUE INFLUENCE*.) — See note 5.

INTELLIGENCE OFFICE. — An intelligence office is an office for obtaining employment or places for domestic servants or other laborers.⁶

INTEMPERANCE — INTEMPERATE. (See also the titles *INTOXICATION*, and the references there given; *LIFE INSURANCE*. As to habitual intemperance, see the title *HABITUAL DRUNKARDS*, vol. 15, p. 221.) — Intemperance is the use of anything beyond moderation; but it does not necessarily imply

1. *In re Boyle*, (Idaho 1899) 57 Pac. Rep. 706.

2. *Belford v. Beatty*, 145 Ill. 418.

3. **Intake — Intaken.** (See also the title *CONTRACTS OF AFFREIGHTMENT AND CHARTER-PARTIES*, vol. 7, p. 254.) — In *Harrison v. One Thousand Bags of Sugar*, 44 Fed. Rep. 687, it was said: "A printed form was employed, and but for the erasure of the word 'delivered' and the interlineation of the words 'intake weight' * * * no question would arise. The payment of freight would be limited, in plain terms, to the cargo delivered. It would read, 'the freight to be paid on unloading and right delivery of the cargo, at the rate of nine shillings sterling per ton of 20 cwt., delivered;' and if no other change had been made than to add the words 'intake weight,' there would still be no question. The word 'delivered,' immediately following, would limit the freight to the part of cargo delivered; but this word being erased, it is, I think, clear that the parties must be held to have stipulated for payment on the entire 'intake weight,' unless the question is controlled by other language of the charter." See also *Robinson v. Knights* L. R. 8 C. P. 468; *Merchant Shipping Co. v. Armitage*, L. R. 9 Q. B. 99; *Spaight v. Farnworth*, 5 Q. B. D. 115.

A charter-party provided for a certain rate of freight on the cargo *intaken*. The word "delivered" in the charter-party had been stricken out and the word *intaken* written in. The court said, in construing this provision: "If the number of tons delivered is conclusive evidence of the number of tons *intaken*, the careful erasure from the charter-party of the printed word 'delivered' and the insertion of the written word *intaken* was an idle ceremony. This would assume, and give to respondents the full benefit of the assumption, that the weight of the cargo is fixed by a definite, certain, inflexible, and unchangeable standard; that there can be no error or fluctuation, loss of quantity, or diminution in weight; and that the exact number of tons which went in at Pomaron would come out here. The evidence discloses the fact that the weight of the *intaken* cargo and the output at the port of delivery seldom, if ever, agree." *The Frogner*, 49 Fed. Rep. 877.

4. **Integrity and Honesty.** (See also the title *EXECUTORS AND ADMINISTRATORS*, vol. 11, p. 720.) — In *Root v. Davis*, 10 Mont. 266, it was said, *per Blake, C. J.*, dissenting: "I have not been able to find in the authorities a satisfactory definition of the term *integrity*, which is found in the statutes relating to the competency of an administrator. Its meaning should not be restricted to what is generally understood by the word 'honesty,' although the last is properly deemed by lexicographers a synonym. * * * When the duties of the position are considered it is evident that the want of *integrity* which renders a person incompetent to receive this appointment should be defined. The following definition by Webster is apposite: 'Freedom from every biasing or corrupt influence or motive.' The court below was called upon to determine judicially, from all the evidence, not merely whether John A. Davis was an honest or a dishonest man in the ordinary signification of words, but whether he was free from all bias, influence, or motive, which would interfere with the exercise of his functions as an administrator of the estate of his deceased brother."

In *Matter of Bauquier*, 88 Cal. 307, it was said: "The word *integrity*, as here used, means soundness of moral principle and character, as shown by a person's dealing with others, in the making and performance of contracts, in fidelity and honesty in the discharge of trusts. In short, it is used as a synonym for probity, honesty, and uprightness in business relations with others."

5. **Intelligent.** — As to the requirement that a juror should be *intelligent*, see *People v. McLaughlin*, 2 N. Y. App. Div. 419, and see the title *JURY AND JURY TRIAL*.

6. **Intelligence Office.** — In *Keim v. Chicago*, 46 Ill. App. 445, it was held that the city of Chicago not having been empowered to license, prohibit, or regulate *intelligence offices*, the penalty prescribed for the violation of its ordinances relating to the subject could not be imposed. And so in *State v. Von Sachs*, 45 La. Ann. 1416, a similar ordinance of the city of New Orleans was held void as being unconstitutional. See generally the titles *MUNICIPAL CORPORATIONS*; *ORDINANCES*.

drunkenness.¹ An occasional use of alcoholic liquors is not to be deemed intemperance, but there must be indulgence to such an extent as would be considered an excess.²

INTEND. (See also INTENT — INTENTION, *post*, p. 980.) — See note 3.

1. *Mullinix v. People*, 76 Ill. 213.

2. *Mowry v. Home L. Ins. Co.*, 9 R. I. 355.

Intemperate. — The defendant, in an answer in a suit to foreclose a mortgage given by her deceased husband, for whom she was administratrix, admitted the execution of the mortgage, but averred that it had been obtained from her husband, who was an illiterate and *intemperate* man, by great importunity and undue influence. The court said: "Giving his character in her answer, she has used the word *intemperate*, from which it may be inferred that he was either excessive in meat and drink or that he was passionate or ungovernable. The word *intemperate*, according to the most approved authorities, conveys both of those meanings. The defendant now alleges, by her petition, that the latter was the sense in which she intended to use the word. Therefore it is ordered that the defendant be, and she is hereby, permitted to file a supplemental answer, correcting the mistake." *Murdock's Case*, 2 Bland (Md.) 463.

Intemperate Habits. (See also the titles INTOXICATING LIQUORS; LIFE INSURANCE.) — *Intemperate* habits, within the meaning of the statute against selling liquors to a person of known *intemperate* habits, cannot be predicated of a person who occasionally drinks to excess. But it is not necessary to show that he is drunk every day. If sobriety is the rule and occasional intoxication the exception, he is not within the statute; and, on the other hand, if the habit is to drink to intoxication when occasion offers, and sobriety or abstinence is the exception — as when one is accustomed to remain sober while at home, but generally drinks to excess when in company, or when visiting the town or village — the charge of *intemperate* habits is sustained. *Tatum v. State*, 63 Ala. 148.

3. In a Patent for lands the words "*intended* for public uses" were held equivalent to "dedicated to public use." *Com. v. Alburger*, 1 Whart. (Pa.) 480.

Intoxicating Liquors. (See also the title INTOXICATING LIQUORS.) — Where a statute orders the forfeiture of liquors "*intended* for sale contrary to law," the forfeiture will take place if any person has an intent to sell them unlawfully. But where the offense is keeping them "with intent" to sell, the intention on the part of the particular person charged must be proved. *State v. Learned*, 47 Me. 426.

Postal Laws. (See also the title POSTAL LAWS.) — A letter with a fictitious address, which cannot be delivered, is not "*intended* to be conveyed by mail," within the meaning of a statute prohibiting the embezzlement of such a letter. *U. S. v. Denicke*, 35 Fed. Rep. 407. See also *U. S. v. Matthews*, 35 Fed. Rep. 896. But see *U. S. v. Smith*, 40 Fed. Rep. 755, where these cases are *disapproved*. Nor is a decoy letter placed in a receptacle for unmailable matter within such statute. *U. S. v. Rapp*, 30 Fed. Rep. 818.

But it has been held sufficient evidence that

letters are "*intended* to be carried by a letter carrier," that they are deposited in pillar boxes, to be carried to the post office, although it is *intended* to intercept them after they have passed through the hands of a suspected employee. *U. S. v. Wight*, 38 Fed. Rep. 106.

Intended to Be Recorded. — The words "*intended* to be forthwith recorded," used in a deed in reference to a power of attorney, under which the deed purports to have been made, imply a covenant on the part of the grantor to procure the recordation of the power within a reasonable time. *Penn. v. Preston*, 2 Rawle (Pa.) 14.

Intended Road. — A covenant for the free use of the "newly *intended* road whenever the same may be made," will not apply to a road which, when the parties contracted, it was *intended* to make, but which was executed and complete before the sealing of the covenant. *Crisp v. Price*, 5 Taunt. 548, 1 E. C. L. 183.

Intended to Locate. (See also the titles PUBLIC LANDS; STATE LANDS.) — In a case of disputed title to land the court held the warrant under which the plaintiff claimed to be descriptive to a common intent, and the surveys to be chamber surveys, but referred the question of actual location to the jurors, with the instruction that if they believed the warrants were located or *intended* to be located on the land claimed by the plaintiff, their verdict should be for the plaintiff, and also if they believed that the surveyor *intended* to locate the surveys on the land claimed, the law located them there. The appellate court said: "He did not mean that a mere unexecuted intention to appropriate could be treated as a survey. He meant rather that an intention to appropriate might be so treated which manifested itself by a formal return into the land office of a survey, which, though only made on paper, was nevertheless sufficient to give notice to the world, and was one of the recognized modes of locating land warrants; and herein he is sustained by a cloud of authorities. Whatever doubts may once have existed in regard to the validity of chamber surveys, full effect has been given to them by modern decisions, where time enough has elapsed since their return to raise a legal presumption. This presumption has all the effect of a legal conclusion, and is *presumptio juris et de jure*. That is to say, after one-and-twenty years the law treats all surveys duly returned into the land office as actual surveys, though no compass was set or chain stretched upon the land. Thus the *intended* appropriation of the surveyor becomes in the highest sense an actual appropriation. We cannot doubt that the learned judge meant to be understood by the jury and was understood as using the word *intended* in the sense above indicated, and that he did not mean that a mere unexecuted purpose of a surveyor could, under any circumstances, become a survey." *McBarron v. Gilbert*, 42 Pa. St. 279.

Intended Husband. — The words "*intended*

Volume XVI.

INTENDMENT. — See note 1.

INTENT — INTENTION. (See also the titles INTERPRETATION; MALICE; MURDER AND MANSLAUGHTER; STATUTES, etc. And see INTEND, *ante*, p. 979; INTENTIONAL, *post*, p. 981. As to *animus manendi* see the title DOMICIL, vol. 10, p. 18. As to criminal intent, see the title CRIMINAL LAW, vol. 8, p. 282. As to the intention of testators, see the title WILLS. As to intent as to fixtures, see the title FIXTURES, vol. 13, p. 597. As to proof of intent, see the title EVIDENCE, vol. 11, p. 506. As to presumption of intent, see the title PRESUMPTIONS. As to intent to defeat or delay creditors, see the titles FRAUDULENT SALES AND CONVEYANCES, vol. 14, p. 265; INSOLVENCY AND BANKRUPTCY, *ante*, p. 630.) Intention is a design, purpose, resolve, or determination of the mind.²

husband," in a settlement of a married woman's separate estate, have been held to apply to all covertures. *In re Gaffee*, 19 L. J. Ch. 179; *Hawkes v. Hubback*, L. R. 11 Eq. 5; *Shafro v. Butler*, 40 L. J. Ch. 308.

Deed. — A building estate was offered for sale in plots. The deed to a plot contained restrictive agreements as to the use and occupation, and recited that it was *intended* that all future contracts for the sale of the plots should contain the same restrictive agreements. It was held that the recital in the deed was not a mere expression of intention which the vendors were at liberty to change, but the effect of the deed was that the vendors thereby entered into a covenant not to authorize the use of the unsold plots in a manner inconsistent with the conditions of the building scheme as therein expressed; that even if the deed had not the effect of a covenant by the vendors, yet the trustees were bound by a contract implied from the whole transaction, restricting their dealing with the land in violation of the building scheme; and that an injunction restraining them from authorizing any purchaser to build contrary to the building scheme should be granted. *Mackenzie v. Childers*, 43 Ch. D. 265.

1. **Intendment.** — In Detroit, etc., R. Co. v. McCammon, 108 Mich. 373, in speaking of a plea of former adjudication the court said: "The plea must negative *intendments*. See Mitf. Ch. Pl. 349 (*298). The meaning of an *intendment* is that allowing an averment to be true, but that at the same time a case may be supposed consistent with it which would render the averment inoperative as a full defense, such case shall be presumed, unless specifically excluded by particular averment. Id. 350 (*299), *citing* Lube Eq. 343."

2. **Intent — Intention.** — Referred to an act, it denotes the state of mind with which the act is done. *State v. Tom*, 2 Jones L. (N. Car.) 416.

It is the exercise of intelligent will, the mind being fully aware of the nature and consequences of the act which is about to be done, and with such knowledge and with full liberty of action willing and electing to do it. *Smith v. State*, 2 Lea (Tenn.) 619.

An intention is defined as a fixed direction of the meaning to a particular object, or a determination to act in a particular manner. *Willis v. Jolliffe*, 11 Rich. Eq. (S. Car.) 489.

In *Smith v. State*, 2 Lea (Tenn.) 619, it was said: "Webster defines *intent* to mean a design, a purpose, *intention*, meaning, drift, aim. Burrill defines it to be 'the presence of

will in the act which consummates a crime. It is the exercise of intelligent will, the mind being fully aware of the nature and consequences of the act which is about to be done, and with such knowledge and with full liberty of action willing and electing to do it.'"

In *State v. McDonald*, 4 Port. (Ala.) 458, it was said: "To *intend* must be understood to mean the same with 'design' or 'contemplate.'" See also *Christian v. Connecticut Mut. L. Ins. Co.*, 143 Mo. 460.

Intent and Intention. — An indictment charging that an assault was made with an *intention* to ravish, instead of *intent*, is good. *State v. Tom*, 2 Jones L. (N. Car.) 414. The court said: "In Walker's Dictionary the two primary definitions of these words are the same, to wit, 'design,' 'purpose.' Can the court say then that a charge of a felonious assault made with the *intention* to commit a rape, *i. e.*, with the design or purpose to commit a rape, is different from a charge of an assault made with the *intent* to commit a rape, *i. e.*, with a design or purpose to commit a rape? The bare statement of the proposition shows its absurdity."

Intention and Act — Life Insurance. (See also the title LIFE INSURANCE.) — A policy provided that if the insured came to his death by his own act and *intention*, the company should be liable only for the net value of the policy at the time. In construing this policy the court said: "While the words 'his own act and *intention*' have been construed to mean no more than the words 'his own act,' on the ground that the word 'act' necessarily implies *intention* (*Chapman v. Republic L. Ins. Co.*, 5 Big. Ins. Cas. 110, 6 Biss. (U. S.) 238), yet the addition of the word *intention* shows that the parties were solicitous to avoid all question as to whether the policy was to be avoided by the physical act simply of the assured when unaccompanied by any corresponding intellectual purpose or act of the mind." *Adkins v. Columbia L. Ins. Co.*, 70 Mo. 31.

Intention and Promise Distinguished. — The trial court instructed: "An *intention* is but the purpose a man forms in his own mind; a promise is an express undertaking or agreement to carry that purpose into effect, and must be express, in contradistinction to a promise implied from an acknowledgment of the justness or existence of the debt." The appellate court said: "This charge, as applied to the case, viz., debts discharged by bankruptcy, we think is entirely correct." *Shockey v. Mills*, 71 Ind. 292.

INTENTIONAL. (See also the titles *INTEND*, *ante*, p. 979; *INTENTION*,

In *Stewart v. Reckless*, 24 N. J. L. 430, it was said: "The expression of an *intention* to do a thing is not a promise to do it. An *intention* is but the purpose a man forms in his own mind; a promise is an express undertaking or agreement to carry the purpose into effect. The *intention* may begin and end with the person who forms it. A promise, supported by a good consideration, can only be rescinded by the act of both the parties to it, for to make a binding promise there must be a promisee as well as a promisor."

Intent and Belief. — Where, in order to arrest on mesne process, a plaintiff was required to make affidavit that "he has reason to believe that the defendant is likely to remove beyond the jurisdiction of the court," an affidavit that he had reason to believe that the defendant "*intends* to leave the state" was held insufficient. The court said: "A person may *intend* to do what there is no likelihood that he will do. And one person may safely swear that he has reason to believe that another *intends* to do an act which he has no reason to believe it is likely that the other will do." *Wood v. Melius*, 8 Allen (Mass.) 434.

The testimony of a defendant upon a charge of a felonious assault that he *intended* to defend himself is not equivalent to testimony that he believed himself in peril of life or limb. *Duncan v. State*, 84 Ind. 204.

Intent and Motive Distinguished. — In *State v. David*, 131 Mo. 397, it was said: "It seems to be a confusion of the necessary *intent* with 'motive.' The distinction is clear. It devolves upon the state to show the *intent*. If the jury believed, as they have said by their verdict they did, that defendant knowingly and wilfully gave the deceased a drink of whiskey with sufficient strychnine in it to kill him, they were bound to find that he *intended* the natural consequence of his act, to wit, death by poison; but can it be maintained that, though they found he accomplished the death of his victim by this intentional act, it was no crime, because, forsooth, they could not discern the motive therefor? The motives for crime are so numerous, so hidden, and often so utterly unreasonable, that it is impracticable to require that they shall always be made manifest. The fact of motive or the absence of motive is always an important inquiry in a case of this character, but the absence of an apparent motive is not conclusive of the innocence of the defendant."

The judge refused to charge the jury that "if they believe that the prisoner had no motive for killing the deceased, as shown by words or deeds previous or subsequent to the act, then they must acquit him on the ground of want of criminal *intent*," and instead charged that "the *intent* must exist and be shown to exist, but the motive may not be discovered; the absence of a motive revealed is a circumstance to be duly considered in weighing the question of guilt." It was held that in this there was no error. *State v. Coleman*, 20 S. Car. 452. See also as to this distinction, *Willis v. Jolliffe*, 11 Rich. Eq. (S. Car.) 489.

Intent and Attempt. (See also the title *AT-*

TEMPTS TO COMMIT CRIME, vol. 3, p. 250; and see *ATTEMPT*, vol. 3, p. 249.) — A statute was directed against attempts to administer poison. The court said: "The act recognizes a distinction between *intent* and 'attempt.' The former indicates the purpose existing in the mind, the latter an act to be committed. Merely soliciting one to do an act is not an attempt to do that act. *Rex v. Butler*, 6 C. & P. 368, 25 E. C. L. 441; *Smith v. Com.*, 54 Pa. St. 209. In this last case it was said: 'In a high moral sense it may be true that solicitation is attempt; but in a legal sense it is not.'" *Stabler v. Com.*, 95 Pa. St. 321. See also *Prince v. State*, 35 Ala. 367; *State v. Marshall*, 14 Ala. 411.

In *Bechtelheimer v. State*, 54 Ind. 133, it was said: "An *intent* to do a given thing is not to be confounded with an 'attempt' to do the same thing. The one may exist without taking any steps whatever toward the accomplishment of the purpose; the other implies more, for an attempt implies the taking of some such steps." This was a poisoning case.

In *Johnson v. State*, 14 Ga. 59, it was said: "We do not deny that there is a distinction between an *intent* and an attempt to do anything. The former implies the purpose only; the latter, an actual effort to carry that purpose into execution."

Same — Murder. (See also the title *MURDER AND MANSLAUGHTER*.) — A statute provided for the punishment of a person convicted of "an assault with an attempt to murder." An indictment was upon assault with *intent* to murder. In holding the indictment sufficient the court said: "It is true, as contended for by the counsel for the prisoner, that there is a marked difference between the terms *intent* and 'attempt to kill and murder,' etc. But while this difference exists in the terms taken separately, the distinction is lost when we consider them in the connection in which they occur in the statute and in the indictment. An assault implies an attempt to do the violence; and the *intent* to murder characterizes the criminality of the act. An assault with an attempt to murder implies nothing less; so, we conclude, the indictment contains a sufficient description of the statutory offense." *State v. Bullock*, 13 Ala. 416.

Same — Rape. (See also the title *RAPE*.) — In *State v. Martin*, 3 Dev. L. (N. Car.) 330, it was said: "There can be none to denote the *intent* more apt than that word *intent* itself. It is the language of the common law, of statutes, of pleading. It is perfectly understood, and ought to be retained. It is said by Lord Ellenborough, in *Rex v. Phillips*, 6 East 472, to be the proper word to convey the specific allegation of *intent*. It is found in all the precedents within our reach; and there is no other term so expressive and precise. Here the word 'attempt' has been used in its stead. We should be justified in rejecting it upon the sole ground that it is not the word of the statute. But it is not even synonymous. *Intent* referred to an act denotes a state of mind with which the act is done. 'Attempt' is expressive rather of a moving towards doing the thing

ante, p. 980; WILFUL.) A result may be said to be intentional when a party either knows or has good reason to believe that it will follow the act done.¹

than of the purpose itself. An attempt is an overt act itself. An assault is an 'attempt to strike,' and is very different from a mere *intent* to strike. The statute makes a particular *intent*, evinced by a particular act, the crime. That purpose and that act cannot be so well nor sufficiently described as by the words of the statute itself." To the same effect see *State v. Hearsey*, 50 La. Ann. 373; *Johnson v. State*, 14 Ga. 60; *Kelly v. Com.*, 1 Grant Cas. (Pa.) 434. But see *State v. Tom*, 2 Jones L. (N. Car.) 414.

In *Witherby v. State*, 39 Ala. 703, it was held that an indictment which charged the defendant with assault with *intent* to ravish was sufficient under a statute against attempts to commit rape. The court said: "The 'only distinction between an *intent* and an attempt to do a thing is that the former implies the purpose only, while the latter implies both the purpose and an actual effort to carry that purpose into execution.' *Prince v. State*, 35 Ala. 367. Therefore a mere *intent* to commit a particular offense does not involve an attempt to do it. But an 'assault with *intent* to commit a rape' is of itself an attempt to commit the offense." *Citing State v. Bullock*, 13 Ala. 473.

And for *intent* and "attempt" used synonymously, see *Griffin v. State*, 26 Ga. 493; *State v. Hayes*, 78 Mo. 317.

Purpose and Intent. — The expressions "with an *intent*" and "for a purpose" are almost identical. *Com. v. Raymond*, 97 Mass. 570. See also *Robertson v. Liddell*, 9 East 437.

Felonious. (See also FELONIOUS — FELONIOUSLY, vol. 12, p. 1029.) — In *Matter of Mutchler*, 55 Kan. 164, it was said: "A felonious *intent* means to deprive the owner, not temporarily, but permanently, of his own property, without color of right or excuse for the act, and to convert it to the taker's use without the consent of the owner."

In *People v. Moore*, 37 Hun (N. Y.) 93, it was said: "Felonious *intent*, where used in penal statutes, means criminal *intent*, and criminal *intent* is an *intent* to deprive or defraud the true owner of his property."

A felonious *intent* is an unlawful and wicked *intent*. *State v. Fisher*, 8 Kan. 208; *State v. White*, 14 Kan. 538.

Larcenous. (See also the title LARCENY.) — In *Wilson v. State*, 18 Tex. App. 274, it was said: "Mr. Archbold defined a larcenous *intent* at common law thus: 'Where a man knowingly takes and carries away the goods of another, without any claim or pretense of right, with *intent* wholly to deprive the owner of them and to appropriate or convert them to his own use.' And Chief Justice Eyre in *Pear's case* [2 East P. C. 685] defined the offense thus: 'The wrongful taking of goods with *intent* to spoil the owner of them *lucri causa*.' *State v. Shermer*, 55 Mo. 83."

Intent to Injure — Maim. (See also the title MAYHEM.) — The *intent* referred to in Pen. Code Minn., § 177, may be defined to be the purpose at the time to do, without lawful authority or necessity, that which the statute forbids; and the words "*intent* to injure" re-

fer to injuries of the same class specified in the statute or such as might reasonably be expected to be dangerous or to result in serious bodily harm. *State v. Hair*, 37 Minn. 351.

Fixtures. (See also the title FIXTURES, vol. 13, p. 597.) — As to all articles not so intimately connected with the freehold as to become essentially a part of it, the *intention*, not the mere physical fact of their connection with the realty, is the criterion of annexation. But the *intention* which thus becomes controlling is not the secret design which may dwell in a party's mind and as to whose existence he alone can speak, but that *intention* which was either expressly declared by the parties competent to make it the governing rule, or which flows, patent to all, from the nature and character of the act, the clear purpose to be served, the manifest relation which the articles bear to the realty, and the visible consequences of their severance upon the proper and obvious use of it. *National Bank v. North*, 160 Pa. St. 303.

Indictment. (See also the title INDICTMENTS, INFORMATION, and COMPLAINTS, 10 ENCYC. OF PL. AND PR. 344.) — When the *intent* with which the act is committed is one of the essential elements of the offense, the word *intent* should be used in the indictment. Thus in *State v. Goldston*, 103 N. Car. 325, the court said: "The *intent* is the fixed purpose of the mind in connection with the assault. This the statute makes an essential element of the offense, and it — not the evidence of it — must be charged. It is possible that some other word or expression would suffice as a substitute for the word *intent*, as employed in the statute, but it is an expressive, precise word, well understood and much used in statutes, and it is not at all safe for pleaders to omit it in all proper connections. The charge should be, 'with *intent*, feloniously,' etc." *Citing State v. Martin*, 3 Dev. & B. L. (N. Car.) 329; *State v. Scott*, 72 N. Car. 461; *State v. Jesse*, 2 Dev. & B. L. (N. Car.) 297.

1. *Knoxville v. King*, 7 Lea (Tenn.) 446.

Intentionally in the Sense of Purposely. — See *Wright v. Clark*, 50 Vt. 130.

"Intentionally" and "With Premeditated Design" Distinguished. — *State v. Brown*, 12 Minn. 490; *State v. Hoyt*, 13 Minn. 132. And see the title MURDER and MANSLAUGHTER.

Intentional Injuries — Accident Insurance. — In *Berger v. Pacific Mut. L. Ins. Co.*, 88 Fed. Rep. 242, it was held that the exception did not include death from being shot by an insane person.

Intentional Violation. — Where the charter of a corporation provided that its ordinances in regard to impounding stock should not be obligatory on the persons and property of non-residents of the municipality, being citizens of the state, unless in case of *intentional* violation, it was held that the stock of such nonresident might be forfeited when he had knowledge of the ordinance, and knew or had good reason to believe that his stock, when turned loose on his premises, would go into the city, without showing that he had the specific *intent* that they should go. *Knoxville*

INTERCOURSE. — See SEXUAL INTERCOURSE.

INTERDICTION. (See also the title INTERNATIONAL LAW, *post.*) — An interdiction or suspension of commercial intercourse means, *ex vi termini*, an entire cessation for the time being of all trade whatever.¹

INTERESSE TERMINI. (See also the titles LANDLORD AND TENANT; LEASE.) — An *interesse termini* is a right to the possession of the premises at a future time; and upon an ordinary lease to commence *instantly* the lessee, at common law, has an *interesse termini* only until entry.²

v. King, 7 Lea (Tenn.) 441. See generally the titles IMPOUNDING, *ante*, p. 4; MUNICIPAL CORPORATIONS.

Estoppel. — In *Gillett v. Wiley*, 126 Ill. 323, it was said: "The cases and text writers seem to use interchangeably the words 'wilfully,' *intentionally*, 'means,' and 'voluntarily,' as synonymous terms, in discussing the question of the making of declarations or performing acts from which it is alleged an estoppel arises."

Failure to File Report. — A statute provided that where directors of certain corporations should "*intentionally* neglect" to file annual reports, they should be liable for debts contracted during the period of neglect. In an action brought against the directors the court below found *inter alia* that "they had no active intention to violate the law," but reached the conclusion of law that "under the statute

the neglect or refusal was an *intentional* one." This was reversed by the Supreme Court, which said: "This provision of the statute * * * cannot be construed as though the word *intentionally* was omitted, and yet such in effect was the construction given it by the court below in the conclusion arrived at." *Breitung v. Lindauer*, 37 Mich. 217.

Intentional Injury — Accident Insurance. (See also the title ACCIDENT INSURANCE, vol. 1, p. 322.) — In *American Acc. Co. v. Carson*, 99 Ky. 441, it was held that the term "*intentional* injuries" covered the death of an officer who was shot by a prisoner whom he was attempting to arrest. See also *De Graw v. National Acc. Soc.*, 51 Hun (N. Y.) 142.

1. *The Edward*, 1 Wheat. (U. S.) 272.

2. 4 Kent's Com. 97, *cited* in *Austin v. Huntsville Coal, etc., Co.*, 72 Mo. 542. See the title MINES AND MINING CLAIMS.

INTEREST.

BY ARCHIBALD R. WATSON.

I. DEFINITIONS, 990.

1. *Interest Generally*, 990.
2. *Simple Interest*, 991.
3. *Compound Interest*, 991.
4. *Legal Interest*, 991.
5. *Conventional Interest*, 991.

II. ORIGIN AND HISTORY OF INTEREST, 991.

1. *Origin*, 991.
2. *Rule of Early Common Law*, 991.
3. *Interest under Statutes of Hen. VIII. and Anne*, 992.
4. *Evolution and Development of Laws of Interest*, 992.
 - a. *In General*, 992.
 - b. *Survey of English Decisions*, 992.
 - c. *Consideration of Canadian Cases*, 993.
 - d. *Review of American Authorities*, 993.
 - (1) *General Outline*, 993.
 - (2) *Interest on Unliquidated Demands*, 994.
 - (3) *Limits of Rule*, 994.
 - e. *Rule under Modern Statutes*, 995.
 - (1) *English Statutes — Act 3 & 4 Wm. IV.*, 995.
 - (2) *Enactments of the Several States*, 995.
 - (a) *In General*, 995.
 - (b) *Doctrine that Interest Is Solely Creature of Statute*, 995.
 - (c) *Actions under Special Statutes Making No Provision for Interest*, 996.
 - (d) *Provision as to Unreasonable and Vexatious Delay*, 997.
 - (e) *Moneys Due on Instruments of Writing*, 997.
 - (3) *Construction and Operation*, 998.
 - (a) *General Rules of Construction Applicable*, 998.
 - (b) *Not Retrospective in Operation*, 998.
 - (4) *Constitutionality*, 998.

III. GROUNDS OF ALLOWANCE OF INTEREST, 999.

1. *In General*, 999.
2. *Doctrine that Equity Follows the Law*, 999.

IV. CONTRACTS TO PAY INTEREST, 999.

1. *In General*, 999.
2. *Express Contracts*, 999.
 - a. *In General*, 999.
 - b. *Written Contracts*, 1000.
 - (1) *In General*, 1000.
 - (2) *Object of Requirement*, 1000.
 - (3) *Requisites*, 1000.
 - (a) *Contract to Specify Rate*, 1000.
 - (b) *Rate to Appear in Contract for Principal Debt*, 1000.
 - (c) *Interest Included in Principal Sum*, 1000.
 - (4) *Construction*, 1001.
 - (a) *In General*, 1001.

INTEREST.

- (b) *Whether Construction for Court or Jury*, 1001.
 - (c) *Parol Evidence*, 1002.
 - (d) *When Interest Payable*, 1002.
 - c. *Verbal Contracts*, 1002.
 - 3. *Implied Contracts*, 1002.
 - a. *In General*, 1002.
 - b. *How Implied Contract May Arise*, 1003.
 - (1) *General Usage or Custom*, 1003.
 - (a) *In General*, 1003.
 - (b) *Mercantile Instruments*, 1004.
 - (c) *Liquidated Accounts*, 1004.
 - (2) *Custom or Course of Dealings of Parties*, 1004.
 - (a) *In General*, 1004.
 - (b) *Knowledge of Custom*, 1005.
 - (c) *Question of Fact for Jury*, 1005.
 - (3) *Particular Acts of Parties or Terms of Particular Contract*, 1005.
 - (a) *In General*, 1005.
 - (b) *No Implication for Interest or Implication Not to Pay It*, 1006.
 - (4) *Breach of Contract to Pay Money*, 1006.
- V. **INTEREST AS DAMAGES FOR BREACH OF CONTRACT**, 1007.
 - 1. *Contracts to Pay Money*, 1007.
 - a. *In General*, 1007.
 - b. *Express Contracts to Pay Money*, 1007.
 - (1) *In General*, 1007.
 - (2) *Several Sorts of Contracts*, 1008.
 - (a) *Bills of Exchange*, 1008.
 - (b) *Promissory Notes*, 1008.
 - (c) *Penal Bonds*, 1008.
 - aa. *In General*, 1008.
 - bb. *Interest in Excess of Penalty*, 1009.
 - (aa) *In General*, 1009.
 - (bb) *Principal and Surety*, 1009.
 - (d) *Lost Instruments*, 1010.
 - (e) *Debts of Decedents*, 1010.
 - (f) *Liquidated Damages*, 1010.
 - c. *Implied Contracts to Pay Money*, 1010.
 - (1) *In General*, 1010.
 - (2) *Money Paid and Received Through Mistake*, 1011.
 - (3) *Money Paid for Use of Another*, 1011.
 - (4) *Money Fraudulently or Wrongfully Obtained*, 1012.
 - (5) *Money Wrongfully or Unlawfully Withheld*, 1012.
 - (6) *Money Had and Received*, 1012.
 - (a) *General Rule*, 1012.
 - (b) *Contrary Doctrine*, 1013.
 - (7) *Conversion of Money*, 1013.
 - d. *Interest as Measure of Damages*, 1013.
 - 2. *Requisites to Recovery*, 1014.
 - a. *In General*, 1014.
 - b. *Amount to Be Paid*, 1014.
 - (1) *In General*, 1014.
 - (2) *Rule as to Unliquidated Demands*, 1015.
 - (a) *In General*, 1015.
 - (b) *Modification of Rule*, 1016.
 - (c) *Where Amount Capable of Ascertainment*, 1016.
 - (d) *Amount in Dispute*, 1016.
 - (3) *Accounts*, 1017.
 - (a) *Unliquidated Accounts*, 1017.

INTEREST.

- (b) *Liquidated Accounts*, 1017.
 - (c) *Interest by Agreement of Parties*, 1018.
- c. *Time for Payment*, 1019.
- d. *Necessity for Default*, 1019.
 - (1) *In General*, 1019.
 - (2) *Default in Liquidating Debt*, 1020.
 - (3) *Liability of Mere Depositary*, 1020.
- e. *Demand*, 1020.
 - (1) *General Rule*, 1020.
 - (2) *Exceptions to General Rule*, 1022.
 - (3) *Requisites of Demand*, 1022.
 - (a) *In General*, 1022.
 - (b) *Excessive Demand*, 1023.
 - (4) *Evidence and Presumption of Demand*, 1023.
 - (5) *Institution of Suit as Demand*, 1023.
 - (a) *In General*, 1023.
 - (b) *Suit Subsequently Dismissed*, 1024.
 - (6) *When Demand Unnecessary*, 1024.
 - (7) *Demands under Particular Statutes*, 1024.
- 3. *Contracts Other than to Pay Money*, 1024.
 - a. *General Rule*, 1024.
 - b. *Exceptions to General Rule*, 1024.
 - (1) *Where Amount Ascertainable by Computation*, 1025.
 - (2) *Market Values*, 1025.
 - (3) *Contracts to Deliver Personalty*, 1025.
 - (4) *Warranties*, 1026.
 - (5) *Contract to Execute Bill or Note*, 1026.
 - c. *Interest as Damages in Lieu of More Certain Standard*, 1026.

VI. INTEREST AS DAMAGES FOR TORT, 1027.

- 1. *In General*, 1027.
- 2. *Torts to Property*, 1027.
 - a. *In General*, 1027.
 - b. *Injuries to or Destruction of Property*, 1027.
 - c. *Deprivation of Use*, 1029.
 - d. *Interest Eo Nomine*, 1029.
 - e. *Unreasonable and Vexatious Delay*, 1030.
 - f. *Property Having Ascertainable Pecuniary Value*, 1030.
 - g. *Doctrine that Interest Not Recoverable*, 1031.
 - h. *Interest in Negligence Cases*, 1031.
 - i. *Exemplary Damages*, 1031.
- 3. *Torts to Person*, 1032.

VII. INTEREST AS MERE INCIDENT OF PRINCIPAL OR INTEGRAL PART OF DEBT, 1032.

- 1. *General Observations*, 1032.
- 2. *Effect of Payment of Principal*, 1033.
 - a. *Interest Due by Contract*, 1033.
 - b. *Interest Recoverable as Damages*, 1033.
 - (1) *In General*, 1033.
 - (2) *Payment Pending Suit*, 1034.
 - (3) *Claiming Right to Interest*, 1034.
 - (4) *Agreement for Survival of Right*, 1035.
 - (5) *Rule of Application of Payments*, 1035.
 - c. *Rule under Special Statutes*, 1035.
 - d. *Payments in Compromise or Settlement of Debt*, 1035.
- 3. *Effect of Payment of Interest*, 1035.

VIII. COMPUTATION OF INTEREST, 1036.

- 1. *General Rule*, 1036.
- 2. *Partial Payments*, 1036.
 - a. *Where Compound Interest Not Allowed*, 1036

INTEREST.

- b. Where Interest Compounded, 1037.*
 - c. Interest on Payments, 1037.*
- 3. *Mistake in Computation, 1037.*
 - a. In General, 1037.*
 - b. Remittitur of Interest Erroneously Allowed, 1038.*
- 4. *Application of Payments, 1038.*
- 5. *Recovery Back of Interest Voluntarily Paid, 1039.*

IX. TIME FROM WHICH COMPUTED, 1039.

- 1. *In General, 1039.*
- 2. *Interest by Contract, 1039.*
 - a. Where Date Expressly Fixed, 1039.*
 - (1) *In General, 1039.*
 - (2) *Interest "After Maturity" — Days of Grace, 1039.*
 - (3) *Date Dependent upon Condition, 1039.*
 - b. Where Date Impliedly Fixed, 1040.*
 - (1) *In General, 1040.*
 - (2) *Money Paid at Another's Request, 1040.*
 - (3) *Contracts to Pay at Stated Time "with Interest," 1040.*
- 3. *Interest as Damages, 1040.*
 - a. For Breach of Contract, 1040.*
 - (1) *General Rule — From Date of Breach, 1040.*
 - (2) *Contracts to Pay Money, 1041.*
 - (a) *Express Contracts, 1041.*
 - aa. General Rule, 1041.*
 - bb. Where No Time for Payment of Principal Fixed, 1043.*
 - cc. Contracts to Pay on Condition, 1043.*
 - dd. Debts Due "On Demand," 1043.*
 - (b) *Implied Contracts, 1044.*
 - aa. General Rule, 1044.*
 - bb. Debts Admitted to Be Due, 1044.*
 - cc. Implication to Pay on Demand, 1044.*
 - (c) *Under Special Statutes, 1045.*
 - (3) *Interest from Institution of Suit, 1045.*
 - (4) *Contracts to Do Something Other than to Pay Money, 1046.*
 - b. For Tort, 1046.*
 - (1) *In General, 1046.*
 - (2) *Injuries to Property, 1047.*
 - (a) *Interest from Date of Injuries, 1047.*
 - (b) *Interest from Institution of Suit, 1047.*
 - (c) *Interest from Judgment, 1047.*

X. TO WHAT TIME COMPUTED, 1047.

- 1. *Interest by Contract, 1047.*
- 2. *Interest as Damages, 1048.*

XI. RATE OF INTEREST, 1048.

- 1. *Generally, 1048.*
- 2. *Rate by Contract, 1048.*
 - a. Express Contracts for Rate, 1048.*
 - (1) *In General, 1048.*
 - (2) *Contracts Increasing Rate, 1048.*
 - (a) *In General, 1048.*
 - (b) *Debts Secured by Mortgage, 1049.*
 - (c) *Stipulation for Higher Rate After Maturity, 1049.*
 - aa. In General, 1049.*
 - bb. Doctrine that Higher Rate Recoverable, 1049.*
 - (aa) *In General, 1049.*
 - (bb) *Waiver of Higher Rate by Acceptance of Lower, 1050.*

INTEREST.

- cc. Doctrine that Higher Rate Not Recoverable,*
1050.
- dd. Interest from Date if Not Paid at Maturity,*
1050.
- (3) *Contracts Reducing Rate,* 1051.
- b. Implied Contracts for Rate,* 1051.
 - (1) *In General,* 1051.
 - (2) *Contract for Interest Without Expressing Rate,* 1051.
- 3. *Rate as Damages,* 1052.
 - a. General Rule — Legal Rate,* 1052.
 - b. Exceptions to General Rule,* 1053.
 - c. Where No Legal Rate Exists,* 1053.
- 4. *Rate After Maturity,* 1053.
 - a. In General,* 1053.
 - b. Rule of Intent of Parties,* 1053.
 - (1) *Generally,* 1053.
 - (2) *Demand and One-day Notes,* 1055.
 - c. Where Contract Rate Higher than Legal Rate,* 1055.
 - (1) *Legal Rate After Maturity,* 1055.
 - (2) *Contract Rate After Maturity,* 1056.
 - d. Where Contract Rate Lower than Legal Rate,* 1058.
 - (1) *In General,* 1058.
 - (2) *Legal Rate After Maturity,* 1058.
 - (3) *Contract Rate After Maturity,* 1059.
 - e. Rule under Special Statutes,* 1059.
 - (1) *In General,* 1059.
 - (2) *Judgments and Decrees,* 1059.
- 5. *Statutes Changing Rate,* 1060.
 - a. In General,* 1060.
 - b. Interest Due by Contract,* 1061.
 - (1) *In General,* 1061.
 - (2) *Interest Contracted for, but No Rate Named,* 1061.
 - (3) *Contract for Money with No Stipulation for Interest,* 1062.
 - (4) *Contract for Legal Rate as Changed by Law,* 1062.
 - c. Interest Recoverable as Damages,* 1062.
 - d. Judgments,* 1062.

XII. SUSPENSION OF INTEREST, 1064.

- 1. *By Terms of Contract,* 1064.
- 2. *By Act or Omission of Creditor,* 1064.
 - a. In General,* 1064.
 - b. Failure to Present Bill or Note for Payment,* 1065.
 - c. Laches,* 1065.
 - d. Neglect to Ascertain Amount Due,* 1066.
 - e. Vendor's Delay to Make Title,* 1066.
 - f. Death of Creditor,* 1066.
 - g. Tender,* 1066.
 - (1) *Generally,* 1066.
 - (2) *What Is Sufficient Tender,* 1067.
 - (a) *Mere Readiness to Pay,* 1067.
 - (b) *Tender of Less Sum than Due,* 1067.
 - (c) *Offer to Pay on Condition,* 1067.
 - (3) *Doctrine that Technical Tender Unnecessary,* 1068.
- 3. *By Act of Law,* 1068.
 - a. In General,* 1068.
 - b. Injunction or Order of Court,* 1068.
 - c. Money Paid into Court,* 1069.
- 4. *By Existence of State of War,* 1069.
 - a. In General,* 1069.
 - b. Only Interest as Damages Suspended,* 1070.
 - (1) *In General,* 1070.

INTEREST.

- (2) *Subsequent Contract to Pay*, 1070.
- c. *Requisites to Application of Rule*, 1070.

XIII. ANNUAL AND PERIODIC INTEREST, 1071.

- 1. *Generally*, 1071.
- 2. *Periodic Interest Due Only by Contract*, 1071.
 - a. *General Rule*, 1071.
 - b. *After Maturity of Principal Debt*, 1071.
- 3. *How Contracted For — Terms of Contract*, 1071.
- 4. *Actions for Interest When Due*, 1072.
- 5. *Interest on Annual or Periodic Interest*, 1073.

XIV. COMPOUND INTEREST AND INTEREST ON INTEREST, 1073.

- 1. *General Rule Against*, 1073.
- 2. *Allowance in Special Cases*, 1074.
 - a. *Generally*, 1074.
 - b. *Coupons*, 1074.
 - c. *Judgments and Decrees*, 1075.
 - (1) *General Rule*, 1075.
 - (2) *Rate*, 1076.
- 3. *Where Contracted For*, 1076.
 - a. *In General*, 1076.
 - b. *Express Contracts*, 1077.
 - (1) *Necessity for Express Contract*, 1077.
 - (2) *Contract for Compound Interest Before Principal Interest Due*, 1078.
 - (3) *Contract for Interest on Interest After Interest Due*, 1078.
 - c. *Implied Contracts*, 1079.
 - (1) *In General*, 1079.
 - (2) *Accounts*, 1080.
 - (a) *General Rule*, 1080.
 - (b) *Contrary Doctrine*, 1080.
 - (c) *After Cessation of Mutual Dealings*, 1080.
- 4. *Compound Interest as Damages*, 1080.
 - a. *In General*, 1080.
 - b. *Compound Interest After Maturity of Principal*, 1080.
 - c. *Effect of Demand*, 1081.
- 5. *Rule under Particular Statutes*, 1081.
- 6. *Simple Interest on Interest of Principal*, 1081.
 - a. *By Contract*, 1081.
 - (1) *Doctrine that Secondary Interest Recoverable*, 1081.
 - (2) *Contrary Doctrine*, 1082.
 - b. *As Damages*, 1082.
 - (1) *General Rule*, 1082.
 - (2) *Rate*, 1083.
 - (3) *Contrary Doctrine*, 1083.
- 7. *Summary of Rules*, 1084.

XV. WHAT LAW GOVERNS, AND CONFLICT OF LAWS, 1085.

- 1. *Interest by Contract*, 1085.
 - a. *Generally*, 1085.
 - b. *Express Contracts*, 1085.
 - (1) *Law of Place with Reference to Which Contract Made*, 1085.
 - (2) *Place Where Contract Entered Into*, 1086.
 - (3) *Place Where Contract to Be Performed*, 1087.
 - (a) *In General*, 1087.
 - (b) *Stipulation for Interest Without Naming Rate*, 1088.
 - (c) *Place Where Contract Made as Place of Performance*, 1088.
 - (4) *Place Where Suit Brought*, 1089.
 - c. *Implied Contracts*, 1090.
- 2. *Interest as Damages*, 1090.

- a. *Damages for Breach of Contract*, 1090.
 - (1) *Law of Place of Performance*, 1090.
 - (2) *Place Where Contract Made as Place of Performance*, 1091.
 - (3) *Law of Place of Suit*, 1091.
- b. *Damages for Tort*, 1091.
- 3. *Foreign Judgments*, 1091.
 - a. *Law of Jurisdiction Where Judgment Rendered*, 1091.
 - b. *Law of Place Where Suit Brought*, 1092.
- 4. *Proof of Interest Law of Foreign Jurisdiction*, 1092.
 - a. *In General*, 1092.
 - b. *Foreign Interest Law Not Subject of Judicial Notice*, 1093.
 - c. *How Foreign Interest Law Proven*, 1094.
 - (1) *In General*, 1094.
 - (2) *Interest by Custom*, 1094.
 - d. *Consequences of Failure of Proof*, 1095.
 - (1) *No Interest Where Foreign Law Not Shown*, 1095.
 - (2) *Interest by Law of Forum*, 1095.
 - (3) *Interest According to Rule of Common Law*, 1095.

XVI. DISCRETIONARY INTEREST, AND INTEREST AS MATTER OF RIGHT, 1095.

- 1. *In General*, 1095.
- 2. *Interest by Contract*, 1096.
- 3. *Interest as Damages*, 1096.
 - a. *In General*, 1096.
 - b. *Damages for Breach of Contract*, 1097.
 - (1) *In General*, 1097.
 - (2) *Contracts to Pay Money*, 1097.
 - (a) *Interest as of Right*, 1097.
 - (b) *Interest in Discretion of Jury*, 1097.
 - (3) *Contracts to Do Something Other than Pay Money*, 1098.
 - c. *Damages for Tort*, 1098.
 - (1) *In General*, 1098.
 - (2) *Torts to Property*, 1099.
 - (a) *Interest as of Right*, 1099.
 - (b) *Interest in Discretion of Jury*, 1099.
 - (3) *Torts to Person*, 1099.
- 4. *When Jury May Be Instructed to Give Interest*, 1100.
- 5. *Rule under Particular Statutes*, 1101.

CROSS-REFERENCES.

For matters of PLEADING and PROCEDURE, see *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*, vol. 11, p. 435.

For a treatment of the subject in special connections see appropriate titles in this work, such, for example, as *BANKS AND BANKING*, vol. 3, p. 787; *BILLS OF EXCHANGE AND PROMISSORY NOTES*, vol. 4, p. 65; *CHECKS*, vol. 5, p. 1028; *COUPONS*, vol. 8, p. 1; *DAMAGES*, vol. 8, p. 537; *EXEMPLARY DAMAGES*, vol. 12, p. 2; *FACTORS OR COMMISSION MERCHANTS*, vol. 12, p. 625; *FALSE IMPRISONMENT*, vol. 12, p. 719; *FIRES*, vol. 13, p. 404; *FRAUDULENT SALES AND CONVEYANCES*, vol. 14, p. 210; *INSOLVENCY AND BANKRUPTCY*, ante, p. 630; *JUDGMENTS*; *LIFE INSURANCE*; *LIMITATION OF ACTIONS*; *MECHANICS' LIENS*; *MUNICIPAL AID BONDS*; *MUNICIPAL CORPORATIONS*; *NATIONAL BANKS*; *PLEDGE AND COLLATERAL SECURITY*; *REPLEVIN*; *SAVINGS BANKS*; *STOCKS*; *STOCKHOLDERS*; *TAXATION*; *TRESPASS*; *TROVER AND CONVERSION*; *VERDICT*.

I. DEFINITIONS — 1. Interest Generally. — Interest is compensation for the use or forbearance of money, or for withholding from or depriving a party of

money or that which has a pecuniary value.¹

2. Simple Interest. — Simple interest is interest on the principal sum originally loaned.²

3. Compound Interest. — Compound interest is interest upon both original principal and accruing interest, the latter being added to the principal sum, and the aggregate treated as a new principal for the calculation of interest for the next period.³

4. Legal Interest. — Legal interest is a term generally applied to the rate of interest, rather than the right to the recovery of interest in the particular case. As such, it is the rate of interest prescribed by law where the parties to the transaction have fixed none. In a broader sense, all interest which the law recognizes or permits is legal interest, illegal interest being usury.⁴

5. Conventional Interest. — Conventional interest is also a term which usually has reference to the rate. So understood it means the rate agreed upon by the parties by contract, express or implied,⁵ and may be greater or less than the legal rate of interest, provided it is not in excess of the maximum rate for which the parties are allowed by law to contract.⁶

II. ORIGIN AND HISTORY OF INTEREST — **1. Origin.** — Originally interest was unquestionably compensation paid to the owner of money for its use, and the practice of taking this money hire probably sprang up among the nations of the world as their respective civilizations reached the stage where money, superseding the barter of goods, became a general medium of exchange.⁷

2. Rule of Early Common Law. — The rule of the early common law did not permit the taking of interest as compensation for the use of money,⁸ and the

1. Interest Defined. — And. L. Dict.; Bouv. L. Dict.

Compensation for Forbearance by Lender. — Lord Ellenborough in *Dent v. Dunn*, 3 Campb. 296; *Parks v. Lubbock*, 92 Tex. 635.

Compensation for Delay in Payment. — Kelsey v. Murphy, 30 Pa. St. 340; *Parks v. Lubbock*, 92 Tex. 635.

Interest as Damages for Delay. — *Nashua, etc., R. Corp. v. Boston, etc., R. Corp.*, 61 Fed. Rep. 237; *Minard v. Beans*, 64 Pa. St. 411.

Statutory Definitions. — Civil Code Cal., § 1915; Rev. Stat. Tex. (1895), art. 3097; *Parks v. Lubbock*, 92 Tex. 635. And see 1 Stimson's Am. Stat. Law, § 481c.

Interest as Damages Not Included in Common-law Definition. — In *Parks v. Lubbock*, 92 Tex. 635, citing 11 AM. AND ENG. ENCYC. OF LAW (1st ed.) 379, it was said that interest, as known to the common law, is defined as "a compensation, usually reckoned by a percentage, for the loan, use, or forbearance of the money," and that this definition does not embrace compensation for the detention of money beyond the time at which, by agreement, it was to be paid; that is to say, after the maturity of the debt. Therefore the parties to a contract for the payment of money might lawfully stipulate that, upon the failure of the debtor to pay at maturity, he should pay for the detention a rate in excess of what the law would allow as interest, the sum so stipulated for being treated, not as interest, but as a penalty for failing to pay at maturity; a stipulation, it was declared, the validity of which the authorities were practically unanimous in maintaining.

2. Simple Interest. — Black's L. Dict.; And. L. Dict.

3. Compound Interest. — Black's L. Dict.; And. L. Dict.

4. Legal Interest Is the Rate of Interest Established by the Law of the Country and which will prevail in the absence of express stipulation. Black's L. Dict.; *Beals v. Amador County*, 35 Cal. 624. But this is erroneous in so far as it states a requirement for an express stipulation as to the rate, in the absence of which interest at the legal rate will prevail. As will be seen hereafter, the right to interest as well as the rate recoverable may be regulated by implication merely, as in the case of known custom or established course of dealings between the parties. See *infra*, this title, *Contracts to Pay Interest* — *Implied Contracts*; *Rate of Interest* — *Rate by Contract* — *Implied Contracts for Rate*. See also Bouv. L. Dict.

5. Conventional Interest. — See Black's L. Dict.; Bouv. L. Dict.

6. See *Fowler v. Smith*, 2 Cal. 568.

7. References to Interest in the Bible. — Interest, or usury as it was then known, the latter term as applied to money signifying merely that which is paid for its use, is mentioned a number of times in the Bible. See Deut. xxiii. 20; Matt. xxv. 27.

8. Taking of Interest Prohibited by Early Common Law. — *Lowe v. Waller*, 2 Dougl. 736; *Nashua, etc., R. Corp. v. Boston, etc., R. Corp.*, 61 Fed. Rep. 237; *Commonwealth Nat. Bank v. Mechanics' Nat. Bank*, 94 U. S. 438; *Pekins v. Reynolds*, 31 Ill. 529, 83 Am. Dec. 244; *Adrianze v. Brooks*, 13 Tex. 279. And see *Perkins v. Fourniquet*, 14 How. (U. S.) 328; 1 Jefferson's Am. State Papers (1st ed.) 307; 2 Black. Com. 454.

Another Statement of Common-law Rule — No Interest in Absence of Contract. — In several American cases it is said that the common-law rule was that no interest could be recovered in the absence of contract. *Fowler v. Harts*, 149

practice was likewise condemned by the law of the ecclesiastics.¹ It seems to have been held by the church to be actually sinful, and by the courts to have been unlawful from the political reason that money, being only a medium of exchange, was naturally barren and unproductive.²

3. Interest under Statutes of Hen. VIII. and Anne. — The first English statute on the subject of interest was 37 Hen. VIII., c. 9. This statute fixed the lawful rate of interest at ten per cent. and visited the receipt of more with forfeiture and imprisonment. By the statute of 12 Anne, stat. 2, c. 16, the rate of interest which might be lawfully contracted for in England was reduced to five per cent.³

4. Evolution and Development of Laws of Interest — a. IN GENERAL. — It may safely be stated that there is no subject in the law with reference to which there is greater conflict and confusion in the cases than that of interest.⁴ The history of interest law, whether allowed by virtue of contract or as damages, is one of an evolution and development by no means gradual, logical, or symmetrical. It is punctuated here and there by legislative enactments, which in some instances, but by no means in all, have served to simplify or render more certain and fixed the principles regulating this very important branch of jurisprudence. Again, in the history of this subject there are landmarks in the way of judicial decisions, themselves amounting practically to legislation, but which still leave the subject in a most unsettled state. It is not until comparatively recent times that the cases have approached anything like harmony, or, it might be said, have evinced a clear comprehension or discriminating understanding of the several distinct principles on which the allowance of interest may properly depend.⁵

b. SURVEY OF ENGLISH DECISIONS. — The conflict of English authority

Ill. 592; *Dodge v. Perkins*, 9 Pick. (Mass.) 368; *Perry v. Taylor*, 1 Utah 66. But these cases, it is apprehended, refer to the American common law, and not to the English common law; the former, it is generally held, including such statutes as those of Henry VIII. and Anne, which were enacted prior to the colonization of America and were not local in their operation to England nor repugnant to the spirit of American institutions. The English common-law rule is believed to be as stated above.

1. Rule of Ecclesiastical Law. — *Lowe v. Waller*, 2 Dougl. 736; *Mason v. Callender*, 2 Minn. 359, 72 Am. Dec. 102, 2 Black. Com. 454, citing Decretals, l. 5, tit. 19.

2. Reasons for Disallowance of Interest Stated and Fallacies Pointed Out. — *Mason v. Callender*, 2 Minn. 359, 72 Am. Dec. 102; 2 Black. Com. 454.

3. Interest under English Statutes. — *Lowe v. Waller*, 2 Dougl. 736; *Commonwealth Nat. Bank v. Mechanics' Nat. Bank*, 94 U. S. 438; *Mason v. Callender*, 2 Minn. 359, 72 Am. Dec. 102; *Jefferson's Am. State Papers* (1st ed.) 307. And see *Nashua, etc., R. Corp. v. Boston, etc., R. Corp.*, 61 Fed. Rep. 237.

Policy of Statute 37 Hen. VIII., c. 9. — It may be questioned whether the statute 37 Hen. VIII., c. 9, was the result of more enlightened views as to the justice, honesty, or advantages of letting money at interest, or was rather the dictate of policy that as the vice could not be suppressed it should be tolerated, but with many and severe restrictions. *Adrian v. Brooks*, 13 Tex. 279.

Statutes Negative in Character. — The statute 37 Hen. VIII., c. 9, with reference to interest, and most of the succeeding statutes of *England*

on the subject, are negative in character. They sanction interest indirectly by declaring that not more than a specified per cent. shall be taken for the loan of money or other commodity. They do not declare affirmatively in what cases interest shall be taken, nor do they positively require its payment in any case. *Adrian v. Brooks*, 13 Tex. 279.

4. Conflict in Cases Noted. — *Elbert, C. J.*, in *Hawley v. Barker*, 5 Colo. 118; *White v. Miller*, 78 N. Y. 394, 34 Am. Rep. 544.

Confusion in Use of Terms. — It has been said that the conflict in the cases on the subject of interest is not so much in regard to principle as in the mode of expression. The contest has been whether the allowance should or should not be made; and the name by which it should be called, whether interest or compensation for delay, measured by the rate of interest, receiving little attention, it has been incautiously said that interest was or was not to be allowed. The distinction, however, is important, and failure to observe it leads to great confusion. *Plymouth Tp. v. Graver*, 125 Pa. St. 37; *Richards v. Citizens Natural Gas Co.*, 130 Pa. St. 37.

5. "The Tendency of Courts in Modern Times" has been to extend the right to recover interest on demand far beyond the limits within which that right was originally confined. What seemed to be the demands of justice did not permit the principle to remain stationary, and hence it has been for years in a state of constant evolution. This, in some measure, accounts for many of the apparently contradictory views to be found in the adjudged cases." *O'Brien, J.*, in *Wilson v. Troy*, 135 N. Y. 103, 31 Am. St. Rep. 817.

on the question of interest has been the subject of special comment.¹ From the clearest view ascertainable from the cases it appears that the rule of 37 Hen. VIII., allowing interest where contracted for, not to exceed a prescribed rate, was extended to cases of implied contracts as well as to those where the contract was express, including mercantile securities, where an undertaking to pay interest would be implied from the usage of trade, and cases where a similar undertaking might be presumed from the course of dealings between the parties.² In the absence of these conditions, interest was not allowed in an action for money lent, or for money had and received, or for money paid, or on an account stated, or for goods sold, or for work and labor, even though to be paid for on a particular day.³ In some cases, however, the doctrine of implied contracts to pay interest does not seem to have been confined to mercantile instruments, or where there is a pre established course of dealings from which an undertaking to pay interest may be presumed, these cases inclining to the position that wherever there is a definite sum of money due, interest should be allowed from the date of default.⁴ Interest has also been allowed, in the discretion of the jury, as damages for the detention of the principal sum.⁵

c. CONSIDERATION OF CANADIAN CASES. — The Canadian cases on the subject of interest are, of course, controlled to a large extent by English precedents. But a tendency to a greater liberality in the allowance of interest is observable in the Canadian courts.⁶

d. REVIEW OF AMERICAN AUTHORITIES — (1) *General Outline.* — In the United States the courts seem, from the outset, to have viewed the allowance of interest with greater favor than the courts of England.⁷ In the first place, the courts of the United States were, from the beginning, able to consider the subject free from the taint of the prejudice of the ancient common and ecclesiastical law. There was never, with them, any doubt about the recovery of interest when expressly contracted for, or where an undertaking to pay it might be implied from a usage of trade, as in the case of mercantile securities, or from the previous course of dealings between the parties. But in addition

1. *Conflict of English Cases.* — *Nashua, etc., R. Corp. v. Boston, etc., R. Corp.*, 61 Fed. Rep. 237; *Anderson v. State*, 2 Ga. 377; *Cartmill v. Brown*, 1 A. K. Marsh. (Ky.) 576, 10 Am. Dec. 763; *Weston, J., in Doe v. Warren*, 7 M. 48; *Van Rensselaer v. Jones*, 2 Barb. (N. Y.) 695.

2. *Contract to Pay Interest* — *Rule under 37 Hen. VIII.* — *Foster v. Weston*, 4 M. & P. 589, 6 Bing. 799, 16 E. C. L. 211; *Page v. Newman*, 9 B. & C. 378, 17 E. C. L. 399; *Higgins v. Sargent*, 2 B. & C. 348, 9 E. C. L. 101. And see *White v. Miller*, 78 N. Y. 394, 34 Am. Rep. 544.

3. *Rule Denying Interest in Absence of Express or Implied Contract Therefor.* — *White v. Miller*, 73 N. Y. 394, 34 Am. Rep. 544.

Simple Contract Debts. — *Rhodes v. Rhodes*, Johns. 553, 6 Jur. N. S. 600, 29 L. J. Ch. 418, 8 W. R. 204. To the same effect see *Lloyd v. Williams*, 2 Atk. 108.

Money Lent. — *Page v. Newman*, 9 B. & C. 378, 17 E. C. L. 399; *Harris v. Henson*, 2 Stra. 410; *Calton v. Bragg*, 15 East 223; *Gordon v. Swan*, 12 East 419.

Single Bonds. — *Hogan v. Page*, 1 B. & P. 337.

The Law of England, it has been said, does not allow interest except by statute or contract, or by the law merchant. *In re Gosman*, 17 Ch. D. 771, 50 L. J. Ch. 624, 45 L. T. N. S. 267, 29 W. R. 793.

4. *Interest on Liquidated Sums from Time of*

16 C. of L.—63

Default. — *Boddam v. Ryley*, 1 Bro. C. C. 239, 2 Bro. C. C. 2; *Trelawney v. Thomas*, 1 H. Bl. 303; *Blaney v. Hendricks*, 2 W. Bl. 761, 3 Wils. C. Pl. 205; *Lowndes v. Collens*, 17 Ves. Jr. 28.

In *Blaney v. Hendricks*, 2 W. Bl. 761, it was said that interest was due on all liquidated sums from the instant when the principal becomes due and payable. These words were subsequently doubted by Lord Ellenborough, in *Calton v. Bragg*, 15 East 223, unless taken in a restricted sense.

5. *Interest in Discretion of Jury.* — *Craven v. Tickell*, 1 Ves. Jr. 60; *Caledonian R. Co. v. Carmichael*, L. R. 2 H. L. Sc. 56; *Webster v. British Empire Mut. L. Assur. Co.*, 15 Ch. D. 169, 49 L. J. Ch. 760, 43 L. T. N. S. 229, 28 W. R. 818; *Arnott v. Redfern*, 11 Moo. 209, 3 Bing. 353, 2 C. & P. 88, 12 E. C. L. 39; *Laing v. Stone*, M. & M. 229, note a, 22 E. C. L. 300, note a; *Cameron v. Smith*, 2 B. & Ald. 308; *Eddowes v. Hopkins*, 1 Dougl. 376.

A History of the Later English Practice on the subject of interest will be found in *London, etc., R. Co. v. South Eastern R. Co.*, (1895) A. C. 420.

6. *Canadian Cases* — *Greater Liberality as to Interest.* — *Spence v. Hector*, 24 U. C. Q. B. 277.

7. *Interest Regarded with More Favor in United States than in England.* — *Sullivan v. McMillan*, 37 Fla. 134, 53 Am. St. Rep. 239; *White v. Miller*, 78 N. Y. 394, 34 Am. Rep. 544; *Van Rensselaer v. Jones*, 2 Barb. (N. Y.) 696.

Volume XVI.

to this, interest has been more readily allowed in the courts of the American Union, either upon an implication regarded as arising from the mere delay in the payment of a money debt,¹ or specifically as damages for the nonpayment of a debt due.²

(2) *Interest on Unliquidated Demands.* — Until a comparatively recent time interest was not allowed on unliquidated demands;³ but this is no longer an invariable rule, and interest on unliquidated damages for the breach of contract or for tort is frequently allowed, in some instances indeed only in the discretion of the jury, but in others strictly as of right, as part of the compensation to which the injured party is entitled.⁴

(3) *Limits of Rule.* — Most of the modern authorities restrict the allowance of interest in actions for damages to cases where the damages are calculable with reference to pecuniary standards of fixed and reasonably certain values,⁵ and hold that interest is not allowable unless the party to be charged could have ascertained, by computation or otherwise, the amount for which he was liable.⁶ The same rule has been applied to actions of tort for personal injuries where the damages are wholly or largely within the discretion of the jury;⁷ and also in the case of injury to or destruction of property, the rule allowing damages in the form of interest on the value of the property has been limited to injury to such property or property right as has a fixed or certain value.⁸ Some

1. Interest for Delay in Payment of Money Debt. — *Hollingsworth v. Hammond* 30 Ala. 668; *Milton v. Blackshear*, 8 Fla. 161; *Cartmill v. Brown*, 1 A. K. Marsh. (Ky.) 576, 10 Am. Dec. 763; *Dilworth v. Sinderling*, 1 Binn. (Pa.) 488, 2 Am. Dec. 469; *Emerson v. Schoonmaker*, 135 Pa. St. 437. And see *Reading, etc., R. Co. v. Balthaser*, 126 Pa. St. 1; *Richards v. Citizens Natural Gas Co.*, 130 Pa. St. 37.

Foundation of Doctrine. — It has been well said that it is a rule founded in justice that when a man has been kept out of his money, he should be allowed to take a reasonable compensation for its use. *Moore v. Patten*, 2 Port. (Ala.) 451. And in *Nashua, etc., R. Corp. v. Boston, etc., R. Corp.*, 61 Fed. Rep. 251, it was declared that "to refuse a plaintiff or complainant interest on money unjustly detained does ordinarily a double injury; it deprives him of the increase to which he was justly entitled, and it violates, in behalf of the defendant, a fundamental maxim of equity, by allowing him to take advantage of his own wrong."

2. Interest as Damages. — *McIlvaine v. Wilkins*, 12 N. H. 474; *Thompson v. Boston, etc., R. Co.*, 58 N. H. 524; *Pass v. Shine*, 113 N. Car. 284.

3. Interest Formerly Not Allowable on Unliquidated Demands. — *Sullivan v. McMillan*, 37 Fla. 134, 53 Am. St. Rep. 239; *Mote v. Chicago, etc., R. Co.*, 27 Iowa 22; *White v. Miller*, 78 N. Y. 394, 34 Am. Rep. 544; *Brugh v. Shanks*, 5 Leigh (Va.) 598.

4. Rule Allowing Interest on Unliquidated Demands. — *Arkansas*. — *Tatum v. Mohr*, 21 Ark. 55; *Kelly v. McDonald*, 89 Ark. 387.

Florida. — *Sullivan v. McMillan*, 37 Fla. 134, 53 Am. St. Rep. 239.

Georgia. — *Georgia R., etc., Co. v. Garr*, 57 Ga. 280, 24 Am. Rep. 492; *Western, etc., R. Co. v. McCauley*, 68 Ga. 818.

Indiana. — *Chicago, etc., R. Co. v. Barnes*, 2 Ind. App. 213; *Wabash R. Co. v. Williamson*, 3 Ind. App. 190.

Iowa. — *Mote v. Chicago, etc., R. Co.*, 27 Iowa 22.

Minnesota. — *Varco v. Chicago, etc., R. Co.*, 30 Minn. 18.

New Hampshire. — *Thompson v. Boston, etc., R. Co.*, 58 N. H. 524.

New York. — *Graham v. Chrystal*, (Supm. Ct. Gen. T.) 1 Abb. Pr. N. S. (N. Y.) 121; *Wilson v. Troy*, 135 N. Y. 96, 31 Am. St. Rep. 817; *White v. Miller*, 78 N. Y. 394, 34 Am. Rep. 544; *Van Rensselaer v. Jewett*, 2 N. Y. 135, 51 Am. Dec. 275.

5. Limits of Rule — Demands Capable of Exact Computation. — *Maryland.* — *Baltimore, etc., R. Co. v. Pumphrey*, 59 Md. 390.

Missouri. — *Padley v. Catterlin*, 64 Mo. App. 629, 2 Mo. App. Rep. 1258.

New York. — *Dana v. Fiedler*, 12 N. Y. 40, 62 Am. Dec. 130; *Clegg v. New York Newspaper Union*, 72 Hun (N. Y.) 395; *Gray v. Central R. Co.*, 89 Hun (N. Y.) 477; *Lush v. Druse*, 4 Wend. (N. Y.) 313; *Van Rensselaer v. Jewett*, 2 N. Y. 135, 51 Am. Dec. 275; *McMahon v. New York, etc., R. Co.*, 20 N. Y. 463; *Mansfield v. New York Cent., etc., R. Co.*, 114 N. Y. 331; *McMaster v. State*, 108 N. Y. 542; *White v. Miller*, 78 N. Y. 396, 34 Am. Rep. 544; *Fishell v. Winans*, 38 Barb. (N. Y.) 228; *Van Rensselaer v. Jones*, 2 Barb. (N. Y.) 643.

Pennsylvania. — *Richards v. Citizens Natural Gas Co.*, 130 Pa. St. 37.

South Carolina. — *Ryan v. Baldrick*, 3 McCord L. (S. Car.) 498.

Utah. — *Nichols v. Union Pac. R. Co.*, 7 Utah 510.

6. Amount Due Not Ascertainable by Party to Be Charged. — *Button v. Kinnetz*, 88 Hun (N. Y.) 35; *Gray v. Central R. Co.*, 89 Hun (N. Y.) 477; *White v. Miller*, 78 N. Y. 396, 34 Am. Rep. 544; *McMaster v. State*, 108 N. Y. 542; *Mansfield v. New York Cent., etc., R. Co.*, 114 N. Y. 331. And see *Wiggins Ferry Co. v. Chicago, etc., R. Co.*, 128 Mo. 224.

7. Damages for Personal Injuries. — See *infra*, this title, *Interest as Damages for Tort — Torts to Person*.

8. Damages for Injury to Property. — *Tilghman v. Proctor*, 125 U. S. 161. And see *Louisville*,

cases, however, are not restrained by these considerations, and hold, apparently, that interest, at least from the institution of the suit, is recoverable in any action in which a money judgment is recovered. A further consideration of these principles and the cases supporting them will be found in other portions of this article.¹

c. RULE UNDER MODERN STATUTES — (1) English Statutes — Act 3 and 4 Wm. IV. — This act (c. 42, § 28) provided, in substance, that interest was recoverable, in the discretion of the jury, on all debts or sums certain, payable by virtue of a written instrument at a certain time, from the time when such debts or sums certain were payable;² or, if not payable by virtue of a written instrument and at a time certain, "then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the time of payment;³ provided that interest shall be payable in all cases in which it is now payable by law." The statute also provided that in actions of trover and trespass *de bonis asportatis*, and in actions upon policies of insurance, the jury might, in its discretion, allow interest as part of the recovery.⁴

(2) *Enactments of the Several States — (a) In General.* — In the several states of the American Union the allowance of interest is largely regulated and controlled by legislative enactment.⁵

(b) *Doctrine that Interest Is Solely Creature of Statute.* — It has often been said that interest is solely a creature of statute, and can never be allowed in the absence of statutory sanction;⁶ but this does not exclude a recovery of interest where

etc., *R. Co. v. Wallace*, 91 Tenn. 41. See also *infra*, this title, *Interest as Damages for Tort — Torts to Property*.

1. See *infra*, this title, *Interest as Damages for Tort — Torts to Property*; also *Time from Which Computed — Interest as Damages — Interest from Institution of Suit*.

2. *A Written Application for a Loan until a Fixed Day* is not an instrument by virtue of which money is payable within the statute 3 & 4 Wm. IV., c. 42, § 28, so as to enable a jury to give interest as damages, though the loan is made on the terms of the application. *Taylor v. Holt*, 3 H. & C. 452, 34 L. J. Exch. 1, 13 W. R. 78, 11 L. T. N. S. 347.

What Is Time Certain under Statute. — A sum certain payable under a written instrument at a stated time after death is a sum payable at a certain time within 3 & 4 Wm. IV., c. 42, § 28, and therefore carries interest after the period fixed for payment has expired. *In re Horner*, 65 L. J. Ch. 694 (1896) 2 Ch. 188, 74 L. T. N. S. 686, 44 W. R. 556; *Knapp v. Burnaby*, 9 W. R. 765.

Where the Time for the Payment of Freight Was Fixed by a Charter-party at two months after the date of the ship's return report at the custom house, it was held that interest on the amount of the freight was not recoverable, the principal sum not being payable at a time certain. *Merchant Shipping Co. v. Armitage*, L. R. 9 Q. B. 99. And see generally on this question *London, etc., R. Co. v. South Eastern R. Co.*, (1892) 1 Ch. 120, 61 L. J. Ch. 294, 65 L. T. N. S. 722, 40 W. R. 194, following *Merchant Shipping Co. v. Armitage*, L. R. 9 Q. B. 99, and overruling *Duncombe v. Brighton Club*, L. R. 10 Q. B. 371.

Statutes as Declaratory of Common Law. — It has been said that the statute 3 & 4 Wm. IV., c. 42, § 28, was only declaratory of the common law. *Thesiger, L. J.*, in *Webster v. British Empire Mut. L. Assur. Co.*, 15 Ch. D. 178.

3. *Requisites of Demand — Certainty of Time and Place.* — *Geake v. Ross*, 23 W. R. 658, 44 L. J. C. Pl. 315, 32 L. T. N. S. 666; *Harper v. Williams*, 4 Q. B. 219, 45 E. C. L. 219, 12 L. J. Q. B. 227.

The Contract Between a Railway Company and a Contractor provided that payments should be made monthly as the work progressed, on the certificates of the company's engineer. There was no stipulation in the contract with reference to the payment of interest, but the contractor made demand in writing for a sum as the balance due to him, and claimed interest thereon. The contractor's accounts were disputed, and on the bill filed by him against the company the result showed the complainant to be entitled to a balance less than one-half the sum which he claimed. It was held that the contractor was not entitled to interest under the statute above referred to, the demand in writing for payment not being of a sum certain payable at a certain time. *Hill v. South Staffordshire R. Co.*, L. R. 18 Eq. 154.

A General Intimation upon a Tradesman's Account that interest will be charged after a certain period of credit is not a sufficient notice or demand of interest within section 28 of 3 & 4 Wm. IV., c. 42. *In re Edwards*, 61 L. J. Ch. 22, 65 L. T. N. S. 453.

4. *Trover and Trespass — Interest in Discretion of Jury.* — See *White v. Miller*, 78 N. Y. 394, 34 Am. Rep. 544, setting forth and referring to this statute.

The Legislature of Quebec has no power to deal with interest though in the terms of an act passed prior to confederation, and by it repealed. *Ross v. Torrance*, 2 Montreal Leg. N. 186, 9 Rev. Leg. 565.

5. *Statutory Regulation in United States.* — See the various local codes and statutes in the United States, and *infra*, this title, *What Law Governs, and Conflict of Laws*.

6. *Doctrine that Interest Is Solely Creature of*

expressly contracted for, though the governing statute may not in terms provide for interest under such circumstances,¹ and a distinction, in the present connection, has been taken between interest *eo nomine* and interest as damages, interest being frequently given in the latter case, it is said, though no statutory provision is made therefor.²

(e) **Actions under Special Statutes Making No Provision for Interest.** — Where an action is brought under a statute creating a special liability, in which the subject of interest is ignored, the general rule is that interest is not recoverable,³ as in case of a statutory demand against a county,⁴ or a claim under a statute imposing liability for injuries on highways,⁵ or making railroad companies absolutely liable for stock killed,⁶ or the owners of stock liable for injuries done by cattle trespassing,⁷ or giving damages for the nonpayment of a foreign bill of exchange,⁸ or imposing a penalty for the violation of a statute regulating railroad rates.⁹

The Reason of the Rule laid down in these cases is that the particular statute under which the action is brought prescribes and limits the measure of dam-

Statute — *Colorado*. — *Keys v. Morrison*, 3 Colo. App. 441; *Corson v. Neatheny*, 9 Colo. 212.

Illinois. — *Cooper v. Johnson*, 27 Ill. App. 504; *Illinois Cent. R. Co. v. Cobb*, 72 Ill. 148; *Chicago v. Allcock*, 86 Ill. 384; *Fowler v. Harts*, 149 Ill. 592; *Harvey v. Hamilton*, 155 Ill. 377; *Firemen's Fund Ins. Co. v. Western Refrigerating Co.*, 162 Ill. 322.

Michigan. — *Kermott v. Ayer*, 11 Mich. 184; *Toisey v. Moore*, 79 Mich. 564.

Mississippi. — *Hamer v. Kirkwood*, 25 Miss. 95; *Warren County v. Klein*, 51 Miss. 816.

Montana. — *Randall v. Greenhood*, 3 Mont. 506; *Palmer v. Murray*, 8 Mont. 312.

Tennessee. — *Caruthers v. Andrews*, 2 Coldw. (Tenn.) 378.

Texas. — *Close v. Fields*, 2 Tex. 232; *Houston, etc., R. Co. v. Jackson*, 62 Tex. 209.

1. **Right to Contract for Interest Independently of Statute.** — *Denver, etc., R. Co. v. Conway*, 3 Colo. 1, 54 Am. Dec. 537; *Aldrich v. Dunham*, 16 Ill. 403; *Klages v. Philadelphia, etc., Terminal Co.*, 160 Pa. St. 386.

2. **Distinction Between Interest *Eo Nomine* and Interest as Damages.** — *Davis v. Greely*, 1 Cal. 422; *Palmer v. Murray*, 8 Mont. 312; *Heidenheimer v. Ellis*, 67 Tex. 426; *Houston, etc., R. Co. v. Jackson*, 62 Tex. 209.

In *Arkansas* the rule as to interest has been held regulated, so far as regards contracts for the payment of money, express or implied, wholly by statute; and it can be recovered only upon contracts for the payment of money in the cases specified in the statute, leaving the recovery of interest in those cases where the liability is tortious in its character to be governed by the general principles of law applicable to them. *Watkins v. Wassell*, 20 Ark. 410.

3. **Actions under Special Statutes** — *Alabama*. — *Jean v. Sandiford*, 39 Ala. 317.

Arkansas. — *Craig v. Price*, 23 Ark. 633.

Indiana. — *New York, etc., R. Co. v. Zumbaugh*, 12 Ind. App. 272.

Iowa. — *Brentner v. Chicago, etc., R. Co.*, 68 Iowa 530; *Hopper v. Chicago, etc., R. Co.*, 91 Iowa 639; *Blair v. Sioux City, etc., R. Co.*, (Iowa 1898) 73 N. W. Rep. 1053.

Kansas. — *Atchison, etc., R. Co. v. Gabbert*, 34 Kan. 132.

Maine. — *Sargent v. Hampden*, 38 Me. 581.

Mississippi. — *Clay County v. Chickasaw County*, 64 Miss. 534.

Missouri. — *Wade v. Missouri Pac. R. Co.*, 78 Mo. 362.

Ohio. — *Iron R. Co. v. Lawrence Furnace Co.*, 49 Ohio St. 102.

Pennsylvania. — *Weir v. Allegheny County*, 95 Pa. St. 414.

Texas. — *Heller v. Alvarado*, 1 Tex. Civ. App. 409; *Texas, etc., R. Co. v. Cunningham*, 4 Tex. Civ. App. 262; *Galveston, etc., R. Co. v. Dromgoole*, (Tex. Civ. App. 1893) 24 S. W. Rep. 372; *Galveston, etc., R. Co. v. Downey*, (Tex. Civ. App. 1894) 28 S. W. Rep. 109; *Texas, etc., R. Co. v. Payne*, (Tex. Civ. App. 1896) 35 S. W. Rep. 297; *Houston, etc., R. Co. v. Muldrow*, 54 Tex. 233; *Houston, etc., R. Co. v. Jackson*, 62 Tex. 209; *Ft. Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104.

Wisconsin. — *Smith v. Morgan*, 73 Wis. 375; *Everett v. Gores*, 92 Wis. 527.

4. **Statutory Claim Against County.** — *Clay County v. Chickasaw County*, 64 Miss. 534; *Weir v. Allegheny County*, 95 Pa. St. 413. And see *Warren County v. Klein*, 51 Miss. 807.

5. **Highway Statutes.** — *Sargent v. Hampden*, 38 Me. 581.

6. **Interest on Value of Stock Killed.** — *New York, etc., R. Co. v. Zumbaugh*, 12 Ind. App. 272; *Brentner v. Chicago, etc., R. Co.*, 68 Iowa 530; *Atchison, etc., R. Co. v. Gabbert*, 34 Kan. 132; *Wade v. Missouri Pac. R. Co.*, 78 Mo. 362; *Houston, etc., R. Co. v. Muldrow*, 54 Tex. 233.

But compare as to the *Texas* rule on this subject, *Gulf, etc., R. Co. v. Dunman*, 6 Tex. Civ. App. 101, and *International, etc., R. Co. v. Cocke*, 64 Tex. 153. The former case was an action under a statute making a railroad liable for the value of stock killed by its negligence, or at a point where its track might have been fenced and was not fenced. It was held that as the damages were not penal, but compensatory merely, interest thereon was properly allowed.

7. **Damages by Cattle Trespassing.** — *Jean v. Sandiford*, 39 Ala. 317.

8. **Damages for Nonpayment of Foreign Bill.** — *Craig v. Price*, 23 Ark. 633.

9. **Statutory Penalties.** — *Hopper v. Chicago, etc., R. Co.*, 91 Iowa 639; *Iron R. Co. v. Lawrence Furnace Co.*, 49 Ohio St. 102.

ages, excluding, therefore, a recovery of interest,¹ and this reason is especially strong where the damages are not restricted to compensation merely, but double or treble damages are given, or something is awarded in addition to the value of the property destroyed.²

(d) **Provision as to Unreasonable and Vexatious Delay.** — The statutes of several states make special provision for interest where the circumstances under which money is withheld constitute unreasonable and vexatious delay.³ Mere delay, however, is not sufficient to bring a case within such a statute, but the debtor must have actively obstructed the collection or by some device of his own have induced the creditor to delay collection;⁴ and it must also appear that the delay was both unreasonable *and* vexatious. The fact that it was unreasonable *or* vexatious will not suffice.⁵

Detention of Proceeds of Property Converted. — But in a jurisdiction where interest is held to be solely a creature of statute, and the statute makes no provision in terms for the recovery of interest in cases of trespass to property, it has been held that where personal property is taken and converted into money the defendant may be required to pay interest thereon as for money vexatiously and unreasonably withheld.⁶

(e) **Moneys Due on Instruments of Writing.** — In some jurisdictions statutes make express provision for the recovery of money due on any instrument of writing.⁷

1. **Statutes Prescribe Measure of Recovery.** — Atchison, etc., R. Co. v. Gabbert, 34 Kan. 132; Sargent v. Hampden, 38 Me. 581; Houston, etc., R. Co. v. Jackson, 62 Tex. 209.

2. **Double and Treble Damages.** — Brentner v. Chicago, etc., R. Co., 68 Iowa 530; Blair v. Sioux City, etc., R. Co., (Iowa 1898) 73 N. W. Rep. 1053; Wade v. Missouri Pac. R. Co., 78 Mo. 362; Atchison, etc., R. Co. v. Gabbert, 34 Kan. 132.

3. **Unreasonable and Vexatious Delay** — *United States*. — Thomas v. Peoria, etc., R. Co., 36 Fed. Rep. 808; Chicago v. Tebbetts, 104 U. S. 120.

Colorado. — Keys v. Morrison, 3 Colo. App. 441; Hawley v. Barker, 5 Colo. 118; Omaha, etc., Smelting, etc., Co. v. Tabor, 13 Colo. 41.

Illinois. — Sammis v. Clark, 13 Ill. 544; Hitt v. Allen, 13 Ill. 592; Aldrich v. Dunham, 16 Ill. 403; McCormick v. Elston, 16 Ill. 204; Bradley v. Geiselman, 22 Ill. 404; Myers v. Walker, 24 Ill. 133; Davis v. Kenaga, 51 Ill. 170; Jassoy v. Horn, 64 Ill. 379; Chicago v. Allcock, 86 Ill. 384; Devine v. Edwards, 101 Ill. 138; West Chicago Alcohol Works v. Sheer, 104 Ill. 586; Patrick v. Perryman, 52 Ill. App. 514; Hoblit v. Bloomington, 71 Ill. App. 204; Franklin County v. Layman, 145 Ill. 138.

Indiana. — McKinney v. Springer, 3 Ind. 59, 54 Am. Dec. 470; Rogers v. West, 9 Ind. 400.

Missouri. — McLean v. Thorp, 4 Mo. 256.

Montana. — Nixon v. Cutting Fruit Packing Co., 17 Mont. 90.

4. **Mere Delay Not Sufficient** — *United States*. — Thomas v. Peoria, etc., R. Co., 36 Fed. Rep. 808.

Colorado. — Keys v. Morrison, 3 Colo. App. 441; Hawley v. Barker, 5 Colo. 118.

Illinois. — Sammis v. Clark, 13 Ill. 544; Hitt v. Allen, 13 Ill. 592; Clement v. McConnel, 14 Ill. 154; McCormick v. Elston, 16 Ill. 205; Aldrich v. Dunham, 16 Ill. 403; Davis v. Kenaga, 51 Ill. 170; Devine v. Edwards, 101 Ill. 138; West Chicago Alcohol Works v. Sheer, 104 Ill. 586; Franklin County v. Layman, 145

Ill. 138; Hoblit v. Bloomington, 71 Ill. App. 204; Levinson v. Sands, 74 Ill. App. 276.

Montana. — Nixon v. Cutting Fruit Packing Co., 17 Mont. 90.

5. **Delay Both Unreasonable and Vexatious.** — Sammis v. Clark, 13 Ill. 544; Devine v. Edwards, 101 Ill. 138; West Chicago Alcohol Works v. Sheer, 104 Ill. 586.

A Delay for Ten Years in the Payment of an Account evidenced by the entries in a depositor's bank book, although demand was repeatedly made, was held to be so vexatious and unreasonable, that interest would be allowed on the account. Jassoy v. Horn, 64 Ill. 379.

Interest from Time When Delay Became Unreasonable and Vexatious. — A person guilty of unreasonable and vexatious delay in making payment of a just claim cannot be relieved by offering to pay interest from the time when the delay began to be unreasonable and vexatious; he is chargeable with interest from the time when the payment became due. Chicago v. Tebbetts, 104 U. S. 120.

6. **Conversion of Property — Detention of Proceeds.** — Omaha, etc., Smelting, etc., Co. v. Tabor, 13 Colo. 41; Bradley v. Geiselman, 22 Ill. 404; Chicago v. Allcock, 86 Ill. 384. And see Illinois Cent. R. Co. v. Cobb, 72 Ill. 148.

7. **Instruments of Writing.** — Thomas v. Peoria, etc., R. Co., 36 Fed. Rep. 808; Goodwin v. Fox, 129 U. S. 601; Simms v. Hampson, (Ariz. 1887) 12 Pac. Rep. 686; Heissler v. Store, 131 Ill. 303; Downey v. O'Donnell, 92 Ill. 559; A. B. Dick Co. v. Sherwood Letter File Co., 157 Ill. 325.

As to What Are Instruments in Writing within the meaning of the statutes referred to in the text, see the following cases: Thomas v. Peoria, etc., R. Co., 36 Fed. Rep. 808; Goodwin v. Fox, 129 U. S. 601; Simms v. Hampson, (Ariz. 1887) 12 Pac. Rep. 686; Smith v. Johnson, 23 Cal. 63; Murray v. Doud, 63 Ill. App. 247, *affirmed* 167 Ill. 368; Peoria Malting Co. v. Davenport Grain, etc., Co., 68 Ill. App. 104; Memory v. Niepert, 131 Ill. 623; Downey v. O'Donnell, 92 Ill. 559; Consumers' Pure Ice

But it is no objection to the recovery of interest under such a statute that the amount due is not stated in the writing and is undetermined.¹

(3) *Construction and Operation* — (a) *General Rules of Construction Applicable*. — Of course, in the construction of interest enactments, the general rules of statutory interpretation apply without exception.² Thus, it has been held, a statute allowing any agreed rate of interest should be strictly construed as in derogation of the common law;³ and where the legislature has enumerated a variety of cases in which creditors shall be allowed to receive interest, the presumption arises that it was not intended to permit its recovery in cases not enumerated.⁴

(b) *Not Retrospective in Operation*. — While it is competent for the lawmaking power to impose on debtors the obligation of paying interest after the passage of the act on debts already due,⁵ a retrospective effect will not be given to interest enactments. They are permitted to operate only on the future rights of the parties.⁶

(4) *Constitutionality*. — Interest laws are within the provisions contained in many of the state constitutions that all laws of a general nature shall have a uniform operation,⁷ and in some jurisdictions the legislatures are expressly forbidden to pass any local or special law establishing the rate of interest.⁸

Statutes Changing Rate, etc. — The validity and effect of statutes changing the

Co. v. Jenkins, 58 Ill. App. 519; Whittaker v. Crow, 132 Ill. 627; Conductors' Mut. Aid, etc., Assoc. v. Tucker, 157 Ill. 194. And see Driggers v. Bell, 94 Ill. 223; Plumb v. Campbell, 129 Ill. 101.

1. *Amount Due Need Not Be Stated*. — A. B. Dick Co. v. Sherwood Letter File Co., 157 Ill. 325.

Bent Due under a Lease which provides for the payment of rent in instalments monthly in advance is within the clause of the statute referred to, and each instalment will bear interest from the date when due, though the amount of the rent is not stated in the lease. Heissler v. Stose, 131 Ill. 393.

2. *General Rules of Construction Applicable*. — Coburn v. Goodall, 72 Cal. 509, 1 Am. St. Rep. 75; Hopkins v. Contra Costa County, 106 Cal. 566; Woodbury v. District of Columbia, 19 D. C. 157; State Trust Co. v. Cowdrey, 68 Hun (N. Y.) 97; Lake v. Tyree, 90 Va. 719.

3. *Statutes Strictly Construed*. — Raun v. Reynolds, 11 Cal. 15; Graveson v. Odd Fellows Temple Co., 6 Ohio Dec. 287.

4. *Expressio Unius Est Exclusio Alterius*. — Toulmin v. Sager, 42 Ala. 127; Hawley v. Barker, 5 Colo. 118; Sammis v. Clark, 13 Ill. 544; Douglass v. Board of Aldermen, 5 Nev. 147.

5. *Not Retrospective in Operation*. — Dunne v. Mastick, 50 Cal. 244.

6. *Affect Only Future Rights* — *California*. — Dunne v. Mastick, 50 Cal. 244.

Louisiana. — Saunders v. Carroll, 12 La. Ann. 793; Cooper v. Harrison, 12 La. Ann. 631; Gordon v. Zacherie, 15 La. Ann. 17.

Oregon. — Besser v. Hawthorne, 3 Oregon 129.

South Carolina. — Righton v. Blake, 1 Brev. (S. Car.) 159.

Texas. — Landa v. Obert, 5 Tex. Civ. App. 620.

Thus, on a Judgment Which Does Not Bear Interest on Its Face, and which was rendered when no general law was in force by which interest could be superadded, no interest is re-

coverable. Barnes v. Crandell, 12 La. Ann. 112; Regan's Succession, 12 La. Ann. 116.

7. *Constitutionality in General* — *Uniformity of Operation*. — Vermont L. & T. Co. v. Whithed, 2 N. Dak. 82.

Interest Charged by Pawnbrokers. — A statute fixing the rate of interest which may be charged by pawnbrokers is not in violation of Const. Cal., art. 1, § 11, which provides that "all laws of a general nature shall have a uniform operation." Jackson v. Shawl, 29 Cal. 267. And see Smith v. Judge, 17 Cal. 554; *Ex p.* Andrews, 18 Cal. 680; French v. Teschemaker, 24 Cal. 544.

8. *Constitutional Prohibition Against Local or Special Laws Fixing Rate of Interest*. — New Orleans v. Firemen's Ins. Co., 41 La. Ann. 1142; Bayha v. Carter, 7 Tex. Civ. App. 1. See also the various state constitutions.

The Territorial Legislatures are forbidden by Act of Congress to pass local or special laws regulating the rate of interest on money. Act Cong. July 30, 1886, 24 U. S. Stat. at L. 170, c. 818; Hotchkiss v. Marion, 12 Mont. 218.

Provision Limited to Contracts Between Individuals. — The provision of the Louisiana Constitution (now Const. 1898, art. 48) prohibiting the General Assembly from passing any local or special law fixing the rate of interest exclusively applies to contracts between individuals. The right of a municipal corporation to enforce the payment of a license tax by the imposition of a penalty in the name of interest for delinquency is not affected by that provision. New Orleans v. Firemen's Ins. Co., 41 La. Ann. 1142.

Certificates for Municipal Improvements. — It has been held that a city charter which authorizes the city to make certificates issued to contractors for municipal improvements bear a different rate of interest from that prescribed by the constitution, is in contravention of the constitutional provision prohibiting the legislature from passing any local or special law establishing a rate of interest. Bayha v. Carter, 7 Tex. Civ. App. 1.

rate of interest or abrogating or suspending the right to interest are considered elsewhere.¹

III. GROUNDS OF ALLOWANCE OF INTEREST — 1. In General. — The grounds on which interest is allowed are: (1) by virtue of a contract to pay it; (2) as damages;² (3) according to some authorities, that the conduct of a party merits its allowance against him, as for some misconduct, breach of trust, or dereliction of duty;³ and (4) that one person has in his possession, without right, funds belonging to another and actually makes interest thereon.⁴ In the last case the allowance is somewhat analogous to the doctrine of accession in the case of personalty.

2. Doctrine that Equity Follows the Law. — It is frequently stated in the present connection that equity follows the law in the allowance of interest.⁵ And it is equally true at the present time that courts of law are frequently influenced by broadly equitable considerations in the allowance of interest as damages.⁶ It has been held, however, that courts of equity are not actually limited in the allowance of interest by the statute of 3 & 4 Wm. IV., c. 42, § 28.⁷

IV. CONTRACTS TO PAY INTEREST — 1. In General. — A contract by virtue of which interest is recoverable may be either express or implied.⁸ Interest made payable by contract, it has been said, becomes part of the debt itself,⁹ and is not merely damages for the detention of the money.¹⁰ But this must be taken with the qualification that interest is recoverable strictly as interest only during the continuance of the contract and as provided by its terms, before breach, and not after.¹¹

2. Express Contracts — a. IN GENERAL. — There has never been doubt,

1. See the title *IMPAIRMENT OF OBLIGATION OF CONTRACTS*, vol. 15, p. 1057, and *infra*, this title, *Rate of Interest*.

2. **Grounds of Allowance — Contract — Damages — England.** — *Dent v. Dunn*, 3 Campb. 296.

United States. — *Harmanson v. Wilson*, 1 Hughes (U. S.) 229.

Alabama. — *Moore v. Patton*, 2 Port. (Ala.) 451.

California. — *Davis v. Greely*, 1 Cal. 422.

Connecticut. — *Selleck v. French*, 1 Conn. 32, 6 Am. Dec. 185; *Jones v. Mallory*, 22 Conn. 386; *Healy v. Fallon*, 69 Conn. 235.

New York. — *Reid v. Rensselaer Glass Factory*, 3 Cow. (N. Y.) 436.

Wisconsin. — *Marsh v. Fraser*, 37 Wis. 149.

3. **Interest for Fraud, Delinquency, or Injustice.** — See *Fowler v. Davenport*, 21 Tex. 635; *Wolfe v. Lacy*, 30 Tex. 349.

It Is Provided by Statute in some states that in every case of oppression, fraud, or malice, interest may be granted at the discretion of the jury. *Johnson v. Northern Pac. R. Co.*, 1 N. Dak. 354; *Comp. Laws Dak.* (1887), § 4578; *Rev. Codes N. Dak.* (1895), § 4975.

4. **Interest Made with Another's Funds.** — *Willis v. Commissioners of Appeals*, 5 East 22; *Bassett v. Kinney*, 24 Conn. 267, 63 Am. Dec. 161.

5. **Doctrine that Equity Follows Law — Alabama.** — *Crocker v. Clements*, 23 Ala. 296; *Chambers v. Wright*, 52 Ala. 444.

California. — *Pujol v. McKinlay*, 42 Cal. 559.

Delaware. — *Beeson v. Elliott*, 1 Del. Ch. 368.

Kentucky. — *McMillen v. Scott*, 1 T. B. Mon. (Ky.) 150; *Samuel v. Minter*, 3 A. K. Marsh. (Ky.) 480; *M'Alexander v. Lee*, 3 A. K. Marsh. (Ky.) 483; *Moore v. Pendergrast*, 6 J. J.

Marsh. (Ky.) 534; *Heydle v. Hazlehurst*, 4 Bibb (Ky.) 19; *Lair v. Jelf*, 3 Dana (Ky.) 181; *Hughes v. Standeford*, 3 Dana (Ky.) 286.

Maryland. — *Hammond v. Hammond*, 3 Bland (Md.) 370.

Michigan. — *Coatesworth v. Barr*, 11 Mich. 199.

South Carolina. — *Hunt v. Smith*, 3 Rich. Eq. (S. Car.) 465.

Canada. — *Box v. Provincial Ins. Co.*, 19 Grant Ch. (U. C.) 48.

6. **Equitable Considerations in Courts of Law.** — *Dyer v. Elderkin*, 1 Root (Conn.) 412; *O'Donnell v. Omaha, etc., R. Co.*, 31 Neb. 846; *Marvin v. McRae, Cheves L.* (S. Car.) 61.

7. **Statute 3 & 4 Wm. IV.** — *Spartali v. Constadini*, 21 W. R. 116.

8. **Contract to Pay Interest Either Express or Implied.** — *Prichard v. Miller*, 86 Ala. 501; *Jersey City v. O'Callaghan*, 41 N. J. L. 349.

9. **When Interest Part of Debt.** — *Verney v. Iddings*, 2 Chit. 234, 18 E. C. L. 317; *Herries v. Jamieson*, 5 T. R. 553; *Crouse v. Park*, 3 U. C. Q. B. 458; *Putnam, J.*, in *Dodge v. Perkins*, 9 Pick. (Mass.) 368; *Bander v. Bander*, 7 Barb. (N. Y.) 560; *McCalla v. Ely*, 64 Pa. St. 254.

10. **Not Damages for Detention of Money.** — *Crouse v. Park*, 3 U. C. Q. B. 458.

11. **Qualification of Rule.** — *Brewster v. Wakefield*, 22 How. (U. S.) 118; *Burnhisel v. Firman*, 22 Wall. (U. S.) 170; *Holden v. Freedman's Sav., etc., Co.*, 100 U. S. 72; *Mason v. Callender*, 2 Minn. 350, 72 Am. Dec. 102; *O'Brien v. Young*, 95 N. Y. 428, 47 Am. Rep. 64; *Macomber v. Dunham*, 8 Wend. (N. Y.) 550; *U. S. Bank v. Chapin*, 9 Wend. (N. Y.) 471; *Hamilton v. Van Rensselaer*, 43 N. Y. 244; *Ritter v. Phillips*, 53 N. Y. 586; *Southern Cent. R. Co. v. Moravia*, 61 Barb. (N. Y.) 180.

except perhaps under the rule of the early common law, that interest is recoverable where there is an express contract to pay it. And where interest is expressly contracted for there may be a recovery strictly according to the terms of the contract, unless, of course, the contract be illegal or usurious, or there is some ground, common to all contracts, for relieving against it in equity.¹

b. WRITTEN CONTRACTS — (1) *In General.* — By statute in many of the states it is provided that a contract for the payment of interest at a rate higher than the legal rate, in the absence of a conventional rate, must, to be valid, be evidenced by a written agreement.²

(2) *Object of Requirement.* — It has been said that the object of such statutes is to avoid ambiguity that would otherwise exist on the face of an instrument calling for interest and mentioning no rate, and to conform to the rule rejecting parol evidence to affect writings.³

(3) *Requisites* — (a) *Contract to Specify Rate.* — It is, in general, requisite that contracts to pay more than the legal rate of interest should specify the rate contracted for.⁴

(b) *Rate to Appear in Contract for Principal Debt.* — In some jurisdictions the statute contemplates that a stipulation for interest at a rate higher than the legal rate should appear in the contract for the principal debt.⁵ But there is authority for the position that any valid written contract for interest will be upheld, though collateral to that providing for the principal.⁶

(c) *Interest Included in Principal Sum.* — An exception to the general rule just adverted to, that the contract for interest at a rate higher than the legal rate in the absence of contract must specify the rate agreed upon, exists in cases where the interest has been computed in advance and appears in the contract as part of the principal sum. In such instances it is necessary only that the

1. *Express Contracts — England.* — *Crouse v. Park*, 3 U. C. Q. B. 458; *Young v. Fluke*, 15 U. C. C. P. 360; *Harrison v. Allen*, 2 Bing. 4, 9 E. C. L. 291.

Arkansas. — *Rogers v. Yarnell*, 51 Ark. 198. *Illinois.* — *Sammis v. Clark*, 13 Ill. 544; *McCormick v. Elston*, 16 Ill. 204; *Aldrich v. Dunham*, 16 Ill. 403; *Myers v. Walker*, 24 Ill. 133; *Houghton v. Francis*, 29 Ill. 244.

Kansas. — *Tootle v. Wells*, 39 Kan. 452. *Kentucky.* — *West v. McCord*, 4 J. J. Marsh (Ky.) 173.

Maine. — *Amee v. Wilson*, 22 Me. 116. *Massachusetts.* — *Dodge v. Perkins*, 9 Pick. (Mass.) 368; *Barnard v. Bartholomew*, 22 Pick. (Mass.) 291.

New York. — *Meech v. Smith*, 7 Wend. (N. Y.) 315.

Texas. — *Tucker v. Coffin*, 7 Tex. Civ. App. 415.

2. *Written Contracts by Statute — California.* — *Smith v. Johnson*, 23 Cal. 63; *Pratalongo v. Larco*, 47 Cal. 378; *Hill v. Eldred*, 49 Cal. 399. *Colorado.* — *Beckwith v. Beckwith*, 11 Colo. 568.

Georgia. — *Tribble v. Anderson*, 63 Ga. 31; *Neel v. Young*, 78 Ga. 342.

Illinois. — *Friend v. Engel*, 43 Ill. App. 386; *Peoria Malting Co. v. Davenport Grain, etc., Co.*, 68 Ill. App. 104.

Iowa. — *Brockway v. Haller*, 57 Iowa 368. *Kansas.* — *Wenger v. Taylor*, 39 Kan. 754.

Louisiana. — *Durnford's Succession*, 8 Rob. (La.) 495; *Barrett v. Chaler*, 2 La. Ann. 875; *Thompson v. Mylne*, 4 La. Ann. 210; *Lalande v. Breaux*, 5 La. Ann. 505; *McLaughlin v. Sauve*, 13 La. Ann. 99; *White v. Jones*, 14 La.

Ann. 693; *Duruty v. Musacchia*, 42 La. Ann. 357.

Massachusetts. — *Haydenville Sav. Bank v. Parsons*, 138 Mass. 53.

Michigan. — *Burchard v. Frazer*, 23 Mich. 240; *Swift v. Barber*, 28 Mich. 505; *Smith v. Graham*, 34 Mich. 302; *Cameron v. Merchants, etc., Bank*, 37 Mich. 244; *Tousey v. Moore*, 79 Mich. 564.

Minnesota. — *Staughton v. Simpson*, 72 Minn. 536.

South Carolina. — *Witte v. Weinberg*, 40 S. Car. 545, 17 S. E. Rep. 681.

South Dakota. — *Tucker v. Randall*, 10 S. Dak. 581.

Tennessee. — *McGhee v. Trotter*, 1 Heisk. (Tenn.) 453; *Rickman v. Rickman*, 6 Lea (Tenn.) 483.

Washington. — *Stickler v. Giles*, 9 Wash. 147. And see the various local statutes.

3. *Object of Requirement.* — *Cameron v. Merchants, etc., Bank*, 37 Mich. 244. And see *Tousey v. Moore*, 79 Mich. 564.

4. *Contract Should Specify Rate.* — See the statutes of the several states.

Interest Payments Indorsed on Note. — The fact that the maker of a note which by its terms bore no interest paid interest thereon for a time after maturity at a rate higher than the legal rate, which payments were indorsed on the note, does not satisfy the statutory requirement for an agreement in writing, nor bind the maker to pay such rate in future. *Haydenville Sav. Bank v. Parsons*, 138 Mass. 53.

5. *Stipulation in Contract for Principal.* — *Rickman v. Rickman*, 6 Lea (Tenn.) 483.

6. *Collateral Contract Upheld.* — *Mueller v.*

aggregate amount to be paid, including the interest, should be clearly expressed in the contract.⁴

(4) *Construction* — (a) *In General*. — Contracts for interest are governed by the same rules of construction and interpretation as are other contracts.⁵ Thus the rule that the manifest intent of the parties must control is applicable.⁶ So also the terms of the contract must, if possible, be construed to mean something rather than nothing at all;⁴ and where the terms of a contract to pay interest leave its interpretation doubtful, the construction to be adopted is that which will operate most strongly against the party agreeing to pay interest.⁵

Omission of Word "Interest." — In a number of cases the point has been made that the terms of the contract alleged to be for interest did not contain the word "interest" at all. But where the context will warrant the construction that interest was intended, the word will, in general, be supplied, and the contract will be enforced accordingly.⁶

Omission of Period by Which Computation to Be Made. — Another frequent defect in contracts to pay interest has been the inadvertent omission of any period with reference to which the *per centum* is to be computed. As a general rule, in the absence of evidence of a contrary intent appearing in the contract, the construction will be that the parties intended to agree upon the stated rate as a *per annum* compensation, and not for any longer or shorter period.⁷

(b) *Whether Construction for Court or Jury.* — It has been held to be the province of the court to construe a contract for a stated rate of interest, as though

McGregor, 28 Ohio St. 365. See also *Andrews v. Campbell*, 36 Ohio St. 361.

1. *Interest Included in Principal Sum* — *United States*. — *Marye v. Strouse*, 6 Sawy (U. S.) 205; *Porter v. Price*, 80 Fed. Rep. 655. And see *Sayward v. Dexter*, 72 Fed. Rep. 753.

California. — *Auzerais v. Naglee*, 74 Cal. 60; *Pratalongo v. Larco*, 47 Cal. 378.

Georgia. — *Tribble v. Anderson*, 63 Ga. 31.

Michigan. — *Cameron v. Merchants, etc., Bank*, 37 Mich. 240.

Nebraska. — *Savage v. Aiken*, 21 Neb. 605.

South Dakota. — *Davey v. Deadwood First Nat. Bank*, 10 S. Dak. 148.

2. *General Rules of Construction.* — *Higley v. Newell*, 28 Iowa 516; *Bradley v. Palen*, 78 Iowa 126; *Webb v. Bailey*, 89 Iowa 747; *Oxford Bank v. Bobbitt*, 108 N. Car. 525; *Seastrunk v. Pioneer Sav., etc., Co.*, (Tex. Civ. App. 1895) 34 S. W. Rep. 466.

Penalties Not Favored. — *Higley v. Newell*, 28 Iowa 516.

Abbreviations in a Contract for Interest will, of course, take their ordinary, usual, and accepted meaning. Thus the abbreviation *cent.* for *centum* is of the same effect as if the word were written out. *Durant v. Murdock*, 3 App. Cas. (D. C.) 114. And the abbreviations "Int. @ 6 % p. a.," in a note, signify that the note is to draw interest from date at the rate of six per cent. per annum. *Belford v. Beatty*, 145 Ill. 414, *affirming* 46 Ill. App. 539. See also the title ABBREVIATIONS, vol. 1, p. 97.

3. *Manifest Intent to Govern* — *Alabama*. — *Evans v. Sanders*, 8 Port. (Ala.) 497, 33 Am. Dec. 297.

Connecticut. — *McClellan v. Morris, Kirby (Conn)* 145.

Florida. — *Harrell v. Durrance*, 9 Fla. 490.

Illinois. — *Latham v. Darling*, 2 Ill. 203; *Cisne v. Chidester*, 85 Ill. 523.

Iowa. — *De Wolfe v. Taylor*, 71 Iowa 650.

Maine. — *Porter v. Porter*, 51 Me. 376.

Minnesota. — *Brewster v. Wakefield*, 1 Minn. 352, 69 Am. Dec. 343.

Mississippi. — *Loury v. Loury, Walk, (Miss.)* 207.

Missouri. — *Finley v. Acock*, 9 Mo. 841.

4. *Rule Stated.* — *Evans v. Sanders*, 8 Port. (Ala.) 497, 33 Am. Dec. 297; *Thompson v. Hoagland*, 65 Ill. 310.

5. *Construction Against Payor.* — *Evans v. Sanders*, 8 Port. (Ala.) 497, 33 Am. Dec. 297; *Martin v. Murphy*, 16 Ill. App. 283; *Brewster v. Wakefield*, 1 Minn. 352, 69 Am. Dec. 343; *Rollman v. Baker*, 5 Humph. (Tenn.) 406.

6. *Omission of Word "Interest."* — Thus a note stipulating for "twenty-four per cent. per annum after maturing, as compensation and damage for nonpayment," imports a promise to pay twenty-four per cent. interest per annum upon the principal sum named in the note, after its maturity, if not then paid. *Davis v. Rider*, 53 Ill. 416. See also *Thompson v. Hoagland*, 65 Ill. 310; *Higley v. Newell*, 28 Iowa 516.

7. *Omission of Period for Computation.* — *Durant v. Murdock*, 3 App. Cas. (D. C.) 114; *Griffith v. Furry*, 30 Ill. 251; *Williams v. Baker*, 67 Ill. 238; *Finley v. Acock*, 9 Mo. 841.

Thus a note dated March 21, 1822, promising to pay a specified sum, being for "money loaned at forty per cent. until paid," was held to be sufficiently explicit as to the agreement of the borrower to pay interest at the rate of forty per cent. per annum. *Loury v. Loury, Walk, (Mass.)* 207.

It is provided by Statute in some states that where a contract prescribes a rate of interest without stipulating the period of time by which such rate is to be calculated, it is to be deemed an annual rate. *Civ. Code Cal.*, § 1916; *Rogers v. Jones*, 92 Cal. 80.

reading such rate "per annum."¹ But in one case, at least, the question seems to have been regarded as one of contractual intent, for the determination of the jury.²

(c) **Parol Evidence.** — It has been held that parol evidence of the intention of the parties as to interest at the execution of a note is not admissible in an action thereon.³

(d) **When Interest Payable.** — The general rule is, in the absence of a contrary stipulation in the contract, that interest is not due and payable until the maturity of the principal debt.⁴ Nor, it has been held, will this rule be varied by the fact that there has been a voluntary payment in advance of part of the interest stipulated for.⁵

Where a Note Is Given Payable in Instalments, "with interest on said sum," no interest is due upon the last instalment until the instalment becomes due.⁶

If the Contract So Provides, however, there may be a recovery of interest as it periodically falls due,⁷ before the maturity of the principal.

c. **VERBAL CONTRACTS.** — In the absence of statutory requirement there is no rule of law requiring that a contract for the payment of interest shall be in writing.⁸ Thus, under statutes requiring that a contract for a rate of interest higher than the legal rate shall be written, it is uniformly held that such a contract, though oral, will be valid to the extent of the rate prescribed by law.⁹

3. Implied Contracts — a. IN GENERAL. — Interest may be recovered by

1. Construction for Court. — *Durant v. Murdock*, 3 App. Cas. (D. C.) 114; *Higley v. Newell*, 28 Iowa 516.

2. Question for Jury. — *Marston v. Bigelow*, 150 Mass. 45.

3. Parol Evidence — *Arkansas*. — *Casteel v. Walker*, 40 Ark. 117, 48 Am. Rep. 5.

Indiana. — *Davis v. Stout*, 126 Ind. 12, 22 Am. St. Rep. 565.

Maine. — *Milliken v. Southgate*, 26 Me. 424.

New York. — *Read v. Attica Bank*, 124 N. Y. 671.

Pennsylvania. — *Beaver v. Slear*, 182 Pa. St. 213.

South Carolina. — *Craig v. Pervis*, 14 Rich. Eq. (S. Car.) 150.

Patent Ambiguity. — A patent ambiguity in the terms of a contract to pay interest is not susceptible of explanation by parol evidence. *Griffith v. Furry*, 30 Ill. 251.

Where a Note Bears No Interest on Its Face, parol evidence is inadmissible to show that it was intended to bear interest during the payee's lifetime. *Beaver v. Slear*, 182 Pa. St. 213.

Nor is parol evidence admissible to prove that when a certificate of deposit containing no stipulation as to interest was issued, the bank agreed that it should bear interest. *Read v. Attica Bank*, 124 N. Y. 671.

Parol Evidence to Vary Rate. — Likewise parol evidence is inadmissible to show that a note bearing a stipulated per centum interest by its terms was by agreement to bear only a lower rate. *Davis v. Stout*, 126 Ind. 12, 22 Am. St. Rep. 565; *Smith v. Smith*, 33 S. Car. 210.

And see generally the titles **AMBIGUITY**, vol. 2, p. 287; **PAROL EVIDENCE**.

4. When Interest Payable — Rule Stated — *United States*. — *Tanner v. Dundee Land Invest. Co.*, 8 Sawy. (U. S.) 187, 12 Fed. Rep. 645.
Kansas. — *Ramsdell v. Hulett*, 50 Kan. 440; *Motsinger v. Miller*, 59 Kan. 575.

Missouri. — *Koehring v. Muemminghoff*, 61 Mo. 406, 21 Am. Rep. 402.

Nebraska. — *Greenwood v. Fenton*, 54 Neb. 573.

New Jersey. — *Cooper v. Wright*, 23 N. J. L. 200.

New York. — *French v. Kennedy*, 7 Barb. (N. Y.) 452; *Bander v. Bander*, 7 Barb. (N. Y.) 560.

5. Voluntary Part Payment in Advance. — *Cooper v. Wright*, 23 N. J. L. 200.

6. Note Payable in Instalments. — *Saunders v. McCarthy*, 8 Allen (Mass.) 42.

Construction of Bond and Mortgage. — Where a bond and mortgage were conditioned to pay a certain sum "with interest after the first day of April next, in fourteen equal annual payments on the first day of April of each and every year after the first day of April next," it was held that the true reading of the condition was that the obligor should pay the amount stated in fourteen equal annual instalments, such instalments to be paid on the first of April in each year, the interest on each instalment to be paid when the instalment became due and not before. *French v. Kennedy*, 7 Barb. (N. Y.) 452.

7. Interest Due Periodically Before Maturity of Debt. — *Sessions v. Richmon*, 1 R. I. 298.

Annual Interest. — See *infra*, this title, *Annual and Periodic Interest*.

8. Verbal Contract Valid. — *Pridgen v. Hill*, 12 Tex. 374; *Adrian v. Brooks*, 13 Tex. 279.

But Where a Statute Establishes a Legal Rate in the absence of contract and also provides that any other rate can be collected when the agreement therefor is in writing, only the legal rate can be verbally contracted for. *Stickler v. Giles*, 9 Wash. 147.

9. Oral Agreement Valid for Legal Rate. — *Johnson v. Hull*, 57 Ark. 550; *Brockway v. Haller*, 57 Iowa 368; *Allen v. Nettles*, 39 La. Ann. 788; *Staughton v. Simpson*, 72 Minn. 536.

virtue of an implied understanding as well as on an express contract to pay it.¹

Under Statutes Requiring Written Contracts. — But it should be observed in this connection that under statutes requiring a written contract for a rate of interest greater than that prescribed by law, implied contracts for a higher than the given rate are generally excluded.²

b. HOW IMPLIED CONTRACT MAY ARISE — (1) *General Usage or Custom*

— (a) *In General.* — It is universally held that a contract to pay interest may be implied from a general custom or usage of trade.³

Requisites. — The rule that a custom to be binding must be legal, uniform,

1. Implied Contracts for Interest — England. — *Nichol v. Thompson*, 1 Campb. 52, note; *Ex p. Williams*, 1 Rose 399; *Bannerman v. Fullerton*, 5 Nova Scotia 200; *Moore v. Voughton*, 1 Stark. 487, 2 E. C. L. 186; *Higgins v. Sargent*, 2 B. & C. 348, 9 E. C. L. 101; *Shaw v. Picton*, 4 B. & C. 715, 10 E. C. L. 443; *Page v. Newman*, 9 B. & C. 378, 17 E. C. L. 399; *Rice v. Ahern*, 6 L. C. Jur. 201, 12 L. C. Rep. 280; *Greenfields v. Wyman*, 21 L. C. Jur. 40; *Carey v. Doyne*, 5 Ir. Ch. R. 104; *Petre v. Duncombe*, 15 Jur. 86, 20 L. J. Q. B. 242; *Cook v. Fowler*, 43 L. J. Ch. 855; *Ackermann v. Ehrensperger*, 16 M. & W. 99, 16 L. J. Exch. 3; *Boisvert v. Saurette*, 19 Rev. Leg. 2; *Bispham v. Pollock*, 1 McLean (U. S.) 411.

United States. — *Curtis v. Innerarity*, 6 How. (U. S.) 146; *Young v. Godbe*, 15 Wall. (U. S.) 562; *Barclay v. Kennedy*, 3 Wash. (U. S.) 350; *Atlantic Phosphate Co. v. Graffin*, 114 U. S. 492; *Bainbridge v. Wilcocks*, Baldw. (U. S.) 536.

California. — *Backus v. Minor*, 3 Cal. 231; *Chandler v. People's Sav. Bank*, 61 Cal. 401; *Auzerais v. Naglee*, 74 Cal. 60.

Connecticut. — *Selleck v. French*, 1 Conn. 32, 6 Am. Dec. 185.

Illinois. — *Sammis v. Clark*, 13 Ill. 544; *Rayburn v. Day*, 27 Ill. 46; *Ayers v. Metcalf*, 39 Ill. 307; *Turner v. Dawson*, 50 Ill. 85.

Iowa. — *Veiths v. Hagge*, 8 Iowa 163; *Isett v. Oglevie*, 9 Iowa 313; *Webb v. Bailey*, 89 Iowa 747.

Kentucky. — *White v. Curd*, 86 Ky. 191.

Louisiana. — *Lalande v. Breaux*, 5 La. Ann. 505; *Soulie v. Brown*, 13 La. Ann. 521.

Maryland. — *Rappanier v. Bannon*, (Md. 1887) 8 Atl. Rep. 555.

Massachusetts. — *Foote v. Blanchard*, 6 Allen (Mass.) 221, 83 Am. Dec. 624; *Fisher v. Sargent*, 10 Cush. (Mass.) 250; *Von Hemert v. Porter*, 11 Met. (Mass.) 219; *Dodge v. Perkins*, 9 Pick. (Mass.) 368; *Barnard v. Bartholomew*, 22 Pick. (Mass.) 291.

Mississippi. — *Wiltburger v. Randolph*, Walk. (Miss.) 20; *Carson v. Alexander*, 34 Miss. 528.

Nebraska. — *Savage v. Aiken*, 21 Neb. 605.

New York. — *Esterly v. Cole*, 1 Barb. (N. Y.) 235; *Patteson v. Whitlock*, 14 Daly (N. Y.) 497; *Salter v. Parkhurst*, 2 Daly (N. Y.) 240; *Rensselaer Glass Factory v. Reid*, 5 Cow. (N. Y.) 587; *Wood v. Hickok*, 2 Wend. (N. Y.) 501; *M'Allister v. Reab*, 4 Wend. (N. Y.) 483; *Meech v. Smith*, 7 Wend. (N. Y.) 315; *Reab v. McAlister*, 8 Wend. (N. Y.) 109; *Eldred v. Eames*, 48 Hun (N. Y.) 253.

Oregon. — *Hoehler v. McGlinchy*, 20 Oregon 360.

Pennsylvania. — *Koons v. Miller*, 3 W. & S. (Pa.) 271; *Williams v. Craig*, 1 Dall. (Pa.) 313; *Knox v. Jones*, 2 Dall. (Pa.) 193; *Watt v. Hoch*,

25 Pa. St. 411; *Kelsey v. Murphy*, 30 Pa. St. 340; *Adams v. Palmer*, 30 Pa. St. 346.

South Carolina. — *Simpson v. M'Million*, 1 Nott. & M. (S. Car.) 192; *Farr v. Farr*, 1 Hill L. (S. Car.) 303; *Ryan v. Baldrick*, 3 McCord. L. (S. Car.) 503; *Dickson v. Surginer*, 3 Brev. (S. Car.) 417; *Godbold v. Kirkpatrick*, 26 S. Car. 607.

Utah. — *Perry v. Taylor*, 1 Utah 63.

Vermont. — *Raymond v. Isham*, 8 Vt. 263; *Wood v. Smith*, 23 Vt. 706; *Gleason v. Briggs*, 28 Vt. 135; *Vermont, etc., R. Co. v. Vermont Cent. R. Co.*, 34 Vt. 1; *Davis v. Smith*, 48 Vt. 52; *Willard v. Pinard*, 65 Vt. 160; *Blodgett v. Converse*, 60 Vt. 410.

2. Statute Excluding Implied Contracts. — *Turner v. Dawson*, 50 Ill. 85; *Western Union R. Co. v. Smith*, 75 Ill. 496; *Bowne v. Ritter*, 26 N. J. Eq. 456; *Adrianse v. Brooks*, 13 Tex. 279; *Close v. Fields*, 2 Tex. 232. And see *supra*, this section, *Written Contracts*.

3. General Usage or Custom — United States. — *Barclay v. Kennedy*, 3 Wash. (U. S.) 350; *Young v. Godbe*, 15 Wall. (U. S.) 562; *Bainbridge v. Wilcocks*, Baldw. (U. S.) 536.

Arkansas. — *Rogers v. Yarnell*, 51 Ark. 198.

Connecticut. — *Selleck v. French*, 1 Conn. 32, 6 Am. Dec. 185.

Illinois. — *Rayburn v. Day*, 27 Ill. 46; *Ayers v. Metcalf*, 39 Ill. 307; *Turner v. Dawson*, 50 Ill. 85.

Iowa. — *Veiths v. Hagge*, 8 Iowa 163.

Massachusetts. — *Fisher v. Sargent*, 10 Cush. (Mass.) 250; *Barnard v. Bartholomew*, 22 Pick. (Mass.) 291.

New York. — *Esterly v. Cole*, 1 Barb. (N. Y.) 235; *Salter v. Parkhurst*, 2 Daly (N. Y.) 240; *McAllister v. Reab*, 4 Wend. (N. Y.) 483; *Meech v. Smith*, 7 Wend. (N. Y.) 315.

Pennsylvania. — *Koons v. Miller*, 3 W. & S. (Pa.) 271; *Adams v. Palmer*, 30 Pa. St. 346; *Knox v. Jones*, 2 Dall. (Pa.) 193; *Williams v. Craig*, 1 Dall. (Pa.) 313.

Vermont. — *Wood v. Smith*, 23 Vt. 706; *Davis v. Smith*, 48 Vt. 52; *Willard v. Pinard*, 65 Vt. 160.

Custom as Affecting Express Contract. — The mere existence of a general custom to charge interest under circumstances similar to those disclosed will not be sufficient to charge the debtor with interest where the terms of a written contract between the parties neither make express provision for interest nor contain any facts which will warrant an inference that the parties intended that the indebtedness should bear interest. *Webb v. Bailey*, 89 Iowa 747.

Similarly it has been held that evidence that other depository banks paid interest on moneys deposited in like manner with them has no tendency to show an implied contract that the defendant had in any manner become bound to

long established, generally acquiesced in, and well known, applies to the usage of merchants in paying interest.¹

General Custom — Particular Usage. — There is a distinction with reference to the implication of a contract for interest between a general custom of merchants and the usage of a particular trade.² In the first instance a knowledge of such custom and a contemplation of it as affecting the contract will be presumed on the part of the contracting parties,³ whereas in the case of the usage of a particular trade, knowledge of it is not presumed, nor, in the absence of knowledge, is a contract with reference to it implied.⁴

(b) **Mercantile Instruments.** — In the case of mercantile instruments a contract to pay interest may be implied by law from usage of trade.⁵

(c) **Liquidated Accounts.** — Where it is a usage of trade that interest shall be charged on the balance of accounts after a certain time or after liquidation or statement, the parties will be deemed to have dealt in contemplation thereof, and interest will be allowed.⁶

(2) **Custom or Course of Dealings of Parties** — (a) **In General.** — Another ground of implication of a contract to pay interest may arise from a custom or usage of the parties or from an established course of dealings between

pay such interest; nor was it sufficient as proof of a custom, as the agreement under which the defendant received the deposits was specific, including terms which constructively excluded the obligation to pay interest. *New York v. Tradesmen's Nat. Bank*, (Supm. Ct. Gen. T.) 11 N. Y. Supp. 95.

Custom as Affected by Cessation of Commercial Intercourse. — The usage to add interest at the end of the year to an annual account and to charge interest on the balance does not apply to a case in which the commercial intercourse between the countries in which the parties respectively reside had ceased when the account was transmitted. *Denniston v. Imbrie*, 3 Wash. (U. S.) 396.

1. **Requisites of Custom.** — *Turner v. Dawson*, 50 Ill. 85; *Wood v. Smith*, 23 Vt. 706. And see generally the title *USAGES AND CUSTOMS*.

Custom of Compounding Interest. — In *Graham v. Williams*, 16 S. & R. (Pa.) 257, 16 Am. Dec. 569, it was held that the practice by a store keeper of balancing his books at the end of each year and charging interest on the balance of a running account upon which there has been no settlement is illegal; and it was intimated that such practice would be illegal even though known to the customer. See also *infra*, this title, *Compound Interest and Interest on Interest*.

Judicial Notice of Custom for Interest. — The custom of merchants in Pittsburgh and Philadelphia to charge interest on their accounts after six months has been held a matter for judicial recognition in *Pennsylvania*. *Watt v. Hoch*, 25 Pa. St. 411; *Adams v. Palmer*, 30 Pa. St. 346; *Koons v. Miller*, 3 W. & S. (Pa.) 271. And see *Bispham v. Pollock*, 1 McLean (U. S.) 411.

2. *Wood v. Smith*, 23 Vt. 706.

3. **Presumption of Knowledge of Custom.** — *Koons v. Miller*, 3 W. & S. (Pa.) 271; *Watt v. Hoch*, 25 Pa. St. 411; *Adams v. Palmer*, 30 Pa. St. 346.

4. **Actual Knowledge of Particular Usage.** — *Fisher v. Sargent*, 10 Cush. (Mass.) 250; *Wood v. Hickok*, 2 Wend. (N. Y.) 501; *De Hertel v. Supple*, 14 Grant Ch. (U. C.) 421, 13 Grant Ch. (U. C.) 648.

5. **Mercantile Instruments.** — *Higgins v. Sargent*, 2 B. & C. 348, 9 E. C. L. 101; *Shaw v. Picton*, 4 B. & C. 715, 10 E. C. L. 443; *Page v. Newman*, 9 B. & C. 378, 17 E. C. L. 399.

6. **Liquidated Accounts — United States.** — *Bispham v. Pollock*, 1 McLean (U. S.) 411; *Barclay v. Kennedy*, 3 Wash. (U. S.) 350; *Denniston v. Imbrie*, 3 Wash. (U. S.) 396; *Bainbridge v. Wilcocks*, Baldw. (U. S.) 536.

Illinois. — *Rayburn v. Day*, 27 Ill. 46; *Ayers v. Metcalf*, 39 Ill. 307.

Iowa. — *Veiths v. Hagge*, 8 Iowa 163.

Massachusetts. — *Fisher v. Sargent*, 10 Cush. (Mass.) 250.

Mississippi. — *Wiltberger v. Randolph*, Walk. (Miss.) 20.

New York. — *Esterly v. Cole*, 1 Barb. (N. Y.) 235; *Salter v. Parkhurst*, 2 Daly (N. Y.) 240; *Rensselaer Glass Factory v. Reid*, 5 Cow. (N. Y.) 587.

Pennsylvania. — *Knox v. Jones*, 2 Dall. (Pa.) 193; *Koons v. Miller*, 3 W. & S. (Pa.) 271; *Watt v. Hoch*, 25 Pa. St. 411; *Adams v. Palmer*, 30 Pa. St. 346. But see *contra*, *Henry v. Risk*, 1 Dall. (Pa.) 265.

Vermont. — *Raymond v. Isham*, 8 Vt. 263; *Davis v. Smith*, 48 Vt. 52.

Interest on Yearly Balances. — In some jurisdictions the rule is that on book accounts where no other understanding or agreement is shown interest is allowed only on the yearly balances. *Von Hemert v. Porter*, 11 Met. (Mass.) 219; *Davis v. Smith*, 48 Vt. 52. This rule, however, does not prevent an understanding or agreement between the parties by which interest on each item from the time when it is entered may be charged. *Willard v. Pinard*, 65 Vt. 160.

Interest from Date of Expiration of Credit. — It has been held that interest is recoverable on goods sold on credit from the date at which the credit expired, where such is the usage of trade at the place where the goods are sold, although there may have been no previous dealings between the parties, no engagement to pay interest, and no notice under the statute that interest would be claimed. *Bannerman v. Fullerton*, 5 Nova Scotia 200.

them.¹ Thus a merchant whose custom it is after a limited period of credit to charge interest on goods sold may charge interest accordingly against those who are in the habit of dealing with him.²

Implication Negatived. — But as an undertaking to pay interest may be implied from the custom of the parties or the course of dealings between them, so also such an implication may be negatived in the same manner.³

(b) **Knowledge of Custom.** — Where a usage or custom of the creditor to charge interest on the accounts of those dealing with him is relied on, evidence of prior dealings or proof that the debtor had knowledge of the particular custom must be given.⁴

(c) **Question of Fact for Jury.** — Whether knowledge of the custom to charge interest exists in any particular case, so that the defendant may be held to have contracted with reference to it, is a proper question for the jury.⁵ But when all the circumstances, including the usages of trade and the course of dealings, are agreed by the parties or found by the jury, then the law arising from them is to be declared by the court.⁶

(3) **Particular Acts of Parties or Terms of Particular Contract** — (a) **In General.** — A contract to pay interest may also be implied from the acts of the parties themselves or from the terms of the particular contract, considered in connection with the subject-matter of the transaction.⁷

1. Custom or Course of Dealings of Parties — *England.* — *Ex p. Williams*, 1 Rose 399; *Nichol v. Thompson*, 1 Campb. 52, note; *Boisvert v. Saurette*, 19 Rev. Leg. 2; *Greenshields v. Wyman*, 21 L. C. Jur. 40. And see *Mosse v. Salt*, 32 Beav. 269; *Clancarty v. Latouche*, 1 Ball. & B. 420.

United States. — *Barclay v. Kennedy*, 3 Wash. (U. S.) 350.

California. — *Backus v. Minor*, 3 Cal. 231; *Auzerais v. Naglee*, 74 Cal. 60.

Connecticut. — *Selleck v. French*, 1 Conn. 32, 6 Am. Dec. 185.

Illinois. — *Sammis v. Clark*, 13 Ill. 544; *Rayburn v. Day*, 27 Ill. 46; *Ayers v. Metcalf*, 39 Ill. 307.

Iowa. — *Veiths v. Hagge*, 8 Iowa 163; *Isett v. Oglevie*, 9 Iowa 313.

Massachusetts. — *Fisher v. Sargent*, 10 Cush. (Mass.) 250.

New York. — *M'Allister v. Reab*, 4 Wend. (N. Y.) 483; *Meech v. Smith*, 7 Wend. (N. Y.) 315; *Reab v. McAlister*, 8 Wend. (N. Y.) 109; *Esterly v. Cole*, 1 Barb. (N. Y.) 235; *Rensselaer Glass Factory v. Reid*, 5 Cow. (N. Y.) 611.

Pennsylvania. — *Knox v. Jones*, 2 Dall. (Pa.) 193; *Koons v. Miller*, 3 W. & S. (Pa.) 271; *Williams v. Craig*, 1 Dall. (Pa.) 313.

South Carolina. — *Dickson v. Surginer*, 3 Brev. (S. Car.) 417.

Vermont. — *Raymond v. Isham*, 8 Vt. 263.

See *contra*, *Adrianne v. Brooks*, 13 Tex. 279.

2. Interest on Merchants' Accounts. — *Nichol v. Thompson*, 1 Campb. 52, note; *Barclay v. Kennedy*, 3 Wash. (U. S.) 350; *Isett v. Oglevie*, 9 Iowa 313; *M'Allister v. Reab*, 4 Wend. (N. Y.) 483; *Reab v. McAlister*, 8 Wend. (N. Y.) 109.

An Express Agreement for Interest in Excess of the Legal Rate in the absence of contract on a particular occasion of the advance of money by one party to another has been held to raise no presumption of a contract to pay interest at the same rate on subsequent advances. *Marsion v. Pioche*, 8 Cal. 522.

And with Stronger Reason It Has Been Decided that under a statute requiring an express agreement for interest and excluding those which are implied, the fact that the parties allowed ten per cent. on some prior balances is not sufficient to show an express agreement for that rate on subsequent accounts. *Western Union R. Co. v. Smith*, 75 Ill. 407.

3. Implication Negatived. — *Chandler v. People's Sav. Bank*, 61 Cal. 401; *Ryan Drug Co. v. Hvambshahl*, 92 Wis. 62.

4. Evidence of Prior Dealings — *England.* — *Moore v. Voughton*, 1 Stark. 487, 2 E. C. L. 186. And see *Mosse v. Salt*, 32 Beav. 269; *Clancarty v. Latouche*, 1 Ball. & B. 420; *Dawes v. Pinner*, 2 Campb. 486, note.

Illinois. — *Rayburn v. Day*, 27 Ill. 46.

New York. — *Meech v. Smith*, 7 Wend. (N. Y.) 315; *M'Allister v. Reab*, 4 Wend. (N. Y.) 483; *Rensselaer Glass Factory v. Reid*, 5 Cow. (N. Y.) 611.

Pennsylvania. — *Knox v. Jones*, 2 Dall. (Pa.) 193.

South Carolina. — *Dickson v. Surginer*, 3 Brev. (S. Car.) 417.

Vermont. — *Raymond v. Isham*, 8 Vt. 263.

Presumption of Knowledge. — A uniform custom of a merchant or manufacturer with reference to interest on accounts is presumed to be known to those who are in the habit of dealing with him, and in their dealings they are supposed to act with reference to the custom. *Backus v. Minor*, 3 Cal. 231; *Auzerais v. Naglee*, 74 Cal. 60; *Reab v. McAlister*, 8 Wend. (N. Y.) 109; *Raymond v. Isham*, 8 Vt. 263.

5. Question for Jury. — *Petre v. Duncombe*, 15 Jur. 86; *Fisher v. Sargent*, 10 Cush. (Mass.) 250; *Dodge v. Perkins*, 9 Pick. (Mass.) 368.

6. When Question for Court. — *Dodge v. Perkins*, 9 Pick. (Mass.) 368.

7. Particular Acts or Terms of Particular Contracts — *England.* — *Rice v. Ahern*, 6 L. C. Jur. 201, 12 L. C. Rep. 280; *Ackermann v. Ehrensperger*, 16 M. & W. 99.

United States. — *Bainbridge v. Wilcocks*, Baldw. (U. S.) 536.

The Assumption to Pay a Substituted Obligation from which interest grows implies the payment of such interest although not stipulated *eo nomine*.¹ But the mere fact that the defendant, at the request of a third party, transferred to the credit of the plaintiff a balance due to such third party upon which, by the course of dealings between the defendant and such third party, interest would have been allowed, has been held to raise no contract by implication to pay interest to the new creditor.²

(b) **No Implication for Interest or Implication Not to Pay It.** — As a matter of course, the acts of the parties and the terms of the particular contract from which an implication of intent not to charge or pay interest may arise are proper subjects for consideration, and where such is the obvious or most reasonable construction, no interest is recoverable. And where the party seeking an allowance of interest may rely on an implied promise for its recovery, he must establish sufficient facts to support the implication.³

(4) **Breach of Contract to Pay Money.** — According to the doctrine of some cases, the law implies on the part of the debtor a contract to pay interest upon the failure to perform an obligation for the payment of a money debt,⁴ an implication created, it has been said, because in such cases justice to the creditor cannot be done without it.⁵ This is believed, however, to be an

Louisiana. — *Soulie v. Brown*, 13 La. Ann. 521.

Nebraska. — *Savage v. Aiken*, 21 Neb. 605.

New York. — *Patteson v. Whitlock*, 14 Daly (N. Y.) 497.

Oregon. — *Hoehler v. McGlinchy*, 20 Oregon 360.

Texas. — *Washington v. Denton First Nat. Bank*, 64 Tex. 4.

A Written Approval of an Account upon which interest has been charged at eight per cent. estops the party from disputing that item; but such an assent does not amount to an agreement to pay interest at the same rate thereafter. *Lalande v. Breaux*, 5 La. Ann. 505.

Failure to Object to Notice of Charge. — The mere fact that a party to whom has been rendered an account upon which is a notice that interest will be charged after one year's credit, does not make objection thereto, has been held insufficient evidence of a promise to pay the interest charged therein. *In re Edwards*, 61 L. J. Ch. 22, 65 L. T. N. S. 453.

Deposit of Title Deeds. — Where a simple contract debt has been secured by the deposit of title deeds unaccompanied by any stipulation as to interest, or by any memorandum from the terms of which the exclusion of the right to recover interest can be implied, the mortgagee is entitled to interest on the debt. *Carey v. Doyne*, 5 Ir. Ch. R. 104; *In re Kerr*, L. R. 8 Eq. 331. And see *Chester v. Jumel*, 125 N. Y. 255.

Implication of Contract to Pay from Payment. — It has been held that the existence of a contract to pay ten per cent. interest on a note bearing only six per cent. by its terms will not be implied from the payment by the maker to the indorser before maturity of ten per cent. interest for a number of years in pursuance of a voluntary promise to do so, in the absence of any consideration to support such promise. *Andrews v. Campbell*, 36 Ohio St. 361. But see *White v. Curd*, 86 Ky. 191.

1. Assuming Substituted Obligation. — *Soulie v. Brown*, 13 La. Ann. 521.

The Assignment of an Interest-bearing Demand or a portion thereof will authorize the assignee

to claim interest on the thing assigned, though in the absence of any words in the assignment expressly authorizing such claim. *Godbold v. Kirkpatrick*, 26 S. Car. 607, 1 S. E. Rep. 156.

2. *Fruhling v. Schroeder*, 2 Bing. N. Cas. 77, 29 E. C. L. 260.

3. *Connecticut.* — *Skelly v. Bristol Sav. Bank*, 63 Conn. 83, 38 Am. St. Rep. 340.

Illinois. — *Fowler v. Harts*, 149 Ill. 592.

Michigan. — *Wilcox v. Allen*, 36 Mich. 160.

New York. — *Trask v. Hazazer*, (N. Y. Super. Ct. Spec. T.) 4 N. Y. Supp. 635; *Chase v. Union Stone Co.*, 11 Daly (N. Y.) 107; *Eldred v. Eames*, 48 Hun (N. Y.) 253.

Pennsylvania. — *Minard v. Beans*, 64 Pa. St. 411.

South Carolina. — *Shoolbred v. Elliott*, 1 Brev. (S. Car.) 423; *Bennett v. Johnson*, 1 Spears L. (S. Car.) 209.

4. Breach of Contract for Money — England. — *Robinson v. Bland*, 2 Burr. 1086.

United States. — *Curtis v. Innerarity*, 6 How. (U. S.) 146; *Atlantic Phosphate Co. v. Graffin*, 114 U. S. 492.

Massachusetts. — *Dodge v. Perkins*, 9 Pick. (Mass.) 368.

Pennsylvania. — *Kelsey v. Murphy*, 30 Pa. St. 340.

South Carolina. — *Simpson v. M'Million*, 1 Nott & M. (S. Car.) 192.

Utah. — *Perry v. Taylor*, 1 Utah 63.

Vermont. — *Wood v. Smith*, 23 Vt. 706, *Gleason v. Briggs*, 28 Vt. 135; *Vermont, etc., R. Co. v. Vermont Cent. R. Co.*, 34 Vt. 1.

Distinction Between Written and Verbal Contracts. — In *South Carolina*, in *Farr v. Farr*, 1 Hill L. (S. Car.) 393, it was held that interest was not recoverable on a verbal contract in which the defendant agreed to pay to the plaintiff a stipulated sum for services rendered. It was said that there was a distinction in respect to interest between verbal and written contracts, the latter bearing interest, but not the former. See also *Ryan v. Baldrick*, 3 McCord L. (S. Car.) 498.

5. Ground of Implication — Justice to Creditor. — *Kenton Ins. Co. v. First Nat. Bank*, 93 Ky.

erroneous theory. That is, the law does not imply a contract to pay interest upon the breach of a contract for the payment of money, but rather, under such circumstances, allows interest as damages and the very measure of damages for the breach.¹

V. INTEREST AS DAMAGES FOR BREACH OF CONTRACT — 1. Contracts to Pay Money — a. IN GENERAL. — Though some cases have held that interest on money due by contract is recoverable as on an implied contract to pay it — that is, that an implied contract to pay interest arises on the breach of a contract to pay money — the sounder theory is believed to be that interest in such cases is recoverable as damages for the breach of the contract.²

b. EXPRESS CONTRACTS TO PAY MONEY — (1) In General. — Although, as already observed, the early doctrine was different,³ the general rule at present undoubtedly is that on the breach of an express contract to pay money interest is allowable as damages to the person to whom the money is due.⁴ Many of the cases, it is true, do not specifically declare that interest is given in the particular instance as damages for breach of the contract, though upon analysis this principle may be shown to be the only one involved upon which interest could have been given. It may be stated as a general rule that

129; *Minard v. Beans*, 64 Pa. St. 413; *Perry v. Taylor*, 1 Utah 63; *Wood v. Smith*, 23 Vt. 706; *Blodgett v. Converse*, 60 Vt. 410.

1. **Interest as Damages.** — *Cook v. Fowler*, 43 L. J. Ch. 855, L. R. 7 H. L. Cas. 27; *In re Roberts*, 14 Ch. D. 49; *Dalby v. Humphrey*, 37 U. C. Q. B. 514; *Dodge v. Perkins*, 9 Pick. (Mass.) 368; *Mason v. Callender*, 2 Minn. 350, 72 Am. Dec. 102; *Gleason v. Briggs*, 28 Vt. 135.

2. See *supra*, this title, *Contracts to Pay Interest — Implied Contracts — Breach of Contract to Pay Money*.

3. See *supra*, this title, *Origin and History of Interest*.

4. **General Rule as Now Existing — England.** — *Skerry v. Preston*, 2 Chit. 245, 18 E. C. L. 321; *Robinson v. Bland*, 2 Burr. 1077; *Knapp v. Burnaby*, 30 L. J. Ch. 844, 5 L. T. N. S. 52, 9 W. R. 765; *Hughes v. Kearney*, 1 Sch. & Lef. 134; *Mountford v. Willes*, 2 B. & P. 337; *Charlie v. York*, 6 Esp. 45; *Gordon v. Swan*, 12 East 419.

Canada. — *St. John v. Rykert*, 10 Can. Sup. Ct. 278; *Peoples Loan, etc., Co. v. Grant*, 18 Can. Sup. Ct. 262; *Peters v. Quebec Harbour Com'rs*, 19 Can. Sup. Ct. 685.

United States. — *Jay v. Allen*, 1 Sprague (U. S.) 130; *The Steamboat Swallow, Olc. Adm.* 334; *U. S. v. Gurney*, 4 Cranch (U. S.) 333; *Young v. Godbe*, 15 Wall. (U. S.) 562; *McCormick v. Eliot*, 43 Fed. Rep. 469; *Blewett v. Front St., etc., Cable R. Co.*, 51 Fed. Rep. 625; *Crescent Min. Co. v. Wasatch Min. Co.*, 151 U. S. 317.

Alabama. — *Moore v. Patton*, 2 Port. (Ala.) 451; *State v. Lott*, 69 Ala. 147.

California. — *Martin v. Ede*, 103 Cal. 157; *Haines v. Stilwell*, (Cal. 1895) 40 Pac. Rep. 332.

Georgia. — *Whaley v. Broadwater*, 78 Ga. 336.

Dist. of Columbia. — *District of Columbia v. Metropolitan R. Co.*, 8 App. Cas. (D. C.) 322.

Illinois. — *Maltman v. Williamson*, 69 Ill. 423; *Heiman v. Schroeder*, 74 Ill. 158; *Phillips v. South Park Com'rs*, 119 Ill. 626.

Indiana. — *Killian v. Eigenmann*, 57 Ind. 480; *Kopelke v. Kopelke*, 112 Ind. 435.

Iowa. — *Bradley v. Palen*, 78 Iowa 126.

Kentucky. — *Honore v. Murray*, 3 Dana (Ky.) 31; *Elkin v. Moore*, 6 B. Mon. (Ky.) 462; *Henderson Cotton Mfg. Co. v. Lowell Mach. Shops*, 86 Ky. 673; *Colston v. Chenault*, (Ky. 1898) 45 S. W. Rep. 664.

Louisiana. — *Hepp v. Ducros*, 3 Mart. N. S. (La.) 185; *Gay v. Kendig*, 2 Rob. (La.) 472.

Massachusetts. — *Dodge v. Perkins*, 9 Pick. (Mass.) 368; *Foote v. Blanchard*, 6 Allen (Mass.) 221, 83 Am. Dec. 624.

Missouri. — *Risley v. Andrew County*, 46 Mo. 382.

New York. — *Van Rensselaer v. Jones*, 2 Barb. (N. Y.) 643; *Clark v. Barlow*, 4 Johns. (N. Y.) 183; *Mower v. Kip*, 6 Paige (N. Y.) 88, 29 Am. Dec. 748; *Crane v. Hardman*, 4 E. D. Smith (N. Y.) 448; *Purdy v. Phillips*, 11 N. Y. 406; *Furber v. McCarthy*, (Supm. Ct. Gen. T.) 12 N. Y. Supp. 794; *Peetsch v. Quinn*, (C. Pl. Gen. T.) 7 Misc. (N. Y.) 6; *Adams v. Ft. Plain Bank*, 36 N. Y. 255.

Pennsylvania. — *Fasholt v. Reed*, 16 S. & R. (Pa.) 266; *Minard v. Beans*, 64 Pa. St. 411; *West Republic Min. Co. v. Jones*, 108 Pa. St. 55.

South Carolina. — *Schmidt v. Limehouse*, 2 Bailey L. (S. Car.) 276; *Piester v. Piester*, 22 S. Car. 139, 53 Am. Rep. 711; *Witte v. Clarke*, 17 S. Car. 313.

Texas. — *Washington v. Denton First Nat. Bank*, 64 Tex. 4; *Roberts v. Smith*, 64 Tex. 94, 53 Am. Rep. 744; *McElyea v. Faires*, 79 Tex. 243; *Yaws v. Jones*, (Tex. 1892) 19 S. W. Rep. 443. *Compare Gammage v. Alexander*, 14 Tex. 414.

Vermont. — *Wood v. Smith*, 23 Vt. 706; *Vermont, etc., R. Co. v. Vermont Cent. R. Co.*, 34 Vt. 1; *Sumner v. Beebe*, 37 Vt. 562.

Wisconsin. — *Atkinson v. Richardson*, 15 Wis. 594; *Marsh v. Fraser*, 37 Wis. 149.

Interest as Damages Whether Contract Oral or Written. — "Both reason and authority say that if, by the terms of the contract, whether oral or written, a debt be due at a certain time, then it by law carries interest from that time, in the absence of any agreement otherwise by the parties." *Henderson Cotton Mfg. Co. v. Lowell Mach. Shops*, 86 Ky. 673.

where, in an action on a contract, there is no undertaking, express or implied, to pay interest, there interest is recoverable only by way of damages for the breach of the contract.¹

Interest After Breach. — A number of well-reasoned decisions are authority for the proposition that after the breach of a contract interest is never recoverable but as damages.² If, according to this theory, the parties provide when the contract is made for interest after maturity or in the event of a breach, then it would be recoverable as liquidated damages, or rather according to a liquidated measure.³ If not so contracted for, interest would, in theory, be recoverable as unliquidated damages, so far as any liquidation by the parties themselves is concerned, but according to a strict measure prescribed by law.⁴

It Is Not Necessary in Such Cases that the contract should expressly mention interest, or that there should be any contractual implication for its payment. It is sufficient that there has been a breach of an express contract to pay money, compensation for which necessarily includes interest on the debt.⁵

Rule Controlled by Stipulation or Inference. — But this rule will, of course, be controlled by a stipulation of the parties or an inference arising from the contract that no interest shall be paid on default.⁶

(2) **Several Sorts of Contracts** — (a) **Bills of Exchange.** — It has been held that interest cannot be computed on the damages allowed by statute upon a protested bill of exchange.⁷ But the contrary has also been decided.⁸

(b) **Promissory Notes.** — Interest on promissory notes is recovered after maturity as damages for the detention of the principal.⁹

(c) **Penal Bonds** — *aa.* **IN GENERAL.** — Where a bond is given in the penalty of a larger sum conditioned for the payment of a lesser, interest is recoverable on

1. *Marsh v. Fraser*, 37 Wis. 149.

2. **Interest After Breach.** — *Du Belloix v. Waterpark*, 1 Dowl. & R. 16, 16 E. C. L. 12; *Dalby v. Humphrey*, 37 U. C. Q. B. 514; *Francis v. Wilson*, R. & M. 105, 21 E. C. L. 391; *Jourolmon v. Ewing*, 80 Fed. Rep. 604; *Mason v. Callender*, 2 Minn. 350, 72 Am. Dec. 102; *Brainard v. Jones*, 18 N. Y. 35.

In an Early Case on the Subject it was held that an action of debt would not lie for interest after the maturity of the contract, such interest being recoverable as damages strictly. *Seaman v. Dec*, 1 Vent. 198. And see *Lapierre v. St. Albans*, 2 Ld. Raym. 773; *Williams v. Fowler*, 1 Stra. 410. See also, however, observations of Lord Kenyon in *Herries v. Jamieson*, 5 T. R. 553, with reference to the case first above cited, expressing doubt on the point in question.

3. **Interest After Breach, Where Contracted for, as Liquidated Damages.** — *Mason v. Callender*, 2 Minn. 350, 72 Am. Dec. 102. See also *Buckingham v. Orr*, 6 Colo. 587; *Reeves v. Stipp*, 91 Ill. 609.

4. **Analogous Rule in Case of Chattels.** — The case of the breach of a contract to pay money is analogous in theory to the case of the breach of a contract whereby the complaining party is deprived for a period of the use of chattels. In such cases, the measure of damages for the simple deprivation of the use is the value of the use during the period of default. This fact, in the case of chattels, must be established by evidence of values, but in the case of money the law prescribes an arbitrary measure. See *infra*, this title, *Rule of Interest*.

5. **Contract Need Not Mention Interest** — *Eng-*

land. — *Robinson v. Bland*, 2 Burr. 1086; *Farquhar v. Morris*, 7 T. R. 120.

United States. — *Crescent Min. Co. v. Wasatch Min. Co.*, 151 U. S. 317; *Young v. Godbe*, 15 Wall. (U. S.) 562; *Jourolmon v. Ewing*, 80 Fed. Rep. 604.

Indiana. — *Killian v. Eigenmann*, 57 Ind. 480.

Louisiana. — *Gay v. Kendig*, 2 Rob. (La.) 472.

Massachusetts. — *Dodge v. Perkins*, 9 Pick. (Mass.) 368.

New York. — *Rensselaer Glass Factory v. Reid*, 5 Cow. (N. Y.) 604.

South Carolina. — *Schmidt v. Limehouse*, 2 Bailey L. (S. Car.) 276; *Piester v. Piester*, 22 S. Car. 139, 53 Am. Rep. 711.

Texas. — *Fowler v. Davenport*, 21 Tex. 635; *Close v. Fields*, 13 Tex. 623; *Houston, etc., R. Co. v. Jackson*, 62 Tex. 209; *Heidenheimer v. Ellis*, 67 Tex. 426.

Vermont. — *Sumner v. Beebe*, 37 Vt. 562.

6. **Effect of Stipulation or Inference.** — *The Isaac Newton, Abb. Adm.* 588; *Henderson Cotton Mfg. Co. v. Lowell Mach. Shops*, 86 Ky. 673; *Robertson v. Mowell*, 66 Md. 530; *Ledyard v. Bull*, 119 N. Y. 62; *Witte v. Clarke*, 17 S. Car. 313; *Vermont, etc., R. Co. v. Vermont Cent. R. Co.*, 34 Vt. 1.

7. **Bills of Exchange.** — *Murphy v. Andrews*, 13 Ala. 708; *Rowland v. Hoover*, 2 How. (Miss.) 769. And see *Hutton v. Ward*, 15 Q. B. 26, 69 E. C. L. 26, 14 Jur. 372, 19 L. J. Q. B. 293; *Fryer v. Brown*, R. & M. 145, 21 E. C. L. 401.

8. **Interest on Statutory Damages.** — *McGarr v. Lloyd*, 3 Pa. St. 474.

9. **Promissory Notes.** — *Du Belloix v. Waterpark*, 1 Dowl. & R. 16, 16 E. C. L. 12.

the amount really due, within the penalty of the bond,¹ even though interest is not expressly reserved.²

bb. INTEREST IN EXCESS OF PENALTY — (aa) In General. — There is a conflict of authority as to the right of the obligee in a penal bond to recover interest beyond the penalty.³ In *England* the weight of authority appears to favor the negative rule,⁴ though there are cases allowing such recovery.⁵ In the *United States* a majority of the cases favor the doctrine that interest may, in certain cases, be recovered in excess of the penalty of a bond,⁶ and where interest is so given it is, in the view of most of the courts, awarded as damages for the detention of the debt.⁷

(bb) Principal and Surety. — There is some lack of precision in the cases over an alleged distinction between the liability of the principal and the surety in the matter of the recovery of interest beyond the penalty of a bond.⁸ But the true rule is simple; wherever the penalty becomes a debt due and payable as to the surety, he is as much liable for interest thereon as if originally the principal debtor.⁹

1. **Penal Bonds.** — *Farquhar v. Morris*, 7 T. R. 120; *Hefford v. Alger*, 1 Taunt. 218; *Trice v. Turrentine*, 13 Ired. L. (35 N. Car.) 212.

Rule under Particular Statute. — It has been held, however, that interest cannot be recovered on a bond given to secure the payment of instalments of stock in a joint-stock company, under the statute 5 Wm. IV., c. 48, though the bond is in a penal sum conditioned to secure the payment of a lesser sum at a certain day. *St. John Bridge Co. v. Woodward*, 3 N. Bruns. 29.

2. **Interest Not Expressly Reserved.** — *Farquhar v. Morris*, 7 T. R. 120.

3. **Conflict of Authority.** — *Mower v. Kip*, 6 Paige (N. Y.) 88, 29 Am. Dec. 748.

4. **English Cases Limiting Principal and Interest to Amount of Penalty.** — *Knight v. Maclean*, 3 Bro. C. C. 496; *Tew v. Winterton*, 3 Bro. C. C. 489; *Wilde v. Clarkson*, 6 T. R. 303, *disapproving* *Lonsdale v. Church*, 2 T. R. 388; *Hefford v. Alger*, 1 Taunt. 218.

5. **English Cases Allowing Interest Beyond Penalty.** — *McClure v. Dunkin*, 1 East 436; *Duval v. Terry*, Show. P. C. 15; *Pulteney v. Warren*, 6 Ves. Jr. 79; *Clarke v. Abingdon*, 17 Ves. Jr. 106; *Kirwane v. Blake*, 4 Bro. P. C. (Toml. ed.) 532; *Lloyd v. Hatchett*, 2 Anstr. 525; *Lonsdale v. Church*, 2 T. R. 388; *Elliot v. Davis*, Bunb. 23; *Holdipp v. Otway*, 2 Saund. 106.

Thus it has been held that interest beyond the amount of the indebtedness may be recovered where the party was prevented by injunction from recovering his debt at law. *Duval v. Terry*, Show. P. C. 15; *Pulteney v. Warren*, 6 Ves. Jr. 79.

Where Bond Provides for Interest. — In an action on a bond in the penalty of one hundred and twenty pounds, conditioned for the repayment of the same sum, with lawful interest, it was held that interest was recoverable beyond the penalty, to the amount of the damages laid in the declaration. *Francis v. Wilson*, R. & M. 105, 21 E. C. L. 391.

6. **Rule of Weight of Authority in United States — United States.** — *Arnold v. U. S.*, 9 Cranch (U. S.) 104.

Alabama. — *Tyson v. Sanderson*, 45 Ala. 364.

Connecticut. — *Carter v. Carter*, 4 Day (Conn.) 35, 4 Am. Dec. 177; *Lewis v. Dwight*, 10 Conn. 95.

Kansas. — *Burchfield v. Haffey*, 34 Kan. 42. *Maine.* — *Wyman v. Robinson*, 73 Me. 384, 40 Am. Rep. 360.

Maryland. — *State v. Wayman*, 2 Gill & J. (Md.) 280.

Massachusetts. — *Harris v. Clap*, 1 Mass. 308, 2 Am. Dec. 27.

New Hampshire. — *Probate Judge v. Heydock*, 8 N. H. 491.

New York. — *Smedes v. Hooghtaling*, 3 Cai. (N. Y.) 48; *Mower v. Kip*, 6 Paige (N. Y.) 88, 29 Am. Dec. 748; *Lyon v. Clark*, 1 E. D. Smith (N. Y.) 250; *Beers v. Shannon*, 73 N. Y. 292.

Pennsylvania. — *Boyd v. Boyd*, 1 Watts (Pa.) 365; *Hughes v. Hughes*, 54 Pa. St. 240; *Weikel v. Long*, 55 Pa. St. 238; *Perit v. Walis*, 2 Dall. (Pa.) 252.

Virginia. — *Tennant v. Gray*, 5 Munf. (Va.) 494; *Roane v. Drummond*, 6 Rand. (Va.) 182; *Baker v. Morris*, 10 Leigh (Va.) 294; *Tazewell v. Saunders*, 13 Gratt. (Va.) 354.

Interest Not Recoverable — Particular Circumstances. — In an action on a penal bond conditioned for the construction of a railroad, executed in consideration of the conveyance of certain real property, it was held that although the general rule was that where the damages equal or exceed the penalty interest is allowed on the penalty from the date of the breach, yet as the land conveyed was wholly unproductive, a judgment of the lower court denying interest on the penalty would not be disturbed. *Blewett v. Front St. Cable R. Co.*, 51 Fed. Rep. 625.

7. **Theory of Allowance — Damages for Detention.** — *Brighton Bank v. Smith*, 12 Allen (Mass.) 243, 90 Am. Dec. 144; *Boyd v. Boyd*, 1 Watts (Pa.) 365; *Roane v. Drummond*, 6 Rand. (Va.) 182; *Baker v. Morris*, 10 Leigh (Va.) 294. And see *Carter v. Carter*, 4 Day (Conn.) 35, 4 Am. Dec. 177.

8. *Mower v. Kip*, 6 Paige (N. Y.) 88, 29 Am. Dec. 748; *Clark v. Bush*, 3 Cow. (N. Y.) 151.

9. **Rule as to Sureties Stated.** — *Brighton Bank v. Smith*, 12 Allen (Mass.) 243, 90 Am. Dec. 144; *Probate Judge v. Heydock*, 8 N. H. 491; *Brainard v. Jones*, 18 N. Y. 35.

Rule by Statute. — In New York, by Code Civ. Pro., § 1915, it is expressly provided that the obligee in a bond conditioned for the payment of money may recover the penalty of the

Interest as Damages

(d) *Lost Instruments*. — There may be a recovery of interest in an action on a note or bond which has been lost or mislaid.¹
 (e) *Debts of Decedents*. — The death of the obligor in an interest-bearing claim for the payment of money in no wise suspends the running of interest.²
Where the Claim Is Not Interest-bearing Ex contractu, presentment to the representative and proof according to law will in general set interest running in the same manner as would a demand upon the decedent if living;³ and even though there be no contract for interest, express or implied, and the claim is of a non-interest-bearing nature, yet interest will be allowed after presentment and proof and subsequent approval by a court of probate, as upon a claim reduced to judgment.⁴

(f) *Liquidated Damages*. — Though a different view has been taken,⁵ it is not perceived why interest should not be allowed on a claim for liquidated damages in the same manner as upon any other liquidated demand.⁶

c. *IMPLIED CONTRACTS TO PAY MONEY* — (1) *In General*. — Among the cases involving the right of recovery of interest as damages for the breach of implied contracts to pay money, the same conflict exists as in most other branches of the subject of interest;⁷ but as a general rule, where the circumstances of the case warrant an implication of law or fact that a certain sum of money shall be paid at a certain time or on demand, interest is recoverable as damages for a breach of the implied obligation.⁸

bond with interest from the time of the breach. See *Steinbock v. Evans*, 122 N. Y. 551.

1. *Lost Instruments*. — *Rector v. Mark*, 1 Mo. 288, 13 Am. Dec. 500; *Gray v. Thomas*, 83 Tex. 246; *Wiedenfeld v. Gallagher*, (Tex. Civ. App. 1893) 24 S. W. Rep. 333; *Allerkamp v. Gallagher*, (Tex. Civ. App. 1893) 24 S. W. Rep. 372.

2. *Debts of Decedents*. — *Reeves v. Stipp*, 91 Ill. 609; *Sinclair's Appeal*, 116 Pa. St. 315; *Hays's Estate*, 153 Pa. St. 332; *Yeatman's Appeal*, 102 Pa. St. 297; *Keebler's Estate*, 4 Pa. Dist. 346; *Huddleston v. Kempner*, 1 Tex. Civ. App. 211.

3. *Effect of Presentment*. — *Pico v. Stevens*, 18 Cal. 376; *Harword v. Larramore*, 50 Mo. 414; *Wainwright's Estate*, 13 Phila. (Pa.) 336, 37 Leg. Int. (Pa.) 133. And see *Matter of Glenn*, 74 Cal. 567; *Shepherd v. Shepherd*, 108 Mich. 82. Compare *Matter of Kennedy*, 94 Cal. 23; *Sprague v. Sprague*, 30 Vt. 483.

Rule by Statute. — In some jurisdictions there are statutes providing that no interest shall be allowed against the estate of a decedent accruing after the debtor's death, unless the claim be verified and payment demanded of the personal representative within one year after his appointment. The object of such a statute is to prevent the unnecessary accumulation of interest on such demands by the delay of creditors in duly presenting, proving, and demanding payment. *Croninger v. Marthen*, 83 Ky. 662.

See also *Durnford's Succession*, 1 La. Ann. 92, and the various local statutes.

4. *Interest After Presentment, Proof, and Approval*. — *Matter of Olvera*, 70 Cal. 184; *Matter of Glenn*, 74 Cal. 567; *Finley v. Carothers*, 9 Tex. 517, 60 Am. Dec. 179.

Claim Having Force and Effect of Judgment. — The approval by the probate court of a claim against the estate of a decedent which has been allowed by the administration has the force and effect of a judgment upon which interest will accrue, although the claim, being in the nature of an open account, would not

carry interest before judgment. *Finley v. Carothers*, 9 Tex. 517, 60 Am. Dec. 179.

But in *Durnford's Succession*, 1 La. Ann. 92, it was held that where a judgment of the Supreme Court directs a judge of probate, in the settlement of the accounts of the curator of a succession, to allow to the latter a credit upon his account from the date of his eviction from property sold to him by the deceased, for an amount awarded to him as damages for such eviction, "and to close the account and give judgment according to law," but is silent as to interest, no interest will be allowed, the allowance of interest not being a necessary consequence of the credit at a particular date.

5. *Liquidated Damages — Doctrine that Interest Not Recoverable*. — *Hoagland v. Segur*, 38 N. J. L. 230.

6. *Doctrine that Interest Allowable*. — *Winch v. Mutual Ben. Ice Co.*, 86 N. Y. 618; *Little v. Banks*, 85 N. Y. 267.

7. *Implied Contracts to Pay Money — Conflict of Authority*. — *Wood v. Robbins*, 11 Mass. 504, 6 Am. Dec. 182.

8. *Statement of General Rule — United States*. — *Dodge v. Tulleys*, 144 U. S. 451.

Illinois. — *Cease v. Cockle*, 76 Ill. 484.

Kentucky. — *Henderson Cotton Mfg. Co. v. Lowell Mach. Shops*, 86 Ky. 676.

Massachusetts. — *Foot v. Blanchard*, 6 Allen (Mass.) 221, 83 Am. Dec. 624; *Dodge v. Perkins*, 9 Pick. (Mass.) 368.

Missouri. — *Dougherty v. Chapman*, 29 Mo. App. 233.

New Mexico. — *Romero v. Desmarais*, 4 N. Mex. 367; *Romero v. Lopez*, (N. Mex. 1889) 21 Pac. Rep. 679.

Money Refundable Ex Aequo et Bono. — Whenever money has been received by a party which *ex aequo et bono* he ought to refund, interest follows as a matter of course. *Barr v. Haseldon*, 10 Rich. Eq. (S. Car.) 53.

Contract to Deliver Specie. — Specie was shipped from Boston to Porto Cabello for the purpose of purchasing a return cargo, and the

(2) *Money Paid and Received through Mistake.* — Where money has been paid and received by mutual mistake, the law will imply a contract to repay it as soon as the error is established and the person to whom it is due is ascertained, and interest is recoverable thereon as damages thereafter.¹ The converse of this rule is also true; that is, one to whom money is paid and who received it believing that it was his due is not chargeable with interest on such money until demand made and refusal to pay, nor until he has reason to be satisfied that he ought to repay it, and knows to whom payment should be made.²

Erroneous Belief of Right to Retain. — Of course, however, if one party detains the money of another without right, the mere fact that he erroneously believes he is entitled to do so will not prevent the recovery of interest.³

(3) *Money Paid for Use of Another.* — Where money is paid for the use or benefit of another or at his request, interest is in general recoverable thereon.⁴

vessel was obliged to put into Antigua, on account of a disaster, where the master, being destitute of funds, sold a part of the specie for the purpose of making the repairs, and the vessel proceeded to her port of destination and thence to Boston. It was held that the owners thereof were entitled to interest on the value of the specie from the time when they would have had the benefit of it at Porto Cabello if it had been carried forward with the rest of the cargo. *The Mary*, 1 Sprague (U. S.) 51.

1. *Money Paid by Mistake.* — *London Chartered Bank v. White*, 4 App. Cas. 413; *Buckley v. Brunelle*, 21 L. C. Jur. 133; *Goodnow v. Plumble*, 64 Iowa 672; *Goodnow v. Litchfield*, 63 Iowa 275; *Smith v. Conrad*, 15 La. Ann. 579. And see *Ashhurst v. Field*, 28 N. J. Eq. 315; *King v. Diehl*, 9 S. & R. (Pa.) 409.

In an action to recover back a sum overpaid for pasturage for cattle it was held that interest was recoverable from the time of the overpayment. *Porter v. Russek*, (Tex. Civ. App. 1895) 29 S. W. Rep. 72.

2. *Requisites to Liability for Interest on Money Received by Mistake.* — *Buckley v. Brunelle*, 21 L. C. Jur. 133; *Manufacturers' Nat. Bank v. Perry*, 144 Mass. 313; *Ashhurst v. Field*, 28 N. J. Eq. 315; *King v. Diehl*, 9 S. & R. (Pa.) 409.

Where Money Is Paid and Received in a Mutual Mistake, and neither fraud nor surprise can be imputed to either party, interest should not be allowed. *Jacobs v. Adams*, 1 Dall. (Pa.) 52.

3. *Erroneous Belief.* — *Shipman v. Miller*, 2 Root (Conn.) 405.

4. *Money Paid for Another's Use — England.* — *Craven v. Tickell*, 1 Ves. Jr. 60; *Trelawney v. Thomas*, 1 H. Bl. 305; *Municipal Council v. Wilmot Tp.*, 17 U. C. Q. B. 82. But see *Carr v. Edwards*, 3 Stark. 132, 14 E. C. L. 167; *Hicks v. Mareco*, 5 C. & P. 498, 24 E. C. L. 426; *Tappenden v. Randall*, 2 B. & P. 467.

United States. — *Allen v. Fairbanks*, 45 Fed. Rep. 445.

Alabama. — *Reynolds v. Mardis*, 17 Ala. 32.

Illinois. — *Backmaster v. Grundy*, 8 Ill. 626.

Kentucky. — *Miles v. Bacon*, 4 J. J. Marsh. (Ky.) 457; *Breckenridge v. Taylor*, 5 Dana (Ky.) 110; *Goodloe v. Clay*, 6 B. Mon. (Ky.) 236.

Massachusetts. — *Gibbs v. Bryant*, 1 Pick. (Mass.) 118; *Ilsey v. Jewett*, 2 Met. (Mass.) 168; *Weeks v. Hasty*, 13 Mass. 218.

Missouri. — *Chamberlain v. Smith* 1 Mo. 718.

New York. — *Hastie v. De Peyster*, 3 Cai. (N. Y.) 190.

Pennsylvania. — *Milne v. Rempubliam*, 3 Yeates (Pa.) 102; *Sims v. Willing*, 8 S. & R. (Pa.) 103.

South Carolina. — *Thompson v. Stevens*, 2 Nott & M. (S. Car.) 404; *Aikin v. Peay*, 5 Strobb. L. (S. Car.) 15, 53 Am. Dec. 684.

Texas. — *Floyd v. Efron*, 66 Tex. 221.

Vermont. — *Hodges v. Parker*, 17 Vt. 242, 44 Am. Dec. 331.

A Partner Who Makes Advances for His Firm is, in some jurisdictions, entitled to interest only where there is a special contract to that effect, or where it may be implied from the circumstances that the firm was to pay interest for such advances. In other words, the claim of the partner is simply on account, the amount due on which cannot be ascertained until an accounting is had. *Prentice v. Elliott*, 72 Ga. 154; *Sweeney v. Neely*, 53 Mich. 421; *Clark v. Warden*, 10 Neb. 87; *Holden v. Peace*, 4 Ired. Eq. (39 N. Car.) 223. See also the title PARTNERSHIP.

Discharge of Liens. — Where the owner of premises pays judgments establishing mechanics' liens which are conclusive on the contractor and the sureties on a bond given by him to protect the owner against such liens, the former is entitled to interest on such payments. *McFall v. Dempsey*, 43 Mo. App. 369.

Principal and Surety. — Another familiar example of an implied contract to pay money upon the breach of which interest is recoverable exists in the case of payments made by a surety in discharge of the obligations of his principal. *Petre v. Duncombe*, 15 Jur. 86, 20 L. J. Q. B. 242; *Miles v. Bacon*, 4 J. J. Marsh. (Ky.) 457; *Thompson v. Stevens*, 2 Nott & M. (S. Car.) 493; *Sims v. Goudelock*, 7 Rich. L. (S. Car.) 23. See also *Knight v. Mantz*, 1 Ga. Dec. (pt. i.) 22. And see generally the title SURETYSHIP.

Contrary Doctrine. — It has been held, however, in *England*, that though the plaintiff has expended money at the request of the defendant, he cannot recover interest unless there is a contract to pay it. *Carr v. Edwards*, 3 Stark. 132, 14 E. C. L. 167. And see *Hicks v. Mareco*, 5 C. & P. 498, 24 E. C. L. 426; *Tappenden v. Randall*, 2 B. & P. 467. But compare, however, with the foregoing cases, *Craven v. Tickell*, 1 Ves. Jr. 60, decided in 1789, where it was decided that there may be

(4) *Money Fraudulently or Wrongfully Obtained*. — Where a party has obtained money by fraud or imposition, the law implies a contract for its immediate payment or repayment to the person rightfully entitled thereto, and for a breach of this duty there may be a recovery of interest as damages for the detention of the money.¹

(5) *Money Wrongfully or Unlawfully Withheld*. — Where one has received the money of another and has not the right conscientiously to retain it, the law imposes interest as damages for the breach of an implied promise to pay it over;² and if one man retains the money of another, the presumption is that he kept it for the purpose of profit, and for this reason, therefore, he should pay interest on it.³

(6) *Money Had and Received* — (a) **General Rule**. — Interest is recoverable on money had and received to the use of another, after it has become the duty of the receiptor to pay it over to the person entitled or to apply it in a particular manner if not so paid over or applied.⁴

a recovery of interest on money advanced to the use of another. In this case the amount advanced was for the purpose of building a house. There seems to have been no definite agreement as to the question of time for repayment, and yet interest was allowed. And compare also *Trelawney v. Thomas*, 1 H. Bl. 305.

Unreasonable and Vexatious Delay. — In *Montana* interest is not recoverable in actions to recover money paid, laid out, and expended for another, unless it can be claimed on the ground of unreasonable and vexatious delay. *Isaacs v. McAndrew*, 1 Mont. 454.

1. **Money Fraudulently or Wrongfully Obtained** — *Colorado*. — *Mayo v. Whalgreen*, 9 Colo. App. 506.

Illinois. — *Steere v. Hoagland*, 50 Ill. 377, 99 Am. Dec. 521; *Deimel v. Brown*, 136 Ill. 586.

Louisiana. — *Burnham v. Hart*, 15 La. Ann. 517.

Maryland. — *Andrews v. Clark*, 72 Md. 396.

Massachusetts. — *Winslow v. Hathaway*, 1 Pick. (Mass.) 211; *Hubbard v. Charlestown Branch R. Co.*, 11 Met. (Mass.) 124; *Wood v. Robbins*, 11 Mass. 504, 6 Am. Dec. 182; *Weeks v. Hasty*, 13 Mass. 218; *Manufacturers' Nat. Bank v. Perry*, 144 Mass. 313.

Missouri. — *Arthur v. Wheeler, etc.*, Mfg. Co., 12 Mo. App. 335.

North Carolina. — *Silver Valley Min. Co. v. Baltimore Gold, etc., Min., etc., Co.*, 99 N. Car. 445.

South Carolina. — *Goddard v. Bulow*, 1 Nott & M. (S. Car.) 45, 9 Am. Dec. 663.

But see *Crockford v. Winter*, 1 Campb. 129.

Recovery Back of Usury. — Interest is recoverable in an action to recover back the amount of usury paid. *Sharp v. Pike*, 5 B. Mon. (Ky.) 155.

Interest on Excess of Freight. — Where a plaintiff had been required by a carrier to pay higher freight rates than were allowed by law, it was held proper that there should be a recovery back of interest on the excess paid, at least from the institution of the suit. *Graham v. Chicago, etc., R. Co.*, 53 Wis. 473.

2. **Money Wrongfully or Unlawfully Withheld** — *England*. — *Ekins v. East-India Co.*, 1 P. Wms. 396; *London Chartered Bank v. White*, 4 App. Cas. 413; *Michie v. Reynolds*, 24 U. C. Q. B. 303.

United States. — *Bischoffsheim v. Baltzer*, 21 Fed. Rep. 531.

Indiana. — *Rogers v. West*, 9 Ind. 400; *Kellenberger v. Foreman*, 13 Ind. 475; *Jeffersonville v. Patterson*, 26 Ind. 15, 89 Am. Dec. 448; *Miller v. Billingsly*, 41 Ind. 489; *Killin v. Eigenmann*, 57 Ind. 480; *Hazzard v. Duke*, 64 Ind. 220.

Iowa. — *Howe v. Jones*, 71 Iowa 92.

Massachusetts. — *Wood v. Robbins*, 11 Mass. 504, 6 Am. Dec. 182; *Weeks v. Hasty*, 13 Mass. 218; *Mason v. Waite*, 17 Mass. 560.

New York. — *Price v. Holman*, (Supm. Ct. Gen. T.) 2 N. Y. Supp. 184; *Greenly v. Hopkins*, 10 Wend. (N. Y.) 97.

Pennsylvania. — *Rapelie v. Emory*, 1 Dall. (Pa.) 349.

South Carolina. — *Marvin v. McRae, Cheves L. (S. Car.)* 61.

Texas. — *Close v. Fields*, 13 Tex. 623.

Vermont. — *Abbott v. Wilmot*, 22 Vt. 437.

Wisconsin. — *Land, etc., Co. v. Oneida County*, 83 Wis. 649.

A Public Officer Retaining Money in His Hands after it is due is chargeable with interest for time it is unlawfully detained. *U. S. v. Curtis*, 100 U. S. 119; *Stern v. People*, 102 Ill. 540; *Cassady v. School Trustees*, 105 Ill. 560; *Hudson v. Tenney*, 6 N. H. 457; *Justices v. Fenimore*, 1 N. J. L. 281; *Lawrence v. Murray*, 3 Paige (N. Y.) 400; *People v. Gasherie*, 1 Johns. (N. Y.) 71, 6 Am. Dec. 263; *Slingerland v. Swart*, 13 Johns. (N. Y.) 255; *Monroe County v. Clarke*, 25 Hun (N. Y.) 282; *Land, etc. Co. v. Oneida County*, 83 Wis. 649; *Michie v. Reynolds*, 24 U. C. Q. B. 303.

Detention by Party Entitled to Set-off. — A party holding money against the will of the owner is chargeable with interest, though he has a set-off and the amount due by him was not liquidated before bringing the action. *Greenly v. Hopkins*, 10 Wend. (N. Y.) 96.

3. **Presumption as to Profits**. — *Simpson v. Feltz*, 1 McCord Eq. (S. Car.) 213; *Marvin v. McRae, Cheves L. (S. Car.)* 61.

Where an Agent Mixes the Money of His Principal with His Own, and uses it in his own business, it is presumed that he has derived a benefit therefrom, and on failure to show how much he has made from the use he is chargeable with interest. *Blodgett v. Converse*, 60 Vt. 410.

4. **Money Had and Received — General Rule** — *England*. — *Pearse v. Green*, 1 Jac. & W. 175; *Harsant v. Blaine*, 56 L. J. Q. B. 511; *Robinson v. Bland*, 2 Burr. 1077.

Where Receipt of Money Fraudulently Concealed. — There may also be a recovery of interest on money received to the use of a party where its receipt is fraudulently concealed from the party entitled thereto.¹

(b) **Contrary Doctrine.** — Though the general rule as to money had and received is as stated, a different view has been taken in some cases.²

(7) **Conversion of Money.** — Where one wrongfully converts money of another to his own use, interest will be allowed from the time when the money should have been paid over.³

Misapplication of Funds. — Where money is received to be applied to a particular purpose, the law implies, in the absence of an express contract, an undertaking on the part of the person receiving it that it shall be so applied. If, therefore, there is default in this particular, interest will be recoverable on the money paid from the time of its receipt.⁴

d. INTEREST AS MEASURE OF DAMAGES. — For the breach of a contract to pay money, interest is not only recoverable, but is the very measure of damages.⁵

Alabama. — Porter v. Nash, 1 Ala. 452.

California. — Link v. Jarvis, (Cal. 1893) 33 Pac. Rep. 206.

Illinois. — Currier v. Kretzinger, 58 Ill. App. 288, affirmed in 162 Ill. 511.

Maryland. — Melvin v. Aldridge, 81 Md. 650.

Massachusetts. — Fowler v. Shearer, 7 Mass. 24; Wood v. Robbins, 11 Mass. 504, 6 Am. Dec. 182; Atlantic Nat. Bank v. Harris, 118 Mass. 147; Moors v. Washburn, 159 Mass. 172.

New York. — Pease v. Barber, 3 Cai. (N. Y.) 266; Lynch v. De Viar, 3 Johns. Cas. (N. Y.) 303; Gillet v. Maynard, 5 Johns. (N. Y.) 88; Greenly v. Hopkins, 10 Wend. (N. Y.) 97.

Pennsylvania. — Rapelie v. Emory, 1 Dall. (Pa.) 349; Com. v. Crevor, 3 Binn. (Pa.) 121.

South Carolina. — Black v. Goodman, 1 Bailey L. (S. Car.) 201; Goddard v. Bulow, 1 Nott & M. (S. Car.) 45, 9 Am. Dec. 663; Greer v. Latimer, 47 S. Car. 176. And see Marvin v. McRae, Cheves L. (S. Car.) 61; Barelli v. Brown, 1 McCord L. (S. Car.) 449, 10 Am. Dec. 683; Ancrum v. Slone, 2 Spears L. (S. Car.) 595; Kimbrel v. Glover, 13 Rich. L. (S. Car.) 191.

Texas. — Close v. Fields, 13 Tex. 623.

Vermont. — Abbott v. Wilmot, 22 Vt. 437.

Wisconsin. — Graham v. Chicago, etc., R. Co., 53 Wis. 473.

Money Received by Agent. — Where the defendants, as agents for the sale of certain property, received money thereon, which they failed to pay over promptly to their principal, it was held proper to award interest on the fund so received. Melvin v. Aldridge, 81 Md. 650.

By Statute in Indiana, under an early statute, interest was recoverable in an action for money had and received where the money is retained without the owner's knowledge, or where it is retained after it has been demanded; but not in other cases on a count for money had and received. Hawkins v. Johnson, 4 Blackf. (Ind.) 21.

Money Received in Illegal Transaction. — It has been held that where money has been paid to brokers for the purchase of stocks on margin to be delivered on a future day, no interest is recoverable in an action to recover it back. Baldwin v. Zadig, 104 Cal. 594.

1. Fraudulent Concealment. — Currier v. Kretzinger, 58 Ill. App. 288, affirmed 162 Ill. 511.

2. Statement of Doctrine Contrary to General Rule. — De Havilland v. Bowerbank, 1 Campb. 50; Crockford v. Winter, 1 Campb. 129; De Bernales v. Fuller, 2 Campb. 426; Walker v. Constable, 1 B. & P. 307; Tappenden v. Randall, 2 B. & P. 472; Higgins v. Sargent, 2 B. & C. 351, 9 E. C. L. 102; Moses v. Macferlan, 2 Burr. 1010; Fruhling v. Schroeder, 2 Bing. N. Cas. 77, 29 E. C. L. 260; Hicks v. Mareco, 5 C. & P. 498, 24 E. C. L. 426; Calton v. Bragg, 15 East 224; Hammond v. Robinson, 3 N. Bruns. 295.

In an Early Case in Pennsylvania it was held that money received as well as paid by mistake without fraud would not carry interest. Jacobs v. Adams, 1 Dall. (Pa.) 52. But compare Dilworth v. Sinderling, 1 Binn. (Pa.) 494; Com. v. Crevor, 3 Binn. (Pa.) 121.

3. Conversion of Money — England. — Hilhouse v. Davis, 1 M. & S. 169.

Illinois. — Robbins v. Lasnell, 58 Ill. 203; Stern v. People, 102 Ill. 540; Cassidy v. School Trustees, 105 Ill. 560.

Massachusetts. — Hill v. Hunt, 9 Gray (Mass.) 66; Dunlap v. Watson, 124 Mass. 305.

New York. — People v. Gasherie, 9 Johns. (N. Y.) 71, 6 Am. Dec. 263; Griggs v. Griggs, 56 N. Y. 504.

South Carolina. — Harrison v. Long, 4 DeSaus. (S. Car.) 110.

4. Hazzard v. Duke, 64 Ind. 220; McShane v. Howard Bank, 73 Md. 135; Dodge v. Perkins, 9 Pick. (Mass.) 368; Fowler v. Shearer, 7 Mass. 24; Tarpley v. Wilson, 33 Miss. 467; Jefferson City Sav. Assoc. v. Morrison, 48 Mo. 273; Capital Nat. Bank v. Coldwater Nat. Bank, 49 Neb. 786, 59 Am. St. Rep. 572.

5. Interest as Measure of Damages — England. — Fletcher v. Tayleur, 17 C. B. 21, 84 E. C. L. 21; Leduc v. Gourdine, 10 Montreal Leg. N. 161.

Canada. — Mennie v. Leitch, 8 Ont. Rep. 397.

United States. — Short v. Shipwith, 1 Brock. (U. S.) 103; Loudon v. Taxing Dist., 104 U. S. 771.

Alabama. — Cooke v. Farinholt, 3 Ala. 384.

California. — Guy v. Franklin, 5 Cal. 416; Heyman v. Landers, 12 Cal. 107; Savings Bank v. Asbury, 117 Cal. 96.

Illinois. — Place v. Dodge, 54 Ill. App. 167; Hoblit v. Bloomington, 71 Ill. App. 204.

This Measure Is Not Varied, no matter what amount of inconvenience has been sustained by the plaintiff on account of the defendant's act,¹ nor is the rule changed though collateral and incidental damages have in fact resulted from the defendant's failure to pay.²

Contract to Lend Money. — Accordingly, it has been held that damages for breach of a contract to lend money cannot extend to losses incurred by the party desiring to borrow, by reason of the necessary sacrifice of his property which would have been avoided but for the breach of contract,³ nor, it has been decided, can damages beyond the amount to be forborne, with interest and costs, be recovered on the breach of a contract to forbear to collect a debt.⁴

2. Requisites to Recovery — *a. IN GENERAL.* — In order to recover interest by way of damages for the breach of a contract to pay money, express or implied, it is necessary that both the amount to be paid and the time for payment be reasonably certain or susceptible of ascertainment.⁵ With these essentials established, the default of the debtor will render the right of recovery of interest complete.⁶

b. AMOUNT TO BE PAID — (1) *In General.* — It is obviously necessary that the amount due should be certain, or at least susceptible of ascertain-

Indiana. — *Brown v. Maulsby*, 17 Ind. 10; *Thayer v. Hedges*, 23 Ind. 141.

Iowa. — *Vennum v. Gregory*, 21 Iowa 326.

Louisiana. — *Mann's Succession*, 4 La. Ann. 28; *Compton v. Compton*, 5 La. Ann. 618.

Missouri. — *Sturgess v. Crum*, 29 Mo. App. 644.

Nevada. — *Cox v. Smith*, 1 Nev. 171, 90 Am. Dec. 476.

New Hampshire. — *Robinson v. Gilman*, 43 N. H. 485.

Rhode Island. — *Sessions v. Richmond*, 1 R. I. 298.

Tennessee. — *Morrison v. Searight*, 4 Baxt. (Tenn.) 476.

Texas. — *Commercial, etc., Bank v. Jones*, 18 Tex. 811.

Virginia. — *Bethel v. Salem Imp. Co.*, 93 Va. 354.

Washington. — *Arnott v. Spokane*, 6 Wash. 442.

1. Measure Not Varied by Particular Circumstances. — *Fletcher v. Tayleur*, 17 C. B. 21, 84 E. C. L. 21; *Mennie v. Leitch*, 8 Ont. 397; *Savings Bank v. Asbury*, 117 Cal. 96; *Bethel v. Salem Imp. Co.*, 93 Va. 354. And see *Hutchinson v. Sparks*, 3 La. Ann. 548; *Morrison v. Searight*, 4 Baxt. (Tenn.) 476. But see *contra*, *Graham v. McCoy*, 17 Wash. 63.

2. Collateral and Incidental Damages. — *Savings Bank v. Asbury*, 117 Cal. 96; *Place v. Dodge*, 54 Ill. App. 167; *Cox v. Smith*, 1 Nev. 171, 90 Am. Dec. 476; *Morrison v. Searight*, 4 Baxt. (Tenn.) 476; *Good v. Caldwell*, 11 Tex. Civ. App. 515. And see *Hutchinson v. Sparks*, 3 La. Ann. 548; *Thoreson v. Minneapolis Harvester Works*, 29 Minn. 341; *Sanborn v. Webster*, 2 Minn. 323.

Rule Stated. — In the case of *Loudon v. Taxing Dist.*, 104 U. S. 771, one of the questions involved was whether, because the city of Memphis neglected to pay the debts it owed to the appellant when they fell due, it must make good to him the losses sustained on that account through exactions of extraordinary interest and discounts on sales of securities to raise money to meet his own obligations. *Waite, C. J.*, said: "It is sufficient to say that all damages for delay in the payment of money

owing upon contract are provided for in the allowance of interest, which is in the nature of damages for withholding money that is due. The law assumes that interest is the measure of all such damages."

Costs of Collection of Debt. — In *Quebec*, in the case of an obligation for the payment of money, the damages resulting from the debtor's default are restricted by art. 1077, C. C., to interest on the sum, either at the rate stipulated, or, in the absence of an agreement, at the rate fixed by law; and the stipulation of a fixed sum, in addition to the interest, for costs of collection, is illegal. *Leduc v. Gourdine*, 10 Montreal Leg. N. 161.

3. Contract to Lend Money. — *Savings Bank v. Asbury*, 117 Cal. 96; *Mennie v. Leitch*, 8 Ont. 397.

4. Contract to Forbear to Collect Debt — Damages from Forced Sale under Execution Not Recoverable. — *Indiana, etc., R. Co. v. Searce*, 23 Ind. 223.

5. Requisites to Recovery in General — *Delaware.* — *Black v. Reybold*, 3 Harr. (Del.) 528.

Kentucky. — *Henderson Cotton Mfg. Co. v. Lowell Mach. Shops*, 86 Ky. 676.

New York. — *Holmes v. Rankin*, 17 Barb. (N. Y.) 454.

Pennsylvania. — *Kelsey v. Murphy*, 30 Pa. St. 340; *Richards v. Citizens' Natural Gas Co.*, 130 Pa. St. 37.

Rhode Island. — *Spencer v. Pierce*, 5 R. I. 63; *Durfee v. O'Brien*, 16 R. I. 213.

South Carolina. — *Ancrum v. Slone*, 2 Spears L. (S. Car.) 595.

Rule Stated. — Two things must necessarily pre-exist to raise a duty on the part of the debtor to pay the debt, namely, the ascertainment of the amount to be paid and its maturity. If these essentials are wanting, the debt, although existing, cannot be said to be due and withheld, and the duty to pay has not become imperative upon the debtor, and interest as damages for nonpayment cannot therefore be allowed. *Kelsey v. Murphy*, 30 Pa. St. 340.

6. Default of Debtor. — *Richards v. Citizens National Gas Co.*, 130 Pa. St. 37. See also *infra*, this section, *Necessity for Default*.

ment,¹ because without this the debtor cannot be in default.²

(2) *Rule as to Unliquidated Demands* — (a) *In General*. — The doctrine that the defendant should not be made liable for interest as damages for breach of contract except in cases where the amount of his debt is reasonably certain finds expression most frequently in the statement that interest is not recoverable on unliquidated damages or demands.³

Unliquidated Demands for Services. — It has been held, accordingly, that an unliquidated demand for services will not bear interest,⁴ especially where the account was not rendered before suit, and where a greater sum was claimed than was allowed.⁵

1. Amount to Be Paid — General Rule — United States. — *Willings v. Consequa*, Pet. (C. C.) 172.

California. — *Brady v. Wilcoxson*, 44 Cal. 239; *Cox v. McLaughlin*, 76 Cal. 60, 9 Am. St. Rep. 164; *Hooper v. Patterson*, (Cal. 1893) 32 Pac. Rep. 514; *Swinerton v. Argonaut Land, etc., Co.*, 112 Cal. 375.

Kentucky. — *Murray v. Ware*, 1 Bibb (Ky.) 325, 4 Am. Dec. 637.

Massachusetts. — *Needham v. Wellesley*, 139 Mass. 372; *Thorndike v. Wells Memorial Assoc.*, 146 Mass. 619.

Michigan. — *Coburn v. Muskegon Booming Co.*, 72 Mich. 134.

Missouri. — *Dozier v. Jerman*, 30 Mo. 216; *McCormack v. Lynch*, 69 Mo. App. 524; *Laming v. Peters Shoe Co.*, 71 Mo. App. 646; *Wiggins Ferry Co. v. Chicago, etc., R. Co.*, (Mo. 1894) 27 S. W. Rep. 568.

New York. — *DeWitt v. DeWitt*, 46 Hun (N. Y.) 258; *Littell v. Ellison*, 63 Hun (N. Y.) 624, 17 N. Y. Supp. 294; *Benedict v. Sliter*, 82 Hun (N. Y.) 190; *Gray v. Central R. Co.*, 89 Hun (N. Y.) 477; *Crawford v. Mail, etc., Pub. Co.*, 22 N. Y. App. Div. 54; *Ledyard v. Bull*, 119 N. Y. 62.

Oregon. — *Pengra v. Wheeler*, 24 Oregon 532.

South Carolina. — *Sullivan v. Susong*, 30 S. Car. 305.

Wisconsin. — *Marsh v. Fraser*, 37 Wis. 149; *Shipman v. State*, 44 Wis. 458; *Martin v. State*, 51 Wis. 407.

Wyoming. — *Kuhn v. McKay*, 7 Wyo. 42.

Claim Subject to Contingent Deductions. — A written instrument admitting money to be due on settlement of accounts, but subject, in a certain event, to a deduction, draws interest, under the statute of *Indiana*, on the amount remaining due after the deduction has been made. *Kellenberger v. Foresman*, 13 Ind. 475. Compare *Pengra v. Wheeler*, 24 Oregon 532.

Amount to Be Ascertained by Appraisement. — An agreement provided that the defendant should pay for a party-wall, upon the amount being ascertained by appraisers to be appointed by the parties. It was held that until an appraisement or something done by the defendant to prevent it, the plaintiff could not sue on the agreement, and the amount being unliquidated, a demand would not entitle him to interest, though the defendant was using the wall. *Thorndike v. Wells Memorial Assoc.*, 146 Mass. 619.

2. Cox v. McLaughlin, 76 Cal. 60, 9 Am. St. Rep. 164; *Swinerton v. Argonaut Land, etc., Co.*, 112 Cal. 375; *Gray v. Central R. Co.*, 89 Hun (N. Y.) 477; *Kuhn v. McKay*, 7 Wyo. 42.

3. Unliquidated Demands — General Rule —

United States. — *Willings v. Consequa*, Pet. (C. C.) 172; *Mowry v. Whitney*, 14 Wall. (U. S.) 620.

California. — *Brady v. Wilcoxson*, 44 Cal. 239; *Cox v. McLaughlin*, 76 Cal. 60, 9 Am. St. Rep. 164; *Hooper v. Patterson*, (Cal. 1893) 32 Pac. Rep. 514; *Swinerton v. Argonaut Land, etc., Co.*, 112 Cal. 375.

Georgia. — *Roberts v. Prior*, 20 Ga. 561.

Illinois. — *Griggs v. Gantord*, 50 Ill. App. 172.

Kentucky. — *Murray v. Ware*, 1 Bibb (Ky.) 325, 4 Am. Dec. 637.

Michigan. — *Coburn v. Muskegon Booming Co.*, 72 Mich. 134.

Missouri. — *Dozier v. Jerman*, 30 Mo. 216; *McCormack v. Lynch*, 69 Mo. App. 524; *Laming v. Peters Shoe Co.*, 71 Mo. App. 646.

Nevada. — *Vietti v. Nesbitt*, 22 Nev. 390.

New York. — *Esterly v. Cole*, 1 Barb. (N. Y.) 235; *McKnight v. Dunlop*, 4 Barb. (N. Y.) 36; *Holmes v. Rankin*, 17 Barb. (N. Y.) 454; *Wood v. Hickok*, 2 Wend. (N. Y.) 501; *Doyle v. St. James Church*, 7 Wend. (N. Y.) 178; *Still v. Hall*, 20 Wend. (N. Y.) 52; *Anonymous*, 1 Johns. (N. Y.) 315; *Newell v. Griswold*, 6 Johns. (N. Y.) 45; *Reid v. Rensselaer Glass Factory*, 3 Cow. (N. Y.) 393; *Spencer, J.*, in *Liotard v. Graves*, 3 Cai. (N. Y.) 226; *Littell v. Ellison*, (Supm. Ct. Gen. T.) 17 N. Y. Supp. 294; *Gray v. Central R. Co.*, 89 Hun (N. Y.) 477; *Crawford v. Mail, etc., Pub. Co.*, 22 N. Y. App. Div. 54.

Pennsylvania. — *Weir v. Allegheny County*, 95 Pa. St. 414.

South Carolina. — *Conyers v. Magrath*, 4 McCord L. (S. Car.) 392; *Sullivan v. Susong*, 30 S. Car. 305.

Wisconsin. — *Marsh v. Fraser*, 37 Wis. 149.

Wyoming. — *Kuhn v. McKay*, 7 Wyo. 42.

Canada. — *Burpee v. Carvill*, 16 N. Bruns. 235.

4. Unliquidated Demand for Services. — *Murray v. Ware*, 1 Bibb (Ky.) 325, 4 Am. Dec. 637; *Doyle v. St. James Church*, 7 Wend. (N. Y.) 178; *Crawford v. Mail, etc., Pub. Co.*, 22 N. Y. App. Div. 54; *De Witt v. De Witt*, 46 Hun (N. Y.) 258; *Littell v. Ellison*, (Supm. Ct. Gen. T.) 17 N. Y. Supp. 294; *Marsh v. Fraser*, 37 Wis. 149.

Where the Amount Due for Professional Services is not susceptible of ascertainment by computation or reference to market value, the plaintiff is not entitled to interest prior to verdict or judgment. *Swinerton v. Argonaut Land, etc., Co.*, 112 Cal. 375.

5. Special Application of Rule. — *Doyle v. St. James Church*, 7 Wend. (N. Y.) 178. And see *Marsh v. Fraser*, 37 Wis. 149.

But an Employee Wrongfully Discharged before the expiration of his contract of employment may recover interest on the amount of wages due to him according to contract from the date of his discharge to the expiration of the period,¹ provided the action is not brought before the expiration of the agreed term, for in the latter event the damages are necessarily unliquidated and incapable of ascertainment by calculation, as liable to deduction by the amount received in other employment.²

What Is Unliquidated Demand. — An unliquidated claim, with reference to the allowance of interest, is one which one of the parties to the contract cannot alone render certain.³

Whenever a Demand Is Fixed and Certain, either by the agreement of the parties or by the operation of law, it is liquidated and will bear interest.⁴

(b) **Modification of Rule.** — Although the general rule is usually met with as stated above, the tendency of modern cases is to modify it in its strictest application.⁵ Thus, some cases only deny the right of recovery in such cases of interest *eo nomine*,⁶ or permit it from demand⁷ or from the date of the institution of the action.⁸

(c) **Where Amount Capable of Ascertainment.** — It is generally sufficient to the recovery of interest at the present time that the amount, though not ascertained, is capable of ascertainment by mere computation.⁹

(d) **Amount in Dispute.** — A dispute as to the contract or some of the items thereof is not always conclusive of the fact that a demand is so unliquidated that no interest is recoverable.¹⁰

1. **Interest on Wages Due.** — *Laming v. Peters Shoe Co.*, 71 Mo. App. 646.

2. **Suit Must Be Brought After Expiration of Term.** — *Crawford v. Mail, etc.*, Pub. Co., 22 N. Y. App. Div. 54.

3. **What Demands Are Unliquidated.** — *Roberts v. Prior*, 20 Ga. 561; *Harvey v. Hamilton*, 155 Ill. 377.

4. **Liquidation by Agreement of Parties or Operation of Law.** — *Nisbet v. Lawson*, 1 Ga. 287; *Bartee v. Andrews*, 18 Ga. 407; *Roberts v. Prior*, 20 Ga. 561; *Clark v. Dutton*, 69 Ill. 521.

Not Necessary to Be in Writing. — In order for a demand to be liquidated so as to draw interest it is not necessary that it should be in writing. *Anderson v. State*, 2 Ga. 370; *Nisbet v. Lawson*, 1 Ga. 287. But in the earlier case of *Fell v. Abbot*, R. M. Charl. (Ga.) 452, which was decided under a statute that "no verdict shall be received on any unliquidated demand where the jury have increased their verdict on account of interest," it was held that all demands were unliquidated unless evidenced by a written acknowledgment or promise. A verbal acknowledgment, therefore, though it be of indebtedness in a certain sum, and a promise to pay such sum, is unliquidated.

5. **Modifications of Rule.** — *Parker v. Parker*, 33 Ala. 459; *Cox v. McLaughlin*, 76 Cal. 63, 9 Am. St. Rep. 164; *Mix v. Miller*, 57 Cal. 356; *McFadden v. Crawford*, 39 Cal. 662; *White v. Miller*, 78 N. Y. 394, 34 Am. Rep. 544.

Interest on Judgment for Unliquidated Damages. — It seems to have been intimated also that although no interest on a judgment for unliquidated damages might be included in an execution thereon, yet in a subsequent action on the judgment the rule might be different. *Marshall v. Dudley*, 4 J. J. Marsh. (Ky.) 244. But compare *Daub v. Martin*, 2 Day (S. Car.) 193, in which case it was held that in an action founded on a judgment for tort, interest was

not recoverable because the case originally sounded in damages.

Rule by Statute. — In *Louisiana* it has been declared that the Act of 1839 implies the allowance of interest on unliquidated demands. *Roper v. Magee*, 12 La. Ann. 409.

6. **Interest Not Recoverable Eo Nomine.** — *Brady v. Wilcoxson*, 44 Cal. 239.

7. **Interest from Demand.** — *Farr v. Semple*, 81 Wis. 230. See also *infra*, this title, *Time from Which Computed*.

8. **Interest from Institution of Suit.** — *Edison General Electric Co. v. Canadian Pac. Nav. Co.*, 8 Wash. 370, 40 Am. St. Rep. 910. See also *infra*, this title, *Time from Which Computed*.

9. **Amount Ascertainable by Computation.** — *Marion Nat. Bank v. Fidelity, etc., Co.*, (Ky. 1890) 14 S. W. Rep. 371; *Robinson v. Stewart*, 10 N. Y. 189; *McMahon v. New York, etc., R. Co.*, 20 N. Y. 469; *Smith v. Velie*, 60 N. Y. 106; *Kelsey v. Murphy*, 30 Pa. St. 340; *Shipman v. State*, 44 Wis. 458; *School Dist. No. 1 v. Dreutzer*, 51 Wis. 153; *Graham v. Chicago, etc., R. Co.*, 53 Wis. 473; *Kuhn v. McKay*, 7 Wyo. 42.

Claim Part Liquidated and Part Unliquidated. — The fact that a claim for a definite sum is joined with claims for unliquidated amounts does not affect the claimant's right to recover interest on the liquidated portion of the demand. *Coxe v. State*, 144 N. Y. 396.

10. **Dispute as to Amount.** — *United States v. Putnam, J.*, in *Nashua, etc., R. Corp. v. Boston, etc., R. Corp.*, 61 Fed. Rep. 237.

Connecticut. — *Healy v. Fallon*, 69 Conn. 228. *Kentucky.* — *Schmidt v. Louisville, etc., R. Co.*, 95 Ky. 289.

Pennsylvania. — *West Republic Min. Co. v. Jones*, 108 Pa. St. 55.

South Carolina. — *Tappan v. Harwood*, 2 Spears L. (S. Car.) 536.

But Where a Party's Right to Compensation under a Contract Is Doubtful, and is contested on reasonable grounds, and suit is required in order to determine the amount due to him, interest will not be allowed for the time preceding such determination.¹

(3) *Accounts* — (a) *Unliquidated Accounts*. — Interest is not generally recoverable on an unliquidated mutual account current prior to an ascertainment of the balance due and some demand on the debtor for payment, or a contract, law, or custom by which interest becomes payable on balances of accounts at or after a certain time.²

(b) *Liquidated Accounts*. — With reference to the recovery of interest on accounts a different rule applies where the account has been liquidated and a balance struck and where the amount is unliquidated as stated above. The general

Wisconsin. — *Vaughan v. Howe*, 20 Wis. 497.
Interest on Disputed Items from Institution of Action. — Where, upon the presentation of an account for professional services, the defendant admitted an indebtedness for the items therein contained, subject to modification and correction as to the amount of the charges, and upon subsequent trial the defendant disputed the amount charged in three items, it was held that the interest on the disputed items should have been limited to the date of the commencement of the action, but upon the undisputed items interest was recoverable from the date of the presentation of the bill. *Hand v. Church*, 39 Hun (N. Y.) 303.

In the somewhat similar case of *Stimpson v. Green*, 13 Allen (Mass.) 326, it appeared that the defendant had rendered an account of the profits in a joint enterprise, but some of the items were in dispute, and the balance was not liquidated, nor had any special demand been made upon him. It was held that interest on the balance found due should be allowed only from the commencement of the suit.

1. **Where Plaintiff's Right Doubtful and Contested**. — *Shipman v. State*, 44 Wis. 458.

2. **Interest on Unliquidated Accounts** — *England*. — *Hill v. South Staffordshire R. Co.*, L. R. 18 Eq. 154; *Charlie v. York*, 6 Esp. 45.

Arkansas. — *Rogers v. Yarnell*, 51 Ark. 198.
California. — *Heald v. Hendy*, 89 Cal. 632; *Brady v. Wilcoxson*, 44 Cal. 239.

Connecticut. — *Temple v. Belding*, 1 Root (Conn.) 314; *Crosby v. Mason*, 32 Conn. 482; *Clark v. Clark*, 46 Conn. 586. And see *Day v. Lockwood*, 24 Conn. 185.

Illinois. — *McCormick v. Elston*, 16 Ill. 204; *Aldrich v. Dunham*, 16 Ill. 403; *Myers v. Walker*, 24 Ill. 133; *Bishop Hill Colony v. Edgerton*, 26 Ill. 54; *Flake v. Carson*, 33 Ill. 518.

Indiana. — *Shewel v. Givan*, 2 Blackf. (Ind.) 312.

Iowa. — *Raymond v. Williams*, 40 Iowa 117.
Kansas. — *Williams v. Hersey*, 17 Kan. 18.

Kentucky. — *South v. Leavy, Hard*, (Ky.) 527; *Murray v. Ware*, 1 Bibb (Ky.) 325, 4 Am. Dec. 637; *Harrison v. Handley*, 1 Bibb (Ky.) 443; *Neal v. Keel*, 4 T. B. Mon. (Ky.) 162; *Adams Express Co. v. Milton*, 11 Bush (Ky.) 49; *Tobin v. South*, (Ky. 1896) 36 S. W. Rep. 1039.

Massachusetts. — *Palmer v. Stockwell*, 9 Gray (Mass.) 237; *Stimpson v. Green*, 13 Allen (Mass.) 326; *Freeman v. Freeman*, 142 Mass. 98.

Michigan. — *Sweeney v. Neely*, 53 Mich. 421.

Nevada. — *Flannery v. Anderson*, 4 Nev. 437.
New York. — *Salter v. Parkhurst*, 2 Daly (N. Y.) 240; *Chase v. Union Stone Co.*, 11 Daly (N. Y.) 107; *Wood v. Hickok*, 2 Wend. (N. Y.) 501; *Doyle v. St. James Church*, 7 Wend. (N. Y.) 178; *McKnight v. Dunlop*, 4 Barb. (N. Y.) 36; *Holmes v. Rankin*, 17 Barb. (N. Y.) 454; *Pursell v. Fry*, 19 Hun (N. Y.) 595; *People v. Delaware County*, (Supm. Ct. Gen. T.) 9 Abb. Pr. N. S. (N. Y.) 408; *Ledyard v. Bull*, (Supm. Ct. Gen. T.) 3 N. Y. Supp. 37; *Smith v. Velie*, 60 N. Y. 106; *Matter of Strickland*, 1 Connolly (N. Y.) 435.

Pennsylvania. — *Henry v. Risk*, 1 Dall. (Pa.) 265; *Williams v. Craig*, 1 Dall. (Pa.) 313; *Graham v. Williams*, 16 S. & R. (Pa.) 257, 16 Am. Dec. 569; *McClintock's Appeal*, 29 Pa. St. 360; *Grubb's Appeal*, 66 Pa. St. 117.

South Carolina. — *Neyle v. Chisholm*, Harp. L. (S. Car.) 274; *Holmes v. Misroon*, Treadw. (S. Car.) 21; *Skirving v. Stobo*, 2 Bay (S. Car.) 233; *Edwards v. Dargan*, 30 S. Car. 177.

Texas. — *Cloud v. Smith*, 1 Tex. 102.

Virginia. — *Waggoner v. Gray*, 2 Hen. & M. (Va.) 603; *M'Connico v. Curzen*, 2 Call (Va.) 358, 1 Am. Dec. 540.

Wisconsin. — *Marsh v. Fraser*, 37 Wis. 149; *Shipman v. State*, 44 Wis. 458.

Rationale of Rule. — The real condition of such an account is, it has been said, that before liquidation, where the accounts are mutual or where they are not mutual, the credit is not terminated; the debt is not due until the liquidation takes place, but then it at once becomes the duty of the debtor to pay the balance or amount found due by him, and on default the law makes him pay damage for the breach of the contract to pay. *Mason v. Callender*, 2 Minn. 350, 72 Am. Dec. 102.

Agreement for Specific Term of Credit. — Ordinarily, in the absence of any evidence of usage or of a special agreement between the parties, interest cannot be recovered on an open running account for goods sold and delivered, when there was no specific term of credit agreed on between the parties. *Fisher v. Sargent*, 10 Cush. (Mass.) 250.

Wrongful Acquisition or Detention of Money. — Interest cannot be recovered on an open and running account for work, labor, goods sold, and the like, unless there is a contract to pay interest, or some usage, as in the case of the custom of merchants, from which a contract may be inferred, or where the defendant is a wrongdoer in acquiring or detaining money. *Goff v. Rehoboth*, 2 Cush. (Mass.) 475.

rule is that where an account is due and liquidated interest is recoverable on the balance thereof.¹

The Mere Act of Striking a Balance of the Account between the parties does not entitle the party in whose favor the balance is to interest from that time.² But where a debtor to whom a bill is presented admits that it is correct, the account is liquidated, within the meaning of a statute allowing interest on the settlement of accounts from the date of liquidation.³

(c) **Interest by Agreement of Parties.** — As a matter of course, however, by express agreement of the parties or by agreement implied from custom, interest may be recovered on the items of an account before liquidation, or on a balance found due as of any previous date.⁴ Thus, though the plaintiffs and the defendant kept a running account for many years, which was unsettled, and bore no interest, it was held that interest was payable on a note given by the plaintiffs to the defendant for money loaned in the course of their mutual dealings, which by its terms bore interest, though the note was included in the account.⁵

1. Liquidated Accounts — England. — *Blaney v. Hendrick*, 3 Wils. C. Pl. 205, 2 W. Bl. 761; *Mountford v. Willes*, 2 B. & P. 337; *Green-shields v. Wyman*, 21 L. C. Jur. 40.

United States. — *Bainbridge v. Wilcocks*, *Baldw.* (U. S.) 536; *Young v. Godbe*, 15 Wall. (U. S.) 562; *Cooper v. Coates*, 21 Wall. (U. S.) 105.

California. — *Auzerais v. Naglee*, 74 Cal. 60.
Georgia. — *Hicks v. Thomas*, *Dudley* (Ga.) 218.

Illinois. — *Underhill v. Gaff*, 48 Ill. 198; *Haight v. McVeagh*, 69 Ill. 624; *Daniels v. Osborn*, 75 Ill. 615; *Luetgert v. Volker*, 153 Ill. 385.

Indiana. — *Ross v. Smith*, 113 Ind. 242.
Iowa. — *David v. Conard*, 1 Greene (Iowa) 336.

Maine. — *Crosby v. Otis*, 32 Me. 256.
Michigan. — *Graham v. Myers*, 67 Mich. 277.
Mississippi. — *Thompson v. Matthews*, 56 Miss. 368.

New York. — *Case v. Hotchkiss*, 3 Keyes (N. Y.) 334; *Walden v. Sherburne*, 15 Johns. (N. Y.) 409.

Pennsylvania. — *Porter v. Patterson*, 15 Pa. St. 229.

South Carolina. — *Elliott v. Minott*, 2 McCord L. (S. Car.) 125; *Barelli v. Brown*, 1 McCord L. (S. Car.) 449, 10 Am. Dec. 683.

Texas. — *Heidenheimer v. Ellis*, 67 Tex. 426.

Vermont. — *Williams v. Finney*, 16 Vt. 297.
Wisconsin. — *Morawetz v. McGovern*, 68 Wis. 312.

Set-off and Counterclaim. — Interest is allowed on the items of an independent account when used as a set-off or counterclaim to extinguish or reduce a debt, but is not to be computed upon payments as such the effect of which is to reduce *pro tanto* the sum due, interest being first discharged. *Overby v. Fayetteville Bldg., etc. Assoc.*, 81 N. Car. 56.

In the Case of Mutual Running Accounts, if interest is allowed on one side, it must be allowed on the other. *Bell's Appeal*, (Pa. 1887) 8 Atl. Rep. 927.

2. Mere Act of Striking Balance. — *Charlie v. York*, 6 Esp. 45.

But Entries in the Books of Account of a Partnership in the handwriting of one of the part-

ners, exhibiting a debit and a credit side of an account, from which it appears that a balance is due from the firm, although no balance is struck in the books, constitute proof sufficient of the original indebtedness, and entitle the creditor to interest from the time when the parties inspected the accounts while in that situation. *Patterson v. Choate*, 7 Wend. (N. Y.) 441.

3. Account Admitted Correct. — *Haight v. McVeagh*, 69 Ill. 624; *Daniels v. Osborn*, 75 Ill. 615; *Luetgert v. Volker*, 153 Ill. 385; *Pollard v. Ehle*, 2 E. D. Smith (N. Y.) 541; *Morawetz v. McGovern*, 68 Wis. 312.

Approval of Account by County Board. — Where a county treasurer renders an account to the county board, its approval by that body liquidates and settles it up to that time. *Stern v. People*, 102 Ill. 540.

Bills Stating Only Parts of Account. — Where parties have been engaged in continuous dealings, the presentation of bills at various times, stating only parts of the account, does not raise the presumption of liquidation under which interest is thereafter chargeable upon the balances shown to be due. *Raymond v. Williams*, 40 Iowa 117.

Recovery of Interest on Account though No Statute So Provides. — There may be a recovery of interest as damages on the balance due upon the account stated, though there is no statute so providing. *Heidenheimer v. Ellis*, 67 Tex. 426.

4. Interest by Agreement — Alabama. — *Moore v. Patton*, 2 Port. (Ala.) 451.

Arkansas. — *Watkins v. Wassell*, 20 Ark. 410.
Kansas. — *Tootle v. Wells*, 39 Kan. 452; *Williams v. Hersey*, 17 Kan. 18.

Massachusetts. — *Goff v. Rehoboth*, 2 Cush. (Mass.) 475; *Fisher v. Sargent*, 10 Cush. (Mass.) 250.

New York. — *McKnight v. Dunlop*, 4 Barb. (N. Y.) 36; *Wood v. Hickok*, 2 Wend. (N. Y.) 501; *Salter v. Parkhurst*, 2 Daly (N. Y.) 240.

South Carolina. — *Holmes v. Misroon*, *Treadw.* (S. Car.) 21.

Wisconsin. — *Marsh v. Fraser*, 37 Wis. 149; *Shipman v. State*, 44 Wis. 458.

5. Note Bearing Interest Included in Account. — *Rogers v. Yarnell*, 51 Ark. 198. See also *Torrance v. Philbin*, 4 L. C. Jur. 287.

c. **TIME FOR PAYMENT.** — In addition to certainty as to the amount, certainty as to the time when the debt is due is essential to the recovery of interest as damages for the breach of the contract to pay.¹

But No Time Need Be Expressly Fixed for the payment of the debt.² It will be sufficient if the time for payment be ascertainable by implication or from the nature of the transaction.³

d. **NECESSITY FOR DEFAULT** — (1) *In General.* — After the ascertainment of the amount to be paid and the time when it is payable, the default of the debtor completes the right to interest as damages,⁴ but of course there need be no default to authorize the recovery of interest where there is an express or implied contract to pay it.⁵

1. **Time for Payment** — *England.* — Walker v. Constable, 1 B. & P. 307; Tappenden v. Randall, 2 B. & P. 467; Calton v. Bragg, 15 East 223; Moses v. Macferlan, 2 Burr. 1005.

Pennsylvania. — Minard v. Beans, 64 Pa. St. 411; Richards v. Citizens Natural Gas Co., 130 Pa. St. 37.

Washington. — Western Mill, etc., Co. v. Blanchard, 1 Wash. 230.

Bond Payable on Contingency. — A bond conditioned for the payment of a specified sum to A on the death of B and C and the survivors of them will, however, bear interest after the death of the persons named, although the principal was payable on a contingency. Helier v. Franklin, 1 Stark. 291, 2 E. C. L. 116.

Contingency Which May Never Happen. — In an action on an agreement to pay to the plaintiff a sum of money in case the promisor should not be compelled to pay a certain judgment against him, less the expenses of litigation in endeavoring to defeat the judgment claim, it was held error to charge the defendant with interest on the entire fund from the date of the promise. Greer v. Latimer, 47 S. Car. 176.

2. **Time Need Not Be Expressly Fixed.** — Sinton v. Greer, (Ky. 1889) 11 S. W. Rep. 366.

3. **Time Ascertainable by Implication or from Nature of Transaction** — *Connecticut.* — Selleck v. French, 1 Conn. 32, 6 Am. Dec. 185.

Kansas. — Wyandotte, etc., Gas Co. v. Schliefer, 22 Kan. 468.

Kentucky. — Henderson Cotton Mfg. Co. v. Lowell Mach. Shops, 86 Ky. 668.

Nebraska. — Coffey v. Knapp, 23 Neb. 579.

Vermont. — Spencer v. Woodbridge, 38 Vt. 492; Vermont, etc., R. Co. v. Vermont Cent. R. Co., 63 Vt. 1.

Wisconsin. — Marsh v. Frazer, 37 Wis. 149.

4. **Necessity for Default** — *Alabama.* — Whitworth v. Hart, 22 Ala. 343.

Arkansas. — Rogers v. Yarnell, 51 Ark. 198.

Kentucky. — Henderson Cotton Mfg. Co. v. Lowell Mach. Shops, 86 Ky. 674.

Louisiana. — Reid v. Duncan, 1 La. Ann. 265.

Maine. — Gay v. Gardiner, 54 Me. 477.

Massachusetts. — Hubbard v. Charlestown Branch R. Co., 11 Met. (Mass.) 124; Dodge v. Perkins, 9 Pick. (Mass.) 368.

Michigan. — Beardslee v. Horton, 3 Mich. 560.

New Hampshire. — National Lancers v. Lovering, 30 N. H. 511; Hudson v. Tenney, 6 N. H. 456.

New York. — Hanley v. Crowe, (Supm. Ct. Gen. T.) 3 N. Y. Supp. 154; Adams v. Ft. Plain Bank, 36 N. Y. 255.

Canada. — Daly v. Daly, 1 Quebec Super. Ct. 457.

Condition Precedent Not Performed. — Where money is deposited in a bank to be paid to the plaintiff on a check indorsed by two parties, and such parties refuse to indorse it, the plaintiff cannot recover interest as against the bank from the time of his demand, as the bank was not in default until the check was presented duly indorsed by the parties. Cooper v. Townsend, (Supm. Ct. Gen. T.) 13 N. Y. Supp. 766, 59 Hun (N. Y.) 624.

Statutory Demand Against County. — In an action under a statute making a county liable for property destroyed by a mob, but making no provision for the payment of interest on the damages, the court held that interest was not recoverable. Weir v. Allegheny County, 95 Pa. St. 413.

Husband Using Wife's Funds. — Where a wife permits her husband to have the use of her money without any agreement or claim for the payment of interest upon it, she cannot recover interest from his estate except for the period that has elapsed after his death. Wormley's Estate, 137 Pa. St. 101.

Similarly it has been held a husband who has the administration of his paraphernal funds cannot be charged by the wife with interest thereon before a dissolution of the community between them. Burns v. Thompson, 39 La. Ann. 377.

Default in the Payment of an Interest Coupon will not give a right of recovery on interest coupons not due, although the note to which the coupons are attached provides that if any interest shall remain unpaid after due, the principal note and all interest coupons shall become due and payable at once, at the option of the holder. Cloud v. Rivord, 6 Wash. 555.

But in an Action to Enforce a Vendor's Lien for default in payment of an instalment in the purchase price of certain property, interest is recoverable on the deferred instalment of the purchase price not yet due, where by the terms of the contract of sale all instalments bear interest from date. Bowman v. Duling, 39 W. Va. 619.

Doctrine that Default Unnecessary. — It has been held in terms under a statute providing that all debts shall bear interest at a specified rate from the time when due, that "no default is necessary to enable the creditor to receive interest of five per cent. [the statutory rate] on a claim for money from the time it is payable." Collins v. Sabatier, 19 La. Ann. 299. But this case does not mean what it says, for an omission to pay a debt when due is, of course, a default.

5. Rogers v. Yarnell, 51 Ark. 198.

(2) *Default in Liquidating Debt.* — In addition to default by failure to pay a debt the amount and maturity of which have been ascertained, there may be such default on the part of the debtor in failing to liquidate the debt as will render him liable to interest on the amount subsequently ascertained, from the prior date at which the debt should have been liquidated.¹

(3) *Liability of Mere Depositary.* — It is held that one in whose hands money is placed as a mere depositary or stakeholder is not liable for interest thereon prior to demand and default.²

Where Depositary Makes Interest on Deposit. — In some instances the rule that no interest is recoverable against a mere depositary has been extended to include cases where the depositary actually makes interest on the fund in his hands.³ But in other cases it is intended that under such circumstances the true owner of the fund should be entitled to the interest as an increment of the principal.⁴

e. DEMAND — (1) *General Rule.* — Whenever a demand by a creditor is necessary to fix the time for the payment of the debt,⁵ interest does not

1. **Defaults in Liquidating Debt.** — *Scroggs v. Cunningham*, 81 Ill. 110; *McMahon v. New York, etc., R. Co.*, 20 N. Y. 463; *Smith v. Velie*, 60 N. Y. 106; *Ansley v. Peters*, 6 N. Bruns. 339.

Debtor's Duty to Liquidate Debt. — Where by contract it was the defendant's duty at a certain time to liquidate the debt, interest is recoverable on the balance found due from that time. *McMahon v. New York, etc., R. Co.*, 20 N. Y. 463.

Agent's Failure to Notify Principal of Receipt of Money. — In *Williams v. Storrs*, 6 Johns. Ch. (N. Y.) 353, 10 Am. Dec. 340, the court said that "if the agent had received moneys and neglected for a long time to inform his principal of the fact, and willfully suffered him to remain in ignorance that the debtor had paid to the agent there would be equity in requiring the agent to pay interest, for here would be a case of default and breach of duty." And in *Landman v. Crooks*, 4 Grant Ch. (U. C.) 353, where it appeared that an agent had received large sums of money for his principal, and had used it for many years in his own business, instead of remitting it to his principal as he might and should have done, he was held chargeable with six per cent. interest and annual rests.

2. **Rule as to Depositories** — *England.* — *Lee v. Munn*, 8 Taunt. 45, 4 E. C. L. 14.

Canada. — *Hutton v. Federal Bank*, 9 Ont. Pr. 568.

United States. — *U. S. v. Denvir*, 106 U. S. 536.

Connecticut. — *Jones v. Mallory*, 22 Conn. 386. *Massachusetts.* — *Wood v. Robbins*, 11 Mass. 504, 6 Am. Dec. 182.

New York. — *Hanley v. Crowe*, (Supm. Ct. Gen. T.) 3 N. Y. Supp. 154; *New York v. Tradesmen's Nat. Bank*, (Supm. Ct. Gen. T.) 11 N. Y. Supp. 95.

Vermont. — *Haswell v. Farmers, etc., Bank*, 26 Vt. 100.

Virginia. — *Daniel v. Wharton*, 90 Va. 584.

Where two contending claimants for money in the sheriff's hands agreed that the sheriff should deposit the amount in bank until the question should be decided, and the sheriff so deposited it, but took it out again soon after, it was held that the sheriff was bound to pay interest to the successful party from the time

when the money was thus taken out of the bank. *Com. v. Crevor*, 3 Binn. (Pa.) 121.

Funds in Hands of Receiver. — While the widow's share of a fund decreed to her in lieu of dower is held by the court in the hands of its receiver, or is being brought in by the receiver, it bears no interest unless it makes interest. If, however, the receiver is personally derelict in not paying out money when he ought to do so, he is personally chargeable with interest for withholding it, but not otherwise. *Johnson v. Moon*, 82 Ga. 247. See generally the title RECEIVERS.

Unreasonable and Vexatious Delay. — In *Corsen v. Neatheny*, 9 Colo. 212, mere delay on the part of a stakeholder to pay over money was held not of itself to warrant the allowance of interest under a former statute allowing interest on "money withheld by an unreasonable and vexatious delay."

3. **Where Depositary Makes Interest.** — *Jones v. Mallory*, 22 Conn. 386; *Hutton v. Federal Bank*, 9 Ont. Pr. 568. And see *Bassett v. Kinney*, 24 Conn. 267, 63 Am. Dec. 161; *Hanley v. Crowe*, (Supm. Ct. Gen. T.) 3 N. Y. Supp. 154.

4. **Liability for Interest Made.** — *Kirkman v. Vanlier*, 7 Ala. 217; *Lewis v. Bradford*, 8 Ala. 632; *Smith v. Alexander*, 87 Ala. 387; *Bassett v. Kinney*, 24 Conn. 267, 63 Am. Dec. 161; *Shackleford v. Helm*, 1 Dana (Ky.) 338; *Lamb v. Lamb*, 11 Pick. (Mass.) 371.

5. **Time of Payment Fixed by Demand.** — It is generally considered that a demand operates by way of fixing the time of payment, rather than by liquidating the amount due. *Brewer v. Tyringham*, 12 Pick. (Mass.) 547; *Palmer v. Stockwell*, 9 Gray (Mass.) 237; *White v. Miller*, 78 N. Y. 394, 34 Am. Rep. 544; *Rexford v. Comstock*, (Supm. Ct. Gen. T.) 3 N. Y. Supp. 878; *Marsh v. Fraser*, 37 Wis. 149; *Tucker v. Grover*, 60 Wis. 245; *Hewitt v. John Week Lumber Co.*, 77 Wis. 548. See the title DEMAND, vol. 9, p. 197.

In *Thorndike v. Wells Memorial Assoc.*, 146 Mass. 619, it was expressly declared that where a claim is uncertain and unliquidated, a mere demand is not sufficient to put the debtor in default, so as to render him liable for interest.

On the Other Hand it has been held that where the plaintiff had performed work for the defendant without any agreement as to the price,

begin to run, in the absence of a contract therefor, until a demand has been made.¹ This is the case where the contract either expressly or impliedly provides for the payment of the principal debt on demand,² or where the claim is for money paid under mutual mistake,³ or for the conversion

he should be allowed to take interest on a reasonable and proper amount from the time when payment was demanded. *De Carricarti v. Blanco*, 121 N. Y. 230; *De Carricarte v. De Lastres*, 121 N. Y. 662; *Gray v. Van Amringe*, 2 W. & S. (Pa.) 128. And see *Mercer v. Vose*, 67 N. Y. 56; *McCollum v. Seward*, 62 N. Y. 316; *Ledyard v. Bull*, 119 N. Y. 12.

In Louisiana, Since the Act of March 20, 1839, it has been held that sums due on contracts bear interest from judicial demand though unliquidated. *Barrow v. Reab*, 9 How. (U. S.) 366. And see *Sullivan v. Williams*, 2 La. Ann. 878; *Petrie v. Wofford*, 3 La. Ann. 562; *Porter v. Barrow*, 3 La. Ann. 140; *Ryder v. Thayer*, 3 La. Ann. 149; *Erwin v. Fenwick*, 6 Mart. N. S. (La.) 230.

1. Necessity for Demand—General Rule—Georgia.—*Georgia R., etc., Co. v. Smith*, 83 Ga. 626.

Illinois.—*North, etc., Rolling Stock Co. v. Nowland*, 73 Ill. App. 689.

Kentucky.—*Paducah Land, etc., Co. v. Hays*, (Ky. 1893) 24 S. W. Rep. 237.

Louisiana.—*Daquin v. Coiron*, 8 Mart. N. S. (La.) 608.

Massachusetts.—*Soule v. Soule*, 157 Mass. 451.

Missouri.—*Newman v. Newman*, 29 Mo. App. 649; *Wolff v. Matthews*, 98 Mo. 246.

New Hampshire.—*Peterborough Sav. Bank v. Hodgdon*, 62 N. H. 300.

New Jersey.—*Ware v. Lippincott*, 45 N. J. Eq. 220.

New York.—*Case v. Osborn*, (Supm. Ct. Gen. T.) 60 How. Pr. (N. Y.) 187; *Hanley v. Crowe*, (Supm. Ct. Gen. T.) 3 N. Y. Supp. 154; *Peck v. Granite State Provident Assoc.*, (Supm. Ct. Spec. T.) 21 Misc. (N. Y.) 84; *Lawrence v. Church*, 128 N. Y. 324.

Ohio.—*Miller v. Elder*, 7 Ohio Cir. Ct. 97, 3 Ohio Cir. Dec. 681.

Vermont.—*Evans v. Beckwith*, 37 Vt. 285.

Wisconsin.—*Marsh v. Fraser*, 37 Wis. 149.

A Promissory Note Fixing No Time for Payment and containing no provision for interest bears none till demand. *Adams v. Adams*, 55 N. J. Eq. 42.

Action for Attorney's Fees.—It has been held that an attorney is entitled to recover interest on an amount due to him for professional services from the date when payment is demanded, when there is no controversy over the value of the services. *Rexford v. Comstock*, (Supm. Ct. Spec. T.) 3 N. Y. Supp. 876.

Interest on Usury Paid.—Until a demand, interest is not recoverable upon usury paid by the plaintiff to the defendant. *Peterborough Sav. Bank v. Hodgdon*, 62 N. H. 300.

2. Demand Required by Terms of Contract—England.—*Pierce v. Fothergill*, 2 Bing. N. Cas. 167, 29 E. C. L. 296, 2 Scott 334, 1 Hodges 251. And see *Crosby's Case*, 3 Wils. C. Pl. 188.

California.—*Butler v. Austin*, 64 Cal. 3.

Kentucky.—*Dillon v. Dudley*, 1 A. K. Marsh. (Ky.) 67; *Gore v. Buck*, 1 T. B. Mon. (Ky.)

209; *Bartlett v. Marshall*, 2 Bibb (Ky.) 469; *Patrick v. Clay*, 4 Bibb (Ky.) 246; *Nelson v. Cartmel*, 6 Dana (Ky.) 7; *Cooke v. Clark*, (Ky. 1899) 51 S. W. Rep. 316.

New York.—*Hanley v. Crowe*, (Supm. Ct. Gen. T.) 3 N. Y. Supp. 154.

South Carolina.—*Cannon v. Beggs*, 1 McCord L. (S. Car.) 370, 10 Am. Dec. 677.

But see *Henry v. Roe*, 83 Tex. 446, construing the *Texas* statute.

The Reason of the Rule which holds that on a debt made payable in terms on demand, interest is not recoverable until a demand made, is obvious. Interest being in the nature of damages for nonpayment, it would be unreasonable to suffer the holder of a bill or note by his own laches to acquire a benefit, and to subject the drawer, acceptor, or indorser to damages when he was guilty of no default. See *Cannon v. Beggs*, 1 McCord L. (S. Car.) 370, 10 Am. Dec. 677.

Note or Duebill Payable on Demand.—A note or duebill payable on demand bears interest only from demand made, and not from the date, unless so expressed, although specified to be for a loan of money on the day of the date. *Schmidt v. Limehouse*, 2 Bailey L. (S. Car.) 276; *Cannon v. Beggs*, 1 McCord L. (S. Car.) 370, 10 Am. Dec. 677.

Certificate of Deposit Payable on Demand.—*Morse v. Rice*, 36 Neb. 212.

Stock Loaned to Be Returned on Demand.—*Parker v. Gaines*, (Ark. 1889) 11 S. W. Rep. 693.

Notice by Corporation to Present Bonds for Payment.—Where a railroad company published a notice that certain bonds issued by it would be payable at a specified place and would be paid on presentation, no interest to accrue thereafter, it was held that interest would cease to run on a bond not presented as required. *Emlen v. Lehigh Coal, etc., Co.*, 47 Pa. St. 76, 86 Am. Dec. 518. Nor, it has been held, is interest allowable on the notes of a banking company where the notes are payable on demand, and no demand for payment has been made before the winding up of the company is ordered. *In re Herefordshire Banking Co.*, L. R. 4 Eq. 250, 36 L. J. Ch. 806.

3. Money Paid under Mutual Mistake—Connecticut.—*Northrop v. Graves*, 19 Conn. 548.

Georgia.—*Georgia R., etc., Co. v. Smith*, 83 Ga. 626.

Massachusetts.—*Haven v. Foster*, 9 Pick. (Mass.) 112, 19 Am. Dec. 353.

Minnesota.—*Sibley v. Pine County*, 31 Minn. 201.

Nebraska.—*Hazelet v. Holt County*, 51 Neb. 716.

New Jersey.—*Ashhurst v. Field*, 28 N. J. Eq. 315.

Pennsylvania.—*Second, etc., St. Pass. R. Co. v. Philadelphia*, 51 Pa. St. 465. And see *Brown v. Campbell*, 1 S. & R. (Pa.) 176; *King v. Diehl*, 9 S. & R. (Pa.) 409; *Jacobs v. Adams*, 1 Dall. (Pa.) 52.

South Carolina.—See *Simons v. Walter*, 1 McCord L. (S. Car.) 97.

of property,¹ or in any case where the money of one person has come into the possession of another who is not chargeable with any fault or wrong in respect thereto.²

Money in Hands of Agents. — So, too, where money is received by a person as agent for another, and it is not his duty, as such agent, to pay the money over immediately or to make any particular disposition of it, interest does not begin to run until a demand has been made.³

(2) *Exceptions to General Rule.* — The requirement of the general rule stated above is necessarily dispensed with if, for any reason, a demand cannot be made, as where the debtor has absented himself,⁴ or if a demand would be a useless formality, as where the debtor has become a bankrupt or insolvent,⁵ or where there are no funds provided for the payment of the debt at the place where the demand should have been made.⁶

(3) *Requisites of Demand* — (a) *In General.* — It has been held that a demand such as will lay the foundation of a claim for interest must be a separate and distinct demand for a debt or sum of money which is afterwards proved or admitted to be due.⁷

Payment of Less than Due. — Where, through a mutual mistake of the parties, less than is really due is paid in a settlement of accounts, interest on the balance remaining unpaid is not recoverable until the error is discovered and a demand is made. Second, etc., St. Pass. R. Co. v. Philadelphia, 51 Pa. St. 465; Brainard v. Champlain Transp. Co., 29 Vt. 154.

1. **Claim for Conversion.** — Dougherty v. Chapman, 29 Mo. App. 233.

2. **Possession of Another's Money Generally.** — U. S. v. Curtis, 100 U. S. 119; U. S. v. Denver, 106 U. S. 536; Ingersoll v. Campbell, 46 Ala. 282; Talbot v. Commonwealth Nat. Bank, 129 Mass. 67, 37 Am. Rep. 302; Black v. Goodman, 1 Bailey L. (S. Car.) 201.

Public Officers. — Where an officer of the government has money committed to his charge with the duty of paying it out as occasion may arise, he cannot be charged with interest on such money until it is shown that he has failed to pay when such occasion required him to do so, or has failed to account when required by the government, or to pay over or transfer the money on some lawful order. U. S. v. Denver, 106 U. S. 536; U. S. v. Knowles, 106 U. S. 537, note.

Where, Pending Litigation as to the Ownership of Attached Property, the goods were sold and turned over to the purchaser, who received them on the understanding that he should not be called upon for the price until the issue as to ownership was decided, it was held that no liability arose for interest on the price before payment became due according to the agreement of the parties and a demand was made therefor. Evans v. Beckwith, 37 Vt. 285.

Unreasonable Delay After Demand. — Where money was left with a party for the purpose of purchasing corn, it was held that interest thereon would not be allowed in the absence of an unreasonable delay in refunding the money after a demand therefor. Myers v. Walker, 24 Ill. 133.

3. **Money in Hands of Agent** — *United States.* — Pope v. Barrett, 1 Mason (U. S.) 117.

Maine. — Wheeler v. Haskins, 41 Me. 432.

Massachusetts. — Elery v. Cunningham, 1 Met. (Mass.) 112; Hill v. Hunt, 9 Gray (Mass.) 66.

Michigan. — Beardslee v. Horton, 3 Mich. 560.

New York. — Williams v. Storrs, 6 Johns. Ch. (N. Y.) 353, 10 Am. Dec. 340.

North Carolina. — Hyman v. Gray, 4 Jones L. (49 N. Car.) 155; Pipkin v. Bond, 5 Ired. Eq. (40 N. Car.) 91; Thornton v. Thornton, 63 N. Car. 211; Neal v. Freeman, 85 N. Car. 441; Porter v. Grimsley, 98 N. Car. 550.

Vermont. — Hauxhurst v. Hovey, 26 Vt. 544.

But an Agent Who Receives and Fraudulently Converts to His Own Use the money of his principal which it is his duty to invest is liable for interest thereon from the time of the receipt without a previous demand for payment. Hill v. Hunt, 9 Gray (Mass.) 66.

Order by Principal for Money in Hands of Agent. — Where a principal indebted to a third party gave to the latter an order on his agent for a balance due to the former, it was held that as the sum named therein became due on the presentation of the order to the drawee, the payee was entitled to interest from that time. Brem v. Covington, 104 N. Car. 589.

4. **Debtor Absent from State.** — Graham v. Chrystal, 2 Abb. App. Dec. (N. Y.) 263.

5. **Insolvency of Debtor.** — Chemical Nat. Bank v. Bailey, 12 Blatchf. (U. S.) 480; Richmond v. Irons, 121 U. S. 27.

6. **Want of Funds at Place of Demand.** — Where commercial paper is made payable at a particular place, but no funds are there to meet it on maturity, interest continues to run though the holder made no demand for payment at the place named. Skinker v. Butler County, 112 Mo. 332. See also Culver v. Marks, 122 Ind. 544, 17 Am. St. Rep. 377, holding that presentation of a bank check is not necessary to set interest running where the drawer had no funds on deposit applicable to the payment of the check.

7. **Requisites of Demand.** — Goff v. Rehoboth, 2 Cush. (Mass.) 475; Cutter v. New York, 92 N. Y. 166; Blodgett v. Converse, 60 Vt. 410; Marsh v. Fraser, 37 Wis. 149; Tucker v. Grover, 60 Wis. 245. See also Oriental Bank v. Tremont Ins. Co., 4 Met. (Mass.) 1; Hubbard v. Charlestown Branch R. Co., 11 Met. (Mass.) 124. And see generally the title DEMAND, vol. 9, p. 197.

(b) **Excessive Demand.** — A demand for the payment of a sum which is larger than that really due will not, it has been held, operate to put the defendant in default in such a manner as to warrant a recovery of interest.¹ But though in an accounting more was demanded than was ultimately obtained, it was held that interest should, as a general rule, be allowed.²

(4) **Evidence and Presumption of Demand.** — An acknowledgment in writing signed by the debtor, that a demand has been made upon him, is sufficient to put him in default and to render the debt interest-bearing from the date of his acknowledgment.³

A Partial Payment on the Debt will, as a general rule, be considered as having been made pursuant to a demand so that the balance due and payable when the part payment was made will bear interest thereafter.⁴

(5) **Institution of Suit as Demand** — (a) **In General.** — Where a default upon demand will warrant the recovery of interest, the institution of a suit will, as a rule, constitute such a demand as will justify the assessment of interest thereafter.⁵

In the Case of a Mutual Account Current, it has been held that a meeting of the parties and an unsuccessful attempt to adjust a balance of the account might properly be regarded as a demand or claim of payment on both sides for what should happen to be due. *Gleason v. Briggs*, 28 Vt. 135.

Necessity for Production of Note. — In order that a demand for the payment of a note, payable on demand, may set interest running, it is not necessary that the note should be produced. *Sanford v. Crocheron*, (Supm. Ct. Gen. T.) 8 Civ. Pro. (N. Y.) 146.

Requisites of Demand under 3 and 4 Wm. IV — Demand by Letter. — In *Mowatt v. Londresborough*, 4 El. & Bl. 1, 82 E. C. L. 1, 18 Jur. 1094, 23 L. J. Q. B. 38, 2 C. L. R. 1181, it appeared that before action the plaintiff, by letter to the defendant, demanded repayment of the whole of the deposits which he had paid on shares in a company which afterwards proved an abortive undertaking, adding that he should expect to be paid five per cent. interest from a time specified, which was prior to the date of the letter. This was held to constitute a sufficient demand of payment within the statute 3 & 4 Wm. IV., c. 42, § 28, to entitle the jury to give interest from the date of the demand until the time of payment. See also *Geake v. Ross*, 23 W. R. 658, 44 L. J. C. Pl. 315, 32 L. T. N. S. 666. Compare *Ward v. Eyre*, 15 Ch. D. 130, 49 L. J. Ch. D. 657, 43 L. T. N. S. 525, 28 W. R. 712.

1. Excessive Demand. — *Goff v. Rehoboth*, 2 Cush. (Mass.) 475.

Thus, where a party who has performed services demands more than they are worth, or more than he is entitled to, interest will be allowed only from the date of the verdict and not from the date of the demand. *Shipman v. State*, 44 Wis. 458.

2. Interest in Accounting. — *Putnam, J.*, in *Nashua, etc., R. Corp. v. Boston, etc., R. Corp.*, 61 Fed. Rep. 237.

3. Evidence and Presumption of Demand. — *Leviston v. Margny*, 13 La. Ann. 353; *Barnard v. Bartholomew*, 22 Pick. (Mass.) 291.

4. Partial Payments. — *Hard v. Palmer*, 21 U. C. Q. B. 49; *Bayliss v. Pearson*, 15 Iowa 279; *Matter of King*, 94 Mich. 411; *Crane v. Hardman*, 4 E. D. Smith (N. Y.) 448; *Peck v.*

Granite State Provident Assoc., (Supm. Ct. App. T.) 21 Misc. (N. Y.) 84.

5. Suit as Demand — *England*. — *Pierce v. Fothergill*, 2 Bing. N. Cas. 167, 29 E. C. L. 296, 2 Scott 334, 1 Hodges 251.

United States. — *Gammell v. Skinner*, 2 Gall. (U. S.) 45; *U. S. v. Poulson*, 30 Fed. Rep. 231.

Alabama. — *Hunter v. Wood*, 54 Ala. 71.

California. — *McFadden v. Crawford*, 39 Cal. 662; *Cox v. McLaughlin*, 76 Cal. 60, 9 Am. St. Rep. 164.

Indiana. — *Smith v. Blair*, 133 Ind. 367.

Iowa. — *Hall v. Farmers', etc., Sav. Bank*, 55 Iowa 612; *Hubenthal v. Kennedy*, 76 Iowa 707.

Kentucky. — *Cooke v. Clark*, (Ky. 1899) 51 S. W. Rep. 316.

Maine. — *House v. McKenney*, 46 Me. 94.

Massachusetts. — *Hunt v. Nevers*, 15 Pick. (Mass.) 500, 26 Am. Dec. 616; *Harrison v. Conlan*, 10 Allen (Mass.) 85; *Stimpson v. Green*, 13 Allen (Mass.) 326; *Thwing v. Great Western Ins. Co.*, 111 Mass. 93; *Freeman v. Freeman*, 142 Mass. 98; *Gay v. Rooke*, 151 Mass. 115, 21 Am. St. Rep. 434.

Missouri. — *Dougherty v. Chapman*, 29 Mo. App. 233; *Patterson v. Missouri Glass Co.*, 72 Mo. App. 492.

Nebraska. — *Morse v. Rice*, 36 Neb. 212; *Bell v. Rice*, 50 Neb. 547.

New York. — *Rawson v. Grow*, 4 E. D. Smith (N. Y.) 18; *Feeter v. Heath*, 11 Wend. (N. Y.) 479; *Case v. Osborn*, (Supm. Ct. Gen. T.) 60 How. Pr. (N. Y.) 187; *McCollum v. Seward*, 62 N. Y. 316; *White v. Miller*, 78 N. Y. 393, 34 Am. Rep. 544.

North Carolina. — *Porter v. Grimsley*, 98 N. Car. 550.

Wisconsin. — *Tucker v. Grover*, 60 Wis. 240; *Hewitt v. John Week Lumber Co.*, 77 Wis. 548.

And see generally the title DEMAND, vol. 9, p. 197.

Answer and Counterclaim. — In an action by the vendee in a contract for the sale of land for specific performance thereof, it has been held that the vendor's answer and counterclaim for past-due instalments of the purchase money would be sufficient to warrant the recovery of interest thereafter although it was specially provided in the contract that no interest was to be computed on deferred payments — they

(b) *Suit Subsequently Dismissed*. — It has been held that the institution of a suit, though afterwards dismissed, is such a demand, putting the defendant in default, as will entitle the plaintiff to recover, in a subsequent action, interest from the date of the institution of the first suit.¹

(6) *When Demand Unnecessary*. — From what has been said it is clear that a demand will never be necessary to the recovery of interest where the amount of the debt and the date when payment should be made are already ascertained.²

And Where It Is the Duty of a Party to Pay Over Money Within a Reasonable Time after its receipt, interest will be allowed after the expiration of such time, though no demand for payment is made.³

Where There Is a Contract for Interest, it may in general be computed in conformity therewith, irrespective of a demand for the payment of the principal.⁴

(7) *Demands under Particular Statutes*. — In some jurisdictions a demand is made necessary to the recovery of interest under prescribed conditions. The practitioner must, of course, consult his local statutes in the examination of questions connected with this subject.⁵

3. Contracts Other than to Pay Money — *a. GENERAL RULE*. — Where the action is for damages for the breach of a contract to do something other than to pay money, the rule against the recovery of interest on unliquidated damages has been held generally applicable.⁶

b. EXCEPTIONS TO GENERAL RULE — (1) *Where Amount Ascertainable by*

to be made, however, within a "reasonable time." *Brown v. Brown*, 124 Mo. 79.

1. Suit Subsequently Dismissed. — *Conway v. Erwin*, 1 La. Ann. 391.

2. When Demand Unnecessary — *England*. — *Towsley v. Wythes*, 16 U. C. Q. B. 139. And see *Pinhorn v. Tuckington*, 3 Campb. 468.

California. — *Whitcher v. Webb*, 44 Cal. 127.

Georgia. — *Anderson v. State*, 2 Ga. 370.

Illinois. — *Chapman v. Burt*, 77 Ill. 337.

Indiana. — *Harden v. Wolf*, 2 Ind. 31.

Louisiana. — Consolidated Assoc. Bank v. Foucher, 9 La. 476.

Maine. — *Swett v. Hooper*, 62 Me. 54.

Massachusetts. — *Dodge v. Perkins*, 9 Pick. (Mass.) 381.

Missouri. — *Fields v. Baum*, 35 Mo. App. 511.

Nebraska. — *Hazelet v. Holt County*, 51 Neb. 716.

New York. — *Matter of Smith* (Surrogate Ct.) 1 Misc. (N. Y.) 256.

Pennsylvania. — *Adams v. Palmer*, 30 Pa. St. 346.

South Carolina. — *Rowan v. Masse*, 1 Montreuil Super. Ct. 177.

Wisconsin. — *Rogers v. Priest*, 74 Wis. 538; *Zautcke v. North Milwaukee Townsite Co.* No. 3, 95 Wis. 21.

3. A County Collector whose duty it is to pay over money within a reasonable time after its receipt is liable for interest after the expiration of such period. *Justices v. Fennimore*, 1 N. J. L. 281.

Where an Attorney Has Collected Money belonging to his client, and converts it to his own use, or is guilty of unreasonable delay in paying it over, a demand is not necessary to the recovery of interest. *Chapman v. Burt*, 77 Ill. 337.

4. Contract for Interest. — *Zautcke v. North Milwaukee Townsite Co.* No. 3, 95 Wis. 21. And see *Whitcher v. Webb*, 44 Cal. 127; *Harden v. Wolf*, 2 Ind. 31.

5. Demands under Particular Statutes — Interest

on Accounts is not allowable in *Missouri* until after demand for payment. *Newman v. Newman*, 29 Mo. App. 640; *Southgate v. Atlantic*, etc., R. Co., 61 Mo. 89.

Debts of Decedents. — The *Kentucky* statute forbids the allowance of interest on claims against estates of decedents unless demanded of the administrator within a year of his appointment. See *Richardson v. Banta*, (Ky. 1893) 23 S. W. Rep. 350; *Tatum v. Gibbs*, (Ky. 1897) 41 S. W. Rep. 565.

Where a Note Was Given Secured by Mortgage, but both instruments were silent as to interest, it was held that no interest could be charged after maturity until demand made under article 1905 of the *Louisiana Code* in force in 1835. *Consolidated Assoc. Bank v. Foucher*, 9 La. 476.

And see the various local statutes.

6. Contracts Other than to Pay Money — *General Rule* — *United States*. — *Blewett v. Front St. Cable R. Co.*, 49 Fed. Rep. 126; *Pacific Postal Tel. Cable Co. v. Fleischner*, 66 Fed. Rep. 899.

California. — *Cox v. McLaughlin*, 76 Cal. 60, 9 Am. St. Rep. 164; *Hooper v. Patterson*, (Cal. 1893) 32 Pac. Rep. 514; *Hewes v. Germain Fruit Co.*, 106 Cal. 441; *Ferrea v. Chabot*, 121 Cal. 233.

Illinois. — *Buckmaster v. Grundy*, 8 Ill. 626; *Harvey v. Hamilton*, 155 Ill. 377.

New York. — *Sipperly v. Stewart*, 50 Barb. (N. Y.) 62; *Reich v. Colwell Lead Co.*, 66 Hun (N. Y.) 634, 21 N. Y. Supp. 495; *Docter v. Darling*, 68 Hun (N. Y.) 70; *Button v. Kinnert*, 88 Hun (N. Y.) 35; *Gray v. Central R. Co.*, 89 Hun (N. Y.) 477; *Riss v. Messmore*, 58 N. Y. Super. Ct. 23; *Sloan v. Baird*, 12 N. Y. App. Div. 481; *Chamberlain v. Dunlop*, (Supm. Ct. Gen. T.) 28 N. Y. St. Rep. 375; *Mansfield v. New York Cent., etc.*, R. Co., 114 N. Y. 331; *McMaster v. State*, 108 N. Y. 542.

North Carolina. — *Trice v. Turrentine*, 13 Ired. L. (35 N. Car.) 212.

Texas. — *Fowler v. Davenport*, 21 Tex. 626. *Wyoming*. — *Kuhn v. McKay*, 7 Wyo. 42.

Computation. — Where the amount of the plaintiff's damages, in an action for the breach of a contract, though unliquidated, is ascertainable by computation merely, it is not infrequently held that interest thereon is recoverable.¹

(2) **Market Values.** — It has been held in many cases that interest is recoverable where the amount of the defendant's liability, though unliquidated and not in terms pecuniary, is ascertainable by computation with reference to established market values.²

The Reason Given for This Modification of the Earlier Rule that interest is not recoverable on unliquidated damages is that in many cases market values are "so well established and so easily obtained that it is easy for the debtor to obtain some proximate knowledge of how much he is to pay."³

Where No Market Value. — The exception to the rule in question does not apply where the property with reference to which the contract is made has no established market value⁴ or the evidence as to market values is uncertain and conflicting.⁵

(3) **Contracts to Deliver Personalty.** — In an action for damages for the breach of a contract to deliver personal property, interest has been held recoverable on the damages assessed.⁶

1. Amount Ascertainable by Computation — United States. — *Fowler v. Park*, 48 Fed. Rep. 789; *Crosby Lumber Co. v. Smith*, 51 Fed. Rep. 63.

Kentucky. — *Ward v. Grayson*, 9 Dana (Ky.) 280.

Missouri. — *McCormack v. Lynch*, 69 Mo. App. 524. See also *Sturgess v. Crum*, 29 Mo. App. 644.

New Hampshire. — *Robinson v. Gilman*, 43 N. H. 485.

New York. — *Milbank v. Demistoun*, 1 Bosw. (N. Y.) 246; *Clegg v. New York Newspaper Union*, 72 Hun (N. Y.) 395; *Stiles v. Benjamin*, 92 Hun (N. Y.) 102; *Sloan v. Baird*, 12 N. Y. App. Div. 481. See also *Mansfield v. New York Cent., etc., R. Co.*, 114 N. Y. 339.

Rhode Island. — *Bicknell v. Waterman*, 5 R. I. 43.

South Carolina. — *Woods v. Cramer*, 34 S. Car. 508.

2. Market Values — United States. — *Barrow v. Reab*, 9 How. (U. S.) 366.

Alabama. — *Stoudenmeier v. Williamson*, 29 Ala. 558.

California. — *Pujol v. McKinlay*, 42 Cal. 559; *Swinerton v. Argonaut Land, etc., Co.*, 112 Cal. 375. And see *Cox v. McLaughlin*, 76 Cal. 60, 9 Am. St. Rep. 164.

Florida. — See *Sullivan v. McMillan*, 37 Fla. 134, 53 Am. St. Rep. 239.

Georgia. — *Bartee v. Andrews*, 18 Ga. 407.

Massachusetts. — *Thomas v. Wells*, 140 Mass. 517.

Mississippi. — *Bickell v. Colton*, 41 Miss. 368. *New York.* — *Lush v. Druse*, 4 Wend. (N. Y.) 313; *Spencer v. Tilden*, 5 Cow. (N. Y.) 144; *Van Rensselaer v. Jones*, 2 Barb. (N. Y.) 643; *Sipperly v. Stewart*, 50 Barb. (N. Y.) 62; *Van Rensselaer v. Jewett*, 2 N. Y. 135, 51 Am. Dec. 275; *Dana v. Fiedler*, 12 N. Y. 40, 62 Am. Dec. 130. But see *contra*, the earlier case of *Van Rensselaer v. Platner*, 1 Johns. (N. Y.) 276.

Pennsylvania. — *Richards v. Citizens Natural Gas Co.*, 130 Pa. St. 37.

South Carolina. — *Ryan v. Baldrick*, 3 McCord L. (S. Car.) 498.

Texas. — *Calvit v. McFadden*, 13 Tex. 324; *Houston, etc., R. Co. v. Jackson*, 62 Tex. 209;

Arlington First Nat. Bank v. Lynch, 6 Tex. Civ. App. 590.

Virginia. — *Enders v. Board of Public Works*, 1 Gratt. (Va.) 364.

Wisconsin. — *Allen v. Murray*, 87 Wis. 41.

Wyoming. — *Kuhn v. McKay*, 7 Wyo. 42.

Rule under Illinois Statute. — It has been held that in an action to recover for the value of a quantity of corn loaned by the plaintiff to the defendant, interest under the *Illinois* statute is recoverable only upon the ground that there has been unreasonable and vexatious delay of payment. *Davis v. Kenaga*, 51 Ill. 170.

3. Rationale of Rule. — *Cox v. McLaughlin*, 76 Cal. 60, 9 Am. St. Rep. 164. To the same effect see *Sipperly v. Stewart*, 50 Barb. (N. Y.) 62.

4. Where No Established Market Price. — *Hewes v. Germain Fruit Co.*, 106 Cal. 441; *Harvey v. Hamilton*, 155 Ill. 381; *Sloan v. Baird*, 12 N. Y. App. Div. 481. Compare *Marsh v. Jones*, 40 Ch. D. 563, 60 L. T. N. S. 610. See also *supra*, this title, *Origin and History of Interest — Evolution and Development of Laws of Interest — Review of American Authorities — Interest on Unliquidated Demands*.

5. Where Evidence as to Market Values Conflicting. — Even though the extent of the damages suffered may be ascertainable with reference to market values, yet if the evidence on this point is conflicting the amount of the damages cannot be said to be so ascertainable by computation as to permit a recovery of interest thereon. *Harvey v. Hamilton*, 155 Ill. 377. And see *Kuhn v. McKay*, 7 Wyo. 42.

6. Contracts to Deliver Personalty — United States. — *Barrow v. Reab*, 9 How. (U. S.) 366.

Georgia. — *Bartee v. Andrews*, 18 Ga. 407.

Missouri. — *Goodman v. Missouri, etc., R. Co.*, 71 Mo. App. 460.

New York. — *Dox v. Dey*, 3 Wend. (N. Y.) 356.

South Carolina. — *Ryan v. Baldrick*, 3 McCord L. (S. Car.) 498. And see *Atkinson v. Scott*, 1 Bay (S. Car.) 307; *Davis v. Richardson*, 1 Bay (S. Car.) 105.

Texas. — See *Heidenheimer v. Ellis*, 67 Tex. 426.

Wisconsin. — *Gallun v. Seymour*, 76 Wis. 251.

Wyoming. — *Kuhn v. McKay*, 7 Wyo. 42.

Where the Purchase Money or Consideration Has Been Paid, the interest recoverable is computed on the value of the property involved.¹

Where the Consideration Has Not Been Paid, interest is recoverable on the difference between the contract price and the market price on the day when delivery should have been made.²

(4) *Warranties*. — There would seem to be no reason, pursuant to the doctrines already considered, for denying the right of recovery of interest on the damages assessed for the breach of a warranty as to the quality of goods.³

(5) *Contract to Execute Bill or Note*. — In case of the breach of a contract to execute a bill of exchange or promissory note in payment of a debt, there may be a recovery of interest as damages from the time when the bill or note would have borne interest if executed according to the contract.⁴ Even in a state of the law where interest was not allowed in the absence of a contract express or implied to pay it, interest seems to have been recoverable for the breach of an undertaking to deliver a promissory note or a bill of exchange for the price of goods sold. The reason stated is that the mercantile instrument, if it had been given, would have borne interest, and the defendant should not be put in a better position by the breach of his contract than he would have occupied had he performed it.⁵

c. INTEREST AS DAMAGES IN LIEU OF MORE CERTAIN STANDARD. — In

See generally the title SALES.

In an action for the breach of a contract to furnish dredge boats, interest has been held recoverable on the amount of damages sustained from the date thereof, in the discretion of the jury. *Watkins v. Junker*, (Tex. Civ. App. 1897) 38 S. W. Rep. 1129. And where the defendant contracted to furnish cars for the shipment of cattle, interest was allowed on the amount found as damages. *Gulf, etc., R. Co. v. McCarty*, 82 Tex. 608.

Doctrine that Interest as Such Not Recoverable. — It has been declared that interest as such is not allowed on damages for breach of a contract to deliver cotton. *Fowler v. Davenport*, 21 Tex. 626, where this holding was made pursuant to the alleged rule that interest as such is not allowed on damages for the breach of a contract to which interest is not a legal incident, but on such cases may be allowed only by way of multiplier or punishment for some fraud, delinquency, or injustice of the debtor, or for some injury done by him to the creditor.

Interest Not Recoverable Unless Contract Rescinded. — According to the doctrine of some cases, where a contract for the delivery of a chattel is broken in a failure to deliver, and the purchaser has paid the price in advance, he may elect to rescind the contract and recover interest on the money paid. But if he elects to affirm the contract and sue for damages, he cannot recover interest. *Dobenspeck v. Armel*, 11 Ind. 31; *Harvey v. Myer*, 9 Ind. 391.

1. **Where Consideration Has Been Paid** — *Maine*. — *McKenney v. Haines*, 63 Me. 74.

Maryland. — *Andrews v. Clark*, 72 Md. 306. *Mississippi*. — *Bickell v. Colton*, 41 Miss. 368. *New Hampshire*. — *Pinkerton v. Manchester, etc., R. Co.* 42 N. H. 424.

Texas. — *Calvit v. McFadden*, 13 Tex. 324; *Houston, etc., R. Co. v. Jackson*, 62 Tex. 212; *Arlington First Nat. Bank v. Lynch*, 6 Tex. Civ. App. 590.

Virginia. — *Enders v. Board of Public Works*, 1 Gratt. (Va.) 364.

Wisconsin. — *Allen v. Murray*, 87 Wis. 41.

Wyoming. — *Kuhn v. McKay*, 7 Wyo. 42.

2. **Where Consideration Has Not Been Paid** — *Illinois*. — *Cease v. Cockle*, 76 Ill. 484; *Driggers v. Bell*, 94 Ill. 223; *Murray v. Doud*, 167 Ill. 368, 59 Am. St. Rep. 297.

Massachusetts. — *Thomas v. Wells*, 140 Mass. 517.

New York. — *Clark v. Dales*, 20 Barb. (N. Y.) 42; *Hamilton v. Ganyard*, 34 Barb. (N. Y.) 204; *Fishell v. Winans*, 38 Barb. (N. Y.) 228; *Currie v. White*, (N. Y. Super. Ct. Gen. T.) 6 Abb. Pr. N. S. (N. Y.) 352; *Dana v. Fiedler*, 12 N. Y. 40, 62 Am. Dec. 130.

3. **Warranties**. — *Stoudenmeier v. Williamson*, 29 Ala. 558; *Brown v. Doyle*, 69 Minn. 543.

Measure of Damages Wholly Uncertain. — Where the measure of damages depends upon such uncertain quantities as the difference between the value of a crop raised from cabbage seed sold and that which would have been produced had the seed been as represented, it has been held that interest was not recoverable. *White v. Miller*, 78 N. Y. 394, 34 Am. Rep. 544. A later case, however, purporting to follow *White v. Miller*, seems to have laid down the rule as a general proposition that interest should not be allowed as damages for a breach of warranty in the sale of goods. *Riss v. Messmore*, 58 N. Y. Super. Ct. 23.

See also the title WARRANTY.

4. **Contract to Give Bill or Note** — *England*. — *Boyce v. Warburton*, 2 Campb. 480; *Slack v. Lowell*, 3 Taunt. 158; *Rhoades v. Selsey*, 2 Beav. 359; *Becher v. Jones*, 2 Campb. 428, note; *Farr v. Ward*, 3 M. & W. 25, 6 Dowl. 163, Mur. & H. 274; *Davis v. Smyth*, 8 M. & W. 399; *Marshall v. Poole*, 13 East 98. And see *Porter v. Palsgrave*, 2 Campb. 472.

Illinois. — *Clark v. Dutton*, 69 Ill. 521.

Kentucky. — *Stark v. Price*, 5 Dana (Ky.) 140. *New York*. — *Patteson v. Whitlock*, 14 Daly (N. Y.) 497.

5. **Exception to Existing Rule.** — *Becher v. Jones*, 2 Campb. 428, note. And see the *English* cases cited in the preceding note.

Volume XVI.

some instances, where, from the nature of the case, the actual damages sustained were extremely uncertain, interest has been adopted as the measure of damages in lieu of a more definite standard of calculation.¹

VI. INTEREST AS DAMAGES FOR TORT — 1. In General. — As the damages recoverable in actions for torts are necessarily unliquidated and often wholly uncertain, the early rule was that interest on such damages was not recoverable.²

2. Torts to Property — a. IN GENERAL. — The common-law objection to the recovery of interest in cases of tort for unliquidated damages seems to have been first modified in actions of trover and conversion, where the value of the property was sought, as having been converted into money.³

b. INJURIES TO OR DESTRUCTION OF PROPERTY. — At the present time the rule of most jurisdictions is that in cases of trover or trespass or in actions for injuries to or destruction or loss of property, negligent or otherwise, interest is recoverable on the damages assessed.⁴

1. Interest on Capital Invested. — In *Green v. Williams*, 45 Ill. 208, it was held that while speculative profits were not recoverable, a recovery was permitted under the circumstances of the case to the extent of interest on the amount of capital invested in the plaintiff's business, during the necessary suspension of such business caused by the defendant's breach of a contract of lease. See also *Paola Gas Co. v. Paola Glass Co.*, 56 Kan. 614, 54 Am. St. Rep. 598.

But a plaintiff is not entitled to recover interest on the value of his entire stock of goods during the time when he is prevented from exposing them for sale by the defendant's breach of contract of lease. *Lowenstein v. Chappell*, 30 Barb. (N. Y.) 241.

Causing Mill to Remain Idle. — Where by reason of a vendor's delay to deliver logs according to contract the vendee's mill was necessarily idle, it was decided that interest on the value of the mill plant for the time during which it thus remained idle would not, under the circumstances, be objectionable as a measure of redress. *Watson v. Kirby*, 112 Ala. 436. See also *Grosvenor v. Ellis*, 44 Mich. 452.

In an Action of Tort for Unlawfully Obstructing a Stream, whereby the plaintiffs were unable to drive logs past the obstruction pursuant to a contract which they had undertaken, the final payment on the contract being thereby delayed for nearly a year, it was held that interest on the amount for the period of delay might be allowed to the plaintiff as damages. *McPheters v. Moose River Log Driving Co.*, 78 Me. 334.

2. Interest on Damages for Torts — Common-law Rule. — *Brentner v. Chicago*, etc., R. Co., 68 Iowa 530.

3. Modification of Common-law Rule. — *Paine v. Pritchard*, 2 C. & P. 558, 12 E. C. L. 261; *Brentner v. Chicago*, etc., R. Co., 68 Iowa 530.

In Some Jurisdictions a Distinction Prevails as to the allowance of interest in actions of trover, replevin, and trespass, and where property has been negligently injured or destroyed, interest being allowed in the former case but not in the latter. See *Omaha*, etc., Smelting, etc., Co. v. Tabor, 13 Colo. 41, 16 Am. St. Rep. 185; *Watson v. Harmon*, 85 Mo. 443. And see *Walker v. Borland*, 21 Mo. 289; *State v. Smith*, 31 Mo. 566; *Spencer v. Vance*, 57 Mo. 427. But, as it has been well said, it is difficult to perceive any sound distinction between the case where

the defendant converted or carried away the plaintiff's horse and the case where through negligence on his part the horse is injured so as to be valueless. There is no reason apparent for a different rule of damages in the one case from that applied in the other. *Wilson v. Troy*, 135 N. Y. 103, 31 Am. St. Rep. 817. See also *Parrott v. Knickerbocker Ice Co.*, 46 N. Y. 361.

4. Torts to Property — When Interest Allowed — England. — *British Columbia*, etc., Lumber, etc., Co. v. Nettleship, L. R. 3 C. P. 499; *Dreyfus v. Peruvian Guano Co.*, 42 Ch. D. 66, 58 L. J. Ch. 758, 61 L. T. N. S. 180.

United States. — *The Gold Hunter*, 1 Blatchf. & H. Adm. 300; *King v. Shepherd*, 3 Story (U. S.) 349; *Bazin v. Steamship Co.*, 3 Wall. Jr. (C. C.) 229; *Fraloff v. New York Cent., etc., R. Co.*, 10 Blatchf. (U. S.) 16; *Woodward v. Illinois Cent. R. Co.*, 1 Biss. (U. S.) 403; *The Morning Star*, 4 Biss. (U. S.) 62; *The Scotland*, 105 U. S. 24; *Mobile*, etc., R. Co. v. Jurey, 111 U. S. 584; *The Nith*, 36 Fed. Rep. 86; *Western Mfg. Co. v. The Guiding Star*, 37 Fed. Rep. 641; *The Rabboni*, 53 Fed. Rep. 952; *The M. Kallfleisch*, 59 Fed. Rep. 198.

Alabama. — *Fail v. Presley*, 50 Ala. 342; *Borden v. Bradshaw*, 68 Ala. 362; *Alabama G. S. R. Co. v. McAlpine*, 75 Ala. 113; *Comer v. Lehman*, 87 Ala. 362.

Arkansas. — *St. Louis*, etc., R. Co. v. Munford, 44 Ark. 439; *St. Louis*, etc., R. Co. v. Phelps, 46 Ark. 485; *St. Louis*, etc., R. Co. v. Lyman, 57 Ark. 52.

California. — *Hamer v. Hathaway*, 33 Cal. 117; *Schmidt v. Nunan*, 63 Cal. 371. And see *Cox v. McLaughlin*, 76 Cal. 60, 9 Am. St. Rep. 164.

Connecticut. — *Aviatt v. Pond*, 29 Conn. 479; *Parrott v. Housatonic R. Co.*, 47 Conn. 575; *Regan v. New York*, etc., R. Co. 60 Conn. 124, 25 Am. St. Rep. 306; *Healy v. Fallon*, 69 Conn. 236.

District of Columbia. — *Hetzel v. Baltimore*, etc., R. Co., 6 Mackey (D. C.) 1.

Florida. — *Skinner v. Pinney*, 19 Fla. 42, 45 Am. Rep. 1; *Jacksonville*, etc., R. Co. v. Peninsular Land, etc., Co., 27 Fla. 1.

Georgia. — *Collier v. Lyons*, 18 Ga. 648; *Brown v. South Western R. Co.*, 36 Ga. 377; *Macon*, etc., R. Co. v. Meador, 67 Ga. 672; *Western*, etc., R. Co. v. McCauley, 68 Ga. 818; *East Tennessee*, etc., R. Co. v. Johnson, 85 Ga. 497.

This Rule Is Obviously Just, and goes to the foundation of the principle upon which a recovery is allowed for civil injuries, viz., compensation to the injured party; and though interest on the value of the property is not always an

Illinois. — *Bradley v. Geiselman*, 22 Ill. 494; *Chicago, etc., R. Co. v. Shultz*, 55 Ill. 421. Compare *Illinois Cent. R. Co. v. Cobb*, 72 Ill. 153; *Toledo, etc., R. Co. v. Johnston*, 74 Ill. 83.

Indiana. — *Pittsburgh, etc., R. Co. v. Swinney*, 97 Ind. 586; *Kavanaugh v. Taylor*, 2 Ind. App. 502; *Wabash R. Co. v. Williamson*, 3 Ind. App. 190.

Iowa. — *Mote v. Chicago, etc., R. Co.*, 27 Iowa 22; *Arthur v. Chicago, etc., R. Co.*, 61 Iowa 648; *Johnson v. Chicago, etc., R. Co.*, 77 Iowa 666; *Burdick v. Chicago, etc., R. Co.*, 87 Iowa 384. And see *Daniels v. Chicago, etc., R. Co.*, 41 Iowa 52.

Kentucky. — *Ormsby v. Johnson*, 1 B. Mon. (Ky.) 80.

Louisiana. — *Holmes v. Barclay*, 4 La. Ann. 53.

Maine. — *Brannin v. Johnson*, 19 Me. 361.

Maryland. — *Andrews v. Clark*, 72 Md. 396.

Massachusetts. — *Spring v. Haskell*, 4 Allen (Mass.) 112; *Cushing v. Wells*, 98 Mass. 550; *Frazer v. Bigelow Carpet Co.*, 141 Mass. 126.

Michigan. — *Kendrick v. Fowle*, 60 Mich. 368, 1 Am. St. Rep. 526.

Minnesota. — *Cowley v. Davidson*, 13 Minn. 92; *Varco v. Chicago, etc., R. Co.*, 30 Minn. 18.

Mississippi. — *Illinois Cent. R. Co. v. Haynes*, 64 Miss. 604.

Nebraska. — *Tremont, etc., R. Co. v. Marley*, 25 Neb. 138, 13 Am. St. Rep. 482; *Union Pac. R. Co. v. Ray*, 46 Neb. 750.

New Hampshire. — *Felton v. Fuller*, 35 N. H. 226; *Adams v. Blodgett*, 47 N. H. 219, 90 Am. Dec. 569; *Boston, etc., R. Co. v. State*, 63 N. H. 572.

New York. — *Stevens v. Low*, 2 Hill (N. Y.) 132; *Greer v. New York*, 3 Robt. (N. Y.) 406; *Hyde v. Stone*, 7 Wend. (N. Y.) 354, 22 Am. Dec. 582; *Lackin v. Delaware, etc., Canal Co.*, 22 Hun (N. Y.) 309; *Duryea v. New York*, 25 Hun (N. Y.) 120; *Hodge v. New York Cent., etc., R. Co.*, 27 Hun (N. Y.) 394; *Bals v. Guernsey*, 8 Johns. (N. Y.) 446, 5 Am. Dec. 348; *Kennedy v. Strong*, 14 Johns. (N. Y.) 128; *Thomas v. Weed*, 14 Johns. (N. Y.) 255; *Sherman v. Wells*, 28 Barb. (N. Y.) 403; *Ludlow v. Yonkers*, 43 Barb. (N. Y.) 493; *Edwards v. Beebe*, 48 Barb. (N. Y.) 106; *Reiss v. New York Steam Co.*, 59 N. Y. Super. Ct. 57; *Walrath v. Redfield*, 18 N. Y. 462; *Andrews v. Durant*, 18 N. Y. 496; *Black v. Camden, etc., R., etc., Co.*, 45 Barb. (N. Y.) 40; *Parrott v. Knickerbocker Ice Co.*, 46 N. Y. 361; *McCormick v. Pennsylvania Cent. R. Co.*, 49 N. Y. 303; *Schwerin v. McKie*, 51 N. Y. 180, 10 Am. Rep. 581; *Buffalo, etc., Turnpike Co. v. Buffalo*, 58 N. Y. 639; *Mairs v. Manhattan Real Estate Assoc.*, 89 N. Y. 498; *Wilson v. Troy*, 135 N. Y. 103, 31 Am. St. Rep. 817, affirming 60 Hun (N. Y.) 183. Compare *Sayre v. State*, 123 N. Y. 291.

North Carolina. — *Rippey v. Miller*, 1 Jones L. (46 N. Car.) 479; *Patapsco Guano Co. v. Magee*, 86 N. Car. 350.

Ohio. — *Hogg v. Zanesville Canal, etc., Co.*, 5 Ohio 410; *Lawrence R. Co. v. Cobb*, 35 Ohio St. 94; *Baltimore, etc., R. Co. v. Schultz*, 43

Ohio St. 275, 54 Am. Rep. 805; *Erie R. Co. v. Lockwood*, 28 Ohio St. 358; *Toledo v. Grasser*, 12 Ohio Cir. Ct. 520, 6 Ohio Cir. Dec. 782.

Pennsylvania. — *Philadelphia, etc., R. Co. v. Gesner*, 20 Pa. St. 240; *Delaware, etc., R. Co. v. Burson*, 61 Pa. St. 369; *Allegheny v. Campbell*, 107 Pa. St. 530, 52 Am. Rep. 478.

Texas. — *International, etc., R. Co. v. Dimmit County Pasture Co.*, 5 Tex. Civ. App. 186; *Sabine, etc., R. Co. v. Joachimi*, 58 Tex. 456; *Grimes v. Watkins*, 59 Tex. 140; *Hudson v. Wilkinson*, 61 Tex. 610; *Houston, etc., R. Co. v. Jackson*, 62 Tex. 209; *Texas, etc., R. Co. v. Tankersley*, 63 Tex. 57; *Gulf, etc., R. Co. v. Holliday*, 65 Tex. 512; *Yellow Pine Lumber Co. v. Carroll*, 76 Tex. 135; *Gulf, etc., R. Co. v. McCarty*, 82 Tex. 608; *Galveston, etc., R. Co. v. Johnson*, (Tex. 1892) 19 S. W. Rep. 867; *International, etc., R. Co. v. Lewis*, (Tex. Civ. App. 1893) 23 S. W. Rep. 323; *Gulf, etc., R. Co. v. Calhoun*, (Tex. Civ. App. 1893) 24 S. W. Rep. 362; *Arlington First Nat. Bank v. Lynch*, 6 Tex. Civ. App. 590; *Gulf, etc., R. Co. v. Dunlap*, (Tex. Civ. App. 1894) 26 S. W. Rep. 655; *Clarendon Land, etc., Co. v. McClelland*, (Tex. Civ. App. 1895) 31 S. W. Rep. 1088; *Gulf, etc., R. Co. v. Jagoe*, (Tex. Civ. App. 1895) 32 S. W. Rep. 717. And see *Wallace v. Finberg*, 46 Tex. 35.

Utah. — *Rhemke v. Clinton*, 2 Utah 230; *Woodland v. Union Pac. R. Co.*, (Utah 1891) 26 Pac. Rep. 298; *Wilson v. Sullivan*, 17 Utah 341.

Vermont. — *Blumenthal v. Brainerd*, 38 Vt. 402, 91 Am. Dec. 349; *Newell v. Smith*, 49 Vt. 255.

Wisconsin. — *Bonesteel v. Orvis*, 20 Wis. 646; *Chapman v. Chicago, etc., R. Co.*, 26 Wis. 205, 7 Am. Rep. 81; *Whitney v. Chicago, etc., R. Co.*, 27 Wis. 327; *Dean v. Chicago, etc., R. Co.*, 43 Wis. 305; *Taylor, J., in Graham v. Chicago, etc., R. Co.*, 53 Wis. 473; *Thomas, etc., Mfg. Co. v. Wabash, etc., R. Co.*, 62 Wis. 642, 51 Am. Rep. 725; *Arpin v. Burch*, 68 Wis. 619; *Wadleigh v. Buckingham*, 80 Wis. 230.

Interest on Diminished Value. — Where the value of property is diminished by an injury wrongfully inflicted, the jury may, in its discretion, give interest on the amount by which the value is diminished from the time of the injury. *Wilson v. Troy*, 135 N. Y. 103, 31 Am. St. Rep. 817. Thus in an action to recover damages for the diminished enjoyment and value of improved property by the defendant's having obstructed the access thereto, if the evidence shows that the plaintiff was actually endeavoring to sell his property, and at that time there was a certain market price for it with the obstruction removed, but with it remaining only a certain lower price, the jury may find that the plaintiff had been deprived by this nuisance from receiving the difference between these two prices, and may render a verdict for such amount, with legal interest from the time when the plaintiff had been so deprived, subject to the statute of limitations. *Hetzel v. Baltimore, etc., R. Co.*, 6 Mackey

adequate compensation the law allows it as approximating compensation, and with a view of fixing some certain and uniform measure of recovery.¹

When Interest Is Given upon Such Theory, it is, in general, awarded as of the time when the injury was sustained and the loss suffered.²

c. DEPRIVATION OF USE. — Where one party is deprived of the use of property for a time by the wrong of another, the former will be entitled to interest on the value of the use of the property during such period.³

d. INTEREST EO NOMINE. — It has been held that interest *eo nomine* is not recoverable in actions *ex delicto* for damages to property;⁴ and according

(D. C.) 1; Moore v. Langdon, 6 Mackey (D. C.) 6.

Interest on Expenses of Restoration. — In an action for damages for injury to real property, interest is recoverable on the amount of the necessary expenditures in restoring the property. Sabine, etc., R. Co. v. Joachimi, 58 Tex. 456. Likewise interest on the cost of proper repairs upon a vessel injured by the defendant's negligence is a proper element of damages in an action therefor. Whitehall Transp. Co. v. New Jersey Steamboat Co., 51 N. Y. 369; Mailler v. Express Propeller Line, 61 N. Y. 316. And see Worrall v. Munn, 38 N. Y. 151. But compare Sayre v. State, 123 N. Y. 291.

Statutory Cause of Action. — Interest is not recoverable where the action is brought under a statute prescribing and limiting the measure of damages and making no provision for interest. Atchison, etc., R. Co. v. Gabbert, 34 Kan. 132; Houston, etc., R. Co. v. Muldrow, 54 Tex. 233. And see *supra*, this title, *Origin and History of Interest — Actions under Special Statutes Making No Provision for Interest*.

As to When Such Interest Is Recoverable as of Right and when in the discretion of the jury only, see *infra*, this title, *Discretionary Interest and Interest as Matter of Right*.

1. **Rationale of Rule** — Florida. — Jacksonville, etc., R. Co. v. Peninsular Land, etc., Co., 27 Fla. 1, 157.

Minnesota. — Varco v. Chicago, etc., R. Co., 30 Minn. 18.

New York. — Wilson v. Troy, 60 Hun (N. Y.) 183; Reiss v. New York Steam Co., 59 N. Y. Super. Ct. 57; Mairs v. Manhattan Real Estate Assoc., 89 N. Y. 498.

Ohio. — Hogg v. Zanesville Canal, etc., Co., 5 Ohio 410; Lawrence R. Co. v. Cobb, 35 Ohio St. 94; Baltimore, etc., R. Co. v. Schultz, 43 Ohio St. 275, 54 Am. Rep. 805.

Pennsylvania. — Richards v. Citizens Natural Gas Co., 130 Pa. St. 37.

Tennessee. — Louisville, etc., R. Co. v. Wallace, 91 Tenn. 35.

Texas. — Gulf, etc., R. Co. v. Holliday, 65 Tex. 512. See also Wallace v. Finberg, 46 Tex. 35; Blum v. Merchant, 58 Tex. 400.

Utah. — Woodland v. Union Pac. R. Co., (Utah 1891) 26 Pac. Rep. 298.

Wisconsin. — Ingram v. Rankin, 47 Wis. 406, 32 Am. Rep. 762.

2. **Party Injured Entitled to Compensation as of Time of Injury.** — Woodland v. Union Pac. R. Co., (Utah 1891) 26 Pac. Rep. 298. See also Lawrence R. Co. v. Cobb, 35 Ohio St. 94.

Interest Is Allowable in Michigan as damages for fraudulently misrepresenting the value of land sold or traded to the plaintiff, where the mere difference in the values of the property exchanged will not make good his damages.

Snow v. Nowlin, 43 Mich. 383; Cook v. Perry, 43 Mich. 623.

3. **Deprivation of Use.** — Johnson v. Bailey, 17 Colo. 59; Brown v. South-Western R. Co., 36 Ga. 377; Murrell v. Dixey, 14 La. Ann. 296; Hegar v. De Groat, 3 N. Dak. 354; Sabine, etc., R. Co. v. Joachimi, 58 Tex. 456.

Where a Plaintiff Is Wrongfully Deprived of the Use of Personal Property, he may recover interest on the value of such use during the time of his deprivation. Brown v. South-Western R. Co., 36 Ga. 377.

In Beals v. Guernsey, 8 Johns. (N. Y.) 446, 5 Am. Dec. 348, which was an action of trespass against a sheriff for illegally taking the plaintiff's personal property, interest was allowed by way of damages.

Damages for Breach of Official Duty. — Where, by reason of the breach of an absolute and certain duty by a public official, the plaintiff has been unable to obtain an amount of money due to him, interest is recoverable in an action against such official. Clark v. Miller, 54 N. Y. 528. And see Clark v. Sheldon, 134 N. Y. 333. And in an action against a constable for the sale of the plaintiff's goods under an illegal execution, where the goods were bought in at the sale for the plaintiff, interest is recoverable on the amount so paid out from the date thereof. McInroy v. Dyer, 47 Pa. St. 118.

4. **Interest Not Recoverable Eo Nomine** — Georgia. — Western, etc., R. Co. v. McCauley, 68 Ga. 818; Chattanooga, etc., R. Co. v. Palmer, 89 Ga. 161; Western, etc., R. Co. v. Brown, 102 Ga. 13; Gress Lumber Co. v. Coody, 104 Ga. 611.

Missouri. — Dozier v. Jerman, 30 Mo. 216. Ohio. — Hogg v. Zanesville Canal, etc., Co., 5 Ohio 410.

Pennsylvania. — Pennsylvania Schuylkill Valley R. Co. v. Ziemer, 124 Pa. St. 560; Plymouth Tp. v. Graver, 125 Pa. St. 24, 11 Am. St. Rep. 867; Reading, etc., Co. v. Balthaser, 126 Pa. St. 1; Emerson v. Schoonmaker, 135 Pa. St. 437; Klages v. Philadelphia, etc., Terminal Co., 160 Pa. St. 386.

Utah. — Rhemke v. Clinton, 2 Utah 230. **Where Damages Insusceptible of Definite Computation.** — In actions of tort where the damages are not in their nature capable of exact computation as to both time and amount, no interest is recoverable *eo nomine*, the default of the defendant not being of a sufficiently absolute nature. Richards v. Citizens Natural Gas Co., 130 Pa. St. 37.

Interest on the Value of Chattels Converted is recoverable, not as interest strictly, but as damages for the retention of money equal to the legal interest on the value of the chattels converted. Omaha, etc., Smelting, etc., Co. v. Tabor, 13 Colo. 41, 16 Am. St. Rep. 185.

to this rule it has been adjudged error to instruct the jury that they may allow interest *eo nomine* on the amount of the damages found from the date of the injury.¹

Consideration of Lapse of Time Since Injury. — But although interest as such is not recoverable, the lapse of time between the happening of the injury and the time of trial is ordinarily a proper subject for the consideration of the jury in making up the amount of damages for which the verdict should be rendered.²

e. UNREASONABLE AND VEXATIOUS DELAY. — Another line of cases declare that while interest is not ordinarily recoverable in actions for torts to property, yet where there has been an actual conversion of property into money there may be a recovery of interest in an action for damages, as for money unreasonably and vexatiously withheld.³

f. PROPERTY HAVING ASCERTAINABLE PECUNIARY VALUE. — In some of the decisions announcing the rule that interest on the value of property lost, injured, or destroyed, the doctrine is expressly or by implication limited to cases where the property involved is susceptible of a pecuniary valuation or has a fixed market price.⁴

And see *Machette v. Wanless*, 2 Colo. 170; *Hanauer v. Bartels*, 2 Colo. 514; *Tucker v. Parks*, 7 Colo. 62.

Damages for Simple Negligence. — In the case of *Atchison, etc., R. Co. v. Ayers*, 56 Kan. 176, it was said that a recovery of damages for the simple negligence of a party to whom no benefit could accrue by reason of the injury inflicted should not include interest as such.

1. Erroneous Instruction of Jury. — *Gress Lumber Co. v. Coody*, 104 Ga. 611; *Reading, etc., R. Co. v. Balthaser*, 126 Pa. St. 1; *Emerson v. Schoonmaker*, 135 Pa. St. 437. Compare *Bare v. Hoffman*, 79 Pa. St. 71, 21 Am. Rep. 42.

2. Consideration of Lapse of Time. — *Western, etc., R. Co. v. McCauley*, 68 Ga. 818; *Chattanooga, etc., R. Co. v. Palmer*, 89 Ga. 161; *Gress Lumber Co. v. Coody*, 104 Ga. 611; *Pennsylvania Schuylkill Valley R. Co. v. Ziemer*, 124 Pa. St. 560; *Plymouth Tp. v. Graver*, 125 Pa. St. 24, 11 Am. St. Rep. 867; *Reading, etc., R. Co. v. Balthaser*, 126 Pa. St. 1; *Richards v. Citizens Natural Gas Co.*, 130 Pa. St. 37; *Emerson v. Schoonmaker*, 135 Pa. St. 437; *Klages v. Philadelphia, etc., Terminal Co.*, 160 Pa. St. 386.

On Damages in Condemnation Proceedings, interest as such is not allowed, but it is proper for the jury to consider the lapse of time between the taking of the land and the time of trial in making up the amount of damages for which to render a verdict. *Klages v. Philadelphia, etc., Terminal Co.*, 160 Pa. St. 386.

3. Unreasonable and Vexatious Delay. — *Omaha, etc., Smelting, etc., Co. v. Tabor*, 13 Colo. 41, 16 Am. St. Rep. 185; *Machette v. Wanless*, 2 Colo. 170; *Hanauer v. Bartels*, 2 Colo. 514; *Tucker v. Parks*, 7 Colo. 62; *Illinois Cent. R. Co. v. Cobb*, 72 Ill. 153; *Bradley v. Geiselman*, 22 Ill. 494; *Chicago, etc., R. Co. v. Ames*, 40 Ill. 249; *Northern Transp. Co. v. Selleck*, 52 Ill. 249.

In *Chicago, etc., R. Co. v. Shultz*, 55 Ill. 421, which was an action for damages for injury to a colt, it was held proper to allow interest from the time when the injury was done. In the later case of *Toledo, etc., R. Co. v. Johnston*, 74 Ill. 83, it was held that what was said about interest in the former case was dictum merely, and erroneous. But in the still later case of

Chicago v. Allcock, 86 Ill. 384, the doctrine of the *Shultz* case with reference to the allowance of interest on the damages assessed in an action of trespass to personal property was commented upon without adverse criticism and apparently recognized.

The Mere Withholding of Money, without bad faith or evil design, cannot, it has been held, be regarded as a tort, so as to warrant a recovery of interest as damages. *Hoblit v. Bloomington*, 71 Ill. App. 204.

4. Property Having Ascertainable Value — *United States*. — *Tilghman v. Proctor*, 125 U. S. 161.

Connecticut. — *Regan v. New York, etc., R. Co.*, 60 Conn. 124, 25 Am. St. Rep. 306.

Iowa. — *Arthur v. Chicago, etc., R. Co.*, 61 Iowa 648.

New York. — *Greer v. New York*, 3 Robt. (N. Y.) 406.

Pennsylvania. — *Richards v. Citizens Natural Gas Co.*, 130 Pa. St. 37.

Tennessee. — See *Louisville, etc., R. Co. v. Wallace*, 91 Tenn. 41.

See also *supra*, this title, *Interest as Damages for Breach of Contract* — *Contracts Other than to Pay Money* — *Market Values*.

Thus, it has been held that indefinite damages resulting from the infringement of a patent cannot bear interest until the amount has been judicially ascertained. *Tilghman v. Proctor*, 125 U. S. 161. And see *Crosby Steam Gage, etc., Co. v. Consolidated Safety Valve Co.*, 141 U. S. 441. It has been held, however, that although damages in such cases do not carry interest as such, interest may be allowed as a part of the damages, which is only a mode of stating the amount found. *Bates v. St. Johnsbury, etc., R. Co.*, 32 Fed. Rep. 628; *Littlefield v. Perry*, 21 Wall. (U. S.) 205.

If Damages Are Discretionary with the Jury, or are not susceptible of any reasonably certain computation in money, interest is not allowable. *Western, etc., R. Co. v. Young*, 81 Ga. 397. See also *infra*, this section, *Exemplary Damages and Torts to Person*. See, however, *Vietti v. Nesbitt*, 22 Nev. 390, in which case it was said that although interest is frequently allowed in actions involving torts to property,

g. DOCTRINE THAT INTEREST NOT RECOVERABLE. — In some jurisdictions the rule is that interest is not recoverable as part of the damages in actions for torts to property. Most of the decisions so holding, however, depend upon special statutes regarded as exclusively controlling the subject of interest, and in which either no provision is made for interest in cases of unliquidated damages for tort, or its recovery in such cases is by implication denied.¹

h. INTEREST IN NEGLIGENCE CASES. — In some jurisdictions the rule seems to be that damages in the form of interest on the value of property negligently destroyed are not recoverable where no benefit could have accrued to the defendant by such destruction.² And on the same ground it has been held that interest is not allowable in an action against a sheriff for refusal to execute a writ of restitution in an ejectment suit.³

i. EXEMPLARY DAMAGES. — In a case of tort when the law allows the recovery of exemplary damages, the allowance and amount of which are entirely in the discretion of the jury, it is error to charge that interest may be computed on the sum so awarded.⁴

it is simply by way of damages and in actions where the amount of damages is more or less in the discretion of the jury.

1. Doctrine that Interest Not Recoverable — *Colorado*. — *Denver, etc., R. Co. v. Conway*, 8 Colo. 1, 54 Am. Rep. 537. See also *Denver, etc., R. Co. v. Moynahan*, 8 Colo. 56; *Pettit v. Thalheimer*, 3 Colo. App. 355.

Illinois. — *Chicago, etc., R. Co. v. Davis*, 54 Ill. App. 130; *Toledo, etc., R. Co. v. Johnston*, 74 Ill. 83. Compare *Bradley v. Geiselman*, 22 Ill. 494, explained in *Chicago v. Allcock*, 86 Ill. 384.

Louisiana. — *Green v. Garcia*, 3 La. Ann. 702; *Wright v. Abbott*, 6 La. Ann. 569. See also *Holmes v. Barclay*, 4 La. Ann. 63; *Robertson v. Green*, 18 La. Ann. 28.

Michigan. — *Coburn v. Muskegon Booming Co.*, 72 Mich. 134. See also *Cook v. Perry*, 43 Mich. 623. Compare *Snow v. Nowlin*, 43 Mich. 383.

Montana. — *Palmer v. Murray*, 8 Mont. 313; *Randall v. Greenwood*, 3 Mont. 506.

New Jersey. — *Speer v. Van Orden*, 3 N. J. L. 232.

Virginia. — *Brugh v. Shanks*, 5 Leigh (Va.) 598.

Trespass Quare Clausum. — The case of *Glidden v. Street*, 68 Ala. 600, was an action of trespass *quare clausum* in which it was held that interest was not recoverable on the damages sustained until ascertained by verdict and merged in the judgment. This case professed to follow, on the question of interest, *Jean v. Sandiford*, 39 Ala. 317; but it should be observed that the latter case was an action under a special statute which made no provision for interest. See also *Borden v. Bradshaw*, 68 Ala. 362. Compare *Fail v. Presley*, 50 Ala. 342; *Alabama G. S. R. Co. v. McAlpine*, 75 Ala. 113; *Comer v. Lehman*, 87 Ala. 362.

In an Action by a Bank Against Its Manager for Damages for Breach of Trust it was held that interest was not recoverable in respect of such claim or in respect of loss which accrued through his conduct. *The Upper Canada Bank v. Bradshaw*, 17 L. C. Rep. 273.

Action on Judgment. — Where interest is not recoverable because the case sounds in damages and the judgment rendered does not bear

interest for such reason, interest will not be allowed in any subsequent action on such judgment. *Daub v. Martin*, 2 Bay (S. Car.) 193.

2. Negligence Cases — *United States*. — *New York, etc., R. Co. v. Estill*, 147 U. S. 591.

Kansas. — *Achison, etc., R. Co. v. Ayers*, 56 Kan. 176.

Missouri. — *Kenney v. Hannibal, etc., R. Co.*, 63 Mo. 99; *Marshall v. Schricker*, 63 Mo. 309; *Atkinson v. Atlantic, etc., R. Co.*, 63 Mo. 367; *Meyer v. Atlantic, etc., R. Co.*, 64 Mo. 542; *De Steiger v. Hannibal, etc., R. Co.*, 73 Mo. 33; *Wade v. Missouri Pac. R. Co.*, 78 Mo. 362; *Kimes v. St. Louis, etc., R. Co.*, 85 Mo. 611; *Brink v. Kansas City, etc., R. Co.*, 17 Mo. App. 177; *Kamerick v. Castleman*, 29 Mo. App. 658; *Damhorst v. Missouri Pac. R. Co.*, 32 Mo. App. 350; *Flannery v. St. Louis, etc., R. Co.*, 44 Mo. App. 396; *State v. Harrington*, 44 Mo. App. 301; *Sonnenfeld Millinery Co. v. People's R. Co.*, 59 Mo. App. 668; *Padley v. Caterlin*, 64 Mo. App. 645.

Pennsylvania. — *Weir v. Allegheny County*, 95 Pa. St. 413.

Cases of Gross Negligence. — Where the rule prevails that interest is not recoverable on the damages assessed for injuries resulting from simple negligence, there may, it has been held, be a recovery of interest where the negligence is gross. *Gray v. Missouri River Packet Co.*, 64 Mo. 47; *Dunn v. Hannibal, etc., R. Co.*, 68 Mo. 268. But see the later *Missouri* cases cited *supra*, this note.

Criticism of Rule Denying Interest Where No Benefit to Party in Default. — *Frazer v. Bigelow Carpet Co.*, 141 Mass. 126; *Chapman v. Chicago, etc., R. Co.*, 26 Wis. 295, 7 Am. Rep. 81.

3. Refusal of Sheriff to Execute Writ. — *State v. Harrington*, 44 Mo. App. 297.

4. Exemplary Damages. — *Ratteree v. Chapman*, 79 Ga. 574; *Chicago, etc., R. Co. v. Barnes*, 2 Ind. App. 213; *Wabash R. Co. v. Williamson*, 3 Ind. App. 190. And see *Varco v. Chicago, etc., R. Co.*, 30 Minn. 18.

Double and Treble Damages. — Interest is not allowable on double damages recoverable against a railroad company for stock killed. *Wade v. Missouri Pac. R. Co.*, 78 Mo. 362; *Brentner v. Chicago, etc., R. Co.*, 68 Iowa 530. Nor does a statute providing for an action of

3. Torts to Person. — The general rule is, in the absence of statute, that interest is not recoverable on the damages awarded in actions for torts to the person,¹ because the damages in such cases are in a large measure discretionary with the jury and are not ascertainable with reference to a pecuniary standard of value.²

Consideration of Time Elapsed Since Injury. — But even in personal-injury cases, though the jury may not give interest *eo nomine*, it has been declared that they are at liberty to consider the lapse of time since the injury and make just allowance in the verdict therefor.³

VII. INTEREST AS MERE INCIDENT OF PRINCIPAL OR INTEGRAL PART OF DEBT

— **1. General Observations.** — Judged merely by the language employed, many if not most of the cases tend to regard interest as, without qualification, a mere incident of the principal debt;⁴ but strictly speaking, it is only where

trespass for cutting timber trees on the land of another, and allowing double or treble the value of the trees, authorize the jury to award interest in addition to the penalty. *McCloskey v. Powell*, 8 Pa. Co. Ct. 22.

1. Torts to Person — *Georgia*. — *Ratteree v. Chapman*, 79 Ga. 574; *Western, etc., R. Co. v. Young*, 81 Ga. 397.

Maine. — *Sargent v. Hampden*, 38 Me. 581.

New York. — *Wilson v. Troy*, 135 N. Y. 103, 31 Am. St. Rep. 817.

Pennsylvania. — *Pittsburgh Southern R. Co. v. Taylor*, 104 Pa. St. 306, 49 Am. Rep. 580.

Tennessee. — *Louisville, etc., R. Co. v. Wallace*, 91 Tenn. 35.

Texas. — *Texas, etc., R. Co. v. Carr*, 91 Tex. 332. And see *Missouri, etc., R. Co. v. Armstrong*, (Tex. Civ. App. 1896) 38 S. W. Rep. 363.

Utah. — *Nichols v. Union Pac. R. Co.*, 7 Utah 510.

The Statutes in some jurisdictions allow interest, in the discretion of the jury, on damages for personal injuries. *Ell v. Northern Pac. R. Co.*, 1 N. Dak. 336 26 Am. St. Rep. 621. It should be observed, however, that the *North Dakota* statute does not expressly give to juries the right to award interest on the damages in personal-injury cases. The statute in question only gives the right to award interest for the breach of obligations not arising from contract, and in cases of oppression, fraud, and malice.

Death by Wrongful Act. — In *New York* it is provided by statute (Laws 1870, c. 73; Code Civ. Pro., § 1904) that interest on the damages assessed in an action under the statute providing for a recovery for death by wrongful act must be given from the date of the death. *Erwin v. Neversink Steamboat Co.*, 23 Hun (N. Y.) 578; *Salter v. Utica, etc., R. Co.*, 86 N. Y. 401; *Manning v. Port Henry Iron Ore Co.*, 91 N. Y. 664.

This statute was held constitutional in *Cornwall v. Mills*, 44 N. Y. Super. Ct. 45.

In *Georgia*, it has been held that in a civil action for personal injuries producing death, the jury may in its discretion award interest on the damages assessed, though there is no statutory authority therefor. *Georgia R., etc., Co. v. Garr*, 57 Ga. 280, 24 Am. Rep. 402; *Central R. Co. v. Sears*, 66 Ga. 409. And see *Western, etc., R. Co. v. Young*, 81 Ga. 414.

See generally the title *DEATH BY WRONGFUL ACT*, vol. 8, p. 955.

Judgments in Actions for Torts to Person. — In some jurisdictions the rule, by statute or otherwise, is that no interest is recoverable even where the damages for personal injuries have been put in judgment. *Washington, etc., R. Co. v. Harmon*, 147 U. S. 571; *McMurtry v. Kentucky Cent. R. Co.*, 84 Ky. 462; *Louisville, etc., R. Co. v. Sharpe*, 91 Ky. 411.

Interest on Verdict from Day Arbitrarily Fixed by Jury. — A jury has no right, it has been said, in returning its verdict in an action for damages for a tort to the person, to select an antecedent day at its discretion and determine that interest on the amount of the verdict shall run from that day. *Costello v. District of Columbia*, 21 D. C. 508.

2. Reason of Rule. — *Western, etc., R. Co. v. Young*, 81 Ga. 397; *Pittsburgh Southern R. Co. v. Taylor*, 104 Pa. St. 306, 49 Am. Rep. 580.

No Interest Before Judicial Ascertainment. — The rule allowing interest on the value of property injured or destroyed does not apply to the case of personal injury which does not necessarily cease when inflicted and is not susceptible of definite and accurate computation. Such an injury does not create a debt, nor does it become one until it is judicially ascertained and determined. Only from that time, therefore, can it draw interest, and interest as damages cannot at any preceding time be added to it without changing and superadding a new element, warranted neither by principle nor authority. *Louisville, etc., R. Co. v. Wallace*, 91 Tenn. 35.

3. Consideration of Lapse of Time. — *Smith v. East Nauch Chunk*, 3 Pa. Super. Ct. 495; *Louisville, etc., R. Co. v. Wallace*, 91 Tenn. 35.

4. Interest Regarded as Mere Incident of Debt. — *McConnel v. Thomas*, 3 Ill. 313; *Anderson's Succession*, 12 La. Ann. 95; *Howe v. Bradley*, 19 Me. 31; *Greenwood v. Fenton*, 54 Neb. 573; *Price v. Holman*, (Supm. Ct. Gen. T.) 2 N. Y. Supp. 184; *Heath v. Page*, 63 Pa. St. 108, 3 Am. Rep. 533.

In *Howe v. Bradley*, 19 Me. 36, while the court conceded the rule that where there is an express contract for interest it may be recovered after the payment of the principal, and where there is no express contract the reverse is the rule, it was held, notwithstanding, that "interest is an incidental amount arising out of and constantly accumulating from the principal."

interest is recoverable, if at all, as damages for the breach of a contract to pay money, or as part of the compensation in tort, that it can be said to be a mere incident of the principal sum with reference to which it is computed.¹ Where there has been an express contract to pay interest, the sum due therefor is as much an integral part of the debt as is the amount for the use of which the interest is contracted.²

2. Effect of Payment of Principal — a. INTEREST DUE BY CONTRACT. — As interest due by contract and accruing before the maturity of the principal becomes an integral part of the debt, or itself an independent liability, the payment of the principal will not *ipso facto* operate to defeat a subsequent demand for interest.³ There would be no more reason for holding that the payment of the original principal extinguished the claim for interest than that a part payment of such principal destroyed the right to the remainder.⁴

b. INTEREST RECOVERABLE AS DAMAGES — (1) In General. — Where

1. Correct Statement of Rule. — *Price v. Holman*, (Supm. Ct. Gen. T.) 2 N. Y. Supp. 184; *Southern Cent. R. Co. v. Moravia*, 61 Barb. (N. Y.) 180; *Bronner Brick Co. v. M. M. Canda Co.*, (Supm. Ct. Tr. T.) 18 Misc. (N. Y.) 681.

2. Interest Payable by Contract. — *Davis v. Harrington*, 160 Mass. 278; *Southern Cent. R. Co. v. Moravia*, 61 Barb. (N. Y.) 180; *Wood v. Smith*, 23 Vt. 706.

When Interest Ceases to Be Incident. — Interest follows the principal as an incident to it only so long as it remains an incident. Where it is separated and set apart from the principal by actual payment, or being carried, when due, to the credit of the owner of the principal, in his account with the debtor, and this in pursuance of a provision in the contract creating and defining the principal debt, it ceases to be an incident thereto and does not necessarily follow it. *Ohio v. Cleveland*, etc., R. Co., 6 Ohio St. 489.

An Assignment of a Named Amount "and Interest," being a portion of a judgment, as collateral security for a debt evidenced by a promissory note entitles the assignee not merely to the sum stated out of the judgment when collected, but is a present transfer of the interest then due on the judgment and as much of the principal of the judgment in addition as is necessary to make up the stipulated amount. And, it has been held, that part of the principal so arrived at will bear interest in favor of the assignee, but the interest on the judgment so included will not. *Godbold v. Kirkpatrick*, 26 S. Car. 607, 1 S. E. Rep. 156.

3. Payment of Principal — England. — *Watkins v. Morgan*, 6 C. & P. 661, 25 E. C. L. 584. *Canada.* — *Thibaudeau v. Pauze*, 2 Quebec Super. Ct. 470.

United States. — *Stewart v. Barnes*, 153 U. S. 456.

Indiana. — *Robbins v. Cheek*, 32 Ind. 328, 2 Am. Rep. 348; *Marks v. Purdue University*, 56 Ind. 288. See *contra*, the earlier case of *Compart v. Ewing*, 8 Blackf. (Ind.) 328.

Maine. — *Howe v. Bradley*, 19 Me. 31; *Milliken v. Southgate*, 26 Me. 424; *Robbins Cordage Co. v. Brewer*, 48 Me. 481.

Maryland. — *Chase v. Manhardt*, 1 Bland (Md.) 333; *Steiger v. Hillen*, 5 Gill & J. (Md.) 128.

Massachusetts. — *Eames v. Cushman*, 135 Mass. 573; *Davis v. Harrington*, 160 Mass. 278.

Missouri. — *Stone v. Bennett*, 8 Mo. 41.

New York. — *Fake v. Addy*, 15 Wend. (N. Y.) 76; *Watts v. Garcia*, 40 Barb. (N. Y.) 656; *Southern Cent. R. Co. v. Moravia*, 61 Barb. (N. Y.) 180; *Smith v. Buffalo*, (Supm. Ct. Spec. T.) 39 N. Y. Supp. 881.

North Carolina. — *King v. Phillips*, 95 N. Car. 245, 59 Am. Rep. 238.

Ohio. — *Graveson v. Odd Fellows Temple Co.*, 6 Ohio Dec. 287.

Separate Suits for Interest and Principal. — The principal sum secured by deed and the interest to be paid thereon are two different sums and not one entire sum, and either may be sued for independently of the other. *Dickenson v. Harrison*, 4 Price 282. Thus where the parties to a promissory note stipulate for interest to be paid before the maturity of the principal sum, a suit will lie for the recovery of the interest when it becomes due. *Callin v. Lyman*, 16 Vt. 45.

Splitting Cause of Action. — It has been held, however, that where interest is properly recoverable as damages or otherwise, a plaintiff should seek to recover it in the action for the principal debt, and should not be permitted to split his cause of action and proceed for the principal in one suit and the interest in another. *Hoblit v. Bloomington*, 71 Ill. App. 204.

Mistake in Recovery — Less Interest than Due — Subsequent Suit — Held Not Maintainable. — *Darlow v. Cooper*, 34 Beav. 281. See also *infra*, this title, *Annual and Periodic Interest*.

4. Reason of Rule. — *Milliken v. Southgate*, 26 Me. 424; *Fake v. Addy*, 15 Wend. (N. Y.) 76; *Smith v. Buffalo*, (Supm. Ct. Spec. T.) 39 N. Y. Supp. 881.

Collateral Contract for Interest. — The defendant agreed with the plaintiff that if the latter would purchase a certain judgment against the former, he would pay to the plaintiff ten per cent. interest thereon as well as on another judgment which the plaintiff held, instead of seven per cent., the rate of interest which each judgment bore. About five years thereafter the defendant paid both judgments, with interest, however, at only seven per cent. It was held that an action lay for the additional interest. *Greenwood v. Fenton*, 54 Neb. 573. See also *Florence v. Jenings*, 3 Jur. N. S. 772, *sub nom.* *Florence v. Drayson*, 1 C. B. N. S. 584, 87 E. C. L. 584, 26 L. J. C. Pl. 274; *McKay v. Fee*, 20 U. C. Q. B. 268.

interest, if allowed at all, is recoverable only as damages for the breach of a contract to pay money, the general rule is that a payment of the principal will extinguish any further right to interest.¹

Independent Collateral Liability. — Where, however, there is an independent collateral liability for interest as damages, this may be enforced although the plaintiff has received the principal sum out of the deprivation of which the right to the recovery of interest has arisen. Thus, where the purchaser at an auction of a reversionary interest in bank stock, upon failure of the vendor to make a title, had recovered back the deposit in an action against the auctioneer, it was held that the vendee might nevertheless recover interest on the deposit in an action against the vendor for not completing his contract, under an averment of special damage in the plaintiff's losing, by reason of the nonperformance, the interest and benefit of his money.²

(2) *Payment Pending Suit.* — The effect of the acceptance of the principal as extinguishing a further claim to interest as damages has been held the same as above indicated, though such payment is made pending suit.³

(3) *Claiming Right to Interest.* — It is held that though the creditor, when he receives the principal, claims a right to interest and expresses a determination to assert it, such circumstance will not take the case out of the operation of the rule.⁴

1. Payment of Principal as Bar to Interest. — *England.* — Dixon v. Parkes, 1 Esp. 110 (respondentia bond); Churcher v. Stringer, 2 B. & Ad. 777, 22 E. C. L. 183; Watkins v. Morgan, 6 C. & P. 661, 25 E. C. L. 584. And see Hellier v. Franklin, 1 Stark. 291, 2 E. C. L. 116.

Canada. — McKay v. Fee, 20 U. C. Q. B. 268.

United States. — Potomac Co. v. Union Bank, 3 Cranch (C. C.) 101; Southern R. Co. v. Dunlop Mills, 76 Fed. Rep. 505; Stewart v. Barnes, 153 U. S. 456 (claim for illegal exaction of revenue tax). And see Johnson v. District of Columbia, 31 Ct. Cl. 395.

Iowa. — Ward v. Chicago, etc., R. Co., 64 Iowa 753.

Kentucky. — Ward v. Everett, 1 Dana (Ky.) 429.

Louisiana. — Mann's Succession, 4 La. Ann. 28; Anderson's Succession, 12 La. Ann. 95.

Maine. — Howe v. Bradley, 19 Me. 31; Milliken v. Southgate, 26 Me. 424 (money received on agreement to repay); Robbins Cordage Co. v. Brewer, 48 Me. 431; American Bible Soc. v. Wells, 68 Me. 572, 28 Am. Rep. 82.

Massachusetts. — Gage v. Gannett, 11 Mass. 217 (action on bond of public officer); Davis v. Harrington, 160 Mass. 278.

New York. — Tenth Nat. Bank v. New York, 4 Hun (N. Y.) 429; Middaugh v. Elmira, 23 Hun (N. Y.) 79; Jacot v. Emmett, 11 Paige (N. Y.) 142 (receipt of distributive share of estate); Southern Cent. R. Co. v. Moravia, 61 Barb. (N. Y.) 180 (calls on stock subscriptions); Fake v. Addy, 15 Wend. (N. Y.) 76; Tillotson v. Preston, 3 Johns. (N. Y.) 229 (goods sold and delivered); Johnston v. Brannan, 5 Johns. (N. Y.) 268; Matter of Smith, (Surrogate Ct.) 1 Misc. (N. Y.) 256; Bronner Brick Co. v. M. M. Canda Co., (Supm. Ct. Tr. T.) 18 Misc. (N. Y.) 681; Peck v. Granite State Provident Assoc., (Supm. Ct. App. T.) 21 Misc. (N. Y.) 84; Gillespie v. New York, 3 Edw. (N. Y.) 512; Hamilton v. Van Rensselaer, 43 N. Y. 244; Cutter v. New York, 92 N. Y. 166 (award of damages for widening street); Matter of Hodg-

man, 140 N. Y. 421; Price v. Holman, (Supm. Ct. Gen. T.) 2 N. Y. Supp. 184; Smith v. Buffalo, (Supm. Ct. Spec. T.) 39 N. Y. Supp. 881; Brady v. New York, 14 N. Y. App. Div. 152; Ludington v. Miller, 38 N. Y. Super. Ct. 478.

North Carolina. — King v. Phillips, 95 N. Car. 245, 59 Am. Rep. 238.

Ohio. — Graveson v. Odd Fellows Temple Co., 6 Ohio Dec. 287.

Rule as Affected by Special Statute. — It has been held that a statute providing for interest and limiting the rate of interest on all contracts for the payment of money does not affect the rule that the acceptance of the principal is a bar to a subsequent action for interest which is recoverable only as damages. Graveson v. Odd Fellows' Temple Co., 6 Ohio Dec. 287.

Effect of Assignment of Principal. — It has been intimated that an assignment or transfer of the principal will operate as an assignment of the interest and will preclude the assignor from a subsequent action for the recovery thereof although such transfer may not have been designed to carry with it the interest which had accrued at the time. Kiddall v. Trimble, 1 Md. Ch. 150.

2. Collateral Liability for Interest as Damages. — Farquhar v. Farley, 1 Moo. 322.

3. Payment of Principal Pending Suit. — Potomac Co. v. Union Bank, 3 Cranch (C. C.) 101; Davis v. Harrington, 160 Mass. 278; Warner v. Bacon, 8 Gray (Mass.) 397, 69 Am. Dec. 253; Fishburne v. Sanders, 1 Nott & M. (S. Car.) 243.

4. Claiming Right to Interest. — Middaugh v. Elmira, 23 Hun (N. Y.) 79; Cutter v. New York, 92 N. Y. 166; Graveson v. Odd Fellows Temple Co., 6 Ohio Dec. 287.

This Doctrine Has Been Likened by Analogy to the rule that in the absence of duress or compulsion, a party yielding to the demands of an adverse claim cannot detract from the force of his concession by accompanying it with an objection or protest when he actually pays the

(4) *Agreement for Survival of Right.* — The receipt of the principal will not in general bar a subsequent action for interest if it is agreed between the parties that it shall not have this effect.¹

(5) *Rule of Application of Payments.* — A payment by a debtor to a creditor claiming principal and interest of an amount equal to or greater than the principal debt will not necessarily extinguish the right of the latter to interest, as, if made generally, it may be first applied to the interest, leaving whatever balance there is due as principal.²

c. *RULE UNDER SPECIAL STATUTES.* — It has been held that where interest is specially provided for by statute in a particular case, the interest becomes thereby engrafted upon and a part of the debt itself. A payment and acceptance of the principal, therefore, will not under such circumstances alone defeat the right to interest.³

d. *PAYMENTS IN COMPROMISE OR SETTLEMENT OF DEBT.* — As a matter of course, where the principal of a debt, doubtful or contested, is paid in compromise of all liability, or where under other circumstances the parties have come to a valid accord, such payment or a satisfaction as agreed, to the extent of the principal sum, will operate to extinguish all further claim for interest, whether due by the antecedent contract or recoverable if at all as damages for its breach.⁴ This, however, is on an entirely different principle from those which have been discussed, but the cases have not always made the distinction clear.⁵

3. *Effect of Payment of Interest.* — There is certainly no ground for holding that the acceptance of interest is a bar to a right of recovery of the principal.⁶

But the Receipt of Interest in Advance may be evidence of a contract to delay the payment of the principal during the period for which the interest has been paid.⁷

claim. The payment nullifies the effect of the protest. *Forrest v. New York*, (Supm. Ct. Spec. T.) 13 Abb. Pr. (N. Y.) 350; *Fleetwood v. New York*, 2 Sandf. (N. Y.) 481.

1. *Agreement for Survival of Right to Interest.* — *Lumley v. Musgrave*, 5 Scott 230, 4 Bing. N. Cas. 9, 33 E. C. L. 265, 3 Hodges 247, 1 Jur. 799; *Lumley v. Hudson*, 4 Bing. N. Cas. 15, 33 E. C. L. 268; *Eames v. Cushman*, 135 Mass. 573; *Bronner Brick Co. v. M. M. Canda Co.*, (Supm. Ct. Tr. T.) 18 Misc. (N. Y.) 681.

Agreement to Arbitrate Claim for Interest. — In *Moore v. Fuller*, 2 Jones L. (47 N. Car.) 205, the defendant paid the principal of his bond to the plaintiff, but refused to pay any interest. The plaintiff claimed that he was entitled to interest, and the matter, by agreement of the parties, was referred to arbitration. The arbitrators found for the plaintiff, but the defendant refused to abide by the award, and an action was brought on the bond. It was held that the bond was discharged by the payment of the principal, and that the plaintiff could not recover interest, which is but an incident to the principal.

2. *Application of Payments.* — *Henderson Cotton Mfg. Co. v. Lowell Mach. Shops*, 86 Ky. 668; *Snowden v. Thomas*, 4 Har. & J. (Md.) 335; *People v. New York County*, 5 Cow. (N. Y.) 331; *Southern Cent. R. Co. v. Moravia*, 61 Barb. (N. Y.) 180; *Price v. Holman*, (Supm. Ct. Gen. T.) 2 N. Y. Supp. 184. And see generally the title APPLICATION OF PAYMENTS, vol. 2, p. 467.

3. *Rule under Special Statutes.* — *Devlin v. New York*, 131 N. Y. 123; *Smith v. Buffalo*, (Supm. Ct. Spec. T.) 39 N. Y. Supp. 881.

4. *Payment in Compromise or Settlement of Debt* — *United States*. — *De Arnaud v. U. S.*, 151 U.

S. 483; *Stewart v. Barnes*, 153 U. S. 456; *Pacific R. Co. v. U. S.*, 158 U. S. 118. See also *U. S. v. Childs*, 12 Wall. (U. S.) 232; *Baker v. Nachtrieb*, 19 How. (U. S.) 126.

Maryland. — *Steiger v. Hillen*, 5 Gill & J. (Md.) 128; *Snowden v. Thomas*, 4 Har. & J. (Md.) 335.

Massachusetts. — *Tuttle v. Tuttle*, 12 Met. (Mass.) 551, 46 Am. Dec. 701.

New York. — *Gillespie v. New York*, 3 Edw. (N. Y.) 512; *Stevens v. Barringer*, 13 Wend. (N. Y.) 640.

Ohio. — *Graveson v. Odd Fellows Temple Co.*, 6 Ohio Dec. 287.

And see generally the titles ACCORD AND SATISFACTION, vol. 1, p. 408; RELEASE.

5. *Tenth Nat. Bank v. New York*, 4 Hun (N. Y.) 429.

6. *Effect of Payment of Interest.* — *People v. New York County*, 5 Cow. (N. Y.) 331; *Moore v. Jefferson*, 45 Mo. 202.

"It Is a Case of Very Frequent Occurrence that the interest is made payable before the principal becomes due; and no one ever doubted that in such a case an action could be maintained for the nonpayment of the interest merely." *Fake v. Addy*, 15 Wend. (N. Y.) 76.

7. *Payment of Interest in Advance* — *Connecticut.* — *Skelly v. Bristol Sav. Bank*, 63 Conn. 83, 38 Am. St. Rep. 340.

Indiana. — *Hamilton v. Winterrowd*, 43 Ind. 393; *Woodburn v. Carter*, 50 Ind. 376.

Kentucky. — *Preston v. Henning*, 6 Bush (Ky.) 557.

New Hampshire. — *Crosby v. Wyatt*, 10 N. H. 318.

New York. — *Wakefield Bank v. Truesdell*, 55 Barb. (N. Y.) 604.

VIII. COMPUTATION OF INTEREST — 1. General Rule. — The rule for the computation of interest is rather one of arithmetic than of law, except in so far as the avoidance of compound interest is concerned.¹

2. Partial Payments — a. WHERE COMPOUND INTEREST NOT ALLOWED. — The general rule in the case of partial payments where interest on interest is not allowed is to compute interest on the principal debt to the date of the first payment, where this equals or exceeds the interest due; then deduct the payment from the aggregate of principal and interest, and repeat the process as to successive payments. Where the payment does not equal or exceed the amount of interest due at the time when it is made, interest on the first principal should be computed until such time as the aggregate partial payments made equal or exceed the amount of interest due when the payment was made which, with prior payments, equals or exceeds the accrued interest, and such aggregate should then be deducted from the sum of the original principal and accrued interest, the balance constituting a new principal, so to remain until reduced as stated.²

Vermont. — *People's Bank v. Pearsons*, 30 Vt. 711.

Washington. — *British Columbia Bank v. Jeffs*, 18 Wash. 135.

See *contra*, *Morse v. Blanchard*, 117 Mich. 37. The Contract of Forbearance to Sue implied by law from the payment and acceptance of interest in advance is not overcome by the fact that it had been the custom of the debtor to pay interest from month to month, payment being made sometimes in advance and sometimes after the expiration of the month. *British Columbia Bank v. Jeffs*, 18 Wash. 135.

1. See *infra*, this title, *Compound Interest and Interest on Interest*.

Where a Statute Prescribes a Mode of Computing Interest in certain cases, such mode should, of course, be adopted; but such a statute does not apply to an instrument given prior to the passage of the statute. *Troxwell v. Fugate, Hard. (Ky.)* 2.

Computation by Interest Tables. — In some states the computation of interest by designated interest tables is expressly authorized by statute. *Duval v. Farmers Bank*, 7 Gill & J. (Md.) 44; *Duncan v. Maryland Sav. Inst.*, 10 Gill & J. (Md.) 312. And see the various local statutes.

Day of Discount. — In the computation of interest on a discounted note the day on which a note is discounted is to be excluded; but a day's interest has accrued at any time of the next day, without regarding the fractions of that day. *Burlington Bank v. Durkee*, 1 Vt. 403.

In Computing Interest with Annual Rests, in the absence of any evidence of a different understanding between the parties, the first rest is to be made at the end of one year, computing from the commencement of the account, and so on from year to year. *Carpenter v. Welch*, 40 Vt. 251.

Where a Creditor Intrusted His Debtor with the Sale of Property to pay the debt, it was held that the account between the parties was properly stated by crediting the former with the original debt and each item of expense incurred, adding to each item interest from its date to the date of settlement, and charging him with each item received as consideration for the sale of the property or as rent, adding to the debits respectively interest to the date

of settlement. *Bell's Appeal*, (Pa. 1887) 8 Aul. Rep. 927.

Where It Is a Custom among Bankers, for the sake of convenience, to compute interest at thirty days to the month and twelve months in the year, it is not error, in a case involving transactions with a banker, in the absence of any evidence to show that another mode of computation was specifically agreed upon by the parties, for the judge to assume that the usual mode of bankers was to be pursued and to direct the jury to compute interest accordingly. *Pool v. White*, 175 Pa. St. 459.

2. Partial Payments Where Compound Interest Is Not Allowed — England. — *McGregor v. Gaulin*, 4 U. C. Q. B. 378; *Barnum v. Turnbull*, 13 U. C. Q. B. 277; *Bettes v. Farewell*, 15 U. C. C. P. 450.

United States. — *Russell v. Lucas, Hempst.* (U. S.) 91; *Dunlop v. Alexander*, 1 Cranch (C. C.) 498; *Story v. Livingston*, 13 Pet. (U. S.) 359; *Smith v. Shaw*, 2 Wash. (U. S.) 167.

Arkansas. — *Vaughan v. Kennan*, 38 Ark. 114.

California. — *Backus v. Minor*, 3 Cal. 231; *Matter of Den*, 35 Cal. 692.

Connecticut. — *Kissam v. Burrall, Kirby* (Conn.) 326; *Treat v. Stanton*, 14 Conn. 445.

Georgia. — *Wade v. Powell*, 31 Ga. 1.

Illinois. — *McFadden v. Fortier*, 20 Ill. 509; *Heartt v. Rhodes*, 66 Ill. 351.

Indiana. — *Wasson v. Gould*, 3 Blackf. (Ind.) 18; *Markel v. Spitzer*, 28 Ind. 488.

Iowa. — *Huner v. Doolittle*, 3 Greene (Iowa) 76, 54 Am. Dec. 489.

Kentucky. — *Guthrie v. Wickliffe*, 1 A. K. Marsh. (Ky.) 584.

Maine. — *Leonard v. Wildes*, 36 Me. 265; *Pierce v. Faunce*, 53 Me. 351.

Maryland. — *Lamott v. Sterett*, 1 Har. & J. (Md.) 42.

Massachusetts. — *Fay v. Bradley*, 1 Pick. (Mass.) 194; *Dean v. Williams*, 17 Mass. 417.

Michigan. — *Payne v. Avery*, 21 Mich. 524; *Wallace v. Glaser*, 82 Mich. 190, 21 Am. St. Rep. 556.

Minnesota. — *Whittacre v. Fuller*, 5 Minn. 508.

Mississippi. — *Houston v. Crutcher*, 31 Miss. 51; *Brooks v. Robinson*, 54 Miss. 272.

Missouri. — *Riney v. Hill*, 14 Mo. 500, 55 Am. Dec. 119.

In the Absence of a Contrary Agreement Between the Parties, express or arising from implication, on a reference ordered to ascertain the amount of a debt, by stating an account between the parties, interest will be calculated on the various items of the account on the principle of partial payments.¹

b. WHERE INTEREST COMPOUNDED. — Where compound interest is not forbidden, interest may, if the parties so agree, be calculated on the new principal after the deduction of the credit, though such new principal consists in part of interest accrued before the partial payment was made.²

c. INTEREST ON PAYMENTS. — It is generally held that it is not proper, where there have been partial payments on an indebtedness, to compute interest on the principal debt until maturity or any given time, and the interest on payments made from the time when made until such time, and deduct the one sum from the other,³ though there have been decisions to the contrary.⁴ Such a mode of computation would, conceivably, permit the debtor not only to discharge himself without paying any principal, or even the interest contracted for, but eventually the original creditor would become the debtor, in an ever increasing amount.⁵

3. Mistake in Computation — **a. IN GENERAL.** — Where there has been a mistake in the computation of interest, and a payment made accordingly,

New Hampshire. — *Hodgdon v. Hodgdon*, 2 N. H. 169; *Ross v. Russell*, 31 N. H. 386; *Townsend v. Riley*, 46 N. H. 300.

New Jersey. — *Baker v. Baker*, 28 N. J. L. 13, 75 Am. Dec. 243; *Stark v. Hunton*, 3 N. J. Eq. 300; *Meredith v. Banks*, 6 N. J. L. 408.

New York. — *Connecticut v. Jackson*, 1 Johns. Ch. (N. Y.) 13, 7 Am. Dec. 471; *Stoughton v. Lynch*, 2 Johns. Ch. (N. Y.) 209.

North Carolina. — *Bratton v. Allison*, 70 N. Car. 498.

Pennsylvania. — *Com. v. Vanderslice*, 8 S. & R. (Pa.) 452.

South Carolina. — *Wright v. Wright*, 2 McCord Eq. (S. Car.) 188; *Teague v. Dendy*, 2 McCord Eq. (S. Car.) 207; *De Bruhl v. Neuffer*, 1 Strobb. L. (S. Car.) 426; *Singleton v. Allen*, 2 Strobb. Eq. (S. Car.) 166.

Tennessee. — *Curd v. Davis*, 1 Heisk. (Tenn.) 574; *Scanland v. Houston*, 5 Yerg. (Tenn.) 310.

Utah. — *Perry v. Taylor*, 1 Utah 67.

Virginia. — *Ross v. Pleasants*, Wythe (Va.) 147; *Lightfoot v. Price*, 4 Hen. & M. (Va.) 431.

West Virginia. — *Hurst v. Hite*, 20 W. Va. 183.

Wisconsin. — *Case v. Fish*, 58 Wis. 56; *Hill v. Durand*, 58 Wis. 160.

Abatement of Purchase Money. — In making an abatement of the purchase money of a tract of land, where the several notes given fall due at different times and do not bear interest until after maturity, it is a proper method of computing interest to divide the amount of the damages by the number of notes and to allow interest on each sum from the time when the notes respectively fell due; but where the several notes, though falling due at different times, all bear interest from a given day before maturity, the interest on the damages should be computed from that day, and not from the maturity of the last note. *Wright v. Wright*, 37 Ala. 420; *Stow v. Bozeman*, 29 Ala. 397.

1. Interest on a Reference. — *Clift v. Moses*, 75 Hun (N. Y.) 517.

2. Partial Payments Where Compound Interest Is Allowed. — Where the interest on a note is

payable semiannually, the accruing interest should be added to the principal at the end of each half-yearly interval, and partial payments made will be deducted from the principal and interest as of the date when the payment is made. The computation of interest upon the new principal then continues, according to the terms of the contract, without regard to whether the payment made exceeds, equals, or falls short of the accrued interest. *Farwell v. Sturdivant*, 37 Me. 308; *Bratton v. Allison*, 70 N. Car. 498.

Upon a Note with Interest Annually, the computation at the end of the year should not be with rests on account of intermediate payments. If such intermediate payments were on account of the interest accruing but not yet due, they should be deducted at the end of the year, but without interest upon them. *Townsend v. Riley*, 46 N. H. 300.

3. Computation of Interest on Payments Not Allowed. — *Handley v. Dobson*, 7 Ala. 359; *Heartt v. Rhodes*, 66 Ill. 351; *Drew v. Towle*, 30 N. H. 531, 64 Am. Dec. 309; *Horner v. Delaware, etc., Canal Co.*, 16 N. J. L. 265; *De Ende v. Wilkinson*, 2 Patt. & H. (Va.) 663.

4. Interest on Payments. — *Tracy v. Wikoff*, 1 Dall. (Pa.) 124. See also *Flannery v. Flannery*, 58 Vt. 576. Compare *Penrose v. Hart*, 1 Dall. (Pa.) 378.

"Connecticut Rule." — In *Wallace v. Glaser*, 82 Mich. 190, 21 Am. St. Rep. 556, where there was a controversy over the proper method of computing interest, the court said: "The commissioner to whom the case was referred computed the interest under what is known as the Connecticut rule; that is, he reckoned interest upon the principal up to the liquidation of the indebtedness, and then computed the interest on payments up to the same time, deducting the latter amount from the principal and interest."

5. Possible Consequences of Computing Interest on Payments. — *McGregor v. Gaulin*, 4 U. C. Q. B. 378. See also *Townsend v. Riley*, 46 N. H. 300; *Henderson Cotton Mfg. Co. v. Lowell Mach. Shops*, 86 Ky. 668.

it has been held that equity will relieve in favor of the injured party.¹ A recovery at law has also been allowed.²

6. REMITTITUR OF INTEREST ERRONEOUSLY ALLOWED. — Where interest has been erroneously allowed in a judgment, but the amount of interest so given is ascertainable by computation alone, the judgment will not, in general, be reversed therefor, but an option to remit such sum will be given to the prevailing party.³ In other cases it has been held that the error may be corrected by the appellate court and judgment rendered for the proper amount;⁴ and the judgment has been remanded with a direction to the trial court to make the proper order in the case, when so made, the judgment to stand affirmed.⁵

4. Application of Payments. — The general rule as stated and fully considered elsewhere in this work is that payments made by a debtor will be applied first in extinguishment of accrued interest and next in reduction of the interest-bearing principal.⁶

Where There Is Interest on Interest Due, payments will be applied first in discharge of the secondary interest, next in discharge of the interest on the principal debt, and last in reduction of the latter sum.⁷

When a Higher Rate of Interest than the Law Allows Has Been Paid, the excess of the payments above the legal rate will be applied in reduction of the principal; but when the payments have been made specifically as interest at a rate higher than the law requires in the absence of contract, but which it does not pro-

1. Mistake in Computation — Relief in Equity. — *Boon v. Miller*, 16 Mo. 457. And see *Wilson v. Boughton*, 50 Mo. 17.

2. Recovery at Law. — *Thompson v. Otis*, 42 Barb. (N. Y.) 461.

3. Option to Remit Interest — United States. — *Washington, etc., R. Co. v. Harmon*, 147 U. S. 571.

Michigan. — *Bresnahan v. Nugent*, 97 Mich. 359.

Missouri. — *Kimes v. St. Louis, etc., R. Co.*, 85 Mo. 611.

New York. — *Jamieson v. New York, etc., R. Co.*, 11 N. Y. App. Div. 50; *Home Ins. Co. v. Pennsylvania R. Co.*, 11 Hun (N. Y.) 182; *Day v. New York Cent. R. Co.*, 22 Hun (N. Y.) 412.

North Dakota. — *Johnson v. Northern Pac. R. Co.*, 1 N. Dak. 354.

Ohio. — *Averill Coal, etc., Co. v. Verner*, 22 Ohio St. 372.

Pennsylvania. — *Richards v. Citizens Natural Gas Co.*, 130 Pa. St. 37; *Emerson v. Schoonmaker*, 135 Pa. St. 437.

South Carolina. — *Holmes v. Misroom*, 3 Brev. (S. Car.) 209.

Tennessee. — *Louisville, etc., R. Co. v. Wallace*, 91 Tenn. 35.

Texas. — *Houston, etc., R. Co. v. Jackson*, 62 Tex. 209; *Texas, etc., R. Co. v. Carr*, 91 Tex. 332.

See also the title REMITTITUR, 18 ENCYC. OF PL. AND PR. 142, 143.

Contrary Doctrine. — *Evans v. Irvin*, 1 Port. (Ala.) 390; *Frank v. Morrison*, 55 Md. 399. But compare *Hunt v. Mayfield*, 2 Stew. (Ala.) 124.

Doctrine of De Minimis. — In the case of *Mercer v. Vose*, 67 N. Y. 56, the action was to recover for services rendered. The claim was unliquidated and contested. The referee allowed interest upon the balance found by him from the time when the plaintiff left the defendant's service and demanded his pay. The

action was commenced in about a month after such demand was made, and it was held that the plaintiff was entitled to recover interest at least from the commencement of the action, and that if there was any error in allowing interest from the earlier date it was too trifling to require correction. See also *Dean v. Chicago, etc., R. Co.*, 43 Wis. 305.

4. Judgment Corrected by Appellate Court. — *Crawford v. Mail, etc., Pub. Co.*, 22 N. Y. App. Div. 54. Compare *Insurance Co. of North America v. Forcheimer*, 86 Ala. 541.

Verdict in Lump Sum. — Where the jury was erroneously instructed to allow interest in a case where the giving of interest was properly within its discretion, it was held that as the verdict was for a lump sum, a modification thereof by a deduction of the interest could not be made, but the judgment must be reversed and a new trial granted. *King v. Southern Pac. Co.*, 109 Cal. 96.

5. Remand for Correction in Trial Court. — **Where the Only Error Is in Allowing Interest,** the amount of which may be ascertained by computation, the judgment will not be reversed *in toto* and a new trial ordered, but the court below will be directed to enter a judgment such as should have been entered in the first place. *Pacific Postal Tel. Cable Co. v. Fleischer*, 66 Fed. Rep. 899; *Chattanooga, etc., R. Co. v. Palmer*, 89 Ga. 161. See also *Jean v. Sandiford*, 39 Ala. 317; *Hepburn v. Dundas*, 13 Gratt. (Va.) 219.

6. Application of Payments. — See the title APPLICATION OF PAYMENTS, vol. 2, p. 467.

Agreement that Principal Shall Be First Paid. — Where a party owes a debt consisting of principal and interest, and it is agreed between him and his creditor that the principal shall be first paid, payments made will be applied accordingly. *Pindall v. Marietta Bank*, 10 Leigh (Va.) 502.

7. Interest on Interest, etc. — *Vaughan v. Kennan*, 38 Ark. 114; *Townsend v. Riley*, 46

hibit, the principal should not be credited by the excess of payments above the legal rate.¹

5. Recovery Back of Interest Voluntarily Paid. — Although interest as paid by the debtor might not have been exacted by the creditor in an action against the former, yet if voluntarily paid and not in violation of law, it cannot, in general, be recovered back.²

IX. TIME FROM WHICH COMPUTED — 1. In General. — In order to the allowance of interest, it is, of course, necessary that the time from which the interest is to be computed should be ascertained.³

2. Interest by Contract — a. WHERE DATE EXPRESSLY FIXED — (1) In General. — Where the contract sued on expressly fixes the date from which interest is to be computed, such stipulation will, as a rule, control.⁴ But although it is provided in a promissory note that interest shall not begin to run until a specified day after maturity, yet the judgment in an action brought thereon will bear interest though rendered before the date at which, according to the terms of the note, interest was to begin to run.⁵

(2) *Interest "After Maturity" — Days of Grace.* — Where a promissory note payable on a certain day stipulates for interest "after maturity," interest should be computed from the day fixed for payment, and not from the last day of grace.⁶

(3) *Date Dependent upon Condition.* — Where a contract provides for interest at a specified rate if not paid at maturity, but without expressly stating whether in the event of default the interest is to be calculated from the maturity or the date of the contract, the general rule is that if the rate stipulated for is higher than the legal rate, the interest should begin at the maturity of the contract, whereas if it is less or no greater than the legal rate, interest should be computed from the date of the contract.⁷

N. H. 300; *Bratton v. Allison*, 70 N. Car. 498; *Anketel v. Converse*, 17 Ohio St. 11, 91 Am. Dec. 115.

1. Payment of Excessive Interest. — *Marye v. Strouse*, 6 Sawy. (U. S.) 204; *Jones v. Rider*, 60 N. H. 452; *Samyn v. Phillips*, 15 Ohio St. 218; *Mueller v. McGregor*, 28 Ohio St. 265; *Pettis v. Ray*, 12 R. I. 344.

Where a Creditor in a Contract for the Payment of Money in which the rate of interest is not stipulated, in the application of payments made thereon, first calculates the interest at a rate higher than the legal rate, the excess above the legal rate will, in an action on the contract, be applied in reduction of the principal. *Godfrey v. Graycraft*, 81 Ind. 476.

2. Recovery Back of Interest Paid Voluntarily. — *Sims v. Squires*, 80 Ind. 42; *Reed v. Boston Loan Co.*, 160 Mass. 237; *West v. White*, 165 Mass. 258; *Church v. Kidd*, 5 Thomp. & C. (N. Y.) 454; 3 Hun (N. Y.) 254.

Payment under Protest. — Where, by reason of a mistake of the defendant's bookkeeper, which mistake was known to the plaintiff, the defendant for several years failed to demand and collect an amount due to it from the plaintiff, the interest on which was subsequently paid by the plaintiff under protest, it was held that the defendant was entitled to retain the interest on the item for the time during which it so remained uncollected. *Davis Provision Co. v. Fowler*, (Supm. Ct. App. Div.) 47 N. Y. Supp. 205, 20 N. Y. App. Div. 626.

See generally the title PAYMENT.

3. Necessity of Ascertaining Commencement of Period. — *Cox v. McLaughlin*, 76 Cal. 60, 9 Am. St. Rep. 164; *Hetzl v. Baltimore*, etc.,

R. Co., 6 Mackey (D. C.) 1; *Slatington-Bangor Slate Syndicate v. Server*, 12 Montg. Co. Rep. (Pa.) 162.

4. Commencement of Period Fixed by Contract. — **The Note Sued On Contained a Printed Stipulation,** "with ten per cent. interest after maturity." This had been changed by writing in, "payable at six per cent. interest." It was held that the effect of this provision was to make the new note draw interest at the substituted rate after maturity, but not to change the date from which interest was to be computed. *Stayner v. Knowler*, 82 Ind. 157. See also *Calhoun v. Reynolds*, 1 McMull L. (S. Car.) 304; *Ellis v. Sanders*, 32 S. Car. 584, 10 S. E. Rep. 824.

Interest from Date — Date Omitted. — Where a note as drawn bears interest from date, but the date is omitted, the date of its delivery may be proved, from which time interest may be computed. *Richardson v. Ellett*, 10 Tex. 190.

A Note Made Payable During the Whole of a Given Month does not bear interest until after the last day of the month. *Pollard v. Yoder*, 2 A. K. Marsh. (Ky.) 264.

Billingsley v. Billingsley, 24 Ala. 518.

6. Interest "After Maturity" of Note. — *Andrews v. Rhodes*, 10 Rob. (La.) 52; *Weems v. Ventress*, 14 La. Ann. 267; *Letchford v. Starns*, 16 La. Ann. 252; *Wheless v. Williams*, 62 Miss. 360, 52 Am. Rep. 190.

7. Stipulation for Interest of Debt Is Not Paid at Maturity. — *Fly v. Witherspoon*, 2 Ala. 131; *Wernwag v. Mothershead*, 3 Blackf. (Ind.) 401; *Billingsly v. Cahoon*, 7 Ind. 184; *Horn v. Nash*, 1 Iowa 204, 63 Am. Dec. 437; *Daggett v. Pratt*, 15 Mass. 177.

b. WHERE DATE IMPLIEDLY FIXED — (1) *In General*. — The date from which the interest is to run may be, and frequently is, established by implication from the terms of the contract.¹

(2) *Money Paid at Another's Request*. — Where money is paid at the request and for the use of another, it is proper, in general, to compute interest on the sum so paid from the date of its disbursement, as on an implied contract to pay interest from such date.²

(3) *Contracts to Pay at Stated Time "with Interest"*. — The general rule at present is that where there is a contract to pay money at a stated time "with interest," interest may be computed from the date of the contract, rather than from the maturity thereof.³ This is in accordance with the rule of construction of contracts by which the stipulations thereof should be held to mean something rather than nothing, because the contract would bear interest after maturity though there were no stipulation.⁴

3. Interest as Damages — *a. FOR BREACH OF CONTRACT* — (1) *General Rule* — *From Date of Breach*. — The general rule is that interest as damages

1. Date Fixed by Implication — In General — *Florida*. — *Florida First Nat. Bank v. Savannah, etc.*, 36 Fla. 183.

Pennsylvania. — *Kistler v. Mosser*, 140 Pa. St. 367.

Texas. — *Roberts v. Smith*, 64 Tex. 94, 53 Am. Rep. 744.

Canada. — *Montchamps v. Perras*, 24 L. C. Jur. 231, 3 Montreal Leg. N. 339; *Arpin v. Lamoureux*, 7 Rev. Lég. 196; *Rice v. Ahern*, 12 L. C. Rep. 280, 6 L. C. Jur. 201; *Dumont v. Sevigny*, 12 Quebec 76; *Hogan v. Clancy*, 15 Quebec 53.

2. Money Paid at Another's Request — England. — *Craven v. Tickell*, 1 Ves. Jr. 60.

Illinois. — *Cease v. Cockle*, 76 Ill. 484.

Iowa. — *Goodnow v. Litchfield*, 63 Iowa 275; *Goodnow v. Plumb*, 64 Iowa 672.

Massachusetts. — *Gibbs v. Bryant*, 1 Pick. (Mass.) 118; *Hisley v. Jewett*, 2 Met. (Mass.) 108; *Winthrop v. Carleton*, 12 Mass. 4; *Weeks v. Hasty*, 13 Mass. 218.

Missouri. — *Chamberlain v. Smith*, 1 Mo. 718. *New York*. — *Gillett v. Van Rensselaer*, 15 N. Y. 397.

Rhode Island. — *Hodges v. Hodges*, 9 R. I. 32.

South Carolina. — *Sollee v. Mcugy*, 1 Bailey L. (S. Car.) 620; *Cheesborough v. Hunter*, 1 Hill L. (S. Car.) 400; *Sims v. Goudelock*, 7 Rich. L. (S. Car.) 23; *Walters v. McGirt*, 8 Rich. L. (S. Car.) 287; *Barr v. Haseldon*, 10 Rich. Eq. (S. Car.) 53; *Thompson v. Stevens*, 2 Nott & M. (S. Car.) 493.

Texas. — *Grimes v. Hagood*, 19 Tex. 246.

Wisconsin. — *Phelan v. Fitzpatrick*, 84 Wis. 240.

Where the Purchaser at a Mortgage Sale took a conveyance of the property under an agreement with the mortgagor that the title should be held until the latter could repay to the former the amount paid out by him, when the premises would be reconveyed, but no time for repayment and reconveyance was specified, it was held that the amount paid out should bear interest from the date of the purchase of the property. *Phelan v. Fitzpatrick*, 84 Wis. 240.

3. Contracts to Pay at Stated Time "with Interest" — *England*. — *Kennerly v. Nash*, 1 Stark. 452, 2 E. C. L. 174; *Roffey v. Greenwell*, 10 Ad. & El. 222, 37 E. C. L. 99, 2 Per. & Dav.

365; *Doman v. Dibden*, R. & M. 381, 21 E. C. L. 465.

Alabama. — *Campbell Printing Press, etc., Co. v. Jones*, 79 Ala. 475.

Arkansas. — *Dickinson v. Tunstall*, 4 Ark. 170.

California. — *Dewey v. Bowman*, 8 Cal. 145.

Colorado. — *Salazar v. Taylor*, 18 Colo. 538.

Connecticut. — *Washband v. Washband*, 24 Conn. 500.

Iowa. — *Elwood v. McDill*, 105 Iowa 437.

Kentucky. — *Miller v. Cavanaugh*, 99 Ky. 377, 59 Am. St. Rep. 463.

Louisiana. — *Bogan v. Calhoun*, 19 La. Ann. 472.

Massachusetts. — *Conners v. Holland*, 113 Mass. 50.

Missouri. — *Pittman v. Barret*, 34 Mo. 84.

Nebraska. — *Jewett v. McGillicuddy*, 55 Neb. 588.

Tennessee. — *Smith v. Goodlett*, 92 Tenn. 230.

A Note for a Specified Amount with Interest, given for the purchase price of a horse under a contract providing for the return of the horse if not as warranted, with a credit indorsed thereon by reason of the taking of another and less valuable horse in exchange for the one first sold, the latter not conforming to the warranty, bears interest from its execution, and not merely from the date of the exchange. *Elwood v. McDill*, 105 Iowa 437.

Upon a Contract to Pay a Sum of Money in Instalments, payments to begin at a future time and to be made semiannually with interest, interest begins to run from the execution of the contract. *Conners v. Holland*, 113 Mass. 50.

A contract for the sale of a mill provided that the vendor should receive a sum named, a portion of which was payable in instalments maturing in six, eighteen, and twenty-four months, with interest "on the whole amount due at ten per cent. annually." It was held that the word "due" should be construed to mean unpaid, and that interest should be computed from the date of the contract, and not merely from the maturity of the several instalments. *Adairs v. Wright*, 14 Iowa 22.

4. Reason of Rule. — *Kennerly v. Nash*, 1 Stark. 452, 2 E. C. L. 174; *Campbell Printing Press, etc., Co. v. Jones*, 79 Ala. 475.

for the breach of a contract should be computed from the date of the breach;¹ or, as some cases express it, from the accrual of the right of action.² But this rule is sometimes subject to qualification where the damages recoverable are uncertain and unliquidated.³

(2) *Contracts to Pay Money* — (a) **Express Contracts** — *aa. GENERAL RULE.* — Where the contract sued on provides for the payment of money at a certain time, interest as damages should be computed from the time when the principal debt should have been paid,⁴ unless the contract itself fixes the time from which interest is to run.⁵

Date Ascertainable by Implication. — The rule that a contract for the payment of money draws interest from the time when the principal sum due becomes payable applies not only when the time of payment is fixed by the express terms of the contract, but also when it is fixed by implication, as in the case of goods sold and delivered or work done without expressly specifying the time of pay-

1. Interest as Damages for Breach of Contract — *Computation from Date of Breach* — *Alabama.* — *Whitworth v. Hart*, 22 Ala. 343.

California. — *Cox v. McLaughlin*, 76 Cal. 60, 9 Am. St. Rep. 164.

Illinois. — *Dobbins v. Higgins*, 78 Ill. 440.

Louisiana. — *Reid v. Duncan*, 1 La. Ann. 265.

Maine. — *Gay v. Gardiner*, 54 Me. 477.

Massachusetts. — *Dodge v. Perkins*, 9 Pick. (Mass.) 381; *Hubbard v. Charlestown Branch R. Co.*, 11 Met. (Mass.) 124.

Michigan. — *Beardslee v. Horton*, 3 Mich. 560; *Fredenburg v. Turner*, 37 Mich. 402.

Minnesota. — *Brackett v. Edgerton*, 14 Minn. 174, 100 Am. Dec. 211.

Mississippi. — *Bickell v. Colton*, 41 Miss. 368.

New Hampshire. — *National Lancers v. Lovering*, 30 N. H. 511.

New Jersey. — *North Hudson R. Co. v. Booraem*, 28 N. J. Eq. 593.

New York. — *Dox v. Dey*, 3 Wend. (N. Y.) 356.

Texas. — *Calvit v. McFadden*, 13 Tex. 324; *Houston, etc., R. Co. v. Jackson*, 62 Tex. 212; *Roberts v. Smith*, 64 Tex. 94, 53 Am. Rep. 744.

Virginia. — *Enders v. Board of Public Works*, 1 Gratt. (Va.) 364; *Merryman v. Criddle*, 4 Munf. (Va.) 542.

Canada. — *Daly v. Daly*, 1 Quebec Super. Ct. 457.

2. Accrual of Right of Action. — *Hewitt v. John Week Lumber Co.*, 77 Wis. 548.

But Where the Contract So Provides, a party may claim interest from a time anterior to the accrual of the cause of action. *Saunders v. McCarthy*, 8 Allen (Mass.) 42; *Rice v. Sims*, 8 Rich. L. (S. Car.) 416.

3. See *infra*, this division of this section, *Interest from Institution of Suit.*

4. Interest from Time for Payment of Principal — *United States.* — *Potter v. Gardner*, 5 Pet. (U. S.) 718; *Armstrong v. American Exchange Nat. Bank*, 133 U. S. 433.

Alabama. — *Moore v. Patton*, 2 Port. (Ala.) 451; *Parker v. Parker*, 33 Ala. 459.

Arkansas. — *Wilson v. Anthony*, 19 Ark. 16.

California. — *Cox v. McLaughlin*, 76 Cal. 60, 9 Am. St. Rep. 164; *Mix v. Miller*, 57 Cal. 356.

Georgia. — *Van Winkle v. Wilkins*, 81 Ga. 93.

Illinois. — *Dobbins v. Higgins*, 78 Ill. 440.

Michigan. — *Fredenburg v. Turner*, 37 Mich. 402.

Nebraska. — *Murphy v. Omaha*, 33 Neb. 402.

New Jersey. — *North Hudson R. Co. v. Booraem*, 28 N. J. Eq. 593; *Ruckman v. Bergholz*, 38 N. J. L. 531.

New York. — *Smith v. Buffalo*, (Supm. Ct. Spec. T.) 39 N. Y. Supp. 881; *Stacy v. Graham*, 14 N. Y. 492; *Adams v. Ft. Plain Bank*, 36 N. Y. 255; *Williams v. Sherman*, 7 Wend. (N. Y.) 109; *Still v. Hall*, 20 Wend. (N. Y.) 51; *Stuart v. Binsse*, 10 Bosw. (N. Y.) 436.

South Carolina. — *Kennedy v. Barnwell*, 7 Rich. L. (S. Car.) 124.

Tennessee. — *Thompson v. French*, 10 Yerg. (Tenn.) 452.

Texas. — *Roberts v. Smith*, 64 Tex. 94, 53 Am. Rep. 744.

Virginia. — *Buchanan v. Leeright*, 1 Hen. & M. (Va.) 211.

Canada. — *Daly v. Daly*, 1 Quebec Super. Ct. 457.

Money Due in Instalments. — Where by the terms of a written contract payments become due on a certain day in each month, it is proper to allow interest on such sum as may be due on the specified day, from that time until paid. *Cox v. McLaughlin*, 76 Cal. 60, 9 Am. St. Rep. 164; *Dobbins v. Higgins*, 78 Ill. 440.

Alternative Agreement. — Upon default in the performance of an agreement in the alternative to pay in cash or in notes at three or four months, interest runs from the time when notes or cash should have been given. *Stuart v. Binsse*, 10 Bosw. (N. Y.) 436.

5. Time Fixed by Contract. — *Waring v. Henry*, 30 Ala. 721; *Shields v. Henry*, 31 Ala. 53; *Kinard v. Glenn*, 29 S. Car. 590.

Promise to Pay on Delivery of Goods. — The purchaser of goods under an agreement to pay the purchase price on delivery is chargeable, in case of nonpayment, with interest from the delivery of the goods. *Foot v. Blanchard*, 6 Allen (Mass.) 221, 83 Am. Dec. 624.

And Where Goods Are Sold on a Stated Credit, interest is to be computed from the expiration of the period of credit. *Roberts v. Wilcoxson*, 36 Ark. 355; *Milton v. Blackshear*, 8 Fla. 161; *Henderson Cotton Mfg. Co. v. Lowell Mach. Shops*, 86 Ky. 668; *National Lancers v. Lovering*, 30 N. H. 511; *Raymond v. Isham*, 8 Vt. 258; *Porter v. Munger*, 22 Vt. 191; *Bannerman v. Fullerton*, 5 Nova Scotia 200.

ment, money of one person received by another to be laid out for certain purposes, etc.¹

Interest from Maturity though Payment of Principal Deferred. — A note due one day after date, with an indorsement thereon that it was not to be paid until the death of the maker, has been held to bear interest from the time when it became due, according to its tenor, without reference to the indorsement.²

Where Certain Prescribed Formalities are necessary to put the defendant in default and are prerequisites to the maintenance of an action, interest will in general be computed from the date of compliance therewith.³

Accounts. — Interest on a balance due upon mutual accounts is generally given from the time when the account is stated or the balance becomes a liquidated demand,⁴ but in some jurisdictions interest is recoverable by usage

1. Goods Sold and Delivered — Interest from Delivery — *United States*. — Atlantic Phosphate Co. v. Grafflin, 114 U. S. 492.

Alabama. — Waring v. Henry, 30 Ala. 721; Shields v. Henry, 31 Ala. 53.

Arkansas. — Roberts v. Wilcoxson, 36 Ark. 355.

Florida. — Milton v. Blackshear, 8 Fla. 161.

Illinois. — Presbyterian Church v. Emerson, 66 Ill. 269.

Kansas. — Wyandotte, etc., Gas Co. v. Schliefer, 22 Kan. 468.

Massachusetts. — Lambeth Rope Co. v. Brigham, 170 Mass. 518.

New Hampshire. — McIlvaine v. Wilkins, 12 N. H. 474; Livermore v. Rand, 26 N. H. 85.

New York. — Beers v. Reynolds, 11 N. Y. 97.

Where Goods Are Sold for Cash interest should be computed from the date of the sale, Pollock v. Ehle, 2 E. D. Smith (N. Y.) 541; Siurges v. Green, 27 Kan. 235; even though, it has been held, it was understood that payment was not actually to be made until the subsequent happening of a certain event, Parke v. Foster, 26 Ga. 495, 71 Am. Dec. 221. According to the doctrine of other cases, however, interest in such circumstances should be computed from the date of the delivery of the goods. Maltman v. Williamson, 69 Ill. 423; Smith v. Shaffer, 50 Md. 132.

Work Done — Interest After Reasonable Time from Completion. — Love v. Mabury, 59 Cal. 484; Ford v. Tirrell, 9 Gray (Mass.) 401, 69 Am. Dec. 297; Ruckman v. Bergholz, 38 N. J. L. 531; Wills v. Brown, 3 N. J. L. 136; Smith v. Buffalo, (Supm. Ct. Gen. T.) 39 N. Y. Supp. 881; Carpenter v. Brand, 40 N. Y. Super. Ct. 551; Booth v. Pittsburgh, 154 Pa. St. 482.

In a contract for work interest on the price usually begins to run from the fulfilment of the agreement, Smith v. Buffalo, (Supm. Ct. Spec. T.) 39 N. Y. Supp. 881; or from the time when the ascertained amount became due, Carpenter v. Brand, 40 N. Y. Super. Ct. 551.

Interest from Completion of Work though Amount Due in Dispute. — Where, though the price for certain work is definitely fixed by contract, and is payable on the completion of the work, the total amount to become due depends on the quantity of material required by the enterprise, which is only approximated, the debtor is nevertheless liable for interest from the time of the completion of the work though the contractor's claim was contested in good faith. Louisville v. Henderson, (Ky. 1890) 13 S. W. Rep. 111.

Money Had and Received. — Dodge v. Perkins, 9 Pick. (Mass.) 381; Scofield v. Kinsler, 2 Strobb. L. (S. Car.) 481.

Where It Is the Duty of a Party to Pay Over Money After a Reasonable Time, interest is to be computed from the expiration of such period. Chapman v. Burt, 77 Ill. 337; Clark v. Moody, 17 Mass. 145; Justices v. Fennimore, 1 N. J. L. 281.

Miscellaneous Cases. — Blake v. Lawrence, 4 Esp. 148; Harrison v. Dickson, 3 Campb. 52, note; Orr v. Churchill, 1 H. Bl. 227; Haines v. Stilwell, (Cal. 1895) 40 Pac. Rep. 332; Howard v. Johnston, 82 N. Y. 271; Williams Tp. v. Williamstown, 9 Pa. Co. Ct. 65; Burk v. Galveston County, 76 Tex. 267; Craig v. Dumars, 7 Tex. Civ. App. 28.

Interest on a Remainder Estate in Money does not begin to run in favor of the remainderman until the death of the tenant for life. McCook v. Harp, 81 Ga. 229.

2. Interest from Maturity though Payment of Principal Deferred. — Powell v. Guy, 3 Dev. & B. L. (20 N. Car.) 70. See also Foster v. Harris, 10 Pa. St. 457. Compare Kinard v. Glenn, 29 S. Car. 590.

3. Formalities Required to Put Defendant in Default. — Wilson v. Troy, 135 N. Y. 103, 31 Am. St. Rep. 817 (presentation of claim against municipal corporation); McMahon v. New York, etc., R. Co., 20 N. Y. 469 (default of debtor in neglecting to ascertain amount due); Peters v. Quebec Harbour Com'rs, 19 Can. Sup. Ct. 685 (final certificate of engineer as to amount due under contract).

4. Accounts — *England*. — Blaney v. Hendricks, 2 W. Bl. 761.

United States. — Young v. Godbe, 15 Wall. (U. S.) 502; Bainbridge v. Wilcocks, Baldw. (U. S.) 536.

Illinois. — Underhill v. Gaff, 48 Ill. 198; Haight v. McVeagh, 69 Ill. 624.

Maine. — Cosby v. Otis, 32 Me. 256.

New York. — Walden v. Sherburne, 15 Johns. (N. Y.) 409; Wood v. Belden, 59 Barb. (N. Y.) 549.

South Carolina. — Dickinson v. Legare, 1 Desaus. (S. Car.) 537.

Washington. — Stickler v. Giles, 9 Wash. 147.

Where the Parties Come Together and Adjust an Account, and strike a balance which is acknowledged, without saying anything about payment, the debt is due immediately, and interest is allowed from that time. Cannon v. Beggs, 1 McCord L. (S. Car.) 370, 10 Am. Dec. 677.

on the balance of an account after the expiration of a reasonable period of credit.¹

Foreign Judgments. — In an action on a foreign judgment interest should be computed from the date of the judgment sued on.²

Penal Bonds. — Interest on the penalty of a bond is to be computed, according to some cases, from the time of the breach of the condition;³ but the weight of authority seems to be that interest in such cases, especially as against sureties, should be computed only from the time of a demand or the institution of suit.⁴

bb. WHERE NO TIME FOR PAYMENT OF PRINCIPAL FIXED. — Where there is a contract for the payment of money, but the time therefor is not fixed, it becomes due immediately, and interest will be allowed as damages for the breach of contract from the date of its execution.⁵

cc. CONTRACTS TO PAY ON CONDITION. — Where there is no stipulation for interest and the principal sum is payable only on a contingency, interest should be computed only from the happening thereof.⁶

dd. DEBTS DUE "ON DEMAND." — Where there is a contract to pay a stated sum of money "on demand," the cases are not agreed whether interest should be computed from the date of the contract or only from the date of demand made for payment of the principal.⁷

Interest from Date. — The doctrine of some authorities is that though a note is expressly made payable on demand, yet interest may be recovered from its date, on the ground that a debt so evidenced is a debt due presently, upon which an action may be maintained without showing a prior demand.⁸

Interest from Demand. — Other cases hold broadly that interest on such instruments can be computed only from the date of demand.⁹

Interest from Reasonable Time After Statement of Account. — It has been held that, where an account has been rendered and has been received and retained by the defendant, without objection, for so long a time as to justify a finding that the defendant acquiesced in it, interest will run only from the time when it became an account stated. *Bainbridge v. Wilcocks*, *Baldw.* (U. S.) 536. *Compare Case v. Hotchkiss*, 3 Keyes (N. Y.) 334, holding that interest should run from the rendition of the account.

1. Interest After Reasonable Credit. — *McKeon v. Brington*, 70 Conn. 429; *Young v. Dickey*, 63 Ind. 31; *Wills v. Brown*, 3 N. J. L. 136.

2. Foreign Judgments. — *Hopkins v. Shepard*, 129 Mass. 600; *Clark v. Child*, 136 Mass. 344.

3. Interest on Penalty of Bond — Computation from Time of Breach. — *U. S. v. Arnold*, 1 Gall. (U. S.) 348; *Carter v. Carter*, 4 Day (Conn.) 36.

4. Interest Computed from Time of Demand or Institution of Suit. — *U. S. Bank v. Magill*, 1 Paine (U. S.) 661; *Vaughan v. Goode*, Minor (Ala.) 17; *State v. Wayman*, 2 Gill & J. (Md.) 280; *Harris v. Clap*, 1 Miss. 303, 2 Am. Dec. 27; *Warner v. Thurlow*, 15 Mass. 154; *Steinbock v. Evans*, 122 N. Y. 551.

5. No Time for Payment of Principal Fixed — England. — *Farquhar v. Morris*, 7 T. R. 120. *Arkansas.* — *Causin v. Taylor*, 4 Ark. 408.

Illinois. — *Packer v. Roberts*, 40 Ill. App. 613. *Kentucky.* — *Francis v. Castleman*, 4 Bibb (Ky.) 282.

Minnesota. — *Horn v. Hansen*, 56 Minn. 43. *New York.* — *Clark v. Lake Ave. Permanent Sav., etc., Assoc.*, 65 Hun (N. Y.) 625; *Purdy v. Phillips*, 11 N. Y. 406; *Gaylord v. Van Loan*, 15 Wend. (N. Y.) 308.

Tennessee. — *Collier v. Gray*, 1 Overt. (Tenn.) 110.

Virginia. — *Kent v. Kent*, 28 Gratt. (Va.) 840; *McVeigh v. Howard*, 87 Va. 599.

Wisconsin. — *Husbrook v. Wilder*, 1 Pin. (Wis.) 643.

An Accepted Draft in which no time for payment is stated bears interest from the date of its delivery. *Clark v. Lake Ave. Permanent Sav., etc., Assoc.*, 65 Hun (N. Y.) 625, 20 N. Y. Supp. 363.

6. Contracts to Pay on Condition. — *Folma v. Carlisle*, 117 Ala. 449; *Wilhite v. Roberts*, 4 Dana (Ky.) 172; *Hodges v. Holeman*, 2 Dana (Ky.) 306.

7. Debts Payable on Demand — Conflict of Authority. — *Pullen v. Chase*, 4 Ark. 210. And see *Darling v. Wooster*, 9 Ohio St. 517.

8. Interest from Date — United States. — *Pate v. Gray*, *Hempst.* (U. S.) 155.

Arkansas. — *Pullen v. Chase*, 4 Ark. 210; *Causin v. Taylor*, 4 Ark. 409; *Ringo v. Biscoe*, 13 Ark. 580.

Illinois. — *Packer v. Roberts*, 40 Ill. App. 613.

Maine. — *Paine v. Caswell*, 68 Me. 80, 28 Am. Rep. 21; *Colby v. Bunker*, 68 Me. 524.

Virginia. — *Omohundro v. Omohundro*, 21 Gratt. (Va.) 631.

Canada. — *Dechantal v. Pominville*, 6 L. C. Jur. 88; *Baxter v. Robinson*, 2 Rev. Lég. 439.

9. Interest from Demand — England. — *In re Herefordshire Banking Co.*, L. R. 4 Eq. 250.

Alabama. — *Vaughan v. Goode*, Minor (Ala.) 417; *Macey v. Knight*, 18 Ala. 300; *Hunter v. Wood*, 54 Ala. 71.

Indiana. — *Goodwin v. Hazzard*, 1 Ind. 514. *Kentucky.* — *Dillon v. Dudley*, 1 A. K. Marsh.

Where Demand in Fact Necessary to Default. — Where, however, the circumstances show that a demand was in fact contemplated by the parties, or where a demand is necessary to put the defendant in default, interest can, of course, be computed only from demand made.¹

(b) **Implied Contracts** — *aa. GENERAL RULE.* — With reference to the date from which interest is computed there is no distinction between implied and express contracts for money. That is, where the law, by fiction or implication, creates a contract to pay a certain sum at a time fixed upon, interest is properly to be computed from such date upon a breach of the implied contract.²

bb. DEBTS ADMITTED TO BE DUE. — Where a contract operates as an admission of an existing debt for a good consideration, the law implies a promise to pay it; and if there is no time specified for the payment thereof, the law makes it payable immediately, and interest may be computed from the date at which the debt is admitted to be due.³

cc. IMPLICATION TO PAY ON DEMAND. — There are many instances in which it is proper to compute interest from demand made for the payment of the principal and only from such time, where the undertaking to pay on demand is only implied, or where a demand is necessary to put the debtor in default.⁴

(Ky.) 66; *Gore v. Buck*, 1 T. B. Mon. (Ky.) 209; *Bartlett v. Marshall*, 2 Bibb (Ky.) 467; *Patrick v. Clay*, 4 Bibb (Ky.) 246; *Nelson v. Cartmel*, 6 Dana (Ky.) 7. Compare *Whitton v. Swope*, 1 Litt. (Ky.) 160.

Michigan. — *Matter of King*, 94 Mich. 411.
New York. — *Bishop v. Sniffen*, 1 Daly (N. Y.) 155; *Sanford v. Crocheron*, (Supm. Ct. Gen. T.) 8 Civ. Pro. (N. Y.) 146. But in *Gaylord v. Van Loan*, 15 Wend. (N. Y.) 308, it was said that a promissory note in which no time of payment is fixed is, in the judgment of the law, payable on demand, and draws interest from its date.

New Jersey. — *Scudder v. Morris*, 3 N. J. L. 13.

Pennsylvania. — *Rayne v. Guthrie*, Add. (Pa.) 137.

South Carolina. — *Cannon v. Beggs*, 1 McCord L. (S. Car.) 370, 10 Am. Dec. 677; *Schmidt v. Limehouse*, 2 Bailey L. (S. Car.) 276.

And see *Dodge v. Perkins*, 9 Pick. (Mass.) 368; *Hunt v. Nevers*, 15 Pick. (Mass.) 500, 26 Am. Dec. 616.

Note Payable "When Wanted." — It has been held that a note stipulating for the payment of the principal "when wanted" does not draw interest until after a demand. *Goodwin v. Hazzard*, 1 Ind. 514.

Duebill for Money Loaned. — A duebill payable on demand bears interest only from demand made and not from the date, unless so expressed, although specified to be for the loan of money made on the day of the date. *Schmidt v. Limehouse*, 2 Bailey L. (S. Car.) 277. See also *Hunter v. Wood*, 54 Ala. 71.

1. Where Demand in Fact Necessary. — *Butler v. Austin*, 64 Cal. 3; *Ordway v. Colcord*, 14 Allen (Mass.) 59; *Irlbacker v. Roth*, 25 N. Y. App. Div. 290; *Gleason v. Briggs*, 28 Vt. 135.

Value Received — Money Lent. — It has been intimated that while a note due on demand for "value received" will not bear interest from date, but only from demand made, the rule might be different if the instrument recited an indebtedness for "money lent," the former phrase, it was held, not being equivalent to the latter. *Rayne v. Guthrie*, Add. (Pa.) 137.

2. Implied Contracts. — *Hazzard v. Duke*, 64 Ind. 220; *Dodge v. Perkins*, 9 Pick. (Mass.) 381.

3. Debts Admitted to Be Due. — *Edgmon v. Ashelby*, 76 Ill. 161; *Corcoran v. Lehigh*, etc., Coal Co., 138 Ill. 390, reversed on another point 138 Ill. 390; *Chester v. Jumel*, 125 N. Y. 237; *McVeigh v. Howard*, 87 Va. 599. See also *Purdy v. Phillips*, 11 N. Y. 406. Compare *Gay v. Rooke*, 151 Mass. 115, 21 Am. St. Rep. 434.

4. Implication to Pay on Demand — England. — *Murray v. East India Co.*, 5 B. & Ald. 204, 7 E. C. L. 66.

United States. — *Spaulding v. Mason*, 161 U. S. 375.

California. — *Turner v. Reynolds*, 81 Cal. 214; *Anderson v. Pacific Bank*, 112 Cal. 598, 53 Am. St. Rep. 228; *Barrere v. Somps*, 113 Cal. 97; *Buttner v. Smith*, (Cal. 1894) 36 Pac. Rep. 652.

Florida. — *Milton v. Blackshear*, 8 Fla. 161.

Georgia. — *Frink v. Southern Express Co.*, 82 Ga. 33; *Phillips v. O'Neal*, 85 Ga. 142.

Kentucky. — *Sharp v. Pike*, 5 B. Mon. (Ky.) 155.

Massachusetts. — *Parker v. Thompson*, 3 Pick. (Mass.) 429.

New York. — *Wilson v. Troy*, 60 Hun (N. Y.) 183; *Graham v. Chrystal*, 2 Keyes (N. Y.) 21.

Ohio. — *Citizens' Nat. Bank v. Brown*, 45 Ohio St. 39, 4 Am. St. Rep. 526.

South Carolina. — *Newman v. Wilbourn*, 1 Hill Eq. (S. Car.) 10.

Wisconsin. — *Farr v. Semple*, 81 Wis. 230.

Money Paid by Mistake. — Where money has been paid and received by common mistake, and no fraud can be imputed to either party, interest will not be allowed except from the time when the mistake was discovered and demand for repayment made. *Manufacturers' Nat. Bank v. Perry*, 144 Mass. 313; *Gould v. Emerson*, 160 Mass. 438, 39 Am. St. Rep. 501; *Ashhurst v. Field*, 28 N. J. Eq. 315; *Jacobs v. Adams*, 1 Dall. (Pa.) 52; *King v. Diehl*, 9 S. & R. (Pa.) 409; *Simons v. Walter*, 1 McCord L. (S. Car.) 67; *Craufurd v. Smith*, 93 Va. 623.

Goods Sold. — If no time for payment of the price of goods sold is fixed, interest thereon may be recovered from the date of demand.

(o) **Under Special Statutes.** — In some jurisdictions statutory provision has been made for the time from which interest is to be calculated on particular contracts or obligations.¹

(3) **Interest from Institution of Suit.** — In many cases of contracts express or implied to pay money it has been held that interest is recoverable only from the institution of the suit.² These cases, in the main, are such as involve unliquidated amounts, or cases in which the time for the payment of the principal has not been fixed, or both; or, in other words, cases where a demand is necessary to set interest running, and the institution of the suit operates as a demand.

Milton v. Blackshear, 8 Fla. 161; *McIlvaine v. Wilkins*, 12 N. H. 474; *Livermore v. Rand*, 26 N. H. 95; *Beers v. Reynolds*, 11 N. Y. 97.

Work Done. — In an action for work done at an agreed price, where no time is fixed for payment, interest is to be computed from the date of demand. *Rishton v. Grissell*, L. R. 10 Eq. 393; *Gammell v. Skinner*, 2 Gall. (U. S.) 45; *Amees v. Wilson*, 22 Me. 116; *Barnard v. Bartholomew*, 22 Pick. (Mass.) 291; *Pierce v. Charter Oak L. Ins. Co.*, 138 Mass. 151; *Ruckman v. Bergholz*, 37 N. J. L. 437; *Chase v. Union Stone Co.*, 11 Daly (N. Y.) 107; *Robbins v. Carll*, 93 N. Y. 656.

It has been held that where services are rendered, but there is no specific contract for the amount to be paid therefor, nor as to the time when the payment shall be made, interest is recoverable on the amount demanded from the date of demand. *Adams v. Ft. Plain Bank*, 36 N. Y. 255; *Hand v. Church*, 39 Hun (N. Y.) 303; *Mygatt v. Wilcox*, 45 N. Y. 306; 6 Am. Rep. 90; *Gray v. Van Amringe*, 2 W. & S. (Pa.) 128.

1. **Statutory Provisions**—*Colorado*.—*Bergundthal v. Bailey*, 15 Colo. 257.

Iowa.—*Issett v. Oglevie*, 9 Iowa 313.

Minnesota.—*Owsley v. Greenwood*, 18 Minn. 429.

Mississippi.—*Thompson v. Matthews*, 56 Miss. 368.

Nebraska.—*Garneau v. Omaha Printing Co.*, 52 Neb. 383. And see *Devereaux v. Henry*, 16 Neb. 55; *Weston v. Brown*, 30 Neb. 609; *Staker v. Begole*, 34 Neb. 107.

Oregon.—*Pengra v. Wheeler*, 24 Oregon 532.

Texas.—*Ft. Worth, etc., R. Co. v. White*, (Tex. App. 1889) 14 S. W. Rep. 1063; *Mills v. Haas*, (Tex. Civ. App. 1894) 27 S. W. 263.

Statutory Provision as to Vexatious Delay. — Where interest is warranted on account of vexatious delay, it is to be allowed from the time when payment was due, and not merely from the date on which the delay became vexatious. *Chicago v. Tebbetts*, 104 U. S. 120.

Statute Regulating Debt of Municipal Corporation. — A debt due to a contractor by the city bears interest as against the latter only from the date of the adjudication of the invalidity of an assessment primarily liable therefor, under a statute providing that the city shall be liable to the contractor only in case an assessment levied on property owners to pay the debt should be declared by the courts to be invalid. *Gafney v. San Francisco*, 72 Cal. 146.

The Price Which a City Agrees to Pay for Municipal Improvement becomes due, in the absence of an agreement to the contrary, on the acceptance of the work. *Murphy v. Omaha*, 33 Neb. 402.

In a Suit by the Creditors of an Insolvent Corporation to subject the stockholders therein to a special statutory liability in excess of the value of their stock, it was held that interest should be allowed from the date of the confirmation of the report of the referee under a code provision (now Civ. Code Ala. 1896, § 2627) that all contracts, express or implied, for the payment of money shall bear interest from the date when such money should have been paid. *National Commercial Bank v. McDonnell*, 92 Ala. 387.

2. **Interest from Institution of Suit**—*United States*.—*The Isaac Newton, Abb. Adm.* 588; *U. S. Bank v. Magill*, 1 Paine (U. S.) 661; *Whitaker v. Pope*, 2 Woods (U. S.) 463; *Gammell v. Skinner*, 2 Gall. (U. S.) 45; *Goddard v. Foster*, 17 Wall. (U. S.) 123; *U. S. v. Poulson*, 30 Fed. Rep. 231; *Nashua, etc., R. Corp. v. Boston, etc., R. Corp.*, 61 Fed. Rep. 237, 21 U. S. App. 50; *Kittell v. Augusta, etc., R. Co.*, 84 Fed. Rep. 386, 55 U. S. App. 366; *U. S. v. Curtis*, 100 U. S. 119.

California.—*Pacific Mut. L. Ins. Co. v. Fisher*, 106 Cal. 221; *McFadden v. Crawford*, 39 Cal. 662; *Lane v. Turner*, 114 Cal. 396.

Florida.—*Milton v. Blackshear*, 8 Fla. 161.

Georgia.—*Phillips v. O'Neal*, 85 Ga. 142; *Frink v. Southern Express Co.*, 82 Ga. 33.

Iowa.—*Hubenthal v. Kennedy*, 76 Iowa 707; *Hall v. Farmers', etc., Sav. Bank*, 55 Iowa 612; *Swails v. Cissna*, 61 Iowa 693; *Hubenthal v. Kennedy*, 76 Iowa 707.

Kentucky.—*Leisman v. Otto*, 1 Bush (Ky.) 225; *Sharp v. Pike*, 5 B. Mon. (Ky.) 155; *Henderson v. Haldeman*, (Ky. 1890) 14 S. W. Rep. 957.

Louisiana.—*Yeatman v. Broadwell*, 1 La. Ann. 424; *Porter v. Barrow*, 3 La. Ann. 140; *Holmes v. Barclay*, 4 La. Ann. 63; *Smith v. Conrad*, 15 La. Ann. 579; *Blymer Ice Mach. Co. v. McDonald*, 48 La. Ann. 439.

Massachusetts.—*Barstow v. Robinson*, 2 Allen (Mass.) 605; *Stimpson v. Green*, 13 Allen (Mass.) 326; *Palmer v. Stockwell*, 9 Gray (Mass.) 237; *Hunt v. Nevers*, 15 Pick. (Mass.) 500, 26 Am. Dec. 616; *Gay v. Rooke*, 151 Mass. 115, 21 Am. St. Rep. 434; *Quin v. Bay State Distilling Co.*, 171 Mass. 283; *Freeman v. Freeman*, 142 Mass. 98.

New York.—*Hand v. Church*, 39 Hun (N. Y.) 303; *McCollum v. Seward*, 62 N. Y. 316; *Mercer v. Vose*, 67 N. Y. 56; *Rawson v. Graw*, 4 E. D. Smith (N. Y.) 18.

Vermont.—*Houghton v. Ilagar*, Brayt. (Vt.) 133.

Washington.—*Edison General Electric Co. v. Canadian Pac. Nav. Co.*, 8 Wash. 370, 40 Am. St. Rep. 910.

Wisconsin.—*Gammon v. Abrams*, 53 Wis.

Institution of Suit as Setting Interest Running When Demand Would Not. — Some cases hold that the institution of a suit will operate to liquidate a claim so as to warrant a recovery of interest subsequently accruing when a mere demand *in pais* would not have such effect,¹ but in other cases this is denied, and interest is allowed only from the ascertainment of the amount by verdict or judgment.²

(4) *Contracts to Do Something Other than to Pay Money.* — Where the contract in suit was not to pay money, but to do some collateral thing, it has been held that interest might be recovered from the date of the breach.³ In some such cases, however, courts have held that interest was recoverable only from the institution of the suit,⁴ while in other cases the running of interest has been deferred until after the liquidation of the demand by verdict or judgment.⁵

b. FOR TORT — (1) *In General.* — Interest as part of the compensation in an action for damages for tort is, as a rule, allowed from the commission of the tort.⁶

Thus, Where Money Has Been Converted by the Defendant, interest should, in general, be computed from the date of the conversion.⁷

323; *Allen v. Murray*, 87 Wis. 41; *Tucker v. Grover*, 60 Wis. 240; *Hewitt v. John Week Lumber Co.*, 77 Wis. 548.

Canada. — *Heaviside v. Munn*, 3 Rev. Lég. 390; *Macdougall v. Montreal Warehousing Co.*, 3 Montreal Leg. N. 64; *Buckley v. Brunelle*, 21 L. C. Jur. 133.

Where in an Action for Work Done at an agreed price there has been no demand previous to the institution of the action, interest on the price agreed upon is recoverable from the latter date. *Gammell v. Skinner*, 2 Gall. (U. S.) 45; *Moore v. Patten*, 2 Port. (Ala.) 451; *McFadden v. Crawford*, 39 Cal. 662; *Swails v. Cissna*, 61 Iowa 693; *Feeter v. Heath*, 11 Wend. (N. Y.) 477; *McCullum v. Seward*, 62 N. Y. 316; *Case v. Osborn*, (Supm. Ct. Gen. T.) 60 How. Pr. (N. Y.) 187.

Waiver of Tort and Suit in Assumpsit. — Where a defendant converts personality and sells it, but the owner thereof waives the tort and proceeds in assumpsit for money had and received, interest is not recoverable from the date of the conversion or from the receipt of the proceeds of the property, but only from the date of the institution of the suit. *Dougherty v. Chapman*, 29 Mo. App. 233. See also *Finlay v. Bryson*, 84 Mo. 670.

Interest on Value of Property Fraudulently Converted. — In an action by a creditor to recover the value of property fraudulently transferred by a debtor, interest is recoverable, not from the date of the transfer to the time of the trial, but only from the time of levy or other proceeding by the creditor to establish a lien. *Bresnahan v. Nugent*, 97 Mich. 359.

In Massachusetts it seems to have been announced as a general rule that where a debt is not payable at an earlier time, interest upon the amount found due is to be allowed from the date of the writ. *Quin v. Bay State Distilling Co.*, 171 Mass. 283, citing *Dodge v. Perkins*, 9 Pick. (Mass.) 369; *Foote v. Blanchard*, 6 Allen (Mass.) 221, 83 Am. Dec. 624.

Where Damages Are Awarded for Breach of Contract, and no interest is included in the several amounts allowed to the plaintiff, although interest was asked for by the conclusion of the declaration, and it appears from the evidence that these amounts are really the minimum

estimate of the damages suffered, as they existed at the date of the institution of the action, the plaintiff is entitled to interest from the date of service in the action on the total amount awarded to him by the judgment; and where such interest is not awarded by the court below, the omission will be rectified on appeal. *Montreal Gas Co. v. Vasey*, 8 Quebec Q. B. 412.

1. *Barrow v. Reab*, 9 How. (U. S.) 366; *Holmes v. Barclay*, 4 La. Ann. 63; *Blymer Ice Mach. Co. v. McDonald*, 48 La. Ann. 439; *Porter v. Barrow*, 3 La. Ann. 140; *Freeman v. Freeman*, 142 Mass. 98; *Allen v. Murray*, 87 Wis. 41; *Tucker v. Grover*, 60 Wis. 240; *Hewitt v. John Weeks Lumber Co.*, 77 Wis. 548.

2. *The Isaac Newton, Abb. Adm.* 588; *Cox v. McLaughlin*, 76 Cal. 60, 9 Am. St. Rep. 164; *Day v. New York Cent. R. Co.*, 22 Hun (N. Y.) 412; *White v. Miller*, 78 N. Y. 393, 34 Am. Rep. 544; *Hand v. Church*, 39 Hun (N. Y.) 303; *McMaster v. State*, 108 N. Y. 542; *Shipman v. State*, 44 Wis. 458. And see *Hooper v. Patterson*, (Cal. 1893) 32 Pac. Rep. 514.

3. **Contracts to Deliver Property.** — *Bickell v. Colton*, 41 Miss. 368; *Dox v. Dey*, 3 Wend. (N. Y.) 356; *Calvit v. McFadden*, 13 Tex. 324; *Houston, etc., R. Co. v. Jackson*, 62 Tex. 212; *Enders v. Board of Public Works*, 1 Gratt. (Va.) 364; *Merryman v. Criddle*, 4 Munf. (Va.) 542.

Contract to Deliver Property on Demand. — For breach of a contract to deliver property on demand, interest is recoverable on the value thereof from the time of demand. *McKenney v. Haines*, 63 Me. 74; *Pinkerton v. Manchester, etc., R. Co.*, 42 N. H. 424.

Property to Be Delivered on Demand to Be Distinguished from Debt Due on Demand. — *Pullen v. Chase*, 4 Ark. 210.

4. *Allen v. Murray*, 87 Wis. 41.

5. *Day v. New York Cent. R. Co.*, 22 Hun (N. Y.) 412.

6. **Interest as Damages for Tort — Allowance from Accrual of Right of Action.** — *Wilson v. Troy*, 60 Hun (N. Y.) 183.

7. **Conversion of Money — England.** — *London Chartered Bank v. White*, 4 App. Cas. 413.

Illinois. — *Cassady v. School Trustees*, 105 Ill. 560.

And Where the Conversion Is of Property Other than Money the same rule as to the computation of interest will apply.¹

Where Money Has Been Fraudulently or Wrongfully Obtained interest may, in general, be computed from the date when it was so obtained.²

(2) *Injuries to Property* — (a) *Interest from Date of Injuries*. — It is obvious that where only the value of property injured or destroyed at the time of the commission of the tort is given in an action for damages therefor, interest as part of the compensation to which the injured party is entitled should be computed from the date of the loss.³

(b) *Interest from Institution of Suit*. — But in some instances, interest in such cases has been given only from the date of the institution of the action.⁴

(c) *Interest from Judgment*. — The doctrine of some cases, however, is that interest on an unliquidated demand for damages to property should be allowed only from the date of the judgment which liquidates the debt.⁵

X. TO WHAT TIME COMPUTED — 1. *Interest by Contract*. — If it is provided by the contract, or if an implication arises from its terms, that interest shall be computed up to a given time or that no interest shall be computed after such time, the recovery of interest will be governed accordingly.⁶

Massachusetts. — *Hill v. Hunt*, 9 Gray (Mass.) 66; *Dunlap v. Watson*, 124 Mass. 305.

Mississippi. — *Tarpley v. Wilson*, 33 Miss. 467.

New York. — *People v. Gasherie*, 9 Johns. (N. Y.) 71, 6 Am. Dec. 263; *Greenly v. Hopkins*, 10 Wend. (N. Y.) 96; *Griggs v. Griggs*, 56 N. Y. 504.

Pennsylvania. — *Com. v. Crevor*, 3 Binn. (Pa.) 121.

See also the title **TROVER AND CONVERSION**.

Conversion of Note Including Interest. — Where interest for the first year is included in a note wrongfully taken from a decedent's estate, interest from maturity only should be included in a decree for its conversion, and not interest from the date of the note. *Weaver v. Williams*, 75 Miss. 945.

Misappropriation of Funds — Presumption as to Time of Conversion. — In an action against a clerk for the misappropriation of funds, if the defendant does not show when the misappropriation occurred it will be presumed to have been when the money was received, and interest will be allowed from that time. *Presson v. Boone*, 108 N. Car. 78. See also *State v. Allen*, 5 Ired. L. (27 N. Car.) 37.

1. **Conversion of Property Other than Money**. — *Robbins v. Laswell*, 58 Ill. 203; *Andrews v. Clark*, 72 Md. 396; *Arpin v. Burch*, 68 Wis. 619. See also the title **TROVER AND CONVERSION**.

2. **Money Fraudulently Obtained — Alabama**. — *Wright v. Wright*, 37 Ala. 420.

Georgia. — *Anderson v. State*, 2 Ga. 370.

Massachusetts. — *Hill v. Hunt*, 9 Gray (Mass.) 66; *Dodge v. Perkins*, 9 Pick. (Mass.) 381; *Wood v. Robbins*, 11 Mass. 504, 6 Am. Dec. 182; *Atlantic Nat. Bank v. Harris*, 118 Mass. 147; *Manufacturers' Nat. Bank v. Perry*, 144 Mass. 313.

Missouri. — *Arthur v. Wheeler*, etc., Mfg. Co., 12 Mo. App. 335.

North Carolina. — *State v. Allen*, 5 Ired. L. (27 N. Car.) 37; *Silver Valley Min. Co. v. Baltimore Gold*, etc., Min. Co., 99 N. Car. 445; *Presson v. Boone*, 108 N. Car. 78.

South Carolina. — *Fowl v. Todd*, 1 Bay (S. Car.) 176.

An Agent Who Receives Money of His Principal under an agreement to invest it forthwith, but who fraudulently converts it to his own use, is liable for interest from the time of the receipt. *Hill v. Hunt*, 9 Gray (Mass.) 66.

Where Money Has Been Wrongfully Taken from the Person of a Decedent, it has been held that interest should be allowed from the time of the death. *Weaver v. Williams*, 75 Miss. 945.

3. **Interest from Date of Injuries — Alabama**. — *Fail v. Presley*, 50 Ala. 342; *Alabama G. S. R. Co. v. McAlpine*, 75 Ala. 113.

Georgia. — *Collier v. Lyons*, 18 Ga. 648.

Illinois. — *Chicago*, etc., R. Co. v. *Shultz*, 55 Ill. 421.

Massachusetts. — *Frazer v. Bigelow Carpet Co.*, 141 Mass. 126.

Minnesota. — *Varco v. Chicago*, etc., R. Co., 30 Minn. 18.

Nebraska. — *Fremont*, etc., R. Co. v. *Marley*, 25 Neb. 138, 13 Am. St. Rep. 482.

New York. — *Hodge v. New York Cent.*, etc., R. Co., 27 Hun (N. Y.) 394; *Wilson v. Troy*, 135 N. Y. 103, 31 Am. St. Rep. 817.

Ohio. — *Baltimore*, etc., R. Co. v. *Schultz*, 43 Ohio St. 275, 54 Am. Rep. 805.

Texas. — *Galveston*, etc., R. Co. v. *Johnson*, (Tex. 1892) 19 S. W. Rep. 867.

4. **Interest from Institution of Action — Illinois**. — *Chicago*, etc., R. Co. v. *Shultz*, 55 Ill. 421; *Toledo*, etc., R. Co. v. *Johnston*, 74 Ill. 83.

Indiana. — *Wabash R. Co. v. Williamson*, 3 Ind. App. 190.

Michigan. — *Lucas v. Wattles*, 49 Mich. 380.

New York. — *Greer v. New York*, 3 Robt. (N. Y.) 406.

Utah. — *Woodland v. Union Pacific R. Co.*, (Utah 1891) 26 Pac. Rep. 298.

Wisconsin. — *Chapman v. Chicago*, etc., R. Co., 26 Wis. 295, 7 Am. Rep. 81; *Dean v. Chicago*, etc., R. Co., 43 Wis. 305.

5. **Interest from Date of Judgment**. — *Wright v. Abbott*, 6 La. Ann. 569.

6. **Period of Computation Fixed by Contract**. — *Cairnes v. Lambert*, Jr. R. 7 C. L. 564; *Matter of Newcomb*, 98 Iowa 175; *Morse v. Ellerbe*, 4 Rich. L. (S. Car.) 600; *Heavyside v. Munn*, 3 Rev. Lég. 390, 2 Rev. Lég. 439.

2. Interest as Damages. — Interest as damages, whether as liquidated by the parties, where the contract provides for interest after breach, or merely as damages by a fixed legal measure for breach of contract, or as part of the compensation in tort, is generally computed to the rendition of the judgment in the action.¹ Then the contract or liability for tort becomes merged in the judgment, and thereafter the accrual of interest is regulated by doctrines fully discussed elsewhere.²

XI. RATE OF INTEREST — 1. Generally. — The rate of interest recoverable is largely a matter of statutory regulation, and in some states has been made the subject of special constitutional provisions.³

2. Rate by Contract — a. EXPRESS CONTRACTS FOR RATE — (1) In General. — It is clear that a rate of interest expressly contracted for, not in excess of the rate allowed by law, is recoverable,⁴ and it has been said that in the absence of statutory provision any rate contracted for, however exorbitant, is recoverable, provided it is not stipulated for as a penalty.⁵

(2) Contracts Increasing Rate — (a) In General. — Where a debt is past due, indulgence to the debtor in the matter of payment is a sufficient consideration to support a contract for an increased rate of interest,⁶ and it has been held

1. Interest as Damages — Computation to Rendition of Judgment. — *Alabama* G. S. R. Co. v. McAlpine, etc., Co., 75 Ala. 113; *Chafin v. Rich*, 92 Cal. 471; *Lamprey v. Mason*, 148 Mass. 231; *Thorn v. Smith*, 71 Wis. 18.

Interest to Date of Levy of Execution. — Interest on a judgment satisfied by an execution upon property should be computed only to the day when the levy was made and the property taken, and not to the time of the subsequent completion of the levy. *Brown v. Lunt*, 37 Me. 423.

In Sheriff's Sales interest is allowed on liens only to the day of the sale, the property being then taken from the defendant and the lien in contemplation of the law discharged. *Siter's Appeal*, 26 Pa. St. 178. See also *Potter v. Langstrath*, 151 Pa. St. 216; *Allen v. Oxnard*, 152 Pa. St. 621; *Meals's Estate*, 13 Phila. (Pa.) 558, 35 Leg. Int. (Pa.) 368.

A Mortgage Creditor of a Decedent whose estate is solvent, it has been held, and whose land has been sold by order of the Orphans' Court for the payment of debts, may recover interest on his accompanying bond after the confirmation of such sale and until the date of payment. But it would be otherwise if the estate were insolvent. *Yeatman's Appeal*, 102 Pa. St. 297.

Where Property Sold Insufficient to Pay Debts. — It has been said that in *Maryland*, according to the usual course of the Court of Chancery, where the proceeds of property the sale of which is ordered for the payment of debts are insufficient to pay all the creditors, the interest on the various claims should be calculated only up to the date of sale. *Strike v. McDonald*, 2 Har. & G. (Md.) 199.

2. See the title JUDGMENTS AND DECREES.

In Rendering Judgment on Money Demands it is usual to compute interest on the principal up to the date of the judgment and to give judgment for the aggregate, which latter sum will bear interest or not, as the case may be, under the law regulating interest on judgments. *Stanton v. Woodcock*, 19 Ind. 273.

3. Rate of Interest Regulated by Statute. — See the various local codes and statutes.

A statute forbidding a loan corporation to

charge more than the "legal rate" of interest does not restrict it to the legal rate of the state in which it was incorporated, but it may lend money in other states and receive interest at the rates prevailing by law in such states. *U. S. Mortgage Co. v. Sperry*, 138 U. S. 313.

The Constitution of Virginia declares that "upon debts hereafter contracted it shall be lawful to receive any rate of interest, not exceeding twelve per centum per annum, which may be agreed upon by the parties and be specified in the bond, note, or other writing evidencing the debt. When there is no such agreement the rate of interest shall be six per centum per annum for use and forbearance of every hundred dollars." *Cecil v. Hicks*, 29 Gratt (Va.) 1, 26 Am. Rep. 391.

4. Right to Contract for Rate of Interest. — *Trippe v. Wynne*, 76 Ga. 200. And see *Cloud v. Rivord*, 6 Wash. 555.

Where the Charter of a State Depository for Court Moneys provides for the payment of a stipulated rate of interest on the money so held, an agreement for a lower rate with the parties to a suit is invalid. The power to change the rate, it was held, is vested solely in the court, and when the order with reference to the deposit is silent in this respect the charter rate of the depository will apply. *National Bank v. Hankinson*, 33 Fed. Rep. 561.

5. Rate Not Limited in Absence of Statute. — *Buckingham v. Orr*, 6 Colo. 587; *Young v. Fluke*, 15 U. C. C. P. 360; *Howland v. Jennings*, 11 U. C. C. P. 272; *Montgomery v. Boucher*, 14 U. C. C. P. 45.

6. Contract Increasing Rate — Georgia. — *Taylor v. Thomas*, 61 Ga. 472.

Michigan. — *Burchard v. Frazer*, 23 Mich. 240; *Spear v. Hadden*, 31 Mich. 265; *Smith v. Graham*, 34 Mich. 302; *Havens v. Jones*, 45 Mich. 253.

New York. — *Ritter v. Phillips*, 53 N. Y. 586; *Kelley v. Phenix Nat. Bank*, 17 N. Y. App. Div. 406.

Ohio. — *Mueller v. McGregor*, 28 Ohio St. 265.

South Carolina. — *Harrell v. Parrott*, 50 S. Car. 16.

Wisconsin. — *Bassett v. McDonel*, 13 Wis. 444.

also that future indulgence will support a contract for an increased rate of interest to be computed from a date already past.¹

Such a Contract Must Be in Writing in some jurisdictions, if the increase goes beyond a certain rate.²

(b) **Debts Secured by Mortgage.** — Where the debt is secured by a mortgage on lands, some question has been made as to the effect of an undertaking by the mortgagor to pay an increased rate of interest, as enlarging the lien of the mortgage, both as against the mortgagor and against purchasers from him of the property mortgaged.³

(c) **Stipulation for Higher Rate After Maturity** — *aa. IN GENERAL.* — There is much conflict among the cases as to the precise effect of a stipulation for a higher rate of interest after the maturity of the principal and a default in the payment thereof; but most of the authorities turn, one way or another, upon the question whether a provision of this character is a mere liquidation by the parties of the damages upon a breach of the contract or is to be regarded as a penalty for the breach thereof.⁴

bb. DOCTRINE THAT HIGHER RATE RECOVERABLE — (*aa*) *In General.* — By the weight of authority a stipulation for a higher rate of interest after maturity is valid and enforceable, provided the increased rate which it is sought to recover does not exceed the highest rate allowed by law;⁵ and in the absence of a statute limiting the rate which may be contracted for, or where the rate provided for after maturity is not unlawful, a stipulation for a higher rate after maturity will

1. Stipulation for Increased Rate of Interest from Date Anterior to Agreement. — *Harrill v. Parrott*, 50 S. Car. 16. See also *Taylor v. Thomas*, 61 Ga. 472; *Burchard v. Frazer*, 23 Mich. 240; *Sanders v. Bagwell*, 32 S. Car. 238, 37 S. Car. 145; *Sloan v. Latimer*, 41 S. Car. 217; *Utey v. Cavender*, 31 S. Car. 282.

2. Necessity of Writing. — *Swift v. Barber*, 28 Mich. 503.

3. Mortgage Debts. — *Burchard v. Frazer*, 23 Mich. 240; *Spear v. Hadden*, 31 Mich. 267; *Smith v. Graham*, 34 Mich. 302; *Havens v. Jones*, 45 Mich. 253; *Bassett v. McDonel*, 13 Wis. 444. And see generally the title MORTGAGES.

4. See the title LIQUIDATED DAMAGES.

Whether the sum named as interest in an agreement to secure performance is to be treated as liquidated damages or as a penalty depends on the intention of the parties. *Reeves v. Stipp*, 91 Ill. 609.

Question as Affected by Phraseology of Contract. — It has been held that where a contract for the payment of money provides for a certain rate of interest, but also stipulates that if the payor shall discharge the obligation at maturity the obligee will accept a lower rate of interest than stated, the contract will be enforceable according to its terms. *Powis v. Maynard*, 3 Ark. 519; *Waller v. Long*, 6 Munf. (Va.) 71. See also *Seton v. Slide*, 7 Ves. Jr. 273; *Brown v. Barkham*, 1 P. Wms. 652; *Brockway v. Clark*, 6 Ohio 45; *Longworth v. Askren*, 15 Ohio St. 370.

Rule Restricting Rate to Reasonable Compensation. — It has been held that the stipulation of the parties as to the rate of interest after maturity may be accepted as the measure of damages, provided they adhere to what may be reasonably sufficient to compensate the loss arising from the breach of contract. Such a stipulation may be regarded as a penalty for

the nonpayment of the principal sum, if the rate so agreed on is greatly in excess of the real value of the money. *Browne v. Sieck*, 2 Colo. 70. Compare *Buckingham v. Orr*, 6 Colo. 537.

5. Stipulation for Higher Rate Held Valid — *United States*. — *Scottish-American Mortg. Co. v. Wilson*, 24 Fed. Rep. 310.

California. — *Finger v. McCaughey*, 114 Cal. 64.

Indiana. — *Wernwag v. Mothershead*, 3 Blackf. (Ind.) 401.

Iowa. — *Palmer v. Leffler*, 18 Iowa 125; *Wilkerson v. Daniels*, 1 Greene (Iowa) 180. But see *Conrad v. Gibbon*, 29 Iowa 120.

Kansas. — *Sheldon v. Pruessner*, 52 Kan. 579.

Maine. — *Capen v. Crowell*, 66 Me. 282.

Montana. — *Davis v. Hendrie*, 1 Mont. 499.

Nebraska. — *Havemeyer v. Paul*, 45 Neb. 373; *Omaha L. & T. Co. v. Hanson*, 46 Neb. 870; *Hallam v. Telleren*, 55 Neb. 255; *Crapo v. Hefner*, 53 Neb. 251; *Home F. Ins. Co. v. Fitch*, 52 Neb. 88. But see the earlier cases of *Weyrich v. Hobelman*, 14 Neb. 432; *Richardson v. Campbell*, 34 Neb. 181, 33 Am. St. Rep. 633.

North Carolina. — *Pass v. Shine*, 113 N. Car. 284.

Washington. — *Haywood v. Miller*, 14 Wash. 660.

Rate After Declared Maturity. — It has been held that where a promissory note bearing ten per cent. per annum interest before maturity provides that it shall bear interest at the rate of four per cent. per month after maturity, such contract for an increased rate of interest applies to the definite time set for the payment of the note, and not to the declared maturity arising by reason of a default in the payment of any instalment of interest. *Cloud v. Rivord*, 6 Wash. 555.

generally be considered as a liquidation of the damages rather than as a penalty for a breach.¹

Stipulation for Interest as Such or as Damages. — Some cases, however, have maintained that a statute limiting the rate which may be contracted for as interest does not restrict the rate which may be stipulated for as damages.²

(bb) *Waiver of Higher Rate by Acceptance of Lower.* — It has been held that where a debtor contracts to pay a higher rate of interest after the maturity of the principal debt if default is made in the payment thereof, the acceptance of the lower rate may be evidence of a contract to waive the higher.³

cc. **DOCTRINE THAT HIGHER RATE NOT RECOVERABLE.** — It is held in some cases that a provision for a higher rate of interest after the maturity and nonpayment of the principal debt imposes a penalty for default and is therefore not enforceable, or will be relieved against in equity.⁴

dd. **INTEREST FROM DATE IF NOT PAID AT MATURITY.** — Some cases hold that a contract providing that if the debt is not paid at maturity it shall thereafter bear interest at an increased rate imposes a penalty, and should not be enforced,⁵ while other decisions maintain a contrary view.⁶

1. Stipulation for Increased Rate Liquidation of Damages — England. — *Herbert v. Salisbury*, etc., R. Co., L. R. 2 Eq. 221.

Arkansas. — *Miller v. Kempner*, 32 Ark. 573.

California. — *Thompson v. Gerner*, 104 Cal. 168, 43 Am. St. Rep. 81; *Finger v. McCaughey*, 114 Cal. 64.

Iowa. — *Wilkerson v. Daniels*, 1 *Greene* (Iowa) 180; *Palmer v. Leffler*, 18 *Iowa* 125.

Montana. — *Davis v. Hendrie*, 1 *Mont.* 499.

Nebraska. — *Havemeyer v. Paul*, 45 *Neb.* 373.

Washington. — *Wortman v. Vorhies*, 14 *Wash.* 152.

2. Stipulation for Interest as Damages — Illinois. — *Smith v. Whitaker*, 23 *Ill.* 309; *Gould v. Bishop Hill Colony*, 35 *Ill.* 324; *Davis v. Rider*, 53 *Ill.* 416; *Witherow v. Briggs*, 67 *Ill.* 96; *Bane v. Gridley*, 67 *Ill.* 385; *Walker v. Abt*, 83 *Ill.* 226; *Funk v. Buck*, 91 *Ill.* 575; *Downey v. Beach*, 78 *Ill.* 53.

Canada. — *Young v. Fluke*, 15 *U. C. C. P.* 360. And see *Howland v. Jennings*, 11 *U. C. C. P.* 272; *Montgomery v. Boucher*, 14 *U. C. C. P.* 45.

The Illinois Statute now provides that a contract for a greater rate of interest than the law permits, though after maturity and in order to insure the prompt payment of the debt, is not enforceable. *Barton v. Farmers, etc.*, Nat. Bank, 122 *Ill.* 352. And see *Starr & Curt. Annot. Stat. Ill.* (1896). c. 74, par. 6.

3. Waiver of Higher Rate by Acceptance of Lower. — *Thompson v. Gerner*, 104 *Cal.* 168, 43 *Am. St. Rep.* 81; *Bradford v. Hoiles*, 66 *Ill.* 517; *Funk v. Buck*, 91 *Ill.* 575.

4. Stipulation for Higher Rate Held Invalid. — *Powis v. Maynard*, 3 *Atk.* 519; *Conrad v. Gibson*, 29 *Iowa* 120; *Goer v. Carter*, 3 *Iowa* 244, 66 *Am. Dec.* 71; *Daniels v. Ward*, 4 *Minn.* 168; *Waller v. Long*, 6 *Munf. (Va.)* 71. And see *Shuck v. Wight*, 1 *Greene* (Iowa) 128.

Rule of Minnesota Cases. — In *Mason v. Callender*, 2 *Minn.* 350, 72 *Am. Dec.* 102, which was an action on a note stipulating for three per cent. per month interest until maturity, and thereafter in case of default five per cent. per month, it was held that the increased rate after maturity was in the nature of a penalty and not recoverable, but that damages computed according to the contract rate before maturity, and not the legal rate, might be given.

In *Talcott v. Marston*, 3 *Minn.* 339, where notes stipulated for interest at five per cent. per month after maturity, it was held that the proper measure of recovery in all these notes was interest at seven per cent., the legal rate. See also *Kent v. Bown*, 3 *Minn.* 347; *Daniels v. Ward*, 4 *Minn.* 168.

Newell v. Houlton, 22 *Minn.* 19, was decided after the enactment of a statute providing that interest should be at the rate of seven per cent. per annum unless a different rate was contracted for in writing, and all contracts should bear the same rate after due as before if it clearly appeared that such was the intention of the parties. The effect of this statute was held to be to restore the doctrine of *Mason v. Callender*, 2 *Minn.* 350, 72 *Am. Dec.* 102, "modified in one particular — that is, that the parties should express in the contract their intention that the rate reserved before due should be the rate after due, or the measure of damages on a breach." And see *Holbrook v. Sims*, 39 *Minn.* 122.

5. Doctrine that Provision for Increased Interest Imposes Penalty — Alabama. — *Dinsmore v. Hand*, *Minor* (Ala.) 126; *Fugua v. Carriel*, *Minor* (Ala.) 170, 12 *Am. Dec.* 46; *Henry v. Thompson*, *Minor* (Ala.) 209; *Boddie v. Ely*, 3 *Stew. (Ala.)* 182.

Nebraska. — *Upton v. O'Donahue*, 32 *Neb.* 566; *Hallam v. Telleren*, 55 *Neb.* 255.

North Carolina. — *Gales v. Buchanan*, 2 *Murph.* (6 *N. Car.*) 145.

Virginia. — *Waller v. Long*, 6 *Munf. (Va.)* 71.

Washington. — *Knutz v. Robbins*, 12 *Wash.* 7, 50 *Am. St. Rep.* 871.

And see *Scottish-American Mortg. Co. v. Wilson*, 24 *Fed. Rep.* 310.

Doctrine as Affected by Phraseology of Contract.

— It has been held that a note stipulating for the payment of interest from date, but containing a provision that if the principal is promptly paid the payee will remit the interest, draws interest from date according to its terms if the condition upon which the interest is to be deducted is not complied with. *Ely v. Wither- spoon*, 2 *Ala.* 131.

6. Contrary Doctrine — Arkansas. — *Portis v. Merrill*, 33 *Ark.* 416.

Indiana. — *Hackenberry v. Shaw*, 11 *Ind.*

(3) *Contracts Reducing Rate.* — An agreement between the parties reducing the rate of interest payable on a loan is enforceable if supported by a legal consideration and not lacking in other essentials to a valid contract.¹

Reduction by Parol. — Some cases have held that the rate of interest borne by a written contract cannot be reduced by parol,² while on the other hand it has been held that such an agreement is valid only when it is founded on a valuable consideration.³

b. IMPLIED CONTRACTS FOR RATE — (1) *In General.* — In the absence of conflict with a statute requiring that contracts for interest above a prescribed rate shall be in writing,⁴ a contract to pay a particular rate of interest may well arise by implication from the usage of trade, the conduct of the parties, etc.⁵ A mere change, however, in the form of the security for a debt for money loaned will not operate to change the rate of interest to be paid from that reserved in the original contract.⁶

(2) *Contract for Interest Without Expressing Rate.* — Where there is a stipulation for interest, but the rate is not specified, the law will presume that the legal rate was intended.⁷

392; *Brown v. Maulsby*, 17 Ind. 10; *Bailey v. McClure*, 73 Ind. 275; *Gully v. Remy*, 1 Blackf. (Ind.) 69; *Horne v. Hunt*, 1 Blackf. (Ind.) 213.

Iowa. — *Horn v. Nash*, 1 Iowa 204, 63 Am. Dec. 437; *Fisher v. Anderson*, 25 Iowa 28, 95 Am. Dec. 761; *Parvin v. Hoopes*, 1 Morr. (Iowa) 294. And see *Wight v. Shuck*, 1 Morr. (Iowa) 425.

Kansas. — *Young v. Thompson*, 2 Kan. 83.

Louisiana. — *Lalande v. Breaux*, 5 La. Ann. 505.

Massachusetts. — *Daggett v. Pratt*, 15 Mass. 177.

Ohio. — *Bowler v. Houston*, 8 West. L. J. 506, 1 Ohio Dec. (Reprint) 389.

South Carolina. — *Satterwhite v. M'Kie*, Harp. L. (S. Car.) 397.

Increased Rate from Date if Not Paid at Maturity. — A provision in a note for interest at the rate of ten per cent. per annum, provided the note is paid when due, but if not then paid the interest to be at an increased rate from the date of the note, is a valid and enforceable contract for interest and not a provision for a penalty. *Finger v. McCaughey*, 114 Cal. 64.

Doctrine that Defendant's Default Must Be Strictly Proved. — Where a note is made payable at a future period with interest from date if not punctually paid, such interest is in the nature of a penalty for not punctually performing the principal obligation, and the default of the debtor must be strictly proved to recover the additional interest. *Glover v. Doty*, 1 Rob. (La.) 130.

1. Contracts Reducing Rate of Interest. — *Tousey v. Moore*, 79 Mich. 564; *Vereycken v. Vandenberg*, 102 Mich. 119.

Agreement to Waive All Interest. — An agreement on the part of the payee of a promissory note past due to waive all interest thereon on the receipt of new notes evidencing the same debt is valid and enforceable as based upon a good and sufficient consideration. *Roberts v. Carter*, 31 Ill. App. 142.

2. Rule that Reduction Cannot Be by Parol Contract. — *Harris v. Creveling*, 80 Mich. 249; *Tousey v. Moore*, 79 Mich. 564.

3. Necessity of Consideration. — *Dudley v. Reynolds*, 1 Kan. 285.

A written agreement by the payee of a promissory note to take a lower rate of in-

terest on a specified date will be presumed to have been founded on a valid consideration and will be held binding, unless such presumption is rebutted or the contract is shown to be invalid for other reasons. *Warren v. Johnson*, 38 Kan. 768. See generally the title CONSIDERATION, vol. 6, p. 667.

4. Rate of Interest Prescribed by Statute Unless Fixed by Written Contract — *California.* — *Hill v. Eldred*, 49 Cal. 399.

Florida. — *Myrick v. Battle*, 5 Fla. 345.

Georgia. — *Wofford v. Wyly*, 72 Ga. 863.

Illinois. — *Ford v. Hixon*, 49 Ill. 142; *Turner v. Dawson*, 50 Ill. 85; *Cooper v. McNeill*, 14 Ill. App. 408.

Iowa. — *Rice v. Hulbert*, 67 Iowa 724.

New York. — *Association, etc. v. Eagleson*, (N. Y. Super. Ct. Spec. T.) 60 How. Pr. (N. Y.) 11. See also the various local statutes.

5. Rate of Interest Fixed by Custom or Usage. — *Auzerais v. Naglee*, 74 Cal. 60; *Willard v. Mellor*, 19 Colo. 534; *Curtis v. Sheldon*, 91 Mich. 390; *Carson v. Alexander*, 34 Miss. 528.

Rate Fixed by Conduct of Parties. — *Crockett v. Mitchell*, 88 Ga. 166 (extension of time on interest-bearing debt); *Carson v. Alexander*, 34 Miss. 528 (receiving account rendered without objecting to rate of interest charged); *Gilmer's Estate*, 158 Pa. St. 186 (accepting payments of interest without objecting to rate).

Assumption of Interest-bearing Debt. — Where the vendee of land agreed as part of the purchase price to discharge a debt of the vendor with interest thereon, he is chargeable as between himself and the vendor with the rate of interest which such debt bears. *Pennington v. Pennington*, 138 Ind. 8.

Note to Bank as Payee — Charter Rate. — In case of a note executed to a bank as payee, payable without interest in the absence of default at maturity, it will be inferred that the contract was made with reference to the bank's charter, and the rate of interest fixed therein will govern. *Consolidated Assoc. Bank v. Foucher*, 9 La. 476.

6. Rate of Interest Not Changed by Mere Change in Form of Security. — *Union Mut. L. Ins. Co. v. Slee*, 110 Ill. 35.

7. Contract for Interest Without Expressing Rate — *United States.* — *Scotland County v. Hill*, 132 U. S. 107.

Where Terms Meaningless or Intelligible. — Where the terms of a note which stipulates for interest are meaningless or unintelligible as to the rate, the legal rate may be given.¹

Ambiguity. — Similarly it has been held that more than legal interest is not recoverable on a contract the terms of which are so ambiguous that it cannot be said with reasonable certainty that more than the legal rate was intended.²

3. Rate as Damages — *a.* **GENERAL RULE — LEGAL RATE.** — Where there is no contract for interest, and interest is given as damages strictly, the general rule is that the legal rate is recoverable.³

Alabama. — *Moore v. Patton*, 2 Port. (Ala.) 451; *Clay v. Drake*, Minor (Ala.) 164.

California. — *Fisher v. Dennis*, 6 Cal. 577, 65 Am. Dec. 534.

Colorado. — *Neuman v. Dreifurst*, 9 Colo. 228; *Salazar v. Taylor*, 18 Colo. 538.

Illinois. — *Prevo v. Lathrop*, 2 Ill. 305; *Convey v. Sheldon*, 1 Ill. App. 555.

Indiana. — *Burns v. Anderson*, 68 Ind. 202, 34 Am. Rep. 250; *Godfrey v. Craycraft*, 81 Ind. 476; *Gale v. Corey*, 112 Ind. 39.

Iowa. — *De Wolfe v. Taylor*, 71 Iowa 650.

Kansas. — *Guthrie v. Merrill*, 4 Kan. 187; *Everett v. Dilley*, 39 Kan. 73.

Maine. — *Eaton v. Boissonnault*, 67 Me. 540, 24 Am. Rep. 52; *Paine v. Caswell*, 68 Me. 80, 28 Am. Rep. 21.

New Jersey. — *Bowne v. Ritter*, 26 N. J. Eq. 456; *Jersey City v. O'Callaghan*, 41 N. J. L. 349.

New York. — *O'Brien v. Young*, 95 N. Y. 428, 47 Am. Rep. 64; *Hewett v. Chadwick*, 8 N. Y. App. Div. 23.

North Carolina. — *Trimble v. Hunter*, 104 N. Car. 129.

South Carolina. — *Sanders v. Bagwell*, 37 S. Car. 145; *Loan, etc., Bank v. Miller*, 39 S. Car. 175.

Texas. — *Daniel v. Henry*, 30 Tex. 26; *Mills v. Haas*, (Tex. Civ. App. 1894) 27 S. W. Rep. 263.

Washington. — *Hazard v. Maxon*, 1 Wash. Ter. 584.

Bonds Authorized under Particular Statute. — Where a statute provided that certain bonds should "bear interest at the rate of eight per centum per annum from the date thereof," it was held that such provision formed a part of the contract, it being wholly immaterial whether such bonds had or had not the rate of interest specified on their face. *Nebbett v. Cunningham*, 27 Miss. 292. And see *McCracken v. Hayward*, 2 How. (U. S.) 613; *Ogden v. Saunders*, 12 Wheat. (U. S.) 297.

1. Meaningless and Unintelligible Terms. — *Salazar v. Taylor*, 18 Colo. 538, in which case the note sued on stipulated for interest "at the rate of one and one-quarter," without more to indicate the rate.

2. Ambiguity. — *Hazard v. Maxon*, 1 Wash. Ter. 584.

3. Rate of Interest as Damages — *United States.* — *Fauntleroy v. Hannibal*, 5 Dill. (U. S.) 219.

California. — *Smith v. Johnson*, 23 Cal. 63; *White v. Lyons*, 42 Cal. 279; *Randall v. Duff*, 107 Cal. 33.

Colorado. — *Neuman v. Dreifurst*, 9 Colo. 228.

Illinois. — *Ford v. Hixon*, 49 Ill. 142; *Edgmon v. Ashelby*, 76 Ill. 161; *Firemen's Fund*

Ins. Co. v. Western Refrigerating Co., 162 Ill. 322; *Cooper v. McNeill*, 14 Ill. App. 408; *Place v. Dodge*, 54 Ill. App. 167.

Indiana. — *Godfrey v. Craycraft*, 81 Ind. 476.

Iowa. — *Munson v. Plummer*, 59 Iowa 136.

Kentucky. — *Elliott v. Gibson*, 10 B. Mon. (Ky.) 438.

Louisiana. — *Stephens v. Beard*, 17 La. Ann. 145; *Buckley v. Seymour*, 30 La. Ann. 1341.

Massachusetts. — *Clark v. Child*, 136 Mass. 344.

Minnesota. — *Sanborn v. Webster*, 2 Minn. 323; *Mason v. Callender*, 2 Minn. 350, 72 Am. Dec. 102; *Thoreson v. Minneapolis Harvester Works*, 29 Minn. 341.

Mississippi. — *Nebbett v. Cunningham*, 27 Miss. 292; *Tarpley v. Wilson*, 33 Miss. 467; *Weaver v. Williams*, 75 Miss. 945.

Nebraska. — *Bell v. Arndt*, 24 Neb. 261.

New Jersey. — *Wilson v. Cobb*, 31 N. J. Eq. 91; *Jersey City v. O'Callaghan*, 41 N. J. L. 349.

New Mexico. — *Romero v. Desmarais*, 4 N. Mex. 367; *Romero v. Lopez*, (N. Mex. 1889) 21 Pac. Rep. 679.

New York. — *Brainard v. Jones*, 18 N. Y. 35; *Hamilton v. Van Rensselaer*, 43 N. Y. 244; *Ritter v. Phillips*, 53 N. Y. 586; *Salter v. Utica, etc., R. Co.*, 86 N. Y. 401; *Meadville First Nat. Bank v. New York Fourth Nat. Bank*, 89 N. Y. 412; *Reese v. Rutherford*, 90 N. Y. 644; *Sanders v. Lake Shore, etc., R. Co.*, 94 N. Y. 641; *O'Brien v. Young*, 95 N. Y. 428, 47 Am. Rep. 64; *Ferris v. Hard*, 135 N. Y. 354; *Govin v. de Miranda*, 140 N. Y. 474; *Hewett v. Chadwick*, 8 N. Y. App. Div. 23; *Kelley v. Phenix Nat. Bank*, 17 N. Y. App. Div. 496; *Jermain v. Lake Shore, etc., R. Co.*, 31 Hun (N. Y.) 558; *Bullock v. Boyd*, Hoffm. (N. Y.) 294; *Bell v. New York*, 10 Paige (N. Y.) 49.

Texas. — *Houston, etc., R. Co. v. Jackson*, 62 Tex. 209; *Gulf, etc., R. Co. v. Humphries*, 4 Tex. Civ. App. 333; *Rio Grande R. Co. v. Cross*, 5 Tex. Civ. App. 454; *Worsham v. Vignal*, 5 Tex. Civ. App. 471; *Gulf, etc., R. Co. v. Gray*, (Tex. Civ. App. 1894) 24 S. W. Rep. 921.

Utah. — *Perry v. Taylor*, 1 Utah 63.

Wisconsin. — *Wegner v. Second Ward Sav. Bank*, 76 Wis. 242; *State v. Guenther*, 87 Wis. 673.

Canada. — *St. John v. Rykert*, 10 Can. Sup. Ct. 278; *People's Loan, etc., Co. v. Grant*, 18 Can. Sup. Ct. 262; *Hogan v. Clancy*, 15 Quebec 53. And see *Arpin v. Lamoureux*, 7 Rev. Lég. 196; *Montchamps v. Perrais*, 24 L. C. Jur. 231, 3 Montreal Leg. N. 339.

A Surety Who Discharges a Note of His Principal bearing interest at the rate of three per cent. per month is not entitled in an action against the principal to recover damages at

b. EXCEPTIONS TO GENERAL RULE. — Where there is a contract to invest money at a specified rate of interest which exceeds the legal rate, or where there has been fraud or a breach of trust, and the delinquent party has actually made more than the legal rate of interest on the other's money, a higher rate than the legal rate will be allowed.¹

c. WHERE NO LEGAL RATE EXISTS. — It has been held that if there is no statute for interest, damages for delay in the payment of money due in lieu of interest may be given by the jury in its discretion under proper proof.²

4. Rate After Maturity — a. IN GENERAL. — There is considerable conflict of authority as to the rate of interest recoverable after maturity where the contract, though stipulating for interest and specifying a rate, makes no provision for interest after default in the payment of the principal sum when due.³

b. RULE OF INTENT OF PARTIES — (1) Generally. — As a matter of course, where the intent of the parties as to the rate after maturity is expressed in the contract, such rate, if not illegal, will in general control.⁴

the rate of interest which the note bears, but can recover only at the legal rate in the absence of contract. *Smith v. Johnson*, 23 Cal. 63.

In an Action for Damages for Deceit against a person assuming authority as agent to sell land, the only damages recoverable on account of the plaintiff's holding idle the money which he had procured to purchase the land is the legal interest thereon, although the securities which the plaintiff converted into the money for the purpose of making the purchase bore a greater interest. *Place v. Dodge*, 54 Ill. App. 167.

Breach of Warranty. — In an action by the vendee to recover damages for breach of warranty in the sale of a chattel, interest is recoverable as damages at the legal rate only, though the notes for the purchase price bear a higher rate. *Thoreson v. Minneapolis Harvester Works*, 29 Minn. 341. And see *Minneapolis Harvester Works v. Bonnallie*, 29 Minn. 373.

Liquidated Accounts bear interest at the legal rate. *Ross v. Smith*, 113 Ind. 242; *Henderson Cotton Mfg. Co. v. Lowell Mach. Shops*, 86 Ky. 676.

Rule under Bills of Exchange Act. — By sections 57 and 88 of the English Bills of Exchange Act, 1882, the interest accruing due after the date of maturity of a promissory note is recoverable by statute as liquidated damages, and is to be calculated at the rate of six per cent. per annum, in the absence of a contract for a different rate. *London, etc., Bank v. Clancarty*, (1892) 1 Q. B. 689; *Lawrence v. Willcocks*, (1892) 1 Q. B. 696.

1. Allowance Exceeding Legal Rate — Contract to Invest Money. — Attorneys who received money under a contract to invest it at ten per cent. interest, but, failing to invest it all, used a part of the balance themselves, have been held properly chargeable with interest at ten per cent. on the amount so used and seven per cent. on the amount not invested or used. *Rogers v. Priest*, 74 Wis. 538.

Fraud or Breach of Trust by Agent. — *Munson v. Plummer*, 59 Iowa 136.

2. Davis v. Greely, 1 Cal. 422; *Perry v. Taylor*, 1 Utah 63.

If There Is No Legal Standard of Damages to control in an action for the breach of a contract to pay money, the damages should be ascertained in a similar manner to that by

which damages in analogous cases are determined — by proof of the market value of money. *Mason v. Callender*, 2 Minn. 350, 72 Am. Dec. 102.

3. Rate After Maturity — Conflict of Authority Noticed. — *Jefferson County v. Lewis*, 20 Fla. 980, in which case it was said that the preponderance of opinion is in favor of the doctrine that the stipulated rate attends the contract until it is satisfied or merged in judgment. See also *Cecil v. Hicks*, 29 Gratt. (Va.) 1, 26 Am. Rep. 391.

Question of Local Law. — The rule as to the rate of interest after maturity on a contract making no provision for interest after due, has been held to be always one of local law. *Holden v. Freedman's Sav., etc., Co.*, 100 U. S. 72.

Where No Statutory Rate. — Where there is no statutory rate, it has been held that a note bearing two per cent. per month would not necessarily warrant a recovery of interest as damages at the contract rate after maturity, the damages, by way of interest or otherwise, being for the jury under the evidence. *Perry v. Taylor*, 1 Utah 63.

4. Rule of Intent of Parties — England. — *Ex p. Fewings*, 25 Ch. D. 338.

United States. — *Brewster v. Wakefield*, 22 How. (U. S.) 118; *Scottish-American Mortg. Co. v. Wilson*, 24 Fed. Rep. 310.

Arkansas. — *Badgett v. Jordan*, 32 Ark. 154; *Vaughan v. Kennan*, 38 Ark. 114; *Casteel v. Walker*, 40 Ark. 117, 48 Am. Rep. 5.

Connecticut. — *Seymour v. Continental L. Ins. Co.*, 44 Conn. 300, 26 Am. Rep. 469.

District of Columbia. — *Lockwood v. Lindsey*, 6 App. Cas. (D. C.) 396.

Illinois. — *Latham v. Darling*, 2 Ill. 203; *Reeves v. Stipp*, 91 Ill. 609.

Kansas. — *Dudley v. Reynolds*, 1 Kan. 285; *Small v. Douthitt*, 1 Kan. 335; *Young v. Thompson*, 2 Kan. 83.

Kentucky. — *Crosthwait v. Misener*, 13 Bush (Ky.) 543.

Maine. — *Capen v. Crowell*, 66 Me. 282; *Eaton v. Boissonnault*, 67 Me. 540, 24 Am. Rep. 52; *Paine v. Caswell*, 68 Me. 80, 28 Am. Rep. 21; *Augusta Nat. Bank v. Hewins*, 90 Me. 255.

Massachusetts. — *Daggett v. Pratt*, 15 Mass. 177; *Lamprey v. Mason*, 148 Mass. 231.

Minnesota. — *Lash v. Lambert*, 15 Minn. Volume XVI.

Implication from Terms of Contract. — Though it is not expressly provided in the instrument whether the contract rate or the legal rate of interest shall prevail after the maturity of the principal debt, yet if the intent of the parties in this respect is fairly inferable from the terms of the contract, or may be arrived at by a legitimate construction thereof, the contract will in general be enforced accordingly.¹

416, 2 Am. Rep. 142; *Holbrook v. Sims*, 39 Minn. 122.

Missouri. — *North v. Walker*, 66 Mo. 454; *Broadway Sav. Bank v. Forbes*, 79 Mo. 226.

Nebraska. — *Kellogg v. Lavender*, 15 Neb. 256, 48 Am. Rep. 339; *Hager v. Blake*, 16 Neb. 12; *Bond v. Dolby*, 17 Neb. 491.

New York. — *Taylor v. Wing*, 84 N. Y. 471; *O'Brien v. Young*, 95 N. Y. 428, 47 Am. Rep. 64.

Rhode Island. — *Pearce v. Hennessy*, 10 R. I. 223; *Lanahan v. Ward*, 10 R. I. 299.

South Carolina. — *Sharpe v. Lee*, 14 S. Car. 341; *Mobley v. Davega*, 16 S. Car. 73, 42 Am. Rep. 632; *Maner v. Wilson*, 16 S. Car. 470; *Miller v. Hall*, 18 S. Car. 141; *Bowen v. Barksdale*, 33 S. Car. 142; *Smith v. Smith*, 33 S. Car. 210.

Wisconsin. — *Spaulding v. Lord*, 19 Wis. 533.

Contract for Rate Named until Principal Paid.

— When the contract provides that interest shall be at a specified rate until the principal shall be paid, then the contract rate governs until the payment of the principal, or until the contract is merged in a judgment. *Taylor v. Wing*, 84 N. Y. 471; *O'Brien v. Young*, 95 N. Y. 428, 47 Am. Rep. 64; *Lanahan v. Ward*, 10 R. I. 299.

A Promissory Note which stipulates in terms for the rate of interest stated therein from date until paid will draw interest at the agreed rate after as well as before maturity. *Crosthwait v. Misener*, 13 Bush (Ky.) 543; *Augusta Nat. Bank v. Hewins*, 90 Me. 255; *Lamprey v. Mason*, 148 Mass. 231; *Holbrook v. Sims*, 39 Minn. 122; *Bond v. Dolby*, 17 Neb. 491.

Where a Party Who Had Assumed the Payment of Certain Bonds making no provision for interest after maturity notified the holders thereof that if they would not insist on prompt payment at maturity the rate of interest specified in the bonds as payable before maturity would continue to be paid thereafter, it was held that such rate was recoverable after maturity where the holders forbore to press payment on the faith of such representation. *Kelley v. Phenix Nat. Bank*, 17 N. Y. App. Div. 496.

Extension of Note at Reduced Rate — Expiration of Period of Extension. — Where a note expressly provided for ten per cent. interest after maturity, but the time of payment was extended by agreement for a certain time at a lower rate, it was held that after the expiration of the time of extension the note would bear interest at the rate of ten per cent. *North v. Walker*, 66 Mo. 453.

Contract for Rate Named until Principal Payable. — A contract for the payment of money at a stipulated rate of interest until the time when the principal sum will be payable bears the legal rate only after maturity. *Spaulding v. Lord*, 19 Wis. 533.

1. Implication from Terms of Contract — Arkansas. — *Vaughan v. Kennan*, 38 Ark. 114. See also *Casteel v. Walker*, 40 Ark. 121, 48 Am. Rep. 5.

Georgia. — *Crockett v. Mitchell*, 88 Ga. 166.

Maine. — *Paine v. Caswell*, 68 Me. 80, 25 Am. Rep. 21.

New York. — *Wilcox v. Van Voorhis*, 58 Hun (N. Y.) 575.

South Carolina. — *Langston v. South Carolina R. Co.*, 2 S. Car. 248; *Mobley v. Davega*, 16 S. Car. 73, 42 Am. Rep. 632; *Miller v. Hall*, 18 S. Car. 141; *Miller v. Edwards*, 18 S. Car. 600; *Westfield v. Westfield*, 19 S. Car. 85; *Smith v. Smith*, 33 S. Car. 210.

Short-time Loans with Provision for Annual Interest. — Where a contract for the payment of money provides for the payment of the principal debt within a year or less than two years, but also stipulates for the payment of interest annually, such stipulation will be taken to indicate an intent that the principal sum is not to be paid when due, but that it is to continue unpaid with an annual payment of interest. *Mobley v. Davega*, 16 S. Car. 73, 42 Am. Rep. 632. See also *Vaughan v. Kennan*, 38 Ark. 116.

So, too, where a mortgage to a savings bank is made payable in one year, providing for interest on the first day of January and July of each year, the rate stipulated for therein, though higher than the legal rate, will continue until the debt is paid or merged in a judgment. *Wilcox v. Van Voorhis*, 58 Hun (N. Y.) 575.

Where No Time for Payment of Principal Set. —

Where a note bore interest at a rate higher than the legal rate in the absence of contract, but no time for payment was stipulated, it was held that the contract rate was recoverable until paid. *Paine v. Caswell*, 68 Me. 80, 28 Am. Rep. 21; *O'Brien v. Young*, 95 N. Y. 428, 47 Am. Rep. 64.

Construction of Particular Agreement. — In *State Bank v. Stickney*, 5 Ill. 4, it appeared that the plaintiffs were indebted to the defendant bank by notes bearing interest at the rate of eight per cent. and secured by a mortgage on a stock of merchandise, and that the bank was authorized, if it should deem such course necessary for its security before the maturity of the notes, to take possession of the property mortgaged, sell it, and apply the proceeds in payment of the notes; the bank being expressly authorized to sell the property "for twelve months' paper." The bank, pursuant to such mortgage and agreement, took possession of the property and sold it, taking notes payable in twelve months, with interest after six months at the rate of six per cent. per annum. It was held that in settling with the plaintiffs the bank was entitled to interest on the latter's notes bearing eight per cent. per annum, up to the maturity of the notes taken for the purchase price of the property sold, the bank, however, accounting for the sales notes with interest at the rate of six per cent. per annum for the six months preceding their maturity, as provided.

(2) *Demand and One-day Notes.* — Where a note due on demand bears a rate of interest which is lawful, but higher than the legal rate in the absence of contract, it will, in general, bear the contract rate until paid;¹ because, since such a note is due immediately, it is not to be supposed that the parties intended the contract rate to be paid only until maturity.²

Where a Note Is Due One Day After Date, and the rate of interest stipulated for is higher than the rate prescribed by law in the absence of contract, it is generally held that there may be a recovery of the conventional rate until payment of the principal sum or merger of the contract into judgment.³

c. WHERE CONTRACT RATE HIGHER THAN LEGAL RATE — (1) *Legal Rate After Maturity.* — Where there is no contract for interest after maturity by which the parties have liquidated their damages, it is generally held that only the legal rate should be computed after the principal sum is due, though a rate not unlawful but higher than the legal rate in the absence of contract is provided for until maturity.⁴ If the creditor desires and the parties intend

Doctrine that Only Legal Interest Recoverable After Maturity though Higher Rate Expressly Contracted For. — Where a mortgage of real estate provided for payment of the principal money secured on or before a fixed date "with interest thereon at the rate of ten per cent. per annum until such principal money and interest shall be fully paid and satisfied," it was held, *affirming* the judgment of the Court of Appeals for Ontario (*Grant v. People's Loan, etc., Co.*, 17 Ont. App. 85), that the mortgage carried interest at the rate of ten per cent. to the time fixed for payment of the principal only, and after that date the mortgagees could recover no more than the statutory rate of six per cent. on the unpaid principal. *Peoples Loan, etc., Co. v. Grant*, 18 Can. Sup. Ct. 262, *following* *St. John v. Rykert*, 10 Can. Sup. Ct. 278.

1. **Note Due on Demand.** — *Casteel v. Walker*, 40 Ark. 117, 48 Am. Rep. 5; *Seymour v. Continental L. Ins. Co.*, 44 Conn. 300, 26 Am. Rep. 469; *Paine v. Caswell*, 68 Me. 80, 28 Am. Rep. 21; *Colby v. Bunker*, 68 Me. 524.

2. **Rationale of Rule.** — *Paine v. Caswell*, 68 Me. 80, 28 Am. Rep. 21.

Rule Not Varied by Particular Statute. — The rule prevails notwithstanding a statute which provides that "any negotiable promissory note payable on demand which remains unpaid four months from its date shall be considered as overdue and dishonored." *Seymour v. Continental L. Ins. Co.*, 44 Conn. 300, 26 Am. Rep. 469.

3. **Notes Payable One Day After Date.** — *Casteel v. Walker*, 40 Ark. 117, 48 Am. Rep. 5; *Gray v. Briscoe*, 6 Bush (Ky.) 687; *Piester v. Piester*, 22 S. Car. 140, 53 Am. Rep. 711.

There is no substantial difference in the matter of interest between a note payable one day after date with annual interest and a note payable on demand with interest at the designated rate or a duebill with like interest. *Casteel v. Walker*, 40 Ark. 117, 48 Am. Rep. 5. See also *Fenley v. Kendall*, (Ky. 1892) 18 S. W. Rep. 637; *White v. Curd*, 86 Ky. 191.

Stipulation that Interest Should Be Paid Annually. — A note payable one day after date "with interest from date at the rate of twelve per cent. per annum, interest to be paid annually," bears twelve per cent. interest after maturity as well as before. *Sharpe v. Lee*, 14 S. Car. 341.

Interest at Monthly Rate. — A note payable one day after date "with interest at the rate of two per cent. per month" carries the stipulated rate of interest after as well as before maturity. *Piester v. Piester*, 22 S. Car. 140, 53 Am. Rep. 711.

Qualification of Rule. — In *Smith v. Smith*, 33 S. Car. 210, where a promissory note dated February 6, 1874, was payable one day after date and with interest at the rate of one per cent. per month from January 1, 1874, it was held that only the legal rate of interest was recoverable after the maturity of the note, because the instrument in terms bore interest at the contract rate for more than a month before its maturity, thereby enabling the court to place the above construction on it and still give full effect to the terms of the contract.

4. **Legal Rate After Maturity — England.** — *Ward v. Morrison, C. & M.* 368, 41 E. C. L. 204; *Financial Corp. v. Jervis*, 17 L. T. N. S. 324; *Cook v. Fowler, L. R.* 7 H. L. 27; *Royal Canadian Bank v. Shaw*, 21 U. C. C. 455. But see the English cases cited *infra*, this division of this section, *Contract Rate After Maturity*.

Canada. — *St. John v. Rykert*, 10 Can. Sup. Ct. 278; *Peoples Loan, etc., Co. v. Grant*, 18 Can. Sup. Ct. 262; *Delaney v. Canadian Pac. R. Co.*, 21 Ont. 11; *Dalby v. Humphrey*, 37 U. C. Q. B. 514.

United States. — *Holden v. Freedman's Sav., etc., Co.*, 100 U. S. 72; *Ewell v. Daggs*, 108 U. S. 143; *Nash v. El Dorado County*, 24 Fed. Rep. 252; *Sherwood v. Moore*, 35 Fed. Rep. 109; *Brewster v. Wakefield*, 22 How. (U. S.) 118; *Burnhisel v. Firman*, 22 Wall. (U. S.) 170.

Alabama. — *Ellis v. Bibb*, 2 Stew. (Ala.) 63.

Arkansas. — *Newton v. Kennerly*, 31 Ark. 626, 25 Am. Rep. 592; *Pettigrew v. Summers*, 32 Ark. 571; *Woodruff v. Wetb.*, 32 Ark. 612; *Gardner v. Barnett*, 36 Ark. 476; *Vaughan v. Kennan*, 38 Ark. 116; *Casteel v. Walker*, 40 Ark. 117, 48 Am. Rep. 5; *Rogers v. Yarnell*, 51 Ark. 198; *Johnson v. Meyer*, 54 Ark. 437.

California. — *Falkner v. Hendy*, 80 Cal. 636; *Malone v. Roy*, 107 Cal. 518. But see the California cases cited *infra*, this division of this section, *Contract Rate After Maturity*.

Connecticut. — *Suffield First Ecclesiastical Soc. v. Loomis*, 42 Conn. 570; *Seymour v. Continental L. Ins. Co.*, 44 Conn. 300, 26 Am. Rep.

that the contract rate shall continue after the maturity of the debt, it would, it has been said, be quite easy to include such a stipulation in the contract.¹

(2) *Contract Rate After Maturity.* — In a number of jurisdictions, however, the rule is well established that where the parties have agreed upon a rate of interest not unlawful, but higher than that provided by law in the absence of contract, the contract rate will prevail after the maturity of the contract, though no reference is made therein to interest after the principal amount is due.²

469. In the case first cited the rule was adopted of assessing damages for the retention of money by the defendant beyond the contract time at the statute rate of interest. See also *Fisher v. Bidwell*, 27 Conn. 363; *Beckwith v. Hartford, etc., R. Co.*, 29 Conn. 268, 76 Am. Dec. 599; *Adams v. Way*, 33 Conn. 419; *Hubbard v. Callahan*, 42 Conn. 524, 19 Am. Rep. 564.

Kansas. — *Robinson v. Kinney*, 2 Kan. 184; *Robinson v. Jordan*, 2 Kan. 192; *Searle v. Adams*, 3 Kan. 515, 89 Am. Dec. 598.

Kentucky. — *Rushing v. Sebree*, 12 Bush (Ky.) 198; *Lucking v. Gegg*, 12 Bush (Ky.) 293; *Rilling v. Thompson*, 12 Bush (Ky.) 310; *White v. Curd* 86 Ky. 191.

Maine. — *Eaton v. Boissonnault*, 67 Me. 540, 24 Am. Rep. 52; *Duran v. Ayer*, 67 Me. 145. And see *Paine v. Caswell*, 68 Me. 80, 28 Am. Rep. 21.

Minnesota. — *Talcott v. Marston*, 3 Minn. 339; *Kent v. Bown*, 3 Minn. 347; *Daniels v. Bartley*, 4 Minn. 158; *Daniels v. Ward*, 4 Minn. 168; *Hollinshead v. Von Glahn*, 4 Minn. 193; *Chapin v. Murphy*, 5 Minn. 474; *Lash v. Lambert*, 15 Minn. 416, 2 Am. Rep. 142; *Moreland v. Lawrence*, 23 Minn. 84. Compare *Mason v. Callender*, 2 Minn. 350, 72 Am. Dec. 192.

New York. — *Bennett v. Bates*, 94 N. Y. 354; *Ferris v. Hard*, 135 N. Y. 351; *In re Bartenbach*, 11 Nat. Bank. Reg. 61. And see *O'Brien v. Young*, 95 N. Y. 428, 47 Am. Rep. 61; *Macomber v. Dunham*, 8 Wend. (N. Y.) 550. Compare, however, *Genet v. Kissam*, 53 N. Y. Saper. Ct. 43.

Pennsylvania. — *Ludwick v. Huntzinger*, 5 W. & S. (Pa.) 51.

Rhode Island. — *Pearce v. Hennessy*, 10 R. I. 223.

South Carolina. — *Langston v. South Carolina R. Co.*, 2 S. Car. 248; *Briggs v. Winsmith*, 10 S. Car. 133, 30 Am. Rep. 46; *Kennedy v. Boykin*, 35 S. Car. 61, 28 Am. St. Rep. 838; *Moble v. Davega*, 16 S. Car. 73, 42 Am. Rep. 632; *Maner v. Wilson*, 16 S. Car. 469; *Miller v. Hall*, 18 S. Car. 141; *Thatcher v. Massey*, 20 S. Car. 542; *Bell v. Bell*, 25 S. Car. 149.

An Agreed Rate of Interest on Balances of Account between parties during the continuation of a joint venture cannot thereafter be charged on balances due to the plaintiff in lieu of the latter's share of the profits realized by the defendant from the investment of the plaintiff's share of the proceeds. Only legal interest, to be compounded annually, will be allowed on balances accruing to the plaintiff after notice by him of dissolution. *Falkner v. Hendy*, 80 Cal. 636.

1. Expression of Intent to Continue Contract Rate After Maturity. — *Cook v. Fowler*, L. R. 7 H. L. 27; *Holden v. Freedman's Sav., etc.,*

Co., 100 U. S. 72; *Pearce v. Hennessy*, 10 R. I. 223.

Doctrine that Only Legal Rate Recoverable After Maturity though Express Stipulation for Higher. — It has been held, indeed, that though there was an express stipulation for the conventional rate of interest until payment, only the legal rate would be recoverable after maturity. *St. John v. Rykert*, 10 Can. Sup. Ct. 278; *Peoples Loan, etc., Co. v. Grant*, 18 Can. Sup. Ct. 262.

2. Contract Rate After Maturity — England. — *Morgan v. Jones*, 8 Exch. 620, 22 L. J. Exch. 232; *Price v. Great Western R. Co.*, 16 M. & W. 244; *Keene v. Keene*, 3 C. B. N. S. 144, 91 E. C. L. 144, 27 L. J. C. Pl. 88. But see the English cases cited *supra*, this division of this section, *Legal Rate After Maturity*.

Canada. — *Howland v. Jennings*, 11 U. C. C. P. 272; *Montgomery v. Boucher*, 14 U. C. C. P. 45; *O'Connor v. Clarke*, 18 Grant Ch. (U. C.) 422. But see the Canadian cases cited *supra*, this division of this section, *Legal Rate After Maturity*.

California. — *Kohler v. Smith*, 2 Cal. 597, 56 Am. Dec. 369; *Guy v. Franklin*, 5 Cal. 416; *Corcoran v. Doll*, 32 Cal. 82. But see the California cases cited *supra*, this division of this section, *Legal Rate After Maturity*.

Florida. — *Jefferson County v. Lewis*, 20 Fla. 980; *Jefferson County v. Hawkins*, 23 Fla. 223.

Illinois. — *Phinney v. Baldwin*, 16 Ill. 108, 61 Am. Dec. 62; *Etivre v. McDaniel*, 28 Ill. 201; *Heartt v. Rhodes*, 66 Ill. 351; *Ohio v. Frank*, 103 U. S. 697, decided with reference to Illinois rule.

Indiana. — *Billingsly v. Cahoon*, 7 Ind. 184; *Burns v. Anderson*, 68 Ind. 202, 34 Am. Rep. 250; *Richards v. McPherson*, 74 Ind. 158; *Kimmell v. Burns*, 84 Ind. 370; *Shaw v. Rigby*, 84 Ind. 375, 43 Am. Rep. 96; *Hume v. Mazelin*, 84 Ind. 574; *Holmes v. Boyd*, 90 Ind. 332; *Kerr v. Haverstick*, 94 Ind. 178; *Soice v. Huff*, 102 Ind. 422; *Gale v. Corcy*, 112 Ind. 39; *Wernwag v. Mothershead*, 3 Blackf. (Ind.) 401; *Bates v. Wernwag*, 4 Blackf. (Ind.) 272; *Kilgore v. Powers*, 5 Blackf. (Ind.) 22. In this last case a recovery of the contract rate after maturity, without express stipulation for a rate of interest after maturity, was allowed, as the court expressed it, "conformably to the terms of the contract;" but whether this referred to an implied contract after maturity or to the expired pre-existing contract was not stated. This case was subsequently *overruled* by *Burns v. Anderson*, 68 Ind. 202, 34 Am. Rep. 250, but the rule as set up in this latter case has been in turn repudiated, and the doctrine declared in *Kilgore v. Powers* was recognized and re-established by the later cases.

Iowa. — *Hand v. Armstrong*, 18 Iowa 324; *Thompson v. Pickel*, 20 Iowa 480; *Parvin v.*

The Theory of some of these cases is that as the parties have themselves agreed upon a specific rate of interest as compensation for the use of money, it is just that the law should adopt the same rate as the measure of damages if the money is retained beyond the time fixed by the contract for its return.¹ Others contend that where parties to a contract for money expressly fix the rate of interest before the maturity of the principal debt, there is an implied contract to continue to pay the same rate if the principal is not paid when due.² This latter theory does not conflict in principle with the rule that where there is no contract for a rate after maturity, the legal rate and only

Hoopes, 1 Morr. (Iowa) 294; *Cromwell v. Sac County*, 96 U. S. 51, decided with reference to Iowa rule.

Louisiana. — *Weems v. Ventress*, 14 La. Ann. 267; *Letchford v. Starns*, 16 La. Ann. 252.

Massachusetts. — *Brannon v. Hursell*, 112 Mass. 63; *Union Sav. Inst. v. Boston*, 129 Mass. 82, 37 Am. Rep. 305; *Pierce v. Boston Five Cents Sav. Bank*, 129 Mass. 425, 37 Am. Rep. 371; *Forster v. Foister*, 129 Mass. 559; *Bowers v. Hammond*, 139 Mass. 360; *Downer v. Whittier*, 144 Mass. 448; *Lamprey v. Mason*, 148 Mass. 231; *French v. Bates*, 149 Mass. 73; *McDonald v. Faulkner*, 154 Mass. 34; *Ayer v. Tilden*, 15 Gray (Mass.) 173, 77 Am. Dec. 355; *Burgess v. Southbridge Sav. Bank*, 2 Fed. Rep. 501, decided with reference to Massachusetts rule.

Michigan. — *Warner v. Juif*, 38 Mich. 662.

Minnesota. — *Brewster v. Wakefield*, 1 Minn. 352, 69 Am. Dec. 343; *Mason v. Callender*, 2 Minn. 350, 72 Am. Dec. 102. But the rule of the weight of authority in this state seems to the contrary, as to which see the cases cited *supra*, this division of this section, *Legal Rate After Maturity*.

Mississippi. — *Meaders v. Gray*, 60 Miss. 400, 45 Am. Rep. 414; *Tishimingo Sav. Inst. v. Buchanan*, 60 Miss. 496.

Missouri. — *Briscoe v. Kinealy*, 8 Mo. App. 76; *Pittman v. Barret*, 34 Mo. 84; *Broadway Sav. Bank v. Forbes*, 79 Mo. 226; *Borders v. Barber*, 81 Mo. 636; *Macon County v. Rodgers*, 84 Mo. 66.

Nebraska. — *Kellogg v. Lavender*, 15 Neb. 256, 48 Am. Rep. 339; *Hager v. Blake*, 16 Neb. 12; *Richardson v. Campbell*, 27 Neb. 644; *Allendorph v. Ogden*, 28 Neb. 201.

Nevada. — *Cox v. Smith*, 1 Nev. 171, 90 Am. Dec. 476; *McLanz v. Abrams*, 2 Nev. 199.

New Jersey. — *Wilson v. Marsh*, 13 N. J. Eq. 289; *Wyckoff v. Wyckoff*, 44 N. J. Eq. 56.

North Carolina. — *Wadesboro Cotton Mills Co. v. Burns*, 114 N. Car. 353. In this case it was stated generally that where a contract stipulates for a certain rate of interest, such rate continues after maturity and until payment. It should be observed, however, that this decision cites and relies on *Womble v. Little*, 74 N. Car. 255, which was the case of a note due one day after date.

Ohio. — *Marietta Iron Works v. Lottimer*, 25 Ohio St. 621; *Hamilton, etc., Hydraulic Co. v. Chutfield*, 38 Ohio St. 575; *Cincinnati Hotel Co. v. Central Trust, etc., Co.*, 25 Cinc. L. Bul. 375, 11 Ohio Dec. (Reprint) 255; *Monnett v. Sturges*, 25 Ohio St. 384. Compare *Brockway v. Clark*, Wright (Ohio) 727.

Tennessee. — *Overton v. Bolton*, 9 Heisk. (Tenn.) 762; *Wade v. Pratt*, 12 Heisk. (Tenn.) 231.

Texas. — *Pridgen v. Andrews*, 7 Tex. 461; *Hopkins v. Crittenden*, 10 Tex. 189.

Virginia. — *Cecil v. Hicks*, 29 Gratt. (Va.) 1, 26 Am. Rep. 391; *Evans v. Rice*, 96 Va. 50.

West Virginia. — *Shipman v. Bailey*, 20 W. Va. 140; *Pickens v. McCoy*, 24 W. Va. 344; *Barbour v. Tompkins*, 31 W. Va. 410.

Wisconsin. — *Spencer v. Maxfield*, 16 Wis. 178; *Pruyn v. Milwaukee*, 18 Wis. 367; *Spaulding v. Lord*, 19 Wis. 533; *Wiswell v. Baxter*, 20 Wis. 680; *Thorn v. Smith*, 71 Wis. 18.

Rate After Declared Maturity. — Where a mortgage is declared due by the mortgagee under a clause providing that the principal debt may be declared due on default in the payment of interest, the rate of interest after such precipitated maturity of the principal continues at the agreed rate and is not reduced to the legal rate of six per cent. per annum. *Cincinnati Hotel Co. v. Central Trust, etc., Co.*, 25 Cinc. L. Bul. 375, 11 Ohio Dec. (Reprint) 255.

Creditor's Refusal to State Balance Due. — Where payments have been made on a promissory note bearing interest at a rate higher than the legal rate in the absence of contract, the mere fact that the payee does not, upon request of the maker, render to him a statement of the balance due will not operate to defeat the payee's right to the recovery of the contract rate of interest after the maturity of the note and after the request of the maker as stated. *Lamprey v. Mason*, 148 Mass. 231.

Rule Applies though New Arrangement Contemplated. — A loan of money was made for two months at two per cent. a month, in contemplation of a new arrangement at the expiration of that time. After the two months, no other arrangement having been effected, the court held that the lender was entitled to claim interest at the rate originally agreed upon. *O'Connor v. Clarke*, 18 Grant Ch. (U. C.) 422.

1. Allowance of Contract Rate After Maturity Regarded as Matter of Justice. — *Keene v. Keene*, 3 C. B. N. S. 144, 91 E. C. L. 144; *Price v. Great Western R. Co.*, 16 M. & W. 244; *Union Sav. Inst. v. Boston*, 129 Mass. 82, 37 Am. Rep. 305; *Spencer v. Maxfield*, 16 Wis. 178; *Pruyn v. Milwaukee*, 18 Wis. 367.

2. Allowance After Maturity on Theory of Implied Contract. — *Lamprey v. Mason*, 148 Mass. 231; *Meaders v. Gray*, 60 Miss. 400, 45 Am. Rep. 414; *Cecil v. Hicks*, 29 Gratt. (Va.) 1, 26 Am. Rep. 391.

Doctrine of Implication as Supported by Analogy. — "When a tenant agrees to pay a stipulated rate for one year, and holds over, the law will imply that he is to pay at the same rate during the entire term of occupancy. What is paid for the use of a house is called rent; what is paid for the use of money is called interest. I fail to see why the contract rate of

the legal rate is recoverable as damages, because these cases profess to imply a contract for interest after maturity at the same rate that is paid before. Both lines of cases might argue with some plausibility that to admit the contrary doctrine is to allow a delinquent debtor, in a sense, to profit by his own wrong in the retention of the principal at a lower rate of interest after default.¹ But the answer to this is that if a default is contemplated or regarded as probable or possible, it is quite easy for the creditor to stipulate for the agreed rate of interest "until paid," and so avoid all uncertainty in the matter; and if he negligently omits to do this, he should, nevertheless, stand or fall by the terms of the contract as made.²

d. WHERE CONTRACT RATE LOWER THAN LEGAL RATE — (1) In General.

— There is the same conflict in the cases as to the rate recoverable after maturity where the contract rate is lower than the legal rate, as has already been observed where the rate contracted for is higher than the legal rate. To be consistent it would seem that in the jurisdictions where, when the contract rate is higher than the legal rate, the former is allowed on the ground of an implied contract to pay it, the same rule, for the same reason, would prevail when the contract rate is lower than the legal rate. But if the higher rate after maturity is allowed solely because otherwise the debtor would derive benefit from his own default, then this consideration might perhaps give the legal rate after maturity where the pre-existing contract called for a lower rate of interest.

(2) *Legal Rate After Maturity.* — Where a contract for the payment of money stipulates for a rate of interest lower than the legal rate in the absence of contract, it is believed, in the absence of anything further to show the intent of the parties than the bare agreement for interest before maturity at the rate stated, that the legal rate as damages for a breach should be given.³

interest should not control until the contract is extinguished; or why a man ought to be excused from paying what in his judgment the use of money is worth, as evidenced by his contract, merely because he has failed to pay the money when it was due. If that were the rule, he may find it to his advantage to violate his agreement to pay his debt when it becomes due. The better rule, most consonant with morality as well as law, is that the agreed rate of interest attends the contract until it is satisfied or extinguished." *Jefferson County v. Lewis*, 20 Fla. 981.

1. Delinquent Debtor Not Allowed to Profit by His Own Wrong. — In *Meaders v. Gray*, 60 Miss. 400, 45 Am. Rep. 414, the court declared that "to hold that the stipulated rate of interest shall not govern after maturity of the contract would be to disregard the plain intent and common understanding of men in their contracts, to pervert the unmistakable meaning of their language, and unjustly to pay defaulting debtors a premium not contemplated by them, for their default. It is probable that no man ever promised a stipulated rate of interest who did not well understand that it was to be borne as long as the debt was unpaid."

2. Terms of Contract Should Govern. — See *Holden v. Freedman's Sav., etc., Co.*, 100 U. S. 72; *Pearce v. Hennessy*, 10 R. I. 223.

3. Legal Rate After Maturity — Alabama. — *Lester v. Mobile Bank*, 7 Ala. 490; *Kitchen v. Branch Bank*, 14 Ala. 233.

Maryland. — *Brown v. Hardcastle*, 63 Md. 484.

Minnesota. — *Moreland v. Lawrence*, 23 Minn. 34.

Mississippi. — *Chambliss v. Robertson*, 23 Miss. 302.

New York. — *U. S. Bank v. Chapin*, 9 Wend. (N. Y.) 471.

Ohio. — *Tuffi v. Ohio L. Ins., etc., Co.*, 2 Disney (Ohio) 121.

Pennsylvania. — *Ludwick v. Huntzinger*, 5 W. & S. (Pa.) 51.

South Carolina. — *Langston v. South Carolina R. Co.*, 2 S. Car. 248; *Sharpe v. Lee*, 14 S. Car. 341; *Mobley v. Davega*, 16 S. Car. 73, 42 Am. Rep. 632; *Gaillard v. Ball*, 1 Nott & M. (S. Car.) 67; *Henderson v. Laurens*, 2 Desaus. (S. Car.) 170.

Wisconsin. — *Wagner v. Second Ward Sav. Bank*, 76 Wis. 242.

Rate on Legacy. — The case of *Henderson v. Laurens*, 2 Desaus. (S. Car.) 170, was an action brought against an executor to recover a legacy which the testator directed to bear five per cent. interest and be paid at a certain time. The time for its payment having passed, the court decreed that it should be paid with interest at five per cent. up to the time when it was due, and at seven per cent., which was the legal rate, thereafter. See also *Spencer v. Maxfield*, 16 Wis. 181.

Denial of Debt and Attempt to Conceal Evidence of Indebtedness. — In *Lawrence v. Leake, etc.*, Orphan House, 2 Den. (N. Y.) 577, it appeared that money had been lent at less than the legal rate of interest, with no definite agreement as to when it should be repaid. After the death of the lender and demand of the debt by his representatives, the borrower denied the debt and attempted to conceal evidence of the indebtedness. It was held that this fraudulent

(3) *Contract Rate After Maturity.* — The rule that where a contract bears a rate of interest lower than the legal rate the latter is, in general, recoverable after maturity, is denied by some courts of high authority, which hold that the contract rate, though lower than the legal rate, will attend the contract until payment of the principal or merger in a judgment.¹

c. RULE UNDER SPECIAL STATUTES — (1) In General. — In some jurisdictions statutes have been enacted for the purpose of setting at rest the disputed question of the rate of interest recoverable after the maturity of a contract for the payment of money, where it is not provided for by the contract itself.²

(2) *Judgments and Decrees.* — In most jurisdictions the rate of interest recoverable on judgments and decrees for the payment of money is expressly

conduct on the part of the borrower was a breach of the contract allowing to him the benefit of the reduced rate of interest, and that legal interest became due from the time of the denial and attempted concealment. See also *Cook v. Fowler*, L. R. 7 H. L. 27.

Where Charter Rate Less than Legal Rate. — In *U. S. Bank v. Chapin*, 9 Wend. (N. Y.) 471, it was held that a bank which was by law limited to six per cent. interest upon all discounts was entitled to recover at the rate of seven per cent. from the time when the debt became due; that the clause in the charter limiting the rate of interest to six per cent. referred only to discounts in the ordinary course of business, and the contract with the bank having been broken, the defendant was liable to pay the rate of interest fixed by the *lex loci* from the time when the debt became due. See also *Kitchen v. Branch Bank*, 14 Ala. 233; *Lester v. Mobile Bank*, 7 Ala. 490; *Chambliss v. Robertson*, 23 Miss. 302; *Tuffli v. Ohio L. Ins., etc., Co.*, 2 Disney (Ohio) 121.

1. Contract Rate After Maturity. — *Andrews v. Keeler*, 19 Hun (N. Y.) 87; *Miller v. Burroughs*, 4 Johns. Ch. (N. Y.) 436; *New York L. Ins., etc., Co. v. Manning*, 3 Sandf. Ch. (N. Y.) 58; *Sullivan v. Fosdick*, 10 Hun (N. Y.) 181; *Elmira Iron, etc., Rolling Mill Co. v. Elmira*, (Supm. Ct. Spec. T.) 5 Misc. (N. Y.) 194.

It Has Been Held that Where a Mortgagee Has Contracted to Receive a Rate of Interest less than the legal rate during the time of credit agreed upon by the parties, and he suffers the mortgagor to remain in possession after the mortgage money becomes due and payable, an understanding between the parties might perhaps be presumed that interest at the agreed rate should continue until the mortgagee should think proper to demand payment. But no such presumption can be indulged where the mortgagee attempts to foreclose his mortgage and take possession of the mortgaged premises under the supposition that he has actually acquired the equity of redemption as a substitute for his debt. Where, therefore, it is sought to make a redemption from the mortgage, the amount due must be computed upon the basis of legal interest. *Bell v. New York*, 10 Paige (N. Y.) 49.

If a Bank Agrees to Pay Interest on a Deposit at a rate less than the legal rate, the contract rate continues until judgment. *Schmidt v. People's Nat. Bank*, 153 Mass. 550; *Pierce v. Boston Five Cents Sav. Bank*, 129 Mass. 425, 37 Am. Rep. 371.

Where It Was Specially Provided by Statute that notes given for the purchase money of certain public lands should bear interest at a specified rate, less than the legal rate in the absence of contract, it was held that the rule applied as well in computing the interest for the time after as before the maturity of the note. *Branch Bank v. Harrison*, 1 Ala. 9. And where a statute authorized the issuance of state bonds bearing interest at the rate of five per cent. payable semiannually, it was held that a bond would bear the same rate of interest after maturity as before. *Carr v. State*, 127 Ind. 204, 22 Am. St. Rep. 624.

2. Rate After Maturity Fixed by Statute — California. — The California statute provides that "unless there is an express contract in writing fixing a different rate, interest is payable on all moneys at the legal rate of seven per cent. per annum after they become due on any instrument of writing." Civ. Code Cal., § 1917; *Nash v. El Dorado County*, 24 Fed. Rep. 252.

Kansas. — In Kansas it is provided that when a rate of interest is specified in a contract, such rate shall continue until full payment is made. Laws Kan. 1889, c. 164, § 5; *Getto v. Friend*, 46 Kan. 24.

Kentucky. — The Kentucky statute formerly provided that after the death of the obligor in a contract bearing a higher rate of interest than the legal rate, and the maturity of the contract, the contract should draw only the legal rate in an action to enforce the vendor's lien. *McClure v. Bigstaff*, (Ky. 1896) 37 S. W. Rep. 294; *Fenley v. Kendall*, (Ky. 1892) 18 S. W. Rep. 637. But see Stat. Ky. (1894), § 2218 *et seq.*

Minnesota. — In Minnesota, under Laws 1860, c. 23, § 1, in order that the contract rate of interest before maturity should furnish the measure of damages after default, it was held that the parties should express in the contract their intention that the rate reserved before due should be the rate after due, or the measure of damages on a breach. *Newell v. Houlton*, 22 Minn. 19. And see *Lash v. Lambert*, 15 Minn. 416, 2 Am. Rep. 142.

Vermont — Rule as to Railroad Bonds. — It has been held that under the Vermont law, railroad bonds draw interest at the contract rate after maturity as well as before, and the interest coupons at the usual rate allowed by law from the time when due. *Jackson, etc., Co. v. Burlington, etc., R. Co.*, 29 Fed. Rep. 474, citing the unreported case of *Cheever v. Rutland, etc., R. Co.*, Supm. Ct. Vt. 1869.

provided for by statute.¹ In some states a general and uniform rate is given on a judgment or decree, irrespective of any agreement of the parties as to rate, where the action is on a contract providing for interest.² In other states, however, the statute contains a provision that where a judgment is upon a contract itself providing for a particular rate of interest, the judgment or decree shall continue to bear such contract rate until paid.³

5. Statutes Changing Rate — a. IN GENERAL. — All of the cases agree that a change in the rate of interest by statute operates, as a general rule, only prospectively, and will not be permitted to affect rights already accrued.⁴

Authorities Not in Accord. — As to what is prospective operation and the reverse.

1. Rate of Interest on Judgments. — See the title JUDGMENTS AND DECREES, and the various local statutes.

2. Rule that Judgments Draw Legal Rate of Interest. — *U. S. Mortgage Co. v. Sperry*, 138 U. S. 313; *Marshall v. Green*, (Ky. 1886) 1 S. W. Rep. 602; *Wyoming Nat. Bank v. Brown*, 7 Wyo. 494. See also *Massachusetts v. Western Union Tel. Co.*, 141 U. S. 40; *Byrd v. Gacquet*, *Hempst.* (U. S.) 261; *Evans v. White*, *Hempst.* (U. S.) 296; *Badgett v. Jordan*, 32 Ark. 154; *Miller v. Kempner*, 32 Ark. 573; *Wernwag v. Brown*, 3 Blackf. (Ind.) 457, 26 Am. Dec. 433; *Burkhart v. Sappington*, 1 Greene (Iowa) 66; *Taylor v. Wing*, 84 N. Y. 471, reversing 23 Hun (N. Y.) 233; *Ward v. Kenner*, (Tenn. Ch. 1896) 37 S. W. Rep. 707; *Roeder v. Brown*, 1 Wash. Ter. 112.

Rule Applies though Contract Rate May Be Recoverable After Maturity. — *Bowers v. Hammond*, 139 Mass. 360.

3. Rule that Judgments Draw Contract Rate of Interest — Georgia. — See *Neal v. Brockhan*, 87 Ga. 130.

Indiana. — See *Burns v. Anderson*, 68 Ind. 202, 34 Am. Rep. 250.

Iowa. — See *Wilson v. King*, 1 Morr. (Iowa) 106.

Kansas. — In Kansas it is provided by statute that when a rate of interest is specified in a contract, any judgment rendered thereon shall bear the same rate of interest, in no case, however, to exceed the rate of ten per cent. per annum. *Laws Kan.* 1889, c. 164, § 5; *Getto v. Friend*, 46 Kan. 24.

Michigan. — In Michigan it is provided that in judgments on written contracts the rate of interest shall be computed at the rate specified in the instrument, not exceeding ten per cent. per annum. *Comp. Laws Mich.* (1897), § 4865; *Tousey v. Moore*, 79 Mich. 564. But as to the maximum rate under the present statute see *Comp. Laws Mich.* (1897), § 4856.

Missouri. — In Missouri it is provided that judgments and orders for money on contracts bearing more than six per cent. interest shall bear the same interest as borne by such contracts. *Rev. Stat. Mo.* (1899) § 3707; *Corley v. McKeag*, 57 Mo. App. 415.

Nebraska. — The Nebraska statute provides in substance that all decrees and judgments for the payment of money shall draw interest at the rate of seven per cent. per annum from the date of the rendition thereof until paid, but if such judgment or decree is founded upon a contract, by the terms of which a greater rate of lawful interest shall have been agreed upon, then such judgment or decree shall draw the same rate of interest as the contract on which

the judgment or decree is based. *Comp. Stat. Neb.* (1899), § 3497; *Havemeyer v. Paul*, 45 Neb. 373; *Bond v. Dolby*, 17 Neb. 491; *Allendorph v. Ogden*, 28 Neb. 201.

Ohio. — *Hamilton, etc., Hydraulic Co. v. Chatfield*, 38 Ohio St. 575.

Texas. — *Sheldon v. Martin*, (Tex. 1888) 8 S. W. Rep. 61; *Williams v. National Park Bank*, (Tex. Civ. App. 1894) 26 S. W. Rep. 171; *Washington v. Denton First Nat. Bank*, 64 Tex. 4; *Llano Imp. Co. v. Watkins*, 4 Tex. Civ. App. 428.

In the case of *Llano Imp. Co. v. Watkins*, 4 Tex. Civ. App. 428, the note sued on provided for twelve per cent. interest and ten per cent. on principal and interest as attorney's fees, if placed in the hands of an attorney for collection. The court gave judgment for the amount due on the note, principal and interest, and ten per cent. thereon as attorney's fees, the whole judgment to bear twelve per cent. interest from date. It was held under the statute not to be error to allow the contract rate of interest on the whole amount of the judgment. See also *Llano Imp., etc., Co. v. Eubanks*, 5 Tex. Civ. App. 108.

West Virginia. — *Shipman v. Bailey*, 20 W. Va. 140; *Pickens v. McCoy*, 24 W. Va. 344.

A Statute Providing that Judgments or Decrees upon contracts bearing more than six per cent. interest shall bear the same interest as may be specified in such contracts, authorizes a judgment for interest at the rate specified in the contract upon the whole sum adjudged or decreed, including both principal debt and damages—that is, interest accruing before the rendition of the judgment. *Henry v. Ward*, 4 Ark. 150. And see *Walker v. Byrd*, 15 Ark. 38.

4. Prospective Operation of Statutes — United States. — *Texas, etc., R. Co. v. Anderson*, 149 U. S. 237.

California. — *White v. Lyons*, 42 Cal. 279. And see *Randolph v. Bayue*, 44 Cal. 366.

Illinois. — *Bauer Grocer Co. v. Zelle*, 172 Ill. 407; *Sharpe v. Morgan*, 44 Ill. App. 346.

New York. — *Bullock v. Boyd*, *Hoffm.* (N. Y.) 294.

Texas. — *Landa v. Obert*, 5 Tex. Civ. App. 620; *Missouri Pac. R. Co. v. Patton*, (Tex. Civ. App. 1896) 35 S. W. Rep. 477.

Virginia. — *Thornton v. Fitzhugh*, 4 Leigh (Va.) 209.

West Virginia. — *Murdock v. Franklin Ins. Co.*, 33 W. Va. 407.

Reduction of Rate on Redemption from Judicial Sales. — It has been held that a law reducing the rate of interest to be paid by parties on redeeming from a judicial sale does not apply

and what may or may not be considered accrued rights in this respect, the authorities are not so harmonious.

b. INTEREST DUE BY CONTRACT — (1) In General. — There is no doubt that where parties to a contract have agreed upon a rate of interest, lawful when contracted for, the fact that the conventional rate is subsequently reduced by legislative enactment will not affect the binding force and validity of the undertaking.¹ To permit such a result would be to impair the obligation of the contract.

(2) *Interest Contracted for, but No Rate Named.* — Where, in a contract for the payment of money, there is a stipulation for interest, but no rate is specified, it has been held that the existing legal rate when the contract was executed becomes the contract rate, and as such is insusceptible of

to redemptions made from sales before such act took effect. *Bauer Grocer Co. v. Zelle*, 172 Ill. 407.

Redemption from Mortgage. — But a statute reducing the rate of interest which redemptioners under a mortgage are required to pay does not impair the contract obligation of mortgages previously executed. *Robertson v. Van Cleave*, 129 Ind. 217.

A Statute Permitting a Renewal of Loans at Ten Per Cent. made when the law in force did not permit a higher rate than six per cent. is not unconstitutional, as being not equal and uniform in its operation, for partiality to the creditor class. *Caruthers v. Andrews*, 2 Coldw. (Tenn.) 378.

1. Contract at Rate of Interest Not Reduced by Subsequent Statute — United States. — *Koshkonong v. Burton*, 104 U. S. 668; *Morley v. Lake Shore, etc., R. Co.*, 146 U. S. 162. And see *Jourlmon v. Ewing*, 80 Fed. Rep. 604.

Connecticut. — *Seymour v. Continental L. Ins. Co.*, 44 Conn. 300, 26 Am. Rep. 469.

Florida. — See *Myrick v. Battle*, 5 Fla. 345.

Georgia. — *Vines v. Tift*, 79 Ga. 301.

Illinois — *Supreme Lodge, etc., v. Portingall*, 64 Ill. App. 283; *Prairie State Loan, etc., Assoc. v. Nubling*, 64 Ill. App. 329.

Indiana. — *Sims v. Squires*, 80 Ind. 42.

Iowa. — *Kassing v. Ordway*, 100 Iowa 611.

Missouri. — *Corley v. McKeag*, 57 Mo. App. 415.

Nebraska. — *Richardson v. Campbell*, 27 Neb. 644.

New York. — *Association, etc., v. Eagleson*, (N. Y. Super. Ct. Spec. T.) 60 How. Pr. (N. Y.) 9; *Wilcox v. Van Voorhis*, 58 Hun (N. Y.) 575.

Oregon. — *Besser v. Hawthorne*, 3 Oregon 129.

South Dakota. — *Guild v. Deadwood First Nat. Bank*, 4 S. Dak. 566.

Texas. — *Landa v. Obert*, 5 Tex. Civ. App. 620.

Wyoming. — *Wyoming Nat. Bank v. Brown*, 7 Wyo. 494.

Interest on Debt Revived by New Promise. — It has been held that where a debt bearing the conventional rate of interest, lawful when the contract was made, was revived by a new promise after having been barred by the statute of limitations, it would continue to bear the conventional rate of interest although by a change in the law, made in the interval between the execution of the note and the revival of the obligation by the new promise, the conventional rate exceeded that allowed by

the provisions of the later law. *Vines v. Tift*, 79 Ga. 301. But in an action on a promissory note the liability upon which had been revived by an oral promise to pay after a discharge in insolvency proceedings, it was held that only legal interest was recoverable, although the note by its terms bore a rate of interest higher than the legal rate. *Lambert v. Schmalz*, 118 Cal. 33.

Rule Applicable Whether Contract Express or Implied. — Where there is either an express or an implied contract to pay interest until the principal sum shall be paid, interest at the agreed rate, if lawful when contracted for, will be the rate recoverable until payment of the principal, notwithstanding subsequent legislation changing the conventional rate. *Wyoming Nat. Bank v. Brown*, 7 Wyo. 494. See also *Wilcox v. Van Voorhis*, 58 Hun (N. Y.) 577.

Interest After Maturity. — It is immaterial whether the interest sought to be recovered had accrued before or after the principal sum was due, provided the rate is recoverable by contract express or implied. *Wilcox v. Van Voorhis*, 58 Hun (N. Y.) 577; *Taylor v. Wing*, 84 N. Y. 471. See also *Association, etc., v. Eagleson* (N. Y. Super. Ct. Spec. T.) 60 How. Pr. (N. Y.) 9.

A Constitutional Provision reducing the rate of interest which may lawfully be contracted for does not affect contracts entered into before its adoption. *Hagood v. Aikin*, 57 Tex. 511; *Cecil v. Hicks*, 29 Gratt. (Va.) 1, 26 Am. Rep. 301.

Contract Controlled by Law in Existence When Contract Made. — Where, at the time of the execution of a promissory note bearing the highest contractual rate allowed by law, the statute prescribing the rate also provided that after the death of the payer and the maturity of the contract only legal interest should be recoverable, it was held that the statute in existence at the time of the execution of the contract would control, although it had been repealed before the death of the payer in the particular contract. *Fenley v. Kendall*, (Ky. 1892) 18 S. W. Rep. 637.

But in Another Case It Was Held that where a person contracted for the payment of a higher rate of interest than could at the time be lawfully contracted for, but the law in force at the time the remedy was sought against him allowed parties to contract for the payment of such higher rate, the latter law would control. *Klingensmith v. Reed*, 31 Ind. 389.

subsequent statutory change.¹

Where, by a Special Statute, legal interest is made payable on particular evidences of debt or specified obligations from a fixed time, the legal rate of interest existing at such date cannot be varied by subsequent legislation.²

(3) *Contract for Money with No Stipulation for Interest.* — Some cases have held that in a contract for the payment of money at a stated time, the legal rate of interest existing at the date of the contract becomes the contract rate, though no reference whatever to interest be made in the contract, and therefore a subsequent change of the legal rate will not affect the rate on such contract.³

(4) *Contract for Legal Rate as Changed by Law.* — There is, of course, no doubt that it is competent for parties to enter into contracts by which the rate of interest to be paid will change with the variations of the legal rate.⁴

c. **INTEREST RECOVERABLE AS DAMAGES.** — Where interest, if allowed, is recoverable only as a legally established measure of damages for default in an obligation to pay money or to compensate for injuries inflicted, the general rule is that in its computation the fluctuations of the legal rate must be considered.⁵

d. **JUDGMENTS.** — The general rule is that a judgment bears interest at the

1. *Contract for Interest but No Rate Named* — *Maine.* — *Eaton v. Boissonnault*, 67 Me. 540, 24 Am. Rep. 52; *Paine v. Caswell*, 68 Me. 80, 28 Am. Rep. 21.

New Jersey. — *Wyckoff v. Wyckoff*, 44 N. J. Eq. 56; *Jersey City v. O'Callaghan*, 41 N. J. L. 349; *Mucklar v. Cross*, 32 N. J. L. 423.

New York. — *O'Brien v. Young*, 95 N. Y. 428, 47 Am. Rep. 64. *Compare Hewett v. Chadwick*, 8 N. Y. App. Div. 23.

Wyoming. — *Wyoming Nat. Bank v. Brown*, 7 Wyo. 494.

Where a Legacy Is Payable with Interest, by the terms of the will, and the lawful rate of interest is afterwards changed, the rate of interest on the legacy continues unchanged. *Woodward v. Woodward*, 28 N. J. Eq. 119.

2. **Statutes Fixing Interest on Particular Obligations.** — *Union Sav. Bank, etc., Co. v. Gelbach*, 8 Wash. 497 (county warrants); *State v. Bowen*, 11 Wash. 432 (state warrants); *State v. Dwyer*, 42 N. J. L. 327 (certificates for road improvements).

3. **Contract Without Stipulation for Interest — Legal Rate at Date of Contract Held Applicable.** — *Lee v. Davis*, 1 A. K. Marsh. (Ky.) 397, 10 Am. Dec. 746; *Association, etc., v. Eagleson*, (N. Y. Super. Ct. Spec. T.) 60 How. Pr. (N. Y.) 9. But see *Reese v. Rutherford*, 90 N. Y. 644; *Sanders v. Lake Shore, etc., R. Co.*, 94 N. Y. 641.

Note Due One Day After Date. — In *Myrick v. Battle*, 5 Fla. 345, where the legal rate of interest was reduced on the day after the execution of a note payable one day after date and containing no stipulation for interest, it was held that the owner of the note was entitled to recover interest at the rate existing on the day when the note was executed.

Annuity Created by Will. — The case of *Thorn-ton v. Fitzhugh*, 4 Leigh (Va.) 209, involved a bequest of an annuity by will while the legal rate of interest was only five per cent., and it was held that though the annuity fell in arrears after the legal rate of interest had been increased to six per cent., yet only five per cent. should be allowed on such arrears.

4. **Contract for Legal Rate as Changed by Law.** — *Mucklar v. Cross*, 32 N. J. L. 423; *Wyckoff v. Wyckoff*, 44 N. J. Eq. 56.

5. **Interest as Damages** — *California.* — *White v. Lyons*, 42 Cal. 279. *Compare Macoleta v. Packard*, 14 Cal. 179.

Illinois. — *Firemen's Fund Ins. Co. v. Western Refrigerating Co.*, 162 Ill. 322.

New Jersey. — *Wilson v. Cobb*, 31 N. J. Eq. 91; *Matter of Doremus*, 33 N. J. Eq. 234; *Jersey City v. O'Callaghan*, 41 N. J. L. 349.

New York. — *Reese v. Rutherford*, 90 N. Y. 644; *Sanders v. Lake Shore, etc., R. Co.*, 94 N. Y. 641; *O'Brien v. Young*, 95 N. Y. 428, 47 Am. Rep. 64; *Hewett v. Chadwick*, 8 N. Y. App. Div. 23; *Bullock v. Boyd, Hoffm.* (N. Y.) 294.

Oregon. — *Stark v. Olney*, 3 Oregon 89.

Texas. — *Gulf, etc., R. Co. v. Humphries*, 4 Tex. Civ. App. 333; *Worsham v. Vignal*, 5 Tex. Civ. App. 471; *Rio Grande R. Co. v. Cross*, 5 Tex. Civ. App. 454; *Gulf, etc., R. Co. v. Gray*, (Tex. Civ. App. 1894) 24 S. W. Rep. 921; *Watkins v. Junker*, 90 Tex. 584.

Wisconsin. — *State v. Guenther*, 87 Wis. 673.

Death by Wrongful Act. — It has been held that the excepting clause of a statute reducing the legal rate of interest from seven to six per cent., declaring that nothing contained therein shall affect contracts or obligations made before the passage of the act, does not apply to the liability for a tort created by statute. Thus, where at the time of personal injuries to a decedent for which a recovery was sought the legal rate of interest was seven per cent., but subsequent thereto and before the verdict rendered in the action for the death the legal rate was changed to six per cent., it was held in an action under a statute providing for interest on the damages assessed from the date of the death that the interest recoverable was at the rate of six and not seven per cent. *Salter v. Utica, etc., R. Co.*, 86 N. Y. 401, *overruling Erwin v. Never-sink Steamboat Co.*, 23 Hun (N. Y.) 578.

legal rate existing at the time when the judgment was recovered, though the rate may have been different at the time when the cause of action accrued.¹

Doctrine that Interest on Judgments Not Subject to Change. — Some cases hold broadly that a judgment is a contract, and upon its rendition the rights of the parties become fixed with reference to the rate of interest borne by judgments under the law existing when the judgment is rendered, which is not, therefore, subject to subsequent legislative change.²

Rule that Interest on Judgments Follows Fluctuations of Law. — On the other hand, exactly the reverse has been held, and the computation of interest made to follow the fluctuations of the rate of interest recoverable on judgments during the entire period for which the interest is allowed.³

Where Judgment in Terms Bears Interest — Rule under Statute. — Still other decisions have only announced a rule which applies to cases where the judgment in terms bears interest,⁴ or where it is rendered on a contract bearing interest under a statute providing that a judgment under such circumstances shall continue to bear the rate of interest stipulated for in the contract.⁵

1. Interest on Judgments — Rate Existing at Rendition. — *Salter v. Utica, etc., R. Co.*, 86 N. Y. 401; *Gunn v. Miller*, (Tex. Civ. App. 1894) 26 S. W. Rep. 278; *Gulf, etc., R. Co. v. Gray*, (Tex. Civ. App. 1894) 24 S. W. Rep. 921.

Change of Rate Between Interlocutory and Final Judgment. — Although at the time of the rendition of an interlocutory judgment by default in an action on an account the law allowed eight per cent. interest, yet if before the time of final judgment the legal rate has been reduced to six per cent., the judgment will bear interest at the latter rate from the date of its rendition. *Alliance Milling Co. v. Eaton*, (Tex. Civ. App. 1896) 33 S. W. Rep. 588.

Change of Rate Between Entry of Judgment and Affirmance on Appeal. — Where a statute provided that judgments affirmed in a higher court should be for the judgment of the lower court, and interest thereon at the rate of six per cent. per annum, instead of twelve and one-half per cent. "as now allowed by law," it was held on a judgment rendered in an inferior court before the act took effect, but not affirmed by the appellate tribunal until several years thereafter, that interest at twelve and one-half per cent. would be considered correct. *Rogers v. Stokes*, 87 Tenn. 294.

Change of Rate Between Contract and Judgment. — Under a statute providing that when a contract upon which a judgment is founded bears a greater rate of interest than eight per cent., not exceeding the highest conventional rate allowed by law, a judgment rendered thereon shall bear the same rate, it has been held that the judgment would be entered at the rate borne by the contract if legal when the contract was made, though such rate would have been illegal if contracted for at the date of the entry of the judgment. *Hagood v. Aikin*, 57 Tex. 511.

2. Interest Rate Not Subject of Change. — *Sharpe v. Morgan*, 44 Ill. App. 346; *Cox v. Marlatt*, 36 N. J. L. 389, 13 Am. Rep. 454.

3. Fluctuations of Rate — New York. — *O'Brien v. Young*, 95 N. Y. 428, 47 Am. Rep. 64; *Morley v. Lake Shore, etc., R. Co.*, 146 U. S. 162, decided under the New York statute.

Texas. — *Gulf, etc., R. Co. v. Humphries*, 4 Tex. Civ. App. 335; *Ellis v. Barlow*, (Tex. Civ. App. 1894) 26 S. W. Rep. 908. But see

Texas, etc., R. Co. v. Anderson, 149 U. S. 237, decided under the Texas statute.

Wyoming. — *Wyoming Nat. Bank v. Brown*, 7 Wyo. 494.

A Judgment Is Not a Contract so that the legal rate existing when the judgment was rendered must continue until paid or merged in another judgment, notwithstanding a subsequent reduction of the legal rate, as would be the case in a voluntary contract or obligation bearing interest by its terms and no time for payment of the principal named. Thus in an action on a judgment rendered during the existence of a statute giving to a creditor seven per cent. interest thereon, it was held that upon the subsequent reduction of the rate to six per cent. the judgment creditor was entitled only to recover seven per cent. up to the date of the change and six per cent. thereafter. *O'Brien v. Young*, 95 N. Y. 428, 47 Am. Rep. 64.

4. Judgment in Terms Bearing Interest — Doctrine that Rate Is Fixed. — It has been held that where a judgment specifies the rate of interest that it shall bear, being lawful at the time of its rendition, such rate will not change with the fluctuation of the interest laws. *Burns v. Woolery*, 15 Wash. 134. See also *Missouri Pac. R. Co. v. Patton*, (Tex. Civ. App. 1896) 35 S. W. Rep. 477.

Doctrine that Rate Fluctuates. — It has been held, however, that the fact that a judgment in terms bears interest does not change the rule that the interest subsequently accruing thereon conforms to the fluctuations of the legal rate. *O'Brien v. Young*, 95 N. Y. 428, 47 Am. Rep. 64; *Proudy v. Lake Shore, etc., R. Co.*, 95 N. Y. 667.

5. Provision that Judgment Shall Carry Contract Rate — Doctrine that Rate Does Not Change. — *Getto v. Friend*, 46 Kan. 24; *Corley v. McKeag*, 57 Mo. App. 415; *Bond v. Dolby*, 17 Neb. 491.

Contrary Dictum. — For an intimation that although it is provided by statute that a judgment rendered on a contract bearing interest shall continue to bear the same rate of interest as borne by the contract, yet upon the subsequent enactment of a statute providing that interest on judgments shall be at a prescribed rate, the rate borne by pre-existing judgments

XII. SUSPENSION OF INTEREST — 1. By Terms of Contract. — Where, by construction of the terms of a contract for the payment of money, interest thereon is to be suspended in a certain contingency or until a specified time, the contract will control and interest will be recoverable only as therein provided.¹

2. By Act or Omission of Creditor — a. IN GENERAL. — Where delay in the payment of the principal debt is caused by some improper act or omission of the creditor, the general rule is that the accrual of interest will be regarded as suspended during such period.² Thus, if a creditor, by his own act, puts it out of the power of the debtor to make payment, as where the creditor, by absenting himself from the country, without leaving an agent or attorney to represent him, renders it impossible for the debtor to discharge the debt, no interest is recoverable during such period as the debtor was thus prevented from paying.³ But as it is the duty of the debtor to seek his creditor and

changes in conformity therewith, see observations of Corn, J., in *Wyoming Nat. Bank v. Brown*, 7 Wyo. 494.

1. Interest Suspended by Terms of Contract. — *Gale v. Corey*, 112 Ind. 39.

Agreement Not to Sue. — Where a note was made payable one day after date, and an agreement was subjoined that suit should not be brought on it so long as the maker should remain solvent, such agreement, it was held, could not be regarded, either in point of intention or in legal effect, as impairing the right to interest as due by the terms of the note and contract of the parties. *Rollman v. Baker*, 5 Humph. (Tenn.) 406.

Note Not Payable until Death of Maker. — A note payable one day after date, with an indorsement thereon that it was not to be paid until the death of the maker, bears interest from the time when it became due according to its tenor, without reference to the indorsement. *Powell v. Guy*, 3 Dev. & B. L. (20 N. Car.) 70.

Suspension of Interest Contrary to Terms of Contract. — In *Hayes v. Elmsley*, 23 Can. Sup. Ct. 623, it was held that though a contract provided that "if from any cause whatever" the price was not paid at a specified time, interest should be paid from the date of the contract, the purchaser was, nevertheless, relieved from payment of interest where the delay was caused by the wilful default of the vendor.

2. Interest Suspended by Acts or Omissions of Creditor — *England*. — *London*, etc., R. Co. v. South Eastern R. Co., (1892) 1 Ch. 120, 61 L. J. Ch. 294, 65 L. T. N. S. 722, 40 W. R. 194; *Anderton v. Arrowsmith*, 2 Per. & Dav. 408; *Webster v. British Empire Mut. L. Assur. Co.*, 15 Ch. D. 169; *Laing v. Stone*, 2 M. & R. 561, 17 E. C. L. 320. See also *Upton v. Ferrers*, 5 Ves. Jr. 801.

Canada. — *Hayes v. Elmsley*, 23 Can. Sup. Ct. 623.

United States. — *Bowman v. Wilson*, 2 McCrary (U. S.) 374. See *Bain v. Peters*, 44 Fed. Rep. 307.

Arkansas. — *Pillow v. Brown*, 26 Ark. 240.

California. — *Martin v. Ede*, 103 Cal. 157.

Illinois. — *Union Mut. L. Ins. Co. v. Chicago*, etc., R. Co., 146 Ill. 320.

Iowa. — *Southern White Lead Co. v. Haas*, 76 Iowa 432.

Kentucky. — *Morford v. Ambrose*, 3 J. J. Marsh. (Ky.) 688; *Hart v. Brand*, 1 A. K. Marsh. (Ky.) 161, 10 Am. Dec. 715.

Massachusetts. — *Suffolk Bank v. Worcester Bank*, 5 Pick. (Mass.) 106.

New Hampshire. — *Thompson v. Boston*, etc., R. Co., 58 N. H. 524.

New Jersey. — *Le Branthwait v. Halsey*, 9 N. J. L. 3.

New York. — *Stevens v. Barringer*, 13 Wend. (N. Y.) 639.

Pennsylvania. — See *Philadelphia*, etc., R. Co. v. *Gesner*, 20 Pa. St. 242; *Richards v. Citizens Natural Gas Co.*, 130 Pa. St. 37.

Tennessee. — *Jane v. Hagen*, 10 Humph. (Tenn.) 332.

Vermont. — *Brainerds v. Champlain Transp. Co.*, 29 Vt. 154; *Sumner v. Beebe*, 37 Vt. 562.

Virginia. — *McCall v. Turner*, 1 Call (Va.) 133.

Legatee Resisting Probate of Will. — Where a will directed an executor to pay the legacy with as little delay as practicable, but the legatee resisted the probate of the will, he was held entitled to the interest only from the time of the probate. *Com. v. Turley*, 4 Bush (Ky.) 398.

Litigation Between Claimants. — Where an award for premises taken in widening a street apportioned the amount between two persons, who litigated between themselves as to the proportion due to each, a notification by one litigant to the corporation not to pay was held to excuse the corporation from the payment of interest during the pendency of such litigation. *Gillespie v. New York*, 3 Edw. (N. Y.) 512.

Delay in Signing Judgment. — In an action of trover the court will not allow interest on the verdict where the signing of judgment is delayed by the opposite party. *New Brunswick R. Co. v. Murray*, 18 N. Bruns. 412.

Delay to Proceed Against Bail. — Where a judgment had been obtained, and no execution issued until ten months afterwards, it was held that the plaintiff, on recovering judgment against the bail, was not entitled to interest on the original judgment for the time during which he delayed to proceed against the bail. *Constable v. Colden*, 2 Johns. (N. Y.) 480.

Interest Between Day of Maturity and Notice of Dishonor. — It has been held that the drawer of a bill of exchange which is dishonored by the acceptor is not liable for interest for the time which elapses between the day on which the bill becomes due and the day on which the drawer receives notice of the dishonor. *Walker v. Barnes*, 5 Taunt. 240, 1 E. C. L. 91, 1 Marsh. 36.

3. Creditor Absenting or Concealing Himself. — *Childs v. Devereux*, 1 Murph. (N. Car.) 398;

pay his debt, he must show that the failure to pay was not the result of his own neglect.¹

b. FAILURE TO PRESENT BILL OR NOTE FOR PAYMENT. — Where a bill of exchange, bond for the payment of money, or promissory note designates a place of payment, interest will not, in general, be allowed from the maturity of the instrument, unless presentment is made accordingly.² But an instrument not designating a place of payment need not be presented when due, in order to bind the obligor for interest after maturity.³

What Defendant Must Show. — According to some cases the rule is that the defendant, in order to relieve himself from interest, must show affirmatively that he had the money at the place of payment on the day when it was due, and that he kept it there or subsequently paid it into court.⁴

c. LACHES. — It has been said that interest is never allowed where the delay is the result of the failure of the creditor to press the collection of his claim,⁵ which seems to have been the ground upon which interest was originally denied in actions for money had and received.⁶

Delay Pending Decision of Test Case. — The delay of a party to enforce a claim while waiting for a decision upon a test case growing out of the same trans-

Schaeffer's Estate, 9 S. & R. (Pa.) 263; Emlen v. Lehigh Coal, etc., Co., 47 Pa. St. 76, 86 Am. Dec. 518; Jane v. Hagen, 10 Humph. (Tenn.) 332; M'Call v. Turner, 1 Call (Va.) 133.

1. Default Must Not Be Result of Debtor's Neglect. — *Pillow v. Brown*, 26 Ark. 240.

Notice to Debtor by Each Member of Firm Not to Pay Other. — In *King v. Kelley*, 51 Pa. St. 36, it appeared that each of the two members of the firm to which the defendant was indebted gave notice to him to make no payment to the other. But this notification, it was held, did not relieve the defendant for liability on the indebtedness.

2. Failure to Present for Payment. — *United States*. — *Cheney v. Libby*, 134 U. S. 68; *Ward v. Smith*, 7 Wall. (U. S.) 447.

New Jersey. — See *Adams v. Hackensack Imp. Commission*, 44 N. J. L. 647, 43 Am. Rep. 406.

New York. — *Hills v. Place*, 48 N. Y. 520, 8 Am. Rep. 568. And see *Locklin v. Moore*, 57 N. Y. 362.

Pennsylvania. — *Emlen v. Lehigh Coal, etc., Co.*, 47 Pa. St. 76, 86 Am. Dec. 518; *Friend v. Pittsburgh*, 131 Pa. St. 305, 17 Am. St. Rep. 811, 25 W. N. C. (Pa.) 239; *Miller v. New Orleans Bank*, 5 Whart. (Pa.) 503, 34 Am. Dec. 571.

See generally as to the necessity for presentment the title *BILLS OF EXCHANGE AND PROMISSORY NOTES*, vol. 4, p. 343.

Contrary Doctrine. — In *Westcott v. Patton*, 10 Colo. App. 544, it was observed, citing *Tisdeman on Commercial Paper*, § 370, that the failure to present for payment notes made payable at a designated place at their maturity would not stop the accrual of interest, nothing but a proper tender of payment having such effect. The authority cited does not state this, however, but on the contrary says that "there can be no recovery of interest if the paper is payable at a specified place and the holder did not present it there for payment."

3. Where Place of Payment Not Designated. — *Westcott v. Patton*, 10 Colo. App. 544.

4. What Defendant Must Show. — *Adams v.*

Hackensack Imp. Commission, 44 N. J. L. 647, 43 Am. Rep. 406; *Kelley v. Phenix Nat. Bank*, 17 N. Y. App. Div. 496; *Hills v. Place*, 48 N. Y. 520, 8 Am. Rep. 568; *Locklin v. Moore*, 57 N. Y. 362.

Money on Deposit — Subsequent Payment into Court. — In *Adams v. Hackensack Imp. Commission*, 44 N. J. L. 647, 43 Am. Rep. 406, the court said: "The only effect of the payor having the money at the bank where the paper is payable is that it will enable him to plead a tender in exoneration of interest and costs of suit, provided he makes his tender good by payment of the principal into court." Citing *Ward v. Smith*, 7 Wall. (U. S.) 447; *Wood v. Merchants Sav. etc., Co.*, 41 Ill. 267; *Carley v. Vance*, 17 Mass. 389; *Caldwell v. Cassidy*, 8 Cow. (N. Y.) 271; *Haxtun v. Bishop*, 3 Wend. (N. Y.) 14.

5. Delay in Collecting Claim. — *Du Belloix v. Waterpark*, 1 D. & R. 16, 16 E. C. L. 12; *Redfield v. Ystalyfera Iron Co.*, 110 U. S. 174; *Erskine v. Van Arsdale*, 15 Wall. (U. S.) 75; *Adams Express Co. v. Milton*, 11 Bush (Ky.) 49; *Morford v. Ambrose*, 3 J. J. Marsh. (Ky.) 688; *Newel v. Keith*, 11 Vt. 214. See generally the title *LACHES*.

The rule stated in the text is especially true where it does not appear that the defendant has earned interest on the money withheld by him. *U. S. v. Sanborn*, 135 U. S. 271.

Delay Between Institution of Action and Trial.

— Where an action was not brought to trial until twenty-three years after its institution, it was held that interest might be denied to the plaintiff if it appeared that the delay between the institution of the suit and the trial was due to his fault or dereliction. Where, however, though an unreasonably long time has elapsed between the institution of the action and its prosecution, the jury finds that the plaintiff has been guilty of laches for a portion of such period only, interest will be denied only for the time during which there has been laches. *Stewart v. Schell*, 31 Fed. Rep. 65.

6. Money Had and Received. — *Depcke v. Munn*, 3 C. & P. 112, 14 E. C. L. 231.

action on which the plaintiff bases his right is not such a delay as will warrant a jury in denying interest.¹

If There Is No Person of Whom Payment May Be Demanded, the creditor is not chargeable with laches in not making a demand.²

Delay at Debtor's Request. — Where the delay is at the request and for the benefit of the debtor, such laches as will bar a recovery of interest will not be imputed.³

d. NEGLIGENCE TO ASCERTAIN AMOUNT DUE. — Where it is the creditor's duty to ascertain the amount due to him by his debtor, interest will not be allowed to him in advance of such ascertainment.⁴ The mere failure of the creditor, however, to come to an amicable settlement of accounts with his debtor, thereby necessitating a proceeding in court for the purpose, will not warrant the denial of interest, unless the creditor's conduct is so arbitrary and capricious as to merit punishment in this manner.⁵

e. VENDOR'S DELAY TO MAKE TITLE. — A mere delay by a vendor of property to make a valid title thereto does not suspend the running of interest as to a vendee in possession,⁶ unless the former's default was wilful, or the vendee has kept the purchase money idle and unemployed in order to pay it over when required.⁷

f. DEATH OF CREDITOR. — It has been held that the death of the creditor will not suspend the running of interest although a considerable period elapses before the appointment of a personal representative.⁸

g. TENDER — (1) *Generally.* — If the obligor in a contract for the payment

1. Delay Pending Decision of Test Case. — *Frazer v. Bigelow Carpet Co.*, 141 Mass. 126. But see *Redfield v. Bartels*, 139 U. S. 694.

2. Death of Debtor and Delay in Appointment of Representative. — Where the acceptor of a bill of exchange died intestate before it became due, it was held, in a suit to administer the personal estate of the intestate, that interest was payable from the date at which the bill became due, although administration had not been taken out for more than thirty-five years from the maturity of the bill. *Maxwell v. Tuohill*, 1 L. R. (1r.) 250.

3. Delay at Debtor's Request. — *Funk v. Buck*, 91 Ill. 575.

4. Neglect of Creditor to Ascertain Amount Due. — *London, etc., R. Co. v. South Eastern R. Co.*, (1892) 1 Ch. 120, 61 L. J. Ch. 294, 65 L. T. N. S. 722, 40 W. R. 194, *following* *Merchant Shipping Co. v. Armitage*, L. R. 9 Q. B. 99, and *overruling* *Duncombe v. Brighton Club, etc., Co.*, L. R. 10 Q. B. 371.

Inadvertent Omission of Item in Account. — Where the plaintiff supplied the defendants with wood, for which they were in the habit of settling from time to time, but omitted at one of these settlements to present his claim for a certain quantity of wood, and the omission was not discovered until a long time after, it was held that he could not recover interest on such item. *Brainerd v. Champlain Transp. Co.*, 29 Vt. 154.

5. Mere Failure to Come to Amicable Adjustment. — *Crawford v. Osmun*, 90 Mich. 77.

And though the Plaintiff Seeks to Recover More than Is Justly Due on a contract for the payment of money, yet interest on the amount properly due is not thereby suspended, in the absence of a tender by the defendant of the sum actually due and owing. *Anderson v. Smith*, 108 Mich. 60.

Failure to Render Account of Amount Due on

Promissory Note. — The fact that the payee in a promissory note does not render an account of the amount due thereon will not discharge the maker of the note from liability for the stipulated interest, in the absence of any tender, and particularly where it is shown that the maker never had on hand a sufficient amount to pay the sum due. *Lamprey v. Mason*, 148 Mass. 231.

6. Vendor's Delay to Make Title. — *Bates v. Wynn*, (Pa. 1887) 11 Atl. Rep. 448; *Selden v. James*, 6 Rand. (Va.) 465; *Stevenson v. Davis*, 23 Can. Sup. Ct. 629. See also the titles *Covenants*, vol. 8, p. 43; *VENDOR AND PURCHASER*.

7. Wilful Default of Vendor. — *Stevenson v. Davis*, 23 Can. Sup. Ct. 629.

Purchase Money Kept Idle by Vendee. — *Selden v. James*, 6 Rand. (Va.) 465; *Bates v. Wynn*, (Pa. 1887) 11 Atl. Rep. 448.

Setting Off Costs Against Interest. — The vendee's costs in defending the suit cannot be set off against the interest, as the trouble and expense of defending a suit are things to which every one is exposed. *Selden v. James*, 6 Rand. (Va.) 465.

8. Death of Creditor. — *Gale v. Corey*, 112 Ind. 39; *Watts v. Garcia*, 40 Barb. (N. Y.) 656; *Stevenson v. Hodder*, 15 Grant Ch. (U. C.) 570.

Where a creditor with whom a policy of insurance on the debtor's life was deposited as security demanded payment after the latter's death intestate, in the absence of administration on his estate, it was held that interest was not recoverable from the date of demand, because the company was justified in refusing payment in the absence of the consent of the insured debtor's personal representative, the delay in such a case being due to the creditor's neglect to clothe himself with the legal title to the money. *Webster v. British Empire Mut. L. Assur. Co.*, 15 Ch. D. 169.

of money makes tender of the amount due at maturity, this will, in general, be held to relieve him from liability for interest thereafter.¹

Tender Considered as Payment. — A tender, it has been said, so far as the computation of interest is concerned, must be considered as a payment.²

(2) *What Is Sufficient Tender* — (a) **Mere Readiness to Pay.** — Mere readiness to pay a debt will not excuse the payment of interest.³

(b) **Tender of Less Sum than Due.** — If tender be made of a less sum than is justly due, a refusal to receive it is no bar to the subsequent recovery of interest on the entire debt.⁴

(c) **Offer to Pay on Condition.** — An offer of payment on a reasonable condition, as that the creditor execute a deed according to contract for property purchased,⁵ or deliver up a promissory note,⁶ is sufficient to prevent the subsequent accrual of interest.

1. Effect of Tender on Interest — England. — *Dent v. Dunn*, 3 Campb. 296.

United States. — *Cheney v. Libby*, 134 U. S. 83. *Alabama.* — *Steele v. Hanna*, 91 Ala. 190. *California.* — *Hidden v. Jordan*, 39 Cal. 61. *Colorado.* — *Westcott v. Patton*, 10 Colo. App. 544.

Connecticut. — *Loomis v. Knox*, 60 Conn. 343. *Iowa.* — *De Wolfe v. Taylor*, 71 Iowa 650; *Metropolitan Nat. Bank v. Commercial State Bank*, 104 Iowa 682.

Kentucky. — *January v. Martin*, 1 Bibb (Ky.) 586.

Massachusetts. — *Suffolk Bank v. Worcester Bank*, 5 Pick. (Mass.) 106; *Davis v. Parker*, 14 Allen (Mass.) 94.

Michigan. — *Crawford v. Osmun*, 94 Mich. 533.

New Hampshire. — *McNeil v. Call*, 19 N. H. 413, 51 Am. Dec. 188.

Ohio. — *Smith v. Merchants, etc., Bank*, 14 Ohio Cir. Ct. 199, 8 Ohio Cir. Dec. 176.

Pennsylvania. — *Hummel v. Brown*, 24 Pa. St. 310; *Thompson v. McKinley*, 47 Pa. St. 353; *West Republic Min. Co. v. Jones*, 108 Pa. St. 55.

South Carolina. — *Ryan v. Baldrick*, 3 McCord L. (S. Car.) 498; *Hood v. Huff*, 2 Mill (S. Car.) 159.

Tennessee. — *Williams v. Willhite*, 3 Head (Tenn.) 344.

Texas. — *Moore v. Perry*, (Tex. Civ. App. 1898) 46 S. W. Rep. 878.

Utah. — *McCauley v. Leavitt*, 10 Utah 91.

Virginia. — *Shobe v. Carr*, 3 Munf. (Va.) 10.

Wisconsin. — See *Lusk v. Smith*, 21 Wis. 27.

See generally the title **TENDER**.

2. Tender Considered as Payment. — *Hidden v. Jordan*, 39 Cal. 61.

Keeping Tender Good. — It was held, however, in *Nelson v. Loder*, 132 N. Y. 288, that "if a debtor wishes to extinguish his liability for subsequently accruing interest, or demands some affirmative relief, he cannot retain the money subject to his own use, but must devote it to the specific purpose of paying the debt, and put it within the power of the creditor to receive it at any time. He must keep his tender good." *Citing Gyles v. Hall*, 2 P. Wms. 378; *Bishop v. Church*, 2 Ves. 371; *Garforth v. Bradley*, 2 Ves. 675; *Stow v. Russell*, 36 Ill. 18; *Tuthill v. Morris*, 81 N. Y. 94; *Harris v. Jex*, 55 N. Y. 421, 14 Am. Rep. 285.

Use of Money by Debtor Subsequent to Tender Refused. — In several cases it has been inti-

imated that if it can be shown that the debtor, after tender made and rejected, employed the funds at a profit, he should not be excused from interest. *Davis v. Parker*, 14 Allen (Mass.) 94. See also, as containing a similar intimation, *Cheney v. Libby*, 134 U. S. 83.

3. Mere Readiness to Pay Held Not Sufficient. — *De Wolfe v. Taylor*, 71 Iowa 650; *Hummel v. Brown*, 24 Pa. St. 310; *Lusk v. Smith*, 21 Wis. 27.

Rule under Statute — "Diligent Inquiry" Not Equivalent to Tender. — Under a statute providing that a negotiable instrument which does not specify a place of payment is payable at the residence or place of business of the maker or wherever he may be found, a person liable on a note cannot avoid liability for interest after maturity merely by making diligent inquiry and efforts to ascertain the whereabouts of the payee and the note. In order to avoid liability for subsequent interest the maker must, at the maturity of the note, make tender at the place of business or residence of the maker. *McCauley v. Leavitt*, 10 Utah 91.

4. Tender of Less Sum than Due — England. — *Kidd v. Walker*, 2 B. & Ad. 705, 22 E. C. L. 174, 1 Dowl. 331.

Iowa. — *Metropolitan Nat. Bank v. Commercial State Bank*, 104 Iowa 682.

New York. — *Burtis v. Dodge*, 1 Barb. Ch. (N. Y.) 77.

Ohio. — *Smith v. Merchants', etc., Bank*, 14 Ohio Cir. Ct. 199, 8 Ohio Cir. Dec. 176.

Pennsylvania. — *West Republic Min. Co. v. Jones*, 108 Pa. St. 55.

Virginia. — *Shobe v. Carr*, 3 Munf. (Va.) 10.

5. Requiring Performance of Contract by Creditor. — *Thompson v. McKinley*, 47 Pa. St. 353; *Williams v. Willhite*, 3 Head (Tenn.) 344.

An Offer by a Third Person, desirous of purchasing property upon which there is a judgment lien, that he will pay off the judgment if he can get a good title to the property, is not such a tender as to stop the interest upon the judgment. *Jones v. Moore*, 1 Edw. (N. Y.) 632.

Tender on Unreasonable Condition. — Where the purchaser of an equity of redemption tendered the mortgage money on a condition which he had no right to impose, he cannot, on its being refused, insist on an abatement of the interest. *Rives v. Dudley*, 3 Jones Eq. (56 N. Car.) 126.

6. Requiring Surrender of Note. — *Dent v. Dunn*, 3 Campb. 296.

(3) *Doctrine that Technical Tender Unnecessary.* — It is held that when interest, if given, is by way of damages for nonpayment, a technical tender is not necessary to warrant its denial, but that the effect of a tender should be given to any circumstances which would make it appear inequitable to require the defendant to pay damages to the plaintiff for the detention of the debt.¹

3. By Act of Law — a. IN GENERAL. — Interest being allowed on the ground that the debtor is in default and has used the creditor's money, it is never given where payment of the debt has been prevented by the order of a court of competent jurisdiction or by the interposition of the law.²

Delay in Course of Legal Proceedings. — Where the delay in the payment of the debt is due merely to delay in the course of legal proceedings, interest will not generally be required.³

b. INJUNCTION OR ORDER OF COURT. — Where a party is restrained by injunction from using funds in his hands, he will not be chargeable with interest while so restrained.⁴

Injunction Against Paying Over Money. — Where persons are merely enjoined from paying over money due and in their possession, for which they contracted to pay interest, it has been held that the money must be paid into court in order that no interest shall be recoverable;⁵ but other cases have decided that no interest will be allowed during the pendency of an injunction⁶ although the party enjoined actually used and made a profit on the funds.⁷

Where Debtor Restrains Creditor from Collection of Debt. — As a general rule, however, a debtor who restrains his creditor from collection of the debt will be liable for interest on dissolution of the injunction.⁸

1. Technical Tender Held Unnecessary. — *Dent v. Dunn*, 3 Campb. 296; *Donohue v. Chase*, 139 Mass. 407; *Goff v. Rehoboth*, 2 Cush. (Mass.) 475; *Suffolk Bank v. Worcester Bank*, 5 Pick. (Mass.) 106; *Lusk v. Smith*, 21 Wis. 27.

An Offer to Pay All That Is Due upon an excessive demand by the creditor will be sufficient to warrant a denial of interest on the balance subsequently found to be owing. *Lusk v. Smith*, 21 Wis. 27.

2. Suspension by Act of Law — United States. — *Willings v. Consequa*, Pet. (C. C.) 301; *Bowman v. Wilson*, 2 McCrary (U. S.) 394. *Arkansas.* — *Pillow v. Brown*, 26 Ark. 240. *Maine.* — *Norris v. Hall*, 18 Me. 333. *Maryland.* — *Chase v. Manhardt*, 1 Bland (Md.) 333.

Massachusetts. — *Oriental Bank v. Tremont Ins. Co.*, 4 Met. (Mass.) 1; *Rennell v. Kimball*, 5 Allen (Mass.) 356.

New Jersey. — *Le Branthwait v. Halsey*, 9 N. J. L. 3.

New York. — *Stevens v. Barringer*, 13 Wend. (N. Y.) 639.

Pennsylvania. — *Irwin v. Pittsburgh, etc.*, R. Co., 43 Pa. St. 488; *Jackson v. Lloyd*, 44 Pa. St. 82; *Jones v. Manufacturer's Nat. Bank*, 99 Pa. St. 317; *Hoare v. Allen*, 2 Dall. (Pa.) 102.

Rule by Statute. — In *California* it is provided by statute that interest is not recoverable during such time as the debtor is prevented by law from paying the debt. Civ. Code Cal., § 3287; *Martin v. Ede*, 103 Cal. 157.

An act of assembly authorizing the auditor of the state to issue warrants in favor of a creditor of the commonwealth on any particular fund will not stop the interest accruing on the debt, unless it appears that the fund was sufficient at the time for its payment. *Com. v. Newton*, 1 Hen. & M. (Va.) 90.

3. Delay in Course of Legal Proceedings. — *Hawley v. Barker*, 5 Colo. 118; *Donahue v. Partridge*, 160 Mass. 336; *Kelsey v. Murphy*, 30 Pa. St. 340.

A district attorney is not entitled to interest on his accounts for the time between their allowance by the treasury department and their payment. *Baxter v. U. S.*, 51 Fed. Rep. 671, 10 U. S. App. 243.

Delay Pending Collateral Litigation. — The vendee of land to whom a deed is made and possession given is not excused from paying interest on the deferred instalments of purchase money by reason of the fact that he delayed paying it on account of litigation over an adverse claim set up by a third party, the vendee having continued in possession and enjoyed the issues and profits. *Selden v. James*, 6 Rand. (Va.) 465.

4. Enjoining Debtor from Using Money. — *Osborn v. U. S. Bank*, 9 Wheat. (U. S.) 738; *Warren v. Banning*, 140 N. Y. 227.

5. Enjoining Debtor from Paying Over Money. — *Curd v. Letcher*, 3 J. J. Marsh. (Ky.) 443.

6. Injunction at Instance of Creditor. — *Le Branthwait v. Halsey*, 9 N. J. L. 3; *Stevens v. Barringer*, 13 Wend. (N. Y.) 639.

7. Where Party Makes Profit on Funds. — Although there was evidence that the defendant actually used and employed the funds during the pendency of the injunction restraining him from paying them over, it has been held that no interest was recoverable. *Stevens v. Barringer*, 13 Wend. (N. Y.) 639. In this case the court said: "There would be no hardship in this case in requiring the defendants to pay interest; but the principle is not to be controverted that a person who is prohibited by an injunction from paying the principal shall not be compelled to pay interest."

8. Restraining Collection of Debt. — *Hosack v.*

Payment Prevented by Order of Court Pending Litigation. — Interest is not, as a rule, allowed where payment has been prevented or suspended by the order of a court of competent jurisdiction to await the settlement of controversy among several claimants.¹

c. MONEY PAID INTO COURT. — If a fund has been paid into court, and cannot be paid out without an order of the court, it does not ordinarily bear interest.²

4. By Existence of State of War — a. IN GENERAL. — If the debtor is a citizen and resident of one country and the creditor a citizen and resident of another, the general rule has been said to be that the accrual of interest will be suspended during such time as a state of war exists between the respective countries.³

Rogers, 9 Paige (N. Y.) 461; Shipman v. Fletcher, 95 Va. 585.

In an Action on an Injunction Bond given upon the granting of an injunction to restrain the payment of a certain sum of money to the obligees, interest on such sum is recoverable as a matter of right up to the time when the money was paid into court on dissolution of the injunction. Wallis v. Dilley, 7 Md. 237.

But Where a Judgment Creditor Had Been Enjoined and ordered to account for and pay over to the defendant money received by virtue of sales made by the sheriff under execution, it was held that he was liable for interest as a matter of course. Smith v. Godbold, 4 Strobb. Eq. (S. Car.) 186.

1. Payment Restrained Pending Litigation. — Bowman v. Wilson, 2 McCrary (U. S.) 394.

A Creditor of an Insolvent Estate who has an unqualified right to a specific fund is, however, entitled to interest accruing on his claim pending litigation concerning it between himself and the debtor's personal representative. *In re* Robb, 5 Ohio N. P. 52, 5 Ohio Dec. 227.

And the interest on a claim is not suspended by the debtor placing it upon his schedule, where the creditor takes no part in the proceeding, although the debtor may obtain a respite. Finley v. Mallard, 12 La. Ann. 833.

Delay in Payment of Dividend. — Where the creditor of an insolvent is delayed in the receipt of a dividend on his debt to which he is entitled, the delay being due to an order of court pending litigation as to the amount of indebtedness on which the dividend is to be computed, the creditor is entitled to interest on such dividend, though it happens that the funds of the insolvent are deposited with the creditor, a bank, such deposit being made in the usual course of business. People v. Remington, 59 Hun (N. Y.) 307.

But where the funds of an insolvent claimed by several creditors, one of them a bank, were, by an order of the court, made by the consent of the parties, deposited in the bank, it agreeing to pay them over on the court's order, if it was finally decided to be not entitled to them, and meantime the bank used the funds as its own, upon a subsequent order upon the bank to pay over the funds it was held liable for interest thereon for the time during which it retained and used them. Kenton Ins. Co. v. First Nat. Bank, 93 Ky. 129.

Appointment of Receiver. — Where a person has contracted to pay a stipulated rate of interest higher than the legal rate in the absence of contract, on the balance of purchase money

on property, the fact that after a default the debtor is deprived of his property by the appointment of a receiver, at the instance of the creditor, is no defense to the claim for interest at the contract rate. Strayer v. Long, 83 Va. 715.

2. Money Paid into Court. — Bowman v. Wilson, 2 McCrary (U. S.) 394; Potter v. Gardner, 5 Pet. (U. S.) 718; Lilley v. Mutual Ben. L. Ins. Co., 92 Mich. 153.

Adverse Claimants of Insurance Money — Payment into Court by Insurer. — An insurance company, joined as defendant in a suit between adverse claimants of the insurance company, which is willing to pay to the proper person when designated by the court, should be permitted to pay into court the amount due under the policy to abide the result of a contest therefor, and by so doing will not be liable for interest thereon pending trial. Lilley v. Mutual Ben. L. Ins. Co., 92 Mich. 153.

Where, on the motion of interveners, acting in good faith, it was ordered that money for which the plaintiff was suing be paid to the clerk to await the further order of the court, and the money was there detained by an erroneous order of the court, whereby the cause was continued, it was held that the interveners were not liable for interest during the time of such detention simply because they failed to establish their right to the money. Van Gordon v. Ormsby, 60 Iowa 510.

Bill of Interpleader. — Interest is not stopped by a bill of interpleader improperly filed. Pfister v. Wade, 69 Cal. 133; Michigan, etc., Plaster Co. v. White, 44 Mich. 25.

3. Existence of State of War — England. — Dubelloix v. Waterpark, 1 D. & R. 16, 16 E. C. L. 12.

United States. — Bigler v. Waller, Chase (U. S.) 316; Conn v. Penn, Pet. (C. C.) 496; Ward v. Smith, 7 Wall. (U. S.) 447; Brown v. Hiatts, 15 Wall. (U. S.) 177; Denniston v. Imbrie, 3 Wash. (U. S.) 396; Bainbridge v. Willcocks, Baidw. (U. S.) 536.

Alabama. — Bean v. Chapman, 62 Ala. 58.

Arkansas. — Pillow v. Brown, 26 Ark. 240; Williams v. State, 37 Ark. 463.

Georgia. — Mayer v. Reed, 37 Ga. 482.

Kentucky. — Selden v. Preston, 11 Bush (Ky.) 191; Haggard v. Conkwright, 7 Bush (Ky.) 16, 3 Am. Rep. 297.

Maryland. — Thomas v. Hunter, 29 Md. 406; Bordley v. Eden, 3 Har. & M. (Md.) 167; Paul v. Christie, 4 Har. & M. (Md.) 161.

Minnesota. — Lash v. Lambert, 15 Minn. 416, 2 Am. Rep. 142.

b. ONLY INTEREST AS DAMAGES SUSPENDED — (1) In General. — The existence of a state of war between the respective countries of the debtor and creditor suspends the accrual of interest only where it would ordinarily be recoverable as damages, and not as a substantive part of the debt.¹ So limited, the reason of the rule is obvious — that a party should not be called upon to pay damages for retaining money where it was his duty to withhold it and not to pay it over.²

(2) *Subsequent Contract to Pay.* — Where, however, interest during the pendency of war was included in an account rendered after the termination of hostilities, which by acquiescence became an account stated, it was held that such interest was recoverable in an action thereon, though it might not have been recoverable had objection to it been made in proper season.³

c. REQUISITES TO APPLICATION OF RULE. — It is essential to the application of the rule suspending interest where the respective countries of the debtor and creditor are engaged in war, that the circumstances be actually such that the payment of the debt was made impracticable, if not impossible.⁴ Thus interest is not suspended in cases where the creditor, although a subject of the enemy, remains in the country of the debtor, or has a known agent there authorized to receive the debt.⁵ The same is true where one of several

Pennsylvania. — *Hoare v. Allen*, 2 Dall. (Pa.) 102; *Foxcraft v. Nagle*, 2 Dall. (Pa.) 132.

South Carolina. — *Ryan v. Baldrick*, 3 McCord L. (S. Car.) 498.

Tennessee. — *Gates v. Union Bank*, 12 Heisk. (Tenn.) 325.

Virginia. — *Brewer v. Hastine*, 3 Call (Va.) 22; *Roberts v. Cocke*, 28 Gratt. (Va.) 207.

And see the title *ALIENS*, vol. 2, p. 64; *WAR*.

War Between the States. — This rule has also been held applicable to debts between citizens of the Confederate states and citizens of the states adhering to the federal government in the late civil war. *Brown v. Hiatts*, 15 Wall. (U. S.) 177. And see *Ward v. Smith*, 7 Wall. (U. S.) 447. Thus it was decided that during the continuance of hostilities between the Confederate states and the United States, interest did not run in favor of a citizen of Pennsylvania against a citizen of Georgia, resident in their respective states. *Mayer v. Reed*, 37 Ga. 482. But compare *Shortridge v. Macon, Chase* (U. S.) 136, holding the rule applicable to a mere rebellion against an existing government, and characterizing the civil war as such.

Where a Trustee Was Held Liable for a loss resulting through his investment of good money in Confederate bonds, interest was not allowed during the period of the civil war. *Kirby v. Goodvkoontz*, 26 Gratt. (Va.) 298.

Citizens and Residents of Same Country. — As a matter of course, the mere existence of a state of war will not suspend the running of interest upon debts between citizens of the same belligerent. *Williams v. State*, 37 Ark. 463. But in a number of states the statutes of limitations were expressly suspended during the civil war.

Statute Prohibiting Recovery of Interest to Persons Engaged in Rebellion. — The *West Virginia* Act of Feb. 15, 1868, prohibiting persons engaged in rebellion from recovering interest accruing during the rebellion, was, however, held not invalid as impairing vested rights. *Hutchinson v. Landcraft*, 4 W. Va. 312.

1. Only Interest as Damages Suspended. — *Lash v. Lambert*, 15 Minn. 416, 2 Am. Rep. 142. Compare *Brown v. Hiatts*, 15 Wall. (U. S.) 177.

Statute Abating Interest Accruing During War.

— It has been held that a state statute allowing an abatement of interest which accrued during the civil war does not contravene the clause of the Federal Constitution which forbids the states from passing laws impairing the obligation of contracts, interest not being a subject of common-law right, but one of legislative permission and within the discretion of the jury to allow it or disallow it. *Harmanson v. Wilson*, 1 Hughes (U. S.) 207. In this case the court said that upon authority as presented in the *Virginia* cases of *McCall v. Turner*, 1 Call (Va.) 133; *Brewer v. Hastie*, 3 Call (Va.) 22; *Cary v. Macon*, 4 Call (Va.) 605, and *Tucker v. Watson*, (Va.) 6 Am. L. Reg. N. S. 220, and the series of Acts of Assembly by which this state has expressly and continuously, from the beginning, reserved to her juries a discretionary power over the subject of interest on money, it might assume the law of this commonwealth, as between citizens thereof, to be that interest during a period of war may be disallowed by a jury or a court without breach of contract.

2. Reason of Rule. — *Brown v. Hiatts*, 15 Wall. (U. S.) 177; *Conn v. Penn*, Pet. (C. C.) 496; *Bean v. Chapman*, 62 Ala. 58; *Hoare v. Allen*, 2 Dall. (Pa.) 102.

3. Subsequent Contract to Pay. — *Bainbridge v. Wilcocks*, Baldw. (U. S.) 536.

4. Payment Impracticable Because of War. — *Shortridge v. Macon, Chase* (U. S.) 136; *Yeaton v. Berney*, 62 Ill. 61.

Assignment and Reacquisition of Note. — Where the holder of a note assigned it before the civil war began, to a bank whose situs was in the town of the maker's residence, in a state which did not secede, and the note was protested for nonpayment at maturity and held by the bank during the pendency of the war, the payee, on reacquiring the note after the termination of hostilities, was held to be entitled to recover interest during the entire period. *Thomas v. Hunter*, 29 Md. 406. And see also cases cited in succeeding notes.

5. Interest Not Suspended Where Creditor or His Agent Resides in Debtor's Country — United

Volume XVI.

joint debtors resides in the same country with the creditor or with the known agent of the creditor, in an action against the former,¹ and also where the action is against the surety of a principal who is an alien enemy,² the defense permitting an abatement of interest being a personal one to the principal, and not available to the surety unless similarly situated.³

XIII. ANNUAL AND PERIODIC INTEREST — 1. Generally. — As has been seen, where interest is contracted for and accrues prior to the maturity of the principal, it will, in the absence of a contrary stipulation, be deemed payable only at the maturity of the principal debt, and not before.⁴

2. Periodic Interest Due Only by Contract — a. GENERAL RULE. — Interest is payable annually or at periodic intervals, of course, when it is made so by the contract of the parties.⁵

b. AFTER MATURITY OF PRINCIPAL DEBT. — In the absence of all contract, express or implied, for interest beyond the maturity of the principal debt, annual interest thereafter is not recoverable, though there may be a provision therefor in the contract, before the principal falls due.⁶

3. How Contracted For — Terms of Contract. — A stipulation for interest at a specified rate per annum does not import a contract to pay interest annually, the term employed only affording a measure for the computation of interest.⁷

States. — *Conn v. Penn*, Pet. (C. C.) 496; *Ward v. Smith*, 7 Wall. (U. S.) 447; *Denniston v. Imbrie*, 3 Wash. (U. S.) 396.

Kentucky. — *Haggard v. Conkwright*, 7 Bush (Ky.) 16, 3 Am. Rep. 297.

Minnesota. — *Lash v. Lambert*, 15 Minn. 416, 2 Am. Rep. 142.

Tennessee. — *Gates v. Union Bank*, 12 Heisk. (Tenn.) 325.

Virginia. — *Roberts v. Cocke*, 28 Gratt. (Va.) 207.

This Is for the Reason that payment to such creditor or his agent could in no respect be construed as a violation of the duties imposed by a state of war upon the debtor. The payment in such cases is not made to an enemy, and it is no objection that the agent may possibly remit the money to his principal; if he should do so, the offense is imputable to him, and not to the person paying the money to him. *Conn v. Penn*, Pet. (C. C.) 524.

Debtor's Knowledge of Proximity of Creditor or Agent. — In order, however, for the fact that the creditor or an agent is resident in the debtor's country to have the effect of taking the case out of the rule suspending interest between alien enemies during the pendency of war, the fact of the creditor's residence or that of his agent must be known to the debtor. *Denniston v. Imbrie*, 3 Wash. (U. S.) 396.

1. Creditor or Agent in Country of Joint Debtor. — *Yeaton v. Berney*, 62 Ill. 61; *Paul v. Christie*, 4 Har. & M. (Md.) 161.

Where a Trustee and Debtors of the Trust Estate both resided in Confederate territory during the civil war, the trustee was held liable for interest on the fund during the war, although the *cestui que trust* resided outside of Confederate territory, as in such case the debtors to the trustee were bound to pay interest to him, and a trustee cannot derive a profit from the trust fund without rendering any equivalent therefor. *Coltrane v. Worrell*, 30 Gratt. (Va.) 434.

2. Resident Surety of Alien Enemy Principal. — *Bean v. Chapman*, 62 Ala. 58; *Paul v. Christie*, 4 Har. & M. (Md.) 161.

3. Defense of Personal Nature. — *Bean v. Chapman*, 62 Ala. 58.

4. See *supra*, this title, *Contracts to Pay Interest — Express Contracts — When Interest Payable.*

5. Contract for Periodic Payments of Interest. — *Baxter v. Blodgett*, 63 Vt. 629.

As to compound interest, see *infra*, this title, *Compound Interest and Interest on Interest.*

6. Periodic Interest After Maturity of Debt. — *In re Bartenbach*, 11 Nat. Bankr. Reg. 61; *Ashuelot R. Co. v. Elliot*, 57 N. H. 397; *Hunter v. Hall*, 14 Ohio Cir. Ct. 425, 6 Ohio Cir. Dec. 366; *Wheaton v. Pike*, 9 R. I. 132, 98 Am. Dec. 377; *Westfield v. Westfield*, 19 S. Car. 85; *Wilson v. Kelly*, 19 S. Car. 160; *Sharp v. Lee*, 14 S. Car. 343.

The Words "With Interest, Payable Annually," in the condition of a bond for the payment of money, do not extend to the allowance of interest on that interest which accrues after the bond becomes due, but only to that which annually accrues within the time limited for the payment of the bond. *De Bruhl v. Neuffer*, 1 Strobh. L. (S. Car.) 426. Likewise, in *Wilson v. Kelly*, 19 S. Car. 160, a bond dated January 24, 1861, "payable in three years, in equal annual instalments, with lawful interest thereon from January 21, 1861, payable annually, and the first instalment, with interest on the whole principal sum due, payable on January 21, 1862," was held to draw annual interest only until maturity, and simple interest thereafter.

Where It Is Expressly Provided by the Contract that the interest shall be paid annually after as well as before the maturity of the principal, effect will, of course, be given to such provision. Thus, a bond payable "in three equal annual instalments from this date, with interest payable annually until the whole be paid," draws annual interest beyond the several instalments, and such annual interest continues after maturity as well as before. *Watkins v. Lang*, 17 S. Car. 13. See also *Miller v. Hall*, 18 S. Car. 141.

7. Contract for Interest at Specified Rate per Annum. — *Ramsdell v. Hulett*, 50 Kan. 440;

Volume XVI.

It has been held, indeed, that a provision in a note, "if interest be not paid annually to become as principal, and bear the same rate of interest," is not a promise to pay annually.¹ But where a note is payable "with annual interest" the interest is payable each year.² A contract for "annual interest" is the same as a stipulation for "interest annually."³

4. Action for Interest When Due. — Though it may formerly have been questioned,⁴ there is now no doubt that there may be a suit for an interest installment if not paid when due, or successive suits for successive defaults, as for a debt separate and distinct from the principal sum.⁵ And the holder of a promissory note which stipulates for the payment of interest semiannually may, upon action brought between the semiannual periods at which the interest is payable, recover full interest up to judgment.⁶

Action for Annual Interest Before Maturity of Principal. — Such actions may be instituted before the maturity of the principal debt.⁷

Action Brought After Maturity of Principal — Merger. — It has been held that

Motsinger v. Miller, 59 Kan. 575; *Koehring v. Muemminghoff*, 61 Mo. 406, 21 Am. Rep. 402; *Cooper v. Wright*, 23 N. J. L. 200; *Catlin v. Lyman*, 16 Vt. 44.

Where Principal Payable in Annual Instalments. — A promissory note for the payment of one thousand dollars in ten annual instalments, with interest, only requires the payment of interest on the several instalments as they respectively become due, and not annually on the whole principal sum remaining unpaid. *Bander v. Bander*, 7 Barb. (N. Y.) 560. See also *Stumps v. Cooper*, 3 Baxt. (Tenn.) 223.

1. *Motsinger v. Miller*, 59 Kan. 575. But see *Meyer v. Graeber*, 19 Kan. 165.

2. **Note "With Annual Interest."** — *Kurz v. Suppiger*, 18 Ill. App. 630; *Cook v. Wiles*, 42 Mich. 439.

Where a note provided that interest should be paid annually, it was held that the interest instalments fell due on the successive anniversaries of the date of the note, and not on the date fixed for the payment of annual instalments of the principal debt. *Jurgensen v. Carlsen*, 97 Iowa 627.

3. **Contract for "Annual Interest."** — *Catlin v. Lyman*, 16 Vt. 44. See also *Austin v. Imus*, 23 Vt. 286.

4. **Early Doubt Subsequently Dispelled — True Intent of Parties.** — In *Sparhawk v. Wills*, 6 Gray (Mass.) 163, the court said that formerly it was doubted whether several suits could be brought on a note payable by instalments, because, though there were different payments to be made at different times, there was but one contract; but it was held that such a contract imported, in legal effect, distinct promises, though expressed in one form of words. So on a note payable at the lapse of a term of years, with interest annually, interest alone may be sued for, when due. So on a note on demand, with interest annually. The law has thus been approximating to the construction which best gives effect to the true intent of contracting parties.

5. **Suit for Interest Instalment When Due — Successive Suits** — *England*. — *Herries v. Jamieson*, 5 T. R. 553.

California. — *Chafoin v. Rich*, 92 Cal. 471.

Georgia. — *Scott v. Liddell*, 98 Ga. 24.

Iowa. — *Fox v. Gray*, 105 Iowa 433; *Carter v. Carter*, 76 Iowa 474; *Jurgensen v. Carlsen*, 97 Iowa 627.

Kentucky. — *Radford v. Southern Mut. L. Ins. Co.*, 12 Bush (Ky.) 434.

Maine. — *Doe v. Warren*, 7 Me. 48.

Massachusetts. — *Greenleaf v. Kellogg*, 2 Mass. 568; *Cooley v. Rose*, 3 Mass. 221; *Connors v. Holland*, 113 Mass. 50; *Andover Sav. Bank v. Adams*, 1 Allen (Mass.) 28; *Sparhawk v. Wills*, 6 Gray (Mass.) 163; *Wilcox v. Howland*, 23 Pick. (Mass.) 169.

Missouri. — *Waples v. Jones*, 62 Mo. 440.

New York. — *Howard v. Farley*, (N. Y. Super. Ct. Spec. T.) 18 Abb. Pr. (N. Y.) 367, 3 Robt. (N. Y.) 308.

Ohio. — *Dunlap v. Wiseman*, 2 Disney (Ohio) 398.

Pennsylvania. — *Stokely v. Thompson*, 34 Pa. St. 210; *Sparks v. Garrigues*, 1 Binn. (Pa.) 165.

Vermont. — *Catlin v. Lyman*, 16 Vt. 44.

Assignment of Principal Reserving Interest. — Where a note payable a certain number of years after date contains a stipulation for the payment of interest annually, the contract to pay interest being severable, the payee may assign the principal and reserve the interest, with the right of collecting it by suit. *Scott v. Liddell*, 98 Ga. 24.

6. **Recovery of Interest After Time of Judgment.** — *Chafoin v. Rich*, 92 Cal. 471.

7. **Action for Interest Before Maturity of Principal** — *England*. — *Herries v. Jamieson*, 5 T. R. 553.

Massachusetts. — *Cooley v. Rose*, 3 Mass. 221.

Missouri. — *Rowe v. Schertz*, 74 Mo. App. 602.

New York. — *Howard v. Farley*, (N. Y. Super. Ct. Spec. T.) 18 Abb. Pr. (N. Y.) 367, 3 Robt. (N. Y.) 308.

Pennsylvania. — *Stokely v. Thompson*, 34 Pa. St. 210; *Sparks v. Garrigues*, 1 Binn. (Pa.) 165.

Principal Payable by Instalments. — Where there is a contract to pay the principal by instalments commencing at a future day and to pay interest annually or semiannually, the holder of the note may sue for each half year's interest as it becomes due although the principal is not payable. *Radford v. Southern Mut. L. Ins. Co.*, 12 Bush (Ky.) 434; *Connors v. Holland*, 113 Mass. 50.

Interest to Be Compounded. — Where the interest on a promissory note became due annually,

although the action for interest is instituted after the principal sum is due, a recovery thereon is no merger of the liability on the principal indebtedness.¹

5. Interest on Annual or Periodic Interest. — It has been held that the recovery of compound interest is not necessarily warranted by the fact that a contract for the payment of money stipulates for interest payable annually.²

XIV. COMPOUND INTEREST AND INTEREST ON INTEREST — 1. General Rule Against. — In the light of the ancient prejudice against all interest, even for the use, forbearance, or detention of the principal debt, it is not to be wondered at that there was a still stronger aversion to interest on interest. And while at the present time this primitive and erroneous notion has been largely outgrown, so far as simple interest is concerned, except indeed to the extent to which the rate is limited by the statutes against usury, it may yet be stated as a general rule that the law does not favor compound interest or interest on interest.³

it was held that the fact that it was to be compounded with the principal, if not paid, did not have the effect of postponing its payment until the maturity of the whole note, nor did the plaintiff, by such stipulation, waive his right to sue for and recover the annual installments of interest as they matured. *Rowe v. Schertz*, 74 Mo. App. 602. And see *Carter v. Carter*, 76 Iowa 474; *Castilio v. Martin*, 11 Mo. App. 251; *Stoner v. Evans*, 38 Mo. 461; *Waples v. Jones*, 62 Mo. 440.

1. Recovery of Interest After Maturity of Principal Not Bar to Subsequent Action for Principal. — *Andover Sav. Bank v. Adams*, 1 Allen (Mass.) 28. See also *Sparhawk v. Wills*, 6 Gray (Mass.) 163. But compare *Howe v. Bradley*, 19 Me. 31; *Bannister v. Roberts*, 35 Me. 75.

2. Interest on Annual Interest. — *Kittredge v. McLaughlin*, 38 Me. 513.

This Subject Is More Particularly Considered in the immediately following section of this title, Compound Interest and Interest on Interest.

3. Compound Interest Not Favored — United States. — *Timberlake v. First Nat. Bank*, 43 Fed. Rep. 231.

Alabama. — *Broughton v. Mitchell*, 64 Ala. 210.

Illinois. — *Barker v. International Bank*, 80 Ill. 66; *Smith v. Luse*, 30 Ill. App. 37.

Kentucky. — *Gray v. Bate*, 8 B. Mon. (Ky.) 573.

Maine. — *Doe v. Warren*, 7 Me. 48; *Kittredge v. McLaughlin*, 38 Me. 513; *Stone v. Locke*, 46 Me. 445; *Whitcomb v. Harris*, 90 Me. 206; *Bradley v. Merrill*, 91 Me. 340.

Massachusetts. — *Lewin v. Folsom*, 171 Mass. 188; *Von Hemert v. Porter*, 11 Met. (Mass.) 219; *Wilcox v. Howland*, 23 Pick. (Mass.) 169.

Michigan. — *Buchtel v. Mason*, 67 Mich. 605.

Montana. — *Wilson v. Davis*, 1 Mont. 183.

Nebraska. — *Hager v. Blake*, 16 Neb. 12.

New York. — *Seymour v. Spring Forest Cemetery Assoc.*, 4 N. Y. App. Div. 359; *Connecticut v. Jackson*, 1 Johns. Ch. (N. Y.) 13, 7 Am. Dec. 471.

Tennessee. — *Union Bank v. Williams*, 3 Coldw. (Tenn.) 579.

Virginia. — *Pindall v. Marietta Bank*, 10 Leigh (Va.) 502; *Childers v. Deane*, 4 Rand. (Va.) 408.

Canada. — *Dionne v. Malleau*, 2 L. C. L. J. 112.

See also cases cited in succeeding notes to this section.

Doctrine at Common Law and under Early English Statutes. — In *Wilson v. Davis*, 1 Mont. 183, the court said that interest upon interest was not allowed at common law, although stipulated for by special contract. It was considered a violation of the laws of God and contrary to good conscience; and although an English statute was enacted leaving it to parties to agree to any interest less than a certain per cent., this statute was never construed by the English courts as allowing compound interest in any amount.

In *Waring v. Cunliffe*, 1 Ves. Jr. 99, Lord Thurlow said: "My opinion is in favor of interest upon interest, because I do not see any reason, if a man does not pay interest when he ought, why he should not pay interest for that also. But I have found the court in a constant habit of thinking the contrary, and I must overturn all the proceedings of the court if I give it." And see *Chambers v. Goldwin*, 9 Ves. Jr. 271.

Mortgagors of Property, After the Execution of Several Successive Mortgages Thereon, cannot agree to compute the interest so as to make it a charge on the mortgaged premises to the prejudice of junior mortgagees whose mortgages were in existence at the time when the agreement to compound the interest was made. *Fitzhugh v. McPherson*, 9 Gill & J. (Md.) 56.

But a deed of trust on real estate executed as security for a bond providing for the payment of interest annually will, it has been held, as between the parties thereto, stand security for the payment of interest notes executed by the debtor for several consecutive years, when the interest became due, as well as for interest on the interest notes. The claim for this interest upon interest will be subordinate, however, to the claims of subsequent creditors or purchasers. *Barbour v. Tompkins*, 31 W. Va. 410. See also *Parkhurst v. Cummings*, 56 Me. 155; *Bradley v. Merrill*, 91 Me. 340; *Kittredge v. McLaughlin*, 38 Me. 513; *Stone v. Locke*, 46 Me. 445.

Deduction of Interest in Advance. — Under a statute which allows interest only on the amount of money actually lent, interest on a loan cannot be deducted in advance. *Timberlake v. First Nat. Bank*, 43 Fed. Rep. 231.

Doctrine of De Minimis. — Where the judgment was for over fifty thousand dollars, it was held that the fact that the jury compounded the interest on nine dollars and sixty-

Explanatory. — For the purpose of anything approaching a clear comprehension of this very difficult subject, it will be necessary to observe at the outset a distinction, rarely made plain by the cases, between interest compounded periodically and simple interest on deferred instalments of interest after payment should have been made. All interest on interest is frequently designated compound interest, but interest compounded annually or periodically involves a different method of computation and a different result from mere simple interest on annual or periodic interest. By the former method, interest on interest, and so on *ad infinitum*, will bear interest, while in the latter case it is only the interest on the original principal sum upon which interest is given.

2. Allowance in Special Cases — *a. GENERALLY.* — In the announcement of the rule against compound interest it is not uncommon to reserve a rather broad exception in favor of the allowance of such interest in "special cases" or "particular circumstances."¹

b. COUPONS. — It is generally held that interest coupons, if not paid when

two cents for a limited period would not, even if erroneous, vitiate the judgment, by virtue of the principle *de minimis non curat lex*. *People's Sav. Bank v. Norwalk*, 56 Conn. 547.

Compound Interest Not Usurious, but Against Policy of Law. — *Connecticut v. Jackson*, 1 Johns. Ch. (N. Y.) 14, 7 Am. Dec. 471; *Kellogg v. Hickok*, 1 Wend. (N. Y.) 521.

Doctrine that Compound Interest Savors of or Tends to Usury. — Interest on interest, while not usury, has been said "to savor of it, and obviously tends to the encouragement of avarice." *Force v. Elizabeth*, 28 N. J. Eq. 403. See also, as expressing a similar view, the following cases:

England. — *Chambers v. Goldwin*, 9 Ves. Jr. 271.

Canada. — *Dionne v. Malleau*, 2 L. C. L. J. 112.

Alabama. — *Eslava v. Lepretre*, 21 Ala. 531, 56 Am. Dec. 266; *Paulling v. Creagh*, 54 Ala. 646.

Connecticut. — *Camp v. Bates*, 11 Conn. 487. *Maine.* — *Farwell v. Sturdivant*, 37 Me. 308; *Whitcomb v. Harris*, 90 Me. 206; *Bradley v. Merrill*, 91 Me. 340.

Nebraska. — *Hager v. Blake*, 16 Neb. 12. *New York.* — *Van Rensselaer v. Jones*, 2 Barb. (N. Y.) 669; *Quackenbush v. Leonard*, 9 Paige (N. Y.) 345.

Ohio. — *Mueller v. McGregor*, 28 Ohio St. 265.

Oregon. — *Levens v. Briggs*, 21 Oregon 333. And see *Murray v. Oliver*, 3 Oregon 539.

Vermont. — *Catlin v. Lyman*, 16 Vt. 44.

Stated Resume of Rules as to Compound Interest. — In *Wilcox v. Howland*, 23 Pick. (Mass.) 167, the court said: "The result of the doctrines upon this subject seems to be that a contract to pay compound interest is not usurious or void; that an agreement to pay interest annually or semiannually is valid and may be enforced by action; that a claim for interest on such interest is an equitable claim; but that on an action brought interest will not be allowed on interest from the time it fell due, because it would savor of usury, and because the holder of the note, by forbearing to call for his interest when it became due, shall be deemed to have waived his right to have the interest converted into capital."

1. Allowance of Compound Interest in Special

Cases — *England.* — *Burdick v. Garrick*, L. R. 5 Ch. 233, 39 L. J. Ch. 369.

Canada. — *Municipal Council v. Wilmot Tp.*, 17 U. C. Q. B. 82; *Landman v. Crooks*, 4 Grant Ch. (U. C.) 353.

United States. — *National Bank v. Mechanics' Nat. Bank*, 94 U. S. 437.

California. — *Merrifield v. Longmire*, 66 Cal. 180.

Connecticut. — *Camp v. Bates*, 11 Conn. 487; *State v. Howarth*, 48 Conn. 207.

Georgia. — *Wofford v. Wylie*, 72 Ga. 863.

Massachusetts. — *Barrell v. Joy*, 16 Mass. 221.

Michigan. — *Heath v. Waters*, 40 Mich. 457; *Hoyle v. Page*, 41 Mich. 533.

New York. — *Van Rensselaer v. Jones*, 2 Barb. (N. Y.) 669; *Ackerman v. Emott*, 4 Barb. (N. Y.) 626; *Connecticut v. Jackson*, 1 Johns. Ch. (N. Y.) 13, 7 Am. Dec. 471; *Schieffelin v. Stewart*, 1 Johns. Ch. (N. Y.) 620, 7 Am. Dec. 507; *Stoughton v. Lynch*, 2 Johns. Ch. (N. Y.) 209.

Ohio. — *Mueller v. McGregor*, 28 Ohio St. 265.

South Carolina. — *Heriot v. McCauley*, Riley Eq. (S. Car.) 19.

Tennessee. — *Governor v. McEwen*, 5 Humph. (Tenn.) 241.

Virginia. — *Childers v. Deane*, 4 Rand. (Va.) 408.

Where a Public Collector employs the money collected by him for his own purposes, he may be chargeable with compound interest. *Governor v. McEwen*, 5 Humph. (Tenn.) 241.

If a Partner Refuses to Disclose the Profits of moneys that he had overdrawn from the partnership funds, compound interest will be allowed against him. *Stoughton v. Lynch*, 2 Johns. Ch. (N. Y.) 209. See further in this connection the title PARTNERSHIP.

Commissioner in Equity. — Where, upon a bill against a commissioner in equity for an account of certain securities ordered by the court to be taken by him, the defendant had reported that he had complied with the court's order in this respect, but gave no further account of the securities, it was held that he must be presumed to have received the money due according to their terms; and the interest thereon being payable annually, he was held to be properly charged with interest on interest. *Heriot v. McCauley*, Riley Eq. (S. Car.) 19.

due, will draw interest like other instruments for the payment of money,¹ though other authorities deny this on the ground that it would violate the rule against compound interest.²

c. JUDGMENTS AND DECREES — (1) *General Rule*. — Notwithstanding the disfavor with which the law is generally regarded as viewing compound interest, in almost every jurisdiction in which a money judgment or decree bears interest, the interest is compounded when such judgment or decree is rendered on an interest-bearing claim. That is, the judgment or decree is rendered for principal and accrued interest, and the aggregate, in the form of a judgment or decree, bears interest thereafter.³

Wrongful Refusal to Account. — Compound interest may properly be allowed in a decree for an accounting by way of damages for persistently and wrongfully refusing to account. *Heath v. Waters*, 40 Mich. 457.

Compound interest should be given against an accounting party only when he has employed the money in his business. Mixing the money with the ordinary bank account of a firm of solicitors is not such employment in business as will render a member of the firm liable to compound interest. *Burdick v. Garrick*, L. R. 5 Ch. 233, 39 L. J. Ch. 369.

See also the titles ACCOUNTS, vol. 1, p. 457; AGENCY, vol. 1, p. 1093; EXECUTORS AND ADMINISTRATORS, vol. 11, p. 1230; GUARDIAN AND WARD, vol. 15, p. 96; PARTNERSHIP; PUBLIC OFFICERS; TRUSTS AND TRUSTEES.

Recovery Back of Compound Interest After Payment. — If interest be actually paid on interest by reason of an agreement made at the time of the original contract, that this should be done, such interest cannot be recovered back, though its payment could not be enforced in the absence of a subsequent agreement made after the interest provided for by the original contract became due. *Mowry v. Bishop*, 5 Paige (N. Y.) 98; *Young v. Hill*, 67 N. Y. 162, 23 Am. Rep. 99; *Church v. Kidd*, 3 Hun (N. Y.) 254. See also the title PAYMENT.

Payment under Protest. — But where it is held that a creditor cannot recover interest on interest becoming due after the maturity of the principal, compound interest required by a mortgagee and paid under protest by one claiming under the mortgagor, in order to prevent the expiration of the right of redemption, the mortgage having been foreclosed, may be recovered by the person who paid it under such circumstances. *Whitcomb v. Harris*, 90 Me. 266.

1. Interest on Coupons Allowed. — See the title COUPONS, vol. 8, p. 10. See also *Jefferson County v. Hawkins*, 23 Fla. 223; *Jefferson County v. Lewis*, 20 Fla. 981; *Humphreys v. Morton*, 100 Ill. 592; *Bowman v. Neely*, 137 Ill. 443; *Cook v. Illinois Trust, etc., Co.*, 68 Ill. App. 478; *Hoyle v. Page*, 41 Mich. 533; *Holbrook v. Sims*, 39 Minn. 125; *Thorn v. Smith*, 71 Wis. 18.

2. Interest on Coupons Held Not Allowable. — *Murtagh v. Thompson*, 28 Neb. 358; *Force v. Elizabeth*, 28 N. J. Eq. 403. See also *Catlin v. Lyman*, 16 Vt. 44.

In an early *Connecticut* case it was held that an interest coupon would not draw interest. *Rose v. Bridgeport*, 17 Conn. 243. But see *contra*, the later case of *Fox v. Hartford, etc., R. Co.*, 70 Conn. 243.

3. Interest on Interest in Judgments and Decrees — California. — *Guy v. Franklin*, 5 Cal. 416; *Emeric v. Tams*, 6 Cal. 155; *Lane v. Gluckauf*, 28 Cal. 288, 87 Am. Dec. 121; *Bibend v. Liverpool, etc., F., etc., Ins. Co.*, 30 Cal. 78; *Corcoran v. Doll*, 32 Cal. 82.

Illinois. — *Stevens v. Coffeen*, 39 Ill. 148; *Barker v. International Bank*, 80 Ill. 96.

Indiana. — *Stanton v. Woodcock*, 19 Ind. 273.

Missouri. — *Corley v. McKeag*, 57 Mo. App. 415; *Catron v. Lafayette County*, 125 Mo. 67.

Montana. — *Palmer v. Murray*, 8 Mont. 312.

Texas. — *Coles v. Kelsey*, 13 Tex. 75; *Ha-good v. Aikin*, 57 Tex. 511; *Washington v. Denton First Nat. Bank*, 64 Tex. 4; *Llano Imp. Co. v. Watkins*, 4 Tex. Civ. App. 428.

Virginia. — *Stuart v. Hurt*, 88 Va. 343.

West Virginia. — *Pickens v. McCoy*, 24 W. Va. 344; *Tiernan v. Minghini*, 28 W. Va. 314.

Interest on Claims Referred to Commissioner. — It has been held that a claim referred to a commissioner appointed on a creditor's bill bearing interest from date at ten per cent. per annum until paid is properly audited and the interest at the contractual rate calculated thereupon as of the date of the auditing of the claim, the amount so computed, principal and interest, bearing interest thence at the contract rate until paid. *Barbour v. Tompkins*, 31 W. Va. 410. And see *Connecticut v. Jackson*, 1 Johns. Ch. (N. Y.) 13, 7 Am. Dec. 471.

But where a commissioner's report showed a balance owing from the defendant consisting entirely of interest found due on an account never before settled, and stated that that balance of interest was to bear interest from a remote day, to which report there was no exception, the court decreeing the balance with interest accordingly, it was held that the decree was erroneous in giving interest on the interest from a remote day, as interest on interest should have been allowed only from the date of the final decree. *Dunbar v. Woodcock*, 10 Leigh (Va.) 660.

Subsequent Action on Judgment Including Interest. — Where a subsequent action is brought on a judgment or decree itself consisting of principal and interest and bearing interest, the judgment rendered in such action will bear interest though the effect will be again to compound the interest. *Corley v. McKeag*, 57 Mo. App. 415; *Stuart v. Hurt*, 88 Va. 343.

It was held, however, in an action against the personal representatives of a decedent's estate on a judgment obtained against the decedent in his lifetime, that the interest should not be compounded on the judgment rendered in favor of the plaintiff. Such latter judg-

(2) *Rate.* — The rate of interest which a judgment itself consisting of principal and interest will bear is usually a matter of statutory regulation in the several jurisdictions. In some states there are statutes providing that where a judgment is rendered on a contract bearing a stipulated rate of interest, the judgment shall continue to bear interest at such rate until paid. Under these statutes the interest due at the rendition of the judgment is added to the principal, the aggregate bearing interest at the conventional rate thereafter.¹

3. *Where Contracted For* — *a.* IN GENERAL. — It has been said that the general rule of law that interest shall not bear interest will yield to an agreement of the parties, express or implied.²

On a Bill in Equity to Redeem Land Mortgaged to secure a debt on which the debtor contracted to pay semiannual interest, it is proper to compute interest on the principal for the first half year, which, together with the principal, will constitute a new principal, upon which in the same manner the interest is to be computed and compounded for each succeeding period.³

Qualifications of Rule. — The doctrine that compound interest is recoverable where there is an express or implied contract for it has, in many cases, been so qualified and limited that it is in no sense an exception to the general rule against compound interest, or interest on interest, as extensive as its terms might seem to indicate.⁴

ment, it was declared, was nothing more than a recognition of the former judgment as a claim against the estate on which interest should be computed according to the rate fixed in the earlier judgment. *Quivey v. Hall*, 19 Cal. 97.

Doctrine that Judgment Must Not Compound Interest. — In *Palmer v. Murray*, 8 Mont. 174, a judgment was rendered for the value of exempt property unlawfully seized under a mortgage, with interest from the date of seizure until judgment, such judgment, including accrued interest, itself bearing interest under the law. This was held to have been erroneous, as compounding the interest.

Compounding Interest by Successive Decrees in Same Cause. — Where a decree was entered in a cause ascertaining and fixing the aggregate amount of the plaintiff's debt and giving interest on such aggregate from the date of the decree, as prescribed by Code W. Va., c. 131, § 16, it was held error in a subsequent decree, entered in the same cause several years thereafter, to reaggregate such debt by calculating interest on such first aggregate sum to the date of the latter decree, then adding this interest to the sum of the first decree and giving interest on the second aggregate from the date of the last decree. *Tiernan v. Minghini*, 28 W. Va. 314.

1. *Rate of Interest on Judgments* — *California.* — *Guy v. Franklin*, 5 Cal. 416; *Emerie v. Tams*, 6 Cal. 155; *McCann v. Lewis*, 9 Cal. 247; *Lane v. Gluckauf*, 28 Cal. 288, 87 Am. Dec. 121; *Corcoran v. Doll*, 32 Cal. 82.

Missouri. — *Corley v. McKeag*, 57 Mo. App. 415; *Catron v. Lafayette County*, 125 Mo. 67. See also *State v. Vogel*, 14 Mo. App. 187; *Murdock v. Lewis*, 26 Mo. App. 234; *Ransom v. Cobb*, 67 Mo. 375; *Buchan v. Broadwell*, 88 Mo. 31.

Texas. — *Washington v. Denton First Nat. Bank*, 64 Tex. 4; *Llano Imp. Co. v. Watkins*, 4 Tex. Civ. App. 428; *Hagood v. Aikin*, 57 Tex. 511. But see *Lyons v. Iron City Nat. Bank*, (Tex. Civ. App. 1893) 24 S. W. Rep. 304,

which was an action on a note with twelve per cent. interest and ten per cent. attorney's fees, in which the court seems to have rendered judgment for the aggregate amount with interest at only ten per cent. per annum.

West Virginia. — *Pickens v. McCoy*, 24 W. Va. 344.

See also the various local codes and statutes, and the title JUDGMENTS AND DECREES.

2. *Doctrine Allowing Compound Interest When Contracted* — *England.* — *Ferguson v. Fyffe*, 8 Cl. & F. 121; *Daniell v. Sinclair*, 6 App. Cas. 181; *Morgan v. Mather*, 2 Ves. Jr. 15.

United States. — *Bainbridge v. Wilcocks*, Baldw. (U. S.) 536.

Alabama. — *Paulling v. Creagh*, 54 Ala. 646.

California. — *Page v. Williams*, 54 Cal. 562; *Fisk v. Lee*, (Cal. 1886) 12 Pac. Rep. 255; *Finger v. McCaughy*, 114 Cal. 64.

Illinois. — *Thayer v. Wilmington Star Min. Co.*, 105 Ill. 540.

Maine. — *Bradley v. Merrill*, 91 Me. 346.

Massachusetts. — *Von Hemert v. Porter*, 11 Met. (Mass.) 210.

Missouri. — *St. Louis Gas-Light Co. v. St. Louis*, 11 Mo. App. 55.

Ohio. — *Mueller v. McGregor*, 28 Ohio St. 265.

South Carolina. — *Gibbs v. Chisolm*, 2 Nott & M. (S. Car.) 38, 10 Am. Dec. 560.

Virginia. — *Pindall v. Marietta Bank*, 10 Leigh (Va.) 502.

Washington. — *Reed v. Miller*, 1 Wash. 426.

West Virginia. — *Genin v. Ingersoll*, 11 W. Va. 540.

3. *Bill in Equity to Redeem Land.* — *Farwell v. Stuidivant*, 37 Me. 308.

4. *Qualifications of Rule.* — A contract to pay money, with interest annually, and if not so paid the interest on the principal to bear interest at the stipulated rate, does not warrant the compounding of interest annually, but only simple interest on the annual instalments of interest from the time when they should have been paid. *Hovey v. Edmison*, 3 Dak. 449.

In *Morgan v. Michigan Air Line R. Co.*, 57 Mich. 430, the interest clause in the bond sued

Agreement for Interest on Interest Need Not Be in Writing. — Although there are several dicta in the reports to the effect that an agreement to pay compound interest on the arrears of interest already due must be in writing,¹ these observations should, it has been said, be understood as applying to cases involving mortgages upon lands or other real securities and as recognizing a difference between such securities and personal contracts.²

b. EXPRESS CONTRACTS — (1) *Necessity for Express Contract.* — Some cases have declared that compound interest cannot be recovered in the absence of an express contract to pay it.³ But this statement is not maintainable as a

on provided that "in case any sum of principal or interest shall not be paid when due, [the obligors shall] pay interest thereon at the rate of ten per cent. per annum during all the time the same may remain overdue and unpaid." It was held that this provision did not authorize the compounding of interest; that unpaid principal or interest would draw only simple interest until paid, computed without rests. And see *Bradley v. Merrill*, 91 Me. 346.

On the other hand it seems to have been held in *Robertson v. Parrish*, (Tex. Civ. App. 1897) 39 S. W. Rep. 646, that a note providing for semiannual instalments of interest in effect authorizes the holder to compound interest. And see also *Preston v. Walker*, 26 Iowa 206, 96 Am. Dec. 140.

Doctrine that Interest When Compounded Must Not Exceed Maximum Conventional Rate on Principal. — In *Hallam v. Telleren*, 55 Neb. 255, it was held that it was competent for a note to provide for the payment of interest at stated periods, and that instalments of interest not paid at the time when they fell due should themselves bear interest, if the whole interest so reserved did not exceed ten per cent. per annum simple interest on the original debt. And see *Mathews v. Toogood*, 25 Neb. 99; *Murtagh v. Thompson*, 28 Neb. 358; *Richardson v. Campbell*, 34 Neb. 181, 33 Am. St. Rep. 633; *Lewis Invest. Co. v. Boyd*, 48 Neb. 604.

Construction of Particular Contract. — In *Goodridge v. Forsman*, 79 Me. 133, the plaintiff sold to the defendants the timber on certain lands. The contract of sale required the defendants to cut and take away a specified amount of timber in the winter of each of the years 1881, 1882, and 1883, or, in case of failure to do so, to pay interest to the plaintiff on the amount of the deficiency in each year from May 1 following to May 1, 1884, any timber remaining uncut after May 1, 1884, to be settled for with interest from January 1, 1882; and provided that all timber cut in any year was to be paid for on or before November 1 following, with interest from May 1 preceding, on which day the account of the timber was to be made and adjusted. It was held that the contract was not to be construed as requiring interest upon interest, or double payment of interest, but that interest paid on deficiencies before May 1, 1884, should be credited as prepaid interest on cuttings after that date, and that the stipulation was not so unconscionable that it should be adjudged void. And see *Sanford v. Bulkley*, 30 Conn. 344.

Interest at the rate of one per cent. per month to be calculated at the end of each year means interest calculated per month, but payable per annum without a monthly compound-

ing. *Rajunder Narian Rae v. Biyai Govind Sing*, 2 Moo. P. C. 253.

An Agreement to Compound Interest Oftener than Once a Year, it has been held, cannot be enforced, but in *Oregon* such a stipulation does not render the agreement void as to the principal sum secured and simple interest. *Murray v. Oliver*, 3 Oregon 539.

1. Origin of Dicta. — These dicta are believed to have their origin in *Brown v. Barkham*, 1 P. Wms. 652, which has reference to interest upon arrears of interest upon a mortgage, wherein Lord Parker expressed the opinion that "to make interest on a mortgage principal, it is requisite that there should be a writing signed by the parties, forasmuch as the estate in the land is to be charged therewith."

2. Contract for Compound Interest Need Not Be in Writing. — *Young v. Hill*, 67 N. Y. 162, 23 Am. Rep. 99. And see *Morgan v. Mather*, 2 Ves. Jr. 15.

Rule under Special Statute. — Though under the *Colorado* statute (Gen. Stat. 1883, § 1708; Mills's Annot. Stat. 1891, § 2253) parties may contract in writing for a rate of interest in excess of the legal rate, yet an oral agreement to compound quarterly simple interest at a rate previously agreed to in writing is invalid. *Beckwith v. Beckwith*, 11 Colo. 568.

3. Necessity for Express Contract Declared — England. — *Thompson v. Leith*, 4 Jur. N. S. 1091.

California. — *Doe v. Vallejo*, 29 Cal. 385.

Illinois. — *Leonard v. Villars*, 23 Ill. 377; *Banker v. International Bank*, 80 Ill. 96.

Indiana. — *Grimes v. Blake*, 16 Ind. 160.

Iowa. — *Aspinwall v. Blake*, 25 Iowa 310.

Kentucky. — *Gilmour v. Kerr*, (Ky. 1896) 36 S. W. Rep. 554.

Maine. — *Doe v. Warren*, 7 Me. 48; *Bradley v. Merrill*, 91 Me. 340; *Bradley v. Merrill*, 91 Me. 346.

Maryland. — *Banks v. McClellan*, 24 Md. 62, 87 Am. Dec. 594.

Michigan. — *Van Husen v. Kanouse*, 13 Mich. 303.

Missouri. — *Stoner v. Evans*, 38 Mo. 461; *St. Louis Gas Light Co. v. St. Louis*, 11 Mo. App. 55.

New York. — *Howard v. Farley*, 3 Robt. (N. Y.) 308. And see *Church v. Kidd*, 5 Thomp. & C. (N. Y.) 454.

Pennsylvania. — *Stokely v. Thompson*, 34 Pa. St. 210.

Vermont. — *Smith v. Rogers*, 35 Vt. 140.

What Constitutes Agreement for Compound Interest. — A correspondence took place between a mortgagee and a mortgagor, extending over a series of years, in which the mortgagee stated his intention, if the interest upon the

general proposition. It has frequently been held that contracts for compound interest may be implied.¹

(2) *Contract for Compound Interest Before Principal Interest Due.* — The rule of many cases is that though there is an express contract for compound interest, it will not be upheld where made in advance of the date on which the interest to bear interest is due and payable.²

(3) *Contract for Interest on Interest After Interest Due.* — The general rule is believed to be that where interest has actually become due and payable, a contract to pay interest thereon is valid and enforceable.³

mortgage debt was not paid, to add it to the principal, and to charge the same interest upon the amount as the mortgage bore. The mortgagor replied from time to time that he could not pay the interest, and that it must be added to the claim of the mortgagee. It was held, however, that on the part of the mortgagor this did not amount to an agreement to pay compound interest, and the claim of the mortgagee was not allowed. *Thompson v. Leith*, 4 Jur. N. S. 1091.

The mere fact that the debtor, whose debt is secured by mortgage, upon account rendered by the creditor claiming a sum stated to be due for interest, returns answer allowing the account and desiring forbearance and promising to make satisfaction to the mortgagee therefor, will not constitute an agreement to make the interest principal, so as to bear interest thereafter. *Brown v. Barkham*, 1 P. Wms. 652.

A Vendee of Land, long delinquent for the purchase price, will not be held liable for compound interest merely because, after the vendor has indorsed on the contract as the sum due, the amount arrived at by compounding the interest, the vendee retains the contract for a time without objection. *Jones v. Ennis*, 18 Hun (N. Y.) 452.

1. See *infra*, this division of this section, *Implied Contracts*.

2. *Contract for Compound Interest Before Principal Interest Accrues Held Invalid* — *England.* — *Ossulston v. Yarmouth*, 2 Salk. 449; *Ex p. Bevan*, 9 Ves. Jr. 223. And see *Chambers v. Gollwin*, 9 Ves. Jr. 254.

Alabama. — *Eslava v. Lepretre*, 21 Ala. 530, 56 Am. Dec. 266; *Paulling v. Creagh*, 54 Ala. 646.

Connecticut. — *Rose v. Bridgeport*, 17 Conn. 243.

Illinois. — *Drury v. Wolfe*, 134 Ill. 294.

Louisiana. — *White v. Henderson*, 2 La. Ann. 241; *Compton v. Compton*, 5 La. Ann. 618.

Massachusetts. — *Von Hemert v. Porter*, 11 Met. (Mass.) 210; *Henry v. Flagg*, 13 Met. (Mass.) 64; *Wilcox v. Howland*, 23 Pick. (Mass.) 167.

Minnesota. — *Mason v. Callender*, 2 Minn. 350, 72 Am. Dec. 102.

Mississippi. — *Perkins v. Coleman*, 51 Miss. 298.

Missouri. — *Gunn v. Head*, 21 Mo. 432.

Montana. — *Wilson v. Davis*, 1 Mont. 183.

Nevada. — *Cox v. Smith*, 1 Nev. 161, 90 Am. Dec. 476.

New York. — *Townsend v. Corning*, 1 Barb. (N. Y.) 627; *Van Rensselaer v. Jones*, 2 Barb. (N. Y.) 669; *Forman v. Forman*, (Suom. Ct. Gen. T.) 17 How. Pr. (N. Y.) 255; *Connecticut*

v. Jackson, 1 Johns. Ch. (N. Y.) 13, 7 Am. Dec. 471; *Van Benschooten v. Lawson*, 6 Johns. Ch. (N. Y.) 313, 10 Am. Dec. 333; *Mowry v. Bishop*, 5 Paige (N. Y.) 98; *Quackenbush v. Leonard*, 9 Paige (N. Y.) 345; *Toll v. Hiller*, 11 Paige (N. Y.) 228; *Young v. Hill*, 67 N. Y. 162, 23 Am. Rep. 99.

North Carolina. — *Kennon v. Dickins*, Conf. Rep. (1 N. Car.) 357, 2 Am. Dec. 642.

Pennsylvania. — *Stokely v. Thompson*, 34 Pa. St. 210.

Virginia. — *Childers v. Deane*, 4 Rand. (Va.) 408.

West Virginia. — *Genin v. Ingersoll*, 11 W. Va. 549.

Reason of Rule. — "The courts will not give effect to a stipulation for compounding future interest, not because such agreements are condemned by the usury laws, but because they may serve as a temptation to negligence on the part of the creditor and a snare to the debtor, and prove in the end oppressive and even ruinous." *Young v. Hill*, 67 N. Y. 162, 23 Am. Rep. 99.

Where Interest in Advance Included in Note — Interest on Total After Maturity. — It has been held that the inclusion in a note payable a specified time after date, of interest until maturity, was not compounding interest, though the note was to bear interest after maturity, because the interest included in the note had been thereby made a part of the principal. *Foard v. Grinter*, (Ky. 1892) 18 S. W. Rep. 1034.

3. *Contract After Interest Due* — *England.* — *Campbell v. Bell*, 11 Montreal Leg. N. 346; *Ossulston v. Yarmouth*, 2 Salk. 449.

United States. — *Porter v. Price*, 80 Fed. Rep. 655.

Alabama. — *Eslava v. Lepretre*, 21 Ala. 530, 56 Am. Dec. 266.

Connecticut. — *Camp v. Bates*, 11 Conn. 487; *Rose v. Bridgeport*, 17 Conn. 243; *Meeker v. Hill*, 23 Conn. 577.

Georgia. — *Ellard v. Scottish American Mortg. Co.*, 97 Ga. 329.

Illinois. — *Thayer v. Wilmington Star Min. Co.*, 105 Ill. 540.

Indiana. — *Niles v. Sinking Fund Com'rs*, 8 Blackf. (Ind.) 158.

Maine. — *Otis v. Lindsey*, 10 Me. 315.

Massachusetts. — *Von Hemert v. Porter*, 11 Met. (Mass.) 210; *Ferry v. Ferry*, 2 Cush. (Mass.) 92; *Wilcox v. Howland*, 23 Pick. (Mass.) 167.

Michigan. — *Hoyle v. Page*, 41 Mich. 533.

Minnesota. — *Mason v. Callender*, 2 Minn. 350, 72 Am. Dec. 102.

Mississippi. — *Perkins v. Coleman*, 51 Miss. 298.

New York. — *Young v. Hill*, 67 N. Y. 162, 23

Forbearance Sufficient Consideration. — Where there is a contract to pay interest on interest after the principal interest is due, the creditor's forbearance to collect the latter constitutes a sufficient consideration to support the contract.¹

Accrued Interest Embraced in New Note or Security. — In many cases the contract for interest on accrued interest is evidenced by a new note given or embraced in a new security after the interest is payable. The recovery of interest on interest in such instances is always allowed.² And the rule applies though by reason of the contract for interest on interest or by successive contracts of this nature the original principal is permitted to earn a higher rate of interest than permitted by law,³ unless the circumstances are such as to evince an attempt to evade the usury laws.⁴

c. IMPLIED CONTRACTS — (1) *In General.* — There is no doubt that, though there is no contract for compound interest in so many words, yet the circumstances may be such as to warrant the implication of a contract therefor, with the same effect as though the contract were express.⁵

Am. Rep. 99; *Howard v. Farley*, 3 Robt. (N. Y.) 308; *Toll v. Hiller*, 11 Paige (N. Y.) 231; *Mowry v. Bishop*, 5 Paige (N. Y.) 98; *Van Benschooten v. Lawson*, 6 Johns. Ch. (N. Y.) 313, 10 Am. Dec. 333; *Kellogg v. Hickok*, 1 Wend. (N. Y.) 521. And see *Guernsey v. Rexford*, 63 N. Y. 631; *Stewart v. Petree*, 55 N. Y. 621, 14 Am. Rep. 352.

Oregon. — *Hathaway v. Meads*, 11 Oregon 66.
Virginia. — *Pindall v. Marietta Bank*, 10 Leigh (Va.) 502; *Childers v. Deane*, 4 Rand. (Va.) 408.

West Virginia. — *Genin v. Ingersoll*, 11 W. Va. 549; *Barbour v. Tompkins*, 31 W. Va. 410.

In Ex p. Bevan, 9 Ves. Jr. 223, the court said: "As to the question of compound interest, it is clear you cannot *a priori* agree to let a man have money for twelve months, settling the balance at the end of six months, and that the interest shall carry interest for the subsequent six months; that is, you cannot contract for more than five per cent., agreeing to forbear for six months. But if you agree to settle accounts at the end of six months, that not being part of the prior contract, and then stipulate that you will forbear for six months upon those terms, that is legal."

Interest Due Regarded as Principal. — In *Eslava v. Lepretre*, 21 Ala. 530, 56 Am. Dec. 266, it was held that when interest is once accrued due, it becomes a debt. There is no longer, therefore, any objection to an agreement *inter partes* that it shall be considered principal and thenceforth carry interest.

1. Forbearance Sufficient Consideration — *England.* — *Eaton v. Bell*, 5 B. & Ald. 34, 7 E. C. L. 13.

Indiana. — *Niles v. Sinking Fund Com'rs.* 8 Blackf. (Ind.) 158.

New York. — *Young v. Hill*, 67 N. Y. 162, 23 Am. Rep. 99.

Virginia. — *Pindall v. Marietta Bank*, 10 Leigh (Va.) 502.

Retrospective Agreement. — It has been held, however, that an agreement to pay interest on interest due should not operate retrospectively; for example, a contract made a year after the interest should have been paid, to pay interest on the interest for the time past, would not be upheld. *Young v. Hill*, 67 N. Y. 170, 23 Am. Rep. 99. See also *Van Benschooten v. Lawson* 6 Johns. Ch. (N. Y.) 313, 10 Am. Dec. 333; *Ehle v. Judson*, 24 Wend. (N. Y.) 97; *Van*

Benschooten v. Lawson, 6 Johns. Ch. (N. Y.) 313, 10 Am. Dec. 333, 23 Am. Rep. 99; *Childers v. Deane*, 4 Rand. (Va.) 408.

2. New Note or Security Given for Interest. — *Camp v. Bates*, 11 Conn. 488; *Meeker v. Hill*, 23 Conn. 577; *Otis v. Lindsey*, 10 Me. 315; *Ferry v. Ferry*, 2 Cush. (Mass.) 92; *Wilcox v. Howland*, 23 Pick. (Mass.) 16; *Kellogg v. Hickok*, 1 Wend. (N. Y.) 521; *Fobes v. Cantfield*, 3 Ohio 17; *Barbour v. Tompkins*, 31 W. Va. 410.

3. Successive Contracts for Interest on Interest. — *Camp v. Bates*, 11 Conn. 488. And see *Otis v. Lindsey*, 10 Me. 315.

Principle Stated with Qualification. — The computation of interest upon the several payments of interest after they have become due, and putting them into a new security, if done fairly and without taking any unconscientious advantage of the situation and the necessities of the debtor to compel him to agree to such computation, will not invalidate the new security thus taken. *Mowry v. Bishop*, 5 Paige (N. Y.) 98.

4. Circumstances Should Not Evince Attempt to Evade Usury Laws. — *Rodes v. Blythe*, 2 B. Mon. (Ky.) 335.

5. Implied Contracts for Compound Interest. — *Morgan v. Mather*, 2 Ves. Jr. 15; *Fergusson v. Fyffe*, 8 Cl. & F. 121; *Bainbridge v. Wilcocks*, Baldw. (U. S.) 536; *Pindall v. Marietta Bank*, 10 Leigh (Va.) 502.

Implication from Course of Dealings. — The charging of compound interest is permitted where the charge is consistent with the established course of dealings between the parties. *Camp v. Bates*, 11 Conn. 487.

No Implication Except in Peculiar Circumstances. — The law will not imply a promise to pay compound interest except under peculiar circumstances and upon some evidence from which an agreement to turn the interest into principal to bear interest for the future can be inferred. *Young v. Hill*, 67 N. Y. 162, 23 Am. Rep. 99.

When Implication Arises. — Where a party contracts to pay a sum of money with interest thereon on a given date, the interest becomes principal when the date arrives, and if the debt be not paid the aggregate of principal and interest then due bears interest for the future. *Doig v. Barkley*, 3 Rich. L. (S. Car.) 125, 45 Am. Dec. 762.

(2) *Accounts* — (a) **General Rule.** — The general rule is that interest on the balance of an account stated is recoverable although the sum may include interest on the items contained therein, or on former balances included.¹

Rationale and Requisites. — As the theory of this liability is an implied contract to pay interest on interest, most of the cases hold that in order to warrant the computation of compound interest on an account, such course must be in accordance with the established course of dealings of the parties, or with a general commercial custom known and acquiesced in.²

(b) **Contrary Doctrine.** — In some cases the right to compound interest in an account by making periodic rests and computing interest on a balance consisting in part of interest has been denied.³

(c) **After Cessation of Mutual Dealings.** — It has been held that it is not proper for the creditor to calculate compound interest on his account after the mutual dealings between the parties have ceased.⁴

4. Compound Interest as Damages — *a. IN GENERAL.* — As a general rule, compound interest or interest on interest is never given as damages.⁵

b. COMPOUND INTEREST AFTER MATURITY OF PRINCIPAL. — The doctrine of some jurisdictions seems to be that there can be no recovery of inter-

If No Contract Be Made for the Payment of Interest at a Time Certain, the law will not imply an agreement for the purpose of converting interest into principal. *De Bruhl v. Neuffer*, 1 Strobb. L. (S. Car.) 426.

1. Balances of Accounts — Compound Interest — *England.* — *Eaton v. Bell*, 5 B. & Ald. 34. 7 E. C. L. 13.

United States. — *Sayward v. Dexter*, 72 Fed. Rep. 758, 44 U. S. App. 376; *Porter v. Price*, 80 Fed. Rep. 655; *Barclay v. Kennedy*, 3 Wash. (U. S.) 350; *Bainbridge v. Wilcocks*, *Baldw.* (U. S.) 536.

Arkansas. — *Crary v. Carradine*, 4 Ark. 216.

Iowa. — *Isett v. Ogelvie*, 9 Iowa 313.

Louisiana. — *Thompson v. Mylne*, 4 La. Ann. 206; *Pickersgill v. Brown*, 7 La. Ann. 296; *Brodnax v. Steinhardt*, 48 La. Ann. 682; *Allen v. Neules*, 39 La. Ann. 788.

Massachusetts. — *Von Hemert v. Porter*, 11 Met. (Mass.) 210.

New York. — *Young v. Hill*, 67 N. Y. 162, 23 Am. Rep. 99; *Healy v. Gilman*, 1 Bosw. (N. Y.) 235; *Connecticut v. Jackson*, 1 Johns. Ch. (N. Y.) 13, 7 Am. Dec. 471; *Stoughton v. Lynch*, 2 Johns. Ch. (N. Y.) 209; *Van Benschooten v. Lawson*, 6 Johns. Ch. (N. Y.) 313, 10 Am. Dec. 333; *Kellogg v. Hickok*, 1 Wend. (N. Y.) 521.

Pennsylvania. — *McClelland v. West*, 70 Pa. St. 183.

Vermont. — *Langdon v. Castleton*, 30 Vt. 285; *Goodnow v. Parsons*, 36 Vt. 46; *Davis v. Smith*, 48 Vt. 53; *Flannery v. Flannery*, 58 Vt. 576.

Wisconsin. — *Case v. Fish*, 58 Wis. 56.

An Agent Who Has Advanced Money for His Principal in effecting insurances and other mercantile business is entitled to charge interest and at the end of every year to make a rest and add the interest then due to the principal. *Bruce v. Hunter*, 3 Campb. 467.

Interest on Balance of Account Compounded Monthly. — Where the defendants kept an account with the plaintiffs as bankers, and at the end of each month a balance of account was ascertained and entered in the books of both parties, interest being reckoned thereon, and it was shown that such was the custom of

bankers, that it was known to the defendant, and that he had never interposed any objection thereto, it was held that the plaintiffs were entitled to have interest computed on their account by monthly rests, and that the court did not err in refusing to instruct otherwise. *Isett v. Ogelvie*, 9 Iowa 313.

Computation of Accounts with Annual Rests. — Where the transactions between the parties constitute a mutual account current, annual rests may be made and balances struck, which latter amount will bear interest until the next annual rest. *Langdon v. Castleton*, 30 Vt. 285; *Davis v. Smith*, 48 Vt. 53. And see *Falkner v. Hendy*, 80 Cal. 636.

Where Credits Exceed Interest. — Where the credits for each year, in an account current, are in excess of the amount of interest charged for the year, it cannot be pretended that compound interest has been charged, inasmuch as payments made by a debtor on account are applied first to the payment of the interest. *Dudley v. Darling*, 2 Montreal Q. B. 458, 10 Montreal Leg. N. 110.

2. Course of Dealing or Custom Essential to Allowance. — *Newell v. Jones*, 4 C. & P. 124, 19 E. C. L. 304; *Thompson v. Mylne*, 4 La. Ann. 206; *Bayly v. Becnel*, 36 La. Ann. 496; *Young v. Hill*, 67 N. Y. 162, 23 Am. Rep. 99; *Averill Coal, etc., Co. v. Verner*, 22 Ohio St. 372; *Jones v. Galigher*, 9 Utah 126; *Wood v. Smith*, 23 Vt. 706. And see *Pickersgill v. Brown*, 7 La. Ann. 296.

3. Right to Compound Interest on Accounts Denied. — *Marr v. Southwick*, 2 Port. (Ala.) 351; *Hunt v. Stockton Lumber Co.*, 113 Ala. 387; *Averill Coal, etc., Co. v. Verner*, 22 Ohio St. 372; *Graham v. Williams*, 16 S. & R. (Pa.) 257, 16 Am. Dec. 569; *Wheelock v. Moulton*, 13 Vt. 430; *Lewis v. Bacon*, 3 Hen. & M. (Va.) 89.

4. Cessation of Mutual Dealings. — *Crosskill v. Bower*, 9 Jur. N. S. 267, 32 L. J. Ch. 540, 11 W. R. 411, 8 L. T. N. S. 135, 32 Beav. 86; *Von Hemert v. Porter*, 11 Met. (Mass.) 219.

5. Interest on Interest Not Allowed as Damages. — *Pauling v. Creagh*, 54 Ala. 646. See also *supra*, this section, *Where Contracted For.* Compare *Von Hemert v. Porter*, 11 Met. (Mass.) 219.

est on interest accruing after the maturity of the principal debt, in the absence of a contract therefor.¹

c. EFFECT OF DEMAND. — It has been said that interest on interest cannot be recovered simply on the strength of a demand,² but other cases favor a different view.³

5. Rule under Particular Statutes. — In some jurisdictions in which the question of interest is regarded as wholly controlled by statute it has been held that compound interest is not recoverable because of the absence of express legislative provision therefor.⁴

6. Simple Interest on Interest of Principal — a. BY CONTRACT — (1) *Doctrine that Secondary Interest Recoverable*. — No reason is apparent why, when a party contracts to pay a specified sum of money on a given day, he should not also be permitted validly to contract for the payment of interest on such sum, although the latter has become due as interest on another principal.⁵

Necessity for Contract After Interest Due. — Many cases, however, require that in

1. Compound Interest Not Allowed After Maturity of Principal Debt — *United States*. — *In re Bartenbach*, 11 Nat. Bankr. Reg. 61.

Maine. — *Whitcomb v. Harris*, 90 Me. 206.

Michigan. — *Voigt v. Beller*, 56 Mich. 140; *Rix v. Strauts*, 59 Mich. 364.

Rhode Island. — *Wheaton v. Pike*, 9 R. I. 132, 98 Am. Dec. 377.

South Carolina. — *O'Neill v. Sims*, 1 Strobb. L. (S. Car.) 115.

In *Bannister v. Roberts*, 35 Me. 75, it was held that if a note was made payable with interest annually, whether by instalments or otherwise, the interest accruing before the whole of the principal becomes payable may be collected if a suit be commenced to recover it before the whole of the principal becomes payable. If no suit be commenced for that purpose until after that time, interest upon the interest, not paid from the time when it should have been paid, cannot be recovered in a suit for the principal and interest due upon the note. And see *Hastings v. Wiswall*, 8 Mass. 455; *Doe v. Warren*, 7 Me. 48; *Wilcox v. Howland*, 23 Pick. (Mass.) 167.

Where No Interest Payable until Principal Due.

— Where, by the terms of a written contract, interest is payable by instalments at fixed periods and separate from the principal, interest is chargeable on each instalment, at the contract rate, until paid; but where no interest is payable until the principal becomes due, no interest will be allowed except on the principal. *Rix v. Strauts*, 59 Mich. 364.

2. Doctrine that Demand Does Not Give Right to Interest on Interest. — *Whitcomb v. Harris*, 90 Me. 206; *Lewin v. Folsom*, 171 Mass. 188.

3. Doctrine that Demand Gives Right to Interest on Interest. — *Mueller v. McGregor*, 28 Ohio St. 273; *Connecticut v. Jackson*, 1 Johns. Ch. (N. Y.) 13, 7 Am. Dec. 471.

In *Howard v. Farley*, 3 Robt. (N. Y.) 308, the court held that the general rule that interest should be allowed where by contract money is to be paid at a fixed day, and the contract is broken, ought to be applied to interest payable semiannually according to the condition of a bond, where the interest had been demanded when due; but that if there was no evidence of a demand before suit, then interest should be given only from the institution of the action. See also *National Bank v. Mechanics' Nat. Bank*, 94 U. S. 437.

4. Rule under Particular Statutes. — Under a *Colorado* statute providing that creditors shall be allowed to receive interest, when there is no agreement at the rate thereof, at the rate of ten per cent. per annum for all moneys after they come due, on any bond, bill, promissory note, or other instrument of writing, or any judgment, it has been held that compound interest is not recoverable in an action on a note though the note provides that interest is to be paid at stated periods. *Denver Brick, etc., Co. v. McAllister*, 6 Colo. 261. And see *Filmore v. Reithman*, 6 Colo. 120.

The *Michigan* statute (now Comp. Laws 1897, § 4859), permits the compounding of interest on instalments that fall due separately under some "written contract," and does not apply to new interest that accrues merely by lapse of time after the maturity of the debt. *Voigt v. Beller*, 56 Mich. 140. See also *Rix v. Strauts*, 59 Mich. 364; *Wallace v. Glaser*, 82 Mich. 190, 21 Am. St. Rep. 556; *McVicar v. Denison*, 81 Mich. 348. It has also been decided that this statute, providing that interest may be compounded on overdue instalments of interest upon any note, bond, mortgage, or other written contract, contemplates cases in which instalments of interest fall due by themselves, and can be demanded apart from the principal, and does not apply to an obligation falling due in "one year after date, with annual interest." *Hoyle v. Page*, 41 Mich. 533.

Under the *Vermont* statute providing that parties cannot contract for a greater rate of interest than six per cent. per annum, it was held that while the court would not uphold a stipulation for compound interest or for interest on deferred instalments of annual or periodic interest whereby a greater rate than six per cent. on the principal for the entire period of the loan was contracted for, yet the parties might make the interest payable for any time short of the time fixed for the payment of the principal sum, and in such case, if the interest was not paid when due, interest by way of damages would be recoverable upon a subsequent suit brought therefor. *Catlin v. Lyman*, 16 Vt. 44.

5. Simple Interest on Interest of Principal — *Arkansas*. — *Vaughan v. Kennan*, 38 Ark. 116. *Dakota*. — *Hovey v. Edmison*, 3 Dak. 449. *Indiana*. — *Grimes v. Blake*, 16 Ind. 160.

order that interest shall be recoverable on annual interest, the contract therefor shall be made after the annual interest has become due.¹

(2) *Contrary Doctrine*. — But it has been held by some cases that a contract for interest on the interest of the principal sum will not be maintained.²

b. AS DAMAGES — (1) *General Rule*. — The weight of authority favors the rule that for breach of a contract to pay an interest instalment when due, interest is recoverable as damages as in all other actions for the breach of a contract to pay a sum certain on a specified day.³

Iowa. — *Ragan v. Day*, 46 Iowa 240.

Kentucky. — *Radford v. Southern Mut. L. Ins. Co.*, 12 Bush (Ky.) 434.

Nebraska. — *Mathews v. Toogood*, 25 Neb. 99; *Richardson v. Campbell*, 27 Neb. 644; *Murtagh v. Thompson*, 28 Neb. 358; *Hallam v. Telleren*, 55 Neb. 255.

Ohio. — *Dunlap v. Wiseman*, 2 Disney (Ohio) 398.

Pennsylvania. — *Pawling v. Pawling*, 4 Yeates (Pa.) 220.

South Carolina. — *Doig v. Barkley* 3 Rich. L. (S. Car.) 125, 45 Am. Dec. 762; *Wright v. Eaves*, 10 Rich. Eq. (S. Car.) 582.

Doctrine that Interest Becomes Principal on Day when Payment Should Be Made. — In *Doig v. Barkley*, 3 Rich. L. (S. Car.) 125, 45 Am. Dec. 762, it was held that where a party contracts to pay a sum of money, with interest thereon, on a given day, when the day arrives the interest becomes principal; and if the debt be not paid, the aggregate of principal and interest then due bears interest for the future.

Qualifications of Rule. — In some cases the rule that a party may validly contract for simple interest on interest of the original principal sum, if such latter interest is not paid when due, is qualified by the requirement that the interest on interest should not be at such a rate that the aggregate interest would be in excess of the maximum statutory rate on the original principal for the entire period of the loan. Thus in *Nebraska* and *Vermont* it has been held that interest on interest is recoverable only where the interest on the interest together with the interest on the principal sum does not exceed the maximum legal rate recoverable on the principal. *Mathews v. Toogood*, 25 Neb. 99; *Richardson v. Campbell*, 27 Neb. 644; *Murtagh v. Thompson*, 28 Neb. 358; *Hallam v. Telleren*, 55 Neb. 255; *Catlin v. Lyman*, 16 Vt. 44.

In other cases, however, it has been held, and, it would seem, upon sound principle, that interest on annual interest is not usurious, though annual interest is at the maximum rate allowed by law. *Ragan v. Day*, 46 Iowa 239; *Wright v. Eaves*, 10 Rich. Eq. (S. Car.) 582. And see *Isett v. Oglevie*, 9 Iowa 313; *Mann v. Cross*, 9 Iowa 327; *Hershey v. Hershey*, 18 Iowa 24; *Preston v. Walker*, 26 Iowa 205, 96 Am. Dec. 140.

An Interest Clause in a Bond provided that "in case any sum of principal or interest shall not be paid when due, [the obligors shall] pay interest thereon at the rate of ten per cent. per annum, during all the time the same may remain overdue and unpaid." It was held that this did not authorize the compounding of interest; unpaid principal or interest would draw interest until paid, but without rests. *Morgan v. Michigan Air Line R. Co.*, 57 Mich. 430.

Only Simple Interest Recoverable. — Where the contract is that interest not due shall bear interest if not paid, only simple interest is recoverable thereon — that is, on the interest. *Ragan v. Day*, 46 Iowa 239.

Rate Recoverable. — Where a recovery of interest on interest is allowed where contracted for, the rate stipulated may be given, provided it is not unlawful. See *Dunlap v. Wiseman*, 2 Disney (Ohio) 398; *Ragan v. Day*, 46 Iowa 239.

1. Necessity for Contract After Interest Due. — *Campbell v. Bell*, 11 Montreal Leg. N. 346.

Thus, in *Grimes v. Blake* 16 Ind. 160, it was held that when a note stipulates for "ten per cent. interest yearly, from date," even if annual payments can be required before the note falls due, yet a failure in such annual payment does not authorize a compounding unless an agreement has been made to pay interest on the interest after it became due.

A Mere Agreement that Interest Shall Be Payable Annually does not warrant the recovery of interest on interest. In order to such end there should be an agreement, after an interest instalment was due, that interest should be paid thereon. *Genin v. Ingersoll*, 11 W. Va. 549.

Similarly, an agreement to pay interest on interest, it has been said, "made after the interest has become due, on a contract reserving interest to be paid annually or at stated periods, is not only legal but is generally just and equitable, as founded upon a moral and equitable consideration." *Meeker v. Hiel*, 23 Conn. 574.

On the Contrary, It Has Been Held that a contract to pay interest on the deferred instalments of interest on the principal sum is valid and enforceable, although made before the interest fell due. *Pawling v. Pawling*, 4 Yeates (Pa.) 220. See *supra*, this section, *Contract for Compound Interest Before Principal Interest Due*.

2. Interest on Annual Interest Held Not Recoverable. — *Drury v. Wolfe*, 134 Ill. 294; *Bowman v. Neely*, 137 Ill. 443; *Young v. Hill*, 67 N. Y. 162, 23 Am. Rep. 99.

It has been held in *Michigan* that interest cannot be compounded by virtue of any provision in the obligation on which it accrues, in the absence of any statute so providing. *Hoyle v. Page*, 41 Mich. 533.

3. Interest on Interest as Damages — *Georgia*. — *Calhoun v. Marshall*, 61 Ga. 275, 34 Am. Rep. 99.

Iowa. — *Mann v. Cross*, 9 Iowa 327; *Preston v. Walker*, 26 Iowa 205, 96 Am. Dec. 140; *Burrows v. Stryker*, 47 Iowa 479; *White v. Savery*, 50 Iowa 520. Compare *Aspinwall v. Blake*, 25 Iowa 319.

Kentucky. — *Radford v. Southern Mut. L.*

(2) *Rate*. — Where interest is allowed as damages for failure to pay instalments of interest on the principal when due, the rate to be given is the legal rate, although the principal debt may, by contract, bear a higher rate of interest.¹

(3) *Contrary Doctrine*. — Other cases hold that for the breach of a contract to pay annual or periodic interest, interest is not recoverable as damages on the amount so due, in the absence of a contract therefor.²

Ins. Co., 12 Bush (Ky.) 434; *Hall v. Scott*, 90 Ky. 340.

Massachusetts. — *Greenleaf v. Kellogg*, 2 Mass. 568.

New Hampshire. — *Peirce v. Rowe*, 1 N. H. 179; *Little v. Riley*, 43 N. H. 113; *Townsend v. Riley*, 46 N. H. 300.

New York. — *Howard v. Farley*, 3 Robt. (N. Y.) 308.

North Carolina. — *Bledsoe v. Nixon*, 69 N. Car. 89, 12 Am. Rep. 642; *Kennon v. Dickens*, Tayl. (1 N. Car.) 231.

Ohio. — *Watkinson v. Root*, 4 Ohio 373; *Anketel v. Converse*, 17 Ohio St. 11, 91 Am. Dec. 115.

South Carolina. — *Singleton v. Lewis*, 2 Hill L. (S. Car.) 408; *O'Neill v. Bookman*, 9 Rich. L. (S. Car.) 80; *O'Neill v. Sims*, 1 Strobb. L. (S. Car.) 115; *Wright v. Eaves*, 10 Rich. Eq. (S. Car.) 583.

Texas. — *Lewis v. Paschal*, 37 Tex. 315.

Vermont. — *Catlin v. Lyman*, 16 Vt. 44; *Flannery v. Flannery*, 58 Vt. 576.

West Virginia. — *Genin v. Ingersoll*, 11 W. Va. 549.

Wisconsin. — *Mills v. Jefferson*, 20 Wis. 50.

Where a Note Bears Interest Payable Periodically, each instalment of interest, at its maturity, becomes a debt due, and bears interest from its maturity in the same manner as any other debt until paid. *Hall v. Scott*, 90 Ky. 340.

From Demand or Institution of Suit. — It has been held that where a bond for the payment of money provides for the payment of interest periodically, interest may be recovered upon unpaid instalments of interest only from the commencement of the action, where no previous demand was made. *Howard v. Farley*, 3 Robt. (N. Y.) 308.

Only up to Maturity of Note. — Interest on interest instalments is recoverable only up to the maturity of the note. *Wheaton v. Pike*, 9 R. I. 132, 98 Am. Dec. 377.

In *O'Neill v. Sims*, 1 Strobb. L. (S. Car.) 115, it was said that where a contract for the payment of money after the expiration of several years contains, without any usurious design, an express and *bona fide* stipulation that interest shall be paid at periods which are at least one year apart, and which will fall before or at the time appointed for the final payment of the principal, interest stipulated to be paid at such period, if not paid, will, like a sum certain appointed in writing to be paid at a certain time, bear interest from the time when it should have been paid.

1. Rate of Interest on Interest — *Georgia*. — *Neel v. Young*, 78 Ga. 342. See also *Wofford v. Wyly*, 72 Ga. 863.

Iowa. — *Mann v. Cross*, 9 Iowa 327; *White v. Savery*, 50 Iowa 520.

Ohio. — *Dunlap v. Wiseman*, 2 Disney (Ohio)

398. And see *Cramer v. Lepper*, 26 Ohio St. 59.

Texas. — *Angel v. Miller*, 16 Tex. Civ. App. 679.

2. Interest on Annual Interest Not Recoverable in Absence of Contract — *Connecticut*. — *Camp v. Bates*, 11 Conn. 487.

Indiana. — *Grimes v. Blake*, 16 Ind. 160.

Maine. — *Kittredge v. McLaughlin*, 38 Me. 516; *Stickney v. Jordan*, 58 Me. 106, 4 Am. Rep. 251; *Whitcomb v. Harris*, 90 Me. 206; *Bradley v. Merrill*, 91 Me. 346; *Doe v. Warren*, 7 Me. 48. Compare *Bannister v. Roberts*, 35 Me. 75, in which case it was intimated that in a suit brought upon a note payable by instalments with interest annually and declaring for the interest, interest upon such interest as accrues before the maturity of the principal debt is recoverable if the suit be commenced before the day when the last instalment should have been paid.

Massachusetts. — *Hastings v. Wiswall*, 8 Mass. 455; *Ferry v. Ferry*, 2 Cush. (Mass.) 92; *Lewin v. Folsom*, 171 Mass. 192. Compare, however, with the foregoing cases, *Greenleaf v. Kellogg*, 2 Mass. 568, which was an action on a note of hand for the payment of ten thousand dollars in eight years with lawful interest from the date, the interest to be paid annually. Three years of the interest being unpaid, the plaintiff sued for it before the principal was due, and the court held that the action was well brought and gave interest upon each year's interest from the day when it was payable.

Minnesota. — *Dyar v. Slingerland*, 24 Minn. 267.

New Jersey. — *Force v. Elizabeth*, 28 N. J. Eq. 403.

Pennsylvania. — *Stokely v. Thompson*, 34 Pa. St. 210; *Sparks v. Garrigues*, 1 Binn. (Pa.) 165.

Doctrine that Right to Interest on Interest Waived by Failure to Sue. — In some states it is established as a general principle, it has been said, without reference to the distinction respecting the postponement of the payment of the principal, that though there be an express agreement in a note or bond to pay interest at a specified time, as annually or semiannually from date, yet interest upon interest from the time when it fell due will not be allowed, but it will be considered that the holder, by neglecting to call for his interest when it fell due, waived his right to have it converted into principal. *Johnson, J.*, in *Genin v. Ingersoll*, 11 W. Va. 549.

So in *Hastings v. Wiswall*, 8 Mass. 455, the court held that upon a note payable in a certain number of years, with interest annually, judgment could be recovered for simple interest only on the principal sum, for the reason that the plaintiff might have brought his action for

7. Summary of Rules. — In view of the considerable conflict of authority upon all questions involving the allowance of compound interest, it is believed that a summary of the rules which seem to be correct in principle and deducible from the reasoning of the best considered cases may be of practical assistance to the reader in enabling him to reconcile for himself conflicting cases or clearly to perceive the precise points of inconsistency: (1) There is no reason, on principle, for holding a contract for compound interest invalid, and the same may be said whether the contract was made before or after the interest on which the debtor contracts to pay interest became due.¹ (2) The contract for compound interest may be implied as well as express.² (3) Interest on interest or compound interest is not, as a rule, recoverable as damages, for the plain reason that simple interest and not compound interest is the legally established measure.³ But this must be taken with the qualification which the terminology of some cases imposes, that all interest recoverable after the maturity of the principal sum is *ex necessitate* recoverable as damages, though when expressly contracted for after maturity as liquidated damages, or, rather, damages to be estimated by a liquidated measure. In this view, if there were a stipulation for annual interest after the maturity of the principal sum, and interest thereon if not paid, there might or should be a recovery of interest on interest as damages.⁴ (4) The effect of a contract

the interest at the end of each year, and by neglecting this he might be considered as waiving his claim to compound interest.

1. General Doctrine of Validity of Contract for Interest on Interest or Compound Interest. — It might well be, however, if a contract provided for the compounding of interest at very frequent intervals — for example, the extreme case of a contract for interest compounded daily — that equity would properly find some ground for intervention and relief. But where the contract contemplates that the interest should be actually paid at the intervals stated, or where the intervals for compounding are not so frequent as to suggest an unconscionable contract, it is believed that the contract for compound interest or interest on interest should in all cases be sustained, in the absence, of course, of a statute to the contrary. Where a contract for compound interest is made after the interest upon which interest was contracted for becomes due, there can be in general no question of unconscionableness, the debtor's attention being specially called to the matter with full knowledge of the extent of the liability which he is incurring. And furthermore, such a contract made after interest due would be persuasive if not conclusive evidence that it had been contemplated by the parties that the first interest was to be actually paid, and so the contract for interest on interest would be founded upon the new consideration of forbearance in the collection of the interest already due.

2. Doctrine that Contract for Compound Interest May Be Implied as Well as Express. — But as has been pointed out, where the law may imply a contract for interest, it will, in the absence of special circumstances, prefer to imply a contract for simple interest rather than compound interest. There are several reasons for this position, none of which, however, warrant the general statement frequently met with, that the law will never imply a contract for compound interest. The fact of the matter is that compound interest is to a certain extent extraor-

dinary and unusual, involving a computation sometimes complicated and peculiar, in view of which circumstances it is more difficult to say from the mere conduct of parties that a contract to pay compound interest was intended. It would be as reasonable to state as a general proposition that the law will not imply a contract to build a house as that no contract for compound interest will be implied. If one party desires to have another erect a dwelling for him, he generally finds it necessary to enter into an express contract for the purpose; so if one party desires another to pay to him interest on interest on interest, and so on *ad infinitum*, it is generally necessary that there should be an express contract to such end, because the dumb vocabulary of mere conduct is generally too limited to express such an intent. There is, however, absolutely nothing inherent in the nature of compound interest which prevents the implication of a contract to pay it, as is amply illustrated by the case of accounts, in which compound interest is, as has been seen, frequently given on the grounds of a contract to pay it implied from custom.

3. Compound Interest as Damages. — There are many cases, of course, in which interest is recoverable as damages for breach of a contract to pay another sum, though the latter may itself be the interest of some other sum. But in such case it is not interest on interest which is recoverable as damages; the sum due, and for the failure to pay which interest is given, being simply regarded as another sum of money, and interest given thereon as damages for the failure to pay.

4. Some Cases Hold, as Has Been Seen, that no interest on interest is ever recoverable, where the interest on which interest is sought has accrued after the maturity of the principal. It is difficult to trace this doctrine to any foundation of sound principle. It may perhaps have originated in cases where there was no contract for interest on interest after maturity, when only simple interest as damages

for interest on interest with reference to statutes limiting the conventional rate belongs more properly to an article which will appear in a later volume of this work.¹ But it is believed to be a safe statement, as a loose general rule, that interest on interest at a rate not greater than the statute permits should never be held usurious where payment of the interest instalments was actually contemplated on the dates fixed, although the aggregate of interest on interest would, if contracted for on the original principal, exceed the rate allowed by law.²

XV. WHAT LAW GOVERNS, AND CONFLICT OF LAWS — 1. Interest by Contract — a. GENERALLY. — Where a contract for interest is made in one state or county to be performed in another, the question arises, By what law is the contract to be controlled as to the right of recovery of interest and the rate of interest recoverable? And where, as is often the case, the action is brought in still a third jurisdiction, the law of the latter must also be taken into consideration in determining what law governs.³

b. EXPRESS CONTRACTS — (1) Law of Place with Reference to Which Contract Made. — The general rule is that a contract for interest will be governed, as to the right of recovery thereunder, by the law of the place with reference to which, in good faith, the contract is made.⁴

would be recoverable on the principal. But why, if the instalments of interest continue to accrue and become payable annually, should not interest be allowed on them as damages for the breach of contracts to pay money? There are also cases that have held that interest on interest was not recoverable except where the interest on the principal was evidenced by some contract therefor, separable from the contract for the principal sum, which might be negotiated with third parties; and other cases have actually required that such separable contracts for interest should be so negotiated before interest is allowed as damages for their breach.

1. See the title **USURY**.

2. Where Payment of Interest Instalments Actually Contemplated. — In a jurisdiction, for example, in which the conventional rate of interest was limited to twelve per cent. per annum, a contract for interest at the rate of one per cent. per month, compounded monthly, would not, in general, be upheld. But if the payment of interest each month was actually contemplated, it is believed that a contract might in advance validly provide that if the interest was not paid when due it should become principal, and be subject to monthly compoundings thereafter. There is probably no case which holds that the parties might not properly come together after the interest had become due and promise to pay interest thereon thereafter. Suppose, in the case mentioned, the parties should meet at the end of the first month and the debtor should execute his note payable a month thence with interest from date. This process might be repeated the next month, and so on throughout the year, which would be compounding interest monthly. If the parties have a right to do this as stated, it is not perceived why the same result should not be permitted by a contract in advance, provided, of course, the debtor fairly understands the nature and effect of his obligation, and the contract is not resorted to as a device to evade the usury laws. There would be much less difficulty in giving simple interest on the

monthly instalments of interest as they fell due, and this course, it is believed, should be adopted in all cases where the payment of the interest instalment was actually contemplated. As a matter of course, it would probably be difficult to make it appear, in the rather extreme case taken above for illustration, that the compounding of interest monthly was not either a device to evade the law limiting the rate or a contract which the debtor did not clearly understand, because by it a so much higher rate of interest on the principal sum first received would be paid than a thoughtless or ignorant person would realize at the outset. In many instances nothing less than compound interest would compensate the creditor, and anything less than compound interest would be, in a sense, permitting the debtor to take advantage of his own wrong. This might readily be the case if the creditor were a bank, with a demand for its funds for short-time loans. Finally, the writer's position is simply this: if the parties may, lawfully and without evasion, accomplish a certain result by a succession of several acts neither illegal nor immoral, they should be permitted to contract for the same result in the beginning, provided, of course, the debtor fully understands the extent of the liability assumed. Perhaps the most important consideration in this connection, and one which in most cases might safely be permitted to control, is whether it was or was not contemplated that the interest should be actually paid at the time when the compoundings are to be made. If so, then at least simple interest on the deferred interest payments should be given.

3. See generally the title **PRIVATE INTERNATIONAL LAW**.

4. Place with Reference to Which Contract Is Made. — *Butters v. Olds* 11 Iowa 1; *Pine v. Smith*, 11 Gray (Mass.) 38; *Davis v. Coleman*, 11 Ired. L. (23 N. Car.) 303; *Irvine v. Barrett*, 2 Grant Cas. (Pa.) 73.

Note Made in One State and Secured by Property in Another. — A promissory note was dated and executed in Wyoming, and by its terms was

Place Where Contract Entered Into — Place of Performance. — The parties may validly contract with reference to the laws of either the place of performance of the contract or the jurisdiction in which the contract is executed.¹

And Where the Circumstances of the Contract Leave It Doubtful whether the contract for interest was made with reference to the law of the place where it was entered into or that where the money was payable, that construction which will render the contract operative according to its terms should, in general, be adopted, rather than that which will render it void.²

(2) **Place Where Contract Entered Into.** — Although, as will be seen hereafter, the law of the place of the performance of the contract will be regarded as having been intended by the parties in the absence of a showing to the contrary, yet in many cases the law of the place where the contract was entered into will be taken as that which the contracting parties appear to have had in view.³

A Contract for the Payment of Interest, if Valid Where Made, will be maintained by

payable there. The maker was a Wyoming corporation, but most of its property was situated and most of its business transacted in Nebraska. The payee was a resident of Wyoming. The note provided for interest at the rate of fifteen per cent. per annum, which was lawful in Wyoming, where the note was made. It was secured by mortgages executed in Wyoming on property situated in Nebraska, the rate of interest provided for being unlawful in the latter state. The payee and mortgagee went to Nebraska for the purpose of examining the records, found no incumbrances, and received the note and mortgages there. There was evidence tending to show that the agreement for the loan was made in Wyoming in good faith. It was held that a finding that the note was governed by the interest laws of Wyoming was proper. *Coad v. Home Cattle Co.*, 32 Neb. 761, 29 Am. St. Rep. 465. See also *Cocke v. Hatcher* (Tenn. 1887) 4 S. W. Rep. 170.

Marriage Settlement — Law of State Where Lands Situated. — In *Quince v. Callender*, 1 Desaus. (S. Car.) 160, it was held that though the marriage bond in the bill mentioned was dated in North Carolina, yet, as the lands on which the settlement was made were situated in South Carolina, the interest of the latter state should be allowed.

Note Dated in One State but Actually Executed in Another. — It has been held that although a note was dated and made payable in one state, but actually executed in another, it might be controlled by the interest laws of the latter state upon averment and proof that it was so dated and made payable through inadvertence, the real intent being that it should operate under the laws of the state where it was in fact made. *Johnson City First Nat. Bank v. Mann*, 94 Tenn. 17.

But where a note was actually dated and executed in one state, yet, under the circumstances, the transaction in which the note was involved was consummated in another state, where the note was also made payable, it was held that it would be governed as to the effect of a stipulation for interest entirely by the laws of the latter jurisdiction. *McGarry v. Nicklin*, 100 Ala. 550, 55 Am. St. Rep. 40.

1. Provision of Contract as to What Law Shall Govern. — *Miller v. Tiffany*, 1 Wall. (U. S.) 298; *Jones v. Rider*, 60 N. H. 452; *Peck v. Mayo*,

14 Vt. 33, 39 Am. Dec. 205. See also the title *USURY*.

Unconscionable Contract. — In *Sime v. Norris*, 8 Phila. (Pa.) 84, it was held that a contract made in California to pay monthly two and a half per cent. interest, and to compound it, though lawful under the local law, was not only unconscionable, but deceptive; and a court of law in Pennsylvania would not enforce it, but would enter judgment for the principal and simple interest at ten per cent.

2. Validity of Contract Presumed. — *Varick v. Crane*, 4 N. J. Eq. 128.

3. Place Where Contract Entered Into — England. — *Fergusson v. Fyffe*, 8 Cl. & F. 121.

United States. — *Cromwell v. Sac County*, 96 U. S. 51; *Miller v. Tiffany*, 1 Wall. (U. S.) 298; *Sturdivant v. Memphis Nat. Bank*, 60 Fed. Rep. 730, 736, 23 U. S. App. 300, 309.

Alabama. — *Crawford v. Simonton*, 7 Port. (Ala.) 110.

Illinois. — *Morris v. Wibaux*, 159 Ill. 627. And see *Sherman v. Garrett*, 9 Ill. 521, 44 Am. Dec. 715.

Iowa. — *Butters v. Olds*, 11 Iowa 1; *Arnold v. Potter*, 22 Iowa 194; *Bigelow v. Burnham*, 83 Iowa 120, 32 Am. St. Rep. 294, 90 Iowa 300, 48 Am. St. Rep. 442.

Kentucky. — *Pawling v. Sartain*, 4 J. J. Marsh. (Ky.) 238.

Louisiana. — *Depau v. Humphreys*, 8 Mart. N. S. (La.) 1.

New Hampshire. — *Townsend v. Riley*, 46 N. H. 300.

New Jersey. — *Varick v. Crane*, 4 N. J. Eq. 128.

New York. — *Chapman v. Robertson*, 6 Paige (N. Y.) 627, 31 Am. Dec. 264; *Staples v. Nott*, 128 N. Y. 403, 26 Am. St. Rep. 480.

Vermont. — *Peck v. Mayo*, 14 Vt. 33, 39 Am. Dec. 205.

"Interest Must Be Regulated by the Lex Loci Contractus unless the contract was to be performed in some other state." *Pawling v. Sartain*, 4 J. J. Marsh. (Ky.) 238.

Where, by the Law or Custom of the Country where a particular sort of a note is given, no interest is payable upon it until judgment obtained, interest before judgment will not be allowed in an action brought within the courts of the United States. *Courtois v. Carpentier*, 1 Wash. (U. S.) 376.

the courts of such jurisdiction, although a higher rate of interest is provided for than is permitted by the law of the place where payment is to be made.¹

(3) *Place Where Contract to Be Performed* — (a) *In General*. — Where a contract for interest is made in one place and is to be performed in another, the law of the place of performance will generally be held to control.²

Stipulation for Annual Interest. — Where, according to the laws of the state where a promissory note was made and payable, a stipulation to pay interest annually would entitle the holder to recover interest on deferred interest instalments, it was held, in an action thereon in a state where the clause in

1. Contract Enforced if Valid Where Made. — *Jackson v. American Mortg. Co.*, 88 Ga. 756; *Raines v. American Freehold Mortg. Co.*, 94 Ga. 699; *Newman v. Keishaw*, 10 Wis. 333; *Richards v. Globe Bank*, 12 Wis. 692; *Vliet v. Camp*, 13 Wis. 198.

Thus the rate of interest to be paid from the date of a note may be legally stipulated according to the law of the place where the note is made, although it is payable in another where the stipulation of a lesser rate is alone legal. *Depau v. Humphreys*, 8 Mart. N. S. (La.) 1.

Where Stipulation as to Interest Conflicts with Law of Both Place of Making and Place of Performance. — Where a contract was made in one state for the payment of interest in another at a higher rate than was allowed by the laws of either state, it was held that the fate of the contract depended upon the laws of the state where it was made. *Adams v. Robertson*, 37 Ill. 45.

2. Law of Place of Performance — *England*. — *Connor v. Bellamont*, 2 Atk. 382; *Bodily v. Bellamy*, 2 Burr. 1094.

United States. — *Building, etc., Assoc. v. Logan*, 66 Fed. Rep. 827, 30 U. S. App. 163; *Cowqua v. Lauderbrun*, 1 Wash. (U. S.) 521; *Jaffray v. Dennis*, 2 Wash. (U. S.) 253; *Bushby v. Camac*, 4 Wash. (U. S.) 296; *Illinois Bank v. Brady*, 3 McLean (U. S.) 268.

Alabama. — *Moore v. Davidson*, 18 Ala. 209; *Hunt v. Hall*, 37 Ala. 702; *Camp v. Randle*, 81 Ala. 240; *Harrick v. Andrews*, 9 Port. (Ala.) 9; *McGarry v. Nicklin*, 100 Ala. 559. 55 Am. St. Rep. 40.

Arkansas. — See *Harrison Bank v. Gibson*, 60 Ark. 269.

Georgia. — *Odom v. New England Mortg. Security Co.*, 91 Ga. 505.

Illinois. — *Chumasero v. Gilbert*, 24 Ill. 293.

Indiana. — *Lefler v. Dermotte*, 18 Ind. 246; *Lines v. Mack*, 19 Ind. 223; *Gray v. State*, 72 Ind. 567.

Iowa. — *Butters v. Olds*, 11 Iowa 1; *Bigelow v. Burnham*, 90 Iowa 300, 48 Am. St. Rep. 412.

Kentucky. — *Brown v. Todd*, (Ky. 1895) 29 S. W. Rep. 621.

Louisiana. — *Bent v. Lauve*, 3 La. Ann. 88; *Hawley v. Sloo*, 12 La. Ann. 815.

Massachusetts. — *Winthrop v. Carleton*, 12 Mass. 4; *French v. French*, 126 Mass. 360; *Von Hemert v. Porter*, 11 Met. (Mass.) 220.

Mississippi. — *Swett v. Dodge*, 4 Smed. & M. (Miss.) 667.

Missouri. — *Louisville Bank v. Young*, 37 Mo. 398; *Long v. Long*, 141 Mo. 352.

New Hampshire. — *Little v. Riley*, 43 N. H.

109; *Chase v. Dow*, 47 N. H. 405; *Jones v. Rider*, 60 N. H. 452.

New Jersey. — *Healy v. Gorman*, 15 N. J. L. 328; *Campbell v. Nichols*, 33 N. J. L. 81.

New York. — *Grand Rapids School Furniture Co. v. Hammerstein*, (C. Pl. Gen. T.) 18 N. Y. Supp. 766; *Lewis v. Ingersoll*, 3 Abb. App. Dec. (N. Y.) 55; *Pomeroy v. Ainsworth*, 22 Barb. (N. Y.) 118; *Smith v. Smith*, 2 Johns. (N. Y.) 235, 3 Am. Dec. 410; *Consequa v. Fanning*, 3 Johns. Ch. (N. Y.) 587; *Thompson v. Ketcham*, 4 Johns. (N. Y.) 285; *Fanning v. Consequa*, 17 Johns. (N. Y.) 511, 8 Am. Dec. 442; *Stewart v. Ellice*, 2 Paige (N. Y.) 604.

North Carolina. — *Arrington v. Gee*, 5 Ired. L. (27 N. Car.) 590; *Davis v. Coleman*, 7 Ired. L. (29 N. Car.) 424; *Roberts v. McNeely*, 7 Jones L. (52 N. Car.) 506, 78 Am. Dec. 261.

Pennsylvania. — *Clark v. Searight*, 135 Pa. St. 173, 20 Am. St. Rep. 868; *Irvine v. Barriett*, 2 Grant Cas. (Pa.) 73; *Archer v. Dunn*, 2 W. & S. (Pa.) 327.

South Carolina. — *Gaillard v. Ball*, 1 Nott & M. (S. Car.) 67.

Tennessee. — *Bolton v. Street*, 3 Coldw. (Tenn.) 31.

Texas. — *Summers v. Mills*, 21 Tex. 77; *Whitlock v. Castro*, 22 Tex. 108.

Vermont. — *Peck v. Mayo*, 14 Vt. 33, 39 Am. Dec. 205.

Virginia. — *Roberts v. Cocke*, 28 Gratt. (Va.) 207.

Where the Defendant's Comakers in a Promissory Note made and payable in New Mexico and bearing ten per cent. interest, a rate not illegal in that state, after a partial payment thereon undertook, in the absence of the defendant, to renew the note for the balance still due, and accordingly executed a new note dated in New Mexico and stipulating for the same rate of interest, and the defendant afterwards, in a state in which more than six per cent. interest was illegal, with full knowledge of all the circumstances, also signed the new note, it was held that he thereby ratified the agreement made by his co-obligors, and the new note would be regarded as made in New Mexico and governed by the laws of such jurisdiction in respect to the rate of interest accruing thereon and the legal effect of the stipulation for interest embodied therein. *Findlay v. Hall*, 12 Ohio St. 610.

Loans Within Dominions of Indian Sovereigns. — The rate of interest for loans advanced within the dominions of native and independent Indian sovereigns by British subjects domiciled and residing within such dominions is not, it has been held, limited to twelve per cent. by the statute of 13 Geo. III., c. 63, § 20. *House of Lords*, 3 Bing. 193, 11 E. C. L. 93.

question would not give the right to compound interest, that such interest might nevertheless be recovered.¹

A Contract Intended to Be Performed Partly in One State and Partly in Another may be treated by the parties as a contract of either jurisdiction and interest recovered accordingly.²

Place of Performance to Be Fixed in Good Faith. — In order that parties in one jurisdiction may validly contract with reference to the interest laws of a foreign place of performance, it is requisite that the latter should be fixed in good faith and not for the purpose of evading the laws of the place where the contract is entered into.³

How Place of Execution or Performance of Contract Shown — Parol Evidence. — The authorities are not agreed on the subject, but the general rule seems to be that parol evidence is admissible to show that a contract for the payment of money and interest thereon was entered into or was to be performed at a place other than that stated in the contract as such.⁴

(b) **Stipulation for Interest Without Naming Rate.** — Pursuant to the rule above stated, where there is a contract for interest but no rate is specified, interest will in general be computed according to the rate of the place where the contract should have been performed, *i. e.*, the place where the money should have been paid.⁵

(c) **Place Where Contract Made as Place of Performance.** — Many cases might be cited

1. **Stipulation for Annual Interest.** — *Stickney v. Jordan*, 58 Me. 106, 4 Am. Rep. 251; *Little v. Riley*, 43 N. H. 109.

2. **Contract to Be Performed Partly in One State and Partly in Another.** — *Porter v. Price*, 80 Fed. Rep. 655.

3. **Place of Performance Fixed in Good Faith.** — *Building, etc., Assoc. v. Logan*, 66 Fed. Rep. 827, 30 U. S. App. 163; *Miller v. Tiffany*, 1 Wall. (U. S.) 298; *Long v. Long*, 141 Mo. 352; *Campbell v. Nichols*, 33 N. J. L. 81.

4. **Parol Evidence to Prove Place of Performance.** — *McGarry v. Nicklin*, 110 Ala. 559, 55 Am. St. Rep. 40; *Hoppins v. Miller*, 17 N. J. L. 185; *Johnson City First Nat. Bank v. Mann*, 94 Tenn. 17; *Austin v. Imus*, 23 Vt. 286.

Doctrine that Parol Evidence Inadmissible. — In *Arrington v. Gee*, 5 Ired. L. (27 N. Car.) 590, it was held that in order to change the rule of presumption that the contract is to be performed where executed, the stipulation for performance elsewhere must appear on the face of the contract.

Where a Bond or Note Fails to Designate the Place of Payment, parol evidence is inadmissible to show that by agreement between the parties it was to be paid at a place different from that of the contract, so that the interest law of the latter place may control. *Moore v. Davidson*, 18 Ala. 209.

5. **Contract for Interest Without Naming Rate** — *England.* — *Connor v. Bellamont*, 2 Atk. 382.

United States. — *Cowqua v. Lauderbrun*, 1 Wash. (U. S.) 521; *Jaffray v. Dennis*, 2 Wash. (U. S.) 253; *Bushby v. Camac*, 4 Wash. (U. S.) 296; *Illinois Bank v. Brady*, 3 McLean (U. S.) 268.

Alabama. — *Moore v. Davidson*, 18 Ala. 209; *Hunt v. Hall*, 37 Ala. 702; *Peacock v. Banks*, Minor (Ala.) 387; *Hanrick v. Andrews*, 9 Port. (Ala.) 9.

Illinois. — *Chumasero v. Gilbert*, 24 Ill. 293.

Indiana. — *Lefler v. Dermotte*, 18 Ind. 246; *Gray v. State*, 72 Ind. 567.

Louisiana. — *Bent v. Lauve*, 3 La. Ann. 88; *Hawley v. Sloo*, 12 La. Ann. 815.

Massachusetts. — *Von Hemert v. Porter*, 11 Met. (Mass.) 210; *Winthrop v. Carleton*, 12 Mass. 4.

Mississippi. — *Swett v. Dodge*, 4 Smed. & M. (Miss.) 667.

New Hampshire. — *Little v. Riley*, 43 N. H. 109.

New Jersey. — *Healy v. Gorman*, 15 N. J. L. 328.

New York. — *Pomeroy v. Ainsworth*, 22 Barb. (N. Y.) 118; *Stewart v. Ellice*, 2 Paige (N. Y.) 604; *Smith v. Smith*, 2 Johns. (N. Y.) 235, 3 Am. Dec. 410; *Consequa v. Fanning*, 3 Johns. Ch. (N. Y.) 587; *Thompson v. Ketcham*, 4 Johns. (N. Y.) 285; *Fanning v. Consequa*, 17 Johns. (N. Y.) 511, 8 Am. Dec. 442.

North Carolina. — *Arrington v. Gee*, 5 Ired. L. (27 N. Car.) 590; *Davis v. Coleman*, 7 Ired. L. (29 N. Car.) 424; *Roberts v. McNecly*, 7 Jones L. (52 N. Car.) 506, 78 Am. Dec. 261.

Pennsylvania. — *Archer v. Dunn*, 2 W. & S. (Pa.) 327; *Irvine v. Barrett*, 2 Grant Cas. (Pa.) 73.

South Carolina. — *Gaillard v. Ball*, 1 Nott & M. (S. Car.) 67.

Tennessee. — *Bolton v. Street*, 3 Coldw. (Tenn.) 31.

Texas. — *Summers v. Mills*, 21 Tex. 77; *Whitlock v. Castro*, 22 Tex. 108.

Vermont. — *Peck v. Mayo*, 14 Vt. 33, 39 Am. Dec. 205.

Virginia. — *Roberts v. Cocke*, 28 Gratt. (Va.) 207.

Stipulation for Interest Generally. — If a contract for the payment of money stipulates for interest generally, the rate of interest taken will be the rate of interest of the place of payment unless it appears that the parties intended to contract with reference to the law of some other place. *Peck v. Mayo*, 14 Vt. 33, 39 Am. Dec. 205. And the rate so taken may be either statutory or customary. *Archer v. Dunn*, 2 W. & S. (Pa.) 327.

which in terms seem to state that it is the law of the place where the contract is made rather than the law of the place of performance which will control in the matter of interest.¹ But such cases all are, or should be, cases of contracts not specifying any particular place of payment or performance, when the presumption always is that the place where the contract was entered into was also intended as the place of performance.² Some cases state the general rule in this connection, as that it is the law of the place where the contract is made which is primarily taken, which, however, will yield to the law of the place of performance where the contract is to be performed elsewhere than where made.³

(4) *Place Where Suit Brought.* — Where interest is contracted for, but there is nothing to show where the contract was executed or to be performed, it has been held that interest according to the *lex fori* may be given.⁴ In some cases also the law of the place where suit brought governs the allowance of interest where the contract was made with reference to the law of a foreign jurisdiction, if it is not shown what that law is.⁵

1. See, for example, *Burton v. Anderson*, 1 Tex. 93, in which it was said: "Interest is conceded to be a creature of local law, and is governed by the law of the country where the contract is made or the debt incurred." See also *Nalle v. Ventress*, 19 La. Ann. 373, where ten per cent. interest was allowed "as stipulated in the note, and authorized by the law of Mississippi, where the contract was made."

2. *Place of Contract as Place of Performance.* — *Stickney v. Jordan*, 58 Me. 106, 4 Am. Rep. 251; *Chase v. Dow*, 47 N. H. 405; *Jones v. Rider*, 60 N. H. 452; *Arrington v. Gee*, 5 Ired. L. (27 N. Car.) 590; *Clark v. Searight*, 135 Pa. St. 173, 20 Am. St. Rep. 868.

Note Secured by Mortgage on Lands in Another State. — The fact that the note given was secured by a mortgage on lands in another state in which the rate of interest or the method of computation differed from that of the state in which the note was executed, is not sufficient to change the rule. *Chase v. Dow*, 47 N. H. 405.

In *Lewis v. Ingersoll*, 3 Abb. App. Dec. (N. Y.) 55, it was held that creditors resident in Pennsylvania, where the limit of interest was six per cent., holding a mortgage executed in New York on lands in that state, might receive seven per cent. interest thereon, if there was nothing to indicate where the securities were payable, nor that a different rate of interest from that allowed by the laws of New York was intended.

Domicil of Creditor Not Considered. — It has been held that a contract payable generally, naming no place of payment, will be regarded as payable at the place of contract, and not where the domicil of the creditor may be. *Arrington v. Gee*, 5 Ired. L. (27 N. Car.) 590. But in *Chapman v. Robertson*, 6 Paige (N. Y.) 627, 31 Am. Dec. 264, it was declared that where a mere personal security is given for the payment of money loaned, and no place of payment is specified therein, the residence of the lender at the time of giving such security must be considered as the place of payment for the purpose of deciding the validity of a stipulation for interest.

3. *Fanning v. Consequa*, 17 Johns. (N. Y.) 511, 8 Am. Dec. 442. See also *Chase v. Dow*, 47 N. H. 405; *Butters v. Olds*, 11 Iowa 1.

4. *Lex Fori — Uncertainty as to Place of Execution or Performance of Contract.* — *Cook v. Crawford*, 4 Tex. 420.

Illustrations. — Where a note sued on in Texas was dated at Philadelphia, but there was no proof that Philadelphia was beyond the limits of the state, it was held that interest was properly computed at the legal rate of the state in which the action was brought. *Cook v. Crawford*, 4 Tex. 420.

Where a note sued on in Greene county, Alabama, was described as made "at Virginia, to wit, in Greene county," it was held that the court would presume Virginia to be some place in the county where the action was brought, in the absence of a showing to the contrary, and would be governed by the legal rate of interest existing in Alabama. *Richardson v. Williams*, 2 Port. (Ala.) 239.

In another case, where two notes sued on in Texas appeared to have been executed in New York and payable "at office of Commercial and Agricultural Bank of Texas, in New Orleans," it was held that the court could not from this alone judicially know that New York and New Orleans were beyond the limits of the state, and hence that the interest recoverable would be according to the rate prevailing in Texas. *Whitlock v. Castro*, 22 Tex. 108.

But see *Pawling v. Sartain*, 4 J. J. Marsh. (Ky.) 238, holding that in an action brought in Kentucky on a note made and to be paid in New York, the court would judicially know that New York was not in Kentucky, and could not, therefore, apply the Kentucky rate of interest as damages for the breach of the contract; interest, if allowable, being governed by the law of New York.

In *Smith v. Robinson*, 11 Ala. 270, it was held in Alabama that where a promissory note was dated at Macon and was "payable at either of the banks in Macon," it could not, in the absence of allegation or proof, be intended that Macon was in another state, so as to devolve upon the plaintiff the necessity of proving the rate of interest abroad; especially, it was held, as there were a county and perhaps several villages called Macon in the state in which the suit was brought, though there was no incorporated bank in either.

5. See *infra*, this section. *Proof of Interest*

c. IMPLIED CONTRACTS. — As to the law controlling, as between the place of contract, performance, or suit brought, there is no difference whatever between express and implied contracts for interest.¹

2. Interest as Damages — a. DAMAGES FOR BREACH OF CONTRACT — (1) *Law of Place of Performance.* — Where interest is given as damages and not by virtue of a contract for it, the general rule is that the rate recoverable is according to the law of the place of performance, irrespective of the law of the place where the contract was entered into or the jurisdiction in which the suit is brought.²

Law of Foreign Jurisdiction — Consequences of Failure of Proof.

1. Same Rules Applicable to Both Express and Implied Contracts — *United States.* — *Bainbridge v. Wilcocks*, *Baldw.* (U. S.) 536; *Lanusse v. Barker*, 3 *Wheat.* (U. S.) 147.

Alabama. — *Crawford v. Simonton*, 7 *Port.* (Ala.) 110.

Kentucky. — *Cocke v. Conigmaker*, 1 A. & K. *Marsh.* (Ky.) 254.

Massachusetts. — *Ayer v. Tilden*, 15 *Gray* (Mass.) 178, 77 *Am. Dec.* 355; *French v. French*, 126 *Mass.* 360.

Vermont. — *Porter v. Munger*, 22 *Vt.* 191.

2. Interest as Damages — *Law of Place of Performance — England.* — *Robinson v. Bland*, 2 *Burr.* 1077; *Reg. v. Grand Trunk R. Co.*, 2 *Can. Exch.* 132; *Champant v. Renelagh*, *Prec. Ch.* 128.

Canada. — *Souther v. Wallace*, 11 *Nova Scotia* 548, 1 *Can. L. T.* 556.

United States. — *Pana v. Bowler*, 107 *U. S.* 529; *City Nat. Bank v. Hunter*, 129 *U. S.* 557; *Coghlan v. South Carolina R. Co.*, 142 *U. S.* 101; *Wittkowski v. Harris*, 61 *Fed. Rep.* 712; *Scotland County v. Hill*, 132 *U. S.* 107; *Illinois Bank v. Brady*, 3 *McLean* (U. S.) 268; *Gelpcke v. Dubuque*, 1 *Wall.* (U. S.) 175; *Bushby v. Camac*, 4 *Wash.* (U. S.) 296; *Lanusse v. Barker*, 3 *Wheat.* (U. S.) 101; *Emory v. Greenough*, 3 *Dall.* (U. S.) 369. See *Fauntleroy v. Hannibal*, 5 *Dill.* (U. S.) 219.

Alabama. — *Moore v. Davidson*, 18 *Ala.* 209; *Hunt v. Hall*, 37 *Ala.* 702; *Evans v. Clark*, 1 *Port.* (Ala.) 388; *Hanrick v. Andrews*, 9 *Port.* (Ala.) 9.

Connecticut. — *Adams v. Way*, 33 *Conn.* 410.

Illinois. — *Forsyth v. Baxter*, 3 *Ill.* 9; *Chumassero v. Gilbert*, 24 *Ill.* 293, 26 *Ill.* 39; *Morris v. Wibaux*, 159 *Ill.* 627.

Indiana. — *Butler v. Myer*, 17 *Ind.* 77; *Lefler v. Dermotte*, 18 *Ind.* 246; *Gray v. State*, 72 *Ind.* 567; *Kopelke v. Kopelke*, 112 *Ind.* 435.

Iowa. — *Butters v. Olds*, 11 *Iowa* 1. But see the *Iowa* cases cited *infra*, this division of this section, *Law of Place of Suit.*

Kentucky. — *Pawling v. Sartain*, 4 *J. J. Marsh.* (Ky.) 238; *Holley v. Holley*, *Litt. Sel. Cas.* (Ky.) 505, 12 *Am. Dec.* 342.

Louisiana. — *Bent v. Lauve*, 3 *La. Ann.* 88; *Bannister v. Hamilton*, 3 *La. Ann.* 401; *Hawley v. Sloo*, 12 *La. Ann.* 815; *Howard v. Branner*, 23 *La. Ann.* 369.

Maryland. — *Pearce v. Wallace*, 1 *Har. & J.* (Md.) 48.

Missouri. — *Louisville Bank v. Young*, 37 *Mo.* 398.

Nevada. — *Sutro Tunnel Co. v. Segregated Belcher Min. Co.*, 19 *Nev.* 121.

New Hampshire. — *Little v. Riley*, 43 *N. H.* 109.

New Jersey. — *Hoppins v. Miller*, 17 *N. J. L.* 185; *Healy v. Gorman*, 15 *N. J. L.* 328.

New York. — *Pomeroy v. Ainsworth*, 22 *Barb.* (N. Y.) 118; *Cartwright v. Greene*, 47 *Barb.* (N. Y.) 9; *Smith v. Smith*, 2 *Johns.* (N. Y.) 235, 3 *Am. Dec.* 410; *Van Schaick v. Edwards*, 2 *Johns. Cas.* (N. Y.) 355; *Ruggles v. Keeler*, 3 *Johns.* (N. Y.) 263, 3 *Am. Dec.* 482; *Thompson v. Ketcham*, 4 *Johns.* (N. Y.) 285; *Fanning v. Consequa*, 17 *Johns.* (N. Y.) 511, 8 *Am. Dec.* 442; *Schofield v. Day*, 20 *Johns.* (N. Y.) 102; *Stewart v. Ellice*, 2 *Paige* (N. Y.) 604.

North Carolina. — *Arrington v. Gee*, 5 *Ired. L.* (27 *N. Car.*) 590.

Pennsylvania. — *Archer v. Dunn*, 2 *W. & S.* (Pa.) 327. Compare *Mullen v. Morris*, 2 *Pa. St.* 85; *Clark v. Searight*, 135 *Pa. St.* 173, 20 *Am. St. Rep.* 868.

Rhode Island. — *Kavanaugh v. Day*, 10 *R. I.* 393, 14 *Am. Rep.* 691.

South Carolina. — *Gaillard v. Ball*, 1 *Nott & M.* (S. Car.) 67; *Stepp v. National L., etc., Assoc.*, 37 *S. Car.* 417.

Tennessee. — *Bolton v. Street*, 3 *Coldw.* (Tenn.) 31.

Texas. — *Cook v. Crawford*, 4 *Tex.* 420; *Wheeler v. Pope*, 5 *Tex.* 262; *Able v. McMurray*, 10 *Tex.* 350; *Bailey v. Heald*, 17 *Tex.* 102; *Summers v. Mills*, 21 *Tex.* 77; *Whitlock v. Castro*, 22 *Tex.* 108; *Pauska v. Daus*, 31 *Tex.* 67.

Vermont. — *Peck v. Mayo*, 14 *Vt.* 33, 39 *Am. Dec.* 205; *Porter v. Munger*, 22 *Vt.* 191; *Austin v. Imus*, 23 *Vt.* 286.

In *Raymond v. Holmes*, 11 *Tex.* 54, it was observed that the English rule was that interest as damages on a bill of exchange is recoverable according to the place where the bill is payable, whether recourse be had upon the drawer or the indorser of the bill. Thus, where a bill was drawn and accepted in Paris, and was payable in England, the drawer and acceptor living in Paris, and no rate of interest being expressed as payable on the bill, it was held that, the default being made in England, interest was payable according to the English and not the French law. *Cooper v. Waldegrave*, 2 *Beav.* 282. See also *Robinson v. Bland*, 2 *Burr.* 1077, where a bill of exchange drawn in France for money lent there and made payable in England was deemed a contract subject to the laws of England and to bear English interest.

But in *Gibbs v. Fremont*, 9 *Exch.* 25, 17 *Jur.* 820, 22 *L. J. Exch.* 302, it was held that if a bill of exchange on the face of which no interest is reserved is drawn in one country, payable in another, the drawer is liable on its dishonor to pay as damages interest at the current rate in the country where the bill was drawn.

(2) *Place Where Contract Made as Place of Performance.* — Where a contract does not provide for a different place of performance, the place where it was made will be deemed to have been intended, and the rate of such jurisdiction will be given as damages for the breach.¹

(3) *Law of Place of Suit.* — In some cases the rule adopted has been to give interest according to the rate of the *lex fori* when it is recovered as damages and not by virtue of a contract to pay it.²

Where Promissory Notes Are Payable Generally, with no place of payment fixed, the general rule has been held to be that the *lex fori* governs in the collection thereof; and where no interest has been provided for therein, the interest after a breach of the contract is recoverable, if allowed, as damages; and where interest is adjudged as damages upon such contracts the rate of interest will be governed by the law of the place of suit.³

b. DAMAGES FOR TORT. — Whether interest should be given as part of the compensation in damages for a tort, seems generally to have been determined with reference to the jurisdiction in which the cause of action arose.⁴

3. Foreign Judgments — *a. LAW OF JURISDICTION WHERE JUDGMENT RENDERED.* — In an action in one jurisdiction on a judgment rendered in another it has been held that the right of recovery of interest and the rate

1. Place of Contract as Place of Performance — *United States.* — Wittkowski v. Harris, 64 Fed. Rep. 712.

Alabama. — Moore v. Davidson, 18 Ala. 209.
Iowa. — Butters v. Olds, 11 Iowa 1.

Kentucky. — Pawling v. Sartain, 4 J. J. Marsh. (Ky.) 238; Holley v. Holley, Litt. Sel. Cas. (Ky.) 505, 12 Am. Dec. 342.

New Jersey. — Hoppins v. Miller, 17 N. J. L. 185.

North Carolina. — Arrington v. Gee, 5 Ired. L. (27 N. Car.) 590.

Rhode Island. — Kavanaugh v. Day, 10 R. I. 393, 14 Am. Rep. 691.

A Promissory Note Dated at New York without designating the place of payment will bear the legal rate of interest as established by the laws of that state after maturity. Hoppins v. Miller, 17 N. J. L. 185.

So in an action in Kentucky on a note executed in New York, with no place of payment specified, it was held that the recovery of interest as damages would be governed by the law of the latter state. Pawling v. Sartain, 4 J. J. Marsh. (Ky.) 238.

Bond Secured by Realty in Another State. — Interest as damages for the nonpayment of bonds at maturity is to be computed by the laws of the state where the bonds with the mortgage to secure them were executed and the parties resided, if no other place of payment is expressed, although the mortgage is upon real estate situated in another state. Kavanaugh v. Day, 10 R. I. 393, 14 Am. Rep. 691.

2. Law of Place of Suit — *United States.* — Goddard v. Foster, 17 Wall. (U. S.) 123; Fauntleroy v. Hannibal, 5 Dill. (U. S.) 219.

Iowa. — Preston v. Walker, 26 Iowa 205, 96 Am. Dec. 140; Burrows v. Stryker, 47 Iowa 481.

Massachusetts. — Hopkins v. Shepard, 129 Mass. 600; Clark v. Child, 136 Mass. 344; Ives v. Farmer's Bank, 2 Allen (Mass.) 236; Barringer v. King, 5 Gray (Mass.) 9; Ayer v. Tilden, 15 Gray (Mass.) 178, 77 Am. Dec. 355. Wood v. Corl, 4 Met. (Mass.) 203. Compare Winthrop v. Carleton, 12 Mass. 4.

Montana. — Isaacs v. McAndrew, 1 Mont. 437.

Action by Assignee of Government Claim — Transaction in Foreign Country. — An assignee for a valuable consideration of a claim upon the government, which was, however, collected by a third person under an authority given by the assignor previous to the assignment, is entitled to recover the amount of the consideration paid for the assignment with interest from the time of the presentation of the claim to the government, such interest, however, to be computed according to the legal rate of the forum, although the transaction took place in a foreign country. Eaton v. Mellus, 7 Gray (Mass.) 566.

3. Promissory Notes Payable Generally. — Kopelke v. Kopelke, 112 Ind. 435.

4. Damages for Tort. — New York, etc., R. Co. v. Estill, 147 U. S. 591; Bischoffsheim v. Baltzer, 21 Fed. Rep. 531.

In Holmes v. Barclay, 4 La. Ann. 63, which was an action for damages done to the property of the plaintiff, situated in another state, by a steamer belonging to the defendants, it was held that as by the laws of the state in which the injury was done the jury might have allowed injuries on the amount of the damages assessed, the plaintiffs would be allowed in an action in Louisiana to recover interest on the damages assessed from the date of judicial demand. In this case the court said that as in Illinois, where the cause of action accrued, it would have been competent for the jury to allow interest in making up the estimates of damages, the plaintiffs should be entitled to the same indemnity in the state where the action was brought.

Tortious Sale of Vessel. — In Ekins v. East-India Co., 1 P. Wms. 395, it was decided that for the tortious sale of the plaintiff's ship in India by his agent there to the defendant, the latter should account for the value in India with twelve per cent. interest, according to the laws of that country, deducting only the charge of remittance to England, where the remedy was sought.

recoverable were dependent on the law of the state or country in which the judgment sued on was rendered.¹

b. LAW OF PLACE WHERE SUIT BROUGHT. — In opposition to the doctrine above announced, other cases hold the matter of interest upon a foreign judgment to be determinable solely by the law of the place where the action on the foreign judgment is brought.² And this rule has been held to apply irrespective of any provision in the foreign judgment itself with reference to interest thereon.³

4. Proof of Interest Law of Foreign Jurisdiction — *a. IN GENERAL.* — Where interest is recoverable according to the law of a foreign jurisdiction, such law must, in general, be proved.⁴ But in the absence of such proof the courts in the several jurisdictions are not agreed on the course to be pursued. The rule of some cases, in such circumstances, is to deny all interest whatever. Others resort to the *lex fori* in the absence of a proper showing of the interest law which should, in principle, control. Still others prefer to presume the existence of the common law on a failure of proof to the contrary.⁵

Where Interest Expressly Stipulated For. — Where there is an express contract for interest at a rate specified, executed or to be performed in a foreign jurisdiction, the general rule is that its validity will be presumed in the absence of a

1. Interest According to Law of Jurisdiction Where Judgment Rendered — *Alabama.* — Clarke v. Pratt, 20 Ala. 470; Harrison v. Harrison, 20 Ala. 630, 56 Am. Dec. 227; Crawford v. Simonton, 7 Port. (Ala.) 110; Murray v. Cone, 8 Port. (Ala.) 250; Hunt v. Mayfield, 2 Stew. (Ala.) 124.

California. — Thompson v. Monrow, 2 Cal. 90, 56 Am. Dec. 318; Cavender v. Guild, 4 Cal. 250.

Illinois. — Prince v. Lamb, 1 Ill. 378; Warren v. McCarthy, 25 Ill. 95.

Kentucky. — Reynolds v. Powers, 96 Ky. 481; Brown v. Todd, (Ky. 1895) 29 S. W. Rep. 621.

Missouri. — Crone v. Dawson, 19 Mo. App. 214.

Pennsylvania. — Schell v. Stetson, 12 Phila. (Pa.) 187, 34 Leg. Int. (Pa.) 114.

Thus in an action brought in Pennsylvania on a New York judgment for costs and disbursements, it has been held that interest would be allowed, because such was the law of the state of New York, although in Pennsylvania interest on such a judgment was not recoverable. Schell v. Stetson, 12 Phila. (Pa.) 187, 34 Leg. Int. (Pa.) 114.

But in Gatewood v. Palmer, 10 Humph. (Tenn.) 466, it appeared that Palmer recovered a judgment against Gatewood in the state of Alabama for damages and costs, and suit was brought on the transcript of the record in Tennessee, and there was judgment for damages and costs, and interest on both damages and costs. This was held erroneous, the plaintiff, it was said, being entitled to judgment for the damages and costs and to interest on the damages, but not on the costs.

Where Judgment Provides for Interest. — Interest may be recovered in an action on a foreign judgment which in terms provides for interest. Arnott v. Redfern, 3 Bing. 353, 13 E. C. L. 3. And in an action on a judgment rendered in a foreign state, directing that a portion thereof bear interest at a specified rate, but silent as to the rate of interest on the residue, interest on the balance may be computed

at the rate allowed by the law of the foreign state. Stewart v. Spaulding, 72 Cal. 264. See, however, Atkinson v. Braybrooke, 4 Campb. 380, in which the doctrine that the plaintiff was not entitled to interest in an action on a foreign judgment was announced without qualification.

As to the Effect of Failure of Proof of the foreign law in an action on a foreign judgment, the right to recover interest upon which is regarded as controlled by the law of the jurisdiction in which the foreign judgment was rendered, see *infra*, this section, *Proof of Interest Law of Foreign Jurisdiction*.

2. Law of Place Where Suit Brought — *England.* — See Bann v. Dalzell, 3 C. & P. 376, 14 E. C. L. 356.

Canada. — Chapman v. Logan, 8 L.C. Jur. 196. *Massachusetts.* — Hopkins v. Shepard, 129 Mass. 600; Clark v. Child, 136 Mass. 344; Barringer v. King, 5 Gray (Mass.) 9.

New Hampshire. — Mahurin v. Bickford, 6 N. H. 567.

South Carolina. — See Nelson v. Felder, 7 Rich. Eq. (S. Car.) 395.

Washington. — Olson v. Veazie, 9 Wash. 481, 43 Am. St. Rep. 855.

Rule by Statute. — It has been held in *Missouri* that Rev. Stat. 1879, § 2725 (Rev. Stat. 1899, § 3707), giving interest on judgments from the date of their rendition, applies to the judgments of other states when made the foundation of proceedings in *Missouri* courts. Shickle v. Watts, 94 Mo. 410.

3. Provision in Judgment for Interest Immaterial. — Clark v. Child, 136 Mass. 344.

Lex Fori in Absence of Proof of Foreign Law. — For a discussion of the question when the *lex fori* is adopted merely for lack of proof of the law of the foreign jurisdiction in actions on foreign judgments, see *infra*, this section, *Proof of Interest Law of Foreign Jurisdiction*.

4. See *infra*, this division of this section, *Foreign Interest Law Not Subject of Judicial Notice*.

5. See *infra*, this division of this section, *Consequences of Failure of Proof*.

showing to the contrary,¹ and this although such contract would not be valid by the *lex fori*.²

b. FOREIGN INTEREST LAW NOT SUBJECT OF JUDICIAL NOTICE. — Whatever disagreement there may be as to the course to be pursued where a foreign interest law properly controlling the case is not proved, the authorities generally concur in holding, in the absence of a statute changing the rule, that the interest law of another jurisdiction is not a subject of judicial cognizance, but must be established by evidence as any other fact.³

1. Express Stipulation for Interest — *Illinois*. — *Smith v. Whitaker*, 23 Ill. 367; *Dearlove v. Edwards*, 166 Ill. 619.

Indiana. — *Holman v. Collins*, 1 Ind. 24; *Trimble v. Trimble*, 2 Ind. 76; *Johnson v. Chambers*, 12 Ind. 102; *Crake v. Crake*, 18 Ind. 156; *Buckinghouse v. Gregg*, 19 Ind. 401; *Smith v. Muncie Nat. Bank*, 29 Ind. 161; *Stout v. Wood*, 1 Blackf. (Ind.) 71; *Titus v. Scantling*, 4 Blackf. (Ind.) 89.

Kentucky. — *Gordon v. Phelps*, 7 J. J. Marsh. (Ky.) 619.

Missouri. — *Louisville Bank v. Young*, 37 Mo. 398.

New Hampshire. — *Jones v. Rider*, 60 N. H. 452.

2. *Stout v. Wood*, 1 Blackf. (Ind.) 71; *Titus v. Scantling*, 4 Blackf. (Ind.) 89; *Holman v. Collins*, 1 Ind. 24; *Trimble v. Trimble*, 2 Ind. 76; *Johnson v. Chambers*, 12 Ind. 102; *Crake v. Crake*, 18 Ind. 156; *Buckinghouse v. Gregg*, 19 Ind. 401; *Smith v. Muncie Nat. Bank*, 29 Ind. 161; *Engler v. Ellis*, 16 Ind. 475; *Louisville Bank v. Young*, 37 Mo. 398.

Excessive Interest. — When a promissory note is made in a sister state, payable with interest at the rate of five per cent. per month after maturity, in the nature of a penalty to secure prompt payment, it will be presumed that it was made in conformity to the laws of the place where executed, in the absence of a showing to the contrary. *Smith v. Whitaker*, 23 Ill. 367.

But in a *Pennsylvania* case it was held that a contract made in California to pay monthly two and a half per cent. interest, and to compound it, though lawful under the local law, was not only unconscionable but deceptive; and a court of law in *Pennsylvania* would not enforce it, but would enter judgment for the principal and simple interest at ten per cent. *Sime v. Norris*, 8 Phila. (Pa.) 84. And see *Brown's Estate*, 8 Phila. (Pa.) 197.

Rule under Particular Statute. — Under a statute providing that in actions brought within the state on debts created without, it should be presumed in the absence of a showing to the contrary that the rate of the forum prevailed in the foreign jurisdiction, it was held that a note executed in another state bearing a higher rate of interest than that permitted by the domestic laws would not sustain a recovery according to its terms, in the absence of pleading and proof of a foreign statute warranting the rate of interest contracted for. *Templeton v. Sharp*, (Ky. 1888) 9 S. W. Rep. 696.

Case Contrary to General Rule. — In *Booty v. Cooper*, 18 La. Ann. 565, which was an action on a promissory note, due one day after date, bearing twelve per cent. interest from date, the court held that where there was nothing in the record showing the *lex loci contractus*, in-

terest on the promissory note would not be allowed at a higher rate than that permitted by the laws of the state where the note was sued on.

3. Proof of Foreign Interest Law Required — *England*. — *Gibbs v. Fremont*, 9 Exch. 25.

Canada. — *Souther v. Wallace*, 11 Nova Scotia 548. 1 Can. L. T. 556.

United States. — *Liverpool, etc., Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397; *Coghlan v. South Carolina R. Co.*, 142 U. S. 101; *Huey v. Macon County*, 35 Fed. Rep. 481; *Young v. Godbe*, 15 Wall. (U. S.) 562; *Jaffray v. Dennis*, 2 Wash. (U. S.) 253.

Alabama. — *Mobile, etc., R. Co. v. Talman*, 15 Ala. 472; *Clarke v. Pratt*, 20 Ala. 470; *Harrison v. Harrison*, 20 Ala. 630, 56 Am. Dec. 227; *Camp v. Randle*, 81 Ala. 240; *Insurance Co. of North America v. Forcheimer*, 86 Ala. 541; *Peacock v. Banks, Minor* (Ala.) 387; *Evans v. Clark*, 1 Port. (Ala.) 388; *Evans v. Irvin*, 1 Port. (Ala.) 390; *Richardson v. Williams*, 2 Port. (Ala.) 239; *Crawford v. Simonton*, 7 Port. (Ala.) 110; *Murray v. Cone*, 8 Port. (Ala.) 250; *Tate v. Innerarity*, 1 Stew. & P. (Ala.) 33; *Hunt v. Mayfield*, 2 Stew. (Ala.) 124.

California. — *Thompson v. Monrow*, 2 Cal. 99, 56 Am. Dec. 318; *Cavender v. Guild*, 4 Cal. 1250.

Illinois. — *Chumasero v. Gilbert*, 24 Ill. 651; *Deem v. Crume*, 46 Ill. 69; *Hall v. Kimball*, 58 Ill. 58; *Morris v. Wibaux*, 159 Ill. 627; *Forsyth v. Baxter*, 3 Ill. 9.

Indiana. — *Lefler v. Dermotte*, 18 Ind. 246.

Kentucky. — *Davidson v. Gohagin*, 2 Bibb (Ky.) 634; *Russell v. Shepherd*, Hard. (Ky.) 48; *Holley v. Holley*, Litt. Sel. Cas. (Ky.) 505, 12 Am. Dec. 342; *Johnsons v. Williams*, 1 J. J. Marsh. (Ky.) 489; *Pawling v. Sartain*, 4 J. J. Marsh. (Ky.) 238; *Templeton v. Sharp*, (Ky. 1888) 9 S. W. Rep. 696; *Reynolds v. Powers*, 96 Ky. 481.

Louisiana. — *Nalle v. Ventress*, 19 La. Ann. 373.

Mississippi. — *Swett v. Dodge*, 4 Smed. & M. (Miss.) 667.

Missouri. — *Hall v. Woodson*, 13 Mo. 462; *Crone v. Dawson*, 19 Mo. App. 214.

Nebraska. — *Hallam v. Telleren*, 55 Neb. 255.

South Carolina. — *Gaillard v. Ball*, 1 Nott & M. (S. Car.) 67.

Texas. — *Cooke v. Crawford*, 1 Tex. 9, 46 Am. Dec. 93; *Ramsay v. McCauley*, 2 Tex. 100; *Cook v. Crawford*, 4 Tex. 420; *Hill v. George*, 5 Tex. 87; *Wheeler v. Pope*, 5 Tex. 262; *Able v. McMurray*, 10 Tex. 350; *Ingram v. Drinkard*, 14 Tex. 351; *Pauska v. Daus*, 31 Tex. 67; *Huff v. Folger, Dall.* (Tex.) 530; *Randall v. Meredith*, (Tex. 1889) 11 S. W. Rep. 170.

Vermont. — *Porter v. Munger*, 22 Vt. 191.

See the title FOREIGN LAWS, vol. 13, p. 1050.

Rate After Judgment. — It has been usually held that, no matter by what interest law an obligation is controlled, after judgment rendered, interest will be governed, in the jurisdiction in which the judgment is obtained, by the law of such jurisdiction.¹

c. HOW FOREIGN INTEREST LAW PROVEN — (1) *In General.* — The subject of proof of foreign laws has been fully discussed in another place,² and the general rules there announced apply without exception in principle to the proof of foreign interest laws.³ A few cases, however, with particular reference to the proof of the interest laws of a foreign jurisdiction, will be found in the notes below.⁴

(2) *Interest by Custom.* — Where in a foreign jurisdiction interest is regulated by custom, and not by written law, it is competent to establish such fact by proof. Where this is done, the fact that there may be no statute for interest will not prevent its recovery.⁵

In an Action on a Judgment Rendered by the Courts of Another State the legal rate of interest therein is a matter of fact to be proven and cannot be judicially noticed. *Cavender v. Guild*, 4 Cal. 250.

So in an action of debt in Alabama, upon a judgment rendered in Mississippi, it has been held error to render judgment final by *nil dicit*, without the intervention of a jury, for the amount of the debt and eight per cent. interest thereon as damages. *Clarke v. Pratt*, 20 Ala. 470.

But in *Schell v. Stetson*, 12 Phila. (Pa.) 187, 34 Leg. Int. (Pa.) 114, it was held that the courts of one state will, in an action on a judgment rendered by the courts of another state, take judicial notice of the laws of the latter with reference to the right to recover interest.

Express Provision in Judgment for Interest. — When the judgment of another state provides in terms that it shall carry interest at a given rate from a specified time, interest may be recovered accordingly without a further showing that judgments carry interest by the statute law of the state in which the judgment was rendered. *Hudson v. Daily*, 13 Ala. 722.

Interest Table Prepared by Secretary of State. — The court of one state cannot take judicial notice of the rate of interest in a sister state, merely from the table of interest prepared by the secretary of state, and appended to the acts of the legislature, as required by statute. The rate of interest must be ascertained by a jury, and the table appended to the acts is only *prima facie* evidence, which may be rebutted by other proof. *Clarke v. Pratt*, 20 Ala. 470; *Mobile, etc., R. Co. v. Talman*, 15 Ala. 472; *Insurance Co. of North America v. Forcheimer*, 86 Ala. 541; *Harrison v. Harrison*, 20 Ala. 629, 56 Am. Dec. 227. And see *Camp, etc., Co. v. Randle, etc., Co.*, 81 Ala. 240.

Presumption in Favor of Jury's Finding. — It has been said that in the absence of proof of the legal rate of interest of another state the finding of the jury will be presumed to be correct. *Holley v. Holley*, Litt. Sel. Cas. (Ky.) 505, 12 Am. Dec. 342; *Henry v. Halsey*, 5 Smed. & M. (Miss.) 573.

1. Rate of Interest After Judgment. — *Bodily v. Bellamy*, 2 Burr. 1094; *Gordon v. Phelps*, 7 J. J. Marsh. (Ky.) 619; *Neil v. Idaho First Nat. Bank*, 50 Ohio St. 193.

Terms of Contract. — Where a contract executed in a foreign jurisdiction provides for in-

terest at the rate of eight per cent. per annum until paid, a stipulation valid in the state where the contract was made, and suit is brought and a decree had in another state, interest at the same rate is payable after the decree as before, without regard to the legal rate of interest in the state where the decree is rendered. *Shipman v. Bailey* 20 W. Va. 140.

2. See the title FOREIGN LAWS, vol. 13, p. 1050.

3. Where the Rate of Interest Is Fixed by the Written Law of a Country it must be proven, in general, as any other fact; that is to say, by the best evidence that can be procured. And this has, in most cases of foreign written law, been held to be by an authentic copy, under the great seal of the state. But as between the several states of the Union, it has been held that a collection of acts printed and published in a book purporting to be by the authority of the state, after being proved by some party, supposed to be well informed on the subject, to be the written law of the state, is evidence that such is the law. *Burton v. Anderson*, 1 Tex. 93.

4. Statutes Best Evidence. — *Murray v. Cone*, 8 Port. (Ala.) 250; *Deem v. Crume*, 46 Ill. 69; *Forsyth v. Baxter*, 3 Ill. 9.

To Prove in the Federal Courts the rate of interest allowed in any one of the United States, it has been said that the law of the state should be produced, on the ground that in the several states of the Union the rate of interest is regulated by law; and therefore any other species of evidence than the law itself is inadmissible. *Jaffray v. Dennis*, 2 Wash. (U. S.) 253.

Rule of Canadian Case — Rate Ascertained by Master. — In *Souther v. Wallace*, 11 Nova Scotia 548, 1 Can. L. T. 556, a verdict for the plaintiff for a certain amount "with interest" was held to be a verdict on which judgment might be entered up, although the note on which the action was brought was payable in Boston, U. S., and specified no rate of interest. In such circumstances the rate of interest at the place of payment, at the time of the trial, is to be ascertained by a master of the court.

5. Interest in Foreign Jurisdiction by Custom. — *Courtois v. Carpentier*, 1 Wash. (U. S.) 376; *Cowqua v. Lauderbrun*, 1 Wash. (U. S.) 521; *Jaffray v. Dennis*, 2 Wash. (U. S.) 253; *Young v. Godbe*, 15 Wall. (U. S.) 562; *Crawford v. Simonton*, 7 Port. (Ala.) 110; *Murray v. Cone*,

d. CONSEQUENCES OF FAILURE OF PROOF — (1) *No Interest Where Foreign Law Not Shown*. — It has been held that where a contract not stipulating for interest is shown to have been made with reference to the law of another jurisdiction, no interest at all is recoverable in the absence of proof that interest is recoverable by virtue of such foreign law.¹

(2) *Interest by Law of Forum*. — Where, though a contract is properly governable by a foreign law, it is not shown what this is, the rule of some courts is to apply the law of the jurisdiction in which the suit is brought.²

(3) *Interest According to Rule of Common Law*. — It has been held that, in the absence of proof to the contrary, the common law as to interest would be presumed by the courts of one state to exist in another, and would be applied by the courts of the former in actions on contracts made with reference to the laws of the latter.³

XVI. DISCRETIONARY INTEREST, AND INTEREST AS MATTER OF RIGHT — 1. In General. — This question is one in which the evolution of the general law of interest is well illustrated.

The rule of the earlier authorities that interest was recoverable in no case unless expressly contracted for, or the circumstances of the transaction plainly evinced an intent that it should be paid, has already been stated.⁴ The first

8 Port. (Ala.) 250; *Tate v. Innerarity*, 1 Stew. & P. (Ala.) 33; *Archer v. Dunn*, 2 W. & S. (Pa.) 327.

1. No Interest Where Foreign Law Is Not Shown — *Alabama*. — *Harrison v. Harrison*, 20 Ala. 630, 56 Am. Dec. 227; *Murray v. Cone*, 8 Port. (Ala.) 250; *Hunt v. Mayfield*, 2 Stew. (Ala.) 124.

California. — *Cavender v. Guild*, 4 Cal. 250. *Kentucky*. — *Davidson v. Gohagin*, 2 Bibb (Ky.) 634; *Russell v. Shepherd*, Hard. (Ky.) 48; *Holley v. Holley*, Litt. Sel. Cas. (Ky.) 505, 12 Am. Dec. 342; *Ingraham v. Arnold*, 1 J. J. Marsh. (Ky.) 406; *Johnsons v. Williams*, 1 J. J. Marsh. (Ky.) 489. But the present doctrine in this state is that in the absence of evidence to the contrary, a judgment of a sister state sued on there bears interest from the date of its rendition at a like rate of interest as judgments rendered in Kentucky, the earlier rule having been changed by statute. *Reynolds v. Powers*, 96 Ky. 481. So also as to a promissory note made elsewhere. See *Templeton v. Sharp*, (Ky. 1888) 9 S. W. Rep. 696.

South Carolina. — *Gaillard v. Ball*, 1 Nott & M. (S. Car.) 67.

Texas. — *Burton v. Anderson*, 1 Tex. 93; *Ramsay v. McCauley*, 2 Tex. 190; *Wheeler v. Pope*, 5 Tex. 262; *Hill v. George*, 5 Tex. 87; *Able v. McMurray*, 10 Tex. 350; *Pridgen v. McLean*, 12 Tex. 420; *Ingram v. Drinkard*, 14 Tex. 351; *Randall v. Meredith*, (Tex. 1889) 11 S. W. Rep. 170. Compare *Bailey v. Heald*, 17 Tex. 102; *Pauska v. Daus*, 31 Tex. 67; *Henry v. Roe*, 83 Tex. 446. And see *Cooke v. Crawford*, 1 Tex. 9, 46 Am. Dec. 93; *Huff v. Folger*, Dall. (Tex.) 530.

2. Interest by Law of Forum — *United States*. — *Huey v. Macon County*, 35 Fed. Rep. 481; *Faulstich v. Hannibal*, 5 Dill. (U. S.) 219.

Illinois. — *Prince v. Lamb*, 1 Ill. 378; *Chummasero v. Gilbert*, 24 Ill. 293, 26 Ill. 39; *Deem v. Crume*, 46 Ill. 69; *Hall v. Kimball*, 58 Ill. 58; *Morris v. Wibaux*, 159 Ill. 627.

Kentucky. — *Templeton v. Sharp*, (Ky. 1888) 9 S. W. Rep. 696; *Reynolds v. Powers*, 96 Ky. 481.

Missouri. — *Hall v. Woodson*, 13 Mo. 462; *Crone v. Dawson*, 19 Mo. App. 214.

Nebraska. — *Hallam v. Telleren*, 55 Neb. 255.

New Hampshire. — *Lougee v. Washburn*, 16 N. H. 134.

Texas. — *Pauska v. Daus*, 31 Tex. 67; *Henry v. Roe*, 83 Tex. 446. But compare this with the rule of the earlier Texas cases in the next preceding note.

Vermont. — *Porter v. Munger*, 22 Vt. 191.

Washington. — *Ritchie v. Carpenter*, 2 Wash. 512, 26 Am. St. Rep. 877.

Canada. — *Griffin v. Judson*, 12 U. C. C. P. 430.

It Will Be Presumed, in the Absence of Proof to the Contrary, that the rate of interest in a foreign jurisdiction is the same as that in which the suit is brought. *Deem v. Crume*, 46 Ill. 69; *Hallam v. Telleren*, 55 Neb. 255.

Judgments. — In the absence of evidence of the rate of interest in another state, interest on a judgment there rendered should be calculated at the rate of the forum. *Prince v. Lamb*, 1 Ill. 378; *Deem v. Crume*, 46 Ill. 69; *Crone v. Dawson*, 19 Mo. App. 214; *Shickle v. Watts*, 94 Mo. 410; *Ritchie v. Carpenter*, 2 Wash. 512, 26 Am. St. Rep. 877.

3. As the Common Law Is Presumed to Be in Force in other states unless the contrary is shown, and at common law judgments do not carry interest, interest is not recoverable on a judgment rendered by the courts of another state without proof that the law of such state allows interest on judgments. *Thompson v. Monrow*, 2 Cal. 99, 56 Am. Dec. 318. See generally the title COMMON LAW, vol. 6, p. 280 *et seq.*

But It Has Been Held that This Presumption Should Be Limited to the states or territory formerly subject to the common law of England. *Hofheimer v. Losen*, 24 Mo. App. 659; *White v. Chaney*, 20 Mo. App. 396; *Crone v. Dawson*, 19 Mo. App. 214.

4. See supra, this title, *Origin and History of Interest*.

step from this position seems to have been to allow interest in the discretion of the jury as damages for the breach of a contract to pay money. This same discretion was later extended by some courts to actions for the breach of contracts to deliver chattels having an ascertainable pecuniary value, as well as in actions of tort for damages to real or personal property, as part of the compensation to which the injured party was entitled. Later the principle became fixed in some jurisdictions to allow interest as of right in such cases.¹

2. Interest by Contract. — Where interest has been expressly or impliedly contracted for it is — provided, of course, the contract is valid — recoverable as of right, and is not subject to the discretion of court or jury.² And the rule is the same, of course, where the debtor has contracted to pay interest after the maturity of the contract, although in such circumstances it is in a sense liquidated damages for the breach of the undertaking.³ But whether the circumstances of the transaction raise an implied contract to pay interest may often be, and in fact generally is, a question for the jury.⁴

3. Interest as Damages — *a. IN GENERAL.* — The statement is frequently met with that when interest, if recoverable at all, is given as damages and not by virtue of a contract to pay it, it is within the discretion of the jury to allow or disallow it.⁵ But however it may have been in early days, this doc-

1. Tendency Towards Allowance of Interest as Rule of Legal Right. — There has been in the main a steady advance of the state of the law from a disposition to allow no interest, through the stages of considering it as a matter of discretion for either the court or the jury, towards a rule of legal right. *Nashua, etc., R. Corp. v. Boston, etc., R. Corp.*, 61 Fed. Rep. 237. See also *Lewis v. Rountree*, 79 N. Car. 122, 28 Am. Rep. 309; and *supra*, this title, *Origin and History of Interest*.

Court Acting as Jury. — Whenever a jury might have allowed interest, the court, if substituted by consent for a jury, may allow interest. *Marshall v. Dudley*, 4 J. J. Marsh. (Ky.) 244.

2. Interest by Contract Recoverable as of Right. — *Redfield v. Ystalyfera Iron Co.*, 110 U. S. 174; *Jourlmon v. Ewing*, 80 Fed. Rep. 604; *Lincoln v. Claflin*, 7 Wall. (U. S.) 132; *McIlvaine v. Wilkins*, 12 N. H. 474; *Richards v. Citizens Natural Gas Co.*, 130 Pa. St. 37; *Fowler v. Davenport*, 21 Tex. 635; *Montgomery v. Boucher*, 14 U. C. C. P. 45.

Interest by Contract Express or Implied. — Upon contracts in which an agreement to pay interest is expressed or can be implied, the interest is a legal incident, and it is the duty of the court to instruct the jury to give interest. *Fowler v. Davenport*, 21 Tex. 635. And see *Houston, etc., R. Co. v. Jackson*, 62 Tex. 209.

Stated Exception to Rule. — With reference to the general rule that where interest has been contracted for it is recoverable as of right, and does not rest in the discretion of either the court or the jury the court said, in *Jourlmon v. Ewing*, 80 Fed. Rep. 604: "To this general rule there are also exceptions, though they are few in number, and rest upon very special reasons. Thus a court of equity, in suits for the specific performance of contracts, will sometimes grant such relief only upon condition of an abatement of interest where the peculiar facts are such as to make it equitable that that should be done. The relief is in the discretion of the court, and it may attach such a condition to granting it as, upon grounds

broader than strict law, the equitable facts indicate as just."

3. Interest After Maturity of Contract. — *Montgomery v. Boucher*, 14 U. C. C. P. 45.

4. Implication of Contract Question for Jury. — *Petre v. Duncombe*, 15 Jur. 86, 20 L. J. Q. B. 242.

In an Action on a Receipt for a Stated Sum, containing a promise to remit the money received to a specified place, on which interest was claimed, it was held that it might or might not be allowed as the jury should determine from the facts and circumstances, and it was error to render a final judgment after default without the intervention of a jury. *Williams v. Inman*, 5 Coldw. (Tenn.) 267. See also for a very similar case *Bell v. Logan*, 7 J. J. Marsh. (Ky.) 593.

5. Discretion of Jury to Allow or Disallow Interest as Damages — *United States*. — *Redfield v. Ystalyfera Iron Co.*, 110 U. S. 174; *Willings v. Consequa, Pet.* (C. C.) 172.

Massachusetts. — *Frazer v. Bigelow Carpet Co.*, 141 Mass. 126.

New York. — *Robinson v. Corn Exch., etc., Co.*, (N. Y. Super. Ct. Gen. T.) 1 Abb. Pr. N. S. (N. Y.) 186; *Van Rensselaer v. Jones*, 2 Barb. (N. Y.) 669; *Richmond v. Bronson*, 5 Den. (N. Y.) 55; *Home Ins. Co. v. Pennsylvania R. Co.*, 11 Hun (N. Y.) 182.

Pennsylvania. — *Richards v. Citizens Natural Gas Co.*, 130 Pa. St. 37.

Texas. — *Fowler v. Davenport*, 21 Tex. 635.

Circumstances Influencing Exercise of Discretion. — The plaintiff may have set his damages so inordinately high as to justify the defendant in refusing to pay, or in other ways the delay may be the plaintiff's fault; or the liability of the defendant may have arisen without fault on his part. In such cases the jury probably would not and certainly should not, make the allowance. *Richards v. Citizens Natural Gas Co.*, 130 Pa. St. 37.

Plaintiff's Refusal to Accept Adequate Amount. — In an action of tort to property, the plaintiff will not, it has been held, be entitled to interest on his damages where it is shown that he re-

trine cannot be recognized as a general rule at the present time.¹

b. DAMAGES FOR BREACH OF CONTRACT — (1) *In General.* — In the present state of the law it is impossible in this connection to announce a safe general rule or one which would be in any degree satisfactory.²

(2) *Contracts to Pay Money* — (a) *Interest as of Right.* — The weight of modern authority favors the recovery of interest as of right in all instances of the breach of a contract to pay a sum certain at a fixed time. Interest as damages in such cases is not within the discretion of the jury, but is recoverable as a measure of damages established and prescribed by law.³

(b) *Interest in Discretion of Jury.* — Where the amount due is controverted or unliquidated, or the time when it is payable is uncertain, not a few cases favor the rule of interest or no interest in the discretion of the jury.⁴

The English Rule seems to be, however, that interest, if given as damages, is

fused before suit to accept damages for a sum larger than he was entitled to. *Thompson v. Boston, etc., R. Co.*, 58 N. H. 524.

If a Plaintiff Has Been Prevented from Having His Damages Ascertained, and in that sense has been kept out of the sum that would have made him whole at the time, so long that such sum is no longer an indemnity, the jury, in its discretion and as incident to determining the amount of the original loss, may consider the delay caused by the defendant. And where this is done no better measure can be adopted than interest on the original damage. *Frazer v. Bigelow Carpet Co.*, 141 Mass. 126. See also *Lincoln v. Clafin*, 7 Wall. (U. S.) 132; *Parks v. Boston*, 15 Pick. (Mass.) 198, *per Shaw, C. J.*; *Burt v. Merchants' Ins. Co.*, 115 Mass. 1; *Old Colony R. Co. v. Miller*, 125 Mass. 1, 28 Am. Rep. 194.

Where Interest Is Matter of Discretion with Jury or Referee, "the court will not interfere with the question, unless the discretion has been exercised in withholding it in a case in which it ought to have been allowed by fixed principles, or *e converso*, or the discretion has been grossly abused." *Van Rensselaer v. Jones*, 2 Barb. (N. Y.) 670.

But where the jury has taken the difference between two sums as the measure of damages, if it distinctly appears that interest has been computed thereon for a greater length of time than the plaintiff has been deprived of it, a new trial will be granted, although the exact period for which interest should be allowed is not shown. *Hetzel v. Baltimore, etc., R. Co.*, 6 Mackey (D. C.) 1.

1. See *infra*, the following subdivisions of this section.

2. Question of Law for Court. — It has been declared that in actions to recover damages for the breach of contracts, the question whether interest is recoverable does not rest in the discretion of the jury, but it is a question of law for the court. *Mansfield v. New York Cent., etc., R. Co.*, 114 N. Y. 331.

Discretion of Court. — In *Porter v. Barrow*, 3 La. Ann. 140, it was said to be discretionary with the court to allow interest from judicial demand on damages for a breach of contract.

Discretion of Jury. — For the doctrine that interest on unliquidated damages for breach of contract is a question for the discretion of the jury, see *Watkins v. Junker*, (Tex. Civ. App. 1897) 38 S. W. Rep. 1129.

3. Contracts to Pay Money — Interest as Legal

Measure of Damages — Alabama. — *Broughton v. Mitchell*, 64 Ala. 210.

Illinois. — *Murray v. Doud*, 63 Ill. App. 247.

Kentucky. — *Henderson Cotton Mfg. Co. v. Lowell Mach. Shops*, 86 Ky. 675.

Missouri. — *Padley v. Catterlin*, 64 Mo. App. 645.

New York. — *De Lavallette v. Wendt*, 75 N. Y. 579, 31 Am. Rep. 494.

Pennsylvania. — *Emerson v. Schoonmaker*, 135 Pa. St. 437; *Reading, etc., R. Co. v. Balthaser*, 126 Pa. St. 1.

Tennessee. — *Stumps v. Cooper*, 3 Baxt. (Tenn.) 223.

4. Interest on Controverted or Unliquidated Claims — Discretion of Jury. — *Sullivan v. McMillan*, 37 Fla. 134, 53 Am. St. Rep. 239; *Marshall v. Dudley*, 4 J. J. Marsh. (Ky.) 244; *Henderson Cotton Mfg. Co. v. Lowell Mach. Shops*, 86 Ky. 675; *Schamberg v. Auxier*, 101 Ky. 292; *Morford v. Ambrose*, 3 J. J. Marsh. (Ky.) 688; *Beaver v. Slear*, 182 Pa. St. 213; *Close v. Fields*, 13 Tex. 623; *Anderson v. Duffield*, 8 Tex. 237.

A Subscription for Stock in a Corporation to be paid for in instalments has been held not to be such a contract as authorizes the recovery of interest as a matter of right. *Frank v. Morrison*, 55 Md. 399.

Accounts. — Interest on a balance of account has been held discretionary with the jury. *Killingly v. Taylor*, 1 Cranch (C. C.) 99. See also *Re Kirkpatrick*, 10 Ont. Pr. 4, in which case it was held that the discretion under which a jury may allow interest on an account applies to the master's office.

Policies of Insurance. — The jury has a discretion to allow interest on the amount of a partial loss on a policy of insurance, if, under all the circumstances, it considers such allowance proper. *Anonymous*, 1 Johns. (N. Y.) 315.

Receipt for Money. — As a matter of law, a receipt for money does not charge the receiptor with interest, but it is discretionary with the court or jury to allow it or disallow it. *Bell v. Logan*, 7 J. J. Marsh. (Ky.) 593.

Where Payment for Work Has Been Long Delayed, it has been held that a jury might give interest from the expiration of a reasonable time, the jury, within the exercise of its discretion, to fix the time from which the interest should begin to run. *Black v. Reybold*, 3 Harl. (Del.) 528; *Young v. Dickey*, 63 Ind. 31; *Rend v. Board*, 75 Ind. 307; *Wills v. Brown*, 3 N. J. L. 136.

still in the discretion of the jury, although the amount and maturity of the debt are both certain and fixed and the debtor's default is established.¹

(3) *Contracts to Do Something Other than Pay Money.* — The doctrine of some authorities is that the recovery of interest as part of the damages for the breach of a contract for something other than the payment of money, such as the conveyance or delivery of property, etc., should be left to the discretion of the jury.² But in other such cases it has been held that interest is recoverable as matter of law, and the court may properly so instruct the jury;³ and in some of these instances the damages were neither liquidated in amount nor ascertainable by mere computation with reference to known and established values.⁴

c. **DAMAGES FOR TORT** — (1) *In General.* — The general rule has been said to be that interest in actions *ex delicto* is a matter for the discretion of the jury.⁵ But however this may have been formerly, there are many exceptions to the rule at the present time; so numerous are they, indeed, that it may

1. **Rule in England as to Discretion of Jury.** — *Du Belloix v. Waterpark*, 1 D. & R. 16, 16 E. C. L. 12; *Gibbs v. Fremont*, 9 Exch. 25; *Norris v. Taylor*, 1 Nova Scotia Dec. 491; *Dalby v. Humphrey*, 37 U. C. Q. B. 514.

Where Delay Not Due to Debtor's Fault. — Where a creditor, with the view of a speedy payment, agreed to accept four per cent. interest, it was held that mere delay in the payment did not entitle him to charge five per cent., the evidence failing to show that the delay was attributable to misconduct on the part of the debtor. *Scott v. Sandeman*, 1 Macq. H. L. 293.

Interest After Maturity — Rate in Discretion of Jury. — In *England* the rule as to the rate of interest recoverable as damages after the maturity of a contract bearing interest at a conventional rate is that the trial tribunal should consider the position of the claimant and award to him such interest as damages, according to the conventional or legal rate, as under the circumstances may seem most just and equitable. *Cook v. Fowler*, L. R. 7 H. L. 27.

Mercantile Securities. — Even in the case of mercantile securities, where there is no express contract for it, interest has been regarded in *England* as damages within the discretion of the jury. *Cameron v. Smith*, 2 B. & Ald. 305; *Dent v. Dunn*, 3 Campb. 296; *Ex p. Charman*, W. N. (1887) 184; *Brewerton v. Parker*, 17 L. T. N. S. 325.

Rate — Conflict of Laws — Question for Court. — It has been held that the rate of interest to be adopted as the measure of damages in an action on a dishonored bill of exchange, as between the rate of the place of the drawer's residence and that of the drawee, is matter of law to be determined by the court. *Gibbs v. Fremont*, 9 Exch. 25.

2. **Contracts Other than for Payment of Money — Interest Held Discretionary — United States.** — *Gilpins v. Consequa*, Pet. (C. C.) 85; *Willings v. Consequa*, Pet. (C. C.) 172.

Kentucky. — *Stark v. Price*, 5 Dana (Ky.) 140; *Henderson v. Stainton*, Hard. (Ky.) 125; *Guthrie v. Wickliffs*, 4 Bibb (Ky.) 541, 7 Am. Dec. 746; *Brown v. McClelland*, 1 A. K. Marsh. (Ky.) 43; *Gatewood v. Gatewood*, 3 J. J. Marsh. (Ky.) 117.

New York. — *Dox v. Dey*, 3 Wend. (N. Y.) 356. But compare this case with later New York cases in succeeding note.

Tennessee. — *Noe v. Hodges*, 5 Humph. (Tenn.) 103.

Wisconsin. — *Allen v. Murray*, 87 Wis. 41.

Contract to Convey Lands. — Where a man contracted for the sale of lands, and it afterwards appeared that he had in truth no title to the lands when the contract was entered into, and in consequence of his want of title he refused to convey, it was held in an action founded on the covenant that whether interest should be allowed on the value of the lands was a question for the discretion of the jury, depending upon the circumstances of the case, of which the jury was the proper judge. *Lecher v. Woodson*, 1 Brock. (U. C.) 212.

Breach by Lessor of Contract to Repair. — In *Hinkley v. Beckwith*, 13 Wis. 34, which was a case for unliquidated damages against a lessor for the breach of a contract to repair, it was held to be within the discretion of the jury to allow interest on the damages assessed from the date of the expiration of the lease.

3. **Contracts Other than for Payment of Money — Interest Allowable as Matter of Right.** — *McCormack v. Lynch*, 69 Mo. App. 524; *Dana v. Fiedler*, 12 N. Y. 40, 62 Am. Dec. 130; *Houston, etc., R. Co. v. Jackson*, 62 Tex. 209; *Gulf, etc., R. Co. v. McCarty*, 82 Tex. 608; *Watkins v. Junker*, (Tex. Civ. App. 1897) 38 S. W. Rep. 1129.

4. **Contract to Furnish Cars for Shipment of Cattle.** — In an action for breach of a contract to furnish cars for the shipment of cattle, it has been held proper for the court to instruct the jury to compute legal interest upon the amount of the damages found to the date of the loss. *Gulf, etc., R. Co. v. McCarty*, 82 Tex. 608.

Contract to Furnish Dredge Boats. — In reconviction of damages for the breach of a contract to furnish dredge boats, the trial court charged that interest was recoverable on such damages as the jury should find to have been suffered, and this was not held to have been error. *Watkins v. Junker*, (Tex. Civ. App. 1897) 38 S. W. Rep. 1129. No objection to the action of the court in this particular seems to have been taken. It was, however, objected on other grounds that interest was not recoverable.

5. **Damages for Torts — Interest in Discretion of Jury.** — *Lincoln v. Claffin*, 2 Wall. (U. S.) 132; *Central R. Co. v. Sears*, 66 Ga. 501; *Walrath*

well be doubted whether the proposition should be regarded as a general rule at all.¹

(2) *Torts to Property* — (a) *Interest as of Right*. — As the authorities seem first to have relaxed the early rule prohibitive of interest in cases involving unliquidated damages in actions of trover and conversion,² so such actions are believed to have been the first of their character in which interest was held recoverable as of right.³

Injuries to Real or Personal Property. — At the present time many cases hold that where there has been injury to real or personal property, interest is recoverable as of right as part of the compensation to which the injured party is entitled.⁴

(b) *Interest in Discretion of Jury*. — In many instances, however, interest has been held discretionary with the jury in actions for damages to property.⁵

(3) *Torts to Person*. — The subject of the discretion of the jury in actions

v. Redfield, 18 N. Y. 462; *Black v. Camden*, etc., R., etc., Co., 45 Barb. (N. Y.) 40; *Mansfield v. New York Cent., etc., R. Co.*, 114 N. Y. 336; *Richmond v. Bronson*, 5 Den. (N. Y.) 55; *Lakeman v. Grinnell*, 5 Bosw. (N. Y.) 625; *Reading, etc., R. Co. v. Balthaser*, 126 Pa. St. 1; *Richards v. Citizens Natural Gas Co.*, 130 Pa. St. 37.

Distinction Stated Between Contract and Tort. — There is, it has been held, "a well-settled distinction between actions resting on contract and those growing out of a tort, so far as interest is concerned. In the former interest is demandable as interest; in the latter it is not. In the former the court may properly direct its allowance; in the latter the question belongs to the jury. It may or it may not enter into their calculation of the damages. Whether it shall or not depends on the judgment of the jury in view of all the circumstances of the case." *Reading, etc., R. Co. v. Balthaser*, 126 Pa. St. 1.

1. See the next following subdivisions of this section.

2. **Statute 3 & 4 William IV.** — By the statute 3 & 4 Wm. IV., interest as part of the damages in actions of trover and trespass *de bonis asportatis* is not matter of right, but is in the discretion of the jury.

The Earlier Cases in New York followed the rule thus established in England and permitted the jury in its discretion to allow interest in such cases. *O'Brien, J., in Wilson v. Troy*, 135 N. Y. 104, 31 Am. St. Rep. 817. See *Beals v. Guernsey*, 8 Johns. (N. Y.) 446, 5 Am. Dec. 348. See also *supra*, this title, *Interest as Damages for Tort*.

3. **Interest as of Right in Trover and Conversion** — *California*. — *Hamer v. Hathaway*, 33 Cal. 117.

Georgia. — *Centra! R. Co. v. Sears*, 66 Ga. 501.

Massachusetts. — *Frazer v. Bigelow Carpet Co.*, 141 Miss. 126.

Missouri. — *Watson v. Harmon*, 85 Mo. 443. See also *Walker v. Borland*, 21 Mo. 289; *State v. Smith*, 31 Mo. 566; *Spencer v. Vance*, 57 Mo. 427.

New York. — *Andrews v. Durant*, 18 N. Y. 496; *McCormick v. Pennsylvania Cent. R. Co.*, 49 N. Y. 303; *White v. Miller*, 78 N. Y. 304, 34 Am. Rep. 544; *Wilson v. Troy*, 60 Hun (N. Y.) 183; *Wehle v. Butler*, (N. Y. Super. Ct. Gen. T.) 43 How. Pr. (N. Y.) 5.

The Reason given for the rule allowing interest

as a matter of right on the value of property converted or lost to the owner by a trespass is that interest is as necessary a part of the complete indemnity to the owner of the property as the value itself, and in fixing the damages is not any more in the discretion of the jury than such value. *Wilson v. Troy*, 135 N. Y. 103, 31 Am. St. Rep. 817. And see *Andrews v. Durant*, 18 N. Y. 496.

In *Fraser v. Bigelow Carpet Co.*, 141 Mass. 126, it was suggested that the reason for the allowance of interest on the damages in actions of trover and conversion is that the defendant may be presumed to have had the use of the goods since the conversion.

Rule Not Universal. — But the recovery of interest as of right in actions of trover and conversion and trespass is not a universal rule, even at the present time. See *Patapasco Guano Co. v. Magee*, 86 N. Car. 350; *Heidenheimer v. Ellis*, 67 Tex. 426; *Sanger v. Thomasson*, (Tex. Civ. App. 1898) 44 S. W. Rep. 408.

4. **Injury to or Destruction of Property — Interest as Part of Compensation** — *Alabama*. — *Alabama G. S. R. Co. v. McAlpine, etc., Co.*, 75 Ala. 113.

Arkansas. — *St. Louis, etc., R. Co. v. Biggs*, 50 Ark. 169.

Minnesota. — *Varco v. Chicago, etc., R. Co.*, 30 Minn. 18.

Nebraska. — *Fremont, etc., R. Co. v. Marley*, 25 Neb. 138, 13 Am. St. Rep. 482.

New York. — *Greer v. New York*, 3 Robt. (N. Y.) 406; *Edwards v. Beebe*, 48 Barb. (N. Y.) 106; *Wilson v. Troy*, 60 Hun (N. Y.) 183.

Ohio. — *Baltimore, etc., R. Co. v. Schultz*, 43 Ohio St. 275, 54 Am. Rep. 805.

Pennsylvania. — *Allegheny v. Campbell*, 107 Pa. St. 530, 52 Am. Rep. 478.

Utah. — *Rhemke v. Clinton*, 2 Utah 230.

5. **Interest Held Discretionary in Actions for Damages to Property** — *United States*. — *Lincoln v. Claffin*, 7 Wall. (U. S.) 132; *The Propeller Mary J. Vaughan*, 2 Ben. (U. S.) 47; *Murray v. Schooner Charming Betsy*, 2 Cranch (U. S.) 64; *Maley v. Shattuck*, 3 Cranch (U. S.) 458; *The Schooner Lively*, 1 Gall. (U. S.) 315; *Del Col. v. Arnold*, 3 Dall. (U. S.) 333; *The Anna Maria*, 2 Wheat. (U. S.) 327; *The Amiable Nancy*, 3 Wheat. (U. S.) 546.

California. — *King v. Southern Pac. Co.*, 109 Cal. 96.

Georgia. — *Western, etc., R. Co. v. McCauley*, 68 Ga. 818; *Western, etc., R. Co. v. Brown*, 102 Ga. 13.

for damages for torts to the person has been practically disposed of by the statement in another place, with reference to such cases, that as a general rule interest is not allowed.¹

4. When Jury May Be Instructed to Give Interest. — From what has been said it follows as an obvious rule that when interest is recoverable of right it is proper to instruct the jury to give it,² and erroneous, in such circumstances, to refuse such an instruction.³

Where Interest Discretionary. — It is also clear that where interest is properly discretionary with the jury, it is error to direct either an award or a denial of it.⁴

Indiana. — *Wabash R. Co. v. Williamson*, 3 Ind. App. 190; *Pittsburgh, etc., R. Co. v. Swinney*, 97 Ind. 586.

Massachusetts. — *Bryant v. Bigelow Carpet Co.*, 131 Mass. 491; *Frazer v. Bigelow Carpet Co.*, 141 Mass. 126.

Michigan. — *Lucas v. Wattles*, 49 Mich. 380.

Missouri. — *De Steiger v. Hannibal, etc., R. Co.*, 73 Mo. 33.

New York. — *Hodge v. New York Cent., etc., R. Co.*, 27 Hun (N. Y.) 394; *Home Ins. Co. v. Pennsylvania R. Co.*, 11 Hun (N. Y.) 152; *Mairs v. Manhattan Real Estate Assoc.*, 89 N. Y. 507; *Moore v. New York El. R. Co.*, 126 N. Y. 671; *Sayre v. State*, 123 N. Y. 291; *Wilson v. Troy*, 135 N. Y. 105, 31 Am. St. Rep. 817; *Mansfield v. New York Cent., etc., R. Co.*, 114 N. Y. 331; *Brush v. Long Island R. Co.*, 10 N. Y. App. Div. 535; *Jamieson v. New York, etc., R. Co.*, 11 N. Y. App. Div. 50; *Reiss v. New York Steam Co.*, 59 N. Y. Super. Ct. 57, reversed on another point 128 N. Y. 103. And see *Duryee v. New York*, 96 N. Y. 477.

Pennsylvania. — *Richards v. Citizens Natural Gas Co.*, 130 Pa. St. 37; *Plymouth Tp. v. Graver*, 125 Pa. St. 24, 11 Am. St. Rep. 867; *Reading, etc., R. Co. v. Balthaser*, 126 Pa. St. 1. Compare *Pennsylvania Schuylkill Valley R. Co. v. Ziemer*, 124 Pa. St. 560.

1. See *supra*, this title, *Interest as Damages for Tort*.

2. When Jury May Be Instructed to Give Interest — *Alabama.* — *Alabama G. S. R. Co. v. McAlpine, etc., Co.*, 75 Ala. 113.

Arkansas. — *St. Louis, etc., R. Co. v. Biggs*, 59 Ark. 169.

Connecticut. — *People's Sav. Bank v. Norwalk*, 56 Conn. 547.

Illinois. — *Murray v. Dowd*, 63 Ill. App. 247.

Minnesota. — *Varco v. Chicago, etc., R. Co.*, 30 Minn. 18.

Mississippi. — *Thompson v. Matthews*, 56 Miss. 363.

Missouri. — *McCormack v. Lynch*, 69 Mo. App. 524.

Nebraska. — *Tremont, etc., R. Co. v. Marley*, 25 Neb. 138, 13 Am. St. Rep. 482.

New York. — *White v. Miller*, 78 N. Y. 394, 34 Am. Rep. 544.

Ohio. — *Baltimore, etc., R. Co. v. Schultz*, 43 Ohio St. 275, 54 Am. Rep. 805; *Longworth v. Cincinnati*, 48 Ohio St. 637.

Pennsylvania. — *Allegheny v. Campbell*, 107 Pa. St. 530, 52 Am. Rep. 478.

Texas. — *Fowler v. Davenport*, 21 Tex. 635; *Gulf, etc., R. Co. v. McCarty*, 82 Tex. 608.

Utah. — *Rhemke v. Clinton*, 2 Utah 230.

And where the jury might properly have been instructed to include interest in the

verdict, it has been held not such an error as will warrant a reversal of the judgment that the court computed interest on the amount of damages found by the jury from the time when such damages were sustained. *Longworth v. Cincinnati*, 48 Ohio St. 637.

3. *Watson v. Harmon*, 85 Mo. 443. And see *Walker v. Borland*, 21 Mo. 289; *State v. Smith*, 31 Mo. 566; *Spencer v. Vance*, 57 Mo. 427.

4. Where Interest Discretionary — *California.* — *King v. Southern Pac. Co.*, 109 Cal. 96.

Georgia. — *Central R. Co. v. Sears*, 66 Ga. 501.

Kentucky. — *Brown v. McClelland*, 1 A. K. Marsh. (Ky.) 43; *Guthrie v. Wickliffs*, 4 Bibb (Ky.) 541, 7 Am. Dec. 746; *Stark v. Price*, 5 Dana (Ky.) 140.

Missouri. — *De Steiger v. Hannibal, etc., R. Co.*, 73 Mo. 33; *State v. Hope*, 121 Mo. 34; *Eagle Constr. Co. v. Wabash R. Co.*, 71 Mo. App. 626; *Carson v. Smith*, 133 Mo. 606.

New York. — *Black v. Camden, etc., R., etc., Co.*, 45 Barb. (N. Y.) 40; *Moore v. New York El. R. Co.*, 126 N. Y. 671; *Reiss v. New York Steam, etc., Co.*, 59 N. Y. Super. Ct. 57; *Jamieson v. New York, etc., R. Co.*, 11 N. Y. App. Div. 50; *Black v. Camden, etc., R., etc., Co.*, 45 Barb. (N. Y.) 41.

North Dakota. — *Ell v. Northern Pac. R. Co.*, 1 N. Dak. 336, 26 Am. St. Rep. 621; *Johnson v. Northern Pac. R. Co.*, 1 N. Dak. 354.

South Dakota. — *Uhe v. Chicago, etc., R. Co.*, 3 S. Dak. 563.

Wisconsin. — See *Allen v. Murray*, 87 Wis. 41.

But where the court improperly instructed the jury that the plaintiff was entitled to damages by way of interest at the rate of eight per cent. per annum, and the jury found interest accordingly, and on appeal it was decided that, although the plaintiff was not entitled to damages as matter of law, yet the jury in such a case might in its discretion allow damages at that rate, and on inspection of the statement of facts the appellate court was satisfied that the jury ought, if the matter had been left to its discretion, to have allowed the same damages, the judgment was affirmed. *Close v. Fields*, 13 Tex. 623.

Doctrine of De Minimis. — Where the charge of the court as to interest was inaccurate in that the jurors were instructed to award to the plaintiff six per cent. interest on the value of the horse killed, if they found the defendant liable, whereas, according to the more approved rule, interest in such cases was in the discretion of the jury, it was held that as the verdict was small and the amount of the interest unimportant, the judgment would not be disturbed. *Plymouth Tp. v. Graver*, 125 Pa. St. 24, 11 Am. St. Rep. 867.

Where Interest Not Recoverable. — And the same may be said of an instruction to the jury that it may in its discretion give interest on the damages assessed in an action in which interest cannot under any circumstances be allowed,¹ or a refusal in such circumstances to instruct the jury not to give it.²

5. Rule under Particular Statutes. — In many jurisdictions the question of interest as of right or in the discretion of the jury has been made a subject of legislative enactment. Some illustrative examples of such statutes, as well as judicial constructions thereof, will be found in the notes below.³

Unreasonable and Vexatious Delay. — Under a statute providing for interest on money due and withheld by an unreasonable and vexatious delay of payment, whether there has been an unreasonable and vexatious delay is, in general, a question for the jury.⁴

1. Where Interest Irrecoverable. — *Louisville, etc., R. Co. v. Wallace*, 91 Tenn. 35. But where the court charged the jury that it might give interest or not as it chose, the judgment should not be reversed even if the charge was erroneous, unless the jury did give interest. *Noe v. Hodges*, 5 Humph. (Tenn.) 103.

2. Where the Demand Was Unliquidated, it has been held error to refuse to instruct the jurors that interest was not recoverable thereon and to charge them that the subject of interest was a matter of their sound discretion. *Murray v. Ware*, 1 Bibb (Ky.) 325, 4 Am. Dec. 637.

But in an Action on an Account the jury may properly be instructed that, if it finds that the account was liquidated on a certain date, interest may be allowed from such date. *Hartshorn v. Byrne*, 147 Ill. 418.

3. Rule under Particular Statute — California. — The California statute provides that in an action for breach of an obligation not arising from contract, and in every case of oppression, fraud, or malice, interest may be given in the discretion of the jury. *King v. Southern Pac. Co.*, 109 Cal. 96; Civ. Code Cal., § 3288.

Georgia. — In Georgia it is provided that "in all cases where an amount ascertained would be the damages at the time of the breach, it may be increased by the addition of legal interest from that time till the recovery." This provision, it is held, applies in terms to an action for damages for the breach of a contract; but in cases arising *ex delicto* for the value of property destroyed, where the measure of damages is the value of the property, the same reasoning would apply the rule. *Western, etc., R. Co. v. Brown*, 102 Ga. 13; 2 Code Ga. (1895), § 3800. And see *Western, etc., R. Co. v. McCauley*, 68 Ga. 818; *Central R. Co. v. Sears*, 66 Ga. 499; *Georgia R., etc., Co. v. Crawley*, 87 Ga. 192.

Mississippi — Debts Due by Account. — In Mississippi it has been held that open accounts do not bear interest as a matter of course, as an incident to the debt; but in such cases it is within the discretion of the jury to allow interest by way of damages for the detention of the debt. *Houston v. Crutcher*, 31 Miss. 51; *Thompson v. Matthews*, 56 Miss. 368.

Missouri. — In Missouri the statute provides that the jury on the trial of any issue or on any inquisition of damages "may, if they shall think fit, give damages in the nature of interest over and above the value of the goods at the time of the conversion or seizure," and under this statute it has been held discretion-

ary with the jury as to whether interest will be allowed on the value of property converted. *Rev. Stat. Mo. (1899), § 2869; Carson v. Smith*, 133 Mo. 606; *State v. Hope*, 121 Mo. 34; *Eagle Constr. Co. v. Wabash R. Co.*, 71 Mo. App. 626; *State v. Hope*, 121 Mo. 34.

New York. — In New York, under the statute in reference to compensation for causing death by negligence, which provides that the amount of damages recovered shall draw interest from the time of the death, "which interest shall be added to the verdict," the jury has nothing to do with the question of interest; that is to be added to the damages inserted in the entry of judgment by the clerk; and this although the jury, in making up damages awarded, in fact, included the interest. *Manning v. Port Henry Iron Ore Co.*, 91 N. Y. 664; *Laws N. Y. 1870, c. 78.*

North Dakota. — In North Dakota it is provided that "in an action for the breach of an obligation not arising from contract and in every case of oppression, fraud, or malice, interest may be given in the discretion of the jury." Under this section it was held to be error for the trial court to charge the jurors that they must allow to the plaintiff interest on the damages sustained in the destruction of property by fire. *Johnson v. Northern Pac. R. Co.*, 1 N. Dak. 354; *Ell v. Northern Pac. R. Co.*, 1 N. Dak. 336, 26 Am. St. Rep. 621; *Rev. Codes N. Dak.*, § 4975.

South Dakota. — In this state the statute is identical with that of North Dakota quoted *supra*. It was held error, therefore, in an action for damages for the destruction of property by fire, for the court to direct the jury to assess interest on the amount of damages. *Uhe v. Chicago, etc., R. Co.*, 3 S. Dak. 563, 4 S. Dak. 505; *Comp. Laws Dak.*, § 4578.

4. Unreasonable and Vexatious Delay — Arkansas. — *Watkins v. Wassell*, 20 Ark. 410; *Tatum v. Mohr*, 21 Ark. 355.

Illinois. — *Davis v. Kenaga*, 51 Ill. 170; *Devine v. Edwards*, 101 Ill. 138; *Levinson v. Sands*, 74 Ill. App. 276. And see *Kennedy v. Gibbs*, 15 Ill. 406.

Indiana. — *Rogers v. West*, 9 Ind. 403.

Missouri. — *McLean v. Thorp*, 4 Mo. 256.

Error to Restrict Jury's Discretion. — Where the right to the recovery of interest is, under the statute, dependent upon whether there has been an unreasonable and vexatious delay of payment, it has been held error to instruct the jury that if they find certain facts to exist they may allow interest. For it is for the jury to say

INTEREST—INTERESTED. — Interest means concern; ¹ also, advantage; good; share; portion; part; participation; any right in the nature of property, but less than title. Its chief use seems to designate some right attaching to property which either cannot or need not be defined with precision.²

whether the particular facts constitute an unreasonable and vexatious delay in order to warrant the allowance of interest. *Davis v. Kenaga*, 51 Ill. 170.

1. *Fitch v. Bates*, 11 Barb. (N. Y.) 471.

2. *East Texas F. Ins. Co. v. Clarke*, 79 Tex. 24, quoting Abb. L. Dict.

Interest. — In *Hoge v. Hollister*, 2 Tenn. Ch. 609, the court quoted from Co. Litt. 345a, as follows: "*Interest ex vi termini*, in legal understanding, extendeth to estates, rights, and titles that a man hath of, in, to, or out of lands; for he is truly said to have an *interest* in them."

Insurance. (See also INSURABLE INTEREST, *ante*, p. 829, and the references there given.) — In a policy of insurance of personal property, the word *interest* is sometimes held to mean insurable *interest*. *Graham v. American F. Ins. Co.*, 48 S. Car. 195.

Interest and Property Distinguished. — In *Buck v. Chesapeake Ins. Co.*, 1 Pet. (U. S.) 162, it was said: "It is only necessary to inspect a few cases on this doctrine to be satisfied that the term *interest*, as used in application to the right to insure, does not necessarily imply property in the subject of insurance."

The term *interest*, however, is sometimes used to denote the property itself. *Chester v. Painter*, 2 P. Wms. 335; *Pierce v. Pierce*, 14 R. I. 517.

Interest and Title. — A policy provided that if the *interest* of the insured was or became "other than the entire, unconditional, unencumbered, and sole ownership of the property," the policy should be void. A short time before the fire the insured had made a contract agreeing to convey the property, but no deed had been made. Upon the question whether the policy was forfeited the court said: "It is a matter of nice discrimination to determine whether the word *interest*, as used in the condition, is synonymous with the word 'title,' or whether it means that and something besides. The authorities generally establish the rule that where the condition is against any change in the legal title, an executory contract of sale is not a violation of the condition; so that if the word *interest* as used in this proviso meant 'title,' there would be no difficulty in reaching the conclusion that the policy was not forfeited." *Arkansas F. Ins. Co. v. Wilson*, (Ark. 1900) 55 S. W. Rep. 935. And in that case it was held that *interest* and "title" were not synonymous. See also *Gibb v. Philadelphia F. Ins. Co.*, 59 Minn. 267; *Germond v. Home Ins. Co.*, 2 Hun (N. Y.) 540.

In reply to a question, "What is your title to or *interest* in the property?" the applicant for fire insurance answered "Deed." It was held that this word did not import a fee. The court said: "We do not think that the single word 'deed' thus used must of necessity have that meaning alone. In the first place, the question put does not ask only as to the legal title. It is in the alternative, and asks as to the title or as to an *interest*. It imports a distinction

of meaning in the two words. It plainly indicates that a title is something greater and more certain than an *interest*, as it sometimes is. A title is a lawful cause or ground for possessing that which is ours. Co. Litt. 345b, *155. An *interest*, though primarily it included the terms 'estate,' 'right and title' (Co. Litt. 345b, *155), has latterly come often to mean less, and to be the same as 'concern,' 'share,' and the like. *Northampton v. Smith*, 11 Met. (Mass.) 390. Clearly it meant less in this question in the application." *Merrill v. Agricultural Ins. Co.*, 73 N. Y. 456. See also *Loventhal v. Home Ins. Co.*, 112 Ala. 108; *Hough v. City F. Ins. Co.*, 29 Conn. 10; *Washington F. Ins. Co. v. Kelly*, 32 Md. 451; *Handover F. Ins. Co. v. Bohn*, 48 Neb. 743; *East Texas F. Ins. Co. v. Crawford*, (Tex. 1891) 16 S. W. Rep. 1068.

But in *Gresham v. Johnson*, 70 Ga. 633, it was said: "Wherever the title to the homestead is referred to as belonging to the beneficiaries, in any of the foregoing decisions, or in any of the cases which they cite, it will be evident that the word is not used in its literal and legal, but in a qualified or loose sense, as synonymous with *interest*."

Same—Assignment of Judgment. — A holder of a judgment assigned it in the following words: "We hereby sell and assign all our right, title, and *interest* in this judgment to M., without recourse on us." In construing this assignment in *Scofield v. Moore*, 31 Iowa 245, the court said: "The assignors transferred their 'right, title, and *interest*' in the judgment, 'without recourse.' The words used clearly indicate the absence of any intention to warrant the validity or value of the judgment or that it was collectible. The word 'title' relates to the assignors' ownership of the judgment—that is, by the use of the word they indicate the intention to transfer whatever property they may hold in it. The words 'right and *interest*' relate to the extent of that ownership or property. By the use of these words the assignors undertook to transfer whatever of value they owned or held in the judgment."

Interest and Estate Used Synonymously. — A deed contained the following words: "And it is further understood that I, S. H., hold a life *interest* in the above-described tract of land." S. H. was the grantor. In construing this deed the court said: "The word *interest* often is used to express or represent 'estate.' As, for instance, an *interest* in a tract of land is often used as meaning the same thing as an 'estate' in a tract of land. These two words are not unfrequently used as convertible terms. In the Code of Virginia of 1860, chapter one hundred and sixteen, sections two and five, and in the Code of 1868, chapter seventy-two, section eleven, the word *interest* is employed to represent 'estate' and as meaning the same thing. The word *interest*, as coupled with the word 'life,' in the deed from plaintiff to defendant, evidently means a life estate; and

taking the whole sentence together, the 'life estate' means an estate for the life of the grantor." *Hurst v. Hurst*, 7 W. Va. 397.

Reversions and Remainders.—A complaint that the complainants were "interested in the reversion" was held, upon general demurrer, a sufficient allegation that they were "entitled to the reversion." *Peck v. Peck*, 35 Conn. 390.

In *Campbell v. Purdy*, 5 Redf. (N. Y.) 434, it was held that one entitled to the remainder after the life estate given by will was "a person interested in the estate" within Code Civ. Pro. N. Y., § 2727, permitting such person to apply to compel an executor to settle his accounts.

Leasehold.—In *Chicago Attachment Co. v. Davis Sewing Mach. Co.*, 142 Ill. 180, it was said: "The language of text books puts it beyond doubt that in legal contemplation a leasehold is 'an interest in or concerning lands.' Coke upon Littleton 345b; Williams on Personal Prop. (3d Am. and 5th Lond. ed.) 50, *2; 1 Washburn on Real Prop. (2d ed.) 9; Bishop on Contracts 1292; 3 AM. AND ENG. ENCYC. OF LAW (1st ed.) 164. And so we have expressly held, in suits between landlord and tenant, that this section includes leases of terms for more than a year. *Lake v. Campbell*, 18 Ill. 110; *Strehl v. D'Evers*, 66 Ill. 78; *Creighton v. Sanders*, 89 Ill. 543." This case was upon the construction of the statute of frauds. See also *Briles v. Pace*, 13 Ired. L. (J. Car.) 279; and see generally the title STATUTE OF FRAUDS.

A Virginia statute provided that any interest or claim to real estate might be disposed of by deed or will. It was held that the contingent remainder was an interest or claim to real estate. *Young v. Young*, 89 Va. 675. See also *Nutter v. Russell*, 3 Met. (Ky.) 163; *Faulkner v. Davis*, 18 Gratt. (Va.) 674.

"The word *interest* embraces the estate of a lessee, which is quite commonly denominated a leasehold interest." *Sanford v. Johnson*, 24 Minn. 173.

A quarterly tenant under notice to quit has been held to have no interest in the land. *Syers v. Metropolitan Board of Works*, 36 L. T. N. S. 277.

In *Jervis v. Lawrence*, 22 Ch. D. 215, Bacon, V. C., said: "A man who has a power of distress has no interest in the land. A landlord or lessor while the lease subsists has no present interest in the land."

Mortgage or Judgment Lien.—It has been said that a mortgage or judgment lien is no interest, estate, or title in the property itself. *Independent School Dist. v. Werner*, 43 Iowa 613; *Daniels v. Densmore*, 32 Neb. 40; *Rodgers v. Bonner*, 45 N. Y. 379.

Where an act provides for reasonable notice to "owners or parties interested" of the sale of property for taxes, a tax deed is not rendered invalid by failure to serve the notice upon a mortgagee, although his mortgage appears on record unsatisfied at the time specified for giving notice. *Smyth v. Neff*, 123 Ill. 310.

But in *Ormsby v. Ottman*, 85 Fed. Rep. 497, it was said: "On the other hand, the word *interest* is the broadest term applicable to claims in or upon real estate. In its ordinary significance among men of all classes it is

broad enough to include any right, title, or estate in, or lien upon, real estate. One who holds a mortgage upon a piece of land for half its value is commonly and truthfully said to be *interested*, to have an *interest* in it, and it would not be true, in the common understanding of men, to say that he had no *interest* in it." This was upon the construction of a statute empowering a person claiming title to real estate to maintain a suit to quiet his title against any person who claimed an adverse estate or interest therein. See also *In re Watts*, 55 L. J. Ch. 332.

A mortgagee out of possession, whose mortgage is recorded, should be made a party to proceedings instituted before county commissioners to ascertain the damages of landowners for land taken for a railroad. He comes within the description of "persons having any interest in land." *Wilson v. European, etc., R. Co.*, 67 Me. 358. And see *Michigan Air Line R. Co. v. Barnes*, 40 Mich. 383.

A mortgage upon the property insured is a conveyance of an interest therein such as to avoid a policy which by its terms was to become void upon any conveyance of an interest in the property by the insured without the consent of the insurer. *East Texas F. Ins. Co. v. Clarke*, 79 Tex. 23.

In *Miller v. Collins*, (1896) 1 Ch. 573, it was held that a married woman's equitable reversionary life interest in a sum of money, properly invested by her trustee upon a mortgage of land, was an interest in land so that she could dispose thereof by deed acknowledged and with the husband's concurrence.

Lien.—A Dakota statute provided for an action to determine adverse estates and interests in real property. In *Power v. Bowdle*, 3 N. Dak. 107, it was held that a mere lien was not primarily within the purview of the statute. See also *Bidwell v. Webb*, 10 Minn. 59. But compare *Brackett v. Gilmore*, 15 Minn. 245; *Donohue v. Ladd*, 31 Minn. 244.

Right of Way.—The term "interest in land" has been held to include a right of way. *Parks, etc., Com'rs v. Michigan Cent. R. Co.*, 90 Mich. 385. See also *State v. Easton, etc., R. Co.*, 36 N. J. L. 181.

Fee.—It has been held that a devise of all the testator's interest in the estate will pass the fee if he holds it. *Andrew v. Southouse*, 5 T. R. 292; *Doe v. Allen*, 8 T. R. 502.

A Deed of all the interest of a grantor in land conveys the same title as a deed of the land. *Dow v. Whitney*, 147 Mass. 1.

Right of Shooting.—In *Webber v. Lee*, 9 Q. B. D. 315, a right to shoot over land was held to be an interest in the land within the statute of frauds. But compare *Bird v. Great Eastern R. Co.*, 19 C. B. N. S. 268, 115 E. C. L. 268.

Conveyances.—The provision of the Land Titles Act, Rev. Stat. Ont., c. 116, § 61, permitting registration of cautions against registered dealings with lands, applies to "any person interested in any way" in the lands. It was held that, as the Land Titles Act relates mainly to conveyancing, whatever dealing gives a valid claim to call for or receive a conveyance of land is an interest within the scope of the statute; and an appointee or nominee in writing of the purchaser of an interest in lands has a *locus standi* as cautioner; and

where such an appointee registered a caution as "owner," and there was no doubt of the substantial nature of his claim, his caution was supportable as against any objection in point of form by virtue of section 131 of the statute. *Re Clagstone*, 28 Ont. 409.

Shares of Stock.—In *Bradley v. Holdsworth*, 3 M. & W. 422, it was held that shares of stock in a railroad company were not *interests* in land, within the statute of frauds. See also *Duncuft v. Albrecht*, 12 Sim. 189; and see the title STATUTE OF FRAUDS.

Bonds.—It has been held that a railway debenture was not an *interest* in land. *Attree v. Hawe*, 9 Ch. D. 337. So in *In re Harris*, 15 Ch. D. 561, it was held that bonds charged on police rates were not *interests* in the land.

Equitable Interest.—"An equitable *interest* is one that can be made available, effective, or sustained in a court of equity." *Connell v. Galligher*, 36 Neb. 754.

For a holding that equitable *interest* is included in the term "*interest* in land," see *Martin v. London, etc.*, R. Co., L. R. 1 Ch. 501.

Patent Interests. (See also the title PATENTS.)—Under the provision of the patent act of 1836 enacting that damages may be recovered by an action brought in the name of the person *interested*, the original owner of the patent who has afterwards sold his right may recover for an infringement committed during the time when he was owner. The word *interested* means *interested* in the patent at the time when the infringement was committed. *Moore v. Marsh*, 7 Wall. (U. S.) 515.

All Who May Feel Interested.—A common carrier engaged in carrying the United States mail and also in the transportation of passengers wrote a letter to a postmaster at one of the offices from which he was accustomed to carry the mail, informing him that on a certain day one of his vessels, which did not ordinarily stop, would stop there, and also requesting him to have a mail in readiness and to "advise all who may feel *interested* in the above." It was held that the expression "all who may feel *interested*" did not refer alone to persons *interested* in the mail, but, under the circumstances, included also those who wished to take passage on the vessel; and, further, that it was competent to introduce parol evidence of the circumstances under which the letter was written, and of the nature of the business in which the common carrier was engaged, in explanation of the phrase: "all who may feel *interested*," in order to show that passengers were embraced in it. *Heirn v. McCaughan*, 32 Miss. 19.

Pecuniary Interest.—A statute provided that no member of the council should be directly or indirectly *interested* in the profits of any contract of the corporation. In construing this statute in *Smedley v. Kirby*, (Mich. 1899) 79 N. W. Rep. 188, the court said: "This indicates that a pecuniary *interest* was intended. Anderson defines *interest* as 'such relation to the matter in issue as creates a liability to pecuniary loss or gain from the event of a suit.'" *Citing* 11 AM. AND ENG. ENCYC. OF LAW 422; *Taylor v. Highway Com'rs*, 88 Ill. 527. See also *Northampton v. Smith*, 11 Met. (Mass.) 395; and see the title MUNICIPAL CORPORATIONS.

A member of a city council who is also a salaried employee of a firm of contractors has not an *interest* in his employer's contracts. The court said that "the word *interested* does not mean anything but pecuniary *interest*, and of this there is no evidence." *Dunlap v. Philadelphia*, 13 W. N. C. (Pa.) 98.

A statute provided that a judge should be disqualified in acting in any case in which he was *interested*. In construing this statute the court said: "But the word *interested*, found in this section of the statute, probably means pecuniarily *interested*, or at least it means that a judge, to be disqualified from hearing a case, must be in such a situation with reference to it or the parties that he will gain or lose something by the result of the action on trial." *Chicago, etc., R. Co. v. Kellogg*, 54 Neb. 138.

State—Quo Warranto.—The state is not "*interested* as a party or otherwise" in a proceeding in the nature of a quo warranto to try the title of a person to an office into which it is alleged he has intruded, in such sense as to give to the Supreme Court jurisdiction to hear an appeal. The *interest* which a state must have in such a cause is a substantial *interest*, as a monetary interest. *McGrath v. People*, 100 Ill. 464.

Owner and Person Interested. (See also OWNER.)—In *State v. Easton, etc.*, R. Co., 36 N. J. L. 184, it was said: "The charter plainly distinguishes between the owner and persons *interested*, throughout the entire proceedings for condemnation as provided for in the seventh and eighth sections. By owner is meant the person having some legal estate which the company proposes by the condemnation to acquire. Under the more comprehensive expression of 'persons *interested*' are included not only the person in whom is vested the legal title which the company proposes to acquire, as indicated by their application, but also other individuals having some independent right or *interest* therein not amounting to an actual legal estate, such as an easement of a right of way, inchoate rights of dower or curtesy, or incumbrances, such as by judgments or mortgages, which are charges or liens on the legal estate. The object attained in making the latter class of individuals parties to the proceedings is that their *interests* may be extinguished by payment out of the money awarded or compensated for under the provisions of the general statute, which authorizes the court into which the money may be paid to make allowance out of the fund in satisfaction of such *interest*."

Trade.—In decreeing damages as compensation for the construction of a railway it was held that the trade carried on in particular premises was a thing appertaining to the premises, and as such was included in the *interest* of the occupier, for which compensation was to be given; and also that the meaning of "persons *interested*" was retaining a special and individual loss by reason of the works which the company had constructed. *Rickett v. Metropolitan R. Co.*, L. R. 2 H. L. 175.

Witnesses.—In *Chicago City R. Co. v. Mager*, 185 Ill. 236, it was said: "Mr. Greenleaf, in his work on Evidence (vol. 1, § 386), defines an *interest* in the result of a suit to be 'some legal, certain, and immediate *interest*,

however minute, either in the event of the cause itself or in the record, as an instrument of evidence, in support of his own claims, in a subsequent action. It must be a legal *interest*, as distinguished from the prejudice or bias resulting from friendship or hatred, or from consanguinity, or any other domestic or social or any official relation, or any other motives by which men are generally influenced; for these go only to the credibility." "

See also the title WITNESSES.

Subscribing Witness. (See also the title WILLS.)

—In *Stephenson v. Stephenson*, 6 Tex. Civ. App. 529, it was held that the father of a beneficiary under a will was not an *interested* party, and was competent, as a subscribing witness, to testify as to transactions with the decedent.

A Magistrate who was a law partner of the defendant's counsel and himself counsel for the defendant in another case was held to be a "person *interested*" and unable to take a deposition. *Dodd v. Northrop*, 37 Conn. 216.

Judge. (See also the title JUDGES.)—"The *interest* which will disqualify a judge must be direct and immediate, and not remote and contingent. * * * Any other construction would be harsh, constrained, and technical, and would, without any just reason, merely throw impediments in the way of suits and unnecessarily embarrass the administration of justice." *Peck v. Freeholders of Essex*, 20 N. J. L. 466, *quoted in Ellis v. Smith*, 42 Ala. 353.

A probate judge who has a power of attorney from any of the persons claiming to be heirs of the deceased, authorizing him to receive for them any money or property to which they might be entitled from the estate, and also letters offering him a percentage upon profits coming to the alleged heir, is *interested* in the estate and cannot act as judge in any matter pertaining thereto. *Matter of White*, 37 Cal. 190.

In *Sauls v. Freeman*, 24 Fla. 209, it was held that the *interest* which disqualifies a judge from sitting in a cause is a property *interest* in the action or in its result. The *interest* which he may have in common with other citizens in a public matter does not disqualify him. See also *Chicago, etc., R. Co. v. Kellogg*, 54 Neb. 138.

In *Austin v. Nalle*, 85 Tex. 520, it was held that a judge who owned taxable property in a city was *interested* in a suit against such city to cancel bonds issued by it.

A Sheriff is not so *interested* in an action of replevin brought against his deputy for property attached by him as to authorize a coroner to serve the writ. *Browning v. Bancroft*, 5 Met. (Mass.) 88.

Nor will the owning of stock in a corporation by a sheriff disqualify him as *interested* from executing process in a case where the corporation is a party. *Hardwick v. Jones*, 65 Mo. 54.

Equalization of Taxes. (See also the title TAXATION.)—Any person who has property listed on the assessment roll of a county for taxation is *interested* in the proceedings of the county board of equalization in the sense of a statute giving to him a right to appear before such board and have redress against an unjust

valuation. *Dundee Mortg. Trust Invest. Co. v. Charlton*, 32 Fed. Rep. 192.

A taxpayer is a "party beneficially *interested*" in having all the property in the district assessed, and is a proper party to make affidavit for the issue of the writ of mandamus to the assessor. *Hyatt v. Allen*, 54 Cal. 353.

Assignments for Benefit of Creditors—Secured Creditors.—A statute provided that the court might remove a voluntary assignee for the benefit of creditors, upon petition for cause shown, where the application for his removal was made by a majority in *interest* of the creditors *interested* in the assignment. It was held that in ascertaining such majority, lien creditors and mortgagees who were fully secured outside of the assignment were not to be reckoned as *interested*. *Matter of Durfee*, 4 R. I. 401. See also the title ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, vol. 3, p. 1.

Intervention. (See also the title INTERVENTION, II ENCYC. OF PL. AND PR. 494.)—By a *South Dakota* statute any person who had an *interest* in the matter in litigation might intervene. It was held that this did not include a simple judgment creditor. The court held that an *interest* must be that created by a claim to the demand or some part thereof, or a claim to a lien upon the property or some part thereof which was the subject-matter of the litigation. *Yetter v. Young*, 3 S. Dak. 263.

An attachment statute provided that any person *interested* might file his petition at any time before the sale of the property attached as the estate of the defendant. It was held that a mere creditor, who had no specific lien upon the property attached, was not a person *interested* within the meaning of the statute. *Crim v. Harmon*, 38 W. Va. 596.

A *Louisiana* statute provided that in order to be entitled to intervene it should be "enough to have an *interest* in the success of either of the parties to the suit." In *Gasquet v. Johnson*, 1 La. 431, it was said: "This, we suppose, must be a direct *interest* by which the intervening party is to obtain immediate gain, or suffer loss, by the judgment which may be rendered between the original parties." See also *Brown v. Saul*, 4 Mart. N. S. (La.) 434.

In *Horn v. Volcano Water Co.*, 13 Cal. 62, it was held that an *interest* which entitles a person to intervene in a suit must be in the matter in litigation, and of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of judgment.

Party Really Interested.—The meaning of the words "the party really *interested*" in moneys for which an action is brought was held to be certainly determined by no fixed rule. Whether a party has or has not the legal title, if he is the party to whom payment can legally be made, and who can legally discharge the debtor, the action may be brought in his name, although the money, when collected, is not for his use, but for that of some other persons, to whose use he is required to apply it, or to whom he is bound to pay it. *Yerby v. Sexton*, 48 Ala. 311.

Trusts. (See also the title TRUSTS AND TRUSTEES.)—The executor of a will who was a codeviser and legatee with two trustees was held not a person *interested* in proceedings

regarding the trust. *Greene v. Borland*, 4 Met. (Mass.) 330.

The beneficiary in a deed of trust of personal property is a party in *interest*, and may file his claim with the sheriff. *State v. McKellop*, 40 Mo. 184.

The trustees of a burial society who, by its constitution, could not be members, were held to be persons *interested*, so as to be able to institute proceedings against the society. *Hull v. M'Farlane*, 2 C. B. N. S. 796, 89 E. C. L. 796.

Same — Vested Interest. — A *Massachusetts* statute provided that a trustee of an estate might be excused from giving sureties on his bond upon the petitions of all persons beneficially *interested* in the estate. It was held that persons *interested*, in this sense, referred only to such persons *interested* as had present vested *interests* in the estate, and not to such as were not in being nor to such as might become *interested* in the future. *Dexter v. Cotting*, 149 Mass. 92.

Vested Interest. — As to *interest* in the sense of "vested *interest*" see *Northampton v. Smith*, 11 Met. (Mass.) 395.

Bankrupt. (See also the title *INSOLVENCY AND BANKRUPTCY*, ante, p. 630.) — A bankrupt out of whose estate a bill of costs is paid by the trustee in bankruptcy is not a "party *interested*" in the property out of which the bill is paid, so as to be able to make application to refer the bill to be taxed, even though ultimately the creditors are paid in full and there is a surplus. *In re Leadbitter*, 27 W. R. 267.

Same — United States Courts. — An Act of Congress provided that the Circuit Court should have "concurrent jurisdiction with the District Courts of the same district, of all suits at law or in equity which may or shall be brought by the assignee in bankruptcy against any person claiming an adverse *interest*, or by such person against such assignee," touching any property of the bankrupt. In construing this statute in *Bachman v. Packard*, 2 Sawy. (U. S.) 264, 2 Fed. Cas. No. 709, the court said: "The term *interest*, as used in the act, signifies an estate, share, or part, and a suit to be maintained in the Circuit Court by or against an assignee must be concerning some property or right of property derived from the bankrupt, and in which it must appear that one party or the other claims an *interest* adversely to, that is, against, the other." See also *Goodall v. Tuttle*, 3 Biss. (U. S.) 219, 10 Fed. Cas. No. 5,533.

Restraint of Trade. — The addition of the words "be concerned in" or "*interested* in," in addition to a promise not to "carry on" or "engage in" a business, shows that the parties intend to extend the contract further than the latter terms alone would do. *Nelson v. Johnson*, 38 Minn. 255. See also the title *RESTRAINT OF TRADE*.

Highways. — A statute provided that upon an affidavit by a party beneficially *interested*, a writ of review to an order of a board of supervisors granting the right to use a highway for the purpose of a railroad might issue. It was held that the affidavit was insufficient where it merely stated that the affiant, in common with others living along the highway, would be damaged. The court said: "It does

not appear that the application for the writ was made on the affidavit of the party beneficially *interested*. The code requires that 'the application must be made on affidavit by the person beneficially *interested*.' Code Civ. Pro., § 1069. It does not appear by the petition in this case that the petitioner has any other or greater right in the public highway mentioned therein than any other citizen of the state. The requirement that the application must be made by 'the party beneficially *interested*' has been construed to mean 'that in an application made by a private party, his interest must be of a nature which is distinguishable from that of the mass of the community.' *Linden v. Alameda County*, 45 Cal. 7." *Ashe v. Colusa County*, 71 Cal. 236.

No person has the right to appeal as a person *interested* from the decision of commissioners of highways in laying out a new road or vacating an old one, unless he is the owner of land adjoining the road to be laid out or vacated. *Taylor v. Highway Com'rs*, 88 Ill. 527. The court said: "The word *interested* must receive a reasonable construction, such as will, on the one hand, protect those who have a direct and substantial interest in the matter, and, on the other hand, protect the commissioners of highways from unnecessary litigation in defending their action as such at the suit of persons who may imagine they have an *interest*, when in fact they have no such *interest* as was contemplated by the legislature. Every citizen of a county, in one sense, has an *interest* in the public highways. So, too, it may be said, and properly, that every citizen of the state has an *interest* in the highways in the different counties of the state. If, therefore, the language of the statute is to be interpreted literally, an appeal might be taken by any citizen of the state. But we apprehend it was not the intention of the legislature that the word *interested* should receive such a liberal construction. It was doubtless intended to give the right of appeal to those persons who had a direct and pecuniary *interest* not shared by the public at large, such as owned land adjoining the new road laid out or the old one vacated."

In *Whitmer v. Highway Com'rs*, 96 Ill. 289, in commenting on the use of the words "land adjoining the new road," etc., in the above case, it was said: "If that is to be taken in the strict meaning of touching the land, so that no person can appeal from such an order unless he is the owner of land which is actually touched by the road to be laid out or vacated, we are satisfied that the construction there adopted was a too narrow one." See also *Brown v. Roberts*, 23 Ill. App. 461.

"Those *interested* therein," who by statute are entitled to notice of the meetings of a committee to whom an application for a highway has been referred, include "all who may be affected by the contemplated highway and all whose *interests* may be adverse to those of the town on the question of damages." *Shelton v. Derby*, 27 Conn. 421. See also the title *HIGHWAYS*, vol. 15, p. 343.

Interest in Shares of Stock. — The defendant, being possessed of certain shares of stock, transferred them as security for a debt. Subsequently he assigned them, subject to the

INTEREST POLICY.—An interest policy is one which shows by its form that the assured has a real, substantial interest; in other words, that the contract of insurance embodied by the policy is a contract of indemnity, and not a wager.¹

INTERFERE.—To intervene, so as to cut off, intercept, or interrupt;² to

debt, to trustees upon trust to repay a loan which had been made to him by his brother, and to apply the surplus for the benefit, at the trustees' discretion, of his wife, his children, or himself. It was held that he still had an interest in the shares. *Cragg v. Taylor*, L. R. 2 Exch. 131. See also *Atty.-Gen. v. Heywood*, 19 Q. B. D. 331.

Contest of Will.—A person who does not take under a will is not *interested* in it within the meaning of Code Civ. Pro. N. Y., § 2653a, and therefore, although a child of the testatrix, cannot maintain an action under that section to determine the validity of her will devising and bequeathing all her estate to the defendant in such action. *Whitney v. Britton*, 16 N. Y. App. Div. 457.

Interests under Will.—A testator devised certain real property to his wife and also gave to her a legacy of one hundred thousand dollars. The personal property of the testator consisted principally of ships and vessels. The testator directed that his executors should not be compelled to sell his ships, etc., or to pay the legacies, until in their judgment the best interests of the estate would be promoted by so doing, and that his wife should draw from the earnings of the ships the share which her interests under the will should bear to the whole net earnings. It was held that the use of the word *interests* did not authorize an inference that the testator intended his widow to have another interest in addition to the legacy, *i. e.* a share in the residuary estate. *Luce v. Dunham*, 69 N. Y. 37.

Legatee.—In *Brigham v. Gott*, (Supm. Ct. Gen. T.) 3 N. Y. Supp. 518, it was held that a legatee was a person *interested* in the event, within a statute providing that such person should not be examined against "a person deriving his title or interest from, through, or under a deceased person," where it appeared that there was not sufficient property to pay the debts of the deceased.

Interested in a Bargain or Contract.—An officer of a local board who is a shareholder in a company having a contract with the board is, so long as the contract exists, *interested* in a bargain or contract with the board within the meaning of the English Public Health Act, 1875, § 193, and if the contract is capable of producing any profit to the shareholders of the company, he is liable to the penalty imposed by that enactment. *Todd v. Robinson*, 14 Q. B. D. 739. So in *Hunnings v. Williamson*, 11 Q. B. D. 536, it was said: "A third objection urged was that there was no sufficient evidence that the defendant was *interested* in a contract made with the vestry. Under section 54, in order to render the defendant liable, he must have been 'concerned or *interested* in' some 'contract or work made with or executed for such * * * vestry.' In the present case we have to consider whether the defendant was *interested* in a contract within the mean-

ing of section 54. It has been contended that as the defendant merely lent money to his brother in order to enable him to carry out the contract, and merely took an assignment of it by way of security for repayment of his loan, he was not *interested* in the contract, but surely it was much to the defendant's *interest* to promote the fulfilment of the contract, in order that he might obtain repayment of the money which he had advanced. I think that the defendant was *interested* in the contract within the meaning of section 54."

Where by the terms of contracts entered into with a local authority, the surveyor to the local authority was to receive from the contractors, in respect of bills of quantities to be prepared by him, percentages on the amounts he should certify to be due to such contractors, it was held that in respect of each contract the surveyor was liable to a penalty as being "concerned or *interested*" therein. *Whitley v. Barley*, 21 Q. B. D. 154, 57 L. J. Q. B. 643. *Lindley, L. J.*, said: "This is not a question of exacting or accepting any fee or reward, but of being '*interested* in a contract,' and if a man is entitled to be paid an amount which varies with the contract price, it appears to me utterly immaterial to consider who his paymaster is. He becomes immediately *interested* in the contract, and he is a person hit at by this section." See also *Dimes v. Grand Junction Canal*, 3 H. L. Cas. 759; *Burgess v. Clark*, 14 Q. B. D. 735.

Power Coupled with Interest.—See the title POWERS.

Marine Interest.—See the title BOTTOMRY AND RESPONDENTIA, vol. 4, p. 736.

Vested Interest.—See the title REMAINDERS AND EXECUTORY INTERESTS, and see VESTED.

Real Party in Interest.—See the title PARTIES TO ACTIONS, 15 ENCYC. OF PL. AND PR. 456.

1. *Sawyer v. Dodge County Mut. Ins. Co.*, 37 Wis. 539.

2. **Interfere.**—Thus it has been held (*Cockburn, C. J.*, dissenting) that the provision of the English Metropolitan Sewers Act, 1848, 11 & 12 Vict., c. 112, § 50, that "where any work by the commissioners done or required to be done in pursuance of the provisions of this act shall *interfere* with or prejudicially affect any ancient mill, or any right connected therewith, or other right to the use of water, full compensation shall be made to all persons sustaining damage thereby," did not apply to cases in which the effect of the sewer was only to intercept underground springs which would otherwise have risen into a pond, even though the pond thereby became dry. *Reg. v. Metropolitan Board of Works*, 3 B. & S. 710, 113 E. C. L. 710. See also *Chasemore v. Richards*, 7 H. L. Cas. 340.

To Interfere with or Affect Any Settlement.—The English Married Women's Property Act provided that it should not *interfere* with or affect any settlement. In construing this case

come into collision; to clash; to be in opposition.¹

the court in *In re Onslow*, 39 Ch. Div. 625, said: "In *In re Armstrong*, 21 Q. B. D. 264. Lord Justice Lindley said that the words 'interfere with or affect any settlement' meant 'invalidate or render inoperative any settlement;' and he observes that the legislature draws a distinction between *interfering* with a settlement and affecting an estate created by the settlement. Lord Justice Lopes concurred in this view. The Master of the Rolls dissented." The court adopted the distinction of Lord Justice Lindley.

Abolition of Office. (See generally the titles JUDGE; PUBLIC OFFICERS.)—The provision of the Constitution of *Arkansas*, art. 7, § 5, that "the General Assembly shall not *interfere* with the term of office of any judge," does not deprive the legislature of the power to abolish the office, and thereby put an end to the term. *Van Buren County v. Mattox*, 30 Ark. 567.

1. Molestation or Interference.—A, a trader, entered into an agreement with his creditors, by deed, by which he was to have license to carry on his business for five years under supervision, and it was provided therein that if any creditor so covenanting should, during the continuance of the license, molest or *interfere* with A, contrary to the true intent and meaning of the indenture, A should thereupon be exonerated and relieved from all debts and demands of such creditor by whom the letter of license should be so contravened. A creditor, party to the deed, brought suit against A within the five years, and it was held that this was a "molestation or *interference*" with A, within the meaning of the proviso, and might be pleaded in bar as such; *Wilde, C. J.*, saying: "It is said that that which has occurred here is not a molestation within the meaning of the deed. Looking at all the circumstances, it is impossible to doubt that suing the debtor was the very species of molestation which the parties sought to guard against, and no other. They clearly could not have had anything else in their contemplation. When, therefore, this action—which in the ordinary course would go on to judgment and execution—was brought, the defendant had a right to assume that it was brought for the purpose of molesting or *interfering* with him, and so preventing him from carrying into effect the contract he had entered into. In the absence, therefore, of anything to control it, it seems to me that the parties contemplated a molesta-

tion by suing out a writ." *Gibbons v. Voulton*, 8 C. B. 483, 65 E. C. L. 483.

Libel.—The secretary of the interior sent out circular letters stating that any *interference* on the part of W. R. L. (plaintiff), a former chief of the stationery and printing division, with the business of the department in any way, would not be to the interest of any firm represented. The plaintiff was then in the business of government contractor. Upon the question whether this letter was libelous, the court said: "As the complaint alleges, it may be read as intending to state that the plaintiff's services would be of no value to persons proposing to employ him. It is capable of a much more vicious meaning. In the light of the circumstances under which it was sent it may be read not only as an imputation of the plaintiff's incompetency as a broker, but also as an intimation that his employment would be regarded by the department of the interior as an intermeddling and an officious *interference* therewith. One meaning of *interference* is 'intermeddling.' The circular implies quite definitely that persons having business to do with the department will consult their interests by not employing the plaintiff." *Lapham v. Noble*, 54 Fed. Rep. 109.

Interfere—Patent. (See also the title PATENTS.)—In *Lowrey v. Cowles Electric Smelting, etc., Co.*, 68 Fed. Rep. 372, it was said: "The words 'do or may *interfere*' are plainly to be construed with reference to the atmosphere in which the parties then were. They were in the atmosphere of the patent office. They were considering the question of applications, caveats, and patents—all technical terms to describe different steps in the securing of a monopoly by government grant. The word *interfere* has a technical meaning in that connection. It is used in the statutes of the United States. Strictly speaking, an *interference* is declared to exist by the patent office whenever it is decided by the properly constituted authority in that bureau that two pending applications, or that a patent and a pending application, in their claims or essence cover the same discovery or invention, so as to require an investigation into the question of the priority of invention between the two applications or the application and the patent." See also *Gold, etc., Ore Separating Co. v. U. S. Disintegrating Ore Co.*, 6 Blatchf. (U. S.) 310.

INTERFERENCE WITH CONTRACT RELATIONS.

I. INTRODUCTORY, 1109.

II. INDUCING BREACH OF EXISTING CONTRACT, 1110.

1. *General Statement*, 1110.
2. *The Contract Broken*, 1111.
3. *Malice*, 1112.
4. *Means Employed to Induce Breach*, 1113.
5. *Damages Produced by Breach*, 1114.

III. PREVENTING FORMATION OR INDUCING TERMINATION OF CONTRACT, 1114.

IV. WHAT IS JUSTIFICATION, 1115.

CROSS-REFERENCES.

For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the titles LABOR COMBINATIONS; MASTER AND SERVANT; RESTRAINT OF TRADE; SLANDER OF TITLE; TRADEMARKS.

I. INTRODUCTORY — *Precedents on Which Grounded.* — The idea of interference with contract relations as a specific tort is of recent origin. The materials from which the generalization was worked out are found in several lines of precedents. From an early day it has been established that a master may maintain an action against one who entices away his servant or harbors and detains him with knowledge of his former contract.¹ The action of slander of title often involves an interference with contract relations either perfect or inchoate.² Lord Holt's assertion of the existence of a common-law right to carry on a trade or earn a livelihood without hindrance or disturbance, after

1. Enticement of Servants Actionable. — Brooke's Abr., tit. Laborers, pl. 21; F. N. B. 167; Adams v. Pafield, Leon. 240; Hambleton v. Veere, 2 Saund. 169; Reg. v. Daniell, 6 Mod. 99, 182, 1 Salk. 380; Reg. v. Callingwood, 2 Ld. Raym. 1116; Hart v. Aldridge, 1 Cowp. 54, 10ff. 493; Blake v. Lanyon, 6 T. R. 221; Lumley v. Gye, 2 El. & Bl. 216, 75 E. C. L. 216, Big. Cas. Torts 306; Evans v. Walton, L. R. 2 C. P. 615.

It was generally assumed, on the strength of the older authorities cited above, that the action for enticing servants was a common-law action, until the elaborate judgment of Coleridge, J., in Lumley v. Gye, 2 El. & Bl. 216, 75 E. C. L. 216. Thus it is laid down in Brooke's Abridgment, *ubi supra*, that "in trespass it was agreed that, at common law, if a man had taken my servant from me, trespass lay *vi et armis*; but if he had procured the servant to depart and he retained him, action lay not at common law *vi et armis*, but it lay upon the case upon the departure by procurement." Sir John Taylor Coleridge, in the judgment referred to, sought to prove from an elaborate examination of the Year Books and older cases that the action for enticement was a statutory action founded on the statute of laborers, A. D. 1350, and that

the generally received view rested on Brooke's misconception of the case, Year Book Mich., 11 Henry IV., fol. 23a, pl. 46. This view is *reaffirmed* by Coleridge, C. J. (John Duke), in Bowen v. Hall, 6 Q. B. D. 341, and by Prof. Wigmore upon a thorough review of the cases from the Year Books in an article in 21 Am. L. Rev. 764, and seems now to be generally accepted. It is, however, combated in Smith on Master and Servant (4th ed.) 157, note. See also Big. Cas. Torts 325. Mr. Smith only shows that the misconception has become an integral part of the law in certain classes of cases.

2. Slander of Title. — In this form of action, "more especially where the property is realty, the damage is usually the loss of the benefit under a particular contract which is thrown up in consequence of the false statement, which contract must of course be proved. The nature of the injury is therefore very analogous to * * * interference with contractual rights." Piggott on Torts 377. See as an illustration Green v. Button, 2 C. M. & R. 707. See also the *New York* cases, Benton v. Pratt, 2 Wend. (N. Y.) 385, 20 Am. Dec. 623; Rice v. Manley, 66 N. Y. 22, 23 Am. Rep. 30, which are considered to belong under this head in Pollock on Torts (1st ed.) 261.

lying unnoticed for more than a century and a half has been brought into much prominence in this connection in recent years.¹ Lastly, the old generalization that the concurrence of damage and injury or of damage and fraud gives an action, however new to the courts in the particular instance in which the concurrence is found, has, of course, played a part in the development of the doctrine.²

Lumley v. Gye. — But the real history of the idea that interference with contract relations is an actionable tort is found in the case of *Lumley v. Gye*, decided in the English Court of Queen's Bench in 1853.³ In this case Miss Wagner, a dramatic artist, had contracted with the plaintiff to sing at his theatre, and not elsewhere, during a certain time. The defendant persuaded her to break the contract. It was held that an action was maintainable at the common law against the defendant for procuring Miss Wagner to break her contract. Coleridge, J., dissented, maintaining that the action for enticing servants originated in the statute of laborers, was applicable only where the employee was strictly a servant, and did not reach the case of a theatrical performer. Crompton, J., thought the old remedy for enticement was applicable in "all cases where there is an unlawful and malicious enticing away of any person employed to give his personal labor or service for a given time, under the direction of a master or employer who is injured by the wrongful act," but he limited his decision to the case of a valid contract for exclusive personal services for a specified period. Erle, J., took a still broader view. He declared that the enticement precedents rested upon the principle that the procurement of the violation of a right is a cause of action in all instances where the violation is an actionable wrong, and appeared to regard the principle as applicable to contracts generally.⁴

II. INDUCING BREACH OF EXISTING CONTRACT — 1. **General Statement.** — The fully developed doctrine has been thus stated: "If one maliciously interferes in a contract between two parties, and induces one of them to break that con-

1. Right to Pursue Livelihood Unmolested. — *Keeble v. Hickeringill*, decided in 1706, best reported in 11 East 574, note. These expressions of Lord Holt in this case have especially been relied on: "He that hinders another in his trade or livelihood is liable to an action for so hindering him." "Where a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood, there an action lies in all cases." The authority of this case is exhaustively discussed in *Allen v. Flood*, (1898) A. C. 1, and from that case Sir Frederick Pollock concludes: "There is no better or higher right to carry on one's business than to do any other lawful act." 14 Law Quart. Rev. 131

The developed doctrine was thus expressed in *Walker v. Cronin*, 107 Mass. 564, by Wells, J.: "Every one has a right to enjoy the fruits and advantages of his own enterprise, industry, skill, and credit. He has no right to be protected against competition; but he has a right to be free from malicious and wanton interference, disturbance, or annoyance. If disturbance or loss come as a result of competition, or the exercise of like rights by others, it is *damnum absque injuria*, unless some superior right by contract or otherwise is interfered with. But if it come from the merely wanton or malicious acts of others, without the justification of competition or the service of any interest or any lawful purpose, it then stands upon a different footing." See also *Barr v. Essex Trades Council*, 53 N. J. Eq.

101; and generally the title *LABOR COMBINATIONS*.

2. Concurrence of Damage and Injury or Fraud. — See the famous cases of *Ashby v. White*, 2 Ld. Raym. 938, 1 Smith Lead. Cas. 264; *Pasley v. Freeman*, 3 T. R. 51, Big. Cas. Torts 1.

In *Bowen v. Hall*, 6 Q. B. D. 337, Brett, L. J., thus stated the principle of *Lumley v. Gye*, 2 El. & Bl. 216, 75 E. C. L. 216: "Wherever a man does an act which in law and in fact is a wrongful act, and such an act as may, as a natural and probable consequence of it, produce injury to another, and which in the particular case does produce such an injury, an action on the case will lie. This is the proposition to be deduced from the case of *Ashby v. White*, 1 Smith Lead. Cas. 264."

3. *Lumley v. Gye*, 2 El. & Bl. 216, 75 E. C. L. 216, 22 L. J. Q. B. 463, 20 Eng. L. & Eq. 168, 17 Jur. 827, Big. Cas. Torts 306.

4. "Where a right to the performance of a contract has been violated by a breach thereof, the remedy is upon the contract against the contracting party; and if he is made to indemnify for such breach, no further recourse is allowed; and as in case of the procurement of a breach of contract the action is for a wrong and cannot be joined with the action on the contract, and as the act itself is not likely to be of frequent occurrence nor easy of proof, therefore the actions for this wrong, in respect of other contracts than those of hiring, are not numerous." Erle, J., in *Lumley v. Gye*, 2 El. & Bl. 232, 75 E. C. L. 232.

tract, to the injury of the other, the party injured can maintain an action against the wrongdoer."¹

2. The Contract Broken — Nature of Contract. — It has been seen that the early common law gave a remedy for interference with contract relations only when the contract was one between master and servant,² and this view is still maintained with vigor in some American jurisdictions.³ In *Lumley v. Gye* malicious interference, *i. e.*, interference with notice, with any contract for exclusive personal service, was regarded as giving rise to a cause of action.⁴ And where malice (in the sense of an indirect motive, as hereinafter explained) is present, in some jurisdictions the action for inducing a breach of contract lies where any contract is concerned.⁵

Whether Enforceable Contract Essential. — The action for enticement of servants was given originally only where there was a binding contract of service,⁶ and it has been held in modern cases that such a contract must be proved.⁷ On the other hand, the existence of a *de facto* relation of master and servant has been held sufficient to sustain the action,⁸ or the enticement of workmen doing piece work without reference to a time contract.⁹ In the modern cases which

1. *Brewer, J.*, in *Angle v. Chicago, etc., R. Co.*, 151 U. S. 13. See also *Temperton v. Russell*, (1893) 1 Q. B. 715; *Chiple v. Atkinson*, 23 Fla. 218, 11 Am. St. Rep. 367; *Jones v. Stanly*, 76 N. Car. 355.

2. See the judgment of Coleridge, J., in *Lumley v. Gye*, 2 El. & Bl. 216, 75 E. C. L. 216, and the article of Prof. Wigmore in 21 Am. L. Rev. 764.

3. **Action for Breach Confined to Contracts of Service.** — Procuring a breach of contract between master and servant is a cause of action, but interference with contracts generally is actionable only when the means used in procuring the breach are unlawful and actionable. In such cases the breach of contract "goes only to the question of damages, that is, how and in what manner and to what extent has the plaintiff been injured by the fraud, deceit, or other wrongful act of the defendant." *Boyson v. Thorn*, 98 Cal. 578. To the same effect see *Chambers v. Baldwin*, 91 Ky. 121, 34 Am. St. Rep. 165; *Bourlier v. Macauley*, 91 Ky. 135, 34 Am. St. Rep. 171; *Glencoe Land, etc., Co. v. Hudson Brothers Commission Co.*, 138 Mo. 439, 60 Am. St. Rep. 560, *McCann v. Wolff*, 28 Mo. App. 447.

4. **Contracts for Exclusive Personal Service.** — *Lumley v. Gye*, 2 El. & Bl. 216, 75 E. C. L. 216. To the same effect is *Bowen v. Hall*, 6 Q. B. D. 333, though the definition of "malice" is made more comprehensive there. See the next subdivision *infra*.

"We are satisfied that it [the right of action for enticing servants] is founded upon the legal right derived from the contract, and not merely upon the relation of master and servant; and that it applies to all contracts of employment, if not to contracts of every description." *Walker v. Cronin*, 107 Mass. 567.

Dramatic Artist. — In *Bourlier v. Macauley*, 91 Ky. 135, 34 Am. St. Rep. 171, it was held, contrary to the first case cited in this note, that a dramatic artist was not within the principle of the allowance of a remedy for enticement. The scope of the latter remedy is governed in *Kentucky* by statute.

5. **Applied in Various Classes of Contracts.** — *Angle v. Chicago, etc., R. Co.*, 151 U. S. 1 (contract for construction of railroad); *Nash-*

ville, etc., R. Co. v. McConnell, 82 Fed. Rep. 65 (contract with carrier of passengers); *Jackson v. Stanfield*, 137 Ind. 592 (contract for sale of lumber); *Morgan v. Andrews*, 107 Mich. 33 (contract to construct machine); *Jones v. Stanly*, 76 N. Car. 356 (contract with carrier for transportation of goods). See also the old case of *Shepherd v. Wakeman*, Sid. 79, where an action for inducing a breach of promise of marriage was allowed.

In *Temperton v. Russell*, (1893) 1 Q. B. 715, *Lopes, L. J.*, affirmed "the broad principle that a person who induces a party to a contract to break it, intending thereby to injure another person or to get a benefit for himself, commits an actionable wrong." Much to the same effect are the remarks of the other judges. As representing the present English rule this case must be modified by the results of *Allen v. Flood*, (1898) A. C. 1. See *infra*, this section, *Malice*.

Dicta to the Effect that Procuring the Breach of Any Contract maliciously is actionable are found in the following cases, which really involved contracts of service: *Chiple v. Atkinson*, 23 Fla. 206, 11 Am. St. Rep. 367; *Lucke v. Clothing Cutters, etc., Assembly No. 7507*, 77 Md. 396, 39 Am. St. Rep. 421; *Lally v. Cantwell*, 30 Mo. App. 524 (probably *overruled* in this particular by *Glencoe Land, etc., Co. v. Hudson Brothers Commission Co.*, 138 Mo. 439, 60 Am. St. Rep. 560).

6. See article by Prof. Wigmore, 21 Am. L. Rev. 766.

Sight of the limitation seems to have been lost at an early period when the action was case. *Garret v. Taylor*, Cro. Jac. 567, 2 Rolle 162.

7. **Binding Contract of Service Essential.** — *Campbell v. Cooper*, 34 N. H. 49. See also *Sykes v. Dixon*, 9 Ad. & El. 693, 36 E. C. L. 244.

8. **De Facto Service Sufficient.** — *Evans v. Walton*, L. R. 2 C. P. 615 [*distinguishing* *Sykes v. Dixon*, 9 Ad. & El. 693, 36 E. C. L. 244]; *Keane v. Boycott*, 2 H. Bl. 511; *Noice v. Brown*, 30 N. J. L. 569; *Haskins v. Royster*, 70 N. Car. 601, 16 Am. Rep. 780.

9. **Piece Work.** — *Gunter v. Astor*, 4 Moo. 12, 16 E. C. L. 357, 21 Rev. Reg. 733. See also *Walker v. Cronin*, 107 Mass. 567.

extend the remedy for interference to contracts generally, stress is usually laid on other circumstances, and the existence of a binding contract is not required.¹

3. Malice.—According to the accepted definition, malice in common acceptation means ill will against a person; but in its legal sense it means a wrongful, *i. e.*, an unlawful, act done intentionally, without just cause or excuse.² Considering, as the general statements of the cases developing the doctrine of actionable interference with contract require,³ that malice is an essential ingredient of the action, the reasoning is somewhat as follows: Breach of contract gives a cause of action against the contracting party guilty of the breach, and is therefore a wrongful or unlawful act. The procurement of a wrongful act is itself wrongful. Therefore the procurement of a breach of contract is wrongful,⁴ and if the procurement is intentional⁵ and without excuse it follows that it is malicious. There is a step in this reasoning which assumes too much. It is that the procurement of an act which gives a cause of action against the actor is universally wrongful. This is settled by precedent in the case of contracts of hire, but it is contrary to analogies when applied to contracts universally,⁶ since it involves the propo-

The Fact that No Action Lies Against the Party Terminating a Contract at the instance of the defendant does not prevent an action against the defendant. *Chiple v. Atkinson*, 23 Fla. 206, 11 Am. St. Rep. 367. But compare *Raycroft v. Tayntoi*, 68 Vt. 219, 54 Am. St. Rep. 882.

1. Interference with Nonenforceable Contracts of Sale.—Thus interference by fraudulent misrepresentations which prevent the completion of a nonenforceable verbal contract of sale is actionable. *Benton v. Pratt*, 2 Wend. (N. Y.) 385, 20 Am. Rep. 623; *Rice v. Manley*, 66 N. Y. 82, 23 Am. Rep. 30.

So an action will lie for interference by threats preventing the performance of such a contract. *Jackson v. Stanfield*, 137 Ind. 592.

See further as to procuring the termination of contracts *infra*, this title, *Preventing Formation or Inducing Termination of Contract*.

2. Malice Defined.—This is the definition of Bayley, J., in *Bromage v. Prosser*, 4 B. & C. 255, 10 E. C. L. 323. This definition has been adopted "in hundreds of cases, both civil and criminal." North, J., in *Allen v. Flood*, (1898) A. C. 40.

3. See *supra*, this section, *General Statement*.

4. Procuring Violation of Right Is Wrongful.—Erle, J., in *Lumley v. Gye*, 2 El. & Bl. 232, 75 E. C. L. 232, said: "It is clear that the procurement of the violation of a right is a cause of action in all instances where the violation is an actionable wrong, as in violations of a right to property, whether real or personal, or to personal security; he who procures the wrong is a joint wrongdoer, and may be sued, either alone or jointly with the agent, in the appropriate action for the wrong complained of."

5. Notice Held to Imply Malice.—In *Lumley v. Gye*, 2 El. & Bl. 224, 75 E. C. L. 224, Crompton, J., said that if interrupting the relation of master and servant is wrongful and malicious, "or, which is the same thing, with notice," it is actionable.

That knowledge is an essential ingredient of such actions, see *Jones v. Blocker*, 43 Ga. 331.

It was early laid down that retaining a hired servant of another without knowledge of the

previous hiring was not actionable. *F. N. B.* 168 *c.*

6. Contract Creates Only Right in Personam.—The foundation upon which actions for enticing servants rest was said by Blackstone to be "the property that every man has in the service of his domestics." 1 Black. Com. 429. But an ordinary contract does not create a property right as against third persons, *i. e.*, a right *in rem*; it creates only a right *in personam* against the other party to the contract. Proceeding on this basis it was said by Cave, J., in *Allen v. Flood*, (1898) A. C. 34, that a right of action for procuring the violation of contracts is anomalous, "because in no other instance in the English law that I am aware of does a right *ex contractu* give rise to a right *in rem*. In no other case that I know of can two persons by agreement between themselves create an obligation binding on all the rest of the world." He pointed out also the anomaly of holding this right *in rem* "available against all the world except the co-contractor whose consent to the contract is supposed to have given birth to this anomalous right *in rem*." But, as Sir Frederick Pollock says, the duty of third persons to refrain from procuring a breach of contract "is not an obligation under the contract, any more than when A sells his land to B, the duty of all men to respect the rights of B instead of A, as owner of that land, is a duty under the contract of sale or the conveyance." Pollock on Contracts (4th ed.) 192, note. But compare Pollock on Torts (1st ed.) 450.

It is sometimes said to be a general rule of law that only the contracting parties are liable for the breach of a contract. Coleridge, J., in *Lumley v. Gye*, 2 El. & Bl. 246, 75 E. C. L. 246; *Boyson v. Thorn*, 98 Cal. 580; *Chambers v. Baldwin*, 91 Ky. 121, 34 Am. St. Rep. 165; *Bourlier v. Macauley*, 91 Ky. 135, 34 Am. St. Rep. 171; *Glencoe Land, etc., Co. v. Hudson Brothers Commission Co.*, 138 Mo. 439, 60 Am. St. Rep. 560. But, as indicated by the last quotation, admitting a remedy for procuring a breach perhaps involves no denial of this, and the statement of such a general rule, for present purposes, rests on negative authority only

sition that merely to persuade a person to break a contract is actionable though the persuasion is *bona fide*, unless the person using such persuasion acts in the assertion of some superior right.¹ A new definition of malice was invented to apply in this connection, and a malicious act was defined as an act done "for the indirect purpose of injuring the plaintiff or of benefiting the defendant at the expense of the plaintiff."² The test here is no longer the character of the act done, but the motive of the actor, and according to this view an act lawful in itself may be unlawful because done with a bad motive.³ A number of dicta and some cases support such a view,⁴ but it is apparent that where the means used are themselves unlawful, for instance when they involve fraud or slander, no question of malice in the sense of motive is involved, and a cause of action for inducing a breach of contract by such means may arise on well-settled principles.⁵ On the other hand, where the means employed are not unlawful according to settled standards, the existence of a bad motive does not, under some authorities, make the interference producing breach actionable.⁶

4. Means Employed to Induce Breach. — Where the means employed to induce the breach of contract are wrongful or unlawful, the interference may give rise to a cause of action under one of the well-recognized heads of tort;⁷ thus when the act of interference is fraudulent or slanderous, or when it constitutes a nuisance, or is accompanied with violence or threats.⁸ Interference

— lack of precedents. See the opinion of Coleridge, J., in *Lumley v. Gye*, 2 El. & Bl. 250, 75 E. C. L. 250.

See the remarks of Holmes, J., in *May v. Wood*, 172 Mass. 14, to the effect that the allowance of an action for maliciously procuring a breach of contract is supported by reason and analogy.

1. **Bona Fide Persuasion.** — Coleridge, J., in *Lumley v. Gye*, 2 El. & Bl. 247, 75 E. C. L. 247, put the case of one *bona fide* persuading and inducing the breach of a contract. Brett, L. J., in *Bowen v. Hall*, 6 Q. B. D. 338, admitted that this might not be actionable. See also *Boyson v. Thorn*, 98 Cal. 583; *Walker v. Cronin*, 107 Mass. 555.

2. Brett, L. J. (afterward Lord Esher, M. R.), in *Bowen v. Hall*, 6 Q. B. D. 338; *Temperton v. Russell*, (1893) 1 Q. B. 715.

3. See *Mogul Steamship Co. v. McGregor*, 23 Q. B. D. 608, *per* Lord Esher, M. R.

4. **Malicious Inference Actionable — Motive** — *England*. — *Bowen v. Hall*, 6 Q. B. D. 333; *Temperton v. Russell*, (1893) 1 Q. B. 715. So far as these cases are authority for the proposition that the motive of the actor can make wrongful and actionable an act otherwise lawful, they are *overruled* in *Allen v. Flood*, (1898) A. C. 1, *reversing Flood v. Jackson*, (1895) 2 Q. B. 21.

United States. — *Nashville, etc., R. Co. v. McConnell*, 82 Fed. Rep. 65.

Florida. — *Chiple v. Atkinson*, 23 Fla. 206, 11 Am. St. Rep. 367.

Louisiana. — See *Graham v. St. Charles St. R. Co.*, 47 La. Ann. 214, 49 Am. St. Rep. 366, a case based solely, however, on the right to freedom in business relations, and the principle announced in the Civil Code of Louisiana that every wrongful act causing damage or loss is actionable. See also *Dickson v. Dickson*, 33 La. Ann. 1261.

Maryland. — *Lucke v. Clothing Cutters, etc.*, Assembly No. 7507, 77 Md. 396, 39 Am. St. Rep. 421.

Massachusetts. — *Walker v. Cronin*, 107 Mass. 555. And see the dissenting opinion of Holmes, Knowlton, and Morton, JJ., in *May v. Wood*, 172 Mass. 11.

Michigan. — *Morgan v. Andrews*, 107 Mich. 33.

North Carolina. — *Jones v. Stanly*, 76 N. Car. 355; *Haskins v. Royster*, 70 N. Car. 605, 16 Am. Rep. 780.

5. See the following subdivision of this title.

6. **Motive Cannot Render Unlawful an Act Otherwise Lawful** — *England*. — *Allen v. Flood*, (1898) A. C. 1.

Canada. — *Perrault v. Gauthier*, 28 Can. Sup. Ct. 241, *affirming* 6 Quebec Q. B. 65.

California. — *Boyson v. Thorn*, 98 Cal. 578.

Kentucky. — *Chambers v. Baldwin*, 91 Ky. 121, 34 Am. St. Rep. 165; *Bourlier v. Macauley*, 91 Ky. 135, 34 Am. St. Rep. 171.

Maine. — *Perkins v. Pendleton*, 90 Me. 166, 60 Am. St. Rep. 252; *Heywood v. Tillson*, 75 Me. 225, 46 Am. Rep. 373.

Minnesota. — *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223.

Missouri. — *Glencoe Land, etc., Co. v. Hudson Brothers Commission Co.*, 138 Mo. 439, 60 Am. St. Rep. 560.

Tennessee. — *Payne v. Western, etc., R. Co.*, 13 Lea (Tenn.) 507, 49 Am. Rep. 666.

7. **Procuring Breach by Illegal Means Actionable.** — *Boyson v. Thorn*, 98 Cal. 578 (*quoted supra*, this section, subdiv. 2, note 1); *Chambers v. Baldwin*, 91 Ky. 121, 34 Am. St. Rep. 165; *Perkins v. Pendleton*, 90 Me. 166, 60 Am. St. Rep. 252; *Glencoe Land, etc., Co. v. Hudson Brothers Commission Co.*, 138 Mo. 445, 60 Am. St. Rep. 560; *Raycroft v. Tayntor*, 68 Vt. 219, 54 Am. St. Rep. 882.

8. **False Representations in Nature of Slander of Title.** — Preventing the delivery of goods under a contract of sale by falsely claiming a lien thereon is actionable. *Green v. Button*, 2 C. M. & R. 707. See the title SLANDER OF TITLE. And see *Angle v. Chicago, etc., R. Co.*, 151

by mere persuasion is, according to some authorities, not actionable except in the case of servants or persons under contract for exclusive personal services.¹ Other authorities, however, appear to allow an action in such a case wherever the interference is malicious.²

Whether Combination or Conspiracy Is Per Se Unlawful is discussed elsewhere.³

5. Damages Produced by Breach. — According to some dicta it must be shown that special damage has resulted from the interference producing the breach,⁴ and this doctrine seems supported by some analogies.⁵

Natural and Probable Consequences. — It is not a tenable objection that the damages resulting from the breach of contract, being the result of the free act of the delinquent contracting party, are not the natural and probable consequence of the interference and are therefore too remote.⁶ But it must be shown that the breach resulted from the defendant's interference.⁷

III. PREVENTING FORMATION OR INDUCING TERMINATION OF CONTRACT. — According to some authorities, an actionable interference with contract relations is not confined to cases where the contract is binding and valid. It is actionable likewise maliciously to induce the termination of a contract terminable at will or to prevent the formation of contracts which in the natural course and but for such interference would have been formed.⁸ "Maliciously"

U. S. 1, where breach was produced by false representations to a third person.

A false and malicious letter, claiming a previous engagement and resulting in a breach of a promise of marriage, gives a ground of action against the writer. *Shepherd v. Wakeman*, Sid. 79.

Interference by Violence, Intimidation, Threats, and the like usually arises in actions grounded on the doings of organizations of laborers, workmen, or employees. These matters are treated under the title **LABOR COMBINATIONS**, to which reference is made. See also the title **RESTRAINT OF TRADE**.

1. *Boyson v. Thorn*, 98 Cal. 578; *Glencoe Land, etc., Co. v. Hudson Brothers Commission Co.*, 138 Mo. 439, 60 Am. St. Rep. 560.

2. **Malicious Use of Any Means Actionable.** — *Bowen v. Hall*, 6 Q. B. D. 336; *Chipley v. Atkinson*, 23 Fla. 206, 11 Am. St. Rep. 367, where the actual means seem to have been unlawful, viz., slander; *Lucke v. Clothing Cutters, etc., Assembly No. 7507*, 77 Md. 396, 39 Am. St. Rep. 421, where the actual means were threats by the defendant, a labor organization.

A breach of contract caused by persuasion actuated by malevolence and not excused or justified is actionable. "The ground of liability is not false statements, but the intentional causing of temporal damage, without justifiable cause, by any means contemplated as effectual, and proving so in the event." *Holmes, J., dissenting*, in *May v. Wood*, 172 Mass. 15, and *citing Walker v. Cronin*, 107 Mass. 555, and *Tasker v. Stanley*, 153 Mass. 148.

3. See the title **LABOR COMBINATIONS**. A well-reasoned late case answering the question in the negative is *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223. Compare *Curran v. Galen*, 152 N. Y. 33, 57 Am. St. Rep. 496.

4. **Special Damage.** — See the remark of Brett, L. J., in *Bowen v. Hall*, 6 Q. B. D. 333, quoted *supra*, this title, *Introductory*, note 4. See also *Temperton v. Russell*, (1893) 1 Q. B. 729.

In *Chipley v. Atkinson*, 23 Fla. 206, 11 Am. St. Rep. 367, it was held that damage must result to give the action, but it appears that if,

from inability to estimate the damages resulting from the breach, nominal damages only can be found, this is sufficient.

5. See *Green v. Button*, 2 C. M. & R. 707, a case of slander of title producing breach of a contract, and the closely analogous case of *Benton v. Pratt*, 2 Wend. (N. Y.) 385, 20 Am. Dec. 623, where the performance of a contract was prevented by fraudulent misrepresentations.

In Actions for Enticing Servants the Measure of Damages is not limited to the value of the servants enticed away, but the plaintiff may recover the damages caused by their leaving him at the time, considering the circumstances of his business. *Gunter v. Astor*, 4 Moo. 12, 16 E. C. L. 357, 21 Rev. Rep. 733; *Hewitt v. Ontario Copper Lightning Rod Co.*, 44 U. C. Q. B. 287.

6. **Special Damage.** — *Bowen v. Hall*, 6 Q. B. D. 338 [*disapproving pro tanto* *Vicars v. Wilcocks*, 8 East 1, 2 Smith Lead. Cas. 554]; *Perkins v. Pendleton*, 90 Me. 166, 60 Am. St. Rep. 252.

In States where an Action for Interference Is Not Recognized in the case of contracts generally, it is said that the direct and proximate cause of damage is the defendant's voluntary breach of contract. *Chambers v. Baldwin*, 91 Ky. 121, 34 Am. St. Rep. 165; *Glencoe Land, etc., Co. v. Hudson Brothers Commission Co.*, 138 Mo. 439, 60 Am. St. Rep. 560.

7. **Causal Connection Must Be Shown.** — Consequently the action will not be supported by a voluntary termination of the contract relation by the plaintiff in consequence of the defendant's interference, nor by the defendant's unsuccessful malicious attempt to terminate the contract. *Chipley v. Atkinson*, 23 Fla. 206, 11 Am. St. Rep. 367. To the same effect see *Gauthier v. Perrault*, 6 Quebec Q. B. 65, *affirmed* 28 Can. Sup. Ct. 241.

8. *Walker v. Cronin*, 107 Mass. 555. See also *Johnston Harvester Co. v. Meinhardt*, 24 Hun (N. Y.) 489, 9 Abb. N. Cas. (N. Y.) 396.

Preventing Formation of Contracts. — In *May v. Wood*, 172 Mass. 14, *Holmes, J.*, in a *dis-*

here is to be understood as implying an indirect purpose of injuring the person who is damaged or of benefiting the interferer at the expense of the damaged person without just, *i. e.*, lawful, cause or excuse.¹ This doctrine naturally follows from the more comprehensive principle of the right to be protected in freedom of business.² Other authorities hold that an action lies in such a case only where the means employed are unlawful.³

IV. WHAT IS JUSTIFICATION. — What amounts to justification negating malice is not settled on broad principles. It seems established, however, that trade competition justifies the use of lawful means to prevent the formation of contracts with rival traders,⁴ though whether it would justify the procure-

menting opinion, laid down this proposition as settled law in *Massachusetts*: "An action will lie for depriving a man of custom, that is, of possible contracts, as well when the result is effected by persuasion as when it is accomplished by fraud or force, if the harm is inflicted simply from malevolence and without some justifiable cause, such as competition in trade."

An Employer Forbidding His Employees to Trade at a Particular Store has been held to give a cause of action to the merchant injured. *Graham v. St. Charles St. R. Co.*, 47 La. Ann. 214, 49 Am. St. Rep. 366. *Contra*, *Payne v. Western, etc., R. Co.*, 13 Lea (Tenn.) 507, 49 Am. Rep. 666; *Robison v. Texas Pine Land Assoc.*, (Tex. Civ. App. 1897) 40 S. W. Rep. 843. In the last case the employer was running a similar store, and the element of competition was held to enter into the case.

Procuring Termination of Contract. — In *Chipley v. Atkinson*, 23 Fla. 206, 11 Am. St. Rep. 367, the plaintiff, who brought suit for procuring his discharge, was employed as a general superintendent by a manufacturing concern. It was alleged that the employment was to continue "for a long period of time," but it was held that neither the fact that the employment was not for a definite time nor the fact that no action lay against the employer for the discharge would bar the action against the person maliciously procuring the discharge. A very similar case is *Lucke v. Clothing Cutters, etc.*, Assembly No. 7507, 77 Md. 396, 39 Am. St. Rep. 421, wherein the *Chipley* case was quoted with approval.

The Damage Recoverable in such cases is not the loss of the value of actual contracts, but "the loss of advantages, either of property or of personal benefit, which, but for such interference, the plaintiff would have been able to attain or enjoy." *Walker v. Cronin*, 107 Mass. 555, quoted in *Perkins v. Pendleton*, 90 Me. 160, 60 Am. St. Rep. 252.

1. Meaning of "Maliciously." — *Chipley v. Atkinson*, 23 Fla. 206, 11 Am. St. Rep. 367; *Walker v. Cronin*, 107 Mass. 555. And see *Temperton v. Russell*, (1893) 1 Q. B. 715, and *supra*, this title, *Malice*.

2. See the opinion of Cave, J., in *Allen v. Flood*, (1898) A. C. 28, and generally the titles LABOR COMBINATIONS; MASTER AND SERVANT; SLANDER OF TITLE.

3. Unlawful Means an Essential. — *Allen v. Flood* (1898) A. C. 1; *Perrault v. Gauthier*, 28 Can. Sup. Ct. 241, affirming 6 Quebec Q. B. 65, which reversed to Quebec Super. Ct. 224, which reversed 6 Quebec Super. Ct. 83; *Perkins v. Pendleton*, 90 Me. 166, 60 Am. St. Rep. 252; *Heywood v. Tillson*, 75 Me. 225, 46 Am. St.

Rep. 373; *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223; *Lally v. Cantwell*, 30 Mo. App. 524; *Payne v. Western, etc., R. Co.*, 13 Lea (Tenn.) 507, 49 Am. Rep. 666.

This seems to be the effect of *Raycroft v. Tayntor*, 68 Vt. 219, 54 Am. St. Rep. 882. The defendant procured the plaintiff's discharge by threatening that he, the defendant, would terminate certain contracts between himself and the plaintiff's employer unless the latter discharged the plaintiff, who was working under a contract terminable at will. The defendant appeared to be actuated solely by malevolence towards the plaintiff. It was held that the action would not lie, since the defendant only threatened to do what he had a lawful right to do. See further *infra*, this title, *What Is Justification*, notes.

Preventing Formation by Conspiracy. — In *Temperton v. Russell*, (1893) 1 Q. B. 715, it was held that to prevent the formation of contracts by conspiracy was actionable, and the judges seem to have been of opinion that the doctrine of malicious interference with existing contracts would have been applicable even in the absence of conspiracy. This, however, was not involved in the case.

Slander. — In *Chipley v. Atkinson*, 23 Fla. 206, 11 Am. St. Rep. 367, it appears that the defendant was guilty of slander, though the decision is not placed on the ground that the means employed in effecting the discharge were unlawful. See also *Lally v. Cantwell*, 30 Mo. App. 524.

Action of Labor Organization. — In *Lucke v. Clothing Cutters, etc.*, Assembly No. 7507, 77 Md. 396, 39 Am. St. Rep. 421, the breach was effected by threats from a labor organization. See generally on this question the title LABOR COMBINATIONS.

4. Mogul Steamship Co. v. McGregor, (1892) A. C. 25, affirming 23 Q. B. D. 598; *Walker v. Cronin*, 107 Mass. 555.

Justification — Scope of Competition. — In the dearth of authority on this question, the remarks of Mr. Justice Holmes, *dissenting*, in *Vegelahn v. Guntner*, 167 Mass. 92, 57 Am. St. Rep. 443, are suggestive: "It is on the question of what shall amount to a justification, and more especially on the nature of the considerations which really determine or ought to determine the answer to that question, that judicial reasoning seems to me often to be inadequate. The true grounds of decision are considerations of policy and of social advantage, and it is vain to suppose that solutions can be attained merely by logic and the general propositions of law which nobody disputes. Propositions as to public policy rarely

ment of the breach of existing contracts is questionable.¹ It appears that the very theory of malicious interference with contract relations as an actionable wrong requires that, in order to be justified, the act of interference or procurement must be founded upon the pursuit by the actor of some lawful interest or object for himself,² though some cases seek to find the reconciliation of two opposing lines of authorities in the rule that an act legal in itself and violating no superior right of another is justified.³

Whether the Fact that a Combination of Persons Is the Actor in procuring a breach or the nonformation of contracts deprives what would otherwise be justification of that character, is not settled.⁴

are unanimously accepted, and still more rarely, if ever, are capable of unanswerable proof. * * * The policy of allowing free competition justifies the intentional inflicting of temporal damage, including the damage of interference with a man's business, by some means, when the damage is done not for its own sake, but as an instrumentality in reaching the end of victory in the battle of trade.

* * * I have seen the suggestion made that the conflict between employers and employed is not competition. But I venture to assume that none of my brethren would rely on that suggestion. If the policy on which our law is founded is too narrowly expressed in the term 'free competition,' we may substitute 'free struggle for life.' Certainly the policy is not limited to struggles between persons of the same class competing for the same end. It applies to all conflicts of temporal interests."

1. See the case of enticement of servants mentioned in the next note following, and the remarks of Lord Herschell in *Allen v. Flood*, (1898) A. C. 123. See also an article by Prof. E. W. Huffcut in 37 Am. L. Reg. & Rev. 275.

2. **Whether Justification Requires Pursuit of Some Interest.**—In *Walker v. Cronin*, 107 Mass. 555, it was declared that "competition or the service of any interest or lawful purpose" amounts to justification. This doctrine seems to lie at the very basis of the whole theory of malicious interference with contracts; namely, that interference is actionable unless justified by some lawful cause or excuse. There is, however, a sentence in the opinion which has been drawn into the service of a different rule. Explaining the cases requiring, in order to constitute an actionable wrong, the violation of a definite legal right of the plaintiff, it was said: "But those are cases, for the most part at least, where the defendants were themselves acting in the lawful exercise of some distinct right, which furnished the defense of a justifiable cause for their acts, except so far as they were in violation of a superior right in another." The court proceeded to illustrate by the case of enticing workmen. If they are under definite contracts and the enticement is with notice, the defendant's lawful effort to further his own business by employing them is no justification, for he acts in violation of a superior contract right in another; if they are employed under terminable contracts, no superior right is violated, and the defendant's lawful pursuit of his own business interests is justification, though in fact he may act maliciously. The meaning here is, as illustrated, in harmony with the text, but the passage has been quoted

as showing that the exercise of any distinct legal right (no superior right being violated) justifies procuring a breach. See article by Wm. L. Hodge in 28 Am. L. Rev. 54; *Raycroft v. Tayntor*, 68 Vt. 219, 54 Am. St. Rep. 882; *Chipley v. Atkinson*, 23 Fla. 206, 11 Am. St. Rep. 370.

That Pursuit of Some Legitimate Interest is essential to justify interference with the business of another is asserted in decisions based on the theory of freedom to do business unhindered. See *Delz v. Winfree*, 80 Tex. 400, 26 Am. St. Rep. 755.

A Stockholder in a Corporation has a right to express his opinion freely about the contracts of the corporation, but if, by the use of wilful and malicious fraud and deceit, he induces the corporation to be guilty of breach of a contract between the plaintiff and such corporation, the defendant is liable to the plaintiff for damages. *Morgan v. Andrews*, 107 Mich. 33.

3. **Justification Requires More than Performance of Lawful Act.**—If it be admitted that the employment of any act lawful in itself is justified to effect the termination of a terminable contract (no superior right is, in general, involved in such a case), the criterion is the lawfulness of the means, and there is no place for malice in the sense of motive. The practical effect of separating the lawful pursuit of some legitimate interest on the part of the defendant from the idea of justification seems to be to overrule the doctrine of the line of cases cited *supra*, p. 1113, note 4, and not to reconcile those authorities with the cases on p. 1113, note 6. The very point in the former cases is that the principle announced in the latter is not of universal application. Yet in *Raycroft v. Tayntor*, 68 Vt. 219, 54 Am. St. Rep. 882, adopting what is conceived to be a misconception in an article in 28 Am. L. Rev. 54, such a holding is held to be in harmony with both lines of decisions. Somewhat similar is *Chipley v. Atkinson*, 23 Fla. 206, 11 Am. St. Rep. 370; but the effect of the ruling therein seems to bring the case in line with the cases holding motive a criterion.

4. **Effect of Combination on Justification.**—The doctrine of many cases seems to be that acts which, if done by one, would be justified as based on competition can claim no such privilege when done by a body of men conspiring together. See *Hopkins v. Oxley Stave Co.*, 83 Fed. Rep. 912; *Vegeahn v. Guntner*, 167 Mass. 92, 57 Am. St. Rep. 443, and the dissenting opinion of Holmes, J., therein. *Contra*, *Hutley v. Simmons*, (1898) 1 Q. B. 181, following *Kearney v. Lloyd*, 26 L. R. Ir. 268. A full treatment of this question will be given under the title **LABOR COMBINATIONS**.

INTERIM. — A Latin word, signifying in the meanwhile, in the intervening time; used as an adjective in the sense of "temporary."¹

INTERIOR. — Interior means inland; remote or distant from the coast.²

INTERLINE—INTERLINEATION. (See also the titles ALTERATION OF INSTRUMENTS, vol. 2, p. 181; WILLS.) To interline is to write between lines already written, for the purpose of adding to or correcting what is written.³

INTERLOCUTORY. (See also INTERLOCUTORY ORDERS, JUDGMENTS, AND DECREES, 11 ENCYC. OF PL. AND PR. 439; and in this work the title FINAL JUDGMENTS AND DECREES, vol. 13, p. 23.) — Interlocutory (in law) means that which does not decide the cause, but only settles some intervening matter relating to the cause.⁴

INTERLOCUTORY INJUNCTIONS. — See the title INJUNCTIONS, *ante*, p. 345.

1. **Interim Factor.** — A judicial officer appointed under the bankruptcy law of Scotland, to preserve the estate until a fit person shall be elected trustee. 2 Bell's Com. 299.

Interim Curator. — An officer appointed by the justice of the peace under the statute 33 & 34 Vict., c. 23, which abolished forfeiture and escheat on conviction of treason and felony, to have the custody and management of the property of the convict. 4 Steph. Com. 419.

2. **More Interior District.** — A United States statute provided that if any ship which should arrive within the limits of any district of the United States, from any foreign port or place, should depart therefrom, unless to proceed on her way to some more interior district, before report or entry should have been made by the master, the master should forfeit the sum of four hundred dollars. In construing this statute the court said: "In this section the legislature intended, by 'more interior district,' a district which, with reference to local and geographical position, and in common usage, is deemed interior to another, that is, further within the indentations or inlets of the contiguous or surrounding country than that in which the vessel has already arrived, and through which she would or might ordinarily pass in order to reach such inner district. I have not found the words used in any other section of the act; but in the close of the 18th section the words 'interior port' occur in a sense exactly like that which I feel constrained to apply to the section under examination." U. S. v. Bearer, 4 Mason (U. S.) 195.

3. **Russell v. Eubanks**, 84 Mo. 88. This case arose upon the construction of a will.

Interlineation. — In *Bagshaw v. Canning*, 52 J. P. 583, it was held that the term *interlineation* was not confined to something written between the lines, but included anything put into any of the lines, though written on the line.

4. **Mora v. Sun Mut. Ins. Co.**, (N. Y. Super. Ct. Spec. T.) 13 Abb. Pr. (N. Y.) 304, 22 How. Pr. (N. Y.) 60.

Interlocutory and Final Distinguished—Decrees. — The words *interlocutory* and "final" have received frequent construction, of which the following are instances: "According to Harrison's Practice in Chancery 622, 'a decree is final when all the circumstances and facts material and necessary to a complete explanation of the matters in litigation are brought before the court, and so fully and clearly ascertained by the pleadings on both sides that the court is enabled from them to collect the re-

spective merits of the parties litigant, and upon full consideration of the case made out and relied upon by each, determines between them according to equity and good conscience.'

'A decree is *interlocutory* when it happens that some material circumstance or fact, necessary to be made known to the court, is either not stated in the pleadings, or so imperfectly ascertained by them, that the court, by reason of that defect, is unable to determine finally between the parties; and therefore a reference to or an inquiry before a master, or a trial of the facts before a jury, becomes necessary to have the doubts occasioned by that defect removed. The court, in the meantime, suspends its final judgment, until by the master's report or the verdict of a jury it is enabled to decide finally.' " *Travis v. Waters*, 12 Johns. (N. Y.) 508. See also *Griffin v. Orman*, 9 Fla. 22, 46.

"The term 'interlocutory decree' is generally applied to decrees in which some matter either of law or of fact is directed preparatory to a final decision." *Brush Electric Co. v. California Electric Light Co.*, 7 U. S. App. 212, citing 2 Daniell's Ch. Pl. and Pr. (1st Am. ed.) 1152, note a.

In *Richmond v. Atwood*, 5 U. S. App. 164, it was said: "Decrees are either final or *interlocutory*. If the decree determined all the questions in issue between the parties, and did not adjourn any matter for further consideration, it was called a final decree. In strictness, however, a decree was said to be *interlocutory* until it was signed and enrolled. For. Rom. 183. But ordinarily it has been termed *interlocutory* when it was pronounced for the purpose of ascertaining matter of law or of fact previously to a final decree."

In *Teaff v. Hewitt*, 1 Ohio St. 520, it was said: "An *interlocutory* decree is one which leaves the equity of the case, or some material question connected with it, for future determination. Where the future action of the court is necessary to give the complete relief contemplated by the court, upon the merits, the decree under which the further question arises is to be regarded, not as final, but as *interlocutory*." Citing *Cocke v. Gilpin*, 1 Rob. (Va.) 22.

And as to the distinction between final and *interlocutory* decrees see the following cases: *Forgay v. Conrad*, 6 How. (U. S.) 201; *Barnard v. Gibson*, 7 How. (U. S.) 650; *Perkins v. Fourniquet*, 14 How. (U. S.) 313; *Beebe v. Russell*, 19 How. (U. S.) 283; *Humiston v.*

INTERLUDE. — An interlude is a short dramatic piece, generally accompanied with music; usually represented or performed between the acts of a longer performance.¹

INTERMEDDLE. — To intermeddle means to meddle with the affairs of others in which one has no concern; to meddle officiously; to interpose or interfere improperly; to intermix.

INTERMEDIATE. — Intervening; interposing; lying between.²

Stainthorp, 2 Wall. (U. S.) 106; Milwaukee, etc., R. Co. v. Soutter, 2 Wall. (U. S.) 510, 521; Worden v. Searls, 121 U. S. 14; Crescent Brewing Co. v. Gottfried, 128 U. S. 158, 163; McCormick v. Graham, 129 U. S. 1, 2; Hurlbut v. Schillinger, 130 U. S. 456, 458; Collins Co. v. Coes, 130 U. S. 56, 64; Cornely v. Marckwald, 131 U. S. 159, 160; Keystone Manganese, etc., Co. v. Martin, 132 U. S. 91; Lodge v. Twell, 135 U. S. 232; St. Germain v. Brunswick, 135 U. S. 227, 228, Yale Lock Mfg. Co. v. Berkshire Nat. Bank, 135 U. S. 342, 344; Magowan v. New York Belting, etc., Co., 141 U. S. 333, 337; McCreary v. Pennsylvania Canal Co., 141 U. S. 459, 460; Dudley E. Jones Co. v. Munger Improved Cotton Mach. Mfg. Co., 2 U. S. App. 202, 203; Whitman Saddle Co. v. Smith, 38 Fed. Rep. 414, 416; Potter v. Mack, 3 Fish. Pat. Cas. 428; Elliott v. Mayfield, 3 Ala. 226; Bennett v. Hetherington, 41 Iowa 142; Russell v. Lathrop, 122 Mass. 300; Morgan v. Rose, 22 N. J. Eq. 583, 593; M'Vickar v. Wolcott, 4 Johns. (N. Y.) 510; Kane v. Whittick, 8 Wend. (N. Y.) 224; Jenkins v. Wild, 14 Wend. (N. Y.) 539; Kelley v. Stanbery, 13 Ohio 421; Delap v. Hunter, 1 Sneed (Tenn.) 101; Rawlings v. Rawlings, 75 Va. 76; Alexander v. Coleman, 6 Munf. (Va.) 340; Thornton v. Fitzhugh, 4 Leigh (Va.) 209, 212; Cocke v. Gilpin, 1 Rob. (Va.) 22, 46; Fleming v. Bolling, 8 Gratt. (Va.) 293.

Same — Judgments. — “*Interlocutory* judgments are such as are given in the middle of a cause, upon some plea, proceeding, or default, which is only intermediate, and does not finally determine or complete the suit.” 3 Black. Com. 396, quoted in Turner v. Browder, 18 B. Mon. (Ky.) 827.

An *interlocutory* judgment is one which determines some preliminary or subordinate point or plea, or settles some step, question, or default arising in the progress of the cause, but does not adjudicate the ultimate rights of the parties or finally put the case out of court. Fuller v. Tuska, (C. Pl. Gen. T.) 17 N. Y. Supp. 357.

In State v. Judge, 42 La. Ann. 319, it was said: “An *interlocutory* judgment is one which does not decide on the merits. It is either ancillary to or executory of the final and complete adjudication of the case.”

In Elliott v. Mayfield, 3 Ala. 226, it was said: “Judgments are either *interlocutory* or final. *Interlocutory* judgments are such as are given in the progress of a cause upon some plea, proceeding, or default which is only intermediate, and does not finally determine or complete the suit, but contemplates further proceedings for that purpose. * * * Final judgments are such as at once finish the proceedings by declaring that the plaintiff either has or has not entitled himself to the

redress he sought, and by ascertaining what amount he shall recover.”

An *interlocutory* judgment is one given in the course of a cause before final judgment. Nacoochee Hydraulic Min. Co. v. Davis, 40 Ga. 320. See also Snell v. Bridgewater Cotton Gin Mfg. Co., 24 Pick. (Mass.) 296; Ward v. Ward, 37 Tex. 389.

For a full discussion of this subject, not only as to the meaning of *interlocutory* and “final,” but also as to what judgments and decrees, etc., are *interlocutory* and what are final, see the note to Williams v. Field, (2 Wis. 421), 60 Am. Dec. 426.

Same — Interlocutory Order. (See also ENCYC. OF PL. AND PR., title APPEALS, vol. 2, p. 52; ORDERS, vol. 15, p. 327.) — In Standard Discount Co. v. La Grange, 3 C. P. D. 71, it was said: “The order was not the final step in the action, and therefore it is *interlocutory*.”

In Meyers v. Becker, 29 Hun (N. Y.) 573, affirmed 95 N. Y. 486, it was said: “*Interlocutory* orders are made to secure some end and purpose necessary and essential to the progress of the suit, and generally collateral to the issues formed by the pleadings and not connected with the final judgment. Every direction of a court made in an action is an order, unless it is contained in a judgment.”

The decision of the High Court upon a special case stated for its opinion by an arbitrator, who is hereupon to make his award, is an “*interlocutory* order.” Collins v. Pad-dington, 5 Q. B. D. 368.

In Smith v. Cowell, 6 Q. B. D. 75, it was held that the term “*interlocutory* order” as used in an English judicature act was not confined to an order made between writ and final judgment, but meant an order other than a final judgment in an action, whether such order was made before the judgment or after.

1. Society, etc., v. Diers, 60 Barb. (N. Y.) 156.

Intermeddle. — McQueen v. Babcock, 41 Barb. (N. Y.) 339, 3 Abb. App. Dec. (N. Y.) 129, 3 Keyes (N. Y.) 428. This case arose upon the construction of an injunction against an assignee *intermeddling* with, receiving, or collecting any property of the assignor, and it was held that the bringing of an action of trespass by the assignee against any person who interfered with the property assigned was not an *intermeddling* with the property.

2. Intermediate Tolls. — Tolls collected from persons who travel over the road, but who do not pass by, through, or around the toll gates. Hollingworth v. State, 29 Ohio St. 552. See generally the title TURNPIKES.

Intermediate Order. (See also the title ORDERS, 15 ENCYC. OF PL. AND PR. 315.) — In Taylor v. Smith, 24 N. Y. App. Div. 526, it was said: “Accurately speaking, an order granted before entry of judgment is an *inter-*

INTERMENT. (See also the titles CEMETERIES, vol. 5, p. 781; DEAD BODY, vol. 8, p. 834.)—See note 1.

INTERNAL.—Used in the phrase “internal commerce,” in the sense of “within the boundaries or limits of a state,” as opposed to interstate commerce, or commerce among the states.²

INTERNAL IMPROVEMENT. (See also IMPROVE—IMPROVEMENT, *ante*, p. 57; and see the titles EMINENT DOMAIN, vol. 10, p. 1061; MUNICIPAL AID.)—See note 3.

mediate order, while one granted hereafter is not. But no sensible or substantial distinction exists between the two cases, for if the judgment is necessarily affected in the one case, it must be so in the other, and *vice versa*. See also Fox v. Matthiessen, 84 Hun (N. Y.) 396.

Orders denying motions to set aside a verdict are not *intermediate* orders. Selden v. Delaware, etc., Canal Co., 29 N. Y. 634. Nor is an order substituting the personal representative of a deceased plaintiff in his stead an *intermediate* order. Hackett v. Belden, 47 N. Y. 624.

1. **Burial and Interment Synonymous.**—Cowley v. Byas, 5 Ch. D. 953.

Reinterment.—In Scadding v. St. Pancras, W. N. (89) 45, 120, it was held that a reinterment of human remains was not an *interment*.

2. **Internal Commerce.** (See also the title INTERSTATE COMMERCE.)—In *New York* it was held that an injunction will not lie to restrain a steamboat company from plying between New York and Troy on the Hudson, by way of New Jersey, on the ground that the state of New York has granted the sole right to navigate these waters for a term of years. North River Steam Boat Co. v. Livingston, 3 Cow. (N. Y.) 713.

3. **Internal Improvements.**—In Union Pac. R. Co. v. Colfax County, 4 Neb. 456, 3 Cent. L. J. 288, it was said: “What are works of *internal improvement*? The Supreme Court of *Alabama*, in defining the phrase *internal improvements*, say: ‘Where *internal improvements* under state authority are spoken of, it is universally understood that works within the state, by which the public are supposed to be benefited, are intended, such as the improvement of highways and channels of travel and commerce.’” Citing Wetumpka v. Winter, 29 Ala. 660.

The phrase *internal improvements* is applied to improvements of highways, channels of travel and commerce, etc. Union Pac. R. Co. v. Colfax County, 4 Neb. 456; Traver v. Merri-
 cick County, 14 Neb. 333.

Beet-sugar Manufactories.—In Getchell v. Benton, 30 Neb. 870, it was held that beet-sugar manufactories which did not manufacture sugar from beets for toll, although propelled by water power, were not within legislative control, and therefore were not works of *internal improvement*.

Railroads, etc.—In State v. Thorne, 9 Neb. 458, it was suggested that works of *internal improvement* might include railroads, turnpikes, canals, and numerous other enterprises not objects of private concern alone.

Public Building.—In *In re Internal Imp. Fund*, 24 Colo. 247, it was held that public

buildings, such as an asylum, state house, etc., were not *internal improvements*, within a *Colorado* act providing that the proceeds of the sale of certain public lands should be paid to the state for the purpose of making *internal improvements*.

Court House.—In Dawson County v. McNamar, 10 Neb. 276, it was held that the building of a county court house was not a work of *internal improvement*. It was said that works of *internal improvement* meant only those works within the state in which the whole body of the people was supposed to be more or less interested and by which it might be benefited.

And as to whether a court house is a work of *internal improvement* see Lewis v. Sherman County, 5 Fed. Rep. 271.

Public Reservoirs for the storage of water for irrigation and domestic uses are *internal improvements* within the meaning of the Act of Congress of March 3, 1875, providing that five per cent. of the proceeds of the sale of agricultural public lands lying within the state of *Colorado* shall be paid to the state for the purpose of making such *internal improvements* within the state as the legislature may direct. *In re* Senate Resolution, etc., 12 Colo. 287.

Waterworks.—In Yesler v. Seattle, 1 Wash. 311, it was held that the term *internal improvements* included waterworks, sewers, and artificial-ice plants. This case arose upon the question whether the act authorizing cities and towns to contract for *internal improvements* sufficiently expressed its subject in the title where the body of the act treated of waterworks, sewers, and artificial-ice plants.

Mill and Water Power.—Bonds issued by the county commissioners of a county in *Nebraska*, on behalf of a precinct in that county, to aid a company in improving the water power of a river for the purpose of propelling public grist mills are issued to aid in constructing a “work of *internal improvement*.” Blair v. Cum-
 ington County, 111 U. S. 363.

So in Guernsey v. Burlington Tp., 4 Dill. (U. S.) 374, negotiable bonds made by the defendant township, reciting that they were issued for the purpose of aiding *internal improvements* in such township, were held valid in the hands of a holder for value, although they were in fact issued to aid in the improvement of a water power and the erection of a watermill owned by a private person. The court said: “Inasmuch as the bond states that it is issued to aid ‘*internal improvements* in the township,’ and as the general legislation of the state shows that *internal improvements* mean such public improvements as may legitimately be aided by taxation, I am inclined to think that the purchaser may assume, without inquiry, *aliunde* the bond and legislative act,

INTERNAL REVENUE. — See the title REVENUE LAWS.

INTERNATIONAL. — See note 1.

that the bond is within the competency of the legislature to authorize."

In *Traver v. Merrick County*, 14 Neb. 327, 45 Am. Rep. 111, a water gristmill for public use and under public regulation was held to be a work of *internal improvement* within a statute authorizing the issue of public bonds. See also *Burlington Tp. v. Beasley*, 94 U. S. 310.

But in *Osborne v. Adams County*, 106 U. S. 181, it was held that a steam gristmill was not a work of *internal improvement*. See also *Osborne v. Adams County*, 109 U. S. 1; *State v. Adams County*, 15 Neb. 569.

Bridges. — In *De Clerq v. Hager*, 12 Neb. 185, it was held that bridges built by a county upon the line of its highways and wholly

within the county were not works of *internal improvement*.

But in *State v. Keith County*, 16 Neb. 508, a bridge across the Platte river was held to be a work of *internal improvement*. See also *Fremont Bldg. Assoc. v. Sherwin*, 6 Neb. 48; *State v. Babcock*, 23 Neb. 179; *Dodge County v. Chandler*, 96 U. S. 205; *U. S. v. Dodge County*, 110 U. S. 156.

1. **International.** — In *Koehler v. Sanders*, 122 N. Y. 72, it was said, "The word *international* is a generic term pertaining to relation between nations, and when applied to business or to transactions of private character it imports dealings of some sort in matters or with people of different nations, or which have some relation to them."

INTERNATIONAL LAW.

BY H. T. TIFFANY.

I. GENERAL PRINCIPLES, 1124.

1. *Definition*, 1124.
2. *Nature of International Law*, 1124.
3. *International Law as Part of Law of Land*, 1125.
4. *Sources of International Law*, 1125.
 - a. *Text Writers*, 1125.
 - b. *Treaties*, 1126
 - c. *Decisions of International Tribunals and Judicial Decisions*, 1126.
 - d. *State Papers*, 1127.
 - e. *Instructions Issued by States*, 1128.
5. *Persons in International Law*, 1128.
 - a. *States Wholly or Partially Independent*, 1128.
 - b. *Effect of Division of State*, 1128.
 - c. *Recognition of New State*, 1128.

II. RIGHTS AND OBLIGATIONS IN TIME OF PEACE, 1129.

1. *Territorial Property of State*, 1129.
 - a. *Acquisition of Territory*, 1129.
 - (1) *Occupation*, 1129.
 - (2) *Cession and Conquest*, 1130.
 - (3) *Prescription*, 1131.
 - (4) *Accretion*, 1131.
 - b. *Rights over Rivers*, 1131.
 - c. *Rights over Seas*, 1132.
 - d. *Protectorates*, 1133.
 - e. *Spheres of Influence*, 1133.
2. *Sovereignty and Jurisdiction*, 1133.
 - a. *Generally Coextensive with Territory*, 1133.
 - b. *As Affected by Nationality or Domicil of Person*, 1134.
 - c. *As Affected by Official Character of Person*, 1135.
 - (1) *Foreign Sovereigns*, 1135.
 - (2) *Diplomatic Officers*, 1135.
 - (3) *Foreign Troops Passing through Territory*, 1135.
 - d. *Subjects of Civilized States in Semicivilized Countries*, 1135.
 - e. *Vessels on High Seas*, 1135.
 - f. *Vessels in Foreign Ports*, 1136.
 - (1) *Public Vessels*, 1136.
 - (2) *Private Vessels*, 1137.
 - g. *Piracy*, 1138.
3. *Measures of Constraint Short of War*, 1138.
 - a. *Retorsion*, 1138.
 - b. *Reprisals*, 1138.
 - c. *Embargo and Non-intercourse*, 1138.
 - d. *Pacific Blockade*, 1139.
4. *Amicable Settlement of Disputes*, 1139.
 - a. *Mediation*, 1139.
 - b. *Arbitration*, 1139.
5. *Intervention*, 1139.

III. MUTUAL RIGHTS AND DUTIES OF BELLIGERENTS, 1140.

1. *Definition of War*, 1140.
2. *Classes of War*, 1140.

INTERNATIONAL LAW.

3. *Commencement of War*, 1140.
4. *Recognition of Belligerency*, 1141.
5. *Effect of War on Treaties*, 1142.
6. *Effect on Intercourse of Individuals*, 1143.
 - a. *In General*, 1143.
 - b. *License to Trade*, 1144.
 - c. *Contracts Between Enemy Subjects*, 1144.
7. *Enemy Character*, 1146.
 - a. *Of Persons*, 1146.
 - (1) *Rendition of Assistance to Enemy*, 1146.
 - (2) *Effect of Domicil*, 1146.
 - (3) *Change of Domicil*, 1148.
 - (4) *Master and Crew of Vessel*, 1148.
 - b. *Of Property*, 1148.
 - (1) *In General*, 1148.
 - (2) *Commercial House in Enemy Country*, 1148.
 - (3) *Products of Enemy Country*, 1149.
 - (4) *Vessels Sailing under Enemy Flag or Pass*, 1149.
 - (5) *Vessels Carrying Enemy License*, 1149.
 - (6) *Vessels Engaged in Privileged Trade of Enemy*, 1149.
 - (7) *Agency in Enemy Country*, 1149.
 - (8) *Consignments to or from Belligerent Territory*, 1149.
 - (9) *Property in Enemy Territory*, 1150.
 - (10) *Transfers of Belligerent Property to Neutrals*, 1150.
 - (a) *In General*, 1150.
 - (b) *Transfers in Transitu*, 1150.
 - (c) *Transfers of Vessels of War*, 1151.
 - (11) *Rights of Neutral or Friendly Lienors*, 1151.
 - (12) *Withdrawal of Property from Enemy Country*, 1151.
8. *Rights of War as Against Enemy Persons*, 1151.
 - a. *Combatants*, 1151.
 - b. *Noncombatants*, 1152.
9. *Rights of War as Against Enemy Property*, 1152.
 - a. *Property in State of Captor*, 1152.
 - b. *Property in State of Enemy*, 1153.
 - (1) *Public Property*, 1153.
 - (2) *Private Property*, 1154.
 - (3) *Contributions and Requisitions*, 1154.
 - c. *Property at Sea*, 1154.
10. *Means and Mode of Carrying On War*, 1156.
 - a. *Land Forces*, 1156.
 - b. *Privateers*, 1156.
 - c. *Destruction of Life and Property*, 1156.
 - d. *Deceit and Stratagems*, 1157.
 - e. *Spies*, 1157.
11. *Military Occupation*, 1157.
12. *Non-hostile Relations of Belligerents*, 1158.
 - a. *In General*, 1158.
 - b. *Armistices and Truces*, 1158.
 - c. *Cartels*, 1159.
 - d. *Flags of Truce*, 1159.
 - e. *Capitulations*, 1159.
 - f. *Ransom*, 1159.
 - g. *Passports and Safe-conducts*, 1159.
13. *Termination of War*, 1159.

IV. RIGHTS AND DUTIES OF NEUTRAL STATES, 1160.

1. *General Duty Not to Give Aid*, 1160.
2. *Furnishing Munitions of War*, 1161.
3. *Loans to Belligerent States*, 1161.

INTERNATIONAL LAW.

4. *Improper Use of Neutral Territory*, 1162.
 - a. *Enlistments*, 1162.
 - b. *Passage of Troops*, 1162.
 - c. *Hostilities*, 1162.
 - d. *Base of Operations in Neutral Territory*, 1163.
 - e. *Arming and Equipping Ships of War*, 1163.
 - f. *Armed Expeditions Issuing from Neutral Territory*, 1164.
5. *Belligerent Vessels in Neutral Ports*, 1164.
 - a. *Right to Use Port*, 1164.
 - b. *Supply of Coal*, 1165.
 - c. *Bringing Prize into Neutral Port*, 1165.
6. *Effect of Violation of Neutral Rights by Belligerent*, 1165.
7. *Effect of Neutral State's Failure to Observe Neutrality*, 1166.
8. *Neutrality Laws*, 1166.

V. RIGHTS AND LIABILITIES OF NEUTRAL SUBJECTS, 1168.

1. *In General*, 1168.
2. *Neutral Commerce*, 1168.
3. *Contraband of War*, 1170.
 - a. *Definition and General Character*, 1170.
 - b. *Arms and Munitions of War*, 1171.
 - c. *Articles Not Intrinsically of Warlike Character*, 1171.
 - (1) *In General*, 1171.
 - (2) *Provisions*, 1171.
 - (3) *Materials of Naval Construction*, 1172.
 - (4) *Vessels*, 1172.
 - (5) *Horses*, 1172.
 - (6) *Coal*, 1172.
 - (7) *Money*, 1173.
 - (8) *Cotton*, 1173.
 - (9) *Miscellaneous*, 1173.
 - d. *Destination of Vessel or Goods*, 1173.
 - e. *Penalty for Carrying Contraband*, 1174.
 - f. *Beginning and End of Offense*, 1175.
4. *Carriage of Belligerent Despatches and Persons*, 1175.
 - a. *In General*, 1175.
 - b. *Despatches*, 1175.
 - c. *Persons*, 1176.
5. *Blockade*, 1177.
 - a. *Definition and General Principles*, 1177.
 - b. *Blockade Must Be Actual and Effective*, 1178.
 - c. *Notice of Blockade*, 1179.
 - d. *Termination or Suspension of Blockade*, 1180.
 - (1) *By Stress of Weather*, 1180.
 - (2) *By Pursuit of Prize*, 1180.
 - (3) *By Enemy's Fleet*, 1180.
 - (4) *By Capture of Blockaded Port*, 1180.
 - e. *What Constitutes Violation*, 1180.
 - (1) *In General*, 1180.
 - (2) *Approach for Inquiry or to Procure License*, 1181.
 - (3) *Egress from Blockaded Port*, 1181.
 - (4) *Case of Necessity*, 1182.
 - (5) *Ultimate Destination of Cargo*, 1182.
 - (6) *Evidence of Violation*, 1183.
 - f. *Duration of Delictum*, 1183.
 - g. *Penalty for Violation*, 1183.
6. *Visit and Search*, 1184.
 - a. *Right in General*, 1184.
 - b. *Of Vessels of War*, 1184.
 - c. *Of Mail Vessels*, 1184.

- d. *Of Vessels under Convoy*, 1184.
- e. *Mode of Exercising Right*, 1185.
- f. *Resistance to Search*, 1185.
 - (1) *In General*, 1185.
 - (2) *Effect on Cargo*, 1185.
- g. *Conclusion of Search*, 1186.
- h. *Capture*, 1186.
 - (1) *What Constitutes*, 1186.
 - (2) *Who May Capture*, 1186.
 - (3) *Effect of Rescue*, 1186.
- i. *Ship's Papers*, 1186.
 - (1) *General Requirements*, 1186.
 - (2) *False Papers*, 1186.
 - (3) *Spoilation or Concealment*, 1187.
- j. *Duties and Liabilities of Captors*, 1187.
 - (1) *As to Persons and Property on Board*, 1187.
 - (2) *As to Care of Vessel*, 1187.
 - (3) *Sending In Vessel for Adjudication*, 1188.
 - (4) *Destruction of Prizes*, 1188.
 - (5) *Proceeding to Adjudication and Restitution*, 1188.
 - (6) *Capture Without Probable Cause*, 1188.
 - (7) *Recapture*, 1189.

CROSS-REFERENCES.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the titles *ADMIRALTY JURISDICTION*, vol. 1, p. 645; *ALIENS*, vol. 2, p. 64; *CONSULS*, vol. 7, p. 6; *EXTRADITION*, vol. 12, p. 590; *FOREIGN LAWS*, vol. 13, p. 1050; *MINISTERS AND AMBASSADORS*; *NAVIGABLE WATERS*; *PRIVATE INTERNATIONAL LAW*; *TREATIES*; *WAR*.

I. GENERAL PRINCIPLES — 1. Definition. — International law has been defined as the rules which determine the conduct of the general body of civilized states in their dealings with one another.¹ The term is of modern origin, and has quite generally among modern writers displaced the term "law of nations," which was in general use until the early part of this century, and is still occasionally used.²

2. Nature of International Law. — There has been, and still is, great difference of opinion as to whether international law is properly to be considered true law. This divergence is, however, chiefly a result of the differing views as to the proper scope of the term "law," some contending that law consists only of commands propounded by a political superior to a political inferior and enforceable by penalties, while others give to the term a broader scope.³

1. Definition. — Lawrence on Int. Law, § 1.

Other definitions which have been given are: "The rules of conduct regulating the intercourse of states." 1 Halleck on Int. Law 41. "The aggregate of the rules which Christian states acknowledge as obligatory in their relations to each other and to each other's subjects." Woolsey on Int. Law (6th ed.), § 5. "International law consists in certain rules of conduct which modern civilized states regard as being binding on them in their relations with one another with a force comparable in nature and degree to that binding the conscientious person to obey the laws of his country, and which they also regard as being enforceable by appropriate means in case of infringement." Hall on Int. Law (4th ed.) 1.

2. Term of Modern Origin. — Dana's Wheaton's

Int. Law, § 12, and note 7; Woolsey on Int. Law, § 10.

3. International Law Not True Law. — The leading exposition of the view that international law is not law at all is to be found in Austin's Jurisprudence, lectures 5 and 6, this being in accord with that author's definition of the word "law."

In *Reg. v. Keyn*, 2 Ex. D. 153, Lord Coleridge said: "Strictly speaking, 'international law' is an inexact expression, and it is apt to mislead if its inexactness is not kept in mind. Law implies a lawgiver and a tribunal capable of enforcing it and coercing its transgressors. But there is no common lawgiver to sovereign states; and no tribunal has the power to bind them by decrees or coerce them if they transgress. The law of nations is that collection of

In support of the view that international law is a true branch of jurisprudence, attention has been called to the facts that its doctrines are founded on legal, not simply on ethical, ideas, since they purport to be rules of strict justice, not counsels of perfection; that they are discussed by the methods appropriate to jurisprudence, and not by those of moral philosophy; that framers of state papers concerning foreign policy appeal not to the general feeling of moral rightness, but to precedents, to treaties, and to opinions of specialists; and that, further, there is actually an international morality, distinct from international law in the usual sense, since a nation may do things which are discourteous, high-handed, and unfair, and yet within its admitted right and giving no formal ground of complaint.¹

3. International Law as Part of Law of Land. — International law is a part of the law of the land,² and hence, unlike foreign municipal law, it does not have to be proved as a fact, but notice of it is taken by the courts.³ Municipal statutes, likewise, should not be construed so as to infringe upon the received doctrines of international law, if such a construction can possibly be avoided.⁴ And since the intercourse of the United States with foreign nations and the policy in regard to them are placed by the Constitution in the hands of the federal government, its decisions upon these subjects are obligatory upon every citizen.⁵

4. Sources of International Law — a. TEXT WRITERS. — The writings of publicists of recognized standing, when in substantial agreement, are of great weight in determining the existing rules of international law.⁶

usages which civilized states have agreed to observe in their dealings with one another. What these usages are, whether a particular one has or has not been agreed to, must be matter of evidence. Treaties and acts of state are but evidence of the agreement of nations, and do not, in this country at least, *per se* bind the tribunals. Neither, certainly, does a consensus of jurists; but it is evidence of the agreement of nations on international points; and on such points, when they arise, the English courts give effect, as part of English law, to such agreement."

Contrary View. — Of this statement, Lord Russell, in his speech to the American Bar Association in 1896, said that the view expressed by Lord Coleridge is based on too narrow a definition of law, a definition which "relies too much on force as the governing idea. If the development of law is historically considered, it will be found to exclude that body of customary law which in early stages of society precedes law which assumes definitely the character of positive command coupled with punitive sanctions. * * * As government becomes more frankly democratic, * * * laws bear less and less the character of commands imposed by a coercive authority, and acquire more and more the character of customary law founded on consent. * * * I claim, then, that the aggregate of the rules to which nations have agreed to conform in their conduct towards one another are properly to be designated 'international law.'" 30 Am. L. Rev. 643.

1. Sir Frederick Pollock, *Oxford Lectures and other Discourses*, London, 1890. See also Hall on Int. Law (4th ed.) 14; Holland's *Jurisprudence* (ed. 1896) 348; *The Paquete Habana*, 175 U. S. 677.

2. *Part of Law of Land.* — *Republica v. De Longchamps*, 1 Dall. (Pa.) 111; *The Nereide*,

9 Cranch (U. S.) 388; *Hilton v. Guyot*, 159 U. S. 163; *The Paquete Habana*, 175 U. S. 677; *Mr. Jefferson to Mr. Genet*, Wharton's Dig. Int. Law, § 8.

The law of nations, "wherever any question arises which is properly the object of its jurisdiction, is here adopted in its full extent by the common law and is held to be a part of the law of the land." 4 Black. Com. 67.

3. **Judicial Notice.** — *Talbot v. Seeman*, 1 Cranch (U. S.) 1; *The Scotia*, 14 Wall. (U. S.) 170.

4. **Effect on Construction of Statutes.** — *Talbot v. Seeman*, 1 Cranch (U. S.) 1; *Murray v. Schooner Charming Betsy*, 2 Cranch (U. S.) 64; *Little v. Barreme*, 2 Cranch (U. S.) 170.

5. **Powers of Federal Government.** — *Kennett v. Chambers*, 14 How. (U. S.) 38.

6. **Text Writers.** — That the opinions of writers are evidence of the rules of international law has been recognized in judicial decisions. Lord Stowell in *The Maria*, 1 C. Rob. 351; *Hilton v. Guyot*, 159 U. S. 113.

In *Triquit v. Bath*, 3 Burr. 1478, in order to justify his own reliance on such opinions, Lord Mansfield said: "I remember, in a case before Lord Talbot, of *Buvot v. Barbut*, * * * Lord Talbot declared a clear opinion that the law of nations in its full extent was part of the law of England, * * * that the law of nations was to be collected from the practice of different nations and the authority of writers. Accordingly he argued and determined from such instances, and the authority of Grotius, Barbeyrac, Bynkershoek, Wiquefort, etc., there being no English writer of eminence upon the subject."

"No civilized nation that does not arrogantly set all ordinary law and justice at defiance will venture to disregard the uniform sense of the established writers on international law." 1 Kent's Com. 19.

The Institute of International Law, which is an association of the leading writers on this subject, adopts from time to time resolutions expressive of the opinions of the members on questions of international law, and these resolutions have the authority which attaches to the mature expression of the views of the leading international jurists, though frequently they state not so much what the assenting members think is the law as what they think should be the law.¹

b. TREATIES. — Treaties and conventions between states may or may not be strong evidence of rules of international law on the subjects referred to therein, according to their character and purpose. A treaty which is intended to change or fix such rules, if signed by practically all the civilized powers likely in any way to be affected by it, is of such great authority that the rules declared thereby may be considered as thereafter a part of international law.² If, however, any state intimately concerned in the subject of the rules, especially if one of the great powers, withholds its assent thereto, the treaty can be regarded as showing a tendency merely, and not as fixing an absolute rule binding on all nations.³ On the other hand, stipulations in treaties between two nations as to their mutual conduct in certain respects generally show either that the rules of international law are otherwise or that they are uncertain, since if this were not the case the stipulations would not be necessary. Such treaty stipulations may, however, if repeated in numerous treaties between different nations, gradually establish a usage and rules in accordance therewith, and they themselves will then gradually disappear as having become unnecessary.⁴

c. DECISIONS OF INTERNATIONAL TRIBUNALS AND JUDICIAL DECISIONS. — The decision of an international tribunal instituted for the purpose of deciding a particular question in dispute has, it would seem, apart from the particular case, a weight dependent upon the character of the persons composing the tribunal and the reasons given for the decision.⁵

See the full discussion of the question in the opinion of Brett, J. A., in *Reg. v. Keyn*, 2 Ex. D. 127.

1. *Institute of International Law.* — See 1 Rivier's *Droit des Gens* 33.

2. *General Treaties or Conventions.* — Among treaties which may be regarded as establishing rules of international law may be mentioned the declaration of the Congress of Vienna of 1815, which fixed diplomatic precedence, and the Geneva Convention of 1864, which, since the adhesion of the United States in 1882, may be regarded as having established the neutral character of persons and things employed in the care of the sick and wounded in war.

3. *Nonconsenting States.* — The Declaration of Paris asserting rules of warfare at sea, though signed by the great powers of Europe, cannot be regarded as fixing the rules in that regard, since it has not secured the adhesion of the United States, Mexico, and Spain, though its rules have been followed in all wars since that time between civilized nations. 2 Rivier's *Droit des Gens* 254.

4. *Treaties Between Particular States.* — The stipulation in the treaty of 1785, between the United States and Prussia, that contraband goods should not be confiscated, but merely detained, was a case in which the treaty provision was directly contrary to the acknowledged practice of nations; and so the varying provisions as to what constitute contraband in various treaties made by the United States are but evidence of the uncertainty of the law in that regard. See *infra*, this title, *Rights and*

Liabilities of Neutral Subjects — Contraband of War.

Mr. Hall, a recognized authority, says (*Int. Law*, 4th ed., 12) that treaties "differ only from other evidences of national opinion in that their true character can generally be better appreciated; they are strong, concrete facts, easily seized and easily understood. They are, therefore, of the greatest use as marking points in the movement of thought. If treaties modifying an existing practice, or creating a new one, are found to grow in number, and to be made between states placed in circumstances of sufficient diversity; if they are found to become nearly universal for a while, and then to dwindle away, leaving a practice more or less confirmed; then it is known that a battle has taken place between new and old ideas, that the former called in the aid of special contracts till their victory was established, and that when they no longer needed external assistance, they no longer cared to express themselves in the form of so-called conventional law. While, therefore, treaties are usually allied with a change of law, they have no power to turn controverted into authoritative doctrines, and they have but little independent effect in hastening the moment at which the alteration is accomplished."

5. *International Tribunals.* — Mr. Wheaton says (*Dana's Wheaton's Int. Law*, § 15) that the decision of an international tribunal is entitled to greater weight than that of an admiralty court; but this would seem to be the case only when the members of the tribunal possess the

The Decisions of Prize Courts on questions of international law have, in the country in which they are rendered, the same force as precedents which belong to decisions on questions of municipal law, while in other countries they are respected in proportion to the ability of the judge and the character of the decision.¹ In *England* and the *United States*, however, there is naturally a tendency to impute greater authority to such decisions as declarations of the rules of international law than in the continental states, where decisions have no place in establishing or determining the municipal law, but are merely determinations of the rights growing out of the particular case.² The decision of a prize tribunal is supposed to be rendered with absolute impartiality, without reference to the fact that the rights of the particular state in which the tribunal is sitting, or of the subjects of such state, may be involved, the tribunal being in theory international, and not of one particular state.³ Such decisions, however, though they may be binding as precedents upon the tribunals of the same nation, are not conclusive as to the rules of international law, unless there is express or tacit assent thereto on the part of other nations.⁴

d. STATE PAPERS. — State papers and diplomatic correspondence are often of very considerable weight in determining the practice of nations, though their value is dependent to a considerable extent upon the ability of the statesmen preparing them or the occasions calling them forth. With these may be included the opinions of the legal advisers of the government on questions submitted to them by it.⁵

same character, ability, and learning as the admiralty judges and the grounds given for their decision are of a convincing character.

1. **Judicial Decisions.** — In *Thirty Hogsheads Sugar v. Boyle*, 9 Cranch (U. S.) 191, Marshall, C. J., said: "The decisions of the courts of every country show how the law of nations, in the given case, is understood in that country, and will be considered in adopting the rule which is to prevail in this. Without taking a comparative view of the justice or fairness of the rules established in the British courts and of those established in the courts of other nations, there are circumstances not to be excluded from consideration which give to those rules a claim to our attention that we cannot entirely disregard. The United States having, at one time, formed a component part of the British empire, their prize law was our prize law. When we separated, it continued to be our prize law, so far as it was adapted to our circumstances and was not varied by the power which was capable of changing it. It will not be advanced, in consequence of this former relation between the two countries, that any obvious misconstruction of public law made by the British courts will be considered as forming a rule for the American courts, or that any recent rule of the British courts is entitled to more respect than the recent rules of other countries. But a case professing to be decided on ancient principles will not be entirely disregarded, unless it be very unreasonable, or be founded on a construction rejected by other nations." See also 1 Kent's Com. 18.

2. Dana's Wheaton's Int. Law, note 11; Lawrence on Int. Law, § 64.

Judicial Decisions Parts of Law Itself. — Mr. Dana says: "So far as international law rests on the practice of nations, judicial decisions in prize causes are parts of the law itself," since if adopted and carried out by the sovereign such a decision has the double authority

of being a solemn judicial decision and also a national act, on national responsibility, both when the decision is against the court's own sovereign and his immediate interests, and also, though in a less degree, when it is in favor of the sovereign and he carries it out with the acquiescence of a neutral sovereign whose subject is the loser. Dana's Wheaton's Int. Law, note 11.

3. **Duties of Prize Tribunal.** — In *The Maria*, 1 C. Rob. 340, Sir William Scott said, in a case involving Swedish vessels: "It is the duty of the person who sits here to determine this question exactly as he would determine the same question if sitting at Stockholm; to assert no pretensions on the part of Great Britain which he would not allow to Sweden in the same circumstances, and to impose no duties on Sweden, as a neutral country, which he would not admit to belong to Great Britain in the same character. If, therefore, I mistake the law in this matter, I mistake that which I consider, and which I mean should be considered, as the universal law upon the question." For quotations suggesting doubts as to how far this judge carried out the idea of his duty thus expressed, see Wharton's Dig. Int. Law, § 329a.

4. **Judicial Decisions Not Necessarily Conclusive of International Rules.** — So it was decided by the Geneva Arbitration Tribunal in regard to various claims that the decisions of neither the British nor the American prize tribunals could affect the mutual responsibilities of the two nations. Wharton's Dig. Int. Law, §§ 329, 359. See also Wharton's Dig. Int. Law, § 329a; Lawrence on Int. Law, § 64.

5. **State Papers.** — Dana's Wheaton's Int. Law, § 15.

The state papers of the United States bearing upon questions of international law, including documents issued by the presidents and the secretaries of state and the opinions of the

2. INSTRUCTIONS ISSUED BY STATES. — The executive branch of a government quite frequently issues instructions for the government of its prize courts or for the conduct of its naval or land forces during war, and these are evidence of a more or less positive nature in regard to the rights and liabilities of belligerents and neutrals.¹

5. Persons in International Law — *a.* STATES WHOLLY OR PARTIALLY INDEPENDENT. — The subjects of international law are primarily independent states, the distinctive marks of which are that they are communities permanently established for political ends, possessing a defined territory and independent of external control.² In addition, a state which is in part subject to the control of another state or some central authority is within the purview of international law, so far as its external affairs are not subject to that control. Members of a confederation,³ protected states, which are states that have placed themselves under the protection of other powers,⁴ and states under suzerainty,⁵ are examples of such partial independence.

b. EFFECT OF DIVISION OF STATE. — Upon the formation of one state out of part of another, the new state acquires the rights and becomes subject to the obligations of the old state, in so far as these have a direct reference to the territory included in the new state. Consequently it takes such territory subject to any privileges accorded by treaty to the subjects of other states, and likewise subject to public debts of a local character. Conversely, it succeeds to the benefit of any treaty stipulations which are directly for the benefit of the inhabitants of its territory, and it acquires also public property located within that territory.⁶

Effect of Cession of Territory. — The same general results follow a cession of part of its territory by one state to another state as when a portion of a state becomes independent. The territory is transferred, apart from treaty stipulations to the contrary, subject to the debts which specially belong to it, while no part of the general debt of the ceding state will pass with the territory ceded unless there is a special provision to that effect in the treaty of cession.⁷

c. RECOGNITION OF NEW STATE. — Apart from the rare instances in which a state is formed upon territory not previously belonging to a civilized power, or in which a state is brought by increase in its civilization within the realm of international law, new states generally come into existence by break-

attorneys-general, are collected in Wharton's Digest of the International Law of the United States, prepared and issued under the auspices of the United States government.

As illustrating the effect of state papers in applying recognized principles to particular states of fact, and so tending to clarify and determine the duties of nations in those regards, the position taken in the diplomatic correspondence of this country at different times in regard to the rights and duties of neutral states, particularly during the administration of Washington and during the civil war, may be instanced. See *infra*, this title, *Rights and Duties of Neutral States*.

1. Instructions Issued by States. — The French Marine Ordinance of 1681, and the "Instructions for the Guidance of the Armies of the United States in the Field," prepared by Francis Lieber and issued by the war department in 1863, are prominent examples of this class of instruments, and have been cited freely by jurists of other nations as authority upon questions referred to therein. See Lawrence on Int. Law, § 66; Dana's Wheaton's Int. Law, § 15.

2. Independent States. — Hall on Int. Law (4th ed.), § 1; Dana's Wheaton's Int. Law, § 20.

3. Confederations. — The typical example of confederation is the German confederation existing from 1820 to 1866, in which both the central authority, the diet, and the individual states had the power of receiving and accrediting envoys, of concluding treaties, and of declaring war. See Dana's Wheaton's Int. Law, § 47 *et seq.*

4. Protected States. — Though the protectorate of Great Britain over the Ionian Islands in effect gave the full executive authority in the islands to Great Britain, it was held that it did not so merge their identity in that of the British government that their neutrality was impaired by the Crimean war. The *Leucade*, Spinks Prize Cases 237.

5. States under Suzerainty. — The chief examples of states under suzerainty at the present time are some of the provinces of the Turkish empire, such as Bulgaria and Egypt, which possess such external powers only as are expressly given to them. See Hall on Int. Law (4th ed.), § 4; Lawrence on Int. Law, § 50.

6. Division of State. — Hall on Int. Law (4th ed.), § 27.

7. Cession of Territory. — Hall on Int. Law (4th ed.), § 28; 1 Rivier's *Droit des Gens* 214. See also Wharton's Dig. Int. Law, § 5.

ing off from an existing state. In this latter case, the question of recognition of the independence of the new state, either by the parent country or by a third power, arises. A third power is not justified in giving such recognition until independence is actually established, or while a substantial struggle to subdue the new state is being made by the parent country, but recognition is proper when the efforts to recover authority are so inadequate as to offer no reasonable ground for supposing that success may ultimately be obtained. Premature recognition is considered as equivalent to intervention, and may on occasion be cause for war on the part of the parent state against that giving the recognition. Such recognition of a new state as an independent nation may be by express declaration addressed to the new state, by negotiation of a treaty with it, by reception of its diplomatic agents or sending a minister to it, and in general by any act fairly indicating an intention to recognize it.¹

Communications Not Involving Recognition may, however, take place between the insurgent government and a foreign state, and of this the parent state cannot complain, since the foreign state must necessarily, for the protection of its citizens and commerce, deal with the authorities actually in control of a portion of the state, though the struggle to subdue the insurrection is still actively going on.²

II. RIGHTS AND OBLIGATIONS IN TIME OF PEACE — 1. Territorial Property of State — a. ACQUISITION OF TERRITORY — (1) Occupation. — Territory may be acquired by a state by occupation of land previously unoccupied by any civilized state.³ This is a matter chiefly of historical interest at the present

1. Recognition of Independence. — Hall on Int. Law (4th ed.), § 26; 1 Rivier's *Droit des Gens* 57; Dana's *Wheaton's Int. Law*, note 16.

Mr. J. Q. Adams, secretary of state, writing to President Monroe in 1816, as stated by Mr. Hall, "pointed out admirably the considerations of law, of morals, and of expediency which are involved in recognition." Mr. Adams said: "There is a stage in such (revolutionary) contests when the party struggling for independence has, as I conceive, a right to demand its acknowledgment by neutral parties, and when the acknowledgment may be granted without departure from the obligations of neutrality. It is the stage when the independence is established as matter of fact so as to leave the chance of the opposite party to recover their dominion utterly desperate. The neutral nation must, of course, judge for itself when this period has arrived; and as the belligerent nation has the same right to judge for itself, it is very likely to judge differently from the neutral, and to make it a cause or pretext for war, as Great Britain did expressly against France in our Revolution, and substantially against Holland. If war thus results, in point of fact, from the measure of recognizing a contested independence, the moral right or wrong of the war depends upon the justice and sincerity and prudence with which the recognizing nation took the step. I am satisfied that the cause of the South Americans, so far as it consists in the assertion of independence against Spain, is just. But the justice of a cause, however it may enlist individual feelings in its favor, is not sufficient to justify third parties in siding with it. The fact and the right combined can alone authorize a neutral to acknowledge a new and disputed sovereignty." Wharton's *Dig. Int. Law*, § 70.

Question for Executive. — The courts cannot

treat a revolutionary party as a state until recognized by the executive. U. S. : Palmer, 3 Wheat. (U. S.) 610; The *Estrella*, 4 Wheat. (U. S.) 298; *Williams v. Suffolk Ins. Co.*, 13 Pet. (U. S.) 415. See also U. S. v. *Hutchings*, (U. S. Cir. Ct.) 2 Wheel. Crim. (N. Y.) 543; *Consul of Spain v. The Schooner Conception*, (U. S. Cir. Ct.) 2 Wheel. Crim. (N. Y.) 597.

Spanish Republics. — In 1818 a resolution in Congress in favor of the recognition of the independence of the Spanish republics as a result of the insurrection which had begun in 1810 was rejected, though at that time several of the South American provinces had become completely free from the Spanish domination, it not being thought that the permanence of the existing order was sufficiently assured so long as Spain had a reasonable chance of success in part of the states the recovery of which would aid her in proceeding against the others; but in 1822, the Spaniards having been expelled, with the exception of garrisons in a few isolated positions, President Monroe declared in his message to Congress that it was a question whether their right to the rank of independent states was not complete, and recognition followed shortly afterwards. See as to recognition of the South American republics and Texas, Wharton's *Dig. Int. Law*, § 70; Dana's *Wheaton's Int. Law*, note 16.

2. Communications Not Involving Recognition. — See Dana's *Wheaton's Int. Law*, note 16.

3. Occupation. — In *Jones v. U. S.*, 137 U. S. 212, in upholding the power of the United States to legislate concerning guano islands, Gray, J., speaking for the court, said: "By the law of nations, recognized by all civilized states, dominion of new territory may be acquired by discovery and occupation, as well as by cession or conquest; and when citizens or subjects of one nation, in its name, and by its authority or with its assent, take and hold

time except so far as Africa is concerned, and there the matter has been generally settled by agreement between the powers interested, especially by the West African conference of 1885 at Berlin.¹ It is now generally agreed that discovery of territory alone, if not followed by occupation, is not sufficient to give title, and to give any rights the occupation must be to a certain extent continuous.²

(2) *Cession and Conquest*. — Territory may also be acquired through cession by one state to another. Cession may be the result of amicable negotiation and agreement, though more frequently it is the result of war and is the price paid for peace by the vanquished state.³ If the successful party to a war takes and retains possession of territory by force of arms without obtaining an actual cession it is said to acquire the territory by conquest, the results, however, being apparently the same in this case as when there is an act of cession.⁴

Effect of Cession. — The effect of cession of territory as regards the rights and obligations of the states directly concerned is considered elsewhere in this title.⁵ The laws previously existing continue until superseded by others.⁶ The individual inhabitants of conquered territory become subjects of the conquering state, as is the case when a cession of territory occurs. In modern treaties of peace and of cession, however, there is generally a provision allowing to natives of the ceded territory the right to retain their former nationality, though this is frequently on condition that they withdraw to the territory of the state allegiance to which they so retain.⁷ It has frequently been decided in the *United States* that the cession of territory does not affect the property rights of individuals.⁸ In a late *English* case it is said that while a change of sovereignty by cession ought not to affect private property, no municipal tribunal has authority to enforce such an obligation.⁹ It is not, however, the duty of the nation receiving the cession to redress wrongs which the grantor nation may have theretofore committed against individuals, except, perhaps, in cases where the wrong was so recently committed that the

actual, continuous, and useful possession (although only for the purpose of carrying on a particular business, such as catching and curing fish, or working mines) of territory unoccupied by any other government or its citizens, the nation to which they belong may exercise such jurisdiction and for such period as it sees fit over territory so acquired."

1. See Hall on Int. Law (4th ed.), § 33; Lawrence on Int. Law, §§ 93, 95. As to the part of the United States in this conference see Wharton's Dig. Int. Law, § 51.

2. **Discovery.** — Hall on Int. Law (4th ed.), §§ 32-34; Letter of Mr. Fish, secretary of state, to Mr. Preston, Wharton's Dig. Int. Law, § 2; 1 Rivier's *Droit des Gens* 188 *et seq.*

3. **Cession of Territory.** — See Hall on Int. Law, §§ 28, 35. The importance of cession as a mode of acquisition of territory is seen in the case of the United States, most of whose territory has been thus acquired.

4. **Conquest.** — Hall on Int. Law, § 204 *et seq.*; Dana's Wheaton's Int. Law, note 169. See also *Johnson v. McIntosh*, 8 Wheat. (U. S.) 588.

5. **Effect of Cession or Conquest.** — See *supra*, this title, *General Principles — Persons in International Law — Effect of Division of State*.

6. **Continuance of Pre-existing Laws.** — *U. S. v. Power*, 11 How. (U. S.) 570; *American Ins. Co. v. 356 Bales Cotton*, 1 Pet. (U. S.) 511; *Cessna v. U. S.*, 169 U. S. 165. See also the title FOREIGN LAWS, vol. 13, p. 1050.

7. **Nationality of Individuals.** — Hall on Int. Law (4th ed.), § 206; 2 Halleck on Int. Law 486.

In *U. S. v. Repentigny*, 5 Wall. (U. S.) 211, it was said that the conqueror who has obtained permanent possession of the enemy's country has the right to forbid the departure of his new subjects or citizens from it and to exercise his sovereign authority over them; and it was decided that where the treaty ceding the conquered territory provided that the former inhabitants who wished to adhere to their vanquished sovereign might sell their property, provided they sold it to a certain class of persons and within a time named, the property, if not so sold, became abandoned to the conqueror.

8. **Effect on Private Property Rights.** — *Leitensdorfer v. Webb*, 20 How. (U. S.) 176; *Strother v. Lucas*, 12 Pet. (U. S.) 410; *U. S. v. Arredondo*, 6 Pet. (U. S.) 691; *Jones v. Masters*, 20 How. (U. S.) 8; *U. S. v. Repentigny*, 5 Wall. (U. S.) 211; *U. S. v. Percheman*, 7 Pet. (U. S.) 51; *Delassus v. U. S.*, 9 Pet. (U. S.) 117; *Mutual Assur. Soc. v. Watts*, 1 Wheat. (U. S.) 279; *U. S. v. Moreno*, 1 Wall. (U. S.) 400; *Cessna v. U. S.*, 169 U. S. 165; *U. S. v. Rillieux*, 14 How. (U. S.) 189; *Fowler v. Smith*, 2 Cal. 39; *Chew v. Calvert*, Walk. (Miss.) 54.

9. *Cook v. Sprigg*, (1890) A. C. 572, 68 L. J. P. C. 144. This case seems to be in conflict with the American decisions above cited, and has been severely criticised. See 16 L. Quar. Rev. 1.

individual may not have had time to appeal to the courts or other authorities of the grantor nation for redress.¹

(3) *Prescription*. — Prescription, or long-continued firm possession, especially if undisputed, is sufficient to give an absolute title to territory possession of which was originally taken wrongfully, or where no original source of proprietary right can be shown to exist.²

(4) *Accretion*. — By the action of water new formations of land may arise, either in actual contact with the pre existing land or in waters near the land. In the former case the new formation belongs to the owner of the land to which it is attached, while in the latter case its ownership is generally determined by the pre-existing boundary.³

b. **RIGHTS OVER RIVERS.** — There has at times been considerable controversy as to the right of a nation whose territory is traversed by a river to exclude other nations from the use of such river or to impose burdens in compensation for such use, especially when the other nation possesses territory abutting on such river nearer to its source. It seems that in strictness a nation has the right so to restrain the use of its rivers by other nations. At the present day, however, there is a marked tendency among nations to permit the free use of rivers for navigation by foreigners, as a result of a more enlightened commercial policy, and numerous provisions have been made by treaty for such use.⁴

Rivers as Boundaries. — When a great river is a boundary between two nations

1. **Redress of Previous Wrongs.** — *Cessna v. U. S.*, 169 U. S. 165.

2. **Prescription.** — Hall on Int. Law (4th ed.), § 36; 1 Rivier's *Droit des Gens* 182; Dana's *Wheaton's Int. Law*, § 164 and note 101.

3. **Accretion.** — 1 Phillimore on Int. Law, §§ 238-240; Bluntschli, §§ 295-299; 1 Halleck on Int. Law 146. See also the title ACCRETION, vol. 1, p. 467.

In *The Anna*, 5 C. Rob. (Reprint) 332, on the question as to whether small mud islands at the mouth of the Mississippi, composed of earth and trees drifted down by the river, were part of the United States, Sir William Scott said: "I think that the protection of territory is to be reckoned from these islands, and that they are the natural appendages of the coast on which they border, and from which indeed they are formed. Their elements are derived immediately from the territory, and on the principle of alluvium and increment, on which so much is to be found in the books of law. * * * Consider what the consequence would be if lands of this description were not considered as appendant to the mainland, and as comprised within the bounds of territory. If they do not belong to the United States of America, any other power might occupy them; they might be embanked and fortified. What a thorn would this be in the side of America! It is physically possible at least that they might be so occupied by European nations, and then the command of the river would be no longer in America, but in such settlements."

4. **Rights over Rivers.** — See Hall on Int. Law (4th ed.), § 39; 1 Halleck on Int. Law 147; Woolsey on Int. Law, § 62. See also the title WATERCOURSES.

The Mississippi and St. Lawrence. — During the ownership by Spain of both banks of the Mississippi at its mouth, a question arose as to the right of the United States to make use of the river from its source to the sea, but this

was settled by treaty in 1795. The right of the United States to make use of the St. Lawrence river passing through British territory has been at times a matter of dispute between Great Britain and the United States, the latter insisting on the right of free passage, the lakes by which it is fed being in large part bounded by the United States. In reference to this, Sir Robert Phillimore (Int. Law, 3d ed., 245) says: "It is difficult to deny that Great Britain may have grounded her refusal upon strict law; but it is at least equally difficult to deny, first, that in so doing she puts in force an extreme and hard law; secondly, that her conduct with respect to the navigation of the St. Lawrence was inconsistent with her conduct with respect to the navigation of the Mississippi. On the ground that she possessed a small tract of domain in which the Mississippi took its rise, she insisted on her right to navigate the entire volume of its waters; on the ground that she possessed both banks of the St. Lawrence where it disembogued itself into the sea, she denied to the United States the right to navigation, though about one-half of the waters of lakes Ontario, Erie, Huron, and Superior, and the whole of Lake Michigan, through which the river flows, were the property of the United States." The question was settled by the reciprocity treaty of June 5, 1854, and later by the treaty of Washington of May 8, 1871, giving citizens of the United States the right to use the river subject to proper laws and regulations.

Other Rivers. — The various tolls on the river Rhine were abolished by convention in 1804, and in 1815, by the Congress of Vienna, the navigation of various other European rivers was declared to be free. In 1856, by the treaty of Paris, the same principle was applied to the Danube. Hall on Int. Law (4th ed.), § 39; Dana's *Wheaton's Int. Law*, § 197 and notes 116, 117. For references to other similar treaties, in regard particularly to South Ameri-

or states, if the original property is in neither and there be no convention in regard to it, each holds to the middle of the stream.¹ But in such cases the waters of the whole river are to be considered as given to both nations for all purposes of navigation as a common highway.² Where a state which has the original proprietorship cedes the territory on one side of the river, making the river the boundary, it retains the river unless there is an express stipulation to the contrary.³

c. **RIGHTS OVER SEAS.** — The theory which formerly obtained that a state could by appropriation obtain predominant rights in parts of the high seas is now entirely exploded, and the rights of any nation are now restricted to a marginal belt. The extent of such belt has been regarded as extending three miles from the shore. This distance was fixed by the supposed range of a cannon, and the more recent extension of the power of artillery suggests the possible desirability of increasing this distance.⁴ The distance of one marine league from the coast has generally been recognized by the United States government in negotiations with other nations.⁵ The same position has been taken by the courts of the *United States*,⁶ and likewise by the courts of *Great Britain* and *Canada*.⁷

Rights Within Marginal Waters. — Within the territorial waters thus defined, fisheries are reserved to the subjects and citizens of the adjacent state exclusively, and the commission of acts of war within them constitutes a violation of the neutral rights of such state; but it is agreed that all states have a right of innocent passage through such waters by vessels other than ships of war, provided such passage is necessary or convenient for the navigation of the open sea.⁸

can rivers, see President Grant's second annual message, 1870, Wharton's Dig. Int. Law, § 30; Hall on Int. Law (4th ed.) § 39.

1. **Rivers as Boundaries.** — *Handly v. Anthony*, 5 Wheat. (U. S.) 374; *The Schooner Fame*, 3 Mason (U. S.) 147.

2. *The Apollon*, 9 Wheat. (U. S.) 362; *The Schooner Fame*, 3 Mason (U. S.) 147.

3. *Handly v. Anthony*, 5 Wheat. (U. S.) 375; *Howard v. Ingersoll*, 13 How. (U. S.) 381; *Henderson Bridge Co. v. Henderson*, 173 U. S. 592.

4. **Marginal Waters.** — See Hall on Int. Law (4th ed.), § 41; Dana's Wheaton's Int. Law, note 108; Lawrence on Int. Law, § 91; 1 Rivier's *Droit des Gens* 145 *et seq.*

5. **Position of United States.** — In 1886 Mr. Bayard, secretary of state, wrote, "We may therefore regard it as settled * * * that, so far as concerns the eastern coast of North America, the position of this department has uniformly been that the sovereignty of the shore does not, so far as territorial authority is concerned, extend beyond three miles from low-water mark, and that the seaward boundary of this zone of territorial waters follows the coast of the mainland, extending where there are islands so as to place round such islands the same belt. This necessarily excludes the position that the seaward boundary is to be drawn from headland to headland, and makes it follow closely, at a distance of three miles, the boundary of the shore of the continent or of adjacent islands belonging to the continental sovereign. The position I here state, you must remember, was not taken by this department speculatively. It was advanced in periods when the question of peace or war hung on the decision." See 1 Wharton's Dig. Int. Law, § 32.

6. **Judicial Decisions.** — *Church v. Hubbard*, 2 Cranch (U. S.) 187; *The Brig Ann*, 1 Gall. (U. S.) 62; *Manchester v. Massachusetts*, 139 U. S. 240; *Dunham v. Lamphere*, 3 Gray (Mass.) 268.

7. **Position of British Courts.** — *Reg. v. Keyn*, 2 Ex. D. 63; *Gammell v. Woods*, etc., Com'rs, 3 Macq. H. L. 419; *Mowat v. McFee*, 5 Can. Sup. Ct. 66.

Criminal Jurisdiction. — In *Reg. v. Keyn*, 2 Ex. D. 63, the defendant was prosecuted for manslaughter in so negligently managing a vessel under his charge as to cause a collision with another vessel, a passenger on which was killed thereby, the collision occurring within three miles of the English coast. While it was generally agreed by the judges that a nation has jurisdiction for certain purposes over the open sea to the extent of at least three miles, it was held by the majority of the court that without special statutory authority the criminal courts had no jurisdiction of offenses within the three-mile limit, while two judges (Kelly, C. B., and Sir R. Phillimore) held that by the principles of international law the power of a nation over the sea within three miles of its coast is only for certain limited purposes, and hence that Parliament could not apply English law within those limits. In consequence of this decision a statute (41 & 42 Vict., c. 73) was passed, giving criminal jurisdiction of offenses committed within these limits.

In *U. S. v. Kessler*, *Baldw.* (U. S.) 15, a prosecution for piracy committed on a foreign vessel, *Hopkinson, J.*, took a view apparently similar to that of the two dissenting judges in the English case.

8. **Rights Within Marginal Waters.** — Hall on Int. Law (4th ed.), § 42.

Straits, Gulfs, and Bays. — The rule of the marine league above referred to would give exclusive rights in straits, gulfs, or bays to the country owning the shores of the particular body of water if the mouth of such body is less than six miles wide, and not otherwise.¹ As a matter of fact, however, such waters are generally claimed as national even though the mouth be of greater breadth than six miles, provided the configuration of the coast practically severs the body of water from the sea.²

d. PROTECTORATES. — Of recent years there has been a tendency on the part of civilized nations to establish protectorates over uncivilized or half-civilized people instead of making the territory occupied by them an integral part of the protecting state. The internal government of the protected people is to a considerable extent left undisturbed in case of a protectorate, while the protecting nation assumes control as regards foreign nations, and is bound to see that reasonable security is afforded to foreign nations and subjects. Generally, also, it exercises some measure of internal control, the amount of which differs in different cases.³

e. SPHERES OF INFLUENCE. — The term "sphere of influence" has been introduced in recent years with reference to agreements made between two or more civilized powers to the effect that one alone of them shall have the right to occupy, conquer, or exercise a protectorate in a particular territory, the other parties agreeing to refrain from all political action therein. Such an agreement gives no rights to the territory as against powers not parties to the agreement, unless recognized by them as binding, and the influencing state is likely therefore to feel obliged, in order firmly to establish its rights in the particular territory, gradually to establish some actual form of government or protectorate therein.⁴

2. Sovereignty and Jurisdiction — **a. GENERALLY COEXTENSIVE WITH TERRITORY.** — A state has, as a general rule, absolute and exclusive jurisdiction over persons and things within its territory, and no powers within the territory of any other state.⁵

"We do not, in asserting this claim [of the three-mile limit] deny the free right of vessels of other nations to pass on peaceful errands through this zone, provided they do not, by loitering, produce uneasiness on the shore or raise a suspicion of smuggling. Nor do we hereby waive the right of the sovereign of the shore to require that armed vessels, whose projectiles, if used for practice or warfare, might strike the shore, should move beyond cannon range of the shore when engaged in artillery practice or in battle, as was insisted on by the French government at the time of the fight between the Kearsarge and the Alabama, in 1864, off the harbor of Cherbourg. We claim, also, that the sovereign of the shore has the right, on the principle of self-defense, to pursue and punish marauders on the sea to the very extent to which their guns would carry their shot, and that such sovereign has jurisdiction over crimes committed by them through such shot, although at the time of the shooting they were beyond three miles from shore." Mr. Bayard to Mr. Manning, Wharton's Dig. Int. Law, § 32.

1. Straits, Gulfs, and Bays. — Hall on Int. Law (4th ed.), § 41; 1 Rivier's Droit des Gens 153 *et seq.*; Manchester v. Massachusetts, 139 U. S. 240.

2. See Reg. v. Cunningham, 2 Bell's Cr. Cas. 72; Direct U. S. Cable Co. v. Anglo-American Tel. Co., 2 App. Cas. 304, in which latter case the Bay of Conception in Newfoundland, fifteen miles in mean breadth and running

forty miles into the land, was decided to be part of Newfoundland; but this was on the ground that the legislative authority had exercised jurisdiction over it.

The mixed commission appointed under the convention of 1853 between the United States and Great Britain, to settle claims by citizens of each nation against the other, decided that the Bay of Fundy was not within the jurisdiction of Great Britain, the bay being about sixty-five miles wide and one hundred and thirty long. Dana's Wheaton's Int. Law, note 142.

Behring Sea Award. — The United States having asserted a right to prohibit the catching of seals in the waters of Behring sea and to seize and condemn any vessels so fishing, and claims for damages caused to British ship-owners by such seizures having become the subject of controversy between Great Britain and the United States, the question was submitted to arbitration, and it was decided by the arbitrators that the United States had no such jurisdiction over the whole body of water known as Behring sea and could take measures for the protection of the seals only within the ordinary three-mile limit of marginal waters. The La Nina, 75 Fed. Rep. 513.

3. Protectorates. — Hall on Int. Law (4th ed.), § 38*; 1 Rivier's Droit des Gens 89.

4. Sphere of Influence. — Hall on Int. Law (4th ed.), § 38*; 1 Rivier's Droit des Gens 177; Lawrence on Int. Law, § 103.

5. Powers limited by Territorial Limits. — Hall

b. AS AFFECTED BY NATIONALITY OR DOMICIL OF PERSON. — The exercise by a state of powers of sovereignty over all persons within its limits is, however, in practice modified to a considerable extent in the case of subjects of another state, over whom it is exercised only so far as to subject them to political and police regulations, to the criminal jurisdiction of its courts, and, as regards certain property rights, to the ordinary laws of the country, they being treated in other respects as strangers to the body politic, not owing to it the duties of a subject or entitled to the rights of one.¹ Accordingly they are generally regarded as exempt from military service, unless the existence of the state is threatened by an invasion of uncivilized people, though they may be compelled to perform duties of a strictly police character.²

How Nationality Determined. — The question what constitutes a person a subject of one state rather than another, as when a person is born in one state of parents who are subjects of another, is viewed differently by different states. In *England* and the *United States* the rule is generally that one takes the nationality of the place of his birth, while in other countries the rule is, with some modifications and exceptions, that one's nationality follows that of his parents.³

Right of Expatriation. — The right of a subject of one nation to change his nationality is a question upon which the rules of the different nations are not entirely in harmony. The question arises as a matter of international law only when the state of one's birth attempts to assert claims of sovereignty over one who has taken steps to change his nationality, as when one's native country claims military service or civil duties from him, or seeks to punish him for treason when engaged in hostilities against her. It was formerly the law of *England* that one could not change his allegiance, or "expatriate" himself, and such has been at times asserted to be the law of the *United States*:⁴ but the executive department has frequently taken a different view,⁵ and it has been declared by Congress that the right of expatriation is a natural and inherent right of all people.⁶ In *Great Britain* it is now provided by statute that one naturalized in a foreign country ceases to be a British subject.⁷ The rules of other nations as to the rights of their subjects to expatriate themselves vary greatly, and in view of the inconveniences and disputes liable to arise from such differences between the state of one's nativity and the state to which he has sought to transfer his allegiance, this matter has frequently been made the subject of treaty provisions.⁸

Naturalization. — Almost every nation, however indisposed to permit its subjects to transfer their allegiance to other states, receives subjects of foreign states into its own political body and gives to them generally the privileges of native subjects. The conditions of such naturalization differ greatly in the

on Int. Law (4th ed.), § 10; 1 Rivier's *Droit des Gens* 326; Church v. Hubbard, 2 Cranch (U. S.) 187; Rose v. Himely, 4 Cranch (U. S.) 241; The Schooner Exchange v. M'Faddon, 7 Cranch (U. S.) 137.

Seizure Outside of Territory. — A nation cannot make a seizure for the breach of its municipal laws within the territory of another nation. The *Apollon*, 9 Wheat. (U. S.) 362; The *Ship Richmond* v. U. S., 9 Cranch (U. S.) 102. It may, however, make such a seizure for breach of its municipal laws upon the sea outside of its territory. Church v. Hubbard, 2 Cranch (U. S.) 187; Hudson v. Guestier, 6 Cranch (U. S.) 284, *overruling* Rose v. Himely, 4 Cranch (U. S.) 241; The *Apollon*, 9 Wheat. (U. S.) 362; The *Vixen*, 1 Dods. 136; The *Sarah Starr*, Blatchf. Prize Cas. 69.

1. Foreigners Within Territorial Limits. — Hall on Int. Law (4th ed.), § 10.

2. Aliens Not Liable to Military Service. — Hall on Int. Law (4th ed.), § 61, *citing* Bluntschli, § 391; Wharton's Dig. Int. Law, § 202.

3. How Nationality Determined. — See Hall on Int. Law (4th ed.), § 66 *et seq.*; U. S. v. Wong Kim Ark, 169 U. S. 649.

4. Right of Expatriation. — 2 Kent's Com. 49; 3 Story on Const. 3; Williams's Case, Whart. St. Tr. 652.

5. See Wharton's Dig. Int. Law, § 171; Dana's Wheaton's Int. Law, note 49.

6. Act July 27, 1868, Rev. Stat. U. S., § 1999. See also *Jennex v. Landes*, 84 Fed. Rep. 73.

7. See Hall on Int. Law (4th ed.), § 71.

8. See Hall on Int. Law (4th ed.), § 71, where Volume XVI.

various countries. The requirements of the United States in this regard are considered elsewhere.¹

Private International Law. — If the general rule of territorial jurisdiction were rigorously applied, every state would ignore entirely the laws of foreign states in determining the private rights of individuals as between themselves. In practice, however, partly as a matter of comity and partly as a matter of convenience, a system of rules has grown up by which, in certain cases, where the individuals concerned do not belong to the same state, or where they contract in a state to which they do not belong, or assert claims to property in such a state, the law of the state to which the individual belongs is allowed to operate instead of the territorial law, or the individual is allowed to be affected by a law other than that of the state in which he resides. This system of rules is called private international law, or the conflict of laws. It is not, however, a part of international law proper, which deals only with the relations of states, or of individuals as members of the state, and is elsewhere treated in this work.²

c. AS AFFECTED BY OFFICIAL CHARACTER OF PERSON — (1) *Foreign Sovereigns.* — A sovereign of one country who enters another country with the knowledge and license, express or implied, of its sovereign, is universally recognized as exempt from arrest or detention, it being assumed that he does not intend to subject himself to a jurisdiction incompatible with his dignity or the dignity of his nation.³ This exemption also extends to members of his suite.⁴

(2) *Diplomatic Officers.* — A much more important, because more frequent, exception to the general rule giving exclusive jurisdiction to a state within its own limits occurs in the case of diplomatic representatives of a foreign state, who, with the members of their families and of their suites, are generally exempt from the local jurisdiction, either civil or criminal.⁵

(3) *Foreign Troops Passing through Territory.* — Permission is sometimes accorded by one nation to another for passage over the territory of the former by troops belonging to the latter.⁶ In such case there is an implied understanding that such troops shall not be subject to the local jurisdiction.⁷

d. SUBJECTS OF CIVILIZED STATES IN SEMICIVILIZED COUNTRIES. — In view of the different methods of judicial procedure existing in oriental countries from those prevailing in the most highly civilized nations, and the risk that Christians would undergo in being made subject to the native jurisdiction, treaties have very generally been made between the so-called Christian powers and such countries, by which the administration of justice, when involving the rights of a subject of a Christian nation, is reserved to the consular courts of such nation, these courts consisting of the local consul, either alone or assisted by others of his nation, with a right of appeal in some cases to the courts of his own nation.⁸

e. VESSELS ON HIGH SEAS. — Every vessel, whether public or private, is, while on the high seas, subject to the exclusive jurisdiction of the nation to

the practice of the more important states in this regard is fully stated.

1. **Naturalization.** — See the title **ALIENS**, vol. 2, p. 64.

2. **Private International Law.** — See the title **PRIVATE INTERNATIONAL LAW**.

3. **Foreign Sovereigns Not Subject to Jurisdiction.** — Marshall, C. J., in *The Schooner Exchange v. M'Faddon*, 7 Cranch (U. S.) 116; 1 Rivier's *Droit des Gens* 416.

4. Hall on *Int. Law* (4th ed.), § 40; 1 Rivier's *Droit des Gens* 416.

5. **Diplomatic Officers.** — Hall on *Int. Law* (4th ed.), § 50; Wharton's *Dig. Int. Law*, §§ 92-96.

See, for a full treatment of this subject, the title **MINISTERS AND AMBASSADORS**.

6. **Foreign Troops.** — Wharton's *Dig. Int. Law*, § 13.

7. Dana's *Wheaton's Int. Law*, § 99; Hall on *Int. Law* (4th ed.), § 56; *The Schooner Exchange v. M'Faddon*, 7 Cranch (U. S.) 116.

8. **Consular Courts.** — See Wharton's *Dig. Int. Law*, § 125; 1 Rivier's *Droit des Gens* 550 *et seq.* And see the title **CONSULS**, vol. 7, p. 17 *et seq.* In *Egypt* mixed tribunals, composed partly of natives and partly of foreigners, have been substituted for consular courts, and these tribunals have proven more satisfactory, it is

which it belongs.¹ The *American* authorities generally regard this rule as based upon the principle that a vessel on the high seas is for legal purposes a part of the territory of the state to which it belongs.² This view, however, is combated by some writers, especially in the case of private vessels.³ The assertion of such jurisdiction over vessels as between nations has been called for most frequently in the case of crimes committed on shipboard.⁴ But in the case of persons on board of a merchant vessel who are of a nationality other than that of the vessel, claims of concurrent jurisdiction in the sovereign of such persons have also been advanced.⁵ The right to exclusive jurisdiction may also be asserted for the purpose of protecting the vessel from unfriendly acts on the part of other powers.⁶

f. VESSELS IN FOREIGN PORTS — (1) *Public Vessels*. — A public vessel of a state is exempt from the jurisdiction of a foreign nation within whose waters she may be found, though she is under the obligation of respecting the laws and regulations of such foreign country. The only remedy of the foreign state for an infraction of its laws is by complaint to the state to which the vessel belongs, except in extreme cases, as where the peace of the country is seriously threatened, when the vessel may properly be ordered out of the country, or, if necessary, forcibly expelled.⁷

said, than the old consular courts. See Lawrence on Int. Law, § 131; 1 Rivier's *Droit des Gens* 550 *et seq.*

1. *Jurisdiction of Vessels on High Seas*. — Dana's *Wheaton's Int. Law*, § 106; 1 Kent's *Com.* 26; *U. S. v. Rodgers*, 150 U. S. 249; *Crapo v. Kelly*, 16 Wall. (U. S.) 610; *R. v. Lesley*, 8 Cox C. C. 269; *Chinese Cabin Waiter's Case*, 13 Fed. Rep. 286.

2. *Vessel Part of Territory*. — It was so held in *Crapo v. Kelly*, 16 Wall. (U. S.) 610, and it has been so stated by the executive department. See Mr Webster to Lord Ashburton, Aug. 8, 1842 and Mr. Evarts to Mr. Welsh, July 11, 1879; Wharton's *Dig. Int. Law*, §§ 33, 33a; Wharton on *Conflict of Laws* (2d ed.), § 356.

3. See Hall on Int. Law (4th ed.), § 76; Lawrence on Int. Law, § 120.

In *In re Ross*, 140 U. S. 453, it was stated that although the deck of a private American vessel is considered for many purposes constructively as territory of the United States, yet persons on board of such vessels, whether officers, sailors, or passengers, cannot invoke the protection of the provisions of the constitution as to indictment and trial by jury, until brought within the actual territorial boundaries of the United States.

4. *Criminal Jurisdiction*. — "No principle of public law is better understood nor more universally recognized than that merchant vessels on the high seas are under the jurisdiction of the nation to which they belong, and that as to common crimes committed on such vessels while on the high seas, the competent tribunals of the vessel's nation have exclusive jurisdiction of the questions of trial and punishment of any person thus accused of the commission of a crime against its municipal laws; the nationality of the accused can have no more to do with the question of jurisdiction than it would had he committed the same crime within the geographical territorial limits of the nations against whose municipal laws he offends." Mr. Evarts, secretary of state, to Mr. Welsh. Wharton's *Dig. Int. Law*, § 33a. To the same effect see *Amistad's Case*, 3 Op.

Atty.-Gen. 484; *American Ships*, 8 Op. Atty.-Gen. 73.

So in *U. S. v. Davis*, 2 Sumn. (U. S.) 482, where a gun was fired from an American ship lying in a harbor of one of the Society Islands, killing a person on board a schooner belonging to the natives in the harbor, it was held by Judge Story that the act was, in contemplation of law, committed on board the foreign schooner where the shot took effect, and that jurisdiction of the offense belonged to the foreign government and not to the courts of the United States.

5. *Claim of Concurrent Jurisdiction*. — Hall on Int. Law (4th ed.), § 79.

6. *England's Claim to Impress Sailors*. — An example of the assertion of jurisdiction for this purpose is found in the resistance by the United States, early in the century, of Great Britain's claim of right to search for and seize British sailors on American ships. See this matter fully discussed in Dana's *Wheaton's Int. Law*, note 67; Wharton's *Dig. Int. Law* § 331.

In 1842, Mr. Webster, writing to Lord Ashburton, said: "Every merchant vessel on the seas is rightfully considered as part of the territory of the country to which it belongs. The entry, therefore, into such vessel, being neutral, by a belligerent, is an act of force, and is *prima facie* a wrong, a trespass, which can be justified only when done for some purpose allowed to form a sufficient jurisdiction by the law of nations." Quoted in Hall on Int. Law (4th ed.), § 76, note.

As to Right of Search in time of war, for certain purposes, as to discover contraband or enemy's property, see *infra*, this title, *Rights and Liabilities of Neutral Subjects — Visit and Search*.

7. *Public Vessels in Foreign Ports*. — In *The Schooner Exchange v. M'Faddon*, 7 Cranch (U. S.) 116, it was decided that when the public ships of war of one nation enter the ports of another friendly nation under the license implied by the absence of any prohibition or under an express stipulation by treaty, they are exempt from the local jurisdiction; and in

(2) *Private Vessels*. — It is generally agreed that where a merchant vessel of one country enters the port of another for the purpose of trade it subjects itself to the law of that place, unless by convention between the two countries it is otherwise agreed.¹ A practice has grown up, however, by which the government or courts of the state in which the vessel is lying refrain from exercising jurisdiction so far as this would involve an interference in the internal affairs of the vessel, provided the public peace or dignity of such country is not disturbed; and provisions in conformity with this view, excluding the foreign jurisdiction in such cases and committing jurisdiction to consuls of the state to which the vessel belongs, have frequently been incorporated in treaties.²

The *Santissima Trinidad*, 7 Wheat. (U. S.) 283, Story, J., said that this exemption is not founded "upon any notion that a foreign sovereign had an absolute right, in virtue of his sovereignty, to an exemption of his property from the local jurisdiction of another sovereign, when it came within his territory, for that would be to give him sovereign power beyond the limits of his own empire. But it stands upon principles of public comity and convenience, and arises from the presumed consent or license of nations, that foreign public ships coming into their ports, and demeaning themselves according to law, and in a friendly manner, shall be exempt from the local jurisdiction. But as such consent and license is implied only from the general usage of nations, it may be withdrawn upon notice at any time."

The same position has been taken by the executive. See letters referred to in Wharton's Dig. Int. Law, § 36.

Other than Vessels of War. — In *The Parlement Belge*, 5 P. D. 197, it was expressly decided that the exemption was not confined to vessels of war, but extended to any public vessel, and consequently that an unarmed packet belonging to the sovereign of a foreign state and engaged in carrying mails was not subject to process, although it also carried merchandise and passengers. See also *The Thomas A. Scott*, 10 L. T. N. S. 726, a case of a troop ship, in which was said that the exemption of the vessel depended "rather upon its public than its military character." As pointed out in *The Parlement Belge*, the exemption in the case of *The Schooner Exchange v. M'Faddon*, 7 Cranch (U. S.) 116, was based on the fact that the vessel was public rather than that it was a vessel of war.

Service of Process. — In the opinions of Mr. Bradford and Mr. Lee, 1 Op. Atty.-Gen. 47, 87, it was stated that criminal and civil process might be served upon a person on board a foreign ship of war in a United States port; but Mr. Cushing (*Belligerent Asylum*, 7 Op. Atty.-Gen. 122), without referring to the previous opinions, decided the contrary in a case involving the right to release a prisoner of war on board such a foreign vessel of war by habeas corpus issuing from the United States courts.

In *The Constitution*, 40 L. T. N. S. 219, involving a United States vessel of war which ran ashore on the Welsh coast where salvage services were rendered to her, Sir R. Phillimore refused to allow a warrant to issue for her arrest, or for the arrest of the goods on

board of her, at the salvor's suit, saying: "It is clear, upon all the authorities which are to be found in the case of *The Charkieh*, L. R. 4 A. & E. 59, that there is no doubt as to the general proposition that ships of war belonging to another nation with whom this government is at peace are exempt from the civil jurisdiction of the country."

1. *Merchant Vessels in Foreign Port*. — U. S. v. Diekelman, 92 U. S. 520; Reg. v. Cunningham, Bell Cr. Cas. 72; Reg. v. Anderson, L. R. 1 C. C. 161; Reg. v. Keyn, 2 Ex. D. 63; 1 Phill. Int. Law (3d ed.), § 351.

In *The Schooner Exchange v. M'Faddon*, 7 Cranch (U. S.) 144, Marshall, C. J., said: "When merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country. Nor can the foreign sovereign have any motive for wishing such exemption. His subjects thus passing into foreign countries are not employed by him, nor are they engaged in national pursuits. Consequently there are powerful motives for not exempting persons of this description from the jurisdiction of the country in which they are found, and no one motive for requiring it. The implied license, therefore, under which they enter can never be construed to grant such exemption."

The Executive Department of the United States has generally sustained the view stated in the text. See Wharton's Dig. Int. Law, § 35a. But see the letter of Mr. Webster to Lord Ashburton, quoted in U. S. v. Rodgers, 150 U. S. 264, where a general claim of jurisdiction in favor of the state to which the vessel belongs is made.

2. *Comity and Treaty Stipulations*. — In *Willdenhus's Case*, 120 U. S. 1, Waite, C. J., after stating the general rule that vessels are subject to the jurisdiction of the state in which they are, said: "From experience, however, it was found long ago that it would be beneficial to commerce if the local government would abstain from interfering with the internal discipline of the ship and the general regulation of the rights and duties of the officers and crew towards the vessel or among themselves. And so by comity it came to be generally understood among civilized nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and did not in-

g. PIRACY. — Acts of piracy may be punished by any nation which may capture the offender, irrespective of his nationality or that of the vessel on which the offense is committed or on which he may be found.¹

3. Measures of Constraint Short of War — a. RETORSION. — "Retorsion" is a term applied to the action of a state in treating the subjects of another state in substantially the same way in which the latter state has treated the subjects of the state using the retorsion. It is merely the application of the *lex talionis* to nations, and is confined to cases of the violation of mere comity or of imperfect obligations. It is perhaps most frequently practiced in the case of differential tariffs, which are met by other tariffs of a similar character.²

b. REPRISALS. — The term "reprisals" is applied to the action of a state in doing injury to another state or its subjects, generally by seizing or destroying property, in order to compensate the state making the reprisal for injuries received from the other state or to compel such state to adopt or relinquish a certain course of conduct. Reprisals are almost certain to result in war if the nation subjected thereto feels that its strength will in any way justify it in entering on hostilities.³

c. EMBARGO AND NON-INTERCOURSE. — Embargo is a form of reprisal consisting in the seizure of vessels and cargoes of another nation found in port, they being subsequently released if peace is confirmed, while if war breaks out they become liable to confiscation.⁴ In practice, however, an embargo of this character is not resorted to, the modern practice being to give to vessels of a foreign nation a certain period in which to depart after the beginning of war.⁵ Another form of embargo consists in the detention by a

volve the peace or dignity of the country, or the tranquillity of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged, as the laws of that nation or the interests of its commerce should require. But if crimes are committed on board, of a character to disturb the peace and tranquillity of the country to which the vessel has been brought, the offenders have never by comity or usage been entitled to any exemption from the operation of the local laws for their punishment, if the local tribunals see fit to assert their authority." This case involved the jurisdiction of the United States courts over a homicide committed in a port of that country on board of a Belgian vessel, and it was held that this was a disorder affecting "tranquillity and public order" within a provision in a treaty with Belgium reserving to the local authorities jurisdiction of such disorders.

For lists of such treaties and conventions see Hall on Int. Law (4th ed.), §§ 58, 105, notes.

1. Piracy. — U. S. v. Pirates 5 Wheat. (U. S.) 184; U. S. v. Holmes, 5 Wheat. (U. S.) 412; Talbot v. Janson, 3 Dall. (U. S.) 133; Hall on Int. Law (4th ed.), § 81. And see the title PIRACY.

2. Retorsion. — Dana's Wheaton's Int. Law, note 151; 2 Rivier's Droit des Gens 189, Bluntschli, § 505.

3. Reprisals. — Hall on Int. Law (4th ed.), § 120; Dana's Wheaton's Int. Law, note 151; 2 Rivier's Droit des Gens 191.

In 1834, France having delayed the payment of the spoliation indebtedness, as fixed by treaty, President Jackson suggested that power to make reprisals on French property on account of this claim be given to him. A report of Mr. Clay, from the committee on

foreign relations, adverts to the giving of such power to the President and contains the following remarks upon this remedy: "It is true that writers on the public law speak and treat of reprisals as a peaceful remedy, in cases which they define and limit. It is certainly a very compendious one, since the injured nation has only to authorize the seizure and sale of sufficient property of the debtor nation, or its citizens, to satisfy the debt due, and, if it quietly submit to the process, there is an end of the business. * * * It is wholly inconceivable that a powerful and chivalrous nation, like France, would submit without retaliation to the seizure of the property of her unoffending citizens, pursuing their lawful commerce, to pay a debt which the popular branch of her legislature had refused to acknowledge and provide for. * * * Retaliation would ensue, and retaliation would inevitably terminate in war. * * * Reprisals so far partake of the character of war that they are an appeal from reason to force; from negotiation, devising a remedy to be applied by the common consent of both parties, to self-redress carved out and regulated by the will of one of them; and, if resistance be made, they convey an authority to subdue it by the sacrifice of life, if necessary. The framers of our constitution have manifested their sense of the nature of this power by associating it in the same clause with grants to Congress of the power to declare war and to make rules concerning captures on land and water." 3 Wharton's Dig. Int. Law, § 318.

4. Embargo. — The Boedes Lust, 5 C. Rob. 246; Dana's Wheaton's Int. Law, note 152.

5. Lawrence on Int. Law, § 158.

So in the recent war with Spain a certain number of days were allowed by the President's proclamation within which Spanish vessels

nation of its own vessels in port in order to protect them from danger of capture by vessels of other nations. An embargo of this character was imposed by the United States in 1807.¹ There were numerous decisions upon the construction of this and similar laws, which are now of but little interest.² Likewise in the early part of the century non-intercourse laws were passed by Congress forbidding all commercial intercourse with England and France. These laws are now also of merely historical importance.³

d. PACIFIC BLOCKADE. — Blockade is a war measure, and as such will be considered later in this article;⁴ but during the last three-quarters of a century it has sometimes been introduced in time of peace as a measure of constraint. The practice of various nations has differed, but the later tendency is to exercise the blockade only against vessels belonging to the nation whose ports are blockaded, and to allow vessels of other states to pass freely, and it is only when thus limited in effect that its legality is admitted by statesmen and publicists.⁵

4. Amicable Settlement of Disputes — *a. MEDIATION.* — It is proper for a state to offer its good offices for the settlement of disputes between other nations, even when an actual state of war has arisen, but the refusal of such offer is no cause of offense. Likewise the offer may be made at the request of one or both of the disputants, and sometimes two or more nations join in making such an offer.⁶

b. ARBITRATION. — International disputes are occasionally submitted to arbitration by disinterested persons, frequently rulers of other states, and the contending parties are concluded by the decision of the arbitrators unless it is outside the terms of the submission or there is evident fraud or denial of justice.⁷

5. Intervention. — Interference by one state as between other states or in the internal affairs of another state has been of frequent occurrence and has

might depart from the United States. 30 U. S. Stat. at L. 1771.

1. United States Embargo Laws. — Wharton's Dig. Int. Law, § 320.

2. For the construction and effect of United States embargo laws see *Otis v. Bacon*, 7 Cranch (U. S.) 589; *Crowell v. M'Fadon*, 8 Cranch (U. S.) 94; *Otis v. Watkins*, 9 Cranch (U. S.) 339; *Speake v. U. S.*, 9 Cranch (U. S.) 28; *Otis v. Walter*, 2 Wheat. (U. S.) 18; *The Ship Cotton Planter*, 1 Paine (U. S.) 23; *The Schooner Paulina v. U. S.*, 7 Cranch (U. S.) 52; *The Sloop Active v. U. S.*, 7 Cranch (U. S.) 100; *U. S. v. The Brig Eliza*, 7 Cranch (U. S.) 113; *The Schooner Good Catharine v. U. S.*, 7 Cranch (U. S.) 349; *The William King*, 2 Wheat. (U. S.) 148; *Schooner Sally*, 1 Gall. (U. S.) 58; *The Brig Ann*, 1 Gall. (U. S.) 62; *The Brig Short Staple*, 1 Gall. (U. S.) 104; *The Ship Argo*, 1 Gall. (U. S.) 150; *The Brig Wasp*, 1 Gall. (U. S.) 140; *U. S. v. Mann*, 1 Gall. (U. S.) 177; *The Sloop Elizabeth*, 1 Paine (U. S.) 10; *U. S. v. The Schooner Little Charles*, 1 Brock. (U. S.) 347.

3. Non-intercourse Laws. — These laws were the subject of construction in numerous decisions involving the seizure and condemnation of vessels for their violation. *Murray v. Schooner Charming Betsy*, 2 Cranch (U. S.) 64; *Little v. Barreme*, 2 Cranch (U. S.) 170; *U. S. v. 1,960 Bags Coffee*, 8 Cranch (U. S.) 398; *U. S. v. The Brigantine Mars*, 8 Cranch (U. S.) 417; *The Ship Richmond v. U. S.*, 9 Cranch (U. S.) 102; *Ten Hogsheads Rum*, 1 Gall. (U. S.) 188; *Schooner Mary*, 1 Gall. (U. S.) 206; *The Brig Rose*, 1 Gall. (U. S.) 211;

Schooner Boston, 1 Gall. (U. S.) 239; *The New York*, 3 Wheat. (U. S.) 59; *The Ship Ann Maria*, 1 Paine (U. S.) 256; *The Ship Adventure*, 1 Brock. (U. S.) 235; *The Schooner Patriot*, 1 Brock. (U. S.) 407; *U. S. v. An Open Boat*, 5 Mason (U. S.) 232; *Clark v. U. S.*, 3 Wash. (U. S.) 101; *U. S. v. The Nancy*, 3 Wash. (U. S.) 281; *Graves v. Tilford*, 2 Duv. (Ky.) 108, 87 Am. Dec. 483; *Amory v. M'Gregor*, 15 Johns. (N. Y.) 24.

4. See *infra*, this title, *Rights and Liabilities of Neutral Subjects — Blockade*.

5. Pacific Blockade. — Hall on Int. Law (4th ed.), § 121; 2 Rivier's *Droit des Gens* 198; Wharton's Dig. Int. Law, § 364.

6. Mediation. — Wharton's Dig. Int. Law, § 49; Dana's Wheaton's Int. Law, note 40; 2 Rivier's *Droit des Gens* 163.

7. Arbitration. — Hall on Int. Law (4th ed.), § 118 *et seq.*; 2 Rivier's *Droit des Gens* 166-188; Wharton's Dig. Int. Law, § 316.

Permanent Arbitration Bureau. — In recent years the availability and desirability of arbitration as a means of settling international disputes have been much discussed, and at the peace conference at The Hague, held in 1899, to which most of the civilized nations sent representatives, a plan was adopted for the establishment of an international bureau of arbitration. According to this plan, the diplomatic representatives of the signatory powers accredited to The Hague are to form a council which shall organize and direct the bureau of arbitration. Each power is to appoint four international lawyers of character and ability, and from these lawyers the parties to any inter-

been based on various pretexts. It is generally agreed that such interference is justified when the state of affairs is such as to involve immediate and pressing danger to the safety of the interfering nation. It is not, however, justified merely because danger may indirectly result from the particular form of government adopted in the other states or from the prevalence of particular ideas therein. Another ground on which such interference is said to be morally justified, although not perhaps legally admissible, is the prevention of gross acts of oppression and cruelty. Humanity has frequently been made the pretext for acts of aggressive interference, and it is generally agreed that to render it a proper ground of intervention an extraordinary state of facts must exist and the disinterestedness of the interfering state must clearly appear. In cases other than those enumerated there is no right of intervention either in the internal affairs of a state or as between two states engaged in a dispute or conflict. There may, however, occasionally be some moral excuse for interference by a number of states acting in concert for the general good when intervention by a single state would be utterly unwarranted.¹

III. MUTUAL RIGHTS AND DUTIES OF BELLIGERENTS—1. **Definition of War.**—War has been well defined as a contest between nations or states, or between parties in the same state, carried on by force of arms.²

2. **Classes of War.**—It is stated that a "perfect" war is one in which a whole nation is at war with another nation and all the members of both nations are authorized to commit hostilities against all the members of the other, in every case and under every circumstance permitted by the general laws of war, while an "imperfect" war is limited as to place, persons, and things.³ Other classifications are mentioned by different writers, such as offensive and defensive, public and private, just and unjust, legal and illegal wars, but these distinctions are either obsolete in view of the changed conditions of the present day, or refer to questions of an ethical character with which international law does not concern itself.⁴

3. **Commencement of War.**—Though it is sometimes stated that war should be preceded by a declaration or notice to the enemy, and such was the practice

national dispute will, upon notification to the bureau, be asked to choose arbitrators, and those so chosen will decide the dispute according to certain rules of procedure to be formulated. Hazell's Annual for 1900, p. 462.

1. **Intervention.**—Hall on Int. Law (4th ed.), § 88 *et seq.*; Wharton's Dig. Int. Law, § 45; 1 Rivier's *Droit des Gens* 389 *et seq.*; Woolsey on Int. Law, § 74 *et seq.*

2. **Definition of War.**—Century Dict. And see the title WAR.

3. **Perfect and Imperfect Wars.**—Dana's Wheaton's Int. Law, § 296.

An imperfect or partial war was considered by the Supreme Court to exist in 1799 between France and the United States, when there were frequent conflicts between vessels of the nations mentioned, but there had been no declaration of war and France was not styled an enemy in Acts of Congress, though Congress had authorized hostilities on the high seas by certain persons in certain cases. *Miller v. The Ship Resolution*, 2 Dall. (U. S.) 19; *Bas v. Tingy*, 4 Dall. (U. S.) 37; *Talbot v. Seeman*, 1 Cranch (U. S.) 1. See *Gray v. U. S.*, 21 Ct. Cl. 340.

In *Bas v. Tingy*, 4 Dall. (U. S.) 37, Washington, J., said: "It may, I believe, be safely laid down that every contention by force between two nations, in external matters, under the authority of their respective governments,

is not only war, but public war. If it be declared in form, it is called solemn, and is of the perfect kind, because one whole nation is at war with another whole nation; and all the members of the nation declaring war are authorized to commit hostilities against all the members of the other, in every place and under every circumstance * * *. But hostilities may subsist between two nations, more confined in its nature and extent, being limited as to places, persons, and things; and this is more properly termed imperfect war, because not solemn, and because those who are authorized to commit hostilities act under special authority, and can go no farther than to the extent of their commission."

See generally the title WAR.

4. **Other Classifications.**—See 1 Halleck's Int. Law, c. 16; Dana's Wheaton's Int. Law, § 295 *et seq.*; 2 Rivier's *Droit des Gens* 202 *et seq.* See also the title WAR.

Private Wars.—In *Talbot v. Janson*, 3 Dall. (U. S.) 160, it was said: "Whatever opinions may have prevailed formerly to the contrary, no hostilities of any kind, except in necessary self defense, can lawfully be practiced by one individual of a nation against an individual of any other nation at enmity with it, but in virtue of some public authority. War can alone be entered into by national authority; it is instituted for national purposes and directed to

until the last century, this formality is not now regarded as essential, and in practice it is usually omitted. What in effect is a declaration of war is the sending of an ultimatum, involving a demand, to which a response is requested within a limited time, coupled with the intimation that a failure to reply will be considered as indicating that the state on which the demand is made desires war. As a matter of fact, in view of the modern ease of communication, an attack by one state upon another without any forewarning to the state attacked is hardly possible, and a formal notification is useless. At the beginning of a war it is the practice for the attacking nation to issue a manifesto or proclamation addressed to its subjects or to neutral nations, announcing the war and generally seeking to justify it, but this proclamation cannot be considered as intended as a notification to the enemy.¹

4. Recognition of Belligerency. — When a civil conflict exists within a state, the question arises whether the state of war shall be recognized by other nations as existing. Such recognition by a foreign government is justifiable only when necessary for the protection of its own interests, and if prematurely given can be regarded as a demonstration of sympathy with the rebellion. When the contest is of a purely internal character, entirely within the territory of the state, it is not the practice, nor is it justifiable, to recognize the insurgents as belligerents. A foreign state which is adjacent to the seat of insurrection may, however, be justified in such recognition when states not similarly situated would not be so justified. When the insurrection assumes such a form as to raise a reasonable expectation of maritime hostilities, or when acts are done at sea by one party or the other which would be acts of war if done between states, recognition of belligerency is fully justified.² The

national objects; and each individual on both sides is engaged in it as a member of the society to which he belongs."

1. Commencement of War. — See Hall on Int. Law, § 123 *et seq*; Wharton's Dig. Int. Law, §§ 333-335; Duncan v. Koster, L. R. 4 P. C. 171; People v. Smith, (U. S. Cir. Ct.) 3 Wheel. Crim. (N. Y.) 100.

There have been only eleven formal declarations of war since 1700, and during this century, before 1870, over sixty wars or acts of reprisal had been begun without formal notice. Lawrence on Int. Law, § 161, *citing* Maurice's Hostilities Without Declaration of War.

Wars of United States. — The war of 1812 between the United States and Great Britain was declared by Act of Congress June 18, 1812, though there had been some hostilities previously. 2 U. S. Stat. at L. 755, c. 102. And war had existed between the United States and Mexico, from March 4 until May 13, 1846, without any formal declaration, the Act of Congress of May 13, 1846, declaring that "by the act of the republic of Mexico," war existed between the countries. 9 U. S. Stat. at L. 9, c. 16. See also Wharton's Dig. Int. Law, § 334.

The Spanish War was to all purposes begun by the ultimatum of April 20, 1898 (30 U. S. Stat. at L. 738), requiring Spain to relinquish Cuba, and the bill passed by Congress on April 25, 1898, recognizing that war already existed by reciting "that war be and the same is hereby declared to exist, and that war has existed since the twenty-first day of April," 1898. 30 U. S. Stat. at L. 364, c. 189.

In *The Buena Ventura*, 87 Fed. Rep. 927, involving certain Spanish vessels seized before any actual declaration or proclamation of war with Spain, Locke, J., said: "The practice of a formal proclamation before recognizing an

existing war and capturing enemy's property has fallen into disuse in modern times, and actual hostilities may determine the date of the commencement of war, although no proclamation may have been issued, no declaration made, or no action of the legislative department of the government had. This date has been declared by the Act of Congress of April 25, 1898, and by the proclamation of the President of the next day, to have been April 21, 1898, including that day, so that any Spanish property afloat, captured from that time, became liable to condemnation, unless exempt by the executive proclamation."

Civil War. — In *Prize Cases*, 2 Black (U. S.) 666, Grier, J., said: "A civil war is never solemnly declared; it becomes such by its accidents — the number, power, and organization of the persons who originate and carry it on. When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a war." See also *Dole v. Merchants' Mut. Marine Ins. Co.*, 51 Me. 470.

Judicial Notice is taken of the determination by the political department of the government that war exists. *Cuyler v. Ferrill*, 1 Abb. (U. S.) 169; *Chappelle v. Olney*, 1 Sawy. (U. S.) 401; *Philips v. Hatch*, 1 Dill. (U. S.) 571; *Sutton v. Tiller*, 6 Coldw. (Tenn.) 593, 98 Am. Dec. 471; *Smart v. Mason*, 2 Heisk. (Tenn.) 223.

2. Recognition of Belligerency. — Dana's *Wheaton's Int. Law*, note 15; Hall on Int. Law (4th ed.), § 5; 2 Rivier's *Droit des Gens* 213.

The courts are guided entirely by the action

state of things between the insurgents and the parent state must, however, amount to a war, since the recognition is supposed to be purely of the war as a fact,¹ and the recognition should not be given unless the insurgents have a *de facto* political organization which is in control of a definite territory.²

Consequences of Recognition. — As a result of the recognition of belligerency, the recognizing state loses all right to complain if commissioned vessels on either side stop, search, and capture merchant vessels belonging to its subjects; nor can it object to the institution of a blockade of the insurgent ports by the parent state, and its merchant vessels likewise become subject to the rules and risks involved in carrying contraband, or dispatches, or military prisoners. On the other hand, the parent state is benefited in that it is relieved from responsibility to the foreign state for acts done by the insurgents, or in territory subject to the control of the insurgents, and it also obtains a right to exercise, as against neutral commerce, the powers of a party to a maritime war.³

Grant of Belligerent Rights by Parent State. — There may also be a recognition by the state revolted against, of a condition of belligerency arising out of the revolt. Such a recognition may be a concession made by the parent state in the interests of humanity, since it results in the treatment of the insurgents as enemies and not as rebels, or it may be made for the purpose of exempting the parent state from liability to foreign states for acts done by the insurgents or in the insurgent territory, or it may arise from a desire on the part of the parent state to enforce belligerent rights against neutrals.⁴

5. Effect of War on Treaties. — Though the outbreak of war frequently has the effect of putting an end to a treaty previously existing between the parties

of the political department of the government in determining whether an insurgent party is entitled to the rights of a belligerent. U. S. v. Palmer, 3 Wheat. (U. S.) 610; The Divina Pastora, 4 Wheat. (U. S.) 52; Dimond v. Petit, 2 La. Ann. 537, 46 Am. Dec. 556.

1. Existence of War as a Fact. — See letter of Mr. Fish to Mr. Motley, Sept. 25, 1869, and seventh annual message of President Grant, in Wharton's Dig. Int. Law, § 69. See also Dana's Wheaton's Int. Law, note 15.

2. De Facto Organization. — Dana's Wheaton's Int. Law, note 15; Rivier's Droit des Gens 213; Lawrence on Int. Law, § 163.

Instances of Recognition. — The belligerency of the South American colonies of Spain during their revolt was recognized by the United States. U. S. v. Palmer, 3 Wheat. (U. S.) 610; The Divina Pastora, 4 Wheat. (U. S.) 52; The Santissima Trinidad, 7 Wheat. (U. S.) 283. There was likewise recognition by the United States of the belligerency of Texas in the civil war between that province and Mexico. See letter of Mr. Forsyth, secretary of state, to the Mexican minister, Sept. 20, 1836, Wharton's Dig. Int. Law, § 69.

Recognition of Civil War in United States. — The action of foreign nations, particularly of Great Britain, in recognizing the Confederate States as belligerents, formed at the time a constant subject of complaint by the United States government. See Dana's Wheaton's Int. Law, note 15; Wharton's Dig. Int. Law, § 69. But it is generally now recognized that these complaints were not justified. Prof. Woolsey, after referring to the secession of a number of states whose territories formed a continuous whole, their formation of a government, followed by a recognition of and prepara-

tions for a state of war, and the proclamation of blockade by President Lincoln, concludes: "The President's proclamation of blockade announced a measure which might have important international consequences. It was, in fact, a declaration of a state of war on the sea. * * * Several neutral vessels were captured between April 19 and July 13, on which last day Congress sanctioned the proceedings of the government. The validity of the captures came before the Supreme Court, and the question when the war began became a very important one. The court decided that the President had a right, *jure belli*, to institute a blockade of ports in the possession of the rebellious states, and that blockade was an act of war. It would seem, then, that if the British government erred in thinking that the war began as early as Mr. Lincoln's proclamation in question, they erred in company with our Supreme Court." Woolsey on Int. Law, app. 3, note 19.

3. Consequences of Recognition. — Dana's Wheaton's Int. Law, note 15; Hall on Int. Law (4th ed.), § 5; Lawrence on Int. Law, § 162.

4. Grant of Belligerent Rights by Parent State. — See Hall on Int. Law (4th ed.), § 5.

Belligerent rights were accorded to the Confederate states during the civil war. Ford v. Surget, 97 U. S. 594.

Such a grant of belligerent rights to insurgents was made by the government of the United States of Colombia in 1885, and notification thereof was made to the government of the United States of America. See The City of Mexico, 24 Fed. Rep. 33.

This is a matter purely for the political department. Latham v. Clark, 25 Ark. 574.

to the war, this is not universally true, and if the treaty contains stipulations which contemplate a state of future war, or if it is evidently intended to set up a permanent state of things by an act done once for all, as when it contains stipulations in relation to boundaries or to the tenure of property, the treaty is revived as soon as hostilities cease.¹

Stipulations Providing for War. — The numerous provisions in treaties in reference to the methods in which war shall be carried on in case it arises between the parties to the treaty are, of course, not rescinded by the breaking out of war, but are, on the contrary, brought into effect thereby. Numerous references to such stipulations will be found in this article in the discussion of the rights of belligerents and neutrals.²

Tripartite Treaties or other treaties to which nations other than the belligerents are also parties are not generally suspended, though the war may have the effect of rendering the performance thereof for the time impossible.³

6. Effect on Intercourse of Individuals — *a. IN GENERAL.* — During a state of war all the subjects of one belligerent government are enemies of all the subjects of the other;⁴ and as a consequence of this principle, and because any other rule might tend to give aid to the enemy, every kind of trading or commercial dealing or intercourse between the subjects of the belligerent powers is absolutely forbidden,⁵ and all vessels or other kinds of property engaged in trade with the enemy are subject to condemnation.⁶

1. Effect of War on Treaties. — In *Society, etc.*, *v. New Haven*, 8 Wheat. (U. S.) 494, Washington, J., said: "There may be treaties of such a nature, as to their object and import, as that war will put an end to them; but where treaties contemplate a permanent arrangement of territorial and other national rights, or which, in their terms, are meant to provide for the event of an intervening war, it would be against every principle of just interpretation to hold them extinguished by the event of war. If such were the law, even the treaty of 1783, so far as it fixed our limits and acknowledged our independence, would be gone, and we should have had again to struggle for both upon original revolutionary principles. Such a construction was never asserted, and would be so monstrous as to supersede all reasoning."

In *Sutton v. Sutton*, 1 Russ. & M. 663, upon the question whether American subjects who held land in England were to be considered in respect to such land as aliens or subjects of Great Britain, or whether the war of 1812 had terminated the treaty provisions of 1794 in that regard, the master of the rolls said: "The privileges of natives being reciprocally given, not only to the actual possessors of lands, but to their heirs and assigns, it is a reasonable construction that it was the intention of the treaty that the operation of the treaty should be permanent, and not depend upon the continuance of a state of peace."

2. Stipulations Providing for War. — See Dana's *Wheaton's Int. Law*, note 143; 1 Halleck's *Int. Law* 242; 1 Kent's *Com.* 176, where Chancellor Kent instances the article in the treaty of 1794 between the United States and Great Britain which provided that in case of war between the two nations debts and choses in action should not be confiscated.

3. Tripartite Treaties. — Hall on *Int. Law* (4th ed.), § 125.

4. Citizens of Belligerents Are Enemies. — *Jecker v. Montgomery*, 18 How. (U. S.) 110; *Bas v. Tingy*, 4 Dall. (U. S.) 37; *Lamar v. Browne*,

92 U. S. 187; *The Venice*, 2 Wall. (U. S.) 258; *Mrs. Alexander's Cotton*, 2 Wall. (U. S.) 404.

For a discussion and criticism of a contrary view advanced by some Continental writers, to the effect that war is "a relation of a state to a state, and not of an individual to an individual," see Hall on *Int. Law* (4th ed.), § 18.

5. Commercial Intercourse Forbidden. — In *U. S. v. Lane*, 8 Wall. (U. S.) 195, Davis, J., said: "By a universally recognized principle of public law, commercial intercourse between states at war with each other is interdicted. It needs no special declaration on the part of the sovereign to accomplish this result, for it follows from the very nature of war that trading between the belligerents should cease. If commercial intercourse were allowable, it would oftentimes be used as a color for intercourse of an entirely different character; and in such a case the mischievous consequences that would ensue can be readily foreseen." See also *Montgomery v. U. S.*, 15 Wall. (U. S.) 295; *McKee v. U. S.*, 8 Wall. (U. S.) 163; *Mitchell v. U. S.*, 21 Wall. (U. S.) 350; *The Hiram*, 1 Wheat. (U. S.) 440; *The Schooner Rapid*, 1 Gall. (U. S.) 303; *The Julia*, 1 Gall. (U. S.) 594; *The Beach v. Kezar*, 1 N. H. 184; *Jecker v. Montgomery*, 18 How. (U. S.) 110; *Barrick v. Buba*, 2 C. B. N. S. 563, 89 E. C. L. 563; *The Joseph*, 8 Cranch (U. S.) 451.

6. Property Engaged in Enemy Trade Liable to Seizure. — *Conner v. The Bark Coosa*, Newb. Adm. 393; *The Hoop*, 1 C. Rob. 196; *The Alexander*, 8 Cranch (U. S.) 169; *The Thomas Gibbons*, 8 Cranch (U. S.) 421; *The Joseph*, 8 Cranch (U. S.) 451, *affirming* 1 Gall. (U. S.) 545; *The Sally*, 8 Cranch (U. S.) 382; *The Rapid*, 8 Cranch (U. S.) 155; *The Mary*, 1 Wheat. (U. S.) 46; *The Brig Alexander*, 1 Gall. (U. S.) 532; *The Brig Mary*, 1 Gall. (U. S.) 620; *The Schooner Rapid*, 1 Gall. (U. S.) 295; *Boat Eliza*, 2 Gall. (U. S.) 4; *The Diana*, 2 Gall. (U. S.) 93; *The Lord Wellington*, 2 Gall. (U. S.) 103; *The San Jose Indiano*, 2 Gall. (U. S.) 263, *The*

The Domicil of the Parties to the trading, and not their situation at the time thereof, determines its legality, and accordingly it is not made legal by the fact that one goes into the enemy's country and carries it on with an enemy there.¹ And so intercourse between an alien domiciled in a country and one of its enemies is invalid.²

b. LICENSE TO TRADE. — Permission may, however, be given by the government for the carrying on of such trade, either by general relaxations of the rules of non-intercourse³ or by special licenses given to individuals, allowing such trade.⁴

Construction and Effect of License. — A license cannot generally be assigned, since the character of the grantee is taken into consideration at the time of the grant,⁵ though if the license is not granted to specific individuals, but is perfectly general in its terms, the privilege of trade which it grants can be sold.⁶ If it is granted to a particular person by name he cannot act as agent of other persons, as this would be in effect an assignment.⁷ There must be a substantial compliance with the statement of the nationality of the vessel to be used, and a vessel of the nationality of the enemy of the grantor cannot be used, unless specially authorized.⁸ Fraud on the part of the licensee subjects the cargo, as well as the vessel, to confiscation, but a small excess or small variation from the license as regards the articles carried does not have this effect.⁹ A deviation from the prescribed course entails confiscation, unless caused by stress of weather.¹⁰ Where the time in which the voyage should begin is limited by the license, the vessel must sail within that time, or at least the cargo must be on board by that time; but a requirement as to the time of arrival is construed with reference to reasonable causes of delay which may have occurred.¹¹

c. CONTRACTS BETWEEN ENEMY SUBJECTS. — It results from the prohibition of commercial intercourse that all contracts made in the course thereof

Shark, Blatchf. Prize Cas. 215; The Napoleon, Blatchf. Prize Cas. 296, 357; The Memphis, Blatchf. Prize Cas. 260; Conner v. The Bark Coosa, Newb. Adm. 393.

If the owner of the vessel belongs to one of the belligerent nations, the vessel is liable to confiscation by his government whether the trade be between ports of the enemy nation and of his own country or between the former and the ports of some foreign nation. The Rügen, 1 Wheat. (U. S.) 62; The Diana, 2 Gall. (U. S.) 93. And the fact that the voyage has terminated does not exempt a vessel which has been so engaged. The Caledonian, 4 Wheat. (U. S.) 100.

1. **Determination of Nationality.** — Mitchell v. U. S., 21 Wall. (U. S.) 350; Desmare v. U. S., 93 U. S. 605; Quigley v. U. S., 13 Ct. Cl. 367.

2. **Habricht v. Alexander**, 1 Woods (U. S.) 413; **Queyrouze v. U. S.**, 7 Ct. Cl. 402.

3. **General Relaxations of Rule of Non-intercourse.** — During the Crimean war, Great Britain and France permitted their subjects to trade at Russian ports in neutral vessels, and Russia permitted the import of French and English goods in neutral vessels. These were, however, recognized to be relaxations of the rule of non-intercourse which otherwise the courts of prize would have been obliged to apply. See Dana's Wheaton's Int. Law, note 158.

4. **License to Trade.** — The Hope, 1 Dods. 226; The Charlotte, 1 Dods. 387; Shifner v. Gordon, 12 East 296; Matthews v. McStea, 91 U. S. 7; Crawford v. The William Penn, 3 Wash. (U.

S.) 484; Mitchell v. Harmony, 13 How. (U. S.) 115.

During the Civil War Congress authorized the President in his discretion to permit commercial intercourse with the Confederate states in such articles, for such time, and by such persons as he might think proper; and accordingly permission was given to individuals to purchase cotton in those states for export to the Northern states, upon the payment of a certain bonus. Hamilton v. Dillin, 21 Wall. (U. S.) 73; Cones v. U. S., 8 Ct. Cl. 421.

5. **Assignment of License.** — The Jonge Johannes, 4 C. Rob. 263; Fenton v. Pearson, 15 East 419; Busk v. Bell, 16 East 3; Morgan v. Oswald, 3 Taunt. 555.

6. The Acteon, 2 Dods. 53.

7. Feize v. Thompson, 1 Taunt. 121; Warin v. Scott, 4 Taunt. 605; Robinson v. Morris, 5 Taunt. 720, 1 E. C. L. 247.

8. **Nationality of Vessel.** — Dana's Wheaton's Int. Law, note 198.

9. **Fraud by Licensee.** — The Cosmopolite, 4 C. Rob. 11; The Jonge Clara, 1 Edw. Adm. 371; The Nicoline, 1 Edw. Adm. 363; The Wolforth, 1 Edw. Adm. 365; The Vrow Cornelia, 1 Edw. Adm. 350.

10. **Deviation in Course.** — The Vroew Deborah, 1 Dods. 160; The Manly, 1 Dods. 257; The Catherine Maria, 1 Edw. Adm. 337; The Europa, 1 Edw. Adm. 342; The Emma, 1 Edw. Adm. 366.

11. **Requirement as to Time.** — The Sarah Maria, Edw. Adm. 361; The Æolus, 1 Dods. 300; Effurth v. Smith, 5 Taunt. 329, 1 E. C. L. 123;

are illegal and incapable of enforcement.¹ The text writers generally state broadly that all contracts between the subjects of belligerent governments are void,² and similar statements are to be found in decisions of the United States Supreme Court.³ More recently, however, that court seems to have adopted the views of the Massachusetts courts, that such contracts are invalid only when they are made in the course of commercial intercourse or in the course of intercourse which is inconsistent with the state of war, as involving submission to the enemy or as tending in any way to increase his resources.⁴

Williams v. Marshall, 6 Taunt. 390; *Schroeder v. Vaux*, 15 East 52.

1. Contracts Based on Commercial Intercourse Illegal — *United States*. — *The Ouachita Cotton*, 6 Wall. (U. S.) 532; *Coppell v. Hall*, 7 Wall. (U. S.) 542; *U. S. v. Lapene*, 17 Wall. (U. S.) 601; *Montgomery v. U. S.*, 15 Wall. (U. S.) 395; *Philips v. Hatch*, 1 Dill. (U. S.) 571; *Habricht v. Alexander*, 1 Woods (U. S.) 413.

Iowa. — *Hill v. Baker*, 32 Iowa 302, 7 Am. Rep. 193.

Louisiana. — *Hennen v. Gilman*, 20 La. Ann. 241, 96 Am. Dec. 396.

Mississippi. — *Mims v. Armstrong*, 42 Miss. 429; *Shacklett v. Polk*, 51 Miss. 378.

New Jersey. — *Mutual Ben. L. Ins. Co. v. Hillyard*, 37 N. J. L. 444, 18 Am. Rep. 741.

New York. — *Griswold v. Waddington*, 16 Johns. (N. Y.) 438; *McStea v. Matthews*, 3 Daly (N. Y.) 349.

Tennessee. — *Rhodes v. Summerhill*, 4 Heisk. (Tenn.) 204.

Virginia. — *Small v. Lumpkin*, 28 Gratt. (Va.) 832; *Billgerry v. Branch*, 19 Gratt. (Va.) 393, 100 Am. Dec. 679.

Bills of Exchange drawn by the subjects of one belligerent on those of the other have generally been treated as invalid, though the object was merely to obtain payment of a debt. 1 *Kent's Com.* 66; *Williams v. Mobile Sav. Bank*, 2 Woods (U. S.) 501; *Woods v. Wilder*, 43 N. Y. 164, 3 Am. Rep. 684; *Lacy v. Sugarman*, 12 Heisk. (Tenn.) 354. *Contra*, *U. S. v. Barker*, 1 Paine (U. S.) 156, where a bill drawn for the amount of a debt was held not to be within the prohibition of commercial intercourse. See also *U. S. v. Ariadne*, Fish. Prize Cas. 32.

Commercial Contracts as between two subjects of one of the belligerents are valid. *Conrad v. Waples*, 96 U. S. 279; *Briggs v. U. S.*, 143 U. S. 346.

2. All Contracts with Enemies Illegal. — 1 *Kent's Com.* 66; *Dana's Wheaton's Int. Law*, § 317; *Hall on Int. Law* (4th ed.), § 126.

3. See *Jecker v. Montgomery*, 18 How. (U. S.) 110; *Hanger v. Abbott*, 6 Wall. (U. S.) 532; *Mitchell v. U. S.*, 21 Wall. (U. S.) 350.

4. Contracts Not in Course of Trade Legal. — In *Kershaw v. Kelsey*, 100 Mass. 561, 1 Am. Rep. 142, the prohibition of contracts between alien enemies was held to extend only to those contracts which are the fruit of commercial intercourse. In this case, Gray, J., reviewed the previous cases on the subject and summed up his conclusions as follows: "The result is that the law of nations, as judicially declared, prohibits all intercourse between citizens of the two belligerents which is inconsistent with the state of war between their countries; and that this includes any act of voluntary submission to the enemy, or receiving his protection,

as well as any act or contract which tends to increase his resources, and every kind of trading or commercial dealing or intercourse, whether by transmission of money or goods, or orders for the delivery of either, between the two countries, directly or indirectly, or through the intervention of third persons or partnerships, or by contracts in any form looking to or involving such transmission, or by insurances upon trade with or by the enemy. Beyond the principle of these cases the prohibition has not been carried by judicial decision." He characterized as dicta the broader statements as to the invalidity of all contracts between alien enemies to be found in *Scholefield v. Eichelberger*, 7 Pet. (U. S.) 586; *Jecker v. Montgomery*, 18 How. (U. S.) 110; *Hanger v. Abbott*, 6 Wall. (U. S.) 532; *The Schooner Rapid*, 1 Gall. (U. S.) 304; *The Julia*, 1 Gall. (U. S.) 601; *The Ship Emulous*, 1 Gall. (U. S.) 571.

The United States Supreme Court in *Briggs v. U. S.*, 143 U. S. 346, and *Williams v. Paine*, 169 U. S. 55, approved the views stated in *Kershaw v. Kelsey*, 100 Mass. 561, 1 Am. Rep. 142, *supra*. See also *Montgomery v. U. S.*, 15 Wall. (U. S.) 395; *U. S. v. Barker*, 1 Paine (U. S.) 156.

Ransom Bills have always been held to be valid contracts. *Ricord v. Beitenham*, 3 Burr. 1734; *Anthon v. Fisher*, 2 Dougl. 650, note, 3 Dougl. 166, 26 E. C. L. 69; *Brandon v. Nesbitt*, 6 T. R. 28; *Crawford v. The William Penn*, 3 Wash. (U. S.) 484.

Contracts for Subsistence made by a prisoner of war have always been held to be valid. *Antoine v. Morshead*, 6 Taunt. 237, 1 E. C. L. 370; *Crawford v. The William Penn*, 3 Wash. (U. S.) 484.

Contracts of Necessity. — Contracts made in an enemy's port by the master of a vessel which are necessary to enable the vessel to return to its home port have likewise been treated as valid. *Hallet v. Jenks*, 3 Cranch (U. S.) 210; *Crawford v. The William Penn*, 3 Wash. (U. S.) 484.

Contracts Directly in Aid of the Enemy Are Void — *United States*. — *Taylor v. Thomas*, 22 Wall. (U. S.) 479; *Radich v. Hutchins*, 95 U. S. 210.

Alabama. — *Shepherd v. Reese*, 42 Ala. 329; *Patton v. Gilmer*, 42 Ala. 548, 94 Am. Dec. 665; *Oxford Iron Co. v. Quinchett*, 44 Ala. 487.

Arkansas. — *Booker v. Robbins*, 26 Ark. 660.

Louisiana. — *West Tennessee Bank v. Citizens' Bank*, 21 La. Ann. 18; *Williams v. Gay*, 21 La. Ann. 110; *Haney v. Manning*, 21 La. Ann. 166; *Pratt v. Draughon*, 21 La. Ann. 194; *McWilliams v. Bryan*, 21 La. Ann. 211; *Eastin v. Ducrest*, 21 La. Ann. 656; *Cousin v. Abat*, 21 La. Ann. 705; *Mansfield v. McLearn*, 22 La. Ann. 216; *Clements v. Graham*, 24 La. Ann. 446.

Antebellum Contracts. — Contracts made before the breaking out of war are not, as a rule, extinguished, but the remedies thereon are suspended until the close of the war, owing to the inability of an alien enemy to sue or be sued.¹ Those contracts, however, which are of such a character that their performance will necessitate the continuance of commercial intercourse during the war, such as partnership contracts, are extinguished.²

7. Enemy Character — *a. OF PERSONS* — (1) *Rendition of Assistance to Enemy.*³ — The enemy or neutral character of an individual is not determined exclusively by the consideration that he is or is not a subject of the enemy or of a neutral state, but depends on the question whether he renders assistance directly or indirectly to the enemy state. If he renders assistance directly by taking up a hostile attitude, there can be no question of his enemy character;³ and so it has been held that one who abandons his home, enters the military lines of his country's enemy, and is in sympathy and co-operation with such enemy is, during his stay, himself an enemy, and liable to be treated as such as to both person and property.⁴

(2) *Effect of Domicil.* — Apart from cases of direct assistance to the enemy, the question of domicil is controlling in determining whether one is to be considered an enemy or a neutral, the theory being that one contributes to the resources of the country in which he is domiciled, and is consequently to be considered as a subject thereof.⁵ So during the civil war persons domiciled

Mississippi. — New Orleans, etc., R. Co. v. State, 52 Miss. 877.

North Carolina. — Cronly v. Hall, 67 N. Car. 9, 12 Am. Rep. 597; Leak v. Richmond County, 64 N. Car. 132; Logan v. Plummer, 70 N. Car. 388; Brickell v. Halifax, 81 N. Car. 240; Smitherman v. Sanders, 64 N. Car. 522; Lewis v. Latham, 74 N. Car. 283; Setzer v. Catawba County, 64 N. Car. 516; Critcher v. Holloway, 64 N. Car. 526.

Texas. — Converse v. Miller, 33 Tex. 216; Roquemore v. Alloway, 33 Tex. 461.

1. Previous Contracts Not Requiring Intercourse Not Extinguished. — New York L. Ins. Co. v. Clopton, 7 Bush (Ky.) 179, 3 Am. Rep. 290; Louisville, etc., R. Co. v. Buckner, 8 Bush (Ky.) 277, 8 Am. Rep. 462; Hillyard v. Mutual Ben. L. Ins. Co., 35 N. J. L. 415, 37 N. J. L. 414, 18 Am. Rep. 741; Hoare v. Allen, 2 Dall. (Pa.) 102; Manhattan L. Ins. Co. v. Warwick, 20 Gratt. (Va.) 614, 3 Am. Rep. 218. See Cohen v. New York Mut. L. Ins. Co., 50 N. Y. 610, 10 Am. Rep. 522; Sands v. New York L. Ins. Co., 50 N. Y. 626, 10 Am. Rep. 535.

In New York L. Ins. Co. v. Statham, 93 U. S. 32, Bradley, J., said that "the doctrine of the revival of contracts suspended during the war is based on considerations of equity and justice, and cannot be invoked to revive a contract which it would be unjust or inequitable to revive."

2. Partnership Dissolved by War. — The William Bagaley, 5 Wall. (U. S.) 377; Hanger v. Abbott, 6 Wall. (U. S.) 532; Matthews v. McStea, 91 U. S. 7; Planters' Bank v. St. John, 1 Woods (U. S.) 590; Cramer v. U. S., 7 Ct. Cl. 302; New Orleans Bank v. Matthews, 49 N. Y. 12; Griswold v. Waddington, 16 Johns. (N. Y.) 438; Taylor v. Hutchinson, 25 Gratt. (Va.) 536, 18 Am. Rep. 699; Booker v. Kirkpatrick, 26 Gratt. (Va.) 145; Small v. Lumpkin, 28 Gratt. (Va.) 832.

The Relation of Agency is not dissolved by war, if the agency is not of such a character as to involve commercial intercourse. U. S.

v. Grossmayer, 9 Wall. (U. S.) 72; U. S. v. Lapene, 17 Wall. (U. S.) 601; Montgomery v. U. S., 15 Wall. (U. S.) 395; University v. Finch, 18 Wall. (U. S.) 106; Botts v. Crenshaw, Chase (U. S.) 24; Williams v. Paine, 169 U. S. 55; Buford v. Speed, 11 Bush (Ky.) 338; Sands v. New York L. Ins. Co., 59 Barb. (N. Y.) 556; Robinson v. International L. Assur. Soc., 42 N. Y. 54, 1 Am. Dec. 490; Mitchell v. Nodaway County, 80 Mo. 257; Hale v. Wall, 22 Gratt. (Va.) 424; Small v. Lumpkin, 28 Gratt. (Va.) 832.

The Assent of the Principal to the continuance of the agency must, however, appear, unless such continuance is to the advantage of the principal, when it will be presumed. New York L. Ins. Co. v. Davis, 95 U. S. 425; Williams v. Paine, 169 U. S. 55. And see Howell v. Gordon, 40 Ga. 302; Conley v. Burson, 1 Heisk. (Tenn.) 145.

3. Rendition of Assistance to Enemy. — Hall on Int. Law (4th ed.), § 168*.

4. Gates v. Goodloe, 101 U. S. 612.

5. Domicil Controlling as to Person's Enemy Character. — The Endraught, 1 C. Rob. 22; The Sarah Christina, 1 C. Rob. 237; The Indian Chief, 3 C. Rob. 23; The President, 5 C. Rob. (Reprint) 248; The Neptunus, 6 C. Rob. (Reprint) 403; U. S. v. The Schooner El Telegrafo, Newb. Adm. 383; Murray v. Schooner Charming Betsy, 2 Cranch (U. S.) 64; The Frances, 8 Cranch (U. S.) 363; The Venus, 8 Cranch (U. S.) 253; The Ship Francis, 1 Gall. (U. S.) 614; The Ship Ann Green, 1 Gall. (U. S.) 274; The Delta, Blatchf. Prize Cas. 133; The Sarah Starr, Blatchf. Prize Cas. 69.

Statement of Rule. — In Livingston v. Maryland Ins. Co., 7 Cranch (U. S.) 542, Story, J., said: "Whenever a person is *bona fide* domiciled in a particular country, the character of the country irresistibly attaches to him. The rule has been applied with equal impartiality in favor of and against neutrals and belligerents. It is perfectly immaterial what is the trade in which the party is engaged, or whether he be

within the Southern states which were in the firm possession and control of the Confederacy were considered as enemies of the United States without regard to their personal sentiments upon the questions involved in the war.¹ And the same rule was applied in the case of citizens of a neutral country domiciled in the Confederate states.² It has even been decided that a citizen of the United States who has become domiciled in a foreign country and is engaged in commerce there must be presumed to intend to continue such domicile, although war has broken out between such country and the country of his nativity.³ One's domicile is considered to determine one's enemy character, even in the case of a neutral consul resident and trading in a belligerent country.⁴

Constituents of Domicil. — Domicil has for this purpose generally the meaning of place of residence with the intention of remaining.⁵ Without any other evidence of such intention, however, a considerable length of residence may in itself be sufficient to establish domicile,⁶ and the presumption is that one

engaged in any. If he be settled *bona fide* in a country with the intention of indefinite residence, he is, as to all foreign countries, to be deemed a subject of that country. Without doubt, in order to ascertain this domicile, it is proper to take into consideration the situation, the employment, and the character of the individual. The trade in which he is engaged, the family that he possesses, and the transitory or fixed character of his business are ingredients which may properly be weighed in deciding on the nature of an equivocal residence or domicile. But when once that domicile is fixed and ascertained, all other circumstances become immaterial."

1. Decisions Growing Out of Civil War. — Prize Cases, 2 Blackf. (U. S.) 635; The Peterhoff, 5 Wall. (U. S.) 28; Mrs. Alexander's Cotton, 2 Wall. (U. S.) 419; The William Bagaley, 5 Wall. (U. S.) 377; Miller v. U. S., 11 Wall. (U. S.) 268; The Pioneer, Blatchf. Prize Cas. 22, 649; The Sally Magee, Blatchf. Prize Cas. 382; The Peterhoff, Blatchf. Prize Cas. 463; The Mary Clinton, Blatchf. Prize Cas. 556; The Amy Warwick, 2 Sprague (U. S.) 143, 24 Law Rep. 404; The Hiawatha, Blatchf. Prize Cas. 1, 18 Leg. Int. (Pa.) 332; U. S. v. The F. W. Johnson, 18 Leg. Int. (Pa.) 334; The Island Belle, 5 Phila. (Pa.) 501, 21 Leg. Int. (Pa.) 60, 26 Law Rep. 263; U. S. v. The Steam Towboat Allegheny, 10 Pittsb. Leg. J. (Pa.) 276, 2 Pittsb. (Pa.) 437.

2. The Flying Scud, 6 Wall. (U. S.) 263.

3. Presumption of Continuance of Domicil. — The Venus, 8 Cranch (U. S.) 253, where goods belonging to an American domiciled in Great Britain were condemned as British property, though the vessel sailed before the outbreak of hostilities and before the owners had knowledge of the war. Marshall, C. J., dissented on the ground that in such a case there is a presumption of an intention on the part of an American citizen to return to his native country at the first opportunity after an outbreak of war, and that accordingly the property should be exempt from condemnation until delay or other circumstances destroy that presumption. Of this dissenting view Chancellor Kent says: "There is no doubt of its superior solidity and justice." 1 Kent's Com. 78, note c.

4. Consul Domiciled in Belligerent Country. — The Indian Chief, 3 C. Rob. 22; The Josephine,

4 C. Rob. 25; The Pioneer, Blatchf. Prize Cas. 666.

5. Intention of Remaining. — 1 Kent's Com. 76; Dana's Wheaton's Int. Law, § 320 *et seq.*; The Bernon, 1 C. Rob. 102; Mitchell v. U. S., 21 Wall. (U. S.) 350. See generally the title DOMICIL, vol. 10, p. 6.

In The Venus, 8 Cranch (U. S.) 279, Washington, J., said: "The question whether the person to be affected by the right of domicile had sufficiently made known his intention of fixing himself permanently in the foreign country must depend upon all the circumstances of the case. If he had made no express declaration on the subject, and his secret intention is to be discovered, his acts must be attended to, as affording the most satisfactory evidence of his intention. On this ground it is that the courts of England have decided that a person who removes to a foreign country, settles himself there, and engages in the trade of the country furnishes by these acts such evidence of an intention permanently to reside there as to stamp him with the national character of the state where he resides. In questions on this subject, the chief point to be considered is the *animus manendi*."

6. Time of Stay. — Rogers v. The Mexican Schooner Amado, Newb. Adm. 400; The Ship Ann Green, 1 Gall. (U. S.) 274.

In The Harmony, 2 C. Rob. 322, Sir William Scott said: "I may venture to hold that time is the grand ingredient in constituting domicile. I think that hardly enough is attributed to its effects; in most cases it is unavoidably conclusive. It is not unfrequently said that if a person comes only for a special purpose, that shall not fix a domicile. This is not to be taken in an unqualified latitude. * * * Suppose a man comes into a belligerent country at or before the beginning of a war; it is certainly reasonable not to bind him too soon to an acquired character, and to allow him a fair time to disengage himself; but if he continues to reside during a good part of the war, contributing, by payment of taxes and other means, to the strength of that country, I am of opinion that he could not plead his special purpose with any effect against the rights of hostility. If he could, there would be no sufficient guard against the fraud and abuses of masked, pretended, original, and sole purposes of a long-continued residence. There is a time

resident in a country is domiciled there.¹

(3) *Change of Domicil.* — The character acquired by mere domicil ceases upon removal from the country without the intention of returning,² and an individual is deemed to have changed his domicil to that of his native country as soon as he starts to return to that country.³ The circumstances requisite to establish domicil are, it is said, flexible and easily accommodated to the real truth and equity of the case, and so it requires fewer circumstances to constitute domicil in the case of a native subject who returns to resume his original character than it does to impress the national character on a stranger.⁴ A mere occasional absence, or periodical visits to one's native country, do not change national character,⁵ nor is a mere intention to return sufficient for this purpose.⁶

(4) *Master and Crew of Vessel.* — The master and crew of a vessel are deemed to be possessed of the same national character as the vessel.⁷

b. OF PROPERTY — (1) *In General.* — An enemy character is imputed to property which does not actually belong to an enemy, if it belongs to a subject of another state who is engaged in the ordinary or extraordinary commerce of the enemy's country upon the same footing and with the same advantages as native resident subjects; his property so employed being regarded as incorporated into the general commerce of that country, and so subject to confiscation, wherever he may reside.⁸

(2) *Commercial House in Enemy Country.* — Accordingly the property of a commercial house established in the enemy country assumes the enemy character, without regard to the domicil of the partners.⁹ A converse rule, however, does not apply so as to render the share of an enemy in property of a house of trade in a neutral country exempt from liability as being neutral property.¹⁰

which will estop such a plea; no rule can fix the time *a priori*, but such a time there must be."

1. *Presumption from Residence.* — The *Venus*, 8 Cranch (U. S.) 253; *Mitchell v. U. S.*, 21 Wall. (U. S.) 350.

2. *Change of Domicil.* — The *Indian Chief*, 3 C. Rob. 12. See also the title DOMICIL, vol. 10, p. 20.

3. *Return to Native Country.* — The *Indian Chief*, 3 C. Rob. 12; The *Ship St. Lawrence*, 1 Gall. (U. S.) 467; The *Ship Francis*, 1 Gall. (U. S.) 614. See the title DOMICIL, vol. 10, p. 12.

4. 1 Kent's Com. 77; *La Virginie*, 5 C. Rob. (Reprint) 91; The *Ship Francis*, 1 Gall. (U. S.) 614.

5. The *Friendschaft*, 3 Wheat. (U. S.) 14; *Johnson v. 21 Bales, etc.*, 2 Paine (U. S.) 601. And see the title DOMICIL, vol. 10, p. 15.

6. *Intention to Return.* — The *President*, 5 C. Rob. (Reprint) 248; *Johnson v. 21 Bales, etc.*, 2 Paine (U. S.) 601.

7. *Master and Crew of Vessel.* — The *Endraught*, 1 C. Rob. 22; The *Bernon*, 1 C. Rob. 102.

8. *Property Incorporated in Commerce of Enemy.* — Hall on Int. Law (4th ed.), § 109.

In The *San Jose Indiano*, 2 Gall. (U. S.) 268, Story, J., said: "Such a trade, so carried on, has a direct and immediate effect in aiding the resources and revenue of the enemy and in warding off the pressure of the war. It is not distinguishable from the ordinary trade of his native subjects. It subserves his manufactures and industry; and its whole profits accumulate and circulate in his dominions, and become regular objects of taxation, in the

same manner as if the trade were pursued by native subjects. There is no reason, therefore, why he who thus enjoys the protection and benefits of the enemy's country should not, in reference to such a trade, share its dangers and its losses. It would be too much to hold him entitled by a mere neutral residence to carry on a substantially hostile commerce and at the same time possess all the advantages of a neutral character. I agree, therefore, that 'it is a doctrine supported by strong principles of equity and propriety, that there is a traffic which stamps a national character on the individual, independent of that character which mere personal residence may give him.'"

9. *Commercial House in Enemy Country.* — The *Vigilantia*, 1 C. Rob. 1; The *Susa*, 2 C. Rob. 255; The *Portland*, 3 C. Rob. 41; The *Friendschaft*, 4 C. Rob. 166; The *Jonge Klassina*, 5 C. Rob. (Reprint) 265; The *Frances*, 8 Cranch (U. S.) 363; The *Antonia Johanna*, 1 Wheat. (U. S.) 159; The *Friendschaft*, 4 Wheat. (U. S.) 105; The *Cheshire*, 3 Wall. (U. S.) 231; The *William Bagaley*, 5 Wall. (U. S.) 377; The *Gray Jacket*, 5 Wall. (U. S.) 342; The *San Jose Indiano*, 2 Gall. (U. S.) 268.

This principle applies with even greater force, it is said, to the property of a corporation formed under the laws of the enemy's country, regardless of the domicil of the individual stockholders. The *Buena Ventura*, 87 Fed. Rep. 927.

10. *Enemy House in Neutral Country.* — The *Frances*, 8 Cranch (U. S.) 348, *affirming* 1 Gall. (U. S.) 618; The *William Bagaley*, 5 Wall. (U. S.) 377; The *Antonia Johanna*, 1 Wheat. (U. S.) 159.

(3) *Products of Enemy Country.* — The products of land situated in the enemy country, or in territory in the military occupation of the enemy, so long as it belongs to the owner of the soil, is considered enemy property, irrespective of his national character or residence.¹

(4) *Vessels Sailing under Enemy Flag or Pass.* — Ships are deemed to belong to the country under whose flag and pass they sail, as against the owner or claimant of the ship or of an interest therein.²

(5) *Vessels Carrying Enemy License.* — The possession by a vessel of a license from the enemy is sufficient to involve the condemnation of the vessel.³

(6) *Vessels Engaged in Privileged Trade of Enemy.* — Ships and other property belonging to neutrals are considered to be enemy property if engaged in a privileged trade of the enemy which is ordinarily and in times of peace confined to the subjects of the enemy, as is frequently the case with the colonial and coasting trade.⁴

(7) *Agency in Enemy Country.* — A neutral merchant may, in general, trade with the country of a belligerent by means of an agent stationed there without giving a belligerent character to the trade, unless he does business there as a privileged trader, in which case the general rule as to privileged trade applies.⁵

(8) *Consignments to or from Belligerent Territory.* — Property shipped from a neutral to the enemy country under a contract by which it is to become the property of an enemy subject, though it be agreed that it shall be at the risk of the shipper during the voyage, is regarded as enemy property.⁶ Likewise property shipped by an enemy to a neutral or friendly consignee will be treated as the property of the former unless it is clearly shown that the property has actually passed to the latter, and that the sale is subject to no conditions.⁷

1. *Products of Enemy Country.* — The Phoenix, 5 C. Rob. (Reprint) 25; Vrow Anna Catharina, 5 C. Rob. 161; The Dree Gebroeders, 4 C. Rob. 232; Thirty Hogsheads Sugar v. Boyle, 9 Cranch (U. S.) 191.

2. *Vessels under Enemy Flag or Pass.* — The Vigilantia, 1 C. Rob. 1; Vrow Anna Catharina, 5 C. Rob. 161; The Success, 1 Dods. 131; The Primus, 29 Eng. L. & Eq. 589; The Industrie, 33 Eng. L. & Eq. 573; Mann v. Sacks, Bee Adm. 202; U. S. v. The Schooner El Telegrafo, Newb. Adm. 383; The William Bagaley, 5 Wall. (U. S.) 377; The Hallie Jackson, Blatchf. Prize Cas. 41; The Anna, Blatchf. Prize Cas. 332. Compare Jenks v. Hallet, 1 Cai. (N. Y.) 60.

3. *Enemy License.* — The Hiram, 1 Wheat. (U. S.) 440; The Ariadne, 2 Wheat. (U. S.) 143; Patton v. Nicholson, 3 Wheat. (U. S.) 204; The Langdon Cheves, 4 Wheat. (U. S.) 103; The Aurora, 8 Cranch (U. S.) 203, affirming 4 Am. L. J. (Hill's) 473; The Julia, 8 Cranch (U. S.) 181, affirming 1 Gall. (U. S.) 594; The Hiram, 8 Cranch (U. S.) 444, reversing Fish. Prize Cas. 69; The Alliance, Blatchf. Prize Cas. 262. But see The Sarah Starr, Blatchf. Prize Cas. 69; U. S. v. The South Carolina, Fish. Prize Cas. 63; U. S. v. The Schooner Matilda, 5 Hughes (U. S.) 44.

4. *Privileged Trade of Enemy.* — The Princessa, 2 C. Rob. 49; The Anna Catharina, 4 C. Rob. 107; The Rendsburg, 4 C. Rob. 121; Vrow Anna Catharina, 5 C. Rob. 161; The Commercen, 1 Wheat. (U. S.) 382; The Ship Ann Green, 1 Gall. (U. S.) 274; The San Jose Indiano, 2 Gall. (U. S.) 268.

5. *Agency in Enemy Country.* — The Anna Catharina, 4 C. Rob. 107.

In The San Jose Indiano, 2 Gall. (U. S.) 268, Story, J., said: "Although, in general, the residence of a stationed agent in the enemy's country will not affect the trade of the neutral principal with a hostile character, yet this is true only as to the ordinary trade of a neutral as such, carried on in the ordinary manner;" and distinguished the case "where such trade is carried on, not on the footing of a foreign merchant, but as a privileged trader, or by an incorporation with the general commerce of the enemy in the same manner, and with the same benefits, as a native merchant."

6. *Consignment by Neutral.* — The Sally Griffiths, 3 C. Rob. 300, note a; The Anna Catharina, 4 C. Rob. 107; The Ship Ann Green, 1 Gall. (U. S.) 274; The Sally Magee, 3 Wall. (U. S.) 451, affirming Blatchf. Prize Cas. 382. Compare Ludlow v. Bowne, 1 Johns. (N. Y.) 1, 3 Am. Dec. 277.

"The prize courts will not allow a neutral and belligerent, by a special agreement, to change the ordinary rule of peace, by which goods ordered and delivered to the master are considered as delivered to the consignee. All such agreements, though valid in time of peace, are in time of war, or in peace if made in contemplation of war and with intent to protect from capture, held to be constructively fraudulent; and if they could operate, they would go to cover all belligerent property while passing between a belligerent and a neutral country, since the risk of capture would be laid alternately on the consignor or consignee, as the neutral factor should happen to stand in the one or the other of those relations." 1 Kent's Com. 87.

7. *Consignment to Neutral.* — The Aurora, 4

(9) *Property in Enemy Territory.* — Property within enemy territory not belonging to enemy persons is subject, like the property of enemies, to the laws of war, and, though belonging to neutrals, may be seized by the enemy if it is in any way susceptible of use for hostile purposes.¹ And so property in a belligerent state belonging to subjects of the other belligerent may, it seems, be regarded by the latter as in all respects enemy property, on the theory that it should be removed to the domicile of the owner upon the breaking out of war;² and if not promptly so removed it is subject to capture as prize of war while being subsequently brought from the enemy territory.³

(10) *Transfers of Belligerent Property to Neutrals* — (a) *In General.* — Transfers of property by belligerents to neutrals are refused recognition when made under such circumstances as to suggest that they were made for the purpose merely of protecting the property from seizure. Transfers of vessels, particularly, owing to the possibilities of fraud, are subject to careful scrutiny, and when made during war or prior to war will not be recognized if there be any conditions affecting the absolute character of the sale, or any reservation of control in the hostile proprietor.⁴ And the absence of good proof of the validity of the sale, by bill of sale and payment of a valuable consideration, will materially impair the neutral claim.⁵

(b) *Transfers in Transitu.* — Another application of the same principle is seen in the adoption by the prize courts of the rule that property which has a hostile character at the commencement of a voyage cannot change that character by a transfer made while it is in transit, so as to protect it from capture;⁶

C. Rob. 218; *The Marianna*, 6 C. Rob. (Reprint) 24; *The Merrimack*, 8 Cranch (U. S.) 317; *The Frances*, 8 Cranch (U. S.) 335, 9 Cranch (U. S.) 183; *The Abo*, Spinks Prize Cas. 44; *The Hannah M. Johnson*, Blatchf. Prize Cas. 35.

So in *The St. Jose Indiano*, 1 Wheat. (U. S.) 208, affirming 2 Gall. (U. S.) 268, it was held that where property was shipped by an enemy's house to its agent at the neutral port for account of a purchaser, the property did not vest in such purchaser so as to exempt it from seizure, the control being reserved by the shipper.

1. *Property in Enemy Territory.* — In *Young v. U. S.*, 97 U. S. 60, Waite, C. J., said: "All property within enemy territory is in law enemy property, just as all persons in the same territory are enemies. A neutral owning property within the enemy's lines holds it as enemy property, subject to the laws of war; and, if it is hostile property, subject to capture. It has never been doubted that arms and munitions of war, however owned, may be seized by the conquering belligerent upon conquered territory. The reason is that if left, they may, upon a reverse of the fortunes of war, help to strengthen the adversary. To cripple him, therefore, they may be captured, if necessary; and whether necessary or not must be determined by the commanding general, unless restrained by the orders of his government, which alone is his superior. The same rule applies to all hostile property." See also *Lamar v. Browne*, 92 U. S. 187.

2. *Belonging to Subjects of Other Belligerent.* — In *The William Bagaley*, 5 Wall. (U. S.) 408, Clifford, J., said: "Personal property, except such as is the produce of the hostile soil, follows as a general rule the rights of the proprietor; but if it is suffered to remain in the hostile country after war breaks out, it becomes im-

pressed with the national character of the belligerent where it is situated. Promptitude is, therefore, justly required of citizens resident in the enemy country, or having personal property there, in changing their domicile, severing those business relations, or disposing of their effects, as matter of duty to their own government and as tending to weaken the enemy."

3. *The Gray Jacket*, 5 Wall. (U. S.) 342.

4. *Transfers to Neutrals Not Favored.* — *The Packet De Bilbao*, 2 C. Rob. 133; *The Noydt Gedacht*, 2 C. Rob. 137, note a; *The Sechs Geschwistern*, 4 C. Rob. 100; *The Jemmy*, 4 C. Rob. 31; *The Omnibus*, 6 C. Rob. (Reprint) 71; *The Rapid*, Spinks Prize Cas. 80; *The Christine*, Spinks Prize Cas. 82; *The Baltica*, Spinks Prize Cas. 273; *The Island Belle*, 5 Phila. (Pa.) 501, 21 Leg. Int. (Pa.) 60, 26 Law Rep. 263. See also *The Cheshire*, Blatchf. Prize Cas. 151, 165; *The Delta*, Blatchf. Prize Cas. 133, 654; *The Mersey*, Blatchf. Prize Cas. 187.

5. *Proof of Good Faith.* — *The Bernon*, 1 C. Rob. 102; *The Dree Gebroeders*, 4 C. Rob. 232; *The Ernst Merck*, Spinks Prize Cas. 89; *U. S. v. The Brig Lilla*, 2 Cliff. (U. S.) 169. Compare *The Ariel*, 5 W. R. 427.

6. *Transfers in Transitu.* — *The Dankebaart Africaan*, 1 C. Rob. 107; *The Hersteller*, 1 C. Rob. 114; *The Baltica*, 11 Moo. P. C. 141; *The Panaghia Rhomba*, 12 Moo. P. C. 168; *The Ship Ann Green*, 1 Gall. (U. S.) 274; *The Ship Francis*, 1 Gall. (U. S.) 614.

In *The Sally Magee*, 3 Wall. (U. S.) 460, Swayne, J., said: "The ownership of property in such cases cannot be changed while it is *in transitu*. The capture clothes the captors with all the rights of the owner which subsisted at the commencement of the voyage, and anything done thereafter designed to encumber the property or change its ownership

and the rule has been applied in the case of a transfer made merely in expectation of war.¹

(c) **Transfers of Vessels of War.** — A belligerent vessel of war cannot be sold or transferred to a neutral, even in a neutral port, so as to exempt her from seizure, however *bona fide* the transaction may be.²

(11) **Rights of Neutral or Friendly Liens.** — Equitable and secret liens on enemy property in favor of persons not enemies are not regarded as affecting its liability to condemnation, nor the rights of the captors to the proceeds;³ but liens in favor of persons in possession of the property are recognized and take precedence of the claims of the captors.⁴ In accordance with this distinction it is held that the lien of a neutral carrier for the freight of an enemy's goods is to be allowed upon capture.⁵ But seamen, it is decided, are not entitled to assert a lien for wages.⁶

(12) **Withdrawal of Property from Enemy Country.** — One is, it seems, allowed a reasonable time after the beginning of war in which to withdraw with his property from the enemy's country,⁷ though in the earlier cases it was stated that the right to withdraw one's property depended upon the acquirement of a license for the purpose.⁸ It has been decided, however, that a citizen cannot go or send a vessel from his own country to the enemy country for the purpose of bringing home such property, this being within the prohibition of trade with the enemy,⁹ and any right of removal must be exercised within a reasonable time.¹⁰

8. Rights of War as Against Enemy Persons — *a.* **COMBATANTS.** — In modern times it is generally conceded that a combatant is entitled to quarter if unable to continue the combat or when ready to surrender as a prisoner. He is at

is a nullity. No lien created at any time by the secret convention of the parties is recognized. Sound public policy and the right administration of justice forbid it. This rule is rigidly enforced by all prize tribunals. The property was shipped to the enemy. It was diverted from its course by the capture. The allegation of a lien wears the appearance of an afterthought. It strikes us as a scheme devised under pressure, to save, if possible, something from the vortex which it was foreseen inevitably awaited the vessel and cargo."

1. Expectation of War. — The Jan Frederick, 5 C. Rob. (Reprint) 115.

2. Transfer of Vessel of War. — The Minerva, 6 C. Rob. (Reprint) 396; The Georgia, 7 Wall. (U. S.) 32, affirming 1 Lowell (U. S.) 96; U. S. v. The Schooner Etta, (N. J.) 4 Am. L. Reg. N. S. 38.

3. Secret Liens Not Recognized. — The Josephine, 4 C. Rob. 25; The Tobago, 5 C. Rob. (Reprint) 194; The Marianna, 6 C. Rob. (Reprint) 24; The Battle, 6 Wall. (U. S.) 408; The Hampton, 5 Wall. (U. S.) 372; The San Jose Indiano, 2 Gall. (U. S.) 268; Harlan v. Nassau, Blatchf. Prize Cas. 199, 220; The Delta, Blatchf. Prize Cas. 133; The Mary Clinton, Blatchf. Prize Cas. 556; The Napoleon, Blatchf. Prize Cas. 296; The Nassau, Blatchf. Prize Cas. 665; The Sally Magee, Blatchf. Prize Cas. 382; U. S. v. The Isaac Hammett, 4 West. L. Month. 486, 10 Pittsb. Leg. J. (Pa.) 97, 2 Pittsb. (Pa.) 358.

4. Possessory Liens. — Where a neutral has a *ius in re* and is in possession with a right of retention until a certain amount is paid to him, the capturer takes *cum onere* and must allow the amount of such right; but where the neutral has merely a *ius ad rem* which he cannot

enforce without the aid of a court of justice, his claim will not be recognized by a prize court. The Tobago, 5 C. Rob. (Reprint) 194; The Amv Warwick, 2 Sprague (U. S.) 150.

A Mortgage recorded before the outbreak of hostilities has been held to vest an interest in the mortgagee which is to be protected though the mortgagor in possession is an enemy. U. S. v. The Arcola, 24 Fed. Cas. No. 14,464*a*.

5. Lien for Freight. — The Belvedier, 1 Dods. 356; The Vrow Sarah, 1 Dods. 255, note; The Constantia Harlessen, 1 Edw. Adm. 232.

6. Lien for Wages. — The Velasco, Blatchf. Prize Cas. 54; U. S. v. The Sally Magee, 4 Int. Rev. Rec. 134, 27 Fed. Cas. No. 16,216; The Brig Langdon Cheves, 2 Mason (U. S.) 58; The Lilla, 2 Sprague (U. S.) 177, 25 Law Rep. 81.

7. Withdrawal of Property from Enemy Country. — The William Bagaley, 5 Wall. (U. S.) 377; The Gray Jacket, 5 Wall. (U. S.) 342; The Evening Star, Blatchf. Prize Cas. 582; Fifty-two Bales Cotton, Blatchf. Prize Cas. 644, reversing Blatchf. Prize Cas. 309; The Sarah Starr, Blatchf. Prize Cas. 650; The John Gilpin, Blatchf. Prize Cas. 661; The General C. C. Pinckney, Blatchf. Prize Cas. 668, reversing Blatchf. Prize Cas. 278; Amory v. McGregor, 15 Johns. (N. Y.) 24.

8. The Dree Gebroeders, 4 C. Rob. 234; The Juffrow Catharina, 5 C. Rob. (Reprint) 126; The Schooner Rapid, 1 Gall. (U. S.) 295.

9. Sending Vessel for Purpose. — The Rapid, 8 Cranch (U. S.) 155.

10. Promptness of Withdrawal. — The William Bagaley, 5 Wall. (U. S.) 377; The St. Lawrence, 9 Cranch (U. S.) 120. In this case it was decided that eleven months after the declaration of war was too late.

all times liable to be taken prisoner, but as such is entitled to and generally receives humane treatment, and proper medical treatment if this is necessary and feasible. Quite frequently persons are released on their parole not to serve again during that war against the captor. The former custom of ransoming prisoners of war is now obsolete, but frequently agreements for the exchange of prisoners are made.¹

b. NONCOMBATANTS. — Noncombatants who in no way aid or take part in hostilities are now generally recognized as exempt from all direct violence or personal injury, though they are exposed to all injuries which may result indirectly from operations directed against armed forces. An important class of noncombatants consists of those whose duty it is to attend and nurse the sick and wounded of the army, and these, by the Geneva convention of 1864, acceded to by most of the civilized nations, are relieved from liability to capture and are generally entitled to the privileges of neutrals.²

9. Rights of War as Against Enemy Property — *a. PROPERTY IN STATE OF CAPTOR.* — It was decided by the federal Supreme Court early in the nineteenth century that property found in the United States at the outbreak of a war with the country to which the owners of the property belonged was subject to confiscation, but that the exercise of this right was a matter for the legislative department, and in the absence of an Act of Congress providing for such confiscation the property could not be judicially condemned, a mere declaration of war not being sufficient for the purpose.³ The same doctrine has been announced and applied in later cases,⁴ and the limited confiscation acts passed by Congress during the civil war were stated to be a proper exercise of belligerent rights.⁵

Practice Opposed to Confiscation. — Though the law as thus stated by the courts of the United States is generally recognized by the jurists of other nations, the exercise of the right of confiscation, except for special reasons arising from the character of the property and its particular utility to the operations of the enemy, is looked upon at the present day with decided disfavor and is not the usual practice. It is frequently provided by treaty that the right to confiscation shall not be exercised.⁶

1. Rights of War as Against Combatants. — Hall on Int. Law (4th ed.), § 127; 1 Rivier's *Droit des Gens* 242 *et seq.*; Wharton's *Dig. Int. Law*, §§ 347, 348; Instructions for Armies of the United States in the Field.

2. Noncombatants. — Hall on Int. Law (4th ed.), § 128; 1 Rivier's *Droit des Gens* 242 *et seq.* See the articles of the Geneva convention, contained in Wharton's *Dig. Int. Law*, § 348.

3. Enemy Property in State of Captor. — Brown v. U. S., 8 Cranch (U. S.) 110.

In this case Judge Story, with the minority, held that the right of confiscation was a function of the executive department as a part of the conduct of the war and not of the legislative department; while the view of Chief Justice Marshall, with the majority of the court, was that although the right to confiscate existed, the practice of nations had so generally avoided it that an authorization of it could not be presumed from the mere declaration or recognition of war. The chief justice also referred to the provision of the Constitution enumerating the powers accompanying that of declaring war, granting the power to Congress "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water," and he went on to say that "it would be restraining this clause within narrower limits than the words

themselves import to say that the power to make rules concerning captures on land and water is to be confined to captures which are extraterritorial. If it extends to rules respecting enemy property found within the territory, then we perceive an express grant to Congress of the power in question as an independent substantive power, not included in that of declaring war."

4. Tyler v. Defrees, 11 Wall. (U. S.) 331; Conrad v. Waples, 96 U. S. 279, 284; Prize Cases, 2 Black (U. S.) 636; Britton v. Butler, 9 Blatchf. (U. S.) 456, 11 Am. L. Reg. N. S. 293; Wagner v. The Schooner Juanita, Newb. Adm. 352; U. S. v. Stevenson, 3 Ben. (U. S.) 119.

5. Confiscation Acts During Civil War. — Miller v. U. S., 11 Wall. (U. S.) 268; Tyler v. Defrees, 11 Wall. (U. S.) 331.

6. Treaty Stipulations Against Confiscation. — A list of treaties in which such provisions were inserted, including a number to which the United States were a party, will be found in Hall on Int. Law (4th ed.), §§ 126, 144, notes. Of this list Mr. Hall remarks that with scarcely an exception one of the parties to each of the treaties is a South American state, and that it might be fairly argued that if similar treaties do not exist between European countries and between them and the United States it is be-

Confiscation of Debts. — The right to confiscate debts due to an enemy by persons within the jurisdiction of a belligerent power at the time of the declaration of war stands upon practically the same footing as the right to confiscate an enemy's tangible property; the right of confiscation existing, but not being usually exercised, and in the United States requiring special authority from Congress.¹

Debts Due by State. — But a strictly obligatory custom of exemption from confiscation has been established in the case of money lent by individuals to a foreign state with which their country afterwards engages in war, an exception which is undoubtedly dictated to a considerable extent by motives of self-interest, since if such loans were the subject of confiscation it would be impossible for a state to borrow except at extremely high rates of interest.²

Enemy Property Entering Territorial Waters After the Commencement of War is, however, subject to confiscation, though the present practice is not to seize vessels so entering if their voyage began before the outbreak of hostilities;³ and occasionally a practice has been made of exempting from capture shipwrecked vessels and vessels driven into port by stress of weather or want of provisions, but such practice is clearly not obligatory upon a belligerent.⁴

b. PROPERTY IN STATE OF ENEMY — (1) *Public Property.* — Property belonging to an enemy state is, if of a movable character, generally treated as subject to capture, but as to the right of the enemy to appropriate moneys due upon contracts by enforcing the payment of debts due to the enemy state there is some question, and while the majority of writers favor such rights of confiscation, there is strong authority to the contrary. On the other hand, lands and buildings belonging to the enemy government are not subject to capture to such an extent as to validate a title made by a sale by the captor, but a belligerent obtaining military occupation of the territory in which such land and buildings are located may make temporary use of the proceeds thereof, and he can, for instance, cut timber from state forests, but should do so with a view to the future utility of the property.⁵ Property belonging to churches, hospitals, or educational or charitable estates, is not to be considered as public property so as to be liable to confiscation;⁶ and the rule is not to seize judicial and other legal documents or archives, these being of great importance to the community and of but little utility to the invader.⁷

cause there has been for a long time little fear that the right guarded against would be exercised by well-regulated states.

During the American Civil War, the Congress of the Confederate states enacted that property of whatever nature, except public stocks and securities, held by an alien enemy should be sequestered and appropriated, and this enactment was the subject of remonstrance by Lord Russell, who said that "whatever may have been the abstract rule of the law of nations in former times, instances of its application in the manner contemplated in the Act of the Confederate Congress in modern and more civilized times are so rare and have been so generally condemned that it may almost be said to have become obsolete." Hall on Int. Law (4th ed.), § 144, note.

The United States government likewise passed acts confiscating property actually used for insurrectionary purposes, and also property belonging to persons who aided or countenanced the Confederacy. Act of Aug. 6, 1861, 12 U. S. Stat. at L. 319; Act of July 17, 1862, 12 U. S. Stat. at L. 589. See also the titles INSURRECTION, *ante*, p. 977; WAR.

1. Confiscation of Debts. — Ware v. Hylton, 3 Dall. (U. S.) 199; Brown v. U. S., 8 Cranch

(U. S.) 110; Miller v. U. S., 11 Wall. (U. S.) 268; 1 Kent's Com. 63.

2. Debts Due by State. — 1 Kent's Com. 62 *et seq.*; Hall on Int. Law (4th ed.), § 144.

The case of the Silesian loan is usually referred to by writers in this connection. The controversy in that case arose from the action of the king of Prussia in seizing funds lent to him by English subjects, by way of reprisal for the capture of certain Prussian vessels by Great Britain, and the report of the law officers of England is said to show unanswerably that such right of seizure did not exist. 1 Kent's Com. 65, note a; Dana's Wheaton's Int. Law, §§ 298, 304.

3. Property Entering Territorial Waters. — The Johanna Emilie, Spinks Prize Cas. 14. See *infra*, this section. *Property at Sea.*

4. Hall on Int. Law (4th ed.), § 145.

5. Public Property of Enemy. — Hall on Int. Law (4th ed.), § 138; Phillimore on Int. Law, pt. 12, c. 4; American Instructions for Armies in the Field, art. 31.

6. Hall on Int. Law (4th ed.), § 138; American Instructions for Armies in the Field, art. 34.

7. Public Documents and Archives. — Hall on Int. Law (4th ed.), § 138.

Property of Artistic and Educational Value. — As to whether works of art or the contents of museums or libraries are also to be regarded as exempt from appropriation there is some difference of opinion, but the most advanced view is in favor of their exemption from seizure, as having no utility for belligerent purposes.¹

(2) *Private Property.* — Private property is in modern times regarded as exempt from capture unless it is of such a character as to be directly useful for belligerent purposes.²

(3) *Contributions and Requisitions.* — But this general rule of exemption, while prohibiting unregulated plunder by the soldiery, which formerly was accompanied by much oppression and cruelty, does not prevent the exaction by the commanders of the invading forces from private individuals of sums of money, and of provisions, means of transportation, labor, or any other articles or instrumentalities which may be needed for the consumption or temporary use of such forces, these exactions being termed respectively contributions and requisitions. As the amount of these exactions is entirely within the control of the invader, they may be the means of very great oppression.³

c. **PROPERTY AT SEA.** — That property of the enemy is generally liable to capture at sea is conceded,⁴ the only important exception being the case of enemy cargoes in neutral vessels, which are now quite frequently treated as exempt.⁵

1. Works of Art and Contents of Museums. — Mr. Hall and Mr. Dana (Dana's Wheaton's Int. Law, note 170) favor this view. On the other hand, the American Instructions (art. 36) assert the liability of such property to confiscation for the public use of the conquering nation. To the same effect see 2 Halleck on Int. Law 104.

Property Captured at Sea, when of this character, has been treated as exempt, but this case stands on a different footing, since the property or proceeds would go to the captors. See *infra*, this section, *Property at Sea*.

2. Private Property Generally Exempt. — U. S. v. Klein, 13 Wall. (U. S.) 123; Planters' Bank v. Union Bank, 16 Wall. (U. S.) 483; Hall on Int. Law (4th ed.), § 139; 2 Rivier's Droit des Gens 318 *et seq.*

In Mrs. Alexander's Cotton, 2 Wall. (U. S.) 404, Chase, C. J., said: "Being enemies' property, the cotton was liable to capture and confiscation by the adverse party. [Prize Cases, 2 Black (U. S.) 687.] It is true that this rule, as to property on land, has received very important qualifications from usage, from the reasonings of enlightened publicists, and from judicial decisions. It may now be regarded as substantially restricted 'to special cases dictated by the necessary operation of the war' [1 Kent's Com. 92], and as excluding, in general, 'the seizure of the private property of pacific persons for the sake of the gain.' [1 Kent's Com. 93.] The commanding general may determine in what special cases its more stringent application is required by military emergencies; while considerations of public policy and positive provisions of law and the general spirit of legislation must indicate the cases in which its application may be properly denied to the property of noncombatant enemies." In this case it was decided that cotton was such an element of strength to the Confederate states as to justify its confiscation, and the same holding was made in subsequent cases. U. S. v. Padelford, 9 Wall. (U. S.) 531; Sprout

v. U. S., 20 Wall. (U. S.) 459; Haycraft v. U. S., 22 Wall. (U. S.) 81; Lamar v. Browne, 92 U. S. 187; Young v. U. S., 97 U. S. 39; Ford v. Surget, 97 U. S. 594.

3. Contributions and Requisitions. — Hall on Int. Law (4th ed.), § 140.

In 1846 Mr. Marcy, while secretary of war, wrote: "An invading army has unquestionably the right to draw supplies from the enemy without paying for them, and to make the enemy feel the weight of the war." In the Mexican war, however, the United States, and in the Crimean war the forces of France and England, from motives of policy, imposed no such exactions. In the Franco-German war, on the other hand, the Germans made extremely heavy demands on the inhabitants of French territory. Hall on Int. Law (4th ed.), § 140.

See as to this right of appropriation Gates v. Goodloe, 101 U. S. 672; Taylor v. Nashville, etc., R. Co., 6 Coldw. (Tenn.) 646, 98 Am. Dec. 474; Wellman v. Wickerman, 44 Mo. 484.

The American Instructions for Armies in the Field (art. 37), after stating that "the United States acknowledge and protect * * * strictly private property," provides: "This rule does not interfere with the right of the victorious invader to tax the people or their property, to levy forced loans, to billet soldiers, or to appropriate property, especially houses, land, boats or ships, and churches, for temporary and military uses."

4. Enemy Property Liable to Seizure at Sea. — 1 Kent's Com. 91; Dana's Wheaton's Int. Law, § 355 and note 171; Hall on Int. Law (4th ed.), § 147; Wharton's Dig. Int. Law, § 342.

5. See *infra*, this title, Rights and Liabilities of Neutral Subjects.

The Sufficiency of Evidence of the enemy character of vessels and cargo, so as to authorize their condemnation, has been the subject of numerous decisions. The Actor, Blatchf. Prize Cas. 215; The Aigburth, Blatchf. Prize Cas. 645; The A. J. View, Blatchf. Prize Cas.

Suggested Exemption from Capture. — There have been, however, since the latter part of the eighteenth century, many suggestions in favor of exempting such property from capture on sea as it is now exempt on land. The United States have always taken a strong position in favor of such a rule, and the same disposition has been shown by some European governments.¹ Up to this time England, as the possessor of a great navy, has been its chief opponent, but there is now a strong sentiment in that country in its favor, in view of the greatness of its mercantile marine, and there seems reason to think that, supported as the doctrine is by nearly all the writers of the different nations, the practice in conformity with this view will greatly extend.²

Property Used for Scientific or Educational Purposes. — Vessels employed only for the purposes of discovery or science have generally been regarded as exempt from capture,³ and the same view has been taken as to property intended for educational use.⁴

143; The Albion, *Blatchf. Prize Cas.* 95; The Alliance, *Blatchf. Prize Cas.* 646; The Angelina, *Blatchf. Prize Cas.* 371; The Anna, *Blatchf. Prize Cas.* 332; The Captain Speden, *Blatchf. Prize Cas.* 127; The Cuba, 2 Sprague (U. S.) 163; The Delight, *Blatchf. Prize Cas.* 145; The D. Sargeant, *Blatchf. Prize Cas.* 576; The Edward Barnard, *Blatchf. Prize Cas.* 122; The Ellis, *Blatchf. Prize Cas.* 248; The Express, *Blatchf. Prize Cas.* 128; The Ezilda, *Blatchf. Prize Cas.* 232, 664; The Florida, *Blatchf. Prize Cas.* 327; The Forest King, *Blatchf. Prize Cas.* 45, 9 Fed. Cas. No. 4,937; The Garonne, *Blatchf. Prize Cas.* 132; The Gondar, *Blatchf. Prize Cas.* 649, *reversing Blatchf. Prize Cas.* 266; The Hallie Jackson, *Blatchf. Prize Cas.* 41, 11 Fed. Cas. No. 5,961; The Henry C. Brooks, *Blatchf. Prize Cas.* 99; The Henry Lewis, *Blatchf. Prize Cas.* 131; The Henry Middleton, *Blatchf. Prize Cas.* 121; The Hetwan, *Blatchf. Prize Cas.* 331; The Jesse J. Cox, *Blatchf. Prize Cas.* 196; The J. G. McNeil, *Blatchf. Prize Cas.* 162; The Joanna Ward, *Blatchf. Prize Cas.* 164; The Lizzie Weston, *Blatchf. Prize Cas.* 144; The Lucy C. Holmes, *Blatchf. Prize Cas.* 196; The Lynchburg, *Blatchf. Prize Cas.* 57, 659; The Maria, *Blatchf. Prize Cas.* 283; The Maria Bishop, *Blatchf. Prize Cas.* 552; The Mercury, *Blatchf. Prize Cas.* 328; The Merrimac, *Blatchf. Prize Cas.* 563; The Mersey, *Blatchf. Prize Cas.* 658, *reversing Blatchf. Prize Cas.* 187; The Ned, *Blatchf. Prize Cas.* 119; The Neptune, *Blatchf. Prize Cas.* 367; The New Eagle, *Blatchf. Prize Cas.* 196; The North Carolina, *Blatchf. Prize Cas.* 645; The Oddfellow, *Blatchf. Prize Cas.* 372, 20 Leg. Int. (Pa.) 229; The Olive, *Blatchf. Prize Cas.* 185; The Osceola, *Blatchf. Prize Cas.* 150; The Pioneer, *Blatchf. Prize Cas.* 163, 666; The Prince Leopold, *Blatchf. Prize Cas.* 89, 647; The Reindeer, *Blatchf. Prize Cas.* 241, 330; The Sally Magee, *Blatchf. Prize Cas.* 379; The Sarah, *Blatchf. Prize Cas.* 195; The Sarah M. Newhall, *Blatchf. Prize Cas.* 629; The Solidad Cos., *Blatchf. Prize Cas.* 94; The Troy, *Blatchf. Prize Cas.* 246; The Venus, *Blatchf. Prize Cas.* 129; The Water Witch, *Blatchf. Prize Cas.* 300; The Wave, *Blatchf. Prize Cas.* 148; The Buena Ventura, 87 Fed. Rep. 927; The Rita, 87 Fed. Rep. 925; The Maria Dolores, 88 Fed. Rep. 548; The Fortuna, 1 Brock (U. S.) 299; Johnson v. 21 Bales, etc., 2 Paine (U. S.) 601; The Caledonian, 4 Wheat. (U. S.) 100.

1. Exemption of Private Property at Sea. — As early as 1785 this position was taken by the United States, and was embodied in the Franklin treaty with Prussia of that year. In 1823 John Q. Adams, as secretary of state, proposed to all the leading European states to abolish by treaty the capture of private property at sea, but the proposition was never acted upon so as to bind the United States, except in cases of special treaty. Again, in 1856, Mr. Marcy, in refusing to accede to the Declaration of Paris abolishing privateering, stated that he would agree thereto only upon condition that "the private property of the subjects of one or the other of two belligerent powers should not be subject to capture by the vessels of the other party, except in cases of contraband of war." In 1870 Mr. Fish, in acknowledging receipt of a communication stating that in the war with France Prussia would regard French mercantile vessels as exempt from capture, expressed a hope that this principle of immunity of private property at sea would soon be universally recognized as another restraining and humanizing influence imposed by civilization upon the art of war. Whart. Dig. Int. Law, § 342. In 1871 a treaty was made with Italy embodying this principle. The same principle was observed by Austria and Prussia in the war of 1866 as between those states and as between Austria and Italy, but in 1871 Prussia changed the attitude which she had taken in favor of such exemption, owing to the failure of France to adopt it, and French mercantile vessels were accordingly subjected to capture. Lawrence on Int. Law, § 216; Hall on Int. Law, § 147.

2. Hall on Int. Law (4th ed.), § 147; Lawrence on Int. Law, § 216.

3. Vessels Engaged in Discovery and Scientific Research. — Hall on Int. Law (4th ed.), 138; 2 Hallock on Int. Law 149; The Paquete Habana, 175 U. S. 677.

4. Property Intended for Educational Use. — A collection of Italian paintings and prints captured by a British vessel during the war of 1812, on their passage from Italy to the United States, was restored to the owner, the Academy of Arts in Philadelphia, by the Vice-admiralty Court of Halifax. The Marquis de Somerueles, Stew. Adm. (Nova Scotia) 445, 482, referred to at length in The Paquete Habana, 175 U. S. 677.

So books intended for a public library in South Carolina, when captured at sea by a

Fishing Vessels, used on the enemy's coasts, with their implements and supplies, cargoes and crews, when unarmed and honestly pursuing the peaceful calling of catching and bringing in fresh fish, have been, by a recent opinion of the United States Supreme Court, decided to be exempt from capture, this exemption being based "on considerations of humanity to a poor and industrious order of men, and of the mutual convenience of belligerent states."¹

Enemy Vessels in Port or Bound for Port at Beginning of War. — The practice has grown up in recent times not only of allowing an enemy's vessel which is in port at the outbreak of a war a certain time within which to depart therefrom without being made subject to capture, but likewise of permitting an enemy vessel bound for such port at the outbreak of the war to enter and discharge her cargo, and afterwards depart, without molestation while at sea or in port.²

10. Means and Mode of Carrying On War — *a. LAND FORCES.* — It is now generally considered that belligerent acts may be performed by bodies of men not possessing any authorization from their sovereign, provided they merely take up arms at the approach of an invading force, act under a responsible head, and comply with the laws of war. So guerilla bands or other forces not a part of the regular army may be employed, and the members thereof are entitled to the treatment accorded to other combatants, provided they are under a responsible chief and wear uniforms or other distinguishing marks of a permanent character, so as not to be able to appear as noncombatants whenever convenient.³

b. PRIVATEERS. — The use of vessels belonging to private citizens in order to carry on hostilities is forbidden by the Declaration of Paris of 1856, and the few governments which have not acceded to this convention, among which is the United States, are not likely again to utilize such instruments of warfare.⁴

c. DESTRUCTION OF LIFE AND PROPERTY. — The modern law of war regards as improper the use of any weapons or instrumentalities which are calculated to render death inevitable, or which cause suffering out of proportion to the actual crippling of the resources of the enemy. Assassination and the use of poison are likewise generally condemned. The destruction of property is forbidden unless some military end is thereby subserved, and it cannot generally be justified on the ground that the enemy will be thereby impelled to cease resistance. In the case of a siege of a fortified town, however, the bombardment of dwellings therein has, even in recent years, been regarded as a proper means of trying to compel a surrender.⁵

United States vessel during the civil war, were released. *The Amelia*, 4 Phila. (Pa.) 412, 18 Leg. Int. (Pa.) 357.

1. Fishing Vessels. — *The Paquete Habana*, 175 U. S. 677, in which case Mr. Justice Gray, speaking for the majority of the court, reviewed at length the whole question of past usages in this regard and the opinions of text writers in respect thereto. The opinion of Lord Stowell in *The Young Jacob*, 1 C. Rob. 20, in which a fishing vessel was condemned, was distinguished as based partly on an express order of the English government directing the capture of fishing vessels and partly on evidence of fraud, besides which it was stated that what was then merely a custom or matter of courtesy might well have become, after the lapse of one hundred years, a settled rule of international law. The exemption does not extend to such vessels when employed in aid of the enemy or when their capture is necessary for war purposes, nor does it extend to "vessels employed on the high sea in taking whales, or seals, or cod, or other fish which are not brought fresh to market, but are salted

or otherwise cured and made a regular article of commerce."

2. Enemy Vessels in Port or Bound for Port. — This latter practice was adopted by England in the Crimean war, by France in the German war, and by Russia in the Turkish war. Hall on Int. Law (4th ed.), § 148.

In the late war with Spain the United States, by proclamation, allowed about a month from the date at which the war began within which Spanish vessels could load cargoes and depart from American ports, and gave permission to enter and unload to any Spanish vessel which, prior to the outbreak of the war, had sailed from a foreign port to a United States port. *The Buena Ventura*, 87 Fed. Rep. 927.

3. Land Forces. — Hall on Int. Law (4th ed.), § 176 *et seq.*; 2 Rivier's *Droit des Gens* 251; Lawrence on Int. Law, §§ 218-220; Instructions for Armies of United States, par. 51, 81-85.

4. Privateers. — Hall on Int. Law (4th ed.), § 180; 1 Rivier's *Droit des Gens*, p. 253; Dana's *Wheaton's Int. Law*, note 173.

5. Destruction of Life and Property. — Hall

d. DECEIT AND STRATAGEMS. — Stratagems and deceit are admissible for the purpose of gaining an advantage over the enemy, provided they do not violate certain recognized rules, which in effect constitute a tacit agreement between the belligerents. Accordingly, hospital flags or flags of truce cannot be used for purposes of deception, and a vessel using an enemy's flag must raise its own flag before opening hostilities. Similarly it is agreed that soldiers using the uniform of the enemy for purpose of deception must assume some distinctive mark before attacking.¹

e. SPIES. — It is permissible to employ persons to penetrate secretly or in disguise within the enemy's lines for the purpose of procuring information. Such a person is, however, liable to be put to death if caught. During the war with France the Prussians claimed the right to treat as spies persons passing over the German lines in balloons, but this position has been generally regarded as unsound.²

11. Military Occupation. — The military occupation of an enemy's territory results in the temporary cessation of the power of such enemy to exercise legislative or administrative control, these rights passing for the time being into the hands of the invader, to the extent necessary for the furtherance of his military operations. The invader has not generally the right to vary or suspend laws affecting property and private personal relations, or to interfere with their exercise generally, but he may impose upon the inhabitants any course of action which seems necessary for his security. Very generally acts of disobedience or hostility are made punishable with the penalty of death. Frequently the invader leaves the civil and judicial administration to some extent in the hands of the native functionaries, they being more competent to enforce the laws of the country. Until the termination of the war, the invader's occupation is regarded as merely temporary, and hence it is his duty to alter or override the existing laws as little as possible.³ The question what constitutes military occupation is one on which considerable difference of opinion has existed, the stronger states of Europe being generally in favor of the view that the mere passage of flying columns or patrols through the region will be sufficient to constitute such occupation, while the smaller states

on Int. Law (4th ed.), §§ 184-186; Lawrence on Int. Law, §§ 226-229; Wharton's Dig. Int. Law, § 349; 2 Rivier's *Droit des Gens*, 260 *et seq.*

A Neutral who takes up his residence in a foreign country assumes the risk of injuries from belligerent acts committed there by another foreign nation; he has no claim against the latter on account of such injuries, and has at most a claim against the country of his residence. *Perrin's Case*, 4 Ct. Cl. 543.

1. Deceit and Stratagems. — Hall on Int. Law (4th ed.), § 187; Bluntschli, § 565; 2 Halleck on Int. Law, 24 *et seq.*; 2 Rivier's *Droit des Gens* 260.

2. Spies. — Hall on Int. Law (4th ed.), § 188, 1 Rivier's *Droit des Gens* 282; Wharton's Dig. Int. Law, § 347; American Instructions par. 88.

3. Military Occupation. — *Coleman v. Tennessee*, 97 U. S. 509; *Shaw v. Carlile*, 9 Heisk. (Tenn.) 594; *State v. Hall*, 6 Baxt. (Tenn.) 3; Hall on Int. Law (4th ed.), §§ 153-164; 2 Halleck on Int. Law, 462 *et seq.*; Dana's Wheaton's Int. Law, note 169; Messages of President Polk in 1846 and 1848 in Wharton's Dig. Int. Law, § 3; American Instructions for Armies in the Field, arts. 41-60. See also *Clark v. U. S.*, 3 Wash. (U. S.) tor.

Effect on Revenue Laws. — Upon the military

occupation of a portion of the territory of the United States, that portion is to be deemed a foreign country, so far as respects the revenue laws, and goods imported during such occupation do not become liable to pay duties to the United States upon the resumption of their sovereignty over the conquered territory. *U. S. v. Rice*, 4 Wheat. (U. S.) 246; *U. S. v. Hayward*, 2 Gall. (U. S.) 486.

But the capture and occupation of a foreign port during war do not make such port a part of the United States, and imports from such port are still subject to duties as upon imports from foreign ports. *Fleming v. Page*, 9 How. (U. S.) 603.

Imposition of Duties. — The conqueror may impose duties as military contributions for the support of the military government and the army. *Cross v. Harrison*, 16 How. (U. S.) 190.

Effect on Character of Property. — An island in the temporary occupation of the enemy was, however, considered as an enemy's colony for the purpose of fixing the enemy character of the produce of the soil. *Thirty Hogsheads Sugar v. Boyle*, 9 Cranch (U. S.) 191.

Allegiance to Conquerors during a temporary occupation merely suspends former allegiance; it does not make the inhabitants aliens *de facto*. *Shanks v. Dupont*, 3 Pet. (U. S.) 242.

have opposed this view. The general theory is that the occupation should be effective, that is, the invader must have such possession as to be able to exercise its authority to the exclusion of the government of the invaded state, though in most modern wars the invading forces have claimed to exercise the rights of an occupant in a particular district upon making proclamation to that effect in any part of the district.¹

End of Occupation. — Upon the termination of the occupation of territory by an enemy, the immediate state of things existing before the hostile occupation is conceived for many purposes as having been in continuous existence, this rule being based upon what is called the right of *postliminium*. This rule, however, does not in general wipe out the effects of acts done by the invader which he had a right to do, such as judicial and administrative acts not of a political character, or acts done, during the belligerent occupancy, by private persons under the sanction of the municipal law; but acts which were properly done by the invader in pursuance of his right of control, while valid in so far as they have produced their effects, generally become inoperative upon the return of the legitimate government.²

12. Non-hostile Relations of Belligerents. — *a.* IN GENERAL. — Belligerents are from time to time brought into non-hostile relations involving a temporary cessation of hostilities, either towards particular individuals or towards the whole or part of the armed forces of the enemy.

b. ARMISTICES AND TRUCES. — Agreements for the temporary cessation of hostilities may be either for a definite time or for an indefinite time, in which latter case either belligerent should give notice before resuming hostilities. A commanding officer may conclude an armistice binding on the district over which his command extends, but his act is subject to ratification by the superior authority and its force ceases as soon as the enemy is notified of the failure to ratify it. During the armistice or truce, neither belligerent can take measures to strengthen his position which, in the absence of the agreement, the enemy would have been in a position to hinder. So the besieger of a fortified place cannot extend or advance his approaches, while the besieged cannot repair damages sustained in the attack, nor erect fresh works in places not beyond the reach of the enemy. Both parties may, however, do any acts which could not have been interfered with during the progress of hostilities, such as constructing works in places not within the enemy's reach, and the accumulation of re-enforcements and material of war. As to whether a besieged place has the right of obtaining further supplies during a truce, there is no authoritative usage, but it would seem reasonable that the besieged should obtain provisions sufficient to supply the place for the time covered by

1. **Different Theories as to Occupation.** — Hall on Int. Law (4th ed.), § 161; Lawrence on Int. Law, § 201; 2 Rivier's *Droit des Gens* 300.

"A Foreign Ship of War, admitted by courtesy into a port held by military occupation, in time of war, by forces of the United States, is subject, so far as concerns the right to carry off persons from such port, to the military orders governing the port." Mr. Seward, secretary of state, to Mr. Tassara, Wharton's *Dig. Int. Law*, § 36.

2. **End of Occupation.** — Hall on Int. Law (4th ed.), § 163; Dana's *Wheaton's Int. Law*, note 169; 2 Rivier's *Droit des Gens* 314 *et seq.* See also *U. S. v. Rice*, 4 Wheat. (U. S.) 246; *Wade v. Barnwell*, 2 Bay (S. Car.) 220.

Contracts Made by Conqueror During Occupation. — In 1871, after the re-establishment of the French government over territory previously under German control, it was asserted by the

French government and conceded by the German government that contracts made by the latter government for felling timber in state forests in France ceased to have any operation, so that the contractors, though they had paid for the timber in advance, were not allowed to finish the removal of the timber. Hall on Int. Law (4th ed.), § 163.

In *New Orleans v. Steamship Co.*, 20 Wall. (U. S.) 387, it was decided that a contract leasing a wharf belonging to the city made by municipal authorities appointed by the commander of the forces occupying the town, was not affected by the termination of such occupation before the end of the term fixed for the lease, the lease being fair and reasonable. The court said, however: "We do not intend to impugn the general principle that the contracts of the conqueror touching things in conquered territory lose their efficacy when his dominion ceases."

the truce. Such questions are, however, generally provided for by the terms of the truce.¹

c. CARTELS. — Cartels are a form of convention made between belligerents regulating the mode in which any intercourse between them shall take place. They cover such matters as the reception of flags of truce, the treatment of wounded and prisoners of war, and more particularly the exchange of prisoners.² The term "cartel ship" is applied to a vessel employed in the carriage of exchanged prisoners, and she is protected from capture so long as she is employed strictly within the line of that particular purpose.³

d. FLAGS OF TRUCE. — In case a belligerent wishes to enter into negotiations with the enemy, he displays a flag of truce. The bearer of such a flag cannot insist upon being admitted, and if he offers himself during the progress of an engagement, the enemy is not obliged to cease firing, and is not responsible if the bearer of the flag is accidentally killed or injured. Though the bearer is not expected to refrain from making observations or from reporting what he may learn without effort on his part, he is punishable as a spy if he abuses the flag by surreptitiously obtaining military knowledge thereunder.⁴

e. CAPITULATIONS. — A capitulation is an agreement under which a body of troops or a naval force surrenders. Such agreements vary greatly in their conditions, generally according to the extent of the power of the surrendering forces to prolong resistance. So far as they are of a strictly military character, they may be made by the officers in command of the forces concerned, but such officers cannot bind their respective governments by stipulations affecting the constitution or administration of a country or place.⁵

f. RANSOM. — Ransom is a repurchase by the original owner from the captor of property, most generally a vessel or its cargo, which has been seized as a prize. Ransoms have been prohibited in Great Britain since the beginning of the nineteenth century, as tending to relax the energies of war, and the practice is likewise forbidden by Russia, Sweden, Denmark, and Holland.⁶ Apart from positive prohibition, the practice seems to have fallen into disuse in recent wars.⁷

Mode of Effecting Ransom. — Ransom is carried into effect by the commander of the captured vessel giving to the captor a ransom bill by which he agrees that a stipulated sum shall be paid to the captor, and this acts as a safe-conduct against capture by other ships of war until arrival at a stipulated port.⁸

Suit on Ransom Bill. — When ransoms were permitted in England, the English courts refused to allow an enemy to sue on a ransom bill during the war,⁹ but this objection to suit has not obtained in other countries.¹⁰

g. PASSPORTS AND SAFE-CONDUCTS. — Permission is occasionally given to subjects of the enemy to travel in territory subject to the grantor's control. Such permission is not transferable and may be revoked at any time, even before the time specified for its termination.¹¹

13. Termination of War. — Though war may terminate by a mere cessation of hostilities, as a general rule a treaty of peace is concluded. Such a treaty

1. *Armistices and Truces.* — 1 Kent's Com. 160; Hall on Int. Law (4th ed.), § 192; Wharton's Dig. Int. Law, § 337a.

2. *Cartels.* — Hall on Int. Law (4th ed.), § 193, 2 Rivier's Droit des Gens 360.

3. *Cartel Ships.* — The Daifjie, 3 C. Rob. 139; The Venus, 4 Rob. Adm. 357; Hall on Int. Law (4th ed.), § 193.

4. *Flags of Truce.* — See American Instructions for the Government of Armies in the Field, arts. 111-114; Hall on Int. Law (4th ed.), § 190.

5. *Capitulations.* — Dana's Wheaton's Int.

Law, § 405; Hall on Int. Law (4th ed.), § 194; 1 Rivier's Droit des Gens 361.

6. *Ransom.* — Dana's Wheaton's Int. Law, note 199; Hall on Int. Law (4th ed.), § 151.

7. 2 Rivier's Droit des Gens 357.

8. 1 Kent's Com. 105.

9. *Anthon v. Fisher*, 2 Dougl. 649, note 1; *The Hoop*, 1 C. Rob. 196.

10. 1 Kent's Com. 107; *Maisonnaire v. Keating*, 2 Gall. (U. S.) 337.

11. *Passports and Safe-conducts.* — 2 Halleck on Int. Law 351; Hall on Int. Law (4th ed.), § 191; 1 Kent's Com. 163; 2 Phillimore Int. Law 28, 29.

places the belligerent countries once more in normal relation to each other, and this involves the cessation of acts committed only in time of war, unless, of course, there is an express reservation in the treaty of a right to do such acts. The conclusion of peace, apart from special stipulations, leaves everything in the state in which it finds it, on the principle of what is called *uti possidetis*; and accordingly territory in the military occupation of the enemy and movable property captured by the enemy are considered to become the absolute property of the enemy in possession, unless it is otherwise agreed. The treaty of peace binds the contracting parties from the moment of its conclusion, and that is understood to be from the day when it is signed, even though the signature is subject to ratification. It sometimes expressly provides, however, that peace shall not commence in regions remote from communication until a certain period of time sufficient for sending information thereto has elapsed; but in such a case, if the information is received before the stipulated time by the commander in a distant region from his own government, he cannot act in disregard thereof, though the stipulated time has not elapsed.¹ Though individuals are not criminal in continuing hostilities after the beginning of peace so long as they are ignorant thereof, they are, it seems, liable to be made responsible civilly in such case.² A treaty of peace in effect cancels all acts done before the war which led up thereto, though the principles involved, if not actually settled by the treaty, may be the ground of further complaints, in case of further acts giving cause therefor. Acts done during the war are also regarded as settled by the treaty, though these acts were in excess of the rights of war; and this principle applies not only to acts authorized by the government, but also to unauthorized acts committed by individuals in behalf of one of the belligerents, though quite frequently individuals are protected in that respect by a special clause in the treaty securing what is called an amnesty.³

IV. RIGHTS AND DUTIES OF NEUTRAL STATES — 1. General Duty Not to Give Aid. — A neutral state is under the absolute obligation to do nothing which will aid one belligerent to the injury of the other. That it cannot furnish armed assistance in the way of troops or munitions of war is now generally regarded as involved in the very idea of neutrality, though in former times the practice of so-called neutral states was very different.⁴

Aid in Pursuance of Treaty Provisions. — Some modern writers of high authority state that a neutral state is at liberty to render aid of this character in performance of treaty engagements made before the war.⁵ The general current

1. Termination of War — Treaties of Peace. — 1 Kent's Com. 170; Hall on Int. Law (4th ed.), § 197 *et seq.*; Wharton's Dig. Int. Law, §§ 130, 356; Dana's Wheaton's Int. Law, §§ 538-551.

In the case of the English ship *Swincherd*, which was captured by a French privateer before the end of the time fixed for the termination of hostilities in the Indian seas where the capture took place, it was decided that the fact that the latter vessel was informed on good authority that peace had been concluded did not affect the validity of the capture, since its information did not proceed directly from its own government. See 1 Kent's Com. 172, note *b*.

In *The Legal Tender*, referred to in 1 Kent's Com. 173, it was decided that a recapture by a British cruiser after the cessation of hostilities, though without knowledge thereof, was invalid, and did not affect the rights of the American capturer, since, on the principle of *uti possidetis*, peace gives a final title to capturers without condemnation. See also to the same effect *The Schooner Sophie*, 6 C. Rob. (Reprint) 138.

2. Liability for Wrongful Continuance of Hostilities. — 1 Kent's Com. 170.

In *The Mentor*, 1 C. Rob. 179, which was an American ship destroyed by a British vessel in 1783, after the cessation of hostilities, but before that fact had come to the knowledge of the vessels, it was held that the officer in command of the capturing vessel was civilly liable, though he should in justice be indemnified by his government.

3. Treaty of Peace Ends Existing Causes of Complaint. — Hall on Int. Law (4th ed.), § 200; 1 Kivier's *Droit des Gens* 454; Dana's Wheaton's Int. Law, § 544.

4. General Duty Not to Give Aid. — Hall on Int. Law (4th ed.), § 208. As late as 1785 a treaty between the United States and Prussia stipulated that neither party would furnish forces to an enemy of the other to be used against each other. Hall on Int. Law (4th ed.), § 211.

5. Aid in Pursuance of Treaty Provisions. — Bluntschli, § 759; 1 Kent's Com. 116; Dana's Wheaton's Int. Law, § 424.

In the treaty of 1778 between the United States and Great Britain.

of opinion is, however, that treaty provisions form no excuse for an obvious breach of neutrality,¹ and in practice nations no longer bind themselves in such a way as to be unable to preserve an absolute neutrality in case of war.²

2. Furnishing Munitions of War. — A neutral nation is in general bound not to furnish munitions of war to a belligerent,³ but there is no obligation upon it to prevent its subjects from doing so, and neutral subjects may freely sell at home to a belligerent purchaser or carry to a belligerent power arms and munitions of war, subject only to the possibility of their seizure as contraband while in transit.⁴

3. Loans to Belligerent States. — A neutral nation, likewise, though it cannot itself loan money to one of the belligerents,⁵ is, by the best authority, under no obligation to restrain its subjects from doing so.⁶

States and France the former accorded to the latter certain privileges as to the use of United States ports by French war vessels and privateers, which were not to be granted to the enemies of France. When war subsequently arose between France and other European powers the latter made the action of the United States in complying with these treaty provisions the ground of complaint, and these engagements were consequently the cause of much embarrassment to the Washington administration. They were subsequently annulled by the convention of 1800 with France. See Wharton's Dig. Int. Law, § 148, p. 124; Dana's Wheaton's Int. Law, § 425 and note 204.

1. Hall on Int. Law (4th ed.), § 215; Dana's Wheaton's Int. Law, note 203; 2 Rivier's *Droit des Gens* 378.

2. Lawrence on Int. Law, § 253.

3. Sales of Munitions of War. — This question was to some extent involved in the case of sales by the United States government of arms and ammunition not needed by it, which were begun before the Franco-Prussian war. After the beginning of that war large purchases were made by an agent of the French government. A committee of Congress appointed to investigate these sales reported that if the purchasers were French agents, this fact was unknown to the government, and even if it had been known, or if "Louis Napoleon or Frederick William had personally appeared at the war department to purchase arms," sales to them would have been lawful, if made in pursuance of a national policy adopted before the war. See Wharton's Dig. Int. Law, § 391. The position of the committee as to the propriety of such sales is not indorsed by European writers. Hall on Int. Law (4th ed.), § 218, note.

4. Sales by Subjects of Neutral State. — 1 Kent's Com. 142; *Richardson v. Maine F. & M. Ins. Co.*, 6 Mass. 103, 4 Am. Dec. 92; *Ex p. Chavasse*, 11 Jur. N. S. 400; *The Helen, L. R. 1 A. & E. 1*; *The Santissima Trinidad*, 7 Wheat. (U. S.) 283; *The Bermuda*, 3 Wall. (U. S.) 514.

"Our citizens have always been free to make, vend, and export arms. It is the constant occupation and livelihood of some of them. To suppress their callings, the only means, perhaps, of their subsistence, because a war exists in foreign and distant countries in which we have no concern, would scarcely be expected. It would be hard in principle and impossible in practice. The law of nations, therefore, respecting the rights of

those at peace, does not require from them such an internal derangement in their occupations." Mr. Jefferson, secretary of state, to the British minister, May 15, 1793. A similar position has been frequently taken since by the state department. Wharton's Dig. Int. Law, § 391.

5. Loans by Neutral Government. — The position that such loans are not permissible was taken by the United States in its instructions to the commissioners sent to Paris to negotiate a treaty with France. See 1 Kent's Com. 116, note *b*.

6. Loans by Neutral Individuals. — Among text writers statements that such loans are forbidden are quite frequently found, but these seem to arise from a failure to recognize the distinction between acts which may be done by a state and those which may be done by the subjects of the state. See Hall on Int. Law (4th ed.), § 217; Lawrence on Int. Law, § 254.

As a matter of fact, in almost every war one or both of the parties rely upon loans made by subjects of foreign nations. During the Franco-Prussian war both parties borrowed in England. Wharton's Dig. Int. Law, § 390.

The correct position was clearly taken by Mr. Webster in 1842 in the following language, quoted in Hall on Int. Law (4th ed.), § 216: "As to advances and loans by individuals to the government of Texas or its citizens, the Mexican government hardly needs to be informed that there is nothing unlawful in this, so long as Texas is at peace with the United States, and that these are things which no government undertakes to restrain." Mr. Webster to Mr. Thompson, Executive Documents, 27th Cong., 1841-42.

Loans in Aid of Insurrection. — It was decided in England that a suit cannot be maintained on a loan made by residents of that country for the purpose of raising money to aid an insurrection in a foreign state which was on terms of amity with England. *De Wutz v. Hendricks*, 9 Moo. 586, 2 Bing. 314, 9 E. C. L. 417.

So the United States Supreme Court decided that an agreement made in the United States to raise money in aid of the Texas insurrection before the independence of Texas was acknowledged by the United States was not enforceable. In the opinion of Chief Justice Taney, in this case, there are some statements adverse to the right of a subject of a neutral state to make any loans to a belligerent, but the court expressly refrained from deciding this point, and based its opinion on the ground that so long as Texas had not been recognized by the

4. Improper Use of Neutral Territory — *a.* **ENLISTMENTS.** — A neutral government is under the obligation not to permit the enlisting of troops in its territory, and has, of course, the right to demand of a belligerent that it refrain from making such enlistments.¹ But a state is not bound to restrain its subjects from enlisting in the service of a belligerent,² unless perhaps it has reason to suspect that this is being done on a very large scale.³

b. **PASSAGE OF TROOPS.** — According to the most recent opinion and practice, a neutral nation has no right to allow the transit of belligerent troops across its territory,⁴ and the modern practice of neutral nations is in accordance with this view.⁵

Interning of Troops. — If, however, troops of one belligerent are driven into neutral territory, the neutral government may allow them to remain, without any breach of neutrality, provided it disarms them and retains them within its territory till the war is over. This is called "interning" the belligerent troops.⁶

c. **HOSTILITIES.** — That the lands and waters of a neutral state should not be made the scene of any acts of war has always been recognized, though the rights of the neutral in this respect were formerly frequently violated, especially in the case of captures in neutral waters.⁷

Excuse of Self-defense. — The only case in which such an encroachment is perhaps excusable is when it is rendered necessary for the purpose of self-defense, and then it would seem to involve an explanation and apology by the offending government.⁸

executive officers of the government as an independent state, the court could not enforce such a contract. *Kennett v. Chambers*, 14 How. (U. S.) 38. The statement of Mr. Webster quoted above in reference to loans by United States citizens to Texas was made long after the recognition of Texan independence, which occurred in 1837.

1. Enlistment of Troops. — This position was taken by the United States government in the case of enlistment by the French minister, Genet, during Washington's administration, and at the time of the Crimean war enlistments by Great Britain were made a ground of complaint, and subsequently of the dismissal of the British minister. See Wharton's Dig. Int. Law, §§ 84, 395.

Enlistment of Sailors by vessels in the ports of a neutral has likewise been decided to be a breach of neutrality. *The Brig Alerta v. Moran*, 9 Cranch (U. S.) 359; *The Santissima Trinidad*, 7 Wheat. (U. S.) 283.

If it can be proven that the persons enlisted were of the state under whose flag the cruiser sailed, who were transiently within the United States, the enlistment is lawful. *The Estrella*, 4 Wheat. (U. S.) 298; *La Amistad De Rues*, 5 Wheat. (U. S.) 385.

2. Duty to Prevent Enlistment. — Wharton's Dig. Int. Law, § 392; *The Santissima Trinidad*, 1 Brock (U. S.) 478.

3. Hall on Int. Law (4th ed.), § 218; Lawrence on Int. Law, § 257.

4. Passage of Troops. — Hall on Int. Law (4th ed.), § 219; Bluntschli, § 770; Dana's Wheaton's Int. Law, § 427, and note 205.

5. In 1877 the United States remonstrated with Mexico on account of the act of Mexican troops in pursuing insurgents across the border into Texas. Wharton's Dig. Int. Law, § 397.

During the Franco-Prussian war Switzer-

land refused to allow bodies of French recruits to cross her territory, and Belgium refused to allow Prussia to send her wounded home by the Belgian railways. 2 Rivier's *Droit des Gens* 397, 399; Hall on Int. Law (4th ed.), § 219.

6. Interning of Troops. — Rivier, *Ibid.*; Lawrence on Int. Law, § 251.

7. Hostilities in Neutral Territory. — Hall on Int. Law (4th ed.), § 209. See *People v. McLeod*, 1 Hill (N. Y.) 377.

Captures in Neutral Waters were frequent during the Napoleonic wars. Dana's Wheaton's Int. Law, note 208. And such violations of the neutrality of the United States were made the subject of complaint in President Jefferson's fifth annual message. Wharton's Dig. Int. Law, § 399.

During the civil war the Florida, a Confederate cruiser, was captured in Brazilian waters by a federal man-of-war, and the United States government immediately offered a satisfactory reparation to Brazil. Subsequently, in *The Florida*, 101 U. S. 37, it was decided that as the United States, in whom the captured property primarily vested, disclaimed the capture in its diplomatic communications, the captors could not assert a claim for the vessel as a prize.

8. Self-defense. — See remarks of Story, J., in *The Anne*, 3 Wheat. (U. S.) 447.

A claim by the United States government against Portugal on account of the capture in Portuguese waters by British vessels of an American privateer, the *General Armstrong*, having been submitted to the emperor of France, he decided against it on the ground that the privateer did not ask the Portuguese authorities for protection, but resisted the attack. See Wharton's Dig. Int. Law, § 399.

Case of the Caroline. — During the Canadian rebellion, 1838, a considerable body of insur-

d. BASE OF OPERATIONS IN NEUTRAL TERRITORY. — A neutral nation is also bound not to allow its territory to be used as "a base of operations," which term has been defined as a place or station from which a land or naval force draws resources or re-enforcements, from which it sets forth on offensive expeditions, and in which it finds a refuge in case of need.¹

e. ARMING AND EQUIPPING SHIPS OF WAR. — At an early period in its existence the United States government took the position that the building, equipping, or manning of vessels of war in a neutral state was a violation of neutrality which the neutral nation was under an obligation to prevent.² This opinion of the executive, though perhaps in advance of the opinions then generally held, and certainly of the practice then current, was adopted by the courts of the United States, and it was accordingly decided that captures were illegal if made by vessels which were equipped in United States territory,³ or which there received an augmentation of their armament.⁴ But the mere replacement of guns after displacing them for the purpose of making nautical repairs is not illegal.⁵

Innocent Sales of Ships of War. — The prohibition of the equipment of armed vessels in neutral territory, however, has been held to apply only when there is an immediate hostile purpose in view, and a neutral nation is not called upon to prevent the equipment of such vessels in its territory and the subsequent sale thereof to a belligerent, either in the neutral port or in that of the purchaser.⁶

gents entered United States territory, seized an island at Niagara, and prepared to cross into Canadian territory on a schooner called the *Caroline*, and, to prevent such crossing, the *Caroline* was boarded by an English force and destroyed while within United States waters. Under remonstrance by the United States, the British government justified the invasion of neutral waters upon the ground of overwhelming and immediate necessity of self-defense, but expressed regret for the violation of American territory, and acknowledged that there should have been an immediate explanation and apology offered, and these assurances were accepted by the American government as satisfactory. Wharton's Dig. Int. Law, § 500.

1. Base of Operations in Neutral Territory. — Hall on Int. Law (4th ed.), § 221; Lawrence on Int. Law, § 250.

"A foreign sovereign who uses the hospitality of our ports as a base of operations for the purpose of sallying forth to harass our allies as well as our own citizens may be called upon for reparation." Mr. Randolph, secretary of state, to Mr. Hammond, Sept. 13, 1795, Wharton's Dig. Int. Law, § 399.

The Treaty of Washington, in providing for the arbitration of the so-called Alabama claims, stated as one of the rules of adjudication that a neutral nation is bound "not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men." There was considerable difference of opinion as to what constitutes a "base of operations," and the opinion of the arbitrators does not clearly appear from their award. See Wharton's Dig. Int. Law, § 402.

2. Arming and Equipping Ships of War — Policy of United States. — On May 15, 1793, Mr. Jefferson, while secretary of state, wrote to the British minister as follows: "The practice of

commissioning, equipping, and manning vessels in our ports to cruise on any of the belligerent parties is equally and entirely disapproved, and the government will take effectual measures to prevent a repetition of it." This was in accordance with the position taken by the President and his cabinet, and the same policy was expressed at that time in other diplomatic communications by the government, and in the treasury regulations issued at the same time. Wharton's Dig. Int. Law, § 396; Dana's Wheaton's Int. Law, note 215.

Of this position and of the general view taken of neutral duties by Washington's administration, Mr. Hall, the foremost English writer, says (Int. Law, 4th ed., § 213): "The policy of the United States in 1793 constitutes an epoch in the development of the usages of neutrality. There can be no doubt that it was intended and believed to give effect to the obligations then incumbent upon neutrals. But it represented by far the most advanced existing opinions as to what those obligations were; and in some points it even went further than authoritative international custom has up to the present time advanced. In the main, however, it is identical with the standard of conduct which is now adopted by the community of nations."

3. Judicial Decisions. — *La Conception*, 6 Wheat. (U. S.) 235; *The Bello Corrunes*, 6 Wheat. (U. S.) 152; *The Gran Para*, 7 Wheat. (U. S.) 471; *The Arrogante Barcelones*, 7 Wheat. (U. S.) 496; *The Fanny*, 9 Wheat. (U. S.) 658.

4. Augmentation of Armament. — *Talbot v. Jancon*, 3 Dall. (U. S.) 133; *The Santissima Trinidad*, 7 Wheat. (U. S.) 283; *British Consul v. Schooner Nancy*, Bee Adm. 73; *Moodie v. The Betty Cathcart*, Bee Adm. 292.

5. Moodie v. The Ship Phoebe Anne, 3 Dall. (U. S.) 319.

6. Innocent Sale of Vessel of War. — *Moodie v. The Ship Alfred*, 3 Dall. (U. S.) 307.

Treaty of Washington and Geneva Award. — The duties of a neutral nation as regards the fitting out of vessels on her territory were the subject of constant controversy between the United States and Great Britain at the time of the civil war and thereafter until the matter was settled by the treaty of Washington providing for an arbitration of the claims, and by the award thereunder. The treaty stated certain rules as to the duties of a neutral nation, one of which, prohibiting a neutral nation from allowing its territory to be used as a base of operations, is stated above,¹ and another of which declared that "a neutral government is bound, first, to use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use."² The vagueness of the language of these rules and the extreme construction adverse to neutral powers placed on them by the arbitrators have caused them to be regarded with disfavor and have prevented their acceptance by the powers generally as guides for the future conduct of neutral states, but they no doubt express in a general way what is now considered the duty of a neutral government.³

f. ARMED EXPEDITIONS ISSUING FROM NEUTRAL TERRITORY. — It is also the duty of a neutral state to prevent the organization in or departure from its territory of an expedition intended to wage war against a friendly nation.⁴ This, however, does not apply to the departure of unassociated individuals, though a number go together at the same time or by the same vessel.⁵

5. Belligerent Vessels in Neutral Ports — a. RIGHT TO USE PORT. — While it has generally been recognized that a vessel of war belonging to a belligerent

In *The Santissima Trinidad*, 7 Wheat. (U. S.) 283, Story, J., said: "There is nothing in our laws or in the law of nations that forbids our citizens from sending armed vessels, as well as munitions of war, to foreign ports for sale. It is a commercial adventure which no nation is bound to prohibit, and which only exposes the persons engaged in it to the penalty of confiscation."

1. See *supra*, this section, *Base of Operations in Neutral Territory*.

2. **Rules of Treaty of Washington.** — See Wharton's Dig. Int. Law, § 402a, for a full presentation and discussion of these rules. Among the many points of difficulty which arose in construing the rules were the meaning to be given to the phrase "due diligence," and whether the latter part of the rule quoted in the text required the neutral power to detain the vessel fitted out in violation of its neutrality in case it came again to its waters.

3. **General Principles Correct.** — That the rules themselves, apart from the construction placed upon them by the arbitrators, correctly present in a general way the course of conduct to be followed by a neutral, see Wharton's Dig. Int. Law, § 402a; Lawrence on Int. Law, § 263; 2 Rivier's *Droit des Gens* 406. This view gains additional strength from the fact that at the commencement of the recent war between Spain and the United States Great Britain stated the observance of these rules to be a substantial part of the duty of a neutral government. 23 L. Mag. & Rev. 385.

Position of the United States. — Though the award was in favor of the United States, in

that case a belligerent nation, the extreme view taken by the arbitrators of the duties of a neutral state, if regarded as binding by the United States in case of war, would render it necessary "either to line our shores with a standing army of almost unlimited extent or to become belligerents ourselves." Wharton's Dig. Int. Law, § 402a. See article by J. N. Pomeroy in 7 Am. Law Rev. 237.

4. **Armed Expeditions.** — Hall on Int. Law (4th ed.), § 222; Lawrence on Int. Law, § 250. See letter of Mr. Seward to Mr. Motley, Wharton's Dig. Int. Law, § 395a.

In *Twee Gebroeders*, 3 C. Rob. 162, it was held that the capture of a hostile vessel by an expedition sent out in boats from ships of war lying in neutral territory was invalid.

5. See letter of Mr. Marcy to Mr. Escalante, Wharton's Dig. Int. Law, § 395a.

In 1870, during the Franco-Prussian war, nearly twelve hundred Frenchmen embarked at New York in two French ships to join the French army. They were not officered or in any way organized, but the vessels were laden with a large quantity of rifles and cartridges. The state department expressed the opinion that the ships could not be looked upon as intended for hostile use against Germany, the men not being in an efficient state and the arms and ammunition being proper subjects of commerce. Hall on Int. Law (4th ed.), § 222; *Wiborg v. U. S.*, 163 U. S. 632.

On the question what constitutes a warlike expedition in violation of the United States neutrality laws see *infra*, this section, *Neutrality Laws*.

may properly be allowed to enter neutral ports and to obtain there necessary repairs of a nautical character and sufficient supplies or provisions to enable her to reach her home port,¹ the recent tendency among nations is to limit these privileges. The practice is to forbid such a vessel to leave within twenty-four hours after the departure of a vessel of the other belligerent, and neutral nations now quite generally restrict to twenty-four hours the time of the stay of a belligerent vessel, except in case of necessity.²

b. SUPPLY OF COAL. — The supply to a belligerent ship by a neutral power, of coal in quantity greater than that necessary to carry it to its nearest home port, is now generally expressly prohibited, since this article may, under modern conditions, be considered a means of aggressive action.³

c. BRINGING PRIZE INTO NEUTRAL PORT. — A belligerent may properly bring a prize into a neutral port, unless this is prohibited by the neutral state.⁴ A prohibitory policy in this regard has, however, been adopted by a number of the important powers, and the United States has frequently stated that it will not allow sales in its ports of prizes captured by foreign belligerents.⁵

6. Effect of Violation of Neutral Rights by Belligerent. — The neutral nation may demand reparation of a belligerent nation which has violated its neutrality, and this will in general consist in the restoration to its original condition of anything affected by the wrongful act, with a proper apology or expression of regret at its occurrence.⁶

Restitution of Prize. — The neutral nation will also, when able, undo the wrongful act of the belligerent, and accordingly, when property is captured in neutral waters, or when the capturing vessel has been equipped or manned in violation of neutrality, the neutral nation will, if the captured property is brought within its jurisdiction, restore the property to its original owner,⁷ though it

1. Right to Enter Port. — See Wharton's Dig. Int. Law, § 394, and especially correspondence therein between Holland and the United States during the civil war on the right of asylum.

2. Time of Departure. — Hall on Int. Law (4th ed.), § 231; 2 Rivier's Droit des Gens 405; Bluntschli, § 776. The restriction of the right of stay in the neutral port to twenty-four hours was imposed by Great Britain during the American civil war, and in the late Spanish war, and by the United States as well during the Franco-Prussian war. Hall on Int. Law (4th ed.), § 231; Proclamation of the President, Wharton's Dig. Int. Law, § 402; 23 L. Mag. & Rev. 386.

3. Supply of Coal. — Such a rule was first made by Great Britain during the civil war in the United States, it being provided further that the same vessel should not obtain more than one supply of coal in British waters within three months. Hall on Int. Law (4th ed.), § 221. And during the Franco-Prussian war the United States imposed a practically similar restriction (see the President's proclamation, Wharton's Dig. Int. Law, § 402), as did Great Britain during the war between the United States and Spain. 23 L. Mag. & Rev. 386.

The Geneva Award states that "in order to impart to any supplies of coal a character inconsistent with the second rule, prohibiting the use of neutral ports or waters as a base of naval operations for a belligerent, it is necessary that the said supplies should be connected with special circumstances of time, of persons, or of place, which may combine to give them such character." It does not appear, however, that Great Britain was held liable for the acts

of any vessel solely in consequence of illegal supplies of coal. See Wharton's Dig. Int. Law, § 369.

4. Bringing Prize into Neutral Port. — Dana's Wheaton's Int. Law, note 213; Hall on Int. Law (4th ed.), § 226; 2 Op. Atty.-Gen. 86; 7 Op. Atty.-Gen. 122. See also Moodie v. Betty Cathcart, Bee Adm. 292.

5. Wharton's Dig. Int. Law, § 400; Hall on Int. Law (4th ed.), § 226, note.

6. Effect of Violation of Neutral Rights. — Hall on Int. Law (4th ed.), § 227; Wharton's Dig. Int. Law, § 315.

7. Restitution of Prize. — Talbot v. Janson, 3 Dall. (U. S.) 133; The Brig Alerta v. Moran, 9 Cranch (U. S.) 359; L'Invincible, 1 Wheat. (U. S.) 235; The Estrella, 4 Wheat. (U. S.) 298; The Bello Corrunes, 6 Wheat. (U. S.) 152; La Conception, 6 Wheat. (U. S.) 235; The Gran Para, 7 Wheat. (U. S.) 471; The Fanny, 9 Wheat. (U. S.) 658; Moodie v. The Betty Cathcart, Bee Adm. 292; Chacon v. Eighty-nine Bales of Cochineal, 1 Brock. (U. S.) 478; Juando v. Taylor, 2 Paine (U. S.) 652. See also The Maria Josepha, (U. S. Cir. Ct.) 2 Wheel. Crim. (N. Y.) 600; Moxon v. The Brigantine Fanny, 2 Pet. Adm. 309; Hollingsworth v. The Betsey, 2 Pet. Adm. 330; Reid v. Ship Vere, Bee Adm. 66.

Burden of Proof. — Where the original owner seeks for restitution in the neutral courts, upon the ground of a violation of neutrality by the captors, the burden of showing such violation is upon him. La Amistad de Rues, 5 Wheat. (U. S.) 385; The Amiable Isabella, 6 Wheat. (U. S.) 1; The Santissima Trinidad, 7 Wheat. (U. S.) 283.

will not attempt to give damages to the injured party.¹ Restitution will not be prevented by the fact that the captured property has been condemned as prize by the court of the country of the captor,² but if the captured property is a ship, and after the capture it is furnished with a commission by the state of the captor, it will not be restored.³ The disability of a vessel fitted out in violation of neutrality to make captures, which will be recognized by the neutral nation, terminates, however, upon the end of the cruise for which the illegal preparations were made, provided the termination of the cruise is *bona fide* and not merely colorable.⁴

Claim by Neutral Nation in Prize Court. — The neutral nation may also present a claim in the prize court of the country of the captors, for the restitution of the vessel to the owner on the ground that the capture was effected in violation of its neutral rights, and only when presented in this way will the question be considered in that court, the individual claimant being considered to have no right to question the capture on this ground.⁵

7. Effect of Neutral State's Failure to Observe Neutrality. — The belligerent nation which has been injured by the neglect of a neutral nation to perform its duties in preventing a hostile use of its territory may also demand reparation of the neutral state. This is a matter for agreement and will generally take the form of a monetary indemnity.⁶

8. Neutrality Laws. — In 1794, in order to enable the administration of Washington to perform what it considered the obligations of the American Union as a neutral state, Congress passed the first of the neutrality laws,⁷ prohibiting the equipment of armed vessels and the enlistment of men in United States territory. Several amendatory acts were passed, and in 1818 the whole subject was codified; and this final form was the model of the British Foreign Enlistment Acts of 1819 and 1870.⁸

The Present Law declares it to be a misdemeanor for any citizen within the territory or jurisdiction of the United States to accept and exercise a commis-

1. Damages Not Allowed. — *L'Invincible*, 1 Wheat. (U. S.) 238; *La Amistad de Rues*, 5 Wheat. (U. S.) 385; *Juando v. Taylor*, 2 Paine (U. S.) 652, 13 Fed. Cas. No. 7,558; *U. S. v. Peters*, 3 Dall. (U. S.) 121.

2. Condemnation in Captor's State. — Chancellor Kent so states (1 Kent's Com. 121), citing *The Arrogante Barcelones*, 7 Wheat. (U. S.) 496, and *La Amistad de Rues*, 5 Wheat. (U. S.) 390. The former of these cases, however, merely decided that if, after the foreign condemnation, the vessel again comes into the hands of the original wrongdoer, he cannot set up such consideration in the courts of the neutral state. The latter of the cases cited does not refer to the subject.

In *The Santissima Trinidad*, 7 Wheat. (U. S.) 283, it was decided that where a vessel was captured in violation of the neutrality of the United States, a foreign decree of condemnation rendered after the vessel had been libeled in the United States and was in the custody of the court did not prevent restitution.

3. Effect of Foreign Commission. — *The Schooner Exchange v. M'Faddon*, 7 Cranch (U. S.) 116; Hall on Int. Law (4th ed.), § 227.

4. Termination of Delictum. — *The Santissima Trinidad*, 7 Wheat. (U. S.) 283; *The Gran Para*, 7 Wheat. (U. S.) 471.

5. Claim by Neutral State. — *Twee Gebroeders*, 3 C. Rob. 162, note; *The Anne*, 3 Wheat. (U. S.) 435; *The Sir William Peel*, 5 Wall. (U. S.) 517; *The Adela*, 6 Wall. (U. S.) 266; *The Lilla*, 8 Sprague (U. S.) 177.

A Consul of the neutral state has no power to interpose such claim. *The Anne*, 3 Wheat. (U. S.) 447.

6. Reparation by Neutral State. — Hall on Int. Law (4th ed.), § 229. See letter of Mr. Clay, secretary of state, to Mr. Rivas y Salmon, Wharton's Dig. Int. Law, § 227.

The decision of the Geneva arbitration on the Alabama claims clearly established such a liability on the part of the neutral state. In 1868 Lord Justice Bowen wrote: "Some people have hinted that the North has no rights at all in the business. The rights violated (so runs the argument) are those of the neutral only. May not the neutral do what it pleases him with his own? If this were excellent learning, it would be indifferent sense. In spite of local juriconsults, America will still be of opinion that she was very closely concerned with the uninterrupted equipment in English ports of cruisers like the Alabama." Quoted by Justice Davey in *L. Quar. Rev.* for July, 1894, p. 214.

7. Neutrality Law of 1794. — 1 U. S. Stat. at L. 381, c. 50.

Prosecution at Common Law. — Before the passage of this law an American sailor had been prosecuted at common law for enlisting in a French privateer. The administration took an active interest in this trial, but, though it was decided that the act was a crime, the defendant was acquitted by the jury. *Henfield's Case*, 1 Whart. St. Tr. 49.

8. Dana's Wheaton's Int. Law, note 215.

sion to serve in war any foreign prince, state, colony, district, or people with whom the United States are at peace,¹ or for any person to enlist or enter himself, or hire or retain another person to enlist or enter himself, or to go beyond the limits of the United States with intent to be enlisted, in the service of any foreign state or people.² It is also made criminal for any person within the United States to fit out or arm a vessel or to increase or augment the force of any armed vessel, or to be knowingly concerned therein, with intent that it shall be employed in the service of a foreign state or any colony, district, or people, to commit hostilities against a state at peace with the United States, the vessel with her stores and armament being also subject to forfeiture in such case.³ And it is likewise made criminal for any person in the United States to begin or set on foot or provide means for any military expedition or enterprise to be carried on from thence against any foreign state with which the United States are at peace.⁴

1. Rev. Stat. U. S., §§ 5281-5290.

Acceptance and Exercise of Commission. — To constitute the crime there must be some overt act under the commission, such as raising men or collecting provisions or munitions of war. *Per McLean, J.*, charge to grand jury, 2 McLean (U. S.) 1.

2. **Enlistment for Foreign Service.** — It is not a crime to leave the country with intent to enlist in foreign military service, or to transport out of the country persons who intend so to enlist. *U. S. v. Kazinski*, 2 Sprague (U. S.) 7. But the crime consists in hiring persons to go abroad, such persons intending to enlist in a foreign service. *U. S. v. Hertz*, 3 Pittsb. Leg. J. (Pa.) 194.

3. **Equipping of Vessel.** — The conversion of a merchant ship into a vessel of war with hostile intention is within the statute, *U. S. v. Guinet*, 2 Dall. (Pa.) 321; as is the raising or lowering of gun carriages or replacing timbers, *U. S. v. Grassin*, 3 Wash. (U. S.) 65.

But the mere carrying on of negotiations for the sale of a vessel with the knowledge that it will be employed against a nation with which the United States are at peace, or the mere sending of a vessel to a neutral port for sale, is not a crime within the statute. *U. S. v. The Steamship Meteor*, (N. Y.) 3 Am. L. Rev. 173.

Intent. — It is necessary that the intent to employ the vessel in acts of hostility shall originate before the vessel leaves the United States. *The City of Mexico*, 24 Fed. Rep. 33, 25 Fed. Rep. 924; *The Laurada*, 85 Fed. Rep. 760; *U. S. v. Quincy*, 6 Pet. (U. S.) 445. In this latter case it was held that one was guilty of being knowingly concerned in fitting out or arming a vessel with intent that she be employed in the service of a foreign state, though the intent was liable to be defeated after the vessel sailed by failure to procure funds at a foreign port; but that he was not guilty if he had no fixed intent when the vessel sailed to employ her as a privateer, but only a wish to employ her if he could obtain funds on her arrival at such port.

Locus Delictum. — The fitting out or arming of the vessel need not be completed within the United States, provided that by prearrangement there, the vessel having been procured there, the fitting out or arming is to be completed after her departure. *U. S. v. Quincy*, 6 Pet. (U. S.) 445; *The Meteor*, (N. Y.) 1 Am. L. Rev. 401; *The City of Mexico*, 28 Fed. Rep. 148.

Carriage of Contraband. — The shipping or carriage of arms and munitions of war to a belligerent is not the "furnishing, fitting out, or arming" of a vessel within the statute. *The Steamship Florida*, 4 Ben. (U. S.) 452; *The Carondelet*, 37 Fed. Rep. 799; *U. S. v. Trumbull*, 48 Fed. Rep. 99; *The Itata*, 56 Fed. Rep. 505.

Employment in Service of Insurgents. — The provision of the statute against the arming of a vessel with intent that she be employed in the service of a foreign state, "or of any colony, district, or people," includes any insurgents or insurrectionary body of people acting together and conducting hostilities, though their belligerency has not been recognized. *The Three Friends*, 166 U. S. 1, reversing 78 Fed. Rep. 175.

4. **Military Expedition.** — A combination of a number of men with a common intent to proceed in a body to a foreign territory and engage in hostilities with others constitutes a military expedition, whether they are provided with arms or intend to secure them in transit. *U. S. v. Murphy*, 84 Fed. Rep. 609; *U. S. v. Hart*, 78 Fed. Rep. 868, affirming 84 Fed. Rep. 799.

In *Wiborg v. U. S.*, 163 U. S. 632, it appeared that a body of men went on board a tug loaded with arms; were taken by it thirty or forty miles and out to sea; met a steamer outside the three-mile limit, by prior arrangement; boarded her with the arms and distributed the arms among themselves; drilled to some extent; were apparently officered; and then, as preconcerted, disembarked to effect an armed landing on the coast of Cuba. It was held that the jury were justified in finding this to be a military expedition or enterprise under the statute. The court, by Fuller, C. J., said: "The men and the arms and ammunition came together; the arms and ammunition were under the control of the men; the elements of the expedition were not only 'capable of proximate combination into an organized whole,' but were combined or in process of combination; there was concert of action; they had their own pilot to the common destination; they landed themselves and their munitions of war together by their own efforts. It may be that they intended to separate when they reached the insurgent headquarters, but the evidence tended to show that until that time they intended to stand together and defend themselves if necessary."

Other Provisions of the statute authorize the President to employ a proper force to prevent the violation of the act and authorize revenue officers to detain any vessel under circumstances rendering it probable that she is to be used for a hostile purpose, and also provide for the giving of bond by the owners of armed vessels about to sail that they shall not be employed in hostilities against a nation with which the United States are at peace.¹

Effect on International Rights and Liabilities.— Though these statutes have apparently been regarded by the courts as declaring what is the law of nations as to the duties of a neutral state,² such municipal statutes are not in any respect a measure of the nation's obligations to other nations as regards the enforcement of neutrality, since, on the one hand, through excessive caution, they may require individuals to refrain from any acts which might in any possible event lead to a violation of the neutrality, and on the other hand they may be ineffective for the purpose of enforcing a proper preservation of neutrality, in which case the failure of the neutral government to observe its duties as a neutral cannot be excused by defects in its own laws.³

V. RIGHTS AND LIABILITIES OF NEUTRAL SUBJECTS — 1. In General.— There are a number of acts, chiefly of a commercial character, which, when done by subjects of a neutral state, are considered to be to such an extent liable to interfere with the proper and effective conduct of the war as to give grounds for action by a belligerent state. This action does not, however, take the form of a demand for redress from the sovereign of the offender, but is directed against the offender himself, and generally takes the form of a confiscation of the property involved in the act complained of. In effect the neutral subject has a perfect right to do these acts, and his own state makes no effort to prevent them, but he takes the risk of interception and capture by the belligerent injured thereby, and in such case can claim no protection from his own state.⁴

2. Neutral Commerce.— By American and English jurists it has always been recognized that, apart from special convention or treaty, an enemy's goods on board a neutral ship are liable to seizure as prize of war, while the goods of a neutral found on board an enemy's vessel are not liable to seizure, this being a mere application of the general principle that war gives a right to capture the goods of an enemy and not the goods of a friend.⁵ Another theory was,

For other cases involving the question of what constitutes a military expedition within the statute, see *U. S. v. Ybanez*, 53 Fed. Rep. 536; *U. S. v. Hughes*, 75 Fed. Rep. 267; *U. S. v. Pena*, 69 Fed. Rep. 953.

Place of Origin and Destination.— The fact that the expedition originated in another country is immaterial, *Ex p. Needham*, Pet. (C. C.) 487; as is the fact that the first stage of the journey was to be merely to an island over which the United States had jurisdiction, *U. S. v. Hart*, 78 Fed. Rep. 868.

That the Parts of the Expedition are to be brought together outside of the United States is immaterial. *U. S. v. Rand*, 17 Fed. Rep. 142; *U. S. v. The Mary N. Hogan*, 18 Fed. Rep. 529.

Intention.— There must be not only a hostile intention, *U. S. v. O'Sullivan*, 27 Fed. Cas. No. 15,975; but also some overt or distinct act; and mere spoken or written words, though indicative of the intent, will not constitute an offense under the statute, *U. S. v. Lumsden*, 1 Bond (U. S.) 5.

That War Is Inevitable does not excuse the transaction, unless the prosecution of the hostile purpose is made to depend upon the event of war. *Coombs's Trial of Aaron Burr* 377; *U. S. v. Lumsden*, 1 Bond (U. S.) 5.

Transportation as Individuals.— But it is not unlawful, under the statute, for men to go as individuals by the same vessel, although that vessel also carries arms and they propose to take part in hostilities, provided only they do not go as a military expedition. *U. S. v. O'Brien*, 75 Fed. Rep. 900; *U. S. v. Hart*, 78 Fed. Rep. 868; *U. S. v. Nunez*, 82 Fed. Rep. 599.

The Furnishing of Transportation to such a military expedition is providing "means" for it within the statute. *Wiborg v. U. S.*, 163 U. S. 632.

1. Rev. Stat. U. S., §§ 5288-5290.

2. **Statutes Declaratory of International Obligations.**— Marshall, C. J., in *The Santissima Trinidad*, 1 Brock. (U. S.) 478; *The Brig Alerta v. Moran*, 9 Cranch (U. S.) 359; *The Estrella*, 4 Wheat. (U. S.) 298; *The Gran Para*, 7 Wheat. (U. S.) 471.

3. **No Extraterritorial Effect.**— Wharton's Dig. Int. Law, § 403; Hall on Int. Law (4th ed.), § 225, note.

4. **Liabilities of Neutral Subjects.**— Hall on Int. Law (4th ed.), § 232; Lawrence on Int. Law, § 248, 2 Rivier's Droit des Gens 408 *et seq.*

5. **American and English Doctrine.**— The Volume XVI.

however, occasionally adopted by treaty from the middle of the seventeenth century, by which the liability of the goods to seizure was determined by the character of the vessel in which they were found, this policy being tersely expressed in the phrases "free ships, free goods," and "enemy ships, enemy goods,"¹ and the liability of neutral goods to capture in an enemy's ship became, at times, the policy of France and Spain, apart from treaty. The two propositions "free ships, free goods," and "enemy ships, enemy goods," have, however, no necessary connection, and one may be adopted without the other; and accordingly it was decided by the United States Supreme Court that where a treaty which provided that "free ships" should make "free goods" was silent as to neutral goods in an enemy's vessel, they remained exempt from seizure.²

The Declaration of the Congress of Paris, made in 1856, to which Great Britain, France, Russia, Prussia, Sardinia, and Turkey were parties, and which has since been accepted by all civilized states with the exception of the United States, Spain, Mexico, and Venezuela, provided (art. 2): "The neutral flag covers enemy's goods, with the exception of contraband of war;" and (art. 3) "neutral goods, with the exception of contraband of war, are not liable to capture under enemy's flag."³ Though the United States have never become a party to this declaration, they have since then, in the civil war and likewise in the war with Spain, expressly adopted the principles of the articles, the first part of which they have always, through their executive department, sought to have incorporated in the law of nations, and the second of which has been frequently applied by the judicial department and has never been questioned by the executive.⁴ The declaration provides that it shall not be

Antonia Johanna, 1 Wheat. (U. S.) 159; The St. Joze Indiano, 1 Wheat. (U. S.) 203; The Atalanta, 3 Wheat. (U. S.) 409; The Nereide, 9 Cranch (U. S.) 418; The London Packet, 1 Mason (U. S.) 14; U. S. v. The Schooner El Telegrafo, Newb. Adm. 383. See the letter of Sir William Scott (Lord Stowell) and Sir J. Nicholl to Mr. Jay, stating the rules applied by British prize courts. Wharton's Dig. Int. Law, § 342. See also 1 Kent's Com. 124; Dana's Wheaton's Int. Law, § 442 *et seq.*; 3 Phillimore on Int. Law, §§ 161-212.

Thomas Jefferson wrote, in 1793: "I believe it cannot be doubted but that by the general law of nations the goods of a friend found in the vessel of an enemy are free, and the goods of an enemy found in the vessel of a friend are lawful prize. It is true that sundry nations, desirous of avoiding the inconveniences of having their vessels stopped at sea, ransacked, carried into port, and detained, under pretense of having enemy's goods on board, have in many instances introduced, by their special treaties, another principle between them, that enemy bottoms shall make enemy goods and friendly bottoms friendly goods; a principle much less embarrassing to commerce, and equal to all parties in point of gain and loss." Wharton's Dig. Int. Law, § 342.

A Presumption Exists that goods on board an enemy's ship are the enemy's property, unless a distinctly neutral character is impressed upon them by accompanying documents. The St. Joze Indiano, 1 Wheat. (U. S.) 208, *affirming* 2 Gall. (U. S.) 268; The London Packet, 5 Wheat. (U. S.) 132; The Sally Magee, 3 Wall. (U. S.) 451; The Flying Fish, 2 Gall. (U. S.) 374; The Buena Ventura, 87 Fed. Rep. 927.

1. Free Ships, Free Goods. — The Dutch were the first promoters of this principle, owing to

their having the bulk of the carrying trade of Europe, and their desire was, by securing the adoption of this rule, to obtain security for the goods of belligerents while in Dutch vessels. To obtain the consent of belligerent nations to the adoption of such a rule, however, it was necessary at the same time to concede to belligerents the right to capture neutral goods in an enemy's vessel. Treaties involving these provisions were quite general, and the United States included them in a number of treaties, a list of which will be found in Hall on Int. Law (4th ed.), § 256, note. See also Lawrence on Int. Law, § 266.

2. The Nereide, 9 Cranch (U. S.) 388, where the question arose in regard to a treaty with Spain.

3. The Declaration of Paris was primarily the embodiment of the rules adopted by England and France during the Crimean war, those governments having recognized that since the former claimed the right to seize an enemy's goods in neutral bottoms, and the latter the right to seize neutral goods in enemy's bottoms, between them neutral commerce was likely to suffer severely. See Lawrence on Int. Law, § 267; Twiss on Belligerent Rights; Wharton Dig. Int. Law, § 342.

The Refusal of the United States to become a party to the declaration was chiefly owing to its unwillingness to agree to the first article, abolishing privateering, unless the other nations would assent to the total exemption from capture of private property though belonging to the subjects of a belligerent state. See Wharton's Dig. Int. Law, § 342, pp. 268-296.

4. Policy of United States. — The executive department of the government has always taken a most advanced position in favor of the extension of neutral rights, and has at times taken

binding "except between those powers who have acceded or who shall accede to it," but in practice this has not affected the policy of the nations which were parties to it, they having given to neutrals not parties to it the benefit of its provisions, and its provisions seem likewise to be regarded as binding on the parties to it when at war with a nation not a party to it.¹

Neutral Goods in Armed Vessel of Enemy. — It has been held in the *United States* that a neutral owner of goods does not render them liable to seizure by the mere fact that he places them in a vessel of one of the belligerents which is so armed as to be able to resist search and capture.² A different view has been taken in *England*.³

Fraudulent Claim by Neutral. — Where a neutral owner of part of the property captured claims, for the purpose of deceiving the court, another part which belongs to an enemy, the neutral property will be condemned as a penalty for the fraudulent conduct.⁴

3. Contraband of War — a. DEFINITION AND GENERAL CHARACTER. — The term "contraband of war" is applied to those commodities which, as being capable of immediate use in the prosecution of hostilities, are subject to interception and seizure when found in a neutral vessel by one of the belligerents, if they are in the course of transportation to the other. As regards the question of contraband, the United States Supreme Court divides articles into three classes: the first consisting of articles manufactured, and primarily and ordinarily used, for military purposes in the time of war; the second, of articles which may be and are used for purposes of war or peace according to circumstances; and the third, of articles exclusively used for peaceful purposes. Merchandise of the first class, when destined to a belligerent country or place occupied by the army or navy of a belligerent, is always contraband, while merchandise of the second class is contraband only when actually destined for the military or naval use of a belligerent, and merchandise of the third class is never contraband, though liable to seizure for violation of blockade.⁵ This view of the question is practically that adopted by the courts and publicists of all nations, except a few of the Continental writers, who

the ground that, even apart from treaty, enemy's goods in neutral ships are exempt from seizure, a position inconsistent with that taken by the judiciary in *The Nereide*, 9 Cranch (U. S.) 388, and other cases, though at other times the executive took the same ground as the courts and merely expressed a desire to have the exemption of enemy's goods in neutral ships made a part of the law of nations. See Wharton's Dig. Int. Law, § 342, especially p. 309; Dana's Wharton's Int. Law, §§ 454-475.

During the civil war the executive made known to foreign powers its intention to observe the principles contained in the articles of the Declaration of Paris referred to in the text. Since there was no treaty or statute imposing "free ships, free goods," as a principle of adjudication, the decisions of the courts would not have been controlled thereby; but, as pointed out by Mr. Dana, in such a case the policy of the executive could be carried out by instructions to the navy not to make captures in such cases, and by directing restitution in case captures were made. See Dana's Wheaton's Int. Law, note 223. The same policy was declared by the United States in the Spanish war. See the President's proclamation, 30 U. S. Stat. at L. 1770, No. 8.

1. Rights of Nations Not Parties to Declaration. — In the Franco-German war the benefit of the principles of the Declaration of Paris was given by the belligerent nations to the property of

subjects of nations which were not parties to it; and at the beginning of the war in 1860 between England and France on the one hand and China on the other, the latter not a party to the declaration, each of the two former nations proclaimed its adherence to the principles of the declaration as regarded the vessels and goods of the enemy and of neutral nations. Twiss on Belligerent Rights 8.

2. Neutral Goods in Armed Vessel of Enemy. — *The Nereide*, 9 Cranch (U. S.) 388; *The Atlanta*, 3 Wheat. (U. S.) 409.

3. The Fanny, 1 Dods. 443.

Neutral Vessels under Convoy. — A neutral vessel is not treated as subject to capture merely because it is accompanied by an armed convoy, it seems, unless such protection was taken for the purpose of resisting search. *The Maria*, 1 C. Rob. 340; *The Elsebe*, 4 C. Rob. 483; *Story*, J., in *The Nereide*, 9 Cranch (U. S.) 438; 1 Kent's Com. 155. See also *infra*, this section, *Visit and Search—Of Vessels under Convoy*.

4. Fraudulent Claim by Neutral of Enemy Property. — *U. S. v. The Brig Lilla*, 2 Cliff. (U. S.) 169, 26 Fed. Cas. No. 15,600, affirming 2 Sprague (U. S.) 177, 15 Fed. Cas. No. 8,348; *The St. Nicholas*, 1 Wheat. (U. S.) 417. But see *The Betsy*, 2 Gall. (U. S.) 377, 3 Fed. Cas. No. 1,364. See also *The Nina*, 4 W. R. 310.

5. Contraband of War. — *The Peterhoff*, 5 Wall. (U. S.) 58.

deny the doctrine of "occasional contraband," as it has been called, by which articles of the second class are contraband or the reverse according to their destination.¹

b. ARMS AND MUNITIONS OF WAR. — In the first class of articles, which may be termed absolutely contraband, are to be included arms and munitions of war. These articles are generally susceptible of use also for peaceful purposes, as gunpowder for blasting and guns for hunting, but the right to intercept their transportation exists because of their essentially warlike character, which renders them likely to be used for belligerent purposes, or at least to increase the enemy's available means of carrying on the war. The term "munitions of war" is somewhat indefinite, but in practice it seems to cover anything the primary and ordinary use of which is military when in the enemy's possession in time of war.²

c. ARTICLES NOT INTRINSICALLY OF WARLIKE CHARACTER — (1) *In General.* — The questions arising as to articles not of a primarily warlike character are difficult of solution. There exists now, as formerly, very great uncertainty in this regard, and in view of the continual change which the arts of war and industry are undergoing, it would be impossible to make a detailed and final enumeration of contraband articles. The practice of nations has been generally dictated by self-interest, and the frequent specifications in treaties as to what articles are to be deemed contraband have not tended to clarify the question, since not only are the treaties of different nations divergent in this respect, but individual nations have generally pursued no consistent course in framing such specifications in treaties with different nations.³

(2) *Provisions.* — While generally not contraband, provisions may become so in circumstances arising out of the particular situation of the war or on account of their destination, and they will be treated as such if in the course of transportation to the army or navy of the enemy, or to its ports of naval or military equipment, unless, it would seem, they are the product of the neutral country to which the vessel belongs.⁴

1. See Dana's *Wheaton's Int. Law*, note 226; Hall on *Int. Law* (4th ed.), § 240; Lawrence on *Int. Law*, § 278; 2 Rivier's *Droit des Gens* 416 *et seq.*; Wharton's *Dig. Int. Law*, § 363 *et seq.*

2. *Arms and Munitions of War.* — See Dana's *Wheaton's Int. Law*, note 226; Hall on *Int. Law* (4th ed.), § 236.

In *The Berinuda*, 3 Wall. (U. S.) 514, it was held that articles for immediate military use in battle, such as cannon and other guns, pistols, swords, cartridges, gunpowder, and shells, are contraband; and in *The Peterhoff*, 5 Wall. (U. S.) 58, artillery harness, men's army bluchers, artillery boots, and "government regulation" gray blankets were stated to belong to the first class above mentioned, that is, to be always liable to seizure when bound to an enemy's port.

United States Naval Regulations. — General Orders No. 492, issued to the navy June 30, 1898, provide that the following articles shall be contraband: Ordnance; machine guns and their appliances, and the parts thereof; armor plate, and whatever pertains to the offensive and defensive armament of naval vessels; arms and instruments of iron, steel, brass, or copper, or of any other material, such arms and instruments being specially adapted for use in war by land or sea; torpedoes and their appurtenances; cases of mines, of whatever material; engineering and transport materials, such as gun carriages, caissons, carriage boxes, campaigning forges, canteens, pon-

toons, ordnance stores; portable range finders; signal flags destined for naval use; ammunition and explosives of all kinds; machinery for the manufacture of arms and munitions of war; saltpetre; military accoutrements and equipments of all sorts; horses.

3. **Treaty Stipulations.** — For reference to various treaty provisions on the subject, including treaties made by the United States, see Hall on *Int. Law* (4th ed.), §§ 238, 239.

4. **Provisions.** — *The Edward*, 4 C. Rob. 68; *The Jonge Margaretha*, 1 C. Rob. 189; *Martin v. Hunter*, 1 Wheat. (U. S.) 304; *Maisonnaire v. Keating*, 2 Gall. (U. S.) 325.

General Orders No. 492, issued to the navy June 30, 1898, provided that provisions shall be contraband when destined for an enemy's ship or ships, or for a place that is besieged.

Judicial Decisions. — In *The Commercen*, 1 Wheat. (U. S.) 382, affirming 2 Gall. (U. S.) 261, barley and oats which were in the course of transportation to the English army in Spain by a vessel of Sweden, which was neutral as between Great Britain and the United States, and was an ally of Great Britain in its war against France, were treated as contraband. Three of the judges, including Marshall, C. J., dissented in this case, which involved the right of the vessel to freight, on the ground that in conveying the commodities to the English army in Spain there was no act of unneutral conduct as against the United States. As remarked by Mr. Dana (*Dana's Wheaton's Int.*

(3) *Materials of Naval Construction.* — Naval stores and materials of naval construction have been the subject of much discussion and difference of opinion.¹ The English courts have regarded them as contraband, and that is the present rule in that country.² The United States apparently regard such articles as contraband,³ though their treaties have frequently contained stipulations to the contrary.⁴ In France, such articles are not regarded as contraband.⁵

(4) *Vessels.* — Vessels have been confiscated as contraband of war when on the way to belligerent ports with the expectation on the part of the owner of selling them there for belligerent purposes.⁶

(5) *Horses.* — Horses are quite generally considered contraband, though in some treaties with South American states the United States have excluded them.⁷

(6) *Coal.* — The question as to the character of coal as a contraband article has become important only in recent years, and consequently the nations have not all clearly defined their positions in that regard. In 1859 and 1870, France, when engaged in war, declared it not to be contraband, and Russia has taken the same position. England, on the other hand, appears disposed to treat it as a contraband article when it is destined to a port of naval equipment or to a naval station or base of naval operations, and this is presumably the view which would be taken by the United States.⁸

Law, note 230), the case might have been regarded as one of hostile service by a neutral vessel, involving the confiscation thereof.

In *The Jonge Margaretha*, 1 C. Rob. 189, Sir William Scott decided that a cargo of cheeses being conveyed by a Dutch ship to Brest, which was universally recognized as a port of naval and military equipment, were contraband; while in *The Frau Margaretha*, 6 C. Rob. 92, he held that such articles bound for a port near Brest were not necessarily contraband, there being no ready communication except by land between the two ports. See also *The Zelden Rust*, 6 C. Rob. (Reprint) 93.

European Policy. — In the latter part of the eighteenth century England asserted the right to seize all vessels laden with provisions bound to a French port, upon the ground that there was a prospect of reducing the enemy by famine. This was a constant source of complaint by the United States, and finally it was agreed by treaty that provisions should be paid for when captured. Since then England has taken a different position, and in 1885 objected strongly to the action of France in declaring during her hostilities with China that shipments of rice for any port north of Canton were to be considered contraband, Great Britain contending that though provisions may in particular circumstances acquire a contraband character, they cannot in general be so treated. The war between France and China was shortly afterwards concluded, and hence no case of seizure under the French declaration arose. See Wharton's Dig. Int. Law, § 370; Hall on Int. Law (4th ed.), § 245.

1. **Articles of Naval Construction.** — See Dana's Wheaton's Int. Law, § 479 *et seq.*

2. **English Decisions.** — The following articles have been decided to be contraband: Planks and wood for shipping or building, *The Endraught*, 1 C. Rob. 23. Sail cloth, *The Neptunus*, 3 C. Rob. 108; *The Nostra Signora de Begona*, 5 C. Rob. (Reprint) 90. Masts and anchors, *The Staadt Embden*, 1 C. Rob. 29;

The Charlotte, 5 C. Rob. (Reprint) 272. Pitch and tar not the product of the country from which it was being exported, *The Maria*, 1 C. Rob. 340; *The Sarah Christina*, 1 C. Rob. 237; *The Richmond*, 5 C. Rob. (Reprint) 290; *The Twee Juffrowen*, 4 C. Rob. 242; *The Neptunus*, 6 C. Rob. (Reprint) 403; *The Jonge Tobias*, 1 C. Rob. 329; *The Charlotte*, 1 Act. 201. Hemp not the product of the country from which it was being carried, *The Apollo*, 4 C. Rob. 158; *The Evert*, 4 C. Rob. 354; provided it was of a quantity fit for naval use, *The Gute Gesellschaft Michael*, 4 C. Rob. 94. Copper adapted for sheathing, *The Charlotte*, 5 C. Rob. (Reprint) 245.

English Admiralty Rule. — The Manual of Naval Prize Law, prepared for the British admiralty by Prof. T. E. Holland, which may be regarded to some extent as presenting the views of the English government upon the question, names naval stores as absolutely contraband, and includes therein not only masts, spars, rudders, cordage, and sail cloth, but also marine engines and the component parts thereof, including screw propellers, paddle wheels, shafts, and boilers.

3. **Position of United States.** — 1 Am. State Papers 450, 560.

4. See Hall on Int. Law (4th ed.), § 239, enumerating the treaties.

5. **French Practice.** — Hall on Int. Law (4th ed.), § 243 [*voir* 1 *Pistoye et Duverdy* 445; *Il Volante*, *ib.* 409; *La Minerve*, *ib.* 410].

6. **Vessels.** — *The Richmond*, 5 C. Rob. (Reprint) 290; *The Brutus*, 5 C. Rob. (Reprint) 370 appendix.

7. **Horses.** — 1 Kent's Com. 136; 3 Phillimore on Int. Law 361; Manning on Law of Nations 355; Hall on Int. Law (4th ed.), § 242. See the letter of Mr. Pickering, secretary of state, to Mr. Adet, Wharton's Dig. Int. Law, § 375.

The General Orders to the Navy make horses absolutely contraband.

8. **Coal.** — Hall on Int. Law (4th ed.), § 244;

(7) *Money*. — If intended to be used in aid of belligerent operations, money may be treated as contraband.¹

(8) *Cotton*. — During the civil war, cotton was, it is stated, treated as contraband under certain circumstances.²

(9) *Miscellaneous*. — Printing presses and materials, paper, and Confederate state postage stamps, belonging to and intended for the immediate use of the Confederate government, were likewise held to be contraband.³

d. DESTINATION OF VESSEL OR GOODS. — Since the belligerent destination of the goods is the foundation of the right of seizure, this is not affected by the fact that the vessel's destination is primarily a neutral port, if this is merely a point from which the vessel is to proceed to the enemy's port.⁴

Continuous Voyages. — An extension of this idea is involved in the application to cases of contraband of the doctrine of "continuous voyages," according to which, as decided by the United States courts, articles may be seized as contraband if their ultimate destination is a hostile port, though the intention is to unload them at an intermediate neutral port and forward them in a different vessel;⁵ and an analogous principle was applied in the case of articles in a vessel bound for a neutral port, which were destined, after being unloaded, to be forwarded by land for the use of the hostile forces.⁶ Goods so sent to

Bluntschli, § 805; Dana's Wheaton's Int. Law, note 226.

United States Naval Regulations. — General Orders, No. 492, issued to the navy June 30, 1898, provide that coal shall be contraband "when destined for a station, a port of call, or a ship or ships of the enemy."

1. *Money*. — U. S. v. Dieckman, 92 U. S. 520. See, for a contrary position taken by the United States government, letters of Mr. Blaine, secretary of state, to Mr. Martinez, Wharton's Dig. Int. Law, § 371.

2. *Cotton*. — "Cotton was useful as collateral security for loans negotiated abroad by the Confederate states government, or, as in the present case, was sold by it for cash to meet current expenses, or to purchase arms and munitions of war. Its use for such purposes was publicly proclaimed by the Confederacy, and its sale interdicted, except under regulations established by, or contract with, the Confederate government. Cotton was thus officially classed among war supplies, and as such was liable to be destroyed when found by the Federal troops, or turned to any use which the exigencies of war might dictate. * * * Cotton, in fact, was to the Confederacy as much munitions of war as powder and ball, for it furnished the chief means of obtaining those indispensables of war. In international law there could be no question as to the right of the Federal commanders to seize it as contraband of war, whether they found it on rebel territory or intercepted it on the way to the parties who were to furnish in return material aid in the form of the sinews of war, arms, or general supplies." Mr. Bayard, secretary of state, to Mr. Muruaga, Wharton's Dig. Int. Law, § 373.

3. *Miscellaneous Articles*. — The Bermuda, 3 Wall. (U. S.) 514.

4. *Destination*. — The Richmond, 5 C. Rob. (Reprint) 290; The Maria, 5 C. Rob. (Reprint) 325; The William, 5 C. Rob. (Reprint) 349.

5. *Continuous Voyages*. — In The Bermuda, 3 Wall. (U. S.) 514, articles were condemned as contraband when seized on board a neutral

vessel while sailing from Bermuda to Nassau, two neutral ports, on the theory that they were shipped with the purpose of transshipping them at Nassau and sending them thence to the Southern states. The court said: "If the ulterior destination is the known inducement to the partial voyage, and the ship is engaged in the latter with a view to the former, then whatever liability may attach to the final voyage must attach to the earlier, undertaken with the same cargo and in continuity of its conveyance. Successive voyages, connected by a common plan and a common object, form a plural unit. They are links of the same chain, each identical in description with every other, and each essential to the continuous whole. The ships are planks of the same bridge, all of the same kind, and all necessary to the convenient passage of persons and property from one end to the other." See also The Stephen Hart, Blatchf. Prize Cas. 387; affirmed in 3 Wall. (U. S.) 559.

6. In The Peterhoff, 5 Wall. (U. S.) 28, it was held that articles of a contraband nature which were on board a vessel bound for Matamoros, a port on the Mexican side of the Rio Grande, were liable to seizure in view of the evidence that they were destined for the use of the rebel forces in Texas. This case was more or less considered by the English Court of Common Pleas in Hobbs v. Henning, 17 C. B. N. S. 791, 112 E. C. L. 791, an action brought by the owners of the goods condemned in the case of the Peterhoff against the underwriters, but no positive opinion was there given as to the merits of the holding of the American court, the tendency of the court's observations however, not being unfavorable to it.

The Institute of International Law in 1896 adopted a resolution recognizing the doctrine of continuous voyages as laid down by the American court. See article by J. Westlake in 15 L. Quar. Rev. 29.

Adverse View. — The American view, as presented in the above cases, is severely condemned by W. E. Hall (see Hall on Int. Law,

a neutral port are not, however, liable to seizure as contraband if they are merely sent there to purchasers or for sale, though the neutral port may be a well-known market for the purchase of supplies by the belligerent, and the consignors may expect that they will ultimately reach the belligerent.¹

e. PENALTY FOR CARRYING CONTRABAND. — Articles of a contraband character are liable to confiscation,² but, by the English practice, commodities which are not necessarily contraband, and those which are the product of the exporting country, are not confiscated, the capturing belligerent forcibly purchasing them at their mercantile value, together with a reasonable profit.³ Other articles in the same vessel which belong to the owner of the contraband may also be confiscated.⁴ The vessel, however, is not, by the modern practice, subject to confiscation, but is ordinarily visited with no greater penalty than loss of time, freight, and expenses.⁵ If, however, it belongs to the owner of the contraband cargo, or if its owner is privy to the carriage of such cargo, the vessel also is liable to confiscation.⁶ The right to confiscate a vessel has also been exercised in cases of the carriage of articles which are expressly made contraband by treaty with the state to which the neutral vessel belongs,⁷ and also in case of the use of false papers and the naming of a false destination.⁸ In some treaties provision has been made allowing the neutral vessel to proceed on its way upon abandonment to the belligerent of the contraband.

4th ed., § 247, note), on the ground that the condemnation in these cases was "not for an act — for the act done was in itself innocent, and no previous act existed with which it could be connected so as to form a noxious whole — but on mere suspicion of intention to do an act." See also the doctrine of continuous voyages considered *infra*, this section, in connection with blockades.

1. Innocent Intention. — The *Peterhoff*, 5 Wall. (U. S.) 28; 15 L. Quar. Rev. 25.

2. Penalty for Carrying Contraband. — The *Peterhoff*, 5 Wall. (U. S.) 28; The *Bermuda*, 3 Wall. 514; *Carrington v. Merchants' Ins. Co.*, 8 Pet. (U. S.) 495.

3. In *The Sarah Christina*, 1 C. Rob. 237, Sir William Scott said: "In the practice of this court there is a relaxation which allows the carrying of these articles, being the produce of the claimant's country, as it has been deemed a harsh exercise of a belligerent right to prohibit the carriage of these articles, which constitute so considerable a part of its native produce and ordinary commerce. But in the same practice this relaxation is understood with a condition that it may be brought in, not for confiscation, but for pre-emption — no unfair compromise, as it should seem, between the belligerent's rights, founded on the necessities of self-defense, and the claims of the neutral to export his native commodities, though immediately subservient to the purposes of hostility." See also *The Haabet*, 2 C. Rob. 174.

The Admiralty Prize Manual, prepared by Professor Holland, provides (p. 24): "The carriage of goods conditionally contraband and of such absolutely contraband goods as are in an unmanufactured state and are the produce of the country exporting them is usually followed only by the pre-emption of such goods by the British government, which then pays freight to the vessel carrying the goods."

4. *The Staat Embden*, 1 C. Rob. 26; The *Peterhoff*, 5 Wall. (U. S.) 28.

5. *Liability of Vessel.* — 1 Kent's Com. 143;

The Ringende Jacob, 1 C. Rob. 89; *The Sarah Christina*, 1 C. Rob. 238; *The Peterhoff*, 5 Wall. (U. S.) 28; *Carrington v. Merchants' Ins. Co.*, 8 Pet. (U. S.) 495.

The ancient practice was to confiscate the ship as well as the cargo. The *Neutralitet*, 3 C. Rob. 195; *The Bermuda*, 3 Wall. (U. S.) 514.

6. *The Staat Embden*, 1 C. Rob. 26; *The Ranger*, 6 C. Rob. (Reprint) 125; *The Ezilda*, *Blatchf. Prize Cas.* 232; *The Gertrude*, *Blatchf. Prize Cas.* 374.

In *The Bermuda*, 3 Wall. (U. S.) 556, it was said, in regard to the liability of the ship: "Mere consent to transportation of contraband will not always or usually be taken to be a violation of good faith. There must be circumstances of aggravation. The nature of the contraband articles and their importance to the belligerent, and the general features of the transaction, must be taken into consideration in determining whether the neutral owner intended or did not intend, by consenting to the transportation, to mix in the war."

7. *The Neutralitet*, 3 C. Rob. 295.

8. False Papers and Destination. — *The Neutralitet*, 3 C. Rob. 295; *The Franklin*, 3 C. Rob. 224; *The Gertrude*, *Blatchf. Prize Cas.* 374; *The St. Nicholas*, 1 Wheat. (U. S.) 417.

In *Carrington v. Merchants' Ins. Co.*, 8 Pet. (U. S.) 521, Story, J., said: "The belligerent has a right to require a frank and *bona fide* conduct on the part of neutrals, in the course of their commerce in times of war; and if the latter will make use of fraud and false papers to elude the just rights of the belligerents, and to cloak their own illegal purposes, there is no injustice in applying to them the penalty of confiscation. The taint of the fraud travels with the party and his offending instrument during the whole course of the voyage, and until the enterprise has, in the understanding of the party himself, completely terminated."

The owner's ignorance of the master's acts in using false papers does not exempt the vessel. *The Ranger*, 6 C. Rob. (Reprint) 126; *The Bermuda*, 3 Wall. (U. S.) 514.

This procedure, however, is subject to the disadvantage that the captor thereby loses the use of the evidence furnished by the ship's papers and the witnesses on board the neutral ship,¹ and a distinguished authority is of the opinion that such a treaty provision could apply only when "there is a capacity in the neutral vessel to insure the captor against a claim on the goods."²

f. BEGINNING AND END OF OFFENSE. — The offense of transporting contraband is complete from the moment of quitting the port, and the liability to confiscation immediately attaches.³ This principle does not, however, impose a liability in case of capture after the belligerent destination has surrendered to the forces of the nation to which the captors belong, thus becoming a friendly port.⁴ On the other hand, when the contraband goods have been deposited at the port of destination and the subsequent voyage has thus been disconnected from the noxious articles, it has not been usual to treat the ship or cargo upon the return voyage as liable to a penalty, although the cargo may be the proceeds of the contraband.⁵ But when the vessel has been guilty of fraudulent conduct on the outward voyage, the return cargo has been held liable to seizure upon her return voyage,⁶ and so the vessel has been held liable when she proceeded to other ports after depositing the contraband articles.⁷

4. Carriage of Belligerent Despatches and Persons — *a.* IN GENERAL. — Somewhat analogous to the carriage of contraband, but differing in important respects therefrom, is the carriage by a neutral vessel of despatches or persons for one of the belligerent governments.⁸ In this case, as in the case of contraband, the belligerent may protect himself by forcibly stopping the trade, but the service performed by the neutral in the case of contraband is a mere trading transaction, while it is in this case actually hostile in character, and the vessel is consequently subject to confiscation in case the owner or his agent is in any way involved.⁹

b. DESPATCHES. — The prohibition of the carrying of despatches applies generally, it seems, to despatches of a public or official nature,¹⁰ but does not extend to despatches of a diplomatic character between a belligerent government and its diplomatic representative accredited to a neutral nation, since in these the neutral nation is presumably as greatly interested as the belligerent.¹¹

Knowledge and Intent. — A neutral vessel carrying despatches for either belligerent is liable to confiscation where the circumstances surrounding the despatches were such as to justify suspicion on the part of the persons in charge of the vessel as to their character,¹² and likewise where there is an

1. **Treaty Provisions as to Vessel.** — For a list of the numerous treaties containing such a provision, see Hall on Int. Law (4th ed.), § 247. See also Bluntschli, § 810; Calvo, § 2502.

2. Dana's Wheaton's Int. Law, note 230.

3. **Beginning of Offense.** — The *Imina*, 3 C. Rob. 167; The *Trende Sostre*, 6 C. Rob. (Reprint) 390, note *a*; The *Dolphin*, 7 Fed. Cas. No. 3,975; The *Stephen Hart*, Blatchf. Prize Cas. 387, affirmed 3 Wall. (U. S.) 559.

4. The *Trende Sostre*, 6 C. Rob. (Reprint) 390, note *a*.

5. **Termination of Offense.** — *Carrington v. Merchants' Ins. Co.*, 8 Pet. (U. S.) 495.

6. The *Nancy*, 3 C. Rob. 122; The *Baltic*, 1 Act. 25; The *Margaret*, 1 Act. 333.

7. *Carrington v. Merchants' Ins. Co.*, 8 Pet. (U. S.) 521, the court, by Story, J., saying that the taint of fraud used by the vessel in exhibiting false papers "travels with the party and his offending instrument during the whole course of the voyage and until the enterprise

has, in the understanding of the party himself, completely terminated." See to the same effect The *Nancy*, 3 C. Rob. 126.

8. **Carrying Belligerent Despatches and Persons.** — Dana's Wheaton's Int. Law, note 228; Hall on Int. Law (4th ed.), § 248; Lawrence on Int. Law, § 284.

9. **Penalty.** — The *Carolina*, 4 C. Rob. 256; The *Friendship*, 6 C. Rob. (Reprint) 420; The *Atalanta*, 6 C. Rob. (Reprint) 440; The *Orozembo*, 6 C. Rob. (Reprint) 430; *U. S. v. Wren*, 27 Law Rep. 267, 28 Fed. Cas. No. 16,768. See Dana's Wheaton's Int. Law, note 228.

10. **Despatches Subject to Rule.** — The *Carolina*, 6 C. Rob. (Reprint) 405; The *Madison*, 1 Edw. Adm. 225; The *Acteon*, 2 Dods. 53; The *Tropic Wind*, Blatchf. Prize Cas. 64.

11. **Diplomatic Correspondence.** — The *Caroline*, 6 C. Rob. (Reprint) 461; The *Madison*, Edw. Adm. 224; The *Tulip*, Fish. Prize Cas. 1; Dana's Wheaton's Int. Law, § 504.

12. **Knowledge of Character of Despatches.** — In *The Rapid*, Edw. Adm. 228, it was decided that

attempt by the person in charge of the vessel to conceal the despatches from the captors.¹

Mails and Mail Carriers.—Neutral vessels carrying mails are not liable to a penalty because of the inclusion in the mails of belligerent despatches, since knowledge of their contents cannot be imputed to the owners of the vessels. They are, however, liable as other vessels to visit and search, and the mails may be seized if believed to contain hostile despatches. In practice there is little disposition to interfere with the free passage of the mails, and seizure would probably occur only under exceptional circumstances.²

c. PERSONS.—The liability to confiscation of a neutral vessel which is under contract for its use in the transportation of men in the service of a belligerent is independent of the question whether the contract be such as to pass the temporary control and ownership of the vessel or be merely one to convey the persons that may be placed on board by the belligerent;³ nor is the number of persons so carried on the vessel under the contract material.⁴ But the carriage of official persons while traveling purely in a private capacity at their own expense is not, it seems, within the rule.⁵

Exercise of Fraud or Restraint.—It has been decided that a vessel is not exempt from liability because the owner of the vessel was imposed upon as to the character of the persons to be transported,⁶ or even when the master was forcibly compelled to use her as a transport.⁷ These decisions are, however,

the caution of the neutral master "must be proportioned to the circumstances under which such papers are received," among which circumstances are to be included the person from whom they are received and the person to whom they are addressed, and likewise the hostile or neutral character of the place at which the voyage commenced and at which the documents are to be delivered.

1. Fraudulent Concealment.—The *Atalanta*, 6 C. Rob. (Reprint) 440; The *Constantia*, 6 C. Rob. (Reprint) 461, note *a*.

2. Mails and Mail Carriers.—Lawrence on Int. Law, § 282; Hall on Int. Law (4th ed.), § 252.

During the civil war the United States government, at the suggestion of the British government, as a matter of comity and not of right, exempted from search public mails of neutral powers, with the proviso that this protection should not extend to "simulated mails verified by forged certificates or counterfeited seals." See Dana's Wheaton's Int. Law, note 228, p. 659. So in 1870 the French government directed its officers not to search the mails on a neutral vessel provided the government officers in charge of the mail gave proper assurances as to the character of the contents.

Various Treaties and postal conventions contain provisions looking to the exemption of mails from the usual liabilities of search and seizure. See Hall on Int. Law (4th ed.), § 252.

In his proclamation at the beginning of the Spanish war the President declared that "the voyages of mail steamers are not to be interfered with except on the clearest grounds of suspicion of a violation of law in respect to contraband or blockade." 30 U. S. Stat. at L. 1770, No. 8.

3. Carriage of Belligerent Persons.—The *Friendship*, 6 C. Rob. (Reprint) 420. In this case an American vessel engaged in the car-

riage to France of crews of shipwrecked French men-of-war was condemned, it being apparent that their passage was paid by the French government and the men being in the service of the state, and it was likewise held immaterial that the particular transportation was not part of a specific military operation or otherwise connected with the immediate active service of the enemy.

4. The Orozembo, 6 C. Rob. (Reprint) 430.

5. Persons Traveling as Private Individuals.—In *The Friendship*, 6 C. Rob. (Reprint) 420, Sir William Scott said that no court had gone so far as to lay down the rule that neutral vessels could not carry a military officer of a belligerent traveling "as an ordinary passenger, as other passengers do, and at his own expense."

6. Involuntary Service.—In *The Orozembo*, 6 C. Rob. (Reprint) 430, it was said: "In cases of *bona fide* ignorance there may be no actual delinquency, but if the service is injurious, that will be sufficient to give the belligerent a right to prevent the thing from being done, or at least repeated, by enforcing the penalty of confiscation. If imposition has been practiced, it operates as force; and if redress in the way of indemnification is to be sought against any person, it must be against those who have, by means either of compulsion or deceit, exposed the property to danger."

7. Deception.—In *The Carolina*, 4 C. Rob. 256, it was decided that a Swedish vessel engaged in the French transport service was liable to condemnation, though her employment in that service was brought about by force, the court saying: "If an act of force exercised by one belligerent on a neutral ship or person is to be deemed a sufficient justification for any act done by him contrary to the known duties of the neutral character, there would be an end of any prohibition under the law of nations to carry contraband or to engage in any other hostile act."

inconsistent with a later decision by the same judge above referred to as to the liability for carrying despatches,¹ and they would very possibly not be followed at the present time.²

Diplomatic Persons. — On the same principle by which a neutral vessel is allowed to carry diplomatic despatches for a belligerent, ambassadors or diplomatic agents may be carried.³ This immunity of diplomatic agents has, however, been stated by high authority to be applicable only to an agent who has actually been received by the neutral government, and not to one merely on his way to his post.⁴

Case of the Trent. — The right of a neutral to carry diplomatic or quasi-diplomatic persons in the service of a belligerent has been extensively discussed in connection with the famous case of the Trent, the facts of which are stated in the notes below.⁵

5. Blockade. — *a. DEFINITION AND GENERAL PRINCIPLES.* — The term "blockade," as used in international law, means the interception by a belligerent of the right of entrance to, and, within certain limits, of departure from, a place which belongs to or is in possession of the enemy. Though the term is in itself applicable to the interception of communication by land, its use in international law is confined to the interception of communication by sea, since interception of communication on land is a result of the general power of a belligerent to prevent any passage or communication through its lines or through any district which is subject to its control, while on the sea a neutral has the same rights as a belligerent, except in so far as they are subordinated to the special needs of the latter.⁶ The object of establishing a blockade is not necessarily, or even generally, the capture of the blockaded port or por-

1. The Rapid, Edw. Adm. 228.

2. See Hall on Int. Law (4th ed.), § 249, note.

3. Hall on Int. Law (4th ed.), § 250; Lawrence on Int. Law, § 282.

4. See the opinion of Sir William Scott in *The Caroline*, 6 C. Rob. (Reprint) 461, which did not directly involve the question. This view is adopted by Mr. Wheaton (Int. Law, § 504), and apparently favored by Mr. Dana (see Dana's Wheaton's Int. Law, note 228, p. 651).

5. **Case of the Trent.** — In 1861 Messrs. Mason and Slidell, who had been appointed diplomatic agents or commissioners from the Confederate states to England and to France respectively, took passage at Havana on the passenger steamer Trent, bound for Nassau, from which latter place they intended to sail for England. While passing through the Bahama channel the vessel was boarded by the United States steamer San Jacinto, Captain Wilkes, and the commissioners were taken out of her and carried to Boston, the Trent being allowed to continue her voyage. The English government immediately demanded and obtained their release, the English and United States governments, however, differing as to the grounds for such release. Mr. Seward, secretary of state, contended that Confederate commissioners were liable to seizure as contraband of war, but agreed to their release on the ground that they and the vessel with them should have been sent in for adjudication. After their release Earl Russell sent a long despatch controverting the position of Mr. Seward that the commissioners were contraband, in view particularly of their neutral destination, and also contended that they were

free from capture as being diplomatic agents. Whether they could be considered as such agents is doubtful in view of the fact that they represented a power not yet recognized by any foreign nation and they themselves had not been as yet received by the powers to which they were accredited. The predominant view among the numerous writers referring to the case is that their seizure was irregular, but there seems to be an entire absence of harmony as to the reason for this view. The importance of the case was chiefly political, and it settled nothing, unless, perhaps, as Mr. Dana says, "that a public ship, though of a nation at war, cannot take persons out of a neutral vessel at sea, whatever may be the claim of her government on those persons." See Dana's Wheaton's Int. Law, note 228; Wharton's Dig. Int. Law, § 374; Lawrence on Int. Law, § 284; Woolsey on Int. Law, § 184; 5 Am. L. Rev. 267; Bluntschli, § 817; Marquardsen, *Der Trentfall*.

6. **Blockade.** — Hall on Int. Law (4th ed.), § 257; 2 Rivier's *Droit des Gens* 288 *et seq.*; Wharton's Dig. Int. Law, § 359 *et seq.*

United States Practice. — The right to institute commercial blockades as a belligerent measure has never been contested by the United States government, though in the period prior to the civil war the government made frequent protests in its diplomatic correspondence with other nations against the system and made efforts towards their prohibition. See Wharton's Dig. Int. Law, § 361; Dana's Wheaton's Int. Law, note 232. The United States Supreme Court has likewise always recognized their validity. See *McCall v. Marine Ins. Co.*, 8 Cranch (U. S.) 59; *Olivera v. Union Ins. Co.*, 3 Wheat. (U. S.) 183; *Prize Cases*, 2 Black

tion of territory, but is rather to cut off all commercial communication between the enemy and subjects of neutral powers, and thereby diminish its resources and render it less able successfully to carry on the war or resist a siege or invasion.¹

Blockade of River Partly in Neutral State. — If one bank of a river is within a neutral state, or if the upper portion of the river is so located, a blockade of the mouth of the river can be maintained only so far as is consistent with free communication with the ports or territory of the neutral state.²

b. BLOCKADE MUST BE ACTUAL AND EFFECTIVE. — It is now agreed by the publicists and courts of all nations that a valid blockade can exist only when there is a sufficient armed force present to make the blockade effective,³ and that a mere proclamation of blockade, or, as it has been called, a "paper blockade," is not binding on neutral ships.⁴

Conditions of Effectiveness. — This effectiveness is attained if the entrance to the port be watched by a force sufficient to render egress or ingress dangerous; or, in other words, sufficient to render the capture of vessels attempting to go in or come out most probable.⁵ Provided this condition of effectiveness is

(U. S.) 635; *The Circassian*, 2 Wall. (U. S.) 135; *The Admiral*, 3 Wall. (U. S.) 603; and other cases cited in this section.

1. Communications with Diplomatic Agents of neutral powers are not, it is stated, subject to interruption by blockade, unless good and sufficient reasons are given therefor. See letters of Mr. Seward to Mr. Webb, and of Mr. Fish to Mr. Kirk, Wharton's Dig. Int. Law, § 361.

Neutral Vessels of War are subject to a blockade as well as merchant vessels, but quite frequently special orders are given allowing their entrance into the blockaded port, as was done during the civil war in the United States and the recent war between Spain and the United States. See Dana's Wheaton's Int. Law, note 233.

2. Blockade of River Partly in Neutral State. — It was decided by the United States Supreme Court that there was no authority in international law for the blockade of the Rio Grande by the United States so as to affect trade with the Mexican shore of the river. *The Peterhoff*, 5 Wall. (U. S.) 54. But it was held that vessels while discharging or receiving cargo for such neutral shores were bound to keep south of the dividing line between the Mexican and United States territories, and, though releasing vessels captured north of that line, the court refused to allow their costs and expenses. *The Dashing Wave*, 5 Wall. (U. S.) 170; *The Volant*, 5 Wall. (U. S.) 179; *The Science*, 5 Wall. (U. S.) 179. Costs and expenses were, however, allowed when the vessel had merely drifted across the line from an anchorage south thereof. *The Teresita*, 5 Wall. (U. S.) 180.

3. Blockade Must Be Actual and Effective. — 1 Kent's Com. 144, 145; Hall on Int. Law (4th ed.), § 257; Halleck on Int. Law 539; *The Betsey*, 1 C. Rob. 93; *The Mercurius*, 1 C. Rob. 84; *The Olinde Rodrigues*, 174 U. S. 510; *The Peterhoff*, 5 Wall. (U. S.) 28.

For executive correspondence in accordance with this position, see Wharton's Dig. Int. Law, § 361.

4. Paper Blockades. — In the wars of the first part of the nineteenth century paper blockades were instituted on a large scale by England and

France, much to the injury of neutral nations, especially the United States, and that government frequently made them a subject of complaint. See 2 Rivier's *Droit des Gens* 295; Wharton's Dig. Int. Law, § 361.

Insurgent Ports. — The prohibition of paper blockades applies also in the case of ports which are in the hands of insurgents, the right of a nation to close its ports for police or other reasons not applying in such a case. This was recognized during the civil war, when, though Congress authorized the President to close any ports in which duties could not be collected, the blockade was treated as extending only to those ports before which there was an effective blockading squadron. A similar position had been taken by the United States in the case of the wars of independence of the South American states. See Dana's Wheaton's Int. Law, note 239; Wharton's Dig. Int. Law, § 361.

The Declaration of Paris (April 16, 1856), which was agreed to by all the great powers with the exception of the United States, contained the following article: "Blockades, in order to be binding, must be effective; that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy." This rigorous requirement has not, however, been literally applied, but the declaration has been generally construed as being directed merely against paper blockades. See note of Lord Russell to Mr. Mason, Feb. 10, 1861, quoted in the *Olinde Rodrigues*, 174 U. S. 510. See also Dana's Wheaton's Int. Law, note 233.

5. Danger in Entry and Egress. — 1 Kent's Com. 145; Hall on Int. Law (4th ed.), § 260; *The Franciska*, Spinks 115; *The Nornen*, Spinks Prize Cas. 171; *The Sarah Starr*, Blatchf. Prize Cas. 69.

"It is impossible to fix with any accuracy the amount of danger in entry which is necessary to preserve the validity of a blockade. It is for the prize courts of the belligerent to decide whether in a given instance a vessel captured for its breach had reason to suppose it to be nonexistent, or for the neutral government to examine, on the particular facts, whether it is proper to withhold or to withdraw recognition." Hall on Int. Law (4th ed.), § 260,

attained, the size of the blockading squadron necessary for the purpose is immaterial.¹ Nor is it material that the blockade is made effective by batteries on shore as well as by ships afloat,² or that the blockading force is at a considerable distance from the port;³ and a blockade cannot be held to be ineffective merely because the officers of a vessel seized for attempting to violate it were not able to see any blockading vessels.⁴

c. NOTICE OF BLOCKADE. — A vessel is not liable to seizure as having violated a blockade unless it has notice of the existence of the blockade.⁵ As a general rule, a government, on instituting a blockade, makes proclamation of the fact, which proclamation is communicated to foreign states, and, according to the practice of the United States and Great Britain, a vessel sailing after the blockade has thus become a matter of public knowledge is presumed to know of it, and no direct notice to it by the blockading squadron is necessary.⁶ When, however, the vessel has sailed before she could have received notice of the blockade, or there has been no public notification of the blockade, she is entitled to warning from the blockading squadron,⁷ and according to the practice of France, Italy, Spain, and Sweden, this warning is always given to a vessel although the circumstances tend to show her knowledge of the blockade.⁸

quoted with approval by the United States Supreme Court in *The Olinde Rodrigues*, 174 U. S. 510.

The occasional successful passage of vessels through the lines of the blockading squadron does not render the blockade ineffective, as in the case of the blockade of Charleston during the civil war, when neutral nations made no question as to the effectiveness of the blockade, though many vessels were able, owing to the conformation of the coast, to elude the blockading squadron. See Hall on Int. Law (4th ed.), § 260.

1. **Size of Blockading Force Immaterial.** — 2 Halleck on Int. Law (Baker's ed.) 219; *The Circassian*, 2 Wall. (U. S.) 135.

In *The Olinde Rodrigues*, 174 U. S. 510, it was decided that the blockade of a port might be effective although there was but one blockading vessel present, provided this vessel was sufficient to render egress and ingress dangerous. In this case the question arose as to the blockade of the port of San Juan, Porto Rico, by a single armed cruiser, and the court decided that in view of her speed and her armament, which enabled her to command a circle of thirteen miles in diameter or in the course of ten minutes a circle of nineteen miles in diameter, there could be no question as to the effectiveness of the blockade. See Hall on Int. Law (4th ed.), § 260.

2. **Aid by Land Batteries.** — *The Circassia*, 2 Wall. (U. S.) 135.

3. **Distance of Blockading Force.** — During the war with Russia in 1854, the blockade of Riga was maintained at a distance of one hundred and twenty miles from town, by a ship in a channel two miles wide which formed the only navigable entrance to the gulf. *The Francisca*, Spinks 115.

4. **Inability to See Blockading Vessels.** — *The Baigorri*, 2 Wall. (U. S.) 474.

5. **Notice of Blockade Necessary.** — *The Columbia*, 1 C. Rob. 154; *The Rolla*, 6 C. Rob. (Reprint) 367; *Yeaton v. Fry*, 5 Cranch (U. S.) 335; *The Louisa Agnes*, Blatchf. Prize Cas. 107; *Radcliff v. United Ins. Co.*, 7 Johns. (N. Y.) 38.

6. **Proclamation of Blockade.** — *The Columbia*, 1 C. Rob. 156; *The Jonge Petronella*, 2 C. Rob. 131; *The Calypso*, 2 C. Rob. 298; *The Neptunus*, 2 C. Rob. 114; *The Vrouw Johanna*, 2 C. Rob. 109; *The Nereide*, 9 Cranch (U. S.) 440; *The Circassian*, 2 Wall. (U. S.) 135; *The Admiral*, 3 Wall. (U. S.) 603; *The Hiawatha*, Blatchf. Prize Cas. 1; *The Hallie Jackson*, Blatchf. Prize Cas. 41; *U. S. v. The Hattie Jackson*, 18 Leg. Int. (Pa.) 348.

The proclamation of blockade is not to be extended by construction to include territory not clearly expressed therein. *The Peterhoff*, 5 Wall. (U. S.) 28.

7. **Warning from Blockading Squadron.** — *The Vrouw Judith*, 1 C. Rob. 151; *Naylor v. Taylor*, 4 M. & R. 531; *The Delta*, Blatchf. Prize Cas. 654.

8. **Policy of Executive Department.** — During the early part of the nineteenth century the executive department of the United States quite generally took the position that a warning was necessary. Such warning was provided for in numerous treaties. See Wharton's Dig. Int. Law, § 360.

The proclamation of blockade during the civil war contained a provision that a vessel approaching a blockaded port should be warned by the commander of one of the blockading vessels and should be captured if he should again attempt to enter the blockaded port; but this provision was held by a majority of the Supreme Court to be applicable only in case the vessel was ignorant of the existence of the blockade (*Prize Cases*, 2 Black (U. S.) 635). Grier, J., saying that it would be absurd to warn parties who had full previous knowledge, since in that case a vessel seeking to evade the blockade might approach and retreat any number of times, and when caught her captors could merely warn her, and the same process might be repeated at every port on the blockaded countries. This construction of the proclamation was not made the subject of complaint by any neutral power. See Dana's Wheaton's Int. Law, note 235.

8. Hall on Int. Law (4th ed.), § 258. See 2 Rivier's *Droit des Gens* 296.

A Vessel Within the Blockaded Port is conclusively presumed to have notice of the existence of the blockade, in case she attempts its violation by passing out.¹

De Facto Blockades. — Blockades not made the subject of diplomatic notice to neutral governments are termed *de facto* blockades, and the liabilities of neutrals as for a breach thereof differ in several particulars from those existing in the case of notified blockades. The burden of proof is on a neutral ship to show that she was ignorant of a notified blockade, while the reverse is true in the case of a *de facto* blockade.² Furthermore, a notified blockade is to be presumed to continue until public notice of its discontinuance is given,³ and hence the act of sailing for the blockaded port is held to be a violation of the blockade,⁴ while there is no such consequence attached to sailing for a port subject to a *de facto* blockade.⁵

d. TERMINATION OR SUSPENSION OF BLOCKADE — (1) *By Stress of Weather.* — A blockade of a port is not interrupted or terminated as regards neutral vessels by the fact that the blockading squadron is temporarily driven off by stress of weather, since a blockade is almost necessarily subject to such interruptions.⁶

(2) *By Pursuit of Prize.* — Nor is it terminated even by the temporary absence of the blockading squadron in pursuit of a prize.⁷

(3) *By Enemy's Fleet.* — But the blockade ceases if the blockading vessels are driven off by the enemy's fleet, even though they speedily resume the blockade, and in such a case it is necessary that a new notification be given to neutrals.⁸

(4) *By Capture of Blockaded Port.* — It was decided by the United States Supreme Court, during the civil war, that the capture and occupation of a blockaded port by the forces of the blockading belligerent did not immediately terminate the blockade.⁹ This decision has been questioned by foreign publicists, and subsequently damages for a seizure were given by the commission appointed under the treaty of Washington.¹⁰

e. WHAT CONSTITUTES VIOLATION — (1) *In General.* — According to the decisions of the United States and Great Britain, the mere act of sailing from a neutral port with knowledge of a duly notified blockade, and with intent to enter the blockaded port, renders the vessel liable to capture as for a violation

1. **Vessel Within Port Chargeable with Notice.** — *The Vrouw Judith*, 1 C. Rob. 150; *The Otto*, Spinks 259; *Prize Cases*, 2 Black (U. S.) 635.

2. **De Facto Blockades.** — *The Franciska*, 10 Moo. P. C. 58; *The Circassian*, 2 Wall. (U. S.) 135.

3. *The Neptunus*, 1 C. Rob. 170.

4. See *infra*, this section, *What Constitutes Violation*.

5. *The Columbia*, 1 C. Rob. 154; *The Neptunus*, 2 C. Rob. 113.

6. **Interruption by Weather.** — 1 Kent's Com. 145; Wharton's Dig. Int. Law, § 361, p. 380; 3 Phillimore on Int. Law, § 294; *The Frederick Molke*, 1 C. Rob. 86; *The Juffrow Maria Schroeder*, 3 C. Rob. 155; *The Columbia*, 1 C. Rob. 154; *The Hoffnung*, 6 C. Rob. (Reprint) 112; *The Olinde Rodrigues*, 174 U. S. 510.

7. **Interruption by Pursuit of Prize.** — In 1861 the Niagara, which was blockading Charleston, having been sent away to intercept a cargo of arms expected at another part of the coast, the harbor remained open for at least five days, and the British government assumed that there was a suspension of the blockade; but the United States refused to admit this contention. See Hall on Int. Law (4th ed.), § 260; Wharton's Dig. Int. Law, § 361, p. 375.

8. **By Enemy's Fleet.** — *The Columbia*, 1 C.

Rob. 156; *The Frederick Molke*, 1 C. Rob. 87; *The Hoffnung*, 6 C. Rob. (Reprint) 112; *Williams v. Smith*, 2 Cai. (N. Y.) 1, 2 Am. Dec. 209; *Radcliff v. United Ins. Co.*, 7 Johns. (N. Y.) 53.

9. **Capture of Blockaded Port.** — *The Circassian*, 2 Wall. (U. S.) 135. Compare remarks of Justice Story in *The Saunders*, 2 Gall. (U. S.) 210.

10. See Hall on Int. Law (4th ed.), § 260, note; Lorimer on Law of Nations 145; Wharton's Dig. Int. Law, § 359.

This decision seems to be to some extent at least in conflict with *Thirty Hogsheads Sugar v. Boyle*, 9 Cranch (U. S.) 195, where it was held that for belligerent purposes an acquisition made during war becomes part of the domain of the conqueror. In the later case the court dwelt upon the statement of Lord Stowell that a notified blockade is presumed to continue until publicly discontinued, but this statement was made with reference merely to the duty of a neutral vessel to act on such presumption by not sailing for a port which it knows to be blockaded.

The Proclamation revoking the blockade of New Orleans was held not to terminate the blockade of the adjoining coast remaining under hostile control. *The Baigorri*, 2 Wall. (U. S.) 474; *The Josephine*, 3 Wall. (U. S.) 83.

of the blockade,¹ and the fact that there is an intention to go in the first place to an intermediate neutral port is immaterial.² But the mere act of sailing for a blockaded port is not an offense where there is no intention of breaking the blockade, the purpose being to find out as to the existence of the blockade by inquiry at a neutral port.³

(2) *Approach for Inquiry or to Procure License.* — The vessel cannot leave the ascertainment of the question whether the blockade is still existing, to the time of her arrival at the blockaded port, and claim that her approach thereto was for the purpose of inquiry,⁴ nor can it approach the blockaded port for the purpose of procuring a license to enter from the blockading fleet.⁵

(3) *Egress from Blockaded Port.* — The act of egress from a blockaded port is as much a violation of the blockade as the act of ingress.⁶ A vessel in the blockaded port at the time of the commencement of the blockade is, however, permitted to issue therefrom with a cargo shipped before the blockade commenced,⁷ but she cannot carry out cargo shipped after the commencement of the blockade.⁸

A Period of Time, usually fifteen days, is generally fixed within which a vessel may so pass out, though occasionally greater time is allowed in view of difficulties of egress from the particular port.⁹

1. Sailing with Intent to Break Blockade. — The *Columbia*, 1 C. Rob. 154; The *Neptunus*, 2 C. Rob. 110; The *Panaghia Rhomba*, 12 Moo. P. C. 168; *Medeiros v. Hill*, 8 Bing. 234, 21 E. C. L. 285; The *Circassian*, 2 Wall. (U. S.) 135, *affirming* 19 Leg. Int. (Pa.) 220; The *Admiral*, 3 Wall. (U. S.) 603; The *Adula*, 89 Fed. Rep. 351; *Ingraham v. The Brig Nayade*, Newb. Adm. 366; The *Dolphin*, 7 Fed. Cas. No. 3,975.

2. The Circassian, 2 Wall. (U. S.) 135; The *Peterhoff*, 5 Wall. (U. S.) 28.

3. Innocent Sailing for Blockaded Port. — *Dalgleish v. Hodgson*, 5 M. & P. 407; The *Medeiros v. Hill*, 8 Bing. 231, 21 E. C. L. 284; The *Betsey*, 1 C. Rob. 332; The *Admiral*, 3 Wall. (U. S.) 603, *affirming* 3 Wall. Jr. (C. C.) 361; The *Empress*, Blatchf. Prize Cas. 175.

4. Approach for Inquiry. — The *Spes*, 5 C. Rob. (Reprint) 72; The *James Cook*, Edw. Adm. 264; The *Josephine*, 3 Wall. (U. S.) 84; The *Admiral*, 3 Wall. (U. S.) 603; The *Delta*, Blatchf. Prize Cas. 133, 654; The *Empress*, Blatchf. Prize Cas. 175.

In *The Cheshire*, 3 Wall. (U. S.) 231, *affirming* Blatchf. Prize Cas. 151, 643, Field, J., said: "If approach for inquiry were permissible it will be readily seen that the greatest facilities would be afforded to elude the blockade; the liberty of inquiry would be a license to attempt to enter the blockaded port; and that information was sought would be the plea in every case of seizure. With a liberty of this kind the difficulty of enforcing an efficient blockade would be greatly augmented." See, however, the opinion of Nelson, J., in *The Empress*, Blatchf. Prize Cas. 659, in which such approach for inquiry was held to be justifiable. See also *The Delta*, Blatchf. Prize Cas. 654; *The Forest King*, Blatchf. Prize Cas. 45.

Such approach is permissible where the announcement of blockade states that it may possibly be confined to certain ports and that vessels will be warned before capture. *Maryland Ins. Co. v. Wood*, 7 Cranch (U. S.) 402.

5. To Procure License. — The *Josephine*, 3 Wall. (U. S.) 83; The *Adula*, 89 Fed. Rep. 351.

See also as to license *Oldden v. McChesney*, 5 S. & R. (Pa.) 71.

6. Egress in Violation of Blockade. — 1 Kent's Com. 146; The *Frederick Molke*, 1 C. Rob. 86; The *Vrouw Judith*, 1 C. Rob. 151; The *Neptunus*, 1 C. Rob. 170; The *Gray Jacket*, 5 Wall. (U. S.) 342; The *Herald*, 3 Wall. (U. S.) 768; The *Hiawatha*, Blatchf. Prize Cas. 1; The *Advocate*, Blatchf. Prize Cas. 142; The *Lizzie Weston*, Blatchf. Prize Cas. 144, The *Wave*, Blatchf. Prize Cas. 148; The *Jesse J. Cox*, Blatchf. Prize Cas. 196; The *Agnes H. Ward*, Blatchf. Prize Cas. 197; The *Annie*, Blatchf. Prize Cas. 222, 335, 612; The *Rambler*, Blatchf. Prize Cas. 302; The *Annie Deas*, Blatchf. Prize Cas. 305; The *Mercury*, Blatchf. Prize Cas. 328; The *Reindeer*, Blatchf. Prize Cas. 330; The *Hetwan*, Blatchf. Prize Cas. 331; The *Neptune*, Blatchf. Prize Cas. 367; The *Angelina*, Blatchf. Prize Cas. 371; The *Oddfellow*, Blatchf. Prize Cas. 372, 20 Leg. Int. (Pa.) 229; The *Emma*, Blatchf. Prize Cas. 561; The *D. Sargeant*, Blatchf. Prize Cas. 576; The *Mary*, Blatchf. Prize Cas. 618; The *Stag*, Blatchf. Prize Cas. 625.

Vessel Admitted into Port. — A vessel which is allowed by the blockading squadron to enter a port has the right to presume that she will be permitted to leave the port, and does not violate the blockade in attempting so to do. The *Juffrow Maria Schroeder*, 3 C. Rob. 160.

7. Vessel in Port at Commencement of Blockade. — The *Vrouw Judith*, 1 C. Rob. 150; The *Potsdam*, 4 C. Rob. 89; The *Comet*, Edw. Adm. 32; *Olivera v. Union Ins. Co.*, 3 Wheat (U. S.) 183.

8. Cargo Shipped After Blockade. — The *Betsey*, 1 C. Rob. 93; The *Vrouw Judith*, 1 C. Rob. 150; *U. S. v. The British Schooner Tropic Wind*, 2 Havw. & H. (D. C.) 374.

Transfer to Lighters. — In *The Otto*, Spinks 257, it was decided that a cargo which had been *bona fide* placed on board the vessel might be partially transferred to lighters for purposes of navigation and reshipped outside. See also *Oldden v. McChesney*, 5 S. & R. (Pa.) 71.

9. Time Given for Departure. — Fifteen days

(4) *Case of Necessity.* — A vessel may enter a blockaded port in case of extreme necessity, when in search of repairs, supplies, or shelter; but allegations of such necessity are regarded with distrust, and satisfactory evidence of the urgency of the necessity is requisite.¹ A vessel so justified in entering the port has the right to issue again, provided her cargo remains unchanged.²

(5) *Ultimate Destination of Cargo.* — During the civil war, the Supreme Court of the United States extended the theory of blockade so far as to hold that a belligerent can seize and condemn for blockade breaking the cargo of a vessel on its way from one neutral port to another, if there be evidence that the cargo, after being unloaded at the neutral port to which it is being carried, is intended to be transported by sea to a blockaded port, it being held that the voyage between the neutral ports and the subsequent voyage from the second neutral port to the blockaded port constitute one and the same illegal voyage.³ This decision, however, has been very generally condemned by foreign writers, and it is perhaps questionable whether it would be followed in another case.⁴

Inland Conveyance of Goods. — But it was decided by the same court that such a violation did not result when it was intended that the goods, after delivery at a neutral port, should be carried to a blockaded port by inland conveyance;⁵

were given by Great Britain and France in the Crimean war and by the United States in the civil war. In the late war between the United States and Spain thirty days were given in the case of the blockade of Cuba. See Hall on Int. Law (4th ed.), § 262; 30 U. S. Stat. at L. 1769, No. 6. Where a period of fifteen days was allowed for egress, it was held that egress after that time was cause for condemnation though the delay was caused by inability to obtain a tug. Prize Cases, 2 Black (U. S.) 635.

1. *Necessity Excusing Entry.* — The *Hurtig Hane*, 2 C. Rob. 124; The *Fortuna*, 5 C. Rob. (Reprint) 31; The *Christiansberg*, 6 C. Rob. (Reprint) 376; The *Diana*, 7 Wall. (U. S.) 354; The *Nuestra Senora de Regla*, 17 Wall. (U. S.) 29; The *Arthur*, Edw. Adm. 202; *Ingraham v. The Brig Nayade*, Newb. Adm. 366; The *Forest King*, Blatchf. Prize Cas. 45; The *Major Barbour*, Blatchf. Prize Cas. 167; The *Sunbeam*, Blatchf. Prize Cas. 316; The *Rising Dawn*, Blatchf. Prize Cas. 368; The *Albert*, Blatchf. Prize Cas. 663.

In *The Diana*, 7 Wall. (U. S.) 354, Field, J., said: "The case, however, must be one of absolute and uncontrollable necessity; and this must be established beyond reasonable doubt. 'Nothing less,' says Sir William Scott, 'than an uncontrollable necessity, which admits of no compromise, and cannot be resisted,' will be held a justification of the offense. Any rule less stringent than this would open the door to all sorts of fraud. Attempted evasions of the blockade would be excused upon pretenses of distress and danger, not warranted by the facts, but the falsity of which it would be difficult to expose."

2. The *Charlotta*, Edw. Adm. 252; The *Hurtig Hane*, 2 C. Rob. 127.

3. *Ultimate Destination of Cargo.* — The *Bermuda*, 3 Wall. (U. S.) 514; The *Springbok*, 5 Wall. (U. S.) 1, affirming Blatchf. Prize Cas. 380, 434. In this latter case the vessel was seized on its voyage between London and Nassau by a Federal cruiser, on the ground that she intended to run the blockade, and while the ship was released by the Supreme Court, the cargo was condemned.

Doctrine of Continuous Voyages. — This was an application of the doctrine of continuous voyages, invented by Sir William Scott in connection with the rule of war of 1756, by which rule it was held to be incompatible with neutrality for a subject of a neutral state to engage in time of war in a commerce between a belligerent and its colonies, if such commerce was forbidden by the latter belligerent in time of peace; and, by the doctrine named, a voyage from an intermediate port to the mother country was held to be continuous with that between the colony and the intermediate port. The *Maria*, 5 C. Rob. (Reprint) 325; The *William*, 5 C. Rob. (Reprint) 349. See Lawrence on Int. Law, § 276; Dana's *Wheaton's Int. Law*, note 231.

4. *Comments on the Springbok Case.* — The effect of the general application of the doctrine of this case would seem to give to a belligerent power a right to stop a neutral vessel in any part of the world in order to determine whether it contains goods which are to be subsequently forwarded from the vessel's destination to a blockaded port. This decision has been severely criticised by practically all the European writers on international law, Bluntschli going so far as to say that it inflicted a more serious blow to neutral rights than did all the orders in council put together. It was, however, approved by the British commissioner when the case came before the Mixed Claims Commission under the treaty of Washington in May, 1877.

See Wharton's Dig. Int. Law, § 362, where will be found a full presentation of the various arguments which have been presented adverse to the correctness of this decision.

5. *Inland Conveyance of Goods.* — This was decided in the case of *The Peterhoff*, 5 Wall. (U. S.) 28, in which the vessel and cargo were carried into the Mexican port of Matamoras, a Mexican town on the Rio Grande, with a possibility of ulterior destination to the blockaded port of Brownsville; the court distinguishing this case from that of *The Bermuda*, 3 Wall. (U. S.) 514, in which the vessel and her cargo were condemned because en-

and the English decisions are to the effect that there is no such violation when the carriage of the goods from or to the blockaded port is by means of inland canals communicating with the sea at a point not blockaded.¹

(6) *Evidence of Violation.* — Among the various facts tending to show an intention to violate a blockade, or the reverse, are the position of the vessel, the condition of the ship's papers, the character of the cargo, and the actions of the owners, officers, and crew;² and the fact that the vessel or the owners thereof had previously been occupied in violating the blockade may be considered.³

f. DURATION OF DELICTUM. — A ship which has broken a blockade is considered to be taken *in delicto*, and therefore liable to condemnation, if captured in any part of the same voyage, and the voyage for this purpose includes her return;⁴ but she is not liable if the blockade ceased between the time of sailing and her capture,⁵ nor is she liable to capture after the termination of her voyage.⁶ The cargo, on the other hand, remains liable to condemnation after its transshipment from the vessel in which it was carried through the blockade, provided there were unbroken ownership and control.⁷

g. PENALTY FOR VIOLATION. — As a general rule, the penalty for a breach

gaged in a voyage ostensibly for a neutral port, but in reality, either directly or by substitution of another vessel, for a blockaded port, while the Peterhoff "was destined for a neutral port with no ulterior destination for the ship or none by sea for the cargo to any blockaded place." See also *The Stert*, 4 C. Rob. 65; *The Jonge Pieter*, 4 C. Rob. 79.

1. *Canal Communications.* — *The Ocean*, 3 C. Rob. 297; *The Jonge Pieter*, 4 C. Rob. 79; *The Stert*, 4 C. Rob. 65.

2. *Facts Showing Violation.* — In the following cases the facts were held to justify the condemnation of the vessel and cargo for violation: *The Circassian*, 2 Wall. (U. S.) 135; *The Baigorry*, 2 Wall. (U. S.) 474; *The Cornelius*, 3 Wall. (U. S.) 214; *The Admiral*, 3 Wall. (U. S.) 603; *The Herald*, 3 Wall. (U. S.) 768; *The Jenny*, 5 Wall. (U. S.) 183; *The Pearl*, 5 Wall. (U. S.) 574; *The Flying Scud*, 6 Wall. (U. S.) 263; *The Adela*, 6 Wall. (U. S.) 266; *The Wren*, 6 Wall. (U. S.) 582; *The Albion*, *Blatchf. Prize Cas.* 95; *The Louisa Agnes*, *Blatchf. Prize Cas.* 107; *The Gipsey*, *Blatchf. Prize Cas.* 126; *The Henry Lewis*, *Blatchf. Prize Cas.* 131; *The Garonne*, *Blatchf. Prize Cas.* 132; *The Delight*, *Blatchf. Prize Cas.* 145; *The Mars*, *Blatchf. Prize Cas.* 150; *The Flash*, *Blatchf. Prize Cas.* 183; *The Mary Stewart*, *Blatchf. Prize Cas.* 210; *The Annie Sophia*, *Blatchf. Prize Cas.* 219; *The Sarah*, *Blatchf. Prize Cas.* 214; *The Ezilda*, *Blatchf. Prize Cas.* 232, 664; *The William H. Northrup*, *Blatchf. Prize Cas.* 235; *The Ann*, *Blatchf. Prize Cas.* 242; *The British Empire*, *Blatchf. Prize Cas.* 245; *The Troy*, *Blatchf. Prize Cas.* 246; *The Elizabeth*, *Blatchf. Prize Cas.* 250; *The Nassau*, *Blatchf. Prize Cas.* 271; *The Anglia*, *Blatchf. Prize Cas.* 300; *The Belle*, *Blatchf. Prize Cas.* 353; *The Nicolai First*, *Blatchf. Prize Cas.* 354; *The Sue*, *Blatchf. Prize Cas.* 361; *The Emeline*, *Blatchf. Prize Cas.* 370; *The Levi Rowe*, *Blatchf. Prize Cas.* 373, 20 Leg. Int. (Pa.) 229; *The Kate*, *Blatchf. Prize Cas.* 550; *The St. George*, *Blatchf. Prize Cas.* 551; *The Tampico*, *Blatchf. Prize Cas.* 554; *The Antona*, *Blatchf. Prize Cas.* 572; *The Banshee*, *Blatchf. Prize Cas.* 580; *The Margaret*, *Blatchf. Prize Cas.* 581; *The A. D.*

Vance, *Blatchf. Prize Cas.* 608; *The Charlotte*, *Blatchf. Prize Cas.* 623; *The Blenheim*, *Blatchf. Prize Cas.* 626; *The Elizabeth*, *Blatchf. Prize Cas.* 642; *The Patras*, *Blatchf. Prize Cas.* 664, *affirming Blatchf. Prize Cas.* 269; *The Richard O'Bryan*, 2 Sprague (U. S.) 197; *The Revere*, 2 Sprague (U. S.) 107, 24 Law Rep. 276; *The Alma*, 2 Sprague (U. S.) 203, 25 Law Rep. 663; *Conner v. The Bark Coosa*, *Newb. Adm.* 393.

Facts Not Showing Intended Violation. — In the following cases the facts were held not to show an intention to violate the blockade: *The Sea Witch*, 6 Wall. (U. S.) 242; *The Jane Campbell*, *Blatchf. Prize Cas.* 101; *The Sarah M. Newhall*, *Blatchf. Prize Cas.* 629; *The Alliance*, *Blatchf. Prize Cas.* 646; *The Prince Leopold*, *Blatchf. Prize Cas.* 89, 647; *The Gondar*, *Blatchf. Prize Cas.* 649, *reversing Blatchf. Prize Cas.* 266; *The Newfoundland*, 89 Fed. Rep. 99; *U. S. v. The F. W. Johnson*, 18 Leg. Int. (Pa.) 334.

3. *Previous Illegal Acts.* — *The Jenny*, 5 Wall. (U. S.) 183; *The Pearl*, 5 Wall. (U. S.) 574; *The William H. Northrup*, *Blatchf. Prize Cas.* 235; *The Belle*, *Blatchf. Prize Cas.* 294; *The Minna*, *Blatchf. Prize Cas.* 333; *The Lady Stirling*, *Blatchf. Prize Cas.* 614.

4. *Duration of Delictum.* — *The Frederick Molke*, 1 C. Rob. 86; *The Christiansberg*, 6 C. Rob. (Reprint) 376; *The Mersey*, *Blatchf. Prize Cas.* 187, 658; *The Captain Spedden*, *Blatchf. Prize Cas.* 127. And see *Szymanski v. Plassan*, 20 La. Ann. 90, 96 Am. Dec. 382.

5. *The Lisette*, 6 C. Rob. (Reprint) 387; *The Saunders*, 2 Gall. (U. S.) 210.

6. 1 Kent's Com. 151; *The Wren*, 6 Wall. (U. S.) 582; *The Welvaart Van Pillaw*, 2 C. Rob. 128.

Though a vessel captured on her return voyage was condemned for breach of blockade on her outward voyage, a cargo shipped for the return voyage by one who had no knowledge of the previous breach was restored. *The Flying Scud*, 6 Wall. (U. S.) 263.

7. *The Maria*, 6 C. Rob. (Reprint) 201; *The Charlotte Sophia*, 6 C. Rob. (Reprint) 204, note *a*; *The Thompson*, 3 Wall. (U. S.) 155.

of blockade is the confiscation of both ship and cargo. If the vessel and cargo are owned by different persons, however, the vessel may be condemned without the cargo, and the latter will be exempt if the owner did not know, or was not in a situation to know, of the blockade at the time of shipment; but if he had such knowledge, the cargo is liable, although the master without authority deviated to a blockaded port,¹ it being presumed that he did so in the service of the cargo.² The vessel is not, however, liable to confiscation merely because of the guilty destination of the cargo, if the owners or persons in control of the vessel are not in fraudulent connection therewith.³

6. Visit and Search — *a. RIGHT IN GENERAL.* — A neutral mercantile vessel, or a vessel carrying a neutral flag, is, as a rule, liable to visit and search by a war vessel of a belligerent for the purpose of determining whether the vessel is really neutral and whether it contains any cargo subject to capture;⁴ and this right of visit and search, it is said, necessarily carries with it all the means essential to its exercise, among which may be included the assumption of the disguise of a friend or an enemy, or the pursuit of the neutral vessel, though this result in its stranding or loss.⁵ In time of peace no right of visit and search exists,⁶ but vessels of war may approach vessels at sea for the purpose of ascertaining their character, and these latter cannot forcibly resist such approach, though not obliged to await it.⁷

b. OF VESSELS OF WAR. — A neutral vessel of war or other government vessel is, on the other hand, not subject to visit and search.⁸

c. OF MAIL VESSELS. — No exemption arises merely because the neutral vessel has a government mail on board.⁹

d. OF VESSELS UNDER CONVOY. — Whether neutral merchantmen are subject to this right when they are under the convoy of vessels of their own nation, has been a subject of much controversy, and occasionally of serious dispute between nations.¹⁰ The text writers and many jurists of the United States and England deny the existence of any exemption in such a case,¹¹ unless it is secured by treaty,¹² while on the continent of Europe the view

1. *Penalty.* — The *Alexander*, 4 C. Rob. 94; The *Adonis*, 5 C. Rob. (Reprint) 228; The *Shepherdess*, 5 C. Rob. (Reprint) 234; The *Panaghia Rhomba*, 12 Moo. P. C. 180; The *William Bagaley*, 5 Wall. (U. S.) 377; The *Wren*, 6 Wall. (U. S.) 582; The *Napoleon*, Blatchf. Prize Cas. 357; The *Exchange*, 1 Edw. Adm. 39; The *James Cook*, Edw. Adm. 261; The *Aries*, 2 Sprague (U. S.) 198.

In *U. S. v. Guillem*, 11 How. (U. S.) 47, it was decided that property taken by a neutral individual on board a vessel on which he was about to depart from a hostile port was not liable to condemnation for a breach of blockade of that port, he not knowing of the blockade.

2. The *Wando*, 1 Lowell (U. S.) 18; The *Sunbeam*, Blatchf. Prize Cas. 656; *U. S. v. The Hattie Jackson*, 18 Leg. Int. (Pa.) 348.

3. *Vessel Not Liable Because of Destination of Cargo.* — The *Bermuda*, 3 Wall. (U. S.) 514; The *Springbok*, 5 Wall. (U. S.) 1.

4. *Right of Visit and Search.* — The *Maria*, 1 C. Rob. 340; *Le Louis*, 2 Dods. 245; The *Eleanor*, 2 Wheat. (U. S.) 345; The *Marianna Flora*, 11 Wheat. (U. S.) 42.

5. The *Eleanor*, 2 Wheat. (U. S.) 345.

6. *Nonexistent in Time of Peace.* — The *Antelope*, 10 Wheat. (U. S.) 66; The *Marianna Flora*, 11 Wheat. (U. S.) 1; Wharton's Dig. Int. Law, § 327.

7. *Maley v. Shattuck*, 3 Cranch (U. S.) 458; The *Marianna Flora*, 11 Wheat. (U. S.) 1.

8. *Vessels of War.* — The *Eleanor*, 2 Wheat. (U. S.) 345; *Dana's Wheaton's Int. Law*, § 107; Woolsey on Int. Law, § 190.

That a vessel of war is not subject to visit and search was conceded by the British government in the case of the *Chesapeake*, an American man-of-war which, while totally unprepared for battle, was, after a short conflict, subjected to visit and search by a British man-of-war for the purpose of discovering deserters from the British navy. See Wharton's Dig. Int. Law, § 131.

9. *Mail Vessels.* — The *Peterhoff*, 5 Wall. (U. S.) 28. Compare, however, remarks *supra*, this section, *Carriage of Belligerent Despatches and Persons*.

10. *Vessels under Convoy.* — See Hall on Int. Law (4th ed.), § 272, for a historical review of the question.

11. The *Maria*, 1 C. Rob. 340; The *Elsabe*, 4 C. Rob. 408; 1 Kent's Com. 155; *Dana's Wheaton's Int. Law*, §§ 525-537, and note 242; 3 Phillimore on Int. Law, § 338.

In *The Nereide*, 9 Cranch (U. S.) 440, Justice Story said: "The law * * * deems the sailing under convoy as an act *per se* inconsistent with neutrality, as a premeditated attempt to oppose, if practicable, the right of search, and therefore attributes to such preliminary act the full effect of actual resistance."

12. The United States have frequently embodied in treaties, especially with other American states, a declaration giving exemption from

has generally been taken that a neutral vessel under convoy is exempt from search if the officer in command of the vessels of war constituting the convoy affirms the neutral character of the merchant vessel and the absence from the cargo of prohibited commodities.¹ Fortunately the possibility of serious international differences arising from the difference of views upon the subject grows steadily less as speed becomes more and more the chief item of commercial success and the possibility of uniting in one fleet vessels of different rates of speed is so rendered impracticable.²

e. MODE OF EXERCISING RIGHT.—The exercise of the right of visit is attended with certain formalities which are not very clearly defined, though quite frequently they form the subject of treaty stipulations.³ The vessel of war usually fires a gun as a warning to the neutral vessel to bring to, but this is not essential;⁴ and an officer is generally sent on board the merchantman, but the master of the merchantman may be brought on board the belligerent vessel, with his ship's papers, for examination.⁵ It is not necessary to man the vessel with a prize master and crew during the search, but the captain of the war vessel may detain the other merely by orders from his own vessel, which the officers of the other are bound to obey.⁶ The right of search must be conducted with due regard to the safety of the vessel being searched, and the captors are liable for damage resulting from their failure to exercise proper care in managing the vessel during the search.⁷

f. RESISTANCE TO SEARCH—(1) *In General.*—A resistance to the exercise of the right of search is in itself ground for the capture and subsequent condemnation of a vessel, since by so doing it forfeits its neutral character;⁸ and the result has been held to be the same when the resistance is by a convoy.⁹ It is, however, a sufficient excuse for such resistance that the neutral vessel did not know of the existence of war and had no reasonable grounds to believe in its existence.¹⁰

(2) *Effect on Cargo.*—In case of resistance to search by a neutral vessel, the cargo therein, though belonging to a different owner, has been stated to be liable to confiscation along with the vessel, this case being distinguished from the case of resistance by an enemy vessel, in which case the neutral cargo is not subject to confiscation.¹¹ The United States Supreme Court has carried the immunity of neutral cargo on an enemy's vessel to the point of deciding that such cargo is not liable to confiscation though the enemy's vessel is armed and makes resistance to capture,¹² a view which, however, was

search to vessels under convoy. See list of treaties in Hall on Int. Law (4th ed.), § 272, note. See also 1 Kent's Com. 154, note c; Dana's Wheaton's Int. Law, note 242.

1. *Continental Policy.*—Bluntschli, § 824; 2 Rivier's Droit des Gens 423.

The Institute of International Law has also declared in favor of exemption from search in such case, and the naval regulations of the Continental powers contain like provisions. Hall on Int. Law (4th ed.), §§ 272, 273, notes.

At the beginning of the late war with the United States, Spain declared that this would be her policy. See 23 Law Mag. & Rev. 389.

2. See Hall on Int. Law (4th ed.), § 272.

3. *Mode of Exercising Right.*—Hall on Int. Law (4th ed.), § 273.

4. *The Marianna Flora*, 11 Wheat. (U. S.) 48.

5. *The Eleanor*, 2 Wheat. (U. S.) 345.

6. *The Eleanor*, 2 Wheat. (U. S.) 345.

7. *The Anna Maria*, 2 Wheat. (U. S.) 327.

8. *Resistance to Search.*—*The Elsbete*, 4 C. Rob. 408; *Garrels v. Kensington*, 8 T. R. 230; *Maley v. Shattuck*, 3 Cranch (U. S.) 488; *The Baigorri*, 2 Wall. (U. S.) 474; *Brown v. Union Ins. Co.*, 5 Day (Conn.) 1, 5 Am. Dec. 123.

9. *The Maria*, 1 C. Rob. 340.

10. *The St. Juan Baptista*, 5 C. Rob. (Reprint) 36.

11. *Effect of Resistance on Cargo.*—*The Catharina Elizabeth*, 5 C. Rob. (Reprint) 206; 1 Kent's Com. 155; Hall on Int. Law (4th ed.), § 275.

12. *The Nereide*, 9 Cranch (U. S.) 388. In this case the court was divided, the decision in favor of the neutral cargo being concurred in by three judges, a majority of the court. Marshall, C. J., speaking for the majority, said: "The object of the neutral is the transportation of his goods. His connection with the vessel which transports them is the same whether that vessel be armed or unarmed. The act of arming is not his; it is the act of a party who has a right so to do. He meddles not with the armament nor with the war. Whether his goods were on board or not, the vessel would be armed and would sail. His goods do not contribute to the armament further than the freight he pays, and freight he would pay were the vessel unarmed." Story, J., rendered an elaborate dissenting opinion. See the very full examination of this

not adopted by the English admiralty court.¹

g. CONCLUSION OF SEARCH. — If the ship's papers or other circumstances give no reason for suspicion, the vessel is allowed to proceed, and detention after ineffectual search is unjustifiable.²

h. CAPTURE — (1) *What Constitutes.* — In order to constitute a capture some act should be done indicative of an intention to seize and to retain as prize, but it is sufficient if such intention is fairly to be inferred from the conduct of the captor.³ The captor must place on the captured vessel a sufficient prize crew, unless the captured crew consents to navigate her, in which case a prize master is generally placed on board to show that the capture is not abandoned.⁴ Property may, however, be condemned as prize though it was not actually taken by force or out of hostile possession, it being enemy property or engaged in illegal traffic.⁵

(2) *Who May Capture.* — Captures may be made by any officer or citizen of a belligerent nation,⁶ and the fact that the capture is by a noncommissioned vessel affects only the captor's interest in the prize so captured.⁷

(3) *Effect of Rescue.* — A rescue or attempted rescue of a neutral vessel after capture has the same effect as resistance in depriving the vessel of its neutral character and exposing it to condemnation.⁸

i. SHIP'S PAPERS — (1) *General Requirements.* — In time of war a neutral vessel should have papers evidencing its nationality and ownership and that of the cargo, a roll of the crew, the log-book, and the charter-party, manifests, or bills of lading, the exact description of the papers varying according to the nationality of the vessel; and the absence of such papers, or omissions therein, will constitute considerations adverse to the legality of the commerce being carried on by the vessel.⁹

(2) *False Papers.* — The possession of false papers is in itself probable cause for the capture of a neutral vessel,¹⁰ but is not in itself a cause for its condemnation unless the falsification was for the purpose of deceiving the

case in *Dana's Wheaton's Int. Law*, note 243. See also, as confirmatory of the views of the majority of the court, *The Atalanta*, 3 Wheat. (U. S.) 417.

1. *The Fanny*, 1 Dods. 448.

2. *Conclusion of Search.* — *The Anna Maria*, 2 Wheat. (U. S.) 327.

3. *Capture.* — *The Grotius*, 9 Cranch (U. S.) 368.

4. *Prize Crew.* — *The Resolution*, 6 C. Rob. (Reprint) 13; *The Pennsylvania*, 1 Act. 33; *The Eleanor*, 2 Wheat. (U. S.) 345; *Wilcocks v. Union Ins. Co.*, 2 Binn. (Pa.) 574, 4 Am. Dec. 480; *The George*, 1 Mason (U. S.) 24; *The Alexander*, 8 Cranch (U. S.) 169, *affirming* 1 Gall. (U. S.) 532.

5. *Prize Need Not Be Taken from Hostile Possession.* — *The Jonge Jacobus Baumann*, 1 C. Rob. 243; *The Aquila*, 1 C. Rob. 41.

So when cotton was picked up at sea by a United States vessel it was held to be properly proceeded against as prize, it appearing to have been recently abandoned either by an enemy or by a neutral engaged in breaking the blockade. *Seventy-Eight Bales Cotton*, 1 Lowell (U. S.) 11. See also *The Siren*, 1 Lowell (U. S.) 280, 22 Fed. Cas. No. 12,911.

6. *Who May Capture.* — *The Rebeckah*, 1 C. Rob. 227; *The Johanna Emilie*, 29 Eng. L. & Eq. 562; *The Elize*, 1 Spinks Prize Cas. 88; *The Prince Leopold*, Blatchf. Prize Cas. 89; *The Tropic Wind*, Blatchf. Prize Cas. 64; *The Ouachita*, Blatchf. Prize Cas. 306; *The Emma*, Blatchf. Prize Cas. 561.

7. *By Noncommissioned Vessel.* — *The Amiable Isabella*, 6 Wheat. (U. S.) 1; *The Dos Hermanos*, 10 Wheat. (U. S.) 306, 2 Wheat. (U. S.) 76; *The Georgiana*, 1 Dods. 397; *The Diligentia*, 1 Dods. 404; *The Nereide*, 9 Cranch (U. S.) 449; *Story, J.*, in *Brown v. U. S.*, 8 Cranch (U. S.) 110.

Captured by a Neutral is, however, illegal, though made with the co-operation of a lawful privateer. *Talbot v. Janson*, 3 Dall. (U. S.) 133.

By Alien Enemy. — But the fact that the commander of a privateer was an alien enemy at the time of a capture made by him does not invalidate the capture. *The Mary*, 1 Wheat. (U. S.) 46.

A Vessel Violating a Blockade may be captured by a national vessel not a member of the blockading squadron. *The Memphis*, Blatchf. Prize Cas. 260; *The Douro*, Blatchf. Prize Cas. 362.

8. *Rescue.* — *The Dispatch*, 3 C. Rob. 278; *The Brig Short Staple v. U. S.*, 9 Cranch (U. S.) 55.

9. *Ship's Papers.* — 1 *Kent's Com.* 157; *The Springbok*, Blatchf. Prize Cas. 434; *The Peterhoff*, Blatchf. Prize Cas. 463.

A list of the papers required in the case of vessels of each of the principal nationalities is to be found in *Hall on Int. Law* (3d ed.), appendix.

10. *False Papers.* — *Del Col v. Arnold*, 3 Dall. (U. S.) 333; *The George*, 1 Mason (U. S.) 24; *Hall on Int. Law* (4th ed.), § 276.

capturing belligerent, since it may as well have been intended to deceive his enemy.¹ It is, however, strong evidence of a guilty design, and may be decisive as to the enemy ownership of the vessel or cargo or the illegal character of the voyage.²

(3) *Spoilation or Concealment.*—The spoliation or concealment of a ship's papers in anticipation of visit and search, if fairly explained, does not affect the vessel or its owners with any liability.³ If, however, it be unexplained, or the explanation be unsatisfactory, or there be other suspicious circumstances, it is made the ground for denial of further proof, and condemnation will ensue from defects in the evidence which the party is not permitted to supply.⁴

j. DUTIES AND LIABILITIES OF CAPTORS—(1) *As to Persons and Property on Board.*—The captors have no right to make any spoliation upon or in any way to injure the ship or its contents, or to embezzle or convert the property therein, or to break bulk, except in case of overruling necessity or emergency.⁵ It is also the duty of the captors to bring in as witnesses the master and principal officers of the captured vessel.⁶ The captor cannot, however, treat persons on board as prisoners of war, and if he maltreats them he is liable in damages.⁷

(2) *As to Care of Vessel.*—When the capture is justified, the captors are not responsible for subsequent losses or injuries to the property arising from mere accident or stress of weather.⁸ They are, however, liable in damages in case the prize be lost through negligence or misconduct.⁹ And in such case the damages are generally fixed at the actual value of the property,¹⁰ though

1. 2 Halleck on Int. Law 299; *The Sarah*, 3 C. Rob. 330; *The Frances*, 9 Cranch (U. S.) 183; *Gibbs v. The Two Friends*, Bee Adm. 416. See also *De Valengin v. Duffy*, 14 Pet. (U. S.) 282, where it was decided that the covering of belligerent property as neutral in order to protect it is perfectly valid when questioned in the courts of the neutral.

2. *Evidence of Guilt.*—U. S. v. *The Schooner Amistad*, 15 Pet. (U. S.) 518; *The Cheshire*, 3 Wall. (U. S.) 231; *The Bermuda*, 3 Wall. (U. S.) 514; *The Louisa Agnes*, Blatchf. Prize Cas. 107; *The J. W. Wilder*, Blatchf. Prize Cas. 181; *The Joseph H. Toone*, Blatchf. Prize Cas. 223; *The Robert Bruce*, Blatchf. Prize Cas. 275; *The Revere*, Blatchf. Prize Cas. 276; *The Scotia*, Blatchf. Prize Cas. 299; *The Ella Warley*, Blatchf. Prize Cas. 288; *The Florida*, Blatchf. Prize Cas. 327; *The Mary Jane*, Blatchf. Prize Cas. 363; *The Antelope*, Blatchf. Prize Cas. 370; *The Lizzie*, Blatchf. Prize Cas. 243; *The Maria*, Blatchf. Prize Cas. 283; *The Gertrude*, Blatchf. Prize Cas. 374; *The Peterhoff*, Blatchf. Prize Cas. 463; *The Cuba*, 2 Sprague (U. S.) 168; *The Ocean Bird*, 2 Sprague (U. S.) 261.

3. *Spoilation or Concealment of Papers.*—*The Rising Sun*, 2 C. Rob. 106; *The Hunter*, 1 Dods. 487; *The Ship Liverpool Packet*, 1 Gall. (U. S.) 513; *The Johanna Emilie*, Spinks 22; *The St. Lawrence*, 8 Cranch (U. S.) 434; *The Pizarro*, 2 Wheat. (U. S.) 227; *The Fortuna*, 2 Wheat. (U. S.) 161, 3 Wheat. (U. S.) 236; *The Bermuda*, 6 Phila. (Pa.) 187, 23 Leg. Int. (Pa.) 116; *The Emma*, Blatchf. Prize Cas. 561; *The Mersey*, Blatchf. Prize Cas. 658, reversing Blatchf. Prize Cas. 187.

4. *Denial of Further Proof.*—*The Circassian*, 2 Wall. (U. S.) 135; *The Bermuda*, 3 Wall. (U. S.) 514; *The Ship St. Lawrence*, 1 Gall. (U. S.)

467; *The Ella Warley*, Blatchf. Prize Cas. 288, 648; *The Joanna Ward*, Blatchf. Prize Cas. 164; *The Tubal Cain*, Blatchf. Prize Cas. 240; *The Stettin*, Blatchf. Prize Cas. 272; *The Ouachita*, Blatchf. Prize Cas. 652, affirming Blatchf. Prize Cas. 306; *The Granite City*, Blatchf. Prize Cas. 355; *The Stephen Hart*, Blatchf. Prize Cas. 379; 1 Kent's Com. 158.

5. *A Neutral Owner* of the cargo is not, however, deprived of right to further proof by a spoliation of the papers by a belligerent master. *The Friendschaft*, 3 Wheat. (U. S.) 12.

6. *Duties of Captors.*—*The Concordia*, 2 C. Rob. 102; *The Eole*, 6 C. Rob. (Reprint) 220; *The Washington*, 6 C. Rob. (Reprint) 275; *Del Col v. Arnold*, 3 Dall. (U. S.) 333; *The Jane Campbell*, Blatchf. Prize Cas. 101.

7. *As to Persons on Board.*—Act Cong. June 30, 1864. Rev. Stat. U. S., § 4615.

8. *Hall on Int. Law* (4th ed.), § 277; *The St. Juan Baptista*, 5 C. Rob. (Reprint) 36; *Die Fire Damer*, 5 C. Rob. (Reprint) 318; *The Jane Campbell*, Blatchf. Prize Cas. 101; *The Schooner Lively*, 1 Gall. (U. S.) 315.

9. *Injuries to Vessel.*—*The Betsey*, 1 C. Rob. 93; *The Catherine*, 4 C. Rob. 39; *The Carolina*, 4 C. Rob. 256; *Del Col v. Arnold*, 3 Dall. (U. S.) 333.

10. *From Negligence or Misconduct.*—*The Speculation*, 2 C. Rob. 293; *The William*, 6 C. Rob. (Reprint) 316; *The Der Mohr*, 3 C. Rob. 129; *Del Col v. Arnold*, 3 Dall. (U. S.) 333; *The Anna Maria*, 2 Wheat. (U. S.) 332; *Wilcocks v. Union Ins. Co.*, 2 Binn. (Pa.) 574, 4 Am. Dec. 480.

11. *Amount of Damages.*—*Maley v. Shattuck*, 3 Cranch (U. S.) 458; *The Anna Maria*, 2 Wheat. (U. S.) 327; *Del Col v. Arnold*, 3 Dall. (U. S.) 333.

other items of damage may be allowed according to the nature and circumstances of the case.¹

(3) *Sending In Vessel for Adjudication.* — It is the duty of the captor to send the prize into some convenient port of the country of the captor for adjudication.² A convenient port has been stated to be such a port as the ship may enter and ride in with safety without unloading.³ And in selecting such port the convenience of both captors and probable claimants should be consulted.⁴ In some cases, however, the captor may be excused from so sending in the captured property for adjudication, and may sell it or otherwise dispose of it before condemnation, as when he cannot spare a sufficient prize crew to man the vessel, or when he is forbidden by orders from his government to send it in, or it is not in a condition to be sent.⁵

(4) *Destruction of Prizes.* — There has been considerable discussion as to the right of the captor to destroy a captured vessel instead of bringing it into port, and this has been done in some instances.⁶ Such destruction has been generally regarded as permissible when the circumstances do not permit the captors to bring in the prize;⁷ and provided the captor, before so doing, clearly ascertains that the property is liable to condemnation as being enemy's and not neutral property, there seems nothing in the practice which could give ground for objection, since nobody is injured thereby, except perhaps the captor himself.⁸

(5) *Proceeding to Adjudication and Restitution.* — If the captors unjustifiably neglect to proceed to adjudication, the court will, in case of restitution, decree demurrage against them,⁹ and the same will be done if the captors, after agreeing to restitution, unreasonably delay.¹⁰

(6) *Capture Without Probable Cause.* — Unless there is probable cause for the capture, the captors are liable in damages and likewise for costs and expenses.¹¹ To constitute probable cause there need be only such circum-

1. The Corier Marítimo, 1 C. Rob. 287; The Narcissus, 4 C. Rob. 20; The Zee Star, 4 C. Rob. 71; The St. Juan Baptista, 5 C. Rob. (Reprint) 36; Die Fire Damer, 5 C. Rob. (Reprint) 318; The Anna Catharina, 6 C. Rob. (Reprint) 10; The Driver, 5 C. Rob. (Reprint) 130; Le Caux v. Eden, 2 Dougl. 594; Talbot v. Janson, 3 Dall. (U. S.) 133; Cotton v. Wallace, 3 Dall. (U. S.) 302; Murray v. Schooner Charming Betsy, 2 Cranch (U. S.) 64; The Schooner Lively, 1 Gall. (U. S.) 315.

2. *Duty to Send In Vessel.* — The Huldah, 3 C. Rob. 235; The Madonna Del Burso, 4 C. Rob. 169; The St. Juan Baptista, 5 C. Rob. (Reprint) 36; The Wilhelmsberg, 5 C. Rob. (Reprint) 128; The Elsebe, 5 C. Rob. (Reprint) 155; The Schooner Lively, 1 Gall. (U. S.) 315; The Nassau, 4 Wall. (U. S.) 635.

3. *Convenient Port.* — The Washington, 6 C. Rob. (Reprint) 275; The Principe, Edw. Adm. 70.

4. Act Cong. June 30, 1864, § 1, U. S. Rev. Stat., § 4615.

5. *Failure to Send In Vessel Occasionally Justified.* — Jecker v. Montgomery, 13 How. (U. S.) 498, 18 How. (U. S.) 110; Fay v. Montgomery, 1 Curt. (U. S.) 266; Act Cong. June 30, 1864, § 1, U. S. Rev. Stat., § 4615.

6. *Destruction of Prizes.* — In the war of 1812 officers in command of the United States squadron were ordered as a general rule to destroy all enemy's property when captured, in order that the cruisers might not be weakened by detaching prize crews. This was also done by the Confederate cruisers during the civil war, on the ground that there were no blockaded ports into which the prizes could be

brought. In 1870 two German vessels were destroyed by a French cruiser owing to want of sufficient men to man them, and in 1877 the Russians destroyed some prizes in the Black Sea because the Russian ports were blockaded. See Hall on Int. Law (4th ed.), § 150; Lawrence on Int. Law, § 215.

7. The Felicity, 2 Dods. 383; The Leucade, Spinks Prize Cas. 221.

8. Hall on Int. Law (4th ed.), § 150.

9. *Delay in Proceeding to Adjudication.* — The Corier Marítimo, 1 C. Rob. 287; The Madonna del Burso, 4 C. Rob. 169; The Peacock, 4 C. Rob. 185; The Anna Catharina, 6 C. Rob. (Reprint) 10; Slocum v. Mayberry, 2 Wheat. (U. S.) 1; The Apollon, 9 Wheat. (U. S.) 362; Jecker v. Montgomery, 13 How. (U. S.) 498.

Such demurrage will include reasonable pay and expenses of an agent to look after the interests of the owners up to the time of the delivery of the vessel to the navy department by the court. The Nuestra Señora de Regla, 108 U. S. 92.

10. *Delay in Restitution.* — The Zee Star, 4 C. Rob. 71.

11. *Capture without Probable Cause.* — The Triton, 4 C. Rob. 78; Cambden v. Home, 4 T. R. 385; The Nemesis, 1 Edw. Adm. 50; Del Col v. Arnold, 3 Dall. (U. S.) 333; Murray v. Schooner Charming Betsy, 2 Cranch (U. S.) 64; Maley v. Shattuck, 3 Cranch (U. S.) 458; Fallieff v. Elphinstone, 5 Bro. P. C. (Toml. ed.) 343; The Schooner Lively, 1 Gall. (U. S.) 315; The Glen, Blatchf. Prize Cas. 375. And see The Sybil, Blatchf. Prize Cas. 615.

stances as will form a reasonable ground for suspicion that the vessel is engaged in an illegal traffic,¹ and the fact that a court restores the vessel without ordering further proof does not of itself show a lack of probable cause.² Probable cause for the capture deprives the owner of the captured vessel of the right to costs,³ and, though restitution is decreed, it will authorize the allowance of reasonable costs and expenses to the captors,⁴ but this allowance is not always made in such a case.⁵

The Person Responsible in damages is, in the case of a capture by a vessel of war, the person ordering the seizure, as being the actual wrongdoer; and consequently an admiral or a commodore cannot be made liable for a seizure ordered by a commander of a vessel without the concurrence of the superior officer,⁶ while in the case of capture by privateers, both the owners and the master of the privateer are liable.⁷

(7) **Recapture.**—When a captured vessel or cargo is recaptured by a fellow subject of the original owner, or by the subject of an ally of his government, the property is, as a general rule, returned to such original owner, provided he pays salvage to the persons making the recapture. The cases in which restitution is made and the conditions of restitution vary, however, in different countries, the United States restoring only when the recapture has been effected before condemnation in a prize court, while England and several other nations make restitution in all cases. The subject is regulated generally by prize acts in the different countries.⁸

INTER PARTES.—Between parties. Instruments in which the parties unite are said to be *inter partes*.⁹

INTERPLEADER.—See 11 ENCYC. OF PL. AND PR. 444.

INTERPOSE.—To interpose means to present or put forward as an obstruction or interruption.¹⁰

1. **Essentials of Probable Cause.**—The *St. Antonius*, 1 Act. 113; The *Thompson*, 3 Wall. (U. S.) 155; The *George*, 1 Mason (U. S.) 24; The *Ship Liverpool Packet*, 1 Gall. (U. S.) 513; The *Rover*, 2 Gall. (U. S.) 240.

2. Story, J., in The *George*, 1 Mason (U. S.) 24.

3. **Effect of Probable Cause.**—The *Argonaut*, Blatchf. Prize Cas. 62; The *Forest King*, Blatchf. Prize Cas. 45; The *General Green*, Blatchf. Prize Cas. 40, 654; The *Hannah M. Johnson*, Blatchf. Prize Cas. 35; The *Jane Campbell*, Blatchf. Prize Cas. 101; *Ingraham v. The Brig Nayade*, Newb. Adm. 366.

4. The *Mary*, 9 Cranch (U. S.) 126; The *Venus*, 5 Wheat. (U. S.) 127; The *London Packet*, 5 Wheat. (U. S.) 132; The *Apollon*, 9 Wheat. (U. S.) 362; The *Thompson*, 3 Wall. (U. S.) 155.

In The *Dashing Wave*, 5 Wall. (U. S.) 170, there being probable cause of capture, the costs and expenses upon restitution were ratably apportioned between the vessel and a part of the cargo which was of a suspicious character, without contribution by the balance of the cargo.

5. The *Sir William Peel*, 5 Wall. (U. S.) 517.

6. **Person Responsible in Damages.**—The *Mentor*, 1 C. Rob. 179; The *Diligentia*, 1 Dods. 404; The *Eleanor*, 2 Wheat. (U. S.) 346.

7. **Capture by Privateers.**—Die *Fire Damer*, 5 C. Rob. (Reprint) 318; Der *Mohr*, 3 C. Rob. 129; *Nostra Signora de los Dolores*, 1 Dods. 290; The *Anna Maria*, 2 Wheat. (U. S.) 327; The *Amiable Nancy*, 1 Paine (U. S.) 111; *Dias v. The Privateer Revenge*, 3 Wash. (U. S.) 262;

The *Mary*, 1 Mason (U. S.) 365; *Talbot v. Three Brigs*, 1 Dall. (Pa.) 95.

8. **Recapture.**—Hall on Int. Law (4th ed.), § 166.

Rev. Stat. U. S., § 4652 (Act June 30, 1864), provides that "a meet and competent sum as salvage, according to the circumstances of each case," shall be awarded by the court, and also that if the recaptured property belonged to a person resident or under the protection of a foreign government in amity with the United States, it shall be restored upon the same conditions that would be required of a citizen of the United States upon a recapture by persons belonging to such state.

For decisions under the Act of March 3, 1800, c. 14, which was the basis of and substantially similar to the present act, see The *Schooner Adeline*, 9 Cranch (U. S.) 244; The *Star*, 3 Wheat. (U. S.) 78.

9. **Inter Partes.**—In *Smith v. Emery*, 12 N. J. L. 60, it was said: "The instrument of writing set forth in this declaration is what is technically called an instrument *inter partes*; that is to say, it is expressed to be made between certain parties, between the persons who are named in it as executing it. In such case it is a settled rule that although a covenant be expressed in the instrument for the benefit of a third person named in it, an action can be brought in the name of one of the parties only, and not in the name of such third person."

10. **Usury.** (See also the title *USURY*).—In *Rosa v. Butterfield*, 33 N. Y. 665, Davis, J., said: "The Act of 1850 is entitled, 'An Act to

prohibit corporations from *interposing* the defense of usury in any action.' The first section, which is the only one necessary to be referred to in these cases, is in these words: 'Section 1. No corporation shall hereafter *interpose* the defense of usury in any action.' (Laws of 1850, c. 172, p. 234.) Plain as the language of this section may appear to be, it is on its face suggestive of several constructions. In a strictly narrow sense, to *interpose* a defense in an action is to plead it or to set it up by answer. In that sense the section would be construed simply to debar a corpora-

tion from thereafter pleading usury as a defense, thus reducing it to a rule of pleading, but operating effectively to prevent proof of usury, under the settled rule which excludes the evidence whenever the fact is not pleaded. In that view it would apply only to pleas or answers thereafter to be *interposed*, and not to issues already joined. But the courts have not hesitated to reject this construction and to hold that to *interpose* the defense of usury, within the meaning of the act, was to set it up or insist upon it in any manner at any stage of the action."

INDEX.

ABBREVIATIONS.

Interest, 1001

ABOUT:

In, 124

ACCIDENT:

Inevitable accident or casualty, 242

ACCIDENT INSURANCE, see *INSURANCE*.

ACCOUNTING, see *INSANITY*.

ACCRETION:

International law, 1131

ACTIONS (see *INJUNCTIONS*; *INSPECTION AND PHYSICAL EXAMINATION*):

Indians, 216

ACT OF GOD:

Inevitable accident or casualty, 242

ADMIRALTY:

Imprisonment for debt and in civil actions, 16

ADMISSIONS:

Incest:

To show relationship, 140

Insanity, 609

Insolvency and bankruptcy, 653

Admitting insolvency as act of bankruptcy, 673

Insurance, 968

ADOPTION:

Indians:

Adoption of whites, 216

ADVERSE POSSESSION:

Improvements:

Necessity for adverse character of occupancy, 82

Exception to the rule, 83

Presumption against change of character of possession, 83

Rule stated, 82

What constitutes adverse possession, 83

Indians, 235

ADVICE OF COUNSEL:

Injunctions, 438

AGE (see *INFANTS*):

Inspection and physical examination:

Determination of age by inspection, 818

AGENCY (see *INSURANCE*; *INSURANCE BROKERS*):

Imprisonment for debt and in civil actions:

Agent for collection, 29

Agent for sale converting proceeds, 29

Conversion of money received for specified purpose, 29

Del credere agency, 30

AGENCY, *cont'd.*

Imprisonment for debt, etc., *cont'd.*

Discharge of execution against the person,

54

Effect of acceptance by agent of draft for property received, 30

Fiduciary character of agent receiving moneys, 29

Fraud by agent, 25

Fraudulent representations by agent, 25

Principal liable to arrest when participant in fraud of agent, 25

Fraud in fiduciary capacity, 28

Injunctions:

Violation of injunction, 437

Injuries to animals by railroads, 489

Insanity:

Employment of agents by guardian, 579

Insolvency and bankruptcy, 700

Bankruptcy of agent, 700

Bankruptcy of principal, 700

Dissolution of relationship, 700

Effect of bankruptcy, 700

Fiduciary debts, 781

Preferences, 736

Revocation of agency, 700

Insurance, 845

Agent insuring his own property, 845

International law:

Dissolution by war, 1146

ALIENS, see *INTERNATIONAL LAW*.

ALIMONY:

Insolvency and bankruptcy:

Effect of discharge, 771

What debts and claims are provable, 683

ALTERATION OF INSTRUMENTS:

Injunctions:

Fraudulent alteration of judgment, 382

AMOUNT IN CONTROVERSY:

Injunctions, 351

ANIMALS, see *IMPOUNDING*; *INJURIES TO ANIMALS BY RAILROADS*.

ANNUITY:

Income, 148

APPEALS:

Injunctions:

Failure to take advantage of remedy by appeal, 377.

Insolvency and bankruptcy, 705

APPLICATION OF PAYMENTS:

Interest, 1035

Computation of interest, 1038

APPRENTICESHIP:

Infants:

Contracts for apprenticeship, 275

Volume XVI.

ARBITRATION AND AWARD:

- Infants, 286
- Injunctions:**
 - Injunctive relief against awards, 398
- Insolvency and bankruptcy, 752
- International law, 1139

ARREST (see IMPRISONMENT FOR DEBT AND IN CIVIL ACTIONS):

- Insolvency and bankruptcy:**
 - Arrest of debtor as act of bankruptcy, 671
 - Exemption of debtor from arrest on civil process, 697
 - Arrests made before commencement of bankruptcy proceedings, 698
 - Debts provable in bankruptcy, 697
 - Habeas corpus to enforce exemption from arrest, 698
 - In general, 697
 - No exemption from arrest for debts not released by discharge, 697
 - Remedy of a debtor, 698
 - Persons privileged from arrest, 660
- Privilege from arrest*, see IMPRISONMENT FOR DEBT AND IN CIVIL ACTIONS.

ARSON:

- Infants, 313

ASSAULT AND BATTERY:

- Imprisonment for debt and in civil actions, 20
- Infants**, 307
 - Criminal liability, 313
 - Indecent assault, 315
 - Intent to kill, 313
- Inns and innkeepers:**
 - By innkeeper, 546
 - By other guests and strangers, 546
 - By servant of innkeeper, 546
 - Liability of innkeeper for assault on guests, 546

ASSIGNMENTS:

- Imprisonment for debt and in civil actions:
 - Effect of assignment of cause of action, 20
- Insolvency and bankruptcy**, 758
 - Assigned claims, 690
 - By whom made, 758
 - Recording of the assignment, 758
 - Required by former bankruptcy laws, 758

ASSIGNMENTS FOR BENEFIT OF CREDITORS:

- Infants, 284
- Insolvency and bankruptcy**, 733, 745
 - Acts of bankruptcy, 669
 - Assignments held merely voidable, 733
 - Preferences, 734
 - Right to recover property assigned, 733
 - What passes to assignee in insolvency, 733

ASYLUMS, see INSANITY.

AT:

- In, 125

ATTACHMENT:

- Imprisonment for debt and in civil actions:
 - Arrest and attachment for same cause of action, 56
 - Arrest in separate action, 57
 - Both attachment and arrest permitted when necessary to insure satisfaction, 56
 - Simultaneous remedies against person and property not permitted, 56

ATTACHMENT, *cont'd.*

- Indebtedness, 162, 163
- Inhabitant, 334
- Insolvency and bankruptcy:**
 - Act of bankruptcy, 671
 - Effect of discharge on attachment liens, 775
 - Preferences, 662
 - Priority of costs of attachments, 695

ATTEMPT:

- Incest, 141

ATTORNEYS:

- Imprisonment for debt and in civil actions, 30
- Discharge by attorney, 54
- English debtors act, 38
- Privilege from arrest, 43
- Injunctions:**
 - Judgments obtained through negligence, incompetence, or mistake of attorney, 392
 - Judgments obtained through unauthorized appearance of attorney, 391
 - View that injunction does not lie if attorney is solvent, 391
 - View that injunction lies irrespective of attorney's solvency or insolvency, 392
 - View that relief by injunction is never permissible, 391
 - Violation of injunction, 437
- Insolvency and bankruptcy:**
 - Effect of discharge, 781

ATTORNEY'S FEES, see INJURIES TO ANIMALS BY RAILROADS.

BAIL:

- Imprisonment for debt and in civil actions:
 - Privilege from arrest, 46
- Indemnity contracts:**
 - Indemnity to bail, 172

BAILMENTS (see INNS AND INNKEEPERS):

- Infants:**
 - Liability for conversion or injury to things bailed, 309
- Insolvency and bankruptcy:**
 - Effect of discharge, 781

BANKERS:

- Imprisonment for debt and in civil actions, 30

BANKRUPTCY, see INSOLVENCY AND BANKRUPTCY.

BANKS AND BANKING:

- Insolvency and bankruptcy**, 730
 - Banker as trustee, 730
 - Effect of discharge, 781
- Insurance:**
 - Power of company to engage in banking, 892

BASTARDY:

- Imprisonment for debt and in civil actions, 31
- Imprisonment in bastardy proceedings, 31
- Warrant of arrest upon institution of proceedings, 32
- Incest, 137
- Infants:**
 - Bond for support of bastard child, 274
 - Necessaries, 279
- Inspection and physical examination:**
 - Inspection of infant in filiation case, 19

BELLIGERENCY, see INTERNATIONAL LAW.
Volume XVI.

BETTERMENT (see **IMPROVEMENTS**):
Improvements, 66

BIGAMY:
Infants, 264

BILLS OF EXCHANGE AND PROMISSORY NOTES:

Infants, 284
A promissory note to compromise a tort, 287
Liability of infant as maker or acceptor, 284
Right of infant payee to indorse, 285
Surety upon promissory notes, 285
Insolvency and bankruptcy, 672
Nonpayment of commercial paper as act of bankruptcy, 672
In general, 672
Retired trader, 672
Rule restricted to persons designated, 672
What is commercial paper, 672
Transfer of negotiable paper, 698

Insurance:
Payment by note, 859

Interest, 1008
Contract to execute bill or note, 1026

International law:
Effect of war, 1145

BLOCKADE, 1177
Approach for inquiry or to procure license, 1181
Blockade of river partly in neutral state, 1178
Canal communications, 1183
Case of necessity, 1182
Conditions of effectiveness, 1178
Danger in entry and egress, 1178
De facto blockades, 1180
Definition, 1177
Duration of *delictum*, 1183
Egress in violation of blockade, 1181
Evidence of violation, 1183
Facts showing violation, 1183
General principles, 1177
Innocent sailing for blockaded port, 1181
International law:
Pacific blockade, 1139
Necessity excusing entry, 1182
Notice of blockade, 1179
Paper blockade, 1178
Penalty for violation, 1183
Previous illegal acts, 1183
Proclamation of blockade, 1179
Running blockade, 1180
Sailing with intent to break blockade, 1181
Termination or suspension of blockade, 1180
Termination or suspension of blockade by capture of blockaded port, 1180
Termination or suspension of blockade by enemy's fleet, 1180
Termination or suspension of blockade by pursuit of prize, 1180
Termination or suspension of blockade by stress of weather, 1180
Ultimate destination of cargo, 1182
Violation of blockades, 1180
What constitutes violation in general, 1180

BOARDING HOUSES, see **INNS AND INN-KEEPERS**.

BONA FIDES, see **IMPROVEMENTS**.

BONDS, see **INDEMNITY CONTRACTS**; **INJUNCTIONS**; **INTEREST**.

BOUNDARIES:

International law:
Rivers as boundaries, 1131

BREACH OF PROMISE OF MARRIAGE:

Imprisonment for debt and in civil actions, 32
Infants, 273
Liability for breach of promise, 265
Necessaries, 279

BROKERS (see **INSURANCE BROKERS**):

Imprisonment for debt and in civil actions, 29
Insolvency and bankruptcy:
Effect of discharge, 781

BUILDING CONTRACTS, see **INDEPENDENT CONTRACTORS**.

BUILDING RESTRICTIONS:

Incumbrance, 158

BURDEN OF PROOF:

Infants:
Capacity and age to commit crime, 313, 314
Injuries to animals by railroads:
Negligence, 472, 473
Insanity, 616
Insolvency and bankruptcy, 653
Insurance, 955
Accident insurance, 958
Admission of title, 955
Amount of loss, 959
Arbitration or reference, 959
Assignment to third person, 955
Breach of conditions, 955
Cancellation of policy, 959
Cause of loss or injury, 957
Conditions, 955
Estoppel and waiver, 957
Exceptions construed as conditions, 958
Exclusive knowledge of agency, 955
Exposure to danger, 958
False statements of agents, 947
Fire caused by insured, 958
In general, 955
Insurable interest, 955
Loss caused by negligence of insured, 958
Making of contract, 955
Marine insurance, 958
Misrepresentations, 956
Misstatements, 956
Notice and proofs of loss, 959
Payment as defense, 959
Payment of premiums, 958
Plaintiffs as beneficiaries, 955
Reformation of policy, 870
Representations, 955
Suicide, 958
Time of bringing suit, 955
Warranties, 955
Warranties and representations subject to different rules, 956

BURGLARY:

Infants, 313

BY-LAWS:

Insurance:
Disregard of by-law not sufficient to show its repeal, 889
Power of company to make by-laws, 889
Validity of company to make by-laws, 889

CANAL COMPANIES:

Independent contractors, 199

CAPTURE, see **INTERNATIONAL LAW**.

CARE OF PASSENGERS :

Independent contractors, 199

CATTLE, see **IMPOUNDING**.**CATTLE GUARDS** see **INJURIES TO ANIMALS BY RAILROADS**.**CERTIORARI :****Injunctions :**

Failure to take advantage of remedy by certiorari, 378

CHARACTER IN EVIDENCE :**Incest**, 140

Character of defendant, 140

Character of prosecutrix, 140

Former conduct of defendant as showing character, 140

CHARTER, see **INSURANCE**.**CHATTEL MORTGAGES :**

Infants, 283

CHILDREN (see **INFANTS**):**Infants :**Child *en ventre sa mere*, 259

Injury to children, 500

CITIZENSHIP (see **INDIANS**):

Inhabitant, 331

CIVIL DAMAGE ACT :

Injury, 500

Infants :

Posthumous child, 261

CIVILITER MORTUUS :

Insolvency and bankruptcy, 698

CLERK OF COURT :**Injunctions :**

Approval of bond, 445

Insertion of unauthorized conditions, 447

CLOUD UPON TITLE :**Injunctions :****Judicial sales**, 408

Apparent lien, 410

Attack upon good faith, 411

Conflict of authority, 409

Doubt as to title, 411

Homestead, 410

Levy upon land of stranger to writ, 409

No equity where complainant shows title in himself, 408

Power in general, 408

Prevention of cloud though sale would be void, 409

Protection of wife's separate estate, 410

Relief though judgment not a lien, 410

Rule that stranger to writ may enjoin sale, 411

Void sale, 408

Where deed would be set aside, 408

COLOR OF TITLE :**Improvements**, 79

Color of title arising from written instrument, 81

Color of title arising in absence of written instrument, 82

Improvements made before acquiring color of title, 80

Meaning of the term, 81

Necessity for color of title, 79

Occupant not required to show a complete chain of title, 80

What may constitute color of title, 81

COMMERCE :**Indians :**

Regulation of commerce, 227

COMMISSION MERCHANT :

Imprisonment for debt and in civil actions, 29

Insolvency and bankruptcy, 729, 730

COMMON LAW :

Interest, 991

COMPARATIVE NEGLIGENCE :

Injuries to animals by railroads, 481

COMPOSITIONS WITH CREDITORS, see **INSOLVENCY AND BANKRUPTCY**.**COMPOUND INTEREST**, see **INTEREST**.**COMPROMISE**, see **INSOLVENCY AND BANKRUPTCY**.**COMPUTATION OF INTEREST**, see **INTEREST**.**COMPUTATION OF TIME**, see **INTEREST**.**CONFESSION OF JUDGMENT :**

Indemnity contracts, 177

Injunctions :

Judgments by confession, 394

Necessity of confessing judgment where relief is sought in equity, 373

Insolvency and bankruptcy :

Preferences, 662

CONFESSIONS :**Incest**, 138

Sufficiency, 141

Infants, 312

CONFISCATION, see **INTERNATIONAL LAW**.**CONFLICT OF LAWS**, see **PRIVATE INTERNATIONAL LAW**.**CONSIDERATION** (see **INSURANCE**):Indemnity contracts, see **INDEMNITY CONTRACTS**.**Insolvency and bankruptcy :**

What debts and claims are provable, 681

CONSPIRACY (see **INTERFERENCE WITH CONTRACT RELATIONS**):

Informers, 325

CONSTITUTIONAL LAW (see **INDIANS; INFAMY AND INFAMOUS CRIMES; INFANTS**):**Imprisonment for debt and in civil actions**, 14, 16

Absconding debtors, 15

Actions *ex delicto*, 16

Constitutionality of statutes in general, 16

Constitutional provisions, 14

Debtors who have surrendered their property, 15

Debts founded on contract, 14

Impairment of obligation of contract, 17

Imprisonment allowed in cases of fraud, 14

Imprisonment for debt prohibited, 14

Imprisonment for militia fines, 15

Statutes abolishing imprisonment held constitutional, 17

Statutes authorizing imprisonment for contempt, 17

Statutes permitting arrest in civil cases, 16

Volume XVI.

CONSTITUTIONAL LAW, *cont'd.***Improvements :**

Constitutionality of statutes allowing compensation, 71

Authorizing general money judgment for improvements, 72

Failure to discriminate between innocent and tortious possession, 737

General rule, 71

Giving occupying claimant option to retain land on paying unimproved value, 72

Provisions rendering statutes unconstitutional, 72

Requiring payment or tender of payment for improvements before bringing suit for property, 73

Retroactive statutes, 72

Informers, 324

Injunctions :

Unconstitutionality of statute on which injunction is based, 430

Injuries to animals by railroads :

Constitutionality of statutes allowing the plaintiff to recover attorney's fees, 475

Liability under statutes relating to erection and maintenance of fences, 496

Allowance of double damages, 497

Ex post facto, 497

Fourteenth amendment, 497

Penal character of statutes, 497

Police power, 497

Statutes held constitutional, 496

Statutes not creating duty but declaring liability, 498

Inns and innkeepers :

Statutory regulation, 514

Insanity :

Right to jury trial, 599

Insolvency and bankruptcy, 638

Discharge of liens, 639

National bankruptcy laws, 638

Discharge of liens, 639

Power to enact, 638

Provision for discharge in voluntary proceedings, 638

Provision for discharge of existing debts, 638

Uniformity of operation, 639

Power to enact, 638

Provision for discharge in voluntary proceedings, 638

Provision for discharge of existing debts, 638

State insolvency laws, 639

Constitutionality as to existing debts, 640

Constitutionality as to subsequent debts, 640

Constitutionality in respect to nonresidents, 640

Power of state to enact insolvency laws, 639

Power of state to pass bankruptcy laws denied, 639

Power of state to pass insolvency laws declared, 639

Uniformity of operation, 639

Insurance :

Constitutionality of statute providing for dissolution of company, 894

Power to regulate insurance companies reserved in constitution, 884

CONSTITUTIONAL LAW, *cont'd.***Interest, 998**

Statutes changing rate, 1060, 1061

CONSTRUCTION, see INDEMNITY CONTRACTS; INSURANCE.

CONTEMPT (see INJUNCTIONS):**Imprisonment for debt and in civil actions :**

Constitutionality of statutes authorizing imprisonment for contempt, 17

Ontario, 35

CONTRABAND OF WAR, see INTERNATIONAL LAW.

CONTRACTED AND INCURRED, 161

CONTRACTORS, see INDEPENDENT CONTRACTORS.

CONTRACTS (see INDEMNITY CONTRACTS; INDEPENDENT CONTRACTORS; INFANTS; INSANITY; INSURANCE; INTEREST; INTERFERENCE WITH CONTRACT RELATIONS; INTERNATIONAL LAW):

Imprisonment for debt and in civil actions :

Debts founded on contract, 14

CONTRIBUTION :**Insolvency and bankruptcy :**

Contribution between bankrupt and his co-obligor, 793

CONTRIBUTION AND EXONERATION :

Indemnity contracts, 183

CONTRIBUTORY NEGLIGENCE, see INDEPENDENT CONTRACTORS; INJURIES TO ANIMALS BY RAILROADS.

CONVERSION AND RECONVERSION :**Insanity, 588**

Exceptions for benefit of lunatic, 589

Fund claimed as personality, 588

General rule, 588

Heir dying without making election, 588

Improvements, 589

Investment of personality, 588

Money recovered as damages to the fee, 588

Sales of real property, 588

Timber severed from soil, 588

Interest, 1013

CORONER :

Insurance, 969

CORPORATIONS (see INSOLVENCY AND BANKRUPTCY).

Inhabitant, 333

Injunctions :

Violation of injunction, 437

Insanity :

Committee, 576

Insolvency and bankruptcy, 659

Application, 647

Right to vote at meeting of creditors, 714, 715

Institutions, 823

COSTS :**Imprisonment for debt and in civil actions, 33**

Criminal cases, 33

Defendant's own costs in criminal cases, 34

Execution for costs in civil cases, 35

Hard labor, 34

Imprisonment of prosecuting witness, 34

Nonpayment of costs, 33

Whether costs part of punishment, 35

Volume XVI.

COSTS, *cont'd.*

Indemnity contracts, 181

Injunctions, 466

In general, 466

Recovery of counsel fees on dissolution of injunction, 467

Allowance of counsel fees on final hearing, 468

Amount as affected by interests involved, 470

Amount question for jury, 470

Confined to services rendered in procuring dissolution, 469

Counsel fees recoverable as damages, 467

Evidence of rendition and value of services, 470

Fees should be reasonable, 469

Limitation of recovery, 469

No recovery where injunction defeated on merits without motion for dissolution, 469

Services on appeal, 468

State courts, 467

Suits to determine title, 468

United States courts, 467

Whether actual payment of counsel fees necessary, 469

Where injunction perpetuated in part, 467

Insanity, see *INSANITY*.**Insolvency and bankruptcy, 774**

Costs of pending action, 778

Discharge, 774

Interest and costs on judgment, 690

Jurisdictional amount, 650

Priority of costs and expenses of proceedings, 695

What claims are allowable, 691

Compensation for services rendered for benefit of the estate, 692

Costs and expenses of the bankruptcy proceeding, 692

Levy under invalid judgment, 691

Rule in England, 691

Rule in the United States, 691

Successful defendant, 691

Successful plaintiff, 691

COUNTIES:**Insolvency and bankruptcy:**

Priority of taxes due to state, county, district, or municipality, 695

COUPONS:**Interest:**

Compound interest, 1074

COURTS (see *INJUNCTIONS; INSANITY; INSPECTION AND PHYSICAL EXAMINATION*):

Inferior courts, 318

COVENANTS:

Indemnity contracts:

Incumbrances, 176

CREDITORS, see *INSOLVENCY AND BANKRUPTCY*.**CRIMINAL CONVERSATION:**

Imprisonment for debt and in civil actions, 20

CRIMINAL LAW (see *INCEST; INFAMY AND INFAMOUS CRIMES; INFANTS; INFORMERS; INJUNCTIONS; INSANITY*):**CRIMINAL LAW, *cont'd.*****Indians:****Jurisdiction, 223**

Crimes committed on reservation by others than Indians, 224

Federal courts have jurisdiction when so reserved, 224

Indian territory, 225

In general, 223

State courts have jurisdiction over crimes committed by Indians on reservation, 224

Inns and innkeepers, 555

Criminal liability of guests for fraudulent practices, 555

Disorderly houses, 555

Refusing to receive and entertain guests, 526

Insolvency and bankruptcy:**Offenses against insolvency and bankruptcy laws, 806**

Constitutionality of penal provisions, 806

Creation of offenses, 806

Jurisdiction, 806

Limitations, 806

Inspection and physical examination, 818

Determination of age by inspection, 818

Examination and inspection of defendant's person, 818

Examination and inspection of person of witness, 818

Footprints, 818

Inspection of infant in filiation cases, 819

Insurrection, 977**CROSSINGS:**

Independent contractors, 199

DAMAGES (see *IMPROVEMENTS; INDEMNITY CONTRACTS; INJUNCTIONS; INJURIES TO ANIMALS BY RAILROADS; INNS AND INNKEEPERS; INTEREST*):

Impounding, 7

Injury, 499

Insanity:

Torts, 623

DEATH:**Injunctions:**

Effect of death of principal on liability of surety, 452

Insanity:

Death of lunatic, 594

Effect upon committee's authority, 595

Effect upon court's jurisdiction, 594

Interest:

Suspension of interest, 1066

DEATH BY WRONGFUL ACT:**Infants:**Rights of action for death of parent by wrongful act where child is *en ventre sa mere*, 261

Injury, 499

Interest, 1032

DEBTS (see *IMPRISONMENT FOR DEBT AND IN CIVIL ACTIONS; INSOLVENCY AND BANKRUPTCY; INTEREST*):

Definitions, 14

Indebted, 162

DEBTS OF DECEDENTS:

Insolvency and bankruptcy, 806

Interest, 1010

DECLARATIONS :

Insanity, 609
Insurance, 968

DECREES, see *INJUNCTIONS*.

DEFAULTS (see *INTEREST*):

Indemnity contracts, 177
Injunctions:
Judgments by default or confession, 393

DELIRIUM, 565

DE LUNATICO INQUIRENDO, see *INSANITY*.

DEMAND, see *INTEREST*.

DEPOSIT :

Interest, 1020

DEPUTY :

Infants:
Deputy sheriff and constable, 266

DESCENT :

Indians, 236

DETECTIVES, see *INFORMERS*.

DE VENTRE INSPICIENDO, 820

DIPSOMANIA, 565

DISCOVERY :

Injunctions, 370

DISTRESS, see *IMPOUNDING*.

DIVORCE :

Imprisonment for debt and in civil actions, 21
Infamy and infamous crimes, 253
Inspection and physical examination, 819
Expenses of examination, 820
How examination conducted, 819
Indelicacy, 819
Methods of enforcing order, 820
Power of courts to order inspection and examination, 819
Where party has already submitted to examination, 819

DOGS :

Injuries to animals by railroads, 485

DOMICIL :

Inhabitant, 330
International law, 1134

DOWER :

Insanity:
Extinguishment of dower, 587

DOWRESS :

Improvements, 102

DRUNKENNESS, see *INNS AND INNKEEPERS*.

EARNINGS :

Income, 151

EJECTMENT (see *IMPROVEMENTS*):

Improvements, 103

ELECTION OF REMEDIES :

Imprisonment for debt and in civil actions:
Waiver of right of arrest, 47

ELECTIONS :

Imprisonment for debt and in civil actions:
Privilege of electors, 39
Indians, 217
Infamy and infamous conduct, 253

EMBARGO :

International law, 1138

EMPLOYEES, see *INDEPENDENT CONTRACTORS*.

ENEMY, see *INTERNATIONAL LAW*.

ENGRAVINGS :

Instrument, 825

EN VENTRE SA MERE, see *INFANTS*.

EQUITY, see *INJUNCTIONS*.

ESCAPE :

Imprisonment for debt and in civil actions:
Second arrest, 56

ESCHEAT :

Improvements, 103

ESTOPPEL :

Consideration:
Waiver and estoppel, 935
Improvements:
When owner of property is estopped to dispute claim for improvements, 102

Independent contractors:

Estoppel to assert relation, 187

Infants:

Misrepresentations, 292

Injunctions:

Executions, 403
Operation of bond as estoppel on sureties, 452
Estoppel to deny existence of judgment recited, 452
Estoppel to deny issuance of injunction, 452
Estoppel to deny pendency of suit, 452
Estoppel to deny that order required bond, 452
Estoppel to plead that order was broader than application, 453
General rule, 452
Insolvency and bankruptcy, 652
Insurance:
Foreign company estopped to allege want of authority, 905

ESTRAY, see *IMPOUNDING*.

EVICTIION, see *IMPROVEMENTS*.

EVIDENCE (see *INFORMERS*; *INJUNCTIONS*;

INJURIES TO ANIMALS BY RAILROADS; *INNS AND INNKEEPERS*; *INSANITY*; *INSOLVENCY AND BANKRUPTCY*; *INSPECTION AND PHYSICAL EXAMINATION*; *INSURANCE*):
Indemnity contracts, 180

EXAMINATION, see *INSPECTION AND PHYSICAL EXAMINATION*.

EXECUTIONS :

Injunctions, 401
Adequacy of legal remedy, 401
Estoppel, 403
Holder of prior lien or incumbrancer, 402
Injunction incidental to original jurisdiction, 402
Irregularities in process or proceedings thereunder, 403
Application of rule, 404
Excessive levy, 405
Execution issued on dormant judgment, 404
Homestead, 405
Irregularity in proceedings under writ, 405
Irregularity in writ or issuance thereof, 404
Levy upon exempt property, 405
Rule stated, 403

EXECUTIONS, *cont'd.*

Injunctions, *cont'd.*

- Relief in general, 401
- Remedy by action, 402
- Right to levy and sell in general, 401
- Seizure of property of stranger to writ, 405**
 - Claimant under execution debtor must show good title, 408
 - In general, 405
 - Levy upon individual property upon judgment against firm, 406
 - Levy upon partnership property for individual debt, 406
 - Loss of trade or business, 407
 - Ordinary legal remedies not available, 407
 - Property of peculiar value to owner, 407
 - Protection of stranger pending appeal by garnishee, 407
 - Remedy by trial of right of property, 406
 - Where owner cannot defend his title, 406
 - Where remedy at law is inadequate, 406
- Stay of execution pending appeal, 402
- To prevent cloud upon title, 408**
 - Apparent lien, 410
 - Attack in good faith, 411
 - Conflict of authority, 409
 - Doubt as to title, 411
 - Homestead, 410
 - Levy upon land of stranger to writ, 409
 - No equity where complainant shows title in himself, 408
 - Power in general, 408
 - Prevention of cloud though sale would be void, 409
 - Protection of wife's separate estate, 410
 - Rule that stranger to writ may enjoin sale, 411
 - Void sale, 408
 - Where deed would be set aside, 408
- Trustee or cestui que trust, 402
- When remedy at law inadequate, 403
- Insolvency and bankruptcy:**
 - Act of bankruptcy, 671
 - Execution issued after discharge, 772
 - Preferences, 662

EXECUTIONS AGAINST THE BODY,
see IMPRISONMENT FOR DEBT AND IN CIVIL ACTIONS.

EXECUTIONS AGAINST THE PERSON,
see IMPRISONMENT FOR DEBT AND IN CIVIL ACTIONS.

EXECUTORS AND ADMINISTRATORS:

Infants:

- Capacity to act as executor or administrator, 267
- Disaffirmance, 297

Insolvency and bankruptcy:

- Effect of discharge, 780
- Executors carrying on testator's business, 660

EXEMPLARY DAMAGES:

- Infants, 308
- Injunctions, 464
- Interest:**
 - Torts to property, 1031

EXEMPTION FROM EXECUTION:

- Injunctions, 405
- Insolvency and bankruptcy, 737, 739
- Instrument, 825

EXEMPTION FROM TAXATION:

Inns and innkeepers:

- Lien of innkeeper on property exempt from taxation, 549, 550

Insurance, 887

- Exemption from *bona fide* debts, 887
- Exemptions strictly construed, 887
- In general, 887

EXPATRIATION:

- International law, 1134

EXPERIMENTS, see INSPECTION AND PHYSICAL EXAMINATION.

EXPERT AND OPINION EVIDENCE:

- Insurance, 969

EXTRADITION:

- Imprisonment for debt and in civil actions:**
 - Defendant privileged from arrest, 42

FACTORS:

- Imprisonment for debt and in civil actions, 29
- Insolvency and bankruptcy, 729, 730**
 - Effect of discharge, 781

FALSE IMPRISONMENT:

- Insanity, 597

FAMILY, see INSANITY.

FELLOW SERVANTS (see INDEPENDENT CONTRACTORS):

- Incompetency, 153

FENCES:

Independent contractors:

- Railroads, 199
- Removal of fences, 208

FIDUCIARY:

- Imprisonment for debt and in civil actions, 28
- Meaning of the term "fiduciary," 28

FINES (see INFORMERS):

- Imprisonment for debt and in civil actions, 33

FIRE ESCAPES:

- Inns and innkeepers, 515

FIRE INSURANCE, see INSURANCE.

FIXTURES (see IMPROVEMENTS):

- Improvements, 66

FOOTPRINTS:

- Inspection and physical examination, 818

FORECLOSURE OF MORTGAGES:

- Insolvency and bankruptcy, 688

FOREIGN INSURANCE COMPANIES,
see INSURANCE.

FOREIGN JUDGMENTS:

- Injunctions, 397

FORFEITURE, see INFORMERS; INSURANCE.

FORTHCOMING AND DELIVERY BOND:

- Insolvency and bankruptcy:**
 - Effect of discharge, 776

FRANCHISES:

- Inns and innkeepers, 509, 513
- Insolvency and bankruptcy:**
 - Whether franchise passes to assignee, 723

FRAUD (see IMPRISONMENT FOR DEBT AND IN CIVIL ACTIONS; INJUNCTIONS; INSURANCE):

Infants:

Marriage, 264

Injunctions, 367

Insolvency and bankruptcy, 728

Effect of discharge upon debts contracted by fraud, 782

Actual positive fraud, 782

Fraud in creation of debt, 782

In general, 782

Liability of partners for acts of copartners, 783

Proving the debt and receiving dividends, 782

What are debts created by fraud, 782

Fraud as grounds for refusing discharge, 797

What debts and claims are provable, 681

Insurance:

Collusion between agent and assured, 947

Evidence, 960

Liability for premiums when insurance is induced by fraud, 952

Interest:

Interest on money fraudulently or wrongfully obtained, 1012, 1013

FRAUDS, STATUTE OF, see STATUTE OF FRAUDS.

FRAUDULENT SALES AND CONVEYANCES:

Imprisonment for debt and in civil actions, 26

In actions to recover chattel where property has been fraudulently disposed of, 32

Insolvency and bankruptcy, 660

Debtor continuing to sell stock of goods, 661

Distinction between preferences and fraudulent conveyances, 747

Existence of fraudulent intent, 661

In general, 660

Mortgage, 661

Preferences, 663

Sale of property fraudulently conveyed, 749

Setting aside fraudulent or preferential transfers, 746

What passes to assignee, 732

Assignees in insolvency may avoid fraudulent conveyances, 732

Constructively fraudulent, 732

Conveyance in contemplation of insolvency, 732

Sale, etc., not in ordinary course of business, 733

Insurance:

Insurance upon property fraudulently conveyed, 844

GAMBLING:

Inns and innkeepers, 555

GAMING CONTRACTS:

Injunctions:

Judgments based on gaming contracts, 394

GIFTS:

Improvements:

Agreement or promise to donate, 95

Donation void for want of form, 95

Parol gift, 95

Rights of donees, 95

GOOD FAITH, see IMPROVEMENTS.

GOVERNMENT, see INTERNATIONAL LAW.

GOVERNOR:

Injunctions, 423

GRANDCHILDREN:

Infants:

Child *en ventre sa mere*, 259

GUARANTY:

Indemnity contracts distinguished from, 168

Insolvency and bankruptcy:

Proof of claim secured by guaranty of third person, 678

GUARDIAN (see INSANITY):

Insolvency and bankruptcy:

Effect of discharge, 780

GUARDIAN AND WARD:

Infants:

Consent of guardian to marry, 264

GUESTS, see INNS AND INNKEEPERS.

HABEAS CORPUS:

Insanity, 598

Authority of applicant, 598

In general, 598

Persons charged with crime, 598

Return of writ, 598

Right of insane persons to habeas corpus, 598

Who may make application, 598

Insolvency and bankruptcy, 698

Habeas corpus to enforce exemption from arrest, 698

HEARSAY EVIDENCE:

Insanity, 609

HEREDITAMENTS:

Incorporeal hereditaments, 155

HIGH SEAS:

International law, 1132

HIGHWAY:

Improvement, 59

HOMESTEAD:

Indians, 233

Injunctions, 405

HOMICIDE, see INSANITY.

HORSES, see INNS AND INNKEEPERS.

HOTELS, see INNS AND INNKEEPERS.

HUSBAND AND WIFE (see MARRIED WOMEN):

Improvements, 122

As between the parties, 122

Creditors, 123

Husband not entitled to compensation, 122

View that compensation should be allowed, 123

View that no compensation should be allowed, 122

Insanity:

Guardian, 575

Husband's liability for maintenance of insane wife, 596

Support and maintenance of lunatic's family and relatives, 580

HUSBAND AND WIFE, *cont'd.***Insolvency and bankruptcy :**

What debts and claims are provable, 682

Antenuptial debts of wife provable against husband, 683

Proof of claim by wife against husband, 682

Where husband becomes indebted to his wife, 682

Whether property of bankrupt's wife passes to assignee, 722

IDIOCY, see *INSANITY*.**ILLEGAL CONTRACTS :****Indemnity contracts, 170**

Act believed to be legal and performed under claim of right, 171

Act known to be illegal, 170

Act not believed to be illegal, 171

Act performed before indemnity given, 172

Apparently legal act which proves to be a trespass, 171

Contract of indemnity against consequences of illegal act, 171

Indemnity against consequences of illegal act, 170

Indemnity given by prisoner illegal, 172

Indemnity to bail, 172

Promise of indemnity unconnected with illegal act, 171

Publication of libelous article, 171

When promise of indemnity is implied, 172

Independent contractors :

Contract for illegal act, 203

Insolvency and bankruptcy :

What debts and claims are provable, 681

Insurance, 847

Property illegally kept or used, 847

IMPAIRMENT OF OBLIGATION OF CONTRACT (see *INSOLVENCY AND BANKRUPTCY*):

Imprisonment for debt and in civil actions, 17

Interest :

Statutes changing rate, 1060

IMPLIED CONTRACTS, see *INTEREST*.**IMPORT, 1**

Interstate commerce, 1

IMPORTATION, 1**IMPORTER, 1****IMPORTUNITY, 2****IMPOSE, 2****IMPOSITION, 3****IMPOSSIBLE CONTRACTS, 3****IMPOST, 3****IMPOTENCY, 3**

Marriage, 3

IMPOUNDING, 4

Animals distrained damage feasant, 4

Appraisement of damages, 7

Certificate to be left with poundkeeper, 5

Character of pound, 5

Charges for food and detention, 6

Damages, 7

Definition, 4

Duties and liability of poundkeeper, 6

Estrays, 4

IMPOUNDING, *cont'd.*

Feeding animals, 6

Illegal impounding, 8

Inclosure, 144

Liability for unlawful impounding, 8

Notice, 6

Pound :

Character of pound, 5

Pound breach, 8

Reasonable time, 5

Release from pound, 7

Rescue, 8

Sale, 7

Scope of article, 4

What constitutes impounding, 5

When animals may be impounded, 4

Who is required to feed animals while impounded, 6

IMPRESSION, 9**IMPRESSMENT, 9****IMPRIMIS, 10****IMPRISON, 10****IMPRISONMENT, 10****IMPRISONMENT FOR DEBT AND IN CIVIL ACTIONS, 12****Absconding debtor :**

Constitutional provisions, 15

English debtors act, 37

Fraud, 27

Intent to defraud creditors, 27

Admiralty, 16

Agency :

Agent for collection, 29

Agent for sale converting proceeds, 29

Conversion of money received for specified purpose, 29

Del credere agency, 30

Discharge of execution against the person, 54

Effect of acceptance by agent of draft for property received, 30

Fiduciary character of agent receiving moneys, 29

Fraud by agent, 25

Fraudulent representations by agent, 25

Principal liable to arrest when participant in fraud of agent, 25

Fraud in fiduciary capacity, 28

Arrest, see *infra*, *PRIVILEGE FROM ARREST*.

Assault and battery, 20

Assignments :

Effect of assignment of cause of action, 20

Attachment :

Arrest and attachment for same cause of action, 56

Arrest in separate action, 57

Both attachment and arrest permitted when necessary to insure satisfaction, 56

Simultaneous remedies against person and property not permitted, 56

Attorneys, 30

Discharge by attorney, 54

English debtors act, 38

Privilege from arrest, 43

Ball :

Privilege from arrest, 46

Bankers, 30

IMPRISONMENT FOR DEBT, ETC., *con.*

- Bastardy, 31**
 - Imprisonment in bastardy proceedings, 31
 - Warrant of arrest upon institution of proceedings, 32
- Breach of promise of marriage, 32
- Brokers, 29
- Clear proof required, 36
- Commission merchant, 29
- Concealment of property, 32
- Concealment or disposal of property, 26
- Conflict of laws, 35**
 - Fraud committed in another state, 30
- Constitutional law, 14, 16**
 - Absconding debtors, 15
 - Actions *ex delicto*, 16
 - Constitutionality of statutes in general, 16
 - Constitutional provisions, 14
 - Debtors who have surrendered their property, 15
 - Debts founded on contracts, 14
 - Impairment of obligation of contract, 17
 - Imprisonment allowed in cases of fraud, 14
 - Imprisonment for debt prohibited, 14
 - Imprisonment for militia fines, 15
 - Statutes abolishing imprisonment held constitutional, 17
 - Statutes authorizing imprisonment for contempt, 17
 - Statutes permitting arrest in civil cases, 16
- Contempt:**
 - Constitutionality of statutes authorizing imprisonment for contempt, 17
 - Ontario, 35
- Contracts:**
 - Actions arising out of contract, 17
 - Debts founded on contract, 14
 - Election of remedies, 18
- Conversion:**
 - Agents, factors, or brokers, 29
 - Bankers, 30
- Conversion of property, 22
- Costs, 33**
 - Criminal cases, 33
 - Defendant's own costs in criminal cases, 34
 - Execution for costs in civil cases, 35
 - Hard labor, 34
 - Imprisonment of prosecuting witness, 34
 - No payment of costs, 33
 - Whether costs part of punishment, 35
- Courts:**
 - Discretion of court:**
 - English debtors' act, 38
 - Discretion of court to grant order of arrest, 36
- Creditors, see infra, FRAUD.*
- Criminal conversation, 20
- Death by wrongful act, 21
- Debt defined, 14
- Definitions, 14
- Discharge:**
 - Women, 44
- Discharge from arrest and imprisonment, 50**
 - Confession of judgment, 51
 - Defendant arrested on mesne process, 50
 - Defendant taken in execution on payment of judgment debt, 52
 - Discharge by attorney, agent, or officer, 54
 - Discharge on account of plaintiff's laches, 51
 - Discharge with consent of plaintiff, 53
 - Evidence, 51

IMPRISONMENT FOR DEBT, ETC., *con.*

- Discharge from arrest and imprisonment, *cont'd.***
 - Evidence of nonexistence of cause of action or ground for arrest, 52
 - Order of arrest not vacated on conflicting affidavits, 52
 - Order vacated only where plaintiff has no cause of action, 52
 - Unauthorized arrest, 50
 - Where arrest was authorized, 50
- Discretion of court:**
 - English debtors act, 38
- Discretion of court to grant order of arrest, 36
- Divorce, 21
- Election of remedies, 18**
 - Actions founded on tort growing out of contract, 18
 - Alleging contract by way of inducement, 18
 - No right of arrest acquired by election to sue in tort, 18
 - Waiver of right of arrest, 47
- Elections:**
 - Privilege of electors, 39
- English debtors act, 36**
 - Arrest of defendant about to quit England, 37
 - Arrest upon mesne process, 37
 - Default by attorney or solicitor, 38
 - Default by trustee or person acting in fiduciary capacity, 37
 - Discretion of court, 38
 - In general, 36
 - Married women, 37
- Equitable actions, 18
- Escape:**
 - Second arrest, 56
- Ex delicto, see infra, TORT.*
- Execution against the person, 48**
 - Actions of tort, 48
 - Death of debtor in custody, 50
- Discharge, 52**
 - On payment of judgment debt, 52
- Discharge by attorney, agent, or officer, 54**
 - Attorney, 54
 - In general, 54
 - Officer, 54
- Discharge with consent of plaintiff, 53**
 - Common-law rule, 54
 - Discharge of one of several defendants, 53
 - Effect of contrary agreement between parties, 53
 - Intention of plaintiff, 53
 - No satisfaction where discharge is without plaintiff's consent, 54
 - Satisfaction of judgment, 53
 - Voluntary return to imprisonment, 53
- Effect of execution, 49
- Effect of execution on judgment lien, 50
- Ejectment, 48
- Execution against one of several defendants, 50
- Execution for costs, 49
- Fraud, 49
- Grounds for execution, 48
- In general, 48
- Proceedings under bankruptcy laws, 49
- Replevin, 48
- Satisfaction of judgment, 53
- Satisfaction of judgment by execution, 49
- Set-off, 49
- Trover and conversion, 48

IMPRISONMENT FOR DEBT, ETC., *con.***Execution against the person, *cont'd.***

Where defendant could not have been arrested before judgment, 49

Exemption, see *infra*, **PRIVILEGE FROM ARREST**.

Extradition:

Defendant privileged from arrest, 42

Factors, 29

False representations, see *infra*, **FRAUD**.

Fiduciary, 28

Agent, factor, or broker, 29

English debtors act, 37

Fraud in a fiduciary capacity, 28

Meaning of the term "fiduciary," 28

Fines, 33**Fraud, 22**

Agent, 25, 29

Arrest in action of fraud and deceit, 22

Bankers, 30

Brokers, 29

Concealment or disposal of property, 26

Constitutional provisions, 14

Creditors, 26

Debt contracted by false representation, 23

Del credere agency, 30

Disposing of property with intent to defraud creditors, 26

Execution against the person, 49

Extension of time, 26

Factors, 29

False representations as to solvency, 24

Fiduciary, 28

Fraud by agent or copartner, 25

Fraud committed after debt was contracted, 23

Fraud committed in another state, 30

Fraud in avoiding payment of debt, 25

Fraud in contracting debt, 23

Fraud in fiduciary capacity, 28

Fraudulent disposal of property in different jurisdictions, 27

Fraudulently disposing of property purchased for cash without making payment, 24

Fraudulently procuring extension of time of payment, 25

Fraudulent purchase, 24

Generally, 22

Intent to defraud, 27

Nonresident debtor coming temporarily into the state, 27

Partner, 25

Payment by worthless post-dated check, 25

Removal of debtor from state, 27

Scienter as to representations of solvency, 24

Vendee concealing his insolvency, 24

What is fraudulent disposal of property, 26

Fraudulent sales and conveyances, 26

In actions to recover chattel where property has been fraudulently disposed of, 32

Frecholders privileged from arrest, 43

Grounds of arrest and imprisonment, 20

Assault and battery, 20

Bastardy cases, 31

Breach of promise of marriage, 32

Clear proof required, 36

Conflict of laws, 35

Contempt, 31

Criminal conversation, 20

Death by wrongful act, 21

IMPRISONMENT FOR DEBT, ETC., *con.***Grounds of arrest and imprisonment, *cont'd.***

Discretion of court to grant order of arrest, 36

Disobedience to orders of court, 31

Divorce, 21

Enticing away plaintiff's husband, 20

False imprisonment, 21

Fraud, see *infra*, **FRAUD**.

Generally, 20

In actions to recover chattel where property has been fraudulently disposed of, 32

Injuries to person or character, 20

Injuries to property, 21

Injury to real property, 22

Libel, 21

Malicious prosecution, 20

Misconduct or neglect in office, 30

Misconduct or neglect in professional employment, 30

Nonpayment of costs, 33

Nonpayment of fines and penalties, 33

Nonresident defendant, 33

Professional men, 30

Public officers, 30

Refusal to make judicial abandonment, 20

Seduction, 20

Slander, 21

Impairment of obligation of contract, 17

Infants:

Privilege from arrest, 43

Insanity:

Privilege of insane persons from arrest, 43

Insolvency and bankruptcy:

Effect of discharge in bankruptcy, 29

Judges:

Privilege from arrest, 40

Judgment (see *infra*, **EXECUTION AGAINST THE PERSON):****Effect of judgment, 19**

Causes of action reduced to judgment are debts, 19

Domestic judgment a merger, 19

Judgments in tort not debts in constitutional sense, 19

Right of arrest not affected by foreign judgment, 19

Jury and jury trial:

Privilege of jurors, 40

Laches:

Privilege from arrest, 46

Legislature:

Privilege of legislators, 39

Libel and slander, 21

Malicious prosecution, 20

Married women:

Privilege from arrest, 44

Military law:

Privilege of soldiers, 39

Militia:

Imprisonment for militia fines, 15

Misrepresentation, see *infra*, **FRAUD**.

Ne exeat, 18

Nonresident, 33

Ontario, 35

Parties:

Codefendant privileged from arrest, 45

Parties privileged from arrest, 40

Extradition proceedings, 42

In what tribunals, 40

Partnership, 29

Partner not liable to arrest for fraud of copartner, 25

IMPRISONMENT FOR DEBT, ETC., *con.*

- Penalties, 33
- Policemen privileged from arrest, 39
- Private international law**, 35
 - Fraud committed in another state, 30
- Privilege from arrest**, 38
 - Action for false imprisonment, 46
 - Attorneys at law, 43
 - Codefendant, 45
 - Debtor brought into jurisdiction by fraud, 45
 - Defendant under extradition proceedings, 42
 - Duration of privilege, 39
 - Electors, 39
 - Extension of the privilege to codefendant, 45
 - False imprisonment, 46
 - Federal officers, 39
 - Freeholders, 43
 - Infants, 43
 - Insane persons, 43
 - Judges, 40
 - Jurors, 40
 - Legislators, 39
 - Married women, 44
 - Members of the royal household, 38
 - Parties to suit, 40
 - Persons in attendance upon court, 40
 - Persons privileged, 38
 - Persons under disability, 43
 - Policemen, 39
 - Sailors, 39
 - Sheriffs, 40
 - Soldiers, 39
 - Statutes exempting women from arrest, 44
 - Waiver of exemption, 45
 - What constitutes waiver of exemption, 45
 - Witnesses, 42
 - Women, 43
- Property** :
 - Conversion of property, 22
 - Injuries to property, 21
 - Unlawful detention of property, 22
 - Whether word "property" includes real property, 22
- Public officers** :
 - Misconduct or neglect in office, 30
 - Privilege from arrest, 39
- Real property, injuries to, 22
- Residence, 33
- Right of arrest as determined by nature of action** (see *infra*, **GROUND OF ARREST AND IMPRISONMENT**):
 - Actions arising out of contract, 17
 - Actions founded on tort, 17
 - Effect of assignment, 20
 - Effect of judgment, 19
 - Election of remedies, 18
 - Equitable actions, 18
- Satisfaction of judgment*, see *infra*, **EXECUTION AGAINST THE PERSON**.
- Seamen** :
 - Privilege from arrest, 39
- Second arrest**, 55
 - Discharge on security, 56
 - Escape, 56
 - For same cause of action, 55
 - Reinstatement of order of arrest, 55
 - Second arrest *prima facie* vexatious, 56
 - When not vexatious, 55
 - Whether second arrest is vexatious dependent upon circumstances of the case, 56

IMPRISONMENT FOR DEBT, ETC., *con.*

- Seduction**, 20, 32
 - Seduction by fraudulent promise of marriage, 32
 - Set-off** :
 - Execution against the person, 49
 - Sheriffs** :
 - Privilege from arrest, 40
 - Statutory provisions**, 15
 - Claims by United States, 16
 - Constitutionality, 16
 - Effect of statutes on obligation of contracts, 17
 - Federal statute, 15
 - Generally, 15
 - Imprisonment of defendant in admiralty cases, 16
 - No arrest except as prescribed by statute, 16
 - Statutes authorizing imprisonment for contempt, 17
 - Statutes construed strictly, 16
 - Surrender of property**, 15
 - Tort** :
 - Actions founded on tort, 17
 - Arrest in action of tort only where special cause shown, 18
 - Election of remedies, 18
 - Trover and conversion**, 22
 - Execution against the person, 48
 - Vexatious arrest*, see *infra*, **SECOND ARREST**.
 - Waiver of exemption from arrest**, 45
 - Generally, 45
 - Laches, 46
 - What constitutes waiver, 45
 - Waiver of right of arrest**, 46
 - Generally, 46
 - Joinder of causes of action, 47
 - Waiver by election, 47
 - Who may exercise right of arrest**, 46
 - General rule, 46
 - Nonresidents, 46
 - Partners, 46
 - Plaintiff must have present right to bring actions, 46
 - Right of action must exist in favor of plaintiff and not of third person, 46
 - Witnesses**, 42
 - Prosecuting witness, 42
 - Whether subpoena necessary to entitle witness to protection, 42
 - Witnesses privileged from arrest, 42
 - Witness voluntarily attending privileged, 42
 - Women** :
 - Privilege from arrest**, 43
 - At common law, 43
 - Discharge on motion, 44
 - Married woman, 44
 - Statutes exempting females from arrest, 44
- IMPROPER**, 57
- Mobs, 57
- IMPROVE**, 57
- IMPROVED LAND**, 59
- IMPROVEMENTS**, 57, 62
- Actions*, see *infra*, **METHODS OF OBTAINING COMPENSATION FOR IMPROVEMENTS**.
 - Adverse claim*, see *infra*, **NOTICE**.

IMPROVEMENTS, *cont'd.***Adverse possession:**

Necessity for adverse character of occupancy,
82

Exception to the rule, 83

Presumption against change of character of possession, 83

Rule stated, 82

What constitutes adverse possession, 83

Against whom compensation will be allowed,
100

Dowress, 102

Improvements made before plaintiff's title accrued, 101

Indian owner, 101

Infant owner, 101

Person entering land without judgment and withholding possession, 101

Person recovering land, 101

Purchaser of school lands, 101

Right to possession must be established,
101

The state, 100

Betterment, 66

Bona fide occupant (see *infra*, STATUTORY PROVISIONS ALLOWING COMPENSATION; WHAT OCCUPANTS ARE ENTITLED TO COMPENSATION):

Right to improve, 69

Color of title, 79

Color of title arising from written instrument, 81

Color of title arising in absence of written instrument, 82

Improvements made before acquiring color of title, 80

Meaning of the term, 81

Necessity for color of title, 79

Occupant not required to show a complete chain of title, 80

What may constitute color of title, 81

Common-law doctrine, 66

Common-law rule modified, 68

Compensation (see *infra*, AGAINST WHOM COMPENSATION WILL BE ALLOWED; MEASURE OF COMPENSATION FOR IMPROVEMENTS; METHOD OF OBTAINING COMPENSATION FOR IMPROVEMENTS; NOTICE; STATUTORY PROVISIONS ALLOWING COMPENSATION; WHAT OCCUPANTS ARE ENTITLED TO COMPENSATION):

Equitable rule, 67

For what improvements compensation will be allowed, 100

Growth of the doctrine, 66

Original common-law rule, 66

Right of *bona fide* occupant to compensation, 69

Right of *bona fide* purchaser, 69

Rule adopted in courts of law, 68

Universal recognition of right to compensation, 69

Whether a complainant may obtain relief, 68

Complainant's right to improve, 68

Constitutional law:

Constitutionality of statutes allowing compensation, 71

Authorizing general money judgment for improvements, 72

Failure to discriminate between innocent and tortious possession, 73

General rule, 71

IMPROVEMENTS, *cont'd.*

Constitutional law, *cont'd.*

Constitutionality of statutes allowing compensation, *cont'd.*

Giving occupying claimant option to retain on paying unimproved value, 72

Provisions rendering statutes unconstitutional, 72

Requiring payment or tender of payment for improvements before bringing suit for property, 73

Retroactive statutes, 72

Constructive notice, 88

Costs:

Who liable for costs of sale of part of land to pay for improvements, 108

Cotenants, see JOINT TENANTS AND TENANTS IN COMMON.

Damages, see *infra*, MEASURE OF COMPENSATION FOR IMPROVEMENTS.

Definition (see *infra*, GENERAL RULE AS TO WHAT CONSTITUTES IMPROVEMENTS), 66

Descent:

Claim founded on descent, 90

Dowress, 102

Ejectment, 103

Election of owner as to taking land or receiving unimproved value, 106

Adjustment where both owner and occupant decline to pay, 107

Rule stated, 106

Tenancy in occupant, 107

Time with reference to which value of land should be computed, 106

Equitable doctrine, 67

Escheat, 103

Estoppel:

When owner of property is estopped to dispute claim for improvements, 102

Fixtures, 66

Forfeiture of claim for improvements, 110

For what improvements compensation will be allowed, 100

Improvements must belong to person claiming compensation, 100

Improvements placed on land by grantor or predecessor in title of occupant, 100

General rule as to what constitutes improvements, 73

Additions must have become a part of the realty, 73

Burden of proof, 75

Illustrations of additions held to be improvements, 74

Repairs, 75

Rule stated, 73

Value of land must be increased, 73

Gifts:

Agreement or promise to donate, 95

Donation void for want of form, 95

Parol gift, 95

Rights of donees, 95

Good faith (see *infra*, WHAT OCCUPANTS ARE ENTITLED TO COMPENSATION), 110

Joint tenants and tenants in common, 113, 115

Growth of the doctrine of compensation, 66

Highway, 99

Husband and wife, 122

As between the parties, 122

Creditors, 123

Husband holding land conveyed to wife,
99

IMPROVEMENTS, *cont'd.***Husband and wife, *cont'd.***

- Husband not entitled to compensation, 122
- View that compensation should be allowed, 123
- View that no compensation should be allowed, 122

- Illustrations, 74, 75

Indians:

- Indian owner holding under treaty stipulation, 101

Infants:

- Infant owner, 101

Insanity:

- Allowance of improvements, 591
- Conversion and reconversion, 589

Interest, 79**Joint tenants and tenants in common, 111**

- Allowance for improvements may be made in partition, 111
- Allowance out of proceeds of sale of property, 116
- Assent of cotenants not necessary, 112
- Assigning an increased quantity of land to maker of improvements, 116
- Assignment of improved portion preferred when practicable, 113
- By assigning improved portion of property to maker of improvements, 112
- Consent of cotenants, 114
- Distinction depending upon knowledge of title of cotenants, 112
- Distinction depending upon whether improving tenant is plaintiff in partition, 114
- Exclusive title in claim, 115
- Exclusive title not claimed by cotenant making improvements, 113
- Good faith, 115
- Good faith of cotenant in making improvements, 113
- How the allowance is made, 112
- Improvements by grantee of original cotenant, 113
- Improvements made by tenants in common in reversion during the previous life estate, 112
- Improvements made for his own benefit by tenant in common in sole possession, 111
- Injury to other cotenants, 113
- Rents and profits may be set off against improvements, 117
- Requiring payment of compensation by other cotenants, 114
- Right to allowance therefor, 111
- Right to have improved portion set off recognized, though right to pecuniary compensation denied, 114
- Setting off improvements against rents and profits, 116

Judicial sales:

- Rights of purchasers at judicial sale, 94
- Execution sale subject to debtor's right of homestead exemption, 95
- General rule, 94
- Redemption from foreclosure sale by junior incumbrancer, 95
- Sale under junior lien, 95
- Want of jurisdiction in court ordering sale, 94

Landlord and tenant, 110, 117

- Acquiescence of remainderman or reversioner, 118

IMPROVEMENTS, *cont'd.***Landlord and tenant, *cont'd.***

- Completion by tenant for life under a will of improvements begun by testator, 119
- Exception to the rule, 118
- General rule, 117
- Improvements by life tenant furnish no ground for compensation, 117
- Lessees, 118
- Purchasers, 118
- Reason of the rule, 118
- Where person making improvements claims absolute title, 118

Leases, 110**Lessees, 110****Life tenant, see *infra*, REMAINDERS AND REVERSION.****Limitation of actions, 104****Measure of compensation for improvements, 75**

- Deterioration after ouster of occupant, 78
- Enhancement of vendible value, 77
- General rule, 75
- Method of ascertaining enhancement of value, 77
- Occupant entitled to compensation to extent that actual value of land has been enhanced, 76
- Rule restricting compensation to value of rents and profits, 78
- Time with reference to which compensation should be computed, 77
- Value of improvements not the measure of compensation, 76
- Whether allowance may exceed actual cost of improvements, 78

Methods of enforcing payment for improvements, 104

- Adjustment where both owner and occupant decline to pay, 107
- Election of owner as to taking land or receiving unimproved value, 106
- Extinguishment of right of occupant by failure to pay unimproved value, 107
- Extinguishment of title of owner by failure to pay for improvements, 107
- Lien of occupant for improvements, 104
- Power of court to extend time for payment for improvements, 106
- Right of occupant to retain land after assessment of compensation, 105
- Right of occupant to retain land during pendency of proceedings for compensation, 105
- Right of occupant to retain land until payment for improvements, 105
- Time with reference to which value of land should be computed, 106
- Use of land by occupant while retaining possession, 106
- Who liable for costs of sale of part of land to pay for improvements, 108

Methods of obtaining compensation for improvements, 102

- Action not seeking recovery of possession, 103
- Actions and proceedings in which improvements may be claimed, 103
- Action to set aside land patent for fraud, 103
- By interposing claim in possessory action, 102
- Direct proceedings, 103
- Ejectment, 103

IMPROVEMENTS, *cont'd.***Methods of obtaining compensation, *cont'd.***

- Escheat, 103
- In what court action for improvements should be brought, 104
- Limitation of actions, 104
- Right to set off improvements where rents and profits or damages are claimed, 102
- Right to set off improvements where rents and profits or damages are not claimed, 103
- Set-off in possessory action as a bar to direct proceeding, 104
- Time of making claim when proceeding is a continuation of possessory action, 103
- Trespass to try title, 103
- Where owner has obtained possession without legal proceedings, 104

Mistake, 90

- Occupants holding through mistake as to identity of land, 98

Mortgages:

- Improvements by mortgagee in possession, 120**
 - Belief of mortgagee that he has acquired complete title, 120
 - Canada, 121
 - England, 121
 - In the United States, 120
 - Rents and profits, 121
 - When compensation may be allowed, 120
- Improvements by mortgagors, 119**
 - Covenant in mortgage for allowance, 120
 - Mortgagor not entitled to compensation as against mortgagee, 119
 - Purchaser from mortgagor, 119

Notice of adverse claim, 86

- Actual notice, 88
- Constructive notice arising from record of adverse title, 88
- Lack of diligence, 88
- Mistake of law, 90
- Occupant must have been ignorant that his title was contested, 87
- Occupant must have believed that there was no adverse claim, 86
- Occupant not entitled to compensation for improvements made after notice of adverse claim, 87
- Purchase *pendente lite*, 88
- When good faith and notice of adverse claim may coexist, 89

Occupancy, see *infra*, POSSESSION.**Occupants, see *infra*, WHAT OCCUPANTS ARE ENTITLED TO COMPENSATION.****Parol donees, 95****Parol vendees, 95****Partition, see *infra*, JOINT TENANTS AND TENANTS IN COMMON.****Payment, see *infra*, METHODS OF OBTAINING COMPENSATION FOR IMPROVEMENTS.*****Pendente lite*, purchase, 88****Possession:**

- Person entering land without judgment and withholding possession, 101
- Possession for at least one year, 91
- Requirement of actual occupancy or possession, 92
- Requirement of peaceful possession, 93
- Right of occupant to retain land until payment for improvements, 105
- Right to possession must be established, 101
- Six years' possession, 97

IMPROVEMENTS, *cont'd.***Public authority:**

*Rights of purchasers at judicial sale, see *infra*, JUDICIAL SALES.*

*Rights of purchasers at tax sale, see *infra*, TAX SALES.*

Title derived from public authority, 90

Public grounds, 90, 91

Public lands, 90, 93

Purchaser of school lands, 101

Question of law and fact:

Good faith, 90

Recording acts, 88

Records:

Constructive notice arising from record, 88

Record title, 91

Remainders and reversion, 117

Acquiescence of remainderman or reversioner, 118

Completion by tenant for life under a will, of improvements begun by testator, 119

Exceptions to the rule, 118

General rule, 117

Improvements by life tenant furnish no ground for compensation, 117

Lessees, 118

Purchasers, 118

Reason of the rule, 118

Where person making improvements claims absolute title, 118

Repairs, 59, 75

*Reversion, see *infra*, REMAINDERS AND REVERSION.*

*Sales, see *infra*, VENDOR AND PURCHASER.*

School lands, 101

Set-off, 108

Improvements must be made in good faith, 110

In direct proceedings for compensation, 108

Joint tenants and tenants in common, 116, 117

Mesne profits prior to entry of occupant, 109

Period for which rents and profits may be set off, 109

Right to set off improvements, 102

Set-off and possessory action as a bar to direct proceeding, 104

Setting off rents and profits against claim for improvements, 108

Where rents and profits are claimed, 102

Where rents and profits are not claimed, 103

Whether rent can be charged on value of property as improved, 109

State:

Against whom compensation will be allowed, 100

Title derived from public authority, 90

*Statutes, see *infra*, WHAT OCCUPANTS ARE ENTITLED TO COMPENSATION.*

Statutory provisions allowing compensation, 70

Constitutionality of statutes, 71

Authorizing general money judgment for improvements, 72

Failure to discriminate between innocent and tortious possession, 73

General rule, 71

Giving occupying claimant option to retain land on paying unimproved value, 72

Provisions rendering statutes unconstitutional, 72

IMPROVEMENTS, *cont'd.***Statutory provisions allowing compensation, *con.*****Constitutionality of statutes, *cont'd.***

Requiring payment or tender of payment for improvements before bringing suit for property, 73

Retroactive statutes, 72

Extent to which rights of occupying claimants are enlarged, 70

General adoption, 70

Tax sales:**Rights of purchasers at, 93**

Belief in integrity of title not necessary, 94

General rule, 93

Improvements made after tender by one entitled to redeem, 94

Improvements made before expiration of time allowed for redemption, 94

*Tenants in common, see infra, JOINT TENANTS AND TENANTS IN COMMON.**Title, see infra, COLOR OF TITLE.*

Extinguishment of title of owner by failure to pay for improvements, 107

Title derived from public authority, 90

Trespasser, 80, 99

Trespass to try title, 103

Universal recognition of right to compensation, 69*Bona fide* occupant, 69

Right not dependent upon statute, 69

Vendor and purchaser:**Rights of vendees under contract of sale, 96**

At equity, 96

At law, 96

Inability of vendor to make good title, 97

Part performance of contract, 98

Where contract was contingent merely, 98

Where vendee fails to carry out old contract, 97

Where vendor is responsible for nonfulfilment of contract, 96

Waiver of claim for improvements, 110**What occupants are entitled to compensation, 79**

Agreement or promise to donate, 95

Color of title, 79

Color of title arising from written instrument, 81

Color of title arising in absence of written instrument, 82

Donation void for want of form, 95

Donees, 95

Erroneous survey, 98

General requisites as to occupancy, 79

Gifts, 95

Husband holding land conveyed to wife 99

Improvements made before acquiring color of title, 80

Meaning of color of title, 81

Necessity for adverse character of occupancy, 82

Exception to the rule, 83

Presumption against change of character of possession, 83

Rule stated, 82

What constitutes adverse possession, 83

Necessity for color of title, 79**Necessity for good faith in occupant, 84**

Constructive notice, 88

Deed void on its face, 86

IMPROVEMENTS, *cont'd.***What occupants entitled to compensation, *cont'd.*****Necessity for good faith in occupant, *cont'd.***

Effect of notice of adverse claim on question of good faith, 86

Existence of good faith question for jury, 90

Hope of purchasing land, 86

Knowledge of lack of title, 85

Knowledge that vendor has no title, 86

Notice of adverse claim, 87

Occupant must have been ignorant that his title was contested, 87

Presumption of good faith, 86

Purchase *pendente lite*, 88

Rule stated, 84.

Title which occupant does or ought to know to be defective, 85

What is meant by good faith, 85

When good faith and notice of adverse claim may coexist, 89

Occupant not required to show a complete chain of title, 80

Occupants holding through mistake as to identity of land, 98

Occupants of public lands, 93

Parol donees, 95

Parol gift, 95

Parol vendees, 95

Peaceful possession, 93

Public lands, 93

Purchasers at judicial sale, see infra, JUDICIAL SALES.

Requirement of actual occupancy or possession, 92

Requirements under particular statutes, 90

Claim founded on descent or any written instrument, 90

Eviction by title both paramount and adverse, 92

Introduction, 90

Occupant dispossessed by legal proceedings, 92

Possession for at least one year, 91

Purchaser of supposed title in fee, 92

Record title, 91

Six years' possession, 91

South Carolina statutes, 92

Title derived from public authority, 90

Rights of purchasers at tax sale, 93

Tax sale, 93

Trespasser, 80, 99

Vendees under contract of sale, see infra, VENDOR AND PURCHASER.

What may constitute color of title, 81

Written instruments:

Claim founded on descent or any written instrument, 90

IMPROVIDENCE, 123**IMPUNITIVE, 123****IMPUNITY, 123****IMPUTABLE NEGLIGENCE, 123****IN, 123**

About, 124

At, 125

Payment, 124

INABILITY, 131**INACCURATE, 131****INADEQUATE, 131**

INADEQUATE DAMAGES, 131**INADVERTENCE, 131****INAPPRECIABLE, 132****IN BEING :**

Conception, see infra, COMMENCEMENT AND DURATION OF INFANCY.
Infants, 258

INBOARD, 132**INCAPABLE, 132****INCAPACITATED, 132****INCAPACITY, 132****IN CASE OF OR IN EVENT OF DECEASE, 126****INCENDIARISM, 132****INCEPTION, 133****INCEST, 134****Admissions :**

To show relationship, 140

Assent, see infra, CONCURRENT ASSENT OF PARTIES.

Attempt, 141

Bastardy, 137

Carnal knowledge, 136

Character in evidence, 140

Character of defendant, 140

Character of prosecutrix, 140

Former conduct of defendant as showing character, 140

Common law, 135

Concurrent assent of both parties :

Consent of female inoperative, 135

Female under age of consent, 135

Guilt of both parties unnecessary, 135

In general, 135

Confessions, 138

Sufficiency, 141

Definition, 134

Emissio seminis, 136

Essential elements, 135

Assent of parties, see infra, CONCURRENT ASSENT OF PARTIES.

The act, see infra, THE ACT.

The relationship, see infra, RELATIONSHIP.

Evidence, 138

Admissibility to prove the act, 138

Admissions to show relationship, 140

Confessions, 138

In general, 138

Other acts of familiarity or illicit intercourse, 139

Previous acts of actual intercourse, 139

Prior acts between the parties, 139

Reputation to show relationship, 140

Sexual acts with third parties, 139

Subsequent acts between the parties, 139

Sufficiency, 140

Confessions of accused, 141

In general, 140

Testimony of prosecutrix, 141

To show character, 140

To show relationship, 140

Half blood, 137

Illegitimacy of one of the parties, 137

Knowledge of relationship, 138

Limitation of actions, 139

INCEST, *conf'd.***Marriage, 136**

Attempt to commit incestuous marriage, 142

Cohabitation as man and wife sufficient, 136

Incestuous marriage, 134

Incestuous marriage in general, 136

Incest without marriage, 134

Intermarriage without carnal knowledge, 136

Punishment, 141

Rape, 135

Relationship, 136

Blood relationship not essential, 137

Brothers and sisters, 137

Cousins, 137

Evidence, 140

Admissions of the defendant, 140

In general, 140

Reputation, 140

Father and daughter, 136

Half blood relationship, 137

In general, 136

Intercourse between father and illegitimate daughter, 137

Knowledge of relationship, 138

Marrying brother's widow, 136

Step-father and step-daughter, 137

Step-mother and step-son, 137

Uncle and niece, 137

Reputation to show relationship, 140

Solicitation, 141

Statutory crime, 135

The act, 125

Carnal knowledge, 136

Cohabitation as man and wife, 136

Emissio seminis, 136

Intermarriage without carnal knowledge, 136

Marriage, 136

Penetration, 136

Single act sufficient, 135

INCESTUOUS ACTS, *see infra, THE ACT.*

INCH, 142**IN CHARGE, 127****INCHOATE, 142****INCIDENT, 142****INCIDENTAL, 142****INCIDENTAL POWER, 144****INCIDENTAL SERVICES, 143****INCITE, 144****INCLOSE, 144****INCLOSURE, 144**

Impounding, 144

INCLUDE, 146**INCLUSIVE, 146****INCLUSIVE LEGACY, 147****INCOMBUSTIBLE, 147****INCOME, 147**

Annuity, 148

Earnings, 151

Net income, 147

Proceeds, 150

Profits and income distinguished, 150

INCOME, *cont'd.*

Revenues, 151
 Royalty, 151
 Salary, 151
 Stock, dividends, surplus, 151

Wills:

Devise of income, 148

INCOME TAX, 152**IN COMMON, 127****INCOMPATIBLE, 152****INCOMPETENCY, 153**

Fellow-servant, 153
 Malpractice, 153
 Master and servant, 153
 Removal of veterans, 153

INCOMPETENT, 153**INCONSISTENCY, 154****INCONSISTENT CONDUCT, 154****INCONTROVERTIBLE, 154****INCORPORATE, 154****INCORPORATED, 154****INCORPORATION, 154****INCORPOREAL, 154****INCORPOREAL HEREDITAMENTS, 155****INCORPOREAL PROPERTY, 155****INCREASE, 156****INCREASE OF LIVE STOCK, 156****INCRIMINATING, 157****INCRIMINATION OF SELF, 157****INCUPLATING, 157****INCUMBENT, 157****INCUMBER, 158****INCUMBRANCE, 158**

Building restrictions, 158
 Indemnity contracts, 176
 Judgment, 159
 Mechanics' liens, 159
 Mortgages, 159
 Street railroads, 160
 Tax sale, 160
 Voluntary and involuntary, 160

INCUMBRANCER, 161**INCUR, 161****INCURABLE, 162****INCURRED, 161****IN CUSTODIA LEGIS, 127****IND., 162****INDEBTED, 162****INDEBTEDNESS, 162**

Attachment, 162, 163
 Definite liability, 163
 Due or to become due, 162
 Involuntary debts, 163
 Subscriptions, 164
 Unpaid stock, 164

INDEBTEDNESS IN WRITING, 164**INDECENCY, 163****INDECENT, 165****INDECENT EXPOSURE, 165****INDECENT LANGUAGE, 165****INDECENT PUBLICATIONS, 165****INDECOROUS, 165****INDEFINITE, 165****INDELICACY:**

Inspection and physical examination, 819

INDEMNIFY, 166**INDEMNITOR, 168****INDEMNITY, 166****INDEMNITY CONTRACTS (see INSURANCE), 167**

Actual losses, see infra, BREACH.

Attorney's fees, 182

Bail:

Indemnity to bail, 172

Breach, 176

Conclusive and *prima facie* evidence, 180

Consent judgment, 177

Contract to do a particular act, 179

Evidence, 180

Indemnitee must have fully performed his part of contract, 177

In general, 176

Judgment by default, 177

Voluntary payments by indemnitee, 177

What constitutes a payment by indemnitee, 177

Whether indemnitee must have suffered actual loss or damage, 178

Affirmative view, 178

Best rule, 178

Equitable right to relief before actual loss, 179

Incurring of liability sufficient, 178

Negative view, 178

Whether actual loss or damage is necessary, 178

Whether notice to indemnitor of suit against indemnitee is necessary, 180

Confession of judgment, 177

Consideration, 172

Becoming surety a sufficient consideration for undertaking to indemnify surety, 172

Future consideration, 173

Necessity, 172

Past consideration, 173

Sufficiency, 172

Construction, 173

Contracts binding indemnitors both individually and as trustees, 175

Contracts construed as prospective, 175

Covenant of indemnity cannot be restricted by recitals, 175

Duration of the contract, 176

Indemnity against certain specified claims, 175

Indemnity against costs extends to costs of defending groundless suit, 174

Indemnity against incumbrances, 176

Indemnity against negligence of indemnitor, 174

Indemnity extending to renewal of original liability, 175

INDEMNITY CONTRACTS, *cont'd.***Construction, *cont'd.***

Indemnity to sureties on bond to answer indictment for criminal offense, 175

In general, 173

Liability of indemnitee to third persons not increased, 176

Losses, damages, and liabilities covered by indemnity, 173

Losses, damages, and liabilities not covered by indemnity, 174

Past advances and existing liabilities, 175

To whose benefit contract of indemnity inures, 176

Contribution and exoneration, 183

Costs, 181

Covenants:

Incumbrances, 176

Damages, *see infra*, BREACH; MEASURE OF RECOVERY.

Defaults, 177

Defenses, 182

Indemnity to officer of corporation for indorsing notes, 183

In general, 182

Definition, 168

What constitutes, 168

Deposits for indemnity, 183

Discharge of indemnitor, 183

Duration of the contract, 176

Evidence, 180

Examples, 168

Expiration of the contract, 176

Frauds, *statute of*, *see infra*, STATUTE OF FRAUDS.

Fulfillment of the contract, 176

Guaranty distinguished from, 168

Illegal contracts, 170

Act believed to be legal and performed under claim of right, 171

Act known to be illegal, 170

Act not believed to be illegal, 171

Act performed before indemnity given, 172

Apparently legal act which proves to be a trespass, 171

Contract of indemnity against consequences of illegal act, 171

Indemnity against consequences of illegal act, 170

Indemnity given by prisoner illegal, 172

Indemnity to bail, 172

Promise of indemnity unconnected with illegal act, 171

Publication of libelous article, 171

When promise of indemnity is implied, 172

Incumbrances, 176

Indemnitee, 168

Indemnitor, 168

Interest, 181

Interpretation, *see infra*, CONSTRUCTIONS.

Joint or several liability of indemnitors, 182

Agreement purporting to be joint, 182

Separate agreement of indemnity, 182

Libel and slander:

Publication of libelous article, 171

Losses, *see infra*, BREACH.

Measure of recovery, 181

Attorney's fees, 182

Costs, 181

Expenses of litigation, 181

In general, 181

Interest, 181

INDEMNITY CONTRACTS, *cont'd.***Mortgages:**

Description of debt or obligation indemnified against, 184

Indemnity mortgages, 183

Nature, 168

Payments:

Voluntary payments by indemnitee, 177

What constitutes a payment by indemnitee, 177

Protection not resulting from act of indemnitor, 176

Statute of frauds, 169

Suretyship, *see infra*, CONSTRUCTION.

Suretyship distinguished from, 168

Validity, 170

Act known to be illegal, 170

Act not believed to be illegal, 171

Indemnity against consequences of illegal act, 170

Indemnity to bail, 172

In general, 170

What constitutes, 168

INDENT, 184**INDENTURE, 184****INDEPENDENT, 184****INDEPENDENT CONTRACTORS, 186**

Adjoining owners, 200

Appliances, defective, 205

Blasting, 208

Canal companies, 199

Care of passengers, 199

Contractor's liability, 209

After completion of work, 209

In general, 209

Crossings, 199

Defective appliances, 205

Definition, *see infra*, WHO ARE INDEPENDENT CONTRACTORS.

Delegation of charter powers, 203

Legal duties not transferable, 197

Discharge, liability to, 190

Drivers of vehicles, 196

Employees, control as to, 190

Employer's liability for contractor's acts (*see infra*, LEGAL DUTIES NOT TRANSFERABLE), 192

Blasting, 208

Building contracts, 194

Contract for illegal act, 203

Contract for nuisance, 197

Contracts for railroad construction, 208

Defective appliances, 205

Defective plans and specifications, 197

Delegation of charter powers, 203

Drivers of vehicles, 196

Duties imposed by contract, 204

Duties under license, 202

Excavations, 207

Frightening horses, 208

General rule, 192

Incompetent contractor, 204

Injuries arising in connection with real property, 194

Injuries to contractor's servants, 195

Injury from acts contracted for, 196

Logging contracts, 194

Mining contracts, 194

Nonliability of employer, 192

Obstructions in streets, 207

Railroad employees, 195

INDEPENDENT CONTRACTORS, *cont'd.***Employer's liability for contractor's acts, *cont'd.***

- Removing fences, 208
- Stevadore contract, 194
- Stipulations for precaution, 202
- Subcontractors, 194
- Towage contracts, 194
- Transfer of employee, 195
- Unsafe premises, 205
- Violation of ordinance, 203
- Work intrinsically dangerous or probably injurious, 201

Estoppel :

- Estoppel to assert relation, 187

Excavations in streets, 207**Fences :**

- Railroads, 199
- Removal of fences, 208
- Frightening horses, 208

Illegal contracts :

- Contract for illegal act, 203

Incompetent contractor, 204**Landlord and tenant :**

- Landlord's duty to tenant, 200

Legal duties not transferable, 197, 200

- Adjoining owners, 200
- Canal companies, 199
- Duty to guests, 200
- In general, 197
- Landlord and tenant, 200
- Master and servant, 199
- Municipal corporations, 197
- Railroad companies, 199
- Turnpike companies, 199

Liability, see *infra*, CONTRACTOR'S LIABILITY; EMPLOYER'S LIABILITY FOR CONTRACTOR'S ACTS.**License :**

- Duties under license, 202

Logs and lumber, 194**Master and servant, 199**

- Injuries to contractor's servants, 195

Mines and mining companies, 194**Municipal corporations :**

- Legal duties not transferable, 197
- Municipality held liable for defective streets, 197, 199
- Municipality held not liable for contractor's acts, 198
- Stipulations in contract, 198

Nuisances, 197**Obstructions in streets, 207****Ordinances :**

- Violation of ordinance, 203

Payments :

- Mode of payment, 189

Questions of law and fact :

- Who are independent contractors, 191

Railroads, 199

- Contracts for railroad construction, 208
- Crossings, 199
- Duty to passenger, 199
- Fences, 199
- Legal duties not transferable, 199
- Management of construction train, 208
- Transfer of employee, 195
- Trespass by contractor, 208

Real Property :

- Injuries arising in connection with real property, 194

Satisfaction of employer, 189**Servants, see *infra*, MASTER AND SERVANT; WHO ARE INDEPENDENT CONTRACTORS.****INDEPENDENT CONTRACTORS, *cont'd.*****Stevadores, 194****Streets :**

- Excavations and obstructions in streets, 207

- Municipal corporations, 197

Subcontractors, liability for acts of, 194

- Supervision and approval of work, 188

Trespass :

- Trespass by contractor, 208

Tugs and towage, 194**Turnpikes, 199****Unsafe premises, 205****Who are independent contractors, 187**

- Character of occupation, 191

- Contracts reserving control of work, 188

- Control as to scope of work, 189

- Estoppel to assert relation, 187

- General definition, 187

- Identity of officers, 187

- Mode of payment, 189

- Questions of law and fact, 191

- Right to control work, 187

- Same person servant and contractor, 187

- Supervision and approval of work, 188

- Surrender of premises, 188
- Under direction and to satisfaction of employer, 189

Working contracts, 194**INDEPENDENT COVENANT, 210****INDEPENDENTLY, 185****INDEX, 210****INDIAN LANDS, 211****INDIANS, 210, 212****Actions, 216****Adoption :**

- Adoption of whites, 216

Adverse possession, 235**Agents, 237****Alienation, see *infra*, INDIAN LANDS.****Allotments in severalty, 232****Claims for Indian depredations, 237****Commerce :**

- Regulation of commerce, 227

Criminal law :**Jurisdiction, 223**

- Crimes committed on reservation by others than Indians, 224

- Federal courts have jurisdiction when so reserved, 224

- Indian territory, 225

- In general, 223

- State courts have jurisdiction over crimes committed by Indians on reservation, 224

Definition, see *infra*, WHO ARE INDIANS.**Depredations, 237****Descent, 236****Elections, 217****Homesteads, 233****Improvements :**

- Indian owner holding under treaty stipulation, 101

Indian country, 210, 220

- Definition, 210

- Government, 221

- Indian reservations, 220

- Indian territory, 221

INDIANS, *cont'd.***Indian lands:**

- Adverse possession, 235
- Alienation of Indian lands, 233**
 - By Indian tribes, 233
 - By individual Indians, 233
- Conveyance in contravention of restraints on alienation void, 234
- Conveyance of land where there is no restraint on alienation, 235
- Effect of citizenship of allottee upon restraints on alienation, 234
- Indirect alienation, 235
- Allotments in severalty, 232
- Descent, 236
- Extinguishment of Indian title, 231
- How far subject to state laws, 235
- Hunting on Indian lands, 226
- Indian title a mere right of occupancy, 230
- Nature of Indian title, 229
- Protection of Indians, 226
- Right of United States to dispose of fee of Indian lands, 230
- Settling on Indian land, 226
- Taxation, 236
- Title of five civilized tribes, 231
- Title to land occupied by the Indian nation, 215
- Where Indian land sold ceases to be Indian country, 232

Insolvency and bankruptcy, 660

Instruction of Indians, 229

Judicial notice:

Judicial notice to tribal laws, 214

Jurisdiction, 221

- Criminal cases, 223
- Employment of military forces, 229
- Federal authority supreme, 221
- Government vested in the United States, 221

Indian traders, 228

In general, 221

Jurisdiction of federal courts in Indian territory, 222

Power of Congress over intercourse with Indian tribes, 221

President may prescribe regulations, 222

Protection of Indians, 225

Regulation of commerce with Indians, 227

Removal of persons from Indian country, 228

Return to Indian country after having been removed therefrom, 229

Sale of liquor to Indians, 228

State and territorial jurisdiction, 222

Legal status of Indians, 213

Adoption of whites, 215

As individuals, 216

Five civilized nations, 214

Generally, 213

Indian as witness, 217

In their tribal relations, 213

Judicial notice of tribal laws, 214

Laches, 217

Marriage of whites and Indians, 216

Power of self-government, 214

Right to sue and be sued, 216

Right to vote in state elections, 217

Status of particular tribes, 213

Title to the land occupied by the Indian nations, 215

Marriages:

Marriage of whites and Indians, 216

INDIANS, *cont'd.*

Officers of Indian affairs, 236

Persons of mixed blood, *see infra*, WHO ARE INDIANS.

Protection of Indians, 225

Public lands, *see infra*, INDIAN LANDS.**Public officers:**

Officers of Indian affairs, 236

Real property (*see infra*, INDIAN LANDS; TITLE OF INDIANS):

Allotments in severalty, 232

Removal of persons from Indian country, 228

Reservations, 220

Criminal jurisdiction, 224

Right of occupancy, 230

Status of Indians, *see infra*, LEGAL STATUS OF INDIANS.

Succession, 236

Taxation, 236

Title (*see infra*, INDIAN LANDS):

Extinguishment of Indian title, 231

Title of Indians, 229

Traders, 228

Treaties, 218

Indian country, 210, 220

In general, 218

Laws of the United States, 218

Treaties between states and Indians, 218

Treaties between United States and Indians, 218

Treaties construed favorably to Indians, 219

United States authority, 221

United States courts, 221, 222

Who are Indians, 217

Burden of proving condition in criminal case, 218

Half breeds, 218

In general, 217

Persons of mixed blood, 217

INDIAN TERRITORY, 221

Jurisdiction of federal courts, 222

INDICATE, 239**INDICAVIT, 239****INDICTMENTS, 239****Inns and innkeepers:**

Refusing to receive and entertain guests, 526

INDIFFERENT, 239**INDIGENT, 239****INDIGNITY, 240****INDIRECT, 240****INDIRECTLY, 240****INDISPENSABLE PARTIES, 240****INDISPUTABLE, 240****INDIVIDUAL, 240****INDOOR, 241****INDORSEMENT, 241****INDUBITABLE, 241****INDUCE, 242****INDUCEMENT, 242****IN DUE FORM, 127****INDULGENCE, 242**

INDUSTRIAL, 242
INDUSTRIAL SCHOOLS, 242
INDUSTRY, 242
INEBRIATE, 242
INEFFECTUAL, 242
INELIGIBLE, 242
INEQUALITIES, 242
INEVITABLE ACCIDENT, 242
 Insanity, 623
INEVITABLE ACCIDENT OR CASUALTY, 242
INFAMOUS, 244
INFAMY AND INFAMOUS CRIMES, 245
 Constitutional law, 245
 As affecting criminal procedure under federal constitution, 253
 Conviction in another jurisdiction, 250
 Definitions, 245
 Disqualification of witness, *see infra*, WITNESSES.
 Divorce, 253
 Elections, 253
 Fifth amendment, 253
 Judgment:
 Necessity of, 248
 Reversal of judgment, 252
 Jury and jury trials, 252
 Pardon, 250
 Conditional pardon, 251
 Conviction may be proved after pardon, 251
 Effect of pardon after endurance of punishment, 250
 Effect of pardon where disability annexed to crime by statute, 251
 In general, 250
 Mere remission or commutation of punishment, 251
 Pardon prior to conviction, 250
 Proof of pardon, 252
 Removal of disqualification, 250
 Public officers, 253
 Self-crimination, 249
 Sentence:
 Necessity of sentence, 248
 Reversal of sentence, 252
 Serving out sentence, 252
 Suffrage, 253
 United States courts:
 As affecting criminal procedure under federal constitution, 253
 Witnesses, 246
 Abolition of common-law rule by statute, 252
 Conditional pardon, 251
 Effect of conviction in another jurisdiction, 250
 Effect of pardon where disability annexed to crime by statute, 251
 Infamy determined by crime and not by punishment, 247
 Mere remission or commutation of punishment, 251
 Mode of proof of conviction, 249
 Pardon, 250
 Proof of pardon, 252
 Removal of disqualification, 250

INFAMY AND INFAMOUS CRIMES, *con.*
 Witnesses, *cont'd.*
 Right of witness to refuse to testify as to his infamy, 249
 Self-crimination, 249
 Sentence of minor to house of refuge, 248
 Sentence or judgment as prerequisite to disqualification, 248
 Serving out sentence, 252
 Statutory enumeration of infamous crimes, 247
 What crimes are infamous, 246
INFANTICIDE, 254
INFANTS, 255
 Age, *see infra*, COMMENCEMENT AND DURATION OF INFANCY; CRIMINAL LIABILITY; MARRIAGES; MISREPRESENTATIONS AS TO AGE.
Apprenticeship:
 Contracts of apprenticeship, 275
 Arbitration and award, 286
 Arson, 313
Assault and battery, 307
 Criminal liability, 313
 Indecent assault, 315
 Intent to kill, 313
 Assignments for benefit of creditors, 284
Avoidance:
 Voidable contracts, *see infra*, CONTRACTS.
Bailments:
 Liability for conversion or injury to things bailed, 309
Bastardy:
 Bond for support of bastard child, 274
 Necessaries, 279
Being:
 In being, 258
 Bigamy, 264
Bills of exchange and promissory notes, 284
 A promissory note to compromise a tort, 287
 Liability of infant as maker or acceptor, 284
 Right of infant payee to indorse, 285
 Surety upon promissory note, 285
Birth, *see infra*, COMMENCEMENT AND DURATION OF INFANCY.
Breach of promise of marriage, 273
 Liability for breach of promise, 265
 Necessaries, 279
Burden of proof:
 Capacity and age to commit crime, 313, 314
 Burglary, 313
Capacity, *see infra*, CRIMINAL LIABILITY.
Capacity to dispose of property by will, *see infra*, WILLS.
Capacity to hold office, *see infra*, PUBLIC OFFICERS.
Capacity to marry, *see infra*, MARRIAGES.
Capacity to testify as witness, *see infra*, WITNESSES.
 Capital punishment, 315
 Chattel mortgages, 283
Children:
 Child *en ventre sa mere*, 259
Civil damage act:
 Posthumous child, 261
Commencement and duration of infancy, 258
 Infants *en ventre sa mere*, 258
 Capacity to take property, 258
 Considered in being for purpose of property, 258

INFANTS, *cont'd.*

Commencement and duration of infancy, *cont'd.*

Infants en ventre sa mere, *cont'd.*

Deemed in being from time of conception, 259, 260

Deemed *in esse* for purposes of property, 259

Distinction between pregnant and quick with child, 260

Existence inchoate and conditional, 260

Fiction for benefit of child only, 260

Included in devise or bequest to children, 259

Included under grandchildren, 259

Interest not divested by judicial sale before birth, 260

"Living at the death," 259

Rights of action, 261

Rights of action for death of parent by wrongful act, 261

Rights of action for personal injuries before birth, 261

Rights of action under civil damage act, 261

Statutory provisions for posthumous children, 261

Legislative relief from disabilities of nonage, 262

Capacity for managing his own affairs, 263

Removal of disabilities allowed by statute, 262

When majority attained, 262

At what moment infants attain majority, 262

Conflict of laws, 262

In general, 262

Statutory changes, 262

Compromise of causes of action, 286

Claims due infants, 286

Torts committed by infants, 286

Conception, see *infra*, COMMENCEMENT AND DURATION OF INFANCY.

Confessions, 312

Confirmation, see *infra*, RATIFICATION AND CONFIRMATION.

Conflict of laws :

At what moment infant attains majority, 262

Consent :

As to age of consent, see *infra*, MARRIAGES.

Consideration, see *infra*, RATIFICATION AND CONFIRMATION; RESTORATION OF CONSIDERATION.

Contracts (see *infra*, TORTS), 271

Binding contracts, 273

Bond for fine in criminal cases, 274

Bond for support of bastard child, 274

Contracts for military service, 274

Contracts for necessities, see *infra*, NECESSARIES.

Contracts in discharge of legal obligation, 273

Contracts of apprenticeship, 275

Executed contracts of marriage, 275

Execution of trust, 274

Marriage contracts, see *infra*, MARRIAGES.

Contracts of infants distinguished, 271

In general, 271

Liability upon contract, 271

Modern rule as to liability, 272

Old rule as to liability, 271

Ratification and confirmation, see *infra*, RATIFICATION AND CONFIRMATION.

INFANTS, *cont'd.*

Contracts, *cont'd.*

Repudiation of contract, 287

Sales of real and personal property, see *infra*, SALES OF REAL AND PERSONAL PROPERTY.

Voidable, 272

Voidable character of contracts, 272

Voidable contracts, 282

Arbitration and award, 286

Assignments for benefit of creditors, 284

Bills and notes, 284

Compromise of causes of action, 286

Compromise of claims due infants, 286

Contracts for service, 285

Contracts in respect to corporation stock, 287

Contracts of suretyship, 285

Conveyances of real property, 282

Disaffirmance and avoidance, 287

Avoidance of whole transaction necessary, 293

Contracts of service, 290

Conveyance after majority, 289

Effect of infant's misrepresentations as to age, 291

Executed contracts, 288

Executory contracts, 287

General principles, 287

Ignorance of one contracting party of infancy of other, 291

Lease of real property, 290

Mode of disaffirmance, 288

Purchase-money mortgage, 293

Purchasers of real and personal property, 290

Restoration of the consideration, see *infra*, RESTORATION OF THE CONSIDERATION.

Right of infants to repudiate their contracts, 287

Sales of real and personal property, 288

When the right of disaffirmance may be exercised, see *infra*, WHEN THE RIGHT OF DISAFFIRMANCE MAY BE EXERCISED.

Who may avail himself of the right of disaffirmance, see *infra*, WHO MAY AVAIL HIMSELF OF THE RIGHT OF DISAFFIRMANCE.

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Who may avail himself of the right of disaffirmance, see *infra*, WHO MAY AVAIL HIMSELF OF THE RIGHT OF DISAFFIRMANCE.

INFANTS, *cont'd.*

Criminal liability, *cont'd.*

- Constraint of parent, 313
- Evidence, 315
- Indecent assault, 315
- Larceny, 313
- Malicious trespass, 313
- Mental capacity in general, 311
- Murder, 312
- Physical capacity, 315
- Punishment, 315
- Rape, 315

Death by wrongful act:

- Rights of action for death of parent by wrongful act where child is *en ventre sa mere*, 261

Definition, 258

Deputy:

- Deputy sheriff and constable, 266

Disaffirmance:

- Voidable contracts*, see *infra*, CONTRACTS.
- Disaffirmance and avoidance*, see *infra*, RES-TORATION OF CONSIDERATION.
- Duration of infancy*, see *infra*, COMMENCEMENT AND DURATION OF INFANCY.

Estoppel:

- Misrepresentations, 292

Executors and administrators:

- Capacity to act as executor or administrator, 267
- Disaffirmance, 297

Exemplary damages, 308

False representations, see *infra*, MISREPRESENTATIONS; MISREPRESENTATIONS AS TO AGE.

Fraud (see *infra*, TORTS):

- Marriage, 264
- Misrepresentations, 292

Grandchildren:

- Child *en ventre sa mere*, 259

Guardian and ward:

- Consent of guardian to marry, 264
- Liability of infant where coercion of guardian, 308

Hiring horses, 309

Ignorance, 291

Imprisonment for debt and in civil actions:

- Privilege from arrest, 43

Improvements:

- Infant owner, 101

In being, 258

Indecent assault, 315

Insanity:

- Disaffirmance by committee in lunacy, 298

Insolvency and bankruptcy, 657

- What debts and claims are provable, 681

Larceny, 313

Leases, 284

- Disaffirmance, 290
- Ratification and confirmation, 307

Legislative relief from disabilities from nonage, 262

Liability for contract, see *infra*, CONTRACTS.

Liability for torts, 307

- Assault and battery, 307
- Coercion of parent or guardian, 308
- Conversion of things bailed, 309
- Disseizin, 308
- Exemplary damages, 308
- Extent of infant's liability, 308
- False representations as to age, 311
- Fraud in making contracts, 310
- Fraud in purchase of property, 310

INFANTS, *cont'd.*

Liability for torts, *cont'd.*

- Fraud in sale of property, 310
- Hiring horses, 309
- In general, 307
- Liability for acts of agent, 308
- Nuisance, 308
- Pure torts, 307
- Seduction, 308
- Torts connected with or growing out of contracts, 308
- Wilful destruction of things bailed, 309

Limitation of actions:

- Disaffirmance, 299

"Living at the death," 259

Majority, see *infra*, COMMENCEMENT AND DURATION OF INFANCY.

Malicious trespass, 313

Marriages, 263

- Age of consent, 263
- Age of consent at common law, 263
- Age of consent in the United States, 263
- Bigamy, 264
- Binding contracts, 273
- Binding effect of contract, 273, 275
- Capacity to marry, 263
- Consent of parent or guardian, 264
- Disaffirming on reaching age of consent, 264

Effect of marriage after age of consent, 264

Effect of marriage below the age of consent, 263

In the absence of any statutory enactment, 263

Liability for breach of promise, 265

Marriage procured by fraud or undue influence, 264

Marriage without consent of parent or guardian, 264

Ratification on reaching age of consent, 264

Where infant over seven years, 263

Where infant under seven years, 263

Marriage settlements, 284

Married women:

- Ratification and confirmation, 305

Master and servant:

- Contracts for service, 285
- Disaffirmance of contract, 290
- Ratification and confirmation, 307
- Statutes regulating employment of infants, 316

Mental capacity, see *infra*, CRIMINAL LIABILITY.

Military law:

- Contracts for military service, 274

Misrepresentations as to age, 291

- Disaffirmance, 291
- Effect at law, 291
- Equity, 292
- Estoppel, 292
- Fraud, 292
- Liability of infant, 311
- Statutes, 292

Mortgages, 283

- Purchase-money mortgage, 293
- Ratification and confirmation, 306

Murder, 312

Necessaries, 275

Express contracts, 276

Doctrine denying liability, 276

Doctrine permitting action, 276

INFANTS, *cont'd.*

Necessaries, *cont'd.*

- Implied contracts, 275
- Liability for money borrowed to purchase necessities, 281
- Liability for money paid by third person, 281
- Obligation imposed by law, 276
- Set-off, 291
- What are necessities, 276**
 - Action in suit, 279
 - Articles of luxury, 278
 - Attorney's services, 277, 279
 - Bastardy, 279
 - Bicycle, 279
 - Breach of promise of marriage, 279
 - Considerations determining the questions, 276
 - Convenience, 278
 - General considerations, 276
 - Improvement of infant's lands, 276
 - Infant's need of it, 279
 - Insurance, 277
 - Intellectual needs, 278
 - Luxury, 278
 - Maintenance of personal liberty and legal rights, 279
 - Necessaries for family, 278
 - Needs of infants, 279
 - Ornaments, 278
 - Over-supply of infant's needs, 279
 - Physical needs, 278
 - Questions of law and fact, 281
 - Recognizance, 279
 - Riding horse, 279
 - Supplying personal wants, 276
 - Things for infant's estate, 276
 - Things required in conducting business, 277
 - Things supplying physical and intellectual needs, 278
 - Utility of articles, 278
 - Wedding presents, 279
 - When infant is supported by parent or guardian, 280

Nuisances, 308

Oath, see infra, INFANTS.

Parent and child :

- Consent of parent to marriage, 264
- Criminal liability, 313
- Liability for torts where coercion of parent, 308

Partnership, 287

Personal injuries before birth, 261

Personal property, see infra, SALES OF REAL AND PERSONAL PROPERTY.

Posthumous children, see infra, COMMENCEMENT AND DURATION OF INFANCY.

Pregnancy, see infra, COMMENCEMENT AND DURATION OF INFANCY.

Pregnant :

Quick with child, 260

Private international law :

At what moment infant attains majority, 262

Protection of infants by statute, 316

Public officers :

- Capacity to hold office, 266
 - Capacity to act as executor or administrator, 267
 - Capacity to act as trustee, 267
 - Capacity to serve process, 266
 - Deputy constable, 266

INFANTS, *cont'd.*

Public officers, *cont'd.*

Capacity to hold office, *cont'd.*

- Deputy sheriff, 266
- In general, 266
- Offices purely ministerial, 266

Punishment, 315

Purchase, see infra, RESTORATION OF CONSIDERATION.

Purchase-money mortgages, 293

Ratification and confirmation, 306

Questions of law and fact :

- Necessaries, 281
- Ratification and confirmation, 305

Quick with child :

Pregnant, 260

Rape, 315

Ratification and confirmation, 300

- Acknowledgment of liability insufficient, 302
- Agent's ratification, 301
- Conditional ratification, 303
- Confirmation of deed, 304
- Consideration necessary, 300
- Consideration, retention of, 303
- Contracts of service, 307
- Coverture, 301
- Effect of ratification, 300
- Executed contracts, 304
- Executory contracts, 301
- Express ratification, 301
- Express ratification of executed contracts, 304
- Express ratification of executory contracts, 304
- Implied ratification, 303
- Implied ratification of executed contracts, 305

In general, 300

Involuntary ratification, 302

Knowledge of nonliability, 302

Lease of land to infant, 307

Marriages, 264

Married women, 305

Mode of ratification, 301

Mortgage, 306

Part payment of debt, 304

Power to ratify, 300

Promise to an agent, 303

Purchase-money mortgage, 306

Ratification a question of fact, 305

Ratification must be voluntary, 302

Redelivery of deed, 305

Registry laws, 305

Retention of goods purchased, 304

Sale of property purchased, 304

Sales and conveyances of property, 306

Terms of ratification, 301

Retention or disposition of consideration, 303

To whom made, 303

Verbal confirmation, 305

Verbal ratification of executory contracts, 305

When ratification may be made, 301

Who may ratify and confirm, 301

Writing necessary, 302

Real property (see *infra, SALES OF REAL AND PERSONAL PROPERTY*):

Conveyances, 282

Disaffirmance of purchase, 290

Reasonable time :

Disaffirmance, 299

INFANTS, *cont'd.*

Recording acts :

Ratification and confirmation, 305

Representations, see infra, MISREPRESENTATIONS AS TO AGE.

Restoration of consideration, 293

At common law, 293

Contracts of purchase, 294

Contracts of sale, 295

Executed agency, 296

Infant not liable for depreciation in property, 295

Payments for rent, 296

Payments upon life insurance, 296

Restoration of subsequent purchaser, 295

Statutes, 296

When the consideration has passed out of the infant's hands, 293

When the infant has all or any part of the consideration, 294

When the infant never received the consideration, 294

When the nature of the consideration prevents the restoration, 295

Sales, see infra, RESTORATION OF CONSIDERATION.

Sales of real and personal property :

Disaffirmance and avoidance, 288

Action of ejectment, 289

Actions at law, 289

Actual or constructive possession, 289

Conveyance after majority, 289

Equity of *bona fide* purchaser, 288

Mode of disaffirmance, 288

Necessity of entry, 289

Recovery for use, 288

Recovery of the thing sold, 288

Writ of entry, 289

Seduction, 308

Service of process, 266

Set-off :

Necessaries as set-off, 291

Sheriffs :

Deputy, 266

Specific performance, 297

Statutes for the protection of infants, 316

Admitting to places of amusement, 317

Employment of infants, 316

In general, 316

Regulations concerning custody and care, 316

Sale of prohibited articles to infants, 317

Stock :

Contracts in respect to, 287

Suretyship, 287

Torts, see infra, LIABILITY FOR TORTS.

Trusts and trustees, 267

Undue influence :

Marriage, 264

Ventre sa mere, see infra, COMMENCEMENT AND DURATION OF INFANCY.

Voidable contracts, see infra, CONTRACTS.

Void or voidable, see infra, CONTRACTS.

When right of disaffirmance may be exercised, 298

Conveyance of real estate, 298

Executory contracts, 298

For infant's benefit, 298

Reasonable time, 299

Right to avoid during infancy, 298

Time for majority limited by statute of limitations, 299

16 C. of L.—77

INFANTS, *cont'd.*

Who may avail himself of the right of disaffirmance, 296

Committee in lunacy, 298

Heirs, 297

Personal representatives, 297

Plea of infancy a personal privilege, 296

Privies in the state, 298

Specific performance not enforceable, 297

Wills :

Capacity to dispose of property by will, 265

At common law, 265

Personal property, 265

Real property, 265

Statutes, 265

Witnesses :

Capacity to testify as witnesses, 267

At what age competent, 267

Competency a matter for discretion of court, 270

Credibility a question for jury, 271

Examination after witness has testified, 268

Examination as to infant's competency, 267

Examination should be in open court, 268

Examples of incompetent infants, 269

Examples of infants held to be competent, 269

Ignorance of punishment for perjury, 269

Instructing witness as to nature of oath, 270

Intelligence the proper test, 268

Lack of intelligence, 269

Necessity for sense of moral responsibility, 269

Nervous agitation, 270

No age limit fixed by law, 268

One examination sufficient, 268

Presumption as to competency, 267

Presumption as to competency at common law, 267

Receiving unsworn testimony of infants, 271

Tests of competency, 268

Where belief in divine punishment not essential, 270

INFECT, 317

INFECTION, 317

INFEOFFMENT, 317

INFERENCE, 317

INFERIOR COURTS, 318

INFIDEL, 319

INFINITESIMAL, 319

INFIRMARY, 319

INFIRMITY, 320

INFLAMMABLE, 320

INFLAMMATORY, 320

INFLICT, 320

INFLUENCE, 321

INFLUENZA, 321

INFORMAL ISSUES, 321

INFORMALITY, 321

Volume XVI.

IN FORMA PAUPERIS, 321**INFORMATION, 321****INFORMATION AND BELIEF, 322****INFORMATION OF INTRUSION, 322****INFORMERS, 323**

- Conspiracy, 325
- Constitutional law, 324
- Definition, 323
- Enforcement of informer's rights, 327
- How share may be divested, 326
 - Misconduct of informer, 327
 - Pardon, 326
 - Release by informer, 327
 - Remission of fine or forfeiture by secretary of treasury, 327
 - Repeal of statute, 326
- Misconduct of informer, 327
- Pardon, 326
- Public officers, 325
- Release by informer, 327
- Revenue laws, 324
- Right to compensation, 323
 - Constitutionality of statutory provision for informers, 324
 - In general, 323
 - Money recovered on contract with United States, 324
 - Out of what fines or forfeitures informer's share allowed, 323
 - Sum recovered from surety on recognition, 324
- Statutes, repeal of, 326
- United States, 324
- Vesting of informer's share, 326
- Violation of neutrality laws, 324
- When informer's share vests, 326
- Who may claim informer's share, 325
 - Disclosing conspiracy, 325
 - Government officers, 325
 - In general, 325
 - Joint informers, 325

IN FORM FOLLOWING, 127**INFRINGEMENT, 328****IN FULL, 128****INGRESS, 328****INGROSS, 328****INHABIT, 328****INHABITANT, 328**

- Attachment, 334
- Citizenship, 331
- Corporations, 333
- Definite absence, 330
- Domicil, 330
- Householder, 333
- Legal settlement, 329
- Occupier, 334
- Resident, 331
- Schools, 334
- Temporary residence, 329
- Two residences, 330

INHERITANCE TAX, 336**IN HIS OWN RIGHT, 129****INHUMAN TREATMENT, 336****INIQUITY, 336****INITIALS, 336****INJUNCTIONS, 337**

Absence of precedent for injunction sought, 363

Accident:

- Injunction to obtain benefit of set-off, 400
- Judgments obtained through accident, 385
 - Accident not attributable to neglect, 383
 - Applications of rule, 384
 - Grounds insufficient for equitable relief, 384
- Showing of meritorious defense necessary, 384

Action:

- Fraud, accident, or mistake, 367
- Right of action, 453

Action on bond (see *infra*, DAMAGES), 453

Accrual of right on discontinuance or dismissal, 456

Agreement to enter suit as enjoined, 454

Assessment of damages as prerequisite to action on bond, 461

Common-law remedy, 453

Defenses to action on bond, 458

- Disobedience to writ, 458
- General rule as to merits of injunction suit, 458
- Issuance of second injunction, 458
- Merits may not be inquired into, 458
- Reversal of judgment enjoined, 459
- Solvency of principal, 458
- Want of jurisdiction, 458

Enforcement of damages, 463

Evidence in action on bond, 459

Extracts from record, 459

Merger of common-law remedy, 453

Necessity for actual issuance of injunction, 454

Necessity for final decree, 454

Accrual of right on discontinuance or dismissal, 456

General rule, 454

Right of action on bare dissolution, 455

Right of action on dissolution dependent on wording of bond, 455

Obedience to injunction not served, 454

Reversal of judgment enjoined, 459

Right of action on dissolution of injunction against judgment, 457

Right to sue on bond without enforcing judgment, 457

Voluntary dismissal by plaintiff, 457

When action for malicious prosecution lies, 453

Where restricted to action on bond, 453

Actions at law (see *infra*, JUDGMENTS AND DECREES), 365

Actions relating to real property, 373

Confining action to original form, 368

Criminal prosecution, 370

Discovery, 370

Enjoining actions against officers of courts, 369

Enjoining another equitable suit in same court, 372

Interpleader suits, 372

Limitation of actions, 369

Mistake, 370

Nature and extent of jurisdiction, 365

Necessity of confessing judgment, 373

Proceedings in same court of equity, 372

To prevent inequitable defenses, 369

Where remedy at law is adequate, 365, 367

INJUNCTIONS, *cont'd.*

- Adequacy of remedy at law** (see *infra*, ACTIONS AT LAW; JUDGMENTS AND DECREES) 352, 355
- Accident, fraud, or mistake, 367
- Adjustment of complicated accounts, 367
- Application of rule, 366
- Concurrent jurisdiction, 366
- Damages not susceptible of estimation, 355
- Equitable rights not available in court of law, 356
- Equity will not enjoin where remedy at law is adequate, 366
- Executions, 401, 403
- Inadequacy of remedy at law, 354
- In general, 352
- Remedy by action for damages, 353
- Remedy must be adequate, 355
- Remedy must be complete, 355
- Remedy must be plain, 354
- Remedy provided for by statute, 354
- Seizure of property of stranger under writ of execution, 406
- Void judgments, 387
- Waiving benefit of rule, 353
- Want of jurisdiction, 366
- Where remedy at law is inadequate, 367
- Where remedy doubtful, 354
- Advice of counsel, 438
- Agency:**
 - Violation of injunction, 437
- Alteration of instruments:**
 - Fraudulent alteration of judgment, 382
- Amount in controversy, 351
- Appeals:**
 - Failure to take advantage of remedy by appeal, 377
- Apprehended injury, 361
- Approval of bond** (see *infra*, BONDS), 445
 - Delegation of power to clerk, 445
 - Delivery to clerk, 445
 - In general, 445
- Arbitration and award:**
 - Injunctive relief against awards, 398
- Assessment of damages*, see *infra*, DAMAGES.
- Attorney and client:**
 - Judgments obtained through negligence, incompetence, or mistake of attorney, 392
 - Judgments obtained through unauthorized appearance of attorney, 391
 - View that injunction does not lie if attorney is solvent, 391
 - View that injunction lies irrespective of attorney's solvency or insolvency, 392
 - View that relief by injunction is never permissible, 391
 - Violation of injunction, 437
- Balance of convenience, 363
- Bankruptcy*, see *infra*, INSOLVENCY AND BANKRUPTCY.
- Bonds** (see *infra*, ACTION ON BOND; DAMAGES; MEASURE OF DAMAGES), 439
 - Amount of bond**, 447
 - In general, 447
 - Probable injury from injunction to be considered, 448
 - Approval:**
 - Order for delivery of bond for prosecution, 449
 - By what statutes governed, 444
 - Consideration for bond, 445

INJUNCTIONS, *cont'd.*

- Bonds, *cont'd.***
 - Dissolution for defective or insufficient bond**, 429
 - Allowing reasonable time to file sufficient bond, 429
 - In general, 429
 - Requirement of bond with new conditions on continuing injunction, 430
 - Requiring additional security, 430
 - Executions**, 444
 - Approval by clerk, 445
 - By whom executed, 444
 - Delegation of power to approve, 445
 - Necessity for proof before filing, 449
 - Place of execution, 444
 - Place of signature, 444
 - Time of execution, 444
 - Filing**, 448
 - Bond operative from time of filing, 449
 - Necessity for, 448
 - Necessity for proof of execution, 449
 - Form and conditions of bond**, 446
 - Clerk may not insert conditions unless authorized, 447
 - Insertion of unnecessary conditions surplusage, 447
 - Necessity for direction in order, 447
 - Statutes must be complied with, 446
 - Substantial compliance with statutes, 446
 - Terms discretionary with court in absence of statute, 447
 - When prescribed by statute, 446
 - Insertion of names of sureties, 448
 - Misrecitals**, 448
 - Necessity for**, 439
 - Allowance of time to execute proper bond, 443
 - As condition for issuing restraining orders, 441
 - At common law, 439
 - Authority of courts, 439
 - Bond by fiduciaries, 441
 - Complainant's right is clear, 442
 - Effect of issuance before execution of bond, 443
 - Enjoining sales of exempt property, 442
 - Exceptions, 442
 - Execution of bond requisite to effectiveness of order, 443
 - Final decree, 441
 - Foreign jurisdiction, 442
 - Inability to give bond, 442
 - Injunction issued before bond irregular only, 443
 - Injunction on final decree, 441
 - In the absence of statutes, 439
 - Mandatory nature of statutes, 441
 - Plaintiff's liability dependent on bond in absent of malice, 440
 - Power of court to dispense with bond as required by statutes, 441
 - Requirement of bond discretionary at common law, 439
 - Resultant injustice to defendant, 439
 - Right of court to require bond, 439
 - Specific statutory exceptions, 442
 - Statutory requirement, 440
 - Waiver, 443
 - When unnecessary, 441
 - Where answers show case for perpetual injunction, 442

INJUNCTIONS, *cont'd.***Bonds, *cont'd.***

Object of bond, 443

Order for delivery of bond for prosecution, 449

Necessity where sureties are to be ap-

proved by judge, 449

Rescission of order, 449

Purpose of bond, 443

In general, 443

What liability imported by bond, 443

Signature, 444

Sureties, 449

Justification by sureties, 449

Liability of sureties, 450

Adjudication of damages, 451

Bond strictly construed, 450

Counsel fees, 451

Estoppel to deny existence of judg-

ment recited, 452

Estoppel to deny issuance of injunc-

tion, 452

Estoppel to deny pendency of suit, 452

Estoppel to deny that order required

bond, 452

Estoppel to plead that order was

broader than application, 453

Extent of liability for damages and

costs, 451

Liability for costs occurring after

death of complainant, 451

Liability for damages accruing after

injunction made permanent, 452

Liability for damages pending appeal

after dissolution, 452

Liability to be strictly construed, 450

No liability beyond statutory require-

ments, 451

Operation of bond as estoppel on sure-

ties, 452

Parol evidence, 451

Strict construction, 450

Sureties bound by decree in injunction

suit, 453

Sureties' liability after death of princi-

pal, 451

Surety estopped to deny recitals of

bond, 452

Surety not liable beyond terms of

bond, 450

When attaches in case of signature in

blank, 450

Whether liability may be varied by

agreement, 450

Necessity for, 449

Order for delivery of bond for prosecu-

tion, 449

Sureties, names of, 448

To whom payable, 445

To whose benefit enures, 446

Burden of proof:

Negligence, 472, 473

Certiorari:

Failure to take advantage of remedy by

certiorari, 378

Classes of injunctions, 342**Clerk of court:**

Approval of bond, 445

Insertion of unauthorized conditions, 447

Cloud on title:

Judicial sales, 408

Apparent lien, 410

Attack upon good faith, 411

Conflict of authority, 409

INJUNCTIONS, *cont'd.***Cloud on title, *cont'd.*****Judicial sales, *cont'd.***

Doubt as to title, 411

Homestead, 410

Levy upon land of stranger to writ, 409

No equity where complainant shows title

in himself, 408

Power in general, 408

Prevention of cloud though sale would

be void, 409

Protection of wife's separate estate, 410

Relief through judgment not a lien, 410

Rule that stranger to writ may enjoin

sale, 411

Void sales, 408

Where deed would be set aside, 408

Common injunctions, 348**Conditions, see *infra*, BONDS.****Confession of judgment:**

Judgments by confession, 394

Necessity of confessing judgment where

relief is sought in equity, 373

Conflict of laws, see *infra*, PRIVATE INTER-**NATIONAL LAW; UNITED STATES COURTS.****Consideration for bond, 445****Constitutional law:**

Unconstitutionality of statute on which

injunction based, 430

Construction of, 450**Constructive fraud, 380****Contempt, see *infra*, VIOLATION OF INJUNC-****TION.****Continuance, see *infra*, DISSOLUTION.****Continuance of injunction, 432**

Answer setting up new matter, 434

Doubtful cases, 434

Doubtful questions of law are at issue, 434

Effect of final judgment, 434

Fraud, 435

Grounds for continuing injunction, 433

Judicial discretion as to continuance, 432

Relief obtainable by final decree, 434

Where dissolution would amount to de-

nial of relief, 433

Where dissolution would effect irreparable

injury, 433

Where dissolution would work greater in-

jury than continuance, 433

Where sufficient time has elapsed, 434

Convenience, balance of, 363**Corporation:**

Violation of injunction, 437

Costs:

Liability of sureties, 451

Sureties' liability after death of principal,

451

Costs and expenses, 466

In general, 466

Recovery of counsel fees on dissolution of in-**junction, 467**

Allowance of counsel fees on final hear-

ing, 468

Amount as affected by interests in-

volved, 470

Amount question for jury, 470

Confined to services rendered in procur-

ing dissolution, 469

Counsel fees recoverable as damages,

467

Evidence as to rendition and value of

services, 470

Fees should be reasonable, 469

Volume XVI.

INJUNCTIONS, *cont'd.***Costs and expenses, *cont'd.*****Recovery of counsel fees on dissolution of injunction, *cont'd.***

Limitation of recovery, 469

No recovery where injunction defeated on merits without motion for dissolution, 469

Services on appeal, 468

State courts, 467

Suits to determine title, 468

United States courts, 467

Whether actual payment of counsel fees necessary, 469

Where injunction perpetuated in part, 467

Counsel fees, see *infra*, COSTS AND EXPENSES.**Courts, see *infra*, JURISDICTIONS; UNITED STATES COURTS.****Discretion of court, 345, 346**

Caution for issuance, 347

Discretion of court as to amount of damages, 465

Enjoining actions against officers of courts, 369

Power of courts of one state or country to enjoin proceedings in another state or country, 420

Evasion of domestic laws, 421

Full faith and credit clause, 422

Power to enjoin proceedings of courts of sister state, 421

Power to enjoin proceedings of foreign court, 420

Preference for adjudication of domestic courts, 422

To prevent injustice and oppression, 421

Under what circumstances injunction denied, 422

Power of court to modify injunction, 423

Power of state courts to enjoin proceedings in federal courts, 420

Right of court dissolving injunction to enforce payment of damages, 462

Criminal acts, 363**Criminal law:****Enjoining criminal prosecutions, 370**

Application of rule, 371

Exceptions to rule, 372

Infraction of municipal ordinances, 371

Prosecution for violation of statutes, 370

Statement of rule, 370

Void ordinance, 371

Judgments in criminal cases, 397

Cross-injunctions, 348**Damages, 459**

Amount of damages, 465

Assessment as prerequisite to action on bond, 461

Costs, see *infra*, COSTS AND EXPENSES.**Counsel fees, see *infra*, COSTS AND EXPENSES.**

Effect of assessment, 462

Enforcement by action on bond, 463

Expenses, see *infra*, COSTS AND EXPENSES.

Liability of sureties, 451

Manner of assessing, 459

At common law, 459

Effect of agreement conferring jurisdiction, 459

Evidence of damages on assessment, 461

Injunction against judgment, 460

Power of court to assess on dissolution, 460

INJUNCTIONS, *cont'd.***Damages, *cont'd.*****Manner of assessing, *cont'd.***

Record must show evidence, 461

Reference to ascertain damages, 460

Under statutes, 460

View that court of equity cannot assess damages, 459

Measure of damages, see *infra*, MEASURE OF DAMAGES.**Proximate damages, see *infra*, MEASURE OF DAMAGES.****Right of court dissolving injunction to enforce payment, 462**

Rendition of judgment against principal, 462

Rendition of judgment against principal and sureties, 462

Death:

Effect of death of principal on liability of surety, 451

Decrees, see *infra*, JUDGMENTS AND DECREES.**Defaults:**

Judgments by default or confession, 393

Definitions, 342

Discharge:

Dissolution and discharge distinguished, 425

Discontinuance, see *infra*, ACTION ON BOND.

Discovery, 370

Discretion of court:

Amount of damages, 465

Caution in issuance, 347

Interlocutory injunctions, 345

Dismissal, see *infra*, ACTION ON BOND.**Disobedience (see *infra*, VIOLATION OF INJUNCTIONS):**

Action on bond, 458

Dissolution (see *infra*, ACTION ON BOND; CONTINUANCE; COSTS AND EXPENSES; DAMAGES):

Effect of dissolution, 431

Dissolution of injunction, 423

Abatement of suit, 425

Additional security, 430

Complainant's disobedience of writ, 429

Defective bond, 429

Defective service of process, 428

Discretion of court in dissolving injunction, 424

Dissolution and discharge distinguished, 425

Dissolution by court of its own motion, 425

Failure to serve subpoena in proper time, 427

Grounds of dissolution, 426

Improvident issuance of injunction, 426

Insufficient bond, 429

***Ipsa facto* dissolution, 425**

Laches in prosecuting cause, 427

Laches in seeking dissolution, 428

Misrepresentation, 431

Requiring additional security, 430

Statute legalizing acts enjoined, 430

Suppression of material facts, 431

Technical errors and inaccuracies in bill or order, 431

Uncertainty of writ, 427

Unconstitutionality of statute on which injunction based, 430

Vagueness, 427

INJUNCTIONS, *cont'd.***Dissolution of injunction, *cont'd.***

- Want of jurisdiction to issue, 426
- Want of notice of application, 428
- What courts have power to dissolve, 423
- Where injunction has become useless, 431

Doubtful cases:

- Continuance, 434

Doubtful right, 358

- Conflict as to facts on which right depends, 360
- In general, 358
- Necessity of establishing right at law, 359

Estoppel:

- Executions, 403

Operation of bond as estoppel on sureties, 452

- Estoppel to deny issuance of injunction, 452
- Estoppel to deny issuance of judgment recited, 452
- Estoppel to deny pendency of suit, 452
- Estoppel to deny that order required bond, 452
- Estoppel to plead that order was broader than application, 453
- General rule, 452

Evidence in actions on bond, 459**Evidence of damages, 461****Executions, 401**

- Adequacy of legal remedy, 401
- Estoppel, 403
- Holder of prior lien or incumbrancer, 402
- Injunction incidental to original jurisdiction, 402

Irregularities in process or proceedings there under, 403

- Application of rule, 404
- Excessive levy, 405
- Execution issued on dormant judgment, 404
- Homestead, 405
- Irregularity in proceedings under writ, 405
- Irregularity in writ or issuance thereof, 404

- Levy upon exempt property, 405

- Rule stated, 403

Relief in general, 401**Remedy by action, 402****Right to levy and sell in general, 401****Seizure of property of stranger to writ, 405**

- Claimant under execution debtor must show good title, 408

- In general, 405

- Levy upon individual property upon judgment against firm, 406

- Levy upon partnership property for individual debt, 406

- Loss of trade or business, 407

- Ordinary legal remedies not available, 407

- Property of peculiar value to owner, 407
- Protection of stranger pending appeal by garnishee, 407

- Remedy by trial of right of property, 406

- Where owner cannot defend his title, 406

- Where remedy at law is inadequate, 406

Stay of execution pending appeal, 402**To prevent cloud upon title, 403**

- Apparent lien, 410
- Attack upon good faith, 411
- Conflict of authority, 409

INJUNCTIONS, *cont'd.***Executions, *cont'd.*****To prevent cloud upon title, *cont'd.***

- Doubt as to title, 411
- Levy upon land of stranger to writ, 409
- No equity where complainant shows title in himself, 408
- Power in general, 408
- Prevention of cloud though sale would be void, 409
- Protection of wife's separate estate, 410

- Relief though judgment not a lien, 410

- Rule that stranger to writ may enjoin sale, 411

- Void sale, 408

- Where deed would be set aside, 408

- Trustee or *cestui que trust*, 402

- When remedy at law inadequate, 403

Execution sale (see *infra*, EXECUTIONS), 418**Executive, 423****Exemplary damages, 464****Exemption from execution, 405****Expenses, see *infra*, COSTS AND EXPENSES.****Final decree, see *infra*, ACTION ON BOND.****Foreign judgments, 397****Fraud (see *infra*, JUDGMENTS AND DECREES), 367**

- Continuance of injunction, 435

Gaming contracts:

- Judgments based on gaming contracts, 394

Governor, 423**Homestead, 405****Illegal acts, 363****Inadequacy of remedy at law, see *infra*, ADEQUACY OF REMEDY AT LAW.****Injunction bond, see *infra*, BOND.****Injuries, see *infra*, NATURE OF INJURY AGAINST WHICH RELIEF IS SOUGHT.****Insolvency and bankruptcy:**

- Insolvency of attorney, 391, 392

- Insolvency of judgment creditor, 400

- Power of federal courts to enjoin proceedings in state courts, 414

- Restraining execution sale, 418

- Under act of 1898, 414

- Where claims are such as a discharge in bankruptcy would release, 417

- Where creditor has acquired unlawful liens within four months of bankruptcy proceedings, 415

- Where property is in actual possession of bankruptcy court, 417

- Where property is in actual possession of bankruptcy court, under former bankruptcy laws, 418

- Where time after which petition may be filed has not elapsed, 414

- Where unlawful liens are otherwise acquired, 416

- Where unlawful liens are procured by attachment, 416

Interest:

- Suspension of interest, 1068

Irregularities, see *infra*, EXECUTIONS.**Irregular judgments, see *infra*, JUDGMENTS AND DECREES.****Interlocutory injunctions (see *infra*, PERPETUAL INJUNCTIONS), 345**

- Discretion of court as to issuance, 345

- Discretion of court defined, 346

- Mandamus to compel issuance, 347

- Mandatory injunctions, 343

INJUNCTIONS *cont'd.***Interlocutory injunctions, cont'd.**

- Nature, 345
- Necessity of caution in issuance, 347
- Object, 345
- Sound judicial discretion, 346

Irreparable injury, 360

- Injunction granted where injury irreparable, 361
- Injunction refused where irreparable injury is shown, 360
- What is irreparable injury, 361

Judgments:

- Damages, 460
- Measure of damages on dissolution of injunction against judgments, 465
- Power of federal courts to enjoin proceedings in state courts, 412

Judgments and decrees, 374

- Attorneys, 391
- Concealment and suppression of material facts, 381
- Concurrent jurisdiction, 398
- Confession of judgments, 394
- Criminal cases, 397
- Default judgments, 393

Defenses not available in action at law, 378

- Defense at law doubtful or embarrassed, 379
- Defense not available at time of trial, 379
- Defense not available because of forms of pleading, 379
- Defense purely equitable, 378

Enjoining judgment by agreement, 298**Erroneous or irregular judgments, 389**

- Application of the general rule, 389
- Entering judgments, 390
- Erroneous admission of evidence, 390
- Erroneous exclusion of evidence, 390
- Erroneous refusal of continuance, 390
- Error in ruling as to sufficiency of defense, 390
- Errors authorizing new trial no ground to enjoin, 389
- Excessive judgments, 390
- Insufficiency of evidence, 390
- Irregularities and errors not ground for injunction, 389
- Rendition of judgment, 390
- Taxing costs, 390

Foreign judgments, 397**Fraud, judgments obtained by, 379**

- Cause of action vitiated by fraud not ground for injunction, 380
- Collusive judgment to defraud third party, 380

Concealment or suppression of material facts, 381**Constructive fraud insufficient, 380**

- Fraud in procurement of judgment necessary, 380
- Fraudulent alteration of instrument, 382
- Laches a bar to relief, 381
- Loss of defense or remedy by violation of agreement, 381
- Meritorious defense prevented by fraud, 380
- Necessity of meritorious defense, 381
- Solvency of defendant, 381
- Statement of general rule, 379
- Violation of agreement, 381

Fraudulent alteration of instrument, 382**INJUNCTIONS, cont'd.****Judgments and decrees, cont'd.**

- Gaming contracts, 394
- Injunction to obtain benefit of set-off, 399
- Injunctive relief against awards, 398
- Insolvency of attorney, 392
- Judgments affecting title of real estate, 396
- Judgments based on gaming contracts, 394
- Judgments based on usurious contracts, 395
- Judgments in criminal cases, 397
- Judgments obtained through accident, 383
- Judgments obtained through law, 383
- Judgments obtained through mistake, 383
- Judgments obtained through mistake of fact, 383
- Judgments obtained through surprise, 385
- Judgments obtained through unauthorized appearance of attorney, 391
- Judgments of other states, 397
- Judgments or decrees of courts of concurrent jurisdiction, 398
- Loss of defense or remedy by violation of agreement, 381
- Mistake, 383

Necessity of taking advantage of legal remedies, 374

- Cases in which equity will relieve enumerated, 375
- Defenses cognizable both at law and in equity, 376
- Defenses purely legal, 374
- Failure to make defense at law, 374
- Failure to take advantage of remedy by appeal, certiorari, motion, or supersedeas, 377
- Ignorance of defense, 375
- Illustrations of rule, 376
- Injustice and hardship of judgment, 375
- Introductory statement, 374
- Payment of debt in suit, 376

Negligence, incompetence, or mistake, 392**Satisfied judgments, 396****Usurious contracts, 395****Void judgments, 385**

- Against whom action lies, 387
- Burden of showing want of service, 387
- Effect of adequate remedy at law on right to injunction, 387
- False return of service of process, 388
- Judgments void for want of jurisdiction of person, 385
- Judgments void for want of jurisdiction of subject-matter, 385
- Necessity of showing defense, 386
- Showing want of service, 387
- View that valid defense need not be shown, 386
- Want of notice of process, 385
- Want of notice or knowledge is not enough, 387

Jurisdiction, 349

- Action on bond, 458
- Dissolution on grounds for want of jurisdiction to issue, 426
- Federal courts and judges, 350
- Inherent power of courts of chancery, 349
- Judgments or decrees of courts of concurrent jurisdiction, 398
- Judgments void for want of jurisdiction of person, 385
- Judgments void for want of jurisdiction of subject-matter, 385

INJUNCTIONS, *cont'd.***Jurisdiction, *cont'd.***

Jurisdiction as affected by amount involved, 351

Jurisdiction conferred by statutory provision, 350

Nature and extent of jurisdiction of courts of law, 365

Power of courts of one state or country to enjoin proceedings in another state or country, 420

Evasion of domestic laws, 421

Full faith and credit clause, 422

Power to enjoin proceedings of courts of sister state, 421

Power to enjoin proceedings of foreign courts, 420

Preference for adjudication of domestic courts, 422

To prevent injustice and oppression, 421

Under what circumstances injunction denied, 422

Power of state supreme courts and judges, 351

Right of court dissolving injunction to enforce payment, 462

Stipulation by parties, 350

Knowledge of injunction:

Violation of injunction, 436

Laches:

Delay from attempt to compromise, 358

Dissolution, 427

How laches determined, 358

Laches in seeking dissolution, 428

When laches of party seeking relief a bar to relief, 356

Application must be seasonably made, 356

Effect of coverture, 357

Laches in conjunction with other causes, 357

Opposite party induced to change his position by laches of applicant, 256

When not a bar to relief, 357

Legislature:

Enjoining legislative or executive action, 423

Limitation of actions, 369

Malicious prosecution, 453

Mandamus:

Mandamus to compel dissolution of interlocutory injunctions, 347

Mandamus to compel issuance of interlocutory injunctions, 347

Mandatory injunctions, 342

Issuance on interlocutory application, 343

Jurisdiction on equity to compel performance of acts recognized, 342

Whether granted on interlocutory application, 343

Master and servant:

Violation of injunction, 437

Matters to be considered in determining right to injunction, 352

Absence of precedent for injunction sought, 363

Adequacy of remedy at law, see *infra*, ADEQUACY OF REMEDY AT LAW.

Balance of convenience, 363

Certainty or doubtfulness of right sought to be protected, 258

INJUNCTIONS, *cont'd.***Matters to be considered in determining right to injunction, *cont'd.***

Criminality or illegality of act which it is sought to enjoin, 363

Laches of parties seeking relief by injunction, see *infra*, LACHES.

Nature of injury against which relief is sought, see *infra*, NATURE OF INJURY AGAINST WHICH RELIEF IS SOUGHT.

Whether injunction will require change of possession, 364

Measure of damages, 463

Amount of recovery limited by bond, 464

Damages for enjoining sale of property under deed of trust, 466

Damages on dissolution of injunction against judgments, 465

Damages on dissolution of injunction restraining acts of ownership, 466

Damages on dissolution of injunction restraining sale or disposal of goods, 466

Discretion of court as to amount, 465

Judgments, 465

Only proximate damages recoverable, 463

Exemplary damages, 464

General rule, 463

Loss of property or diminution of profits, 463

Necessity for exercise of care and prudence by defendant, 464

Recovery of damages on partial dissolution, 464

Remote or speculative damages not recoverable, 463

Merger:

Merger of common-law remedy in action on bond, 453

Misrepresentations, 431**Mistake, 367, 370**

Injunction to obtain benefit of set-off, 400

Judgments obtained through mistake, 383

Mistake at law, 383

Mistake of court, 383

Judgments obtained through negligence, incompetence, or mistake of attorney, 392

Modification of injunction, 423

Enjoining action at law, 423

In general, 423

Power of court to modify injunction, 423

Motive, 438

Multiplicity of suits, 373

Municipal corporations:

Infraction of municipal ordinances, 371

Nature of injury against which relief is sought, 360

Apprehended injury insufficient, 361

Apprehended injury not ground for injunction, 361

Irreparable injury necessary, 360

Past injuries, 362

Present intent to neglect future duty, 361

Reasonable grounds for apprehension necessary, 361

Substantial injury necessary, 360

Threatened injury with power to injure, 362

Negligence:

Judgments obtained through negligence, incompetence, or mistake of attorney, 392

Notice, see *infra*, SERVICE OF PROCESS.

INJUNCTIONS, *cont'd.***Notice of application :**

Dissolution, 428

Notice of injunction :

Violation of injunction, 436

Novelty of injunction, 363

Obedience, see *infra*, VIOLATION OF INJUNCTION.**Orders :**

Restraining orders, 349

Ordinances, 371

Parol evidence :

Bonds, 451

Past injuries, 362

Perpetual injunctions (see *infra*, INTERLOCUTORY INJUNCTIONS), 344

Burden of establishing right to injunction, 344

Examples, 344, 345

In general, 344

Temporary injunction not prerequisite, 344

Possession :

Examples, 364

Property not taken from one party and placed in possession of another, 364

Whether injunction will require change of possession, 364

Preliminary injunctions, see *infra*, INTERLOCUTORY INJUNCTIONS.**Preventive injunctions, 342**

Issuance on interlocutory application, 343

Jurisdiction on equity to compel performance of acts recognized, 342

Whether granted on interlocutory application, 343

Private international law :

Power of courts in one state or country to enjoin proceedings in another state or country, 420

Evasion of domestic laws, 421

Full faith and credit clause, 422

Power to enjoin proceedings of courts of sister state, 421

Power to enjoin proceedings of foreign courts, 420

Preference for adjudication of domestic court, 422

To prevent injustice and oppression, 421

Under what circumstances injunction denied, 422

Proximate damages, see *infra*, MEASURE OF DAMAGES.**Public officers :**

Enjoining actions against officers of courts, 369

Real property :

Actions relating to real property, 373

Judgments affecting title of real estate, 396

Reference :

Reference to ascertain damages, 460

Refusal of injunction, 435

Reinstatement of injunction, 435

Reinstatement or refusal of injunction, 435

Remedies, see *infra*, ACTION ON BOND.*Remedy at law*, see *infra*, ADEQUACY OF REMEDY AT LAW.**Restraining orders, 349**

Definition, 349

Duration of order, 349

Purpose of order, 349

Satisfied judgment, 395

INJUNCTIONS, *cont'd.***Second injunction, 365**

Action on bond after issuance of second injunction, 458

Seizure, see *infra*, EXECUTIONS.**Service of process** (see *infra*, EXECUTIONS):

Dissolution, 427, 428

False return of service of process, 388

Want of knowledge, 387

Set-off :

Injunction to obtain benefit of set-off, 399

Accident, 400

Claims which cannot be satisfied by ordinary suit, 400

Erroneous advice as affecting right, 400

Exceptions to rule, 400

Failure to name sum claimed as due, 401

Fraud, 400

Insolvency of judgment creditor, 400

Mistake, 400

Unliquidated demands arising out of same or different transactions, 400

Where defense is made at law, 399

Where defense not made at law, 399

Where whole judgment not enjoined, 401

Signature :

Bonds, 444

Sister states judgments, 397

Special injunctions, 348

Statute of limitations, 369

Sureties :

Right of court dissolving injunction to enforce payment of damages, 462

Suretyship, see *infra*, BONDS.**Surprise :**

Judgments obtained through surprise, 385

United States courts, 350

Costs and expenses, 467

Power of federal courts to enjoin proceedings in state courts, 411

Action already begun in state court, 412

Condemnation proceedings, 413

Illustrations, 412

Judgments of state courts, 412

Municipal assessments, 413

Proceedings in violation of federal constitution, 412

Receivership, 413

Sales under execution, 412

Service of process, 412

Statutory provisions, 412

Taking possession of property, 413

Under bankruptcy laws, see *infra*, INSOLVENCY AND BANKRUPTCY.

Where federal court first acquires jurisdiction, 413

Where state court first acquires jurisdiction, 411

Where suit has been removed to federal court, 414

Power of state courts to enjoin proceedings in federal courts, 420

Usury :

Judgments based on usurious contracts, 395

Venue, 352

Power to grant injunctions throughout the state, 352

Suit must be brought in county designated, 352

Violation of injunction, 435

Acts not prohibited by injunction, 437

Advice of counsel, 438

INJUNCTIONS, *cont'd.***Violation of injunction, *cont'd.***

- Contempt, 436, 438
- Disobedience of erroneous order, 438
- Duty to obey and consequences of disobedience, 435
- Invalidity of order, 439
- Knowledge of injunction, 436
- Matters in excuse, 438
- Matters in mitigation, 438
- Motive, 438
- Notice of injunction, 436
- Order erroneously and improvidently granted, 438
- Violation by agents, attorneys, and servants, 437
- Violation by corporation, 437
- Violation by strangers, 437
- Violation of the spirit of an injunction, 437
- Violation pending appeal, 436
- What constitutes violation, 436
- Void judgments, see infra, JUDGMENTS AND DECREES.*

INJURE, 499**INJURIA, 470****INJURIES TO ANIMALS BY RAILROADS, 471**

- Actual contact between train and animal, 486
- Agency, 489
- At large** (see *infra, CONTRIBUTORY NEGLIGENCE ON FENCED ROADS OR INDEPENDENT OF DUTY TO FENCE*):
 - Company's liability as affected by right of cattle to be at large, 494
- Attorney's fees:**
 - Statutes awarding attorney's fees to persons recovering judgment, 474
- Cattle guards** (see *infra, LIABILITY UNDER STATUTES RELATING TO ERECTION AND MAINTENANCE OF FENCES*):
 - Duty to erect and maintain cattle guards, 485
 - What are sufficient cattle guards, 486
- Comparative negligence, 481
- Constitutional law:**
 - Constitutionality of statutes allowing the plaintiff to recover attorney's fees, 475
 - Liability under statutes relating to erection and maintenance of fences, 496**
 - Allowance of double damages, 497
 - Ex post facto*, 497
 - Fourteenth amendment, 497
 - Penal character of statute, 497
 - Police power, 497
 - Statutes held constitutional, 496
 - Statutes not creating duty but declaring liability, 498
- Contributory negligence, 490**
 - Contributory negligence no defense, 490
 - Effect regulated by statute, 490
 - Jurisdictions where contributory negligence is a defense, 490
 - Jurisdictions where contributory negligence no defense, 491
 - Turning animals into pasture with knowledge of defective fence, 491
 - Where statutes are silent, 490
 - Wilful act of owner contributing to injury a defense, 491

INJURIES TO ANIMALS BY RAILROADS, *cont'd.*

- Contributory negligence on fenced roads or independent of duty to fence, 475**
 - Animals at large not by fault of owner, 480
 - Cattle wilfully killed, 478
 - Comparative negligence, 481
 - Contributory negligence where animals unlawfully at large, 479
 - Defendant's negligence after discovering animals on track, 480
 - Jurisdictions where contributory negligence to allow animals to run at large, 478
 - Jurisdictions where not contributory negligence to allow animals to run at large, 478
 - Plaintiff's negligence must proximately contribute to injury, 480
 - Right of recovery barred by contributory negligence, 476
 - Scope of statute, 475
 - Where contributory negligence not sustained, 477
 - Whether contributory negligence to allow animals to run at large, 478
- Damages** (see *infra, LIABILITY UNDER STATUTES RELATING TO ERECTION AND MAINTENANCE OF FENCES*):
 - Actual damages recovered for injuries due to defective fences or cattle guards, 482
 - Double damages, 483**
 - Constitutionality of statute, 497
 - Penal character of double damages, 484
 - Dogs, 485
 - Double damages, 484, 485**
 - Constitutionality of statute, 497
 - Entry, place of, 489
 - Estrays, see infra, CONTRIBUTORY NEGLIGENCE ON FENCED ROADS OR INDEPENDENT OF DUTY TO FENCE.*
 - Fences** (see *infra, CONTRIBUTORY NEGLIGENCE ON FENCED ROADS OR INDEPENDENT OF DUTY TO FENCE; LIABILITY UNDER STATUTES RELATING TO ERECTION AND MAINTENANCE OF FENCES*):
 - Legal fence, 485
 - Necessity of statute to make railroads liable merely because of nonexistence of fences, 498
 - Statutes creating absolute liability irrespective of negligence or duty to fence, 474
 - What is sufficient fence, 485
 - Gates, 485
 - Hogs, 484, 485
 - Introduction, 472
 - Landlord and tenant, 488
 - Lessees, see infra, LIABILITY AS BETWEEN OWNERS AND OPERATORS.*
 - Liability as between owners and operators, 487**
 - Contractors, 487
 - Either lessor or lessee liable, 489
 - Engineers, 487
 - In general, 487
 - Lessee's liability in absence of statute, 488
 - Lessee's liability under special statute, 488
 - Lessors and lessees, 487
 - Liability of lessee, 488
 - Meaning of agents, 487
 - Road operated by receiver, 489
 - Tracks used by both owner and another, 489
 - Who are agents of corporation, 487

INJURIES TO ANIMALS BY RAILROADS, *cont'd.*

- Liability under statutes relating to erection and maintenance of fences (see *infra*, LIABILITY AS BETWEEN OWNERS AND OPERATORS), 481
- Actual damages recovered for injuries due to defective fences or cattle guards, 482
- Amount of recovery under these statutes, 482
- Animals forbidden by statute to run at large, 485
- Circumstances under which notice presumed, 493
- Company's liability as affected by right of cattle to be at large, 494
- Company's notice of defect as affecting its liability, 493
- Constitutionality of statutes, 496
- Contributory negligence, 490
 - Contributory negligence no defense, 490
 - Effect regulated by statute, 490
 - Jurisdiction where contributory negligence is a defense, 490
 - Jurisdictions where contributory negligence no defense, 491
 - Turning animals into pasture with knowledge of defective fence, 491
 - Where statutes are silent, 490
 - Wilful act of owner contributing to injury a defense, 491
- Debarment must be sufficient to exclude all ordinary live stock, 484
- Dogs, 485
- Double damages, 483
- Duty of erecting and maintaining cattle guards, 485
- Duty to maintain debarments at particular points, 494
- Gate fastenings, 485
- Gates, 485
- Kind and character of animals to be excluded, 484
- Kind and character of debarments required, 484
- Legal fence, 485
- Must repair or rebuild within reasonable time after discovery, 493
- Obligation to fence begins as soon as the road is used, 492
- Penal character of double damage statutes, 484
- Place or entrance rather than of injury governs liability, 489
- Purpose of these enactments, 481
- Recovery of amount in excess of actual damages, 483
- Sheep, 484, 485
- Sufficiency of debarments to answer intended purpose, 485
- Swine, 484, 485
- What are sufficient cattle guards, 486
- What is sufficient fence, 485
- Where both duty to fence imposed and recovery for neglect thereof authorized by statute, 481
- Where only duty to fence imposed by statute recovery may be had for neglect thereof, 482
- Whether actual contact between train and animal essential to liability, 486

INJURIES TO ANIMALS BY RAILROADS, *cont'd.*

- Necessity of negligence on part of railroad company, 472
- Animals hitched to vehicles, 473
- Burden of proof showing precautions, 473
- No presumption of negligence at common law, 472
- Proof that injury was done by train, 473
- Rebuttal of presumption of negligence, 474
- Statutes creating presumption of negligence, 472
- Negligence (see *infra*, LIABILITY AS BETWEEN OWNERS AND OPERATORS; LIABILITY UNDER STATUTES RELATING TO ERECTION AND MAINTENANCE OF FENCES; NECESSITY OF NEGLIGENCE ON PART OF RAILROAD COMPANY):
 - Statutes creating absolute liability irrespective of negligence or duty to fence, 474
- Notice of defects, 493
 - Circumstances under which notice presumed, 493
 - Company's notice of defect as affecting its liability, 493
 - Must repair or rebuild within reasonable time after discovery, 493
 - Necessity of notice of defect by company, 493
 - Plaintiff must show the company's knowledge, 493
 - Reasonable care and diligence, 493
- Obligation to fence begins as soon as road is used, 492
- Owner, see *infra*, LIABILITY AS BETWEEN OWNERS AND OPERATORS.
- Place of entrance rather than of injury governs, 489
- Presumption as to place of entry, 490
- Presumption of knowledge of defects, 493
- Presumption of negligence, see *infra*, NECESSITY OF NEGLIGENCE ON PART OF RAILROAD COMPANY.
- Proximate cause, see *infra*, CONTRIBUTORY NEGLIGENCE ON FENCED ROADS OR INDEPENDENT OF DUTY TO FENCE.
- Receivers, 489
- Running at large, see *infra*, CONTRIBUTORY NEGLIGENCE ON FENCED ROADS OR INDEPENDENT OF DUTY TO FENCE.
- Company's liability as affected by right of cattle to be at large, 494
- Sheep, 484, 485
- Statutes, see *infra*, LIABILITY UNDER STATUTES RELATING TO ERECTION AND MAINTENANCE OF FENCES.
- Necessity of statutes to make railroads liable merely because of nonexistence of fences, 493
- Presumption of negligence, 472
- Statutes awarding attorney's fees to persons recovering judgment, 474
- Statutes creating absolute liability irrespective of negligence or duty to fence, 474
- Swine, 484, 485
- Trespasser, 494

INJURIES TO PERSONS, 501**INJURY, 499.**

- Civil damage act, 500
- Damages, 499
- Death by wrongful act, 499

INJURY, *cont'd.*

- Intent to injure, 500
- Property of persons, 500

INJURY TO CHILDREN, 500**INJURY TO INHERITANCE, 501****INJURY TO PROPERTY, 501****INLAND BILL, 502****INLAND NAVIGATION, 502****INLAND WATERS, 502****INLET, 503****INMATE, 503****INNOCENCE, 503****INNOCENT AGENT, 503****INNOCENT CONVEYANCES, 503****INNOCENT PURCHASER, 503****INNOCENT WOMAN, 503****INNS AND INNKEEPERS, 505**

- Action for price of entertainment, 554

Admissions, 545**Assault and battery:**

- By innkeeper, 546
- By other guests and strangers, 546
- By servant of innkeeper, 546
- Liability of innkeeper for assault on guests 546

Baggage:

- Liability of innkeeper, 539

Boarding-house keepers:

- Lien, 549, 554

Boarding houses (see *infra*, WHO ARE GUESTS):

- Distinction as to the nature of the occupant, 511
- Innkeeper may also be boarding-house keeper, 511
- Keeper of boarding house not an innkeeper, 511
- Keepers of, 510
- Liability of keepers of boarding houses, 532
 - Boarding-house keeper not liable as bailee, 532
 - Deposit of goods with boarding-house keeper, 532
 - Keepers of boarding houses and lodging houses not liable as innkeepers, 532
 - No obligation to take care of goods, 532

Bond, 515**Compensation:**

- Action for price of entertainment, 554
- Criminal liability of guests for fraudulent practices, 555

Constitutional law:

- Statutory regulation, 514

Contributory negligence of guests, 528

- Acts of servants or companions of guests 530
- Degree of negligence, 530
- Failure to ask for baggage, 528
- Failure to deposit money with innkeeper, 528
- Failure to give notice of value, 528
- Failure to lock door, 529
- Innkeeper is not liable for loss where guest is negligent, 528
- Intoxication of guest, 530
- Noncompliance with regulations of inn 529
- What constitutes negligence, 528

INNS AND INNKEEPERS, *cont'd.***Criminal law, 555**

- Criminal liability of guests for fraudulent practices, 555
- Disorderly houses, 555
- Refusing to receive and entertain guests, 526

Custody of innkeeper, see *infra*, LIABILITY IN RESPECT TO EFFECTS OF GUESTS.**Damages, 544**

- Cost of property, 544
- Interest, 545
- Measure of damages, 544
- Measure of damages for refusing entertainment to guest, 526
- Pecuniary value to owner recoverable in absence of market value, 544
- Where property has no market value, 544

Definition, see *infra*, WHO ARE GUESTS; WHO ARE INNKEEPERS.**Disorderly houses, 555**

- Gambling, 555
- Indictment, 555
- In general, 555
- Sale of intoxicating liquors, 555
- Statutory regulation of inns, 555

Drunkenness, see *infra*, INTOXICATION.**Duties, see *infra*, LIABILITY FOR PERSONAL INJURIES TO GUESTS; LIABILITY IN RESPECT TO EFFECTS OF GUESTS; LIMITING LIABILITY; RECEIVING AND ENTERTAINING GUESTS.****Ejecting persons not coming as guests, 526****Evidence:**

- Admissions of servants, 545
- As to whether a place is an inn, 513
- Plaintiff as witness in his own behalf, 545
- Presumption arising from loss, 545
- Sign as evidence, 513

Excluding or ejecting persons not coming as guests, 526**Exemption from taxation:**

- Lien of innkeeper on property exempt from taxation, 549, 550

Facts and circumstances indicating occupation, 513**Fire:**

- Injuries caused by fire, 547
- Fire escapes, 515
- Franchises, 509, 513
- Gambling, 555

Goods of guests, see *infra*, LIABILITY IN RESPECT TO EFFECTS OF GUESTS.**Guests (see *infra*, LIABILITY FOR PERSONAL INJURIES TO GUESTS; LIABILITY IN RESPECT TO EFFECTS OF GUESTS; RECEIVING AND ENTERTAINING GUESTS; WHO ARE GUESTS):**

- Provision for lodging guests, 515

Horses:

- Leaving horses at inn, 518
- Lien, 551
- Transportation of United States mails, 549, 550

Horses, accommodation for, 509**Hotel, 508****Indictments:**

- Refusing to receive and entertain guests, 526

Injuries, see *infra*, LIABILITY FOR PERSONAL INJURIES TO GUESTS.**Inn defined, 507****Innkeepers, see *infra*, WHO ARE INNKEEPERS.****Innkeeper's lien, see *infra*, LIENS.**

INNS AND INNKEEPERS, *cont'd.*

- Inspection, 516
- Intoxicating liquors, 510**
 - Sale of intoxicating liquors, 510
 - Whether retailing liquors constitute a place an inn, 510
 - Whether sale of liquors is an essential characteristic of an inn, 510
- Intoxication:**
 - Ejection of drunk or disorderly persons, 525
 - Intoxication of guest contributing to loss, 530
- Liability, see infra, LIMITING LIABILITY; RECEIVING AND ENTERTAINING GUESTS.*
- Liability for personal injuries to guests, 545**
 - Assault and battery, 546
 - Assault and battery by innkeeper, 546
 - Assault and battery by other guests and strangers, 546
 - Assault and battery by servant of innkeeper, 546
 - Defective or unsanitary condition of inn, 547
 - Injuries caused by fire, 547
 - Innkeeper bound to maintain premises in safe condition, 547
 - Unwholesome food, 547
- Liability in respect to effects of guests (see *infra, LIMITING LIABILITY*), 527**
 - Act of God or public enemy, 528
 - Acts of servants or companions of guests, 530
 - Admissions of servants, 545
 - Baggage, 539
 - Conflict of rules considered, 537
 - Contributory negligence, 528
 - Costs of property not measure of damage, 544
 - Custody of innkeeper, 533
 - Default of innkeeper, 535
 - Degree of negligence, 530
 - Delivery of baggage to wrong person, 531
 - Departure of guest terminates extraordinary liability, 531
 - Effects left by departing guest with consent of innkeeper, 531
 - Evidence, 545
 - Exceptions to rule, 528
 - Exclusive custody of guest, 534
 - Exhibiting goods for sale, 535
 - Existence of relation of innkeeper and guest, 530
 - Failure to lock door, 529
 - Form of action, 544
 - Goods constructively *infra hospitium*, 534
 - Innkeeper liable as gratuitous bailee of goods left by departing guest, 531
 - Interest, 545
 - Intoxication of guests, 530
 - Keepers of boarding houses and lodging houses, 532
 - Liability as insurer, 535
 - Losses resulting from inherent causes, 530
 - Measure of damages, 544
 - Measure of damages where property has no market value, 544
 - Money, 538
 - Nature and extent of liability, 535
 - Negligence of guest, 528
 - Noncompliance with regulations of inn, 529
 - Operation of *vis major*, 528

INNS AND INNKEEPERS, *cont'd.*

- Liability in respect to effects of guests, *cont'd.***
 - Plaintiff as witness in his own behalf, 545
 - Property of third persons, 540
 - Reason of rule, 537
 - Reckless exposure of money, 529
 - Requisites of liability, 530
 - Rule of *prima facie* liability, 536
 - Rule stated, 527
 - To what property liability attaches, 538
 - What constitutes negligence, 528
 - What law governs, 527
 - When custody of innkeeper commences, 433
- License, 509, 514**
 - Enforcement of license laws, 515
 - License not necessary unless required by statute, 509
 - Revocation of license, 515
 - Right to keep an inn not a franchise, 509
 - Statutory requirements, 514
 - Who authorized to grant license, 514
- Lien, 548**
 - Boarding house and lodging-house keepers, 549
 - Care of property held under lien, 553
 - Enforcement of lien, 553
 - Extent of boarding-house keeper's lien, 549
 - Horses, 550
 - Horses owned by the United States and employed in carrying mails, 551
 - Horses used in carrying United States mail, 550
 - Innkeepers proper, 548
 - Lien on goods of guests, 548
 - Loss of lien, 552
 - Married women, 549
 - Money loaned to guest, 552
 - Person of guest, 552
 - Property belonging to guests, 550
 - Property exempt from execution, 549, 550
 - Property of third persons in possession of guests, 550
 - Statutory lien of boarding-house keepers, 554
 - Statutory power of sale, 554
 - Stolen property, 551
 - To what charges lien extends, 552
 - To what lien attaches, 550
 - Wages, 550
 - Waiver of lien, 552
 - Wearing apparel, 550
 - Wearing apparel of guests, 550
 - Where innkeeper knew that guest was not the owner of property, 552
- Limiting liability, 540**
 - By contract, 540
 - Delivery of goods to innkeeper for safe custody, 541
 - Effect of complying with statute, 542
 - Extent of limitation, 542
 - Innkeeper not relieved against defaults of himself or servants, 542
 - Jewelry and watches, 543
 - Liability not affected by failure to deposit, 542
 - Limitation as to amount, 543
 - Limitation effected by terms of statute, 541
 - Notice to a guest, 540
 - Notice to public, 542
 - Posting copy of statute, 542
 - Property contemplated by statute, 543

INNS AND INNKEEPERS, *cont'd.***Limiting liability, *cont'd.***

Property placed in innkeeper's custody, 543

Statutes, 541

To whom statutes apply, 543

Lodging guests, 515

Lodging houses:

Keepers of, 510

Keepers of distinguished from innkeepers, 511

Liability of keepers of lodging houses, 532

Boarding-house keeper not liable as bailee, 532

Deposit of goods with boarding-house keeper, 532

Keepers of boarding houses and lodging houses not liable as innkeeper, 532

No obligation to take care of goods, 532

Lodgings:

Taking food without lodgings, 519

Taking lodgings without food, 519

Master and servant:

Admissions of servants, 545

Liability of innkeeper for assault by servant, 546

Measure of damages, see infra, DAMAGES.

Misconduct of guest, 522

Money:

Liability of innkeeper, 538

Negligence (see *infra*, LIABILITY IN RESPECT TO EFFECTS OF GUESTS):

Negligence of guest, 528

Acts of servants or companions of guests, 530

Degree of negligence, 530

Failure to ask for baggage, 528

Failure to deposit money with innkeeper, 528

Failure to give notice of value, 528

Failure to lock door, 529

Innkeeper not liable for loss where guest is negligent, 528

Intoxication of guest, 530

Noncompliance with regulations of inn, 529

What constitutes negligence, 528

Notice:

Limitation of liability, 540, 542

Presumption:

Presumption of continuance of relationship, 522

Relationship of guest and innkeeper, 523

Presumption of negligence from fact of loss 545

Questions of law and fact:

Who are guests, 518

Receiving and entertaining guests:

Compelling performance of duty, 526

Drunk or disorderly persons, 525

Duty to receive all comers, 508

Duty to receive all who offer as guests, 524

Excluding or ejecting persons not coming as guests, 526

Extent of duty, 524

Grounds for refusing entertainment, 524

Guest not entitled to apartments except for lodgings and refreshments, 524

Indictment for refusing entertainment, 526

Innkeeper suable for refusing entertainment, 525

Liabilities for improper refusal, 525

INNS AND INNKEEPERS, *cont'd.***Receiving and entertaining guests, *cont'd.***

Measure of damages for refusing entertainment, 526

Persons not able to pay for entertainment, 525

Reasonable accommodation, 524

Statutory penalties for refusing entertainment, 526

Relationship of landlord and guest, see infra, WHO ARE GUESTS.

Restaurants:

Keepers of restaurants, 512

Obligations of restaurant keeper similar to those of innkeeper, 512

Rights, see infra, LIENS; RECEIVING AND ENTERTAINING GUESTS.

Securing and enforcing right to compensation, see infra, LIENS.

Signs:

Evidence of character of place, 513

Necessity of sign, 510

Sleeping-car companies, 512

Statutes, see infra, LIMITING LIABILITY.

Statutory regulation, 514

Bond, 515

Constitutionality of the statute, 514

Fire escapes, 515

In general, 514

License, 514

Official inspection, 516

Police power, 514

Provisions for lodging guests, 515

Rates of charges, 514

Steamboat companies, 512, 513

Summer resorts, 511

Keepers of hotels at summer resorts as innkeepers, 511

Tavern, 508

Traveler, 516

Wages of guests, 550

Waiver of lien, 553

Watering places, 511

Wayfarer, 516

Who are guests, 516

Accommodation and convenience of traveler, 519

Definition, 516

Distinction between guests and boarders, 522

Contracts creating relation, 523

Definition of boarder, 522

Effect of special contract as evidence of relation, 524

Express contract as to time and rate of entertainment, 523

Length of stay not controlling, 523

Permanent or transient character of stay, 522

-Presumption as to relation, 523

Duration of relation, 520

Abandonment of transient character, 522

Commencement, 520

Departure from inn as termination, 521

Innkeeper's right to determine relationship, 522

Leaving baggage or effects at inn, 521

Leaving inn temporarily, 521

Misconduct of guest, 522

Mutual agreement or understanding, 521

Porter's authority, 521

Presumption of continuance, 522

Relation determinable at will of guest, 521

INNS AND INNKEEPERS, *cont'd.***Who are guests, *cont'd.*****Duration of relation, *cont'd.***

Special contract with an innkeeper, 522

Temporary departure, 521

Termination, 521

Termination by guest, 521

Termination of relation by innkeeper, 522

Food without lodgings, 519

Guests may make express contracts with innkeepers for price, 517

Inanimate chattels left at inn by owner, 518

Leaving horses at inn, 518

Nature of accommodation furnished, 519

Necessity of personal presence, 518

Only transients may become guests, 517

Persons belonging to the army and navy, 517

Persons not travelers may become guests, 516

Property taken to inn by bailee of owner, 518

Property taken to inn by owner's servant or member of family, 518

Questions of law and fact, 518

Railroad conductors, 517

Taking lodgings without food, 519

Traveler, 516

Wayfarer, 516

What constitutes relationship in general, 517

Who may become guests, 516

Who are innkeepers, 507

Accommodations for guests, 508

Accommodations for horses, 509

Boarding-house keepers, 510

Café keepers, 512

Definition, 507

Distinctions, 510

Duty to receive all comers, 508

Essential characteristics, 508

Evidence, 513

Explanation of terms, 508

Facts and circumstances indicating occupation, 513

Franchise, 509, 513

Hotel, 508

Innkeeper defined, 507

Keepers of boarding houses, 510

Keepers of hotels at summer resorts, 511

Keepers of lodging houses, 510

License, 509

Lodging-house keepers, 510

Necessity of license, 509

Necessity of sign, 510

Regular business, 509

Restaurant keepers, 512

Sale of intoxicating liquors, 510

Sign as evidence, 513

Sleeping-car companies, 512

Steamboat companies, 512

Summer resorts, 511

Tavern, 508

Watering places, 511

Who may keep an inn, 513

INNUENDO, 556**IN OFFICE, 128****INOFFICIOUS WILL, 556****INOPPORTUNE, 556****IN PERSONAM, 129****IN PROGRESS, 130****INQUEST, 556****INQUEST OF OFFICE, 556****INQUIRY, 557****INQUISITION, see INSANITY.****IN REM, 129****INSANE ASYLUMS (see INSANITY), 557****INSANITY, 558****Accounting, 589**

Accounting for profits of ward's labor, 591

Acting without authority, 593

Allowance of items, 591

Annual accounts, 589

Compelling committee to account, 590

Conclusiveness of annual accounts as evidence, 590

Costs, 592

Counsel fees, 592

Creditor compelling annual accounts, 590

Damage to guardian's property by ward, 593

Duty to make annual accounts, 589

Final accounting for property received, 590

Guardian becoming *non compos mentis*, 591

Improvements to estate, 592

Interest, 591

Payment of ward's past debts, 592

Responsibility for safety of investments, 591

Support of ward, 591

Void appointment, 593

Ward's individual debt to guardian, 593

Actions by and against lunatics and their guardians, 600

Action for necessities, 602

Actions against guardian, 602

Actions against lunatic after inquisition, 602

Actions against lunatic himself, 601

Judgment in favor of insane plaintiff, 601

Lunatic's liability to be sued, 601

Lunatic's right to allege his own insanity, 602

Lunatic's right to sue, 600

Lunatic's right to sue after inquisition, 601

Lunatic's right to sue before inquisition, 600

Next friend, 600

Validity of judgment in favor of insane person, 601

Admissions, 609**Agency :**

Employment of agent by guardian, 579

Ancestors, see *infra*, HEREDITARY TAINT.**Appearance, 610****Appointment of guardian, 573**

Appointment of receiver, 577

Bond, 577

Character of trust, 573

Collateral attack on appointment, 574

Consideration given to lunatic's wishes, 575

Corporations, 576

Guardianship of infants distinguished, 573

Heir at law, 575

Husband, 575

Mere curator, 573

Next of kin, 575

INSANITY, *cont'd.***Appointment of guardian, *cont'd.***

- Nomination, 574
- Nonresident lunatics, 577
- Notice to lunatic, 574
- Officers of court, 576
- On whose nomination appointment to be made, 574
- Prior adjudication of insanity requisite, 574
- Relatives, 575
- Residence of committee, 576
- Same person as committee of person and estate, 574
- Strangers, 577
- Whether security required, 577
- Who may be appointed, 575
- Wife as committee, 576
- Woman, 576

Asylum, 597

- Common-law rule, 598
- Confinement in an asylum, 597
- England, 598
- Habeas corpus, 598
- Person's temporary relief, 598
- Records, 607
- Where insane persons may be confined, 597

Attorney's fees :

- Accounting by guardian, 592

Bonds :

- Appointment of guardian or committee, 577
- Books of science as evidence, 611
- Breach of the peace, 597
- Burden of proof, 616
- Charitable enterprises, 580

Children :

- Support of lunatic's children, 581

Commission, see *infra*, INQUISITION.**Committee, see *infra*, ACCOUNTING; ACTIONS BY AND AGAINST LUNATICS AND THEIR GUARDIANS; APPOINTMENT OF GUARDIAN; COMPENSATION OF GUARDIAN; MANAGEMENT OF ESTATE; SALES, TRANSFERS, AND INCUMBRANCES; TERMINATION OF GUARDIANSHIP.****Compensation of guardian, 593**

- In England, 593
- In the United States, 594
- Receiver with salary, 593
- Where extraordinary care and expense involved, 593

Conduct, 610**Confinement, see *infra*, RESTRAINT OF INSANE PERSONS;****Consideration, 628****Constitutional law :**

- Right to jury trial, 599

Contracts, 623

- Absence of fraud, 628
- After adjudication of insanity, 626
- Bona fide* executed contracts, 625
- Consideration grossly inadequate, 628
- Contracts for necessities, 625
- Contracts for necessities after inquisition, 626
- Contracts for necessities for lunatic's family, 626
- Equitable relief, 627
- Former rule as to civil acts, 624
- In general, 623
- Mere mental weakness, 628

INSANITY, *cont'd.***Contracts, *cont'd.***

- Mere weakness of mind, 628
 - Present rule as to liability, 624
 - Test of mental capacity, 624
 - Where finding of lunacy would not be justified, 627
 - Where party cannot be adjudged lunatic, 628
 - Who may avoid lunatic's contract, 629
- Conversion and reconversion, 588**
- Exceptions for benefit of lunatic, 589
 - Fund claimed as personality, 588
 - General rules, 588
 - Heir dying without making election, 588
 - Improvement, 589
 - Investment of personality, 588
 - Money recovered as damages to the fee, 588
 - Sales of real property, 588
 - Timber severed from soil, 588

Corporations :

- Committee, 576

Costs :

- Accounting by guardian, 592

Costs and disbursements, 571

- Attorney's fees for opposing commission, 571
- By what court allowed, 573
- Costs upon traverse, 573
- Extent of court's authority, 573
- Imposed upon lunatic's estate, 571
- Imposed upon prosecutor, 571
- In general, 571
- Prosecution without probable cause, 571
- Where inquisition fails or is set aside, 572
- Where the return was defective, 572

Courts :

- Control of court over management of estate, 578

Covenants :

- Guardian's covenants, 586

Craziness, 565**Criminal law :**

- Absence of motive as evidence of insanity, 609
- Liability for crimes, 618**
 - American cases following rule in M'Naghten's case, 620
 - American cases modifying rule in M'Naghten's case, 620
 - Compared with civil responsibility, 621
 - Delusions, 618
 - Hallucinations, 618
 - In general, 618
 - Insanity at or after trial, 621
 - Instruction as to merits of defense, 621
 - Irresistible impulse, 618
 - Irresponsibility acquits, 621
 - Knowledge of right and wrong, 619
 - M'Naghten's case, 619
 - Moral insanity, 618
 - Punishment of prisoner, 620
 - Reduction of degree of crime, 621
 - Right and wrong test, 619
 - Rule in M'Naghten's case followed in English cases, 620
 - Separate trial of issue by jury discretionary, 622
 - Trial of prisoner, 621
 - Uncontrollable impulse, 618
- Nature of criminal acts as evidence of insanity, 608

INSANITY, *cont'd.***Criminal law, *cont'd.***

Requisite degree of proof in criminal cases, 615
 English view as to degree of proof, 615

In general, 615

Preponderance of evidence, 616

Three views, 615

View that accused must prove insanity beyond reasonable doubt, 615

View that issue should be decided according to preponderance of evidence, 616

View that prosecution must prove sanity beyond reasonable doubt, 617

Curator, see *infra*, APPOINTMENT OF GUARDIAN.

Custody (see *infra*, RESTRAINT OF INSANE PERSONS);

Jurisdiction of court, 565, 566

Damages:

Torts, 623

Deaf and dumb persons, 562

Death:

Death of lunatic, 594

Effect upon committee's authority, 595

Effect upon court's jurisdiction, 594

Debts:

Payment of ward's past debts, 592

Declarations, 609

Definition, 562

Craziness, 565

Deaf and dumb persons, 562

Delirium, 565

Delirium tremens, 563

Delusions, 563

Dipsomania, 565

Emotional insanity, 563

Homicidal mania, 564

Idiocy, 562

Imbecility, 563

Insanity generally, 562

Irresistible impulse, 563

Kleptomania, 564

Lucid intervals, 565

Lunacy, 562

Monomania, 564

Moral insanity, 563

Persons *non compos mentis*, 563

Pyromania, 564

Senile dementia, 563

Somnambulism, 565

Transitory homicidal mania, 564

Delirium, 565

De lunatico inquirendo, see *infra*, INQUISITION.

Delusions, 618

Depravity, 611

Diaries, 610

Dipsomania, 565

Dower:

Extinguishment of dower, 587

Emotional insanity, 563

Estate, see *infra*, MANAGEMENT OF ESTATE; SALES, TRANSFERS, AND INCUMBRANCES.

Evidence:

Accounting, 590

Evidence of insanity (see *infra*, HEREDITARY TAIN; RECORD OF INQUISITION), 606

Absence of motive, 609

Admissions, 609

Appearance, 610

Books of science as evidence, 611

Civil acts, 608

16 C. of L.—78

INSANITY, *cont'd.***Evidence of insanity, *cont'd.***

Competency of evidence in regard to time, 614

Condition at time of act is point for decision, 614

Evidence of condition before and after act admissible, 614

In rebuttal, 615

To prove insanity at time of act, 614

Conduct, 610

Criminal acts, 608

Declarations, 609

Depravity, 611

Diaries, 610

Expert and opinion evidence, 611

Family tradition, 612

General conduct and appearance, 610

General reputation, 612

General reputation and family tradition to prove insanity of parties, 612

Hereditary taint, see *infra*, HEREDITARY TAIN.

Irrational acts and beliefs, 610

Irritability, 611

Letters, 610

Nature of act under consideration, 608

Particular facts and circumstances tending to show mental aberration, 610

Proof of hereditary taint, see *infra*, HEREDITARY TAIN.

Recitals in written instrument, 610

Religious belief, 611

Requisite degree of proof in criminal cases, 615

English view as to degree of proof, 615

In general, 615

Preponderance of evidence, 616

Three views, 615

View that accused must prove insanity beyond reasonable doubt, 615

View that issue should be decided according to preponderance of evidence, 616

View that prosecution must prove sanity beyond reasonable doubt, 617

Spiritualism, belief in, 611

Suicide, 603

Verbal statements, 609

Examination of lunatic, 570

Expenditures for lunatics, see *infra*, MANAGEMENT OF ESTATE.

False imprisonment, 597

Family:

Support and maintenance of lunatic's family and relatives, 580

Adopted children, 581

Children, 581

Illegitimate children, 581

Lunatic's brother's illegitimate children, 582

Lunatic's collateral kindred, 582

Lunatic's personal servants, 582

Lunatic's stepchildren, 581

Lunatic's wife and children, 580

Marriage portions, 581

Nephews, cousins, etc., 582

Family tradition as evidence, 612

Friends, see *infra*, INQUISITION.

Guardians, see *infra*, ACCOUNTING; ACTIONS BY AND AGAINST LUNATICS AND THEIR GUARDIANS; APPOINTMENT OF GUARDIANS; COMPENSATION OF GUARDIAN; MANAGEMENT OF ESTATE; SALES, TRANSFERS, AND INCUMBRANCES.

INSANITY, *cont'd.*

- Guardian's covenants, 586
- Guardianship*, see *infra*, TERMINATION OF GUARDIANSHIP.
- Habeas corpus**, 598
 - Authority of applicant, 598
 - In general, 598
 - Persons charged with crime, 598
 - Return of writ, 598
 - Right of insane persons to habeas corpus, 598
 - Who may make application, 598
- Hallucinations, 618
- Hearing**:
 - Right to notice and hearing before confinement, 599
- Hearsay evidence, 609
- Heir at law**:
 - Guardian, 575
- Hereditary taint**, 613
 - Admitted as cumulative evidence, 614
 - As to nature of malady, 613
 - General reputation and family tradition, 612
 - Insanity of ancestors, 613
 - Insanity of collateral kindred, 613
- Homicidal mania, 564
- Husband and wife** (see *infra*, MARRIED WOMEN):
 - Guardian, 575
 - Husband's liability for maintenance of insane wife, 596
 - Support and maintenance of lunatic's family and relatives, 580
- Idiocy, 562
- Illegitimate children, support of, 581, 582
- Imprisonment*, see *infra*, RESTRAINT OF INSANE PERSONS.
- Imprisonment for debt and in civil actions**:
 - Privilege of insane persons from arrest, 43
- Improvements**:
 - Allowance of improvements, 592
 - Conversion and reconversion of property, 589
- Improvident bargains and habits, 611
- Inadequate consideration, 628
- Incumbrances*, see *infra*, SALES, TRANSFERS, AND INCUMBRANCES.
- Inevitable accident, 623
- Infants**:
 - Disaffirmance by committee in lunacy, 298
- Inquisition** (see *infra*, ACTIONS BY AND AGAINST LUNATICS AND THEIR GUARDIANS; COSTS AND DISBURSEMENTS; RECORD OF INQUISITION), 566
 - Appearance as waiver of notice, 568
 - Attendance of lunatic, 567
 - Bias of juror, 570
 - Compelling attendance of witnesses, 569
 - Decision of questions of law, 570
 - Discretion of issuing commission, 567
 - Exclusion of spectators, 570
 - General statement, 566
 - Improper interference by commissioners, 569
 - Improper interference by sheriff, 569
 - Jurors, 570
 - Lunatic's right to be present, 570
 - Municipal authorities, 567
 - New York, 598
 - Notice to lunatic, 567
 - Notice to next of kin, 568
 - Personal examination of lunatic, 570

INSANITY, *cont'd.*

- Inquisition, *cont'd.***
 - Powers and duties of commissioners, 569
 - Relative or friend, 566
 - When commission will issue, 567
 - When notice or presence of lunatic may be dispensed with, 569
 - Where confinement the object, 566
 - Who may make application, 566
- Insane asylums*, see *infra*, ASYLUMS.
- Insolvency and bankruptcy, 658
- Interest**:
 - Accounting by guardian, 591
 - Irrational acts and beliefs, 610
 - Irresistible impulse, 563, 618
 - Irritability, 611
- Judgments**:
 - Validity of judgment for insane plaintiff, 601
- Jurisdiction**, 565
 - Court of general jurisdiction, 566
 - Death of lunatic, 594
 - In England, 565
 - In the United States, 566
 - Probate courts, 566
 - To whom custody of idiots and lunatics belongs, 565
- Jurors**:
 - Inquisition, 570
- Jury and jury trial**:
 - Right to jury trial, 599
- Kleptomania, 564
- Leases**, 586
 - Inherent power of court, 586
 - Renewal of lease, 587
 - Right of committee to make lease, 586
 - Statutory authority, 586
- Letters, 610
- Liability for contracts*, see *infra*, CONTRACTS.
- Liability for crimes*, see *infra*, CRIMINAL LAW.
- Liability for torts*, see *infra*, TORTS.
- Libel and slander, 623
- Lucid intervals, 565
- Lunacy, 562
- Maintenance*, see *infra*, MANAGEMENT OF ESTATE.
- Management of estate** (see *infra*, ACCOUNTING; SALES, TRANSFERS, AND INCUMBRANCES), 578
 - Compensation of guardian**, 593
 - In England, 593
 - In the United States, 594
 - Receiver with salary, 593
 - Where extraordinary care and expense involved, 593
 - Control of court, 578
 - Employment of agents, 579
 - Expenditure for lunatic**, 579
 - Comfort first consideration, 579
 - Property within jurisdiction primary fund, 580
 - Traveling expenses, 580
 - Ward's charitable enterprises, 580
 - Where expenditure exceeds income, 579
 - In general, 578
 - Relative powers and duties of committee, 589
 - Support and maintenance of lunatic's family and relatives**, 580
 - Adopted children, 581
 - Children, 581

INSANITY, *cont'd.***Management of estate, *cont'd.*****Support and maintenance of lunatic's family and relatives, *cont'd.***

- Illegitimate children, 581
- Lunatic's brother's illegitimate children, 582
- Lunatic's collateral kindred, 582
- Lunatic's personal servants, 582
- Lunatic's step-children, 581
- Lunatic's wife and children, 580
- Married portion, 581
- Nephews, cousins, etc., 582

Married women :

- Sale of real estate of insane married woman, 585

Money, see *infra*, SUPPORT AND MAINTENANCE.**Monomania, 564****Moral insanity, 618****Mortgages, 587**

- Sale of property under existing mortgages, 586

Motives :

- Absence of motive, 609

Municipal corporations :

- Inquisition, 567

Necessaries, 625

- Action for necessities, 602
- After inquisition, 626
- Liability for necessities, 625
- Necessaries for lunatic, 625
- Necessaries for lunatic's family, 626

Next of kin :

- Guardian, 575

Notice, 567

- Alleged lunatic, 567
- Appearance as waiver of notice, 568
- Appointment of guardian, 574
- Effect of lack of notice, 568
- Notice to alleged lunatic, 567
- Notice to relatives, 568
- Personal notice to lunatic, 568
- Right to notice and hearing before confinement, 599
- Waiver to next of kin, 568
- When notice or presence of lunatic may be dispensed with, 569

Officers of courts :

- Committee, 576

Partition :

- Partition sales, 586

Personal examination of lunatic, 570**Preponderance of evidence, 616****Presence of the lunatic, see *infra*, INQUISITION.****Presumptions, 604**

- Continuance of insanity, 604
- Of sanity, 604
- Restoration of former mental vigor need not be shown in rebuttal, 605
- Temporary insanity, 606

Pyromania, 564**Questions of law and fact, 603**

- Civil cases, 604
- Existence of insanity question of fact, 603
- General rule, 603
- In courts of chancery, 604
- Insufficiency of evidence, 604
- Legal effect of insanity question of law, 604
- Where evidence conflicting, 604

Real property, see *infra*, SALES, TRANSFERS, AND INCUMBRANCES.**INSANITY, *cont'd.*****Reasonable doubt :**

- View that accused must prove insanity beyond reasonable doubt, 615
- View that prosecution must prove sanity beyond reasonable doubt, 617

Receivers :

- Appointment of receiver, 577

Reconversion, see *infra*, CONVERSION AND RECONVERSION.**Record of inquisition, 606**

- Commitment to asylum, 607
- In general, 606

- Records of asylum, 607

- Transactions overreached by finding, 607

Relatives, see *infra*, HEREDITARY TAIN; INQUISITION; MANAGEMENT OF ESTATE.

- Guardian, 575

- Religious beliefs, 611

Reputation :

- General reputation and family tradition as evidence, 612

Restraint of insane persons, 596

- Actual insanity, 597
- Breach of peace in presence of magistrate, 597
- Danger of immediate injury, 597
- Detention after acquittal upon criminal charge, 600
- False imprisonment, 597
- Incarceration in madhouse, 597
- Inquiry by commission in lunacy, 598
- Insane person charged with crime, 598
- Private person acting without warrant, 596
- Right to institute proceedings for relief, 599
- Right to jury trial, 599
- Right to notice and hearing, 599
- Right to writ of habeas corpus, 598
- Without warrant, 596

Sales, transfers, and incumbrances, 582

- Effect upon character of property, 588
- Exceptions for benefit of lunatic, 589
- Heir dying without making election, 588
- Improvements, 589
- Mortgage discharged from personal estate, 588
- Proceeds of realty regarded as realty, 588
- Timber severed from soil, 588
- Upon investment of personalty, 588

General rules, 582**Personal property, 583****Personal property for payment of debts, 583****Real property, 583**

- Extinguishment of dower, 387
- For better investment, 585
- For payment of taxes, 585
- For support and maintenance, 585
- Guardian's covenants, 586
- Insane married woman, 585
- Leases, 586
- Mortgages, 587
- Partition sales, 586
- Personalty to primary fund for support, 585
- Power to sell, 583
- Power to sell in England, 583
- Power to sell in the United States, 584
- Renewal of leases, 587
- Statutes, 584

INSANITY, *cont'd.*

Sales, transfers, and incumbrances, *cont'd.*

Real property, *cont'd.*

Statutory authority as to leases, 587

Subject to existing liens, 586

Under existing mortgage or trust deed, 586

Somnambulism, 565

Spiritualism, 611

Stepchildren, support of, 581

Suicide, 608

Suits, see *infra*, ACTIONS BY AND AGAINST LUNATICS AND THEIR GUARDIANS.

Support and maintenance (see *infra*, MANAGEMENT OF ESTATE), 591

Accounting, 591

Husband's liability for maintenance of insane wife, 596

Personalty the primary fund for support, 585

Sales of real property, 535

Taxes, 585

Sale of real property for payment of taxes, 585

Termination of guardianship, 594

Causes for removal, 596

Death of ward, 594

Effect of ward's death upon committee's authority, 595

Effect of ward's death upon jurisdiction, 594

Failure to file inventory, 596

Recovery of lunatic, 595

Removal of committee, 595

Resignation of committee, 595

Torts, 622

Damages, 623

Inevitable accident, 623

In general, 622

Liability of lunatic, 622

Measure of damages, 623

Slander, 623

Tortious negligence, 623

Transfers, see *infra*, SALES, TRANSFERS, AND INCUMBRANCES.

Trust deed:

Sale of real property under existing trust deed, 586

Trusts and trustees:

Relative power and duties of prior trustee, 589

Uncontrollable impulse, 618

Witnesses:

Compelling attendance of witnesses, 569

INSIST, 629

INSOLENCE, 629

INSOLENT, 629

INSOLVENCY AND BANKRUPTCY:

Abandonment of property, 745

Absconding debtor, 670

Accounting, 756

Allowances to assignee or trustee, 756

Compensation, 756

Duty of assignee to account, 756

Expenses, 757

Accounts:

Failure to keep, concealment, or destruction of books of account, 799

Actions, 752

Actions against assignee or trustee, 752

INSOLVENCY AND BANKRUPTCY, *con.*

Actions, *cont'd.*

Actions by assignee or trustee, 752

Evidence of official character, 752

Right to maintain, 752

Intervention and substitution in pending action, 752

Actions brought against bankrupt, 753

Actions brought by bankrupt, 762

Jurisdiction, see *infra*, JURISDICTION.

Limitation of actions, 755

Actions against debtor, 702

Action pending at commencement of proceedings, 703

Actions against joint debtors, 705

Actions brought after commencement of proceeding, 702

Actions involving bankrupt's title to property, 704

Actions involving title to property, 704

Actions of debts not dischargeable in bankruptcy, 704

Assignee's title not affected by judgment against insolvent, 703

Cases on appeal, 705

Claims sometimes dischargeable in bankruptcy, 703

Effect of insolvency and bankruptcy proceedings, 702

Leave of court to sue, 703

Right to sue bankrupt, 702

Right to sue pending application for a discharge, 703

Stay of proceedings, 704

Unreasonable delay on the part of bankrupt, 704

Actions by debtor, 701

Action by debtor with consent of assignee or trustee, 701

Action not abated by bankruptcy of plaintiff, 702

Actions affecting exempt property, 702

Bankruptcy of plaintiff, 702

Cases denying right of plaintiff to prosecute action after bankruptcy, 702

Operation and effect of insolvency and bankruptcy proceedings, 701

Property or rights of action not scheduled with assets, 701

Prosecution of pending actions, 702

Recovery for benefit of assignee, 702

Right of action in general, 701

Right of bankrupt to proceed with action, 702

Rule that only assignee or trustee can sue, 701

Acts of bankruptcy or insolvency, 660

Admitting insolvency, 673

Arrest of debtor, 671

Assent of creditors to assignment, 670

Assignments for benefit of creditors, 669

Departure of debtor or concealment of person, 670

Fraudulent conveyance or transfer of property, 660

Nonpayment of commercial paper, 672

Preference, see *infra*, PREFERENCE.

Removal or concealment of property, 671

Seizure of goods under legal process, 671

Adequacy of consideration, 681

Adjournment of meeting of creditors, 713

Admissions, 653

Admitting insolvency as act of bankruptcy, 673

INSOLVENCY AND BANKRUPTCY, *con.*

- Agency**, 700
 - Bankruptcy of agent, 700
 - Bankruptcy of principal, 700
 - Dissolution of relationship, 700
 - Effect of bankruptcy, 700
 - Fiduciary debts, 781
 - Preferences, 736
 - Revocation of agency, 700
- Alimony**:
 - Effect of discharge, 771
 - What debts and claims are provable, 683
- Allowances**, see *infra*, PROOF AND ALLOWANCE OF DEBTS AND CLAIMS AGAINST ESTATE.
- Amount allowable**, 674
- Amount of debts**, 649
- Amount of indebtedness**, 647, 657
- Appeals**, 705
- Appointment of assignee**, see *infra*, ASSIGNEE OR TRUSTEE.
- Arbitration and award**, 752
- Arrest**:
 - Arrest of debtor as act of bankruptcy, 671
 - Exemption from arrest and imprisonment after discharge**, 787
 - Discharge from existing imprisonment, 788
 - Discharge granted in another state, 788
 - Discharge limited to civil actions, 788
 - Discharge limited to exemption from arrest, 788
 - In general, 787
 - Nature of debts and liabilities, 788
 - Where the debt is not dischargeable, 788
 - Exemption of debtor from arrest on civil process**, 697
 - Arrests made before commencement of bankruptcy proceedings, 698
 - Debt provable in bankruptcy, 697
 - Habeas corpus to enforce exemption from arrest, 698
 - In general, 697
 - No exemption from arrest for debts not released by discharge, 697
 - Remedy of a debtor, 698
 - Persons privileged from arrest, 660
- Assignee or trustee**, see *infra*, TITLE OF ASSIGNEE OR TRUSTEE; WHAT PASSES TO ASSIGNEE OR TRUSTEE.
- Abandonment of property**, 745
- Accounting**, see *infra*, ACCOUNTING.
- Actions**, see *infra*, ACTIONS.
- Additional appointment**, 721
- Appointment** (see *infra*, MEETING OF CREDITORS):
 - Additional appointment, 721
 - Appointment by court, 717
 - Appointment by debtor, 718
 - Computing amount of claim, 716
 - Computing number of creditors, 716
 - Confirmation of election, see *infra*, CONFIRMATION OF ELECTION.
 - Election by creditors, 711
 - How selection is made, 711
 - Meeting of creditors, see *infra*, MEETING OF CREDITORS.
 - Notice of appointment, 718
 - Right to vote, see *infra*, MEETING OF CREDITORS.
 - Statutory provisions for election of creditors, 711

INSOLVENCY AND BANKRUPTCY, *con.*

- Assignee or trustee**, *cont'd.*
- Appointment**, *cont'd.*
 - Votes necessary to elect, 715
 - Who may be appointed, 718
- Arbitration**, 752
- Bond**, 718
- Collection of assets**, see *infra*, COLLECTION OF ASSETS.
- Compensation**, 756
- Compromise**, 752
- Continuing business**, 747
- Diligence**, 742
- Distinction between preferences and fraudulent conveyances**, 747
- Duties**, 742
- Expenses**, 757
- Good faith**, 742
- Joint trustees**, 742
- Liabilities**, 742
- Postponing appointment**, 721
- Powers**, 742
- Power to bind the estate**, 742
- Sale of property**, see *infra*, SALE OF PROPERTY.
- Setting aside fraudulent or preferential transfers**, 746
- Termination of office**, 719
 - Death of assignee or trustee, 721
 - Death of debtor, 721
 - Discharge after completion of duties, 719
 - Grounds of removal, 720
 - Neglect or misconduct, 720
 - Removal, 719
 - Removal at instance of creditors, 720
 - Removal under state insolvency laws, 720
- What passes to assignee or trustee**, see *infra*, WHAT PASSES TO ASSIGNEE OR TRUSTEE.
- Assignments**, 758
 - Assigned claims, 690
 - By whom made, 758
 - Recording of the assignment, 758
 - Required by former bankruptcy laws, 758
- Assignment for benefit of creditors**, 733, 745
 - Acts of bankruptcy, 669
 - Assignments held merely voidable, 733
 - Preferences, 734
 - Right to recover property assigned, 733
 - What passes to assignee in insolvency, 733
- As to what debts and claims provable**, see *infra*, PROOF AND ALLOWANCE OF DEBTS AND CLAIMS AGAINST ESTATE.
- Attachments** (see *infra*, LIENS ON DEBTOR'S PROPERTY):
 - Act of bankruptcy, 671
 - Effect of discharge on attachment liens, 775
 - Preferences, 662
 - Priority of costs of attachments, 695
- Attorneys**:
 - Effect of discharge, 781
- Attorney's fees**:
 - Claims allowable, 692
 - Mortgage or sale to pay attorney's fees or other expenses, 666
 - Priority, 695
- Auction**, 749
- Bailments**:
 - Effect of discharge, 781
- Banks and banking**, 730
 - Banker as trustee, 730
 - Effect of discharge, 781

INSOLVENCY AND BANKRUPTCY, *con.***Bills of exchange and promissory notes, 672****Nonpayment of commercial paper as act of bankruptcy, 672**

Character of stoppage or suspension, 672

In general, 672

Retired trader, 672

Rule restricted to persons designated, 672

What is commercial paper, 672

Transfer of negotiable paper, 698

Bond of assignee or trustee, 718

Books of account:

Failure to keep, concealment, or destruction of books of account, 799

Brokers:

Effect of discharge, 781

Burden of proof, 653

Business, continuing, 747

Cash sale, 749

*Character of debtor, see infra, WHO MAY BE ADJUDGED BANKRUPT OR INSOLVENTS.***Choses in action, 724**

Claims against government, 727

Contracts to purchase land, 726

Effect of payment to bankrupt, 725

Fraud and deceit, 725

Insurance policies, 726

Judgments, 725

Liabilities of stockholders, 726

Payment to the bankrupt, 725

Personal torts not assets, 725

Shares or membership in corporations and exchanges, 726

Usurious interest paid by bankrupt, 725

Whether chose in action passes to assignee, 724

*Civiliter mortuus, 698**Claims, see infra, DEBTS AND CLAIMS AGAINST ESTATE; PROOF AND ALLOWANCE OF DEBTS AND CLAIMS AGAINST ESTATE.**Collateral attack upon discharge, see infra, DISCHARGE OF DEBTOR.***Collection of assets, 743**

Assignments for benefit of creditors, 745

Deposit of funds, 743

Discovery of assets, 745

Duty to collect assets prescribed, 743

In general, 743

Order to pay over money or deliver property to trustee, 743

Property claimed or held adversely, 744

Property held by officer of state court, 744

Property held under judicial process, 744

Receiver appointed before petition in bankruptcy, 744

Redemption of property by assignee, 743

Commercial paper, see infra, BILLS OF EXCHANGE AND PROMISSORY NOTES.

Commission merchants, 729, 730

Compensation of assignee or trustee, 756

Composition meetings, 759

Agreement not to press for payment, 763

Amount of consenting creditors, 760

Claims entitled to priority, 763

Claims payable, 762

Confirmation of composition, 760

Convening creditors, 759

Debtor not entitled to discharge, 761

Default in making, 763

Disputed claims, 760

Effect of composition, 764

Grounds for refusing confirmation, 760

INSOLVENCY AND BANKRUPTCY, *con.***Composition meetings, *cont'd.***

Investigation of debtor's affairs, 759

Mode of payment of dividends, 762

Number of consenting creditors, 760

Payment of dividends, 762

Preference of creditors, 764

Prejudice to creditors, 760

Proof of claims, 763

Right to vote, 759

Secret agreement with creditors, 764

Secret preference creditors, 764

Secured creditors, 760

Security for payment, 764

Special advantage to creditors, 761

Terms of composition, 760

Time of payment of dividends, 762

Unliquidated claims, 763

Want of good faith, 762

When approval of composition is refused, 761

Who may vote, 759

Compositions, 758

Authority to make compositions, 758

*Composition meetings, see infra, COMPOSITION MEETINGS.***Setting aside compositions, 765**

Default in payment of instalments, 766

Effect as to prior acts, 766

Extra inducement to particular creditors, 765

Failure to comply with statute, 766

Grounds for setting aside compositions, 765

Inducement furnished by third persons, 765

Injustice or undue delay, 766

Power to set aside composition, 765

Who may move, 765

Compromise, 752

Agreement of petitioning creditors to compromise, 652

Concealing property, 652

Concealment of assets:

Refusing discharge, 797

Concealment of books of account, 799

Concealment of person an act of bankruptcy, 670

Concealment of property an act of bankruptcy, 671

Conclusiveness of discharge, 768

Conditional, contingent, and defeasible interests, 727

*Condition of debtor, see infra, WHO MAY BE ADJUDGED BANKRUPT OR INSOLVENTS.***Confession of judgment:**

Preferences, 662

Confirmation of composition, 760

Confirmation of election of assignee or trustee, 716

Cases in which confirmation has been refused, 717

Creditors not represented at election, 717

Election of near relative of bankrupt, 717

Grounds for refusing, 716

Necessity, 716

Who may oppose confirmation, 717

Conflict of laws, see infra, OPERATION OF INSOLVENCY AND BANKRUPTCY LAWS, 658

Discharge as exemption from arrest, 788

Extra-territorial effect of discharge, 783

Abandonment of extra-territorial immunity, 787

INSOLVENCY AND BANKRUPTCY, *con.***Conflict of laws, *cont'd.*****Extra territorial effect of discharge, *cont'd.***

Claims standing in name of third person, 786

Contracts made in other states, 786

Debts to nonresidents contracted in state where discharge was granted, 785

Discharge under state insolvency laws, 784

Effect of domestic discharge on foreign creditors, 784

In general, 783

Nonresidence of creditors, 784

Notes made to resident and by him transferred to nonresident, 785

Where the court has jurisdiction of both debtor and creditor, 786

Property in other countries and states, 737

Consideration (see *infra*, NEW PROMISE TO PAY DEBT RELEASED BY DISCHARGE):

Payment:

When condition of policy requires, 857

What debts and claims are provable, 681

Constitutional law, 638

Constitutionality of penal provisions, 806

Discharge of liens, 639

National bankruptcy laws, 638

Discharge of liens, 639

Power to enact, 638

Provision for discharge in voluntary proceedings, 638

Provision for discharge of existing debts, 638

Uniformity of operation, 639

Power to enact, 638

Provision for discharge in voluntary proceedings, 638

Provision for discharge of existing debts, 638

State insolvency laws, 639

Constitutionality as to existing debts, 640

Constitutionality as to subsequent debts, 640

Constitutionality in respect to nonresidents, 640

Power of states to enact insolvency laws, 639

Power of state to pass bankruptcy laws declared, 639

Power of state to pass bankruptcy laws denied, 639

Uniformity of operation, 639

Construction, 641

Contingent claims, 685

Continuing contracts:

Effect of discharge, 776

Contribution:

Contribution between bankrupt and his obligor, 793

Set-off of claim for contribution or reimbursement, 794

Control of property, 698

Appointment of receiver, 699

Bankrupt considered *civiliter mortuus*, 698

Bankrupt in possession regarded as trustee, 699

In general, 698

Negotiable notes, 698

No right to dispose of property pending bankruptcy proceedings, 698

INSOLVENCY AND BANKRUPTCY, *con.***Control of property, *cont'd.***

Possession pending appointment of assignee, 699

Property acquired pending bankruptcy proceedings, 699

Protection of interests pending appointment of assignee, 699

Surplus remaining after termination of proceedings, 699

Surplus reverts to bankrupt, 699

Transfer voidable only, 699

Convicts, 660

Corporations, 659

Application, 647

Discharge of debtor, 768

Number and amount of creditors, 650

Right to vote at meeting of creditors, 714, 715

Costs, 774

Costs of pending action, 778

Discharge, 774

Interest and costs on judgment, 690

Jurisdictional amount, 650

Priority of costs and expenses of proceedings, 695

What claims are allowable, 691

Compensation for services rendered for benefit of the estate, 692

Costs and expenses of the bankruptcy proceeding, 692

Levy under invalid judgment, 691

Rule in England, 691

Rule in the United States, 691

Successful defendant, 691

Successful plaintiff, 691

Counties:

Priority of taxes due to state, county, district, or municipality, 695

Courts:

Appointment of assignee or trustee by court, 717

Credit, 749

Creditors, see *infra*, ASSIGNEE OR TRUSTEE.

Creditors' meeting, see *infra*, COMPOSITION MEETINGS; MEETINGS OF CREDITORS.

Criminal law:

Offenses against insolvency and bankruptcy laws, 806

Constitutionality of penal provisions, 806

Creation of offenses, 806

Jurisdiction, 806

Limitations, 806

Death:

Discharge not prevented by death of debtor, 768

Death of assignee or trustee, 721

Death of debtor:

Termination of authority of assignee or trustee, 721

Debtor, see *infra*, WHO MAY BE ADJUDGED BANKRUPT OR INSOLVENT.

Debts and claims against estate (see *infra*, PROOF AND ALLOWANCE OF DEBTS AND CLAIMS AGAINST ESTATE):

Priority, see *infra*, PRIORITY.

Debts of decedents, 806

Decedents' estates, 806

Declaration of insolvency, 807

Effect of declaration of insolvency, 807

Failure or neglect to suggest insolvency, 808

INSOLVENCY AND BANKRUPTCY, *con.*

- Decedents' estates, *cont'd.***
 - Jurisdiction of court of probate, 807
 - Procedure, 808
 - Statutory provisions, 806
- Defects, 651**
- Definition, 636**
 - Bankrupt, 636
 - Insolvency, 636
 - Insolvent partnership, 637
 - Popular and general sense of insolvency, 637
- Departure of debtor, 670**
- Discharge:**
 - Discharge of liens by national bankruptcy laws, 639
 - Provision for discharge in voluntary proceedings in national bankruptcy laws, 638
 - Provision for discharge of existing debts in national bankruptcy laws, 638
- Discharge of debtor, 766**
 - Collateral attack upon discharge, 804**
 - Grounds of attack, 805
 - Liability to collateral attack, 804
 - Rule under national bankruptcy law, 804
 - Rule under state insolvency laws, 805
 - Conclusiveness of discharge, 768
 - Effect as to persons liable with debtor, 792**
 - Contribution between bankrupt and his co-obligor, 793
 - Co-obligor, 792
 - Co-obligor's claim for reimbursement, 793
 - Liability of co-obligor not affected by discharge, 792
 - Payment of surety, etc., after discharge, 793
 - Set-off claim for contribution or reimbursement, 794
 - Effect of discharge, 768
 - Exemption from arrest and imprisonment, 787**
 - Discharge from existing imprisonment, 788
 - Discharge granted in another state, 788
 - Discharge limited to civil actions, 788
 - Discharge limited to exemption from arrest, 788
 - In general, 787
 - Nature of debts or liabilities, 788
 - Where the debt is not dischargeable, 788
 - Grounds for refusing discharge, 795**
 - Concealment of accounts, 799
 - Concealment of assets, 797
 - Conduct and affairs of bankrupt as ground for refusing discharge, 795
 - Destruction of books of account, 799
 - Existence of debts not affected by discharge, 802
 - Extravagance in living, 795
 - Failure to keep accounts, 799
 - False statements as to assets and liabilities, 797
 - Fraud, 797
 - Fraudulent intent, 798
 - Influencing creditors, 801
 - In general, 795
 - Irregularities, 796
 - Offenses against statute, 796
 - Only statutory grounds available, 796
 - Preferences, 798
 - Previous bankruptcy or insolvency, 802
 - Reckless trading, 795

INSOLVENCY AND BANKRUPTCY, *con.*

- Discharge of debtor, *cont'd.***
 - Grounds for refusing discharge, *cont'd.***
 - Refusal to submit to examination, 802
 - Want of jurisdiction, 796
 - Jurisdiction over debtor, 792**
 - New promise to pay debt released, 789**
 - By whom promise made, 789
 - Debtor bound by new promise to pay discharged debts, 789
 - Express, positive, and unconditional promise, 790
 - In general, 789
 - New promise inures to benefit of assignee of claim, 790
 - Part payment, 791
 - Positive and unequivocal promise required, 791
 - Promise of third person, 789
 - Question whether new promise is the real cause of action, 792
 - Time of making promise, 790
 - Whether writing required, 791
 - Written promise, 791
 - Opposition to discharge, 794**
 - Agreements to withdraw opposition, 795
 - Evidence, 795
 - Grounds for refusing discharge, 795**
 - Concealment of accounts, 799
 - Concealment of assets, 797
 - Conduct and affairs of bankrupt as ground for refusing discharge, 795
 - Destruction of books of account, 799
 - Existence of debts not affected by discharge, 802
 - Extravagance in living, 795
 - Failure to keep accounts, 799
 - False statements as to assets and liabilities, 797
 - Fraud, 797
 - Fraudulent intent, 798
 - Influencing creditors, 801
 - In general, 795
 - Irregularities, 796
 - Offenses against statute, 796
 - Only statutory grounds available, 796
 - Preferences, 798
 - Previous bankruptcy or insolvency, 802
 - Reckless trading, 795
 - Refusal to submit to examination, 802
 - Want of jurisdiction, 796
 - Who may oppose, 794
 - Release from debts, 769**
 - Alimony, 771
 - Attachment liens, 775
 - Attorneys at law, 781
 - Bailees, 781
 - Bankers, 781
 - Brokers, 781
 - Contingent liabilities, 775
 - Continuing contracts, 776
 - Costs, 774, 778
 - Debt contracted before passage of law, 778
 - Debt for necessities, 770
 - Debts contracted by fraud, 782
 - Debts not scheduled, 770
 - Discharge of debts provable but not proved, 770
 - Effect of proving fiduciary debts, 782
 - Execution issued after discharge, 772
 - Extinguishment of debt or liability, 770

INSOLVENCY AND BANKRUPTCY, *con.***Discharge of debtor, *cont'd.*****Release from debts, *cont'd.***

- Extra-territorial effect of discharge in general, 783
- Extra-territorial effect of discharge under state insolvency laws, 784
- Extra-territorial effect of domestic discharge on foreign creditors, 784
- Factors, commission merchants, 781
- Fraud, 782
- Fiduciary debts, 779
- Implied trusts, 781
- In general, 769
- Judgment liens, 775
- Judgments, 771, 778
- Judgments for nondischargeable debts, 773
- Judgments rendered after commencement of proceeding, 772
- Judgments rendered after discharge, 773
- Liabilities arising out of torts, 783
- Liability of bankrupt as surety or indorser, 776
- Lien debts, 774
- Maintenance of children, 771
- Mechanics' liens, 775
- Mortgage liens, 775
- Note given for pre-existing debt, 777
- Ordinary agents not fiduciaries, 781
- Partnership debts, 779
- Payments by sureties and indorsers, 778
- Pending actions, 771
- Rents accruing after adjudication, 778
- Rents accruing after discharge, 777
- Suretyship, 780
- Taxes and other debts due the government, 778
- Time of accrual of liabilities, 777
- Trustees, 780
- Vendor's liens, 775
- What constitutes fiduciary relation, 780
- Right to discharge, 766**
 - Amount of indebtedness, 767
 - Consent of creditors, 767
 - Consent procured by improper influences, 768
 - Corporations, 766
 - Death of debtor, 768
 - Form of consent, 768
 - In general, 766
 - Surety debts, 767
 - Surrender of all property, 766
- Setting aside or impeaching discharge, 802**
 - Authority to set aside or annul discharge, 802
 - Collateral attack, 804
 - Direct attack, 802
 - Grounds of relief, 803
 - Time of application, 804
 - Who may make application, 803
- Discovery of assets, 745
- Dividends, see infra, COMPOSITIONS.*
- Effect of insolvency and bankruptcy proceedings, see infra, OPERATION AND EFFECT OF INSOLVENCY AND BANKRUPTCY PROCEEDINGS.*
- Election, see infra, COMPOSITION MEETINGS; MEETING OF CREDITORS.*
- Election between tort and contract, 686
- Election of assignee or trustee, see infra, ASSIGNEE OR TRUSTEE.*
- Equitable interests, see infra, TRUSTS.*
- Equities of redemption, 730

INSOLVENCY AND BANKRUPTCY, *con.*

Estoppel, 652

Evidence, *see infra*, PROOF AND ALLOWANCE OF DEBTS AND CLAIMS AGAINST ESTATE, 653

Admissions, 653

Burden of proof, 653

Examination of debtor, 654

In general, 653

Proof of controverted matters, 653

Examination of debtor, 654

Executions (see *infra*, LIENS ON DEBTOR'S PROPERTY):

Act of bankruptcy, 671

Execution issued after discharge, 772

Preferences, 662

Executors and administrators:

Effect of discharge, 780

Executors carrying on testator's business, 660

Right to vote at meeting of creditors, 714

Exemption, 739

Exemption of debtor from arrest on civil process, 697

Existing debts, see infra, CONSTITUTIONAL LAW.

Expenses of assignee or trustee, 757

Extension of time, 678

Factors, 729, 730

Effect of discharge, 781

Failure to keep, concealment, or destruction of books of account:

Destruction or concealment of books, 800

In general, 799

Intent of debtor, 801

Rule limited to merchants or traders, 801

Time of acts or omissions, 800

What are proper books, 800

False statements as to assets, 797

Farmers, 656, 660

Fiduciary debts, *see infra*, TRUSTS AND TRUSTEES, 647

Fisherman, 656

Foreclosure of mortgages, 688

Foreign insolvency or bankruptcy proceedings:

Proving claim in foreign proceedings

waiver of extra-territorial immunity, 680

Forthcoming and delivery bond:

Effect of discharge, 776

Franchises:

Whether franchises pass to assignee, 723

Fraud, 728**Effect of discharge upon debts contracted by fraud, 782**

Actual positive fraud, 782

Fraud in creation of debt, 782

In general, 782

Liability of partners for acts of copartner, 783

Proving the debt and receiving dividends, 782

What are debts created by fraud, 782

Fraud as grounds for refusing discharge, 797

Setting aside compositions, 765

What debts and claims are provable, 681

Fraudulent sales and conveyances, 660

Debtor continuing to sell stock of goods, 661

Distinction between preferences and fraudulent conveyances, 747

Existence of fraudulent intent, 661

In general, 660

INSOLVENCY AND BANKRUPTCY, *con.***Fraudulent sales and conveyances, *cont'd.***

- Mortgage, 661
- Preferences, 663
- Sale of property fraudulently conveyed, 749
- Setting aside fraudulent or preferential transfers, 746

What passes to assignee, 732

- Assignees in insolvency may avoid fraudulent conveyances, 732
- Constructively fraudulent, 732
- Conveyance in contemplation of insolvency, 732
- Sale, etc., not in ordinary course of business, 733

Good will, 723**Government:**

- Claims against government, 727
- Effect of discharge of debts due the government, 778
- Priority of claims of government, 693

Graziers, 656**Guaranty:**

- Proof or claim secured by guaranty of third person, 678

Guardians:

- Effect of discharge, 780

Habeas corpus, 698

- Habeas corpus to enforce exemption from arrest, 698

Hearing and determination, 652

- Adjudication, 654
- Annulling or setting aside adjudication, 655
- Bankruptcy proceedings considered proceedings *in rem*, 655
- Compromise, 652
- Concealing property, 652
- Conclusiveness of adjudication as to parties, 654
- Defenses, 652
- Estoppel, 652
- Evidence, see *infra*, EVIDENCE.
- Insufficient number of petitioning creditors, 652
- Laches, 655
- Mode of trial, 653
- Objections, 652
- Operation and effect in general, 654
- Payment or tender to petitioning creditor, 652
- Preferences, 652
- Who may oppose adjudication, 653
- Withdrawal of some of the petitioning creditors, 652

Husband and wife:

- What debts and claims are provable, 682
 - Antenuptial debts of wife provable against husband, 683
 - Proof of claim by wife against husband, 682
 - Where husband becomes indebted to his wife, 682
- Whether property of bankrupt's wife passes to assignee, 722

Illegal contracts:

- What debts and claims are provable, 681

Impairment of obligation of contract, see infra, CONSTITUTIONAL LAW.

Impaching discharge, see infra, DISCHARGE OF DEBTOR.

Implied trusts, 781

INSOLVENCY AND BANKRUPTCY, *con.***Imprisonment for debt and in civil actions:**

- Effect of discharge in bankruptcy, 29
- Indians, 660

Indorsers:

- Joint and several debts, 687
- What debts and claims are provable, 682

Infants, 657

- What debts and claims are provable, 682

Injunctions:

- Insolvency of attorney, 391, 392
- Insolvency of judgment creditor, 400
- Power of federal courts to enjoin proceedings in state courts, 414
- Restraining execution sale, 418
- Under Act of 1898, 414
- Where claims are such as a discharge in bankruptcy would release, 417
- Where creditor has acquired unlawful liens within four months of bankruptcy proceedings, 415
- Where property is in actual possession of bankruptcy court, 417
- Where property is in actual possession of bankruptcy court under former bankruptcy laws, 418
- Where time after which petition may be filed has not elapsed, 414
- Where unlawful liens are otherwise acquired, 416
- Where unlawful liens are procured by attachment, 416

Insanity, 658**Insurance companies, 659****Insurance policies, 726**

Intention, see infra, PREFERENCES.

Interest, 690

- Judgment, 690
- Proof and allowance of claims, 675

Interpretation, 641**Inventory and schedule, 650**

- Defects, 651
- Fraudulent omissions, 651
- Necessity, 650
- Omission, 651
- Omission of names from list of creditors, 651
- Omitting assets from the inventory unintentionally, 651
- Requisites, 650
- Statement of assets, 650
- Statement of liabilities, 651
- Verification, 651

Involuntary proceedings, 648

- Amount of debts, 649
- Ascertainment of amount of debts, 650
- Character or kind of debts, 648
- Corporation, 650
- Costs, 650
- In general, 648
- Interest, 650
- Number of creditors, 649
- Partnership creditor, 649
- Preferred creditors, 650
- Secured claims, 649
- Joint and several debts, 687

Judgments (see *infra*, HEARING AND DETERMINATION), 690, 725

- Assigned claims provable in hands of assignee, 690
- Debts provable notwithstanding judgment, 690

INSOLVENCY AND BANKRUPTCY, *con.***Judgments, *cont'd.*****Effect of discharge, 771**

Costs, 774

Execution issued after discharge, 772

Judgments barred by discharge, 771

Judgments rendered after commencement of proceeding, 772

Judgments rendered after discharge, 773
Where the original debt was not discharged, 773

Interest and costs on judgment, 690

Judgment in criminal proceeding, 690

Judgment liens, 775

Judgment rendered after bankruptcy held provable, 690

Judgments as provable debts, 690

What debts and claims are provable, 690

Jurisdiction (see *infra*, OPERATION OF INSOLVENCY AND BANKRUPTCY LAWS), 644**Actions by or against assignee or trustee, 753**

Circuit court of the United States, 754, 755

District courts of the United States, 754

Jurisdiction of state courts, 754

Jurisdiction under Act 1898, 754

State courts, 754, 755

Under early statutes, 753

After discharge, 792

Amount, 650

Exclusive jurisdiction of court of probate over decedents' estates, 807

In England, 644

In United States, 645

Locality as affecting jurisdiction, 645

Offenses against insolvency and bankruptcy laws, 806

Under national bankruptcy laws, 645

Under state insolvency laws, 646

Want of jurisdiction as grounds for refusing discharge, 796

Laches, 655

Landlord and tenant:

Priority of landlord's lien, 693

Leases:

Whether leases pass to assignee, 723

Licenses:

Whether licenses pass to assignee, 723

Liens:

Discharge of liens, 639

Effect of discharge, 774

Priorities, 692

Priority of debts of the United States subject to pre-existing liens, 694

Liens on debtor's property, 705

Attachment by trustee process, 709

Attachments dissolved by proceedings under state insolvency laws, 707

Attachments on mesne process, 707

Bankruptcy proceeding operates *ex proprio vigore*, 709

Circumstances affecting dissolution of existing liens, 709

Continuation of lien by order of court, 711

Effect of insolvency and bankruptcy proceedings, 705

Effect of judgment in attachment suit, 710

Execution liens, 708

Existing liens dissolved by proceeding, 705

Foreign attachments, 711

Knowledge on part of creditor, 710

Liens acquired by legal proceedings, 706

Liens created by act of parties, 705

INSOLVENCY AND BANKRUPTCY, *con.***Liens on debtor's property, *cont'd.***

Liens created by statute, 706

Liens existing at commencement of proceeding, 705

Liens not obtainable pending insolvency or bankruptcy proceedings, 705

Liens not obtained within period designated by statute, 709

Nature of claim, 711

Obligation of contracts, 711

Priority between creditors, 711

Rule under bankruptcy laws of the United States, 706

Sale under attachment, 710

State insolvency laws, 708

Time computed from filing of petition, 709

Limitation of actions, 684, 755

Admissions, 685

Applicability, 755

Claims barred by statute of limitations, 684

Offenses against insolvency and bankruptcy laws, 806

Period of limitation, 756

Placing debt on schedule, 685

Proof after revival, 685

Statute of limitation suspended by bankruptcy proceedings, 685

What debts and claims are provable, 684

What statute of limitations governs, 685

Lunatics, 658

Married women, 657

What property passes to assignee, 722

Master and servant, see *infra*, WAGES AND SALARIES.**Mechanics' liens:**

Effect of discharge, 775

Meeting of creditors (see *infra*, COMPOSITION MEETINGS), 712

Adjournment of meeting, 713

Conduct of meeting, 712

How convened, 712

Mode of voting, 713

Place of meeting, 712

Right of creditor to change his vote, 713

Right to vote, 713

Assignee of claim, 713

Corporations, 714

Executors and administrators, 714

In general, 713

Officers of bankrupt corporation, 713

Partnerships, 714

Postponing proof or allowance of claims, 715

Power of attorney, 714

Preferred creditors, 714

Secured creditors, 714

Separate bankruptcy of partners, 714

Votes necessary to elect, 715

Time of meeting, 712

Meetings, see *infra*, COMPOSITION MEETINGS.**Mortgages:**

Effect of discharge on mortgage liens, 775

Fraud upon creditors, 661

Mortgage or sale to pay attorney's fees or other expenses, 666

Municipal corporations:

Priority of taxes due to state, county, district, or municipality, 695

Necessaries:

Effect of discharge, 770

Negotiable instruments, see *infra*, BILLS OF EXCHANGE AND PROMISSORY NOTES.

INSOLVENCY AND BANKRUPTCY, *con.*

New promise to pay debt released by discharge, 789

Debtor bound by new promise to pay discharged debts, 789

Express, positive, and unconditional promise, 790

In general, 789

New promise enures to benefit of assignee of claim, 790

Part payment, 791

Positive and unequivocal promise required, 791

Promise of third person, 789

Question whether new promise is the real cause of action, 792

Time of making promise, 790

To whom promise made, 789

Whether writing required, 791

Written promise, 791

Nonresidents, see *infra*, CONSTITUTIONAL LAW.

Notice of appointment of assignee, 718

Operation and effect of insolvency and bankruptcy proceedings, 697

Actions against debtor, see *infra*, ACTIONS AGAINST DEBTOR.

Actions by debtor, see *infra*, ACTIONS BY DEBTOR.

Agency, 700

Control of property, see *infra*, CONTROL OF PROPERTY.

Exemption of debtor from arrest on civil process, 697

Liens on debtor's property, see *infra*, LIENS ON DEBTOR'S PROPERTY.

Partnerships, 700

Operation of insolvency and bankruptcy laws (see *infra*, JURISDICTION), 641

Effect of bankruptcy law on state insolvency law, 642

Pending proceedings under state laws, 643

Power of state to enact insolvency law, 642

State law suspended by enactment of federal law, 642

Matters occurring after approval of law but before it goes into operation, 641

Partial suspension of operation, 641

Repeal of statutes, 644

Rules of construction, 641

Suspension of operation generally, 641

Territorial operation, 643

Parties, see *infra*, INVOLUNTARY PROCEEDINGS; VOLUNTARY PROCEEDINGS.

Partnerships, 659, 700

Application, 647

Assignment by firm for benefit of creditors, 700

Assignment by partner for benefit of creditors, 700

Claims against both firm and individual partner, 687

Dissolution of partnerships, 700

Effect of discharge on partnership debts, 779

Individual claim against partner not provable against partnership estate, 687

Mere fact of insolvency not a dissolution of partnership, 700

Partner in possession of partnership assets becoming bankrupt, 730

INSOLVENCY AND BANKRUPTCY, *con.*

Partnerships, *cont'd.*

Partnership creditor in proceedings against one of the partners separately, 649

Partnership debts provable against partnership estate, 687

Proof of partnership debts against individual partner, 687

Right to vote at meeting of creditors, 714

Undivided interests, 731

Where one partner only becomes bankrupt, 687

Part payment, 791

Patents:

Whether patent passes to assignee, 724

Payments, see *infra*, COMPOSITIONS.

Pending proceedings under state laws where national statute is passed, 643

Petitioning creditors, see *infra*, HEARING AND DETERMINATION; WHO MAY APPLY FOR ADJUDICATION.

Physicians and surgeons, 656

Power of appointment:

Whether power of appointment passes to assignee, 724

Power of attorney:

Voting at meeting of creditors, 714

Preferences, see *infra*, PRIORITIES, 652, 661, 734

Acts done under previous agreement, 664

Agreement contemplating immediate transfer, 664

Circumstances of debtor, 667

Composition with creditors, 764

Creditors, 735

Creditor's knowledge as to circumstances and intent of debtor, 669, 735

Debtor as witness of intent, 669

Distinction between preferences and fraudulent conveyances, 747

Doctrine of pressure, 665

Effect as act of bankruptcy or insolvency, 661

Evidence, 736

Evidence of intent to prefer, 669

Exchange of values, 665

Fraudulent conveyances, 663

Grounds for refusing discharge, 798

In general, 798

Insolvency or contemplation of insolvency, 799

Intent of debtor, 799

Knowledge of creditor, 799

Intention of debtor governs, 666

Intent of debtor, 735

Intent to create preferences, 668

Knowledge of agent imputed to principal, 736

Liability of agent, 736

Mortgage or sale to pay attorney's fees, 666

Payment of money to creditor, 662

Preference by confession or otherwise procuring entry of judgment, 662

Preference by giving security to creditor, 664

Preference by procuring levy of attachment or execution, 662

Preference forbidden by state insolvency laws, 734

Preference of creditors an act of bankruptcy, 661

Preferred claims, 690

INSOLVENCY AND BANKRUPTCY, *con.***Preferences, *cont'd.***

- Pressure, 665
- Raising funds to defray expenses of bankruptcy proceedings, 666
- Reasonable cause to believe that a debtor is insolvent, 736
- Right of preferred creditors to vote at meeting of creditors, 714
- Security for loans, advances, etc., 666
- Setting aside fraudulent or preferential transfers, 746
- Surrender of preference, 690
- Time limitation in statute, 734
- Time of affecting consequences of act, 667
- Transferring property or giving security to debtor, 663
- Validity of prohibition against preferences, 736
- Void, 734
- Voidable, 734
- What constitutes an exchange, 665
- What constitutes preference, 662
- Preferred claims, 690
- Preferred creditors, 650
- Priorities (see *infra*, PREFERENCES), 692**
 - Attorney's fees, 692, 695
 - Claims given priority by state laws, 697
 - Costs, 695
 - Costs of attachments, 695
 - Debts due to state, 694
 - Debts due to the United States, 694
 - Expenses, 695
 - Government, 693
 - In cases of trust, 693
 - In general, 692
 - Judgments rendered after insolvency, 692
 - Landlord's lien, 693
 - Liens on debtor's property, 711
 - Preference of lien debts, 692
 - Salaries, 695
 - Substitution to priority of United States, 694
 - Taxes, 693
 - Taxes due to a state, county, district, or municipality, 695
 - Trust property mingled with individual property, 694
 - Wages, 695
- Private international law, 658**
 - Discharge as exemption from arrest, 788
- Extra-territorial effect of discharge, 783**
 - Abandonment of extra-territorial immunity, 787
 - Claims standing in the name of third person, 786
 - Contracts made in other states, 786
 - Debts of nonresidents contracted in state where discharge was granted, 785
 - Discharge under state insolvency laws, 784
 - Effect of domestic discharge on foreign creditors, 784
 - In general, 783
 - Nonresidence of creditors, 784
 - Notes made to resident and by him transferred to nonresident, 785
 - Where the court has jurisdiction of both debtor and creditor, 786
- Property in other countries and states, 737
- Privileged from arrest, 660

INSOLVENCY AND BANKRUPTCY, *con.***Proof and allowance of debts and claims against estate, 673**

- Allowance of claims, 678
- Amount allowable, 674
- Amount allowable in general, 674
- Assigned claims, 675
- Assignee of claim, 674
- Before whom provable, 673
- By whom payable, 673
- Claim for services rendered, 674
- Contest of claims, 679
- Debt partly paid, 675
- Debt payable in future, 675
- Debt secured by guaranty of third person, 678
- Debt secured on property belonging to third persons, 677
- Effect of proving claims, 679
- Extension of time for filing claims, 678
- Foreign insolvency or bankruptcy proceedings, 680
- Interest, 675
- Liability created for enforcing security, 677
- Necessity of proof in general, 673
- Only amount equitably due provable, 674
- Proving for balance after deducting value of security, 676
- Right of creditor to sue after proof of claim, 679
- Secured claims, 676
- Set-off, 676
- Time of filing claims, 678
- Waiver of lien of security, 679
- Waiver of right to sue debtor, 679
- Waiver of security, 677
- What debts and claims are provable, 680**
 - Adequate consideration, 681
 - Admissions, 685
 - Alimony, 683
 - Antenuptial debts of wife provable against husband, 683
 - Assigned claims, 690
 - Claims accruing after commencement of proceedings, 683
 - Claims arising out of torts, 686
 - Claims barred by statute of limitations, 684
 - Compensation for services rendered for the benefit of the estate, 692
 - Contingent and unliquidated claims, 685
 - Costs, 690
 - Costs and expenses, 691
 - Costs and expenses of attachments and executions, 691
 - Costs and expenses of bankruptcy proceedings, 692
 - Debt recoverable in law or equity, 680
 - Debts payable in future, 682
 - Election between tort and contract, 686
 - Expenses, 691
 - Fraud, 681
 - Husband becoming indebted to his wife, 682
 - Illegality, 681
 - Indorsers, 682, 687
 - Infant's debts, 682
 - In general, 680
 - Interest, 690
 - Joint and several debts, 687
 - Judgments, 690
 - Necessity of consideration, 681

INSOLVENCY AND BANKRUPTCY, *con.***Proof and allowance of debts and claims against estate, *cont'd.*****What debts and claims are provable, *cont'd.***

Partnerships, 687

Periodical payments, 684

Preferred claims, 690

Proof after revival, 685

Proof of claim against several bankrupts, 687

Rent, 684

Secured claims, 688

Sureties, 682, 687

Unliquidated claims, 685

Whether right to action is extinguished, 680

Property, see *infra*, CONTROL OF PROPERTY; TITLE OF ASSIGNEE OR TRUSTEE; WHAT PASSES TO ASSIGNEE OR TRUSTEE.**Property transferred by debtor, see *infra*, WHAT PASSES TO ASSIGNEE OR TRUSTEE.**

Railroads, 659

Receivers :

Appointment of receiver pending appointment of assignee, 699

Receiver appointed before petition in bankruptcy, 744

Redemption, 730

Release, see *infra*, DISCHARGE OF DEBTOR.**Removal of assignee or trustee, 719**

English bankruptcy act, 719

Grounds for removal, 720

Instances of neglect and misconduct, 720

Power, 719

State insolvency laws, 720

United States law, 720

Unsuccessful or unnecessary litigation, 720

Who may ask for removal, 720

Removal of property as act of bankruptcy, 671

Rents :

Rents accruing after adjudication, 778

Rents accruing after discharge, 777

What debts and claims are provable, 684

Repeal of statutes, 644

Resale, 751

Salary, see *infra*, WAGES OR SALARIES.**Sale, see *infra*, CONTROL OF PROPERTY.****Sale of property, 747**

Assignee not permitted to purchase, 750

Auction or private sale, 749

Authority to sell, 747

Bankrupt himself purchasing, 750

Cash, 749

Credit, 749

Doubtful claims, 749

Inadequacy of price, 752

Leave of court, 748

Manner and terms of sale, 749

Perishable property, 749

Power to sell under state insolvency laws, 748

Property fraudulently conveyed, 749

Property subject to sale, 749

Resale, 751

Rights of purchasers, 751

Sale free from incumbrances, 750

Sale in parcels or *en masse*, 749

Setting aside sale, 751

Title of purchasers, 751

Who may purchase, 750

Schedule, see *infra*, INVENTORY AND SCHEDULE.**INSOLVENCY AND BANKRUPTCY, *con.***

Secret agreements, 764

Secured claims (see *infra*, LIENS ON DEBTOR'S PROPERTY), 649, 688

Bankruptcy law of 1867, 689

Deduction of value of security or amount realized therefrom, 688

Effect of proof of claim in bankruptcy, 676

Creditor required to exhaust security, 677

Debt secured on property belonging to third person, 677

Disclosure of security, 676

Failure of secured creditor to disclose security, 677

Liability created by enforcing security, 677

Proving for balance after deducting value of security, 676

Waiver of security, 677

Leave of bankruptcy court to foreclose mortgages, 688

Proof affected only by security on property of debtor, 689

Proof of claim as waiver of lien of security, 679

Relying exclusively on security, 689

Surrender of security, 688

What claims and debts are provable, 688

Secured creditors :

Composition meetings, 760

Right to vote at meeting of creditors, 714

Seizure of goods under legal process as act of bankruptcy, 671

Separate property of married women :

What passes to assignee, 722

Set-off, 676

Mutual debts and credits, 676

Proof and allowance of claims, 676

Spoliation claims, 727

State (see *infra*, OPERATION OF INSOLVENCY AND BANKRUPTCY LAWS):

Priority of debts due to the state, 694

Statutes :

Jurisdiction, 644

Repeal of statutes, 644

Stay of proceedings, 704

Stockholders :

Effect of discharge on stockholders' liability, 776

Stocks and stockholders, 726

Sureties, 687

Joint and several debts, 687

What debts and claims are provable, 682

Suretyship, 778

Discharge, 767

Effect of discharge as to persons liable with debtor, 793

Effect of discharge on liability of bankrupt as surety, indorser, etc., 776

Effect of discharge upon surety debt, 767

Surety on bond of trustee, 780

Surplus, 699

Suspension, see *infra*, OPERATION OF INSOLVENCY AND BANKRUPTCY LAWS.**Taxation :**

Effect of discharge, 778

Taxes due to a state, county, district, or municipality, 695

Taxes :

Priority of taxes, 693

Termination of assignee's office, 719

Time of filing claims, 678

INSOLVENCY AND BANKRUPTCY, *con.*

Title of assignee or trustee, 740
 Assignee takes title subject to equities against debtor, 740
 Quantity of title, 740
 When title is divested, 741
 When title vests, 741

Torts, 686
 Effect of discharge of liabilities arising out of torts, 783

Trade marks.
 Whether trade mark passes to assignee, 724

Traders, 655

Transfer, see *infra*, CONTROL OF PROPERTY.

Trustee, see *infra*, ASSIGNEE OR TRUSTEE.

Trusts :

Right of assignee to trust property, 728

Assignee not entitled to trust property, 728

Banker, 730

Equities, 730

Factors, commission merchants, etc., 730

Factors, or commission merchants, or other agent, 729

Money held in trust for another, 729

Partner in possession of partnership assets, 730

Property held in trust by debtor, 728

Property held in trust for debtor, 730

Right of *cestui que trust* to lien on general estate, 729

Rights of redemption, 730

Secret and fraudulent trusts, 729

Vendor in executory contract to convey land, 730

Trusts and trustees :

Effect of discharge on fiduciary debts, 679

Agents, 781

Attorneys at law, 781

Bailees, 781

Bankers, 781

Brokers, factors, and commission merchants, 781

Debts created by defalcations, etc., 780

Effect of proving debt, 782

Executors and administrators, 780

Guardians, 780

Implied trusts, 781

Statutory provisions, 779

Surety on bond of trustee, 780

Trustee property, 780

What constitutes fiduciary relationship, 780

Fiduciary debts, 647

Priority of trust claim, 693

Ability to trace or identify trust property, 693

Trust property mingled with individual property, 693

Undivided interests, see *infra*, WHAT PASSES TO ASSIGNEE OR TRUSTEE.

United States (see OPERATION OF INSOLVENCY AND BANKRUPTCY LAWS):

Claims against United States, 727

Effect of discharge on debts due to the United States, 778

Priority of debts due to the United States, 694

Early statutes, 694

In general, 694

Priority subject to pre-existing liens, 694

Substitution to priority of the United States, 694

What are debts due to the United States, 694

INSOLVENCY AND BANKRUPTCY, *con.*

Unliquidated claims, 685

Vendor and purchaser :

Contracts to purchase land, 726

Vendors' liens :

Effect of discharge, 775

Voluntary proceedings, 646

Amount of indebtedness, 647

Authority of debtor to make application, 646

Character or condition of debtor, 647

Character or kind of debts, 647

Circumstances affecting right of debtor to institute proceedings, 646

Corporations, 647

English bankruptcy laws, 646

Fiduciary, 647

National bankruptcy laws, 646

Partnerships, 647

State insolvency laws, 646

Who may apply for adjudication, 646

Voting, see *infra*, COMPOSITION MEETINGS; MEETING OF CREDITORS.

Wages or salaries, 695

Contractor, 696

English statute, 695

In general, 695

Nature and extent of right, 696

Occasional employment, 696

Priorities, 695

Priority of wages under bankruptcy laws of the United States, 696

Priority of wages under state insolvency laws, 696

Traveling agent or salesman, 696

Who are entitled to priority, 696, 697

Warranties :

Effect of breach on attempted revival of policy, 929

What passes to assignee or trustee, 721

Allowances, 739

All property of bankrupt, 721

Choses in action, see *infra*, CHOSSES IN ACTION.

Conditional interests, 727

Contingent interest, 727

Exemptions, 739

Failure of trustee to assert claim, 738

Franchises, 723

General rule, 721

Good will, 723

Interest accruing under a will, 723

Leases, 723

Licenses, 723

Liquor licenses, 724

Patent rights, 724

Powers of appointment, 724

Property acquired after adjudication, 738

Property acquired after commencement of proceeding, 738

Property acquired after discharge, 738

Property in other countries and states, 737

National bankruptcy act, 737

Personal estate, 737

Real property, 737

Rule in England, 737

State insolvency laws, 737

Property of bankrupt's minor children, 723

Property of bankrupt's wife, 722

Property transferred by debtor, 731

Assignments for benefit of creditors, 733

Fraudulent conveyances, 732

In general, 731

Preferences, 734

INSOLVENCY AND BANKRUPTCY, con.**What passes to assignee or trustee, *cont'd.***

Provision for write out of her own property, 722

Ship at sea, 738

Trade marks, 724

Trade names, 724

Trusts and equitable interests, 728

Assignee not entitled to trust property, 728

Banker, 730

Equities, 730

Factor or commission merchant or other agent, 729

Factors, commission merchants, etc., 730

Money held in trust for another, 729

Partner in possession of partnership assets, 730

Property held in trust by debtor, 728

Property held in trust for debtor, 730

Right of *cestui que trust* to lien on general estate, 729

Rights of redemption, 730

Secret and fraudulent trusts, 729

Vendor in executory contract to convey land, 730

Undivided interests, 731

Encumbered property, 731

Partnership property, 731

Undivided interests in real estate, 731

*Who may apply for adjudication, see infra***INVOLUNTARY PROCEEDINGS; VOLUNTARY PROCEEDINGS, 646****Who may be adjudged bankrupts or insolvents, 655**

Aliens, 657

Amount of indebtedness, 657

Character of debtor, 657

Condition of debtor, 657

Convicts, 660

Corporations, 659

Executors and administrators, 660

Farmers, 656, 660

Fishermen, 656

Graziers, 656

Indians, 660

Infants, 657

In general, 655

Inkeeper, 656

Insurance companies, 659

Landowner, 656

Law of domicile, 658

Lunatics, 658

Married women, 657

Partnerships, 659

Persons privileged from arrest, 660

Physician, 656

Railroad companies, 659

Wage earners, 660

Who are traders, 655

Witnesses:

Debtor, 669

Debtor testifying as to intention in making transfer, 669

Private international law, see infra, **OPERATION OF INSOLVENCY AND BANKRUPTCY LAWS.****INSPECT, 808****INSPECTION, 808**

Inns and innkeepers, 516

INSPECTION AND PHYSICAL EXAMINATION, 810**Actions for personal injuries, 811**

Application for order for examination, 814

Compulsory exhibition of injuries to jury, 817

Discretion of court as to making order for examination, 813

Effect of refusal to obey order for examination, 816

Examination must be indispensable, 814

Exhibition of injuries to jury, 817

Expenses of examination, 816

Experiments in court, 818

Interrogating plaintiff as to condition, 816

Manner of conducting examination, 816

Number of examiners, 815

Physicians as examiners, 815

Place of examination, 816

Qualification of physicians, 815

Selection of examiners, 815

Status of physician, 816

Statutory authorization to compel submission to examination, 813

Time of making application for order for examination, 814

Unwillingness to submit to examination, 815

Voluntary exhibition of injuries to jury, 817

What must be shown to entitle party to order, 814

When not authorized by statute, 811

Implied agreement to make necessary disclosure, 812

In the United States, 811

Under what circumstances examination ordered, 812

View that courts may compel submission to examination, 812

View that no power exists to compel submission to examination, 811

Age:

Determination of age by inspection, 818

Bastardy:

Inspection of infant in filiation cases, 819

Criminal law, 818

Determination of age by examination, 818

Examination and inspection of defendant's person, 818

Examination and inspection of person as witness, 818

Footprints, 818

Inspection of infant in filiation cases, 819

Divorce, 819

Expenses of examination, 820

How examination conducted, 819

Indelicacy, 819

Method of enforcing order, 820

Power of courts to order inspection and examination, 819

Where party has already submitted to examination, 819

Footprints, 818

Indelicacy, 819

Jury and jury trial:

Exhibition of injuries to jury, 817

Marriages, 819

Nullity of marriage, 819

Physicians, 815

Number of physicians, 815

Qualification of physicians, 815

Selection of physicians as examiners, 815

Status of physician, 816

INSPECTION AND PHYSICAL EXAMINATION, *cont'd.*

Statutes, see infra, ACTIONS FOR PERSONAL INJURIES.

Trial by inspection under early English practice, 810

Writ de ventre inspiciendo, 820

INSPECTION LAWS, 808

INSPECTION OF BOOKS, 820

INSPECTION OF MUNICIPAL RECORDS, 820

INSPECTION OF PUBLIC RECORDS, 821

INSPECTOR, 821

INSTALMENT, 821

INSTANCE, 821

INSTANT, 821

INSTANTANEOUS, 821

INSTANTER, 822

INSTANTLY, 821

INSTEAD OF, 822

INSTIGATE, 822

INSTITUTE, 822

INSTITUTION, 822

Corporations, 823

Institution in the sense of establishment, 823

Institution in the sense of organization, 823

IN STORE, 130

INSTRUCTIONS, 824

INSTRUMENT, 824

Engravings, 825

Exemption from execution, 825

Letters, 825

Mere writing, 825

INSTRUMENTALITY, 828

INSUFFICIENCY, 828

INSUFFICIENT, 828

INSULTING, 829

INSURABLE INTEREST *see* INSURANCE), 829

INSURANCE (*see* INSURANCE BROKERS), 830

Accident insurance:

Burden of proof, 958

Accounts, 964

Adjusters, 916

Admissions, 968

Agency, 845

Agency:

Agent insuring his own property, 845

Agents, see INSURANCE BROKERS.

Appointment by foreign insurance company of agent to receive service of process, 900

Authority of agent to accept notice of cancellation, 874

Authority of agent procuring insurance, 874

Conditions in policy, 874

General authority of agent, 874

When agent's authority has ceased, 874

16 C. of L.—79

INSURANCE, *cont'd.*

Agents, *cont'd.*

Cancellation, 871

Cancellation of policy, 871

Duties and liabilities in respect to principal, 912

Duty to preserve rights created for principal, 914

In general, 912

Liability for neglect to cancel policies, 913

Liability for writing insurance contrary to instruction, 912

Liability of sureties on agents' bonds, 914

Measure of damages for failure to cancel policy, 913

Waiver of cancellation, 913

Insurance brokers distinguished from, 970

Insurer's agent not agent of insured, 909

Agent of insurer procuring policies from other insurers, 910

Effect of provisions in application or policy, 910

Rule stated, 909

Stipulations in application, 910

Payment by agent individually, 859

Payment to agent, 860

Personal liability, 917

Liability for loss resulting from unauthorized acts or representations, 918

Liability for neglect to effect insurance, 918

Liability for sums received as premiums, 917

Where agency is of foreign company not authorized to do business, 918

Where agent fails to deliver policy, 917

Where company becomes insolvent before receiving premium, 918

Where company has no authority to do business, 918

Where person induced by fraudulent representations to insure, 917

Power of agent to waive condition requiring payment, 858

Powers and rights in respect to principal, 911

Additional insurance secured by another agent, 911

Compensation of subagents, 911

Estoppel of agent to deny terms of employment, 911

Forfeiture of compensation for misconduct or breach of trust, 912

In general, 911

Right to compensation, 911

Power to bind principal, 914

Acts done after termination of agency, 917

Adjusters, 916

Collecting agents, 916

Correcting description of property, 915

Effect of limitation in policy, 917

Effect of private instructions to agent, 917

General agent, 915

General agent's clerks, 915

In general, 914

Nature and extent of authority, 915

Ostensible authority in general, 916

Real authority, 915

Soliciting agents, 915

Special agents, 915

Volume XVI.

INSURANCE, *cont'd.***Agents, *cont'd.*****Power to bind principal, *cont'd.***

Waiver of conditions, 915

Waiver of limitation and ratification of acts, 917

Statutory regulation of agents, 911

Sureties, 914

Termination of agency, 918

Effect of termination, 919

How it may be terminated, 918

Right to commissions on renewal policies, 919

Termination at election of either party, 918

Termination by operation of law, 919

Waiver and estoppel:**Limitations on face of policy, 948**

Agent's knowledge of intended breach, 950

Application of limitations to waiver of conditions to be performed after loss, 952

Clauses prohibiting waiver by agents, 948

Conditions to be performed after loss, 952

Effect on agent's authority after issuance of policy, 950

Effect on agent's authority at or before issuance of policy, 948, 949

Failure to indorse not chargeable to insured, 950

General agent, 949

General agent of foreign company, 949

In general, 948

Limitations as to mode of waiver, 949

Prohibition of parol waiver by officers and agents generally, 951

Statutes adopting standard form of policy, 951

Verbal consent of soliciting agent where policy requires writing, 951

Verbal waiver by general agent, 950

Waiver by agents, 942

Adjuster, 947

Agent misinforming applicant, 946

Agent on his own responsibility writing in answers, 946

Agent's knowledge acquired outside of agency, 948

Applicant ignorant of false statement inserted by agent, 946

Burden of proof, 947

Collector, 947

Effect of stipulation in application that insurer shall be bound by written statements only, 946

False statements inserted by agent in application, 945

Fraud and collusion between agent and assured, 947

General agent, 942

General knowledge of ground of forfeiture at time of issuance of policy, 943

In general, 942

Medical examiner inserting false answers, 945

Misstatements by agent as to subject of insurance, 946

Power of general agent to waive after issuance of policy, 943

INSURANCE, *cont'd.***Agents, *cont'd.*****Waiver by agents, *cont'd.***

Provision that solicitor shall be agent of applicant, 947

Soliciting agent, 943

Soliciting agent's insertion of false statements in application, 945

Soliciting agent's waiver after issuance of policy, 944

Soliciting agent's waiver at time of issuance of policy, 943

Soliciting agent's waiver of conditions as to future conduct, 944

Statute declaring agent to be agent of company only, 947

Waiver by agents generally, 942

Waiver of requirement for action in specified time, 947

Who are insurance agents, 907

At common law, 907

Brokers, 909

Evidence of general agency, 908

General agents, 908

In general, 907

Medical examiner, 908

Statute, 908

Sub-agents, 908

Agreement, 849

Acceptance of the proposal, 850

Application by insured and acceptance by insurer, 850

Approval at home office, 851

Form of agreement, 851

Acceptance of policy, 855

Assent to conditions, 856

Conditions in policy, 854

Delivery of policy, 855

Effect of policy, 856

Enforcement of contract by action at law, 853

Enforcement of contract by suit in equity, 853

Execution of policy, 854

In general, 851

Merger of preliminary contract in policy, 856

Necessity of delivery and acceptance of policy, 855

No formality required, 852

Oral agreement, 852

Policy must conform to preliminary agreement, 853

Power of agent, 853

Power of insurance companies to make preliminary contracts, 851

Preliminary contract, 851

Sealing policies, 855

Signature of officers, 854

Sufficiency of delivery and acceptance, 855

Validity of policy, 854

General agreement, 850

In general, 849

Mode of agreement, 850

Tender of policy by insurer and acceptance by insured, 851

Terms must be fixed, 849

Aleatory contracts, 839

Amalgamations, *see infra*, INSURANCE COMPANIES.

Amount of damages, 964

INSURANCE, *cont'd.*

Application, see *infra*, AGREEMENT; INTERPRETATION.

Approval, see *infra*, AGREEMENT.

Avoidance, see *infra*, FORFEITURE AND AVOIDANCE.

Banks and banking :

Power of company to engage in banking, 892

Bills of exchange and promissory notes (see *infra*, CONSIDERATION):

Payment by note, 859

Borrowing money, 890

Breach of warranties, see *infra*, WARRANTIES.

Brokers (see INSURANCE BROKERS):

Agents, 909

Burden of proof, 955

Accident insurance, 958

Admission of title, 955

Amount of loss, 959

Arbitration or reference, 959

Assignment to third person, 955

Breach of conditions, 955

Cancellation of policy, 959

Cause of loss or injury, 957

Conditions, 955

Estoppel and waiver, 957

Exceptions construed as conditions, 958

Exclusive knowledge of agency, 955

Exposure to danger, 958

False statements of agents, 947

Fire caused by insured, 958

In general, 955

Insurable interest, 955

Loss caused by negligence of insured, 958

Making of contract, 955

Marine insurance, 958

Misrepresentations, 956

Misstatements, 956

Notice and proofs of loss, 959

Payment as defense, 959

Payment of premiums, 959

Plaintiffs as beneficiaries, 955

Reformation of policy, 870

Representations, 955

Suicide, 958

Time of bringing suit, 955

Warranties, 955

Warranties and representations subject to different rules, 956

Burden of proof as to payment of premiums, 959

Business in which insurance companies may engage, 892

By-laws:

Disregard of by-laws not sufficient to show its repeal, 889

Power of company to make by-laws, 889

Validity of company to make by-laws, 889

Cancellation, see *infra*, RESCISSION AND CANCELLATION.

Cash payment, 859

Charter, see *infra*, DISSOLUTION AND FORFEITURE OF CHARTER.

Companies, see *infra*, INSURANCE COMPANIES.

Conditions, see *infra*, PREMIUM NOTE.

Conflict of laws, see *infra*, FOREIGN INSURANCE COMPANIES.

Consideration, 857

Forfeiture of policy for nonpayment of premium note, 862

In general, 857

Necessity of payment in general, 857

INSURANCE, *cont'd.*

Consideration, *cont'd.*

Payment, 857

Application of debt due by agent, 860

Cash, 859

Mode of payment, 859

Necessity of, 857

Note, 859

Payment to agent, 860

Payment to agent individually, 859

Payment to broker, 860

Power of agent to waive, 858

To whom made, 860

Unconditional delivery of policy, 858

Validity of requirement, 857

Waiver of condition, 858

Withholding delivery of policy, 857

Suspension of policy for nonpayment of premium note, 861

Insurer not liable during default, 861

Notice, 861

Partial payment, 861

Revival of policy, 861

Waiver of stipulation, 861

Consolidation, see *infra*, INSURANCE COMPANIES.

Constitutional law :

Constitutionality of statutes providing for dissolution of company, 894

Power to regulate insurance companies reserved in constitution, 884

Construction, see *infra*, INTERPRETATION; REPRESENTATIONS; WARRANTIES.

Contract of indemnity, 840

Absence of other insurance clause, 841

Insurance of property, 840

Liability limited to loss actually sustained, 840

Liability of insurer, 840

Liability of several insurers, 841

Liability of several insurers where policies contain other insurance clause, 842

Life insurance, 842

Restoration of property, 841

Want of insurable interest, 841

When property is destroyed by tortfeasor, 841

Contracts, see *infra*, CONSIDERATION; FORFEITURE AND AVOIDANCE; INTERPRETATION; REFORMATION OF POLICY; RENEWAL OF POLICY; RESCISSION AND CANCELLATION, 839

Aleatory contracts, 839

Contract of indemnity, see *infra*, CONTRACT OF INDEMNITY.

Executed contracts, 840

Executory contracts, 840

Form of contract, 851

Acceptance of policy, 855

Assent to conditions, 856

Conditions in policy, 854

Delivery of policy, 855

Effect of policy, 856

Enforcement of contract by actions at law, 853

Enforcement of contract by suit in equity, 853

Execution of policy, 854

In general, 851

Merger of preliminary contract in policy, 856

Necessity of delivery and acceptance of policy, 855

INSURANCE, *cont'd.***Contracts, *cont'd.*****Form of contract, *cont'd.***

- No formality required, 852
- Oral agreement, 852
- Policy must conform to preliminary agreement, 853
- Power of agent, 853
- Power of insurance companies to make preliminary contract, 851
- Preliminary contract, 851
- Sealing policies, 855
- Signature of officers, 854
- Sufficiency of delivery and acceptance, 855
- Validity of policy, 854

Modification of contract, 868

Nature of contract in general, 839

Personal contract, 843

- Bailor and bailee, 844
- In general, 843
- Insurance upon property fraudulently conveyed, 844
- Mortgagor and mortgagee, 844
- Trespasser, 844
- Vendor and purchaser, 843

Power of company to contract, 890

Requisites of contract, 844

Requisites of contract, see infra, AGREEMENTS; CONSIDERATION; INSURABLE INTEREST; PROPER PARTIES; RISK; SUBJECT MATTER.

Coroner, 969

Corporations, *see* **INSURANCE COMPANIES.**

Creditors, see infra, DISSOLUTION AND FORFEITURE OF CHARTER.

Declarations, 968

Definition, 838

Insurance in its most general and comprehensive signification, 838

Technical sense, 838

Dissolution and forfeiture of charter, 893

Constitutionality of statute, 894

Construction of statute, 894

Dissolution at suit of creditor or stockholder, 894

Dissolution upon petition of officer designated by statute, 894

Involuntary dissolution, 893

Involuntary dissolution at common law, 893

Involuntary dissolution by statute, 894

Penalty of statute cannot be avoided by voluntary assignment, 895

Petition of officer designated by statute, 894

Rights and duties of receivers, 896

Rights of creditors, 895

Standard of solvency required by statutes, 895

Text of statute, 894

Voluntary dissolution, 893

Doing business, see infra, FOREIGN INSURANCE COMPANIES.

Estoppel:

As to estoppel to claim forfeiture, see infra, WAIVER AND ESTOPPEL.

Foreign company estopped to allege want of authority, 905

Evidence (*see infra, BURDEN OF PROOF; PAROL EVIDENCE*):

Accounts and inventories, 964

Admissions by insurer's representatives, 968

INSURANCE, *cont'd.***Evidence, *cont'd.***

Amount of loss, 964

Breach of conditions, 960

Declaration by insured or beneficiary, 968

Existence and terms of contract, 960

Expert and opinion evidence, 969

Fire caused by insured, 962

Fraud in application, 960

Intentional killing of insured, 963

Life insurance, 962

Matters material to risk, 961

Overvaluation, 965

Particular issues, 960

Payment of premiums, 960

Policies, 966

Preponderance of evidence, 963

Presumption of innocence, 963

Proceedings before coroner, 969

Proof, 953

Proofs of loss, 968

Property insurance, 961

Quantum of evidence, 963

Reasonable doubt, 963

Receipt or acknowledgment of payment, 960

Secondary evidence, 969

Title, 962

Total or partial loss, 965

Executed and executory contracts, 840

Exemption from taxation, 887Exemption of *bona fide* debts, 887

Exemptions strictly construed, 887

In general, 887

Existence of subject-matter, 847

Expert and opinion evidence, 969

False representations, see infra, REPRESENTATIONS.

False statements, see infra, AGENTS; REPRESENTATIONS.

Foreign insurance companies, 896, 898

Adjustment of loss, 902

Authority to transact business, 896

Authority of superintendent of insurance, 897

Constitutionality of statutes imposing conditions upon right to transact business, 898

In general, 896

In the United States, 897

State prohibiting citizens to contract with unauthorized foreign companies, 898

Business not in line of insurance not prohibited, 902

Company charged with notice of conditions imposed, 901

Company estopped to allege want of authority, 905

Constitutionality of statutes imposing conditions upon right to transact business, 898

Appointment of agent or attorney to receive process, 900

Conditions relating to form and legal effect of policy, 901

Deposit with state for security of policy holders, 899

Filing statement of financial condition, 899

License and what is required to obtain it, 899

Possession of certain amount of capital, 900

Retaliatory legislation, 901

INSURANCE, *cont'd.***Foreign insurance companies, *cont'd.*****Constitutionality of statutes, etc., *cont'd.***

- Right to remove causes into federal courts, 898
- Various conditions prescribed, 899
- Whether in conflict with citizenship clause of federal constitution, 898
- Whether such statutes regulate commerce, 898
- Contracts void in hands of company for noncompliance with conditions, 903
- Delivery of policies and taking premium notes as doing business, 902
- Effect upon contracts of noncompliance with conditions, 903
- In general, 896
- In the United States, 897
- Notice of noncompliance with statutory conditions bars recovery, 904
- Obligations and liabilities of companies which have become domesticated, 907
- Penalties imposed for transacting business without complying with statutory requirements, 906
- Performance of statutory requirements *prima facie* presumed, 904
- Power of state to change conditions of admission, 901
- Presumption in suits on premium notes, 904
- Revocation of license to transact business, 905
- Right of holder without notice of premium note, 904
- State prohibiting citizens to contract with unauthorized foreign companies, 898
- Taking an application for insurance, 902
- What constitutes doing business within meaning of statutes, 902
- Where foreign company takes securities in state, 902
- Forfeiture** (see *infra*, DISSOLUTION AND FORFEITURE OF CHARTER):
 - Conditions prescribing forfeitures strictly construed, 863
 - Forfeitures not favored, 863
- Forfeiture and avoidance**, 919
- Estoppel**, see *infra*, WAIVER AND ESTOPPEL.
- Ground of forfeiture**, 919
 - Representations*, see *infra*, REPRESENTATIONS.
 - Warranties*, see *infra*, WARRANTIES.
- Waiver**, see *infra*, WAIVER AND ESTOPPEL.
- Warranties**, see *infra*, WARRANTIES.
- Forfeiture of policy for nonpayment of premium note, 862
- Fraud**:
 - Cancellation induced by fraud, 872
 - Collusion between agent and assured, 947
 - Evidence, 960
 - Fraudulent cancellation, 872
 - Liability for premiums when insurance is induced by fraud, 952
- Rescission of policies tainted with fraud**, 877
 - Repudiation within reasonable time, 877
 - When fraud affects insurer only, 877
 - Where fraud affects interest of assured, 877
- Fraudulent sales and conveyances**:
 - Insurance upon property fraudulently conveyed, 844

INSURANCE, *cont'd.***Gambling contracts, see *infra*, INSURABLE INTEREST.****History**, 839**Illegal contracts**, 847

Property illegally kept or used, 847

Indemnity contracts, see *infra*, CONTRACT OF INDEMNITY.

Indorsement on back of policy, 864

Insurable interest, 845

Cessation or diminution of interest does not affect life insurance, 846

Insurable interest not necessary, 846

Necessity at time of creation of contract, 845

Necessity of time of loss, 846

Necessity at time of loss where life is insured, 846

Necessity at time of loss where property is insured, 846

Validity of wager policies, 845

Insurance agent, see *infra*, AGENTS.**Insurance companies, see *infra*, DISSOLUTION AND FORFEITURE OF CHARTER; FOREIGN INSURANCE COMPANIES; TAXATION, 878****Consolidation and amalgamation**, 881

Acceptance must be with full knowledge of facts, 883

Acceptance of amalgamated company's indorsement, 883

Accepting substituted liability, 883

Amalgamation, 882

Amalgamation defined, 882

By statute, 881

Consolidation, 882

Payment of premiums to amalgamating company, 883

Policy holder in amalgamated company also shareholder in that company, 883

Receipt of annuity for amalgamating company, 883

Rights of policy holders in amalgamated company, 882

Right to amalgamate, 882

Right to issue joint policies, 882

Distinction between stock and mutual companies, 879

Mixed companies, 879

Mutual companies, 878

Organization, 879

Deposit of sum as security, 879

Estoppel to deny corporate existence, 880

Individuals, partnerships, and unincorporated associations, 881

In general, 879

Limitation upon character of business, 881

Possession of specified capital required 879

Registration, 881

Vacation of charter for noncompliance with its conditions, 881

Powers, 888

Authority to declare dividends from profits, 888

Character of business in which insurance companies may engage, 892

Company cannot take stock in nor advance money to other corporations, 891

Construction of particular powers, 891

Contracts *prima facie* valid, 890

Volume XVI.

INSURANCE, *cont'd.***Insurance companies, *cont'd.*****Powers, *cont'd.***

- Disregard of by-law not sufficient to show its repeal, 889
- In general, 888
- Particular powers construed, 888
- Power to amend or repeal charter, 889
- Power to borrow money and procure sureties, 890
- Power to contract, 890
- Power to engage in banking business, 892
- Power to give and take notes and other securities, 892
- Power to insure property in foreign state, 893
- Power to make by-laws, 889
- Power to make loans and investments, 891
- Repeal, 889
- Validity of by-laws, 889
- When defense of ultra vires will avail, 893

Regulation, 884

- Examination into affairs of companies, 885
- Examples of regulation, 885
- Penal statutes, 886
- Police power, 884
- Power of state to regulate, 884
- Power reserved in constitution, 884
- Regulations prescribed in exercise of power, 884
- Statements and conditions of company required, 885
- Several kinds of insurance companies, 878
- Stock companies, 878
- Stockholder's interest, 878

Insurer (see *infra*, CONTRACT OF INDEMNITY; DISSOLUTION AND FORFEITURE OF CHARTER; FOREIGN INSURANCE COMPANIES; INSURANCE COMPANIES), 878**Definition, 878**

Insurance companies, see infra, INSURANCE COMPANIES.

Who may insure, 878**Interest, see *infra*, INSURABLE INTEREST.****Interpretation (see *infra*, REPRESENTATIONS; WARRANTIES), 862**

- Application construed to be part of contract, 866
- Application not attached to policy, 865
- Application not referred to in policy, 865
- Application subsequently delivered, 866
- Charter and by-laws of mutual insurance companies, 867
- Conditions of premium note, 867
- Conditions prescribing forfeitures strictly construed, 863
- Construction of attached clauses and general conditions, 864
- Construction of standard policy, 864
- Construction of written and printed parts, 864
- Construing contents of other instruments as part of contract, 865
- Construing several policies on same subject matter, 867
- General principles, 862
- General rules of construction, 862
- Inconsistent conditions of premium note, 867

INSURANCE, *cont'd.***Interpretation, *cont'd.***

- Indorsement, 865
- Indorsement on back of policy, 864
- Interpretation of terms used, 862
- Interpretation to be made by court, 862
- Memorandum construed as part of policy, 864
- Parol evidence, 867
- Policy not admissible without application, 867
- Statutes, 865
- Statutes providing for dissolution and forfeiture of charter, 894
- When terms admit of two constructions, 863

Inventories, 964**Investments:**

- Power of company to make investments, 891

Knowledge, see *infra*, WAIVER AND ESTOPPEL.**Liability for premiums, 952****Liability of assured for premiums, 952**

- Refusal to accept corrected policy, 953
- When insurance is induced by fraud, 952
- When insurer cancels policy, 953
- When liability on policy is suspended, 953
- When policy does not conform to application, 952
- When policy is void, 952
- Where applicant does not offer to return the policy, 953

Liability of insurer for return of premiums, 953

- Buildings and contents, 954
- Effect of estoppel upon company, 954
- Entire and divisible contracts, 954
- In general, 953
- Misrepresentations, concealment, or false warranty by assured, 954
- Return of premiums where risk has never attached, 954
- When risk has attached, 954
- When risk has never attached, 954
- Wrongful cancellation by insurer, 954

Liability of insurers, see *infra*, CONTRACT OF INDEMNITY.**Licenses, 899**

- Foreign insurance companies, 899
- Revocation of license of foreign companies to transact business, 905

Loans:

- Power of company to make loans, 891

Marine insurance:

- Burden of proof, 958

Materiality of representations, see *infra*, REPRESENTATIONS; WARRANTIES.**Medical examiners as agents, 908****Memorandum construed as part of policy, 867****Mistake:**

- Reformation of policy, 870
- Modification of contract, 868

Mutual insurance:

- Cancellation under by-laws of mutual insurance companies, 872
- Construction of charter and by-laws of mutual insurance companies, 867
- Mutual insurance companies, 878
- Notice of cancellation, 873
- Agent's authority general, 874

INSURANCE, *conf'd.***Notice of cancellation, *conf'd.***

- Authority of agent, 874
- Conditions in policy, 874
- Effect of condition in policy upon agent's authority, 874
- Form of notice, 873
- Insurer sends notice by mail, 873
- Loss payable to mortgagee, 873
- Necessity of, 873
- Time of notice, 875
- Waiver by insured, 873
- When agent's authority has ceased, 874

Origin, 839**Other insurance clause:**

- Liability of several insurers in the absence of other insurance clause, 841
- Liability of several insurers where policies contain clause, 842

Parol evidence, 867, 966

- Construction of warranties, 927
- Designation of beneficiaries, 967
- Explanation of description, 967
- In general, 966
- Technical words and phrases, 967
- To vary policy, 966
- Usage of trade, 967

Parol representations, 926**Parol waiver 935****Parties, see *infra*, PROPER PARTIES.****Payment (see *infra*, CONSIDERATION; PREMIUMS).**

- Receipt or acknowledgment of payment, 960

Penalties:

- Penalties imposed for transacting business without complying with statutory requirements, 966

Personal contract, 843**Police power:**

- Power to regulate companies, 884

Policy (see *infra*, AGREEMENT; CONSIDERATION; CONTRACT; FORFEITURE AND AVOIDANCE; INTERPRETATION; RENEWAL OF POLICY; REPRESENTATIONS; WARRANTIES):

- Evidence, 966

Powers, see *infra*, INSURANCE COMPANIES.**Premium (see *infra*, CONSIDERATION; LIABILITY FOR PREMIUMS):**

- Acknowledgment of payment of policy, 961
- Evidence of payment of premiums, 960
- Return of premium upon receiving notice of cancellation, 875

Premium note:

- Construction and conditions of premium note, 867
- Inconsistent conditions, 867

Preponderance of evidence, 963**Private international law, see *infra*, FOREIGN INSURANCE COMPANIES.****Proper parties, 844**

- Agency, 845
- Agent insuring his own property, 845
- Who may be insured, 844
- Who may insure, 844

Questions of law and fact:

- Materiality of representations, 934

Reasonable doubt, 963**Receivers, 896**

- Rights and duties of receivers, 896

Reformation of policy, 869

- Burden of proof, 870

INSURANCE, *conf'd.***Reformation of policy, *conf'd.***

- Evidence to support, 870
- Measure of proof, 870
- Mistake must be mutual, 870
- Power of equity to reform, 869
- Reformation after loss, 870

Regulation, see *infra*, INSURANCE COMPANIES.**Regulation of commerce, 898****Removal of causes, 898****Renewal of policy, 868**

- Breach of contract to renew, 869
- Change of parties insured, 869
- Description of property insured, 869
- How effected, 868
- In general, 868
- Mode of renewal, 869
- Power of agent to renew, 868

Representations (see *infra*, WARRANTIES), 932

- Burden of proof, 955
- Character of representations, 932
- Definition, 932
- Effect of misrepresentations in general, 932
- Good faith in respect to representations not material, 933

Materiality of representations, 933

- Good faith of insured immaterial, 933
- Immateriality of representations in general, 933
- Materiality question of fact, 934
- Representations to avoid policy must be material, 933
- Stipulation as to materiality, 934
- What representations are material, 933

Parol representations, 926**Promissory representations, 932****Representations not made warranties by stipulation as to materiality, 933****Statements of doubtful character construed to be representations, 923****Stipulations as to materiality, 933****Substantial truth of representations, 932****Warranties distinguished from, 922****What representations are material, 933****Rescission and cancellation, 870**

- Agents, 871
- Agent's authority to accept notice, 874
- Burden of proof, 959
- By act of parties themselves, 870
- By-laws of mutual insurance companies, 872
- Cancellation by mutual agreement, 871
- Cancellation by right reserved to assured, 876

Cancellation by right reserved to insurer, 873, 876

- Actual tender must be made, 875
- Agent's authority general, 874
- Authority of agent to accept notice, 874
- By-laws of mutual insurance companies, 872
- Effect of cancellation, 876
- Entry on books, 876
- Form of notice of cancellation, 873
- Fraudulent cancellation, 872
- Full amount returnable must be tendered, 867
- In general, 872
- Issuing of other policies, 876
- Mode of cancellation, 873
- Notice must not be equivocal, 874
- Notice of cancellation, 873
- Return of unearned premium, 875

INSURANCE, *cont'd.***Rescission and cancellation, *cont'd.*****Cancellation by right reserved to insurer, *con.***

Time of notice, 875

Waiver by insured, 873

Cancellation of policy tainted with fraud, 877

Cancellation of valid policies, 870

Agents, 871

Cancellation by mutual agreement, 871

Cancellation induced by fraud, 872

Conditional agreements, 872

Mode of cancellation, 871

Right to cancel in general, 870

Cancellation under right conferred by statute, 877

Courts of equity, 878

Effect of cancellation, 876

Entry on books, 876

Fraud, 877

Repudiation within reasonable time, 877

When fraud affects insurer only, 877

When fraud affects interest of assured, 877

Fraud affects insurer only, 877

Fraudulent cancellation, 872

Liability for premiums when insurer cancels policy, 953

Mode of cancellation, 871

Notice of cancellation, 873

Agent's authority general, 874

Authority of agent, 874

Conditions in policy, 874

Effect of condition in policy upon agent's authority, 874

Insurer sends notice by mail, 873

Loss payable to mortgagee, 873

Necessity of, 873

Time of notice, 875

Waiver by insured, 873

When agent's authority has ceased, 874

Return of unearned premium, 875

Actual tender must be made, 875

Full amount returnable must be tendered, 876

Issuing of other policies, 876

Necessity of, 875

Where no premium has been paid, 875

Statutes, 877

Waiver by insured, 873

When fraud affects interest of assured, 877

Rescission and cancellation of policy:**Liability of agent for neglect to cancel policy, 913**

How direction to cancel must be given, 913

In general, 913

Measure of damages, 913

Waiver of cancellation, 913

Risk, 848

Carriers' negligence, 848

Causes of loss, 848

Commencement of risk in general, 848

Date not conclusive as to commencement of risk, 848

Duration of risk, 849

Fraudulent concealment by insured, 849

Fraudulent negligence, 848

Insurer must be subject to liability, 848

Negligence of insured, 848

Prospective insurance, 849

Retrospective insurance, 849

Seaworthiness of vessel, 848

INSURANCE, *cont'd.***Service of process:**

Appointment of agent or attorney to receive service of process, 900

Statements held to be representations notwithstanding incorporation in policy, 925

Statutes (see *infra*, AGENTS; DISSOLUTION AND FORFEITURE OF CHARTER; FOREIGN INSURANCE COMPANIES; WARRANTIES):

Statutes requiring application to be attached to policy, 865

Stockholders:

Dissolution at suit of stockholder, 894

Stockholder's interest in company, 878

Subject-matter, 847

Articles kept for sale in violation of law, 847

Existence, 847

Illegal use of building, 848

Insurance upon lottery tickets, 947

Insurance upon voyage illegally undertaken, 847

Property illegally kept or used, 847

Suicide:

Burden of proof, 958

Suretyship:**Liability of sureties on agents' bonds, 914**

Failure of company to promptly notify surety, 914

Foreign insurance company without license to do business, 914

In general, 914

Power of company to borrow money and procure sureties, 890

Taxation:**Taxation of insurance companies, 886**

Exemptions, 887

Exemptions of *bona fide* debts, 887

Exemptions strictly construed, 887

Municipal taxes, 886

Property liable to taxation, 887

State taxes, 886

Taxation of capital and surplus at its actual value, 887

Unearned premiums, 887

Title, 962

Tortfeasor, when property is destroyed by, 841

Ultra vires, 888, 893

Various kinds of insurance, 839

Wager policies, see *infra*, INSURABLE INTEREST.*Waiver*, see *infra*, AGENTS.**Waiver and estoppel, 934****Acts after issuance of policy but prior to forfeiture, 937**

Assertion of specific breach, 937

Waiver after issuance of policy but prior to forfeiture, 937

Waiver of preliminary proofs by denial of liability, 937

Agents, 942

Adjuster, 947

Agent misinforming applicant, 946

Agent on his own responsibility writing in answers, 946

Agent's knowledge acquired outside of agency, 948

Applicant's ignorance of false statements inserted by agent, 946

Burden of proof, 947

Collector, 947

INSURANCE, *cont'd.***Waiver and estoppel, *cont'd.*****Agents, *cont'd.***

Effect of stipulation in application of insurer shall be bound by written statements only, 946

False statements inserted by agent in application, 945

Fraud and collusion between agent and assured, 947

General agent, 942

General agent's knowledge of grounds of forfeiture at time of issuance of policy, 943

In general, 942

Limitations of authority, 948

Agent's knowledge of intended breach, 950

Application of limitations to waiver of conditions to be performed after loss, 952

Clauses prohibiting waiver by agents, 948

Conditions to be performed after loss, 952

Effect on agent's authority after issuance of policy, 950

Effect on agent's authority at or before issuance of policy, 948, 949

Failure to indorse not chargeable to insured, 950

General agent, 949

General agent of foreign company, 949

In general, 948

Limitations as to mode of waiver, 949

Limitations on face of policy, 948

Prohibition of parol waiver by officers and agents generally, 951

Statutes adopting standard form of policy, 951

Verbal consent of soliciting agent where policy requires writing, 951

Verbal waiver of general agent, 950

Medical examiner inserting false answers, 945

Misstatements as to subject of insurance, 946

Power of general agent to waive after issuance of policy, 943

Provision that solicitor shall be agent of applicant, 947

Soliciting agent, 943

Soliciting agent inserting false statements in application, 945

Soliciting agent's waiver at time of issuance of policy, 943

Soliciting agent's waiver of conditions as to future conduct, 944

Statutes declaring agent to be agent of company only, 947

Waiver after issuance of policy, 943

Waiver by agents generally, 942

Waiver of requirement for action in specified time, 947

By whom waiver may be made, 942

Agents, 942

President, 942

Secretary, 942

Vice-president, 942

Conduct after forfeiture, 938

Acceptance of payment of premium, 940

INSURANCE, *cont'd.***Waiver and estoppel, *cont'd.*****Conduct after forfeiture, *cont'd.***

Conduct relied on as forfeiture not intended nor understood as such, 939

Consent to assignment, 938

Constructive knowledge, 939

Deposit of premium in court, 940

Failure of knowledge to restore insured to former status, 939

In general, 938

Insured must understand payment as waiver, 941

Knowledge necessary, 939

Mere demand for payment which is refused, 941

Mere silence or nonaction not a waiver, 939

Necessity of knowledge of forfeiture to create waiver, 939

Notice of intention to violate condition, 940

Receipt of premium earned before forfeiture, 941

Requiring proofs of loss, 941

Retention of premium after knowledge of breach, 940

Silence, 939

Waiver by acts subsequent to forfeiture, 938

Waiver of one ground does not bar insistence on another, 939

Express waiver, 934

General application of waiver or estoppel to forfeitures of insurance policies, 934

Implied waiver not technical estoppel, 935

Issuance of policy without objection to known grounds of forfeiture, 935

Effect of constructive knowledge, 936

Failure to examine or inquire as to existing facts, 936

In general, 935

Insurer put on notice, 936

Knowledge at time of issuance, 936

Omission or imperfect answer appearing on face of application, 937

Waiver by failure to inquire as to existing facts, 937

Necessity of new consideration, 934

Parol waiver, 935

Waiver and estoppel interchangeable terms, 935

Waiver inferred from acts, 935

Waiver of liability, 937

Waiver of preliminary proof by denial of liability, 937

What constitutes waiver of estoppel, 934

Warranties (see *infra*, REPRESENTATIONS), 919

Assignment of policy, 929

Breach of warranties, 928

Effect of assignment of policy, 929

Effect of attempted rescission of policy, 929

Effect of breach declared by policy, 929

Effect of breach of warranty, 928

Effect of breach on attempted revival of policy, 929

General rule as to breach of warranties, 929

Literal compliance required, 929

Particular warranties, 930

INSURANCE, *cont'd.***Warranties, *cont'd.*****Breach of warranties, *cont'd.***

- Warranty against alienation of property, 931
- Warranty against incumbrances, 931
- Warranty as to increase of risk, 930
- Warranty as to status of personal property, 930
- Warranty describing property, 932
- Warranty of ownership, 931
- Warranty to give notice of incumbrances, 932
- Burden of proof, 955, 957
- Construction and effect of statutes, 921
- Construction of warranties, 927
- Construed most strongly against insurer, 928
- Contractual stipulations as to materiality, 921
- Distinction between affirmative and promissory warranties, 920
- Effect of attempted rescission of policy, 929
- Effect of breach of warranty, 928
- Effect of breach of warranty declared by policy, 929
- Effect of warrantor's good faith, 922
- Failure to make answer, 927
- Form or language of statements, 924
- Fraud or mistake of agent of insurer, 922
- Good faith of warrantor, 922
- Intention of parties controls, 927
- Kinds of warranties, 920
- Materiality of facts warranted, 920
- Mode of incorporating application in policy, 925
- Nature of warranties, 820
- Parol evidence in aid of construction, 927
- Parol representations, 926
- Partial answers, 927
- Physical annexation of application not necessary, 926
- Printed controlled by written parts, 927
- Qualified warranties, 922
- Reference to application for description of property, 926
- Statements held to be representations notwithstanding incorporation in policy, 925
- Statements incorporated in policy, 924
- Statements of doubtful character construed to be representations, 923
- Statutes requiring incorporations of application in policy, 925
- Statutory provisions as to materiality, 921
- Strict construction, 927
- Use of word warranty not conclusive, 924
- Warranties defined, 919
- Warranties distinguished from representations, 922
- Warranties must be embraced in policy, 924
- Warranties not created or extended by construction, 923
- Warranties not favored, 923
- What constitutes warranty, 923
- Words of description, 924

INSURANCE BROKERS (see INSURANCE), 970**Agency of broker, 971**

- Agency in delivering policy and collecting premium, 972

INSURANCE BROKERS, *cont'd.***Agency of broker, *cont'd.***

- Broker's acts, representations, and concealments chargeable to insured, 971
- Broker's legal status not changed by delivery of policy to him, 971
- Effect of provision in policy declaring broker agent of insured, 972
- Effect of stipulation that broker should be deemed agent of insured, 973
- Employed as agent of insurer, 972
- Evidence of general custom to give notice of cancellation to broker procuring insurance, not admissible, 973
- In general, 971
- Notice to broker of cancellation not notice to insured, 973
- Ordinarily agent of insured, 971
- When agent of insurer, 972
- When authorized to represent principal in all insurance matters, 974
- When employed only to procure policy, 973
- Agents distinguished from, 970
- Definition, 970
- Duty and liability to principal, 975**
 - In general, 975
 - Liability for fraudulently procuring insurance in nonexistent company, 975
 - When broker receives instructions from principal, 975
 - When matter is left to broker's discretion, 975
- Liabilities, see infra, DUTY AND LIABILITY TO PRINCIPAL.*
- Licenses, 974
- Lien upon policy and moneys received thereon, 974**
 - Extinguishment of lien by parting with policy, 975
 - In general, 974
 - When broker does not know of agency, 974
 - When broker is employed by agent, 974
 - When broker knows of agency, 974
- Payment to broker, 860**
 - Effect of in general, 860
 - Policy provided that brokers shall be considered agents, 861
 - Where the insurer keeps an account with the broker, 860
- Rights, duties, and liabilities of brokers, 974
- Statutes requiring broker to obtain license, 974

INSURANCE COMPANIES (see INSURANCE):

- Insolvency and bankruptcy, 659

INSURED, 975**INSURGENT, 975****INSURRECTION, 977**

- Bloodshed unnecessary, 977
- Criminal law, 977
- Definition, 977
- Military law, 977
- President, 977
- Scope of article, 977
- Suppression of insurrection, 977
- War, 977

INT., 978**INTAKE, 978****INTEGRITY, 978**

INTELLIGENCE, 978
INTELLIGENCE OFFICE, 978
INTELLIGENT, 978
INTEMPERANCE, 978
INTEMPERATE, 978
INTEND, 979
INTENDMENT, 980
INTENT, 980
INTENTION, 980
INTENTIONAL, 981
 Felonious, 982
INTERCOURSE, 983
 War:
 Effect on intercourse of individuals:
 Antebellum contracts, 1146
INTERDICTION, 983
INTERESSE TERMINI, 983
INTEREST, 984, 1102
 Abbreviations, 1001
Accounts:
 Account admitted correct, 1018
 Compound interest, 1080
 Accounts stated, 1080
 After cessation of mutual dealings, 1080
 Balances of accounts, 1080
 General rule, 1080
 Interest by agreement, 1018
 Liquidated accounts, 1017
 Mere act of striking a balance, 1018
 Note bearing interest included in account, 1018
 Unliquidated accounts, 1017
Actions, see *infra*, **ANNUAL AND PERIODIC INTEREST**.
 American authorities, 993
Amount to be paid, see *infra*, **INTEREST AS DAMAGES FOR BREACH OF CONTRACT**.
Annual and periodic interest, 1071
 Action brought after maturity of principal, 1072
 Action for annual interest before maturity of principal, 1072
 Action for interest when due, 1072
 After maturity of principal debt, 1071
 How contracted for, 1071
 In general, 1071
 Interest on annual or periodic interest, 1073
 Periodic interest due only by contract, 1071
Application of payments, 1035
 Computation of interest, 1038
Bills of exchange and promissory notes, 1008
 Contract to execute bill or note, 1026
Bonds:
 Penal bonds, 1008
 In general, 1008
 Interest in excess of penalty, 1009
 Liquidated damages, 1010
 Principal and surety, 1009
Breach of contract (see *infra*, **INTEREST AS DAMAGES FOR BREACH OF CONTRACT**):
 Implied contracts to pay interest, 1006

INTEREST, *cont'd.*
 Canadian cases, 993
 Common law, 991
Compound interest, 991, 1073
 Allowance in special cases, 1074
 Annual and periodic interest, 1073
Compound interest as damages, 1080, 1082
 Compound interest after maturity of principal, 1080
 Effect of demand, 1081
 In general, 1080
 Interest on interest not allowed as damages, 1080
 Coupons, 1074
 Doctrine that compound interest savors of or tends to usury, 1074
 Explanatory, 1074
 General rule against, 1073
 Interest on claims referred to commissioner, 1075
 Judgments and decrees, 1075
 Not favored, 1073
 Partial payments where compound interest is allowed, 1037
 Partial payments where compound interest is not allowed, 1036
 Rate of interest, 1083
 Rate of interest on judgment, 1076
 Recovery back of compound interest after payment, 1075
Simple interest on interest of principal, 1081
 As damages, 1082
 By contract, 1081
 Contrary doctrine, 1083
 Doctrine that secondary interest recoverable, 1081
 Interest clause in bond, 1082
 Necessity for contract after interest due, 1081
 Qualifications of rule, 1082
 Rate, 1083
 Statutes, 1081
 Summary of rules, 1084
Where contracted for, 1076
 Accounts, 1080
 Accrued interest embraced in new note or security, 1079
 Agreement for interest on interest need not be in writing, 1077
 Construction of particular contract, 1077
 Contract for compound interest before principal interest due, 1078
 Contract for interest on interest after interest due, 1078
 Forbearance sufficient consideration, 1079
 Implied contracts, 1079
 In general, 1076
 Necessity for express contract, 1077
 On bill in equity to redeem land mortgaged, 1076
 Qualifications of rule, 1076
 Retrospective agreement, 1079
 Wrongful refusal to account, 1075
Computation of interest (see *infra*, **TIME FROM WHICH COMPUTED**), 1036
 Application of payments, 1038
 General rule, 1036
Mistake in computation, 1037
 In general, 1037
 Remittitur of interest erroneously allowed, 1038

INTEREST, *cont'd.***Computation of interest, *cont'd.*****Partial payments, 1036**

Interest on payments, 1037

Where compound interest not allowed, 1036

Where interest compounded, 1037

Recovery back of interest voluntarily paid, 1039

Computation of time :

To what time computed, 1047

Interest as damages, 1048

Interest by contract, 1047

Conflict of laws, see *infra*, PRIVATE INTERNATIONAL LAW.**Constitutional law, 998**

Statutes changing rate, 1060, 1061

Construction of contracts, 1001

Contracts (see *infra*, INTEREST AS DAMAGES FOR BREACH OF CONTRACT; SUSPENSION OF INTEREST; TIME FROM WHICH COMPUTED):Rate of interest, see *infra*, RATE OF INTEREST.**Contracts to pay interest** (see *infra*, IMPLIED CONTRACTS), 999

Abbreviations, 1001

Construction of contracts, 1001

Express contracts, 999

In general, 999

Interest included in principal sum, 1000

Note given payable in instalments, 1002

Object of requiring written contracts, 1000

Omission of period by which computation to be made, 1001

Omission of the word interest, 1001

Parol evidence, 1002

Rate to appear in contract for principal debt, 1000

Requisites, 1000

Specifying rate, 1000

Verbal contracts, 1002

When interest payable, 1002

Whether construction for court or jury, 1001

Written contracts, 1000

Conventional interest, 991

Conversion, 1013

Coupons :

Compound interest, 1074

Damages (see *infra*, COMPOUND INTEREST; DISCRETIONARY INTEREST AND INTEREST AS MATTER OF RIGHT; INTEREST AS DAMAGES FOR BREACH OF CONTRACT; INTEREST AS DAMAGES FOR TORTS; RATE OF INTEREST; TIME FROM WHICH COMPUTED):

Double and treble damages, 1031

Interest as damages, see *infra*, COMPUTATION OF TIME.Date, see *infra*, TIME FROM WHICH COMPUTED.**Death :**

Suspension of interest, 1066

Death by wrongful act, 1032

Debts, see *infra*, INTEREST AS MERE INCIDENT OF PRINCIPAL OR INTEGRAL PART OF DEBT.

Debts of decedents, 1010

Defaults :

Necessity for default before right to interest as damages accrues, 1019

Default in liquidating debt, 1020

In general, 1019

Liability of mere depository, 1020

INTEREST, *cont'd.***Definition, 990**

Compound interest, 991

Conventional interest, 991

Legal interest, 991

Necessity generally, 990

Simple interest, 991

Demand, 1020

Contract for interest, 1024

Demand required by terms of contract, 1021

Demands under particular statutes, 1024

Evidence and presumption of demand, 1023

Exceptions to general rule, 1022

Excessive demand, 1023

Money in hands of agents, 1022

Money paid under mutual mistake, 1021

Necessity for demand, 1021

Partial payment on the debt, 1023

Requisites of demand, 1022

Suit as demand, 1023

Suit subsequently dismissed, 1024

Time of payment fixed by demand, 1020

Want of funds at place of demand, 1022

When demand unnecessary, 1024

Deposit, 1020

Discretionary interest and interest as matter of right, 1095

In general, 1095

Interest as damages, 1096

Contracts to do something other than pay money, 1098

Contracts to pay money, 1097

Damages for breach of contract, 1097

Damages for tort, 1098

Damages to property, 1099

Destruction of property, 1099

Discretion of jury, 1096

In general, 1096

Torts to person, 1099

Torts to property, 1099

Trove and conversion, 1099

When jury may be instructed to give interest, 1100

Interest by contract, 1096

Domicil :**Effect of domicil on enemy character :**

Constituents of domicil, 1147

English decisions, 992

Equity follows the law, 999

Evolution and development of laws of interest, 992

Exemplary damages :

Torts to property, 1031

Extent of debt, see *infra*, INTEREST AS MERE INCIDENT OF PRINCIPAL OR INTEGRAL PART OF DEBT.*Foreign judgments*, see *infra*, JUDGMENTS AND DECREES.*Foreign law*, see *infra*, PRIVATE INTERNATIONAL LAW.**Fraud :**

Interest on money fraudulently or wrongfully obtained, 1012, 1013

Grounds of allowance of interest, 999

History, 991

Impairment of obligation of contract :

Statutes changing rate, 1060

Implied contracts (see *infra*, RATE OF INTEREST), 1002

Assuming substituted obligation, 1006

Breach of contract to pay money, 1006

Volume XVI.

INTEREST, *cont'd.***Implied contracts, *cont'd.***

- Compound interest, 1079
- Custom or course of dealings of parties, 1004
- General usage or custom, 1003
- How implied contract may arise, 1003
- In general, 1002
- Interest as damages for breach of implied contract to pay money, 1010
 - Conversion of money, 1013
 - In general, 1010
 - Interest as measure of damages, 1013
 - Misapplication of funds, 1013
 - Money fraudulently or wrongfully obtained, 1012
 - Money had and received, 1012
 - Money paid and received through mistake, 1011
 - Money paid for use of another, 1011
 - Money wrongfully or unlawfully withheld, 1012
 - Principal and surety, 1011
 - Public officer retaining money in his hands, 1012
 - Receipt of money fraudulently concealed, 1013
- Knowledge of custom, 1005
- Liquidated accounts, 1004
- Mercantile instruments, 1004
- No implication for interest or implication not to pay it, 1006
- Particular acts of parties or terms of particular contract, 1005
- Questions of law and fact, 1005
- Requisites of general usage or custom, 1003
- Time from which interest computed, 1044
 - Contracts to do something other than to pay money, 1046
 - Debts admitted to be due, 1044
 - General rule, 1044
 - Implication to pay on demand, 1044
 - Interest from institution of suit, 1045
 - Statutory provisions, 1045
 - Work done, 1045
- Under statutes requiring written contracts, 1003
- Improvements, 79
- Indemnity contracts, 181
- Injunctions:**
 - Suspension of interest, 1068
- Insanity:**
 - Accounting by guardian, 591
- Insolvency and bankruptcy, 690**
 - Judgment, 690
 - Proof and allowance of claims, 675
- Interest as damages, see *infra*, RATE OF INTEREST; TIME FROM WHICH COMPUTED; DISCRETIONARY INTEREST AND INTEREST AS MATTER OF RIGHT; COMPOUND INTEREST.
- Interest as damages for breach of contract (see *infra*, TIME FROM WHICH COMPUTED,) 1007
 - Amount to be paid, 1014
 - Accounts, 1017
 - Default in liquidating debt, 1020
 - Demand, see *infra*, DEMAND.
 - In general, 1014
 - Liability of mere depository, 1020
 - Necessity for default, 1019
 - Rule as to unliquidated demands, 1015
 - Amount capable of ascertainment, 1016

INTEREST, *cont'd.***Interest as damages for breach of contract, *con.*****Amount to be paid, *cont'd.*****Rule as to unliquidated demands, *cont'd.***

- Amount in dispute, 1016
- Demand fixed and certain, 1016
- In general, 1015
- Modification of the rule, 1016
- Unliquidated demands for services, 1015
 - What is unliquidated demand, 1016
- Time for payment, 1019
- Contracts other than to pay money, 1024
- Contracts to deliver personalty, 1025
- Contracts to execute bill or note, 1026
- Contracts to pay money, 1007
 - Bills of exchange, 1008
 - Contracts not mentioning interest, 1008
 - Debts of decedents, 1010
 - Express contracts to pay money, 1007
 - Implied contracts to pay money, 1010
 - In general, 1007
 - Interest after breach, 1008
 - Interest in excess of penalty, 1009
 - Liquidated damages, 1010
 - Lost instruments, 1010
 - Penal bonds, 1008
 - Principal and surety on penal bond, 1009
 - Promissory notes, 1008
 - Rule controlled by stipulation or inference, 1008
 - Written or oral contracts, 1007
- Default of debtor, 1014
- Exceptions to general rule, 1024
- Implied contracts to pay money, 1010
 - Conversion of money, 1013
 - In general, 1010
 - Interest as measure of damages, 1013
 - Misapplication of funds, 1013
 - Money fraudulently or wrongfully obtained, 1012
 - Money had and received, 1012
 - Money paid and received through mistake, 1011
 - Money paid for use of another, 1011
 - Money wrongfully or unlawfully withheld, 1012
 - Principal and surety, 1011
 - Public officer retaining money in his hands, 1012
 - Receipt of money fraudulently concealed, 1013
- Interest as damages in lieu of more certain standard, 1026
- Interest as measure of damages, 1013
- Market values, 1025
- Measure of damages, 1013
- Requisites to recovery, 1014
- Warranties, 1026
- Where amount is ascertainable by computation, 1021
- Where consideration has been paid, 1026
- Interest as damages for tort, 1027
 - Consideration of lapse of time since injury, 1030
 - Death by wrongful act, 1032
 - Deprivation of use of property, 1029
 - Doctrine that interest not recoverable, 1031
 - Double and treble damages, 1031
 - Exemplary damages, 1031
 - In general, 1027
 - Injuries to or destruction of property, 1027
 - Interest *eo nomine*, 1029

INTEREST, *cont'd.***Interest as damages for tort, *cont'd.***

- Interest in negligence cases, 1031
- Interest not recoverable *eo nomine*, 1029
- Interest on diminished value, 1028
- Property having ascertainable pecuniary value, 1030
- Torts to person, 1032
- Torts to property, 1029
- Unreasonable and vexatious delay, 1030

Interest as mere incident of principal or integral part of debt, 1032

- Effect of payment of interest, 1035
- Effect of payment of principal, 1033**
 - Agreement for survival of right to interest, 1035
 - Application of payments, 1035
 - Claiming right to interest, 1034
 - Collateral contract for interest, 1033
 - Independent collateral liability, 1034
 - Interest due by contract, 1033
 - Interest recoverable as damages, 1033
 - Payment of principal as bar to interest, 1034
 - Payment pending suit, 1034
 - Payments in compromise or settlement of debt, 1035
- General observations, 1032

Interest on interest, see *infra*, COMPOUND INTEREST.**Interpretation :**

- Contracts, 1001

Judgments and decrees :

- Compound interest, 1075
- Fluctuations of rate, 1063
- Provision that judgment shall carry contract rate, 1063
- Rate existing at rendition, 1063
- Rate of interest, 1059, 1076
- Statutes changing rate, 1063
- What law governs interest on foreign judgments, 1091**
 - Law of jurisdiction where judgment rendered, 1091
 - Law of place where suit brought, 1092
 - Where judgment in terms bears interest, 1063

Jurisdiction, see *infra*, PRIVATE INTERNATIONAL LAW.**Jury, see *infra*, DISCRETIONARY INTEREST AND INTEREST AS MATTER OF RIGHT.****Laches :**

- Suspension of interest, 1065
- Legal interest, 991
- Liquidated damages, 1010
- Lost papers, 1010

Matter of right, see *infra*, DISCRETIONARY INTEREST AND INTEREST AS MATTER OF RIGHT.**Measure of damages, 1013****Mistake :**

- Computation of interest, 1037
- Demand, 1021
- Money paid and received through mistake, 1011

Maturity (see *infra*, RATE OF INTEREST):

- As to stipulation for higher rate after maturity, see *infra*, RATE OF INTEREST.*

Origin, 991**Parol evidence, 1002**

- Contracts reducing rate of interest, 1051

Partial payments :

- Computation of interest, 1036

INTEREST, *cont'd.*

- Payment of money into court, 1069

Payment of principal, 1033

- Agreement for survival of right to interest, 1035
- Application of payments, 1035
- Claiming right to interest, 1034
- Collateral contract for interest, 1033
- Independent collateral liability, 1034
- Interest due by contract, 1033
- Interest recoverable as damages, 1033
- Payment of principal as bar to interest, 1034
- Payment pending suit, 1034
- Payments in compromise or settlement of debt, 1035

Payments :

- Recovery back of compound interest after payment, 1075
- Voluntary payments of interest, 1039

Penal bonds, see *infra*, BONDS.**Periodic interest, see *infra*, ANNUAL AND PERIODIC INTEREST.****Private international law, 1085**

- Contract for interest without naming rate, 1088
- Contract for payment of interest if valid where made, 1086
- Contract to be performed partly in one state and partly in another, 1088
- Express contracts, 1085

Foreign judgments, 1091

- Law of jurisdiction where judgment rendered, 1091
- Law of place where suit brought, 1092
- Implied contracts, 1090

Interest as damages, 1090

- Damages for breach of contract, 1090
- Damages for tort, 1091
- Law of place of performance, 1090
- Law of place of suit, 1091
- Place where contract made as place of performance, 1091
- Promissory notes payable generally, 1091

Interest by contract, 1085

- Law of place of performance, 1087
- Law of place with reference to which contract made, 1085

Lex fori, 1089

- Note dated in one state, but actually executed in another, 1086

Note secured by mortgage on lands in another state, 1089**Parol evidence to prove place of performance, 1088****Place where contract entered into, 1086****Place where contract made as place of performance, 1088****Place where contract to be performed, 1087****Place where suit brought, 1089****Proof of interest law of foreign jurisdiction, 1092**

- Consequences of failure of proof, 1095
- Foreign interest law not subject of judicial notice, 1093

How foreign interest law proven in general, 1094**In general, 1092****Interest according to rule of common law, 1095****Interest by custom, 1094**

INTEREST, *cont'd.***Private international law, *cont'd.*****Proof of interest law of foreign jurisdiction, *cont'd.***

- Interest by law of forum, 1095
- Interest table prepared by secretary of state, 1094
- No interest where foreign law is not shown, 1095
- Rate after judgment, 1094
- Where interest expressly stipulated for, 1092

Provision of contract as to what law governs, 1086**Stipulation for annual interest, 1087****Public officers :**

- Officer retaining money in his hands, 1012

Questions of law and fact :

- Construction of contract, 1001
- Knowledge of custom to charge interest, 1005

Rate of interest, 1048**After maturity, 1053**

- Allowance of contract rate after maturity, 1057
- Allowance of contract rate after maturity on theory of implied contract, 1057
- Contract rate after maturity where contract rate is lower than legal rate, 1059
- Demand and one-day notes, 1055
- Expression of intent to continue contract rate after maturity, 1056
- Implication from terms of contract, 1054
- In general, 1053, 1059
- Intent of parties, 1053
- Legal rate after maturity, 1055
- Legal rate after maturity where contract rate is lower than legal rate, 1058
- Promissory note, 1054
- Rate after maturity fixed by statute, 1059
- Short-time loans with provisions for annual interest, 1054

Statutes, 1059

- Judgments and decrees, 1059
- Where contract rate is higher than legal rate, 1055
- Where contract rate lower than legal rate, 1058
- Where note is due one day after date, 1055

Contracts increasing rate, 1048**Contracts reducing rate, 1051****Debts secured by mortgage, 1049****Express contracts for rate, 1048****Generally, 1048****Implied contracts, 1051**

- Ambiguity, 1052
- Contracts for interest without expressing rate, 1051
- In general, 1051
- Where terms meaningless or unintelligible, 1052

Interest on interest, 1083**Judgments and decrees, 1076****Rate as damages, 1052**

- Exceptions to general rule, 1053
- General rule, 1052
- Legal rate, 1052
- Statutes changing rate, 1062
- Where no legal rate exists, 1053

Rate by contract, 1048**INTEREST, *cont'd.*****Rate of interest, *cont'd.*****Statutes :****Rule as to rate of interest after maturity, 1059****In general, 1059****Judgments and decrees, 1059****Statutes changing rate, 1060****Contract for legal rate as changed by law, 1062****Contract for money with no stipulation for interest, 1062****In general, 1060****Interest after maturity, 1061****Interest contracted for but no rate named, 1061****Interest due by contract, 1061****Interest recoverable as damages, 1062****Judgments, 1062****Statutes fixing interest on particular obligations, 1062****Stipulation for higher rate after maturity, 1049****Contracts reducing rate, 1051****Doctrine that higher rate is not recoverable, 1050****Doctrine that higher rate is recoverable, 1049****In general, 1049****Interest from date if not paid at maturity, 1050****Stipulation for interest as such or as damages, 1050****Waiver of higher rate by acceptance of lower, 1050****Remittitur of interest erroneously allowed, 1038****Right, see *infra*, DISCRETIONARY INTEREST AND INTEREST AS MATTER OF RIGHT.****Rule under modern statutes, 995****Actions under special statutes making no provision for interest, 996****Constitutionality, 998****Detention of proceeds of property converted, 997****Doctrine that interest is solely creature of statute, 995****Enactment of the several states, 995****English statutes, 995****Moneys due on instruments of writing, 997****Operation, 998****Provision as to unreasonable and vexatious delay, 997****Retrospective, 998****Simple interest, 991****States wholly or partially independent, 1128****Statutes (see *infra*, PRIVATE INTERNATIONAL LAW; RATE OF INTEREST; RULE UNDER MODERN STATUTES):****Compound interest, 1081****Discretionary interest and interest as matter of right, 1101****Statutes of Henry VIII. and Anne, 992****Suretyship :****Payments made by surety in discharge of obligation of principal, 1011****Penal bonds, 1009****Suspension of interest, 1064****By act of law, 1068****By act or omission of creditor, 1064****By terms of contract, 1064****Creditor absconding or concealing himself, 1064**

INTEREST, *cont'd.***Suspension of interest, *cont'd.***

- Death of creditor, 1066
- Delay in collecting claim, 1065
- Delay in course of legal proceedings, 1068
- Delay in payment of dividend, 1069
- Existence of state of war, 1069
- Failure to present bill or note for payment, 1065
- Injunction, 1068
- Laches, 1065
- Money had and received, 1065
- Money paid into court, 1069
- Neglect to ascertain amount due, 1066
- Order of court, 1068
- Requisites to application of rule, 1070
- Technical tender unnecessary, 1068
- Tender, 1066
- Tender considered as payment, 1067
- Tender of less sum than due, 1067
- Tender to pay with conditions, 1067
- Vendor's delay to make title, 1066
- What defendant must show, 1065
- What is sufficient tender, 1067
- Where interest as damages suspended, 1070

Tender :**Suspension of interest, 1066**

- Doctrine that technical tender unnecessary, 1068
- Effect of tender on interest, 1067
- In general, 1066
- Keeping tender good, 1067
- Offer to pay on condition, 1067
- Tender considered as payment, 1067
- Tender of less sum than due, 1067

Time, computation of, see infra, COMPUTATION OF TIME.

Time from which computed, 1039

In general, 1039

Interest as damages for breach of contract, 1040

- Accounts, 1042
- Contracts to pay money, 1041
- Contracts to pay on condition, 1043
- Date ascertainable by implication, 1041
- Debts due on demand, 1043
- Express contracts to pay money, 1041
- Foreign judgments, 1043
- From date of breach, 1040
- General rule, 1040
- Goods sold and delivered, 1042
- Goods sold on a stated credit, 1041
- Implied contracts, 1044

- Contracts to do something other than to pay money, 1046

- Debts admitted to be due, 1044

- General rule, 1044

- Implication to pay on demand, 1044

- Interest from institution of suit, 1045

- Statutory provisions, 1045

- Work done, 1045

- Interest from date, 1043

- Interest from demand, 1043

- Interest from maturity, 1042

- Interest from time for payment of principal, 1041

- Money had and received, 1042

- Penal bonds, 1043

- Where no time for payment of principal fixed, 1043

- Work done, 1042

INTEREST, *cont'd.***Time from which computed, *cont'd.*****Interest as damages for tort, 1046**

- In general, 1046

- Injury to property, 1047

- Interest from date of injury, 1047

- Interest from institution of suit, 1047

- Where money has been converted by the defendant, 1046

- Where money has been fraudulently obtained, 1047

- Interest by contract, 1039

Where date expressly fixed, 1039

- Date dependent upon condition, 1039

- Days of grace, 1039

- In general, 1039, 1040

- Interest after maturity, 1039

Where date impliedly fixed, 1040

- Contracts to pay at stated time with interest, 1040

- Money paid at another's request, 1040

Time of payment :**Certainty as to time of payment :**

- Certainty as to time when debt is due, 1040

Torts, see *infra*, INTEREST AS DAMAGES FOR TORT.

- Trover and conversion, 1013

- Unliquidated damages, 1015

- Unliquidated demands, 994

Usages and customs, 1003

- Custom as affecting express contract, 1003

- Custom or course of dealing of parties, 1004

- General custom, 1004

- General usage or custom, 1003

- Knowledge of custom, 1005

- Unliquidated accounts, 1004

- Mercantile instruments, 1004

- Particular usage, 1004

- Questions of law and fact, 1005

- Requisites, 1003

- Verbal contracts, 1002

- Voluntary payments, 1039

War :**Suspension of interest by existence of state of war, 1069**

- In general, 1069

- Only interest as damages suspended, 1070

- Statute abating interest accruing during war, 1070

- War between states, 1070

What law governs, see infra, PRIVATE INTERNATIONAL LAW.

Written contracts, see infra, CONTRACTS TO PAY INTEREST.

INTERESTED, 1102

- Title, 1102

INTEREST, INTERESTED :

- Highways, 1106

- Intervention, 1105

- Leasehold, 1103

- Magistrate, 1105

- Mortgage or judgment lien, 1103

- Person interested, 1104

- Reversions and remainders, 1103

- Right of way, 1103

- Sheriff, 1105

- Trusts, 1105

INTEREST POLICY, 1107**INTERFERE, 1107**

INTERFERENCE WITH CONTRACT RELATIONS, 1109

- Damages produced by breach, 1114
- Employer forbidding his employees to trade at particular store, 1115
- Inducing breach of existing contract, 1110
 - Bona fide* persuasion, 1113
 - Contract broken, 1111
 - Contract creates only right *in personam*, 1112
- Damages produced by breach, 1114
- De facto* service sufficient, 1111
- General statement, 1110
- Malice, 1112
- Malicious interference actionable, 1113
- Malicious use of any means actionable, 1114
- Means employed to induce breach 1113
- Motive, 1113
- Nature of contract, 1111
- Notice held to imply malice, 1112
- Piece work, 1111
- Procuring breach by illegal means, 1113
- Special damages, 1114
- Whether enforceable contract essential, 1111
- Introductory, 1109
- Malice, 1112
- Maliciously, 1115
- Master and servant:
 - Enticement of servants, 1109
- Motive, 1113
- Preventing formation or inducing termination of contract, 1114
- Right to pursue livelihood unmolested, 1110
- Slander of title, 1109
- What is justification, 1115
 - Combination, 1116
 - In general, 1115

INTERIM, 1117**INTERIOR, 1117****INTERLINE, 1117****INTERLINEATION, 1117****INTERLOCUTORY, 1117****INTERLOCUTORY INJUNCTIONS (see INJUNCTIONS), 1117****INTERLUDE, 1118****INTERMEDDLE, 1118****INTERMEDIATE, 1118****INTERMENT, 1119****INTERNAL, 1119****INTERNAL COMMERCE, 1120****INTERNAL IMPROVEMENT, 1119****INTERNAL REVENUE, 1120****INTERNATIONAL, 1120****INTERNATIONAL LAW, 1121**

- Accretion, 1131
- Acquisition of territory, 1129
- Agency:
 - Dissolution by war, 1146
- Amicable settlement of disputes, 1139

/ 16 C. of L.—80

INTERNATIONAL LAW, *cont'd.*

- Arbitration, 1139
- Armistices, 1158
- Bays, 1133
- Belligerency*, see *infra*, ENEMY; NON-HOSTILE RELATIONS OF BELLIGERENT; WAR.
- Belligerents:
 - Consequences of recognition of belligerency, 1142
 - Grant of belligerent rights by parent state, 1142
 - Mutual rights and duties of belligerents, 1140
 - Recognition of belligerency, 1141
- Bills of exchange and promissory notes:
 - Effect of war, 1145
- Blockade, 1177
 - Approach for inquiry or to procure license, 1181
 - Blockade of river partly in neutral state, 1178
 - Canal communications, 1183
 - Case of necessity, 1182
 - Conditions of effectiveness, 1178
 - Danger in entry and egress, 1178
 - De facto* blockades, 1180
 - Definition, 1177
 - Duration of delictum, 1183
 - Egress in violation of blockade, 1181
 - Evidence of violation, 1183
 - Facts showing violation, 1183
 - General principles, 1177
 - Innocent sailing for blockaded port, 1181
 - Necessity excusing entry, 1182
 - Notice of blockade, 1179
 - Pacific blockade, 1139
 - Paper blockade, 1178
 - Penalty for violation, 1183
 - Previous illegal acts, 1183
 - Proclamation of blockade, 1179
 - Running blockade, 1180
 - Sailing with intent to break blockade, 1181
 - Termination or suspension of blockade, 1180
 - Termination or suspension of blockade by capture of blockaded port, 1180
 - Termination or suspension of blockade by enemy's fleet, 1180
 - Termination or suspension of blockade by pursuit of prize, 1180
 - Termination or suspension of blockade by stress of weather, 1180
 - Ultimate destination of cargo, 1182
 - Violation of blockades, 1180
 - What constitutes violation in general, 1180
- Boundaries:
 - Rivers as boundaries, 1131
- Capitulations, 1159
- Capture, see *infra*, VISIT AND SEARCH, 1186
 - Capture without probable cause, 1188
 - Effect of rescue, 1186
 - What constitutes, 1186
 - Who may capture, 1186
- Cartels, 1159
- Cession, 1130
 - Cession and conquest, 1130
 - Continuance of pre-existing laws, 1130
 - Effect of cession, 1130
 - Effect on private property rights, 1130
- Cession of territory, 1128
- Combatants, 1151
- Confiscation*, see *infra*, RIGHTS OF WAR AS AGAINST ENEMY PROPERTY.

INTERNATIONAL LAW, *cont'd.***Contraband of war, 1170**

- Arms, 1171
- Articles not intrinsically of warlike character, 1171
- Beginning and end of offense, 1175
- Coal, 1172
- Continuous voyage, 1173
- Cotton, 1173
- Definition, 1170
- Destination of vessel or goods, 1173
- False papers and destination, 1174
- General character, 1170
- Horses, 1172
- Liability of vessel, 1174
- Materials of naval construction, 1172
- Miscellaneous examples, 1173
- Money, 1173
- Munitions of war, 1171
- Penalty for carrying contraband, 1174
- Provisions, 1171
- Vessels, 1172

Contracts between enemy subjects, 1144

- Agency, 1146
- Antebellum contracts, 1146
- Bills of exchange, 1145
- Contracts based on commercial intercourse illegal, 1145
- Contracts directly in aid of the enemy, 1145
- Contracts not in course of trade legal, 1145
- Contracts of necessity, 1145
- In general, 1144
- Partnership, 1146
- Ransom bills, 1145

Contributions, 1154**Despatches, 1175****Division of state, 1128****Domicil, 1134**

- Effect of domicil on enemy character, 1046
- Change of domicil, 1148
- Decisions growing out of civil war, 1147
- Domicil controlling as to person's enemy character, 1146
- Intention of remaining, 1147
- Time of stay, 1147

Embargo, 1138**Enemy:****Intercourse with enemy, 1143**

- Citizens of belligerents are enemies, 1143
- Commercial intercourse forbidden, 1143
- Consideration of license to trade, 1144
- Contracts between enemy subjects, 1144
- In general, 1143
- License to trade, 1144
- Property engaged in enemy trade liable to seizure, 1143

Enemy character, 1146**Enemy character of persons, 1146**

- Change of domicil, 1148
- Constituents of domicil, 1147
- Decisions growing out of civil war, 1147
- Effect of domicil, 1146
- Master and crew of vessels, 1148
- Rendition of assistance to enemy, 1146

Enemy character of property, 1148

- Agency in enemy country, 1149
- Commercial house in enemy country, 1148
- Consignments to or from belligerent territory, 1149
- In general, 1148
- Products of enemy country, 1149
- Property in enemy territory, 1150
- Rights of neutrals or friendly lienors, 1151

INTERNATIONAL LAW, *cont'd.***Enemy character of property, *cont'd.***

- Sufficiency of evidence of enemy character of vessels, 1154
- Transfers of belligerent property *in transitu*, 1150
- Transfers of belligerent property to neutrals, 1150
- Transfers of vessels of war, 1151
- Vessels engaged in privileged trade of enemy, 1149
- Vessels sailing under enemy flag or pass, 1149
- Withdrawal of property from enemy country, 1151

Expatriation, 1134**Flags of truce, 1159****General principles, 1124****Gulfs, 1133****High seas, 1132****Independent states, 1128****International law as part of law of land, 1125****Intervention, 1139*****Jurisdiction*, see *infra*, SOVEREIGNTY AND JURISDICTION.****License to trade with enemy, 1144****Measures of constraint short of war:**

- Embargo, 1138
- Nonintercourse, 1138
- Pacific blockade, 1139
- Reprisals, 1138
- Retorsion, 1138

Mediation, 1139**Military occupation, 1157****Naturalization, 1134****Nature of international law, 1124****Neutrality (see *infra*, BLOCKADE; CONTRABAND OF WAR; VISIT AND SEARCH), 1160****Armed expeditions issuing from neutral territory, 1164****Arming and equipping ships of war, 1163**
Base of operations in neutral territory, 1163**Belligerent vessels in neutral ports, 1164****Bringing prize into neutral port, 1165****Right to use port, 1164****Supply of coal, 1165****Carriage of belligerent despatches and persons:**

- Despatches, 1175
- Diplomatic correspondence, 1175
- In general, 1175
- Knowledge of character of despatches, 1175

Mails and mail carriers, 1176**Penalty, 1175****Persons, 1176****Claim by neutral nation in prize court, 1166****Effect of neutral state's failure to observe neutrality, 1166****Effect of violation of neutral rights by belligerent, 1165****Enlistments in neutral territory, 1162****Furnishing munitions of war, 1161****General duty not to give aid, 1160****In general, 1160****Sales of munitions of war, 1161****Hostilities in neutral territory, 1162****Improper use of neutral territory, 1162****Innocent sales of ships of war, 1163****Loans to belligerent state, 1161****Munitions of war, 1161**

INTERNATIONAL LAW, *cont'd.***Neutrality, *cont'd.*****Neutral commerce, 1168**

Declaration of the congress at Paris,

1169

Fraudulent claim by neutral, 1170

Free ships, free goods, 1169

In general, 1168

Neutral goods in armed vessels of enemy, 1170

Neutrality laws, 1166

Passage of troops, 1162

Restitution of prize, 1165

Rights and liabilities of neutral subjects, 1168

Sales of munitions of war by subjects of neutral states, 1161

Self-defense in neutral territory, 1162

Treaty of Washington and Geneva award, 1164

Neutrality laws of the United States, 1166

Effect on international rights and liabilities, 1168

Enlistment in foreign service, 1167

Equipment of vessel, 1167

In general, 1166

Locus delictum, 1167

Military expedition, 1167

Noncombatants, 1152**Non-hostile relations of belligerent, 1158**

Armistices and truces, 1158

Capitulations, 1159

Cartels, 1159

Flags of truce, 1159

In general, 1158

Passports, 1159

Ransom, 1159

Safe-conducts, 1159

Nonintercourse, 1138**Occupation, 1129****Occupation of territory, 1129****Partnership:**

Dissolution by war, 1146

Passports, 1159**Persons in international law, 1128**

Communications not involving recognition, 1129

Effect of division of state, 1128

Recognition of new state, 1128

States wholly or partially independent, 1128

Piracy, 1138**Prescription, 1131****Privateers, 1156****Private international law, 1135****Property (see *infra*, ENEMY CHARACTER OF PROPERTY; RIGHTS OF WAR AS AGAINST ENEMY PROPERTY):**

Destruction of life and property, 1156

Property at sea, see *infra*, RIGHTS OF WAR AS AGAINST ENEMY PROPERTY.**Protectorates, 1133****Ransom, 1159****Ransom bills, 1145****Recognition of belligerency, 1141****Recognition of new state, 1128****Reprisals, 1138****Requisitions, 1154****Retorsion, 1138***Rights and duties of neutral states* see *infra*, NEUTRALITY.

Rights and obligations in time of peace, 1129

INTERNATIONAL LAW, *cont'd.***Rights of war as against enemy persons,**

1151

Combatants, 1151

Noncombatants, 1152

Rights of war as against enemy property,

1152

Contributions, 1154

Debts due by state, 1153

Enemy property entering territorial waters

after commencement of war, 1153

Private property in enemy state, 1154

Property at sea, 1154

Enemy property liable to seizure at sea, 1154

Enemy vessels in port or bound for port at beginning of war, 1156

Fishing vessels, 1156

Property used for scientific or educational purposes, 1155

Sufficient evidence of enemy character, 1154

Suggested exemption from capture, 1155

Property in state of captor, 1152

Property in state of enemy, 1153

Public property in state of enemy, 1153

Requisitions, 1154

Treaty stipulations against confiscation, 1152

Rivers:

Rights over rivers, 1131

Rivers as boundaries, 1131

Safe-conduct, 1159*Sea*, see *infra*, RIGHTS OF WAR AS AGAINST ENEMY PROPERTY.**Seamen:**

Enemy character, 1148

Search, see *infra*, VISIT AND SEARCH.

Seas, rights over seas, 1132

Service of process:

Persons on board foreign ship of war, 1137

Ships and shipping:

Merchant vessels, 1137

Sovereignty and jurisdiction over vessels on high seas, 1135

Vessels in foreign ports, 1136

War vessels, 1136

Ship's papers, 1186

False papers, 1186

General requirements, 1186

Spoliation or concealment, 1187

Visit and search, 1186

Sources of international law, 1125

Decisions of international tribunals and judicial decisions, 1126

Decisions of prize courts, 1127

Instructions issued by states, 1128

State papers, 1127

Text writers, 1125

Treaties, 1126

Sovereignty and jurisdiction:

As affected by nationality or domicile of person, 1134

As affected by official character of person, 1135

Diplomatic officers, 1135

Foreign sovereigns, 1135

Foreign troops passing through territory, 1135

Generally coextensive with territory, 1133

How nationality determined, 1134

Naturalization, 1134

INTERNATIONAL LAW, *cont'd.***Sovereignty and jurisdiction, *cont'd.***

- Piracy, 1138
- Private international law, 1135
- Private vessels in foreign ports, 1137
- Public vessels in foreign ports, 1136
- Right of expatriation, 1134
- Subjects of civilized states in semi-civilized countries, 1135
- Vessels in foreign ports, 1136
- Vessels on high seas, 1135

Spheres of influence, 1133**Spies, 1157****Spoliation or concealment of ship's papers, 1187****States (see *infra*, TERRITORIAL PROPERTY OF STATE):**

- Effect of cession of territory, 1128
- Effect of division of state, 1128
- Recognition of new state, 1128
- States wholly or partially independent, 1128

Straits, 1133**Termination of war, 1159****Territorial property of state, 1129**

- Accretion, 1131
- Acquisition of territory, 1129
- Cession, 1130
- Conquest, 1130
- Occupation, 1129
- Prescription, 1131
- Protectorates, 1133
- Rights over rivers, 1131
- Rights over seas, 1132
- Rivers as boundaries, 1131
- Spheres of influence, 1133
- Straits, gulfs, and bays, 1133

Treaties:

- Effect of war on treaties, 1142
- In general, 1143
- Stipulations providing for war, 1143
- Tripartite treaties, 1143

Truces, 1158**Visit and search, 1184**

- Captor's duty as to care of vessel, 1187
- Captor's duty as to persons and property on board, 1187
- Capture, 1186
- Capture without probable cause, 1188
- Conclusion of search, 1186
- Destruction of prizes, 1188
- Duties and liabilities of captors, 1187
- Effect of rescue, 1186
- Effect of resistance to search on cargo, 1185
- False papers, 1186
- In general, 1184
- Inter partes*, 1189
- Interpleader, 1189
- Interpose, 1189
- Mail vessels, 1184
- Mode of exercising right, 1185
- Proceeding to adjudication and restitution, 1188
- Recapture, 1189
- Resistance to search, 1185
- Sending in vessel for adjudication, 1188
- Ship's papers, 1186
- Spoliation or concealment, 1187
- Vessels of war, 1184
- Vessels under convoy, 1184
- What constitutes capture, 1186
- Who may capture, 1186

INTERNATIONAL LAW, *cont'd.***War (see *infra*, ENEMY; MEASURES OF CONSTRAINT SHORT OF WAR; NEUTRALITY; NON-HOSTILE RELATIONS OF BELLIGERENT; RIGHTS OF WAR AS AGAINST ENEMY PERSONS; RIGHTS OF WAR AS AGAINST ENEMY PROPERTY), 1140**

- Classes of war, 1140
- Commencement of war, 1140
- Deceit and stratagems, 1167
- Definition of war, 1140
- Destruction of life and property, 1156
- Effect of war on treaties, 1142
- In general, 1143
- Stipulations providing for war, 1143
- Tripartite treaties, 1143
- Effect on intercourse of individuals, 1143
- Commercial intercourse forbidden, 1143
- Contracts between enemy subjects, 1144
- Domicil of parties, 1144
- In general, 1143
- License to trade, 1144
- Property engaged in enemy trade liable to seizure, 1143
- Land forces, 1156
- Means of carrying on war, 1156
- Mode of carrying on war, 1156
- Privateers, 1156
- Recognition of belligerency, 1141
- Spies, 1157
- Termination of war, 1159

INTERPRETATION (see INDEMNITY CONTRACTS; INSURANCE):**Insolvency and bankruptcy, 641****Interest:**

- Contracts, 1001

INTERSTATE COMMERCE:

- Import, 1

INTERVALS:

- Lucid intervals, 565

INTERVENTION:

- International law, 1139

IN THE FIRST PLACE, 127**IN THE NAME OF, 128****IN THE NEXT PLACE, 127****INTOXICATING LIQUORS:**

- Inns and innkeepers, 510
- Sale of intoxicating liquors, 510
- Whether retailing liquors constitutes a place an inn, 510
- Whether sale of liquor is an essential characteristic of an inn, 510

INTOXICATION, see INNS AND INNKEEPERS.**IN TRUST, 130****INVESTMENTS:**

- Insurance:
- Power of company to make investments, 891

IRREPARABLE INJURY:

- Injunctions, 360
- Injunctions granted where injury irreparable, 360
- Injunction refused where irreparable injury is shown, 360
- What is irreparable injury, 361

JOINT TENANTS AND TENANTS IN COMMON:**Improvements, 111**

Allowance for improvements may be made in partition, 111
 Allowance out of proceeds of sale of property, 116

Assent of cotenants not necessary, 112

Assigning an increased quantity of land to maker of improvement, 116

Assignment of improved portion preferred when practicable, 113

By assigning improved portion of property to maker of improvements, 112

Consent of cotenants, 114

Distinction depending upon knowledge of title of cotenants, 112

Distinction depending upon whether improving tenant is plaintiff in partition, 114

Exclusive title in claim, 115

Exclusive title not claimed by cotenant making improvements, 113

Good faith, 115

Good faith of cotenant in making improvements, 113

How the allowance is made, 112

Improvements by grantee of original cotenant, 113

Improvements made by tenants in common in reversion during previous life estate, 112

Improvements made for his own benefit by tenant in common in sole possession, 111

Injury to other cotenants, 113

Rents and profits may be set off against improvements, 117

Requiring payment of compensation by other cotenants, 114

Right of allowance therefor, 111

Right to have improved portion set off recognized, though right to pecuniary compensation denied, 114

Setting off improvements against rents and profits, 116

Imprisonment for debt and in civil actions:

Privilege from arrest, 40

JUDGMENTS (see INJUNCTIONS; INSOLVENCY AND BANKRUPTCY):

Imprisonment for debt and in civil actions, see IMPRISONMENT FOR DEBT AND IN CIVIL ACTIONS.

Effect of judgment, 19

Causes of action reduced to judgment are debts, 19

Domestic judgment a merger, 19

Judgments in tort not debts in constitutional sense, 19

Right of arrest not affected by foreign judgment, 19

Incumbrance, 159

Infamy and infamous crimes:

Necessity for, 248

Reversal of judgment, 252

Insanity:

Validity of judgment for insane plaintiff, 601

Insolvency and bankruptcy, 690, 725

Assigned claims provable in hands of assignee, 690

Debt provable notwithstanding judgment, 690

JUDGMENTS, cont'd.**Insolvency and bankruptcy, cont'd.****Effect of discharge, 771**

Costs, 774

Execution issued after discharge, 772

Judgments barred by discharge, 771

Judgments rendered after commencement of proceeding, 772

Judgments rendered after discharge, 773
 Where the original debt was not discharged, 773

Interest and costs on judgment, 690

Judgment in criminal proceedings, 690

Judgment liens, 775

Judgment rendered after bankruptcy held provable, 690

Judgments as provable debts, 690

What debts and claims are provable, 690

Interest:

Compound interest, 1075

Fluctuations of rate, 1063

Provision that judgment shall carry contract rate, 1063

Rate existing at rendition, 1063

Rate of interest, 1059, 1076

Statutes changing rate, 1063

What law governs interest on foreign judgments, 1091

Law of jurisdiction where judgment rendered, 1091

Law of place where suit brought, 1092

Where judgment in terms bears interest, 1063

JUDICIAL NOTICE:**Indians:**

Judicial notice of tribal laws, 214

JUDICIAL SALES:**Improvements:**

Rights of purchasers at judicial sale, 94

Execution sale subject to debtor's right of homestead exemption, 95

General rule, 94

Redemption from foreclosure sale by junior incumbrancer, 95

Sale under junior lien, 95

Want of jurisdiction in court ordering sale, 94

JURISDICTION (see INSOLVENCY AND BANKRUPTCY; INTERNATIONAL LAW; PRIVATE INTERNATIONAL LAW):**Indians, 221**

Criminal cases, 223

Employment of military forces, 229

Federal authority supreme, 221

Government vested in the United States, 221

Indian traders, 228

In general, 221

Jurisdiction of federal courts in Indian territory, 222

Power of Congress over intercourse with Indian tribes, 221

President may prescribe regulations, 222

Protection of Indians, 225

Regulation of commerce with Indians, 227

Removal of persons from Indian country, 228

Return to Indian country after having been removed therefrom, 229

Sale of liquor to Indians, 228

State and territorial jurisdiction, 222

Volume XVI.

JURISDICTION, *cont'd.*

- Injunctions**, 349
 - Action on bond, 458
 - Federal courts and judges, 350
 - Inherent power of courts of chancery, 349
 - Judgments or decrees of courts of concurrent jurisdiction, 398
 - Judgments void for want of jurisdiction of person, 385
 - Judgments void for want of jurisdiction of subject matter, 385
 - Jurisdiction as affected by amount involved, 351
 - Jurisdiction conferred by statutory provisions, 350
 - Nature and extent of jurisdiction of courts of law, 365
 - Power of state supreme courts and judges, 351
 - Stipulation by parties, 350
- Insanity**, 565
 - Court of general jurisdiction, 566
 - In England, 565
 - In the United States, 566
 - Probate courts, 566
 - To whom custody of idiots and lunatics belongs, 565
- Insolvency and bankruptcy**:
 - After discharge, 792
 - Offenses against insolvency and bankruptcy laws, 806

JURY AND JURY TRIAL:

- Imprisonment for debt and in civil actions**:
 - Privilege of jurors, 40
- Infamy and infamous crimes, 252
- Insanity**:
 - Right to jury trial, 599
- Inspection and physical examination**:
 - Exhibition of injuries to jury, 817

KLEPTOMANIA, 564**LABOR COMBINATIONS**, see INTERFERENCE WITH CONTRACT RELATIONS.**LACHES:**

- Imprisonment for debt and in civil actions**:
 - Privilege from arrest, 46
- Injunctions**:
 - Delay from attempt to compromise, 358
 - Dissolution, 427
 - Laches in seeking dissolution, 428
- When laches of party seeking relief a bar to relief**, 356
 - Application must be seasonably made, 356
 - Effect of coverture, 357
 - Laches in conjunction with other causes, 357
 - Opposite party induced to change his position by laches of applicant, 356
 - When not a bar to relief, 357
- Insolvency and bankruptcy, 655
- Interest**:
 - Suspension of interest, 1065

LANDLORD AND TENANT:

- Improvements**, 110, 117
 - Acquiescence of remainderman or reversioner, 118
 - Completion by tenant for life under a will, of improvements begun by testator, 119
 - Exceptions to the rule, 118

LANDLORD AND TENANT, *cont'd.*

- Improvements, *cont'd.***
 - General rule, 117
 - Improvement by life tenant furnishes no ground for compensation, 117
 - Lessees, 118
 - Purchasers, 118
 - Reason of the rule, 118
 - Where person making improvements claim absolute title, 118
- Independent contractors**:
 - Landlord's duty to tenant, 200
 - Legal duties not transferable, 200
- Injuries to animals by railroads, 488
- Insolvency and bankruptcy**:
 - Priority of landlord's lien, 693

LARCENY:

- Infants, 313

LAW, see INTERNATIONAL LAW.**LEASEHOLD:**

- Interest, interested, 1103

LEASES:

- Improvements**, 110
- Infants**, 284
 - Disaffirmance, 290
 - Ratification and confirmation, 307
- Insanity**, 586
 - Inherent power of court, 586
 - Renewal of lease, 587
 - Right of committee to make lease, 586
 - Statutory authority, 586
- Insolvency and bankruptcy**:
 - Whether leases pass to assignee, 723

LEGACIES AND DEVICES:

- In case of or in event of decease, 126

LEGISLATURE:

- Imprisonment for debt and in civil actions**:
 - Privilege of legislators, 39

LETTERS:

- Instrument, 825

LIBEL AND SLANDER:

- Imprisonment for debt and in civil actions, 21
- Indemnity contracts**:
 - Publication of libelous articles, 171
- Torts, 623

LICENSE:

- Independent contractors**:
 - Duties under license, 202
- Inns and innkeepers**, 509, 514
 - Enforcement of license laws, 515
 - License not necessary unless required by statute, 509
 - Revocation of license, 515
 - Right to keep an inn not a franchise, 509
 - Statutory requirements, 514
 - Who authorized to grant license, 514
- Insolvency and bankruptcy**:
 - Whether licenses pass to assignee, 723
- Insurance**, 899
 - Foreign insurance companies, 899
 - Insurance brokers, 974
- LIENS** (see **INSOLVENCY AND BANKRUPTCY**; **INSURANCE BROKERS**):
 - Inns and innkeepers**, 548, 550
 - Boarding house and lodging house keepers, 549
 - Care of property held under lien, 553
 - Enforcement of lien, 553

LIENS, *cont'd.*
Inns and innkeepers, *cont'd.*

- Extent of boarding-house keeper's lien, 549
- Horses, 550
- Horses owned by the United States and employed in carrying mails, 551
- Horses used in carrying United States mail, 550
- Innkeepers proper, 548
- Lien on goods of guests, 548
- Loss of lien, 552
- Married women, 549
- Money loaned to guest, 552
- Person of guest, 552
- Property belonging to guests, 550
- Property exempt from execution, 549, 550
- Property of third persons in possession of guests, 550
- Statutory lien of boarding-house keepers, 554
- Statutory power of sale, 554
- Stolen property, 551
- To what charges lien extends, 552
- Wages, 550
- Waiver of lien, 552
- Wearing apparel, 550
- Wearing apparel of guest, 550
- Where innkeeper knew that guest was not the owner of property, 552
- Insolvency and bankruptcy:**
 - Discharge of liens, 639
 - Effect of discharge, 774

LIFE INSURANCE, see INSURANCE.
LIMITATION OF ACTIONS:

- Improvements, 104
- Incest, 139
- Infants:**
 - Disaffirmance, 299
- Injunctions, 369
- Insolvency and bankruptcy, 684, 755**
 - Admissions, 685
 - Applicability, 755
 - Claims barred by statute of limitations, 684
 - Offenses against insolvency and bankruptcy laws, 806
 - Period of limitation, 756
 - Placing debt on schedule, 685
 - Proof after revival, 685
 - Statute of limitations suspended by bankruptcy proceedings, 685
 - What debts and claims are provable, 684
 - What statute of limitations governs, 685

LIQUIDATED DAMAGES:

- Interest, 1010

LIVING AT THE DEATH, 259
LOANS:

- Insurance:**
 - Power of company to make loans, 891

LODGING HOUSES, see INNS AND INN-KEEPERS.
LOGS AND LUMBER:

- Independent contractors, 194

LOST PAPERS:

- Interest, 1010

LUCID INTERVALS, 565
LUNACY, see INSANITY.
MAJORITY, see INFANTS.
MALICE:

- Interference with contract relations, 1112

MALICIOUS PROSECUTION:

- Imprisonment for debt and in civil actions, 20
- Injunctions, 453

MALICIOUS TRESPASS:

- Infants, 313

MALPRACTICE:

- Incompetency, 153

MANDAMUS:

- Injunctions:**
 - Mandamus to compel issuance of interlocutory injunction, 347

MARINE INSURANCE (see INSURANCE):

- Insurance:**
 - Burden of proof, 959

MARRIAGE:

- Impotency, 3
- Incest, 136**
 - Attempt to commit incestuous marriage, 142
 - Cohabitation as man and wife sufficient, 136
 - Incestuous marriage, 134
 - Incestuous marriage in general, 136
 - Incest without marriage, 134
 - Intermarriage without carnal knowledge, 136

Indians:

- Marriage of whites and Indians, 216

Infants, 263

- Age of consent, 263
- Age of consent at common law, 263
- Age of consent in the United States, 263
- Bigamy, 264
- Binding contracts, 273
- Binding effect of contract, 273, 275
- Capacity to marry, 263
- Consent of parent or guardian, 264
- Disaffirming on reaching age of consent, 264
- Effect of marriage after age of consent, 264
- Effect of marriage below the age of consent, 263
- In the absence of any statutory enactments, 263
- Liability for breach of promise, 265
- Marriage procured by fraud or undue influence, 264
- Marriage without consent of parent or guardian, 624
- Ratification on reaching age of consent, 264
- Where infant over seven years, 263
- Where infant under seven years, 263
- Inspection and physical examination, 819

MARRIAGE SETTLEMENTS:

- Infants, 284

MARRIED WOMEN:

- Imprisonment for debt and in civil actions:**
 - Privilege from arrest, 44
- Infants:**
 - Ratification and confirmation, 305
- Insanity:**
 - Sale of real estate of insane married woman, 585
- Insolvency and bankruptcy, 657

MASTER AND SERVANT (see INDEPENDENT CONTRACTORS; INSOLVENCY AND BANKRUPTCY; INTERFERENCE WITH CONTRACT RELATIONS), 1109

Enticement of servant 1109

Incompetency, 153

Independent contractors, 199

Injuries arising to contractor's servants, 195

Infants:

Contracts for service, 285

Disaffirmance of contract, 290

Ratification and confirmation, 307

Statutes regulating employment of infants, 316

Injunctions:

Violation of injunction, 437

Inns and innkeepers:

Admissions of servants, 545

Liability of innkeeper for assault by servant, 546

Interference with contract relations:

Enticement of servants, 1109

MECHANICS' LIENS:

Incumbrance, 159

Insolvency and bankruptcy:

Effect of discharge, 775

MEDIATION:

International law, 1139

MEETINGS, see INSOLVENCY AND BANKRUPTCY.**MERGER:****Injunctions:**

Merger of common-law remedy in action on bond, 453

MILITARY LAW:

Impressment, 9

Imprisonment for debt and in civil actions:

Privilege of soldiers, 39

Infants:

Contracts for military service, 274

Insurrection, 977

MILITIA:**Imprisonment for debt and in civil actions:**

Imprisonment for militia fines, 15

MINES AND MINING COMPANIES:

Independent contractors, 194

MINOR, see INFANTS.**MISTAKE:****Improvements**, 90

Occupants holding through mistake as to identity of land, 98

Injunctions, 367, 370

Injunction to obtain benefit of set-off, 400

Judgments obtained through mistake, 383

Mistake at law, 383

Mistake of court, 385

Judgments obtained through negligence, incompetence, or mistake of attorney, 392

Insurance:

Reformation of policy, 870

Interest:

Computation of interest, 1037

Demand, 1021

Money paid and received through mistake, 1011

MOBS:

Improper, 57

MONEY, see INTEREST.**MONOMANIA**, see INSANITY.**MORTGAGES:****Fraudulent sales and conveyances:**

Fraud upon creditors, 661

Improvements:**Improvements by mortgagee in possession**, 120

Belief of mortgagee that he has acquired complete title, 120

Canada, 121

England, 121

In the United States, 120

Rents and profits, 121

When compensation may be allowed, 120

Improvements by mortgagors, 119

Covenant in mortgage for allowance, 120

Mortgagor not entitled to compensation as against mortgagee, 119

Purchaser from mortgagor, 119

Incumbrance, 159

Indemnity contracts:**Indemnity mortgages**, 183

Description of debt or obligation indemnified against, 184

In general, 183

Infants, 283

Purchase-money mortgage, 293

Ratification and confirmation, 306

Insanity, 587

Sale of property under existing mortgages, 586

Insolvency and bankruptcy:

Effect of discharge on mortgage liens, 775

Mortgage or sale to pay attorney's fees or other expenses, 666

MOTIVE:

Interference with contract relations, 1113

MUNICIPAL CORPORATIONS:**Independent contractors:****Legal duties not transferable**, 197

Municipality held liable for defective streets, 197

Municipality held not liable for contractor's acts, 198

Stipulations in contract, 198

Injunctions:

Infraction of municipal ordinances, 371

Insanity:

Inquisition, 567

Legal duties not transferable:

Municipality held not liable for defective streets, 199

MURDER:

Infants, 312

MUTUAL INSURANCE:**Insurance:**

Cancellation under by-laws of mutual insurance companies, 872

Construction of charter and by-laws of mutual insurance companies, 867

Mutual insurance companies, 878

NATURALIZATION:

International law, 1134

NAVIGATION:

Improper navigation, 57

NECESSARIES, see **INFANTS**; **INSANITY**.

NE EXEAT:

Imprisonment for debt and in civil actions, 18

NEGLIGENCE, see **INDEPENDENT CONTRACTORS**; **INJURIES TO ANIMALS BY RAILROADS**.

NET INCOME, 147

NEUTRALITY, see **INTERNATIONAL LAW**.

NEW PROMISE, see **INSOLVENCY AND BANKRUPTCY**.

NON COMPOS MENTIS, see **INSANITY**.

NOTICE (see **IMPROVEMENTS**; **INJURIES TO ANIMALS BY RAILROADS**):
Impounding, 6

NUISANCES (see **INJUNCTIONS**):
Independent contractors, 197
Infants, 308

NULLITY OF MARRIAGE:
Inspection and physical examination, 819

OCCUPANTS, see **IMPROVEMENTS**:

OCCUPATION:

International law, 1129

OCCUPIER:

Inhabitant, 334

ORDERS:

Injunctions:
Restraining orders, 349

ORDINANCES:

Independent contractors:
Violation of ordinance, 203
Injunctions, 371

PARDON:

Infamy and infamous crimes, 250
Conditional pardon, 251
Conviction may be proved after pardon, 251
Effect of pardon after endurance of punishment, 250
Effect of pardon where disability annexed to crime by statute, 251
In general, 250
Mere remission or commutation of punishment, 251
Pardon prior to conviction, 250
Proof of pardon, 252
Removal of disqualification, 250
Informers, 326

PARENT AND CHILD (see **INFANTS**):

Infants:

Consent of parent to marriage, 264
Criminal liability, 313
Liability for torts where coercion of parent, 308

PAROL EVIDENCE:

Injunctions:

Bonds, 451

Insurance, 867, 966

Construction of warranties, 927
Designation of beneficiaries, 967
Explanation of description, 966
In general, 966
Technical words and phrases, 967
To vary policy, 966
Usage of trade, 967

Interest, 1002

Contracts reducing rate of interest, 1051

PARTITION (see **IMPROVEMENTS**):

Insanity:

Partition sales, 586

PARTNERSHIPS:

Imprisonment for debt and in civil actions, 29
Partner not liable to arrest for fraud of co-partner, 25

Infants, 287

Insolvency and bankruptcy, 659, 700

Application, 647

Assignment by firm for benefit of creditors, 700

Assignment by partner for benefit of creditor, 700

Claims against both firm and individual partner, 687

Dissolution of partnerships, 700

Effect of discharge on partnership debts, 779

Individual claim against partner not provable against partnership estate, 687

Mere fact of insolvency not a dissolution of partnership, 700

Partner in possession of partnership assets becoming bankrupt, 730

Partnership creditor in proceedings against one of the partners separately, 649

Partnership debts provable against partnership estate, 687

Proof of partnership debts against individual partner, 687

Right to vote at meeting of creditors, 714

Undivided interests, 731

Where one partner only becomes bankrupt, 687

International law:

Dissolution by war, 1146

PASSPORTS:

International law, 1159

PATENTS:

Insolvency and bankruptcy:

Whether patent passes to assignee, 724

PAYMENTS (see **INTEREST**):

In, 124

Indemnity contracts:

Voluntary payments by indemnitee, 177

What constitutes a payment by indemnitee, 177

Independent contractors:

Mode of payment, 189

PENALTIES:

Imprisonment for debt and in civil actions, 33

Insurance:

Penalties imposed for transacting business without complying with statutory requirements, 906

PERSONAL INJURIES, see **INSPECTION AND PHYSICAL EXAMINATION**.

PERSONS, see **INFORMERS**.

PHYSICAL EXAMINATION, see **INSPECTION AND PHYSICAL EXAMINATION**.

PHYSICIANS AND SURGEONS (see **INSPECTION AND PHYSICAL EXAMINATION**):
Insolvency and bankruptcy, 656

PIRACY:

International law, 1138

Volume XVI.

POLICE POWER :**Insurance :**

Power to regulate companies, 884

POSTHUMOUS CHILDREN, see **INFANTS**.**POUND**, see **IMPOUNDING**.**POUND BREACH :**

Impounding, 8

POWER OF ATTORNEY :**Insolvency and bankruptcy :**

Voting at meeting of creditors, 714

PREFERENCES, see **INSOLVENCY AND BANKRUPTCY**.**PREGNANCY** (see **INFANTS**) :*Writ de ventre inspiciendo*, 820**PREGNANT :**

Quick with child, 260

PREMIUM, see **INSURANCE**.**PRESCRIPTION :**

International law, 1131

PRESIDENT :

Insurrection, 977

PRESUMPTION (see **INJURIES TO ANIMALS BY RAILROADS**) :**Inns and innkeepers :**

Presumption of continuance of relationship, 522

Relationship of guest and innkeeper, 523

Insanity, 604

Of sanity, 604

Restoration of former mental vigor need not be shown in rebuttal, 605

Temporary insanity, 606

PRIORITIES, see **INSOLVENCY AND BANKRUPTCY**.**PRIVATE INTERNATIONAL LAW** (see **INSOLVENCY AND BANKRUPTCY; INSURANCE**) :**Imprisonment for debt and in civil actions**, 35

Fraud committed in another state, 30

Infants :

At what moment infant attains majority, 262

Insolvency and bankruptcy, 658

Discharge as exemption from arrest, 788

Extra-territorial effect of discharge, 783

Abandonment of extra-territorial immunity, 787

Claims standing in the name of third person, 786

Contracts made in other states, 786

Debts to nonresidents contracted in state where discharge was granted, 785

Discharge under state insolvency laws, 784

Effect of domestic discharge on foreign creditors, 784

In general, 783

Nonresidence of creditors, 784

Notes made to resident and by him transferred to a nonresident, 785

Where the court has jurisdiction of both debtor and creditor, 786

Property in other countries and states, 737

Interest, 1085

Contract for interest without naming rate, 1088

Contract for payment of interest if valid where made, 1086

PRIVATE INTERNATIONAL LAW, *con.***Interest**, *cont'd.*

Contract to be performed partly in one state and partly in another, 1088

Express contracts, 1085

Foreign judgments, 1091

Law of jurisdiction where judgment rendered, 1091

Law of place where suit is brought, 1092

Implied contracts, 1090

Interest as damages, 1090

Damages for breach of contract, 1090

Damages for tort, 1091

Law of place of performance, 1090

Law of place of suit, 1091

Place where contract made as place of performance, 1091

Promissory note payable generally, 1091

Interest by contract, 1085

Law of place of performance, 1087

Law of place with reference to which contract made, 1085

Lex fori, 1089

Note dated in one state but actually executed in another, 1086

Note secured by mortgage on land in another state, 1089

Parol evidence to prove place of performance, 1088

Place where contract entered into, 1086

Place where contract made as place of performance, 1088

Place where contract to be performed, 1087

Place where suit brought, 1089

Proof of interest law of foreign jurisdiction, 1092

Consequences of failure of proof, 1095

Foreign interest law not subject to judicial notice, 1093

How foreign interest law proven in general, 1094

In general, 1092

Interest according to rule of common law, 1095

Interest by custom, 1094

Interest by law of forum, 1095

Interest table prepared by secretary of state, 1094

No interest where foreign law is not shown, 1095

Rate after judgment, 1094

Where interest expressly stipulated for, 1092

Provision of contract as to what law shall govern, 1086

Stipulation for annual interest, 1087

PRIVILEGE FROM ARREST, see **IMPRISONMENT FOR DEBT AND IN CIVIL ACTIONS**.**PROCEEDS :**

Income, 150

PROFITS :

Income, 150

PROSECUTING WITNESS, see **INFORMERS**.**PUBLIC ENEMY**, see **INTERNATIONAL LAW**.**PUBLIC LANDS** (see **INDIANS**) :**Improvements**, 90, 93

Purchaser of school lands, 101

PUBLIC OFFICERS (see **INFORMERS**):**Imprisonment for debt and in civil actions:**

Misconduct or neglect in office, 30

Privilege from arrest, 39

Infamy and infamous crimes, 253**Infants:**

Capacity to hold office, 266

Capacity to act as executor or administrator, 267

Capacity to act as trustee, 267

Capacity to serve process, 266

Deputy constable, 266

Deputy sheriff, 266

In general, 266

Offices purely ministerial, 266

Informers, 325**Injunctions:**

Enjoining actions against officers of courts, 369

Interest:

Officer retaining money in his hands, 1012

Removal of veterans:

Incompetency, 153

PYROMANIA, 564**QUESTIONS OF LAW AND FACT:****Improvements:**

Good faith, 90

Independent contractors:

Who are independent contractors, 191

Infants:

Necessaries, 281

Ratification and confirmation, 305

Inns and innkeepers:

Who are guests, 518

Insanity, 603

Civil cases, 604

Existence of insanity question of fact, 603

General rule, 603

In courts of chancery, 604

Insufficiency of evidence, 604

Legal effect of insanity question of law, 604

Where evidence conflicting, 604

Insurance:

Materiality of representations, 934

Interest:

Construction of contract, 1001

Knowledge of custom to charge interest, 1005

QUICK WITH CHILD:

Pregnant 260

RAILROADS (see **INJURIES TO ANIMALS BY RAILROADS**):**Independent contractors, 199**

Contracts for railroad construction, 208

Crossings, 199

Duty to passenger, 199

Fences, 199

Legal duties not transferable, 199

Management of construction train, 208

Transfer of employee, 195

Trespass by contractor, 208

Insolvency and bankruptcy, 659

RANSOM:

International law, 1159

RANSOM BILLS:

International law, 1145

RAPE:

Incest, 135

Infants, 315

RATE OF INTEREST, see INTEREST.**REAL PROPERTY** (see **IMPROVEMENTS; INSANITY**):**Independent contractors:**

Injuries arising in connection with real property, 194

REASONABLE DOUBT:**Insanity:**

View that accused must prove insanity beyond reasonable doubt, 615

View that prosecution must prove sanity beyond reasonable doubt, 617

Insurance, 963

REASONABLE TIME:

Impounding, 5

Infants:

Disaffirmance, 299

RECEIVERS:

Injuries to animals by railroads, 489

Insanity:

Appointment of receiver, 577

Insolvency and bankruptcy:

Appointment of receiver pending appointment of assignee, 699

Receiver appointed before petition in bankruptcy, 744

Insurance, 896

Rights and duties of receivers, 896

RECONVERSION, see CONVERSION AND RECONVERSION.**RECORD, see INSANITY.****RECORDING ACTS:**

Improvements, 88

Infants:

Ratification and confirmation, 305

REFERENCE:**Injunctions:**

Reference to ascertain damages, 460

REFORMATION OF INSTRUMENTS, see INSURANCE.**RELATIONSHIP, see INCEST.****REMAINDERS AND REVERSION:****Improvements, 117**

Acquiescence of remainderman or reversioner, 118

Completion by tenant for life under a will, of improvements begun by testator, 118

Exceptions to the rule, 118

General rule, 117

Improvements by life tenant furnishes no ground for compensation, 117

Lessees, 118

Purchasers, 118

Reason of the rule, 118

Where person making improvements claims absolute title, 118

REMOVAL OF CAUSES:

Insurance, 898

REPAIRS:

Improvement, 59, 75

REPRESENTATIONS, see INSURANCE.**REPRISALS:**

International law, 1138

RESCISSION OF CONTRACT, see INSURANCE.

RESCUE :

Impounding, 8

RESIDENCE :

Inhabitant, 328

RESIDENT :

Inhabitant, 331

RESTAURANTS :

Inns and innkeepers :

Obligations of restaurant keeper similar to those of innkeeper, 512

RETORSION :

International law, 1138

REVENUE LAWS :Import, importation, importer, 1
Informers, 324**REVENUE :**

Income, 151

REVERSION, see *REMAINDERS*.*REWARDS*, see *INFORMERS*.**ROYALTY :**

Income, 151

SALARY :

Income, 151

SALE :

Impounding, 7

SCHOOLS :

Inhabitant, 334

SEAMEN :

Imprisonment for debt and in civil actions :

Privilege from arrest, 39

International law :

Enemy character, 1148

SEARCHES AND SEIZURES, see *INTERNATIONAL LAW*.*SECURITY*, see *INDEMNITY CONTRACTS*.**SEDUCTION :**

Imprisonment for debt and in civil actions, 20, 32

Seduction by fraudulent promise of marriage, 32

Infants, 308

SENTENCE :

Infamy and infamous crimes :

Necessity of sentence, 248

Reversal of sentence, 252

Serving out sentence, 252

SEPARATE PROPERTY OF MARRIED**WOMEN :**

Insolvency and bankruptcy :

What passes to assignee, 722

SERVANTS, see *INDEPENDENT CONTRACTORS*.**SERVICE OF PROCESS :**

Infants, 266

Injunctions :

Dissolution, 427, 428

False return of service of process, 388

Want of knowledge, 387

Insurance :

Appointment of agent or attorney to receive service of process, 900

International law :

Persons on board foreign ship of war, 1137

SET-OFF :

Imprisonment for debt and in civil actions :

Execution against the person, 49

Improvements, 108

Improvements not made in good faith, 110

In direct proceedings for compensation, 108

Joint tenants and tenants in common, 116,

108

Mesne profits prior to entry of occupant, 109

Prior for which rents and profits may be

set off, 109

Right to set off improvements, 102

Set off and possessory action as a bar to direct proceeding, 104

Setting out rents and profits against claim for improvements, 108

Where rents and profits are claimed, 102

Where rents and profits are not claimed, 103

Whether rent can be charged on value of property as improved, 109

Infants :

Necessaries as set-off, 291

Injunctions :

Injunction to obtain benefit of set-off, 399

Accident, 400

Claims which cannot be satisfied by

ordinary suit, 400

Erroneous advice as affecting right, 400

Exceptions to rule, 400

Failure to name sum claimed as due, 401

Fraud, 400

Insolvency of judgment creditor, 400

Mistake, 400

Unliquidated demands arising out of

same or different transactions, 400

Where defense is made at law, 399

Where defense not made at law, 399

Where whole judgment not enjoined, 401

Insolvency and bankruptcy, 676

Mutual debts and credits, 676

Proof and allowance of claims, 676

SHERIFFS :

Imprisonment for debts and in civil actions :

Privilege from arrest, 40

Infants :

Deputy, 266

SHIPS AND SHIPPING, see *INTERNATIONAL LAW*.**SLANDER OF TITLE :**

Interference with contract relations, 1109

SLEEPING-CAR COMPANIES :

Inns and innkeepers, 512

SOLICITATION :

Incest, 141

SOMNAMBULISM, 565*SOVEREIGNTY*, see *INTERNATIONAL LAW*.**SPECIFIC PERFORMANCE :**

Infants, 298

SPIES :

International law, 1157

STATE (see INTERNATIONAL LAW) :

Improvements :

Against whom compensation will be allowed, 100

Insolvency and bankruptcy :

Priority of debts due to the state, 694

Volume XVI.

STATUTE OF FRAUDS:

Indemnity contracts, 169

STATUTES, see **INSPECTION AND PHYSICAL EXAMINATION; INTEREST.****STAY OF PROCEEDINGS:**

Insolvency and bankruptcy, 704

STEAMBOAT COMPANIES:

Inns and innkeepers, 512, 513

STEVEDORES:

Independent contractors, 194

STOCK:

Indebtedness, 164

Infants:

Contracts in respect to, 287

STOCKHOLDERS:

Insolvency and bankruptcy:

Effect of discharge on stockholders' liability, 776

Insurance:

Dissolution at suit of stockholder, 894

STRAY, see **IMPOUNDING.****STREET RAILROADS:**

Incumbrance, 160

STREETS:

Independent contractors:

Excavations and obstructions in streets, 207

Municipal corporations, 197

SUCCESSION:

Indians, 236

SUFFRAGE:

Infamy and infamous crimes, 253

SUICIDE:

Insanity, 608

Insurance:

Burden of proof, 958

SURETYSHIP (see **INDEMNITY CONTRACTS; INJUNCTIONS; INSOLVENCY AND BANKRUPTCY**):

Indemnity contracts distinguished from, 168

Infants, 285

Insolvency and bankruptcy, 778

Effect of discharge as to persons liable with debtor, 793

Effect of discharge on liability of bankrupt as surety, indorser, etc., 776

Surety on bond of trustee, 780

Insurance:

Liability of sureties on agents' bonds, 914

Failure of company to notify surety, 914

Failure of insurance company without license to do business, 914

In general, 914

Power of company to borrow money and procure sureties, 890

Interest:

Payments made by surety in discharge of principal, 1011

Penal bonds, 1009

SURPRISE:

Injunctions:

Judgments obtained through surprise, 385

SUSPENSION OF INTEREST, see **INTEREST.****TAVERN**, see **INNS AND INNKEEPERS.****TAXATION:**

Indians, 236

Insolvency and bankruptcy:

Effect of discharge, 778

Taxes due to a state, county, district, or municipality, 695

Insurance:

Taxation of insurance companies, 886

Exemptions, 887

Exemptions of *bona fide* debts, 887

Exemptions strictly construed, 887

Municipal taxes, 886

Property liable to taxation, 886

State taxes, 886

Taxation of capital and surplus at its actual value, 887

Unearned premiums, 887

TAXES:

Insanity, 585

Sale of real property for payment of taxes, 585

TAX SALES:

Improvements:

Rights of purchasers at, 93

Belief in integrity of title not necessary, 94

General rule, 93

Improvements made after tender by one entitled to redeem, 94

Improvements made before expiration of time allowed for redemption, 94

Incumbrance, 160

TENDER:

Interest:

Suspension of interest, 1066

Doctrine that technical tender unnecessary, 1068

Effect of tender on interest, 1067

In general, 1066

Keeping tender good, 1067

Offer to pay on condition, 1067

Tender considered as payment, 1067

Tender of less sum than due, 1067

TIME, COMPUTATION, see **INTEREST.****TITLE** (see **IMPROVEMENTS**):

Interested, 1102

TORTS (see **IMPRISONMENT FOR DEBT AND IN CIVIL ACTIONS; INSANITY**):

Insolvency and bankruptcy:

Effect of discharge on liabilities arising out of torts, 783

TRADE MARKS:

Insolvency and bankruptcy:

Whether trade mark passes to assignee, 724

TRADERS:

Insolvency and bankruptcy, 655

TRAVELER:

Inns and innkeepers, 516

TREATIES:

Indians, 218

Indian country, 210, 220

In general, 218

Laws of the United States, 218

Treaties between states and Indians, 218

Treaties between United States and Indians, 218

Treaties construed favorably to Indians, 219

TREATIES, *conf'd.***International law :**

- Effect of war on treaties, 1142
- In general, 1143
- Stipulations providing for war, 1143
- Tripartite treaties, 1143

TRESPASS :

- Independent contractors :
- Trespass by contractor, 208

TRESPASSER (see IMPROVEMENTS):

- Improvements, 80
- Injuries to animals by railroads, 494

TRESPASS TO TRY TITLE :

- Improvements, 103

TRIAL, see INSPECTION AND PHYSICAL EXAMINATION.**TROVER AND CONVERSION :**

- Imprisonment for debt and in civil actions, 22
- Execution against the person, 48
- Interest, 1013

TRUSTS AND TRUSTEES :

- Infants, 267
- Insanity :
- Relative power and duties of prior trustee, 589
- Insolvency and bankruptcy :
- Effect of discharge on fiduciary debts, 779
- Agents, 781
- Attorneys at law, 781
- Bailees, 781
- Bankers, 781
- Brokers, factors, and commission merchants, 781
- Debts created by defalcations, etc., 780
- Effect of proving debt, 782
- Executors and administrators, 780
- Guardians, 780
- Implied trusts, 781
- Statutory provisions, 779
- Surety on bond of trustee, 780
- Trustee property, 780
- What constitutes fiduciary relationship 780
- Fiduciary debts, 647
- Priority of trust claims, 693
- Ability to trace or identify trust property, 693
- Trust property mingled with individual property, 693

TUGS AND TOWAGE :

- Independent contractors, 194

TURNPIKES :

- Independent contractors, 199

ULTRA VIRES :

- Insurance, 888, 893

UNDUE INFLUENCE :

- Infants :
- Marriage, 264

UNITED STATES (see INDIANS; INTERNATIONAL LAW):

- Informers, 324
- Insolvency and bankruptcy :
- Claims against United States, 727
- Effect of discharge on debts due to the United States, 778

UNITED STATES, *conf'd.***Insolvency and bankruptcy, *conf'd.***

- Priority of debts due to the United States, 694
- Early statutes, 694
- In general, 694
- Priority subject to pre-existing liens, 694
- Substitution to priority of United States, 694
- What are debts due to the United States, 694

UNITED STATES COURTS :

- Indians, 221, 222
- Infamy and infamous crimes :
- As affecting criminal procedure under federal constitution, 253
- Injunctions, 350
- Costs and expenses, 467
- Power of federal courts to enjoin proceedings in state courts, 411
- Action already begun in state court, 412
- Condemnation proceedings, 413
- Illustrations, 412
- Judgments of state courts, 412
- Municipal assessments, 413
- Proceedings in violation of federal constitution, 412
- Receivership, 413
- Sales under execution, 412
- Service of process, 412
- Statutory provisions, 412
- Taking possession of property, 413
- Under bankruptcy laws, see *infra*, INSOLVENCY AND BANKRUPTCY.
- Where federal court first acquires jurisdiction, 413
- Where state court first acquires jurisdiction, 411
- Where suit has been removed to federal court, 414
- Power of state courts to enjoin proceedings in federal courts, 420

UNLIQUIDATED DAMAGES :

- Interest, 1015

UNLIQUIDATED DEMANDS, see INTEREST.**USAGES AND CUSTOMS :**

- Interest, 1003
- Custom as affecting express contract, 1003
- Custom or course of dealings of parties, 1004
- General custom, 1004
- General usage or custom, 1003
- Knowledge of custom, 1005
- Liquidated accounts, 1004
- Mercantile instruments, 1004
- Particular usage, 1004
- Questions of law and fact, 1005
- Requisites, 1003

USURY :

- Injunctions :
- Judgments based on usurious contracts, 395

VENDOR AND PURCHASER (see IMPROVEMENTS):

- Insolvency and bankruptcy :
- Contracts to purchase land, 726
- Effect of discharge, 775

VENTRE SA MERE, see INFANTS.

VENUE:

- Injunctions, 352
 - Power to grant injunctions throughout the state, 352
 - Suit must be brought in county designated, 352

VIEW, see INSPECTION AND PHYSICAL EXAMINATION.

VOID OR VOIDABLE, see INFANTS.

WAGER POLICIES, see INSURANCE.

WAIVER, see INSURANCE.

WAR (see INTERNATIONAL LAW):

- Insurrection, 977
- Interest:
 - Suspension of interest by existence of state of war, 1069
 - In general, 1069
 - Only interest as damages suspended, 1070
 - Statute abating interest accruing during war, 1070
 - War between states, 1070

WARRANTIES, see INSURANCE.

WAYFARER:

- Inns and innkeepers, 516

WILLS (see INFANTS):

- In case of or in event of decease, 126
- Income:
 - Devise of income, 148
- Infants:
 - Capacity to dispose of property by will, 265
 - At common law, 265
 - Personal property, 265
 - Real property, 265
 - Statutes, 265

WITNESSES (see INFORMERS):

- Imprisonment for debt and in civil actions, 42
- Prosecuting witness, 42
- Whether subpoena necessary to entitle witness to protection, 42
- Witnesses privileged from arrest, 42
- Witness voluntarily attending privileged, 42
- Infamy and infamous crimes*, see INFAMY AND INFAMOUS CRIMES.

WITNESSES, cont'd.

Infants:

- Capacity to testify as witnesses, 267
- At what age competent, 267
- Competency a matter for discretion of court, 270
- Credibility a question for jury, 271
- Examination after witness has testified, 268
- Examination as to infant's competency, 267
- Examination must be in open court, 268
- Examples of incompetent infants, 269
- Examples of infants held to be competent, 269
- Ignorance of punishment for perjury, 269
- Instructing witness as to nature of oath, 270
- Intelligence the proper test, 268
- Lack of intelligence, 269
- Necessity for sense of moral responsibility, 269
- Nervous agitation, 270
- No age limit fixed by law, 268
- One examination sufficient, 268
- Presumption as to competency, 267
- Presumption as to competency at common law, 267
- Receiving unsworn testimony of infants, 271
- Tests of competency, 268
- Where belief in divine punishment not essential, 270
- Insolvency and bankruptcy:**
 - Debtor, 669
 - Debtor testifying as to intention in making transfer, 669

WOMEN:

- Imprisonment for debt and in civil actions:
 - Privilege from arrest, 43
 - At common law, 43
 - Discharge on motion, 44
 - Married woman, 44
 - Statutes exempting females from arrest, 44

WORKING CONTRACTS (see INDEPENDENT CONTRACTORS):

- Independent contractors, 194

WRIT DE VENTRE INSPICIENDO, 820

Volume XVI.

